FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LVM/2022/0004**
Property	:	**Frognal Estate, Finchley Road, London NW3 5HG**
Applicant	:	**Martin Kingsley**
Respondents	:	**(1) RFYC Ltd** **(2) Metropolitan & County Holdings Ltd**
Interested Parties	:	**(1) Lessees of Frognal Estate (full list attached to application)** **(2) Simon Freed, former director and shareholder of RFYC Ltd** **(3) Close Bros, mortgagees in possession of Penthouse Flats**
Type of application	:	**Variation of Appointment of Manager**
Tribunal	:	**Judge Nicol** **Mr R Waterhouse BSc LLM MA FRICS** **Mr C S Piarroux JP CQSW**
Date and venue of Hearing	:	**4th December 2023** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**5th December 2023**

DECISION

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(1) The following documents are excluded because they are too late, in breach of the Tribunal's directions:

(i) The "witness statement" provided on 1st December 2023 from Dr Kory; and

(ii) The email dated 4th December 2023 from Close Bros containing brief submissions.

(2) The application by Mr Simon Freed to be joined as a party to the proceedings is refused.

(3) In accordance with section 24(9) Landlord and Tenant Act 1987, the Management Order made by the Tribunal on 11th December 2019 (ref: LON/00AG/LVM/2019/0017) is varied as follows:

(a) The Schedule referenced in paragraph 4 of the Tribunal's order of 26th May 2009 (case reference: LON/00AG/LAM/2009/0001) and attached thereto is hereby replaced by the table attached hereto and which declares the percentage proportions for each flat on the Frognal Estate in accordance with clause 1.4 of the said Management Order; and
(b) The said percentage proportions shall have effect from 13th November 2018.

Relevant legal provisions are set out in the Appendix to this decision.

Reasons

1. The Frognal Estate is located on Finchley Road in north London and includes the following residential buildings:

- 1-12 Frognal Court
- 14-29 Frognal Court
- 30-45 Frognal Court
- 1-4 Midland Court
- 1-6 Warwick House

2. The Tribunal first appointed a manager for the Frognal Estate on 7th May 2009. The Applicant is the Manager appointed by order of the Tribunal on 26th April 2016, which appointment was extended on 30th August 2016 and 11th December 2019 and is currently due to expire on 11th December 2024.

3. The Applicant has applied to vary the terms of the management order under section 24(9) of the Landlord and Tenant Act 1987 (the "Act"). The First Respondent had built 8 penthouse flats at 14-29 and 30-45 Frognal Court but no leases were granted before the company's dissolution and so no service charges have been apportioned to them to date. The Applicant seeks an order requiring new proportions for each flat's share of the service charges, including for the penthouse flats.

4. The application was heard on 4th December 2023. The attendees were:

(a) The Applicant;
(b) Mr Edward Denehan, counsel for the Applicant;
(c) Ms Dehar, the Applicant's assistant;
(d) Dr Michael Anson, lessee of Flat 36 and witness for the Applicant;
(e) Mr Martin Hay, on behalf of the Second Respondent; and

(f) Dr Agnes Kory, lessee of Flat 6, purporting to represent not only herself but also some other lessees.

5. The documents before the Tribunal consisted of a bundle of 611 pages from the Applicant and a skeleton argument from Mr Denehan.

Procedural history

6. As well as being the developer of the Penthouse Flats, the First Respondent is a mesne landlord of the residential parts of the Estate. The Second Respondent is its superior landlord.

7. On 4th January 2022 the First Respondent company was dissolved. On 28th February 2022, the Treasury Solicitor issued a Notice of Disclaimer of the First Respondent's leasehold interest in the Frognal Estate. On 5th April 2022, the Applicant's solicitors notified the Tribunal that the disclaimer had just come to its attention. As a result, they sought a stay of the Tribunal proceedings so that negotiations could take place with the Second Respondent and Interested Persons to determine who would hold any interests in the Penthouse Flats, which fell within the demise of the disclaimed lease and which were the subject of the application; and whether an agreement could be reached with the relevant party as to the contributions to be paid in relation to those flats.

8. Therefore, on 12th April 2022, the Tribunal stayed the proceedings. The stay was continued on three further occasions.

