FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BG/LVM/2016/0020**
Property	:	**Canary Riverside Estate**
Applicant(s)	:	**Octagon Overseas Limited (1)** **Canary Riverside Estate Management Limited ("CREM") (2)** **Palace Church 3 Limited (3)** **Yiannis Hotel Group (4)** **YFSCR Limited (5)**
Represented by	:	**Mr. Justin Bates of Counsel (1) and (2). Instructed by Trowers & Hamlins, Solicitors** **Mr. N. Yeo of Counsel (3), (4) and (5). Instructed by Mr. Chris Christou, Solicitor.**
Respondent(s)	:	**Mr. A. Coates – tribunal appointed manager.**
Represented by	:	**Ms. Amanda Gourlay of Counsel Instructed by Downs Solicitors**
Interested persons	:	**Various leaseholders as per the original application.**
Type of application	:	**Variation of an Order appointing a manager.**
Tribunal	:	**Ms. A. Hamilton-Farey** **Mr. L. Jarero BSc FRICS**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision:	:	**29 September 2017**

DECISION

The tribunal confirms the appointment of Mr. Alan Coates of HML Andertons ("the Manager") in accordance with the Management Order attached for a term of three years with effect from 1 September 2017.

BACKGROUND:

1. Canary Riverside is a mixed-use development situated at Westferry Circus, E.14 comprising 7 buildings including 325 flats (45 of which are owned by Circus Apartments Limited) ("the residential element"), an hotel, health club, parking spaces and various restaurants/commercial premises and shared communal spaces/grounds.

2. Ownership structure: -

   - Freehold – registered to Octagon Overseas Limited; subject to six sub-leases:
   - Headlease: for a term of 999 years from 28 May 1997 vested in Canary Riverside Estate Management Limited (CREM);
   - Headlease: for a term of 999 years from 1 May 1998 vested in Yiannis Hotels in relation to the hotel;
   - Headlease: for a term of 999 years from 1 May 1998 in respect of the lower level of the car park, vested in CREM;
   - Headlease: for a term of 999 years from 1 May 1998 vested in CREM in relation to 28 – 30 Westferry Circus;
   - Headlease: for a term of 999 years from 1 May 1998 vested in CREM in relation to the Health Club;
   - Headlease: for a term of 999 years from 28 May 1997 vested in CREM in relation to 37 Westferry Circus;

   Each of those interests is subject to a registered charge.

3. The residential headlease (CREM) is subject to long under-leases of the individual flats for a term of 999 years less 3 days from 28 May 1997. In addition, there are several non-residential under-leases in relation to the hotel, offices, parking spaces, the health club, and other businesses, together with various licences in relation to office space, parking spaces and a car wash business.

4. Some of those leases and licences have been granted since the original management order was made.

5. For the purposes of this decision it is relevant to record that on 23 March 2015 Canary Riverside Estate Management (CREM) and Palace Church 3 Limited entered into a loan agreement with Abbey National Treasury Services Plc (now Santander Corporate Banking) in the sum of £40,000,000. That loan was secured against the Palace Hotel and 3 to 11 Pier Hill, Southend-on-Sea; the headleases of the residential properties at Canary Riverside; 28-30 and 37 Westferry Circus; the Health Club at Westferry Circus and various parking spaces also at Westferry Circus; together with the 'Octagon Pier Property' the Park Inn Palace, Church Road, Southend-on-Sea.

6. On 24 March 2015 Palace Church 3 Limited entered into a debenture with Abbey National Treasury Services Plc (now Santander Corporate Banking) in relation to the Palace Hotel identified above.

7. On 24 March 2015 CREM entered into a debenture with Abbey National Treasury Services Plc (now Santander Corporate Banking) in relation to the properties used for security under the loan noted above.

8. A notice under S.22 of the Landlord & Tenant Act 1987 was served on Octagon Overseas and CREM on 19 May 2014.

9. The tribunal appointed Mr. Alan Coates as manager with effect from 1 October 2016.

10. Various appeals, judicial reviews and injunctions have been sought and/or made in relation to the appointment.

11. This tribunal is aware that a further appeal has been made to the Court of Appeal following the decision of HHJ Walden Smith, the decision of which is unknown.

12. In addition to the above, the tribunal has received an application for a variation of the order by the manager, but that matter has not yet been heard, and may be disposed of as part of the Court of Appeal proceedings mentioned above. If not, this tribunal will deal with that application at a later stage.

13. Following the substantive hearing the leaseholders made an application under S.20C of the Landlord & Tenant Act 1985 to limit the landlords' costs of proceedings. A decision was issued by the tribunal in March 2017 that has been appealed by the landlords and that appeal and final decision is dealt with in this document.

14. In addition, various procedural decisions were made during the hearings, these are also recorded in this document.

The extent of the premises to which the management order applies:

15. Mr. Bates said that the extent of the premises to which the order should apply should be tied into the functions of the manager, and that it was not necessary for the order to extend over the whole estate. Mr. Bates considered that this might give rise to anxiety on the part of Santander, that the manager might have management rights over the commercial elements of the development.

