FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**CAM/44UF/LAM/2022/0007**
Property	:	**33 Clarendon Square Leamington Spa CV32 5QY**
Applicant	:	**Pablo F Beker**
Respondent	:	**Maureen Macready**
Representative	:	**Andrew Meanley**
Type of application	:	**Appointment of a manager**
Tribunal members	:	**Mary Hardman FRICS IRRV (Hons)** **Judge Shepherd**
Date of decision	:	**25 April 2023**

DECISION

Description of hearing

This has been a remote video hearing. A face-to-face hearing was not held because all issues could be determined in a remote hearing. The tribunal was provided with a 543 page bundle.

Decisions of the tribunal

1. The application to appoint a manager is dismissed.

2. The tribunal orders under section 20C of the Landlord and Tenant Act 1985 that all the costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

Reasons

Application

3. The Applicant, who is the leaseholder of Flat B, one of five flats at the Property applied to the Tribunal for an order under section 24 of the Landlord and Tenant Act 1987 (the "**1987 Act**") appointing Mark Bruckshaw of Inspire Property Management, 318 Stratford Road, Shirley, Solihull B90 3DN as manager. This was a change from the original named manager due to illness.

4. The Applicant sought the order on the grounds set out in their preliminary notice dated 25 May 2022, considered below.

5. A case management hearing (CMH) was held on 9 November 2022 and the procedural chair gave case management directions on 14 November 2022. There was no inspection because good quality photographic evidence was available.

6. At the CMH the issue of outstanding repairs was explored. Mr Meanley said that he was aware that repairs were required. He acknowledged that the managing agents, Marston's had been dilatory. However, he felt that the latest person appointed within Marston's to deal with the property seemed 'more on the ball'. They had now served first and second notices under s20 Landlord and Tenant Act 1985 which covered the items that Mr Beker had listed in his s22 notice. The second notice also included the installation of a fire alarm system. Mr Beker had objected to the second notice and the agents had decided to restart the process.

7. The cost of the works was said to be £26,000. There was £8,000 in the reserve fund so there was a need to raise £18,000 from the five leaseholders. The works could not commence until the notices had all been served and the contribution from each leaseholder had been collected. Mr Meanley was not necessarily against changing the agent, although to do so mid-process would substantially delay the works needed.

8. Mr Beker said that the issue was not just the repairs needed but also the lack of maintenance for many years. He was not the only leaseholder to object to the second notice. He had done so as the second quotation, which he had asked the managing agents for, was not forthcoming and the notice period was running out. He felt that the agents were not maintaining the building and he did not trust the landlord to ensure that they did what they were supposed to do.

9. In terms of the application being solely in his name he said that the basement leaseholder was not interested in the common parts and two of the other leaseholders were absent landlords. He had explored trying to buy the freehold, which remains on the market, and acquiring the Right to Manage but there were not enough leaseholders interested to allow this.

10. He had identified the proposed manager after doing some research and put his name to Mr Meanley in November 2021 but had got no response.

11. He did not think that there was any merit in staying his application to await the completion of the repairs or to discuss alternative managers with the landlord given his lack of responsiveness previously.

12. The Tribunal explained the relatively high bar to appoint a manager and the considerable requirements in terms of submission of evidence.

13. Mr Meanley challenged the validity of the application on the basis that it had been served by one tenant only and he believed that the legislation required that it was served by two tenants. The chair assured him that the Act allowed one tenant to make such an application s21(1) and that he was reading s21(4) which referred to 'jointly by the tenants of two or more flats' out of context.

14. The tribunal would issue directions but would be prepared to stay the application if parties felt progress could be made outside of the formal application process – but would be unlikely to do so unless both parties agreed to a stay.

15. Directions were issued on 14 November 2022 and because the parties did not apply for a stay the application proceeded to hearing on 13 March 2023 – although not without a substantial amount of correspondence between the parties and the Tribunal along the way.

16. The Applicant provided a hearing bundle of 543 pages. He sent a draft management order as part of the bundle.

17. He also made an application for an order under section 20C of the Landlord and Tenant Act 1985 (the "**1985 Act**") to prevent the Respondent from recovering its legal costs through the service charge.

18. At the hearing on 13 March 2023, the Applicant, Mr Beker represented himself and the Respondent was represented by Mr Andrew Meanley. The proposed manager, Mr Bruckshaw also attended as did Mrs Jessica Parker Allen from Edward H Marston and Company (Marstons), the current managing agents.

