



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

Case Reference : **MAN/36UG/LAM/2020/0006**

Property : **Kirbys Flats, East Terrace, Whitby, North
Yorkshire YO21 3HB**

Applicants : **Mrs. J McLean – Smith
Mr. A Smith
Ms. B Thomasson**

Respondents : **(1) Kirbys (Whitby) Limited
(2) Various Long Leaseholders**

Type of Application : **1. Application under section 24(9) of
the Landlord and Tenant Act 1987 for
the variation of a management order
so as to extend the current manager’s
appointment**
**2. Application S20C of the Landlord
and Tenant Act 1985**

Tribunal Members : **Regional Surveyor N. Walsh
Judge J. Holbrook**

Hearing Date & Venue : **27 September 2022 – Scarborough Justice
Centre**

Date of Decision : **31 October 2022**

DECISION

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DECISION

The Tribunal considers it just and convenient to extend the appointment of Ms Abel as the Tribunal appointed manager for the period of 3 years from the date of this decision.

The overall terms of Ms Abel's extension remain the same as per the existing Management Order, save for the amendments, dates and fee and insurance updates detailed in this decision.

The Applicants' application under Section 20C of the Landlord and Tenant Act 1985 is refused.

Background

1. The Tribunal received an application dated 11 December 2020 seeking a 3-year extension to the existing 5-year term of the current Tribunal appointed manager, Ms Rosalie Abel, of Kirbys Flats, East Terrace, Whitby, North Yorkshire YO21 3HB (the Property). The application was made by Mrs Jan McLean- Smith and Mr Andrew Smith the long leaseholder owners of Flat 15 at Kirbys Flats. The Applicants named the remaining long leasehold flat owners as the Respondents. Each flat owner being a co-shareholder in Kirbys (Whitby) Ltd, the landlord and freeholder of the Property, which is responsible for managing the Property under the terms of the Leases. One of the participating Respondents, Mr M. Neville, sadly died shortly before the hearing. The Tribunal is grateful to his son, Mr E. Neville, who in his capacity as the executor of his late father's estate attended the inspection and hearing and also acted as a spokesperson for the other participating Respondents.
2. Tribunal Judge Bennett issued directions on the 25 November 2020, 19 March 2021 and 8 December 2021. Following receipt and review of the parties' submissions in compliance with these directions a procedural judge considered that an in person oral hearing, as opposed to a remote video hearing, was appropriate. Further directions were issued to the parties by letter dated 3 May 2022 setting out the requirements for the hearing bundle and directing the Tribunal appointed manager to attend the hearing.
3. The Property comprises 20 residential flats contained within a large rendered fronted terrace situated on an imposing elevated position to the west of Whitby harbour with commanding views of the harbour, the abbey and the church. Kirbys which has had Grade II Listed status since 1965, was originally constructed as separate town houses in about 1855. At a later date the houses were converted into a hotel and then in c.1979 to the residential flats that exist today.

Inspection

4. The Tribunal inspected the Property externally, the internal communal areas and also flats 3 and 15 internally, with the kind permission of Mr E. Neville and Mrs McLean-Smith, on the morning of the hearing. The Tribunal noted from its external inspection that the main roof and mansard elevations were in good condition and appeared to have been recently replaced to a good standard. The windows were a mix of timber sash windows and modern PVC replacements. Existing timber windows appeared to be in poor condition showing extensive signs of rot and decay. The external iron work railings and first floor balcony also appeared to be in poor condition with little evidence of decorative or significant repairs being undertaken for many years. The exterior decorative condition of the building also required attention. Being situated in such an exposed position by the coast has taken its toll on the external fabric of building, particularly given the lack of regular maintenance works over many years.
5. The internal common parts were generally found to be tired and in need of redecoration and upgrading to carpets with the occasional loose and trailing telephone and lighting wires. The exception being the top floor landings which have recently been redecorated and re-carpeted. All communal corridors were clean and clear from any obstructions. When the Tribunal internally inspected Flat 3 there was clear evidence of damp penetration and water ingress above the sash windows on the external facing wall. This appeared to be emanating from the first-floor balcony but it was not possible to determine this without accessing the balcony. In contrast Flat 15 was not found to be suffering from any such issues. The owner, Mrs McLean-Smith, advising that all leaks had ceased when the roof was replaced. The Tribunal was able to more closely examine the roof, the mansard elevations, gutters and flashings from the windows of flat 15. All appeared to be in good condition and to have been recently replaced to a good standard. It was also noted that a number of internal fire doors to some of the flats, which looked a recent addition, were not fitted correctly with excessive gaps apparent. It was not clear who undertook this work and whether these doors were the responsibility of individual leaseholders or the current appointed Tribunal manager.

