FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/24UG/LAM/2020/0008
Property	:	Providence House, Bartley Way, Hook, Hampshire RG27 9FG
Applicant	:	Samantha Aspey and others
Representative	:	Ms Lara Kuehl of Counsel Instructed by Setfords Solicitors
Respondent	:	(1) Bartley Way Limited (2) Frederick George Management Services Limited
Representative	:	Ms Claire Thompson of Counsel instructed by Clarke Mairs LLP (1)
Type of Application	:	Appointment of Manager- section 24 of the Landlord and Tenant Act 1987
Tribunal Member(s)	:	Judge J Dobson Mr N Robinson FRICS Mr M Woodrow MRICS
Date of Hearing	:	11th May and 19th May 2021- remotely as video proceedings
Date of Decision	:	22nd July 2021

DECISION

Summary of the Decision

1. **The Applicants' application for the appointment of a manager for Providence House, Bartley Way, Hook, Hampshire, RG27 9FG is granted.**

2. **Mr James Farrow is appointed as Manager of Providence House, Bartley Way, Hook, Hampshire RG27 9FG until 30th June 2024 on the terms set out in the Management Order dated 14th June 2021 and pursuant to section 24(1) of the Landlord and Tenant Act 1987.**

3. **The First Respondent shall repay the £300 fees paid by the Applicants within 28 days.**

Background, titles and the Property

4. The Applicants made an application dated 7th July 2020, for an Order appointing a manager for Providence House, Bartley Way, Hook, Hampshire RG27 9FG which consists of the building itself ("the Building") and some land around it ("the Curtilage") (collectively "the Property") in accordance with section 24 of the Landlord and Tenant Act 1987 ("the 1987 Act"). An application was also made pursuant to section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") that the First Respondent's costs of these proceedings should not be included in the service charge.

5. The Applicants are the Lessees of various flats within the Building. The First Respondent is the freehold owner of the Property. The First Respondent's title is registered with title number HP375112 and the bundle included plans of that title. The Applicants, other supporting leaseholders who are not Applicants and the four other residential leaseholders who it was said did not oppose the application (collectively "the Lessees" and singular "Lessee") hold long leases ("the Leases") of the flats ("the Flats" collectively or "Flat" singularly") within the Property. A sample lease ("the Lease") specifically of Flat 73, granted to Ms Samantha Aspey, has been provided with the application made.

6. There are one hundred and seven Flats in total (in addition to which two more intended flats were still in the process of being built at the time of the hearing), of which forty-six remain in the ownership of the First Respondent, over 40%. Thirteen of those had been let to tenants and thirty-three had been vacant as at some months ago, although more had been let recently, it was said. The Lease is for 128 years from 1st January 2016. The Tribunal understands that the Leases of the other Flats are in substantively the same terms. Service charges are apportioned according to square footage. The Property was formerly used as commercial offices but was more recently converted into

residential accommodation by the First Respondent, which holds the freehold, including the Flats not the subject of the long Leases.

7. As the Tribunal finds below, that conversion work had not, at least in relation to parts outside of the Flats themselves, been completed. It was not clear whether that was because of finance difficulties, a falling out with the building contractor or otherwise. It was not clear whether the First Respondent had intended to retain any Flats and not grant long leases on them. However, it appears not because it was explained on behalf of the First Respondent in evidence that the reason for sales ceasing was the issues as to fire safety referred to below.

8. It is relevant that the Curtilage is not all the land on the site. It was established that part of the area laid out as access and parking ("the Other Land") in relation to which complaints were made by the Applicants, does not now fall within the Respondent's title at all, as revealed by the plans of that title, and does not fall within the scope of this application and any determinations to be made by the Tribunal. As to how much parking exists excluding that on the Other Land and how that fits with any parking rights purchased by the Lessees along with the Flats falls outside of the scope of this application. A potential related issue may arise with access to the Property, which requires passing over land not in the title and the Tribunal trusts that whether by way of an easement of necessity or otherwise, a solution to any problem will be found. However, that also falls outside the scope of this application.

9. It is not irrelevant that the owner of the remaining land on the site is called Bartley Way Developments Limited and is a sister- company to the First Respondent. It may be very relevant that the transfer of the Other Land was registered 25th April 2018 and so post-dating the Lease and 43 of the other Leases. The "Estate" as defined in at least the earlier Leases included the Curtlilage and the Other Land and at least the registered covenants must persist in relation to the Other Land notwithstanding the transfer.

10. The Second Respondent managed the Property as agents of the First Respondent until 3rd May 2021 until replacement with Farrow and Lynas Limited as from that date.

11. The Applicants sought to serve a section 22 Notice dated 10th March 2020 on the First Respondent landlord. The Notice itself met the relevant requirements. There were submissions made on behalf of the Applicants as to service being sufficient, but the First Respondent did not advance any point as to service in the event.

12. The period in which the notice required steps to be taken had expired by the date of this application. Three separate headings of breaches were set out in Schedule 2, in relation to breach of obligations, that there had been or were likely to be unreasonable service charges and that other relevant circumstances exist. The matters relied on in

Schedules 3 provide twenty- one bullet points in respect of the breach of obligations heading, five paragraphs of further details and six paragraphs under other circumstances. Schedule 4 in relation to remedies listed eighteen steps required to be taken and required each of the steps to be undertaken in one month. The Applicants subsequently varied that to requiring a schedule of works to be prepared within a month of the end of Covid 19 restrictions affecting works.

13. The Applicants nominated Mr James Farrow as the proposed manager, who prepared a management plan. He is, as addressed further below, the Farrow in Farrow and Lynas Limited. Whilst the Respondent is said to have originally opposed his appointment, in the event there was no dispute between the parties as to appointment of Mr Farrow as the manager in the event of appointment of such a manager and the Tribunal determining Mr Farrow to be suitable as the appointee.

The History of the case

14. Directions were first issued on 18th July 2020 setting out the steps to be taken in preparation for the final hearing on 19th October 2020. The hearing was to be heard remotely as video proceedings.

15. However, that hearing was unable to proceed due to, in particular, concerns as to service of the application on the First Respondent. The First Respondent was not in attendance at that hearing and had provided no response. As set out in some detail in subsequent Directions, there was thereafter a case management hearing and final hearing dates were listed but adjourned, in particular to facilitate what was represented to be an expected agreement between the parties, which plainly did not in the event materialise. Applications were made late in the day, causing no little inconvenience to the Tribunal, an approach which ought to be avoided wherever possible and as to which success should not commonly be expected.

16. During the course of the case, the First Respondent became represented and, somewhat later in the proceedings, so too did the Applicants. The Second Respondent applied to be joined as a party during the course of the proceedings, the Tribunal understands motivated by the criticism of its management of the Property by the Applicants. However, by the final hearing, its instruction by the First Respondent had ended and so it was indicated that the Second Respondent no longer wished to play a part in the proceedings.

The Hearing

17. The hearing proceeded remotely as video proceedings as envisaged and, in the event, across two days, being the 11th and 19th May 2021. The Applicants were represented at the hearing by Ms Lara Kuehl and the Respondent by Ms Claire Thompson, both of Counsel. The Tribunal is

grateful to both for assistance in this complex matter. Representatives of their instructing solicitors also attended.

18. In addition, the hearing was attended by the four witnesses from whom the Tribunal heard oral evidence and had received written evidence, namely Andrew Adamson (from whom there were several statements made at different times during the case) and Selena Coburn (from whom there were also a, smaller, number of statements), Applicants and former representatives of the Applicants generally prior to the appointment of legal representatives; James Farrow, the proposed Manager; and Moishe Kornbluh, bookkeeper at Pineview Property Limited. The Tribunal is also grateful to them for their evidence.

19. The Applicants produced a bundle in PDF form plus a supplement, of 936 pages all told. Counsel also provided Skeleton Arguments. Ms Kuehl provided one eighteen pages long, where is doubtful that skeletal was an accurate description, and cited six case authorities. That of Ms Thompson was nine pages long and so relatively slim, though not skeletal either. She did not rely on any specific case authorities. Amongst the many other documents, Ms Kuehl provided a draft management order. Both Ms Kuehl and Ms Thompson made oral closing submissions.

20. The contents of those submissions and Skeleton Arguments, insofar as they relate to matters of evidence and law which the Tribunal found relevant to the basis for its decision, are referred to below. The essence of the Applicants' case was that management, at least prior to the proceedings, had been "shambolic" and significantly affected by lack of funds contributed by the First Respondent and incomplete construction works. The essence of the First Respondent's paper case was that it was not in breach of many its obligations, although certain admissions were made, and that much had changed since the time of the application and which addressed matters raised by the Applicants. The Second Respondent addressed criticism of itself and was critical of the First Respondent. As the second Respondent did not attend, that was not expanded on.

