RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/23UF/LAM/2008/0007
In the matter of an application under Section 24 of the Landlord & Tenant Act 1987 (as amended)
And in the matter of The Mount, Theescombe, Amberley, Stroud, Gloucestershire GL5 5AT

Between:

Mr. John Bilboa Applicant

and

The Mount (Amberley) Residents' Association Limited Respondent

Order for the appointment of a manager and receiver of the Property at The Mount, Theescombe, Amberley, Stroud, Gloucestershire, GL5 5AT

Upon hearing the Applicant in person and a representative of the Respondent

The Leasehold Valuation Tribunal orders as follows:

1. That Caroline Jane Forsyth of The Flat Managers Limited, Kensington House, 33 Imperial Square, Cheltenham GL50 1QZ ("the Manager") be appointed manager and receiver of the Property for the period from 17 June 2009 until 16 June 2011.

2. That she shall manage the Property in accordance with:
   a. The respective obligations of the landlord and the lessees under the various leases by which the flats at the Property are demised and in particular, but without prejudice to the generality of the foregoing, with regard to the obligations to maintain, repair, decorate and insure the Property.
   b. The duties of a manager set out in the Service Charge Residential Management Code published by the Royal Institution of Chartered Surveyors ("the Code") approved by the Secretaries of State for England and Wales under the terms of Section 87 of the Leasehold Reform, Housing and Urban Development Act 1993.

3. That, there being an existing dispute between the parties to the application leading to the making of this order as to the liability to maintain and repair a steel beam in the kitchen of the Applicant's flat at the Property, the Manager shall take no step to repair or maintain that

beam until such time as the parties jointly inform her that they have agreed the liability for repairing and maintaining the beam or she is notified that liability for repairing and maintaining the beam has been finally determined in a manner which is binding on the parties.

4. That she shall receive all sums whether by way of ground rent, insurance premiums, payment of service charges or otherwise arising under the said leases with the exception of sums due in respect of service charges before 17 June 2009.

5. That she shall apply the sums so received by her (other than those representing her fees hereby specified) in the performance of the landlord's covenants contained in the said leases.

6. That she shall make arrangements with the present insurers of the Property to make any payments due under the insurance policy presently effected by the Respondent to her.

7. That she shall be entitled to the following remuneration (which for the avoidance of doubt shall be recoverable as part of the said service charges in accordance with Schedule 4 of the said leases) namely:
    a. A basic annual fee of £1,200.00 for performing the duties set out in paragraph 2.5 of the Code; and
    b. An additional hourly charge of £40 for work properly undertaken by her which is not included within paragraph 2.5 of the Code.

8. Value added tax shall be payable in addition to the remuneration mentioned in the preceding paragraph, if appropriate.

9. This order shall remain in force until varied or revoked by further order of the Tribunal and the Applicant, the Respondent and the Manager shall each have permission to apply to the Tribunal for further directions.

Dated 8 April 2009

Signed

.....

Mr. J G Orme
Chairman

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Between:

Mr. John Bilboa Applicant

and

The Mount (Amberley) Residents' Association Limited Respondent

Date of application: 18 November 2008
Date of hearing: 24 and 25 March 2009
Members of the Tribunal: Mr. J G Orme (Lawyer chairman)
Mr. P E Smith FRICS (Valuer member)
Mr. S Fitton (Lay member)
Date of decision: 8 April 2009

Reasons for the order

Background

1. The Mount, Theescombe, Amberley, Stroud, Gloucestershire GL5 5AT ("the Property") is a Victorian detached house, converted into 4 flats which have been sold on long leases. The Applicant, Mr. John Bilboa, is the owner of the lease of flat 1, comprising part of the ground floor and basement of the Property. Miss Suzie Almond is the owner of the lease of flat 2 which comprises another part of the ground floor. Mr. Peter Gannon is the owner of the lease of flat 3 on the first floor. Mr. Steve Champion is the owner of the lease of flat 4 on the second floor.

2. The freehold of the Property is vested in the Respondent, The Mount (Amberley) Residents' Association Limited. As freeholder, the Respondent owes certain obligations to the leaseholders under the terms of their leases. The 4 leaseholders are all directors and shareholders of the Respondent. Mr. Gannon is the company secretary. 100 shares have been issued in the Respondent. The Applicant holds 35 shares. Mr. Gannon and Mr. Champion hold 25 each and Miss Almond holds 15.

