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MAN/00CY/LAM/2009/0006

LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1987, SECTION 24
LANDLORD AND TENANT ACT 1985, SECTION 20C

RE: Oats Royd Mill, Luddenden, West Yorkshire HX2 6RL

Mr Richard Woodcock, and leaseholders of 23 other flats **APPLICANTS**

And

Lowry Renaissance Ltd **RESPONDENT**

Date of hearing: 21st January 2010

Tribunal: Professor Caroline Hunter
Mr Roy Wormald
Mrs Margaret Oates

Summary Decision

1. The application by the leaseholders for the appointment of a manager under the Landlord and Tenant Act 1987, s.24 is refused.

Introduction

2. The Oats Royd Mill development was described during the course of the hearing before us as a "stunning development". It is unlikely that any of the parties to this application would disagree with this view. The development comprises what will eventually be 50 apartments in a mixture of the original Victorian mill buildings (parts of which are Grade 2 listed), and a new build block. It is set high on the valley side, with stunning views over and easy access to the countryside.

3. The redevelopment of the Mill has taken place over the last seven years or so, with the first leases granted in 2005. The development has proceeded in stages and has inevitably been caught up in the problems of the property market which have emerged in the last two years. This has meant that the final stage of the sale of properties in the Acre Shed has proceeded far more slowly that the developers (and indeed residents) would have wished. At present eight flats remain unsold of which seven are being held at "shell". They require further works both internally, and to an extent externally in order for them to be completed. This work will not be carried out until the flats have prospective purchasers.

4. The legal arrangements for the development are in quite a common form for a modern medium scale development such as this. The freeholders of the scheme are Lowry Renaissance Ltd ("the developers"), which is jointly owned by two firms, one of which is Jackson Holdings. Another firm owned by Jackson Holdings, Lowry Homes are the builders engaged to carry out the works. There is clearly a very close connection between the companies and indeed at the hearing the Respondent was represented entirely by directors and members of staff of Lowry Homes.

5. The lease provides for a management company (Oats Royd Management Company Ltd, "ORMC"), which covenants to carry out various management functions (see para. 11, below) set out in the seventh Schedule of the lease. The lessee in return covenants with ORMC to observe reciprocal covenants, including the payment of a service charge. Each lessee has become a shareholder of ORMC. Although the details of the establishment and the articles of association of ORMC were not before the Tribunal, we understand the position to be that at present the leaseholders have no voting rights in ORMC, and the power to appoint directors and make decisions are retained by the developers (presumably Lowry Renaissance). When the final apartment has been sold the intention is that the articles will be changed and control in ORMC will be vested in the leaseholders.

6. Stevens Scanlan were appointed as managing agents for the scheme in 2002 and have taken control of management of the scheme on a phased basis, as each residential area became occupied. They manage the property in relation to the obligations under the lease which apply to ORMC.

7. There have been a number of disputes between the leaseholders and the developers relating to the standard of the build. Some of these are being pursued in other ways, e.g. under NHBC guarantee. However, a number have also spilled into concerns about the management of the scheme. The leaseholders have formed a Residents Association, and on February 26, 2009 the Association, representing the leaseholders of 33 of the flats, served notice on Lowry Renaissance under s. 22 of the Landlord and Tenant Act 1987 ("the 1987 Act"), stating the intention to apply for the appointment of manager under s.24 of the 1987 Act. For some reason that notice was not proceeded upon (perhaps because it was issued in the name of the Residents Association) and a further notice was issued on May 7, 2009, in the individual name of Mr Richard Woodcock, of 12 Oats Royd Mill. Mr Woodcock is secretary of the Residents Association. That notice set out 35 matters on which the leaseholders relied. The notice stated that in order to remedy the matters thought capable

of remedy, Stevens Scanlan should be replaced "with a more professional, proactive service manager and hands-on service manager who actually wants to manage the site."

