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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BN/LVM/2015/0004**
Property	:	**Wakefield House, 7-9A New Wakefield Street, Manchester M1 5NP**
Applicant	:	**GMS (Parking) Limited**
Represented by	:	**Shoosmiths**
First Respondent	:	**Revolution Property Management Limited**
Second Respondent	:	**Wakefield House Residents' Association**
Represented by	:	**Foulds Solicitors Ltd.**
Type of Application	:	**Landlord and Tenant Act 1987 – Section 24(9)**
Tribunal Members	:	**Judge C Wood** **Mr J Rostron**
Date of Decision	:	**17 May 2016**

DECISION

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DECISION

1. The Tribunal orders that the order dated 27 July 2012, ("the Order") is not discharged.

2. Subject to receipt of written confirmation from the First Respondent within 14 days of the date of this Decision, that, in the person of Mr L Birkett, they are prepared to continue to act as manager of the Property, the Order is varied to provide that it shall continue for a period of 2 years from the date of this Decision subject to the right of any interested party to make application to discharge or vary the Order under section 24(9) of the Landlord and Tenant Act 1987, ("the Act").

3. If the First Respondent declines to continue as manager of the Property, then the Tribunal issues the following further Directions:

3.1 within 21 days of the date of the First Respondent's confirmation to the Tribunal that they are not willing to continue to act as manager of the Property, the parties shall submit in writing to the Tribunal either relevant details of a third party appointee upon whom they are agreed should be appointed as manager in place of the First Respondent, or, in the absence of agreement between the parties, to the Tribunal and to each other, relevant details of third party appointees proposed by each of them to be appointed as manager in place of the First Respondent. For the purpose of these Directions, "relevant details" include the name and professional address of the proposed appointee(s), qualifications to act as manager, management experience of properties similar to the Property, current professional indemnity insurance and draft management agreement together with a draft order containing any variations required to the Order;

3.2 each party may, within 7 days, make written submissions regarding the other party's proposed appointee;

3.3 in the absence of a request from either party for a further hearing, the Tribunal shall determine the matter on the basis of the written submissions received from the parties at a date to be confirmed to the parties.

BACKGROUND

4. By an application dated 24 December (sic) 2015, the Applicant sought an order under section 24(9) of the Landlord and Tenant Act 1987, ("the 1987 Act"), to discharge and/or to vary the Order.

5. Directions dated 23 December 2015 were issued in pursuance of which the parties submitted the following:

5.1 the Applicant's Statement of Case dated 18 January 2016 together with supporting documentation;

5.2 the Second Respondent's Statement of Case (undated) together with supporting documentation;

5.3 letter dated 8 January 2016 from Mr Birkett.

6. A hearing of the Application was arranged for Friday 15 April 2016 at 1000.

LAW

7. Section 24(9) of the Act provides that the Tribunal "...may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section..."

8. Section 24 (9A) of the Act provides that the Tribunal "...shall not vary or discharge an order...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."

HEARING

9. The hearing was attended by the following:

   Sam Dance - GMS (Parking) Ltd, Bukola Aremu - Shoosmiths, James Browne - Counsel, Ms A Wedrychowski - Deloitte LLP, Lee Burkitt - Revolution Property Management, Ian Hollins - Wakefield House Residents Association, David Foulds - Foulds Solicitors

10. Before the hearing began, Mr Foulds and Mr Rostron disclosed to all parties that they were both members of the Residential Property Tribunal (Wales). No objections to Mr Rostron continuing to act were received from any of the parties.

11. The Applicant's submissions are summarised as follows:

11.1 the Applicant's focus is on a discharge of the Order: the Applicant is a responsible freeholder and leaseholder of 7 flats at the Property;

11.2 there is no evidence before the Tribunal that, if the Order were discharged, there would be a recurrence of the events which led to its' making: in particular, on acquisition, all arrears of service charge were paid by the Applicant, it has paid a service charge demand in February 2016 and intends to pay all service charges as they fall due. Further, it understands its' duties as the freeholder of a mixed use building and also of residential units where there is a mix of owner-occupiers and tenants on short-term leases;

11.3 the Applicant has extensive experience of renovating "distressed" buildings;

11.4 the Applicant's representative, Mr S Dance had visited the Property twice and also has had sight of the 2013 building survey of the Property carried out by Hanley Amos Stewart (pages 41 – 63 of the Second Respondent's Statement of Case) ("the 2013 Survey"), and has also commissioned its' own survey from N D Oliver & Co. (who it is believed are chartered surveyors). Whilst this survey was not yet completed, the Applicant is aware of significant structural defects at the Property and intends to draw up a management plan to address all of these;