9. On 28th April 2022, application was made to the County Court at Central London to reinstate the First Respondent, that is to restore the company to the Register (claim number 757 of 2022). That application was adjourned to be dealt with on the papers on 16th December 2022 and then further adjourned to obtain consent from the original members.

10. On 6th March 2023, Judge Powell continued the stay of the application until after the hearing of the application in the county court which was due to be heard in May 2023. He directed reports as to progress to be provided to the Tribunal. At a further case management hearing on 28th July 2023, he considered those reports and made the following findings:

(a) The application in the county court had been adjourned, again, to 14th September 2023 on the application of Mr Freed;

(b) The application was listed to be heard after possession proceedings on 8th September 2023 (claim number J02CL093) which relate to a claim for possession of the 8 Penthouse Flats brought by Mark Wordsworth and David Arkwright as Joint Receivers of John Arkwright & Co and Close Brothers Ltd against Mr Freed and the occupants of the penthouse flats;

(c) The parties had continued negotiations and, according to a letter from the Applicant's solicitors, Gisby Harrison, dated 7th June 2023, "It is considered that potentially only the date from which service charges are

payable remains in dispute and otherwise the apportionment of services (with the exception of Dr Kory) has been agreed";

(d) A number of leaseholders have provided statements to say how they think the apportionments should be made and that the manager's application should continue notwithstanding the position of the First Respondent.

11. Judge Powell concluded that the stay should be lifted and made directions for the matter to proceed to a final hearing, listed for 4th December 2023.

12. However, there were then further developments:

(a) On 8th September 2023, the county court granted possession of the Penthouse Flats to Close Bros, with Mr Freed and any occupiers ordered to vacate them by 15th September 2023. Directions were made to progress a money claim for use and occupation charges.

(b) The county court hearing on 14th September 2023 to reinstate the First Respondent was vacated, in the light of an application that was made and of documents to support restoration not having been filed. That hearing was re-listed for 14th November 2023.

(c) The Respondents did not comply with Judge Powell's direction to file and serve their statements of case and all documents relied upon by 13th October 2023, resulting in an application by the Applicant to debar the Respondents made on 20th October 2023.

(d) Numerous leaseholders on the Frognal Estate have written to the Tribunal to express support for the Applicant's application to vary the apportionment of the service charges.

(e) On 14th November 2023, the First Respondent was not reinstated but the application for reinstatement was adjourned as a result of two intervention applications.

(f) On 28th November 2023, Rise Legal applied to the Tribunal on behalf of Mr Freed, first, for him to be joined as a Respondent and, secondly, for the hearing on 4th December 2023 to be adjourned.

13. By order dated 29th November 2023, Judge Powell refused the applications to add Mr Freed as a Respondent, to adjourn the hearing and to debar the Respondents but gave permission for any of the applications to be renewed at the start of the hearing on 4th December 2023.

14. By email dated 29th November 2023, Ms Marie Garside, the lessee of Flats 15 and 20, requested to attend the hearing on 4th December 2023 either online or by phone. Unfortunately, the Tribunal had no facilities to accommodate the request at such short notice and so Judge Nicol refused it.

15. By email dated 1st December 2023, the last working day before the hearing, Dr Kory purported to provide a brief "witness statement" containing her evidence and submissions in opposition to the Applicant's proposed apportionment. However, she had been directed to provide her material by 13th October 2023. She had provided no apology, let alone an explanation for such a serious breach of the Tribunal's directions. At the hearing she said she had expected her email correspondence containing her objections to the proposed new apportionment would be included in the hearing bundle but there was no order for such correspondence to stand as her statement of case. Everyone else involved in the proceedings is not expected to speculate that she will maintain her objections exactly as they had been previously and she should have complied with the directions rather than making assumptions about everyone else's behaviour. Therefore, her witness statement is excluded from consideration.

16. By email sent on the morning of the hearing, Close Bros sought to make some submissions. Similarly, this is late, in breach of the Tribunal's directions and entirely unexplained. Therefore, the email is excluded.

