Residential
Property
TRIBUNAL SERVICE

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTION 20C OF THE LANDLORD AND TENANT ACT 1985 AND SECTION 24 OF THE LANDLORD AND TENANT ACT 1987

Reference number:	LON/00AY/LAM/2005/0029
Property:	Ruskin Court, Winchmore Hill Road, London, N21 1QJ
Applicants:	Dr E A and Mrs J A Mottalib (Lessees of Flat 18)
Respondent:	Regisport Limited (Lessor)
Appearances:	For the Applicants: Mr R Mottalib, a Barrister and son of the Applicants For the Respondent: Mr R Colley of Johnson Cooper Limited, Managing Agents
Tribunal:	Mr A Andrew Mr F Coffey FRICS Mrs M Colville JP, LLb
Application Dated:	21 November 2005
Directions:	14 December 2005 and 16 March 2006
Hearing:	28 April 2006
Decision:	5 June 2006

DECISION

1. We declined to appoint a manager.

2. We declined to make an order under Section 20C of Landlord and Tennant Act 1985 ("the 1985 Act") or to order the Respondent to reimburse the application and hearing fees paid by the Applicants to the tribunal.

FACTS

3. On the basis of the submissions made on behalf of both parties and the documents in the substantial hearing bundles, to which our attention was specifically drawn, we found the following facts: -

   (a) The Property was built in the 1930s and consists of 21 two-bedroom flats contained in two separate blocks. There are garden areas to the front of both blocks. To the rear of one block is a further garden area, whilst to the rear of the other are garages accessed by a drive leading from the main road.

   (b) On 4 October 1996, the Applicants took a lease of Flat 18 from the then Freeholders, Mountview Estates Plc. The Lessor's covenants are to be found in Clause 3 of the Lease. Subclause 3(2) requires the Lessor to insure the Property *"... against loss or damage by fire and such other risks as the Lessor may determine in its absolute discretion ..."*. Apart from this point the terms of the Lease were not put in issue before us. Mountview Estates Plc insured the Property with Norwich Union and the policy included subsidence cover.

   (c) Cracks started appearing in the Property in 1998 although it would seem that at that time, they were not a particular cause for concern. The cracks widened substantially in 2001. It was not clear when Mountview Estates Plc first became aware of the problem. In any event they sold the Property in March 2001 to the Respondent without making any claim under their building's insurance policy. Mr Colley suggested that the freehold reversion was owned by Regis Group Plc but on the basis of the documents in the hearing bundle, we were satisfied that it was owned by the Respondent, presumably a wholly owned subsidiary.

   (d) Upon its purchase, the Respondent insured the Property with CGU. On the basis of the submissions made at the hearing, it was apparent that the Property was insured under a block policy that initially included subsidence cover. Following the Respondent's purchase of the Property, a subsidence claim was notified to CGU. As far as we could ascertain, from Mr Mottalib's submissions, that company rejected the claim and withdrew subsidence cover, presumably on the basis of a failure to disclose a pre-existing condition. Although not directly relevant to our decision, we were also informed that Norwich Union subsequently acquired CGU.

(e) In September 2001, Mountview Estates Plc submitted a claim to Norwich Union in respect of the damage caused to the Property. Norwich Union ultimately agreed to accept the liability for damage caused between 1995 and 2001 when they were at risk. However, they declined to accept liability for *"any major distortions, nor the provision of underpinning"* on the basis that the relevant damage occurred after their period of risk.

(f) The Applicant's have issued proceedings in the High Court against both Mountview Estates Plc and the Respondent seeking an order that they complete the underpinning of the Property without charge to the lessees. There is a directions hearing in May 2006 and Mr Mottalib informed us that the claim would be heard towards the end of this year.

(g) On its purchase of the Property, the Respondent appointed Manage, Administer and Supervise Limited as managing agents. That company was acquired by Equity Asset Management Limited in early 2002 so that the latter company became the managing agents.

