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**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/21UC/LAM/2013/0005

Property : Ashbourne Court, Burlington Place, Eastbourne, East Sussex BN21 4AX

Applicant : Mr Jaffer Manek

Representative : None

Respondents : Ashbourne Court (Eastbourne) Ltd and others

Representative : Mrs Carol Pearce of Stredder Pearce

Type of Application : Appointment of manager under s.24 of the Landlord and Tenant Act 1987

Tribunal Members : Judge A Johns (Chairman)
Mr A O Mackay FRICS (Surveyor Member)
Mr T W Sennett MA MCIEH (Professional member)

Date and venue of Hearing : 20 & 21 August 2013, Best Western York House Hotel, Eastbourne

Date of Decision : 13 September 2013

DECISION

Introduction

1. This is an application by Mr Manek for the appointment of a manager. The application is under s.24 of the Landlord and Tenant Act 1987. Complaint is made by Mr Manek of the management of Ashbourne Court, Burlington Place, Eastbourne BN21 4AX. He is the leaseholder of Flat 1, being one of two ground floor flats, under a lease dated 25 March 2000 ("the Lease").

2. The original respondent was Ashbourne Court (Eastbourne) Ltd as freeholder ("ACE"), a company owned by all the leaseholders. The leaseholders of the other nine flats in Ashbourne Court were later added as respondents. All opposed the application. All expressed themselves to be happy with the management of Ashbourne Court.

Procedure

3. The Tribunal gave directions on 15 April 2013 including for the giving of specified information relating to the person nominated by Mr Manek to be the manager. The person nominated in the application form was Mr Anton Bree of Ross & Co. But he was then substituted for Mr Marcus Staples of Deacon & Co. Mr Staples provided the information by a letter dated 29 May 2013. Both Mr Manek and ACE filed full statements of case. Letters or statements were also filed by the other leaseholders. Further directions were given on 3 and 13 June 2013 for the filing of indexed and page numbered hearing bundles by Mr Manek and the provision of copy hearing bundles to any respondents who requested them.

4. The hearing of the application was listed for the two days 20 & 21 August 2013. By letter of 5 August 2013 ACE asked for Mr Manek's application to be struck out for failure to provide hearing bundles, alternatively as raising matters already decided, or being an abuse of process or having no reasonable prospect of succeeding. A judge of the Tribunal directed on 12 August 2013 that the application to strike out be heard at the start of the hearing on 20 August 2013.

Inspection

5. The Tribunal inspected the property on the first day immediately before the hearing. The inspection was attended by Mr Manek, Mrs Carol Pearce of Stredder Pearce as the current managing agent, and Mr Taylor and Mrs Williams of ACE.

6. The Tribunal inspected the building from the outside at ground level as well as viewing the common parts and the basement. The interiors of the individual flats were not seen.

7. The property comprises a detached purpose built block of ten flats arranged on basement ground and four upper floors with part brick and part concrete elevations under a new pitched and slated roof. To the rear of the property there are ten garages with vehicular access from the adjoining property known as Pearl Court. Ashbourne Court is situated in a town centre location of Eastbourne close to the principal shopping thoroughfares and the seafront.

8. The Tribunal's attention was drawn to the recently completed major works in

re-roofing the property and associated repairs, redecoration and anti-fouling measures, the open strip of ground at the western side of the building and running from front to back, the garage area, the condition of the carpet in the entrance hall, the location of the gas meters in the basement, the positioning of flowerpots outside of Flat 1 and the paving slabs on the western strip of ground.

9. It was plain to the Tribunal that this was a building in good repair. It gave every sign of being well managed.

Statutory provisions

10. The Tribunal's jurisdiction to appoint a manager is given by s.24(1) of the 1987 Act which provides, so far as relevant, as follows:

(1) [A leasehold valuation 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) [A leasehold valuation 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”

Hearing

11. The hearing followed the inspection. Mr Manek attended in support of his application along with Mr Staples. ACE was represented by Mrs Pearce and Mrs Williams. Most of the leaseholders attended. Some gave oral evidence.