Property

19. The Respondent purchased the freehold title to 33 Clarendon Square on 26 September 2003. The property is a Grade II listed terraced house built around 1830 and converted into flats in the 1980's. There are five flats over five floors and a basement. The leases are for 125 years from 1 January 2003.

20. The Applicant purchased the lease of Flat B, 33 Clarendon Square on 13 November 2017.

Relevant issues

21. In the case management directions, the following issues were identified for determination:

- Is the preliminary notice compliant with section 22 of the Act and/or, if the preliminary notice is wanting, should the Tribunal still make an order in exercise of its powers under section 24(7) of the Act?
- Has the Applicant satisfied the Tribunal of any ground(s) for making an order, as specified in section 24(2) of the Act?
- Is it just and convenient to make a management order?
- Would the proposed manager be a suitable appointee and, if so, on what terms and for how long should the appointment be made?
- Does the proposed manager need any additional powers to levy his own service charge in respect of flats that have not been demised to any lessee, but have been retained by the respondent?
- If application is made, should the Tribunal make an order under section 20C of the Landlord and Tenant Act 1985, to limit the landlord's costs that may be recoverable through the service charge and/or an order for the reimbursement of any fees paid by the applicant?

Preliminary notice

22. Before an application is made for a management order under section 24, section 22 of the 1987 Act requires the service of a preliminary notice

which must (amongst other things) sets out: (a) the grounds on which the Tribunal would be asked to make the order; and (b) steps for remedying any matters relied upon which are capable of remedy, giving a reasonable period for those steps to be taken.

23. In the present case the notice alleged breach of the landlord's covenants to

a) Repair and maintain the main structure and common parts

b) Clean and light the common parts

24. At the hearing the Respondent did not challenge the preliminary notice.

Conclusion

Having examined the preliminary notice, we are satisfied that it complied with section 22. The Respondent had not taken any of the action required by the notice, even within a reasonable period after he had received the notice. When questioned by the Tribunal he said that the did not know he had to do anything with it. He said that he employed managing agents and expected them to manage.

Grounds under s.24(2) of the 1987 Act

25. Under section 24(2) of the 1987 Act, the Tribunal may appoint a manager in various circumstances. These include where the Tribunal is satisfied that:

a)

- any "*relevant person*" (in this case, the Respondent) is in breach of any obligation owed by him to the tenant under their tenancy and relating to the management of the premises in question or any part of them; and
- it is just and convenient to make the order in all the circumstances of the case (section 24(2)(a)); or

b) that other circumstances exist which make it just and convenient for the order to be made (section 24(2)(b)).

Breach of obligation(s) and related matters

26. Under clause 1 of the First Schedule to the lease held by the Applicant the landlord covenants:

1.To maintain and keep in good and substantial repair and condition and renew or replace when required the main structure, the common parts and any parts used in common by the Leaseholder and other Leaseholders of the building and which are not expressly made the responsibility of the Leaseholder or any other Leaseholder in the building and the boundary walls and fences not included in the Lease of any flat in the building.

27. And under clause 3 of the same schedule the landlord covenants:

3.To keep the common parts clean and where appropriate lit

28. We were supplied only with a copy of the lease for Flat D whereby the leaseholder covenants to pay 25% of the 'service charge percentage of the annual expenditure. Annual expenditure is defined as : *(1.13.1) all costs expenses and outgoings whatever reasonably and properly incurred by the Landlord during a Financial Year in or incidental to providing all or any of the Services and (1.13.2) all sums reasonably and properly incurred by the Landlord during a Financial Year in relation to the Additional Items if any and (1.13.3) any VAT payable on such sums costs expenses and outgoings but excluding any expenditure in respect of any part of the building for which the Leaseholder or any other Leaseholder is wholly responsible and excluding any expenditure that the Landlord recovers or that is met under any policy of insurance maintained by the Landlord pursuant to his obligations in this lease.*

29. We were told that other flats paid a lesser percentage – this being the largest flat.

30. Mr Beker referred to the witness statement from Mrs Beale, leaseholder of Flat A until November 2021, who was in occupation prior to his arrival. He said that she had brought a number of issues to the attention of the landlord shortly after moving in during March 2016. These included extensive rising and penetrating damp, noxious smells, a defective sash window, fractured external steps leading from the pavement level to the front door of the property and access to utility meters. She reported nothing was done although she was informed that Marstons took over as managing agent from January 2018.

31. As nothing was done, a pre action letter of claim in May 2018 was issued. The Tribunal was not provided with this letter and the Respondent claimed never to have received it.

