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

Case Reference : **LON/00BF/LAM/2014/0022**

Property : **43 Eaton Road, SM2 5ED**

Applicants : **Mr S.N. Welford & Mrs D.J. Welford**

Representative : **Mr R Varma (Counsel) instructed by Pain Smith Solicitors**

Respondent : **Ms Wei Ming Gould**

Representative : **Not represented and not present at the hearing**

Type of Application : **Application for the appointment of a Manager (section 24 Landlord & Tenant Act 1987)**

Tribunal Members : **Mr M Martynski (Tribunal Judge)
Mr C Norman BSc FRICS
Mr O Miller BSc**

Date and venue of Hearing : **29 January 2015
10 Alfred Place, London WC1E 7LR**

Date of Decision : **9 February 2015**

DECISION

Decision summary

1. Subject to paragraph 2 below, Mr Darren Powell is appointed as Manager of 43 Eaton Road ('the Building') from **2 March 2015** until **midnight** on **1 March 2018**. The management order is attached.
2. Ms Katherine Neal has the right to object to the appointment of the a Manager. If she wishes to object, she must do so by giving written notice of that objection with her grounds for her objection to the tribunal, the Applicants and to the Respondent by **no later than 27 February 2015**.
3. The Respondent must pay to the Applicants the following sums:
 - (a) £1,710.00 in respect of costs
 - (b) £380.00 in respect of tribunal fees paid by the Applicantsby **9 March 2015**.
4. An order is made pursuant to Section 20C Landlord and Tenant Act 1985 that none of the costs incurred, or to be incurred, by the Respondent in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Applicants.

Background

The Building

5. The Building in question is Victorian house converted into six flats (although it is possible that the ground floor and basement part of the Building has now been altered so as to be one flat - in which case there are five flats).
6. The freehold interest in the Building is held by the Respondent. The Respondent also owns the leasehold interest in flats A & B which, it is believed, are let out on short-term tenancies.
7. Flat C and the Basement Flat have separate Land Registry titles but, as stated above, may now be one flat. Ms Katherine Neal owns the long leasehold titles and we are told by the Applicants that she lives in the Building.
8. The Applicants own Flat D on the first floor. Their lease is dated 19.3.2007 and is for a term of 99 years from 1.7.2000. The Applicants and Respondent are the original parties to the lease. The Applicants have never lived in the Flat; they let it on short-term tenancies.

9. The remaining flat is number 3, which is situated in the roof space which is owned by Mr Douglas Williams.
10. The Respondent's brother, a Mr Lam, managed the Building up until recently

Notice

11. By letter dated 30 July 2014, the Applicants' solicitors sent to the Respondent a Notice pursuant to Section 22 Landlord and Tenant Act. That Notice complained of the following:-
 - (a) The Building was in disrepair in that there was a leak into the Applicants' flat. Despite being given notice of it in November 2013, no action had been taken by the Respondent or Mr Lam.
 - (b) The Respondent had failed to decorate or maintain the Building
 - (c) A failure to deal reasonably with management issues raised by the Applicant
 - (d) A failure to visit the Building regularly
 - (e) A failure to comply with Part 13 of the RICS Code of Management with regard to undertaking repairs
 - (f) A failure to provide an address that complies with sections 47 & 48 Landlord and Tenant Act 1985.
 - (g) No management had take place for many years causing the fabric of the Building to deteriorate
 - (h) Demands for Service Charges did not comply with statutory requirements
 - (i) The Respondent and Mr Lam did not understand their responsibilities

The Notice gave 28 days for action to be taken.

The proceedings before this tribunal prior to the final hearing

12. Following the application being made to this tribunal, a Case Management Hearing was set for 25 November 2014. Mr Lam sought an adjournment of that hearing but was refused. The hearing was attended by Counsel for the Applicants. At that hearing directions were made and sent out to the parties.
13. In addition, letters were sent to the other leaseholders sending them copies of the application and the directions. Unfortunately the addresses used for the other leaseholders were the address of their mortgage companies.
14. The Respondent took no further part in the proceedings. She did not, as she was told to in the directions, make any statement in response to the application by the deadline given of 12 January 2015.