(h) Piers Management Limited, who are also a wholly owned subsidiary of Regis Group Plc, were appointed in 2004 to collect the ground rents and insurance premiums so that, from that time, the management of the Property was effectively split between Equity Asset Management Limited and Piers Management Limited.

(i) Johnson Cooper Limited were formed in January 2005 by Mr Stephen Johnson and Mr Grant Cooper who, we accept, were not previously involved with either Regis Group Plc or their subsidiary companies. Johnson Cooper Limited purchased the assets of Equity Asset Management Limited and were appointed as the new managing agents of the Property.

(j) In November 2005 another company, Erinaceous Group plc purchased the shares in Mountview Estates Plc and also the shares of Mr Grant Cooper in Johnson Cooper Limited. Nevertheless on the basis of Mr Colley's submissions, we accepted that there was no connection and no common shareholding between the Respondent and Johnson Cooper Limited. These facts are not directly relevant to our decision but we add them because it was apparent that they had caused a degree of confusion and suspicion in the minds of the Applicants.

(k) The Applicants issued Notices under Section 22 of the Landlord and Tenant Act 1987 ("the 1987 Act") on 22 September 2004 and 18 October 2005 and copies of both Notices were in the hearing bundles.

(l) On 21 November 2005, the Applicants made three applications to the Tribunal. They applied under Section 27A of the 1985 Act for a determination of their liability to pay service charges in respect of the years 2001/2 through to and including 2005/6. They also applied under Section 24 of the 1987 Act for the appointment of a manager. Finally,

in respect of both applications they applied under Section 20C of the 1985 Act for an order limiting the recovery, through the service charge, of the Respondent's costs incurred in the proceedings. The Directions authorised us to consider ordering the Respondent to reimburse the application and hearing fees paid by the Applicants.

(m) The issues were referred, with the consent of the parties, to mediation that occurred in February 2006. A copy of the mediation agreement, which did not include a confidentiality clause, was included in the hearing bundles. In essence, the parties reached agreement on all the service charge issues leaving outstanding only the application to appoint a manager and the application under Section 20C of the 1985 Act insofar as it related to those proceedings. It was apparent from the mediation agreement that the Respondent, through its managing agents, had made substantial concessions in respect of the disputed service charges. In particular they had agreed that in future the service charges and ground rents, including the insurance premiums, would be collected by a single managing agent. Thus we understood that the management of the Property was now in the sole hands of Johnson Cooper Limited.

GROUNDS FOR THE APPLICATION TO APPOINT A MANAGER

4. In their Notice dated 18 October 2005, served under Section 22 of the 1987 Act, the Applicants specified 20 grounds upon which they proposed to rely in applying for an order for the appointment of a manager. At the hearing Mr Mottalib helpfully condensed those grounds under four broad headings.

Vermin Infestation

5. For a period just short of three years, the Property had been infested by rats. This was caused by poor refuse facilities. The problem was only cured following the intervention of Enfield Council who served a formal notice under the Prevention of Damage by Pests Act 1949 on 10 June 2003.

Subsidence

6. Mr Mottalib criticised the Respondent for its failure both to insure against subsidence (which he considered to be in breach of its obligations under the Lease) and to either underpin the Property or repair the damage that had occurred since 1998 when cracks first appeared in the Property. It was apparent from the photographs handed in at the hearing that the Property was in a poor state of repair.

7. The previous managing agents had in August 2003 served statutory consultation notices in respect of essential drainage, roof and chimney repairs. The total cost of which was estimated at just over £50,000. The covering letter stated that during the following year, the Respondent also proposed to carry out internal and external decorations at an estimated cost of £2,850 per lessee. None of this work had been completed. Mr Mottalib asserted that the estimated costs were too high although he accepted that he

could produce no evidence to support that assertion. In any event he accepted that it would be pointless to complete the work until the Property had been underpinned and appropriate remedial work completed.

