



12006
**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **LON/00BA/LAM/2016/0015**

Property : **16 Arterberry Road, London SW20
8AJ**

Applicant : **Ms Sarah Simonis**

Representative : **In person**

Respondent : **Ms Cynthia Diana Rowley**

Representative : **No appearance**

Type of application : **Appointment of Manager**

Tribunal member(s) : **Judge Hansen, Mr Cairns MCIEH**

Venue : **10 Alfred Place, London WC1E 7LR**

Date of hearing : **13 March 2017**

DECISION

Decision

- (1) In accordance with section 24(1)(a) of the Landlord and Tenant Act 1987 Paul Anthony Cleaver (“the Manager”) of Urang Property Management Limited is appointed as manager of the property at 16 Arterberry Road, Wimbledon, London SW20 8AJ (“the Property”).
- (2) The order shall continue for a period of 3 years from 13 March 2017. If the parties wish to apply for any extension of the order, they are encouraged to do so at least three months before the order expires.
- (3) The Manager shall manage the Property in accordance with:
 - (a) The Directions and Schedule of functions and services contained in the Annex to this Decision;
 - (b) The respective obligations of the landlord and the leases by which the flats at the Property are demised by the Respondent and in particular with regard to repair, decoration, provision of services and insurance of the Property, save where otherwise provided in the Directions and Schedule of functions and services contained in the Annex to this Decision; and
 - (c) The duties of a manager set out in the Service Charge Residential Management Code (“the Code”) or such other replacement code published by the Royal Institution of Chartered Surveyors and approved by the Secretary of State pursuant to section 87 Leasehold Reform Housing and Urban Development Act 1993.
- (4) In addition, in accordance with section 24(1)(b) of the Landlord and Tenant Act 1987 the Manager is appointed as receiver of the landlord to the following limited extent: To receive those service charge funds (if any) currently held by the landlord or on her behalf by Salter Rex LLP.
- (5) The Manager shall register the order against the landlord’s registered title as a restriction under the Land Registration Act 2002, or any subsequent Act.
- (6) An order shall be made under section 20C Landlord and Tenant Act 1985 that the Respondent’s costs before the Tribunal shall not be added to the service charges.

Background

1. The Applicant, who is the lessee of Flat 5 on the top floor of 16 Arterberry Road, London SW20 (“the Property”), seeks an Order appointing a manager under section 24 of the Landlord and Tenant Act 1987 (“the Act”). The Property is a Victorian house converted into 5 flats.
2. A preliminary notice under section 22 of the Act dated 16 April 2015 (pages 35-64 of Bundle 1) was served on the Respondent. It is clear that the Respondent is on notice of this application but has thus far chosen to take no real part in the proceedings. Her only meaningful involvement has been to indicate by way of a letter from her solicitors Stone Rowe Brewer LLP (“SRB”) dated 26 October 2016 (pages 84-85 of Bundle 2) that she is *“happy to consent to the appointment of a property manager, but only on the basis that any fees chargeable by such a property manager or agent are met by the tenants within this block as part of the service charge and a majority of tenants agree to the appointment. [...] On that basis our client has no objection to the draft provisions contained within the appendix attached to the Further Directions dated 15 August 2016”*.
3. In order to understand the reference to *“the appendix to the Further Directions”*, it is necessary to explain what happened when this matter was last before the Tribunal on 15 August 2016.
4. The proposed manager was originally intended to be Ms Sarah Robertson of Appre Management Services Limited who had indicated that she was willing to accept the appointment. Following directions given by Judge Tagliavini on 12 May 2016 the final hearing was set for 15 August 2016. On 8 August 2016 Ms Robertson unexpectedly withdrew and the Applicant was therefore left without a proposed manager. Her reasons for withdrawing were as follows: *“We feel the*

complexities faced with this building and potential problems is not something we wish to become involved with. It has also become apparent that we would not have 100% support from all leaseholders which would make our position unmanageable”.

