IN THE MATTER OF THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA TENANT MANAGEMENT ORGANISATION LIMITED

AND IN THE MATTER OF AN ANNUAL GENERAL MEETING SCHEDULED FOR 17 OCTOBER 2017

ADVICE

INTRODUCTION

1. We are instructed by two firms of solicitors, Bindmans and Bhatt Murphy, who both represent substantial numbers of victims of the tragic fire at Grenfell Tower on 14 June 2017. We are asked to advise urgently on certain questions relating to the imminent Annual General Meeting ("**the AGM**") of the Royal Borough of Kensington and Chelsea Tenant Management Organisation Limited ("**the TMO**") which has been called by the Board of the TMO for this Tuesday, 17 October 2017.

2. The main business of the AGM will be to vote on Ordinary Resolution 5 and Special Resolution 6 (together, "**the Resolutions**"). The Resolutions were purportedly notified to Members of the TMO on 22 September 2017 (although, as we explain below, there is an issue about how many Members have been notified).

3. We should make clear that we have not seen all the documents relating to these issues, and the situation is unusual in that RBK&C and the TMO Board have not fully explained their position. It may be that, in light of provision of those documents/information, the concerns expressed below fall away, but at present we have seen nothing to point to that conclusion.

4. The background can, for present purposes, be stated very shortly. In light of the fire at Grenfell earlier this year, RBK&C has resolved to end the TMO's role in managing properties in the Borough. It has, as a result, indicated an intention to terminate the Modular Management Agreement by which the TMO fulfils its functions. On termination of the Management Agreement, the TMO will cease to have any 'Members' as defined in the Articles. RBK&C has therefore proposed that, on termination, it should become the sole member of the TMO.

SUMMARY OF ADVICE

5. The purpose of this Advice is to assist those Members who will be casting votes at the AGM, if it goes ahead, on the relevant legal principles. In summary, our conclusions are as follows:

   (a) There are very real risks to the process of holding the TMO accountable if the resolutions are passed.

   (1) The result of the Resolutions is to give RBK&C sole control over the affairs of the TMO, as its sole Member. Those risks include:

   (i) That RBK&C will have sole control over the manner in which the TMO interacts with the Moore-Bick Public Inquiry and with the consequences more generally of the fire, and;

   (ii) That RBK&C could wind up the TMO, thereby potentially impeding either a criminal prosecution for corporate manslaughter, or a civil action.

   (b) **RBK&C's proposed solution is not the only viable solution to the problem, and there is a fairer and obvious alternative.**

   (1) The TMO's Board appears to be correct to say that, if the Management Agreement is terminated, the TMO has no 'Members' as defined in the Articles.[1]

   (2) However, it does not follow that RBK&C has to be the sole Member when the Management Agreement comes to an end.

   (3) Rather, an equitable solution which should resolve RBK&C's concerns and ensure accountability would be for the existing membership to be maintained on termination of the Management Agreement.

   (c) **The Resolutions may be invalid because of a failure to give notice of the AGM to Members who are also victims of the fire:**

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1 The board may be incorrect *if* there are pre 24.11.08 Members who have never been "*Residents*" as defined in the TMO's Articles but were retained as Members by virtue of Article 9.2. It would seem to us incorrect to describe any persons in this category as having "*ceased to be a Resident*" within Article 11.1.1.

(1) It has emerged over the weekend that at least one former Grenfell resident who is a Member of the TMO has not received notice of the AGM. Those instructing me are concerned there may be many more victims in such a position. We are instructed that this may be a result of those victims' residence in temporary accommodation (to TMO's knowledge), and their consequent non-receipt of notice given by post.

(2) In our view, it is well arguable that the effect of the Companies Act and the TMO's Articles of Association is that, in light of those failures to give notice, any resolutions passed at the AGM will be invalid. It would in any event be clearly inappropriate for the meeting to proceed in circumstances where former Grenfell residents have not in reality received adequate notice of it. For this reason too, the sensible course is to adjourn the AGM to allow the giving of notice.

(d) **The sensible course is for Members to vote to adjourn the AGM for 21 days, which will give time for the proper consideration of alternative solutions and will not cause any prejudice:**

(1) Under Article 20.3, the 'Meeting' can direct the Chairman to adjourn the meeting. That requires a simple majority of those present (and proxies) to vote for such a motion.

(2) If the meeting is adjourned, all its business is simply 'held over' until the re-convened meeting.[2] There is no business which cannot be conducted and resolved at the re-convened meeting, which can be held in a sensible timeframe.

