5357

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case number : CAM/22UN/LAM/2010/0001

Property	:	**High Oaks, Michaelstowe Drive, Harwich, Essex CO12 5ER**
Applications	**a**	For the appointment of a manager [LTA 1987, s.24]
	b	For the limitation of landlord's costs recoverable by way of service charge [LTA 1985, s.20C]
Applicants	**1**	Peter W Howlett, 24 High Oaks, Michaelstowe Drive, Harwich, Essex CO12 5ER
	2	Mrs A Watkins, 1 High Oaks, Michaelstowe Drive, Harwich, Essex CO12 5ER
Landlord	:	Matthew Ritchie Thorpe, Britannia House, 150 London Road, Southend-on-Sea, Essex SS1 1PH
Management Co	:	High Oaks Management Company Limited, c/o Compass Limited, 28 Kingsway, Harwich, Essex CO12 3AB [fao Mr R C Frith]

DECISION

Handed down 6th September 2010

Tribunal	:	G K Sinclair (chairman), G F Smith MRICS FAAV, C Gowman BSc MCIEH MCMI
Hearing date	:	Thursday 12th August 2010 at The Tower Hotel, Harwich

Introduction

1. By this application Mr Howlett and Mrs Watkins seek to replace Mr Frith, the principal director of Compass Ltd, as managing agent for this mainly new-build estate of flats and bungalows intended for occupation by the active over-55s. Mr Howlett and Mr Frith had a previous falling out over service charge issues, as documented in an earlier tribunal decision dated 29th December 2009.[1] As was pointed out in paragraph 27 of that decision

[1] CAM/22UN/LAM/2009/0004

the effect of an order appointing a new manager would be not merely to replace Mr Frith/Compass Ltd but also the respondent management company, owned and controlled by the lessees themselves, that had appointed Compass as its managing agents.

2. Having inspected the premises in the presence of the applicants, Mr Frith and some leaseholder representatives of the respondent management company, and on considering the parties' written and oral evidence and submissions, and after several unsuccessful attempts by the applicants to get their proposed new manager to attend the hearing, the tribunal determined – for the reasons appearing below – that, while the management provided by Compass Ltd is amateurish and the company lacks adequate understanding of the statutory framework governing residential property management, the application to appoint a new manager under Part II of the Landlord and Tenant Act 1987 should be dismissed. In the circumstances there are no grounds for making an order in the applicants' favour under section 20C of the Landlord and Tenant Act 1985.

Applicable legal provisions

3. The law concerning the appointment by the tribunal of a manager can be found in sections 21 to 24A inclusive of the Landlord and Tenant Act 1987. Section 21 refers to the tenant's right to apply, section 22 to service of a preliminary notice, section 23 to the manner of application to a tribunal, and section 24 deals with the order which a tribunal can make and the circumstances in which it may do so. Section 24A deals with the jurisdiction of the tribunal.

4. No party to this application being legally qualified or represented, the very detailed provisions of section 24, as amended, are set out in full below. See especially subsection (2), which lists the circumstances in which the tribunal may make such an order.

> (1) A leasehold valuation 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 –
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> (a) such functions in connection with the management of the premises, or
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> (b) such functions of a receiver,
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> or both, as the tribunal thinks fit.
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> (2) A leasehold valuation tribunal may only make an order under this section in the following circumstances, namely –
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> (a) where the tribunal is satisfied –
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> (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
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> (ii) . . .
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> (iii) that it is just and convenient to make the order in all the circumstances of the case;
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> (ab) where the tribunal is satisfied –
>
> (i) that unreasonable service charges have been made, or are

proposed or likely to be made, and

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

(aba) where the tribunal is satisfied –

(I) that unreasonable variable administration charges have been made, or are proposed or likely to be made, and

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

(abb) where the tribunal is satisfied –

(I) that there has been a failure to comply with a duty imposed by or by virtue of section 42 or 42A of this Act, and

(ii) 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

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

or

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

(2ZA) In this section "relevant person" means a person –

(a) on whom a notice has been served under section 22, or

(b) in the case of whom the requirement to serve a notice under that section has been dispensed with by an order under subsection (3) of that section.

(2A) For the purposes of subsection (2)(ab) a service charge shall be taken to be unreasonable –

(a) if the amount is unreasonable having regard to the items for which it is payable,

(b) if the items for which it is payable are of an unnecessarily high standard, or

(c) if the items for which it is payable are of an insufficient standard with the result that additional service charges are or may be incurred.

In that provision and this subsection "service charge" means a service charge within the meaning of section 18(1) of the Landlord and Tenant Act 1985, other than one excluded from that section by section 27 of that Act (rent of dwelling registered and not entered as variable).

(2B) In subsection (2)(aba) "variable administration charge" has the meaning given by paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

(3) The premises in respect of which an order is made under this section may, if the tribunal thinks fit, be either more or less extensive than the premises specified in the application on which the order is made.

