FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CA/LAM/2021/0006**
Property	**:**	**37 Hall Road East, Crosby, Liverpool L23 8TT**
Applicant	**:**	**Mr Ian Parnell**
Representatives	**:**	**Mr Lowe, Counsel.** **Mr M Smeaton, Bermans Solicitors**
Respondents	**:**	**(1) Fernhawk Property Management Limited** **(2) Mr Daniel Birmingham** **(3) Ms Fiona McCaul** **(4) Ms Mavis Forrest**
Representatives	**:**	**(2)` Dr Sidoli, Counsel.** **(2) Mr H Nulty, SHL Solicitors.**
Type of Application	**:**	**Section 24(1) of the Landlord & Tenant Act 1987** **Rule 13 Application under Tribunal Procedure Rules 2013**
Tribunal Members	**:**	**Regional Surveyor N. Walsh** **Judge J. Holbrook**
Date of Decision	**:**	**7 December 2022**
Final Hearing Date & Venue	**:**	**10:30 am 31 October 2022 – Liverpool Civil and Family Hearing Centre, Vernon Street.**

DECISION

DECISION

The Tribunal considers it just and convenient to appoint the Applicant's proposed manager, Ms Delaney, as the Tribunal appointed manager with effective from 1 January 2023 on the terms set out in annexed Management Order.

The Applicant's Rule 13 cost application is refused.

REASONS

Procedural history

1. The Tribunal received an application dated 5 November 2021 seeking the appointment of Ms Delaney of Residence Liverpool Limited as the Tribunal appointed manager under section 24 of the Landlord and Tenant Act 1987 for 37 East Hall Road, Crosby, Liverpool L23 8TT (the Property). The Applicant is Mr Ian Parnell the leasehold owner of Flat 2 at the Property.

2. On 16 December 2021 the Tribunal issued directions, which culminated in a Remote Video hearing on 23 August 2022. The Applicant was represented at the video hearing by Mr Lowe of Counsel and also in attendance was Mr Birmingham, a co-Respondent and the leaseholder owner of flat 1, his representative Dr Sidoli of Counsel and the proposed manager Ms Delaney. Neither of the other two remaining co-Respondents attended this hearing.

4. At the video hearing the Tribunal dealt with a number of preliminary matters. Firstly, the Management Company, Fernhawk Property Management Limited, appeared not to be named as a Respondent for the purposes of these proceedings. This was a clear error, the Section 22 Notice having been served on the management company. Given no objections from the parties, the Tribunal added Fernhawk Property Management Limited as a co-Respondent under rule 10 of the Tribunal Procedure Rules 2013. The second preliminary issues dealt with and permitted Mr Birmingham's position statement to be admitted into evidence.

5. The Tribunal decided, and indeed all parties present agreed, that because the Tribunal did not have a draft Management Order before it to review and insufficient information from the proposed manager, Ms Delaney, to assess her suitability for the role, an adjournment of the hearing was the most appropriate course of action.

6. The Tribunal issued directions in its post hearing Case Management Hearing Note, dated 24 August 2022, for a new hearing date. In the event that the parties were unable to agree to the appointment of a management agent without recourse to the Tribunal, the Tribunal directed the Applicant to re-file and re-serve a copy of the proposed draft Management Order, accompanied by the proposed manager's draft management plan and service charge budget for the Property and any additional written submissions that the Applicant wished to make, with the Respondents having the opportunity to respond. The Tribunal is grateful to the Applicant and Mr Birmingham for complying with the Tribunal's directions and for their submissions.

7. Mrs Forrest the leaseholder owner of flat 4 is supporting the Applicant's application and is content for Mr Parnell to take the lead in these proceedings, and therefore has decided not to participate personally.

8. An in-person hearing was held at the Liverpool Civil and Family Hearing Centre, Vernon Street on 31 October 2022. Mr Parnell did not attend but was represented by Counsel, Mr Lowe. Mr Birmingham also attended and represented himself, Mrs Forrest also attended but for the reasons already stated chose not to participate at the hearing. Ms McCaul the leaseholder owner of flat 3 did not attend the hearing. Ms McCaul did however provide a detailed statement of case enclosing extensive appended documents in compliance with the Tribunal's initial directions, dated 16 December 2021, which the Tribunal has taken into consideration in reaching its decision.

9. Ms Delaney, the proposed manager was unfortunately and unexpectedly unable to attend the hearing on 31 October 2022 due to illness. The hearing was therefore adjourned for a second time and reconvened on 14 November when Ms Delaney was able to attend and the Tribunal was able to question her in order to assess her suitability to be appointed as manager, as well as her willingness to accept the role. Any party that wished to attend the Tribunal's hearing with Ms Delanay on 14 November 2022 as observers were invited to do so and a number did.

