FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/45UH/LAM/2020/0007
Property	**:**	Flats 1-20 Hampton Court, Brighton Road, Worthing, West Sussex BN11 2EF
Applicant	**:**	Kirkland Investment Management Limited
Representative	**:**	Bate & Albon Solicitors
Respondent	**:**	Rushcavern Limited
Representative	**:**	Brethertons LLP
Type of Application	**:**	Appointment of a manager section 24 of the Landlord and Tenant Act 1987.
Tribunal	**:**	Judge Tildesley OBE Mr W Gater FRICS
Date of Hearing	**:**	4 August 2020 Havant Justice Centre By remote hearing using Full Video Hearing Platform
Date of Decision	**:**	7 September 2020

DECISION

1.

Summary of Decision

1) In accordance with section 24(1) Landlord and Tenant Act 1987, Mr Gary Pickard of Jacksons, 193 Church Road, Hove, East Sussex is appointed as Manager of the Property known as Flats 1-20 (inclusive), Hampton Court, Brighton Road, Worthing BN11 2EF and registered at HM Land Registry under title number WSX 1600 (the Property) for a period of 3 years from 5 October 2020 subject to the terms of the management order attached to the decision.

2) The Tribunal is satisfied the circumstances merit giving the Manager the benefit of some form of protection against future disposals of the property by the Respondent.

3) The Respondent is not entitled under the leases to recover its legal costs in connection with these proceedings through the service charge. Given this finding there is no ground for making an order under section 20C of the 1985 Act. In the alternative if the Tribunal had the power to make a section 20C order, it would have considered it just and equitable to do so because of the consensual nature of the proceedings when it would be expected for each party to bear its own legal costs.

4) The Tribunal records the Applicant's concession that the Respondent is entitled to recover its reasonable costs in connection with the handover process provided those costs did not involve legal costs.

Background

1. The Applicant seeks an order appointing Mr Gary Pickard as a manager under Section 24 of the Landlord and Tenant Act 1987 ("the Act").

2. A preliminary notice under Section 22 of the Act was served on the Respondent.

3. The Applicant has also applied for an order under section 20C of the Landlord and Tenant Act 1985 preventing the landlord from recovering his costs through the service charge.

4. Directions were issued on 27 June 2020 requiring the Applicant to notify all leaseholders of the application and ordering the parties to exchange their statements of case.

5. A hearing was held on 4 August 2020 remotely by use of the Full Video Hearing Platform. Mr Jeremy Patrick Donegan, Partner at Bate & Albon solicitors appeared for the Applicant. Mr Peter David Humphries attended on behalf of the Applicant company. Mr Justin Bates of Counsel represented the Respondent. Mr Darren

Winter and Mr John Winter were in attendance. Mr Gary Pickard, the proposed Manager, also attended the hearing to speak to his proposed management plan for the property.

6. The Applicant supplied a bundle of documents which was admitted in evidence. References to pages in the bundle are in [ ].

7. The Applicant holds a long lease of Flat 8 Hampton Court, Brighton Road, Worthing BN11 2EP. The Respondent is the freeholder of the property, which is a purpose-built block comprising 20 flats plus a utility room, garages and parking spaces.

8. The property is currently managed by Helm Estate Services Limited ('HESL'), which is a company controlled by Mr Darren John Winter. who is also director of the Respondent. He is the son of Mr John William Winter who controls the Respondent.

9. The Applicant purchased Flat 8 on 25 August 2017. Since that time the relationship with HESL has completely broken down. This culminated in the Applicant issuing Part 8 proceedings in the County Court in relation to various 'management regulations' that HESL purported to introduce. Those proceedings were compromised following a round table settlement meeting on 05 March 2020.

10. The settlement terms agreed between the parties are found in the schedule to a Tomlin Order dated 04 April 2020 [156-157]. These include provision for an application to the Tribunal for the appointment of a manager and the Respondent has agreed to support that application. The parties agree that the appointment of a manager is in the long-term interests of the property.

11. The Applicant served a section 22 notice on the Respondent on 20 April 2020 [145-166]. Exhibited to the notice are emails/letters of support from leaseholders of ten additional flats. In addition, the Respondent, which is also the long leaseholder of Flat 16, supported the section 22 Notice.