Strike out application

12. The Tribunal dealt first with the application to strike out. Mrs Williams and Mrs Pearce made submissions in support of that application. They relied in particular on the failure by Mr Manek to get copies of the hearing bundle to all those respondent leaseholders that had asked for one, and the fact that this application was just the latest in a series of cases brought by Mr Manek against ACE raising, unsuccessfully, many of the same issues.

13. The Tribunal decided that it would not strike out Mr Manek's application and indicated that its reasons would be given in writing.

14. It was accepted by ACE that any strike out would be discretionary, being under rule 9(3) of the Tribunal Procedure (First-tier tribunal) (Property Chamber) Rules 2013 which provides that "The Tribunal *may* strike out the whole or a part of the proceedings...".

15. As to a failure in respect of the provision of copy bundles, it would be unjust in the view of the Tribunal to strike out Mr Manek's application on that ground. First, he had largely complied with the directions as to bundles in that bundles were provided to at least ACE and the Tribunal and they had at least a form of indexing and pagination. Second, the other respondents had copies of at least the documents forming part of Mr Manek's case and, being members of ACE, can be said to have access to the other documents. Third, ACE very fairly attributed Mr Manek's failure to a lack of understanding on his part. In the event, the failure did not hamper the presentation of either side's case or the involvement of any of the respondents in the hearing.

16. As to earlier proceedings, this Tribunal is very concerned at the multiplicity of cases to which the respondents have had to respond raising the same or similar matters. ACE's documents for the hearing included the following previous decisions:

16.1 A decision of 9 July 2010 refusing an application by Mr Manek to vary his lease. That application included the issues of contribution to the costs of the garages, maintenance of the common parts, improvements to security, and the reserve fund.

16.2 A decision of 19 December 2011 determining against Mr Manek, save in one minor respect, an application as to the payability of service charges for the years 2009 and 2010. That application included the issues of contribution to the costs of the garages, drain blockages, the reserve fund, and legal costs.

16.3 A decision of 29 May 2012 determining as a preliminary issue against Mr Manek on a further application as to the payability of service charges that he was precluded from pursuing such application for the years 1999 to 2010. The issues which he had wished to pursue in respect of those years included the issues of contribution to the costs of the garages, drain blockages, the reserve fund, and legal costs.

16.4 A decision of 14 February 2013 determining against Mr Manek an application as to the payability of service charges for the 2011 year. That application included the issues of contribution to the costs of the garages, legal costs, positioning of flower pots, and managing agents fees.

17. But, as ACE accepted, its request that the application be struck out on one or more of the grounds contained in rule 9(3)(c)-(e) involved an examination of the merits of Mr Manek's application. Given that the date for the hearing of that application had arrived and full preparation already been made for it on both sides, the Tribunal exercised any discretion it had to strike out by refusing to do so. Had the application to strike out come before the Tribunal in advance of the full hearing with the opportunity to save the costs and effort of preparation, it may well have taken a different view.

Parties' cases on the appointment of a manager

18. Mr Manek began with some opening remarks. Notwithstanding that one ground of his application was that in s.24(2)(ab) of the 1987 Act, namely that unreasonable service charges had been made, he said in referring to the previous decisions of the Tribunal that the reasonableness of service charges was an issue that was "done and dusted". So that the Tribunal could understand fully his contention that there had been breaches of obligation owed to him as lessee, being the ground in s.24(2)(a) of the 1987 Act, it allowed Mr Manek to take it through each of the 16 matters complained of as set out in schedule 3 to his preliminary notice. Those 16 items and Mr Manek's submissions on them were, in brief, as follows:

18.1 That ACE had failed to upgrade his drains. He said there had been three blockages, one in 2007, one in 2010, and one in 2011. He pointed to the lessor's obligation in his lease to maintain the drains – clause 4(2)(e) of the Lease.

18.2 That ACE had failed to upgrade security. He said there should be a barrier across the strip of land on the western side of the building. He pointed to the right of the lessor under the Lease to make rules for the safety of the occupiers - the Third Schedule, para.4.

