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**HM Courts
& Tribunals
Service**

**LEASEHOLD VALUATION TRIBUNAL
Case no. CAM/00MC/LAM/2011/0007**

Property: Aveley House, Iliffe Close, Reading, RG1 2QF

Applicants:	<u>Name</u>	<u>Flat No.</u>
	Sarah Wall	64
	Also representing –	
	Laura White	9
	Ben Colbeck	16
	Mr and Mrs V Mehta	17
	James Warren	18
	Ross Wilkinson	23
	Charlotte Frost	25
	Christopher Coull	26
	Ginny Lau	33
	Abhay Mehta	35
	Mr R and Mrs J Mehta	36
	D A Green	39
	A M and H B Haycox	41
	Libby Schweber	43
	Alister Napier	44
	Susana Puente	51
	Paul Hradek	54
	Anthony Froud	56
	Andrew Stokes	59
	Steven Hagen	69
	K Robinson	70
	David Lawton	71

Respondent: Crest Nicholson (Eastern) Limited

Type of

Application: For appointment of a Manager – section 24 of the Landlord
And Tenant Act 1987

Hearing Date: 24th April 2012

Tribunal: David S Brown FRICS MCI Arb (Chair)
Joanne Oxlade
Adarsh Kapur

2. We require that where service charges are found to have been over-charged, that the overpayments are either held in credit on each lessee's account, in accordance with clause 6.2. of the Seventh Schedule of the lease, or held as a reserve in a separate trust fund, in accordance with clause 3 of the Tenth Schedule of the lease and section 42 of the Landlord and Tenant Act 1987.
3. We require that an annual maintenance programme should be planned specifically for the garage door and that it be repaired.
4. We require the Landlord to draw up and publish a long-term planned maintenance programme for The Property.

The Notice required these matters to be remedied within 21 days.

5. In an undated letter, Shelly Heaney of Labyrinth Properties replied as agents for the Landlord. She enclosed accounts for the years 2006-2010 which she said were certified and that there is no requirement for them to be audited under the terms of the lease. She accepted that there has been a delay in supplying the August 2010 accounts, which was due to a delay in processing the financial information at the year end by Countrywide's internal accounting department. The 2010 accounts were sent to all Lessees on 9th August 2011.
6. Ms Heaney stated that any surpluses or deficits on accounts have been transferred to the reserve fund and gave an example of the year ended August 2008.
7. She acknowledged that there have been many issues with the garage door and that this is due to a number of reasons. She said the current and previous property managers have taken steps to try to rectify this issue. The current property manager became involved in December 2010 and a final condition report was sent to lessees on 9th February 2011. Following receipt of responses from them it was confirmed to them on 2nd April 2011 that a professional survey of the gate would be undertaken. This has been instructed and it is anticipated that a report will be received by the end of August. A ten year Planned Maintenance Programme has already been commenced and will be completed once the report has been received, anticipated to be by 26th August.
8. She disputed that there was any unwillingness to involve lessees in resolving these issues and expressed a desire to discuss them further with Ms Wall.
9. Ms Wall made an application to the tribunal on 31st January 2012. It was later established that she was appointed by the other Applicants to represent them.

The Lease

10. The Lease for Plot 63 was attached to the application and has been treated by all parties as an example of the essential terms relating to all leases in the building. It is dated 26th May 2005. The relevant provisions are:-
11. The Sixth Schedule is headed "Maintenance Expenses". Paragraph 4 refers to an account of the Maintenance Expenses for each year end 31st August to be prepared "as soon as is practicable" and if so requested by the Transferee to serve a copy of the account "and of the accountants certificate" on the Transferee. This is defective drafting because