16. Mr. Yeo said that the order should not make any reference to any commercial premises and should be confined to the residential leasehold properties.

17. We take the view that the manager must be entitled to manage the whole estate including those comprising the grounds and common parts which form part of the shared services enjoyed by all occupiers. It is accepted that the manager has no right to 'manage' any of the commercial units, but he does have the right to manage services used by the commercial units in common with residential units. In our view, it is only sensible for the manager to have this responsibility. We have therefore referred to the whole estate in the management order and attached an estate plan for ease of reference.

Access to areas now subject to occupational agreements made since the hearing of the original application in 2016.

18. Some of the equipment relating to shared services, have been located within areas which were under the control of the landlord before the original hearings. Since that time, the landlord has granted occupational leases, licences and other agreements in relation to several offices, stores, and similar areas and now says that, because of this the manager must use the access arrangements contained within the agreements, if it is required for servicing or emergency purposes.

19. It is our view that the manager cannot adequately manage the estate without access to these areas, and that it is not practical for access to rely on the relevant clauses in the various agreements. In our view, this puts the manager at risk of legal action, where, for example access could not be gained in the event of an emergency and losses were sustained by one of the occupiers. In our view therefore, this must be balanced by an indemnity from the landlord which is ordered as follows.

20. The landlord shall notify its insurers that some of the shared service equipment is contained with rooms over which the manager has no right of access without notice, and that this is a

change from previously. The landlord shall therefore indemnify the manager for any claims or losses made by occupiers which are reasonably incurred as a result of the manager being unable to obtain access in a timely manner. The landlord shall provide proof of such an indemnity to the manager within 28 days of the date of this decision.

The case on behalf of the applicants in relation to the loan agreement and debenture.

21. As identified above, the Canary Riverside Estate and other properties in Southend-on-Sea have been used as security in relation to a loan and debenture in the sum of £40,000,000. Those documents were signed in March 2015.

22. Mr. Yeo's case is that the making of a management order over the estate, could affect the security in relation to the Palace Church 3 Properties (the hotel in Southend-on-Sea), in that Santander could call-in their loan, without warning, or reason, and that in effect, his clients were innocent third parties in this matter and should not have to suffer the possible actions of Santander, given that his clients had not been parties to the original application, and in effect had not been responsible for the circumstances that lead to the making of the order in the first place.

23. Mr. Yeo also explained that under the terms of the loan agreement and by reference to banking law and practice, Santander did not have to give a reason for 'calling-in' the loan, or to give compensation to any of the borrowers for any losses that might be suffered. Mr. Yeo said that, it was important given the possibly catastrophic consequences to the borrowers that might occur if Santander took action, that no management order should be made; or if the tribunal was minded to continue to grant the order, that it should be for less than the three years contained within the management order.

24. Ms. Gourlay's case was that the loan was arranged after the service of the S.22 notice, that the parties were all in the same group and were closely linked, and that given those facts, that the parties should have been aware of the previous proceedings and the service of the S.22 notice.

25. Ms. Gourlay, also on behalf of the manager told the tribunal that the purpose of a management order was to correct poor management on the part of the landlord, and that it was therefore important that the management order should not be constrained by loan conditions to which the leaseholders were

not parties and which in any event had not been mentioned during the original hearing of this application.

26. Ms. Gourlay also frequently made reference to the very close relationship between the freeholder and the various companies which are applicants in this application, and that although they were separate legal entities, several of the companies shared directors and registered addresses. This was not denied by either Mr. Yeo or Mr. Bates, although the latter referred us to the fact that they were separate legal entities on several occasions.

27. We have taken into consideration the evidence and documents given by Mr. Yeo, and are sympathetic to the potential problems that might arise between his clients and Santander. However, we must have regard to why a management order was made in the first place. His clients may not have been parties to the original application for the appointment of a manager, but they are clearly part of the same group of companies, and we consider that it might have been prudent for them, prior to entering into a loan/debenture such as this to have made enquiries as to the status of the estate, especially given the history of this estate and the several cases that have been made to this tribunal over the years in relation to both appointment of manager and service charge issues.

28. The difficulty for the tribunal is that we are dealing with a hypothetical situation. No-one knows what the response of Santander would be in relation to the loan/debenture and the making of a management order. The applicants said that they 'believed' that Santander was aware of the situation and at the present time had not taken any action.

29. This tribunal takes the view that the consequences of the management order, given the hypothetical situation, cannot over-ride the reasons for making of the order in the first instance. The purpose of the order is to ensure that the estate is well managed to the benefit of all residential units and shared service charge payers. Santander's interest is closely linked to the rental stream of the commercial units, and although the loan/debenture extends over the whole estate, there is no income stream to Santander from the residential units.

30. The management order specifically excludes the collection or setting of any rents or non-shared service charges in relation to the commercial units. In our view therefore Santander should be comforted by the fact that the manager is not involved directly in any of the commercial leases/licences.

