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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**: CHI/29UL/LAM/2013/0019**
Property	**: The Grand** **The Leas** **Folkestone** **Kent** **CT20 2LR**
Applicants	**:Mrs. J. Olliver and other Lessees**
Representative	**: Freshlaw Solicitors**
Respondent	**: Hallam Estates Limited**
Representative	**: Quality Solicitors Clapham & Collinge**
Type of Application	**: Appointment of Manager and Receiver** **Section 24 Landlord and Tenant Act 1987**
Tribunal Members	**: Judge R. Norman (Chairman)** **Mr. R. A. Wilkey FRICS** **Mr. P.A. Gammon MBE BA**
Dates and venues of Hearing	**: 19th March 2014 Hythe** **19th and 20th May Folkestone**
Date of Decision	**: 11th June 2014**

DECISION

Decision

1. The Tribunal makes the following determinations:

(a) Mr. D. Hammond BSc (Hons) MRICS is appointed Manager and Receiver in respect of The Grand, The Leas, Folkestone, Kent CT20 2LR ("the premises") in the terms of the attached Order.

(b) An order is made under Section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") that all or any of the costs incurred or to be incurred by Hallam Estates Limited ("the Respondent") in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by Mrs. J. Olliver and the Lessees listed in paragraph 7 below ("the Applicants").

Background

2. An application has been made by the Applicants for the appointment of a manager in respect of the premises which comprises The Grand, a seven storey Grade ll listed building. Approximately 25% of The Grand is in commercial use and the remainder comprises 62 flats all let on long leases. The leases of a number of those flats are held by Mr. and/or Mrs. Stainer and are referred to as the landlord controlled flats. Apparently they are used as holiday lets. Section 24 of the Landlord and Tenant Act 1987 ("the 1987 Act") provides that the Tribunal may appoint a manager/receiver in certain circumstances and the Applicants listed the circumstances which it was suggested provided the justification for such an appointment.

Inspection

3. On 19th March 2014 the Tribunal inspected the premises in the presence of Mrs. J. Olliver, Mr. A. Rosenthal of counsel representing the Applicants, Ms Nillooshaponnuthurai the Applicants' solicitor, Mr. D. Hammond BSc (Hons) MRICS the proposed manager, Mr. M. Stainer Director of the Respondent, Mr. J Upton of counsel representing the Respondent, Ms J. Tinney the Respondent's solicitor and Mr. R. D. Baker BSc (Est Man) Hons FRICS of the managing agents Fell, Reynolds.

4. The exterior elevations of the premises were inspected. It could be seen that work was required to the exterior and Mr. Baker pointed out work which had been carried out over the years and areas where work was required and planned. As to the west elevation, he listed work which had been done in 1998 and the work which was planned for the current year namely painting, pointing and dealing with water ingress. Mr. Rosenthal pointed out the condition of the lower brickwork and a fall pipe on the west elevation. He also pointed out the woodwork to the restaurant which needs repair and painting and stated that the lessees contribute to such work. As to the south elevation, Mr. Baker listed the work which had been done in 2006 and the work planned for the current year; in particular work to steel beams and the dormer windows. There was scaffolding in place where the south and east elevations

meet and Mr. Baker said the work was to deal with water ingress. As to the east elevation, Mr. Baker listed the work which had been done in 2009/2010 and stated that further work was part of the 5 year plan. Also, that with a building of this size the plan is to deal with one elevation each year. Mrs. Olliver indicated that the flats on the lower ground floor are used as holiday lets apparently by either the Respondent or Mr. and/or Mrs. Stainer.

5. Inside the building the Tribunal was shown a staircase which serves as a fire escape and the only access by stairs to the north side of the building. The staircase is in need of repair and decoration. In other staircases and landings there were a number of areas where the carpet was threadbare. On a number of corridors on various floors we were shown cracks in the wall and Mr. Stainer stated that such cracks were at the point where an extension had been added to the original building. In some corridors we saw rusting joists and flaking plaster surrounding them. We were also shown ceilings which were cracked and walls and ceilings which were in need of decoration. The level of lighting in corridors was low. Mr. Baker pointed out a new fire alarm system and fire escape lighting which he stated had been installed last year. He also stated that the wall of the light well had been rebuilt in about 2004. He accepted that the dome at the foot of the light well was in a poor state and had been patched. He said it was intended to be dealt with when the new fire escape route was completed. In the sitting room of the Monmouth Suite there was evidence of water ingress to the ceiling and the wall to the right of the east facing window of the sitting room and in the kitchen. We were shown the staircase where a resident had fallen. On the lower ground floor, the common parts leading to the holiday lets appeared to have been re-carpeted. In the corridor to the Fordwich Suite there were cracks and signs of water ingress. In the bedroom and sitting room on the west side of the building there was evidence of water ingress and through the window could be seen a hole in the flashing outside, just behind the gable end. In the Britannia Suite the terracotta balustrades of the balcony were in a very poor state and Mr. Baker stated that their repair was planned for the summer of 2015.

The Hearing

6. Present at the hearing on 19th March 2014 were those who had been present at the inspection and a number of lessees from the premises.

7. It was confirmed by counsel for the parties that the Respondent Hallam Estates Limited is the only respondent in these proceedings and that the following lessees are Applicants in these proceedings:

Mr. D. and Mrs. W.N.G. Kendall
Mr. R.J. Davidson
Mr. H.D. Bolton
Mrs. B. Gillanders
Mrs. I. Ashley
Mr. C.J. Leach
Mr. and Mrs. A. Jefford
Mrs. E.A. Cullingworth
Ms J. Cordrey

Mr. and Mrs. G. Darrington
Mrs. M. Rose
Ms T. Dudova
Mr. and Mrs. R.D. Dancy
Mr. and Mrs. H.J. Luxton
Mr. and Mrs. V.J. Olliver
Mr. M. O'Mara de la Fuente
Mr. and Mrs. D. Tossell
Dr. and Mrs. W.P. Lewis
Mr. N.R. Boardman

8. Mr. Upton asked that preliminary issues be considered by the Tribunal.

(a) Whether the lessees had authorised the notice under Section 22 of the 1987 Act to be served. The list which had appeared in the First Schedule to the notice included Mr. J.T. Foley and Dr. E. Araci. They were no longer on the list of Applicants handed in at the hearing. The Respondent's case is that neither Mr. Foley nor Dr. Araci authorised service of the notice on their behalf. They are no longer Applicants but there is compelling evidence from Mr. Foley in a letter dated 19th August 2013 (exhibit MS1 at pp 37 and 38 of the Respondent's bundle) 5 days after the date of the notice (14th August 2013) that he did not want to be an Applicant. Mr. Upton submitted that it was inconceivable that Mr. Foley authorised the notice to be served on his behalf and that the notice was therefore invalid. Mr. Upton referred the Tribunal to a copy of the judgement in the case of Elnaschie v Pitt Place (Epsom) Ltd where a notice had been held to be invalid. That case concerned not an appointment of manager but a first refusal case under the 1987 Act but he submitted that the principle applied equally to a notice under Section 22 and that such a notice is only valid if it is served on behalf of all those it purports to be given by. Mr. Foley did not authorise so the notice was invalid. As to whether Dr. Araci gave his authority, the Applicants were put on notice about this on the day before the hearing and so had the duty to prove Dr. Araci's authority.

