12537

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LAM/2016/0032**
Property	:	**7 Regent Square, London, WC1H 8HZ ("the Property")**
Applicants	:	**(1) Ms Sophie Peach and Mr Andrew Peach – Flat 3** **(2) Mr Pablo Clements & Ms S Lamden – Flat 1** **(3) Mr & Mrs Andrew Aglionby – Flat 5** **("the tenants")**
Representative	:	**Mr Michael Walsh, counsel (Direct Access)**
Respondents	:	**Mr Anton Brazil (the "landlord")**
Representative	:	**Bude Storz, solicitors**
Type of application	:	**Appointment of a manager**
Tribunal member(s)	:	**(1) Judge Vance** **(2) Mr H Geddes** **(3) Mr O N Miller**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of hearing	:	**23 January 2017**
Date of Decision	:	**22 February 2017**

DECISION

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Decision of the tribunal

1. The application for an order appointing a manager under Section 24 of the Landlord & Tenant Act 1987 ("the Act") is refused.

Introduction

2. This is an application for the appointment of Mr Martin Kingsley as manager of the Property pursuant to Section 24 of the Act.

3. Page numbers in square brackets and in bold below refer to pages in the hearing bundle provided by the applicants.

4. The Property is a grade II listed Georgian terraced house which has been converted into five residential flats. Mr and Mrs Peach are the long lessees of the first floor flat (Flat 3). Mr and Mrs Aglionby are the long lessees of the second and third floor flat (Flat 5) and Pablo Clements and Sherry Lamden are the long lessees of the ground floor and basement flat (Flat 1). Flats 2 and 4 are studio flats that have reverted to freeholder and are let on short leases. The respondent holds the freehold interest in the Property and was registered as the freehold proprietor at HM Land Registry on 6 July 2000.

5. Mr and Mrs Peach hold their leasehold interest under the terms of a lease dated 22 April 1988 granted for a term of 125 years by Greycroft Limited to Claudia Brightman and Alexander Taye ("the Lease"). The tribunal has proceeded on the basis that the leases for Flat 1 and 5 are in all material respects on identical terms as the lease for Flat 3. The parties did not suggest otherwise.

6. The Lease requires the landlord to provide services and for the tenants to contribute towards their costs by way of a variable service charge. Mr & Mrs Peach are liable to pay 20% of the annual service charge sum due. Mr & Mrs Aglionby are liable to pay 40% of that sum and Mr Clements and Ms Lamden are liable to pay 30%. The respondent is liable to pay 10% for the two studio flats. The specific provisions of the Lease will be referred to below, where appropriate.

7. A notice under section 22 of the Act dated 9 June 2016 was served by the applicants on the respondent notifying him that they intended to apply to this tribunal for the appointment of a manager. Four grounds were specified, namely that the landlord had:

   (a) failed to keep the Property watertight and in good repair;
   (b) failed to properly manage the Property;
   (c) demanded unreasonable and excessive service charges; and

HM Courts
& Tribunals
Service

Property Chamber
London Residential Property
First-tier Tribunal

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Mr M Kingsley
K & M Property Group Ltd
The Studio
63 Darlands Drive
Barnet
Hertfordshire
EN5 2DE

Your ref:

Our ref: LON/00AG/LAM/2016/0032

Date: 24 February 2017

Dear Mr Kingsley

RE: LANDLORD & TENANT ACT 1987 - SECTION 24(1)

PREMISES: 7 REGENT SQUARE, LONDON, WC1H 8HZ

The Tribunal has made its determination in respect of the above application and a copy of the document recording its decision is enclosed.

Yours faithfully
Ms Margaret Egenti
Case Officer

(d) failed to comply with the Royal Institute of Chartered Surveyors ("RICS") Service Charge Residential Management Code.

8. Directions were issued by the tribunal on 24 November 2016 following a case management hearing. Attached to those directions was a template for a draft possible management order.

The Hearing

9. The hearing on 23 January 2017 was attended by Mr Walsh, Mr and Mrs Peach. Mr Knightley, the applicants' proposed manager, also attended.. Mr Raphael Bude represented the respondent. Mr Joel Frankel, a director of the current managing agents of the Property, Wellcroft Management Limited ("Wellcroft") was present as was Mr Ian Brown, the manager and company secretary of Wellcroft.

10. We heard witness evidence from Mrs Peach, Mr Frankel and Mr Bude, all of whom had provided witness statements in advance of the hearing. We also questioned Mr Knightley about his suitability to be appointed as a manager.

