



**First-tier Tribunal
Property Chamber
(Residential Property)**

Case reference : **CAM/00KF/LAM/2017/0004**

Property : **Ingledene Court,
Horace Road,
Southend-on-Sea,
SS1 2DN**

**Applicant
Represented by** : **Morgelay Ltd
Maria Pia Lauretta BA (Hons)**

**Respondents
Represented by** : **George Shepherd, Frank Duffy and Jane
Lesley Hutton
(self representing)**

Date of Application : **6th October 2017**

Type of Application : **Application to vary leases (Part IV
Landlord and Tenant Act 1987 as
Amended (“the 1987 Act”))**

The Tribunal : **Application for the appointment of a
Manager (Part II of the same Act)**
**Bruce Edgington (lawyer chair)
Gerard Smith MRICS FAAV
John Francis QPM**

**Date and venue of
hearing** : **16th March 2018, The Court House,
80 Victoria Avenue, Southend-on-Sea,
SS2 6EU**

DECISION

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1. In connection with the application to vary the leases, Jane Lesley Hutton is made a Respondent
2. The Application to vary the 4 long leases for the 4 flats at the property is granted so that in the Fourth Schedule, where the words “*under Clause 4(1)(b)-(f)*”

appear, on two occasions, they are substituted by “*under Clause 4(1)(a)-(f)*”.

3. The Applicant must lodge details of this variation at the Land Registry in respect of all 4 flats within 28 days. It must also pay any fee(s) necessary and deal with any requisitions of the Land Registry.
4. The application to appoint Laurence Cox MRICS BSc (Hons) as manager of the property is granted pursuant to the order and directions set out in Appendices A and B set out below.
5. The Applicant’s request for an order that the cost of works which may be necessary to the roof shall be paid in full by the Respondents is refused.
6. The Application for an order pursuant to section 20C of the **Landlord and Tenant Act 1985** (“the 1985 Act”) preventing the Applicant and the first 2 Respondents (as freehold owners) from adding any amount to any future service charge account as costs of representation before this Tribunal is refused.
7. Any other claim for costs arising from this case is refused

Reasons

Introduction

8. This is an application involving considerable antagonism between the parties for many years. There was a hearing before the Leasehold Valuation Tribunal (now this Tribunal) on the 17th May 2012, chaired by the same judge as today with the same surveyor member, when considerable efforts were made by the Tribunal to soften the parties’ approaches and suggest ways forward (“the 2012 decision”). It appears that all that effort was completely ignored by the parties and they remain at loggerheads. It should be said that Ms. Hutton was not a party to that previous case.
9. The difficulties arose when Morgelay Ltd. purchased a third of the freehold title of the property together with one of the leasehold interests. Previously management of the building had been very informal with a monthly sum being paid into a bank account by all 4 leaseholders and monies then being paid out as and when necessary. None of the service charge collection provisions in the leases were complied with and the service charge requirements in the 1985 Act and the 1987 Act were ignored.
10. This is the sort of arrangement adopted by many leaseholders who also own the freehold of a property with a small number of flats where everyone gets on and trusts each other. It has the obvious advantage of saving considerable expense. In this case, however, after an initial meeting between the freeholders, Ms. Lauretta, on behalf of Morgelay Ltd. indicated that she wanted positive involvement in management. Mr. Shepherd and Mr. Duffy were reluctant to accept this because, presumably, they were wary of a stranger.

11. Morgelay Ltd. then did not pay for anything and Mr. Shepherd and Mr. Duffy issued court proceedings to recover what they considered to be outstanding service charges and a counterclaim was lodged by Ms. Laretta claiming damages for harassment. The service charge issue came to the tribunal which had to decide that no monies were due because of the failure to comply with the terms of the leases or the 1985 or 1987 Acts. It was also suggested that no damages should be awarded for the counterclaim as this would make matters worse. The matter was pursued by Ms. Laretta, and the county court judge did not award any damages because the judge just did not accept much of what she was saying.
12. Since then, Mr. Shepherd and Mr. Duffy seem to have stopped insuring the building, contrary to the terms of the leases. Those 2 and Ms. Hutton have just insured their own flats. They argue that this has been done because Morgelay Ltd. has still failed to contribute to anything. They appear to have still failed to comply with the terms of the leases or the 1985/1987 Acts.
13. Thus we have a classic 'Catch 22' situation and, as a result, this Tribunal is being asked to appoint a manager and vary the leases.