History

6. In its decision dated 18 November 2015, the Tribunal previously appointed Ms Abel of Abel Property Services as the Tribunal appointed manager for a term of 5 years from 1 December 2015. Judge Bennett subsequently extended Ms Abel's appointment until the determination of the current application, to provide continuity of property management and to avoid Ms Abel's appointment lapsing.
7. The Tribunal's 2015 decision provides a detailed and comprehensive examination of the issues at that time. The decision makes a number of significant findings and we note that many of the parties to those proceedings are the same today. The 2015 decision outlines that it was accepted by the Respondents that Kirbys (Whitby) Limited was "in breach of its obligation to keep the roof and the exterior of Kirbys Flats in repair and the conditions set

out in sections 2(2)(a) of the 1987 Act were met”. The Tribunal found specifically and as set out in paragraph 70 of its decision:

“It was the view of the Tribunal that KWL had failed to discharge its duty to manage the building In particular, it had:

- Failed to repair the roof, parapet and copings.
- Failed to repair the ironwork to the exterior of the building.
- Failed to keep the common parts clean and clear.
- Failed to redecorate the exterior of the building.”

8. At paragraphs 44 and 45 of the Tribunal’s decision, the Tribunal specifically referenced the personality clashes between various parties, which were evident at the hearing, and the “tortuous nature of disputes” between the parties.
9. Matters have progressed since Ms Abel’s appointment and this will be covered later in the decision when commenting on Ms Abel’s report and update to the Tribunal.

The Statutory Framework

8. These applications are made pursuant to s.24(9) of the 1987 Act which provides that:

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

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

- (a) that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and
- (b) that it is just and convenient in all the circumstances of the case to vary or discharge the order.

Manager’s Report and oral update at the hearing.

9. The Tribunal received two written updates from Ms Abel prior to the hearing dated 2 May and 15 September 2022, respectively. Additionally, the Tribunal invited Ms Abel at the start of the hearing to provide an oral report as the current position at the Property in her capacity as the Tribunal appointed manager.
10. Ms Abel was accompanied by Ms Cattermole of Counsel. Ms Catermole clarified for the benefit of the Tribunal that because Ms Abel was not a party in

these proceedings, Ms Cattermole was not anticipating that it would be necessary to represent Ms Abel at the hearing. However, she was present purely to assist Ms Abel in the event that any prejudicial matters arose in the course of the hearing necessitating Ms Abel to seek legal advice or to address the Tribunal on.

12. Ms Abel confirmed that she was only willing to continue as a Tribunal appointed manager, should her appointment be extended, and was not willing to act as the management agent working directly to Kirby (Whitby) Ltd.
13. Ms Abel outlined that her first priority was to complete phase 1 of the required works, which was in the main the replacement of the roof, which was now done. This took longer to complete and was more expensive than initially envisaged because more extensive repairs were required than originally anticipated. Specifically, the replacement of structural roof members and replacing every single joist end at the parapet gutter which were rotten. The extent of this issue only became apparent on stripping away the roof covering. After such a lengthy and costly repair, Ms Abel intended a short pause before commencing the Phase 2 building works, to allow leaseholders to financially prepare for further significant costs. The gap or pause between the Phase 1 and 2 works was however longer than initially planned because of the impact of the Covid-19 pandemic.
14. Phase 2 works include:
 - window and door refurbishment/replacement
 - installation of a secure bin store
 - siting of CCTV cameras and satellite dish and redesign of rear porches
 - refurbishment of ground floor railings, basement access steps and ground/basement, external decoration, balcony repairs and railing refurbishment
 - front and gable render repairs, rear re-pointing and
 - weatherproofing by means of external redecoration.
15. Ms Abel confirmed that all Section 20 Consultation requirements had been fully complied with and that planning permission and listed building consent had also been secured for the Phase 2 works. Ms Abel outlined that she was keen to see the management of the Property return to the leaseholder management company but she considered that the Phase 2 works required professional management by an individual with the experience and capability to deliver such a complex set of works. Ms Abel was keen to progress and deliver the works as quickly as possible and anticipated a 4 to 5-month project of works once a contractor had been appointed through a successful tender exercise.
16. Ms Abel advised that the results from the tender exercise had not generated sufficient tender submissions and that invitations to tender would now be sought from outside the local area.