17. Mr Freed appears to have renewed his application to be joined as a party to the proceedings. However, he did not attend the hearing, nor was he represented, so that there was no-one to speak to his application. As things stand, Mr Freed is a former director of a company which used to have, but no longer has, an interest in the subject property and is subject to an order for possession. He claims that it is inevitable that the company will shortly be reinstated but that claim was made previously and the Tribunal has no idea what the county court will decide. Moreover, Mr Freed has had the opportunity for more than a year to set out any objections he has to the proposed apportionment but has not taken it. Mr Freed has no standing to be joined and it is not clear that he has anything to say if he were. Therefore, his application is refused.

Apportionment

18. Under paragraph 1.4 of the existing management order, the Applicant is entitled to demand and receive service charges from lessees on the Frognal Estate "in the appropriate and proper percentage proportions". Those proportions for each flat were set out in a schedule agreed between the parties to the original application for the appointment of a manager and attached to the Tribunal's first order made on 7th May 2009. Since that time, the estate has been added to by the construction of the Penthouse Flats. There is a Final Certificate from Head Projects Building Control Ltd marking the completion of the building work as at 13th November 2018. The schedule has not been adjusted since so that the Penthouse Flats have benefited from the provision of services without being liable for any proportion of them.

19. The existing apportionment was based on rateable values which it was understood to be intended in the various (at least 6) forms of sub-sub-underleases granted to the lessees on the Frognal Estate. However, the

Penthouse Flats have never been assessed for rates, having been constructed long after the abolition of domestic rates, and so a different system of apportionment is required.

20. The Applicant has worked with Dr Anson to devise the new apportionment which is set out in a schedule within the hearing bundle. On the basis that the Penthouse Flats occupy a fifth of each of the two blocks and are in a higher council tax band than the other flats (Band E rather than D), Dr Anson concluded that the Penthouse Flats should be liable for 24% of the costs which make up the service charges.

21. Ms Garside stated in her witness statement that she supports the application and speaks on behalf of other lessees and that the Penthouse Flats benefit from:

(a) 2 en-suite bathrooms
(b) New lifts
(c) Lighting and cleaning of the new communal areas
(d) Balcony extensions to the fire escape
(e) Advertised as "luxury apartments"
(f) A share of the buildings insurance.

22. The Penthouse Flats consist of four flats on each of two blocks, with one larger flat and 3 smaller ones in each group of four. Dr Anson suggested that the apportionment of the 24% liability for each set of penthouse flats should be in the ratio of 4:3:3:3. Therefore, for example, the larger flats would pay 4/13th of 24% of the costs relating to each block.

23. There is also a separate estate charge. There are 62 flats in the estate, including the 8 penthouse flats. Dr Anson suggested that the Penthouse Flats should pay 1/62nd of the estate expenditure, uplifted by the aforementioned 24%.

24. The resulting apportionment across all the flats has been calculated to add up to a total of 100%, meaning that all the flats other than the Penthouse Flats would see a reduction in their service charge liability.

25. By clause 3.10 of the Management Order, the Applicant was given the specific right to apply to the Tribunal "for directions and/or orders concerning the contributions to be made by the tenants or other owners of the flats constructed, or in the course of construction, on the Estate". This express provision reflects the fact that the Tribunal making the order envisaged that the apportionment would need to be revised in due course.

26. Despite having had the opportunity to make alternative proposals for apportionment, no-one involved in these proceedings has done so, save for Dr Kory. Her suggestion was that all flats should pay the same percentage of the service charge but she gave no basis for this assertion other than it would be simpler. The Applicant's proposal sought to reflect the value of each property and was consistent with the way service charges had always been apportioned on the Estate.

27. The Tribunal is satisfied that the Applicant's proposed new apportionment is reasonable and appropriate in all the circumstances and should be implemented in place of the apportionment used from 2009 to date.

28. This leaves the question of the date on which the new apportionment applies. The Applicant suggested the date of completion of the Penthouse Flats, namely 13th November 2018 as referred to above. He explained that the Penthouse Flats and their occupiers had occupied a disproportionate amount of his management time. During the building of the Penthouse Flats, there were leaks into the flats below. In 2020 Mr Freed's son had taken occupation of the Penthouse Flats and sub-let some of them on assured shorthold tenancies. The occupiers were involved in anti-social behaviour such that the police had to be called. Both Dr Kory and Mr Hay gave further details supporting the Applicant's account. The Applicant argued that it would be unjust and unreasonable to set a date any later than that proposed.