(b) The validity of the notice was also challenged by reference to parts of it. Mr. Upton referred to the Respondent's statement in reply from paragraph 14 onwards.

(i) Paragraph 15.1 refers to paragraph 5(a) of the notice and clause 1(a) of the fourth schedule to the notice. The Respondent provided a 5 year plan in January 2014. That was not within the 2 or 3 months stated in the notice but by S. 22 (2) (d) of the 1987 Act a reasonable period must be specified for steps to be taken and 2 to 3 months was not reasonable. A more reasonable period would have been 6 months. It was accepted that by Section 24(7) of the 1987 Act the Tribunal can make an order appointing a manager even if it thinks that any period in the notice was not a reasonable period but there is the question of jurisdiction under Section 23 in that no application can be made unless (a) where a notice has been served either (i) the notice has expired and steps have not been taken or (ii) that paragraph was not applicable in the circumstances of the case. A reasonable period would have been 6 months and

that had been complied with and if that is right then under Section 23 the Tribunal has no jurisdiction.

(ii) Paragraph 15.2 refers to paragraph 5(b) of the notice and clause 1(b) of the fourth schedule to the notice requiring repairs to the west elevation to be commenced by February, March and April 2014. The application was made in December 2013 before the period had expired. Under Section 23 the period must have expired before an application can be made and therefore under Section 23 (1)(a) the Tribunal has no jurisdiction.

(iii) Paragraph 15.3 refers to paragraph 5(c) of the notice and clause 2 of the fourth schedule to the notice requiring information on the accounts in 7 days. The accounting year ends on 29th September in each year. The accounts for the year ended September 2013 were given on 4th December 2013. Reference was made to paragraph 15 of Mr. Baker's witness statement. The lease provides that accounts be provided as soon as practicable after 29th September and to require them within 7 days was unreasonable. Mr. Upton accepted that by Section 24(7) of the 1987 Act this could be disregarded but given that the accounts were served as soon as practicable on 4th December 2013 the Respondent had complied with the requirement and under Section 23 of the 1987 Act the Tribunal has no jurisdiction.

(iv) Paragraph 15.4 refers to paragraph 5(d) of the notice and clause 3 of the fourth schedule to the notice requiring co-operation with the managing agents. Mr. Stainer on behalf of the Respondent says he has always co-operated but Mr. Upton accepts that is a disputed fact and a substantive matter together with the remaining grounds of the application.

(v) Paragraph 15.5 refers to paragraph 5(e) of the notice and, in error, clause 3 of the fourth schedule to the notice. It should be clause 4 and requires the Respondent to undertake to ensure that all tenants' future service charge demands are fairly assessed to the extent of their estimated liability only and that the total estimated service charges are fairly estimated based on the contribution from all 63 tenants and the freeholder of the building. Mr. Upton suggested that it was not clear what lay behind that requirement. The basis is a suggestion that in previous years the service charge budget had been deliberately inflated to take account of funds not recovered from the landlord or funds not recovered from flats purportedly controlled by the landlord. There was no suggestion in the evidence that demands in October 2013 did not fairly assess the tenants' liability or the total estimated service charges based on the due contribution from all 63 tenants. It followed that in serving service charge demands in 2013 the Respondent had complied with paragraph 5e of the notice and therefore under Section 23 of the 1987 Act the Tribunal has no jurisdiction.

(vi) Paragraph 15.6 refers to paragraph 5(f) of the notice and clause 5 of the fourth schedule to the notice and concerns noise and nuisance. The Respondent denies this has ever been caused but there is no evidence in support of the application that suggests a noise or other nuisance is continuing. Therefore if there were any breach which required remedy, it had

been remedied and under Section 23 of the 1987 Act the Tribunal has no jurisdiction.

9. Mr. Rosenthal made the following points in reply:

(a) It is presented that the points submitted on behalf of the Respondent go to jurisdiction but Mr. Rosenthal submitted that at this stage the Tribunal should rule that they do not. Submissions on all the points go to the Tribunal's discretion not jurisdiction. Section 22(3) of the 1987 Act gives the Tribunal power to dispense with the requirement to give the notice and as that does not have to apply to the notice as a whole then a discretion may apply to particular aspects. By Section 24(7) the Tribunal has discretion to make an order notwithstanding that any period in the notice was not a reasonable period or that the notice failed in any other respect.

(b) Mr. Rosenthal referred to paragraph 4 (2) of his skeleton argument and a copy of the judgement in the case of Wildsmith v Arrowgame Ltd. This concerned an acquisition order as a result of a notice under Section 27(2) of the 1987 Act which mirrors Section 22(2) and in particular sub paragraphs (2) (c) and (d). The notice did not give a reasonable time and it was submitted that that undermined the jurisdiction of the County Court but the judge held that the notice was valid and made the acquisition order sought. On appeal to the Chancery Division the appeal was dismissed. Mr. Rosenthal referred in particular to paragraph 32 at p 1060 of the judgement and submitted that it applied equally to Section 22 of the 1987 Act. The legislation should be construed with that primary purpose in mind. It would be wrong to say that the absence of a reasonable time goes to jurisdiction without hearing the evidence. The Applicants were entitled to make the application. There are the two statutory provisions in Sections 22 and 27 of the 1987 Act so that the Tribunal can hear the evidence and decide at the time of the hearing if the landlord has done enough to overcome the points made in the notice. He submitted that the Respondent had not done enough to overcome the points and the evidence should be heard.

(c) As to the specific points raised, whether the new 5 year plan complies is a matter of fact and evidence but Mr. Rosenthal submitted that what had been done was not enough. As to the west elevation, it was accepted by the Respondent that work was required. The period had not expired but relying on the Wildsmith case, the question is whether at the time of the hearing the landlord had done enough to satisfy the Tribunal. Mr. Rosenthal submitted that as a matter of discretion the order should be made. The steps taken by the Respondent were flawed and insufficient. As to the matters of accounts, service charge demands and noise, all will turn on the evidence. They are questions of fact and cannot be decided on the Respondent's assertion that they have now been complied with. None of the submissions made on behalf of the Respondent go to jurisdiction and if the application were to be dismissed at this stage it would be contrary to the 1987 Act and the decision in the case of Wildsmith.

(d) As to the authority to give notice, the Applicants learned of this challenge only late on the day before the first date of hearing. It had not been addressed

in evidence. It was a question of fact whether they did authorise and if not then a question of law whether that invalidated the notice. On the question of fact no evidence had been adduced because the point had been raised the day before the hearing but the Tribunal was invited to hear evidence from Mrs. Olliver as to whether or not authorised and to make a finding of fact on the evidence of the letters from Mr. Foley and on Mrs. Olliver's evidence.