32. The Respondent claimed work was subsequently done to remedy the damp although the Applicant suggested that this was done at a cost of £4000 from the service charge account for which no S20 consultation was carried out.

33. The Applicant alleged that despite a number of reminders including sending video footage, the Respondent had failed to repair the front entrance columns which were cracked, and masonry had fallen away – the Tribunal were provided with photographs/video evidence of this and subsequent alleged defects.

34. The Applicant further alleged that the Respondent had failed to maintain and repair the entrance stair handrails where the paint had flaked off and the wood was beginning to crack.

35. The first-floor balcony rails to the Applicant's flat had not been maintained. They were missing several screws and iron segments. The Applicant felt that they presented a serious hazard to occupiers and to passers-by as the balcony overlooked the street below. In addition, the balcony floor surface needed to be re-levelled as water accumulated, making the surface very slippery and increasing the risk of a fall from the balcony. This had meant that the balcony had been unusable for the last two years.

36. The Applicant said that the building did not have a valid Fire Risk Assessment (FRA) and that the agents had failed to ensure that one was undertaken on taking over the management of the property. He believed that the absence of this could invalidate the insurance policy.

37. He said that the Respondent had commenced a S20 consultation process in respect of the repairs on four occasions. On two occasions the process had been aborted with no explanation and on the third and fourth he had objected because only one estimate had been provided despite him naming contractors. Further the scope of the works had changed between the first and second notice each time.

38. In terms of the covenant to keep the common parts clean and where appropriate lit, the Applicant said that the timer had not worked since September 2021 which meant that some of the lights were on permanently at the cost of the leaseholders whilst the other did not work at all. He said that the wiring was substandard and that there was no emergency lighting on the stairs. They had asked the management company and the Respondent to carry out these repairs for more than two years.

39. The Applicant said that the leases contained a clause requiring the premises to be used for the *'purposes of a private residence in the occupation of one leaseholder only'* . Flat C had been let to students for a number of years. He had reported the breach to Marstons, and they had done nothing about it. He was concerned that this breach may invalidate the insurance policy on the building.

40. He had asked two of his fellow leaseholders for their views and Mr Darlaston-Williams (Flat E) had expressed the view that 'all the time Marston are the managing agents we will continue to get shafted' and Mrs Jones (Flat D) said that she had been chasing repairs for several months prior to April 2021 with no response.

41. He also referred to a statement in the bundle from Sarah Churchill, Senior Environmental Health Officer at Warwick District Council. She had been contacted by the Applicant and inspected the property in June 2022. She found issues with lack of correct smoke detection and fire safety provisions, lack of emergency lighting and communal lighting potentially running off flat supplies. In Flat B there was a wrought iron balcony which had come loose, and water was pooling on it due to lack of fall away.

42. She had emailed David Satchell at Marstons advising them of the repairs needed and had advised Marstons in October 2022 that she could serve an Improvement Notice on them for the fire safety works if they did not see some progress. They continued to work informally to seek to rectify the issues although the lack of fire safety provision meant that fire was the highest scoring hazard under HHSRS. There was no evidence provided of what it actually scored nor the category of hazard.

43. The Respondent did not deny the alleged breaches. He said that Marstons had been 'dilatory' and 'incompetent' previously but that since Jessica Allen had been appointed, they had got a lot better. He accepted that they had not carried out the works to comply with the s22 notice although these would have been completed by now if Mr Beker had not lodged objections to the S20 consultation process.

Conclusion

44. We are satisfied that the Respondent is in breach of the repairing obligations owed to the Applicants under their leases. British Telecom v Sun Life Assurance Society [1996] Ch. 69 confirmed the well-established principle that a landlord's obligation to repair arises when the defect occurs, so the landlord is in breach of covenant immediately (unless the defect occurs in parts demised to the tenant, where the breach arises only when the landlord has notice of the defect and a reasonable period for performing remedial work has passed, which is not the case here).

45. These breaches have clearly continued for some time. The photographs produced by the Applicant show the building defects the Applicant complained of, and these were not denied by the Respondent. It was accepted that for a period there was no FRA and when it was carried out it had highlighted the need for an electrical upgrade. The Applicant said, and it was not contested, that they had complained to the Respondent on a number of occasions, as had other tenants but nothing substantive had been done in respect of the defects complained of.

46. This determination does not mean that the Respondent is ultimately responsible for any or all the repair costs. That is a different question and one which, if unresolved between the parties may be the subject of an application to the tribunal under s27A of the Act.

