FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/26UK/LAM/2023/0005**
Property	**:**	**Wilmington Close, Watford, Hertfordshire WD18 OFQ**
Applicants	**:**	**1. Richard Kent** **2. Raj Saigal** **3. Avi Geller**
Respondents	**:**	**1. Wilmington Close RTM Company Limited** **2. Wallace Estates Limited**
Representatives	**:**	**1. Nicholas Higgs, Counsel** **2. Mattie Green, Counsel**
Type of application	**:**	**Appointment of Manager**
Tribunal members	**:**	**Judge K. Saward** **Mrs S. Redmond BSc ECON MRICS**
Date of hearing	**:**	**19 February 2025**
Date of decision	**:**	**3 March 2025**

DECISION AND REASONS

Decisions of the Tribunal

1. The Tribunal does not make an order for the appointment of a manager. The application is dismissed.

2. The Tribunal does not 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

3. The application for reimbursement of Tribunal fees is refused.

REASONS

The application and hearing

4. By application dated 1 August 2023, the Applicants applied to the Tribunal to appoint a manager under section 24 of the Landlord and Tenant Act 1987 ('the 1987 Act'). The manager proposed by the Applicants is Jim Thornton, a consultant for Hurford Salvi Carr Property Management Ltd.

5. The original application was made by (1) Richard Kent (2) Raj Saigal (3) Anita Deb (4) Avi Geller. Upon her request, Ms Deb was removed as an applicant by the Tribunal on 30 August 2024. The Tribunal was informed at the hearing that Mr Kent has moved address since the application was made and he is no longer involved. However, the Tribunal is unable to locate an application from Mr Kent to be removed from the record and his name therefore remains.

6. The Applicants are leaseholders within the property at Wilmington Close, being a purpose-built development comprising 143 residential flats and 9 commercial units ('the Property'). Mr Saigal holds leases for two flats at the Property. The First Respondent is a 'Right to Manage' company ('the RTM company') that acquired the right to manage in 2014. The Applicants were directors in the RTM company before resigning. The RTM company appointed Prime Property Management Limited ('Prime) as their managing agents with effect from July 2023.

7. The Applicants sought the order due to alleged (i) breaches of covenant and obligations by the landlord (ii) failure to comply with provisions of the RICS Code of Practice (effective from 1 June 2016) (iii) failures of directors in their fiduciary duties to act in the best interests of the RTM company, and (iv) failure of directors to exercise reasonable care and skill.

8. Wallace Estates Limited holds the freehold title of the property. By letter dated 19 August 2024 the company applied to be joined to these proceedings due to its "material interest" as freeholder, albeit not intending to take an active part. On 22 October 2024, the Procedural Judge directed that Wallace Estates Limited be added as a second Respondent on condition that it complied with directions. Those directions required the company to provide a statement of case with any

supporting documents once the Applicants had sent it a copy of the hearing bundle. In furtherance of the directions, the Second Respondent filed a supplemental bundle containing its statement of case and the Applicants' response to it.

The hearing

9. With the consent of the parties, the application was heard remotely by Cloud Video Platform on 19 February 2025.

10. Mr Saigal and Mr Geller attended the hearing and were unrepresented. They each gave evidence and took the opportunity to put questions to witnesses called by Nicholas Higgs, Counsel, for the RTM company. Those witnesses were (1) Aran King, a director of the RTM company, and (2) Fergus Dalton, Property Manager, at Prime. The Second Respondent was represented by Mattie Green, Counsel, whose participation focused on the implications arising from the Building Safety Act 2022 ('the BSA').

11. The proposed manager, Jim Thornton, also attended and answered questions from the Tribunal as well as the Respondents' Counsel.

12. The documents before the hearing comprised an indexed (but unpaginated) bundle formed of 24 tabs prepared for the Applicants, and a supplemental indexed bundle prepared by the Second Respondent. Ahead of the hearing, the Tribunal also received a skeleton argument with attachments from Counsel for the RTM company, a skeleton argument from Counsel for the Second Respondent and the Applicants' response skeleton argument.

The issues

13. At the start of the hearing, the issues for determination were identified as those set out in the Tribunal Directions of 25 July 2024, with the addition of a preliminary point of law on the BSA raised by the Second Respondent and adopted by the First Respondent. The main issues are:

- Did the preliminary notice comply with the statutory requirements within section 22 of the Act? If the preliminary notice is wanting, should the Tribunal still make an order in exercise of its powers under section 24(7) of the 1987 Act?