10. Mr. Upton did not object to dealing with this by Mrs. Olliver giving evidence.

11. Mrs. Olliver gave evidence that at the AGM of the Residents' Association ("RA") on 16th March 2013 a vote was taken to make this application and a list of signatories was obtained. She had the signature of Mr. Foley. He and a number of others signed and some just gave their assent. An RA document with his signature was handed to the Tribunal. Mrs. Olliver only became aware that Mr. Foley did not agree when she saw the letter dated 16th January 2014 at p 38 of the MS1 exhibits. He is no longer an Applicant. She noted that on that letter Mr. Foley gave the postcode of the commercial area, not the residential area and considered it was not a mistake a resident would make. Dr. Araci attended the same AGM and gave his consent. He did not sign. Some did and some did not but he made a payment to the legal fund to take forward the application. It was not until later when he received letters from Mr. Stainer that Dr. Araci became concerned. He wanted to be an interested party but did not want to be an Applicant or a Respondent. He wrote to the Tribunal to say that he wanted to switch from being an Applicant to being an interested party.

12. In cross examination Mrs. Olliver stated that the document was at the AGM and that there were no further meetings before the notice was served in August 2013. The position was clear at the AGM. Some residents chose to fund the application and some did not. The RA was happy whether they paid or not. It was suggested that Mr. Foley pay £120 for the year plus the annual subscription to the RA of £30. He agreed to pay £20 a month but never paid. He was not pursued. The RA just wanted support. After the AGM, no letter was written to the lessees. The RA went ahead as it had the agreement recorded at the AGM. There was no further communication. Nobody came back to Mrs. Olliver. Mr. Richardson is the commercial manager and why he should give her the letter from Mr. Foley she did not know. Prima facie from the letter he did not support the application but he wrote it following a letter from Mr. Stainer, who wrote to all lessees. Following that letter Dr. Araci did not want to be an Applicant. It was put to Mrs. Olliver that the letter from Mr. Stainer (p 34 of the Applicants' bundle) was dated 23rd August 2013 so Mr. Foley could not have written on 19th August in reply. Mrs. Olliver said she would need to know when Mr. Stainer received the notice in order to comment and could not say when Mr. Foley received the letter from Mr. Stainer.

13. In re-examination Mrs. Olliver said that she had not received anything from Mr. Foley to show he was not supporting the action. He never made her or the committee of the RA aware. Dr. Araci did.

14. Mr. Rosenthal submitted that the Respondent had 2 letters from Mr. Foley but there was no challenge to the evidence that Mr. Foley had signed the RA document and there was evidence from Mrs. Olliver that he had not revoked it. Who was the Applicant at the time of the notice? Things had since changed. There was no serious challenge to the evidence that Mr. Foley and Dr. Araci gave consent. If either or both did not give authority then it was said that the notice is invalid. That was wrong. The Elnaschie case was given as authority but could be distinguished from the present application. There is a difference between the purchase notice in that case and the Section 22 notice in this case. A purchase notice is in part 1 of the 1987 Act. It concerns a right of first refusal and a notice must be served by the requisite majority of any qualifying tenants. Because a majority has to give the notice it cannot be valid because the landlord cannot ascertain whether it has been given by the right people. That does not arise in respect of a Section 22 notice which can be given by a single tenant not a majority. The nature of a notice under Section 12 of the 1987 Act is to compulsorily transfer the landlord's interest to those named in the notice. It is a compulsory notice. A Section 22 notice is just a gateway to the Tribunal to exercise discretion to appoint a manager. There are two areas of discretion, Sections 22(3) and 24(7). There is no equivalent in respect of Section 12 or any notice in Part 1 of the 1987 Act. Mr. Rosenthal produced a copy of the judgement in the case of Tudor and others v M25 Group Ltd which concerned a notice under Section 11A in Part 1 of the 1987 Act and the provisions of Section 54(2). A distinction was drawn between mandatory and directory requirements and even though there had been a failure to comply with Section 54(2) the failure did not render the notice invalid. It is not possible to borrow the case of Elnaschie and put it into Section 22.

15. Mr. Rosenthal submitted further that even if the Tribunal was not with him on the question of fact, the law did not preclude the Tribunal hearing the case and exercising its discretion. The Tribunal could dispense with the notice and with a failure to comply. It would be wrong to strike out the application at this stage. The Tribunal should hear the evidence and decide on merits.

16. Mr. Upton submitted that on the facts the evidence was that Mr. Foley appeared to have agreed at the meeting in March that he supported the application but that by 19th August, 4 or 5 days after the notice dated 14th August 2013 he did not. It was put to Mrs. Olliver that Mr. Stainer did not receive the notice until 20th August and that if that was right, and it was likely all the notices were sent and received at the same time, then Mr. Foley was expressing not to support the notice before the notice was received. Therefore he could not have been put up to writing the letter by Mr. Stainer. The person sending the notice had to ensure that it was being served with the authority of all the persons it purported to be served by. So a signature given in March was not sufficient when serving a notice in August. Mr. Foley had not communicated his change of mind to Mrs. Olliver. Mr. Upton asked the Tribunal to find as a fact that when the notice was served Mr. Foley did not authorise it on his behalf. On a question of law, Mr. Upton accepted what Mr. Rosenthal said about the difference between a purchase notice and a Section 22 notice but it did not follow that the same principle should not apply. It was more fundamental. A notice was not valid if not served or purported to be

served by persons who did not authorise it. He submitted that there was a need to check when there was a delay between authority and service. As to the Tudor case he submitted that the law had moved on and referred to a House of Lords case on criminal compensation where the consequences of non-compliance were considered (but no copy of the judgement was produced). He submitted that the Respondent is entitled to know who is serving the preliminary notice.

17. Over the lunchtime adjournment between 13.55 and 14.45 the Tribunal considered the evidence which had been heard and submissions which had been made and came to the conclusion, which was announced at 14.45, that we were satisfied that the Section 22 notice was valid but that in any event the provisions of the 1987 Act gave us jurisdiction to proceed to hear the evidence and to deal with the application.

18. We accepted the evidence of Mrs. Olliver that authority had been given at the AGM in March and that those who had authorised the application had not notified her of any change to that authorisation by the date of service of the notice. We therefore found on a balance of probabilities that although Mr. Foley and Dr. Araci later changed their minds about being party to the proceedings the notice was valid. Even if they had revoked their authority, the provisions of the 1987 Act give the Tribunal the power to dispense with the requirement to serve a notice. Also, where an application for an order under Section 24 was preceded by the service of a notice under Section 22, Section 24(7) allows the Tribunal, if it thinks fit, to make such an order notwithstanding – (a) that any period specified in the notice in pursuance of subsection (2)(d) of Section 22 was not a reasonable period, or (b) that the notice failed in any other respect to comply with any requirement contained in subsection (2) of that Section or in any regulations applying to the notice under Section 54(3). Consequently, we were satisfied that the Tribunal did have jurisdiction to proceed to hear and determine the application.

19. Counsel had earlier expressed their opinion that a further 2 days would be required to hear the application and had suggested that as there were no further preliminary matters to be dealt with and only a limited time left on 19th March 2014 it would be preferable to make a fresh start with the evidence on the next hearing day.