15. The first real engagement with the proceedings on the Respondent's part comes on 21 January 2015 when she sends an email to the Applicants' solicitors and the tribunal. In that email she says that she had been misled by Mr Lam and goes on to say:-

Secondly, I do acknowledge that the property needs professional management (as I am abroad most of the time, and I now can no longer trust Mr Lam). This being the case, can the hearing on the 29th Jan be called off, as I have no objection per se to a professional Manager being appointed except for 2 queries:-

- 1) Are the other lessees in agreement with the Manager proposed?
 - 2) Can we have quotes from a few more companies, before a final appointment is made?
16. In response to this the Applicants' solicitor asks the Respondent to confirm that Mr Lam is no longer instructed by her and say that they intend to proceed with the hearing of the application.
17. Responding to this in an email dated 23 January, the Respondent repeats that she does not mind having the proposed Manager appointed but asks again, do the other lessees agree and could further quotes be obtained?

Evidence

18. The Respondent was not present or represented at the final hearing. The only evidence before us came from the Applicants. Mr Welford, one of the Applicants, had made a witness statement and supplemented that with oral evidence. One of the other leaseholders, Mr Williams, had made a witness statement but was not present to give evidence.
19. In relation to the issues set out in the initial Notice served by the Applicants, we summarise the evidence as follows:-
20. *The Building was in disrepair in that there was a leak into the Applicants' flat:* There was no direct evidence that the leak into the Applicants' flat was as a result of disrepair in the structure of the Building. Mr Welford stated that the flat above his covered his flat entirely. The water ingress into the Applicants' flat was not in areas that would make it obvious that the water was coming from the outside. Indeed initially Mr Welford and Mr Williams made some fairly thorough investigations with a plumber to ascertain if the water was coming from the plumbing in Mr Williams' flat.
21. Mr Welford said that when plumbing issues were ruled out, three roofers were instructed to inspect the roof. All the roofers came back with quotes to carry out similar work. They all reported that there were works required to, the flashings around the chimney and valley gutter and slipped slates.

22. Unfortunately none of the written quotes with the described works were before us. There was no evidence before us to link, even on the balance of probabilities, the leaks into the Applicants' flat and disrepair on the roof.
23. Further, we noted that demands had been made of the Applicants for payments on account of Service Charges. No such payments had been made. In the Applicants' lease, the Respondent's liability to repair the structure and exterior is said to be dependent upon the Applicants making the payments required of them.
24. *Despite being given notice of the leaks in the Applicants' flat and the quotes from the roofers in November 2013, no action had been taken by the Respondent or Mr Lam:* Both Mr Welford and Mr Williams did however give clear evidence that to this day, nothing had been done regarding the issues on the roof and the leak (which is continuing). Mr Lam's only response was to ask for the quotes from the roofers to be in his name.
25. *The Respondent had failed to decorate or maintain the Building:* Mr Williams, who appears to have prepared his statement by himself, set out clearly with detail the failure to decorate or maintain the Building. He said that the Building had not been decorated and that:-

The garden is now very overgrown.

In ten years the outside of the building has never been maintained, paintwork is patchy and tired. The window ledges show signs of rot and deterioration requiring replacement.

The drive on to the property is full of holes

Mr Williams' comments were endorsed by Mr Welford.

26. *A failure to deal reasonably with management issues raised by the Applicant:* This really relates to the failure to respond properly to the issue of the leaking into the Applicants' flat. The evidence here is not completely clear-cut. On the one hand Mr Welford and other leaseholders refuse to make payments on account of Service Charges and contributions to a sinking fund demanded of them and did not for some time make payments for other Service Charges¹. On the other hand, whilst there is clear provision in the Applicants' lease obliging the leaseholder to make payments on account of the Service Charge on demand, there is no provision obliging the leaseholder to pay towards a sinking fund; further, the demands made of Mr & Mrs Welford are not in the proper statutory form and so not payable as a matter of law.
27. *A failure to visit the Building regularly:* There is no real evidence of this. The Applicants do not live at the Building. However, it is clear

¹ They refuse to do this because they are not being given an Service Charge accounts for the Building

that neither Mr Lam nor the Respondent visit or sent anyone round to inspect the issue of leaking into the Applicants' flat.

