11750

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AN/LAM/2016/0023**
Property	:	**32 Charleville Road, London W14 9JH**
Applicant	:	**Ian James Ferns**
Representative	:	**Ms Wong of Hubbard Pegman & Whitney LLP**
Respondents	:	**Britstop Ltd, freeholder Merbar Ltd, maintenance trustee**
Representative	:	**Mr Bishop, barrister Field Court Chambers**
Interested Party	:	**Michael Hole (first floor flat)**
Type of application	:	**Appointment of a manager**
Tribunal member(s)	:	**Ruth Wayte (Tribunal Judge) Andrew Lewicki FRICS Rosemary Turner JP**
Date and venue of hearing	:	**16 September 2016 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**21 October 2016**

DECISION

© CROWN COPYRIGHT

Decisions of the tribunal

(1) The application is dismissed.

(2) The tribunal makes the determinations as set out under the various headings in this decision

(3) The tribunal does not make an order under section 20C of the 1985 Act.

The application and hearing

1. On 17 June 2016 the applicant and leasehold owner of flats on the second and third floors of the property made an application for an order appointing Derek Lee MRICS of Property Maintenance and Management Services as manager under section 24 of the Landlord and Tenant Act 1987 ("the Act"). The applicant sought the order due to the alleged failure of the freeholder to comply with the terms of its leases and relevant landlord and tenant legislation. In addition to his own evidence, the applicant relied on findings of fact made against Britstop Ltd on 22 January 2015 by a tribunal in this jurisdiction.

2. Copies of the application form were sent to the respondents and the interested party, the lessor of the first floor flat. The freeholder is the owner of the other two leases to the property. On 7 July 2016 the applicant and Mr Michael Bartlett of the respondent companies attended a case management conference. The respondent made an application to strike out the preliminary notice served by the applicant on the basis that it was defective but the Tribunal Judge decided it would be more appropriate to deal with that issue at the final hearing.

3. Both Mr Bartlett and the applicant gave evidence at the hearing. The tribunal also heard from the current manager Mr Reed and the applicant's proposed manager Mr Lee. The interested party did not attend the hearing but had submitted a witness statement shortly beforehand. The following issues were identified for determination:

   - Did the contents of the section 22 notice comply with the statutory requirements?

   - Has the applicant satisfied the tribunal of any grounds for making an order as specified in section 24(2) of the Act?

   - Would the proposed manager be a suitable appointee and, if so, on what terms and for how long should the appointment be made?

Statutory Framework

9. Under section 24(2) of the Act, the tribunal may appoint a manager under section 24 in various circumstances. These include where the tribunal is satisfied:

   - 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

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

Section 22 notice

10. Before an application for an order under section 24 is made section 22 of the Act requires the service of a notice which must, amongst other requirements, set out steps for remedying any matters relied upon which are capable of remedy and give a reasonable period for those steps to be taken. It was common ground that the notice did not contain any such details.

11. Ms Wong stated that given the previous intransigence shown by Mr Bartlett on behalf of the respondents and the urgency of the works to the roof, there was simply no point in prolonging matters further for what she asserted would have been a pointless exercise.

12. Mr Bishop asserted that the requirements of section 22(b) and (d), summarised above, were not optional. If the applicant's argument was that the breaches were incapable of remedy that was a bad point as a breach of a positive covenant is always capable of remedy (for example by carrying out the works to the roof). If the argument was that the respondent could be in no doubt as to what was required, the application was issued so soon after the service of a notice that the respondent was denied any reasonable opportunity to address the breaches complained of in the notice.

13. Mr Bishop conceded that the tribunal had the power to make an order on a defective notice, as set out in section 24(7), "if it thinks fit". His skeleton argument referred to the first instance decision of *Howard v Midrome Ltd* [1991] 1EGLR 58 where that discretion was exercised but sought to distinguish the case on the basis that the judge was clear that on the facts of that case *"There is no suggestion that* [the landlord] *will take steps to remedy the condition of the roof or indeed any other*

steps towards the proper management of the property". Mr Bishop submitted that in contrast the respondents are at an advanced stage in a section 20 consultation process and had deposited monies to cover the cost of the works with their solicitor.

14. Mr Bishop also referred to a decision in this tribunal of *Erogbogbo v Bolina* LON/00AH/LAN/2010/1. Again, it is not a precedent but is on the same point, the Tribunal Judge stating: "*The appointment of a manager is not exercised lightly by the tribunal and in our opinion the notice must comply with the legal requirements set out in the Act so that the landlord is given one last chance to remedy the matters complained of.*" Mr Bishop maintained that such an analysis must be correct and in all the circumstances this was not an appropriate case to exercise the section 24(7) discretion.