20. It was agreed that the hearing would be adjourned and would proceed on 19th and 20th May 2014, which were dates available to those concerned, commencing at 10.00 am at a venue to be arranged.

21. Mr Upton stated that things such as the Respondent making progress on the matters complained of may change by the next hearing date and asked for leave to file updated evidence. Leave was given to file just an update and to provide one copy to the Applicants and four copies to the Tribunal no later than 14 days before 19th May 2014. It was noted that the lessees would not be prepared to pay service charges or to respond to consultation notices under Section 20 of the 1985 Act before a decision is made by the Tribunal as to whether or not a manager is to be appointed. The Respondent did not object to that.

22. Further documents were received from the Respondent but later than 14 days before 19th May 2014. However, the Tribunal considered those documents.

23. The hearing resumed on 19th May 2014 and continued on 20th May 2014.

24. During the hearing on those two days and even at the end of submissions further documents were produced on behalf of the Respondent.

25. On 19th and 20th May 2014, the Tribunal heard evidence from Mrs. Olliver, Mr. Boardman, Mr. Davidson, Mrs. Cullingworth, Dr. Lewis, Ms Cordrey, Mr. Hammond, Mr. Baker, Mr. Mead and Mr. Stainer. The Tribunal also heard submissions by Mr. Upton and Mr. Rosenthal.

26. The Tribunal considered all the evidence which had been given orally, all the documents provided by or on behalf of the parties, including those which had been supplied by or on behalf of the Respondent less than 14 days before 19th May 2014 and during the 19th and 20th May 2014, and the submissions made on behalf of the parties and made findings of fact on a balance of probabilities.

The Law

27. By Section 24 of the 1987 Act the Tribunal:

"...may only make on order under this section in the following circumstances, namely-

(a) where the tribunal is satisfied -

(i) that any relevant person either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and

(ii)...

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

(ab) where the tribunal is satisfied-

(i) that unreasonable service charges have been made, or are proposed or likely to be made and

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

(aba) where the tribunal is satisfied-

(i) that unreasonable variable administration charges have been made, or are proposed or likely to be made and

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

(abb) where the tribunal is satisfied-

(i) that there has been a failure to comply with a duty imposed by or by virtue of section 42 or 42A of this Act, and

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

(ac) where the tribunal is satisfied-

(i) that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and

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

(b) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made."

The Submissions

28. Mr. Upton, on behalf of the Respondent, accepted that in view of the evidence one of the grounds in Section 24 had been made out, namely that the Respondent was in breach of the landlord's obligation in the leases to repair and maintain the main structure of the building and to paint the outside of the building. Therefore it was accepted on behalf of the Respondent that on that ground the Tribunal could make an order but had to consider whether to exercise its discretion to do so on the basis of whether it was just and convenient to make an order and if so on what terms.

29. It was not accepted that there had been a breach in relation to the internal staircases etc. Nor was it accepted that there had been a breach of obligation in keeping the lifts in repair or the obligation to serve service charge accounts as soon as reasonably practicable. They had been served within 6 months of the year end, which was generally sooner than expected. The failure to co-operate with the managing agent was not accepted. The Respondent had not been able to provide funding but had not failed to co-operate. As to unreasonable service charges, it was alleged that the budget was overstated. That was not accepted and there had been no determination by a Tribunal that service charges were excessive. As to the Code of Practice, any breach was unparticularised. Mr. Baker does comply and was not cross-examined about that. Mr. Upton invited the Tribunal to find that that ground was not made out. As to other circumstances referred to in the notice under Section 22 of the 1987 Act (P 15 of the Applicants' bundle of documents), noise nuisance was not accepted. There had been a fireworks display 4 or 5 years ago. It was not currently a nuisance. There had been no evidence of the diminishing values or diminishing marketability of the flats at the premises and in fact Mr. Stainer had given evidence that the values of flats had increased recently so service charge issues were not having an impact. As to the allegation that the cost of future works had increased, the Applicants were not comparing like with like and it was not a fair comparison. There had been no evidence that the cost of future works had increased. As to the allegation that the failure to carry out works in a timely fashion will also place a financial hardship on the tenants in the future if they are required to pay cumulatively for all the overdue works, no evidence of that had been produced.

30. Mr. Upton made the following submissions in relation to the exercise of the Tribunal's discretion:

(a) Mr. Stainer had rescued the building in the 1970s. He was passionate about the building; its restoration and survival. He had transformed it from a demolition site into what could be seen now and was work in progress over 40 or so years.

(b) The application had been made by a minority of lessees: 18 out of 62 or 18 out of 45 if Mr. and Mrs. Stainer were not included: under half. Mr. Stainer considered that the majority supported the Respondent. Not all the leaseholders were represented at the Tribunal hearing. The current managing agent had been appointed by the landlord on a vote of tenants following a decision of the Court. The leases provide a mechanism for replacement of the managing agent, so tenants not participating in the application had taken leases on the basis that they would have a say in the appointment of the managing agent. It was submitted that the Tribunal should have regard to this and be slow to interfere and to disrupt this regime.

(c) There were 5 reasons why the Tribunal should not make an order:
(i) To a large extent the source of the dispute had been or nearly been resolved namely, the Respondent's failure to meet the shortfall in its contribution and the failure of Mr. and Mrs. Stainer to provide their appropriate share of service charge liability. This had been to a large extent resolved. Reference was made to the schedule setting out the aggregate of contributions. There was a deficit of 2.1% and when the 6 flats were completed that would reduce to 0.5% which was a significant improvement on the position 10 years ago. The risk of a shortfall was much reduced.
(ii) Also, as to Mr. and Mrs. Stainer's ability to pay service charge contributions, there was the email from a mortgage broker indicating that £144,000 would be available in the next few weeks and this was going to be used to pay off arrears immediately and to put money into the maintenance fund. The problem was not going to happen again because when the 6 flats are developed they will generate income of about £50,000 a year and will cover Mr. and Mrs. Stainer's service charge liability. The source behind the dispute was the Respondent's lack of funding. If there were sufficient funding the premises would be run properly. Mr. Baker and Mr. Stainer say the lack of funding will soon be remedied and will not be a problem in the future.
(iii) The Applicants have concerns over the condition of parts of the building and those concerns are being addressed. Now that Mr. Baker has sufficient income from the Respondent and the landlord controlled flats Mr. Baker can do what is necessary. It is not a case of the Respondent failing to take action after the Section 22 notice. The revised 5 year plan includes the west elevation and to carry out those works there is a creative solution which will generate significant savings for the lessees. Mr. Baker and Mr. Mead had given detailed evidence on how the contract would work. It was accepted that it was not conventional. They had been sceptical initially but when the process was broken down it could be appreciated that there would be independent oversight. The tenders had all been considered by an independent third party. The administrator would be a chartered surveyor and there would be an experienced clerk of works. If the works were defective they would not be