Insurance Documents

8. Mr Mottalib drew our attention to a number of letters and documents in the hearing bundles that supported his assertion that the previous managing agents had, over a long period of time, failed to provide copies of all the relevant insurance documents so that the lessees had been unable to establish either the extent or the amount of cover. There was a suggestion that the Property had for a period of time been left uninsured although we were unable, with any confidence, to verify that suggestion. Certainly Johnson Cooper Limited had provided copies of the current insurance documents and it was apparent that the Property was now insured with Allianz Cornhill. Although one of the insurance certificates referred to Flats 1-12, Ruskin Court, it was clear that that was no more than a typographical error that appeared to have been corrected.

Accounts

9. Mr Mottalib criticised the previous managing agents for numerous and repeated failures relating to the preparation of the accounts and the provision of supporting documents. It is unnecessary to recount those failures in detail because they were accepted by Mr Colley. In essence, the previous managing agents had failed to provide audited accounts for the years from 2001 to 2004. They had endeavoured to accumulate a reserve fund, for which the lease made no provision. They had claimed administration charges for which the lease, again, made no provision. They had ignored requests from the Applicants to inspect the invoices and receipts supporting the expenditure claimed through the service charges. When finally produced they could not be reconciled with the sums actually claimed.

10. In respect of Johnson Cooper Limited, Mr Mottalib's main complaint was that they had acted in a rude and aggressive manner to the extent that the Applicants had made a complaint to the police. However, no oral evidence was given to support that allegation and Mr Mottalib relied on an inconclusive letter from Basildon Central Section Police Station to Dr E A Mottalib requesting him to contact the Community Liaison Officer. With an allegation of this nature, we considered that the burden of proof lay with the Applicants and we further considered that such burden had not been discharged.

11. We heard evidence from Mr M Yun, the Applicant's proposed manager. However our decision not to order the appointment of a manager did not turn on that evidence and it is unnecessary to consider it further.

REASONS FOR OUR DECISION

12. The provisions relating to the appointment of a manager are to be found in part 2 of the 1987 Act. Subsection 24(2) provides that we may only make an

order in certain specified circumstances. These can be paraphrased as follows: -

(a) Where there are breaches of the lessor's management obligations and it is just and convenient to make an order; and

(b) Where unreasonable service or administration charges have been made or are proposed to be made and it is just and convenient to make an order; and

(c) Where there are breaches of the lessor's obligations to hold service charge contributions in a designated account and in trust and it is just and convenient to make an order; and

(d) Where there has been a failure to comply with the approved code of practice and it is just and convenient to make an order; and

(e) Where other circumstances exist which make it just and convenient to make an order.

13. On the basis of Mr Mottalib's submissions and the documents in the hearing bundle, to which our attention was drawn, there was no doubt that there had been numerous breaches of the lessor's management obligations: unreasonable administration charges had been made and there had been breaches of the RICS residential management code, which is that approved under Section 87 of the Leasehold Reform Housing and Urban Development Act 1993. We did not consider that the Applicants had substantiated their complaint of unreasonable service charges and on the basis of Mr Mottalib's submissions it was not part of their case that the Respondent had failed to hold the service charge contributions in a designated account or in trust. Equally, on the basis of the insurance covenant recited above, the Respondent was under no obligation to insure the Property against subsidence.

14. With the exception of the continuing disrepair (to which we refer below), all the breaches and failures had taken place whilst the Property was being managed by either Manage Administer and Supervise Limited or Equity Asset Management Limited. Johnson Cooper Limited had assumed responsibility for management of the Property on 18 January 2005. Despite the past accounting irregularities, they had produced accounts for the year ending 31 March 2005 by June 2005. A realistic budget had been prepared for the following year and on-account payments, demanded on the basis of that budget. Presumably with the consent of their clients, they had agreed to the mediation of all the outstanding service charge issues. Agreement had been reached with the Applicants and it was apparent from the mediation agreement that past mistakes had been acknowledged and concessions made.

