



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : CHI/18UK/HTA/2018/0001

**Property** : Forest Park Lodges (Phase 1)

**Applicant** : Forest Park (Phase 1) Leaseholders Association

**Representative** : Mr Philip Naylor (Secretary)

**Respondent** : Mr Elsayed Mohamed Aly and Mrs Diane Aly

**Representative** :

**Type of Application** : Recognition of Tenants' Association

**Tribunal Member(s)** : Judge D. Agnew

**Date and Venue of Hearing** : Paper determination

**Date of Decision** : 20<sup>th</sup> December 2018

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DECISION

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## **Decisions of the Tribunal**

1. The Tribunal determines that it will not on this application grant a certificate recognising the Applicant as a tenants' association under section 29 of the Landlord and Tenant Act 1985 (as amended) ("the Act"). The reasons for the decision are set out below.

## **The Application**

2. On 10th July 2018 the Applicant applied to the Tribunal under the Act for a certificate recognising the Applicant as a tenants' association under section 29 of the Act.
3. The Applicant had by email dated 8<sup>th</sup> July 2018 sought recognition from the Respondent but this had been refused the same day. Consequently, the Applicant submitted its application to the Tribunal.
4. Directions were issued on 6<sup>th</sup> September 2018 providing amongst other things for the Tribunal to deal with the application by way of a paper determination under Rule 31 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 unless either party objected within 28 days. Neither party did object.
5. The aforesaid Directions recognised that both parties had already made written submissions and the application came before me for determination on 27 November 2018. I raised some queries with the Applicant and a response was received which enclosed a copy of the minutes of the first meeting of the Association when the constitution was adopted. This constitution differed from the draft constitution submitted with the application form in material respects (referred to in more detail hereafter). The Respondent submitted further comments. All submissions have been taken into account in this decision.

## **The Applicant's case**

6. Forest Park (Phase 1) comprises 17 detached leasehold holiday houses or lodges. The planning permission allows for year round occupation but not more than six months consecutively nor more than a total of ten months a year. The leases are for a term of 999 years from 1<sup>st</sup> January 2003. The leases give the Applicant the option of charging by way of additional rent a service charge of £250 plus RPI from 1<sup>st</sup> January 2003 or, alternatively, on the more conventional basis of recovering the cost of services provided each year.
7. The Respondent has opted to recover service charges on the latter basis. This means that the service charges are variable: they go up or down depending on the cost of the services provided during the year.
8. The Applicant points out that a previous Tribunal has determined that the service charges payable by the lessees are subject to the provisions

of sections 18 to 30 of the Act, in particular section 27A which gives the Tribunal jurisdiction to determine the payability and reasonableness of service charges.

9. As mentioned above, the Applicant has produced a copy of the inaugural meeting of the Association at which the constitution of the Association was approved. A list of members of the Association has been supplied. This shows that owners of 15 out of 17 (88.24%) of the lodges are members of the Association.
10. The Applicant says that the reason why they seek recognition of the Association is that this will give the Association certain rights conferred by the Act and regulations and it lists 11 such rights. The Applicant says that there is a history of and that there are ongoing disputes between the lessees and the Respondents concerning service charges and the management of the estate and a certificate of recognition would give the lessees a collective voice in their dealings with the landlord.

### **The Respondent's case**

11. The Respondent has a number of objections to the recognition of the Applicant as a tenants' association under the Act. In summary they are as follows.
12. The first reason given, in the response to the request for recognition, was that "we are not a residential site". The Respondent's meaning is given in the "Landlord's Observations" document dated 9<sup>th</sup> August 2018. They say "Mr Naylor would not be able to form Residential Association (sic) on our site as it is only a commercial Holiday non-residential site".
13. Secondly, they say that Mr Naylor did not send a formal request for recognition to the landlord, just an email.
14. Thirdly, not all leaseholders submitted forms saying that they wanted to become members. 27% did not submit a form and 13.5% did not sign their form.
15. The leaseholders are registered with the local council as running holiday businesses and claim business rates.
16. Fifthly, 60% of leaseholders are in breach of covenant.
17. Mr Duncan Hoare, who purports to be the Chairman of the Association, is not himself a leaseholder.
18. The previous Tribunal decision did not confirm that the leaseholders are covered by the Act.
19. The leaseholders have been withholding £6000 in respect of utilities monies unjustifiably.

20. Some leaseholders are refusing to pay rent and service charges and refusing to abide by the previous Tribunal ruling.
21. The landlords have sent “breach notices” to the lessees.
22. Mr Naylor intends to form “RMT” (presumably he means RTM (Right to Manage) and the lessees have no right to manage the site. The landlord “cannot allow these applicants to form a residential association to run our site”.
23. The police are investigating hate crimes against the landlord allegedly by Mr Naylor.

### **The relevant law**

24. Section 29 of the Act provides that:-
  - “(1) A recognised tenants’ association is an association of qualifying tenants (whether with or without other tenants) which is recognised for the purposes of the provisions of this Act relating to service charges either-
  - (a) by notice in writing given by the landlord to the secretary of the association, or
  - (b) by a certificate-
  - (i) in relation to dwellings in England, of the First-tier Tribunal.
25. By section 29(4) of the Act:
  - “...for the purposes of this section a number of tenants are qualifying tenants if each of them may be required under the terms of his lease to contribute to the same costs by the payment of a service charge.
26. Subsection (5) of section 29 refers to regulations being made by the Secretary of State in respect of such proceedings. At the time this application was made no such regulations had been made. However, a document issued by the Department of Communities and Local Government entitled “Residential Long Leaseholders-a guide to your rights and responsibilities” contains the following guidance: “As a general guide, an association should represent at least 60% of the flats in the block in respect of which variable service charges are payable”. In a further document issued by HM Courts and Tribunals service entitled “Guidance on Recognition of Tenants’ Associations” it is stated on page 2 that:-
  - “In practice the tribunal will want to be satisfied that the constitution and rules of the association are fair and democratic and that it is independent of the landlord.....”