17. Ms Abel provided a detailed written explanation and response to the criticisms levied at her by some Respondents in connection with her communication style and allegations concerning service charge discrepancies, the level of her fees and additional charges, breaches of GDPR rules, accountancy irregularities, overcharging for works, and generally failing to perform her duties. Ms Abel highlighted that the Respondents are at liberty to make an S27A application to the Tribunal to directly challenge these charges and she is content that she will be able to demonstrate all charges are reasonable and have been reasonably incurred. Ms Abel clarified that the fee increase being sought was a £10 increase from £150 to £160 per flat from the 1 January 2023 and that all other charges are and would comply with the RICS Service Charge Code.

Hearing, submissions and evidence

18. The Tribunal is grateful to the Applicants for their preparation of the Hearing bundle which runs to some 471 pages and the supplementary evidence bundle totaling some 295 pages. The bundle contains detailed written submissions from the Applicants, Mr Mark White, Mr M. Neville, Mrs Sarah Price, Mr and Mrs Carmichael, and a final reply from the Applicants. Most if not all of the submissions contain multiple attachments and enclosures, including reports, service charge accounts, correspondence between the parties, minutes of various meetings, articles of association and such like.
19. Having started the hearing by clarifying the status of Ms Cattermole's position at the hearing, as detailed above, the Tribunal next addressed the S24(1) Application made by the late Mr M. Neville on 27 April 2022, which was only brought to the attention of the panel in the week prior to the hearing. The Tribunal did not consider it appropriate to deal with this application at today's hearing, as requested in the application, as no directions have been issued and the parties did not appear to have had an opportunity to formally engage with this application, despite the considerable overlap with the current proceedings. The Tribunal outlined that from preliminary review of this application the Tribunal could not see a good reason as to why the required preliminary Section 22 had not been served and correspondingly, but purely on the basis of the information contained within the application form, a good reason to grant dispensation. The Tribunal noted that the application also failed to nominate a specific manager and as such should really be viewed as an application to discharge the current manager, without tending a replacement in her stead. The Tribunal outlined that it was of course willing to determine this application through separate independent proceedings and invited Mr E Neville to consider if he wished to continue with this application as the executor of the estate of late Mr M Neville.
20. Ms Cattermole helpfully then explained that the application and fee had in fact been returned by the Tribunal office, so it did not appear to be a live application in any event. While the Tribunal was left confused as to the current status of this application, this did not alter the Tribunal's decision that it was not appropriate to join and determine this S24(1) application within the current proceedings. We hope however our observations are helpful to Mr E

Neville in deciding whether he wishes to pursue this matter or not on behalf of his late father's estate.