11.5 if the Tribunal discharges the Order, the Applicant's intention is to appoint Deloitte LLP as its' managing agent for the Property. If the Tribunal decides to vary the Order, then the Applicant proposes Deloitte LLP to be the manager appointed under the terms of the Order as varied;

11.6 Ms A Wedrychowski of Deloitte LLP gave evidence as to her qualifications and experience of property management. She confirmed that, whilst she was based in London, she dealt with properties nationwide, and further that there were building managers and qualified surveyors in their Manchester office. If appointed (whether by the Applicant as landlord or by the Tribunal), the frequency of her visits to the Property would depend on the terms of the management agreement but typically she would expect to visit monthly and her Manchester colleagues to visit weekly. She had not, as yet, visited the Property and had not been involved in instructing N D Oliver & Co.. Whilst she had seen the 2013 Survey, because of its' age, she would not be relying on it but would await the Oliver report to prepare a 10 year maintenance plan, prioritising works as appropriate. She confirmed that she had not previously been appointed as a manager by a Tribunal. She also accepted the need – whether acting as a managing agent for the Applicant or following appointment by the Tribunal – to be seen to be acting in the interests of all leaseholders;

11.7 the Applicant's preference would be to appoint Deloittes LLP as their managing agent with Ms Wedrychowski being the point of contact. It was not considered relevant that Ms Wedrychowski had not been appointed as a manager by a Tribunal previously and the Applicant was satisfied that she had the relevant qualifications to act in either role. They were also satisfied that, notwithstanding her being proposed by the Applicant, she was able to act professionally and without bias towards any particular section of the leaseholders: she would establish relations with both the Applicant and the Second Respondent/the Recognised Tenants' Association, ("RTA"). If the Tribunal was minded to vary the Order by appointing an individual from Deloitte's as manager but would prefer to see someone from the Manchester office, then that person would be David Wilson. Like Ms Wedrychowski, he has all appropriate qualifications for the role.

12. The First Respondent was represented by Mr L Birkett. His submissions are summarised as follows:

12.1 he had believed that the appointment of a manager under the terms of the Order could make a real difference to the management of the Property but, from the outset, the previous freeholder and leaseholder of 7 of the flats had made things difficult and he had struggled throughout the term of the appointment. Initially, the freeholder/leaseholder refused to acknowledge the appointment and then, in June 2013, having failed to make payment of any service charges, they made a s27A application to the Tribunal. The Tribunal determined that all service charges were reasonable but payment was still not made. Mr Birkett reasoned that, because the freeholder and the defaulting leaseholders were the same entity, there was no point in pursuing forfeiture proceedings but (fortunately as it turned out) charging orders for the service charge arrears were registered;

12.2 the acquisition by the Applicant in December 2015 of the freehold and the 7 flats has changed the situation. All service charge arrears were cleared on acquisition and a subsequent service charge demand has been paid in full. In his view, there was no indication that there would be a recurrence of the situation which led to the making of the Order;

12.3 he highlighted what he regarded as the inadequacy of the legal position for the other leaseholders where the freeholder is also a significant leaseholder of units in the same building. He considered that the interests of those other leaseholders would be better served by discharging the Order which would then give them immediate recourse to the freeholder should problems arise. He confirmed that, whilst it was not his preference to do so, if the Order was not discharged, then if necessary he would continue as manager;

12.4 with regard to Mr Ian Hollins, he confirmed that he had worked as a building manager for the First Respondent until February 2015. He also confirmed that he had been responsible for the establishment of the RTA.

13. The Second Respondent's submissions are summarised as follows:

13.1 the Applicant's submissions as to how they intended the Property would be managed going forward lacked any supporting evidence;

13.2 having submitted the Application and then having plenty of time to prepare for its' hearing, the Applicant had demonstrated very little effort eg the draft management order submitted was merely a "copy and paste" of the existing Order, rather than using this an opportunity to improve on the present situation;

13.3 to date, the Applicant had made no attempt to engage with the Second Respondent;