12. In response to the directions seven leaseholders of eight flats completed the pro-forma and indicated their agreement with it. The remaining leaseholders did not return the pro-forma.

The Issues

13. The Applicant relied on section 24(2)(b) of the 1987 Act, namely that

> "...other circumstances exist which make it just and convenient for the order to be made."

14. Those circumstances according to the Applicant are

a) The close relationship between the Respondent and HESL, which is not 'arm's length' and could affect HESL's ability to act impartially,
b) The total breakdown in the relationship between the Applicant and HESL, rendering it unworkable.
c) The terms of the Tomlin Order.
d) The parties' agreement that a Tribunal appointed manager is in the long-term interests of the property.
e) The support for a Tribunal appointed manager from the Respondent and a majority of the leaseholders.

15. The Respondent stated that the property had some significant management challenges (1) Uncontrolled or unauthorised lettings of a majority of the Flats. (2) Unauthorised and uncontrolled structural alterations at the Flats. (3) General anti-social behaviour at the property, such as residents' misuse/abuse of the communal bin store, residents' fly-tipping and unauthorised storage in the common parts, unauthorised parking, smoking in the common parts and a concern of drug use/dealing.

16. The Respondent recognised that unopposed Applications of this nature were rare but the parties could not see any other arrangement working. The Respondent stated that the parties had considered other management arrangements but they concluded that no other arrangement would fulfil the twin purposes of the Application which were:

a) to have independent management by someone who is not answerable to the Applicant or the Respondent, and,
b) to enable someone to manage with management powers exceeding that which the Applicant contends was restricted or prevented by the current leasehold scheme to get to grips with remedying the problems that exist.

17. The parties had agreed upon the appointment of Mr Pickard as the proposed manager for the Property. Mr Pickard is the proprietor of Jacksons, established managing agents based at 193 Church Road in Hove, and he holds a number of appointments under section 24 of the 1987 Act.

18. The issues for the Tribunal are whether (1) the grounds for appointing a manager are met under section 24(2) of the 1987 Act, and (2) whether Mr Pickard is a suitable person to be appointed as manager.

19. The Respondent disagreed with the Applicant about the need for a restriction to be registered against the freehold title and opposed the making of an order under section 20C preventing the landlord from recovering its costs of the application through the service

charge. The Tribunal would be required to resolve these disagreements if it decided to appoint Mr Pickard as manager.

Consideration

20. The Tribunal's jurisdiction to appoint a manager under the 1987 Act is fault based. The Tribunal can only make an order if one or more of the circumstances set out in section 24 of the 1987 are met and it is just and convenient to make an Order. The parties are correct that it is unusual for the Tribunal to make an Order because both parties are in agreement. In such circumstances the Tribunal would expect the parties to reach alternative arrangements rather than resorting to an appointment by the Tribunal.

21. The parties relied on the wording of 24(2)(b) that other circumstances existed which made it just and convenient for the order to be made. The Applicant noted that there appeared to be no reported cases on the application of section 24(2)(b) of the 1987 Act. The Applicant cited two FTT decisions where an appointment had been made in agreed cases.

22. If the only basis for the Application is that the parties were in agreement, the Tribunal would be reluctant to make an Order. The parties, however, accepted that there were numerous management problems at the property, although they disagreed on the cause of the problems. These problems were summarised in Mr Humphries' second witness statement [126-128] and Mr D Winter's second statement [135-136]. Further it agreed that the relationship between the parties had irretrievably broken down and that they had explored all other alternative options for managing the property.

23. The Tribunal is satisfied that the agreed evidence on numerous management problems at the property substantiated the finding of "other circumstances" within the meaning of section 24(2)(b) of the 1987 Act. The Tribunal considers that it is just and convenient to make an order because of the parties' diagnosis with which the Tribunal agrees that only a manager independent of the parties would have a chance of resolving the management problems at the property.

24. The Tribunal heard from Mr Pickard who provided the following documents in support of his appointment: a curriculum vitae [171-173], a management plan [167-170], verification of professional indemnity insurance in the sum of £5 million signed by a S Gorman and J Dopson on behalf of MGB insurance brokers limited [174], and a signed declaration that Mr Pickard would comply with "the Residential Management Code" per section 87 of the Leasehold Reform Housing and Urban Development Act 1993 Version 3.

