FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/29UL/LRA/2017/0001
Property	:	The Grand, Folkestone
Applicant	:	The Association of Residents in the Grand, Folkestone
Representative	:	Peter Cobrin, Chairperson
Respondent One	:	Hallam Estates Limited
Representative	:	Michael Stainer, director
Respondent Two	:	David Hammond, Tribunal Appointed Manager of CR Child & Partners
Type of Application	:	Recognition of a Tenants Association
Tribunal Members	:	Judge Tildesley OBE Mr P Gammon MBE
Date and venue of Hearing	:	The Law Courts, Castle Hill, Lane, Folkestone 3 August 2017
Date of Decision	:	24 August 2017

DECISION

Decisions of the Tribunal

(1) The Tribunal grants a certificate of recognition to the Applicant for a period of four years commencing with the date of decision pursuant to section 29(1)(b) of the 1985 Act.

(2) The Tribunal refuses the Respondent One's application for an unreasonable costs order in accordance with rule 13(1) of the Tribunal (Procedure) Rules 2013.

Background

1. This is an application for the grant of a certificate of recognition as a tenants' association to The Association of Residents in the Grand (AORG) pursuant to section 29(1)(b) of the 1985 Act.

2. The Grand is a seven storey Grade 2 listed Edwardian building comprising 69 residential flats[1] and commercial premises. The Grand is located on the western edge of Folkestone close to the promenade known as the Leas with panoramic views over The Channel.

3. Around 25 per cent of The Grand is used for commercial purposes including meeting spaces, wedding venues and food and drink outlets. The commercial parts are occupied rent free by the commercial operators which also pay no contribution to the service charge for the property. Around 15 per cent of the building is currently unoccupied or unused and has been identified for development.

4. Hallam Estates Limited has been the registered proprietor of the freehold of The Grand under Title Number K39421 since 7 February 1996. Mr Michael Stainer is the director of Hallam Estates. His wife, Doris Stainer is Company Secretary. At a previous Tribunal hearing Mr Stainer described himself as the Controller of Hallam Estates.

5. The Stainer family under various guises own the leaseholds of 24 of the 69 flats. 18 of those flats are not occupied by private families for residential purposes but are used as commercial holiday flats widely advertised on the internet and managed by The Grand commercial operations. The six new flats are part of an ambitious development programme costing in the region of £800,000. Although the Stainer family owned 24 flats, they contribute just 14.1 per cent of the total service charge bill for The Grand with Hallam Estates funding another 0.3 per cent of the bill.

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[1] Leases for six new flats were created on 30 June 2017 and granted to Trusts , the beneficiaries of which were Mr Stainer's family.

6. The long leaseholders of the remaining 45 residential flats in The Grand in 2014 are responsible for 85.6 per cent of the service charge bill. Their service charges go towards the maintenance of the fabric of the building which operates also as a subsidy to the commercial enterprises operating from The Grand.

7. AORG has been in existence in various forms since 1983. The membership of the Association is open to any bona fide leaseholder having a lease of a suite in The Grand in excess of 21 years. AORG's Constitution specifically excludes those leaseholders who are wholly connected with the landlord or freeholder of The Grand including any agent, spouse or other person associated with or acting for or on behalf of such landlord or freeholder.

8. The Objects of AORG are to advance and protect the common interests of its members, including upholding the terms of the long leases and any variations thereto, and of co-operating with the managing agents for the time being and appointed by the landlord as required by the lease. In essence AORG is there to protect the interests of those 45 leaseholders who contribute 85.6 per cent of the service charges for The Grand.

9. In March 2013 the members of AORG voted at their annual general meeting to apply to the Tribunal for the appointment of a manager. On 11 June 2014 the Tribunal after a three day hearing appointed Mr David Hammond as manager for a term of five years[2]. The Tribunal recorded that Hallam Estates accepted that it had failed to maintain the structure of The Grand and had also failed to paint the exterior of it in contravention of the covenants under the lease. The Tribunal observed that the continuing theme in this case was the failures by Hallam Estates and of Mr and Mrs Stainer to make the contributions they are obliged to make to the maintenance fund.