signed off and the sub-contractor would not get paid. Also the lessees were still protected by section 19 of the 1985 Act. Mr. Baker wrote to the lessees about the 5 year plan and there had been no letter criticising the plan. Section 20 notices had been served and a tender report received. The Respondent had made a lot of progress in dealing with concerns expressed in the section 22 notice. The Respondent's approach was consistent with what needs to be done to the building. Now, or soon, all will be resolved. The 5 year plan addresses other things. The primary concern is the west elevation but there are other works covered by the plan. The provision for internal decorations is less than in 2010. There was some force in what Mr. Baker and Mr. Stainer said about the total cost being over £1,000,000 and the need to have regard to the lessees' ability to pay. Reference was made to the decision of the Upper Tribunal in the case of Garside and to section 19 of the 1985 Act. Works were being prioritised. Rather than replacing all the carpeting, it would be replaced where required and some pieces of carpet would be moved around. That would be more cost effective. Mr. Stainer has a significant interest in the building and so do the lessees. Works are being addressed. Mr. Baker is better placed to manage. He has managed the premises for 20 years. He knows the issues and the works required. Mr. Hammond, when asked, could not identify what substantive works were required and what he would do differently to the 5 year plan. That may be a lack of insight from the proposed manager. It would have been far more impressive if Mr. Hammond had stated the issues and priorities. He was rather vague and greater understanding would have been expected. There was no real criticism of the way Mr. Baker had managed the premises. There was criticism of lack of funds. Mrs. Olliver had approached Mr. Baker to see if he would be prepared to act as manager but he declined. If there had been criticism of the way he ran the building he would not have been proposed.
(iv) If the Tribunal appoints Mr. Hammond there will be a significant delay until any works are commenced. Mr. Hammond's evidence was that he would undertake an audit and survey then the consultation process would begin all over again before works commenced. It would not be before 2015 at the earliest and probably the end of 2015 if he were appointed. Mr. Stainer says that if there is no appointment then the work to the west elevation will start as soon as the consultation process is completed.
(v) If Mr. Hammond is appointed there will be a significant additional cost to the lessees. His evidence was that he would charge £18,500 per annum plus £5,000 in the first year and plus £3,000 in the second year. If he is appointed then the lessees will lose the savings of the Respondent being the contractor for the major works.

31. Mr. Upton referred to paragraph 2 of the 4th schedule to the leases which requires not less than 12 months notice to terminate the managing agent's contract. So if notice is given immediately the lessees will have to pay two lots of fees for the first 12 month period. Mr. Upton had not seen the terms of the contract between Mr. Baker and the Respondent but considered it was fairly safe to assume that that was what the contract would provide.

32. Mr. Upton submitted that if the Tribunal were against him on making an order then consideration should be given to the terms of the order. In an open letter sent by Mr. Stainer to the Applicants he had offered a compromise

on the basis of a suspended order. Mr. Upton asked the Tribunal to consider making an order on those terms. The Respondent was confident in having the funding shortly to carry out works this year and in the 5 year plan. This would allow the Respondent the opportunity to make good on its promises. If the promises were fulfilled then everybody would be happy. The maintenance fund would not be in arrears and the works would be done. If not, then the Applicants would get the manager they were seeking. There would be no need for another hearing or for costs to be incurred. If there were default then the appointment would take place immediately. If there is concern as to whether the Respondent will continue to comply with its obligations and at that stage Mr. Hammond is not still agreeable to act as manager it would not be difficult to propose another manager and for the Tribunal to consider the proposed new manager. There could be a short hearing to question the proposed manager.

33. Mr. Upton submitted that if the Tribunal were against him on suspending the order then consideration should be given to making the order for 3 years not 5 years and conditional upon Mr. Hammond providing a copy of his liability insurance with evidence that premiums had been paid up in full and that the order not take effect until 21 days after the decision or the determination of any application for leave to appeal, if made.

34. Mr. Rosenthal, on behalf of the Applicants made the following submissions:

(a) The concession as to one of the grounds was noted but Mr. Rosenthal maintained that all the grounds had been made out on the evidence. As to those disputed:
(i) The breach of the obligation to keep the lift in repair. A decision had been taken not to carry out works recommended and there was the Applicants' evidence of breakdowns.
(ii) As to the lack of co-operation, this had been established. There was the funding issue and the odd evidence of Mr. Stainer concerning the 2010 budget. It was not clear from Mr. Stainer's evidence whether he was saying he saw it and was evidence of a failure to co-operate.
(iii) As to unreasonable service charge demands, this ground was established. All demands which required the lessees to fund the Respondent's shortfall are unreasonable. Likewise those shortfalls created by Mr. and Mrs. Stainer's failure to pay. Also recent demands in respect of the 2013/2014 budget were flawed.
(iv) As to breach of the Code of Practice, the Applicants rely on the matters set out in the Section 22 notice at pp 10-15 of the Applicants' bundle of documents.
(v) As to other circumstances, the Applicants rely on the use of residential areas for commercial purposes and the examples of nuisance caused to residential lessees. Mr. Stainer's evidence that the noise complained of was just the playing of a piano was so fanciful as to be untrue. There was a noise abatement notice. There were references to harassment and the evidence of the lessees' concern about management but these were not pursued because there were more significant matters. The principal basis of the application is not nuisance and wrongful use of premises, but funding, the lack of

maintenance and the breakdown in relations between the lessees and the current management.

(b) In relation to the Tribunal's exercise of its discretion Mr. Rosenthal made the following submissions, 3 of which are historic and 3 are moving forward:
(i) The most significant history is of the present agents being powerless to deal with shortfalls in the Respondent's contribution and the failure by Mr. and Mrs. Stainer to pay their share under their leases. Any suggestion that the shortfall caused by Mr and Mrs. Stainer is not to be attributed to the Respondent is wholly incorrect. Mr. Stainer controls the Respondent. In considering the exercise of its discretion the Tribunal needs to consider the arrears. In the response to the Section 22 notice Mrs. Stainer's arrears are attributed to a lack of repair by the Respondent. This speaks volumes. Apart from Mr. Baker's statement about Mr. Taylor there was no evidence of significant arrears by others and Mr. Taylor was a special case where costs had been awarded in his favour. The only other arrears were those of Mr. and Mrs. Stainer. In addition, the figures Mr. Stainer gave in his oral evidence included demands sent out on 25th March 2014 and on account payments for the 2013/14 budget. It was not right to take those into account. Mr. Rosenthal had said at the first hearing date that demands were unlikely to be paid pending the outcome of this application. If they were demanded then they would be challenged as unreasonable under Section 19 of the 1985 Act. There were no further arrears. Mr. Baker, as matter of law, is powerless to do anything about either head of shortfall. Mr. Baker did not accept that but said he relied on his power of persuasion. That was nonsense. He is the agent of the Respondent and therefore answers to Mr. Stainer as controller of the Respondent. The situation was different between a managing agent appointed by the landlord and a manager appointed by the Tribunal. Under Section 24 of the 1987 Act the Tribunal has power to vest in the manager the powers of a receiver. He would have power to see that historic shortfalls under both heads could be redressed and that was crucial.
(ii) The historic lack of maintenance to the building is a real problem. The common areas are shabby and not in keeping with the building. The failure to maintain the structure has had a real effect on the flats. Mr. Baker's plan was endorsed by Mr. Stainer that all aspects of the exterior be considered before the interior. The site inspection speaks for itself. The issue with the carpets arises because of Mr. Stainer's desire to match early 20th century carpet like for like, which can only be provided bespoke overseas. There is no quote for replacing carpet throughout the building with something that does not match so closely the existing carpet but which would be reasonable. This is a telling issue as to the management approach. The cracks in the common parts are not recent and there is no evidence of anything having been done to investigate. There is water ingress in a number of flats. Mr. Mead set out in detail the current position. Some water ingress would be expected in a building of this size and age but the number of instances, and the time to resolve, results from an historic lack of maintenance.
(iii) There are safety issues concerning new handrails and the southern staircase and there is the evidence of Mrs. Cullingworth. She relies on the lifts but there has been an inability to carry out maintenance because of the Respondent's shortfall and Mr. and Mrs. Stainer's arrears. It was suggested by Mr. Stainer that phases 2 and 3 of the recommended works to the lifts were