### **Discussion and Decision**

27. The sole reason for my refusing to grant a certificate of recognition in this case concerns the constitution of the Applicant Association. It was somewhat surprising to find that it was not until after I raised a query

concerning the ability of someone who was not a lessee to have a casting vote at meetings that it was disclosed that the constitution that was actually adopted by the Association differed from that which accompanied the application form. Had that query not been raised it would have been the case that the Tribunal's determination would have been based on a false premise. I would have expected the Applicant to have notified the Tribunal of the change in the constitution. That, however, is not the reason for declining to grant the certificate. If the adopted constitution had been satisfactory, then the omission to have notified the Tribunal of the change could have been overlooked.

28. The problem with the constitution as I see it is that it could permit a situation where non-lessees could be making decisions of the Association. The original proposed constitution (which was in the format approved by ARMA) provided that "any leaseholder may upon application and payment of an entrance fee ....become a full member.." At the General Meeting held on 22<sup>nd</sup> September 2018 this was changed to read as follows:-  
" Any leaseholder or a nominated member of their immediate family may upon application .....become a full member".
29. The first problem with this change is that "immediate family" is not defined and could lead to dispute. More importantly, however, in theory this could mean that those who are not leaseholders and not service charge payers could form the majority of those voting at a meeting and could therefore override the wishes of leaseholders who are the service charge payers. Further, once they have become a member there is no mechanism for them to be removed as a member by the leaseholder should the leaseholder change their mind or wish to vote in a different way.
30. I find that the rationale behind recognising tenants' associations under section 29 of the Act, coming as it does within sections 18 to 30 of the Act, is to confer the various rights and protections set out in the Act upon service charge payers. This is underlined by the definition of "qualifying tenants" under section 29(4) which refers to service charge payers. and whilst it is permissible (and quite common) for tenants' associations to have members who are not service charge payers it is not common for them to have voting rights. In my view, this would not be permissible if the association is to be recognised under section 29 of the Act.
31. This problem is thrown into focus by the query I raised about the Chairman, Mr Hoare, who is not a lessee, having a casting vote as Chairman in the event of voting at a meeting being even. The Applicant's response explained why the adopted change was thought to be desirable but did not address the concern I expressed as to a non-leaseholder (and therefore someone not liable to pay a service charge and not a qualifying tenant) being Chairman with a casting vote.

32. I have concluded, therefore, that I cannot approve the constitution in its existing form for a recognised tenants' association under the Act. I did consider whether to refer my concerns back to the Applicant to see whether they would be prepared to make the necessary amendments to the constitution but having already brought my concerns to the Applicant's attention I considered it right to proceed with the determination which has been outstanding for some time now. Should the Applicant take my concerns on board and make the appropriate changes they can always re-apply.
33. Having refused the application I feel it necessary to address the Respondent's objections in case a further application for recognition is made and the Respondent considers that they can raise the same or similar objections. Although my determination below cannot bind a subsequent Tribunal it will be persuasive.
34. I find all the Respondent's objections to the recognition of the Applicant as a recognised tenants' association to be irrelevant as to whether there should be recognition save in one respect and that is the objection to a non-leaseholder being Chairman of the Association.
35. The Respondent seems to be under two fundamental misconceptions. The first is that by recognising the Association as a recognised tenants' association that somehow this gives them the right to manage the site. That is not the case. The management of the site would remain with the landlord. The Respondent would be well advised to look at the statutory provisions which confer rights on recognised tenants' associations. They are the eleven points enumerated by Mr Naylor in his Response to the Landlord's Objections document submitted under cover of an email dated 4<sup>th</sup> September 2018.
36. The second misconception is that the Tribunal has determined that the lessees are not entitled to rely on sections 18 to 30 of the Act. The Tribunal's decision of June 2018 clearly showed that the Tribunal does have jurisdiction within the confines of those sections with regard to the Forest Park (Phase 1) lodges as determinations were made with regard to the service charges for 2016 to 2018. A subsequent application was struck out, not because the dwellings on this Park do not come within the compass of sections 18 to 30 of the Act but because what was being sought in those subsequent proceedings had either already been decided or involved matters to do with the implementation of the earlier decision which was not within the Tribunal's jurisdiction. The landlord's site might well be a commercial business but that does not mean that the lodges themselves are not residential dwellings. The fact that they are restricted to holiday use does not obviate sections 18 to 30 of the Act (see *Phillips v Francis 2010 L&TR 28*).
37. As for the other objections I will deal with them briefly as follows:-

- a) there is no merit in the objection that the lessees' original request to the landlord for recognition of the Association was made by email. There is nothing in the statute to prescribe the form of the request.
- b) Whether or not the lessees are in breach of covenant is not a matter that can properly be dealt with in the context of an application for recognition. However, the obvious existence of disputes between the landlord and the lessees evident from the papers in connection with this application and in the determinations of previous Tribunals, if anything, militates in favour of the recognition of a tenants' association, as referred to by HH Judge Huskinson at paragraph 33 of his judgment in the case of *Roslyn Mansions Tenants' Association v Winstonworth Limited* [2015] UKUT 0011(LC).

Dated the 20<sup>th</sup> December 2018

Judge D. Agnew.

## **RIGHTS OF APPEAL**

38. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
39. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
40. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
41. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking

