Neutral Citation Number: [2018] EWHC 132 (Ch)

Appeal Ref: CH-2017-000072

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
HH JUDGE CRYAN

The Rolls Building
The Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 30/01/2018

Before:

Sir Geoffrey Vos, Chancellor of the High Court

B E T W E E N

VICTORY PLACE MANAGEMENT COMPANY LIMITED

Claimant/Respondent

and

(1) FLORIAN GUNTER KUEHN

(2) GABRIELLE MARIA KUEHN

Defendants/Appellants

Mr David Phillips QC and Mr Simon Butler (instructed by J Garrard & Allen) appeared for the Appellants

Mr Christopher Heather QC and Mr Tim Hammond (instructed by Longmores Solicitors) appeared for the Respondent

Hearing date: 25th January 2018

Judgment

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. This is an appeal against the order of HHJ Cryan dated 27th February 2017, whereby he granted the claimant/respondent, Victory Place Management Company Limited ("VPMC" or the "claimant"), an injunction requiring the defendants/appellants, Mr Florian Gunter Kuehn ("Mr Kuehn") and Mrs Gabrielle Maria Kuehn ("Mrs Kuehn") (together the "defendants"), to remove their dog from 18 Imperial House, 9 Victory Place, London E14 8BQ (the "Property").

2. This appeal raises a single question about whether the judge was right to decide that VPMC had complied with its implied obligation to deal reasonably with a request by the defendants to be allowed to keep their dog in the Property, notwithstanding a covenant in their lease preventing them doing so without the written consent of VPMC. It was common ground that an obligation on VPMC should be implied into the covenant, at least, to the effect that it was obliged only to take into account matters that it ought to have taken into account and not to take into account matters which ought not to have been considered. This was the first limb or "process" requirement taken from Lord Greene MR's judgment in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 at pages 233-4 ("*Wednesbury*"), and referred to by Baroness Hale in *Braganza v. BP Shipping Ltd* [2015] UKSC 17 at paragraph 24 ("*Braganza*").

3. VPMC is the management company for Victory Place which is a gated residential development in Limehouse comprising 146 flats or maisonettes ("Victory Place") held on long leases, one of which the defendants hold. The members of VPMC are the lessees at Victory Place, who in turn elect its board of directors.

4. The defendants entered into a covenant (the "Covenant") in Part III of the seventh schedule of their occupational underlease dated 16th February 1998 (the "Lease"), which was expressed to be enforceable by parties including the freeholder (the "Lessor") and VPMC and the lessees of the other properties in Victory Place, and provided as follows:-

> "No dog bird cat or other animal or reptile shall be kept in the [Property] without the written consent of [VPMC]".

5. VPMC originally cross-appealed on the ground that the judge had been wrong to hold that the second limb of the *Wednesbury* test was also to be implied, so that a further obligation on VPMC should be implied into the Covenant to the effect that it was obliged not to come to an unreasonable or irrational decision. Since, however, the defendants confined their argument on this appeal to their "process" complaint, I shall not need to determine that interesting question.

6. As Mr David Phillips QC, leading counsel for the defendants, put the issue in opening his appeal, the core question the court had to decide was whether the "no dogs" policy pursued by VPMC was an illegitimate predetermination to reach a particular decision (in which case he ought to succeed) or a legitimate predisposition towards a particular

point of view (in which case he accepted that the appeal would fail). I shall return to this question in due course, but first I shall need to set out a little more of the background.

Factual background

7. The Lease was granted on 16th February 1998 to the then-tenant for a term of two hundred years less three days. By clause 3(c) of the Lease, the tenant covenanted "with the Phase Management Company [now VPMC] to observe and perform the covenants … set out in Parts II and III of the Seventh Schedule". The tenant also covenanted in a similar manner with the lessees of the other dwellings at Victory Place.

8. Various documents recording meetings of VPMC and emails between 2002 and 2014 show that VPMC was operating a strict "no pets" policy at Victory Place on the premise that that was the majority view of the lessees. This policy is described in detail in a statement made by Ms Ewa Jones, a director and chair of VPMC ("Ms Jones"), upon which Mr Phillips placed great reliance. I shall return to set out some short passages from that statement.

9. In 2014, Mr and Mrs Kuehn were contemplating purchasing the Property, or more formally taking an assignment of the Lease. They owned a young Yorkshire/Maltese terrier called Vinnie, and so asked the estate agent whether dogs were permitted in Victory Place, to which he replied that it would not be a problem. Nonetheless the judge found that Mr and Mrs Kuehn probably knew of the "no dogs" policy from the beginning, and this finding was not challenged.

10. On 29th September 2014, Mr and Mrs Kuehn purchased the residue of the term granted by the Lease. They then embarked on substantial alterations to the Property, with a view to moving in once these were complete.

11. The board of VPMC arranged a meeting with Mr and Mrs Kuehn and their directly instructed counsel, Mr Simon Butler ("Mr Butler") representing them, to discuss alterations to the Property. The meeting took place on 9th September 2015. But Ms Jones's evidence was that, before the meeting, the board of VPMC had met to discuss the fact that the defendants owned a dog and had agreed to make it clear at the 9th September 2015 meeting that "the policy of not allowing pets in [Victory Place] existed and was being enforced", which was what Ms Jones went on to do.

12. At some stage, the defendants had made an application to the Lessor of Victory Place for consent to keep Vinnie at the Property, which was granted on 18th September 2015.

13. On 19th October 2015, Mr Butler emailed VPMC to seek consent to keep a dog at the Property in the following terms:-

> "Please find attached notification from the landlord that my clients are permitted to keep a dog at the premises.
>
> Can you please confirm that the Board [of VPMC] will give the same consent?

If the answer is in the negative, can you please confirm the reasons for refusing consent?

I look forward to hearing from you".

14. On 19th October 2015, VPMC made two responses by email, the first referring to the mention of the "no pets" policy at the 9th September 2015 meeting, and the second attaching the Covenant and refusing consent in the following terms:-

> "… [VPMC] has adopted a policy of not allowing pets on the premises. There is no need to justify this decision on an individual case by case basis. At any point in the past when approached with a question or request by any prospective buyers or existing leaseholders the Board's answer was always the same: Sorry, but not allowed. This policy stands firm and the Board would consider as breach of trust of all leaseholders who bought their flats with the understanding that pets are not allowed in Victory Place, if the Board were to break away from this policy without the consensus of the majority of the shareholders …".

15. A number of communications between Mr Butler and VPMC's solicitors followed. On 29th October 2015, VPMC's solicitors wrote to Mr Butler saying:-

> "… Although our client will always consider special circumstances (such as a requirement for a guide dog), in the absence of any – and it is noted that your clients have not advised ours that any special circumstances exist – it is proper for our client to apply a blanket ban on dogs …".

16. On 30th October 2015, Mr Butler informed VPMC's solicitors by voicemail that Vinnie was required for therapeutic reasons. In a subsequent telephone conversation that day, VPMC's solicitors requested that medical evidence be provided to support that claim.

17. On 7th November 2015, having completed the alteration works, Mr and Mrs Kuehn and Vinnie moved into the Property.

18. On 12th November 2015, VPMC's solicitors emailed Mr Butler, requesting that full reasons for keeping Vinnie in the Property, supported by the medical evidence previously referred to, be provided by 4.00 p.m. the next day.

19. On 13th November 2015, Mr Butler responded by email in the following terms:-

> "… My client's reasons for keeping the dog in the flat are quite obvious. The dog is part of the family unit. My client would be keeping the dog in the flat whether or not it was supported by medical evidence. It just so happens that my client's medical practitioners have confirmed that Vinnie is helping my client clinically. Please accept these reasons for keeping the dog in the flat."

20. On 18th November 2015, VPMC's solicitors responded by writing a "Letter of Claim" to Mr Butler including the following:-

> "… As I said to you before, [VPMC] will always consider any special circumstances for a leaseholder requiring a dog, for instance if a guide dog is

needed. When they made their application your clients did not give any special reasons for needing to keep a dog in the Property. However, you subsequently mentioned that your clients would be providing medical evidence which showed a medical need to keep a dog, hence I asked you to provide your clients' full reasons supported by that evidence.

The only reason your clients have given for wanting to keep a dog in the Property is that the dog is part of the family unit. Despite a bald reference in your email dated 13 November 2015 to a confirmation from medical practitioners, you have not provided any documentary evidence to show that there is a medical requirement to keep a dog in the Property. [VPMC] does not consider that the reason given by your clients constitutes a special circumstance; every dog kept by a family would be part of a family unit …

It follows that [VPMC] does not consider the sole reason given by your clients to be sufficient for permission to be granted to keep a dog on the estate when such permission would be contrary to the wish of the majority of the other leaseholders who live there.

I confirm, therefore, that your clients' application for consent to keep a dog in the Property is refused …

Your clients are now keeping a dog in the Property in breach of the covenant contained in their lease. Unless you or your clients confirm to me by 4 pm on 19 November 2015 that the dog has been removed from the Property then [VPMC] will commence court proceedings for an injunction requiring the dog to be removed …".

21. On 23rd December 2015, VPMC issued proceedings against the defendants in the County Court at Central London. On 27th February 2017, following a three-day hearing, HHJ Cryan gave judgment in favour of VPMC. In brief summary, his reasons were as follows:-

i) The communications between the parties and their solicitors up to and including 13th November 2015 needed to be "read as a whole", as they together constituted the process by which VPMC reached its decision not to grant consent (paragraph 28).

ii) Having reviewed various authorities, he was on balance prepared to accept that *Wednesbury* principles applied to the way in which VPMC exercised its discretion under the Covenant. Otherwise, there would be a risk of tyranny by majority. Thus, VPMC was obliged to take into account relevant considerations whilst ignoring irrelevant ones, and precluded from reaching an irrational conclusion (paragraphs 39-52).

iii) However, VPMC's policy did not violate these principles. Its members did not want dogs on the estate, based on reasonable concerns about them barking, chewing or defecating in public areas. The policy therefore fell on the right side of the distinction identified in *Bovis Homes Limited v. New Forest District Council* [2002] EWHC 483 (Admin) ("*Bovis*") at paragraphs 111-3. It was not

an inflexible one predetermining the outcome of all applications, but rather "a legitimate predisposition to a particular point of view" (paragraph 54).

iv) Nor was the policy exercised in a way that violated *Wednesbury* principles. VPMC was willing to consider special circumstances, but Mr and Mrs Kuehn did not provide any. Their application to keep Vinnie in the Property was based on nothing more than love of their dog. That is not in any way exceptional and therefore, if accepted as a reason, would undermine the policy altogether (paragraphs 55-56).

v) VPMC did not act in such a way as to defeat its right to equitable relief. It made its position clear to Mr and Mrs Kuehn from the outset, and the couple nonetheless took the deliberate risk of moving Vinnie into the Property (paragraphs 57-58).

22. The judge's order of the same day required Mr and Mrs Kuehn to remove Vinnie from the Property within 28 days, unless permission to appeal was sought within that time, in which case the injunction would be stayed until 14 days after refusal of the permission application or determination of the appeal. The order also required Mr and Mrs Kuehn to pay VPMC's costs, and to make a payment of £20,000 on account of those costs within 14 days.

23. On 15th March 2017, Mr and Mrs Kuehn filed their Appellant's Notice against the order of HHJ Cryan. Their grounds of appeal were that the judge was "wrong to conclude that a refusal to exercise an unfettered discretion was nevertheless a rational and reasonable decision in the Wednesbury sense", and therefore injunctive relief should not have been granted. On 27th July 2017, permission to appeal was granted by Carr J.

The pleadings

24. In its Particulars of Claim, which were attached to its Claim Form dated 23rd December 2015, VPMC pleaded at paragraphs 8 and 17 that:-

> "The majority of the lessees at Victory Place have chosen since the establishment of the estate in the late 1990s that Victory Place remains a "no pet" estate. That choice has been communicated to successive directors of [VPMC], who have managed Victory Place accordingly …
>
> It is abundantly clear that the majority of the lessees do not wish the existing "no pets" policy to change. The directors of [VPMC] must act in a way that reflects the wishes of the lessees."

25. In their Defence dated 26th January 2016, Mr and Mrs Kuehn pleaded at paragraph 5 that:-

> "The following term was necessarily implied into the lease as a matter of custom and to give effect to the necessary intentions of the parties:
>
> (i) Consent would not unreasonably be withheld.

> (ii) The power exercised by the directors should be exercised not only in good faith but also without being arbitrary, capricious or irrational."

As I have said, the point that was pursued on this appeal was the implication of a term obliging VPMC to adhere to the first "process" limb of the *Wednesbury* test.