21. Something of a preliminary issue arose in relation to the considerably late service of the witness evidence of Mr Kornbluh by the Respondent and responding statements from Mr Adamson and Ms Coburn. There was disagreement as to whether the parties had agreed that those three statements could be relied upon. The Tribunal allowed reliance on all of the statements, considering that appropriate in the circumstances.

The Law

22. The relevant statutory provisions in respect of this application are found in s24 of the 1987 Act. The provisions read as follows:

24 Appointment of a manager by [a .....tribunal]

(1) [The appropriate tribunal] may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this part applies-
(a) Such functions in connection with the management of the premises, or
(b) Such functions of a receiver,
or both, as [the tribunal] thinks fit.

(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 an order in all the circumstances of the case;
(aba) where the Tribunal is satisfied-
(i) That unreasonable variable administration charges have been; and
(ii) That it is just and convenient to make an order in all the circumstances of the case made, or are proposed or likely to be made,
(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.

23. Certain of the words and phrases are explained or expanded upon in subsequent subsections of section 24 of the 1987 Act. Later subsections address the extent of the premises and the extent of the powers of the manager.

24. Accordingly, there is essentially what is often described as “a threshold criterion” for the making of an order that there is a breach made out, although equally there can be an order if relevant “other circumstances” have arisen, without a necessity for a breach to be found. The breach can be only one of many alleged and can be modest.

25. The fact of there being a breach or there being other circumstances does not mean that an order must be made, simply that one then may be made. It then falls to the Tribunal to consider whether the making of an order is just and convenient. Several examples of factors which may support the making of an order or may support not making an order are identified in case authorities and other learned sources. Any specific decision must necessarily consider the interplay of any relevant factors in the particular case.

26. The principle of appointing a manager and the question of the appointment of a specific proposed manager are separate issues.

27. The opening provision of section 24 of the 1987 Act enables the Tribunal to give to the manager such powers as it considers appropriate, not limited to those given to the freeholder under the Lease.

28. Ms Kuehl cited six case authorities in relation to different aspects of the application. The first was *Petrou v Metropolitan Properties Co Ltd (unreported)* which is one source of the matters at paragraph 23 above.

29. She also cited the oft-quoted authority of *Maunder Taylor v Blaquire* [2002] 1 WLR 379 and a case of *Lodge* v *Queensbridge Investments Ltd* (unreported), although only the Upper Tribunal judgement in that case is usually cited- *Queensbridge v Lodge* [2015] UKUT 635 (LC)- which she also cited. Relevant elements of those emphasise the point stated in paragraph 26 and the cases are regularly cited in that regard.

30. *Maunder Taylor* also makes it clear that the manager acts pursuant to his or her appointment and independently of the landlord. The manager's powers stem from the order appointing and not from the terms of the Lease (hence the effect that the powers which may be granted are not limited by the provisions of the Lease). It has separately been said that the aim is to produce a coherent scheme of management.

31. *Queensbridge* related to mixed residential and commercial premises and is commonly cited for having explained that the manager can be given powers extending to both sets of premises, notwithstanding that the application is brought by a residential lessee against his or her freeholder and not by a commercial lessee. The powers granted in *Queensbridge* were wide and were upheld. In this instance, Ms Kuehl principally relied on the more limited points in the first instance decision that it may be relevant where residential lessees are charged all of the service costs (although that remains most obviously relevant where there are also non-residential leases) and the fact that the Tribunal is not limited to the extent of the order applied for.

32. Ms Kuehl also cited a first instance decision of *Opie v Kyriacou* (unreported) that a manager may need the authority of an appointment even where the landlord has contracted with the manager and a High

Court decision of *Howard v Midrome [1991]* EGLR 58, in which the requirement for reasonable notice was waived.

33. In terms of a service charge being unreasonable, that is effectively the reverse of it being reasonable in amount for the work or service provided and where those are of a reasonable standard

34. The relevant code of practice referred to in section 24 of the 1987 Act is the Royal Institution of Chartered Surveyors Service Charge Residential Management Code 3rd Edition ("the Code"). The Code provides for a range of matters relevant to the management of a property such as this one. The Code states, and in this regard the Tribunal simply sets out some relevant examples of provisions, that (Part 4.1) "You should manage the property on an open and transparent basis", (4.2) You should respond promptly to reasonable requests from leaseholders for information or observations relevant to the management of the property indicating a timescale by which the request will be dealt with. Relevant information may be provided, if the lease/tenancy agreement obliges or if it is reasonable".

35. With particular regard to financial matters, the Code addresses that in detail in Part 6. Service charges are covered in Part 7.

The Lease provisions

36. Under clause 5 of the Lease, the First Respondent is responsible to the Lessees to provide the "Services", defined in clause 1a as those services listed in the Sixth Schedule to the Lease and also services in the Seventh Schedule. However, whilst there is no such provision in relation to services in the Sixth Schedule, the services to be provided under the Seventh Schedule are limited to being "such of the services set out ……. as the landlord may from time to time at its absolute discretion in the interests of good estate management decide to provide".

37. The obligations on the First Respondent are said to be subject to the Lessee complying with obligations, which include paying sums towards the rent reserved and performing and observing the obligations as provided for. However, the Tribunal determined that the Lease is not worded in such a manner as to create a condition precedent.

38. The obligations in the Sixth Schedule require, amongst other matters the First Respondent:

> "2. To maintain in a good state of repair and condition:
> (a) The roadways forming part of the Common Parts [those Common parts being defined in clause 1a of the Lease];
> (b) Any common pipes wires drains channels watercourses waterways and service conduits in under or over the Building or the Estate"
> 3. To keep in good repair (and where applicable decorative condition):
> (a) the roof foundations main walls and other structural parts of the Building;

(b) the exterior of the Building;

.....

(f) the Common Parts and all fixtures and fittings in the Common Parts (including lifts and refuse chutes if any) and additions thereto (including the renewal and replacement of all worn or damaged parts);
(g) the glass in the exterior windows and frames serving the Building.

39. There are also requirements to provide facilities determined (acting reasonably) to be appropriate and to maintain those (paragraphs 5 to 7 inclusive). Other usual obligations follow. Paragraphs 8 and 9 of the Sixth Schedule require the First Respondent to insure the Property against the usual risks.

40. In addition, the First Respondent covenanted (paragraph 10) to keep proper books of accounts of all costs, charges and expenses of providing the Services and to provide relevant certificate. In paragraph 11, the First Respondent agreed to create and maintain a capital reserve fund to cover "anticipated costs to be incurred by the Landlord in the provision of the Services as the Landlord may reasonably require".

41. The service charge is split into five different elements, including amounts related to the Estate beyond the Building and to Parking. That split has no direct relevance for the purpose of this application.

42. The Lessee agreed by clauses 3 and 4 to comply with the obligations under the Lease. The obligations are detailed in the Fourth Schedule and Fifth Schedule, including paying the rent and proportionate share of Outgoings (paragraph 1 of the Fourth Schedule) and the Service Charge Proportions (paragraph 10). The sums are payable by equal instalments in advance on 1st January and 1st July in the amount estimated by the First Respondent (paragraph 11).

43. The First Respondent is notably obliged by clause 5(c) of the Leases in respect of Flats in relation to which there are no leases, as follows:

"Until the grant of leases on sale of the residential flats in the Building remaining unsold at the date hereof have been completed to observe and perform in relation to such flats such of the covenants and conditions corresponding to those contained in the Lease on the part of the Tenant as relate to the payment of service charges thereunder and the repair thereof".

Approach to Evidence and Submissions received

44. The Tribunal does not attempt to set out all of the evidence received and makes passing, where any, reference to such matters as it considered did not weigh one way or the other in relation to an appointment. As noted above, the bundle was some 936 pages- including a statement from Ms Sally Drake of the Second Respondent in addition to the statements from the witnesses who gave oral evidence- and four notepads of notes were taken of the hearing. The hearing was recorded.

45. The Tribunal instead seeks to set out the key elements of the evidence and submissions which it considered of particular relevance to the determination made, including resolving any notable disputes as to evidence, and to touch upon some of the other issues between the parties. The principal, albeit not the only, themes of the dispute related to the undertaking of works to the property and to financial and accounting matters. The Tribunal makes it clear that it has considered all the several matters in dispute but whilst some were significant in considering whether or not an appointment is just and convenient, others were of little or no significance in the context of determining whether or not to make such an appointment. Car park lighting, rubbish skips and, whilst plainly significant to the particular lessees affected, drainage problems are examples of matters which fell into the latter category.