10. Since his appointment Mr Hammond has had no success in collecting service charges from Mr and Mrs Stainer. Hallam Estates has also sought an injunction against Mr Hammond barring him from entering The Grand. The Tribunal understands that Mr Hammond is considering making an application to the Tribunal in respect of the service charges owed by Mr and Mrs Stainer

11. It is against this background that on 14 December 2016 Mr Cobrin, the Chair of AORG, applied to the Tribunal for AORG to be recognised as the Tenants Association for The Grand. The application has had a tortious journey to the hearing which will be amplified upon when considering the application for unreasonable costs.

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[2] CHI/29UL/LAM/2013/0019

12. Mr Cobrin acknowledged that the Certificate of Recognition, if granted, was unlikely to transform the current relationship with Hallam Estates and with Mr Stainer in particular. Mr Cobrin accepted that recognition only bestowed upon AORG in effect the right to be consulted on matters to do with service charges. Mr Cobrin, however, argued that Recognition would send a clear message to Hallam Estates and Mr Stainer that The Grand was not a petty fiefdom where the interests of the residents were secondary to the commercial interests of the Stainer family, and that ownership of an iconic building was a privilege not a right and that this privilege carried obligations.

13. Mr Hammond, the Tribunal appointed manager, supported the application. Mr Hammond believed that residents should be given a voice in decisions on The Grand in order to promote healthy discussion and to forge a balance between the commercial and residents' interests. Mr Hammond felt strongly that the resident's voice should be a collective one. Mr Cobrin echoed the need for a collective voice so as to protect the vulnerable leaseholders.

14. Mr Stainer adopted an enigmatic approach to recognition. Mr Stainer insisted that Hallam Estates were very supportive of the principle of residents' associations provided the proper procedures were followed. At the hearing Mr Stainer stated that Hallam Estates would grant AORG recognition subject to Mr Cobrin obtaining signatures of the joint leaseholders. Although the Tribunal is grateful to Mr Stainer for this indication, the Tribunal considered that Mr Stainer's offer of recognition on behalf of Hallam Estates was still clothed in caveats, and that it was best to proceed and determine the application on the merits.

15. The Tribunal heard the application on 3 August 2017 at Folkestone Law Courts. Mr Cobrin presented the case on behalf of AORG, whilst Mr Stainer did likewise for Hallam Estates. Mr Hammond was also present and gave his views on the application. The Tribunal allowed the parties to ask questions of one another. Mr Cobrin prepared the hearing bundle. References to documents in the bundle are in [ ]. 18 present and current leaseholders attended the hearing as observers.

16. After receipt of the application the Tribunal joined Mr Hammond as second Respondent. The Tribunal considered whether Mr Hammond alone was entitled to recognise AORG as the tenants' association. Mr Hammond in his capacity as manager is responsible for the collection of service charges and would meet the definition of landlord in section 30 of the 1985 Act. After raising the issue with the parties at the hearing the Tribunal steered away from that course of action because the certificate, if granted, was likely to extend beyond the term of Mr Hammond's appointment, in which case Hallam Estates as de facto landlord had the right to be heard.

Consideration

The Law

17. Section 29(1) of the 1985 Act, defines a recognised tenants' association as:

> "an association of qualifying tenants (whether with or without other tenants) which is recognised for the purposes of the provisions of the Act relating to service charges either by notice given by the landlord or by a certificate in relation to dwellings in England of the First- tier Tribunal."

18. Section 29(4) defines "qualifying tenants" as

> "... 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".

19. Section 29(5) enables the Secretary of State to make regulations to specify the procedure to be followed in connection with an application for recognition under section 29(1)(b) and the matters to which regard is to be had in giving a certificate.

20. The Secretary of State has made no regulations under section 29(5). For the past 30 years various Government departments, the Tribunal Service and HMCTS have attempted to fill the void created by the absence of regulations by publishing guidelines on the procedures and on the matters which would be considered by the Tribunal when entertaining an application for recognition.

21. The current guidance is entitled "Guidance on Recognition of Tenants' Association; General Information about the Process" (T545) (HMCTS) which was revised in January 2017.

22. The guidance states that

> "There is no statutory specification of the matters to which the tribunal is to give regard in giving or cancelling a certificate of recognition and each application will be considered on its merits.
>
> 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 and, in the case of a company landlord, its employees. The tribunal will be concerned to see that the actual paid up membership of the association represents a substantial proportion (as a general rule not less than 60%) of the potential membership.
>
> A certificate will usually be granted for a fixed period (usually for four years) and application can be made for its renewal".