28. *A failure to comply with Part 13 of the RICS Code of Management with regard to undertaking repairs:* This is a repeat of the matters described above.
29. *A failure to provide an address that complies with sections 47 & 48 Landlord and Tenant Act 1985:* There is no evidence that such an address was supplied in the correct form. In an email dated 23 January 2015, the Respondent provided a UK address, however she has not made it clear that this is an address for service.
30. *No management had take place for many years causing the fabric of the Building to deteriorate:* This has already largely been covered above. Both Mr Williams and Mr Welford confirm that there has been no effective active management over the years. Additionally, Mr Williams in his statement refers to the facts that:
 - (a) There has never been any cleaning of the common parts organised by the Respondent
 - (b) No fire alarm was installed until one of the leaseholders took it in hand
 - (c) There is no intercom or alarm system
 - (d) The back door to the Building has one very old bolt and is a security risk.
31. *Demands for Service Charges did not comply with statutory requirements:* We were shown a demand dated 31 August 2013 which did not comply with statutory requirements in that it did not appear to contain a statement of rights and obligations. If a demand does not comply with statutory requirements, a leaseholder is not legally obliged to pay it.
32. *The Respondent and Mr Lam did not understand their responsibilities:* This has been covered above.

Our conclusions

33. We are not convinced that the leaking into the Applicants' flat is as a result of a failure to repair on the part of the Respondent. We were surprised not to have seen any evidence on the cause of the leaking. The Applicants have failed to prove this ground.
34. As discussed above, the leaseholders appear to have failed to make any payments on account as required by their leases.
35. However, the fault for the problems at the Building must ultimately lie at the door of the Respondent. She is responsible for the management of the Building and the employment of Mr Lam. It is clear that there has been a failure to manage the Building. Proper management would have ensured that:

- Service Charge demands were sent out in the proper form so that effective action could be taken to enforce them if necessary
 - Proper annual accounts would be drawn up showing Service Charge expenditure and provision
 - Inspections would be made and recorded
 - A maintenance plan was in place
 - Leaseholders' reports of leaking were properly investigated to establish the cause of the leaks
 - There was proper checking of the Building for security, fire and other health and safety risks
36. We can only appoint a Manager if we are satisfied of one or more of the matters set out in section 24(2) of the Landlord and Tenant Act 1987 ('the Act').
37. Having regard to the evidence set out above, we are satisfied that:-
- (a) The Respondent and her appointed Manager Mr Lam, have failed to comply with The Service Charge Residential Management Code² as follows³: -
- i. Failing to arrange periodic health and safety and fire risk assessments [para 2.4 j)]
 - ii. Failing to make proper demands for Service Charges [paras 6.2]
 - iii. Having no proper reporting system for repairs [para 13.4]
 - iv. Dealing promptly with reports of repairs issues and inspecting [paras 13.5 & 13.6]
- and that it is just and convenient to make the order in all the circumstances of the case
[section 24 (2)(ac) of the Act] and
- (b) Other circumstances exist which make it just and convenient for the order to be made, those being:-
- i. The Respondent acknowledges that the management of the Building has been poor
 - ii. The Respondent accepts that a Manager should be appointed
 - iii. It appears that the Building requires substantial work which will require substantial contributions from leaseholders. In view of the history of neglect of the Building and the fact that leaseholders have failed to pay sums on account in the past, this is better managed by a professional manager.
[section 24 (2)(ac) of the Act]
38. Whilst we can be confident that Mr Williams of Flat E is aware of the proceedings on the basis that he made a witness statement in

² RICS 2nd Edition

³ This may not be an exhaustive list of the Respondent's failings under the Management Code

support of the Applicants' case, we are concerned that Ms Neal of the ground floor and basement was not served by the tribunal with a copy of the application and directions. There is no evidence that she has been served with notice of the hearing by anyone else. We are told by Mr Welford that Ms Neal is aware of the proceedings and supports his application. He could not be 100% sure however that she was aware of the hearing date. We consider it prudent therefore to allow Ms Neal a short time to consider this decision and the order attached appointing the Manager and to give her the chance to oppose the order if she so wishes.