(4) An order under this section may make provision with respect to –

(a) such matters relating to the exercise by the manager of his functions under the order, and

(b) such incidental or ancillary matters

as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters.

(5) Without prejudice to the generality of subsection (4), an order under this section may provide –

(a) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager;

(b) for the manager to be entitled to prosecute claims in respect of causes of action (whether contractual or tortious) accruing before or after the date of his appointment;

(c) for remuneration to be paid to the manager by any relevant person, or by the tenants of the premises in respect of which the order is made or by all or any of those persons;

(d) for the manager's functions to be exercisable by him (subject to subsection (9)) either during a specified period or without limit of time.

(6) Any such order may be granted subject to such conditions as the tribunal thinks fit, and in particular its operation may be suspended on terms fixed by the tribunal.

(7) In a case where an application for an order under this section was preceded by the service of a notice under section 22, the tribunal may, if it thinks fit, make such an order notwithstanding –

(a) that any period specified in the notice in pursuance of subsection (2)(d) of that section was not a reasonable period, or

(b) that the notice failed in any other respect to comply with any requirement contained in subsection (2) of that section or in any regulations applying to the notice under section 54(3).

(8) The Land Charges Act 1972 and the Land Registration Act 2002 shall apply in relation to an order made under this section as they apply in relation to an order appointing a receiver or sequestrator of land.

(9) A leasehold valuation 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.

(10) An order made under this section shall not be discharged by a leasehold valuation tribunal by reason only that, by virtue of section 21(3), the premises in respect of which the order was made have ceased to be premises to which this Part applies.

(11) References in this Part to the management of any premises include references to the repair, maintenance or insurance of those premises.

5. The grounds for making an order which are of greatest relevance in the instant case, in the tribunal's view, are those in subsection (2)(ab), (aba) & (ac). In each, as well as

making a primary finding of fact, the tribunal must also be satisfied that "it is just and convenient to make the order in all the circumstances of the case".

Inspection, hearing & evidence

6. The tribunal inspected the estate on the morning of the hearing. At the time the weather was fine and dry. Present throughout were Mr Howlett, his spokesman Mr Terry, and Mr Frith. Other leaseholders made themselves known as the group progressed around the main building and grounds.

7. High Oaks is a residential development built next to the site of a former borstal, on the western edge of Harwich. The former borstal is itself a care home at present. High Oaks comprises the former headmaster or governor's house (now converted into two flats), a main building with flats on either side of a long corridor with informal meeting areas on each of two floors, and eleven individual freehold bungalows. The tribunal was informed that the main building had been abandoned in a part-completed state for a number of years after the original developers went into liquidation. It was then acquired by Knight Developments Ltd (the original landlord) and completed. The buildings all have pitched roofs, with the main building and bungalows constructed of brick while the former headmaster's house is finished in an unpainted concrete render. There is parking on site, and communal garden areas laid largely to grass, shrubs and hedging. Mr Frith stated that all the external areas were communal, even the small hedged gardens outside the bungalows. This the tribunal found surprising, but without sight of a copy of any of the freehold titles (including that for the estate itself) it was unable to check. The lawn next to the former borstal is bounded by a small fence or hedge. Access is obtained by a private roadway; the adopted highway terminating on Michaelstowe Drive near the entrance to the former borstal.

8. Prior to the hearing the tribunal had been informed by fax that due to a combination of holidays and staff illness the proposed new manager, Ms Tanya Lumbis, a chartered surveyor at Boydens in Colchester, would be the only surveyor in her office on the day of the hearing, so under RICS rules could not leave the building other than briefly. She would not be at the hearing, despite the tribunal's request that she present herself for questioning, both by it and by the respondents. The tribunal urged the applicants to check if this was still the position, or whether she could obtain cover from another of her firm's offices. It was informed that the position was unchanged.

9. Mr J Terry addressed the tribunal on behalf of the applicants. At the directors' request Mr Frith represented the respondents. Also present were twenty-one residents, all but one supporting the respondents and the existing management arrangements.

10. The applicants' concerns about the present system of management are set out in some detail in the application form, but at the hearing Mr Terry concentrated on :
    a. The alleged mishandling of a contract to repair gutters, where he argued that a vote amongst residents in favour of a more limited and less costly scheme had been ignored
    b. Lack of consultation over gardening and cleaning contracts
    c. Failure to make an insurance claim for the repair of damage caused by a leaking roof

d. The needless replacement of storage heaters in the corridors, when spare parts were still available more cheaply
e. Failure properly to remove the crown and some dangerous branches from an oak tree close to some residents' homes
f. Failure to produce the certificate of insurance and receipts, etc when requested to do so
g. Failure to comply with any Code of Practice
h. Provision of misleading budgets and accounts (a point followed up by the tribunal)
i. Persisting with demands for "arrears" of service charge from Mr Howlett – and informing other residents that such were due – despite an earlier tribunal finding that, on the evidence presented, nothing was owing.