5. The hearing on 15 August 2016 went ahead in any event to make such progress as could be made in the absence of a proposed new appointee for the role of manager and as part of our case management directions the Tribunal appended to its directions an example of the form that an order under s.24 usually takes in an effort to assist the parties and any new prospective manager. This is what SRB had in mind when they referred to *“the draft provisions contained within the appendix attached to the Further Directions dated 15 August 2016”*.
6. The hearing was reconvened on 13 March 2017 where we once again had the benefit of helpful submissions from the Applicant and heard from the new proposed Manager, a Mr Paul Cleaver. Mr Cleaver is a Director of Urang Property Management Limited and has considerable experience of acting as a Manager appointed by the Tribunal. We note from his witness statement dated 6 December 2016 (pages 17-19 of Bundle 2) that he has been appointed by this tribunal as a Manager on 8 previous occasions. We were satisfied from his witness statement and his response to our questions that he was a suitable appointee in the event that we decided to make an order under s.24 of the Act.

The Act

7. The Tribunal is satisfied that the Property constitutes premises to which Part II of the Act applies. We are also satisfied that the Applicant is a tenant of a flat in such premises and that the condition precedent to the making of an application contained in s.23(1)(a) of the Act is satisfied. Section 24(2) of the Act provides as follows:

(2) *[The appropriate tribunal] may only make an order under this section in the following circumstances, namely—*

(a) *where [the tribunal] is satisfied—*

(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*

(ii) *...*

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

[(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.*

The Applicant's Case

8. The Applicant put her case in a number of ways, relying on s.24(2)(a), (2)(ab) and (2)(b). Having heard the Applicant's submissions and considered the Applicant's Statement of Case, Skeleton Argument and the documentary evidence in the bundles, the Tribunal was satisfied that the Applicant had made out her case under s.24(2)(b) and that it was just and convenient to make an order in all the circumstances. It is therefore unnecessary to consider the other provisions of the Act.

Conclusions

9. Our reasons for so concluding can be shortly stated. There appears to be a complete absence of any management of the Property in circumstances where proper management is urgently required. The condition of the Property is poor; there is evidence of significant cracking to the front elevation (see e.g. page 33), as well as water ingress causing significant damp and damage to the structure of the building and other disrepair. There is confusion in the lease terms as to the responsibilities for repair and the collection of service charges. The lessee of Flat 4 appears to hold under an old form of lease (see e.g. at pages 282-301 of Bundle 1) whereas the remaining four lessees appear to hold under a lease in substantially the same terms as the Applicant's lease dated 7 July 2003 (pages 303-341 of Bundle 1). The old form of lease provides for the lessee to execute and comply with the provisions of an Estate Deed of Covenant ("the Old Deed") as contained in the Fourth Schedule. By the terms of the Old Deed (Clause 2(a)) the Covenantee Parties, who are intended to be all the lessees, covenant with each other and the lessor that "*they will at their own cost and expense ... maintain repair redecorate and renew in good and substantial condition the structure of the Building*". [..]. By Clause 3 of the Old Deed the lessees are given the option of delegating their repairing obligations to a firm of Managing Agents whose terms of

appointment are to be determined by the majority view of the Covenantee Parties “(but in the event of there being no majority decision the Lessor shall have the casting vote)”. The Old Deed then went on to record that Messrs Rodney Scott & Company had been appointed as Managing Agents for a term of 2 years whose fees were to be met by the lessees in equal shares. The new form of lease, which was a new lease following a lease extension granted under the Leasehold Reform Housing and Urban Development Act 1993, also provides, at Clause 3(g), for the lessee to enter into an Estate Deed of Covenant (“the New Deed”) and the New Deed is in substantially the same terms as the Old Deed, as would be expected given the legislation under which the extension granted. We were told that in the past only 2 lessees have been prepared to vote, the other three refusing to do so. When the Respondent was then approached to exercise her casting vote, she failed and/or refused to do so. Thus nothing could be done because action requires a majority decision. We were told that Salter Rex, the current managing agents, were ostensibly appointed by a majority of lessees, but no one is sure, including Salter Rex, that they have ever been validly appointed. It was largely for this reason, we were told, that they stopped doing anything in 2013. When, in or about March 2016, a majority of lessees *did* indicate that they wished to appoint new agents, Salter Rex replied as follows: “*Mrs Rowley is the client and you will need to seek her agreement to this. The procedure once a termination is agreed, will be for us to prepare a closing account and any deficit in the account including our management fees paid before all documents can be handed over*” (see page 93 of Bundle 2). They then sent the Applicant a statement of account dated 1 April 2016 purporting to bill her for services rendered from 25 March 2013 through to 29 September 2015 (page 94 of Bundle 2). We should refer also to an email dated 29 July 2016 sent to the Tribunal in response to this application (page 95 of Bundle 2) in which Salter Rex said this:

“I refer to the above and write to advise that we are in no position to either agree or object to the appointment of a Manager for the building 16 Arterberry Road.

We have had little or no contact with the freeholder of the property for some time now and do not have their instructions to represent them at the Tribunal. We do not know whether they intend to send or submit representation but have no instructions at all from them. Therefore we have no instructions or legal basis to oppose or agree the application.

We have been involved with the management for some time but have chosen to withdraw services to the property for the past number of years due to numerous issues not least the unworkable nature of the lease, the non-acceptance of the leaseholders as a whole of their group responsibility and the refusal of one leaseholder to honour their individual lease obligation. A combination of these factors and many more has made it unworkable for us to be involved going forward. [...]”

10. Given the evidence of the Applicant which we accept, and her detailed submissions as to the multitude of apparently intractable problems bedevilling this Property, as explained above and exemplified by the contents of this email, the Tribunal is entirely satisfied that it is just and convenient to make an order in all the circumstances. The Property is in a serious state of disrepair; the leases are badly drafted and the voting procedures appear to be unworkable or have proven to be in practice; the Managing Agents have done nothing for a number of years; there is doubt as to whether they were ever validly appointed; there is a lack of clarity as to which lessees have signed the various Estate Deeds of Covenant; there is a profound disagreement amongst the lessees in relation to the management of the Property and no ready mechanism for resolving that disagreement; at least one tenant, the tenant of Flat 4, appears determined not to pay her fair share and there seems neither the will nor the ability (whether in the Respondent or Salter Rex) to take enforcement action against her; there are issues relating to the insurance and at least one claim has been made which requires the attention of someone with an interest in pursuing the matter to completion; the whole business of managing the Property for the benefit of the lessees has drifted unsatisfactorily for years now and

cannot be allowed to drift any longer. There has, as already noted, been no meaningful engagement with the application by the Respondent but we note her conditional consent to the proposed appointment of a manager in the terms we have set out above. However, whether or not the landlord consents, the Tribunal must be satisfied that the conditions set out in s.24(2) of the Act are satisfied before it can make an order under s.24(1) and it is so satisfied. We are prepared to make an order on the basis that it is just and convenient to do so in all the circumstances. It is unnecessary for us to consider the other bases upon which the application was put.

11. The above-mentioned email from Salter Rex went on to say that they believed that the appointment of a manager was not necessarily the solution to the problem “*as this relates more to the terms of the lease*”. We understand the point they are making. However, the Tribunal can give the proposed manager a wide range of powers and is not strictly limited to requiring him or her to administer the obligations in the leases. The purpose of any order is to create a coherent scheme of management and not merely ensure the efficient discharge of the landlord’s obligations: *Maunder Taylor v Blaquiére* [2003] 1 WLR 379. Furthermore, a manager appointed by the Tribunal is not appointed to favour the tenants or the particular tenant that applied for the order, nor simply to carry out the functions of the landlord under the leases. The manager is appointed to oversee a scheme of management and act independently of the parties as the servant of the tribunal, and the Tribunal has a wide discretion as to the necessary terms of appointment. Whilst any order we make must be proportionate to the circumstances giving rise to the appointment (see e.g. *Queensbridge Investments Ltd v. Lodge* [2015] UKUT 635 (LC)) we are satisfied that the Order we propose to make, and in particular the Directions and Schedule of Functions and Services contained in the Annex to this Decision, are necessary and proportionate. As HHJ Huskinson said in *Queensbridge* at [47]:

It may well be correct that, where leases are defective, the only proper solution in the long term is to seek an amendment of the terms of the leases under section 35 and following. However this does not mean that the appointment of a manager under section 24 (which may only be an appointment for a limited period) cannot properly confer powers upon the manager which will avoid a problem arising from any inadequate drafting of the leases. [..]. In summary, by way of further example, suppose circumstances in which the leases are badly drafted such that the management which the tenants could expect under these badly drafted provisions would be unsatisfactory, and suppose also that the landlord has failed even to provide this unsatisfactory level of management. In my judgment if a manager is appointed under section 24 in such circumstances the F-T's powers when appointing the manager are not limited to conferring upon the manager only the inadequate powers of management conferred under the badly drafted leases.

12. The Tribunal considers that this is a case in point.

13. The Applicant also sought an Order under s.20C of the Landlord and Tenant Act 1985 and we are satisfied, in the circumstances, that it is just and convenient to make such an Order.

Name: Judge W Hansen

Date: 13 March 2017

ANNEX

DIRECTIONS

1. From the date of the appointment and throughout the appointment the Manager shall ensure that he has appropriate professional indemnity cover in the sum of at least £1,000,000 and shall provide copies of the current cover note upon a request being made by any lessee of the Property, the Respondent or the Tribunal.
2. That no later than four weeks after the date of this order the parties to this application shall provide all necessary information to and arrange with the Manager an orderly transfer of responsibilities. No later than this date, the Applicant and the Respondent shall transfer to the Manager the following (if any): all the accounts, books, records and funds (including, without limitation, any service charge reserve fund).
3. The rights and liabilities of the Respondent arising under any contracts of insurance, and/or any contract for the provision of any services to the Property shall upon 13 March 2017 become rights and liabilities of the Manager.
4. The Manager shall account forthwith to the Respondent for the payment of ground rent received by him and shall apply the remaining amounts received by him (other than those representing his fees) in the performance of the Respondent's covenants contained in the said leases and/or the discharge of his functions under this Order.
5. The Manager shall be entitled to remuneration (which for the avoidance of doubt shall be recoverable as part of the service charges of leases of the Property) in accordance with the Schedule of Functions and Services below.
6. By no later than 12 months from the date of this order, the Manager shall prepare and submit a brief written report for the Tribunal on the progress of the management of the property up to that date and shall do so every 12 months thereafter for the duration of this order including any extension period as ordered by the Tribunal. The Manager shall also send a copy of any report submitted to the Tribunal to the Lessees no later than 14 days after the report has been submitted.
7. Within 28 days of the conclusion of the management order, the Manager shall prepare and submit a brief written report for the Tribunal, on the progress and outcome of the management of the property up to that date, to include final closing accounts. The Manager shall also serve copies of the report and accounts on the lessor and lessees, who may raise queries on them within 14 days. The Manager

shall answer such queries within a further 14 days. Thereafter, the Manager shall reimburse any unexpended monies to the paying parties or, if it be the case, to any new tribunal-appointed manager, or, in the case of dispute, as decided by the Tribunal upon application by any interested party.

8. The Manager shall be entitled to apply to the Tribunal for further directions.

SCHEDULE OF FUNCTIONS AND SERVICES

Insurance

- (i) Maintain appropriate building insurance for the Property.
- (ii) Ensure that the Manager's interest is noted on the insurance policy.

Service charge

- (i) Prepare an annual service charge budget, administer the service charge and prepare and distribute appropriate service charge accounts to the lessees.
- (ii) Set, demand and collect service charges (including contributions to a sinking fund), insurance premiums and any payment due from the lessees, other than ground rent. Each lessee shall be liable to pay the following percentage of the total sum due by way of service charge: Flat 1 (16.666667%); Flat 2 (20.833333%); Flat 3 (12.5%); Flat 4 (25%); Flat 5 (25%) ("the Lessees' Proportions"). Separate provision is made for the payment of management fees as hereinafter set out.
- (iii) Instruct solicitors to recover unpaid rents and service charges and any other monies due to the Respondent and/or the Manager.
- (iv) Place, supervise and administer contracts and check demands for payment of goods, services and equipment supplied for the benefit of the Property with the service charge budget.
- (v) Place, supervise and administer contracts and check demands for payment of goods, services and equipment supplied for the benefit of the Property with the service charge budget.
- (vi) The service charge and sinking fund contributions will be payable by each flat quarterly in advance and special collections for major works projects, where not covered by the sinking fund, will be payable within 14 days of being demanded.
- (vii) Any other expenditure on services not anticipated by the budget shall be payable by the lessees in accordance with the Lessee's Proportions within 14 days of being demanded. Any excess of contributions over actual expenditure on services shall accrue for the benefit of the sinking fund.