3. The Applicant served on the Respondent a notice dated 1 October 2008 under Section 22 of the Landlord and Tenant Act 1987 (as amended) ("the Act") setting out the grounds on which he intended to

apply for an order under Section 24 of the Act and giving the Respondent a period of 28 days in which to remedy those matters referred to in the notice which were capable of being remedied.

4. By an application dated 18 November 2008, the Applicant applied to the Tribunal under Section 24 of the Act for an order appointing a manager to manage the Property. The Applicant nominated Mrs. Jane Forsyth as manager. The grounds of the application were that the Respondent was in breach of obligations owed to the Applicant under his lease (Section 24(2)(a)), that the Respondent had proposed unreasonable service charges (Section 24(2)(ab)), that the Respondent was in breach of the code of practice approved by the Secretary of State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 (Section 24(2)(ac)) and that other circumstances exist which make it just and convenient to appoint a manager (Section 24(2)(b)). In the application, the Applicant asked for an order dispensing with service of a notice under Section 22 of the Act. In addition, the Applicant asked the Tribunal to make an order under Section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act").

5. On the same date, the Applicant applied to the Tribunal under Section 27A of the 1985 Act for a determination of his liability to pay and the reasonableness of service charges in respect of the Property.

6. On 21 November 2008 the Tribunal issued preliminary directions providing for a pre-trial review to be held on 16 December 2008.

7. At the pre-trial review on 16 December 2008, directions were given for the parties to provide written statements of case setting out their positions on each of the applications and providing written statements of any witnesses of fact or expert witnesses on whom they intended to rely. It was directed that a copy of the order be served on the proposed manager and she was invited to supply certain information to the Tribunal. The application to dispense with the notice under Section 22 was withdrawn as it had been made in error. The Applicant was given until 9 January to indicate whether or not he intended to proceed with his application under Section 27A of the 1985 Act. The Applicant subsequently withdrew that application.

8. The applications under Section 24 of the Act and under Section 20C of the 1985 Act were subsequently listed for hearing on 24 and 25 March 2009.

The inspection

9. The Tribunal inspected the Property on 24 March in the presence of the 4 leaseholders.

10. The Property is a large, detached house built mainly of stone with mullioned windows under a tiled roof. The parties agree that it was built in mid-Victorian times with 2 subsequent extensions at ground floor level. The Property is set within a steeply sloping site, facing West. Overall, the Property appears to be in generally good structural condition but its appearance suggests a lack of planned maintenance.

11. The Tribunal was able to gain access to the roof space. It was able to inspect the roof timbers. It was possible to see signs of woodworm infestation but the Tribunal was not able to determine whether the infestation is still active.

12. In flat 3, the Tribunal was shown where water had penetrated above a window in the South wall.

13. In flat 1, the Tribunal was shown some new plaster in the dining room. The Applicant said that the repair was the result of water ingress through the South wall following a break in the rainwater downpipe. The Tribunal was also shown new plaster work on the wall between the kitchen and bathroom. The Applicant said that the repair was necessary as a result of water ingress due to leaking gutters and downpipes. The Tribunal also noted a new Velux window in the bathroom.

14. In the basement, under the kitchen, the Tribunal was shown a steel beam in the West wall at external ground level which was badly corroded. The kitchen is located in an extension on the South side of the Property. The extension is a single storey with a basement beneath. The beam runs along the West wall of the extension and is set within the wall of the basement and the kitchen. It is corroded at the end closest to the original wall of the Property.

15. The hallway and stairs of the Property are carpeted except for the basement stairs. The carpet appeared to be in good condition but in need of cleaning. The stairs to the basement were in need of cleaning.

16. There is a porch at the front door of the Property. Settlement cracks were visible inside the porch at high level where the porch joins the main house. There were also cracks along the floor where the porch joins the main house. Externally, the barge boards at both ends of the porch were rotten, the metal gutter along the West front of the porch was rusting and a stop-end was missing. There were signs of settlement to the steps leading to the door of the porch.