10. Mr Lowe also made an application under Rule 13 of the Tribunal Procedures Rules 2013 on behalf of Mr Parnell, seeking an order against Mr Birmingham and Ms McCaul for the reimbursement of the costs that Mr Parnell has incurred in these proceedings. The Tribunal has had the benefit of both written and oral submissions in respect of this cost application from Mr Lowe, Mr Birmingham and his solicitors but no submissions have been received from Ms McCaul in respect of the Applicant's Rule 13 application.

11. The Tribunal did not inspect the Property and judgement was reserved.

Background

12. We are informed that the Property was constructed in 1913 and was subdivided into four self-contained flats in 1963. From the photograph on the front of Ms Delaney's Management Proposal document the Property is a former substantial house of standard brick and tile construction.

13. All four parties to this application hold their respective flats under 999-year underleases, which we are informed are virtually identical in terms. The underleases are granted out of a long leasehold interest held by Fernhawk Property Management Limited, which as lessor is responsible for managing the Property, keeping it in good repair and insured under clause 3 of the underleases. Each flat owner is named as a director in the management company and is also an equal shareholder. By clause 2(vii) of the underleases the flat owners are required to contribute 25% of the cost incurred by the company in discharging its obligations under clause 3 of the underleases.

14. In around 2020, the internal common areas were re-carpeted and the front drive was re-surfaced with tarmacadam following works to the external drains. Despite the Property's insurers only covering the resurfacing costs of the driveway immediately affected by the drainage works, a decision was made to re-surface the whole driveway so as to have the same finish throughout the driveway and to avail of the discounted price on offer for these works on account of the contractor being on site. This meant that there was a shortfall between the monies owed to the contractor and the monies recouped through the insurance claim. The costs attributable to the carpets and the resurfacing of the driveway, over and above the usual service charge levied, amounted to approximately £2,325 per flat.

15. The way in which these works were undertaken, approved and sanctioned led to a significant dispute between the parties. Ms McCaul and Mr Birmingham do not believe that they were properly consulted nor afforded the opportunity to decide whether the works were necessary and appropriate, and they dispute that the works were properly instructed by the management company as opposed to individual flat owners acting independently.

16. Mr Parnell and Mrs Forrest hold a very different view. They consider that the works were necessary and required, and there was prior agreement as to the necessity to redecorate and re-carpet the internal common areas. They believe that they communicated with both Mr Parnell and Ms McCaul prior to instructing the works to be undertaken and took their lack of a response as tacit agreement to what was being proposed.

17. The position between the parties now appears to have broken down to such an extent that Mr Parnell and Mrs Forrest between them paid for the totality of the works, with Mr Birmingham and Ms McCaul refusing to contribute to the cost of the carpets or the excess charges for the resurfacing of the driveway. Indeed, Mr Birmingham subsequently refused to pay any service charge demands from the management company and has instead been paying this amount into a separate bank account held by him.

18. It would appear common ground between all the parties that the position between the respective flat owners has broken down to such an extent that the management company is unable to function properly. The company is unable to agree what the current appropriate service charge should be, what future repair works are necessary above and beyond the usual day to day maintenance items, and whether necessary actions such as the placing of insurance cover have been done correctly or in fact unilaterally by one flat owner without the management company's approval.

The Statutory Framework

19. Section 24 of the Landlord and Tenant Act provides:

    (1) The appropriate tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies—

    (a) such functions in connection with the management of the premises, or,

(b) such functions of a receiver, or both, as the tribunal thinks fit.

(2) The appropriate tribunal may only make an order under this section in the following circumstances, namely

(a) where the tribunal is satisfied—

(i) that any relevant person either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and

(ii) . . . . . .

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

(ac) where the tribunal is satisfied—

(i) 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

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

Hearing, submissions and evidence in respect of the substantive S24 application

20. Mr Lowe has drawn the Tribunal's attention to the fact that given the breakdown in the parties' relationship the management company is unable to function and to discharge its obligations under the underleases. He outlined that Mr Parnell and Mrs Forrest wished to see a more corporate approach adopted which enables the recovery of the costs expended by the management company, necessary works to the chimney and roof to be undertaken and the external redecoration of the Property.

21. Mr Lowe contended that Mr Birmingham and Ms McCaul wished the management of the Property to be retained on a more informal basis. However, this is not working and Mrs Forrest is currently unable to sell her flat because of the ongoing dispute. Mr Lowe outlined that the position in respect of Ms McCaul is unknown because she has failed to engage with these proceedings.