not carried out because phase 1 had remedied all problems but there was no evidence of that. Correspondence showed that Mr. Baker had collected funds for the works but did not get them from Mr. Stainer and then returned the money to the other lessees. The Tribunal was asked to look at what the Respondent had done and intends to do. The Section 22 notice gave a final chance to do something about maintenance.

(iv) It is necessary to look at what is being done and what is suggested will be done to resolve the funding issue. It is more of the same. From the correspondence it shows that the problem has gone on for decades. It has been the source of litigation in the past and has recurred throughout. The evidence of Mr. Stainer is too little too late. He has been promising for a long time that he would be in a better position to fund the service charges but there is no evidence of funds in place. Both Mr. Stainer's witness statements suggest he has nothing in writing to provide evidence of the funds he is hoping for or the borrowing he is hoping to do. Reference should be made to paragraph 17 of his first statement and paragraph 3 of his second statement, yet when Mr. Stainer was re-examined he said he had something from Natwest. This was a desperate attempt to suggest he is going to come up with funds. There was no concrete evidence. Even if he had come to the hearing with cash to replenish the funds and the funds would be in credit today that would not remedy the situation. The Tribunal cannot be sure that the problem is not going to start again in the next few months and occur again and again. But that position has not been reached. There is just an email in principle to a loan and not enough evidence that the funding problem is to be resolved in the near future or at all. As to the income from the additional 6 flats, there is a timing issue. Mr. Stainer is vague as to the planning position. It is not for the Applicants to prove a negative. Mr. Stainer produced no evidence. He accepts that consent is required. The timing of a decision is wholly speculative. He stated that an application was initially made in October 2013 but it was registered only about a week before this hearing in May 2014 and for only one of the flats. There was insufficient evidence that in the near future, or at all, there would be consents for works which would unlock funds to make up the shortfall. Since there is a need for reliance on resolving the funding shortfall, Mr. Stainer's evidence generally should be considered and Mr. Rosenthal submitted that the Tribunal should be extremely cautious about his assurances. He was evasive, unduly combative, refused to accept the most straightforward of propositions and scoffed at accountability and auditing. There was also the situation in relation to the missing flat named Pembroke in respect of which he or his wife hold a lease with service charge liability. Service charge liability varies each year but Mr. Stainer says that it cancels out the rent each year. That cannot be right if there is a genuine open arrangement in place. The fact that the agent Mr. Baker did not know about service charge liability of that flat raises doubts about Mr. Stainer's evidence and where there are doubts over his evidence they should be resolved in favour of the Applicants.

(v) Major works are required. It was accepted by Mr. Baker and Mr. Mead that the proposal to award the contract for the west elevation works is unconventional. The proposal is influenced by Mr. Stainer to cut costs not to benefit other lessees but in a way to reduce his own liability. There is mystery about the February 2013 budget. The form had figures for works and then parts were redacted and later the parts redacted were replaced with TBC (to be

confirmed). Notwithstanding that, Mr. Stainer's evidence was that it arose from Mr. Baker going to send out the budget with the figures and Mr. Stainer said not to and to have the new tender exercise first for which the Respondent could tender. He expected the lessees to accept the budget which he considered had been accepted by the lessees at the meeting in February. The minutes of that meeting were Mr. Stainer's. The majority represented at the meeting were Mr. and Mrs. Stainer's flats. No vote was taken. It was suggested that there was no dissent and that the budget was met with a resounding approval but the Tribunal has the evidence in the witness statements. It was made clear at the meeting that those present did not agree and for Mr. Stainer to say there was no dissent is insulting. As to the proposal that the Respondent act as principal contractor, the Applicants and other lessees are sceptical about that and are right to be. The idea that the Respondent can tender for major external works to the building is ridiculous. Mr. Hammond said it was inappropriate. Mr. Baker accepted it had never been contemplated before. If the use of individual contractors in this way was a good way it would have been done before but it is a knee jerk reaction. Employing only small contractors for each bit of the works is a recipe for disaster. On the last day of the hearing a full copy of the tender document was produced. It contains numerous examples of works that would require specialists. For example, lead work to roofs, balconies, specialist steelwork and welding. At p 3/5 of the Works Schedule at E-H there are structural brickwork repairs. On behalf of the Respondent it is said that none is required but other contractors have put in figures. It is not a standard set of works as suggested. The tender document supports that. There is also the issue of timing. Mr. Stainer says the timing of the major works is related to the timing of work to his own parts of the building. He will be using contractors who are there for other purposes but the Tribunal cannot be satisfied that other development works are going to happen in the near future or at all. The 5 year plan includes the work to the west elevation. Mr. Baker and Mr. Stainer were asked to look at the draft 5 year Capital Expenditure Programme at p 291 of the Applicant's bundle, the August 2010 budget and at p 346 the updates and the Respondent's 2013/14 budget at p 9 of the exhibit to Mr. Stainer's first witness statement. For Mr. Stainer to suggest, as he did, that the budget is a wish list is ludicrous. He knows the role the budgets play. A lessee selling will need to produce a budget to a prospective purchaser. It should be discussed with the lessees. It is a budget for work to take place prepared by Mr. Baker, or Mr. Stainer from the Respondent, setting out works considered necessary from 2010 to 2015 and almost none have been addressed. The sum of £50,000 for internal decorations has now been reduced to £8,000 and will be just touching up here and there. It will not scratch the surface. Likewise, the carpet. As to the proposed cost of the west elevation works, if all other third party contractors are looking to charge so much more there must be a reason. It is not just about savings for the lessees.

