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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/21UG/LAM/2014/0014**
Property	:	**Motcombe Court. Bedford Avenue, Bexhill on Sea, East Sussex TN40 1NQ**
Applicant	:	**Mr Geoffrey Waterman**
Representative	:	**In person**
Respondent	:	**Motcombe Court RTM Company Limited**
Representative	:	**Mr Dan Newman, Director**
Type of Application	:	**Appointment of Manager under section 24 Landlord and Tenant Act 1987**
Tribunal Members	:	**Judge E Morrison (Chairman)** **Mr N I Robinson FRICS (Surveyor member)**
Date and venue of Hearing	:	**19 January 2015 at Bexhill Town Hall**
Date of decision	:	**26 January 2015**

DECISION

The Application

1. By an application dated 9 October 2015 the Applicant lessee requested the appointment of a manager for Motcombe Court pursuant to section 24 of the Landlord and Tenant Act 1987 ("the Act").

Summary of Decision

2. Although the Tribunal is satisfied that the Respondent RTM company is in breach of obligations owed to the Applicant relating to the management of Motcombe Court, the Tribunal is not satisfied that it is just and convenient to appoint a manager and does not do so.

The Leases

3. The Tribunal had before it a copy of the lease for Flat 1 and was told that the leases for all the other flats were in similar form. The lease is for a term of 99 years from 25 December 1969 at a yearly ground rent increasing every 33 years and currently £22.50 per annum..

4. The relevant provisions in the lease may be summarised as follows:

   (a) The lessee is liable to pay a proportion of a general service charge comprising the cost to the lessor of complying with its covenants as set out in clauses 6(B) and (D);
   (b) Advance on account payments are payable each 25 December and 24 June;
   (c) The lessor is to provide year end accounts, any balance due from the lessee is payable forthwith, and any surplus may be repaid to the lessee, applied towards the next year's charge, or retained as a reserve;
   (d) The on account payments demanded must not exceed the amount spent in the previous year plus 10%;
   (e) Clause 6(B) obliges the lessor to maintain insurance for the block and by clause 6(D) the lessor covenants to:
   "(i) Keep the main structural parts of the said Block (not comprised in the demised premises or any of the flats in the said Block) including the roofs main walls and timbers and external parts thereof and the foundations thereunder and all cisterns tanks sewers and conduits not used solely for the purposes of the demised premises or any one of the other flats in the Block and the entrance and entrance halls passages stairs and landings in the Block in good and substantial repair and condition throughout the term hereby granted .."
   (ii)- (vi) ...
   "(vii) To employ such persons or persons as shall be reasonably necessary for the due performance of the covenants... and for the proper management of the Block and in particular ... (b) To employ a firm of chartered surveyors or other professional managers of property to handle the management of the Block..."

(viii) – (x)...
"(xi) To use its best endeavours to maintain a supply of hot and cold water to the Flat
(xii) To use its best endeavours to maintain sufficient heat through the central heating apparatus to provide reasonable warmth during the winter months".

The Inspection

5. The Tribunal inspected the subject property on the morning of the hearing, accompanied by the Applicant and various directors of the Respondent. Motcombe Court comprises a six storey purpose built block of 29 flats originally constructed around 1938. The south elevation directly faces the sea and so is very exposed. The Tribunal was shown flats 7, 8, 11, 15, 17 & 20. All the flats showed signs of water damage, mostly, it appeared, through the walls, and particularly through the south facing ones; some damage was worse above and below windows. Access was obtained to the roof area. The main roof has, many years ago, been re-covered using a felt system and whilst it was understood to be currently serviceable it could be seen that this was reaching the end of its useful life with at least one spongy section and defects visible to the parapet upstands and flashings. The two top floor central flats have the benefit of large south facing balconies which also form the roofs of the flats below. It was noted that these balconies were in the process of being re-covered, with the west balcony complete and the promenade tiles still to be provided to the east balcony. The common part entrance and staircase was used to access the flats and roof. This was generally in good order, recently redecorated, and with modern carpets although there was some water damage to wall plaster under a window presumably caused by an external defect. The staircase faces north, showing that the damp problems are not exclusively on the more exposed south and west elevations. The Tribunal also inspected the exterior of the building from ground level. The exterior is generally rendered with mostly replacement UPVC windows and cracks to the render were visible in a number of places, mostly running between windows but also in other places. Attention was also drawn to the external downpipes etc. which were noted to be in need of at least redecoration but probably some repair if not replacement.