Admissions

46. It was admitted on behalf of the Respondent (in which regard the Tribunal is grateful to Ms Thompson for identifying the relevant matters in her Skeleton Argument and closing submissions) that:

    i) The Respondent was in breach of the Lease as at the date of the application in relation to repair and maintenance covenants and where it was said in the statement of Mr Kornbluh and the Skeleton Argument of Ms Thompson that the items would be dealt with, as follows:

    Covenants in Part 1 paragraph 3(a), (b), (e) and (f) Sixth Schedule
    - Fix guttering where allowing water to leak into apartments below
    - Drip marks to north side
    - Replace the façade to the front entrance
    - Replace broken glass and window frames to apartments coming away from the building (although in relation to the latter it was only said that the frames were being considered and so there was no admission as to works being required)

    ii) There had been other breaches, although those had, it was asserted, subsequently already been remedied:

    Covenants in Part 2 of Sixth Schedule
    - Provision of lighting to the front of the Property
    - Fitting out of the gym (although not supply of equipment)
    - Clearing of rubbish from the parking area and the installation of lighting
    - Repair of car parking spaces
    - Repair of height barrier

47. It necessarily follows that the threshold for the making of an order has been cleared and therefore the question for determination by the

Tribunal was one of whether the appointment of a manager was just and convenient. However, that is not a decision resting solely on the matters admitted, which Ms Thompson sought to argue were relatively minor or matters of decorative repair. There were disputes the resolution of which were also relevant to the wider situation and which were significant in determining whether an appointment to be just and convenient.

48. Mr Kornbluh was cross-examined by Ms Kuehl about the items admitted but not attended to, in particular the dates when these items would be dealt with. The most notable outcome was that Mr Kornbluh could not provide that information.

Evidence and Findings in relation to matters in dispute

49. As matters admitted were only a portion of those in issue, the Tribunal turns to the key matters in dispute and its findings in relation to those insofar as relevant to the determination made. Those findings are principally ones of fact, although they encompass terms of the Lease as and where relevant. The Tribunal seeks to divide that from the question of whether it is just and convenient to appoint a manager as far as practicable, albeit incompletely. The matters under each of the headings in the section 22 Notice are taken in turn.

i) Breach by First Respondent of obligations under the Lease [save financial matters] alleged and not accepted

50. The Applicant's case was that the Property had been, and to a lesser extent still was, in a dangerous condition and particular concern was expressed with regard to matters of fire safety. Ms Kuehl submitted that reflected the First Respondent's failure to meet obligations under statute and the Lease. Most of the individual items complained of however related to external areas rather than to the Building itself. The exceptions were the entranceway, hallway, landings, lifts and staircases and passageways décor; the repair of the lifts; the fitting out of the gymnasium and problems arising with window frames to the Flats plus broken glass around the entranceway.

51. Whilst the First Respondent has admitted a breach where identified above, most of the alleged breaches in relation to specific items of work were not admitted. As Ms Thompson set out, matters not accepted fell into two categories- items where there was a factual dispute and items where it was argued that there was no breach pursuant to the Lease. The second category relates to services which fall within the Seventh Schedule. The Tribunal has added a third category, namely matters admitted but where there were nevertheless matters in dispute or other disputes relating to works.

"Items where there was a factual dispute"

52. Turning firstly to the first category, the First Respondent denied that

a) The tarmac to the roadway (to the extent part of the Common Parts as defined) is, and was as at the date of the Notice, in disrepair;
b) The pathways are and were in disrepair
c) The entranceway, hallways, landings, lift, staircases, passageways and bin store areas were not in good decorative condition
d) The lifts were not in working order

53. The Tribunal found in relation to the tarmac that was not in disrepair. Mr Adamson said that there were many areas of green moss, leaves and debris so that it was hard to see the white lines. The Tribunal considered that the roadway would be better for some cleaning and tidying but not that it was in disrepair. The Tribunal accepted Ms Thompson's argument that the provision agreed in the Lease in relation to the roadway did not encompass cleaning. The Tribunal did not specifically consider in relation to this item the extent to which the item related to the "Other Land" and any effect of that.

54. The Tribunal did not find the pathways to be in disrepair. There were areas where works had clearly been undertaken prior to the photographs taken in August 2020, including where newer paving was not the same colour as other surrounding paving. Aesthetically that was not particularly pleasing. However, it did not amount to disrepair or another identifiable breach of the Respondent's obligations. Mr Adamson accepted that there were no holes or gaps. There had been a gap in the paving, filled by that newer paving in or before early 2020 but not thereafter.

55. Notwithstanding the Respondent's admission that there had been rubbish and position that it had been cleared, it should be noted that the evidence of Mr Adamson was that the Lessees had organised the clearing of some of that, including shopping trolleys which had been used by workmen undertaking works to carry materials and had then been left. It was common ground that rubbish had, predominantly, been left by travellers, not that the cause was directly relevant to the need for clearance of it. Mr Adamson conceded that much of the clearing had not been attended to by the Lessees and that most rubbish was no longer present, although he said some was. The Tribunal accepted that to a modest extent- but see below.

56. The Tribunal found that there were inadequacies in the condition of internal communal areas. The Tribunal found cogent the evidence of Mr Adamson that the bannister was not satisfactory. Mr Kornbluh did not recall being shown that by Mr Adamson- when he apparently undertook an inspection of the Property- and opined that it was a small defect, but the Tribunal accepted a lack of repair requiring attention. However, that aside, it considered that Ms Thompson had been able to demonstrate in cross-examination that photographs of the condition of the area were from early 2020 at the latest. There was insufficient evidence to persuade the Tribunal of other ongoing issues as at the date of the application or the hearing. The Tribunal accepted that the

Lessees had fixed carpeting on a staircase. The Tribunal noted the argument that the Notice was vague but did not consider that an answer in this instance.

57. Ms Kuehl put to Mr Kornbluh that the fire escape barriers had collapsed. He accepted that the fire escape was not in good condition at the time of this application but said it had been fixed in late 2020 or early 2021 and was in a much better condition when he was on site in March 2021. The Tribunal identified no evidence to gainsay that.

58. The Tribunal did not find a breach in relation to the bin store. The Applicants' complaint was that it was no fully enclosed but there was no obligation to do that and nothing which the Tribunal found to fall within the obligations which did exist.

59. In respect of the lifts, whilst the Respondent's case was that the lifts were in working at the time of the application and currently, Mr Adamson was very firm that only one of the two lifts was working properly as at the application, although he did not know that any problem existed at the date of the hearing. The Tribunal found that evidence to be correct and so necessarily did not find an ongoing breach as at the date of the hearing, there being no evidence of any. The Tribunal also noted Mr Kornbluh's evidence that the lifts worked when he inspected on 16th March 2021. Mr Adamson also contended in written evidence that a programme of regular maintenance of the lifts was required but was lacking. The Tribunal agreed such an approach may be sensible but did not find the lack of one to be a breach of the Lease or the Code in this instance.

"Items where there was no breach pursuant to the Lease"

60. In respect of the second category, it was determined by the Tribunal that the alleged breaches as numbered 8 to 16 inclusive, did relate to matters contained in the Seventh Schedule and so to matters within the discretion of the First Respondent. Ms Thompson submitted that there had therefore been no breach, unless the Tribunal determined that the provision of any of the services was in fact mandatory.

61. The Tribunal does not so find. That said, the discretion had, pursuant to the Lease, to be exercised in the interests of good estate management. Necessarily, where the Respondent has a discretion, there may be a range of reasonable approaches which may be taken, although there ought to be a proper process followed and a proper decision taken as to what would be in the interests of such good estate management. Simple failure to do anything and to consider whether, or not, to do anything is not the exercise of discretion.

62. Mr Adamson complained that directional markings had faded and were hard to see at night, that there was a need for areas of road to be one way and that signs were needed to emphasise the parking area was private property and to avoid other residents nearby and people

working at or using a nearby car dealership from parking. The Tribunal makes not specific finding in relation to individual items, given the Respondent's discretion and the uncertainty as to the Other Land and any responsibilities of the Respondent.

63. The Tribunal did find there to be matters which ought to have been attended to in the course of good estate management to the extent that the land was owned by the First Respondent. The Respondent stated, in the witness statement of Mr Kornbluh that all items were being attended to or would be. In respect of item 13 only, the asserted need to provide a noticeboard on which to place regulations made relating to the Building, was that there had been no breach of any covenant in any event.