The Inspection

14. The Tribunal inspected the premises in the presence of Mr. Duffy, Mr Shepherd, Ms. Laretta and Mr. Cox, the proposed manager. The general description as set out in the 2012 decision still applies. The exterior of the property is in fairly poor decorative order and the roof shows signs of having been repaired on numerous occasions. The basement referred to in the 2012 decision was seen by the valuer member.

The Leases

15. The bundle includes copies of the leases for all 4 flats which are in the same relevant terms so far as this application is concerned. The service charge provisions are in the Fourth Schedule. The insurance provisions consist of a covenant by the landlord to insure the building (clause 4(1)(a)) but the service charge provisions fail to allow for the collection of all monies due under that sub-clause, only for the individual flats.
16. The procedure for claiming service charges is that a claim can be made on account of likely charges in the following year. Then, as soon after the end of each accounting period as possible, the landlord must provide a summary of total expenditure certified by a qualified accountant and a reconciliation certificate certified by the landlord. Payment of any shortfall must be made within 28 days from the provision of the certificate.

The Law

17. Section 35 of the 1987 Act permits any party to a long lease of a flat to apply to this Tribunal for an order varying such lease if it "*fails to make satisfactory provision with regard to one or more of the following matters*". There then follows a list of matters such as repair or maintenance of the building, insurance, repair or maintenance of 'installations' or services and the ability to recover all

the service charges from the tenants. This would clearly cover this sort of situation i.e. where the landlord is required to insure the whole building but cannot recover the total costs from the long leaseholders because of an obvious error.

18. Section 24 of the 1987 Act says that a Tribunal **may** (our emphasis) make an order appointing a manager to manage a property if various grounds are made out and if it is 'just and convenient' to make the order. A number of grounds are set out and the only relevant one would appear to be:

"the [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"

19. In this case, Mr. Shepherd and Mr. Duffy are the relevant persons and they are alleged to be in breach of the obligations to insure the building and replace the roof. Morgelay Ltd. is, of course, also a freeholder and is thus also in breach of the obligation to insure.

The Hearing

20. The hearing was attended by those who attended the inspection plus Jane Hutton, the long leaseholder of flat 4. The Tribunal chair, after introductions, explained that as part of the application was to vary all the leases, Ms. Hutton would have to be a party. She readily accepted that and agreed to be a Respondent.
21. The Chair then explained why the variation was required and Mr. Shepherd, at least, seemed to understand. There was further discussion which included several comments from both sides about past behaviour which the Tribunal made clear was irrelevant. Mr. Shepherd then said that after the last hearing, an e-mail and letter had been sent to Ms. Laretta apologising, suggesting a minuted meeting and urging a more conciliatory approach. No reply had been received. Ms. Laretta said that no such e-mail or letter had been received.
22. Mr. Cox confirmed that the e-mail at page 184 in the bundle set out his firm's terms and conditions. However, there was a discussion about clause 6 in the Fourth Schedule to the leases which said that the summary of expenditure had to be certified by a 'qualified' accountant. Mr. Cox said that one of the partners in Hair & Son LLP was a qualified accountant and would be able to give this certificate. This would mean that the need to involve E H Taylor would be removed which would obviously save cost.
23. The Tribunal Chair explained that if the appointment of manager was confirmed, it would be for 3 years and any application to renew such order would have to be

made before that time expired. Alternatively, the freeholders themselves could simply agree to continue to employ Mr. Cox – or anyone else for that matter.