8. Lowry Renaissance did not take the step required, and the Residents Association issued an application to appoint a manager under s.24. The application is made in the name of Mr Woodcock. A copy of the notice was served on ORMC on July 22, and the lessees of 23 other flats asked to be joined as applicants.

9. The Tribunal inspected the site on the morning of January 21, 2009. The inspection was followed by a hearing.

The statutory provisions and the lease

10. The Tribunal may appoint a manager under s.24 of the 1987 Act only if one of the circumstances set out in s.24(2) are met. Those relevant to this application are where the tribunal are satisfied:

"(a) 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 that it is just and convenient to make the order in all the circumstances of the case; or

(ac) that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice); and that it is just and convenient to make the order in all the circumstances of the case; or

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

11. As can be seen from the wording of section 24 the provisions of the lease will be important in deciding whether the circumstances exist which permit the appointment of a manager. The primary covenants by ORMC are contained in the Seventh Schedule to the lease. These include:
"1. To keep the Reserved Property and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair decoration and condition including the renewal and replacement of all worn or damaged parts and the fitment upgrading replacement and maintenance (at the discretion of the Management Company) of security equipment and other fitment and fittings which the management Company deem appropriate.....

"2. Subject to the payment by the Lessee to the Management Company of the Service Charge:
(a) maintain those parts of the Reserved Property (including the Mill Dam) as are laid out as amenity grounds for the enjoyment of the Lessee in common with others entitled to the like right and to keep the whole of the reserved Property in good order and free from litter in accordance with good standards of management
(b) maintain those parts of the Reserved Property laid out as roads drives footwalks accessways and forecourts in good repair and condition and reasonably lit
(c) maintain the boundary walls and/or fences and/or hedges surrounding the Estate and the electronic entrance gates and other gates giving access to the Estate
(d) keep the halls stairs landings and passages within the buildings included in the Reserved Property properly cleaned and lit"

12. The lease also includes a provision requiring the painting of the outside wood and iron work of the apartments, and of buildings in the Reserved Property in every fifth year, and also to repaper or paint the internal common parts.

The Inspection

13. The inspection of the scheme revealed a site that was generally tidy and well-maintained, both externally and in the internal common parts which we viewed. One of the complaints of the leaseholders relates to the provisions of temporary fencing and a lack of landscaping and maintenance to the external sides of the Acre Shed. The Tribunal was able to view these areas and the temporary fencing, which is clearly unsightly and not in keeping with the remainder of the development. The leaseholders have also complained about leaking guttering. As the morning of the inspection was dry there was no way of observing this, although the Tribunal noted that there was no discolouring on the walls of the various buildings which would indicate a serious and long-term problem.

The issues

14. At the hearing Mr Woodcock and Mr Nash (the leaseholder of Number 32) led on behalf of the applicants in relation to the issues which had first been raised by the leaseholders in their initial notice. Nine other leaseholders also attended and at times made contributions. Five representatives attended on behalf of the respondent, all of whom, as noted above, were in fact directors or employees of Lowry Homes (the builders). Mr Booth a technical director led primarily although others also were able to give further explanations of the situation. Mr Tomlin and Mr Wallace attended from RSM North, the proposed new managing agents. Mr Margennis and Ms Howarth attended from Stevens Scanlan.

15. We will consider the issues raised in the documents and at the hearing under two headings:
    - Failure to maintain and repair the common parts
    - The work of Stevens Scanlan

Failure to maintain and repair the common parts

16. In the end, despite a mountain of evidence there was not a great deal of factual dispute between the parties, and we do not intend to go through it in fine detail. Nonetheless, a number of issues relating to the common parts were still proving problematic to the applicants. First there had been on-going problems with the intercom system from the main gate. When raised the evidence shows that Stevens Scanlan have responded by employing reputable contractors to try and resolve the issues. Unfortunately these have not been entirely successful, and a number remain in non-working order.