The Applicants' Case

19. We initially heard evidence from Ms Wall about the Schedule 4 matters, to establish whether or not they had been remedied by the date specified in the Notice. Dealing with each in turn:-
20. Ms Wall asserted that the Respondent had only partly complied with item 1 because the accounts which had been provided were not certified or audited. She referred to Part C of the Sixth Schedule of the lease, paragraphs 7.4 and 9, which include in the "costs applicable to any or all of the previous parts of this Schedule" the preparation for audit of the accounts in respect of service charge and the employment of a qualified accountant for the purpose of auditing and certifying the accounts. She also referred to section 21 of the Landlord and Tenant Act 1985 ("the 1985 Act") and to the Code of Practice, paragraphs 10.4 (Landlords should arrange for service charge accounts to be audited annually) and 10.20 (which refers to section 21 requests).
21. Mr Wooding responded that there is no requirement in the lease for the accounts to be audited. He handed in copies of the accounts for 2006-2010, which have been certified by an accountant. He referred to the Sixth Schedule of the lease, which sets out "The Maintenance Expenses" and provides at paragraph 4, "An account of the Maintenance Expenses.....shall be prepared as soon as is practicable and the Manager shall if it so decides or if requested in writing by the Transferee to do so serve a copy of such account and of the accountant's certificate on the Transferee". He asserted that Part C did not create any obligation to audit but merely sets out costs that may be applicable under the definition of Maintenance Expenses; it provides an ability to charge for auditing if it is undertaken. He referred to the Tenth Schedule, headed "Covenants on the part of the Manager", which contains no requirement for audit. Also, paragraphs 2 and 5 the Seventh Schedule, "The Lessee's Proportion of Maintenance Expenses", refers to certification, not audit.
22. With regard to the Code of Practice, the references to auditing in Parts 10 and 11 state "should" not "must" and so do not impose an obligation to audit.
23. Ms Wall pointed out that the Draft Budget Forecast attached to the October 2004 Transfer by Crest Nicholson (Eastern) Limited to Cornish Residential Property Investments Limited provides for audit fees and the covenants on behalf of the manager contained in the Seventh Schedule of the operative clauses includes employment of a qualified accountant to audit the service charge account. Mr Wooding submitted that the Transfer is not relevant; it relates to a different title. Asked if it should be taken into account when construing the lease he considered that it should not because the leaseholders are not party to it.
24. In respect of item 2, Ms Wall referred to section 42 of the 1987 Act, which requires service charge funds to be held in a separate account or accounts on trust to defray service charge costs. Mr Wooding submitted that this requirement was being complied with.
25. With regard to alleged overpayments, Ms Wall referred to the 2008 accounts, and the balance of £14,527 which, she said, resulted from an overcharge on repairs and maintenance, gutter cleaning and drainage and ventilation. She was not able to produce any evidence that these items were overcharged and

acknowledged that there were some ongoing problems but these were being dealt with by the current property manager. Steps have been taken to rectify the damage to the leaking roof and the NHBC had been consulted. A professional survey of the garage door would be undertaken. Any breach is minimal and so it would not be just to appoint an alternative manager.

32. Ms Aven then submitted a witness statement dated 28th March 2012. She is employed as a property manager at the Swindon office of CEM, who have managed the property known as Crown Point - (which includes Aveley House) – since the property was built in 2004, being dealt with by various offices of Countrywide. She has been responsible for the day to day management since July 2010.
33. Ms Aven referred to the relevant provisions of the Act and the lease and set out the background to development. She specifically referred to the fact that Rimaud House has no leasehold titles and under the terms of the Transfer this block is due to pay 6.2% of the management costs of the Development. This is a point that was raised by Ms Wall in August 2011 and Ms Aven has since been looking into this. The apportionment is unfair and she believes one of her predecessors must have altered the budgets so that the charges are split across the 70 units. The definition of Development would appear to include Aveley House and so they believe that this block should have been charged all historic costs. They have approached two accountants and are seeking legal opinion on all of the title documentation to consider chargeability. She considers that if sums should have been charged to Rimaud House they will have to serve notice under clause 7.11 of the lease which she considers can be done retrospectively.
34. She set out the chronology of events relating to the roof leak. As these are part of the bundle and have not been disputed, we do not consider it necessary to set them out in full here. Suffice to say that on July 2011 Daniels Harrison, Chartered Surveyors, attended the site and inspected flats 41 and 56 plus the communal areas and in August of that year the roof exterior was inspected. Following discussion with the NHBC, further inspections were made in December 2011 to produce a specification for tender, which was tendered in January 2012. A further tender was sought in February and an approach made to the NHBC to reconsider their position on 7th March. A reply was received on 19th March continuing to refuse the claim.
35. The issues with the garage door have been going on for a number of years, she stated. She has obtained initial reports and endeavoured to consult leaseholders to find a suitable solution. Daniels Harrison completed a survey and reported in 2011. In the bundle is a copy letter from Ms Heaney to leaseholders dated 9th February 2011, enclosing a report by Lollypop Maintenance which concluded that the door was functional and all that was needed was to change the radio receiver and transmitters. The letter asked for leaseholders comments and suggested an alternative course of instructing a professional survey of the door which could be incorporated into the ten year maintenance plan currently being produced if leaseholders so wished. She subsequently wrote to say that she had received three responses to proceed with the Lollypop recommendation but also questions from other leaseholders and that she believed it best to commission another survey. Daniels Harrison received the second report in August 2011, which recommended complete replacement of the door. Ms Aven stated that major works to the door have been suspended due to the fact that the roof is of a

44. At the hearing, he expanded upon his proposals for management of the Property. In answer to questions from Mr Wooding, he said that his fee would be lower than quoted because he had included the five units at Rimaud House, his quotation included all of the management. He said that he would have applied to the NHBC about the roof repairs and appealed their initial rejection but he would have done it years ago. He would not provide audited accounts unless the lease required it.