The Law and Jurisdiction

6. Subject to certain qualifications not relevant in this case, Section 21 of the Act permits a tenant of a flat to apply to the tribunal for an order appointing a manager. Before doing so a notice must be served, as required by section 22, on the landlord and any other person with management obligations, which must specify the grounds on which the tribunal would be asked to make an order, and requiring matters capable of being remedied to be remedied within a specified reasonable

period. Where an RTM company is in place, as here, the RTM company is treated as the landlord for this purpose.

7. Section 23 provides that no application may be made unless the period allowed for remedy in the notice has expired without matters having been remedied or the requirement to serve a notice has been dispensed with.

8. Section 24(2) provides that a tribunal may only make an order:

" (a) where the tribunal is satisfied—
(i) that any relevant person either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and
(ii) ...
(iii) that it is just and convenient to make the order in all the circumstances of the case;

(ab) where the tribunal is satisfied—
(i) that unreasonable service charges have been made, or are proposed or likely to be made, and
(ii) that it is just and convenient to make the order in all the circumstances of the case;

(aba) ...

(ac) where the tribunal is satisfied—
(i) that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and
(ii) that it is just and convenient to make the order in all the circumstances of the case; or

(b) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made".

Representation and Evidence at the Hearing

9. The Applicant Mr Waterman represented himself at the hearing, assisted by his son Matthew and daughter-in-law. Mr Waterman had prepared a written statement of case with supporting documents, along with a response to the Respondent's submissions, a statement from Matthew Waterman, and confirmation from the proposed manager as to his willingness to act. The Respondent had provided written statements from five directors and another lessee Mr Alberico. It was

represented by its Acting Chairman Mr Newman, assisted by a fellow director Mr E Haslitt. Three other directors, Mr M Below, Mr D Collinson and Mrs M Cox, also gave evidence.

Background

10. The following background facts are not in dispute. The Applicant Mr Waterman is a joint lessee of Flats, 1, 7 and 22. He is also a director of Crownland Ltd, which has owned the freehold of Motcombe Court since the 1980s. For many years Parsons Son & Basley acted as Crownland's managing agents. The lessees were dissatisfied with the management of the building and the majority of them formed the Respondent company ("the RTM") which acquired the right to manage in June 2011. Shortly afterwards, the RTM appointed Arko Property Management Limited, of whom Mr George Okines is the principal, in place of Parsons Son & Basley. Mr Okines acts as the company secretary of the RTM, which currently has six directors (all lessees). The lessees of 21 flats (out of 29) are members of the RTM. Mr Waterman is not a member of the RTM.

11. On 10 April 2014 Mr Waterman, in his capacity as lessee of Flat 1 (he did not then own the other two flats) served a notice under section 22 of the Act on the RTM. In summary. this notice asserted that the RTM was in breach of its repairing obligations as regards necessary roof repairs, had made and proposed unreasonable service charges, was in breach of parts of the RICS Service Charge Residential Management Code, and had failed to keep lessees informed. It gave the RTM three months to make substantial progress with the roof repairs.

12. On 10 September 2014, Mr Waterman and his son Matthew, who by then jointly owned Flats 1 and 22, served a further section 22 notice which was similar to the previous one but now included a complaint that the RTM had also failed to address replacement of the communal heating system. It gave the RTM one month to complete the roof repair, to start section 20 consultation on the heating system and external repair and redecoration, and to commission specifications for these works.

13. The application under section 24 was dated 9 October 2014 but not actually made until 14 October i.e. after expiration of the specified one month remedial period. The application asks the Tribunal to appoint Mr Okines as manager. If a manager is appointed under section 24, the RTM will lose the right to manage. In effect therefore, the application seeks to remove the RTM, but to retain the services of Mr Okines.

14. All concerned acknowledge that Motcombe Court requires extensive and costly repair and renovation. In brief, the building suffers from extensive water penetration, particularly but not exclusively on the south and west elevations, and current indications are that major work on the external elevations will be required to address this, as well as

repair/replacement of the roof. In addition the communal heating and hot water system requires complete renewal or replacement.

The Applicant's case

15. Mr Waterman relied on both section 22 notices. He said that the RTM had allowed Motcombe Court to deteriorate under its stewardship. In 2010 Parsons Son & Basley had started a section 20 consultation for exterior works, but then the RTM had taken over and no work had been done. The problems had become more severe in the meantime. Although section 20 consultation had been carried out for replacement of the roof, the RTM had delayed and failed to proceed with the work. Instead there had been a new suggestion to use a cheaper contractor without a proper specification, but this had not gone ahead either. Nothing had been done about the water penetration through the walls or, apart from isolated pipe repairs following leaks, the communal heating and water system. The failure to repair was a breach of clause 6(D)(i) of the lease.