- Whether the Tribunal can appoint a manager of the Property on the grounds applied for;

- Have the Applicants satisfied the Tribunal of any ground/s for making an order as specified in section 24(2) of the 1987 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?

- Should any order extend to commercial as well as residential premises?

- Should the Tribunal make an order under section 20C of the Landlord and Tenant Act 1985 ('the 1985 Act'), to limit the landlord's costs that may be recoverable through the service charge and/or an order for the reimbursement of any Tribunal fees and costs paid by the Applicants?

Preliminary matters

14. At the start of the hearing the Tribunal flagged up that it had not received a signed agreement from Mr Thornton to act as manager. It is worthy of mention at the outset that whilst Mr Thornton verbally confirmed his willingness to act, it later emerged later that his willingness was in fact conditional upon Prime remaining as managing agents. This was not apparent from the Applicants' bundle.

15. Mr Thornton stated there was not a problem with Prime, and he did not wish to replace them. He somehow wished to work above Prime and give directions to them. Mr Thornton had written to Prime with this suggestion, but he did not wish to say whether or how they had replied. It became apparent that Mr Thornton was not willing to act as manager in the circumstances arising in the application. Notwithstanding this rather fundamental issue, we proceed to address other issues arising.

Section 22 notice

16. Before applying for the appointment of a manager under section 24 of the 1987 Act, a preliminary notice must be served under section 22 upon: (i) the landlord, and (ii) any other person by whom obligations relating to the management of the premises, or any part of them, are owed to the tenant under their tenancy. Amongst other things, the notice must specify the grounds on which the Tribunal would be asked to make an order and give a reasonable period to take steps for matters within the notice capable of being remedied.

17. In this case, the section 22 notice was dated 26 June 2023. Counsel for the Respondents confirmed that no issues are raised regarding the validity of the notice. The Tribunal is satisfied that the section 22 notice satisfied the procedural requirements.

18. The issues identified in the section 22 notice were used as a framework to hear evidence on the grounds of application.

19. Over the course of the proceedings before the Tribunal, the Applicants had added more items to their case not identified in the section 22 notice. They included complaints over works to the boilers and breaches of the Companies Act 2006 by directors of the RTM company. An important purpose of a section 22 notice is to give opportunity for matters to be addressed that are capable of remedy. It is not permissible for the Applicants to introduce new matters of their own volition. As a matter of procedural fairness, the Tribunal made clear that it would confine its considerations to the grounds advanced in the section 22 notice.

Grounds under the Act

20. The Tribunal may only make an order to appoint a manager in the circumstances set out section 24(2) of the Act. The application relies on grounds under section 24(2)(a) and section 24(2)(b). In summary, these sections provide that the Tribunal must be satisfied:

- that any 'relevant person' (in this case the RTM company) 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 (section 24(2)(a)(i));

And,

- it is also just and convenient to make the order in all the circumstances of the case (section 24(2)(a)(iii));

Or,

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

Whether the order can be made on the grounds applied for

21. The Applicants accept that the Property is a higher risk building within the meaning of the BSA and that it is registered with the Building Safety Regulator.

22. It is also common ground that the RTM company is currently the 'accountable person' with various statutory duties relating to building safety risks under sections 83 and 84 BSA. Those duties include taking steps promptly to prevent building safety risk and carrying out works for which the accountable person is responsible.

23. The Applicants allege a breach of obligation under section 24(2)(a)(i) by the RTM company from management failures and delays in its approach to works on the Automatic Opening Vents ('AOV') that form part of the smoke control system ('SCS'). They also cite failures to comply with other fire safety requirements. Critically, section 24 was amended by section 110 BSA so that section 24(2)(a) does not apply in respect of a breach of a building safety obligation by an accountable person for a higher risk building by virtue of section 24(2ZB).

24. Initially, the Applicants sought to argue that section 24(2)(a) remained engaged for the SCS and AOV. They insisted they were not pursuing breaches of building safety obligations but breaches of obligation within the lease. The two cannot be divorced. All agreed that the AOV is part of the SCS that draws smoke out of corridors in the event of a fire. A fault with the SCS/AOV is a building safety risk. It follows that any breach of obligation to maintain the SCS/AOV is clearly a breach of a building safety obligation.

25. Eventually, after considerable time spent hearing particulars of the argument Mr Saigal agreed with the Respondents that their complaints concerned breach of building safety obligations after all. That is patently right. Despite this admittance, Mr Saigal maintained that the issue fell under section 24(2)(b) as 'other circumstances' which make it just and convenient for the order to be made.

