FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/00KF/LAM/2020/0003**
HMCTS code (audio, video, paper)	**:**	**A:BTMMREMOTE**
Property	**:**	**21 Wakering Avenue, Shoeburyness, Southend-on-Sea, Essex SS3 9BE**
Applicants	**:**	**Loxbell Limited**
Representative	**:**	**Ashley Bean**
Respondent	**:**	**John Edward Victor Horsley**
Interested Parties	**:**	**1. Laura Jane Tilbury** **2. Matthew Tilbury**
Type of application	**:**	**Appointment of a manager**
Tribunal members	**:**	**Judge David Wyatt** **Mary Hardman FRICS IRRV (Hons)**
Date of decision	**:**	**9 December 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote audio hearing. The form of remote hearing was A:BTMMREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents we were referred to are in a bundle of 148 pages, together with the further document provided after the hearing and described in paragraph 28 below, the contents of which we have noted.

Decisions of the tribunal

(1) The tribunal does not make an order for appointment of the proposed manager.

(2) The tribunal makes the findings set out under the various headings in this decision.

Application

1. The Applicant leaseholder of Flat B at the Property applied to the tribunal for an order appointing Roisin Mahoney of Vision Property & Estate Management UK Ltd ("**Vision**") as a manager of the Property under section 24 of the Landlord and Tenant Act 1987 (the "**1987 Act**").

2. The Applicant sought the order on the grounds set out in their preliminary notice dated 12 May 2020, which is considered below. The Applicant said in these proceedings that the Respondent landlord was missing and the building was not being managed. The preliminary notice and the documents in these proceedings were sent to the address for service recorded in the Land Registry entries for the Respondent's freehold title to the Property. The Applicant has been unable to trace any other contact details for him.

3. The Interested Parties, Mr and Mrs Tilbury, are the leaseholders of Flat A at the Property. They do not live there, but Mrs Tilbury's mother does. They questioned the need for, but did not oppose, appointment of a manager. They had reservations about the proposed manager because they were not sure whether she was independent.

Procedural history

4. The tribunal wrote to the Respondent with notice of these proceedings and gave case management directions on 3 August 2020. The Respondent did not respond or communicate with the tribunal. The other parties followed the directions, after an extension of time for any response from the Respondent and the Interested Parties. There was no inspection. The directions had stated that the tribunal considered an inspection was not required and good quality photographic or video would be admitted. The parties did not request an inspection and produced colour photographs in the bundle.

5. At the hearing on 19 November 2020, Ashley Bean (a solicitor acting privately, not through the firm he works for) represented the Applicant and gave evidence for them. The proposed manager, Mrs Mahoney, attended as explained below. The Respondent did not attend and was not represented. We were satisfied that reasonable steps had been

taken to notify him of these proceedings and this hearing and it was in the interests of justice to proceed. The Interested Parties, Mr and Mrs Tilbury, attended in person.

Property

6. The Respondent is the registered proprietor of the freehold title to the Property. The Land Registry entries indicate that he acquired or registered the title in 1981, granting a mortgage to National Westminster Bank PLC. They also include a bankruptcy inhibition entered in 1987, referring to a bankruptcy order made by the Southend County Court. On 17 August 2020, the tribunal sent notice of these proceedings to National Westminster Bank PLC, and they were subsequently notified of the hearing date. They have not applied to join the proceedings or otherwise responded.

7. The Property is a house which was converted into two flats, one on the ground floor (Flat A) and one on the first floor (Flat B). In 1982, the flats were let by the Respondent on long leases. The lease of Flat A includes the front garden and the left-hand half of the rear garden. The lease of Flat B includes the right-hand half of the rear garden.

8. The Applicant purchased the lease of Flat B in 2014. It had no contact or communication from the Respondent. Mr Bean wrote to the treasury solicitor on 31 December 2019, and again on 12 May 2020, saying that the Applicant would like to purchase the freehold title, but had not received a response. He had never received a response to correspondence sent to the Respondent and had been unable to trace him at any other address.

9. The first Interested Party (Mrs Tilbury) said that she had purchased the lease of Flat A in 2007. She then transferred the leasehold title to herself and the second Interested Party (Mr Tilbury) in 2016.

Issues

10. In the case management directions of 3 August 2020, the following issues were identified for determination. Each of these is examined in turn below.

    - Did the Applicant's preliminary notice comply with section 22 (and if not, should the tribunal still make an order in exercise of its powers under section 24(7)) of the 1987 Act?