The evidence of Ms Jones

26. Mr Phillips placed great reliance on passages from Ms Jones's statement, which he argued demonstrated that VPMC had a clear and illegitimate predetermination to reject any application to keep a dog. I shall not set out all that he relied upon but perhaps the most important passages were as follows:-

> "5. I am not aware of any formal regulation or resolution being passed to introduce this ["no pets"] policy. It has however been applied consistently …
>
> 8. When reference is made to a no pet policy the current directors agree that it represents a *policy of not granting consent to residents to keep pets in their apartments unless there are special circumstances* [e.g. a guide dog] …
>
> 10. These examples show that the Board consistently and firmly adheres to the pet policy … Therefore, the Board does not, as a matter of course, examine each case individually or discuss whether to allow or not allow the pet in question …
>
> 43. Of key importance in all this is the lessees' collective right to self-determination. The lessees democratically elect the Board to manage Victory Place in accordance with the terms of the leases. It is surely the case that when the Board must exercise a discretion which will affect all lessees, it should exercise it in line with the wishes of the majority …".

The arguments of the parties

27. As I have already indicated, the arguments of the parties were eventually confined within a narrow compass. Mr Phillips submitted for the appellants that the judge's approach and conclusion was "fundamentally wrong". It was, he argued, clear from the documents and witness statement that I have referred to, that it was VPMC's view from the outset that it was entitled to reject Mr and Mrs Kuehn's consent application without considering the merits, and on the basis of its ongoing policy alone. The board of VPMC had already decided to reject the application to keep the dog before it was made and even before the meeting of 9th September 2015. It was simply wrong for VPMC to adhere to the majority view without considering the merits. The "no pets" policy was not a legitimate predisposition to a particular point of view, but rather an inflexible rule predetermining the outcome of all applications, and fell on the wrong side of the line in *Bovis*.

28. I put to Mr Phillips that the appeal was somewhat academic since, even if he won, the board of VPMC would be likely to reach the same decision again, even after

following a proper process. He said that, even if all that was in issue was the costs of the appeal, they were important.

29. Mr Christopher Heather QC, leading counsel for VPMC, submitted that the judge's conclusion was entirely correct. Historical adoption of a policy, he argued, does not in itself equate to an unreasonable decision-making process or lead to an unreasonable decision. A policy can be valid if it provides, as here, that consent will not be granted unless exceptional circumstances are present (*R v. Torquay Licensing Justices ex p. Brockman* [1951] 2 KB 784). Further, the application of a policy is acceptable where it is unrealistic and impractical to consider each case individually (*R v. Chief Constable of South Yorkshire* [2004] UKHL 39). In the present case, VPMC could not have been expected to assess the suitability of each individual dog, and doing so would surely have resulted in accusations of favouritism or irrationality. Therefore, an approach where no dogs are allowed except in special circumstances was a reasonable one. As the judge rightly found, Mr and Mrs Kuehn were aware of the policy and were given numerous opportunities to evidence any special circumstances, but made no attempt to do so. VPMC was therefore entitled to the relief granted.

The relevant authorities

30. The parties have put a number of authorities before the court, which are of less importance to the outcome in the light of the common legal ground I have already mentioned. It is, however, important to make clear that the question before HHJ Cryan was what term should be implied into the Covenant as to VPMC's handling of an application for written consent to keep a "dog, bird, cat or other animal or reptile" under the Covenant. Public and private law concepts should not be confused, as Arden LJ pointed out in paragraph 37 of her judgment in *Lymington Marina Ltd v. Macnamara and others* [2007] EWCA Civ 151. The fact that a concept borrowed from public law may inform the kind of term that may be implied in a private law context should not blur the distinction.

31. Baroness Hale made this point herself in *Braganza*, which concerned the contract of employment of a vessel's chief engineer. The contract provided a death in service benefit, subject to the following clause:-

> "For the avoidance of doubt compensation for death, accidental injury or illness shall not be payable if, **in the opinion of the company or its insurers**, the death, accidental injury or illness resulted from amongst other things, the officer's wilful act, default or misconduct whether at sea or ashore …" (emphasis added).

32. The employee disappeared one night, and his employer formed the opinion that the most likely explanation was that he had committed suicide by throwing himself overboard. Accordingly, his widow was denied the death in service benefit. She brought a contractual claim to recover it, which succeeded at first instance and in the Supreme Court on the basis that the employer's opinion as to the cause of death was unreasonable in the *Wednesbury* sense. Baroness Hale said this:-

> "18. Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties' bargain for

> them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given …
>
> 20. The decided cases reveal an understandable reluctance to adopt the fully developed rigour of the principles of judicial review of administrative action in a contractual context. But at the same time they have struggled to articulate precisely what the difference might be …".