13.4 Mr Ian Hollins confirmed his qualifications as MIRPM and an Associate Member of RICS, and that, since 2013, he has run his own residential property management business, Clear Building Management Limited, ("CBM"). He confirmed that the business is based in Manchester, and that they are currently managing 4 blocks of apartments (c 200 units). Of these, 3 are new-build, and 1 a conversion. He is familiar with the RICS code and CBM has the necessary finance and operations' functions for dealing with service charge administration. CBM carries PI insurance of £1,000,000 each and every occurrence;

13.5 as a resident of the Property, he knows and understands both the structural problems and the relationship problems (eg the potential conflicts between owner-occupiers and non-resident leaseholders) at the Property better than the Applicant's proposed nominee. This is reflected in both the management plan (pages 36-40 of the Second Respondent's Statement of Case) where it is set out how he would address these issues and in the draft management order (attached to the Second Respondent's solicitors letter dated 22 April 2016) which addresses 2 particular issues arising out of the terms of the Leases, namely, the granting to the Manager of the right to make additional demands for service charges where "...the Manager considers there to be an urgent need for funds to carry out his management functions", (para.13), and dispensing with the need for a surveyor to prepare annual service charge estimates, (para.14);

13.6 in response to questions from Mr Brown, Mr Hollins confirmed:

(i) the locations of the 4 blocks currently under management (Wakefield, Swinton, West Kirby and Leigh) and that West Kirby was on the Wirral, Leigh was about 15 miles and Swinton about 3 miles from CBM's offices;
(ii) that 3 of the blocks were new-builds and 1 a conversion. Whilst the new-builds were not comparable properties to the Property, the converted property was and he had been involved with its' roof renewal. He had not undertaken a s20 consultation as yet with CBM but he had done so when working for the First Respondent;
(iii) he did not consider that it would be a problem if, as manager, he was required to take action against other leaseholders who (where resident) may be his neighbours; he confirmed that only 3 of the apartments were owner-occupied which meant that this was less of an issue. With regard to problems associated with non-resident leaseholders eg anti-social behaviour, he confirmed that he knew the leaseholders as he had already engaged with them in his position as Chair of the Second Respondent but, were problems to persist, he would use the local authority to enforce their powers in this respect;

(iv) with regard to the issue regarding leaks from the wet rooms, he said that communication with leaseholders to ensure proper maintenance of their flats had been successful except in the case of the 7 flats now owned by the Applicant. He hoped that, as the Applicant had confirmed its' intention to be a responsible freeholder/leaseholder, these flats would now be properly maintained and that, again, this would not be an issue going forward.

14. In closing submissions, Mr Brown stated:

14.1 in support of their application to discharge the Order:

(i) there had been a "sea change" because of the change in the identity and attitude of the Applicant as freeholder and leaseholder;
(ii) they had commissioned a full structural survey of the Property;
(iii) all service charges had been paid;
(iv) Mr Dance had given evidence to the Tribunal of their commitment to the repair/maintenance of the property and of their experience of renovating tired and distressed buildings;
(v) Deloitte, as their proposed managing agents, were a professional organisation with all of the necessary expertise;
(vi) whilst rejecting the suggestion that the leaseholders would have more powers on discharge of the Order than on its' variation, he did accept the "formidable point" made by Mr Birkett that, an independent manager in this situation, had less room for "manoeuvre" where the freeholder-leaseholders refused to honour their contractual commitments under their leases;

14.2 if the Tribunal was not minded to discharge the Order, then in support of their application to vary the Order:

(i) their proposed nominee as Manager was either Ms A Wedrychowski or Mr D Wilson, (if it was considered important to make a local appointment);
(ii) whilst not doubting Mr Hollins' good intentions, the management plan submitted was based on the 2013 survey, where the Applicant's approach was to await the Oliver report and then work with the manager to put together a management plan;
(iii) in comparison to Deloitte's, Mr Hollins' experience both in residential management and of residential management of properties similar to the Property was limited (although it was made clear that, whilst the Applicant considered that Deloitte was the preferable nominee, there was nothing to indicate that an appointment of Mr Hollins was, in any way, inappropriate);
(iv) there was less perception of conflict with the appointment of a professional firm like Deloitte as manager (even allowing for its' association with the Applicant) than with the appointment of a resident leaseholder like Mr Hollins;

(v) the management fee would be up to £250 plus VAT in the first year, with annual RPI increases thereafter.