(3) RBK&C had, at one stage, suggested that a failure to vote for the Resolutions today will lead to the termination of the Management Agreement and the winding-up of the TMO. In our view, that suggestion is completely misconceived, because any such issues can be resolved after an adjournment. In their most recent correspondence to our instructing solicitors, RBKC appear to accept this as the correct position.

2 *Palmer's Company Law* at §7.624

RISKS INVOLVED IN THE RESOLUTIONS

6. There are, in our view, substantial risks to the Resolutions.

7. In light of RBK&C's decision to terminate the Management Agreement, we see the force in RBK&C's assertion that the TMO ought to vote for such a termination, though that is a matter for the Members' judgment as to the best way forward. Understandably, former residents of Grenfell Tower, the Walkways and others do not want the TMO to continue to play any role in managing accommodation in the Borough.

8. However, RBK&C's proposed solution is in our view undesirable for a number of reasons.

9. Under the Resolutions, when the Management Agreement is terminated, RBK&C will be the sole "Member" of the TMO. We do not know how long the Management Agreement may take to terminate, but it seems likely to be in the order of months rather than years. As such, RBK&C will be the sole Member of the TMO before the conclusion of the Moore-Bick Public Inquiry, and long before either civil or criminal proceedings have concluded.

10. There is no evidence before us that RBK&C has any malicious intent in seeking to take over the TMO in this way. At the same time, it is likely to be advisable that adequate checks are imposed on it. If it became the sole Member of the TMO, there would be no company law mechanism for victims and former residents to exert influence over the TMO's behaviour, such as there is at present. Although RBK&C's letter of 16 October 2017 refers to the role of the Board in ensuring accountability, all Board members will (if the Resolutions are passed) be appointed by the RBK&C.

11. Such loss of influence over the TMO by the current Members would seem to us to be a matter of obvious concern in itself. In addition, there are two specific risks.

12. The first specific risk is that the TMO may give inadequate disclosure to the Public Inquiry. We have seen an email from the Solicitor to the Inquiry, to Bhatt Murphy, which says that the Metropolitan Police have conducted a "large scale data grab at the outset" and that the Inquiry has made a "targeted request which Kennedys [solicitors] are dealing with." That offers some comfort, but seems to us insufficient in

circumstances where (i) the data taken by the police may not be disclosable to the Inquiry and (ii) the Inquiry itself has not yet seen the disclosure the TMO is to give.

13. Secondly, if RBK&C is the sole member of the TMO, it could potentially use its rights as the sole Member to procure that the TMO is wound up and, ultimately, dissolved – that is to say, no longer appears on the Register at Companies House nor has any legal personality. A company that has been dissolved cannot, without further legal steps, either by sued in civil proceedings or face criminal prosecution.

14. It might be argued that, in light of the victims' potential claims against the TMO, the TMO would be in 'insolvent liquidation', and therefore would have to remain on the Register until those claims had been resolved. We understand, however, that the TMO will have almost no assets to distribute, and as such a liquidator may decide not to preserve the company's existence.

15. Dissolution would thus impede both victims' right to financial compensation from the TMO and the possibility of a corporate manslaughter prosecution.

16. RBK&C has provided certain assurances in correspondence about its present intentions not to wind up the TMO. However, these commit only to maintaining the TMO until the end of the Public Inquiry, and in any event may well not be binding on RBK&C.

17. If the TMO were dissolved it would be open to the victims to apply to the High Court to restore the TMO to the Register for the purpose of bringing a civil claim, and/or to the Crown Prosecution Service to bring a similar application in relation to criminal proceedings. However, that is likely to be costly, lead to delays, and take the possibility of such action out of the hands of victims (at least as regards civil claim) and place it with the High Court.

ALTERNATIVE RESOLUTIONS

18. The Board, and RBK&C, set out in the letter by which they gave notice of the AGM (dated 22 September 2017) their reasons for proposing that, on the termination of the Management Agreement, RBK&C should become the sole Member.

19. They may be correct to contend that, on termination of the Management Agreement, the definitions of a "Member" in the Articles are such that, when read together, there

would be no remaining Members of the TMO.[3] That would create real issues for decision-making within the TMO.

20. However, it does not follow that residents of the properties currently managed by the TMO could not remain Members if appropriate amendments to the Articles were made. As the current Resolutions propose amendments to the relevant Articles, it should be straightforward to draft an alternative scheme by which, for instance, the membership were ‘frozen’ at the date the Management Agreement terminated so that the TMO’s Members simply remained the same.