17. The Tribunal inspected the exterior of the kitchen of flat 1. In front of the kitchen door there was a void and it was possible to see the external side of the corroded beam. The Applicant pointed out how the rainwater from the kitchen roof had previously flowed through a downpipe beside the kitchen door from which it had flowed onto the tarmac surface. The Applicant said that it was this water that had seeped into the ground and caused the corrosion to the beam. There

had previously been a water butt connected into the downpipe. The gutter along the West wall of the Kitchen has been re-routed so that water flows away from the kitchen door towards the South West corner.

18. The gutters and downpipes on the South wall appeared to be rusty and in need of repair and decoration. A rainwater hopper needs fixing properly. The gutters on the West wall were in a similar state. Downpipes and soil pipes on the East wall were a mixture of old and new with rusting in parts. All gutters and downpipes appeared to be serviceable. At the time of the inspection, the weather was dry and bright and there was no sign of prolonged water staining on the walls.

19. There is a small conservatory area at the base of the South wall which forms a porch to the rear door of flat 2. This area was in poor repair and decorative order. No information was given to the Tribunal to show whether this conservatory area forms part of flat 2 or is part of the freehold.

20. The driveway to the Property and the patio leading around to the porch and the kitchen door of flat 1 are surfaced with tarmac which appears to be fairly old but still intact. At the rear of the Property are 3 gates. One is a vehicle gate with a wicket gate incorporated into it. The other 2 gates are pedestrian gates. All gates appeared to be in good working and decorative order. There is a tunnel underneath the pathway adjacent to the North wall of the Property. The tunnel gives access to a door leading to the basement. There is a metal gate at the entrance to the tunnel. Inside the tunnel, the stone walls are damp and ferns are growing in the cracks.

The Law

21. Part II of the Act provides a mechanism enabling a tenant of a flat who is dissatisfied with the standard of management of the building which contains the flat, to apply for a manager to be appointed to manage the building. Section 21(1) of the Act gives the tenant of a flat contained in premises containing 2 or more flats, a right, subject to certain exceptions and conditions, to apply to a leasehold valuation tribunal under Section 24 for an order appointing a manager to act in relation to the premises.

22. Before making an application under Section 24, the tenant must serve on his landlord and any other person responsible for managing the property, a notice under Section 22 warning that he intends to make such an application; specifying the grounds on which he intends to do so and the matters on which he intends to rely to establish those grounds; and giving a reasonable time for those items which are capable of being remedied to be remedied.

23. Section 24 of the Act provides:
(1) A leasehold valuation 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) A leasehold valuation 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) ....
(aba) ...
(abb) ...
(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) ....
(2B) ....

(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.

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

Subsections 7 to 10 are not relevant to this application.

24. The "service charge residential management code" published by the Royal Institution of Chartered Surveyors ("the Code") has been approved by the Secretaries of State for England and Wales under the terms of Section 87 of the Leasehold Reform, Housing and Urban Development Act 1993.

25. Section 20C(1) of the 1985 Act provides that *"a tenant may make an application for an order that all or any costs incurred, or to be incurred, by the landlord in connection with proceedings before a ... leasehold valuation tribunal ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application."* Subsection 20C(3) provides that *"the court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."*

The Lease

26. The Tribunal was provided with a copy of the lease of flat 1. The lease is dated 30 January 1986 and was made between Jean Mary Hannibal as lessor and Alan Edward Brant and Constance Brant as lessees. It records that the Property has been divided into 4 self-contained flats and that it was intended to grant leases of the other flats on similar terms.

27. The lease is for a term of 995 years from 17 June 1985 at a rent of £35 per year. The demised premises are described as *"All that flat which comprises the parts of the ground floor and loft area of the House edged green and red on the plan numbered 2 hereto annexed and the rooms in the basement of the House lying beneath the rooms edged red on the said plan known as Flat No.1 ... including one half part in depth of the structure between the floors of the said flat and the ceiling of the flat below it and between the ceilings of the said flat and the floors of the flat above it and the internal and external walls between such levels and also ...".* At clause 3(d) the lessees covenanted to *"repair maintain uphold and keep the demised premises as to afford all necessary support shelter and protection to the parts of the House other than the demised premises ..."* At clause 3(e) the lessees covenanted to *"maintain upon and keep the demised premises (other than the parts thereof comprised and referred to in sub-clauses (d) and (f) of clause 4 hereof) and all walls window frames glass sewers drains pipes cables wires and appurtenances thereto belonging in good and tenantable repair and condition ..."* The lessees also covenanted to pay a service charge. The service charge provisions are set out in clause 3(b) and schedules 4 and 5.