- (viii) Salter Rex LLP and the Respondent to hand over all uncommitted funds and prior sets of accounts and invoices to the appointed manager within 30 days of this order, together with all other files relating to the property including health & safety documentation.

Accounts

- (i) Prepare and submit to the Respondent and lessees an annual statement of account detailing all monies received and expended. The accounts to be certified by an external auditor, if required by the Manager.
- (ii) Maintain efficient records and books of account which are open for inspection by the lessor and lessees. Upon request, produce for inspection, receipts or other evidence of expenditure.
- (iii) Maintain on trust an interest bearing account/s at such bank or building society as the Manager shall from time to time decide, into which ground rent, service charge contributions and all other monies arising under the leases shall be paid.
- (iv) All monies collected will be accounted for in accordance with the principles set out in the RICS management code.

Maintenance

- (i) Deal with routine repair and maintenance issues and instruct contractors to attend and rectify problems. Deal with all building maintenance relating to the services and structure of the Property.
- (ii) The consideration of works to be carried out to the Property in the interest of good estate management and making the appropriate recommendations to the Respondent and the lessees.
- (iii) The setting up of a planned maintenance programme to allow for the periodic re-decoration and repair of the exterior and interior common parts of the Property.
- (iv) Appoint Surveyors as soon as practicable after the appointment, to (a) provide a full survey of the Property, (b) identify any structural or other damage or issues relating to the Property and (c) determine the likely cause of the cracks that have appeared in the Property.
- (v) To recover the costs of the Surveyors from the tenants in the Lessees' Proportions and/or to recover the costs of repairing any damage identified by the Surveyors from any tenant that may be at fault and to appoint lawyers to recover such costs if appropriate. In the event that the tenant alleged to be at fault disputes liability, and such dispute cannot be resolved by means of alternative dispute resolution, the Manager may recover such costs from all tenants in the Lessees' Proportions, provided that the Manager reasonably decides against pursuing litigation against the tenant allegedly responsible.

Fees

- (i) Fees for the above-mentioned management services will be a basic fee of £350 + VAT per annum per flat. For the avoidance of doubt, the total management fee payable will be £1,750 + VAT and each lessee shall be liable to pay £350+ VAT by way of management fee towards that sum (in addition to any service charges payable). Those services to include the services set out in the Service Charge Residential Management Code published by the RICS.
- (ii) Major works carried out to the Property (where it is necessary to prepare a specification of works, obtain competitive tenders, serve relevant notices on lessees and supervising the works) will be subject to a charge of 10% of the cost (subject to a minimum fee of £500). This in respect of the professional fees of an architect, surveyor, or other appropriate person in the administration of a contract for such works.
- (iii) An additional charge for dealing with solicitors' enquiries on transfer will be made on a time related basis by the outgoing lessee.
- (iv) VAT to be payable on all the fees quoted above, where appropriate, at the rate prevailing on the date of invoicing.
- (v) The preparation of insurance valuations and the undertaking of other tasks which fall outside those duties described above are to be charged for a time basis. Time will be charged at £125 per hour for a property manager, £150 per hour for a senior property manager or head of finance or legal and £200 per hour for the director of Urang. This will include for time spent on any issues that do not constitute normal day to day management.
- (vi) Any additional fees for management services payable pursuant to (v) above shall be payable by the lessees in equal proportions.

Complaints procedure

- (i) The Manager shall operate a complaints procedure in accordance with ARMA guidelines.