



FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference : CHI/00MW/LAM/2015/0013

Property : 1-6 Cavalier Quay, East Cowes, Isle of Wight.
PO32 6EW

Applicants : Mr T P Waite & Mrs J Waite

Representative : Mr T P Waite

Respondent : One to Six Cavalier Quay RTM Company Limited

Representative : J B Leitch Solicitors

Type of Application: Application under Section 24 Landlord and Tenant Act 1987 ("the 1987 Act") for the appointment of a manager

Tribunal Members : Judge P J Barber
Mr P D Turner-Powell FRICS

Date of Decision : 25th April 2016

DECISION

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Decision

1. The Tribunal determines in accordance with the provisions of Section 24 of the Landlord and Tenant Act 1987 (the 1987 Act) not to appoint a manager in relation to the Block.
2. In regard to (1) the Applicants` Section 20C claim in regard to the Respondent`s costs and (2) the Respondent`s claim for a wasted costs order against the Applicants pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, the latter being made on the basis of the Applicants having allegedly acted unreasonably in making the application for appointing a manager, the Tribunal directs that the parties shall, within 21 days of the date of this decision send one copy to the Tribunal, and one copy to the other party, of any written representations which they may respectively wish to make in respect both of the above mentioned Section 20C and Rule 13 applications and the Tribunal shall then proceed to make a determination in both matters on the basis of such written representations, without an oral hearing, and the parties shall be notified of that determination in writing within six weeks of it having been made.

Reasons

BACKGROUND

3. This application for the appointment of a manager under Section 24(1) of the 1987 Act was made by Mr T P Waite and Mrs J Waite ("the Applicants"), in respect of the block comprising 6 residential flats situate at and known as 1-6 Cavalier Quay, East Cowes, Isle of Wight PO332 6EW ("the Block"). The Block comprises a purpose built building of 6 residential flats.
4. The Applicants served a notice pursuant to Section 22 of the 1987 Act on the Respondent, such notice being dated 15th September 2015, and in the second schedule of which the Applicants set out the grounds for the application, and the matters relied upon in detail, in the third schedule. The notice also gave the Respondent warning of the Applicant`s intention to make an application to the Tribunal for the appointment of a manager, unless the remedial action and/or steps set out in the notice were satisfactorily resolved within a period of one month from the date of the notice.
5. The Respondent stated that it opposed the application and disputed a number of the matters as alleged in the Applicants` Section 22 Notice.
6. A copy of the lease relating to the Applicants` Flat No. 1, and being a lease dated 25th June 1999 made between Barratt Homes Limited (1) Holding and Management (Solitaire) Limited (2) Christopher James Kemp and Linda Irene Kemp (3) ("the Lease") was included in the bundle and the lease plans were separately included in the bundle at Pages 68/9; the parties agreed at the hearing that all six leases in relation to the Block were in broadly common or similar form.
7. In the week preceding the hearing, the Respondent`s solicitors J B Leitch, filed with the Tribunal a skeleton argument drafted by their counsel, Stephen Murch and dated 7th April 2016, together also with a statement of the Respondent`s costs

in the matter in a total of £14,599.20 calculated to 8th April 2016, having they said, also copied such documents to the Applicants. The Applicants filed a case summary dated 12th April 2016 in the matter, and confirmed that they had provided a copy to the Respondent.

THE LAW

8. Section 24 of the 1987 Act provides that the LVT may, on an application for an order under that section, appoint a manager to carry out in relation to the relevant premises, (a) such functions in connection with the management of the premises, or (b) such functions of a receiver, or both as the LVT thinks fit.

In brief summary, by virtue of Section 24(2) of the 1987 Act the LVT may only make an order in one or more of the following circumstances:

1. *Where the LVT is satisfied that :*

The landlord is in breach of any obligations owed by him to the tenant under his/her tenancy and relating to the management of the premises in question or any part of them and that it is just and convenient to make the order in all the circumstances of the case.

- (b) *Where the LVT is satisfied that:*

Unreasonable service charges have been made, or are proposed or likely to be made, and that it is just and convenient to make the order in all the circumstances of the case.

- (c) *Where the LVT is satisfied that:*

The landlord has failed to comply with any relevant provision of a code of practice approved by the Secretary of State pursuant to Section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 and that it is just and convenient to make the order in all the circumstances of the case.