Tribunal's decision

15. The tribunal agrees with the respondent that the notice is defective. The failure on the part of the applicant to allow the respondent any period at all to attend to the works to the roof, in the context of the progress shown by SKPM, was substantive and without justification. In the circumstances the tribunal declines to exercise its discretion under section 24(7) and the notice is invalid. This means that the application fails at the first hurdle, although the tribunal has dealt with the other issues raised in this matter as even if it had felt it appropriate to allow the notice, it would not have made an order in this case.

Grounds under the Act

16. There was no dispute that there had been a failure on the part of the respondents to comply with the terms of the lease in the past. The issue was whether the respondent had now realised the error of its ways and taken steps to put the management of the property on a professional footing.

17. The applicant gave evidence that he didn't trust SKPM to carry out the works and was cynical about the recent section 20 consultation process given the delays in having any work carried out since 2015. He had not paid the demand for service charges on account as he was advised that as they were for major works, a section 20 consultation process was necessary beforehand and as at the date of the demand, no such process had been carried out.

18. Mr Bartlett for the respondent maintained that the works would have been carried out if the applicant had paid the service charges demanded by SKPM. Scaffolding had been erected at the property in order to carry out an inspection of the roof and had been left there for several months to carry out the works. Both the first respondent and the

interested party had paid the service charges and the only reason the works did not proceed was due to the applicant's failure to pay his share.

19. Mr Bishop submitted that past breaches were insufficient for section 24 and in substance the applicant had failed to make out grounds since the appointment of SKPM.

Tribunal decision

20. Given the previous proceedings between the parties and the clear delays in the acceptance by the respondents that works were required to the roof, the Tribunal determines that there have been breaches of covenant which would satisfy section 24. However, the Tribunal also determines that there is clear evidence that the respondents have attempted to remedy those breaches capable of remedy, by the appointment of SKPM and the proposal to carry out works to the roof and exterior of the property. These attempts were thwarted in the main by the refusal of the applicant to pay his share of the on account costs.

The proposed manager

21. Mr Lee attended to give evidence as to his suitability. He managed a wide variety of properties in the London area and had 30 years' experience. He had not inspected the property but had seen it online. He had been a client of the applicant's solicitor which had led to the proposal. He had not previously acted as a tribunal appointed manager and was unclear what that meant in practice. He had not seen the draft order until the hearing but felt it was sufficient for his purposes.

22. Although not directly in response to this evidence, it seems appropriate to consider at this point the evidence of Mr Reed, the manager currently appointed by the respondent. He had managed the property since March 2015 and gave evidence of the work undertaken since that date, which included regular attendance at the property. Mr Bartlett, who maintained he had 20 properties in the area which he'd looked after for 30 years, described Mr Reed as one of the best managing agents he'd ever come across. The leaseholder of the first floor flat also supported his appointment, although that was unsurprising in the circumstances.

Tribunal decision

23. The tribunal did not consider that Mr Lee was a suitable manager. It was concerned that he was insufficiently prepared for the appointment and he lacked familiarity with the property, in contrast with the current manager. The draft order was insufficiently detailed and it was a concern that Mr Lee had not thought it appropriate to be involved with the drafting or appreciated its limitations. A further relevant factor was the support for Mr Reed by the other leaseholders. Mr Reed was an

honest and impressive witness, who appeared to appreciate the difficulties in managing the property and had done his best to proceed with the works to the roof.

Just and convenient

24. Ms Wong stated that the only way to avoid future litigation would be to appoint Mr Lee as the manager, although she conceded the tribunal would take a view on Mr Lee's evidence. Mr Bishop submitted that in the light of all the circumstances of the case and in particular the evidence that previous problems had been remedied, it would not be just and convenient to appoint a manager.

Tribunal decision

25. The tribunal agrees that it is not just and convenient to make the order in this case. There is a clear history of difficulties on both sides which have inflamed relationships and led to the current impasse in respect of the works to the roof. Mr Reed appeared to be a decent and competent manager and the tribunal did not feel that Mr Lee was a suitable manager for the reasons set out above. Any new appointment would lead to further delay which is not in the interest of any of the parties and particularly not the applicant. The tribunal is concerned that the failure of the applicant to pay his on account contribution for the works on the incorrect assumption that a section 20 consultation process was required at that stage (as opposed to when the relevant costs are incurred) has materially contributed to the delay. It is hoped that he will now make that payment so that the works can commence before the winter.

Section 20C

26. Ms Wong made her application on the basis that there had been such a failure of management it would be wrong to pass any costs of the proceedings through the service charge. Mr Bishop maintained there was nothing to support an order under section 20C given the current management of the property.

27. In all the circumstances of the case and on the basis of the determinations made as set out above the tribunal considers that a section 20C order is not justified and the application is refused.

Name: Ruth Wayte **Date:** 21 October 2016

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).