29. Mr Hay informed the Tribunal that Close Bros had now taken possession of the Penthouse Flats, having evicted the last occupier very recently, and would look to grant long leases on them as soon as they could. Close Bros themselves had suggested that the new apportionment should not commence until after such long leases had been granted but Mr Denehan pointed out that it was possible that this would never happen.

30. Mr Denehan suggested that, if the issue of the start date for the new apportionment had not been sufficiently aired ahead of the hearing, then it could be put off to a further hearing. However, Close Bros and all others involved in these proceedings have had ample opportunity to come up with a reasoned alternative. Dr Kory urged the Tribunal not to delay matters further since it would only add to the costs which the lessees are already likely to have to bear in relation to these proceedings.

31. In the circumstances, the Tribunal is satisfied that it is just and reasonable for the new apportionment to apply with effect from 13th November 2018.

32. The effect of the new apportionment on any relevant party's liability for service charges is not for the Tribunal at this time but may be subject to further application to the Tribunal by any aggrieved party if matters cannot be worked out by agreement.

Name: Judge Nicol **Date:** 5th December 2023

Rights of appeal

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

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

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

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

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

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

Appendix – relevant legislation

Landlord and Tenant Act 1987

Section 24

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

(2) The appropriate tribunal may only make an order under this section in the following circumstances, namely–
  (a) where the tribunal is satisfied–
    (i) that any relevant person either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and
    (ii) . . .
    (iii) that it is just and convenient to make the order in all the circumstances of the case;
  (ab) where the tribunal is satisfied–
    (i) that unreasonable service charges have been made, or are proposed or likely to be made, and
    (ii) that it is just and convenient to make 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.

(2ZA) In this section "relevant person" means a person–

(a) on whom a notice has been served under section 22, or

(b) in the case of whom the requirement to serve a notice under that section has been dispensed with by an order under subsection (3) of that section.

(2A) For the purposes of subsection (2)(ab) a service charge shall be taken to be unreasonable–

(a) if the amount is unreasonable having regard to the items for which it is payable,

(b) if the items for which it is payable are of an unnecessarily high standard, or

(c) if the items for which it is payable are of an insufficient standard with the result that additional service charges are or may be incurred.

In that provision and this subsection "service charge" means a service charge within the meaning of section 18(1) of the Landlord and Tenant Act 1985, other than one excluded from that section by section 27 of that Act (rent of dwelling registered and not entered as variable).

(2B) In subsection (2)(aba) "variable administration charge" has the meaning given by paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

(3) The premises in respect of which an order is made under this section may, if the tribunal thinks fit, be either more or less extensive than the premises specified in the application on which the order is made.

(4) An order under this section may make provision with respect to–

(a) such matters relating to the exercise by the manager of his functions under the order, and

(b) such incidental or ancillary matters,

as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters.

(5) Without prejudice to the generality of subsection (4), an order under this section may provide–

(a) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager;

(b) for the manager to be entitled to prosecute claims in respect of causes of action (whether contractual or tortious) accruing before or after the date of his appointment;

(c) for remuneration to be paid to the manager by any relevant person, or by the tenants of the premises in respect of which the order is made or by all or any of those persons;

(d) for the manager's functions to be exercisable by him (subject to subsection (9)) either during a specified period or without limit of time.

(6) Any such order may be granted subject to such conditions as the tribunal thinks fit, and in particular its operation may be suspended on terms fixed by the tribunal.

(7) In a case where an application for an order under this section was preceded by the service of a notice under section 22, the tribunal may, if it thinks fit, make such an order notwithstanding–

(a) that any period specified in the notice in pursuance of subsection (2)(d) of that section 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).

(8) 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.

(9) The appropriate tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section; and if the order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 2002, the tribunal may by order direct that the entry shall be cancelled.

(9A) The tribunal shall not vary or discharge an order under subsection (9) on the application of any relevant person unless it is satisfied–

(a) that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and

(b) that it is just and convenient in all the circumstances of the case to vary or discharge the order.

(10) An order made under this section shall not be discharged by the appropriate tribunal by reason only that, by virtue of section 21(3), the premises in respect of which the order was made have ceased to be premises to which this Part applies.

(11) References in this Part to the management of any premises include references to the repair, maintenance, improvement or insurance of those premises.