    - Has the Applicant satisfied the tribunal of any grounds for making an order as specified in section 24(2) of the 1987 Act?

- Would the proposed manager be a suitable appointee and, if so, on what terms and for how long should the appointment be made?

- Is it just and convenient to make a management order?

Preliminary notice

11. Before an application is made for a management order under section 24, section 22 of the 1987 Act requires the service of a preliminary notice which must (amongst other things) set out: (a) the grounds on which the tribunal would be asked to make the order; and (b) steps for remedying any matters relied upon which are capable of remedy, giving a reasonable period for those steps to be taken.

12. On 12 May 2020, Mr Bean sent the Applicant's preliminary notice to the Respondent at the address for service given in the Land Registry entries for his freehold title. The notice was based on a template standard form. It said that the grounds on which the order would be sought were breach of obligations owed to the tenant under their lease and that other circumstances exist which make it just and convenient to appoint a manager. It alleged breach of the landlord's covenants to:

    a) insure the building (clause 4(2) of the lease); and

    b) repair the main structure, including the roof, of the building (clause 4(4) of the lease).

Conclusion

13. Having examined the preliminary notice, we are satisfied that it complied with section 22. Even if we are wrong about that, we would in relation to the matters relied upon by the Applicant have made an order in exercise of our powers under section 24(7) of the 1987 Act.

14. Even if the notice is not deemed to have been served on the Respondent by sending it to his only known address as recorded in the Land Registry entries for the freehold title, in the circumstances we would have made an order under section 22(3) of the 1987 Act to dispense with the requirement to serve the notice on this apparently missing landlord.

Grounds under s.24(2) of the 1987 Act

15. Under section 24(2) of the 1987 Act, the tribunal may appoint a manager in various circumstances. These include where the tribunal is satisfied:

a) that:

- any "*relevant person*" (in this case, the Respondent) is in breach of any obligation owed by him to the tenant under their tenancy and relating to the management of the premises in question or any part of them; and

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

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

Insurance and repairing covenants in the leases

16. Only the lease of Flat B was produced in the bundle. We were asked to assume that both leases were in the same material terms. Sub-clause 4(2) is a covenant by the Respondent landlord to:

> "*…insure and keep insured the building against loss or damage by aircraft explosion storm tempest or so far as insurable act of war of accident or any other perils within the usual comprehensive policy of the Sun Alliance Insurance Group or such other office as the Landlord shall determine at the full replacement value thereof…*"

17. The extent of the demise is not entirely clear. The definition of the upper floor "*Flat*" includes the roof. Clause 1 demises to the leaseholder: "*…the upper floor flat situate and known as No.21b*". However, the general covenant by the leaseholder to repair the demised premises excludes: "*…the parts thereof comprised and referred to in sub-clause … (4) … of clause 4 hereof*" (sub-clause 3(1)).

18. Sub-clause 4(4) is a covenant by the landlord to maintain repair decorate and renew: "*…the main structure the foundations and in particular the roof chimney stacks and rainwater-pipes of the building and … the boundary walls and fences of the building*."

19. Sub-clause 3(2) is a covenant by the leaseholder to pay: "*…one equal third part of the costs and expenses outgoings and matters mentioned in the Third Schedule hereto*." The Third Schedule includes: "*(1) The expenses of maintaining repairing redecorating and renewing … the main structure and in particular the footings foundations roof chimney stacks gutters and rainwater pipes of the building … the boundary walls and fences of the building…*"; and "*(2) The cost of the insurance mentioned in sub-clause 4(2) hereof and of the insurance against third party risks in respect of the building if such insurance shall in fact be taken out by the Landlord…*".

Correspondence

20. The Applicant said that, in or around 2018, there were problems with the roof. Mr Bean had on behalf of the Applicant attempted to liaise with the Interested Parties, but despite correspondence (an initial letter in 2016 and correspondence from 2018) they had been unable to agree how insurance and repairs should be arranged and paid for. In summary:

    a) Mr Bean wrote to Mrs Tilbury from 16 July 2018 to say that the roof needed repair, proposing that they share the cost of an interim repair quotation of £900 plus VAT and suggesting that they work together to acquire the freehold. The Interested Parties were unsure about this because they had carried out other repair work to the building at their own expense. They took legal advice, offered one third of the cost of the immediate roof repairs and suggested that the Applicant should contribute one third of their expenses of repointing the exterior walls and damp-proofing works. The Applicant does not seem to have answered. Mr Bean said that he understood it had arranged for the immediate roof repairs to be carried out at its own expense;

    b) correspondence then started again from late 2019, with the Applicant saying that rain was coming in, causing damage, and referring to repair or possible renewal of the roof. Unfortunately, the parties then made no real progress in correspondence, talking about different proportions, communications, leaks and damage suffered by the Interested Parties (said to be caused by first floor windows and gutters which were then replaced by the Applicant), and other roof repair and fencing work which had been paid for by the Interested Parties.

