



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

**Case reference** : **LON/00AA/LAM/2019/0012**

**Property** : **Tapestry Building, 16 New Street,  
London, EC2M 4TR**

**Applicants** : **(1) Michael Kucharski  
(2) Mark Beeston**

**Representative** : **Michael Kucharski, in person on  
behalf of the Applicants**

**Respondents** : **(1) Freehold Properties 23 Limited  
(2) CG Shield House (Jersey)  
Limited & CG Shield House  
(Jersey) 2 Limited**

**Representatives** : **(1) Mr Stevenson, Solicitor of  
Stevensons Solicitors  
(2) Mr Fieldsend of Counsel**

**Type of application** : **Appointment of Manager**

**Tribunal members** : **Tribunal Judge I Mohabir  
Mr J Barlow FRICS  
Mr L Packer**

**Venue** : **10 Alfred Place, London WC1E 7LR**

**Date of decision** : **28 October 2019**

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**DECISION**

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## ***Introduction***

1. The substantive application is made by the Applicants under section 24 of the Landlord and Tenant Act 1987 (as amended) (“the Act”) for an order appointing a manager in respect of Tapestry Building, 16 New Street, London, EC2M 4TR (“the property”).
2. The Applicants also make two further applications. These are:
  - (a) for an order under Schedule 11, paragraph 5A of the Commonhold and Leasehold Reform Act 2002 limiting the amount of litigation costs payable as an administration charge in these proceedings; and
  - (b) for an order under section 20C of the Landlord and Tenant Act 1985 limiting the (same) litigation costs payable as a service charge.
4. At the hearing, Mr Fieldsend on behalf of the Second Respondents stated that they would not be seeking the costs incurred in these proceedings personally against the Applicants. Therefore, the Applicants withdrew the application made under Schedule 11, paragraph 5A above so far as the Second Respondents were concerned. They also withdrew an “informal” application to vary a provision in the lease that provides for payment of an administration charge, as it did not fall within the jurisdiction of this application.
5. The property is a mixed use premises arranged over 7 floors with commercial units on the ground floor and 14 residential flats on the upper floors together with the basement accommodation that services both the commercial and residential parts. The residential flats are all let on long leases.
6. The Second Respondents are the freehold owners of the property. The First Respondent holds a lease of part of the property, which includes the residential flats. The lease is dated 5 April 2011 for a term of 125 years from 20 July 2007 (“the headlease”). Therefore, the Second Respondents are the superior landlord and the First Respondent is the Applicants’ immediate landlord.
7. The First and Second Applicants are the lessees of flats 15 and 8 respectively. As the Tribunal understands it, all of the residential leases are in common form (“the residential leases”).
8. BNP Paribas Real Estate Advisory & Property Management UK Ltd (“BNP”) are the Second Respondents’ property managers. They manage the property together with other premises, which together is referred to as the Devonshire Square Estate.
9. Hurford Salvi Carr Property Management Ltd (“HSC”) is the manager appointed by the First Respondent.

10. The facts that give rise to the application to appoint a manager are largely a matter of common ground.
11. It seems that the property was converted from a former warehouse and was sold as a new build from 8 March 2011 with a Premier Guarantee for New Homes dated 11 March 2011.
12. On 17 September 2015, the lessee of flat 9 reported water ingress from the roof into their premises to HSC. On 26 January 2016, HSC instructed Ashby Building Surveyors to inspect the roof. They found that some of the external roof timber trusses were in substantial decay. Apparently, they were exposed during the works to convert the property. The reason for doing so was to house residential plant. The works were carried out pursuant to agreements made between the First Respondent and Carrot Developments Ltd. It appeared to the Tribunal from photographs submitted in evidence that the decay was not only serious, but longstanding, from well before the conversion in 2011.
13. On 8 June 2016, a structural engineer report was commissioned by Ashby Building Surveyors, which confirmed the initial findings about the extent of the decay to the affected external roof trusses. This was further confirmed by an inspection by a City of London conservation officer on 13 July 2016.
14. Subsequently, on 7 March 2017 HSC began to carry out statutory consultation under section 20 of the Landlord and Tenant Act 1985 (as amended) on behalf of the First Respondent to repair the decayed trusses. The estimated cost of the repairs was £34-46,000.
15. Nothing further was heard from HSC until the First Applicant wrote a letter of complaint on 1 October 2018 about the lack of progress and pointed out that the property was subject to the Premier Guarantee for New Homes. On 3 October 2018, the underwriter of the policy only partially accepted liability for the waterproof membrane on the roof but not the cost of repairing the external roof trusses.
16. Further correspondence then ensued between the First Applicant about various matter including a timescale for the commencement of the repair works. On 26 October 2018, HSC served a further notice under section 20 of the 1985 Act.
17. Eventually, on 1 November 2018, the First Applicant served HSC on behalf of the First Respondent with a preliminary notice under section 22 of the Act. The breaches of the residential leases complained of were:
  - (a) breach of the covenant of quiet enjoyment under clause 4.1 of the lease.
  - (b) a failure to provide “property services” for the common parts of the property in breach of Schedule 3, Part 2 of the lease.