25. Mr Pickard has been involved in property management since 1970 when he joined Jacksons, a firm of managing agents based in Hove. Mr Pickard became a Senior Partner in 1985 and now runs the business with family members. Mr Pickard specialises in long leasehold block management and his firm had a portfolio in excess of 100 buildings from purpose-built blocks of up to 96 flats to smaller two unit buildings. Mr Pickard primarily acts for Right to Manage Companies and Freehold owning Companies where the lessees have enfranchised. In 2003 his firm achieved Corporate Membership of ARMA.

26. Mr Pickard's first appointment as a Tribunal manager was in 2003 and since that date he has held 14 separate appointments. Mr Pickard is currently appointed as a Manager on eight properties and is dealing with the winding up of an appointment on another property.

27. Mr Pickard supplied evidence of professional indemnity insurance to the cover of £5 million. Mr Pickard stated that he had adopted the ARMA complaints procedure and all accounts are prepared in accordance with Tech 03/11 where this was not consistent with lease requirements.

28. Mr Pickard said he had only been able to inspect the exterior of property because of the constraints imposed in connection with Covid-19. Mr Pickard had no particular concerns with the exterior of the property. Mr Pickard noted that it was in a windy location which would lead to deposits of litter. Mr Pickard was questioned on the issues of unauthorised structural alterations, anti-social behaviour and building constructive relationships with and between the parties.

29. The Tribunal considers Mr Pickard to be an experienced and competent manager who has a thorough understanding of the role of a Tribunal appointed manager. The Tribunal is satisfied that Mr Pickard is a suitable person to be appointed as Manager. The Tribunal would ask Mr Pickard to develop a plan for addressing the problem of anti-social behaviour at the property and to take steps to promote a constructive relationship with and between the parties. The Tribunal will require Mr Pickard to supply the Tribunal with a brief progress report after the first 6 months and, thereafter at 12 monthly intervals.

30. The Applicant supplied a draft management order [175-182]. The Respondent objected to the inclusion of a direction to the Manager to register a restriction against the freehold title stating that no disposition of the freehold estate is to be registered without the written consent of Mr Pickard.

31. The Respondent objected on two grounds. First there was no justification on the facts to include such a direction which

interfered with the proprietorial rights of the freeholder. The Respondent said that it had fully co-operated with the Applicant in respect of the application for a management order, and had agreed to the making of such an order. The Respondent asserted that it was committed to making the management order which was reflected in the terms of the Tomlin Order.

32. Second the Respondent referred to the recent decision of the Upper Tribunal in *Richard Urwick (1) Caroline Yrazu-Bajo (2) v Gary Pickard* [2019] UKUT 0365 (LC). At [71] Martin Rodger QC, Deputy Chamber President stated that

> "A restriction in form N would prevent registration of a disposition without the written consent of the manager. That would be a very significant intervention in the property rights of the landlord, which might be thought to go beyond the scope of Part II, LTA 1987. As the Tribunal has repeatedly stated, a management order should be proportionate to the purpose for which it is imposed (Senadine Properties Ltd v Heelis [2015] UKUT 55 (LC); Queensbridge Investments Ltd v Lodge [2015] UKUT 635 (LC)). An order which, in effect, prevented a sale should only be made after careful consideration and never as a matter of routine. If it was decided that such an order was just and convenient, it would be essential that it specify precisely in what circumstances the manager would be required to give consent, such as if agreement was reached with the purchaser that it would treat itself as being bound by the management order, or if the majority of lessees indicated that they were content for the purchaser to assume responsibility for management. The manager might also be directed that, if called upon to give consent, or if specified conditions were not satisfied, an application should be made to the FTT for directions".

33. The Respondent also referred to the Deputy President's suggestion that the FTT might wish to consider liaising with the Land Registry to devise a suitable non-standard restriction to provide clarity for managers in respect of which they have been appointed and which could then be included as part of a management order [77].