22. Mr Lowe submitted that it is just and convenient to appoint a manager in these circumstances and indeed this is the only course of action open to enable the Property to be properly and effectively managed.

23. Mr Birmingham explained that the problems arose when the monthly service charge increased dramatically to £500 pcm. He had no issues with the general run of the mill monthly maintenance costs and expenditure but considered that significant costly items of repair should and needed to be discussed and agreed by the leaseholders.

24. Mr Birmingham accepted the need for a manager to be appointed and was not opposed to the appointment of Ms Delaney. Mr Birmingham also now wanted matters to be put on a more formal basis, which he felt would introduce a professional distance between the parties and enable more effective consultation through the statutory S20 process.

25. Mr Birmingham also helpfully confirmed that if Ms Delaney is appointed that he would provide her with copies of the bank statements for the account that he has been paying his service charge monies into and that he would transfer the accumulated funds to Ms Delaney to be incorporated into the Property's service charge accounts.

26. Mr Lowe then took the Tribunal through the proposed Management Order, which broadly mirrored the recommended draft order appended to the Tribunal Practice Statement but with a number of suggested amendments by the Applicant to address the specific circumstances in this case. Namely:

- Paragraph 5 sets out that the Management Order is seeking to address and resolve the historic dispute concerning the re-carpeting of internal common parts and the re-surfacing of the driveway, the necessity of works to the chimney stacks and external redecoration, and the level of future service charges.
- Paragraph 6 provides for the creation of a sinking fund, the recovery of improvements in addition to repairs, setting budgets for service charge years prior to the appointment of the manager (by which the Tribunal took to mean the final service charge accounts for the preceding years) and the power to seek the recovery of service charges in respect of previous years.
- Given that Mrs Forrest is seeking to sell her flat, on enquiry from the Tribunal, all parties considered that it was sensible for paragraph 15 to be retained and that this power should be transferred to the Tribunal appointed manager, if appointed, so as to ensure that Mrs Forrest can obtain all the necessary approvals required for the sale of her flat in a timely fashion.

27. Mr Lowe was clear that the Applicant was not necessarily seeking the creation of a sinking fund but simply considered that this was a sensible facility for any prospect Tribunal appointed manager to have, should they require it. The inclusion of the power to recover improvements was to ensure that Mr Birmingham and Ms McCaul could not avoid contributing to cost of the carpets and the re-surfacing of the driveway on the grounds that the works constituted improvements and not repairs. Mr Lowe was upfront that the purpose of this amendment was to avoid the possibility that these costs were not payable in the event that improvements are not recoverable under the terms of the leases.

28. Mr Lowe outlined that the Applicant was seeking a 3-year term of appointment for Ms Delaney, which Mr Lowe considered to be an appropriate period to remedy the issues identified and to enable relationships to be repaired.

Rule 13 submissions

29. The Applicant is seeking an order for Mr Birmingham and Ms McCaul to pay a significant contribution to his costs pursuant to Rule 13(1)(b) of the 2013 Tribunal Procedure Rules, on the basis that they have acted unreasonably. Mr Lowe cited the decision of Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC) and invited the Tribunal to deal with costs on a summary basis to avoid the need for satellite litigation in respect of costs.

30. Mr Lowe in his oral submissions referred the Tribunal to the detailed grounds he set out in the Applicant's supplementary position statement. The crux of which was the lack of engagement by both Mr Birmingham but particularly Ms McCaul with these proceedings. This despite, as Lowe contends, it being abundantly clear to all parties that the company was deadlocked and could no longer function to manage the property effectively. In the case of Mr Birmingham Mr Lowe asserts that it was unreasonable to wait until the eleventh hour before agreeing the draft management order and to the appointment of Ms Delaney.

31. Mr Lowe urged the Tribunal not to accept Mr Birmingham solicitor's "mea culpa" letter of 28 October 2022. He contended that it did not stand up to scrutiny nor did their claim that neither they nor Mr Birmingham were in a position to respond until they had sight of the draft Management Order and the proposed manager's Management Proposal.

32. Mr Lowe referred the Tribunal to the minutes of a meeting between Mr Birmingham and Ms McCaul on 4 October 2022 which were copied to Mr Parnell and Mrs Forrest. These minutes refer to the Property being well managed and Mr Parnell acting in an unreasonable and disruptive fashion and describe his application to the Tribunal as being vexatious. Mr Lowe contended that this constituted unreasonable behaviour on the behalf of Mr Birmingham and Ms McCaul and given this, the Applicant was left with no alternative but to make this application to the Tribunal.