64. The Tribunal determines that the First Respondent was obliged to give appropriate consideration to the question of whether, or not, it was appropriate to undertake the items in the interests of good estate management and that it failed to give such appropriate consideration. The Tribunal further finds that if the First Respondent had given the matter appropriate consideration, it would have been very likely to decide that at least some of the matters complained of by the Applicants ought to be attended to. Accordingly, the Tribunal found there to be a breach in not considering the requirements of good estate management and in properly exercising discretion and the failure to properly exercise discretion to be relevant to an order being just and convenient.

"Matters admitted but where there were nevertheless matters in dispute and other disputes relating to works"

65. In relation to this third aspect, there were several other relevant elements in relation to repairs and breaches of related obligations in respect of which disputes or other relevant matters arose, including in relation to items asserted by the First Respondent to have already been attended to.

66. A significant matter in relation to breach by the First Respondent related to fire safety. The First Respondent obtained an assessment in January 2019 which stated that all was essentially fine. The Tribunal does not accept the accuracy of that report. It is apparent that the Respondent acted on the report nevertheless, and Mr Kornbluh stated that construction of the Property was complete (albeit the Tribunal does not agree) in April 2019 save for snagging work and the creation of the two additional flats in the atrium.

67. He asserted that the fire department then added additional requirements. The Tribunal is unable to identify why that may have occurred. In any event, the Tribunal accepts the accuracy of the Fire Enforcement Notices issued by Hampshire Fire and Rescue Service in August 2019. The Fire Service identified six matters to be addressed.

68. The Tribunal found that the evidence available in the bundle supported a notice having been withdrawn but not the one relied on by the Applicants, there having been two such Notices issued. The Respondent's representative subsequently- around lunchtime on the second day provided evidence of the withdrawal- the Fire Service apparently being content with that following discussions. The Tribunal accepted that. It was unclear why a second notice was later issued and that was withdrawn.

69. The Tribunal found that a Housing Act 2004 Improvement Notice issued by Hart District Council had not been withdrawn until late 2020, although another had been at an earlier point. It appeared that had been appealed, presumably to this Tribunal, but no Decision was provided by the parties. The email produced on behalf of the Applicants dated 28th October 2021 from Mr Ian Barton of Hart District Council was found to convey the correct position, namely that almost all of the fire safety works had by that date been undertaken and that when the final elements had been completed and inspected, the Improvement Notice could be removed.

70. The Tribunal found that there had been a number of fire safety failings on the part of the First Respondent. It appeared to the Tribunal that those were, or predominantly, were failings which had always existed from the development of the Property by the First Respondent, although accepted the possibility that there might be elements subsequent to that, insufficient evidence being received on which a specific finding could have been made had that been required.

71. The First Respondent had, by the time of the hearing, completed the fire safety works, the cost of which is referred to below. The Tribunal finds on the evidence received that such works had addressed all fire safety issues save perhaps to an extent in relation to the staircase, although if the Tribunal has misunderstood the full extent of the works- and the evidence was imperfectly clear- the Tribunal considers that nothing turns on that when weighed against other factors for the purpose of determining this application. The manager must check carefully that the fire safety position. Nevertheless, the evidence supports the conclusion that the works were completed, and that the Council was content with the works and fire safety following completion.

72. It was put to Mr Kornbluh by Ms Kuehl as to why the works had not been undertaken sooner. His reply was cashflow until the shareholders injected more funds. That is, whilst commendably candid, not even remotely approaching an acceptable explanation for a significant breach.

73. Moving on from fire safety, it was argued on behalf of the First Respondent, and the Tribunal so finds on the evidence, that some of the breaches asserted related to the "Other Land" which does not, it is explained above, fall within the First Respondent's title, albeit that it

had done prior to 27th April 2018. Necessarily, the Tribunal finds that the First Respondent was not in breach in relation to land it did not own and in relation to which it owed no identified obligations to the Applicants. The picture was less than entirely clear that obligations and ownership went hand in hand and as to terms of agreement, whether formal or otherwise, between the First Respondent and its sister company and whether prior to the sale, contained within any contract or the transfer or subsequently. However, the Tribunal considered that the most likely situation was at least a licence as between the two for the First Respondent and/or the Lessees to use the "Other Land" but had nothing on which a finding could properly made as to whether any maintenance obligations were imposed on the Respondent. Mr Kornbluh only said that the sister company did not object to the use of the parking spaces.

74. Much of the rubbish deposited in the parking area was found by the Tribunal to have been present on land which fell outside the title of the Respondent. So too were various parking spaces complained of and the parking height barrier. However, the First Respondent made admissions in relation to those items and hence the Tribunal treats the position as being that there were breaches to the extent such were admitted but not beyond that where the matters related to land beyond the First Respondent's title and in the absence of any clear evidence that the First Respondent is otherwise responsible. The Tribunal adds that in the event that approach is too broad brush, the items are not ones considered by the Tribunal to be of sufficient weight that they would have altered the outcome of this application in any event when set against other factors. It follows that the Tribunal does not, for example, seek to determine whether the repair of the height barrier was or was not of itself an adequate repair.

75. Whilst not part of the above, this appears to the Tribunal to be as good a point as any to observe that the evidence, including that of Mr Farrow, was that each Flat was sold with a parking space. However, if that is so, it is very difficult to see how those can be provided within the Curtilage. Whilst any issue which may arise does not form part of this application, the right pre-dated the transfer of the Other Land in the case of most of the Flats held by Lessees and the issue might sensibly have arisen at the time of the later Leases when the Curtilage was much-reduced. The Tribunal is mindful that an issue relevant to the manager may yet arise.

76. Mr Adamson was asked about the window frames, stating that to an extent the issue was outside but also that in some of the Flats a finger could be inserted between the window and the wall. The Tribunal accepted that evidence. Mr Kornbluh was also cross-examined about the window frames coming away, which he said- at that stage in the hearing- was a defect from their installation, accepting some of them to be bent, but not accepting the extent of the problems asserted. The Tribunal did accept the evidence of Mr Adamson and considers that the First Respondent was obliged to take specific action and failed to do so.

The frames "are being considered" is not an adequate step and Mr Kornbluh was vague as to what action would be taken and when.

77. There was questioning of both Mr Adamson and Ms Coburn about exterior lighting having been fitted by the Respondent as demanded in the section 22 Notice and the residents having complained it was too bright and the lighting being turned off. However, the Tribunal does not consider that anything arose which assists it with the question to be answered.

78. It was not immediately obvious to the Tribunal from the photographs provided that the gym had been completed to a high standard and indeed Ms Thompson conceded in closing that it was "largely finished", not entirely so. However, the Applicants did not challenge the matter in the hearing nor did they dispute that the gym equipment should be funded from service charges.

ii) Unreasonable service charges and financial matters alleged and not accepted

79. It should be said at the outset that there was no suggestion that Lessee money had not been held appropriately or that any had been misappropriated by the Respondent or its agents at any time. There were no other similar issues about the day to day dealings with the money received and held on trust for Lessees.

80. There had been a lack of payment by the First Respondent of the sums required to be paid as what the Tribunal has elsewhere termed "Equivalent Contributions" to the property expenses, the sums payable by the Freeholder pursuant to clause 5(c) of the Leases in respect of such of the Flats in relation to which there are no leases, or otherwise by the First Respondent to fund works and services to an equivalent sum. The First Respondent was in breach of that covenant.

81. The Second Respondent's case, and the content of emails sent on its behalf prior to the proceedings, was that it had no ability to compel the First Respondent to pay. The Second Respondent was simply the agent of its principal, the First Respondent, and could only take action on its principal's behalf, which could not be against its principal itself.

82. The Second Respondent stated in the statement by Ms Sally Drake that the "debt" owed by the First Respondent to the service charge fund was £146,748.32 as at the date of the statement. The Tribunal does not consider that "debt" is the correct term, given that there were only two parties to the Lease and so service charges were collected on behalf of the First Respondent to contribute to sums which it was required to pay for services which it was required to provide. The First Respondent cannot owe a debt to itself and there is indeed no debt at all.

83. The First Respondent was obliged to comply with its obligations. The extent to which the First Respondent has not leased Flats simply limits,

for these purposes, the proportion of the contribution to the cost of compliance recoverable from the Lessees. The share of the given budget which relates to the Flats not leased is the extent to which the First Respondent has to put its hand in its own pocket to meet the costs of compliance. Ms Kuehl on behalf of the Applicants apparently understood the distinction, referring to it in paragraph 56 of her Skeleton Argument.