16. Mr Waterman submitted that the RTM had proved itself to be incompetent and detrimental to the property, He referred to many changes of directors and internal dissent within the board. Although he accepted that some work had finally been carried out in 2014, it wasn't enough, and he thought this had only been done because he had applied pressure by serving a section 22 notice. Previous warning letters he had sent to the board had had no effect. The survey of the heating system had only been carried out after service of the second section 22 notice.

17. He submitted that all were happy with Mr Okines, and that if Mr Okines were appointed as manager by the Tribunal, he would be able to get on with the job, unimpeded by the RTM. The RTM had had their chance and had failed miserably.

18. Matthew Waterman spoke briefly to support his father.

The Respondent's Case

19. Mr Below, a long-serving director of the RTM, gave the Tribunal a narrative of events up to spring 2014. He said that the building had suffered from long neglect and poor management under Parsons Son & Basley, who were instructed by Crownland Ltd[1]. Parsons had excused lack of work on non-payment of service charges, but since Arko had become the managing agents, arrears had not been a problem. On appointing Arko, the RTM board had asked Arko to address the problem of water penetration. Arko had obtained a report from Mr Standen, a chartered building surveyor, dated 5 December 2011. This

[1] His evidence on this matter was supported by written statements of Mrs Cox, Mr Saunders and Mr Alberico, although only Mrs Cox attended the hearing to confirm this.

report was in a the bundle and confirmed that the damp problems were extensive, and discussed possible options for remedy but noted that further research was needed to establish the approach to the external walls.

20. Mr Below said that Mr Standen and Mr Okines eventually agreed that the primary cause of the water penetration was the roof and this should be done first. Mr Standen prepared a detailed specification for replacement of the entire roof, which went out to tender, and the section 20 process was undertaken, with the second consultation period ending on 15 November 2012. The lowest estimate was from Clarke Roofing, for about £110,000 + VAT. However one director then suggested another contractor whom he thought would get the job done more cheaply. This contractor would not price against the existing specification but offered a different system for £80,000 + VAT. There was disagreement within the board about how to proceed, which remained unresolved during much of 2013. Mr Below and Mr Okines were against using the alternative contractor.

21. In October 2013 Mr Below and a new director (two had died and been replaced) went to see Mr Okines to try to progress matters. Mr Okines had, of his own initiative, arranged for an inspection of the walls using a cherry-picker, but Mr Okines and Mr Standen then agreed that the balcony roofs were the priority. It was agreed that Mr Standen would produce revised specification limited to the balcony roofs and their parapet walls, against which Clarke Roofing would be asked to produce a revised estimate. When Mr Standen (who had been instructed through Mr Okines) failed to produce the specification by the date requested, a majority of the board voted to exclude Mr Okines/Arko from dealing with the major works and to deal with contractors direct. Mr Below disagreed and resigned from the board at this point (although he re-joined in 2014).

22. However by early 2014 Mr Okines was once again involved with the works. On 18 March 2014 Mr Okines produced a report arising from the inspection of the walls five months earlier, which indicated that walls and not the roof could be the main source of water penetration. Mr Standen then produced a paper headed "Options for repair and maintenance work". At a meeting of lessees and RTM members on 1 May 2014 the majority agreed to proceed first with roof repairs limited to the balcony roofs and their parapet walls as suggested by Mr Standen.

23. Mr Newman, who was one of several new directors joining the board in early 2014, took over the narrative at this point. He explained that in early 2014 the lessees had been asked to fund major works in the sum originally quoted by Clarke Roofing for repair of the whole roof. In June 2014 Clarke Roofing produced a revised estimate for the balcony roof areas, agreeing that the rest of the roof could wait another 2-3 years. The board understood that work would start on 6 September 2014, the earliest date Clarke was available. When work did not start

then, the board discovered that Mr Okines had failed to formally instruct Clarke. Work eventually began on 9 November 2014. Mr Newman said water penetration into his own flat (directly below the west balcony) had now stopped.

24. So far as the walls were concerned, Mr Standen had agreed in May 2014 to provide a strategy but nothing had yet been received. Mr Okines had suggested doing temporary repairs to the obvious cracks in the render and sealing round the windows to provide some protection against this winter's weather, and section 20 consultation on this had just been completed on 15 January 2015. If the RTM remained in place, these works could proceed.

25. With respect to the heating, a survey had been commissioned in October 2014 and received in November 2015. The two very old boilers and all the pipework need replacing. There were various options, all very costly, to be considered.