21. That correspondence had not been entirely constructive, but at the hearing both parties apologised to each other for this, agreed to draw a line under it and discussed arranging to meet.

Breach of obligations and related matters

22. On the information provided, the Respondent has been absent for many years, since before Mrs Tilbury purchased Flat A in 2007. The parties have separately insured their properties. The Applicant was concerned about the risk of problems with cover or other complications unless a normal buildings insurance policy was in place. Mr Bean said he was also concerned about the lack of any asbestos survey or fire risk assessment, and the general condition of the roof, which might jeopardise insurance cover at least for certain types of claim.

23. The Interested Parties felt they had addressed any such risk for themselves by taking out an additional indemnity policy for the risks in respect of the absent freeholder. They were reluctant to take out a joint building policy with the Applicant because they both worked in the financial services sector and had to be very careful about being linked with third parties.

24. The parties agreed that the Property was Victorian (c. 1900) and the slate roof appears to be original. The Interested Parties agreed that the roof might need to be replaced. The photographs in the bundle indicate that the similar neighbouring property has a replacement tiled roof which was probably installed years ago. The Interested Parties confirmed that a flat roof at the rear of the Property has been changed twice during their period of ownership. The documents in the bundle include estimates obtained by the Applicant in 2018 for the costs of roof renewal, including scaffolding costs. One estimates £5,500 plus VAT for removing the slates and fitting a concrete tiled roof. The other estimates £11,820 plus VAT for a new slate roof. Mr Bean said that the first contractor, Mr Stringer, had advised him that the roof was at the end of its life.

25. The Interested Parties had taken the approach of simply paying themselves for external repair work from time to time. They had not produced receipts or other documentary evidence, but thought they had spent over £10,000 on such work over the years.

26. Mr Bean said the Applicant was keen to fix the roof as soon as possible, to seek to avoid any risk of uninsured damage or more expensive problems in the future. He said that a roof survey should be carried out to assess whether it can be repaired or needs to be replaced, so that a specification can then be drawn up and contractors can quote for the works. He said the Applicant would not be trying to insist on any particular contractor; the Interested Parties would be welcome to propose a contractor or obtain a quote from them. Mr Bean acknowledged that the fixed one-third contributions set out in the lease were problematic. He confirmed that, to resolve this, the Applicant would be prepared to undertake to pay two thirds of all service charge costs for the period a manager was appointed by the tribunal. We note that this proposal might help to offset the costs which the Interested Parties have paid themselves in the past.

Conclusion

27. We are satisfied that the Respondent is in breach of the insuring and repairing obligations owed by him to the Applicant and the Interested Parties under their leases and relating to the management of the Property. The other matters summarised above are relevant to the question of whether it is just and convenient to appoint a manager, as considered below.

Just and convenient

28. Mrs Mahoney, the proposed manager, attended the hearing to answer questions about her suitability. She had been appointed (by consent) by a tribunal in this jurisdiction as manager of the Axis Development in Romford, so she understood the requirements of this type of appointment. In her written material, she described positive feedback from the leaseholders of the Axis Development. She understood that if she was appointed it would be in her own name, with personal liability. She had produced evidence of the professional indemnity insurance cover in place for Vision, but it was not clear whether this covered her personal liabilities. At the hearing, we agreed to allow 24 hours for her to produce clarification of this, and a further 24 hours for the Interested Parties to comment on whatever was produced. On 20 November 2020, the Applicant produced an e-mail from Vision's insurance brokers confirming that any appointments by the tribunal in the name of Mrs Mahoney of Vision "*…would be protected in the event of a claim*". The Interested Parties made no comments on this.