- (c) a failure to properly insure and to diligently proceed with any insurance claim and to make up any shortfall in any such claim in breach of clauses 4.3(a) and (b) of the lease thereby resulting in leaseholders having to potentially face unreasonable service charges.
  - (d) various breaches of the RICS Service Charge Residential Management Code.
  - (e) breach of section 4 of the Defective Premises Act 1972.
18. HSC replied that the Second Respondents did not consider that they were obliged to carry out the roof repairs and that they had been given verbal consent to carry out the proposed repairs on behalf of the First Respondent. HSC indicated that the works were likely to commence in early 2019.
19. In the meantime, HSC was pursuing an appeal against the decision made by the insurers to provide limited cover under the Premier Guarantee for New Homes without success. HSC also sought to blame the Second Respondents for the continuing delay in commencing the proposed repair works.
20. On 26 April 2019, the Applicants made this application to the Tribunal.

### **The Law**

21. Section 24 of the Landlord and Tenant Act 1987 provides:
- "(1) A leasehold valuation tribunal may, on an application for an order under this section, by order 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...*
    - (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)...

(abb)...

(ac) *where the tribunal is satisfied-*

(i) *where 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*

(ii) *that it is just and convenient to make the order in all the circumstances of the case;*

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

### **Hearing**

22. The hearing took place on 15 August 2019. The Applicants were represented by Mr Kucharski in person. The First Respondent was represented by Mr Stevenson of Stevensons, Solicitors. Mr Fieldsend of Counsel appeared on behalf of the Second Respondents.
23. Mr Fieldsend conceded that under clause 5.3 of the headlease, the Second Respondents are obliged to repair the structure of the building, which included the affected roof trusses. Indeed, as at the time of the hearing, he said that repair works had commenced.
24. Mr Fieldsend also conceded that under the terms of the headlease the Second Respondents are obliged to insure the building as a whole.
25. It should be noted that for the application to appoint a manager to succeed, the Applicants must firstly establish that one or more of the breaches complained of in the section 22 notice has been made out thereby satisfying the criteria in sections 24(2)(a), (ab) and (ac) of the Act. Contractually, any findings of breach can only be against the First Respondent, as the Applicants have not privity of contract or estate with the Second Respondents. Further and in the alternative, the Applicants must establish generally that it is just and convenient to make an order appointing a manager.
26. Having done so, the Applicants must secondly satisfy the Tribunal that the proposed manager possesses the relevant knowledge and experience to be appointed.
27. Therefore, the Tribunal firstly considered the allegations of breach as against the First Respondent

## ***Decision***

### ***Breach of Covenant of Quiet Enjoyment***

28. As the Tribunal understands it, the allegation of breach of the covenant of quiet enjoyment by the First Respondent is based on its failure to carry out the necessary roof repairs in a timely manner. However, as stated earlier, contractually it has always been the position that it was the Second Respondents who are obliged to do so. Indeed, clause 4.11 of the headlease expressly prohibits the First Respondent from carrying out any such works.
29. What clause 4.2(b) of the residential leases requires the First Respondent to do is to use its reasonable endeavours to enforce the repairing covenant against the Second Respondents.
30. On balance, the Tribunal was satisfied that the First Respondent, through HSC, did use reasonable endeavours to have the necessary roof repairs carried out. It came under the control of the present shareholders on 12 July 2018. There is clear evidence of attempts being made by HSC to contact BNP in order to have the works carried out. The response from BNP was to seek the Second Respondents' costs of providing a Licence for Alterations.
31. This misconception could only have resulted from a complete failure on the part of HSC and BNP, who hold themselves out to be professional managing agents, to consider the respective repairing obligations under the headlease and the residential leases. This led to the inevitable delay that occurred in commencing the remedial roof works. This was accepted by Mr Daniel Wye in cross-examination, who is a Director of BNP. He could provide no explanation for the delay in progressing the roof repairs since being on notice since 2017. Where HSC can be perhaps fairly criticised is their failure to obtain legal advice to resolve the position. However, the Tribunal considered that this failure in itself was sufficient to make a finding that clause 4.2(b) of the residential leases had been breached.