23. The Tribunal is entitled to have regard to the guidance but the limitations of the guidance were exposed by the Upper Tribunal decision in *Rosslyn Mansions Tenants Association v Winstonworth Ltd* [2015] UKUT 11 (LC) which established the following principles:

(i) The Tribunal has a wide discretion under section 29.
(ii) There is no presumption in favour of granting a certificate. It is for the Tribunal to decide whether a certificate should be granted having regard to all the relevant facts of the case.
(iii) The question of whether the application for recognition is supported by a substantial proportion of the qualifying tenants is a relevant consideration amongst other considerations.
(iv) There is no requirement in section 29 for a minimum percentage of the total qualifying tenants to support the proposed tenants association. The more substantial the percentage support the stronger may be the merits of the application for the certificate, but the application must be looked at in the light of all the relevant circumstances.
(v) It is also relevant to consider the proportion of the overall variable service charges payable by these supporters.

24. The Upper Tribunal left open the possibility of considering other matters relating to the management of the building. The Upper Tribunal allowed the Appeal on the basis that the FTT did not go onto consider whether the history of complaints and the apparent breakdown of relations was a factor which weighed in support of the giving of the certificate.

25. The Upper Tribunal also left open the question of whether account should only be taken of qualifying tenants who are wholly independent of the landlord.

Facts Found

26. The factual context for this application is the ongoing tension between the different needs of the commercial and long term residential interests invested in The Grand. Hallam Estates which is effectively controlled by Mr Stainer promotes the commercial interests whilst the long leaseholders seek to protect their rights of quiet enjoyment. This dynamic came to a head at the previous Tribunal hearing which resulted in the appointment of a manager. The previous Tribunal found that Hallam Estates had not met its repairing and maintenance obligations under the lease. The principal cause of this was the recurrent failures by Hallam Estates, Mr Stainer and Mrs Stainer to pay their service charges, which continue despite the manager's appointment.

27. This application is concerned with service charges, management and the right of long leaseholders to form an association which is recognised by the landlord as representing their voice on the subjects of service charges and management. The existence of a recognised association does not challenge the proprietary interests of the landlord but is intended to give a more effective and coherent voice to the long leaseholders whenever the subjects of service charges and management are raised. This is seen to be helpful to a landlord who can consult with a recognised association rather than having to go the greater trouble and expense of dealing with individual leaseholders.

28. Under the arrangements at The Grand the landlord can recover the entire costs of the maintenance and upkeep of the building from the long leaseholders. The commercial interests that occupy the building contribute nothing by way of service charges, except 0.3 per cent from Hallam Estates. As Mr Stainer pointed out at the hearing this arrangement was the cumulative effect of the payment clauses incorporated in the individual residential leases and part of the commercial bargain struck between the landlord and the individual long leaseholder.

29. At the time of the application to the Tribunal there were 63 long leaseholds at the Grand which increased to 69 at the hearing. Mr Stainer, Mrs Stainer and two family Trusts owned the long leaseholds of 24 flats and under their leases contributed 14.1 per cent of the total service charge bill for the building. The remaining 45 long leaseholders were responsible for 85.6 per cent of that bill.

30. When considering an application for recognition the Tribunal is required to have regard to whether the application is supported by a substantial proportion of the qualifying tenants. The Guidance proposed a threshold of not less than 60 per cent of the potential membership. The Upper Tribunal in *Rosslyn Mansions*, however, pointed out there was no requirement in the 1985 Act for a minimum percentage of total qualifying tenants to support the application. The Upper Tribunal emphasised that the Application must be looked at in the light of all relevant circumstances.

31. In this Application AORG's support have fluctuated from 30 long leaseholds at the time of the application to 33 when Mr Cobrin served Hallam Estates with the names of the long leaseholders to 31 at the date of the hearing[3]. Mr Stainer contended that the figure of 31 as against the total number of leaseholds of 69 did not represent a substantial proportion of the qualifying tenants at The Grand.

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[3] One long leaseholder had sadly passed away by the time of the hearing. The other leasehold had the wrong name.