29. Mrs Mahoney was an associate member of the IRPM and Vision was ARMA-Q accredited. Mrs Mahoney had over 17 years' experience of block management. She founded Vision in 2009 and the company currently managed 65 residential blocks of various sizes. Before 2009, she had worked for MCL Holdings Limited, managing about 200 properties, including some in Southend. Vision had a team of five property managers and three property assistants. Mrs Mahoney said that her style of management was that the leaseholders would contact her directly. Her proposed fees appeared reasonable, at an annual fixed fee of £400 plus VAT and 8% of major works charges, plus professional fees (such as those of surveyors, where specifications needed to be prepared). She confirmed that no insurance commission or other additional charges were made, except for notices of assignment (£55 plus VAT) and seller's information packs (£200 plus VAT).

30. Mrs Mahoney had inspected the Property last year together with other properties in Southend. At that time, she explained, Flat B was managed by Vision on behalf of the Applicant. She could not recall the details of the Property and she was not able to say whether the roof needed to be replaced. She had not produced any actual management plan, draft budget or any other specific details. She had briefly read the lease of Flat B and she had not seen the lease of Flat A. She had not fully read the documents in the bundle, but had quickly reviewed them. She had seen the Applicant's draft appointment order and was not seeking any additional powers other than those set out in the leases.

31. We asked Mrs Mahoney about this preparation, and how she would handle a conflict between one leaseholder keen to replace the roof and another wanting or needing patch repairs to spread the cost. The Interested Parties had explained that currently they did not have

thousands of pounds for new roof works and would have to borrow for any such expenditure. They had also signed a deed of trust with Mrs Tilbury's mother, expecting her to cover all expenses (although they remain the leaseholders), but she had been made redundant. Mrs Mahoney answered that if she was appointed a condition survey would be carried out by a surveyor and the leaseholders would be consulted about repair/replacement works based on the survey. Her aim would be to do what was required in the best interests of the Property for the long term, communicating with both parties. She said that contributions could be collected each year towards a reserve fund for major works/expenses. She did not seem to be aware that the leases do not include provision for a reserve fund.

32. The draft order sought appointment for three years, which was based on Mrs Mahoney's experience. She thought that if both parties engaged willingly 15-18 months would be the minimum realistic period. She confirmed that if she was appointed she would reinspect and meet with the leaseholders to explain matters in detail.

33. The Interested Parties had asked whether Mrs Mahoney was independent from the Applicant. No connections had been disclosed by the Applicant or by Mrs Mahoney in their application and proposal documents. The Interested Parties had discovered from a search at Companies House that most of the shares in Mrs Mahoney's company, Vision, were held by a Daniel Bean. Later, when Mr (Ashley) Bean had argued this was not significant, they had carried out further searches. These indicated that Lynda Gail Dobrin (the sole director and shareholder of the Applicant) was a director of Mardan Properties Limited (described as an inventory clerk), as (until 2017) was Roisin Dunne (Mrs Mahoney) and as (until 2009) was Mr (Ashley) Bean. Mrs Mahoney had been since 2010, and remained, company secretary of Mardan Properties Limited.

34. Mrs Mahoney told us she had no relationship with Ms Dobrin except as director of the Applicant. Her only relationship with Mr (Ashley) Bean was professional, having worked with him as solicitor. She had worked for Mardan Properties Limited managing a portfolio of properties in Kent, overseeing letting agents, but she, Ms Dobrin and Ashley Bean were co-directors, with no personal relationship. Daniel Bean was Ashley Bean's son and a "*property investor*" who had acquired the shares in Vision in about 2011/12. He was not involved with the day to day running of Vision.

35. Mr (Ashley) Bean's correspondence to the Interested Parties, particularly in the latter stages, seemed less like a solicitor writing on behalf of a client and more like a principal, talking about "*I*" and "*we*", and saying that Mr Bean could authorise a contribution towards some costs. As mentioned above, we learned from Mrs Mahoney during the hearing that Vision had managed Flat B for the Applicant, using a

separate firm (Appointmore) as letting agents, until Ms Dobrin had decided to manage it herself. When we asked, Mr Bean told us that Ms Dobrin is his life partner. Daniel Bean is his son, from a previous relationship. Daniel Bean was or had been a director of Vision and holds most of the shares in Vision; he is qualified as a solicitor and invests in property management businesses. Mr (Ashley) Bean was confident there was no conflict, as was Mrs Mahoney. He had proposed Mrs Mahoney because he knew she would be professional, and he was sure that she would not prefer one leaseholder over another.