28. The lessor's covenants are set out at clause 4 and include a covenant to insure the house. Clause 4 also includes the following provisions: 4(d) that subject to payment of rent and service charge, the lessor *"will maintain and keep in good and substantial repair and condition:*
(i) the main structure of the house including the foundations and the roof thereof with its gutters and rainwater pipes
(ii)all such gas and water pipes drains and electric cables and wires in under and upon the House and its curtilage as are enjoyed or used by the lessee in common with the owner or lessees of the other flats
(iii) the entrances passages landings and staircases of the House and the parts of the curtilage thereof coloured brown on the said plan numbered 1 enjoyed or used by the lessee in common as hereinafter provided
provided that the lessor shall not be liable to the lessee for any defect or want of repair hereinbefore mentioned unless the lessor or her managing agents have had notice thereof
(e) that (subject as aforesaid) the lessor will so far as practicable keep clean and reasonably lighted the passages landings staircases and other parts of the House enjoyed or used by the lessee in common as aforesaid
(f) that (subject as aforesaid) the lessor will so often as reasonably required decorate the exterior of the House in the manner in which the same is at the time of this demise decorated or as near thereto as circumstances permit."

29. The 4th schedule sets out the matters to which the lessee is to contribute by way of service charge. It includes the cost of the lessor fulfilling her obligations under clause 4.

30. The 5th schedule sets out how the service charge is to be ascertained and certified. It is not necessary to set out the provisions in full but it provides for the service charge year to run from 17 June in each year and for the lessor to provide the lessee with a certificate of service charge for each year on request. The certificate is to be signed by the lessor or her auditors or accountants or managing agents and is to contain a summary of the lessor's expenses and outgoings for that year. The definition of "expenses and outgoings" is contained in paragraph 6 of the schedule and is in wide terms. It includes reasonable provision for anticipated expenditure. Paragraph 7 allows the lessor to serve notice on the lessee to pay within 28 days of receipt of the notice sums on account of service charge as are considered to be required to cover the cost of any urgent repairs or decorations to the house and its curtilage.

31. It was agreed by the parties at the pre-trial review and at the hearing that the freehold of the Property is now vested in the Respondent and that the Respondent is now responsible for carrying out the obligations of the lessor under the lease.

32. The Applicant purchased the lease of flat 1 in 2005. At that time, the leases of flats 2, 3 and 4 were already vested in Miss Almond, Mr. Gannon and Mr. Champion respectively.

The hearing and the issues

33. The hearing took place at the Old Courtroom, Tetbury on 24 and 25 March. The Applicant appeared in person. The Respondent was represented by Mr. Gannon, the company secretary, with occasional assistance from Mr. Champion and Miss Almond.

34. Both parties had lodged written statements setting out their respective cases accompanied by bundles of relevant documentation. These enabled the Tribunal to identify the issues. The work of the Tribunal was considerably assisted by the amount of work and effort that had been put into the preparation of both statements.

35. The issues that arose for consideration by the Tribunal and which were addressed by the parties at the hearing were:

    a. Was the Tribunal satisfied that the Respondent was in breach of any obligation owed to the Applicant under his tenancy relating to the management of the Property? There were a number of allegations to consider under this heading, namely:

        i. The beam in the kitchen;

        ii. The porch;

        iii. Woodworm infestation in the roof space;

        iv. Gutters and downpipes;

v. Passages, landings and staircases;

vi. Exterior decoration;

vii. Paths, drives and gateways;

viii. Service charge accounts and certificates;

b. Was the Tribunal satisfied that the Respondent had failed to comply with any relevant provision of the Code?

c. In the case of both (a) and (b) above, was the Tribunal satisfied that it was just and convenient to make an order in all the circumstances of the case?

d. Were there other circumstances which made it just and convenient for an order to be made under Section 24(2)(b)?

e. If the Tribunal was minded to appoint a manager,

i. Was the manager nominated by the Applicant suitable?

ii. What functions and powers should she have and for what period should she be appointed?

f. Was it appropriate to make an order under Section 20C of the 1985 Act?