Discussion

24. There is really very little for the Tribunal to say in this case bearing in mind the advice given in the 2012 decision. As was said the leases clearly need to be amended and yet the Respondents simply ignore this. As Jane Lesley Hutton is a party to the lease to flat 4, she needed to be made a party to the application to vary the leases. It is not necessary to delay matters because she agreed to be a Respondent.
25. The lease variation issue was anticipated by the 2012 decision when the then Tribunal indicated that such an application would be granted. It deals with the ability of the freeholder to collect insurance premiums as part of the service charges. Clause 4(1)(a) of the lease is a covenant by the landlord to insure the building. The service charge provisions in the Fourth Schedule say that the 'total expenditure' which the landlord can recover is the expense involved in all the clause 4(1) sub-clauses except 4(1)(a).
26. One of the points made by the Respondents in their statement of reply at page 197 in the bundle is that the variation is not necessary because clause 1 provides for it. With respect, that is simply incorrect. Clause 1 says that the lease is made subject to payment by the leaseholder of the price, the ground rent and "*SECONDLY by way of additional rent during each year of the said term a sum equal to the sum or sums which the Landlord may from time to time pay by way of premiums in effecting or maintaining the insurance of the demised premises in accordance with the Landlord's covenant in that behalf hereinafter contained....*". The demised premises are just the flat in question, not the whole building i.e. the clause does not include insurance for the hallways, staircases and the other common parts or any uninsured flat(s).
27. The error here is that the landlord is required to insure the whole building, not just the demised premises and the service charge provisions in the Fourth Schedule or clause 1 do not enable the landlord to recover the whole premium.
28. As far as management is concerned, a service charge regime is set out in the leases but does not exist in fact because Mr. Shepherd and Mr. Duffy simply refuse to put things on a proper footing, comply with the terms of the leases and issue proper service charge demands. Anarchy exists which has now produced the result that the building is probably not adequately insured. The appointment of a manager is going to cost each leaseholder £2/300 per annum and if the Tribunal had any indication that the parties could just cooperate and organise things between themselves, it would have been reluctant to appoint a manager.
29. Further, Ms. Lauret has misunderstood part of the 2012 decision with regard to the replacement of the roof. The Tribunal did not say it had to be replaced. It is noted that in the section 22 letter, Ms. Lauretta is now saying that Messrs. Shepherd and Duffy must now replace it at their expense. That is because of an

alleged promise made many years ago when the Applicant purchased (denied by the Respondents) that any roof repairs would be met by them out of a relatively small reserve fund. Because of the failure of the Applicant to pay insurance premiums, that reserve fund seems to have been used up and any 'promise' would therefore appear to be irrelevant all these years later.

30. What the Tribunal said was that the exterior was in need of attention and the wooden surfaces needed maintenance and decoration. Then, the decision said (in paragraph 13) "*...the roof has had a large number of repairs. It looks as if it needs fairly urgent replacement.*". All this was saying was that this should be looked at. It was said in that way because the Tribunal members did not have the necessary access to have a good look at the roof.

Conclusions

31. As was said in the 2012 decision, the lease defect so far as the insurance provisions are concerned needs to be rectified and the variation sought does that.
32. The parties are clearly incapable of managing the property themselves. The full insurance provisions are not known to the Tribunal, but the joint and several obligation on the landlords to insure the building as a whole is clear. Any of the 3 freeholders could have arranged this but they have failed to do so since 2014. The scheme for providing services and sharing the cost is at stalemate, despite the advice given to the parties by the Tribunal in 2012.
33. In order to try to ascertain what, if any, goodwill existed between the parties, the Tribunal Chair even asked Ms. Laretta whether she would accept that the insurance for the building had been paid by Mr. Shepherd, Mr. Duffy and Ms. Hutton up to and including 2014, and that upon production of evidence of this would she arrange for her company to pay its share as a gesture of goodwill as she had clearly received that benefit. Her answer was that she would not. Her legal reason was sound, but that response clearly showed that she was not prepared to make any effort to form any sort of friendly relationship with her company's co-owners. The Tribunal members were saddened to hear this.
34. The order that a manager shall be appointed is therefore made as requested and if there is any defect in the section 22 notice served, as alleged, the Tribunal dispenses with such service.

Costs

35. An application for a section 20c Order is misconceived in a situation where the main parties are both landlord and tenant. Further, the Fourth Schedule does not allow the landlord to include legal costs as part of a service charge demand in a situation such as this.
36. As far as any other costs order is concerned, this is a 'no costs' Tribunal unless unreasonable behaviour in the conduct of the proceedings can be established. This does not mean that if a party has a very weak case, costs will be awarded. There has been no unreasonable behaviour in the conduct of these proceedings

by any of the parties and no order is made. The alleged unreasonable behaviour is not in respect of the way the proceedings have been conducted.

37. The Tribunal will not make any further comment on past failings. Ms. Laretta said at the hearing that she has a portfolio of other properties whereas it was clear that the Respondents were very much amateurs in property management. Perhaps those facts alone should have given everyone a clear message that allowances would have to be made. Let us hope that a period of stability and good management will improve things.