26. As regards the effectiveness of the RTM, Mr Newman accepted that it had " had an extended learning curve" and had been dysfunctional, but was no longer so. There were now new directors, 5 of whom attended the hearing, and it was functioning well; two disruptive board members had left. Copies of minutes of board meetings held on 13 September 2014 and 6 December 2014 were provided to the Tribunal. Some of the directors had relevant experience. Mr Newman used to be a contractor dealing with hotel interiors and is a director of a number of small property companies. Mr Saunders (the absent director, he was away) has a small building company, Mr Collinson is a landscape architect, and Mr Below is a retired civil engineer. The board had got things moving and it was coincidental that this happened about the same time as the first section 22 notice was received.

27. The Tribunal asked the five directors in attendance whether they could work together. They all said Yes.

28. Mr Newman expressed some concerns about Mr Okines' effectiveness in terms of delays and lack of clear advice, and he was not committed to using Mr Okines for all the major works.

29. Mr Haslett said his only criticism of Mr Okines was delays and that he had to be chased up; Mr Haslett did not think the pace would pick up if the RTM disappeared. The board was still waiting for Mr Okines to come up with a proposal for the walls. There was now about £180,000 collected in service charges, and the board knew that the priority was to make the building watertight.

30. Mrs Cox did not wish to add anything to her written statement, which focussed on her view that Mr Waterman, though Crownland and Parsons Son & Basley, had allowed the building to fall into disrepair in the first place. She said that the residents had voted with a large

majority to keep the RTM going. Mr Below's written statement notes that a vote on 23 November 2014 was 12 – 3 to retain the RTM.

The proposed manager

31. Mr Okines explained that he runs Arko Property Management, a business founded in 2003 and incorporated in 2008. With 8 staff he manages about 80 buildings in the local area. The company is an ARMA member and he has an AIRPM qualification.

32. He confirmed the basic chronology as recounted by Mr Below. Addressing progress in 2014, he accepted that Clarke Roofing had failed to start the roof work in September due to lack of instruction. He said this was Mr Standen's responsibility as project manager. He accepted that he had not checked that Mr Standen had issued the instruction, and said that he and the board were no longer impressed by Mr Standen. It was he who had originally got Mr Standen involved.

33. In response to questions by the Tribunal about other delays for which he might have some responsibility, Mr Okines said that failings on all sides had caused delay. He accepted that he had not provided a report to the board on the Oct 2013 wall investigation until March 2014. He put part of this delay down to arguments with the board and the fact he was removed for a time from involvement with section 20 work. He had also not carried out various tasks assigned to him in the recent board minutes.

34. So far as the walls were concerned, proper investigation was still needed to establish the best way forward; he had yet to source someone with the necessary specialised knowledge. The temporary repairs could be proceeded with once the board selected the contractor and "should buy us two years".

35. Mr Okines said that the board was now better organised than ever before. He was happy to work with the board "if it [the board] works". But everyone faced a mammoth task. There were multiple issues to address. On the water penetration front it now appeared that the windows were a contributory factor as well as the render, and it was unclear who was responsible for the windows as many lessees had fitted their own uPVC windows. Difficult decisions would also have to be made as regards the heating system. It was unrealistic to expect all the work could suddenly get done. It could easily take 5 years but he had time to progress it.

36. In response to questions from the Tribunal, Mr Okines acknowledged that the lease does not actually permit monies for major works to be demanded in advance due to the wording limiting advance demands to costs incurred in the previous year + 10%. Nor does the lease provide for the regular service charge to include contributions to a reserve fund. Fortunately the lessees have so far paid voluntarily. At this point Mr

Haslett interjected and said the reason people had paid was because the RTM had created a good atmosphere and the lessees were behind the RTM's efforts.

Discussion and Determination

37. The starting point is to consider whether the Applicant has established any of the grounds on which he asks the Tribunal to make an order.

38. Insofar as the section 22 notices rely on unreasonable service charges having been made or proposed (section 24 (2) (ab)(i)), this ground was not referred to by Mr Waterman at the hearing and there is no documentary evidence supporting it. Indeed the documents provided contain no detail whatsoever of service charges. Accordingly this ground is not established.

39. Insofar as the first section 22 notice relies on refusal of the RTM to communicate information to the lessees, again there was no evidence to support this, and in any event it is not a ground set out in section 24(2).

40. Insofar as the section 22 notices relies on breaches of paragraphs 13.2 and 13.5 of the RICS Code, again this was not mentioned by the Applicant at the hearing. In any event these paragraphs address the issue of failure to repair, which is more conveniently dealt with below.