Submissions

45. It was agreed that Mr Wooding would make his final submissions on the question of "just and convenient" first. He said that a certain clarity of focus had developed today, some of the complaints do not withstand scrutiny and some had been answered but there were some significant matters in dispute. He wished to make six points.
46. Firstly, the application was by a minority of residents. Many of the leaseholders had not joined and Ms Aven said that she did not hear complaints from them.
47. Secondly, a large number of the complaints are historic. The outstanding ones are much narrower. The roof and garage door have been the focus of the evidence. The appointment of manager provisions are not intended as punishment for past management. The tone today has been one of greater and better communication, which reflects the hard work done by Ms Aven.
48. Thirdly, the present manager's application and attitude had been shown by her response to the section 22 notice. She sent a detailed letter of reply and dealt with the Schedule 4 issues, bar the garage door repair. Certified accounts were provided. There is a maintenance plan but he acknowledged criticism about when and to whom it was sent.
49. With regard to the roof, Ms Aven had taken steps regarding the NHBC and was now proceeding with section 20 consultation. The leak was notified to her on 23rd June 2011 and she acted immediately. She may now make a section 20ZA application. Mr Mortimer would have taken the same action but sooner.
50. With regard to the garage door, Ms Aven had to marshal thin resources and prioritise. He accepted that there could be criticism of the way some decisions were made but Ms Aven was doing a sound and competent job in managing.
51. Finally, there would not be much difference if an appointment was made. He had no criticism of Mr Mortimer's qualifications and proposals. What he hopes to achieve will depend on the reality of the situation as he finds it. An appointment had to be just and convenient for all the leaseholders. The evidence shows that Countrywide have acted reasonably, fairly and competently and, whilst it is acknowledged that there are disputes on some matters, it would not be just and convenient to make an order.
52. Ms Wall submitted that there has been a fundamental breakdown in trust and that has not changed today. The Applicants do not believe that the Manager has the best interests of the leaseholders at heart. There are areas other than the roof and garage door which have not been attended to. There is fire risk from the lack of exit signage and the smoke vent flashing. When help and support is requested from the manager for items like the roof leak and garage

accepted that it had wrongly demanded payment from leaseholders in respect of the 2008 account shortfall because such demand was not made in accordance with the terms of the lease. The Respondent accepted at the hearing that sums paid would need to be credited back to the individual leaseholders. However, in considering whether this ground had been made out as alleged, we find that a separate reserve fund has been and is being maintained, and so we conclude that there has been no breach of the lease in this respect.

59. An annual maintenance programme was prepared in August 2011 but was apparently not sent to the leaseholders. Ms Wall stated that she received a copy on 3rd April 2012 and Mr Wooding was not able to show that it had been sent any earlier than that or to any other leaseholders. We find that the failure to previously prepare and to publish a maintenance programme is contrary to the Code of Practice.
60. There is no requirement in the lease to prepare a planned maintenance programme for the garage door but there is an obligation to effect repairs in a timely way. The garage door had not been repaired by the due date and is still faulty. No attempt has been made to effect the repair to the door edge as was recommended and on Ms Aven's account, callout charges incurred since then have exceeded the cost of that repair. It is a preliminary option that ought to have been effected, especially as the failure of the door to close properly on occasions permits entry by unauthorised persons, which creates a risk to the safety and security of leaseholders and their vehicles. It is not unreasonable for the Manager to be concerned about incurring the cost of a replacement door in the same year as the roof repairs but the answer on such an important item would be to consult with the leaseholders on that issue. It is nonsensical to not consult with them because the lease makes no formal provision for such consultation. The obligation on the Manager was to repair or replace the door and the failure to do so for such a long period is a breach of the Manager's lease obligations.