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Bruce Edgington
Regional Judge
19th March 2018

Appendix A

ORDER

1. In this Management Order and in the Directions, the Schedule of Rights, Functions, and Services attached to this Management Order, the following expressions shall have the meanings set out below:
 - (a) “the property” shall mean and include the building, gardens, amenity space, drives, pathways, parking spaces, landscaped areas, bin stores, common parts and all other parts of the property known as and situated at Ingledene Court, Horace Road, Southend-on-Sea SS1 2DN
 - (b) “the building” shall mean the 3-storey building comprising flats 1, 2, 3 & 4, as referred to in the leases of the premises plus the basement.
 - (c) “the Landlord” shall mean George Shepherd, Frank Duffy and Morgelay Ltd., or in the event of the vesting of the reversion of the residential leases of the property in another, the Landlord’s successor in title
 - (d) “the leases” shall mean the long leases of the flats in the property and “Leases” shall be construed accordingly
 - (e) “the tenants” shall mean the proprietors for the time being of the Leases as lessees and the “Tenants” shall be construed accordingly
 - (f) “the Manager” shall mean Laurence Cox MRICS, of Hair & Son LLP, 200 London Road, Southend-on-Sea, SS1 1PJ

2. It is hereby ordered that:

- (a) in accordance with section 24(1) of the Landlord and Tenant Act 1987 the Manager shall be appointed as receiver and manager of the property with effect from 3rd April 2018
- (b) the order in paragraph 2(a) herein shall continue until 2nd April 2021
- (c) the Manager shall manage the Property in accordance with:
 - (i) the Directions and Schedule of rights, functions, and services attached to the Directions (Appendix B)
 - (ii) the respective obligations of the Landlord under the Leases by which the flats at the property are demised by the Landlord are subject to the terms of this Management Order in so far as those terms effectively vary or supplement the terms of the Leases. In each and every respect in which the terms of this Management Order differ from or are in conflict with the terms of the Leases, the terms of this Management Order shall take precedence.

3. Liberty to Apply

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Bruce Edgington
Regional Judge
 19th March 2018

Appendix B

DIRECTIONS

- 1. The functions and duties of the Manager shall be:
 - (a) to effect any repairs to the building (as defined in the leases and referred to in paragraph 1 of the Order dated 16th March 2018), so to ensure it is in sound structural condition,
 - (c) to establish and carry out a pattern of cyclical maintenance and to set up a reserve fund if appropriate in accordance with clause 5 in the leases,
 - (d) to arrange building insurance cover for the building,
 - (e) to make or progress any relevant insurance claim in respect of the building
 - (f) to gather in service charges in accordance with the lease
 - (g) to take any necessary general management functions as appear necessary to achieve (a)-(f)

2. From the date of appointment and throughout the appointment the Manager shall ensure that he has appropriate professional indemnity cover in the sum of £3,000,000 and shall provide copies of the current cover note upon request being made by the Tenants, the Landlord or the Tribunal.
3. The Manager in the performance of his functions and duties, and in the exercise of his powers under the Management Order and these Directions, shall exercise all the reasonable skill, care and diligence to be expected of a manager experienced in carrying out work of a similar scope and complexity to that required for the performance of the said functions and duties and the exercise of the said powers and shall indemnify the Landlord in respect of any loss occasioned by any negligent act or omission of himself, his servants, or Agents.
4. The Landlord and its servants and agents shall give reasonable assistance and co-operation to the Manager in pursuance of his functions, rights, duties, and powers under the Management Order and these Directions and shall not interfere or attempt to interfere with the exercise of any of his rights, duties, or powers save by due process of law.
5. The Landlord shall deliver to the Manager forthwith copies of all specifications, tenders, planning permissions and any other consents, permission documents, and instruments which the Landlord has, or which come into the power, control or custody of the Landlord after the date of the Management Order concerning or arising out of any major works, extensions, rebuilding or other constructional matters at the Property or which are in the power, control, custody of any of the Landlord's servants or agents, in which last case it shall take all reasonable steps to procure such delivery from its servants or agents.
6. The rights and liabilities of the Landlord arising under any contracts or insurance, and/or any contract for the provision of any service to the property shall upon a date 4 weeks from the date on which the Management Order takes effect become rights and liabilities of the Manager.
7. The Manager shall be entitled to remuneration of his fees and reasonable costs, including legal, accountancy, and any other professional service costs in accordance with the Schedule of Rights, Functions and Services set out below.
8. The Manager shall be entitled to apply to the Tribunal for further directions in accordance with section 24(4) of the 1987 Act, with particular regard (but not limited to) the following events:
 - (a) a failure by any party to comply with any of these directions and/or
 - (b) in the event that there are insufficient sums held by him to pay the manager's remuneration.