11. In response Mr Frith :
a. Produced all of the voting slips and minutes of meetings concerning the gutter repairs, and explained how quotations for the work were increased by his 10% uplift for management, to show the true cost to residents.
b. Explained that gardening and cleaning were put out to tender in March each year, but that the cleaning firm approached by Mr Howlett had not quoted until long after the closing date. They were free to do so again in early 2011.
c. Said that, contrary to what the applicants were saying, the cost of the two lights damaged by water ingress was a lot less than the insurance excess. The total cost of dealing with the water ingress was about £80 for two lights; there was no damage to the carpet, and the damp to the ceiling dried out and a crack dealt with by the decorator on his next visit. The cause of the damp was traced to moss falling into an internal roof gully and thence into the drain. When that was cleared the problem was solved.
d. Stated that the majority of the storage heaters had been installed by the original developer in about 1988, before the main building sat derelict for some years. There were numerous problems with them sticking and blasting out heat for a few hours and, after discussing the matter with the regular electrician it was decided that it was better to replace them at trade prices than dismantle them completely in order to replace a defective part. The total cost was less than the statutory consultation limit, and Compass restricted its own management fee for the work to only £50.
e. Said that so far as the tree was concerned he had consulted the gardener and, as it was subject to a TPO, then approached the Essex County Council Tree Officer in Chelmsford, who then took several months before attending site and informing Mr Frith that as the tree had been pruned thoroughly 25 years before he would not be allowed to re-prune it for another 25. Mr Frith confirmed that he had not first sought the advice of an arboriculturalist
f. Reiterated that he had supplied copies of the insurance details to Mr Howlett on more than one occasion and, as had been confirmed to be the case by Mr Terry when he was a director of the management company, receipts etc were open of inspection
g. Said that he had his own Code of Practice (a copy of which could be found in the hearing bundle at pages 127–128
h. Said that, although he had set them out under different categories, while the account had lumped them together, the figures for repairs and maintenance on

his budget at page 79 and the accountant's certified account on page 125 did tally. However, he accepted that the substantial cost of the buildings insurance was completely absent from the accounts because he considered that insurance was separate from the service charge.

i. He (and a number of the spectators sitting behind him) still believed that if the other residents had paid an amount for service charge and Mr Howlett had not then it was still owing.

12. Asked by the tribunal about the buildings insurance, Mr Frith confirmed that he used a broker, Deacon, to check the cost of cover annually, and tended to go with the cheapest. Last year cover was with Aviva; this year with Groupama.

13. Questioned by the tribunal, Mr Frith did not see that there was a problem, either in fact or in perception, in him being the appointed managing agent, the company secretary for the management company, and also chairing its annual and directors' meetings (despite not being a director). Neither he nor those behind him, including directors, saw any problem with Mr Frith continuing to chair meetings – instead of withdrawing from the room – while the renewal of his contract was being discussed.

Findings

14. Having considered all the evidence put before it, oral and written, and having taken note during the inspection and hearing of the physical state of the premises and the relationship which Mr Frith appears to enjoy with the vast majority of residents – being on first name terms with those met in passing on site – the tribunal is satisfied that in many practical ways Mr Frith is delivering a good standard of service at an economical price, with regular reviews of the insurance, and perhaps also other contracts (none of which appear to be long-term within the meaning of the consultation regulations). So far as the issues of the guttering and storage heaters are concerned it recognises that there is a conflict of view but prefers the evidence of Mr Frith and the management company. The uplift in the tender figure provided by Mr Howlett's son was explained properly as a means of informing residents of the true cost of each quote after the addition of the managing agent's 10% fee. It was not some vile conspiracy.

15. However, the tribunal is surprised that in the case of tree surgery to the oak tree – usually an expensive operation – Mr Frith relied upon the advice of a jobbing gardener instead of getting in professional help from an arboriculturalist who would be best placed to report and then negotiate with the Tree Officer on the management company's behalf.

16. Of greater concern is Mr Frith's lack of knowledge or concern about the precise terms of the lease and the more professional and legal aspects of property management. He was seemingly unaware of the *Service Charge Residential Management Code* ("the Blue Book") published by the Royal Institution of Chartered Surveyors, and approved by the Secretary of State under the terms of section 87 of the Leasehold Reform, Housing & Urban Development Act 1993. He is not himself a chartered surveyor, but it is a far better guide to that which is regarded as good practice than his own two page effort.