After explaining the derivation of the *Wednesbury* test and its two limbs, Baroness Hale continued:-

> "25. The parties in this case disagree as to whether the term to be implied into this contract includes both limbs. Mrs Braganza argues that the employer must "keep within the four corners of the matters which they ought to consider", while the employer argues that its decision may only be impugned if it is a decision which no reasonable employer could have reached …
>
> 28. There are signs … that the contractual implied term is drawing closer and closer to the principles applicable in judicial review. The contractual cases do not in terms discuss whether both limbs of the *Wednesbury* test apply …
>
> 31. But whatever term may be implied will depend on the terms and the context of the particular contract involved. …
>
> 32. However, it is unnecessary to reach a final conclusion on the precise extent to which an implied contractual term may differ from the principles applicable to judicial review of administrative action. Given that the question may arise in so many different contractual contexts, it may well be that no precise answer can be given. The particular context of this case is an employment contract, which, as Lord Hodge JSC explains, is of a different character from an ordinary commercial contract …".

(See also Lord Hodge at paragraphs 53-5 and Lord Neuberger at paragraphs 102-3).

33. Employment contracts are plainly different from covenants in leases, and the implication of terms depends entirely on the circumstances of the particular contract in question. Since it does not matter to the outcome here, this is not a case in which to review and decide upon the full extent of an appropriate implication in a covenant of the kind in issue here. Suffice it to say, however, that my inclination would have been to hold, had it mattered, that both the "process" limb of the *Wednesbury* test and the "outcome" limb would have been applicable, as the judge held. Here, the Covenant was expressed to be for the benefit of the other lessees as well as VPMC. The implication must obviously be that the management company should behave

reasonably in considering whether or not to grant consent. Reasonableness in that context involves both a reasonable process and a rational outcome. But in the context of a Lease such as this, these are not high thresholds to meet. The negative formulation of the Covenant is relevant since it creates a presumption that pets are not allowed unless written consent is granted.

34. I mention, in deference to the parties' careful arguments, the other authorities in this area that I have considered, without needing to recite them: *Price v. Bouch* (1986) 53 P&CR 257 at pages 260-1 per Millett J; *Paragon Finance plc v. Nash* [2002] 1 WLR 685 at paragraphs 39-42 per Dyson LJ; *Socimer International Bank v. Standard Bank London* [2008] EWCA Civ 116 at paragraphs 60-6 per Rix LJ; and *Hayes v. Willoughby* [2013] UKSC 17 at paragraph 14 per Lord Sumption.

35. It is only necessary now to cite a passage from Ouseley J's judgment in *Bovis*, since Mr Phillips relied upon it in support of his distinction between a predetermined outcome due to an inflexible policy and a legitimate predisposition to a particular point of view. In that case, a housing developer sought to challenge the decision of a district council to designate a particular area of land as part of a heritage area. The developer argued that the council's adoption of its local plan was unlawful because it had given legally inadequate reasons for rejecting the local planning inspector's recommendation that the area in question should not be within the heritage area, and that the council had approached the recommendation with a closed mind, and without considering the merits. Ouseley J concluded that the council fell on the wrong side of that line:-

> "111. In my judgment a Council acts unlawfully where its decision-making body has predetermined the outcome of the consideration which it is obliged to give to a matter, whether by the delegation of its decision to another body, or by the adoption of an inflexible policy, or as in effect is alleged here, by the closing of its mind to the consideration and weighing of the relevant factors because of a decision already reached or because of a determination to reach a particular decision. It is seen in a corporate determination to adhere to a particular view, regardless of the relevant factors or how they could be weighed. It is to be distinguished from a legitimate predisposition towards a particular point of view. I derive those principles from [*R v. Secretary of State for the Environment ex p. Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 … particularly at page 321G].
>
> 112. There is obviously an overlap between this requirement and the commonplace requirement to have rational regard to relevant considerations. But, in my judgment, the requirement to avoid predetermination goes further. The further vice of predetermination is that the very process of democratic decision making, weighing and balancing relevant factors and taking account of any other viewpoints, which may justify a different balance, is evaded. Even if all the considerations have passed through the predetermined mind, the weighing and balancing of them will not have been undertaken in the manner required. Additionally, where a view has been predetermined, the reasons given may support that view without actually being the true reasons. The decision-making process will not then have proceeded from reasoning to decision, but in the reverse order. In those circumstances, the reasons given would not be true reasons but a sham.

> 113. In my judgment the sequence of steps and the accumulation of events here shows predetermination and a closed mind, rather than just a strong disposition to include the land within the [heritage area]."