34. The Applicant pointed out that the UT decision in *Urwick* made it clear that a manager is entitled to apply for a restriction in form L or N by virtue of section 24(8) of the 1987 Act and rule 9(3) of the Land Registration Rules.

35. The Applicant contended that a restriction was necessary because the Respondent could sell the freehold and the buyer would potentially take it free of any management order. The Applicant acknowledged that any sale would be subject to the right of first refusal provisions in Part 1 of the 1987 Act. This right, however, is subject to various exclusions including disposals by a body corporate to a company that has been an associated company for a least two years.

According to the Applicant, this exclusion was of particular concern in this case given the Respondent is controlled by Mr John Winter, who also has significant control of three other companies. The Applicant submitted that given the limited duration of the proposed management order, a form N restriction is appropriate.

36. The Tribunal starts with the wording of section 24(8) of the 1987 Act which states that *"The Land Charges Act 1972 and the Land Registration Act 2002 shall apply in relation to an order made under this section as they apply in relation to an order appointing a receiver or sequestrator of land.*"

37. In the Tribunal's view it follows from the explicit inclusion of section 24(8) that Parliament intended to give managers the same protection as receivers in respect of changes of ownership of premises to which the Management Order. The Tribunal, however, accepts that the inclusion of section 24(8) does not mean that it is necessary in every case for the powers of the manager to be protected against future disposals of the premises. The Upper Tribunal in *Urwick* imposes a threshold criterion of proportionality before any such restriction is placed on the freeholder's right to dispose of the property.

38. The Tribunal acknowledges that the Respondent had co-operated with the application for a management order and had accepted the need for the property to be managed by someone independent of the parties. The Tribunal observes that although both parties agree that there are significant management problems at the property, they do not agree on the appropriate means to resolve those problems. Their disagreement is reflected in the terms of the draft management order at paragraph 5 of the Schedule of Functions and Services which gives the Manager the authority "to make vary or withdraw management rules or regulations in accordance with restriction 1/17 in the First schedule of the Leases". The imposition of management rules by the Respondent was at the heart of its dispute with the Applicant. The Tribunal considers that by giving the Manager express powers to deal with management rules and regulations creates an expectation that the Manager would resort to them to deal with the management problems at the property and has the potential for conflict with the Respondent if the Manager chooses a different route.

39. The Tribunal also considers that the risk of the Respondent disposing of the property to frustrate the management order is higher in this case because of Mr Winter's control of three associated companies.

40. The Tribunal is, therefore, satisfied the circumstances merit giving the Manager the benefit of some form of protection against future disposals of the property by the Respondent.

41. At the hearing the Tribunal proposed the following wording for the restriction if it decided to give the Manager the power to apply for a restriction against the Respondent's legal estate in the property:

> "No disposition of the registered estate (other than a charge) by the proprietor of the registered estate, or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction, is to be completed by registration without a certificate signed by the applicant for registration [or their conveyancer] that the provisions of paragraph X of the Order of the Tribunal dated xxx have been complied with."
>
> Paragraph X reads: On any disposition [other than a charge] of the landlord's estate in the property registered under title no xxxx the landlord will procure from the disponee of the property, a direct covenant with the Manager, that the disponee will (a) comply with the terms of this order and (b) on any future disposition (other than a charge) procure a direct covenant in the same terms from its disponee".

42. The parties made no specific objections to the proposed wording of the restriction.

43. The Respondent suggested several amendments to the draft order which were agreed by the Applicant.

44. The Tribunal took on board the concern expressed by the Upper Tribunal in *Urwick* at [67] that the FTT often approves a draft order with little detailed consideration. The Tribunal has reviewed the draft order, and made several changes, none of which should be controversial. If the parties and the Manager wish to make observations on the changes made, **they can do so within seven days from the date of the decision.**

45. The final issue concerned whether the Tribunal should make an Order under section 20C of the Landlord and Tenant Act 1985 preventing the landlord from recovering its costs incurred in these proceedings through the service charge.

46. The Respondent submitted that it had already agreed as part of the Tomlin order in the County Court case not to seek to recover any part of the costs of that case from any leaseholder but it did not make a similar concession as regards the costs of this Application. The Respondent did not see why it should be prevented from recovering its reasonable costs in connection with this Application or the associated handover process. The Respondent maintained that by agreeing to this Application it was acting out of a concern for the best interests of the building and should, therefore, be able to recover its reasonable costs.