17. While he was able to explain the apparent radical discrepancy between his own figures for repairs and those shown in the certified accounts this should in future be clarified,

with the managing agent and accountant trying to adopt consistent terminology. What is wholly wrong is the omission from both Mr Frith's budget figures (with a list of actual expenditure in the previous year) and the certified accounts of the expenditure incurred for buildings insurance. This would give a very misleading impression both to residents and also to intending purchasers. The word that the latter's solicitors might be inclined to use is "misrepresentation". The Fourth and Fifth Schedules to the lease are quite clear. Buildings insurance is simply one element of the annual service charge and it must be accounted for properly.

18. The tribunal had to remind Mr Frith, and directors and other residents supporting him, that when a tribunal has determined – on the basis of the evidence that the managing agent has chosen to place before it – that Mr Howlett is not liable to pay an amount by way of service charge, and when permission to appeal has been refused both by that tribunal and also by the appellate body (the Lands Tribunal), then that is final. It was quite wrong of Mr Frith to seek to pursue Mr Howlett further in the County Court and to persist in including this amount as owing in accounts later presented to and discussed with the other residents.

19. The tribunal was also not impressed by steps taken by the management company to exclude those which its members decided were "in breach" of their obligations from all votes and participation in the affairs of the estate. Democracy can all too easily become a "tyranny of the majority" and if in the present context it leads to leaseholder members of the awkward squad either not being permitted to involve themselves or being actively excluded from discussions affecting their potential service charge liabilities then the natural consequence could well be that they feel obliged to resort instead to exercise of their statutory rights under sections 20 and 27A of the Landlord and Tenant Act 1985.

20. The overall impression gained by the tribunal is of a managing agent that on a practical level gets the job done reasonably well, at very reasonable cost, and is approachable by all but a few with whom he has fallen out. However, perhaps encouraged by residents, there is an over-emphasis on "health and safety" as a wet blanket to the sorts of activities which residents – particularly those who are retired – like to indulge in to brighten their days. In particular, the refusal to permit some modest planting, installation of flower pots or the erection of bird feeders outside windows without a requirement to "gift them" to the estate in order that they can be covered by insurance is depressing. The tribunal has seen many other similar estates where gardening by residents is believed to give them purpose, a sense of belonging by personalising their surroundings, reduces dependence on contract gardeners, and is encouraged by those in charge. Such a difference from High Oaks.

21. On a professional level the tribunal regards the current management to be amateurish, lacking in knowledge of the law and best practice, and reluctant to seek assistance from relevant experts where that would be advisable – perhaps for fear of the cost.

22. The tribunal is satisfied that the current management has levied unreasonable service charges, but only to the extent that demand was made of Mr Howlett that he pay sums later determined by a tribunal not to be payable. Otherwise there is no sign here of excessive charging. Compass has also unlawfully sought to charge Mr Howlett by way

of administrative charges (for which the lease makes no provision) for recovery of sums found not to be due, for the improper service of no fewer than three section 146 notices, and for Mr Frith's costs of earlier court and tribunal proceedings. The invoices and amounts concerned are mentioned in paragraph 12 of the tribunal's earlier decision.

23. As to the question whether Compass 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 it is simpler to say that Mr Frith was wholly unaware of its existence. He was urged to invest in a copy and to apply it in his daily practice.

24. The applicants would therefore appear to have successfully jumped the first hurdle in seeking the appointment of a new manager. However, the all-important second stage is that it must also be "just and convenient to make the order in all the circumstances of the case".

25. In most such cases the tribunal is presented with a united or almost united tenant body determined to rid themselves of an incompetent or avaricious manager. They produce before the tribunal their choice of replacement manager, questions are asked about his or her experience, terms and conditions, and their proposed rates of charge and start dates are discussed. Not so in this case. For reasons which are no fault of the applicants their proposed manager was unable to attend, despite the importance of being at the hearing. The majority of the residents – the tribunal would venture to suggest the vast majority – turned up in support of the manager whom they both know and like. This rather gave the lie to the applicants' contention that there were two camps of equal size, and a large number of others too intimidated by the manager to make their views known.

26. Where the large majority of paying residents (both leaseholders and freehold owners of the bungalows) appear to support a management which is attentive, friendly and mindful of the desire of those perhaps on fixed incomes to avoid unnecessary extravagance it would be churlish for a tribunal to force upon them a wholly unknown quantity as a new manager, particularly where the disclosed management costs are, if anything, slightly higher. The application therefore fails. No order is made under section 20C.

27. The tribunal trusts that careful thought will be given to the criticisms of the current management which appear in this decision, and that the residents collectively recognise that administrative standards must be improved. If the rift between residents can be healed then so much the better, as a refusal to respond to legitimate queries and explain steps which are being taken is likely to result only in the more expensive and time-consuming need to respond to an application to a Leasehold Valuation Tribunal.

Dated 6th September 2010

Graham K Sinclair – Chairman
for the Leasehold Valuation Tribunal