21. The Tribunal was struck that despite the volume of documentation submitted and inviting all parties to refer the Tribunal to any relevant documents, extracts or evidence contained within the bundle, none of the parties did. The cases articulated by the various parties can and were in fact stated quite succinctly. Mr E. Neville acted as spokesperson for the Respondents opposing the application but the Tribunal also heard oral submissions from Mr Carmichael and Mrs Price. In support of the application the Tribunal heard oral submissions from the Applicants Ms Thomasson and Mrs McLean-Smith, and also from Ms Middleton.
22. The Applicants case is that the directors and managers of Kirbys (Whitby) Limited lack the collective expertise, capability and cohesion to oversee the planned Phase 2 works. Given the nature and age of the building, and the previous years of neglect, the remaining planned works are challenging and require the input of an experienced and proven professional such as Ms Abel. While the Phase 1 works took longer than expected because the roof was found to be in a worse condition than anticipated and the inevitable disruption caused by Covid-19, however the roof was replaced and works completed to a good standard.
23. The Applicants fear if Ms Abel is discharged that this will lead to a lengthy hiatus and the outstanding works will not be progressed in a timely fashion or undertaken in a professional manner under the direct oversight of the Kirbys (Whitby) Limited. The Applicants do agree that a Tribunal appointed manager cannot stay in place indefinitely and are fully supportive of Kirbys (Whitby) Limited taking back the management of the Property when the major outstanding works have been completed, the building is back in a structurally sound condition and in good general repair, and the leaseholders merely have to focus on normal day to day management matters. The Applicants stressed that 9 of the 20 leaseholders support the application, 4 leaseholders have not participated and 7 leaseholders are opposing this application, 4 of whom are directors of Kirbys (Whitby) Limited.
24. Mr E. Neville expressed his frustration at the lack of speed in tackling maintenance issue and the outstanding works. He outlined that he could readily and quickly fix many issues such as water leaks into flat 3 from water pipes or water ingress emanating from the balcony but has not been allowed to take unilateral action by Ms Abel. He also cited the example of offering to install electric car chargers at his own expense and would only ask fellow leaseholders to contribute towards the costs if they wished to use them.
25. Mr Neville outlined that all the Respondents wished to appoint a professional managing agent and that he had approached a number of potential candidates, but none were willing to engage with him while an existing Tribunal appointed manager was in place. He stated that he "can't comment on the works [done to date], look good to me."

26. Mr Carmichael expressed his frustration that the works stopped in 2018 and despite the cost of Phase 1 roof work being approximately £25,000/£27,000 per flat the works should have continued on at pace. There have been copious amounts of S20 documentation produced but the works have not progressed as quickly as they should have under Ms Abel and should have been completed by now.
27. Mrs Price expressed her concerns about the lack of coherent and robust budgetary plans being produced by Ms Abel to oversee and effectively manage these works, as well as to provide transparency to leaseholders. The documents and spreadsheets she has been referred to are difficult to follow and some cells have “nothing in it”.

Conclusion

28. While all parties conducted themselves in a considerate and respectful fashion throughout the inspection and hearing, it is clearly apparent to the Tribunal that the position between Applicants, those supporting them, and the leaseholder Respondents is very polarised. The situation is not at all conducive to collaboratively overseeing and delivering a major building project, as planned in Phase 2 of the works.
29. It is clear, and completely understandable, that Kirbys (Whitby) Limited and some of its directors want direct control of the management of the Property. It is their contractual right under the leases and the removal of that right is a very draconian action. While we do understand the frustration of not being in complete control and to be able go instruct tradespersons to quickly remedy single points of failure causing damage to a particular flat, such is the nature of leasehold ownership where the elements of the Property not demised to individual leaseholders remain within the control of the freeholder/management company and leaseholders are unable to take unilateral action of their own volition.
30. The key issue appears to be one of control for many of the Respondents because all agree that a professional manager is required and most would agree to Ms Abel continuing if she was directly instructed by Kirbys (Whitby) Limited and Kirbys (Whitby) Limited could set her performance objectives and directly monitor and oversee her work. There also does not appear to be any complaint about the standard of the replacement roof works completed under the Phase 1 works.
31. If Ms Abel were discharged now, she is not prepared to be employed by Kirbys (Whitby) Limited, and so another manager would need to be found and employed. This would inevitably lead to further significant delays and given the extensive history of management problems would almost inevitably lead to disagreements as to how the outstanding programme of works should be managed, prioritised and overseen.