32. Mr Stainer's proposition begged the question of what is the constituency of qualifying tenants for assessing the level of support for the recognised tenants' association. Mr Cobrin argued that the constituency should be restricted to the 45 long leaseholds which have no connection with Hallam Estates and the Stainer family. Mr Stainer, on the other hand, contended that he and his wife were required under the terms of their leases to contribute by way of service charge to the same costs as the other 45 long leaseholders, and were, therefore qualifying tenants for the purposes of section 29 of the Act. Further Mr Stainer asserted that they were independent of the landlord as their flats were not controlled by Hallam Estates, and were certainly independent of the manager who was now responsible for the collection of service charges. Finally Mr Stainer stated that there were no grounds to exclude the flats owned by Mrs Stainer, particularly as she was not a director of Hallam Estates.

33. Before dealing with the central point regarding the exclusion of the long leaseholds owned by the Stainer family, the facts of this case highlight the problem of using the number of long leaseholds as the benchmark for the assessment of a substantial proportion. Although the Stainer family own 24 of the 69 long leaseholds, they contribute just 14.1 per cent of the total service charge bill for The Grand. In contrast the 31 long leaseholds named on the list at the hearing as supporting the application are responsible for 62.8 per cent of the total service charge bill. Thus the 31 long leaseholds would constitute substantial support of the application, when the measurement of proportion of total variable service charge paid is applied.

34. Turning now to the question of the constituency for qualifying tenants, the Tribunal is satisfied that the constituency should be restricted to the 45 long leaseholds which have no connection with the Stainer family. The defining feature of the arrangements at The Grand is the commercial/residential dynamic. The Tribunal finds that Mr and Mrs Stainer's interests align with the commercial use of The Grand. The flats owned by Mr and Mrs Stainer are advertised as short stay holiday and visitor accommodation and other business uses and managed by the commercial arm of The Grand. Mr Stainer is the sole director of Hallam Estates and by his own admission exercises significant control over the company. Mrs Stainer is Company Secretary of Hallam Estates. Finally Mr and Mrs Stainer have shown no inclination to contribute towards the service charges, and are largely responsible for the shortfall in the service charge funds.

35. Mr Stainer raised a series of other objections to the list of names supplied by Mr Cobrin. Mr Stainer referred to his various exchanges with Mr Cobrin over the provision of the list of names, and that he was supplied with a list of 32 members on 3 June 2017 which was not signed and dated by all the members. The Tribunal at this stage does not intend to dwell on the history of exchanges which will be considered in more detail under the application for unreasonable costs.

36. For the purposes of the determination the Tribunal will rely on the list of members supplied in the hearing bundle at [2] which was supported by various attachments where the leaseholders have appended their signatures. The list of names in the bundle did not substantially vary from the list originally sent to the Tribunal, and the list supplied to Mr Stainer in June 2017. The changes that have occurred were the death of one of the supporters, the withdrawal of one supporter, and the addition of a new supporter. There were 31 names on the list.

37. The Tribunal's reliance on the list included in the hearing bundle has not prejudiced the position of Hallam Estates. Mr Stainer did not request an adjournment for consideration of the names on the list. Mr Stainer instead presented the Tribunal with a detailed analysis of the list setting out his objections which were:

- One name did not have an accompanying signature.
- The names and signatures for four flats did not correspond with the name of the leaseholder held by Mr Stainer.
- The signatories of leaseholders of 10 flats were dated after the date of the application.
- There was only one signatory for 18 flats which were owned by joint leaseholders.
- In summary only 8 flats met all the requirements, namely, signatures of all the leaseholders for the flats concerned which predated the making the application.

38. The Tribunal investigated at the hearing the details of the four names who Mr Stainer said were not the current leaseholders. The Tribunal finds that the four disputed names could be included in the total number of qualifying tenants supporting application because:

- Mr Stainer made an error with one of the names, wrongly alleging that the signature did not belong to the leaseholder.
- Mr Stainer's objection to another name was that they had taken out an equity release scheme on their property which according to Mr Stainer meant they were no longer the leaseholders for the property. The Tribunal disagrees with Mr Stainer's interpretation of the effect of an equity release scheme which in the Tribunal's view did not alter the status of the current occupiers of the flat as leaseholders and qualifying tenants.
- The third disputed signatory was the son of the current leaseholder. The Tribunal accepted Mr Hammond's statement that he believed the son had Power of Attorney in respect of his father's affairs.
- The final disputed signatory was of a person who had lived at the flat for a long time and was the mother of the two leaseholders, which suggested some form of Trust arrangement. Mr Hammond confirmed that the mother paid the service charges.