The Manager

39. The proposed Manager, Mr Darren Powell MRICS of Ringley Chartered Surveyors attended the hearing and was questioned by the Tribunal as to his experience and knowledge.
40. Mr Powell has not been appointed before by a tribunal as a Manager of premises. We are however satisfied that Mr Powell:-
 - (a) has sufficient management experience (over 10 years in New Zealand) and more recently in the UK (over 2 years)
 - (b) He is employed by a reputable firm
 - (c) His immediate principal, Ms Bowring has been appointed by the tribunal as a Manager in other cases
 - (d) He has a management plan which is to be expanded after an inspection of the Building and after consultation with leaseholders
 - (e) He understands his duties as Manager in that he stands independent of the Respondent and that he is answerable to the tribunal.
 - (f) Is a Professional Member of the RICS.

Costs

Unreasonable behaviour

41. Counsel for the Applicants asked that an order be made that the Respondent pay the Applicants' legal costs on the grounds that the Respondent has acted unreasonably in defending and conducting these proceedings.
42. Counsel relied on the fact that the Respondent, failed to attend or be represented at the Case Management Hearing for the case in November 2014 and that she then ignored the directions given at that that hearing. She made no meaningful engagement with the proceedings until her email referred to above of 21 January 2015 when she stated that she was not going to contest the application.
43. The result of her conduct, argued Counsel, was that the Applicants had been put to the expense of legal fees that could have been avoided had the Applicant engaged in the process earlier and

conceded the application earlier.

44. The costs claimed amounted to £6,442. Details of those costs and notification that they would be claimed from her, were sent to the Respondent by the Applicants' solicitors by letter dated 27 January 2015 (also sent by email).
45. The first question for us is whether the Respondent's behavior in these proceedings had any reasonable explanation. The Respondent's explanation was set out in her email of 21 January and can be usefully repeated here (where relevant); she says;

I have perused with shock and dismay, the damaging evidence.... which your clients produced, in particular all those letters and cheques which had been sent to Mr Lam, none of which I was made aware of!!!! Hence my insistence in my previous e-mail communications to you that I have not heard from your client for seven years until Jan. 2014!!

Apologies therefore for my silence these past few weeks, but I have been busy trying to get some answers from Mr Lam, and to try to get to the bottom of things.

Unfortunately, I have got no success in that direction. Suffice to say, in the process, I discovered I have been a victim of lies, deceit, massive fraud, and betrayal!

In the light of evidence produced by your clients that he had regularly kept in touch with Mr Lam, and had paid his dues fairly regularly, there is really no case for me to enter, except to find a meaningful way forward for all concerned.

Living abroad most of the time, I had depended entirely on Mr Lam to look after my affairs but it seems he had another hidden agenda, and has utterly misled and misrepresented things to me.

.....
Secondly, I do acknowledge that the property needs professional management (as I am abroad most of the time, and I can no longer trust Mr Lamb).

This being the case, can the hearing on 29th Jan. be called off, as I have no objection per se to a professional manager being appointed, except for 2 queries: -

- 1) Are the other lessees in agreement with the manager proposed
- 2) Can we have quotes from any few more companies, before a final appointment is made?

46. This is all very well, however we do not see, even if the above is correct, why the Applicants should have to bear the financial consequences of Mr Lam's failings. The Respondent is the freeholder and she is ultimately responsible for the management of the Building. It is incumbent upon her therefore, if she is unable to manage the Building herself, to appoint a competent managing agent. She failed to do this.
47. Additionally, we have had regard to the Respondent's email of 26 August 2014 to the Applicants' solicitors. Relevant parts of that email are as follows:-

Your client's claim that I have not sent valid demands for service charges etc., hence according to you, no payments are due from them.....

The demands sent by me each year, accompanied by a copy of the forthcoming year's Insurance Certificate have been issued according to the Lease Agreement which your client signed when they purchased the property.

They were not accompanied by the Statutory Notices, which your client obviously are aware of, but still would not relieve them of their contractual financial obligations per the Lease Agreement.

To deny his financial obligations under the Lease, by claiming that "no valid demands" for service charges had been sent is not a valid excuse for non-contribution for his share of sinking fund. If he does not know the purpose of a sinking fund, he could have asked all communicated with me.