18.3 That ACE had failed to remove his redundant gas meter. This had since been removed by Mr Manek's tenant liaising with the gas supplier, but Mr Manek complained that ACE ought to have done that.

18.4 That ACE had been paying VAT on communal electricity at the rate of 17.5% or 20% since October 2007 when it should have sought to pay VAT at the reduced rate of 5%. He accepted, on being shown an invoice for the period including October 2007 that was amongst the documents submitted by ACE, that VAT had in fact been paid at 5% since at least that time.

18.5 That ACE had failed to provide him with a copy of any written report of the CCTV drain survey.

18.6 That ACE/Stredder Pearce did not respond properly or at all to his correspondence.

18.7 That there had been excessive expenditure on legal fees. He pointed to clause 4(9) of the Lease which contained a lessor's obligation to enforce at the written request and at the cost of a tenant the covenants of other tenants.

18.8 That ACE had failed to install a separate electricity meter for the garages. He said the Lease was unjust in not providing for this.

18.9 That there should be recovery from third party garage owners of contributions paid by Mr Manek and other leaseholders to the upkeep of the garages. Again, he said the Lease was unjust in not providing for this.

18.10 Mr Manek complained that a rat got into his flat in 2011. He pointed to the covenant for quiet enjoyment but accepted the point of entry was a mystery that the Tribunal could not resolve.

18.11 Mr Manek complained of the positioning of plant pots at the rear of the building. But he indicated that he was now content, all pots having been removed.

18.12 That ACE had failed to replace the carpet in the entrance hall, such being 15 years old. He relied on a mark caused by wear from the opening of the front door. He pointed to the failure to replace the carpet as an example of acts of malice by ACE against him.

18.13 That ACE had failed to relay uneven paving slabs in the strip of land on the western side of the building. He relied on this as a further act of malice.

18.14 That ACE had replaced the roof without first obtaining a structural engineer's report.

18.15 Mr Manek complained of fouling by pigeons but indicated that the roof works had now addressed his concerns.

18.16 That ACE had failed to produce a copy of a contract for the emergency phone service provided by the managing agents. He pointed to clause 3(9) of the Lease which provided that the tenant is entitled on reasonable notice to inspect at the offices of the managing agent vouchers and receipts for items in the annual maintenance account.

19. As part of Mr Manek's case, the Tribunal heard from Mr Staples as the prospective manager. Mr Staples was questioned by the Tribunal concerning his relevant experience, qualifications, professional indemnity insurance and was asked how he would manage the building if appointed. Mr Staples said the building was not run down. He thought the case was one of a breakdown of goodwill rather than any mismanagement. He expressed concern as to whether he could improve the situation. He wished to hear the rest of the evidence and submissions before expressing a firmer view. He said his would be likely to be a difficult job given that nine of the ten leaseholders were opposed to his appointment.

20. The case for the respondents was that there were no shortcomings in the management of the property. In any event, there were neither unreasonable service charges nor any breach of obligation owed to Mr Manek. Many of the complaints made by Mr Manek had already been decided against him in previous cases before the Tribunal. None of them amounted to a breach of covenant in any event. Mrs Pearce addressed each of the 16 items in support of that submission.

21. At the conclusion of evidence and submissions, the Tribunal returned to Mr Staples. Having sat through the two day hearing, he said he couldn't see anything that Stredder Pearce were doing wrong and made clear that he made no criticism of them. Whilst still being willing to accept an appointment he said that it would not work if he didn't have the support of the leaseholders.

Discussion

22. Having inspected the building and heard two days of evidence and submissions, the Tribunal reached the firm view that Ashbourne Court is a well managed property.

23. The Tribunal took the opportunity to question Mrs Pearce and heard from her on each of the 16 complaints made by Mr Manek. She showed herself to be an impressive managing agent. The Tribunal is not surprised that all leaseholders, with the exception of Mr Manek, are pleased with the way Ashbourne Court is run.

24. Addressing the grounds in s.24 of the 1987 Act, the Tribunal would first have to be satisfied that unreasonable service charges had been levied or that ACE was in breach of an obligation owed to Mr Manek. The Tribunal considered carefully each of the 16 specific complaints made by Mr Manek. But it was unable to find any respect in which the service charges were unreasonable or in which ACE was in breach of obligation to Mr Manek.