The Evidence

36. **The beam in the kitchen**: The Applicant gave evidence that in July 2007 he found water flooding into the cellar beneath his kitchen. He considered that this was due to faulty guttering and downpipes on his kitchen roof. Work was carried out to re-route the guttering and during the course of that work it was discovered that the beam beneath the kitchen wall was badly corroded. A report was obtained on 16 October 2007 from a structural engineer, Peter Goodhind and Associates which put forward options for remedial work. The Applicant asked the Respondent to carry out the appropriate remedial work. On 7 November 2007, Mr. Gannon informed the Applicant that he was advised that the Respondent was not responsible for repairs as the beam formed part of the Applicant's demise and that he, the Applicant, was responsible for maintaining it. The Applicant says that the beam forms part of the structure of the Property and that the Respondent is liable to maintain it under clause 4(d)(i) of his lease. There then followed a long exchange of views, details of which are set out in the Applicant's statement, leading to the Applicant's solicitor sending to the other directors a letter dated 23 October 2008, alleging that the Respondent was in breach of its obligations and claiming consequential damages in nuisance and negligence. As at the date of the hearing, no remedial work has been carried out to the beam.

37. The Respondent's position is that it reacted supportively when the problem first arose in July 2007 by paying for the remedial work to the guttering and by paying for the Goodhind report. However, having taken advice, the Respondent does not consider that it is responsible for maintaining the beam as it forms part of the Applicant's demise. Further it says that the original cause of the water ingress was due to the Applicant's predecessors installing a water butt in the downpipe by the kitchen door which caused water to spill over onto the tarmac surface which was porous due to lack of maintenance by the Applicant's predecessors. The poor arrangement of water drainage was pointed out to the Applicant in the survey report which he commissioned when purchasing flat 1 ("the Fraser Glennie report").

38. Both parties have suggested means of resolving the dispute without resort to court proceedings but no agreement has been reached on an appropriate method of dispute resolution.

39. **The porch:** The Applicant says that the porch has suffered from subsidence and is in a bad state of repair. This was identified in the Fraser Glennie report. He has had various discussions with the Respondent and Mr. Gannon as to how to deal with the problem but nothing has been done. The Applicant submitted an insurance claim when he was the company secretary but the claim was rejected.

40. The Respondent accepted that the porch is in a state of disrepair and needs attention. It says that the way in which the Applicant submitted the insurance claim caused subsidence cover to be withdrawn for 3 months which did not help resolution of the problem. It has suggested stabilizing the porch by infilling with concrete and foam or replacing the porch with galleried steps but neither proposal was acceptable to the Applicant. The Respondent accepts that work needs to be carried out but has not resolved how to proceed.

41. **Woodworm infestation in the roof space:** The Applicant's case is that the Fraser Glennie report advised him that there were signs of past beetle infestation in the roof timbers and that a specialist report should be obtained. The Applicant obtained a report from Frampton Consultants Ltd dated 24 May 2005 which concluded that there was a slight scattered infestation of common furniture beetle in the roof void. The Applicant provided the Respondent with copies of both reports and on 5 December 2005, the Respondent agreed to carry out the work. However, the work could not be carried out until the roof space had been cleared of rubbish and the work has still not been done.

42. The Respondent accepted that it had received a copy of the Frampton report in 2005 which put it on notice that the matter needed to be dealt with. However, it says that the Frampton report quoted only for the cost of treating the Applicant's part of the roof space. The Respondent accepted that it had taken no steps to obtain a further report nor to treat the roof space. This was due to financial restraints, lack of collective will to clear the roof space and the intervention of other

matters which had a prior call on the limited resources available to the Respondent.