84. The First Respondent was, assuming Ms Drake's figure to be correct, obliged to provide and fund works and services of an additional £146,748.32 over and above such works and services as could be funded from the sums recoverable from the Lessees (and more insofar as any of the sums had not been recovered from the Lessees until such time as they were).

85. Ms Drake added in her statement that a small amount of contribution to the costs of the Services had been made by the First Respondent in the first service charge year -2018- and more recently that some ground rent had been paid over. Mr Kornbluh's evidence was consistent with that. Inevitably, Ms Drake could not be cross-examined as she was not in attendance. However, the Tribunal notes that the Second Respondent held the relevant information, notes the lack of challenge to the evidence and finds the sum which the First Respondent was obliged to contribute as equivalent to the service charge contributions of the Lessees was the extent identified by Ms Drake.

86. Mr Kornbluh said in oral evidence that the First Respondent had paid to the extent of paying the cost of insurance, done directly and a large sum, such that there were credits to the (notional) account of the First Respondent to that extent. Hence part, though not all, of the sums attributable to the retained Flats had been expended. The Tribunal is prepared to accept that as correct. Mr Kornbluh was credible on the point and the shortfall identified by Ms Drake was not inconsistent with some payment having been made. The Tribunal makes no findings as to any impact on recoverable service charges.

87. In addition, and as Ms Kuehl referred to in cross- examination of Mr Kornbluh, there is a Debtor's Report in the bundle which records some payments against some of the Flats retained by the First Respondent. However, and this was Ms Kuehl's point, such sums are a fraction of the funds which ought to be provided by the First Respondent rather than the service charges and related to the retained Flats.

88. The Tribunal found no difficulty in being satisfied that the First Respondent had substantially been in breach of its obligations to fund the cost of budgeted services works over and above the appropriate proportion payable by the Lessees and such that matters could not be attended to.

89. The Applicants' case, as summarised by Ms Kuehl in her Skeleton Argument, was that service charges were said to be unreasonable

because the Lessees were expected to pay the First Respondent's "shares" as well as their own. Reference was made to correspondence from the Second Respondent that there was a considerable shortfall in sums received as compared to the service charge budgets because of the failure by the First Respondent to pay.

90. However, the Tribunal considers that the Applicants' case sought to conflate two different matters, namely on the one hand, the amount of service charges demanded for the services budgeted to be appropriate and, on the other hand, whether the service charge account contained sufficient funds to enable the services budgeted for to be provided. The Tribunal found no difficulty in reaching the finding that there were insufficient funds.

91. The Tribunal was not persuaded that any issue arose with the budgets or with the sums demanded: the issue was the separate one that the First Respondent had not paid towards cost of compliance with obligations, hence their obligations had not been fulfilled. The Tribunal accepted the First Respondent's case, as advanced by Ms Thompson in her Skeleton Argument and submissions, which also noted that the previous managing agent gave that reason for the failure to provide some services. The Applicants consequently failed to satisfy the Tribunal that there was unreasonable demand for service charges for the reason argued.

92. The Applicants also argued that the service charges were unreasonable having regard to the standard of the services provided because of the asserted payment of excess sums to make up for the First Respondent's failure to pay. That argument also necessarily fails.

93. The Applicants further contended that they had paid for services that they had not received. The Respondent's argument was that credits had been posted to the extent appropriate. Relatively little was said in relation to this element, although it was briefly raised with Mr Adamson by Ms Kuehl in re-examination. He said that the Second Respondent decided to re-do the accounts and take into account only the services actually received, such that there were refunds. That largely accorded with a paragraph in the statement of Ms Drake that costs for the gym and the third lift had been removed.

94. Mr Adamson also asserted those only related to 2020 and he perceived credits had been applied on behalf of the First Respondent for previous years. Ms Drake in her statement referred to crediting "the overcharge from the Year End 2018 and Year End 2019 Final Accounts to the Bartley Way Retained units" to give the £146, 748.32 figure. However, other evidence was lacking, and the Tribunal was unclear what that meant had occurred and how it related to any credits to the Lessees.

95. In the particular premises, the Tribunal makes no finding as to whether the net effect is that there has been a charge for services not supplied. The Tribunal also cannot identify whether charges on account were or

were not reasonable when demanded and whether it was reasonably expected that the particular services would be supplied at that time. No finding is necessary in the event for the purpose of determining this case. If the Lessees ascertain that they were treated differently to the First Respondent and consider that their service charges were thereby unreasonable, they may seek to make an application accordingly.

96. The Tribunal was concerned that service charges might be unreasonable for having funded works which were not properly chargeable as service charges, but which instead ought to have been undertaken in the course of conversion and development of the Property. Ms Drake had said in written evidence that she had cross-checked, although the outcome of that exercise is not apparent. However, no such works were identified as undertaken and then charged for through service charges, at least by the date of the hearing.

97. Mr Kornbluh did accept that some of the works attended to, or which would be related to completing the construction, were not chargeable as service charges, in response to question by Ms Kuehl. She did not take that point further at that stage. The Tribunal also had regard to Mr Kornbluh's evidence that no snagging work had been so charged, which was not specifically challenged by the Applicants, albeit Ms Kuehl revisited the point. Mr Kornbluh said that no recent works had been charged to the service charge fund or equivalent contributions to date.

98. The more relevant question was whether such works would be charged. The Tribunal notes that Mr Kornbluh accepted in reply to questions by Ms Kuehl that the defects to window frames relate to their installation, as referred to above. However, Mr Kornbluh in response to questions by the Tribunal was rather less clear as to the charging for such works. He stated that works had been undertaken in March 2021 and stated that bent frames had not been installed, contradicting his earlier evidence. The Tribunal questioned how a decision would be made as to whether the works were chargeable to service charges. Mr Kornbluh suggested that an application would be made, and the Lessees could object. Whilst Ms Thompson sensibly sought to repair that damage in re-examination, the Tribunal was not entirely re-assured. Her submission in closing was that the managing agent- in the event, the manager- would have to look into the cause but the Tribunal was not satisfied that an agent beholden to its principal would be able to do that satisfactorily given the comments, and change in comments, of Mr Kornbluh.

99. In addition, the Tribunal was concerned that service charge funds may have been used for items such as the clearing of rubbish which related to land not falling within the Property and its curtilage and not owned by the Respondent, accepting again the Applicants not to have argued the case in that manner. However, the Tribunal was in any event unable to make any specific finding of that on the limited evidence available in relation to that.

100. No evidence was given that the 24- hour fire watch required until fire safety remedial works were completed were paid for from service charges collected. Mr Kornbluh stated that the cost had been £4000 per week for part of 2019. The cost was otherwise unclear and did not answer Ms Kuehl's observation that the First Respondent had only paid a small portion of the sum it ought. The impression formed by the Tribunal was that the First Respondent may assert that to be a cost which should have been borne by the service charges or Equivalent Contributions.

101. In addition, there were the fire safety works themselves. The Respondent said that such works cost some £670,000 and the Respondent's position, as expressed in the evidence of Mr Kornbluh in particular, was that the costs of the works were recoverable through the service charges. Given that the works amount to major works and necessarily a limited sum, although not an insignificant one cumulatively, can be charged to each Lessee, this issue is discussed below in relation to Just and Convenient. Those matters are not rehearsed here.

102. The Tribunal does not reach a finding that there have to date been unreasonable service charges because of funding works not chargeable as service charges, on the evidence available which is insufficient to support such a finding. However, the Tribunal finds, in light of the above matters, that there is a risk of unreasonable service charges being demanded in the future and in relation to works which are not properly chargeable as service charges. There may or may not be an application as Mr Kornbluh suggested.

103. Mr Farrow will need to consider the issue of the First Respondent if it arises. The Tribunal appreciates that such argument is not how the Applicants advanced unreasonableness of demands but rather how matters developed during the course of the hearing.

104. The Respondent accepted, including through the evidence of Mr Kornbluh, that no capital reserve fund had been created. However, breach of the Lease thereby was denied. The Tribunal finds that there was no breach. The Lease was drafted such as to enable the First Respondent to demand service charges from the Lessees to, amongst the other matters listed, create such a fund, to which a proportionate contribution would be required from the First Respondent reflecting the number of Flats retained.