- (d) *Where the LVT is satisfied that:*

Other circumstances exist which make it just and convenient for the order to be made.

INSPECTION

9. The Tribunal's inspection took place in the presence of the Applicants, Mr and Mrs Waites, and Mr Mills and Mr Pike in their capacity as directors of the Respondent company, Ms Rebecca Blake of the current managing agents BSC Management IW Limited ("BSC") and Mr Murch of counsel, for the Respondent.
10. The Block is located immediately adjacent to the riverside water frontage at East Cowes and comprises 6 residential flats believed to have been constructed by Barratt in or about the late 1990s; it comprises three storeys under a pitched and tiled roof. There are common parts comprising an entrance door, entrance hall passage and stairway, but no lift. Carpet of a reasonable quality is laid to the common areas and the walls in the hall and landing areas appeared to have been recently newly emulsion painted. To the outside of the Block there are relatively narrow peripheral grassed areas and also a car park area with numbered parking spaces, including a number of visitor spaces although the latter were not marked as

such. The parking area is also used by the owners of adjacent freehold houses known as 7-11 Cavalier Quay, and further property at Rosetta Drive.

11. In regard to external decoration and repair of the main structure and the condition of the communal garden areas, the grass appeared to be in reasonably good condition. The main entrance door and window frames were noted to be in need of decoration and there was some evidence to rot in some of the ground floor timber windows and some "misting" of the double glazed window panels suggesting that seals may have failed. The flank walls are part brick and part rendered and there was some algae marking noticeable on the rendered sections.
12. The bin store fence was noted to be in apparently stable condition.
13. The parking area space was laid to tarmac and appeared to be in a reasonable state of repair although there was some minor breaking of the surface visible around certain circular drain covers; the line markings and numbering to the car parking spaces were well worn but still just about visible.

HEARING AND REPRESENTATIONS

14. The hearing was attended by Mr and Mrs Waites, Mr Murch, counsel for the Respondent, Mr and Mrs Mills, Janet Leal, Mr Pike and Rebecca Blake of BSC.
15. By way of preliminary issues, the parties confirmed that the RTM Company is the correct Respondent, rather than Mr Mills and Mr Pike personally, as named in the application, and Mr Murch confirmed for the Respondent that it was accepted that the Section 22 notice had been properly served.
16. The Tribunal indicated to the parties, and they agreed, that the Applicants' Section 20C application and the Respondent's Rule 13 wasted costs application, be dealt with separately by means of both parties submitting written representations on each such application, to the Tribunal and also to each other, within 21 days of the date of this decision and on the basis that the Tribunal will then make a determination on both costs applications, on the papers and without a further oral hearing.
17. The Tribunal invited the parties to make their respective submissions one by one, on each of the matters for complaint as alleged in the Section 22 Notice and accordingly the parties made their submissions in regard to each as follows:

Failure to enforce obligations on assignment / sub-letting

The Applicants complained as to breach of Paragraph 10 Third Schedule of the Lease and a failure by the Respondent to enforce the requirement on any underlessee to enter into a direct deed of covenant with the company. The Respondent referred in turn to paragraph 12 Third Schedule of the Lease, and to the effect that it did not require a covenant "to observe and perform" to be inserted in underleases unless they are for a period exceeding seven years. Mr Murch further submitted that neither provisions were management functions within the scope of, or relevant to the appointment of a manager for the Block.

Failure to attend properly to Service Charge Accounts

Mr Waites asserted that the Respondent had failed to separate car park income and expenses from the Block and failed to appoint an auditor, contrary he said, to the requirements of Clause 10.4 on Page 31 of the RICS Code of Practice. Mr Murch submitted that there was no requirement in the Lease for an audit to occur and

that in consequence the Code of Practice did not require it either. Mr Murch said that with effect from 15th April 2016 Mr Mills would no longer be a director of the Respondent company; he added that going forward, the managing agents will be having the accounts audited in any event. It became clear that the service charge accounts for the year ended 30th June 2015 had still not been issued; Mr Mills said that the accountants were awaiting certain comparator information from earlier years` accounts. In regard to the car park expenditure, Mr Murch said there had been no breach of any term of the Lease and that the issue of collecting contributions and/or separately accounting was more of a practical than a legal issue. In regard to the rotting window frames Mr Waites submitted that 8 years was an unreasonable delay which had he said, in itself contributed to the timbers becoming exposed and starting to rot. Mr Murch said that quotations have been obtained for the window replacement, but submitted that two years ago when UPVC replacements were being suggested, Mr Waites had objected.