Just and convenient

47. Mr Beker has outlined the history of the issues with this property and the lack of any substantive action to date to resolve them.

48. Mr Meanley for the Respondent has accepted that they have not taken action but that the new managing agent appointed by Marstons, Mrs Allen was much more proactive. The Tribunal heard from Mrs Allen who explained that she was appointed as the property manager in May 2022 as successor to James Gallagher. She accepted that there had been deficiencies in the past and there was a history of things not being done as quickly as they could have been.

49. However, since her appointment a revised initial notice was issued to reflect additional works on the 10 May 2022, these works included the electrical upgrades. A statement and notice of estimates was issued on the 5 October 2022 the quotes included fireproofing to comply with FRA that was commissioned. During this time, she had approached ITC Building and Electrical Contractors Limited (ITC). In response to the second notice the Applicant had submitted that it was void as the revised initial notice didn't refer to the works required on the FRA. A further revised initial notice was served on the lessees together with a letter of explanation on 28 October 2022.

50. In response to the further revised notice the Applicant advised he wished to nominate 2 contractors to submit quotes, and, on 16 December 2022, he provided the names of two contractors. The specification was submitted to the contractors but as of 30 January 2023 Mrs Allen said that no responses had been received. Mr Beker did not accept that they had been approached. The Tribunal were satisfied with Mrs Allen's evidence in this regard.

51. A revised Statement and Notice of Estimates was issued at the beginning of February 2023 supported by a quotation for works from ITC. Mrs Allen accepted it was good practice to get more than one estimate. However, she had approached others, but they were not interested in quoting.

52. They were due to go to a third notice at the beginning of March. When questioned by the Tribunal she said that she proposed to call a meeting of the leaseholders to discuss the prioritisation of the works as there was not enough money in the service charge account to cover all the works.

53. Mr Meanley for the Respondent said that he believed that changing the manager now, when the S20 process was drawing to an end would delay matters again and mean that works that needed to be done would not get done.

Conclusion

54. The Tribunal can understand why Mr Beker is frustrated by the lack of progress on the repairs required to this property. In particular the issues with the balcony which mean that effectively this part of his property is inaccessible to him and his family.

55. For their part the Respondent and indeed the managing agents have accepted that they have been slow, and works have not been done as quickly as they could have done.

56. The Tribunal was close to finding, that, due to historic failings it should appoint a manager. However, on balance it was persuaded by Jessica Allen's evidence of the progress made since she had taken over and that the consultation process was nearing an end. She appeared to be au fait with the work needed, the lack of funds available and the need to talk to leaseholders and seek to sort out priorities for the works.

57. There would seem to be a real possibility of matters being turned around and a risk of additional delay if the Tribunal were to appoint a new manager at this stage. Furthermore, the Tribunal does not intervene lightly in these matters. Therefore, the Tribunal has decided that it is not just and convenient to appoint a manager at this stage.

58. It would urge the Respondent and the managing agent to work with the leaseholders to ensure that these matters are resolved as soon as possible.

59. Parties may apply to the Tribunal again under s27A in respect of any service charges payable.

60. The Applicant may of course make another application for appointment of a manager should the required progress not be made.

61. In respect of the insurance the tribunal is not persuaded that the property is uninsured or that the insurance is invalid, although any claim in respect of Flat C may well be impacted if student letting continues.

Section 20C application

62. We had no submissions on whether, under the terms of the leases, the costs of these proceedings could be recovered through the service charge.

Given the delays in the past, and that it is understandable why Mr Beker felt it reasonable to make such an application, we direct that the Respondent cannot recover their legal costs of this application from the service charge. We also order the Respondent to reimburse the Tribunal application and hearing to the Applicant (£300 in total) within 28 days, not least given their lack of active engagement in the case prior to these proceedings.

Observations

63. In the circumstances the Tribunal does not need to go on to consider whether the proposed manager would be a suitable appointee and, if so, on what terms.

64. However, having questioned the manager, Mr Bruckshaw, the Tribunal did not find him particularly impressive. The additions to the draft management plan supplied by the tribunal were very sparse and did not address the issues beyond listing the works required. He did not appear to hold PII insurance needed as a Tribunal manager, he showed a lack of understanding and familiarity with the leases and had no proposed timetable for the works nor proposals for raising the required monies from the leaseholders.

Name: Mary Hardman FRICS IRRV(Hons) **Date:** 25 April 2023

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).