39. The Tribunal saw no reason to exclude the leaseholders whose signatures were dated after the making of the application from the number to be counted as supporters. It appeared to the Tribunal that Mr Cobrin had requested some leaseholders to sign a more detailed declaration about the implications and advantages of recognition. Many of these "late" signatories had previously appended their signature to the initial form giving consent for AORG's application for recognition. The Tribunal notes that Mr Cobrin was one of those counted by Mr Stainer as giving his signature after the date when the application was made.

40. Mr Stainer argued that where a flat was owned by joint tenants both tenants must sign the list of members in support of AORG's application for recognition. Mr Stainer contended that an application for recognition was analogous to the service of notices by joint tenants. In this regard Mr Stainer cited various examples: all joint tenants must apply for relief against forfeiture (*TM Fairclough & Sons Limited v Berliner* [1931] 1 Ch 60; until the reforming section 41A was inserted in Part II of the Landlord and Tenant Act 1954 (*Jacobs v Chaudhuri* [1968] 2QB 470, all joint tenants had to apply for a new business tenancy; and all joint tenants must apply to a Rent Tribunal for a reduction of rent (*Turley v Panton* (1975) P&CR 397.

41. The Tribunal considers Mr Stainer's argument misconceived. The question concerning the list of members is an evidential one, namely, whether the Association has the substantial support of the qualifying tenants for its application for recognition. The question is not one of process, namely, the correct procedure for service of notices. The evidential question posed by the list of members is not analogous to the service of notices by joint tenants.

42. The Tribunal also considers the examples given by Mr Stainer are concerned with changes to fundamental property rights: the forfeiture of the lease, the grant of a new lease and the reduction of rent. In contrast an application for recognition is concerned solely with the requirement to consult and has no bearing on the property rights of either the landlord or tenant.

43. The Tribunal observes there is no legal requirement for a list of members to be signed by both joint tenants. The Tribunal notes that AORG's constitution permits one vote for each of the Suites (flats) on all matters requiring a vote by members.

44. The Tribunal is satisfied that the issue of whether the list has been signed by one of both of joint tenants was one of evidential weight. The Tribunal finds that Mr Cobrin made efforts to ensure that AORG had the support of its members for the application. On 23 February 2017 he emailed the "Grandees" (members) advising them of Mr Stainer's allegation that he had door-stepped them in gaining their support for the application without understanding its purpose, meaning and effect. Mr Cobrin asked members to let him know if they no longer wished to

support the Application or leave AORG. Mr Cobrin also called an EGM on 6 May 2017 to consider a resolution regarding the Application for recognition. Mr Stainer adduced no evidence which indicated that the signature by one joint tenant did not represent the views of the other tenant.

45. The Tribunal finds there are no grounds to disregard the leaseholders of those flats where the list has been signed by one of the joint tenants as supporters of the Application for recognition.

46. The Tribunal places weight on the resolution [41] passed at the Extraordinary General Meeting (EGM) of AORG held on 6 May 2017 which read:

> "The following resolution was put to the meeting proposed by Peter Cobrin and seconded by Nicholas Boardman:
> 'That those attending this meeting and those who have voted in writing agree that the Association of Residents in the Grand, Folkestone requests a certificate of recognition from the First-tier Tribunal Property Chamber (Residential Property) (FTT) under section 29 of the Landlord and Tenant Act 1985".
> The resolution was passed by 32 votes out of a total of 33 members".
>
> Signed by Peter Cobrin, Chairperson and Nicholas Boardman, Member".

47. The Tribunal notes that Mr Hammond had seen the list of AORG members. Mr Hammond stated that AORG applicants contributed 70.45 per cent of the total variable service charges for The Grand.

48. Mr Stainer contended that Mr Hammond's evidence of 70.45 per cent support lacked credibility. Mr Stainer pointed out that Mr Hammond's statement dated 28 March 2017 was made before the list was provided to Mr Stainer in June 2017, and that Mr Hammond's figure of 70.45 per cent had no relationship with the service charge contributions set out in Mr Stainer's schedule.