105. The Lease enabled such a fund "as the Landlord may reasonably require" and sums to be demanded to that extent. If the First Respondent did not create such a fund, neither could it demand sums for such. The creation of the fund was not obligatory, and the provision differs from the requirement for the exercise of discretion and good estate management relevant to the Seventh Schedule.

iii) Other circumstances alleged and not accepted

106. The Applicants also asserted in the section 22 Notice that there were other relevant circumstances. Those were said to relate to the Second Respondent and across six individual points essentially criticised the Second Respondent's management.

107. One related to asserted conflict of interest because the Second Respondent could not pursue the First Respondent but that misunderstands the nature of an appointment as managing agent. The Second Respondent was not conflicted- it only owed duties to the First Respondent. The fact that the Second Respondent could not compel the First Respondent to, one way or another, meet the cost of compliance with the First Respondent's obligations over and above the service charges payable by the Lessees and recovered was plainly a limit to the Second's Respondent's abilities to ensure that compliance occurred- and was very relevant to the appointment of manager, contrary to Ms Thompson's contention- but that was in the nature of the Second Respondent's appointment as agent and its duty being to its principal.

108. The Tribunal was troubled by the allegation that service charge demands have only been served on certain of the Lessees, not least where the majority of the Lessees were Applicants. However, the evidence presented did not demonstrate adequately that the allegation was correct. Nothing turns on the matter in light of other considerations, although the manager will need to establish whether there are Lessees from whom service charge contributions still need to be demanded. The manager will also need to consider potential limitations on such demands now being made and further sums which must be met by the First Respondent in the absence of an ability to recover them from others.

109. The other matters in this part of the section 22 Notice do not, the Tribunal has determined, add anything which is beyond negligible to the application and so the Tribunal does not consider it necessary to address them in this Decision save to say that the Tribunal finds much merit in Ms Coburn's comment in evidence, when asked about criticism of the Second Respondent, that it was between a rock and a hard place.

110. The Applicants added one further and potentially important point in the course of the application, namely that the Property was under-insured. In the witness statement from Ms Coburn, it was asserted that the Property was only insured for 50.6% of its value**.** Reliance was placed on correspondence from the insurance underwriters. Consequently, there was argued to be a further breach of the First Respondent's obligations under the Lease. Ms Coburn said that certain residents had made a claim about sewage issues (the existence of which and the investigation of which was covered by Mr Adamson) and had been told that they would only receive 50.6% of their claim back.

111. The Respondent's position was that loss adjusters would scale down a claim and suggested Ms Coburn had limited information and not first-

hand. Mr Kornbluh said in response to the witness statement of Ms Coburn asserting under-insurance, enquiries had been made and the relevant insurance broker said the Property was fully insured.

112. The Tribunal was concerned at potential under-insurance and the impact of that but was unable to find that to be the situation. The email 26th March 2021 from loss adjusters asserting inadequate insurance for the value of the Property was the only direct evidence of potential under-insurance. There was inadequate evidence as to the correct position and no way of identifying the merits of the loss adjusters' comments, not least where arguments about claims are to be expected.

Consideration of whether it is just and convenient to appoint where matters have been identified as relevant to that

113. The combination of the admissions made on behalf of the Respondent and other findings made are such that the Applicant has stepped over the low threshold, although it will be appreciated that not all of the matters alleged were accepted by the Tribunal. In principle an appointment of a manager could be made, provided that was determined to be just and convenient.

114. A whole array of factors may or may not make it just and convenient to appoint a manager, as noted above. Most notably, serious breaches have been found of covenants entered into by the First Respondent in relation to payments required and in relation to obligations in relation to the Building and over a significant period of time, indeed some years.

115. The section 22 Notice did not prompt any response from the First Respondent, whether in writing or by way of discernible action. The evidence of Mr Kornbluh that the First Respondent was focused on making the building safe was not a convincing reason for that. It was entirely reasonable, not to say almost inevitable, that the proceedings followed.

116. It can properly be said that the fact that a section 22 Notice gives a time within which the given applicant requires actions to be taken, does not of itself mean that such time is a reasonable one. However, a landlord is able to take such a point in responding to the Notice, assuming that it does so respond. In this instance, the Notice only required a schedule of works to be undertaken within a month, giving scope for the First Respondent to provide what it asserted to be a reasonable period for works being undertaken and other issues addressed. The First Respondent did not provide one. As Ms Kuehl submitted in her Skeleton Argument, the hearing of this application took place over a year after the service of the Notice and works remained outstanding. The Applicants have demonstrated, the Tribunal found, that items remained unattended to which ought properly to have been.

117. It is relevant that not all of the allegations made by the Applicants have been found to be sound. Some of the items set out in the Notice did not

require action. However, several- and the Tribunal considers the most significant ones- were made out.

118. The First Respondent allowed fire safety hazards to remain, which were considered by relevant enforcement authorities to create a serious risk for a significant period and until in or about late 2020. The failure of the First Respondent to have attended to matters of fire safety is inevitably a cause of considerable concern to the Tribunal.

119. The Tribunal also considers that to the extent items of work had remained unresolved, the First Respondent cannot fail to have been unaware. Attendance at the Property would have revealed those works which had not been completed, irrespective of any certificate from contractors, and other works required would, at least in the main, have been obvious. The First Respondent cannot, the Tribunal finds with no difficulty, have considered that it had dealt with everything that it should. It knew that matters required attention. It did not deal with them. To any extent that such a state of affairs may have related to funding, it does not alter the situation on the ground.

120. Ms Thompson argued that insofar as there had been breaches, they were not material ones and that in any event, the First Respondent had dealt with them or was taking steps to do so and hence they did not render it just and convenient for a manager to be appointed. In particular, that relates to such of the fire safety works as now undertaken. She took the Tribunal through the items one by one in closing.

121. It is right to say that there has plainly been progress made as compared to the position at the time of the section 22 notice. That improvement is a considerable positive for the Lessees.

122. In appropriate circumstances, the Tribunal may find that sufficient progress has been made that it is no longer appropriate to appoint a manager. However, in this instance the progress made was too little and far too late, where the First Respondent had owned the Property from the outset and was directly responsible for failure to complete the construction of the Property which lay at the heart of a number of the problems and to maintain, or fund the maintenance of, the Building and its Curtilage thereafter.

123. Equally, there is no evidence that the Respondent would have undertaken the works which have been carried out in the absence of the proceedings being issued. Whilst the motivation for works being undertaken is not directly relevant to the fact of remedy of the breach or lack of it, it is significant in relation to the consideration of future management of the Property.

124. The Tribunal may in a particular case find that despite considering the undertaking of works and the remedy of other breaches to be motivated by the issue of proceedings, nevertheless the Tribunal can be

sufficiently confident about future management. However, inevitably an assertion by a landlord in such circumstances that the future management will be appropriate will be examined with care.

125. One factor which has been identified as potentially of relevance is the appointment of a new managing agent, not least where relevant fault lay with the previous managing agent and whether the Tribunal is confident that there has been or will be a change in approach to management of the property arising from the appointment of the new managing agent from that which previously caused concern. Ms Thompson argued that the appointment of a new managing agent addressed the bulk of the Applicants' concern. That was a rather optimistic argument and was not persuasive.

126. The change of agent had been formally made only a few days before the hearing, although the evidence including that of Mr Farrow, was that he had been involved with the Property since March 2021, as set out further below. As a perhaps inevitable consequence, there was little evidence that had altered the approach taken by the Respondent by the dates of the hearing. Whilst it was put to Ms Coburn that the change of agent to Farrow and Lynas Limited was a positive, the Tribunal considered that company had not had the opportunity to make much progress and so although, for example, attendances on site was a positive in itself, there was nothing specific yet available to demonstrate that the appointment- and any dealings by Mr Farrow- in the capacity of managing agents beholden to the First Respondent, would address the concerns in respect of the Property.

127. The Tribunal was taxed by the question of the extent to which works required formed part of the development of the Property and so were obligations of the First Respondent under the Leases and any contract of the Leases or any other obligation related to the original grant of those Leases, as compared to being matters which should properly be funded through the service charge and the First Respondent's equivalent contributions.

128. The point was arguably less notable than it would have been if significant work from construction remained outstanding. In that event, there would have been the thorny question of how the manager operated against a background of incomplete construction work and how the manager could ensure that was undertaken to then be in a position to deal with the repair and maintenance obligations under the Lease. Such a position would have been highly unlikely to alter the outcome. Indeed, it may have meant that it was all the more important to appoint a manager and grant carefully identified and extensive powers. In the event, that need not be dwelt upon.