11. At the time the respondent acquired the freehold of the Property in 2000 the managing agents were Locking and Co. On 16 November 2004, Bude Storz solicitors notified the long lessees that they would be taking over the management function for the Property. Highfield Estates were then appointed as managing agents in January 2008 but were subsequently replaced by Wellcroft in November 2015. At the start of the hearing Mr Bude conceded that there had been historic mismanagement of the Property in that a poor management service had been provided by Highfield Estates from about 2013.

12. During the course of the hearing permission was sought to rely on copies of the following documents. No objection was made by either party and we admitted them in evidence:

(a) Email dated 6 April 2016 from S Gross at Wellcroft to Mrs Peach;
(b) Email exchange 30 November 2016 to 12 January 2017 between Ms Peach and Elite.

The law

13. The relevant parts of Section 24 of the 1987 Act are set out in Appendix 1 to this decision.

The Hearing

The Applicant's case

14. Mr Walsh submitted that the respondent had breached his obligations under the Lease in the following ways:

    (a) There has been water ingress into the Property since in or around 2010 despite two sets of major works;
    (b) The fire alarm system has been constantly displaying a fault warning since 2011;
    (c) He had not maintained an insurance policy that provided for the cost of rebuilding the Property;
    (d) He has allowed the Property to fall into a state of disrepair;
    (e) No management function at all was carried out by Bude Storz when they were supposed to be managing the Property;
    (f) He allowed an aggressive alcoholic tenant to occupy one of the studio flats retained by him.

15. Mr Walsh also submitted that service charges demanded since 2011 had been unreasonable and excessive.

16. When asked by the tribunal to provide details of extant breaches of the lease by the respondent, rather than historic breaches, he identified the following:

    (a) Wooden window frames in the communal areas were cracked;
    (b) The decorative condition of the common parts was poor; and
    (c) The fire alarm still displayed a fault warning

17. Ms Peach's evidence in her witness statement is that when Bude Storz were managing the Property no apparent repairs, maintenance or cleaning was carried out at the Property. In early 2005 Bude Storz ceased communications and ignored her requests for accounts and the carrying out of repairs. She said that no demands for service charges or ground rent were made between February 2005 and January 2008. This was not disputed by Mr Bude.

18. She states that an improvement notice for the property was served by Camden Council on 7 December 2010 **[102]** which identified the presence of several hazards in the Property. They included the lack of a fire detection system and double-hung sash-windows in the common parts that were rotten in places and could not be kept open.

19. Another problem present at that time was, she says, water ingress from the roof into the communal hallway into Flat 5. In her view, subsequent works carried out by Highfield Estates in 2011 were haphazard, of poor quality and failed to remedy the water penetration problem. Despite complaints, Highfield did not, she says, agree to carry out further works to the roof until the summer of 2014. In her view those works were also

carried out poorly and failed to remedy the water penetration issue which, instead, became increasingly worse.

20. In February 2016, she commissioned a report from John Perrin & Sons **[154]**, building surveyors, who recommended that certain works be carried out at the Property, including to the main roof. Further works were then carried out by the respondent in December 2016, including to the roof, after which Ms Peach asked John Perrin & Sons to re-inspect the Property. In their letter of 6 January 2017 **[226]** John Perrin & Sons state that the leak from the rainwater outlets on the roof has been resolved and that the external wall in the communal hallway, which was previously giving very high moisture readings was now only giving very low readings. They state that, however, that there remained surface cracking to the window frames on the communal staircase and that work was required to the lower flat roof including fully clearing the gutters.

21. Mrs Peach queried why no statutory consultation exercise was carried out before the respondent entered into a qualifying long term agreement for the fire alarm and intercom systems on 18 July 2001 for a 14-year term **[180]**. She states that the fire alarm has displayed fault signs since 2011 and that the company who provided the system, Nagle Fire Ltd, entered liquidation in April 2016.

22. As to the nuisance tenant who occupied the studio flat in Flat 4 from April 2016 she says that he was a violent alcoholic. The police had been called out on four occasions. One incident concerned a kitchen knife placed under a mat in the communal area. Because of noise and other disturbances caused by this tenant she and her husband moved out of their flat in August 2016 and stayed with family.

23. Mrs Peach also contends that since 2011 the respondent has spent more than £55,000 on major works to the Property which, in her view, been ineffective.