49. The Tribunal does not share Mr Stainer's concerns about Mr Hammond's evidence. A list of AORG members supporting the application has been available since November 2016. Mr Stainer declined Mr Cobrin's invitation of 15 November 2016 to inspect the list of members at a time and place convenient for him. The number of leaseholders has varied slightly during the course of these proceedings. The Tribunal understands that around March 2017 there were 33 leaseholders supporting the application contributing around 66 per cent of the total variable service charge. The Tribunal considers the difference between 66 per cent and Mr Hammond's figure of 70.45 per cent marginal, particularly as there appears to be a slight discrepancy between Mr Hammond's records of service charge contributions and those held by Mr Stainer. Mr Hammond had a figure of 15.32 per cent for the service charge contribution of the Stainer family and Hallam

Estates, whilst Mr Stainer's schedule showed a contribution of 14.409 per cent. Mr Hammond at the hearing did not dispute the figures given in Mr Stainer's schedule. The Tribunal, however, notes that Mr Stainer presented the schedule to Mr Hammond at the hearing which did not give Mr Hammond much time to check the schedule against his records.

50. The Tribunal takes the view that it is entitled to look at the evidence as a whole in deciding the level of support for AORG's application for registration. The Tribunal finds that the level of support amongst the residential leaseholders has remained consistently stable throughout the history of the application ranging from 30 to 33 members at any one given time. This level of support has been substantiated by the lists of signed members produced by Mr Cobrin at various times during the course of proceedings, the resolution passed at the EGM of AORG in May 2017 and by Mr Hammond's evidence. Mr Stainer's challenge to the evidence comprised a number of technical points which had no substance. Mr Stainer was unable to substantiate his allegation that the leaseholders named on the list did not know what they were signing up for. The Tribunal is satisfied the list of 31 members exhibited at [2] is an accurate reflection of the number of qualifying tenants supporting AORG's application for registration.

51. The Tribunal finds that at least 31 of the 45 residential leaseholders (69 per cent) supported AORG's application for registration. The 31 leaseholders contributed 62.8 per cent of the total variable service bill for The Grand or 73.35 per cent of the total of variable service charges payable by the 45 residential leaseholders. The Tribunal is satisfied that a substantial proportion of the residential leaseholders supported AORG's application for registration.

52. The Tribunal considers examination of the evidence as a whole for determining the level of support is consistent with the exercise of its wide discretion in respect of applications for registration. There is no prescribed procedure laid down in legislation for establishing the level of support. In the Tribunal's view, Mr Stainer placed too much reliance on the form of the list of members and appeared to suggest that a list in a prescribed format was a necessary pre-requisite before the Tribunal could consider the application. The Tribunal notes that the provision of a list of members has no statutory authority. Likewise The Senior President's Practice Direction on *Applications to Start Proceedings* dated 9 September 2013 imposed no requirements on the type of documents accompanying applications for registration. In the Tribunal's view, the purpose of the list is to give the landlord the opportunity to verify whether the persons named are qualifying tenants, and not as a procedural sledgehammer to stop the application. The Tribunal also notes that when Mr Stainer was provided with the list, he raised obscure technicalities rather than dealing with the substantive questions posed by the list.

53. As well as the question of the level of support, the Tribunal is required to consider the Constitution of AORG which will determine whether it can act as representative body of the tenant membership. The Guidance states that rules of association should be fair and democratic, and cover openness of membership; notices of meetings; election of officers; payment and amount of subscription; voting arrangements; and quorum and independence of the landlord.

54. A copy of AORG's Constitution is found at [38]. Mr Stainer raised no specific challenge to the contents of the Constitution. The Tribunal finds that the Constitution has provisions dealing with the specific matters required by the Guidance.

55. The Tribunal notes that membership is open to any bona-fide leaseholder having a lease of a suite in The Grand in excess of 21 years who has paid the subscription for the current year (to include where applicable the spouse of such leaseholder) and is wholly unconnected with the landlord or freeholder of The Grand (including any agent, spouse or other person associated with or acting for or on behalf of such landlord or freeholder).

56. The effect of this clause is that it precluded Mr Stainer and Mrs Stainer from membership of AORG even though they were qualifying tenants. The Tribunal considers that the exclusion of Mr and Mrs Stainer was justified having regard to their connection with the commercial activities of The Grand and Hallam Estates. The Tribunal observes that Mrs Stainer is excluded because of her association with the freeholder in her capacity as Company Secretary not because she was the wife of Mr Stainer. The Tribunal suspects this clause was drawn up when Mr Stainer held the freehold of the property.