129. Without wishing to pre-judge any application which may be made in relation to the reasonableness or otherwise of service charges which may have been demanded or which may be demanded in relation to any specific element of the works, it is stating the obvious to observe that

the First Respondent- and indeed the manager- can only demand as service charges such sums as are properly payable as service charges relating to the Property as it ought to have been developed. To the extent that the First Respondent had not completed construction works, the First Respondent was obliged to do so and is not entitled to charge the cost as service charges.

130. Nevertheless, it is considered by the Tribunal to be very important that there is a careful distinction drawn between works which properly relate to the First Respondent fulfilling its obligations under the Lease and those fulfilling other obligations. It is plainly in the financial interests of the First Respondent for any costs to fall into the former category as opposed to the latter one. The need to avoid any potential conflict between the two different possibilities and charges is a further strong reason for appointing a manager independent of the First Respondent and who is therefore able to take a neutral approach to the question of into which category any given relevant costs should be placed.

131. That may be particularly relevant in relation to the fire safety works and why the Tribunal was concerned as to risk of unreasonable service charges in relation to such works as touched on above. The Respondent argued that such works cost some £670,000 and the Respondent's position, as expressed in the evidence of Mr Kornbluh in particular, was that the costs of the works were recoverable through the service charges. Ms Thompson's Skeleton Argument referred to the First Respondent considering bringing an application for dispensation from consultation requirements.

132. The Tribunal considers that any such application can only be appropriate, and in commenting the Tribunal makes no attempt to determine what the outcome of the application should otherwise be, to the extent that the works undertaken are works properly chargeable as service charges. It will be important in that context for the Tribunal members by whom any such application is considered to have careful regard to the condition of the Property prior to the works and identify to what extent that relates to incomplete construction as compared to subsequent repair and maintenance. It is unsurprising that in his more recent witness statement, Mr Adamson sought a breakdown of the costs incurred. The Tribunal notes the evidence of Mr Adamson about inadequate or incomplete works during conversion but considers this is not the time to make any specific finding.

133. It may be that in due course a determination will be made that there are such works which are chargeable as service charges and for which dispensation is granted. It may therefore be that in due course the First Respondent will be entitled to balance out the proportionate equivalent sums in respect of those works which relate to the Flats not leased and for there to then be credits against the cost of the works sums which it should have historically contributed. It may be that the effect will be to

cancel out the current "debt". That was certainly Mr Kornbluh evidence as to how that "debt" was sought to be addressed.

134. However, at this stage, no dispensation has been granted and to the extent that the works are a set of major works the majority of the cost- that beyond £250 per Flat leased- cannot be charged for and so the substantial majority of the "debt" remains. The Tribunal can only properly consider the position that currently exists and not one of several possibilities which may exist at some unknown future date.

135. The point as to whether costs are properly chargeable to the service charges and equivalent also arises in relation to the fire warden costs and where Mr Kornbluh implied those may be Equivalent Contributions by the First Respondent and it is plainly in the interests of the First Respondent to so charge them. However, to the extent that the charges relate to the failure of the First Respondent to adequately complete works during the development of the Property, the Tribunal considers that would not be appropriate. Concern that the First Respondent may adopt that course is an added point in favour of the appointment of a manager, as is the ability of a manager to independently assess whether any such sums should be credited if the First Respondent seeks to argue for that.

136. The Tribunal's concern was amplified by Mr Kornbluh's contradictory evidence about charging for works to the window frames which had come away from the wall and the suggestion of charging for those. The Tribunal concluded that the First Respondent may very well, if a manager is not appointed, attempt to require payment from service charges and equivalent of matters which arguably relate to construction, emphasising the merits of an independent manager.

137. The simple reality is that the First Respondent has not contributed to the cost of the Services year on year. The First Respondent cannot fail to have been aware of that and indeed sensibly did not argue that it was. The Respondent continually and deliberately failed to meet its financial obligations. The Tribunal considered that the failure of the First Respondent to pay the service charges historically and the inability of any agent appointed by the First Respondent to pursue non-payment, is a very powerful reason for a manager to be appointed. Ms Kuehl was correct to so argue. That is irrespective of the answer to the point immediately above as to any potential offset in the future. The First Respondent cannot have failed to appreciate the consequences of that failure in respect of the Property or be surprised at the impact on the approach taken by this Tribunal.

138. It may be that the First Respondent will fund such of the budgeted and subsequent actual costs for the Services required by the Lease in relation to the forty-six Flats that are not leased on long leases and on the due dates hereafter, as Mr Kornbluh also stated. He was firm that the First Respondent would pay in 2021 and ongoing when cross-examined.

139. The information as to the financial position of the First Respondent is sufficiently unclear as to prevent confidence, whereas the historic failure creates considerable concern, albeit that the Tribunal noted that Mr Kornbluh also stated that the Respondent now receives income from the thirteen Flats rented out, as would be expected. That plainly provides the First Respondent with an additional source of funds. Mr Kornbluh added that the First Respondent was precluded from renting out any of the Flats in 2019 and 2020 as the Council would not allow it. The Tribunal perceives that related to the Improvement Notices or similar. He said that in 2020 the Council released the notice and so since 22nd November the First Respondent had dealt with matters other than the fire issues.

140. It may also be that the First Respondent will seek to sell more of the Flats now that no fire safety issues appear to prevent that and assuming any prospective buyers are not put off by any matters still requiring attention. The First Respondent may therefore receive significant capital sums and the proportion of Flats owned by it may fall, with the share of expenditure recoverable through service charge rising accordingly. However, it is not appropriate to venture into what is entirely speculation.

141. Mr Kornbluh also gave evidence that some service charge fund contribution may have been paid by the shareholders of the First Respondent for the current year, about which he had apparently been informed the previous day. However, he had no first- hand knowledge and could not even provide a figure for the sum. Even if such a payment was made, it adds little against the weight of other considerations. The Tribunal was not satisfied that Mr Kornbluh was correct about future payments, which, all else aside, appeared not to be in his gift.

142. It should be added that the Respondent's case was also, Ms Thompson submitted, that the 2021 proportion relating to Flats not leased is being paid by the Respondent from rent receipts and some of the "debt" has been cleared by payment of ground rent already in recent months. The Respondent is of course entitled to utilise rent receipts or such other funds as it chooses over and above the service charge sums received to meet its obligations. The Tribunal understands that there have specifically been payments into the service charge account.

143. It was beyond question that whatever contributions had more recently been made, the Respondent had still substantially underpaid as compared to its obligations under the Lease.

144. The concern about the future financial position of the First Respondent, only partially alleviated, is especially significant where the Respondent's contributions are such a large proportion of the whole and where the effect of non-payment is consequently so substantial. The Tribunal considers it vital that there is an ability to pursue the First

Respondent for non-payment if payments are not made when due- and that such pursuit of any non-payment occurs without undue delay.

145. The Tribunal was not persuaded by Ms Thompson's submission of the Lessees entitlement to enforce the Respondent's covenant being a sufficient answer, albeit that the Tribunal accepted the point to be relevant and gave it consideration. The point also rather implicitly had to acknowledge the limitations on the actions of a managing agent. She also argued in that regard that the manager could only be appointed to carry out functions in the Lease, which is not correct, and that the manager may need to obtain a judgement against the Respondent. That last point may well prove correct, much as it may be hoped not, but where the Tribunal can make taking action a key feature of the manager's appointment and make clear the manager's powers and responsibilities, facilitating the taking of such action as far as possible.

146. The effect of the First Respondent's failure to pay any sum and the limit to available funds to the service charges collected can be seen in the shortfall on the funds required to fund the Services for a lengthy time and the impact on the ability to undertake necessary works insofar as properly fundable by the service charges. That impact is an inevitable one where there are inadequate funds. The consequent lack of works impacts considerably on the Lessees and could do in the future in ways affecting their safety, as has occurred previously.

147. The Tribunal did not consider that recent attempts to go further towards fulfilling the First Respondent's obligations to undertake and/or facilitate the provision of works and services by funds being paid to be anywhere near sufficient to alter the outcome of this case. The Tribunal finds that the Applicants have comfortably demonstrated it to be just and convenient for there to be a manager appointed.

Decision to appoint a manager in principle

148. Consequently, in relation to the matter of appointing a manager in principle, the Tribunal does find it just and convenient to appoint a manager for the Property, as conveyed to the parties at the end of the hearing.

Appointment of Mr Farrow

149. The principle of appointing a manager and the appointment of the specific manager are different matters. It does not necessarily follow that the first will lead to the second. The Tribunal must be satisfied that the particular manager proposed is suitable to be so appointed in light of his experience and abilities and his understanding of the role of a manager, together with any other considerations the Tribunal regards as relevant.