47. Respondent's counsel contended that it was entitled to recover the legal costs in connection with these proceedings by virtue of Clauses

4(B)(i) and 6D(v) of the lease relating to Flat 8 dated 30 September 1976 between Scott Properties (Sussex) Limited and Mr and Mrs R J West [53a]. Under Clause 4(B)(i) the lessee covenants to pay the lessee's proportion of all moneys expended by the lessor in complying with its covenants in relation to the Block as set out in Clauses 6(B) and 6(D) of the lease.

48. Clause 6(D)(v) of the lease relates to the costs of employing such person or persons as shall be reasonably necessary for the due performance of the covenants on its part herein contained and for the proper management of the Block and in particular but without prejudice to the following (a) a cleaner; (b) a firm of chartered surveyors or other professional managers to handle the management of the block; (c) a firm of qualified accountants to audit the service charge accounts and certify the service charge statement.

49. Respondent's counsel argued that the Respondent had engaged in these proceedings to ensure the proper management of the property. Counsel said that this was not a case where the Respondent was opposing the Application instead the Respondent had sought from the outset of the dispute to find a solution to the management problems at the property which was agreeable to the leaseholders of the various Flats in the property. Counsel concluded that the costs incurred by the Respondent in pursuit of this aim fell squarely within the wording of Clause 6(D)(v).

50. The Applicant disagreed with Counsel's construction of 6(D)(v) in relation to legal costs. The Applicant, however, accepted and did not challenge the Respondent's entitlement to recover its reasonable costs in connection with the handover process provided those costs did not include the legal costs.

51. The Applicant argued that Clause(D)(v) made no explicit reference to solicitors' or legal costs. The Applicant accepted that the failure to make explicit reference is not conclusive but provides a strong indication that legal costs incurred in Tribunal proceedings were not in the contemplation of the parties when they agreed to the lease. According to the Applicant, its submission regarding legal costs was given added impetus by the fact that this lease was granted in 1976 when there was no statutory protection for leaseholders against a contractual liability to contribute through a service charge towards a landlord's cost of management. In the Applicant's view the absence of explicit words in the lease regarding legal costs together with the relevant statutory landscape as it existed in 1976 supported a construction that the Respondent is not entitled to recover its legal costs in connection with these proceedings through the service charge.

52. The Tribunal prefers the Applicant's construction of the lease that the Respondent is not entitled to recover its legal costs in connection

with these proceedings through the service charge. Given this finding there is no ground for making an order under section 20C of the 1985 Act. In the alternative if the Tribunal had the power to make a section 20C order, it would have considered it just and equitable to do so because of the consensual nature of the proceedings when it would be expected for each party to bear its own legal costs.

53. The Tribunal records the Applicant's concession that the Respondent is entitled to recover its reasonable costs in connection with the handover process provided those costs did not involve legal costs.

Decision

54. In accordance with section 24(1) Landlord and Tenant Act 1987, Mr Gary Pickard of Jacksons, 193 Church Road, Hove, East Sussex is appointed as Manager of the Property known as Flats 1-20 (inclusive), Hampton Court, Brighton Road, Worthing BN11 2EF and registered at HM Land Registry under title number WSX 1600 (the Property).

55. The order shall continue for a period of 3 years from 5 October 2020. If the parties wish to apply for any extension of the order, they are encouraged to do so at least three months before the order expires for a period of 3 years from 5 October 2020.

56. The Manager shall manage the Property in accordance with the terms of the Order attached.

57. The Manager shall register the Order against the Landlord's registered title as a restriction under the Land Registration Act 2002 or any subsequent Act. The wording of the restriction shall be:

> "No disposition of the registered estate (other than a charge) by the proprietor of the registered estate, or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction, is to be completed by registration without a certificate signed by the applicant for registration [or their conveyancer] that the provisions of paragraph 11 of the Order of the Tribunal dated 7 September 2020 have been complied with."

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. The Application must be sent by email to rpsouthern@justice.gov.uk.

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.