57. The Constitution also referred to other categories of membership which included spouses/civil partners of leaseholders and tenants and owners of properties on assured shorthold tenancies in excess of 12 months. A vote by members was restricted to one vote for each of the Suites in membership.

58. The Tribunal is satisfied that AORG's Constitution as it currently stands passed the fair and democratic threshold.

59. The Tribunal considers that the Constitution could be improved by making explicit that the one vote for each of the Suites is to be exercised by the long leaseholder or nominated proxy, and that the other categories of members have no voting rights.

60. The Tribunal has a broad discretion when determining an application for recognition, and is not restricted to the issues of level of support and of The Constitution. The Tribunal is satisfied that the commercial/residential dynamic of The Grand was highly relevant to its decision on recognition. This dynamic has complicated the management of The Grand and created competing priorities between

the commercial and residential arms which were evident from the Tribunal's decision on the appointment of a manager. In such circumstances the residential leaseholders require strong and coherent representation which in the Tribunal's view can be facilitated by granting recognition to AORG.

61. Given the strong level of support, the fair and democratic nature of its Constitution, and the challenging circumstances regarding the management of The Grand, the Tribunal decides to grant a certificate of recognition to AORG.

62. The Tribunal adopts the recommendation in the Guidance that the certificate of recognition should be for a period of four years from the date of the decision

The Costs Application

63. Mr Stainer on behalf of Hallam Estates submitted an application for costs under rule 13(1)(b) of the Tribunal Rules 2013. Mr Stainer supplied a copy of an invoice in the sum of £10,290 plus VAT for the professional fees of Mr Jonathan Upton Counsel for advice on the application for certificate of recognition.

64. Rule 13(1)(b) so far as relevant provides:

> "The Tribunal may make an order in respect of costs only ...(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in ....(ii) a leasehold case".

65. The Tribunal as a rule operates a no costs jurisdiction. Rule 13(1)(b) only permits the Tribunal to award costs if it is satisfied that a person has acted unreasonably.

66. The Upper Tribunal in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC) gave guidance on the Tribunal's discretion to award costs due to a party's unreasonable behaviour.

67. The Upper Tribunal stated at paragraph 43:

> "The issues we have discussed above are only some of the factors which it will be relevant to take into consideration in determining applications under rule 13(1)(b). We conclude this section of our decision by emphasising that such applications should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become major disputes in their own right. They should be determined summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. We consider that submissions are likely to be better framed in the light of the tribunal's decision, rather

than in anticipation of it, and applications made at interim stages or before the decision is available should not be encouraged. The applicant for an order should be required to identify clearly and specifically the conduct relied on as unreasonable, and if the tribunal considers that there is a case to answer (but not otherwise) the respondent should be given the opportunity to respond to the criticisms made and to offer any explanation or mitigation. A decision to dismiss such an application can be explained briefly. A decision to award costs need not be lengthy and the underlying dispute can be taken as read. The decision should identify the conduct which the tribunal has found to be unreasonable, list the factors which have been taken into account in deciding that it is appropriate to make an order, and record the factors taken into account in deciding the form of the order and the sum to be paid".

68. The Upper Tribunal decided that the First-tier Tribunal should adopt a systematic or sequential approach to costs applications under rule 13(1)(b):

> "With these points in mind we suggest that a systematic or sequential approach to applications made under the rule should be adopted. At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be".

69. The Tribunal has to decide first whether Mr Cobrin for AORG acted unreasonably. Mr Stainer for Hallam Estates submits that AORG acted unreasonably in:

- Refusing to provide a list of members signed by the members themselves before issuing the application.
- Refusing to provide the list with the application.
- Claiming in a letter dated 29 March 2017 that the aggregate contribution of the overall variable service charges payable by persons who supported the application was around 70 per cent which was patently not true given that a number of persons have only very recently indicated that they support the application for recognition.
- Not providing a list until 3 June 2017.
- Including persons on the list who are not qualifying tenants of the flat for the purposes of the application.

- Amending the list of persons who purportedly support the application without expressly notifying Hallam Estates or seeking or obtaining the Tribunal's permission.