24. We referred Mrs Peach to a letter sent to her by Wellfield dated 29 June 2016 **[372]** following service of the section 22 Notice in which it is stated that *"we have taken over a tremendous mess from the previous agent"* and in which they assured her that works would be carried out at the Property and asked her to provide a copy of the surveyor's report that she had commissioned. She confirmed that she did not respond to this letter and that she did not communicate with Wellcroft after this date except in relation to the problem with the tenant of Flat 4. Instead, Mr Walsh corresponded with Wellcroft on her behalf She told us that she had not the paid service charges demanded by Wellcroft on 1 January 2006 because she wanted someone else to manage the Property. She also said that she only found out about further works to the roof carried out

in December 2016 following receipt of an email from Mr Brown sent on 30 December 2016 **[214]**.

The Respondent's Case

25. Mr Bude provided two witness statements. In his first statement, he responded to the four grounds set out in the section 22 notice. He asserted that:

    (a) the Property was now watertight and in a good state of repair;
    (b) the fire alarm was in working order;
    (c) the nuisance tenant had vacated;
    (d) service charge expenditure was not excessive for a property of this size and age; and
    (e) service charges had now been demanded but remained unpaid.

26. In his second statement, he asserted that much of Mrs Peach's witness statement referred to historic issues and that he was satisfied that Wellcroft have remedied the problem with water penetration and that Elite Fire Protection ("Elite") had been instructed to maintain the fire alarm system at the Property.

27. In his witness statement, Mr Frankel stated that Wellcroft had arranged for FL Industrial & Domestic Roofing Limited to inspect the roof in December 2016 who identified that there were cracks in the valley gutter allowing water ingress. Works had therefore been carried out to seal those cracks **[299]**. He also stated that trees that overhang the Property shed leaves that cause blockages in the gutters, causing water to run on to the exterior walls and causing dampness. Wellcroft had decided that the best way to deal with this problem was to ensure that the gutters were regularly cleared.

28. Mr Frankel's evidence was that Elite inspected the fire alarm system on 21 October 2016. Their test certificate **[310]** states that there were 27 faults on the system which all appeared to relate to the need to replace batteries which required access to all the flats. Those batteries were, he said, subsequently changed following which Elite recommended that additional works were needed including the installation of replacement heat detectors to flats 1 and 2. Wellcroft would, he said, be taking steps to carry out these works but that despite these fault signs the fire alarm system was fully working at all times.

29. Mr Frankel's contention was that Wellcroft have managed the Property for about a year and that in that time appropriate steps had been taken to remedy the problems identified by Mrs Peach. Wellcroft, he says, manage over 180 units across London and are able to provide a good

management service for the Property. The respondent therefore opposed the making of a management order.

Inspection

30. The tribunal inspected the Property on the morning of the hearing. There were no obvious defects to the front external elevation. We were unable to gain access to the rear of the Property. The communal areas of the hallway and staircase were in reasonable decorative condition and no significant disrepair was present except that the bottom sash of the window on the first-floor landing on the staircase did not remain open. There was no evidence of any current water penetration problems into the common parts.

31. The panel to the fire alarm system in the hallway displayed a fault sign indicating that a battery was low.

Decision and Reasons

32. The tribunal is not satisfied, from the evidence before us, that it is appropriate to make a management order of the Property.

33. We do not accept that it is appropriate to make a management order on the basis that the respondent is currently in breach of the terms of the Lease. We disagree with the suggestion that the common parts are in disrepair and in a poor decorative condition. There was negligible cracking to the window frames of the communal window on the staircase and whilst the fact that the window did not remain open arguably constitutes a breach of the respondent's repairing obligations under the Lease, this is a minor issue. Although the fire alarm displayed a sign indicating that the battery was low there was no evidence that the system was non-operational. Even if these issues amounted to breaches of the respondent's covenants under the Lease they are not breaches that we consider make it just and convenient to make a management order.

34. We do not consider the applicants have established that unreasonable service charges have been incurred. Ms Peach asserts in her witness statement that she has had to pay for two sets of major works to the Property which were ineffective. We have not been provided with a breakdown of the costs and there is no analysis by the applicants as to which of the costs incurred during those sets of works were unreasonably incurred and why this is considered to be the case. We note from the specification of the March 2011 major works **[258]** that the planned works included both external and internal redecoration and repair. The applicants do not assert that the costs incurred by the respondent for these works were unreasonable in amount and Ms Peach's position

appears to be that because roof works carried out in 2011 and 2014 failed to remedy the water penetration problem from the roof that it follows that service charges demanded towards the costs of those works had been unreasonably demanded. We do not consider there is sufficient evidence before us to conclude that the works carried out were of an insufficient standard. This is for two reasons. Firstly, although we have a copy of the 2011 specification of works we have not been told exactly what works were carried out in 2011 and 2014. Secondly, the applicant has not identified what works she considers were carried out inappropriately or to a poor standard and why. As we cannot identify what works it is said were poorly carried and we do not have a breakdown of the relevant costs we cannot conclude that costs were unreasonably demanded through the service charge.