26. The Tribunal does not accept this line of argument. Issues over the AOV system were identified in the section 22 notice as a breach of obligation being pursued under section 24(2)(a). That is where the alleged breach of obligation squarely falls. From use of the word 'other' in section 24(2)(b) it must mean circumstances other than those falling within the preceding paragraphs at subsection (2)(a). Moreover, subsection (2ZB) cannot have been introduced by Parliament to remove breaches of building safety obligations by an accountable person from the Tribunal's remit under section 24(2)(a) only for them to be capable of introduction under section 24(2)(b).

27. We conclude that the Tribunal cannot consider alleged building safety breaches by the RTM company as the accountable person as a ground to make a management order under section 24. It has no jurisdiction to do so. Accordingly, arguments over the AOV and SCS are disregarded.

28. The Applicants persisted nevertheless to argue that there remained breaches from delays in the section 20 consultation process for the AOV, which remained open to the Tribunal to consider. This is not a sustainable argument because such matters still concern building safety obligations by the RTM company.

Carpets and LED lighting

29. It is undisputed that the communal area carpets require replacement. Mr Geller described the disintegrated underlay as looking like sand. It had caused the carpet to bunch creating a tripping hazard. In response, Mr Dalton of Prime explained that the managing agents are aware of the issue. They visit regularly and have acted upon any health and safety issues. Where necessary, Prime had placed heavy duty tape on the carpet, as shown in photographs, in order to address the risk.

30. The sample lease contains a covenant on the part of the developer in Schedule 5 to keep the common areas of the building in a good and substantial state of repair, condition and decoration, including renewal and replacement of all worn and damaged parts.

31. Mr King of the RTM company explained how the decision to replace the carpet was deferred due to the need to incur expenditure in undertaking emergency works which had taken priority. The Applicants' chronology records that the decision to defer for an undetermined period was taken whilst the Applicants were directors "with the Applicant dissenting". Mr King confirmed that it remains the intention of the RTM company to replace the carpet once funds can be released. The budget is currently under discussion for the next service charge year.

32. The Tribunal is satisfied that a firm intention exists to address the carpet and that reasonable steps have been taken in the meantime. It is unfortunate the carpet has not been replaced sooner, but the evidence demonstrates that it was necessary to delay for legitimate reasons.

33. In the circumstances, the Applicants have not satisfied the Tribunal that a breach of obligation within the lease has occurred by reason of the condition of the communal area carpet.

34. When the Applicants were directors, the RTM company proposed to replace lights in common areas with LED lighting. They are aggrieved this has not materialised. It is undisputed by the RTM company that energy costs could be reduced over time by fitting LED lights. However, the lease does not require wholescale replacement of the lights for the common areas to be kept in good order. The failure to fit LED lighting is not a breach of covenant.

35. A main thread of the Applicants' case is that notices were issued under the consultation provisions for major works in section 20 of the Landlord and Tenant Act 1954 setting out the intention to undertake works, but they did not materialise. The Tribunal heard how the carpet and lighting works did not proceed after the RTM company obtained a Capital Expenditure and Dilapidation Report in March 2023. The report identified a series of critical works, including smoke detection works and pipework for communal heating.

36. Whilst section 20 notices had been issued for the carpets and LED lighting, there is no legal requirement to proceed with the works. It does not demonstrate any breach of obligation within the lease.

Reserve fund

37. The Applicants are highly critical of the RTM company board. They make generalised comments over financial mismanagement and failures to act in the best interests of the RTM company. In their skeleton argument, the Applicants refer to failures of the board to make necessary uplifts in the service charge from 2023. From what the Applicants said at the hearing, the grievance appears to be that the carpet and LED lighting works could have been accommodated with better budgeting.

38. From the First Respondents' evidence, the RTM company has taken and acted upon professional advice. The board obtained a capital expenditure report to assist in prioritising works and raise funds for the likely expenditure. There have been significant calls upon the reserve fund, including circa £400k in replacing timber balconies that posed a fire risk and around £75k on boiler replacement. The RTM company has engaged professional managing agents in assessing the appropriate level of reserve fund to hold.

39. Clearly there have been tensions between the Applicants and RTM company board, with the Applicants expressing exasperation with what they believe to be inadequate communication, amongst other matters.

However, it has not been demonstrated that there has any breach of obligation owed to the Applicants under the terms of their lease or relating to the management of the Property.

Other circumstances

40. The section 22 notice referred only to failures of the directors in their fiduciary duties to act in the best interests of the RTM company in their relationship with the previous managing agent. This ground was not advanced further at the hearing. The Tribunal cannot be satisfied from the documentary material reveals any other circumstances which make it just and convenient to make the management order.