SCHEDULE OF RIGHTS, FUNCTIONS AND SERVICES

A. Service Charges

- 1.1. The Manager shall have the right to demand and receive from the Tenants as the proprietors of any flats in the building and their successors in title to any flats in the building, contributions to the cost of the performance of his functions and duties in such reasonable and proper proportions to be determined by the Manager in accordance with clauses 4, 5 and the Fourth Schedules of the Leases to include payments in advance which shall reasonably be required.
- 1.2. The Manager shall have the power in his own name on behalf of the Landlord to bring and defend any action or other legal proceedings in connection with his functions and duties including but not limited to proceedings against any Tenants in respect of moneys due under the Leases.
- 1.3. In the event that the Tenants shall be in breach of their obligations as provided in the Management Order and these Directions, the Manager shall be entitled to recover from any such Tenant on a full indemnity basis any costs, fees, charges, expenses and/or disbursements incurred or occasioned by him in the appointment of any Solicitors, Counsel, Surveyors, or any other professional reasonably retained by the Manager for the purpose of enforcing such covenants or obligations whether or not the Manager brings any proceedings in Court of before any Tribunal.
- 1.4. The Manager shall place, supervise, and administer contracts and check demands for payment for goods, services, and equipment supplied for the purpose of his functions and duties
- 1.5. The Manager shall have the power to appoint Solicitors, Accountants, Architects, Surveyors, and such other professionally qualified persons as may reasonably be required to assist him in the performance of his functions.
- 1.6. The Manager shall have the power to appoint any agent or servant to carry out such functions or obligations which the Manager is unable to perform himself or which can be more conveniently done by an agent or servant and he power to dismiss such agent or servant.
- 1.7. The Manager shall have the power to open and operate bank accounts in the name of Hair & Son LLP in relation to the performance of his functions and duties and to invest moneys received pursuant to his appointment in any manner specified in parts I and II of the First Schedule of the Trustee Investment Act 1961 and to hold those funds received from the Tenants of the Flats in the Property pursuant to section 42 of the Landlord and Tenant Act 1987.
- 1.8. The Manager shall have the power to claim in the bankruptcy, insolvency, sequestration, or liquidation of any Tenant owing moneys due under this Order.

1.9 The Manager shall have the power to borrow all sums reasonably required for the performance of his functions and duties and the exercise of his powers under the Management Order or these Directions in the event of there being:

- (a) arrears or other shortfalls of contributions due from the Tenants; or
- (b) arrears or other shortfalls of other sums due from the Tenants, such borrowing to be secured (if necessary) on the interest of the Landlord and/or the tenants, or any one of them, in the Property or any part thereof.

PROVIDED THAT the Manager shall not secure any such borrowing without the prior written consent of the Landlord (such consent not to be unreasonably withheld or delayed) or in the default of that consent or those consents, without further order of the Tribunal.

B. Accounts

- 2.1. The Manager shall prepare and submit to the Landlord and the tenants an annual certificate in accordance with paragraph 6 of the Fourth Schedule to the leases detailing all monies received and expended on their behalf.
- 2.2. The Manager shall upon request produce for inspection receipts or other evidence of expenditure.
- 2.3. All monies collected for the purpose of the Manager's functions and duties will be accounted for in accordance with the Accounts Regulations as issued by the RICS subject to the Manager receiving interest on the monies whilst they are in his client account. Any reserve fund monies to be held in a separate client account with interest accruing to the Landlord.

C. Maintenance

- 3.1 In regard to Major Works which need to be carried out to the Property the Manager will (where necessary) prepare a specification of works, obtain competitive tenders, serve relevant notices on Lessees informing them of the works and supervising the works. The Manager will comply with any Statutory consultation requirements.

D. Fees

- 4.1. The Manager's fees will be calculated in accordance with the statement of terms and conditions dated 29th October 2017 from the manager as seen by the Tribunal save that the cost of the service charge certificate will simply be the time spent by the in house accountant for checking the service charge account and certifying it. In the event of any conflict between those terms and conditions and these directions, these directions will prevail.

- 4.2. The Manager shall be entitled to recover from the Tenants all costs, fees, expenses, and disbursements properly and reasonably incurred in employing any Solicitors, Counsel, Surveyors, Architects, Accountants or any other professional.
- 4.3. VAT to be payable on fees quoted above, where appropriate, at the rate prevailing at the date of invoicing.

E. Complaints Procedure

- 5.1.1 The Manager shall operate a complaints procedure in accordance with the requirements of the RICS. Details of the procedure are available from the Institution upon request.

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Bruce Edgington
Regional Judge
19th March 2018

ANNEX - RIGHTS OF APPEAL

- i. 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.
- ii. 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.
- iii. 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.
- iv. 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.