41. The section 22 notices also rely on breach of an obligation owed to the Applicant and relating to the management of the premises (section 24(2)(a)(i)). The obligation referred to is the obligation of the lessor under the lease, but now that of the RTM in place of the lessor, to keep the structure of the building, including the roofs, main walls, all commonly used pipes and conduits, in good and substantial repair and condition (clause 6(D)(i) of the lease). There is clear evidence from the Tribunal's own inspection, and indeed the Respondent accepts, that necessary repairs have not been carried out over a substantial period. It is now three and a half years since the RTM took over the management functions. The internal common parts have been decorated but externally very little has been done. The Tribunal is therefore satisfied that there has been a relevant breach of obligation.

42. However that is not the end of the matter. Before appointing a manager, the Tribunal must also be satisfied that "it is just and convenient to make the order in all the circumstances of the case" (section 24(2)(a)(iii)).

43. The Tribunal notes that of the 21 lessee members of the RTM, all of whom were served with this application, none have supported it, and 7 have given oral or written evidence against it. The evidence before the Tribunal, unchallenged by Mr Waterman, is that the majority of the members of the RTM want it to remain in place, which it would not do if a manager is appointed.

44. Having said that, support for the RTM, however overwhelming, would not carry much weight if the RTM were unable to carry out its responsibilities. Based on the evidence before it, the Tribunal finds that the RTM did not carry out its responsibilities in a satisfactory way for approximately 17-18 months between November 2012 and April 2014. Once the section 20 consultation on roof replacement was completed, the process was derailed by an alternative plan, and did not get back on track until spring 2014. In the meantime no work took place to tackle the ongoing serious problem of water penetration.

45. Mr Waterman says that the progress made since spring 2014 has only occurred because he served a section 22 notice. It is true that the roof repairs were commissioned only after the first notice had been received, and the heating system was surveyed only after the second notice was received. However between October 2014 and April 2014 some limited steps were being taken (see paragraphs 20-21 above) and the new board appears to have been in place by early April. The Tribunal has no doubt that the section 22 notices have concentrated the minds of the board, but does not attribute all forward motion to them.

46. Since April 2014 the RTM appears to have been functioning well. The recent board minutes are impressive and show that all issues are being actively considered and progressed and that a business-like approach is being taken. It was not the fault of the RTM that the balcony roof works did not start on time in September. The RTM has requested and needs clear advice from Mr Okines on how to tackle the remaining water penetration through walls and possibly round the windows. Mr Okines has not provided that advice or as yet sourced the necessary expertise that is needed; it is not clear why but again that does not appear to be the fault of the RTM. The recent board minutes tend to support the view expressed by two of the directors that Mr Okines does not always act quickly enough. In his evidence to the tribunal he stressed the difficulties in resolving the problems at Motcombe Court, but did not actually set out any specific positive steps that he would be taking, or advising the RTM to take, to resolve them. In the view of the Tribunal it is essential that competent specialised expertise is sourced without further delay.

47. Any appointment of Mr Okines as manager would need to be for a considerable period, at least two years, in order for meaningful progress to be made. The Tribunal is not persuaded that Mr Okines, acting independently, is likely to make more progress as a manager appointed by the Tribunal than if he remains under the RTM; indeed the reverse may be true. The lessees have a vested interest in resolving the problems with their building and the RTM is satisfied that the RTM board is now committed to achieving that aim. Hopefully Mr Okines can do what is required of him as a managing agent, but if not, the Tribunal believes the RTM should be free to look elsewhere for assistance.

48. The Tribunal also bears in mind the defects in the lease, and that collecting in the funds for the works in advance of the costs being incurred is dependent on the goodwill of the lessees. This goodwill could be dissipated if the RTM loses the right to manage.

49. In conclusion the Tribunal is satisfied that the RTM is now functioning in a proper way and is supported by the majority of the lessees, and that taking into account all the circumstances it would not be "just and convenient" to appoint a manager. Although the board suggested they would be prepared to step back and leave matters to Mr Okines if the application failed, it is the Tribunal's firm view that the board should continue to be very actively involved, and indeed they have legal responsibilities and duties as directors that cannot be delegated. The Tribunal believes that a sustained joint effort by the RTM and the managing agent, supported by good professional advice, is the best way forward. Of course, if progress is not made, it will be open to Mr Waterman or any other lessee to make a further application under section 24.

Concluding Remarks

50. It is suggested that active consideration be given to seeking a variation of the leases under section 37 (or possibly section 35) of the Act to permit the cost of major works to be collected in advance through the service charge, and for a reserve or sinking fund to be created.

Dated: 26 January 2015

Judge E Morrison (Chairman)

Appeals

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.