32. There is a general consensus that Kirbys (Whitby) Limited needs to take back the management of the Property when the works have been completed. It would seem eminently sensible to the Tribunal to do this when these significant and outstanding works have been completed. This should remove many of the difficult management issues Kirbys (Whitby) Limited will face in the early days after taking back management responsibility and hopefully enable constructive relationships to be fostered and re-established between all directors and wider leaseholders.
33. For these reasons the Tribunal considers that it is just and convenient to extend Ms Abel's appointment to ensure the delivery of these works. While Ms Abel has advised the Tribunal that the projected timeframe for completing the works is 4 to 5 months from the date the works are started, the Tribunal is concerned that the extension period sought of 3 years to 1/12/2023 does not leave much time to complete these works should any delays be encountered. The Tribunal has particularly noted the difficulty the manager has already encountered in securing tender bids and accordingly proposes that the 3-year period of extension runs from the date of this decision. However, the Tribunal is keen to see the transfer of the management functions back to Kirbys (Whitby) Limited at the earliest opportunity on completion of the Phase 2 works. The Tribunal's expectation would therefore be if the works are completed within this 3-year period that the manager will make an application to be discharged from her Tribunal appointed role and facilitate the return of all management functions to Kirbys (Whitby) Limited at the earliest opportunity.
34. The Applicants have headed some of their correspondence referencing an application under S20C under the Landlord and Tenant Act 1983, which we take to mean the 1985 Act. Section 20C gives the Tribunal power to order that none of the costs incurred by a party in connection with these proceedings are to be taken into account in determining the amount of any service charge payable by the Applicants. Such an order may be made if it is just and equitable to do so.
35. No S20C application appears to have been made, nor is any mention of the S20C application referred to in the Applicants' S24(9) application nor is there any reference to limiting the costs of these proceedings recoverable through the service charge levied in the Applicants written or oral submissions. That said, the Tribunal is content to deem that an application has been made under this provision and indeed the Tribunal indicated the acceptance of such an application in its directions.
36. The costs of these proceedings are not yet known and the reasonableness of recovering any such costs through the service charges levied may in due course be challenged by leaseholders should they decide to make a Section 27A application. What the Tribunal is being asked to consider here is whether in principle is it just and equitable for the Applicants to contribute to these costs through the service charge levied upon them. While the Applicants have been successful in their application, we do not consider that it is just and equitable in the circumstances to ask other leaseholders to meet their proportion of the costs of these proceedings. This is a challenging Property and issue, the

managers appointment has been longer than usually anticipated and while we consider it appropriate for Ms Abel's appointment to be extended, it was not in our view unreasonable for some leaseholders and directors of Kirbys (Whitby) Limited to oppose this application. It is understandable for them to have an expectation that the management of the Property should return to Kirbys (Whitby) Limited on the expiry of the original term of the Management Order. Reflecting this fact, and that all parties have conducted themselves reasonable throughout the course of these proceedings, confirms to the Tribunal that it is reasonable for all leaseholders to equally bear the cost of any reasonable costs incurred with these proceedings. We therefore refuse to make an order under section 20C of the 1985 Act.

36. Finally, some 12 days after the hearing the Respondents e mailed the Tribunal panel, via the Tribunal Case Officer, raising additional questions such as why Judge Bennett was no longer dealing with their case, how could Ms Abel secure builders for her own business projects but not Kirbys and why was Ms Abel accompanied by legal representatives at the hearing? The Respondents also claimed that the seating layout and the acoustics of the court inhibited them from being able to participate effectively at the hearing and in being able to support Mr E. Neville in answering the Tribunal's questions.
37. The Respondents did not raise any such issues at the hearing and appeared to the Tribunal to be fully and effectively engaging with all parties and the Tribunal panel at the hearing. Mr E. Neville, Mr Carmichael and Mrs Price all addressed the panel, and appeared to respond effectively to questions from the Tribunal panel. There has also been extensive opportunity for all parties to make written submissions through the course of these proceedings, which the parties have availed of. The Tribunal is fully aware of all parties' positions in this matter and the contents of the Respondents' latest e mail which has not been submitted in accordance with the Tribunal's directions, would have little or no bearing on the Tribunal's decision. The Tribunal has excluded it and considers that there are no grounds to hold a further hearing.
38. The Tribunal finds that Ms Abel is managing the Property in a diligent fashion and has proven her ability to effectively oversee significant building works to a good standard by the completion of the Phase 1 works. It is just and convenient to allow her the opportunity to complete the major outstanding building and refurbishment works contained within Phase 2 and then to return the management of the Property back to Kirbys (Whitby) Limited. We consider this to be the most appropriate and sensible course of action for all concerned. Accordingly, Ms Abel appointment is extended for 3 years from the date of this decision on the terms of the existing Management Order save for the increase in her fees from £150 to £160 per flat from 1 January 2023 and the increased level of professional indemnity insurance cover to £2,000,000.

Niall Walsh
Regional Surveyor 31/10/2022