70. The Tribunal commences its consideration with the nature of the proceedings for application for recognition. The Secretary of State has declined to introduce Regulations prescribing the procedures for making such applications. The power to make Regulations has been in force for over 30 years. The reasons given for not introducing Regulations range from "insufficient information about the circumstances of tenants' associations", "the desirability of seeing how the procedure for recognition would operate in practice" "on the whole the guidelines work well, particularly in respect of individual blocks", and "restrict unnecessarily the circumstances in which a tenants' association may be recognised".

71. The Tribunal procedures are governed by the overriding objective of dealing with cases fairly and justly which include dealing with cases in ways which are proportionate to the importance of the case, the complexity of issues and the costs and resources of the parties. Wherever possible the Tribunal should avoid unnecessary formality and seek flexibility. At the heart of the Tribunal's jurisdiction is a focus on substance with the aim of resolving the dispute with process being the means of achieving that outcome rather than an end in itself.

72. As a rule the Tribunal adopts a relatively informal approach to applications for certificates of registration. They are normally dealt with on the papers and a certificate is issued without detailed reasons. This procedure fits in with the character of applications for registration. They involve no changes to the parties' property rights. They are about improving the landlord and tenant relationship by providing effective channels of communication and consultation.

73. Mr Stainer asserted on various occasions that he was prepared to grant recognition provided AORG met various requirements particularly relating to the provision of the list of members. The Tribunal was not convinced with the sincerity of Mr Stainer's avowed intentions. The Tribunal observes that when he was supplied with the list of members, he raised a range of technical objections to it, and emailed at least two of the names on the list asking whether they had actually given their support to the application [24 & 25]. Following submission of the application of registration to the Tribunal, Mr Stainer instructed Furley Page solicitors to send a letter to Mr Cobrin on behalf of himself and Hallam Estates threatening action for defamation in respect of statements made by Mr Cobrin in the Application [117-120]. On 24 May 2017 Mr Stainer issued Mr Cobrin with a Notice Pursuant to the Torts (Interference with Goods) Act 1977 in respect of items left in the common areas [106]. Mr Stainer requested a hearing of the Application

after the Tribunal directed that the application was suitable to be dealt with on the papers. The Tribunal formed the view that Mr Stainer on behalf of Hallam Estates had no inclination to engage with the substance of the Application but was doing his best to stop the application from being heard on its merits.

74. The application for unreasonable costs should be viewed in the above context. Mr Stainer first raised the issue of costs on 2 June 2017 when he invited the Tribunal to strike out the application and order costs pursuant to Rule 13. On 12 June 2017 Mr Stainer raised a range of procedural issues re-iterating his strike out and costs applications but adding "That the Applicant is most welcome to submit a fresh application to the Landlord for recognition, and provided it complies with the Tribunal's established guidelines it will be approved within 28 days of receipt". In the Tribunal's view, Mr Stainer's offer was a poisoned chalice. Mr Cobrin on behalf of AORG would have to go through the process again, and also face the prospect of defending a claim for costs.

75. The Tribunal turns now to the specific grounds relied upon by Mr Stainer to substantiate his allegation of unreasonable behaviour. The Tribunal finds the following:

- Mr Stainer did not take up Mr Cobrin's offer of 15 November 2016 to make the list available for inspection at a time and place convenient to you. This offer was made prior to the Application to the Tribunal. Instead Mr Stainer insisted that Mr Cobrin send him a list of members, showing their flats, signed and dated by each of the members themselves.
- The delay in providing Mr Stainer with the list of members in support of the Application was due to the time taken by the Tribunal to find a middle ground of dealing with Mr Cobrin's concerns about giving Mr Stainer free access to the list without a formal assurance from Mr Stainer that he would not contact the names on the list, and to a genuine misunderstanding on the part of Mr Cobrin that the Tribunal would send the list once it had directed that it should be provided to Mr Stainer.
- The Tribunal has dealt with the claim of 70 per cent and the allegation that the list contained names of persons who were not qualifying tenants in the body of the decision. The Tribunal found the claim of 70 per cent was not a patent untruth, and that the four names had been correctly included in the list.
- Mr Cobrin updated the Tribunal and Mr Stainer with changes to the list of names.

76. The Tribunal is satisfied on the above findings that the grounds relied upon by Mr Stainer did not amount to unreasonable behaviour.

77. The Tribunal refuses the Respondent's application for an unreasonable costs order in accordance with rule 13(1) of the Tribunal (Procedure) Rules 2013.

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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