Just and convenient

41. Even if the Tribunal had been satisfied of a ground under section 24(2) (which it has not), we would still need to be satisfied that it is 'just and convenient' for the order to be made. A multitude of issues arise.

42. The application was made by a very small proportion of leaseholders indicating that the vast majority are content with existing arrangements. Now that Prime are managing agents, there appears to be a good working relationship with the RTM company. Prime were only appointed in July 2023 and steps are being taken to address the works required. In our view, it is too early to replace them; a view that appears to be shared by the proposed manager.

43. As already mentioned, it transpired that Mr Thornton's willingness to act as manager is conditional upon Prime remaining as managing agents. Mr Thornton had also anticipated that he would take control of the RTM company by removing the directors until replacements were elected. It is a cause for concern that the nominated person had not fully understood the role. His conditions of appointment cannot be met.

44. When the application was made, Mr Thornton had not appreciated that the appointment of a manager would result in the RTM company being removed. Under section 105(4) of the Commonhold and Leasehold Reform Act 2002, the right to manage the premises would cease to be exercisable by the RTM company once a manager appointed under Part 2 of the 1987 Act begins to act.

45. During the hearing, Mr Thornton suggested that the Tribunal might exercise its discretion to keep the RTM company in place and compel the directors to resign. This was plainly outside the scope of the section 24 application. It would serve no purpose for the Tribunal to address the suitability of the nominated appointee in more detail.

46. Further factors arise from the Property being a higher risk building with the added dimension of the BSA. At present, the RTM company is the accountable person under the BSA. The question for the Upper Tribunal in *Unsdorfer v Octagon Overseas Limited* [2024] UKUT 59 (LC) was whether a Tribunal appointed manager under section 24 of the 1987 Act

can be an 'accountable person' within the meaning of section 72, BSA. The conclusion reached was that no management order made by the Tribunal may require the manager to perform functions which Part 4 imposes on the accountable person. The Tribunal is not able to confer functions on the Manager which Part 4 provides are to be carried out by an accountable person [114].

47. There was consensus at the hearing that if an order to appoint a manager is made, then (applying *Unsdorfer*) the manager cannot carry out BSA obligations of an 'accountable person' and cannot be an 'accountable person'. By default, the Second Respondent (the freeholder) would become the 'accountable person' and the 'principal accountable person' for the purposes of the BSA. The Second Respondent strongly opposes being placed in that position, having not been involved in the management of the building for over a decade. During that time, it has had no control over repairs or maintenance.

48. There was no suggestion that the reluctance of the freeholder to become involved with BSA matters raised any jurisdictional bar to the Tribunal making the order. However, the division in responsibilities for the building and how they would be funded (given that the manager would be responsible for raising service charges) would require unravelling. Inevitably, it would cause delay.

49. When Mr Thornton submitted the draft form of management order, he envisaged taking control of the RTM company and removing the directors. Radical changes would be needed to the draft management order, to include the involvement of the Second Respondent. This would be another time-consuming factor. It is significant because urgent building safety matters need attention. They include the SCS which is not working due to end of lifespan components. Steps are being taken to address these matters, and it would not assist progress by complicating the management arrangements at this time. It is clearly imperative that critical works be allowed to proceed unhindered by delay from these proceedings.

50. In all the circumstances, it is not just and convenient for the order to be made to appoint a manager.

Conclusion

51. The Applicant has not satisfied the Tribunal of any grounds for making an order as specified in section 24(2) of the 1987 Act.

52. It follows that no order for the appointment of a manager shall be made, and the application must be dismissed.

Application under section 20C and fees

53. The Applicants applied for an order under section 20C of the Landlord and Tenant Act 1985 so that the landlord may not pass on any costs

incurred in connection with these proceedings before the Tribunal through the service charge. The Applicants also applied for a refund of the fees paid in respect of the application/hearing.

54. The application to appoint a manager has not succeeded with no grounds within section 24(2) demonstrated. In the circumstances, it would not be just and equitable to make an order under section 20C.

55. As the Applicants have not succeeded in their application to appoint a manager, the application for reimbursement of Tribunal fees is refused.

56. Whilst the Applicants had indicated that they wished to seek recovery of their costs, they decided to await the outcome of this decision. The attention of all parties is drawn to the Upper Tribunal decision in *Willow Court Management Co Ltd v Alexander* [2016] UKUT 0290 (LC), which informs us that unreasonable conduct is a precondition to the power to award costs. That first stage involves the application of an objective standard and not the exercise of the Tribunal's discretion.

Name: **Judge K. Saward** **Date:** 3 March 2025

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).