17. Complaints are also made as to the external lighting. In this case it is not that it does not work at all, rather that the sensor/timing systems do not work to turn it off appropriately. This clearly impacts on the charges that the leaseholders will have to pay for electricity and also replacement bulbs. Again the evidence indicates that Stevens Scanlan have sought to rectify the issues, albeit unsuccessfully. It is not at all clear whether this problem is due to a subsequent breakdown in the operation of the lights, or is a matter of an installation that was never effective. In either event it seems to us that it is a breach of the lease.

18. Another issue which it appears has been finally resolved is the operation of the main gate. This was broken for 133 days before an effective repair was carried out. Again the evidence is that Stevens Scanlan sought to get this work carried out. At the hearing the representatives of Lowry Homes explained there was a significant issue about the road levels and drainage which had to be resolved (as we understand it water seepage was causing problems with the electronics in the gates). The matter was accordingly put in the hands of Lowry Homes for rectification, which they (eventually) completed.

19. As noted above in relation to the inspection, there have also been on-going concerns about leaking gutters. Again the evidence shows that Stevens Scanlan have taken steps to deal with this. It is suggested by the leaseholders that the problem is not one of maintenance but faulty installation (no expansion joints having been fitted between lengths of guttering). We are not in a position to resolve this, but in so far as the gutters are not in repair again there would seem to be a breach of the lease.

20. There were in addition, a number of other matters which were raised by the leaseholders, e.g. the fact that some of the meters for individual supply to the flats had been wrongly connected, the size of the car parking spaces. In our view none of these could be said to be matters relating to the on-going management of the premises, but rather relate to the original works and contracts between leaseholders and the developer.

21. A further issue is as to the safety of the wooden decking and of the walkway giving access to the flats in the new build block, Weavers Walk. When wet the walkway becomes slippery, and is even more dangerous when, as recently, the weather is freezing. Again a number of steps have been taken to try and deal with this issue, including a new coating on the walkway. Further measures we understand are planned.

22. As noted above, a major grievance of the leaseholders relates to the temporary fencing and failure to finish the landscaping in the area around Acre Shed. This issue has been clouded by an apparent on-going dispute with the neighbouring farmer about the boundary line. At the hearing it emerged that in fact the boundary dispute had nothing to do with the decision by the developers not to complete the boundary works – although it will need final resolution at some point. They were clear that this work could not be completed until the final units are built out as access will be needed which would be prevented by erection of permanent fencing. This is not in any event a matter of repair or maintenance, but one of completing the development.

The work of Stevens Scanlan

23. Although at times the leaseholders seem to have been happy with the service they are receiving from Stevens Scanlan (see e.g. the e-mail from Terry Nash to Nicola Howarth of March 19, 2009), one concern is the infrequency of site visits. Ms Howarth, who has principle responsibility for the day-to-day management on behalf of Stevens Scanlan, stated that she had only visited once during 2009 and the same in 2008. The RICS Code of practice (approved under s.87 of the 1993 Act), para. 3.15 states that the manager: "Should have procedures in place to visit the building at regular intervals having regard to the type and nature of the occupation and the complexity of the facilities provided." Indeed the contract which Stevens Scanlan has to manage the site refers to monthly visits. In our view visiting once a year (albeit that visits may be made by other staff, e.g. for the fire safety inspection) is not compliance with the Code. Regular visits would give a better understanding of the problems which the residents raised and whether the contractors being employed had effectively remedied them.

24. Complaints were also made about the failure to produce a fire safety plan until very recently. It would undoubtedly have been beneficial for residents' peace of mind had the plan and work necessitated by it (e.g. signage) been carried out sooner, but there was nothing to suggest it was not being done competently. To an extent the failure to do this sooner must be laid at the door of ORMC and the developers for not issuing instructions to undertake the work. The same could be said of the failure to produce a maintenance plan. The lease does not require production of such a plan, but it is clearly a sensible way forward given the five-yearly requirement to paint. In fact, it emerged at the hearing that a planned maintenance survey had been commissioned and carried out and provided to Stevens Scanlan on December 21st. This was now in the hands of the developers. This was the first time that the residents had been made aware of this, and was symptomatic of the poor communication with them.