3) I have told you I am well aware of my responsibilities as a freeholder.....

It is your client and the other leaseholders who seem to be unaware of their corresponding responsibility towards the maintenance of the property.

7) You mentioned in your letter that the "serious disrepair is caused by the failures of my manager and myself" -are you and your client illiterate or just chose to be publishers?! I have not caused all failed to repair the building; It is your client and others in the building who have CAUSED the deterioration of the fabric of the building by failing to contribute to a sinking fund, hence the non-repair.

.....
In the meantime, I am having discussions with various management companies to take over the management of the property, so that things will be run smoothly in the future, as far as issues concerning the property is concerned.

48. We conclude from this email that, whilst Mr Lam may have withheld money from her paid by leaseholders and not mentioned communications from leaseholders, by the time that this emails was sent in August 2014:-
- (a) The Respondent was clearly unaware of her legal responsibilities and the terms of the lease (there is no provision for a sinking fund).
 - (b) She was not properly equipped or ready to manage the property.
 - (c) She was aware of the issues at the property
 - (d) She was aware of the need for a professional manager

49. The directions given at the Case Management hearing provided as follows:-

The Respondent's case

5. By **12 January 2015** the respondent shall send to the applicant a statement in response addressing the issues identified above, including whether the appointment of a manager is opposed and, if so, why.

50. The tribunal's power to order a party to pay costs is limited with

reference to a party's behavior in the proceedings. We cannot therefore consider any behavior prior to the application having been made in mid-October 2014.

51. The failure to attend or be represented at the Case Management Hearing is not of itself unreasonable behavior, as neither attendance or representation were obligatory.
52. The directions quoted above allowed the Respondent until 12 January 2015 to comment on the application; the direction anticipated that the comment may be one that the appointment of a Manager was not opposed.
53. We do not consider therefore that the Respondent can be said to have been acting unreasonably in not having agreed to the appointment of a Manager prior to the deadline of 12 January 2015 for her response.
54. However, we do consider that, given what we have said above, the Respondent did then act unreasonably by failing to indicate by 12 January 2015 that she agreed to the appointment of a Manager. Had she done so by that date, it may well have been that further legal fees may have been saved. As we have noted above, it is apparent that the Respondent realised in August 2014 that an independent Manager needed to be appointed.
55. We consider that the Applicants behaved reasonably in proceeding with the application and the hearing even after receiving the Respondent's email of 21 January 2015. The acceptance of the need for a Manager in that email and the following one on 23 January was equivocal. In the circumstances and given the long history of the matter the Applicants were justified in wanting the matter to be decided by the tribunal.
56. Accordingly we conclude that the Respondent should pay the Applicants' legal costs incurred post 12 January 2015.
57. We do not consider that the Applicants' solicitors should be allowed the rate of £250.00 per hour for a Grade A solicitor. This application was straightforward and could be dealt with a Grade C solicitor. Further, we refer to what we said earlier in this decision regarding the lack of evidence presented to us and the brevity of Mr Welford's statement. We therefore allow a rate of £150.00 per hour (£15.00 per letter/email).
58. The following costs are allowed after 2 January 2015:
 - 10 emails/letters
 - Preparing brief to Counsel: 2 hours
 - Preparing costs schedule: 30 mins
 - Preparing documents for the hearing: 1 hour

Counsel's fees of the final hearing: £750

These costs amount to £1425.00 plus VAT of 20% making a total of £1710.00.

Fees

59. Given the nature of our decision, it follows that the Respondent should further pay to the Applicants the sum of £380.00 paid by them to the tribunal in order to make this application and for the hearing.