33. When asked as to the amount of costs being sought or the division of costs between Ms McCaul and Mr Birmingham, Mr Lowe did not wish to specify figures or percentages, preferring instead to leave this to the Tribunal's discretion.

34. Mr Birmingham's solicitors have submitted in correspondence that any blame for delay rests wholly at their door and not Mr Birmingham's. However, they point out that the proposed manager's detailed management plan and proposed budgets were only received by them on 13 October. SHL then wrote to Mr Birmingham on the same day and met with him on 21 October and then wrote to the Applicant and the Tribunal on 24 October setting our Mr Birmingham's response. Mr Birmingham accordingly opposes the cost application for these reasons.

35. Ms McCaul has not made any submissions or representations in respect of the Applicant's Rule 13 cost application.

Ms Delaney's witness evidence

36. Ms Delaney being unable to attend the hearing on 31 October gave her witness evidence by video on 14 November 2022. Ms Delaney confirmed that she was willing to undertake the role and she acknowledged and understood that the Tribunal appointed manager role was a personal appointment rather than the appointment of her firm.

37. Ms Delaney confirmed that she has no conflicts of interest and that she understood that as a Tribunal appointed manager she would be working independently of, but clearly in the interests of, all leaseholders but ultimately answerable only to the Tribunal. Ms Delaney confirmed her standard fees as being £1,800 per annum and that she would operate in full compliance with the RICS Service Charge Code in all respects.

38. Ms Delaney outlined to the Tribunal what her immediate priorities would be if appointed to the role, such as addressing existing fire safety issues and the dampness at the rear of the Property. Ms Delaney also confirmed that her Professional Indemnity insurance cover was to £500,000 for a single claim.

Discussion

Section 24 application

39. It is accepted by all the parties that attended the hearing that the current position is untenable and that an external manager needs to be appointed. The Tribunal has determined that the possibility of consensual progress being made between the parties here to remedy the current position is next to nil, in respect of such matters as agreeing an appropriate monthly service charge, the repair works required and their prioritisation. The lessor management company is paralysed by lack of a majority view amongst its leaseholder directors and so is unable to take the necessary management actions required. Accordingly, the Tribunal is no doubt that the necessary conditions required to warrant the appointment of a Tribunal manager exist. Namely, the lessor is unable to discharge its obligations under the leases and the Tribunal finds accordingly that the requirements of S24(2)(a)(i) are met and it is 'just and convenient' to make such an appointment under S24(2)(b).

40. Without a Tribunal appointed manager, the Tribunal fails to see how the Property will be properly managed and how the existing consequences for leaseholders, especially Mrs Forrest's inability to be able to sell her flat, can be remedied.

41. Having interviewed Ms Delaney, the Tribunal is satisfied that she is a suitable person to undertake this role. Ms Delaney demonstrated a good understanding of the requirements and duties of the role. Ms Delaney's proposed fees of £1,800, her latest and higher service charge budget estimates, Professional Indemnity cover, management plan and prioritisation all appear reasonable.

42. The appointment of a Tribunal appointed manager is normally and mostly a forward-looking exercise. In this instance however the Tribunal accepts that a resolution is required in respect of the dispute concerning the carpets and the re-surfacing of the driveway. This goes to the very heart of the breakdown in the relationships between the leaseholders and in the absence of finally determining whether Mr Birmingham and Ms McCaul are liable to contribute to these costs, or not, it is unlikely that the leaseholders and the management company will be able to function in the future without the external intervention of the Tribunal.

43. The Tribunal is however not persuaded by the Applicant's suggestion to incorporate within the Management Order the explicit right to recover the costs of improvement works and that the power to create a sinking fund is the right course of action. The purpose of appointing a manager under S24 of the Act is to ensure that the Property is properly managed going forward and not to ensure the recovery of costs incurred by any means, irrespective of whether or not those costs are recoverable under the terms of the lease or by statute.

44. It is appropriate that the independent appointed manager is able to seek the recovery of outstanding service charges, if they consider these to be payable in accordance with the terms of the leases and statute, for example the S20 Consultation provisions under the Landlord and Tenant Act 1985 have been complied with. The Tribunal will incorporate that power within the Management Order and will also direct the Manager to decide, upon a review of the Leases, and to communicate to the Leaseholders whether she intends to seek the recovery of a 25% contribution from Mr Birmingham and Ms McCaul in respect of the monies expended upon carpets and the new drive surface. All parties, Ms Delaney as the appointed manager and the leaseholders, shall have the benefits and protection of S27A of the Landlord and Tenant Act should monies be pursued in respect of these costs. However, the Tribunal does not feel it is necessary or appropriate to make changes to the terms of the Management Order which could potentially alter the parties' contractual liability at the date the disputed works were undertaken.