On other matters raised in the Notice –

61. The flat roof has been leaking for some considerable time. It has caused damage to the flat beneath and ingress of water which could affect electrical cabling or power points, creating a danger to occupants. We accept that it was first reported in 2008. Ms Aven was made aware of the problem in June 2011 and yet it has still not been repaired. It was correct for the Manager to take the matter up with the NHBC but having received the first refusal from them, it would have been prudent to proceed with section 20 consultation, refer the quotations received under that process to the NHBC, then proceed with the repairs on the basis that any refund from the NHBC would be set off against repairing costs charged to the leaseholders. Alternatively, an application could have been made under section 20ZA for dispensation with the consultation requirements. We find that this disrepair has not been dealt with competently and the Manager is in breach of its obligations on this matter.
62. The Manager has failed to produce service charge accounts as soon as is practicable, as required by The Sixth Schedule, Part A paragraph 4 of the lease. The August 2010 accounts were produced in August 2011. The Respondent's explanation, being that the delay was due to a delay in processing the financial information at the year end within Countrywide's

mistrust clearly remains and it is understandable that, on past performance, the Manager does not have the confidence of the Applicants.

70. There were a number of grounds other than those referred to above cited by Ms Wall in the Notice and referred to in the documents, about which we did not hear evidence at the hearing. We find that the breaches of obligations under the lease referred to above, combined with a lack of evidence as to imminent changes in management practices to deal with the shortcomings, are in themselves sufficiently serious and persistent, for us to conclude that it is just and convenient for a new manager to be appointed.
71. We have taken into account the failure of the manager to comply with provisions in the RICS Service Charge Residential Management Code. Mr Wooding asserted that where the provision is that a landlord or manager "should" do something it is not mandatory and a failure to do it is not a breach of the Code. Section 87(7)(b) of the Leasehold Reform, Housing and Urban Development Act 1993 provides that "*any provision of any such code which appears to the court or tribunal to be relevant to any question arising in proceedings shall be taken into account in determining that question*". In our view, a failure to follow a provision in the Code that a landlord or manager "should" act in a certain way is relevant to the evaluation of the past management of a property in connection with consideration of a section 24 appointment of manager. However, as indicated above, the breaches of the lease obligations alone are sufficient to lead us to our conclusion that an order is appropriate in this case.
72. The Respondent has not challenged the suitability of Mr Mortimer to be appointed. We therefore order that John Mortimer be appointed as manager for the Property in accordance with the attached Schedule. In his management proposals, Mr Mortimer refers to proposed charges for a two year period, which implies that he seeks an appointment of this length. We consider that an initial two year appointment is appropriate in this case.
73. With regard to the application for an Order under section 20C, the first point is that we have found in favour of the Applicants on the section 24 application. Secondly, whilst the Respondent has incurred costs, some of these have been incurred in attempting to put right its past defaults. In the circumstances we consider it just and equitable to make such an Order.

Signed:

Date: 9th May 2012

~~D S Brown FRICS MCI Arb (Chair)~~



Property : Aveley House
Iliffe Close
Reading
Berks
RG1 2QF

Applicants : Sarah Wall
Laura White
Ben Colbeck
Mr. & Mrs. V. Metha
James Warren
Ross Wilkinson
Christopher Coull
Ginny Lau
Abhay Metha
D.A. Green
A.M. & H.B. Haycox
Libby Schweber
Alison Napier
Susana Puente
Paul Hradek
Anthony Froud
Andrew Stokes
Steven Hagen
K. Robinson
David Lawton

Respondents : Crest Nicholson (Eastern) Limited

Date of Application : 31st January 2012

Date of Order : 9th May 2012

Type of Application : Section 24 Landlord and Tenant Act 1987

ORDER

DIRECTIONS

1. The functions and duties of the Manager are to undertake the general management functions as set out in the lease as being the obligations and rights of the Manager. .
2. That from the date of appointment and throughout the appointment the Manager shall ensure that he has appropriate professional indemnity cover in the sum of £2,000,000 and shall provide copies of the current cover note upon request being made by the Tenants, the Landlord or the Tribunal.
3. That the Manager in the performance of his functions and duties, and in the exercise of his powers under this Management Order, shall exercise all the reasonable skill, care and diligence to be expect 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 occasions by any negligent act or omission of himself, his servants, or Agents.
4. That 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 this Management Order 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. That the Landlord shall deliver to the Manager forthwith
 - (i) copies of all specifications, tenders, planning permission 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 this 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. Such documents shall include the correspondence concerning the NHBC claim made in 2008 and in 2011,
 - (ii) any uncommitted service charges accrued by the Landlord

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 or 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 his own name 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 1987 Act.
- 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 This Manager shall have the power to borrow all sums reasonably required by the Manager for the performance of his functions and duties and the exercise of his powers under this Management Order in 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 Respondents and/or Applicant Tenant, or anyone 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 Respondents or Applicant Tenant (such consent not to be unreasonably withheld or delays) or in the default of that consent or those consents, without further order of the Tribunal.

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.

David S Brown FRICS MCI Arb

Chairman

9th May 2012