150. The Tribunal has determined that Mr Farrow possesses sufficient suitability to be appointed. Whilst it is not determinative, the Tribunal

has been mindful that Mr Farrow, or at least the company of which he is a director, has recently been appointed to manage the Property in any event. Importantly, he not only appears to enjoy the confidence of the First Respondent but also of the Applicants. There can be little doubt from the Tribunal's experience that management of a Property is that much simpler, at least initially, where that confidence is held.

151. The Property has been, as set out above, in a particularly bad state and there is the ongoing complication of the extent to which matters fall within the expenses for which service charges can properly be demanded as compared to issues with the original construction and particularly the unfinished construction of the Property. So too, the potential question of dispensation with consultation in relation to any relevant fire safety works and provision of funds in the future by the First Respondent. The management of the Property pursuant to the Order made may be no simple task and may be considerably more difficult than the average. The question of the suitability or otherwise of Mr Farrow being appointed was therefore a matter to which the Tribunal gave even greater thought that might inevitably be required for any appointment of a manager.

152. Mr Farrow was questioned by the Tribunal- and to a lesser extent by Ms Kuehl and Ms Thompson- as to his understanding of the role of a Tribunal- appointed manager and as to his experience and in relation to his management plan, which on paper was somewhat generic. Mr Farrow has not held a manager appointment previously and was plainly unfamiliar with the process. That raised a common conundrum for the Tribunal, namely that there are not many Tribunal- appointed managers and the creation of a wider pool of them necessarily involves appointments of persons without previous experience of such appointment.

153. The Tribunal determined that Mr Farrow's experience of managing properties was fairly good from its probing of that and ought to enable the competent management of the Property. He was in possession of appropriate information and indicated understanding of the essence of the role. Mr Farrow also had some knowledge of the Property by the dates of the hearing and at least had his feet under the table. He understood the extent of the curtilage of the Property. Mr Farrow explained that he had issued the demands for service charges for the second quarter of 2021 and had also settled invoices of some contractors. He gave satisfactory evidence as to potential issues with the First Respondent wishing to put expenditure through the service charges and equivalent and explained experience in unpicking accounts.

154. Mr Farrow was also asked about the insurance claim by certain Lessees and made reference to insurance documentation he had seen**.** An issue arose as to that as the documentation had apparently been provided in confidence and whether the Applicants were entitled to sight of the

documentation and indeed whether it had already been provided to them.

155. That was the subject of correspondence to the Tribunal following the hearing and so, whilst nothing turns on the matter for the purpose of this Decision, it merits brief mention. Ms Kuehl said that the documentation had not been seen by the Applicants. Ms Thompson said that it had been sent to Setfords. Ms Kuehl said that he instructions were that was not correct. Ms Ager of Clark Mair's subsequent correspondence referred to Ms Thompson recalling having said as above on her understanding of the position. Ms Ager made clear that was in error and that she had sent an email in relation to the insurance claims and the assertion of the loss adjuster but had not sent the documentation.

156. Plainly the error is regrettable, and such should be avoided if at all possible. However, the Tribunal can identify how the misunderstanding of Ms Thompson may have arisen and does not consider that any more need be said. That said, and whilst beyond the matters for determination by the Tribunal, the Tribunal does consider that the relevant documentation ought to be provided to the Applicants in the event that has still not happened, whilst noting the time that has passed and that matters may have moved on somewhat.

157. Mr Farrow was asked about and demonstrated understanding of different bases of valuation.

158. It was noted by the Tribunal that the Applicants sought a manager whose primary focus was Providence House. The Tribunal also identified that the management of the Property may be significantly time- consuming, at least in the early stages. The Tribunal questioned whether the fee intended by Mr Farrow of just under £20,000 was sufficient for it to be economically viable for him to spend the time on the Property which was considered likely to be required, as compared to other requirements of his company. Mr Farrow was firm in his evidence that he did not foresee any difficulty and that he was satisfied with the fee for the two year period for which it was proposed to be fixed, being the time he considered was required to bring the Property up to standard, which the Tribunal also considered to be a realistic timeframe. It is for him to reconcile competing commitments and the Tribunal was content to leave Mr Farrow to do so.

159. The Tribunal was troubled by the recent appointment of Farrow and Lynas Ltd as managing agent with, on the one hand, a potential conflict of interest between that role and, on the other hand, the good judgement of Mr Farrow in agreeing to that appointment. In relation to the latter, the Tribunal was satisfied that on this particular occasion there was insufficient to dissuade the Tribunal of the appropriateness of appointing Mr Farrow, including in light of his explanation that the Applicant had proposed that he act as managing agent, which the Tribunal found cogent. The margin was somewhat fine and it is to be

firmly recommended to any subsequent proposed manager that they do not enter into a contractual relationship with the Respondent during the course of proceedings for appointment of a manager, lest the Tribunal may- and very likely will- regard that as rendering such proposed manager unsuitable.

160. In relation to the conflict aspect, the Tribunal gave Directions at the hearing on 19th May 2021, albeit only written up on 28th May 2021, that by 28th May 2021 Mr Farrow and/ or the parties were to inform the Tribunal whether Mr Farrow has been able to obtain the release of Farrow and Lynas Limited from its contract with the Respondent and thereby at least avoid what would otherwise have been two concurrent appointments, one by the Tribunal and one contractually with the Respondent, if the Tribunal had nevertheless appointed Mr Farrow. As made clear at the hearing and in those Directions, in practice the Tribunal would not have done so.

161. In light of Farrow and Lynas Ltd and the First Respondent terminating the contract between them and the other evidence given, including in particular by Mr Farrow, the Tribunal accepted that there was little if any risk of conflict and so the previous short contractual relationship did not preclude Mr Farrow being appointed as manager.

The Terms of the Management Order

162. The relevant management order was made dated 14th June 2021, as explained above and appointing Mr Farrow.

163. For completeness, the Tribunal had indicated at the hearing that it would provide a draft of the Order considered appropriate subject to amendment following submissions from the parties, such that other disputes between the parties as to the terms of the Order were not necessarily relevant. The Tribunal did so, observations received were considered and a finalised form of order was issued thereafter. The terms include the ability of the Manager to collect in the contributions which the First Respondent covenanted to make in relation to such of the Flats as have not been sold on long leases.

164. The Tribunal reiterates that Mr Farrow will need to review the situation in respect of fire safety and other health and safety aspects and be satisfied that those are acceptable. If not, the undertaking of further works will need to be addressed, including the question of whether such works fall within Services under the Lease or relate to the original construction and hence as to how those are to be funded. It may well be that documentation in relation to the original conversion and to more recent works will be required.

165. Mr Farrow should utilise the ability to apply back to the Tribunal for further Directions in the event that he considers that necessary in due course. That aside, the parties are expected to co-operate with Mr Farrow in his management of the Property, in the best interests of all

concerned and Mr Farrow is expected to use his experience to manage the Property.

Section 20C Application

166. The question for the Tribunal is whether it is just and equitable to disallow recovery of the costs incurred by the Respondent in relation to the proceedings through the service charge.

167. Ms Kuehl argued that the costs of the First Respondent should not be recoverable. She asserted that the application by the Applicants ought to have been unnecessary, that the Applicants had sought to resolve matters and the First Respondent had failed to do so. She noted that breaches had been admitted and the Tribunal had determined it appropriate to appoint a manager. Ms Kuehl argued that the Applicants were blameless.

168. Ms Thompson referred to the relevant test and said that there were two key points. Those were that the Respondent had no choice but to engage with the proceedings and that the Lessees had other protection if the costs incurred by the Respondent were considered to be unreasonable. She argued that there could be no criticism of the Respondent's conduct of proceedings.

169. The Tribunal finds in all the circumstances that it is just and equitable to disallow recovery of such of the costs incurred by the Respondent as could otherwise be charged through the service charge. The significant breaches by the Respondent and appointment of the manager in the face of opposition by the Respondent, whilst the outcome is not determinative of such an application, are particularly significant factors in this instance. The Tribunal did not find Ms Thompson's arguments to be strong, for example finding that the Respondent could have accepted the appointment of a manager, as Ms Kuehl noted, and had only filed evidence very late.

170. For completeness, the Tribunal records that Ms Kuehl indicated that a rule 13 costs application may be made. If such an application is made, Directions will be issued and in due course a determination reached. It is unnecessary to say more at this time.

Rights of Appeal

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.