External Repair

Mr Waites accepted that the balcony water penetration repair had now been effected and similarly that the rainwater system repair and Flat 2 balcony masonry work have now been carried out. Mr Waites said that the inside of the porch roof has recently been painted but he said the damp penetration problem had not been addressed. Ms Blake of BSC said that the internal hallway decorations had been carried out in early March, since which time there have been periods of heavy rain but no indications of further water ingress.

Failure to maintain gardens and common areas

The Applicants complained regarding alleged failure to repair loose paving leading to the main entrance of the Block, although accepted that this work has now been done. Mr Waites also complained about a failure to maintain the grassed areas, and also the car parking space line markings, although accepted that the bin store fence has now been repaired. Mr Murch submitted that the car park line markings are adequate and that the tarmac is not in any significant disrepair.

Insurance Obligations

The Applicants complained that the Respondent had failed to obtain an expert opinion as to full replacement value; Mr Waites said that when they purchased their flat in 2010 they were advised by their solicitors that the Block was under-insured at £567,302. The Respondent made reference to clause 8 Fifth Schedule of the Lease being the relevant obligation to insure; Mr Murch said that an insurance appraisal has now been carried out. Ms Blake said that the insurance cover recommended as a result, is now £715,000. Mr Mills said that the insurance obligations had been taken over by the RTM company from Solitaire in or about 2007/08 and that since then they had simply followed broker`s advice to index link the cover year on year. It appeared that no formal valuation had been conducted since at least 2007.

Unreasonable Service Charges

Mr Waites asserted that the Respondent`s proposal to replace existing wooden windows and doors by UPVC material was an unnecessary improvement for which he said, the landlord`s consent had in any event been refused; he added that the windows could and should have been re-painted years ago. Mr Murch submitted that on the one hand Mr Waites had objected to possible UPVC replacement

windows 2 years ago, but was on the other hand now saying that window work was outstanding. Mr Murch did however accept that the work is now overdue.

Breaches of the RICS Service Charges Residential Management Code

The Applicants complained that the Respondent had failed to obtain reports on health & safety, fire risk and asbestos risk, in alleged breach of the requirements arising under Paragraph 3.20 in the RICS Code of Practice. Ms Blake of BSC said that a fire risk survey and health and safety survey had each been carried out in December 2015 and that an asbestos survey had been conducted in January 2016.

18. In regard to the suitability of the proposed manager, Mr Waites had stated in his letter dated 25th November 2015, that he sought appointment as manager and that he understood the duties and obligations involved, referring to his knowledge of the RICS Code of Practice, his residential management experience and his proposed management plan for the Property. However, Mr Waites also stated in such letter that in order to achieve the plan, he intended to appoint John Rowell Estate Management as managing agents at an annual cost of £1,200. Mr Waites added that he intended to arrange professional indemnity insurance with AXA Insurance at a cost of £133. No evidence as to formal acceptance in principle, by John Rowell Estate Management, of appointment as managing agents was adduced, nor was that company in attendance or represented at the hearing. Mr Murch submitted that Mr Waites effectively accepted that he was not able to carry out the management and that what he proposed was simply to appoint another agent in place of BSC. Mr Murch also said that no formal evidence had been provided as to the suitability of John Rowell Estate Management.
19. In closing, Mr Murch said that whatever the past situation may have been, there are now professional managing agents in place; he referred to the witness statement provided in that regard by Ms Blake of BSC. Mr Murch added that various of the matters complained about by Mr Waites have now been addressed save for the external decorations which, he said, will also now be dealt with. Mr Murch said there was no merit in the car parking issue and that the application came down to Mr and Mrs Waites` desire to replace the agent agreed to by five of the 6 lessees, to one selected by Mr and Mrs Waites. In view of what has already been done, Mr Murch said it would not be just and convenient to make the appointment as requested in the application and that there was no evidence as to John Rowell Estate Management`s suitability or even as to their willingness to accept an appointment.
20. In his closing, Mr Waites said that BSC had been appointed in April 2015 but nothing had happened for 5 months. Mr Waites said he did not expect his application to get to a Tribunal hearing, adding that the work done so far had only been done owing to the application having been made. Mr Waites added that in his view it would be just and convenient to make the order and that they had been forced to make the application.