45. For similar reasons, the Tribunal is not persuaded of the need to establish a sinking fund. This goes beyond the existing terms of the Leases and we do not consider that the lack of a sinking fund inhibits the managers ability to effectively manage the Property. Should major and significant works be required, the manager is able to levy an appropriate service charge on completion of the usual S20 consultation requirements under the 1985 Landlord and Tenant Act. We are conscious that this application, while successful, is an application to appoint a manager to ensure the Property is properly managed going forward and not an application to vary the terms of the Leases. The term of any management order is usually relatively short lived before reverting back to the person or corporate entity with the contractual right to manage the Property in accordance with the terms of those Lease terms. We can see no material benefit in making the variations sought to the existing terms of the Leases and in fact this has the potential to cause confusion when the Management Order ceases. Not to mention the fact that this could potentially create a liability for parties that did not exist under the contractual lease terms. The Tribunal is not persuaded that this is just or right.

46. The Tribunal is therefore satisfied that it is just and convenient to appoint Ms Delaney as the Tribunal appointed manager for the Property for the term of 3 years, as sought by the Applicant, on the terms of the attached Management Order. A 3-year period would appear to the Tribunal to be a sensible term to address the outstanding repair and liability issues, and hopefully allow sufficient time to resolve these matters such that the management company can take back the responsibility for managing the Property in 3 years' time. Whether this be retaining the services of an external property manager or not.

Rule 13 Application

47. The Tribunal's powers to make orders for costs are governed by rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The general principle (set out in rule 13(1)(b)) is that the Tribunal may only make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings before the Tribunal. The application of rule 13 was considered and explained by the Upper Tribunal (Lands Chamber) in the case of Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC). The correct application of the rule requires the Tribunal to adopt the following approach when determining an application for costs:

    1. Is there a reasonable explanation for the behaviour complained of?

    2. If not, then, as a matter of discretion, should an order for costs be made?

    3. If an order for costs should be made, what should be the terms of that order?

48. While the Tribunal does understand the frustration of the Applicant in having to bring formal tribunal proceedings to achieve this outcome, as opposed to being able to resolve this matter by agreement, this is not in itself however tantamount to unreasonable behaviour on behalf of the Respondents. Both Ms McCaul and Mr Birmingham have engaged with these proceedings, albeit not to the extent that the Applicant would have liked. Even if both Respondents had completely ignored the application and declined completely to participate in the proceedings, this does not necessarily constitute unreasonable behaviour.

49. The Tribunal would similarly be slow to discourage parties from making late admissions or concessions for fear of it of this having adverse cost implications. While this may be a cause of frustration for the Applicant, nevertheless and in accordance with the decision of Willow Court, an essential first step or pre-condition must be that this conduct transgresses the line of reasonableness. As the following extracts from Willow Court make clear, the test in assessing unreasonable behaviour is set at quite a high bar and even more so for a litigant in person.

    "24. An assessment of whether behaviour is unreasonable requires a value judgement in which views might differ but the standard of behaviour expected of the parties ought not be set at an unrealistic level..... It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas

Bingham's "acid test": is there a reasonable explanation of the conduct complained of?"

50. Given the manner in which this dispute arose, relating to the cost of the carpets and the re-surfacing of the driveway, we can understand why the Respondents were reticent to agree to appoint a manager suggested by Mr Parnell. It is not a question of whether they were right or wrong, merely was there a reasonable explanation for their actions. We consider there was. The disputed issue as to whether Ms McCaul and Mr Birmingham should contribute to the cost of the carpets and the re-surfacing of the driveway is inextricably linked with the S24 application to appoint a manager and absence of resolving this issue by agreement it is hard to see how either Ms McCaul or Mr Birmingham have acted in anyway unreasonable during the course of these proceedings. Both have engaged to varying degrees and indeed Mr Birmingham has engaged legal representation. We can readily understand the Respondents initial reluctance to accept Mr Parnell's proposed manager for fear of this affecting their potential liability for the disputed re-carpeting and driveway resurfacing works. Accordingly, we fail to see how the Respondents conduct during these proceedings could be classed as being unreasonable. It is important to note that unreasonable conduct in the context of rule 13 is limited to conduct in bringing, defending or conducting the proceedings. The quality of any conduct by either Respondent leading up to these proceedings is immaterial.

51. For these reasons the Tribunal declines to make a Rule 13 Costs Order and the Applicant's Rule 13 application is refused.

Regional Surveyor N. Walsh

7 December 2022