35. Nor are we satisfied that the applicants have established that there has been a failure by the respondent or his managing agents to comply with the RICS Code. The applicants did not specify what breaches of the Code they believed had occurred in either their section 22 Notice or in Ms Peach's witness evidence. All the section 22 Notice says is that the respondent is in breach "in ways too numerous to particularise" and that every "breach set out in this Notice amounts to a breach of the relevant code". The first time specific breaches of the Code were particularised was in Mr Walsh's skeleton argument, handed up on the morning of the hearing. This, we consider, was unfair on the respondent, who is entitled to know in advance of the hearing what case he must answer so that he can respond to it. It is unsatisfactory to raise these for the first time in cross-examination of the respondent's witnesses.

36. In his skeleton argument, Mr Walsh asserts that:

a. the respondent has failed to keep the Property watertight and in good repair in breach of paragraph 9.2 of the Code;

b. the fact that the fire alarm has displayed a fault warning since 2011 is a breach of paragraph 8.4 of the Code.

c. the respondent has not maintained an insurance policy that provides for the cost of rebuilding the Property in breach of Part 12.2 of the Code;

d. there have been periods when there has been no management at all in breach of paragraph 4.5 of the code;

e. the respondent pays a disproportionately low percentage of the service charge (only 10%) in breach of paragraph 7.3 of the Code

37. In our view the first of those two alleged breaches are not supported by the evidence before us. In summary, paragraph 9.2 of the Code sets out that procedures and systems should be in place for the reporting and carrying out of repairs. However, the applicants have not at any point set out how, with reference to the specific terms of the Code, these requirements have been breached.

38. Similarly, there is no explanation as to the period for which it is said that the landlord has failed to properly insure the Property or how Part 12.2 of the Code is said to have been breached. We conclude that the evidence does not establish that the respondent failed to insure the Property.

39. It was accepted by both parties that there was a period between 2004 and 2008 when no management was carried out by Bude Storz but paragraph 4.5 of the code refers to a withdrawal or withholding of services. There is no evidence that there was a deliberate withdrawal or withholding of services as opposed to a failure Bude Storz to provide a proper management service at all. In any event, if this was a breach of the Code, it is a historic one that took place over nine years ago and we do not consider it relevant to the question of whether it is appropriate, in the current circumstances, to make a management order.

40. We do not see the relevance of the argument that the respondent pays a disproportionately low percentage of the service charge when these apportionments are determined by the provisions of the lessees' leases.

41. We do not, therefore, consider that the requirements to make a management order in section 2(4)(a) of the Act have been met. We have given considerable thought as to whether it appropriate to make an order under section 2(4)(b) namely that other circumstances exist which make it just and convenient for the order to be made.

42. This was not a point addressed by Mr Walsh in his skeleton argument. However, we have considered whether, considering the evidence provided by Mr Frankel at the hearing, it can be concluded that there is a lack of understanding on the part of Wellcroft of its responsibilities and obligations as managing agents of the Property, including the requirements of the RICS Code, which casts doubts on its ability to manage this Building to a satisfactory standard.

43. Mr Frankel's evidence in cross-examination, whilst frank and credible, was somewhat unconvincing on these points. He could not, for example, provide details of the management agreement between Wellcroft and the respondent. Nor was a copy of the management agreement in the hearing bundle. He could not provide details of the professional indemnity arrangements in place nor explain how service

charges were collected and if they were demanded as per the terms of the Lease. He believed there was a risk assessment in place but did not know when it was carried out. He could not explain what provisions were in place to deal with inspections of the Property and nor did he demonstrate any significant awareness of the provisions of the RICS code in respect of these matters.