(vi) Mr. Rosenthal invited the Tribunal to look at the current management arrangement and to ask if it is satisfactory. Mr. Baker has years of experience but he is too intimately connected with the Respondent to manage. He had concerns about the way of carrying out works to the west elevation but having discussed the matter with Mr. Stainer he had no worries. Mr. Baker is at the hearing to assist the Respondent with its case in these proceedings. Based on all the evidence, the time has come for a change. There had been a Deed of

Variation as a result of a compromise of court proceedings. The effect was that a majority of lessees should have control over who should manage but now that Mr. Stainer and his wife have acquired leases the machinery for that control is all but redundant. The breakdown of relations is encapsulated in a factual dispute concerning the Fordwich Suite and extensive damp ingress. Ms Cordrey said whatever Mr. Baker or Mr. Mead told her she did not understand that work to remedy the problem would have to wait until the west elevation works. Mr. Mead said that independently doing the work would bring about an extra cost of £25,000 but that was for the entire cost of scaffolding for the works; about £4,000 to £10,000 extra. This was an example of something which was false and based on a broken promise. Mr. Rosenthal asked that Mr. Boardman's evidence should be read where he said a manager was required who would not be hand in glove with the Respondent and would treat the lessees with respect. Mr. Stainer's interest was primarily in the commercial part of the building. He appoints the managing agent and he has control. Mr. Rosenthal suggested that an appointment of a manager/receiver for 5 years was appropriate. The Tribunal has a supervisory role and if there are problems Mr. Stainer can apply as lessee to the Tribunal.

(c) As to the points made by Mr. Upton, Mr. Rosenthal made the following submissions:
(i) The open offer by Mr. Stainer for a suspended order. The Residents Association did not accept it and there were two reasons it would be inappropriate. Firstly, it requires reliance on Mr. Stainer's funding evidence. The time for an order is now. Secondly, it is based on the flawed proposal for undertaking work to the west elevation. It is a recipe for dispute in the future. It would not be, as suggested, automatic. There would have to be a default and if, as is likely, the Respondent did not accept there had been a default there would be uncertainty.
(ii) The relevance of the approach by Mrs. Olliver to Mr. Baker. As Mrs. Olliver said, it was as a matter of courtesy and offered him the opportunity to resign and accept appointment by the Tribunal. It was not an endorsement of Mr. Baker in his current position. If he were to be appointed by the Tribunal he would be in a different position.
(iii) The comparison of Mr. Baker and Mr. Hammond. It was suggested that Mr. Hammond did not produce satisfactory evidence of ability to undertake the role because he did not come to the Tribunal with proposals. He does not have the tools to do that yet. As to fees, yes there will be the additional fees of the manager/receiver and Mr. Hammond's managing agent fees will be lower than Fell Reynolds and with the number of flats in the building it is not significant.
(iv) The notice period of Mr. Baker. The Respondent undertook that and it would be wrong for the Tribunal to have regard to that to stand in the way of an order if satisfied for all other reasons that an order should be made.
(v) As to the submission that less than half of the lessees of non-Stainer owned flats are named as Applicants and that they have not committed personally to contribute to the costs, is of no consequence. More telling is the fact that not one lessee came forward to support the status quo. The numbers present at the hearing should be noted. Not all were giving evidence, but not one came to oppose the application.

Reasons

35. In giving evidence, Mr. Stainer had stated that he was the sole director of the Respondent and the controller of it.

36. The Tribunal found the submissions of Mr. Rosenthal persuasive. From the witness statements and documents produced before the hearing in March 2014 it was clear that the main problem was that the Respondent and Mr. and Mrs. Stainer had failed to make the required contributions to the maintenance fund. It was also clear that Mr. Baker as the managing agent employed by the Respondent was not in a position to take action against the Respondent or Mr. or Mrs. Stainer.

37. There were further statements and documents produced on behalf of the Respondent and oral evidence was given at the hearing in May by Mr. Baker, Mr. Mead and Mr. Stainer. Those statements, document and oral evidence could not change the problems which had been encountered in the past, and which were continuing, but sought to persuade us that it would not be necessary to appoint a manager/receiver because there was a 5 year plan for the maintenance of the premises and the promise of funds from the Respondent and Mr. and Mrs. Stainer. Those funds were to come from the reduction of the Respondent's contribution to the maintenance fund, the income from a further 6 flats and money which would be advanced by mortgage.

38. At the end of the hearing it was accepted on behalf of the Respondent that one of the grounds for making an order existed because the Respondent had failed to maintain the structure of the premises and had failed to paint the exterior of it as required by the leases and therefore there remained only the decision to be made by the Tribunal as to whether it would be just and convenient in all the circumstances to make an order.

39. It is therefore not necessary for the Tribunal to make a finding as to other breaches of obligation in relation to repair or in respect of the other grounds alleged but the Tribunal was satisfied that:

(a) From the evidence there had been a failure by the Respondent to co-operate with the managing agent in that the Respondent had not provided funds to enable proper management to take place. There was also the odd evidence of Mr. Stainer in respect of the redacted parts of the 2010 budget and that a budget is a wish list. In addition there is the Pembroke flat. Mr. Baker was not aware of it until recently and Mr. Stainer considered it was of no importance as the variable service charges always matched the rent payable and therefore it made not a penny difference. Mr. Stainer was dismissive of the suggestion that from an accounting and audit viewpoint this was unacceptable.

(b) There is also the proposal to use the Respondent as the main contractor for major works and the Respondent would then employ sub-contractors to carry out the actual work. Mr. Stainer's evidence is that in that way there will be a saving to all concerned because the Respondent will not make any profit

and there will be no VAT except on supplies. Mr. Baker and Mr. Mead said that initially they were sceptical about carrying out the works in that unconventional way but considered that with the employment of a Chartered Surveyor as the contract administrator and an experienced Clerk of Works it would work. They had candidates for those roles. Why, if this was such a good idea, it had not been used before was not explained. Just as Mr. Baker and Mr. Mead were initially sceptical, so was the Tribunal and we remained so. To run a contract in that way is a recipe for dispute, litigation and unfinished work. The tender documents were produced during the hearing and we had little opportunity to consider them and raise questions but some aspects of the tender by the Respondent were vague and some items were simply not included and there was a note that they were not necessary. Mr. Stainer said that he would employ people who were on site working for him in converting the 6 additional flats but when that work will start is not known. The planning and listed building consent for the 6 flats has not yet been obtained. The present position is unclear. Mr. Stainer's evidence was that the applications for the 6 flats had been made in October 2013 and that consent had been granted but when it was pointed out that the only record on the local authority's website was that the application in respect of only one of the flats has been registered very recently, apparently in May 2014 he explained that he had changed the plans to provide showers so that the flats would have a four star rating and just recently the authority had said that the plans were acceptable and the application had been registered. He could not explain why only one flat was registered. The fact remains that at the time of the hearing of this matter in May 2014 planning and listed building consent has not been obtained. Whether consent will be granted and how long it will be before the flats are completed is not known but Mr. Stainer is relying on the income from letting those flats to provide part of the funding which the Respondent, Mr. Stainer and/or Mrs. Stainer are obliged to contribute to the maintenance fund.

40. It was accepted on behalf of the Respondent that a breach had occurred, that the ground for the appointment of a manager/receiver existed and that the Tribunal must now consider whether it is just and convenient to make an order.

41. The most important matter for consideration is the continuing theme of the failure of the Respondent and Mr. and/or Mrs. Stainer to provide the funds which they are obliged to provide and the situation which prevents Mr. Baker from pursuing them for those funds. Mr. Baker said in evidence that he could have managed the building properly if he had had the funds. The only evidence of lessees, other than Mr. and/or Mrs. Stainer, not providing funds is that relating to Mr. Taylor and the non-payment of recent demands. In the case of Mr. Taylor that was not a simple matter of a debt but involved set-off of costs awarded to him. As to recent demands, they have not been paid pending the outcome of this application.