15. We agreed with Mr Mottalib that it was the lessor, and not its managing agent, who must bear responsibility for any breaches of its statutory and contractual obligations. Clearly a lessor could not be allowed to frustrate the intention of

Section 24 of the 1987 Act by the simple expediency of appointing a succession of new managing agents when things went wrong. However, in this case, Johnson Cooper Limited had been in place for more than 15 months and, on the basis of the evidence before us, they appeared to be managing the Property effectively.

16. We also considered that where, as in this case, only one lessee applies for the appointment of a manager, a cautious approach should be adopted. Although we appreciated that only four or five of the lessees occupied their flats, it was obvious that all the lessees had a vested interest in ensuring that the Property was effectively managed. To make an order on the application of only one lessee could result in an appointment that did not have the support of a majority. Our concerns in this respect were strengthened by the Applicant's letter of 21 March 2006, to the proposed manager. In that letter they proposed *"scrapping"* the arrangement for the cleaning of the common parts; they suggested that the gardening service be substantially reduced and they proposed that service charges should be demanded quarterly rather than half-yearly as provided in the Lease. Although any manager appointed by the tribunal would obviously abide by the Lease terms, the tenor of the Applicants' letter suggested that this had not been understood.

17. The outstanding live issue related to the continuing state of disrepair that had resulted from the settlement of the Property since 1998. We fully understood the Applicants' concerns and we had considerable sympathy for the position in which they and the other lessees found themselves. However, in reality, the Property was blighted pending the outcome of the current High Court litigation. Mr Mottalib considered that the total cost of underpinning, associated remedial work and internal and external decorations could be as high as £1 million. On the basis of the evidence produced to us, it seemed that only a relatively small proportion of that cost would be funded by the Norwich Union as a result of the claim made by Mountview Estates Plc. The Respondent clearly considered that the balance would have to be funded by the lessees through the service charge. Equally it was apparent that the lessees would not pay those service charges pending resolution of the High Court proceedings. Were we to appoint a manager, he would have no funds either to carry out the necessary work or to pursue either the Respondent or the lessees for the necessary funds. Such reserve fund as had existed had been returned to the lessees, at the request of the Applicants, as part of the mediated agreement. Any manager appointed by us would be in no better position than Johnson Cooper Limited. Indeed if we were to appoint Mr Yun as manager he would find himself in a wholly invidious position in that he would face conflicting expectations and demands from the Respondent and the lessees that could not be resolved pending the outcome of the High Court litigation.

18. As will be observed, from the summary of Section 24 of the 1987 Act set out above, a tribunal should only order the appointment of a manager if satisfied that it is *"just and convenient"* for the order to be made. For each and all of the reasons set out above, we did not consider that it would be just and

convenient, in this case, to order the appointment of a manager and we declined to do so.

REASONS FOR OUR DECISIONS ON THE 20C APPLICATION AND FEES

19. To the extent that costs might be recovered, the right to recover them is a property right, which should not lightly be disregarded. Section 20C of the 1985 however provides that a Tribunal may *"make such order on the application as it considers just and equitable in the circumstances"*. We considered that those words permitted us to take into account the conduct of the parties in deciding whether to make an order.

20. The service charge issues having been mediated, we were surprised that the Applicants had persisted with their application for the appointment of a manager. In particular, Mr Mottalib accepted that the necessary remedial work and redecorations could not be completed until the underpinning had been completed. As he acknowledged, the liability for the cost of that work would only be resolved on the conclusion of the proceedings in the High Court. Having, in such circumstances, declined to order the appointment of a manager, we did not consider that it would be just and equitable to limit the recovery of the Respondent's costs through the service charge. For similar reasons, we considered also that it would be unreasonable and inappropriate to order the Respondent to reimburse any application and hearing fees paid by the Applicants.

Chairman:.....(A J Andrew)

Dated: 5 June 2006