15. In closing submissions, Mr Foulds stated:

15.1 there was little evidence before the Tribunal of the "sea change" referred to;

15.2 it was accepted that they had paid the one service charge demand made on them since acquisition but the payment of the arrears was necessary if they wanted to complete the purchase ie it was no evidence of future intentions;

15.3 4 months after their purchase, the Oliver report is still not available and as a result no management plan has been put before the Tribunal;

15.4 he questioned whether Deloitte would run the risk of losing their appointment as managing agent of the Property (and maybe also of jeopardising their wider relationship with the Applicant) by taking action against the Applicant for breach of its' leases;

15.5 Mr Hollins has the necessary qualifications and experience to accept the appointment as manager and has the advantage of being resident at the Property to deal with problems quickly and efficiently;

15.6 the management fee would be £190 plus VAT.

16. In response to the Tribunal's request for the parties to respond to the suggestion of a time-limited appointment, Mr Brown said that the Applicant would prefer a longer term, whilst Mr Foulds said that the Second Respondent would not object to a 2-year appointment.

17. The parties agreed that the effective date from which the Order was to be discharged/ a new Manager was to be appointed should be 1 July 2016.

REASONS

18. The Tribunal determined that it was premature to grant the Applicant's application to discharge the Order for the following reasons:

18.1 there was little, if any, independent evidence before the Tribunal to support the Applicant's stated intentions as to how it would address the repair, maintenance and management problems at the Property, all factors which were relevant in the making of the Order. In this respect, the Tribunal noted, in particular, the absence of any up-to-date structural survey of the Property although it was clear to the Tribunal from the parties' submissions that the present condition of the Property was a matter of serious concern;

18.2 whilst the Tribunal accepted the evidence of the Applicant's payment in full of the February 2016 service charge demand, it also accepted that payment of the arrears was a necessity for completion of the purchase rather than any indicator of future conduct;

18.3 as long as the situation remained that the Applicant was both the freeholder and the leaseholder of a significant number of the flats at the Property, the potential for conflict between the Applicant and the Second Respondent remained a reality. The past difficulties (for which the Tribunal accepted the Applicant had no responsibility) meant that the Second Respondent viewed the Applicant's stated intentions for the Property with what the Tribunal considered to be an understandable degree of suspicion. The Tribunal considered that it was fundamental to the effective management of the Property in the interests of all the leaseholders (whether by a manager appointed by the Tribunal or by managing agents appointed by the freeholder) that a good working relationship was established between the Applicant and the Second Respondent. There was no evidence that any progress towards this had begun. Whilst the Tribunal considered that there was a risk that the establishment of this relationship could be hindered by the discharge of the Order, the Applicant's assurances to the Tribunal, in its capacity as leaseholder, should ensure that there would be no recurrence of the difficulties in managing the Property previously experienced by the First Respondent.

19. In view of its' decision not to discharge the Order, the Tribunal considered that the most pragmatic and cost-effective resolution for the parties would be for the First Respondent to continue as manager of the Property under the Order, as varied to provide that his appointment should continue for a further 2 years, subject to the right of any interested party to make application under section 24(9) of the Act. The Tribunal noted that, in his evidence, Mr Birkett had confirmed that, whilst the preference of the First Respondent was to cease to act as manager, it would continue if that was determined to be "necessary". The Tribunal considered that the First Respondent had to be given the opportunity to confirm whether or not it wished to continue to act as manager and, if it was willing to do so, whether it required any variation to the terms of the Order.

20. If the First Respondent declined to continue to act, then the Tribunal would vary the Order by the appointment of another person to act as manager again for a period of 2 years from 1 July 2016, and subject to the right of any interested party as above. In this respect, the Tribunal was not satisfied that either of the nominees suggested by the Applicant and the Second Respondent respectively was appropriate. The Tribunal considered that the pre-existing relationship between the Applicant and Deloitte would make their role as manager appointed by the Tribunal difficult, a situation highlighted by Ms Wedrychowski's apparently limited knowledge/understanding of the difference between this role and that of a managing agent appointed by the freeholder. In the case of Mr Hollins, the Tribunal accepted the points raised by the Applicant as to the difficulties which he may face as both manager and resident leaseholder. Further, in both cases, the Tribunal considered that the perception (if not the actuality) of bias towards one "set" of leaseholders had the potential to cause conflict and to make the manager's appointment, at best, difficult and, at worst, ineffective.

21. Accordingly, if the First Respondent declined to continue to act as manager of the Property, then the Further Directions set out in paragraph 3 of this Decision would take effect. The Tribunal urged the parties to try to reach agreement on a suitably qualified and experienced third party appointee who is mutually acceptable to them both.