25. The Tribunal's reasons for so concluding in respect of each of the 16 items are as follows:

25.1 There is no obligation to upgrade the drains in the absence of a relevant obligation in the Lease (the covenant to repair not extending to improvements) and in the absence of any real problem with the drains. There have been just three isolated incidents and none since 2011 despite Mr Manek's flat being let to a family. There was a CCTV survey which was unable to identify any defect.

25.2 Whilst security is a concern, this being a town centre location, there is no obligation to upgrade security in the absence of any relevant obligation in the Lease. In any event, as Mrs Pearce pointed out, works to provide a barrier would be pointless unless a like barrier were provided by the adjoining block, Pearl Court; there being a similar open strip to the side of Pearl Court immediately adjoining the strip forming part of Ashbourne Court.

25.3 There was no obligation to remove the gas meter in the absence of any relevant obligation in the Lease. Indeed, the energy company would not remove it at the instance of anyone other than the customer.

25.4 The complaint as to VAT had no foundation whatsoever. VAT was being paid at the rate of 5%.

25.5 The short answer to the point about the CCTV report is that none exists. A survey was undertaken. As it disclosed no defects, very sensibly ACE did not incur the costs of a written report.

25.6 The Tribunal reviewed the correspondence with Mr Manek. It is simply untrue to say that his correspondence was not responded to. The impression the correspondence gave to the Tribunal was of the leaseholders and Stredder Pearce dealing fairly with Mr Manek's sometimes difficult letters.

25.7 The question of reasonableness of legal fees has already been determined by previous Tribunals. In any event, the covenant pointed to by Mr Manek is not in point, being concerned with the entirely different situation where the lessor acts to enforce a covenant against one tenant at the request and cost of another.

25.8 The question of the apportionment of electricity and other charges in respect of the garages has already been decided by the Tribunal.

25.9 The rat incident is, as already noted, a mystery the Tribunal cannot resolve. The Tribunal had no basis for considering it was the fault of ACE or that further investigation should be carried out. There have been no further incidents.

25.10 The question of the flower pots has already been decided by the Tribunal.

25.11 The carpet in the entrance hall is in fact 10 years old. It does not, in the view of the Tribunal, require replacement.

25.12 Whilst there was some unevenness in the paving slabs, this did not amount to disrepair in the view of the Tribunal and so there is no breach of covenant. Further, the decision of ACE to postpone relaying them until after the siting and removing of the scaffolding in connection with the recent roof works is an obviously reasonable one.

25.13 There was simply no need for a structural engineer's report prior to the recovering of the roof. This complaint by Mr Manek struck the Tribunal as particularly unmeritorious given that Mr Manek had written on 18 September 2009 to the effect that the roof was overdue for renewal.

25.14 Any pigeon problem was dealt with by the roof works as Mr Manek accepted.

25.15 Stredder Pearce provide the emergency phone service as part of their management. ACE therefore has no separate contract of which it can provide a copy. In any event, it became plain Mr Manek had not invoked the clause in the Lease

entitling him to inspect vouchers and receipts at the offices of the managing agent. He described such clause which involved him attending those offices as unjust.

26. Even if this Tribunal is wrong, and there is some respect in which the service charge can be said to be unreasonable or ACE be said to be in breach of obligation, the Tribunal is very clear that it would not be just and convenient, such being the test in s.24 of the 1987 Act, to make an order appointing Mr Staples as manager.

27. The Tribunal reaches that conclusion for the following reasons:

27.1 The matters complained of by Mr Manek fall far short of establishing mismanagement of the building.

27.2 On the contrary, an examination of his complaints revealed examples of particularly good management such as the postponement of any relaying of the paving slabs and not incurring the unnecessary costs of a written report of the CCTV survey.

27.3 Nine of the ten leaseholders are happy with the way Ashbourne Court is run. The Tribunal were satisfied that they had good reason to be satisfied. The building is well maintained, Mr Staples rightly made no criticism of the current management, and in Mrs Pearce the leaseholders have a clearly competent managing agent.