21. It is hard to follow why RBK&C insists that the only viable solution is for it to become the sole member of the TMO. From the correspondence we have seen between Bindmans/Bhatt Murphy and RBK&C, RBK&C has failed to appreciate that there are viable alternative solutions which may better ensure victims’ rights.

22. In the letter of 22 September 2017, and again in a letter of 16 October 2017 from RBK&C, reference is made to the potential insolvency of the TMO. This suggestion is not entirely easy to follow. In light of the claims likely to be brought by victims, once the TMO has no cash flow resulting from the properties it manages, it may well be insolvent. That is not, however, a reason that RBK&C must be the sole Member. The conclusion does not follow from the premise.

23. Consequently, there are a number of potential alternative resolutions which would resolve the issue RBK&C have raised without the adverse features outlined above. Sufficient time is required to formulate an alternative arrangement which ensures accountability and proper management, and in the circumstances, the best course in our view would be to adjourn the meeting, under Article 20.3, to allow for such a solution to be formulated.

NOTICE

24. Finally, it seems to us well arguable that any resolutions passed at the AGM would be invalid, because of potential failures to give adequate notice.

25. We are instructed that at least one Member of the TMO did not receive notice of the AGM at the time it was sent out. Those instructing us are urgently investigating the

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3 Subject to the caveat mentioned in footnote 1 above.

position, but are concerned that many other Members may be in a similar position. The obvious possible reason for that is that notice has typically been given by post, but many Members are no longer resident at Grenfell Tower and the Walkways as a result of the fire.

26. s.301 Companies Act 2006 provides that, in order for a resolution passed at a general meeting to be valid, "notice of the meeting and of the resolution [must be] given…in accordance with…the company's articles."

27. Under Article 14.3 of the Articles, notice must be given in writing either by post or in electronic form at an address notified to the TMO by the relevant Member. In light of the above, the TMO is plainly aware that Members who were resident at Grenfell/Walkways are no longer so, and therefore has been constructively notified of the ineffectiveness of notices given by post to those Members. It was open to the TMO to give notice instead personally or by 'Electronic Means' i.e. email. In light of that, it seems to us well arguable that notice has not been validly given under the Articles, and therefore that the Resolutions would be invalid and ineffective.

28. We further note that, in light of the fact that the TMO did not announce the AGM on its website until as late as Friday 13 October (and on that date also made reference to the change of venue)), such Members are highly likely to have been unaware of the AGM.

29. To the extent that the TMO or RBK&C argue that Article 14.5 prevents this consequence, that is in our view a bad argument. Although the Article makes reference to 'non-receipt of notice…by any person entitled to receive notice of the meeting', and then says that this will not invalidate proceedings at the meeting, that reference must be qualified by the word 'accidental' earlier in the sentence. In other words, if the failure to give notice was not 'accidental', the Article does not apply.

30. In any event, as noted earlier, It would in our view be clearly inappropriate for the meeting to proceed in circumstances where former Grenfell residents have not in reality received adequate notice of it.

ADJOURNMENT

31. In light of all the above, the obvious course appears to us to be for the AGM to be adjourned. The TMO has contended that this is impossible until the AGM has

commenced, a position on which we do not express any view. However, once the AGM has commenced, it can be adjourned under Article 20.3 by a majority vote.

32. If the meeting is adjourned, then the required business can be properly conducted as soon as it is restored. An adjournment simply 'holds the ring', so that victims and their solicitors can take further advice, and have a proper dialogue with RBK&C about the future of the TMO and the above concerns.

33. It has been suggested to us that there may be regulatory and compliance issues with not re-appointing Baker Tilly as the auditors today. We express no view on that, but consider it likely that they would in any event be deemed to be re-appointed automatically under s.487 Companies Act 2006.[4] If the TMO is concerned about this point, the obvious course is to pass a resolution re-appointing Baker Tilly and then adjourn the meeting – that should dispel any such concerns.

34. We note for completeness that RBK&C and the TMO appear to be under the impression that, if a vote to continue the Management Agreement is not taken at the AGM on 17 October 2017, then there must be a vote within 28 days refusing to confirm that decision or the Management Agreement comes to an end. In our view, that is plainly wrong. If the meeting is adjourned, then Clause 17.1 of the Management Agreement is not engaged, because it is not the case that the resolution to continue has been "rejected by a simple majority vote at the [AGM]." Rather, the business can be dealt with at the restored AGM after the adjournment.

ANDREW HENSHAW Q.C.

BEN WOOLGAR

Brick Court Chambers

17 October 2017

[4] It is arguable that s.487 does not apply because Article 13.3.4 "requires actual re-appointment" within the meaning of s.487(2)(b), but we think that would be the wrong construction.