31. For these reasons we consider that it remains just and convenient for a management order to be made; the terms of that order are appended to this decision.

The possibility that the tenants would exercise their rights of first refusal under the 1987 Act.

32. Mr. Bates was concerned that, if the tribunal made a management order for a period of two or more years, the tenants would have the right to acquire the entire landlord's interest, and that this would also be of concern to Santander.

33. Mr. Bates sought disclosure of any documents in possession of HML Andertons which might have shown that they gave advice on compulsory acquisition and as a 'reward' had been put forward as managers for the scheme in the original application.

34. This was based on company accounts which appeared to suggest that HML had given advice on enfranchisement prior to being selected by the leaseholders.

35. The tribunal sought clarification from Mr. Coates who confirmed that he had not given any such advice, that he was not qualified to do so, and that, no-one else in HML had given any such advice. Mr. Coates said that the statement in the company accounts was an error, and had been made by someone who was not aware of the facts.

36. The tribunal considers that it was unfortunate that such a statement had been made, but was satisfied by Mr. Coates' evidence that no such advice had been given.

37. The tribunal refused permission for the disclosure sought by Mr. Bates on the basis that we considered it to be in the form of a 'fishing expedition' and that it was not clear what purpose would be achieved. If HML had given advice on possible enfranchisement that did not automatically mean that leaseholders would exercise their statutory rights to acquire, or indeed could do so.

38. In addition, we take the view that it is not for this tribunal to curtail management orders so as to remove statutory rights of tenants.

39. We have already determined that an order should be made. The original order effective from 1 October 2016 was for a period of three years. Due to the various appeals, legal action and other difficulties experienced by the manager in actually managing this estate, we consider that the final confirmed order should also be for a period of three years, but should take effect from 1 September 2017 thus expiring on 31 August 2010, and we amend the order to this effect.

Insurance:

40. The Upper Tribunal allowed an appeal in relation to the insurance of this estate in its decision of 22 March 2017. Since that date and the subsequent hearing of this tribunal, the landlord has arranged for the insurance, however the actual mechanics of how that would operate have not been formally set out.

41. The tribunal confirms that the landlord shall be responsible for placing the insurance in relation to the buildings, common parts, shared service areas that comprise the entire estate. In addition, the landlord shall provide an indemnity to Mr. Coates against public liability.

42. Mr. Coates shall be allowed to deal directly with the insurers in dealing with all claims in respect of the residential units, the common parts of those units and the shared service areas. The landlord shall continue to have responsibility for claims in relation to commercial and non-shared service areas of the estate. The landlord shall not be entitled to claim any administration fees in relation to the arranging of the insurances or allowing Mr. Coates to deal directly with insurers. The landlord is at liberty to make any administration charges it considers reasonable in relation to non-residential and non-shared service areas insurance.

43. The landlord shall demand the insurance premiums calculated in accordance with the leases, in relation to the residential units and shared service areas, from the manager in accordance with the leases. The manager shall then reimburse the landlord, again in accordance with the leases those relevant costs.

44. For the avoidance of doubt, the landlord shall not be entitled to charge the manager any element of the insurance premiums payable in relation to any office, parking area, or other area (including storage facilities) to which the manager has no right of access, and which may be let under the terms of a commercial lease, licence or other occupational agreement, except in relation to parking spaces which are the subject of leases to residential units.

S.20C appeal decision:

45. The tribunal made an order under S.20C of the Landlord & Tenant Act 1985 prohibiting the landlord from recovering any of the costs of proceedings in the applicants' service charges. At the time of making that order, the tribunal had been informed of

the amount that had been incurred by the landlord, and ordered that a refund should be made to the service charge account.

46. The landlord appealed that decision on the basis that the tribunal could not make such an order, and could not order a refund. The landlord also said that the amount included within the tribunal's order was incorrect in any event.

47. We have reviewed our decision and re-make it as follows:-

48. The tribunal considers that the circumstances that prompted the application for a manager were severe and that the leaseholders had endured poor management for a considerable time. The tribunal also takes into account that the making of a management order is not to penalise the landlord, but to correct management failures. In this case, the leaseholders have succeeded in all areas where they considered there to be poor management, as the applicants here say, there was no criticism in relation to the placing of insurance and the leaseholders have not succeeded on that point however they have succeeded on everything else.

49. The tribunal therefore finds that it should make an order that the landlord should not recover any of the costs of these proceedings from any service charges payable by any of the of the leaseholders who were either original applicants, or who subsequently joined the application in relation to any service charges for which the landlord was entitled to charge. Following the making of the management order, the landlord has been deprived of the right to make any demands for service charge and therefore is not entitled to make any demand, or set-off any costs of these proceedings from any service charge funds belonging to the leasehold applicants/joiners.

S.20za application:

50. The tribunal is still seized of an application on the part of the manager under S.20za of the Landlord & Tenant Act 1985, and should be pleased to receive details of whether this should be progressed.

Tribunal: Ms. A. Hamilton-Farey
Mr. L. Jarero, BSc, FRICS

Date: 29 September 2017.