27.4 The Tribunal makes no criticism at all of Mr Staples. But his appointment would not and could not improve the management of the building. It is already well run. And Mr Staples would have the heavy disadvantage of having been appointed against the wishes of nine out of the ten leaseholders.

28. Mr Manek suggested that he was being treated deliberately unfairly by ACE/Stredder Pearce and that this was somehow racially motivated. Those are serious allegations which clearly offended some of the leaseholders. The Tribunal found absolutely no foundation for those allegations. Mr Manek said that the unfairness could be seen in the way the ground floor, where his flat is situated, was neglected in contrast to money being spent on the upper floors. But there is no neglect on the ground floor. Insofar as there is some wear to the entrance hall carpet, that is used by all as their entrance. And the uneven paving slabs are part of a maintenance strip for the whole building, not an area for the use of ground floor flat owners. That there has been no unfair treatment of the ground floor was reflected in the evidence of Mr Derham. As the leaseholder of Flat 2, the other ground floor flat, he told the Tribunal that having lived there for two years he is very happy with the management of the building.

29. It follows from all the above that the Tribunal has no hesitation in dismissing the application for the appointment of a manager.

Costs

30. Mr Manek asked for an order under s.20C of the Landlord and Tenant Act 1985 that the costs of these proceedings are not to be treated as relevant costs for service charge purposes.

31. ACE resisted that and asked for an order for the payment of costs against Mr Manek in the sum of £500 under schedule 12 of the Commonhold and Leasehold Reform Act 2002 on the grounds that Mr Manek's conduct of these proceedings was frivolous, vexatious and unreasonable.

32. This application for the appointment of a manager should never have been brought. Previous decisions of the Tribunal had noted that Ashbourne Court is well maintained and well managed. Indeed, Mr Manek had conceded at a previous hearing that he had no issue with the core functions of management such as insurance, maintenance and cleaning. And many of the complaints relied on by Mr Manek in these proceedings have already been the subject of previous failed applications.

33. Accordingly, the Tribunal refuses to make an order under s.20C and does make an order for the payment of £500 as asked by ACE (as contemplated by para.3(7) of Schedule 3 to The Transfer of Tribunal Functions Order 2013).

Future applications

34. The order for costs made on the exceptional basis in paragraph 33 above is now the fourth such order made by the Tribunal in applications against ACE by Mr Manek concerning Ashbourne Court. There is an obvious risk of ACE being vexed by further unmeritorious applications. Worryingly, as part of Mr Manek's opening remarks he said that if he was unsuccessful in his application he would have to keep trying and that he would forever be asking 'where is the natural justice?'

35. In those circumstances, ACE asked for some order to be made which would avoid them having to incur the costs of responding fully to any further unmeritorious applications to the Tribunal. Mr Manek accepted it would be reasonable for some such order to be made.

36. The new Tribunal Procedure (First-tier tribunal) (Property Chamber) Rules 2013 provide that "The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time" (rule 6(2)) and the overriding objective to which the Tribunal must give effect in interpreting and exercising its powers under that rule is the dealing with cases fairly and justly which expressly includes having regard to the resources of the parties and the Tribunal (rule 3(2)(a)). The issues raised by Mr Manek have now taken up too much of the resources both of the respondent and the Tribunal.

37. The Tribunal therefore directs that on any further application ACE may request in writing that such application be struck out and ACE shall not be required to respond further to the application unless and until that request has been determined.

Summary of decision

38. The Tribunal therefore decides that:

- (1) The application for the appointment of a manager is dismissed
- (2) No order is to be made under s.20C of the Landlord and Tenant Act 1985
- (3) There shall be an award of costs in the sum of £500 against Mr Manek in favour of ACE

(4) On any further application to the Tribunal by Mr Manek, ACE may request in writing that such application be struck out and ACE shall not be required to respond further to the application unless and until that request has been determined.

Appeal

39. 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.

40. 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.

41. 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.

42. 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.

Judge A Johns (Chairman)

Dated 16 September 2013