### ***Failure to Provide Property Services***

32. This allegation of breach is derived out of the same complaint made by the Applicants to effect the necessary roof repairs.
33. Given that contractually the Second Respondents were always obliged to carry out the roof repairs, it therefore cannot be said that the First Respondent was in breach of Schedule 3, Part 2 of the residential leases. It is clear that under Schedule 3, Part 1 of the said leases, the obligation to maintain and repair the common parts of the property excluding the roof falls on the First Respondent.

## ***Insurance***

34. As stated earlier, contractually, it has always been the position that the Second Respondents are obliged to insure the entire building. All the First Respondent has to do under clause 4.3(a) of the residential leases is to insure or procure the insurance of the property under clause 4.4(a).
35. Insurance certificates for the flats and the entire building were eventually provided to the Applicants after the application was issued. These are exhibited to the second witness statement of Daniel Wye made on behalf of BNP. The allegation of failing to procure insurance appears to have been made because the certificates for the flats name a different entity to the Second Respondents as being the insured party. However, the insurers Aviva, have confirmed that the building has been insured since 13 April 2018 when the current owners of the Second Respondents acquired the controlling shareholding.
36. As to the First Respondent's failure to prosecute the claim under the Premier Guarantee for New Homes, it was clear that this was only a guarantee issued when the property was converted. It was not a policy of insurance. Therefore, strictly speaking, the First Respondent could not be said to be in breach of the insuring covenant.
37. It follows that the allegations that the First Respondent had breached clauses 4.3(a) and (b) of the residential leases is not made out.
38. It also follows from the findings above that the allegation that the Applicants will be potentially faced with increased remedial costs for the roof repairs because of historic neglect and/or the failure to prosecute the buildings insurance claim is also not made out. In addition, the Tribunal considered such a claim to be premature because the final cost of the roof repairs is not known. Furthermore, if and when such costs are claimed by the First Respondent through the service charge account, they can always be challenged by the Applicants and/or other leaseholders by making a separate application under section 27A of the 1985 Act.

## ***Breaches of RICS Management Code***

39. In the light of the Tribunal's findings above, the Tribunal also found that the First Respondent had not breached paragraphs 4.2, 4.7 and 8.3 specifically complained of by the Applicants. The issue of delay on the part of HSC in correctly establishing who was responsible for the roof repairs is dealt with below when the issue of costs is considered.

## ***Defective Premises***

40. The Tribunal found that section 4 of the Defective Premises Act 1972 does not apply in this instance because the issue of disrepair relates to non-demised premises and the Act has no application.

### ***Just and Convenient***

41. The Tribunal also heard evidence from Mr Davidoff of Aldermartin Baines & Cuthbert who it was proposed should be appointed as the manager on the basis that it would be just and convenient to do so because of the delay in progressing the roof works.
42. Having done so, it was clear that Mr Davidoff had many years of experience in residential and commercial management. However, in this instance the Tribunal was concerned that he had not familiarised himself with the headlease or commercial leases. In other words, he did not appear to have carried out sufficient diligence on these highly relevant matters such as these. In addition, he said that if appointed he would not be directly managing the property. This would be done by his staff reporting any matters to him. Indeed, he said that he had no direct involvement in day-to-day management of properties for the last 5 years. Given the unfortunate history of this property, the Tribunal was of the view that a more “hands on” approach was required and this would not be provided by Mr Davidoff. Therefore, the Tribunal did not consider that he should be appointed as the manager on this occasion.
43. In conclusion, the Tribunal found that sections 24(2)(a), (ab) and (ac) of the Act had not been satisfied and that it was neither just nor convenient to appoint the proposed manager. Accordingly, the application to appoint a manager is dismissed.

### ***Costs – Schedule 11, paragraph 5A & Section 20C***

44. Both of these applications relate to the landlord’s costs and only concern the First Respondent and can be taken together because the considerations are the same. As stated earlier, the Second Respondents are not seeking any costs from the Applicants directly under Schedule 11.
45. Although the Applicants have not succeeded in having a manager appointed, the Tribunal considered that the application to do so had merit in so far as it had the effect of resolving the issue regarding who is responsible for the roof repairs and in progressing the works. The Tribunal was satisfied that this would not have occurred had the application not been issued. As stated earlier, the Tribunal is also satisfied that the conduct of HSC and BNP resulted in the inordinate and unexplained delay that occurred in having the remedial roof works carried out.
46. That conduct should be reflected in costs. It would neither be just nor equitable for the Applicants to pay the First Applicant’s costs in defending these proceedings. Therefore, the Tribunal makes an order under Schedule 11, paragraph 5A(3) of the Commonhold and Leasehold Reform Act 2002 and under section 20C of the 1985 Act that the First Respondent is not entitled to recover any of the costs of these proceedings against the Applicants either as administration and/or service charges.



**Name:  
Tribunal  
Judge I  
Mohabir**

**Date: 28  
October  
2019**

### **Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).