25. The papers prepared for the hearing were also the first time that the leaseholders had had access to the detailed paperwork behind the summary accounts. There was, however, no basis for saying that there had not been compliance with the requirements of the Landlord and Tenant Act 1985. Although the leaseholders had requested copies of invoices and other documents, there is no requirement to do more than make them available for viewing, which Stevens Scanlan did. We are sympathetic to Stevens Scanlan's view that it would be an unrealistic burden (the cost of which would ultimately have to be passed on to

leaseholders) for them to respond to requests to copy all documents and provide them, and indeed this is why the 1985 Act does not make this a requirement.

26. There was nothing before the Tribunal to indicate that Stevens Scanlan were not experienced and generally competent managing agents. Mr Margennis, a partner in the firm, gave evidence that they had worked on many schemes with the developers over the past 12 years. In only two had they not been retained by the residents when management was handed over to them on completion of the development.

Conclusions

27. The position of the developers was that many of the disputes were developer/builder issues rather than disputes over the competence of the managing agents. Indeed as Mr Nash stated to the Tribunal the grievances of the leaseholders were not with Stevens Scanlan, although they were concerned about the independence of Stevens Scanlan from the developers. Although the Tribunal have found that there are a number of matters which meet the circumstances set out in s.24 of the 1987 Act – breaches of the leasehold covenants and failures to meet the RICS Code of Practice, none of these are of such seriousness that they, in our view, merit the appointment of a manager. Further it did not seem to the Tribunal that the appointment of a new manager would resolve many, if any, of the issues raised by the leaseholders. In these circumstances the Tribunal was of the view that it would not be just and convenient to make an appointment of a new manager.

28. Many of the issues in this case arise from a lack of communication by the developers who have failed to understand that they must make ORMC a much more active company in taking on the management of the scheme and communicating with residents. Those representing the developer were unable to shed much light on the way that ORMC is currently operated. It appears at one time to have been run from the Isle of Man, although it was now suggested that it would be run from the Manchester Office by John Kilburn, one of the directors of Jackson Holdings. At the end of the hearing Mr Booth, for the developers made a proposal to improve communications. He suggested bi-monthly meetings between a representative of ORMC, the managing agents and the residents' association chair. These would be used to identify and clarify the distinct problems which have arisen and place the responsibilities for dealing with them where they lie. The meetings would be minuted. This would, we hope, make progress in rectifying the frustrations which the residents now feel. The work of the Residents Association and the general willingness of the residents to take part in clean-ups and communal events, shows the enormous goodwill which exists on this scheme. The developers would do well not to dissipate this through an unwillingness to recognise that where they cannot complete a development (for understandable reasons) they must take a much more active and communicative role in its on-going management.

Section 20C application

29. The leaseholders made an application under s.20C of the Landlord and Tenant Act 1985 that the costs incurred by the landlord in the application should not be regarded as costs which could be charged to the leaseholders under their service charges. After taking instructions those representing the developer undertook that they would not in any event seek to recharge those costs. It was accordingly not necessary for us to decide this issue. We feel it appropriate to indicate, however, that in the absence of such an undertaking we would have made the order sought by the leaseholders. Although we have not felt it appropriate to make the appointment of a manager, it has only been by bringing these proceedings that they have been able to get information and indeed it would seem prompt some works to be carried out and plans to be drawn up. The response of the developers prior to this could be characterised as laissez-faire. They have not involved themselves, either through ORMC or any other of the other firms involved in the development in the concerns of the leaseholders. It has taken the proceedings to make them realise that they must be more pro-active.

Caroline Hunter
February 11, 2010