44. We were not impressed by Mr Frankel's lack of knowledge both as to the contents of the RICS code and what management steps had been taken by Wellcroft since they were appointed as managing agents for the Building. However, all of the points in the preceding paragraph, were made for the first time in Mr Frankel's cross-examination. They do not appear in the section 22 Notice, nor the application notice, or in Ms Peach's witness evidence. They do not even appear in Mr Walsh's skeleton argument. Whilst it would have been evident to the respondent that the applicants were alleging poor management and non-compliance with the RICS code he was not on notice that these specific points formed part of the applicants' case. If notice had been provided, then the respondent may well have adduced witness evidence from a different witness within Wellcroft who was competent to address these issues. Mr Frankel acknowledged, at the end of his evidence, that he was the wrong witness to be giving evidence on the points raised during cross-examination. He explained that his role was overseeing major works and that others in Wellcroft dealt with the matters referred to in the previous paragraph.

45. We do not consider it can be said that Wellcroft are unsuitable to remain as managing agents because Mr Frankel was unable to answer questions raised for the first time in cross-examination and we do not consider other circumstances exist which make it just and convenient to make an order under section 2(4)(b).

46. We accept that there have been considerable failings on the part of the respondent to ensure proper management of the Property in the past and both parties accepted there had been historic problems. We also consider that there have been failings by Wellcroft since they were appointed managing agents. They were appointed, it seems, in November 2015 but did not notify the applicants of their appointment until January 2016. The delay appears unreasonable. In addition, Mr Frankel and Mr Bude confirmed that they had inspected the Building prior to Wellcroft's appointment and Mr Frankel confirmed that he saw evidence of water penetration in the common parts on that visit. We consider it unsatisfactory for there have been a delay of about a year before substantive action seems to have taken to remedy these water penetration problems.

47. However, as was apparent from our inspection there is currently no significant disrepair affecting the common parts of the Property. No

enforcement action was taken by the local authority following the 2010 enforcement notice. The water penetration problem has, eventually, been rectified. It was accepted by Mr Walsh at the hearing that buildings insurance for the Property was in place. Service charges have been demanded and the nuisance tenant has moved out. We accept Mr Frankel's evidence that steps have been taken to address the error message on the alarm system, but clearly further action is needed. In our view Wellcroft have taken appropriate action to remedy long standing problems since being appointed as managing agents for the Property and whilst criticism as to the speed with which they have done so may well be justified we do not, on balance, consider that the requirements for the making of a management order have been established.

48. As to the suitability of Mr ~~Knightley~~ Kingsley to be appointed as a manager we questioned him in some detail about his qualifications and experience in property management. He inspected the Property in November 2016 and has drawn up a management plan **[320]** which we consider appropriate. His fees at £750 per flat are reasonable and if we were making a management order we are satisfied that he would be an appropriate person to be appointed as manager.

Amran Vance

Dated: **22 February 2017**

APPENDIX 1 - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.

<u>**APPENDIX 2**</u>

Landlord and Tenant Act 1987

Section 24 Appointment of manager by [a . . . tribunal]

(1) The appropriate tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies—

(a) such functions in connection with the management of the premises, or

(b) such functions of a receiver,

or both, as the tribunal thinks fit.

(2) The appropriate tribunal may only make an order under this section in the following circumstances, namely—

(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) where the tribunal is satisfied—

(i) that unreasonable variable administration 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;

(abb) [....]

(ac) [....]

or

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

[....]

(3) The premises in respect of which an order is made under this section may, if the tribunal thinks fit, be either more or less extensive than the premises specified in the application on which the order is made.

(4) An order under this section may make provision with respect to—

(a) such matters relating to the exercise by the manager of his functions under the order, and

(b) such incidental or ancillary matters,

as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters.

(5) Without prejudice to the generality of subsection (4), an order under this section may provide—

(a) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager;

(b) for the manager to be entitled to prosecute claims in respect of causes of action (whether contractual or tortious) accruing before or after the date of his appointment;

(c) for remuneration to be paid to the manager by any relevant person, or by the tenants of the premises in respect of which the order is made or by all or any of those persons;

(d) for the manager's functions to be exercisable by him (subject to subsection (9)) either during a specified period or without limit of time.

(6) Any such order may be granted subject to such conditions as the tribunal thinks fit, and in particular its operation may be suspended on terms fixed by the tribunal.

[7 – 8]

(9) The appropriate tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section; and if the order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 2002, the tribunal may by order direct that the entry shall be cancelled.

(9A) The tribunal shall not vary or discharge an order under subsection (9) on the application of any relevant person unless it is satisfied—

(a) that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and

(b) that it is just and convenient in all the circumstances of the case to vary or discharge the order.