CONSIDERATION

21. We, the Tribunal, have taken into account all the oral evidence and those case papers to which we have been specifically referred and the submissions of both parties.
22. The Tribunal considers that the appointment of a manager is a relatively draconian step to be taken where it is satisfied variously, that serious breaches of covenant

have occurred, that unreasonable service charges have been made, that there has been a breach of the RICS Code of Conduct and/or that circumstances exist resulting in it being just and convenient to make the order.

23. In regard to the various matters of complaint raised in the Preliminary Notice, the Tribunal considers the position to be as follows:

Breach of obligations owed to tenants under the Lease

- (a) In regard to the complaint pursuant to paragraph 10 of the Lease, that the Respondent had failed to enforce the obligation in the Lease that any assignee or underlessee should enter into a direct covenant, the Respondent submitted that under paragraph 12, a covenant would not be required in the case of assured shorthold tenancies granted for terms of less than 7 years. The Tribunal notes the view of the Respondent that this is not a management function in any event, but considers that even if there has been a breach, it is of a relatively minor nature and not such as to justify appointment of a manager.
- (b) In regard to the complaint as to failure to separate car park income and/or to appoint an auditor in regard to the accounts, the Tribunal notes that the Applicants were unable to point to any specific obligations in the Lease in such regard, and consequently the Tribunal finds no evidence of breach is established. However the Tribunal also notes that the Respondent has confirmed that it will ensure that future service charge accounts supplied to lessees, are audited.
- (c) In regard to the Applicants' allegation as to failure to keep the Block in repair, the Tribunal notes the provisions of clauses 1(a) to (c) to the Fifth Schedule of the Lease. The Tribunal notes that the Respondent has now carried out the decoration required to the internal common areas and that it intends to carry out external decoration in the near future. The Tribunal notes the Respondent's acceptance, in its' proposal to obtain quotations for works (Page 115 of the bundle) of "*overdue external decoration*". Whilst the Tribunal considers there to be an element of breach, it does not however consider such breach to be of a magnitude overall as to make it just and convenient to appoint a manager, taking into account the evidence provided as to an intention to remedy the position shortly.
- (d) In regard to maintenance of the gardens and external communal areas, the Tribunal notes that the fencing around the bin store, the guttering clearance works and repairs to paving by the front entrance have all now been undertaken. There was no clear evidence provided as to water penetration through the porch roof. Accordingly the Tribunal considers that no breach of obligation is subsisting although it does note that the works undertaken post-dated the application.
- (e) With regard to insurance obligations, the Tribunal notes that the requirement at clause 8 of the Fifth Schedule of the Lease is to insure in a full replacement value. The Respondent had only recently obtained a valuation and when issued, it revealed evidence of significant under insurance which has now been addressed. In those circumstances, whilst the complaint no longer subsists, the Tribunal notes that seemingly only as a result of the application, a serious under-insurance issue with the Block has been identified.

Unreasonable service charges

The complaint in this regard was in relation to replacement of windows and entrance door being an unnecessary improvement; the Tribunal notes however that the Applicants do also complain as to current disrepair of the windows and entrance door. In any event there is no clear evidence provided that service charges of an unreasonable nature are being proposed.

Breach of the RICS Code of Practice

The Tribunal notes that the Respondent has now addressed the position by obtaining various reports although apparently only somewhat belatedly and seemingly in response to the application. Whilst the position has been addressed, the Tribunal notes that the Respondent and BSC appear to have been relatively slow to progress tasks such as the obtaining of these reports which could have been readily commissioned much sooner after BSC's appointment in April 2015.

24. As regards the identity of the proposed manager, the Tribunal has some concerns that whilst Mr Waites envisaged being appointed in person, he actually intended to appoint a separate managing agent to carry out his proposed management plan for the Property. The Tribunal noted an absence of any formal confirmation being provided from John Rowell Estate Management to confirm their willingness to undertake such role.
25. Accordingly and in all the circumstances the Tribunal is not minded to make the order sought.
26. We made our decisions accordingly.

Judge P J Barber

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.