Section 20C Landlord and Tenant Act 1985

60. Again, given the way in which we have decided this application and our findings, it is just and equitable to order that none of the costs incurred, or to be incurred, by the Respondent in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

Mark Martynski, Tribunal Judge
9 February 2015



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

Case Reference : **LON/00BF/LAM/2014/0022**

Property : **43 Eaton Road, SM2 5ED**

Applicants : **Mr S.N. Welford & Mrs D.J. Welford**

Respondent : **Ms Wei Ming Gould**

ORDER FOR THE APPOINTMENT OF A MANAGER

1. In accordance with section 24(1) Landlord and Tenant Act 1987 Mr Darren Powell MRICS of Ringley Chartered Surveyors ('the Manager') is appointed as Manager of the Building at 43 Eaton Road, SM2 5ED ('the Building') as from 2 March 2015.
2. The order shall continue for a period of three years expiring at midnight on 1 March 2018 unless before that time this order is varied, revoked or extended.
3. The Manager shall manage the Building in accordance with:
 - (a) The directions and schedule of functions and services attached to this order.
 - (b) The respective obligations of the landlord and the leases by which the flats at the Building are demised by the Respondent and in particular with regard to repair, decoration, provision of services and insurance of the Building.
 - (c) The duties of a Manager set out in the Service Charge Residential Management Code ('the Code') or such other replacement code published by the Royal Institution of Chartered Surveyors and approved by the Secretary of State pursuant to section 87 Leasehold Reform Housing and Urban Development Act 1993

Mark Martynski (Tribunal Judge)
9 February 2015

DIRECTIONS

1. From the date of the appointment and throughout the appointment the Manager shall ensure that he has appropriate professional indemnity cover in the sum of at least £1,000,000 and shall provide copies of the current cover note upon a request being made by any lessee of the Building, the Respondent or the Tribunal.
2. That no later than two weeks after the date of this order the parties to this application shall provide all necessary information to and arrange with the Manager an orderly transfer of responsibilities. No later than this date, the Respondent shall transfer to the Manager all the accounts, books, records and funds (including without limitation, service charge reserve fund).
3. The rights and liabilities of the Respondent arising under any contracts of insurance, and/or any contract for the provision of any services to the Building shall upon commencement of this order become rights and liabilities of the Manager.
4. The Manager is to be entitled to prosecute claims in respect of causes of action accruing before or after the date of his appointment.
5. The Manager shall be entitled to remuneration (which for the avoidance of doubt shall be recoverable as part of the service charges of leases of the Building) in accordance with the Schedule of Functions and Services attached.
6. The Manager shall be entitled to apply to the Tribunal for further directions.

SCHEDULE OF FUNCTIONS AND SERVICES

Insurance

- i. Maintain appropriate building insurance for the Building. Ensure that the Manager's interest is noted on the insurance policy.

Service charge

- i. Prepare an annual service charge budget, administer the service charge and prepare and distribute appropriate service charge accounts to the lessees.
- ii. Set, demand and collect service charges (including contributions to a sinking fund), insurance premiums and any other payment due from the lessees. Instruct solicitors to recover unpaid rents and service charges and any other monies due to the Respondent.
- iii. Place, supervise and administer contracts and check demands for payment of goods, services and equipment supplied for the benefit of the Building with the service charge budget.

Accounts

- i. Prepare and submit to the Respondent and lessees an annual statement of account detailing all monies received and expended. The accounts to be certified by an external auditor if required by the Manager.
- ii. Maintain efficient records and books of account which are open for inspection. Produce for inspection, receipts or other evidence of expenditure.
- iii. Maintain on trust an interest bearing account/s at such bank or building society as the manager shall from time to time decide into which, service charge contributions and all other monies arising under the leases shall be paid.
- iv. All monies collected will be accounted for in accordance with the accounts regulations as issued by the Royal Institution for Chartered Surveyors.

Maintenance

- i. Deal with routine repair and maintenance issues and instruct contractors to attend and rectify problems. Deal with all building maintenance relating to the services and structure of the Building.
- ii. Give consideration to works to be carried out to the Building in the interest of good estate management and making the appropriate recommendations to the Respondent and the lessees.
- iii. Set up of a planned maintenance programme to allow for the periodic re-decoration and repair of the exterior and interior common parts of the Building. The programme must be put in writing and sent to all leaseholders within three months of the manager's appointment.

Agreement and Fees

The management agreement will be the standard management agreement of Ringley Chartered Surveyors. The fee shall be £2,000 plus VAT per annum plus any further charges incurred as per Ringley's standard terms of business

Complaints procedure

The Manager shall operate a complaints procedure in accordance with or substantially similar to the requirements of the Royal Institution of Chartered Surveyors.