36. After we had heard from Mrs Mahoney and Mr Bean, the Interested Parties said they were less concerned than they had been, but were still left feeling that anything they did not agree was always going to go against them. Mr Bean confirmed the Applicant would be happy with a different professional property manager, but none had been proposed. The Interested Parties had consulted local agents, but neither they nor those agents had known that proposals would need to be produced to the tribunal for everyone to consider and the proposed manager would need to be made available to answer questions from the tribunal. As we explained at the hearing, more is expected of a tribunal-appointed manager than a normal managing agent.

Conclusion

37. Having considered all the evidence, we are not satisfied that it would be just and convenient to make an order under section 24 of the 1987 Act to appoint the proposed manager.

38. If the leaseholders are not able to reach agreement on the way forward, the tribunal could consider a future application for appointment of an independent manager. There is an absent landlord. While the Interested Parties seemed confident that their insurance arrangements would give the cover they needed, no real evidence was produced about this. On the information provided, it would probably be simpler and safer to have a normal buildings insurance policy, suitable for properties let on long leases and with the interests of the leaseholders noted, in place. There was no real dispute that roof works would be needed and the offer by the Applicant to undertake to pay two thirds of all the service charge costs during the period of management by a tribunal appointed manager was a substantial positive factor.

39. In the circumstances, we would have been minded to appoint a suitable manager, even if only for a relatively short period, to give the parties time to organise immediate matters and pursue longer-term solutions. However, for the reasons explained below, we have decided that: (a) the relevant parties ought now to be able to agree matters between themselves; and (b) even if they cannot agree, it would not be just and convenient for the tribunal to appoint Mrs Mahoney in the particular circumstances of this case.

40. It seemed likely that, after their discussion during the hearing, the Applicant and the Interested Parties would be able to decide on a fair way to share the costs of repairing the Property. The Interested Parties recognised that the offer from the Applicant was constructive and suggested alternatively that if the Applicant was prepared to pay for all the costs of roof replacement works then the Interested Parties would agree to all future service charge costs being split 50/50. If these parties can reach agreement in relation to repairs, they ought to be able to reach a sensible agreement about insurance arrangements. As mentioned at the hearing, they may also wish to take advice on potentially seeking to acquire the no-fault right to manage through an RTM company under sections 78 to 85 of the Commonhold and Leasehold Reform Act 2002 (the "**2002 Act**"), whether or not as a precursor to seeking to acquire the freehold.

41. Even if these parties cannot reach agreement, the risk of actual or apparent conflict or bias, the failure to disclose the relevant connections and the inadequate preparation for the proposed appointment lead us to conclude that it would still not be just and convenient to appoint Mrs Mahoney in this case.

42. We would be making an order appointing this manager and giving her management powers against the wishes of the only other leaseholder and in the absence of the freeholder. Even apart from the other associations and connections mentioned above, Mrs Mahoney's business is owned by the son (Daniel Bean) of the partner (Ashley Bean) of Ms Dobrin, who is the sole director and shareholder of the Applicant. Mrs Mahoney seemed professional and she might genuinely not favour one party over another. However, this is too close a connection to expect her to be able to disregard it or the other leaseholders to have confidence that advice from and decisions by Mrs Mahoney would be objective and independent. Further, there was no advance disclosure of these connections, by the Applicant or by Mrs Mahoney, even in response to the queries from the Interested Parties after their initial searches, until we asked direct questions at the hearing. The second witness statement from Mr Bean (responding to their first queries) said that his son was a "*part owner*" of Vision and the Applicant was controlled by Ms Dobrin, without disclosing his own relationship with Ms Dobrin. His third witness statement, commenting on the previous and current directorships of Mardan Properties Limited, did not disclose this either.

43. No survey had been provided to give proper advice about the actual condition of the roof and any options for repair or renewal, which left Mrs Mahoney unable to make management proposals in respect of one of the two matters relied upon by the Applicant. Mrs Mahoney had not prepared fully for the proposed appointment, which would include reading the leases carefully and preparing specific proposals. Generally, this is not the type of appointment to be taken on and then worked out afterwards.

44. We do not intend criticism of the Applicant or Mrs Mahoney. We have given our reasons in some detail because we would otherwise have been minded to appoint a manager, at least for a short period.

45. This decision obviously leaves open the possibility of a new application for appointment of a different manager. However, we would encourage the relevant parties to carry on their discussions, seek to reach agreement on practical matters and investigate whether they can acquire the no-fault right to manage. The tribunal cannot advise, but that might be simpler and faster, even with an application to the tribunal under section 85 of the 2002 Act, and a longer-term solution pending any acquisition of the freehold.

Name: Judge David Wyatt **Date:** 9 December 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).