Was the judge wrong not to hold that VPMC was in breach of its implied obligation to deal reasonably with the defendants to be allowed to keep their dog in the Property?

36. I come now to consider whether Mr and Mrs Kuehn have made good their argument that the judge was wrong. It is first necessary, I think, to consider how VPMC actually handled the request to keep Vinnie at the Property. Here the parties have interpreted the events quite differently. VPMC says that, at the relevant times, it made clear that its policy was to implement its quite reasonable "no pets" policy save where special circumstances were shown, whilst the claimants say that the policy was an illegitimate predetermination that no pets would be allowed, in reality, whatever the circumstances.

37. As to this point, it is of course correct to say that VPMC has expressed its policy in different ways at different times in the many years since it was introduced. But I do not think it would be fair to make an arbitrary choice between one or other of the many documents to identify the policy. The fact is that the events leading up to VPMC's final decision to refuse the defendants the right to keep Vinnie at the Property gave VPMC an opportunity to consider precisely what policy it was applying. It did so, and on at least two occasions made clear to the defendants that its policy was not to allow any pets save in special circumstances. On 29th October 2015, VPMC's solicitors wrote to Mr Butler saying that "[a]lthough our client will always consider special circumstances (such as a requirement for a guide dog), in the absence of any … it is proper for our client to apply a blanket ban on dogs". On 18th November 2015, VPMC's solicitors gave its final decision and repeated that VPMC would "always consider any special circumstances for a leaseholder requiring a dog, for instance if a guide dog is needed". This was reinforced by Ms Jones's evidence that "when reference is made to a no pet policy the current directors agree that it represents a policy of not granting consent to residents to keep pets in their apartments unless there are special circumstances".

38. But this does not end the matter, because Mr Phillips contended that VPMC had in fact made the adverse decision even before the formal request was made on 19th October 2015. I think this is an unfair, and indeed incorrect, interpretation of what occurred. Before the meeting on 9th September 2015, the board had discussed informally the fact that it appeared that the defendants wanted to move a dog into the Property, but they cannot be said to have reached a final immutable conclusion at that stage. If the promised medical evidence had emerged, there was every prospect that the board would have taken a different approach. They said so, and their integrity was not challenged. The events cannot and should not be viewed with the formality that one might approach a council decision in a planning matter or a decision to dismiss an employee. Context is crucial. The context here was that the board was carrying out the wishes of the majority of the lessees at Victory Place in making clear that it would enforce a "no pets" rule, to the possibility of which prospective tenants were alerted by the Covenant in the lessees' leases.

39. But that point also does not conclude the matter, because Mr Phillips then submitted that the "no pets" rule itself amounted to a predetermination to make a particular

decision, and that there was either no place in the decision-making process or only a very limited place for taking into account the views of the majority. This too seems to me to be a wholly unrealistic analysis. The reality is that, in a management company like VPMC, the views of the lessees who are its members are important. The board of VPMC was elected by, and could be removed by, the lessees as members of the company. Of course, the fact that there was a majority in favour of a "no pets" policy does not entitle the board to behave unreasonably let alone irrationally, but it does justify the board of VPMC in telling prospective residents and anyone else who was interested about the Covenant and the policy that it applied in relation to the Covenant.

40. Moreover, I do not think the policy that requests would be refused save in special or exceptional circumstances was either unreasonable or irrational. It would be possible to argue that a different, more liberal, policy might be equally consistent with a Covenant framed in this negative way. But that is not really the point. The implied term is only to operate a reasonable process in considering requests. It is quite reasonable, in considering requests, to take into account the policy set by a majority of lessees as members of VPMC that dogs would not be permitted save in special circumstances. I entirely reject Mr Phillips's submission that this amounts to an illegitimate predetermination to reach a particular decision in a particular case. It simply represents what it was, namely one important consideration that the board of VPMC would take into account in every case where a lessee sought permission to keep a pet at Victory Place. It was not the only consideration, as I have said, and if the defendants had been able to show a real medical reason for keeping a dog the decision might have been different, but they did not in the event avail themselves of that opportunity. Mr Phillips has entirely failed to persuade me, as Mr Butler failed to persuade the judge, that the board of VPMC had a closed mind or adopted an unfair process.

<u>Conclusion</u>

41. For these reasons, it seems to me that the judge reached the right conclusion in this case. The challenge to VPMC's decision-making process in deciding whether to give the defendants written consent to keep their dog, Vinnie, at the Property under the Covenant, fails, and the appeal must be dismissed.