42. We heard no evidence from Mrs. Stainer as to her intentions to pay in the future but we did hear from Mr. Stainer and he said that it did not really matter whether he and his wife paid their service charges because any shortfall would be covered by the Respondent and he controls the

Respondent. Unfortunately, the history of this building shows that the Respondent has not covered shortfalls. Indeed the Respondent has added to the shortfalls by failing to contribute to the maintenance fund. Mr. Stainer's evidence is that things will change. He has in mind ways of reducing the Respondent's contribution to the maintenance fund. He also has the anticipated income from the 6 flats, the loan to be secured by a mortgage and some money from his bank but such evidence as was produced to support those sources of income did not satisfy us that the money was readily available. As submitted by Mr. Rosenthal, even if Mr. Stainer had come to the hearing with the money, there was no guarantee that the same problems of funding would not occur again as they had done in the past with Mr. Baker being in the difficult position of being unable to enforce payment.

43. Mr. Upton asked us to consider the making of a suspended order in the terms set out in a letter from Mr. Stainer. We accept Mr. Rosenthal's submissions on this point. It would not be, as suggested, automatic. There would have to be a default and if, as is likely, the Respondent did not accept there had been a default there would be uncertainty and the need for further proceedings. It follows from that that we do not find that the making of a suspended order appropriate.

44. Mr. Upton asked us to consider making the appointment for three, rather than five years. We saw no reason to reduce the period. Three years we considered not to be long enough in this case. If problems occur during the five years then appropriate applications can be made by those concerned, including Mr. Stainer.

45. The continuing theme in this case is the failure by the Respondent and Mr. and/or Mrs. Stainer to make the contributions they are obliged to make to the maintenance fund.

46. The Tribunal is satisfied that the only way to improve the situation is by the appointment of a manager/receiver so that the provision of funds can be enforced and therefore we find that it is just and convenient to make an order. Mr. Hammond is the manager/receiver proposed by the Applicants and we are satisfied that he be appointed subject to providing to the Tribunal evidence of his personal professional indemnity insurance in the sum of £4,000,000 and proof of his payment of the premium for the current year. To give time for that, his appointment will not take place until 28 days after the date of this decision.

47. There is before us an application for an order under Section 20C of the 1985 Act. We find that it is just and equitable in the circumstances to make such an order because the Applicants were justified in bringing these proceedings to deal with the maintenance and repair problems and the funding difficulties. We therefore make an order that all or any of the costs incurred or to be incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

Appeals

48. 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.

49. 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.

50. 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.

51. 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.

Judge R. Norman (Chairman)

IN THE FIRST TIER TRIBUNAL
PROPERTY CHAMBER

CASE REF: CHI/29/UL/LAM/2013/0019

BETWEEN

J. OLLIVER AND OTHERS **Applicants**
- and -
HALLAM ESTATES LIMITED **Respondent**

ORDER

UPON the application made on 13 December 2013 under Part II of the Landlord and Tenant Act 1987 for the appointment of a manager in respect of The Grand, The Leas, Folkestone, Kent, CT20 2LR ("the Premises")

IT IS ORDERED THAT

1. David Hammond MRICS of C R Child & Partners, 17/19 High Street, Hythe, Kent, CT21 5AD ("the Manager") be appointed manager and receiver of the Premises with effect from the date 28 days after the date of the decision of the Tribunal and subject to his providing to the Tribunal evidence of his personal professional indemnity insurance in the sum of £4,000,000 and proof of his payment of the premium for the current year.

2. The Manager shall manage the Premises in accordance with:

(1) The respective obligations of the Respondent and its successors in title ("the Landlord"), as landlord under the leases of those flats in the Premises which are subject to leases granted for more than 21 years ("the Leases"), with regard to the management of the Premises, more particularly set out in the second schedule to the Leases; and
(2) In accordance with the duties of a manager set out in the Service Charge Residential Management Code published by the Royal Institution of Chartered Surveyors, approved by the Secretary of State pursuant to section 87 of the Leasehold Reform, Housing and Urban Development Act 1993.

3. The Manager shall not be responsible for or entitled to perform any management functions, whether as set out in schedule 2 to the Leases or otherwise, in relation to those parts of the Premises over which the lessees under the Leases have no rights of use and / or access.

4. The Manager shall be entitled to receive all sums by way of ground rent, service charge or otherwise due to the Landlord pursuant to the Leases.

5. The Manager shall account to the Landlord of the Premises for the payments of ground rent received by him, after deducting therefrom such sum

as required to make up the shortfall (if any) in the annual service charge budget after accounting for the sums payable under all of the Leases.

6. After accounting to the Landlord under paragraph 5, above, the Manager shall apply the remaining sums received by him (other than those representing his fees hereby specified) in the performance of the Landlord's covenants contained in the Leases.

7. The Respondent shall provide to the Manager and / or procure that within 14 days of the date of this order, the current managing agent, Roderick Baker FRICS of Messrs Fell Reynolds, will provide to the Manager:

(1) all books, records and counterpart leases (whether or not registered at HM Land Registry) relating to the Premises in the possession of Mr Baker and / or the Respondent;

(2) the balance of the service charge monies held by Mr Baker and / or the Respondent, including any reserve funds, together with up-to-date accounts;

(3) a schedule of all existing contracts relating to the Premises to which Mr Baker and / or the Respondent is a party or in respect of which he has or the Respondent has any rights and liabilities, which schedule shall state the terms of each contract, the terms of any variation thereof, the extent to which such contracts have been performed, and particulars of any claims which have been made or, so far as the Manager is aware, are likely to be made under each such contract.

8. The rights and liabilities arising under any such contracts to which the Manager is not a party shall become rights and liabilities of the Manager, subject to the Manager satisfying himself that they are proper and reasonable contracts. If he is not so satisfied, he shall serve a notice to that effect on the Respondent within one month of his appointment as Manager.

9. The Manager shall be entitled to prosecute claims in respect of causes of action vesting in the Respondent under the Leases before or after the date of his appointment.

10. If the Landlord fails to meet any shortfall in the budgeted or actual costs of providing the "services" under schedule 2 to the Leases, after account has been taken of the liability of all lessees under the Leases and after any ground rent recovered under paragraph 5, above, has been applied towards such shortfall, the Manager shall be entitled to recover such sums from the Landlord as a debt.

11. The Manager shall be entitled to remuneration in the annual sum of £18,500 (with VAT thereon), together with additional sums of £5,000 (with VAT thereon) and £3,000 (with VAT thereon) for the first and the second, years, respectively.

12. The appointment of the Manager shall be for a period of five years from the date 28 days after the date of the decision of the Tribunal and subject to his providing to the Tribunal evidence of his personal professional indemnity insurance in the sum of £4,000,000 and proof of his payment of the premium for the current year.

13. The Respondent's costs of and arising out of this application shall not be treated as relevant costs for the purposes of section 20C of the Landlord and Tenant Act 1985.

Judge R. Norman

Date: 11th June 2014