43. **Gutters and downpipes**: The Applicant lists a large number of complaints in his statement but principally he complains about the gutters and downpipes on the South wall, the gutters and downpipes on the porch and the drainage gully on the North wall. He says that the gutters and downpipes are in poor condition, contributing to problems of water ingress to his kitchen, that the gully on the North wall is blocked with leaves and that the downpipes discharge water onto the surface close to the walls of the Property. In particular, he complains that a broken downpipe on the South wall was repaired with gaffer tape which broke causing water to flow into his kitchen; that render is missing beside a drain in the conservatory on the South wall; and that water discharged from the North-West corner of the Property and the porch flows along the path past his kitchen causing damage to his patio surface and the stone steps leading to his garden. He accepts that the Respondent has carried out some work to the gutters on the East wall and on the South wall.

44. The Respondent accepts that some work needs to be done to the gutters and downpipes but says that the company has no funds to pay for the work. Various proposals have been put forward for funding works including creating a £10,000 fund or the company taking out a loan but it has been unable to reach agreement with the Applicant about a method of funding for the works. It also says that in April 2008 it put forward a proposal for re-pointing the South wall and repairing the gutters at the same time which was rejected by the Applicant. (The applicant says that this was because if the beam is not the Respondent's responsibility, then neither is the re-pointing.)

45. **Passages, landings and staircases**: The Applicant says that the porch, entrance hall, stairwells, cellar steps, carpets and windows are perpetually dirty and not maintained to an acceptable standard. He says that the windows were last cleaned 2 years ago; that there is no regular cleaning of the stair carpet; and that there are cobwebs and spiders on the cellar steps. He also complains that the light over the main front door was not working for a period of about 6 months over the winter. That light is now working but the light on the West wall is still not working although he has been given permission to employ an electrician to mend it.

46. The Respondent accepts that there is no contract for regular cleaning of the carpet due to the cost involved and suggests that this is something that could be done by the residents themselves. Mr. Champion said that he originally supplied the carpet and that he cleans it. Mr. Gannon said that he repaired the light over the front door.

47. **Exterior decoration**: The Applicant says that there are various parts of the exterior which are in need of decoration. He lists them at

paragraph 4.5.1 of his statement. The list includes barge boards, gutters, downpipes and the conservatory area on the South wall.

48. The Respondent accepts that this is another area which needs attention but says that it cannot be done due to lack of funding. The Respondent was unable to say when the exterior was last decorated except that parts were decorated as and when they could obtain access at high level. There was no programme for periodic decoration in place.

49. **Paths, drives and gateways:** The Applicant's complaints fell under 3 main sub-headings:

    a. The tarmac driveway and patio: The Applicant says that when he arrived in 2005, the main drive, which is very steep, was covered with moss and weeds, making it very slippery. With the agreement of the Respondent he bought a pressure washer and cleaned the drive and patio area leading to the porch. However, the drive and patio remain rough and in need of further maintenance. They are also porous which is allowing damp to get into the Property and into the tunnel beneath the drive.

    b. The tunnel: The Applicant says that the Respondent has taken no steps to stop damp getting into this area so that it can be utilised more effectively.

    c. The gates: The Applicant says that the main gate to the rear of the Property and the gate to Miss Almond's flat are in need of routine maintenance and that the life of the gates will be reduced if this is not done.

50. The Respondent replies:

    a. The Applicant's cleaning of the drive and patio area with a high pressure jet removed the protective layer. The tarmac does need resurfacing but it will cost about £3,600 and there is no point spending that amount of money whilst they are talking about digging up parts of the tarmac to re-route drains away from the house. In the meantime, the gardener employed by the Respondent carries out regular weed control on the drive and patio.

    b. Prior to the Applicant's purchase of flat 1, his predecessors had treated the tunnel as their own. Since the Applicant's acquisition, the Respondent has replaced the gate at the entrance to the tunnel. As the only purpose of the tunnel is to gain access to the basement door, if the Respondent is responsible for maintaining the tunnel, then it will arrange for it to be filled in.

c. The main gate was replaced between 2000 and 2005. It was pressure treated at the time and only requires treatment with clear preservative every 2 years. It was stained to match the existing wicket gate and the Applicant is merely complaining about areas where the stain has been rubbed off. Likewise, the gate to Miss Almond's flat was pressure treated and needs no maintenance.

51. **Service charge accounts and certificates:** The Applicant says that as a result of the dispute about the beam in 2007 and 2008, he became disillusioned with the management of the Property and so, on 3 January 2008, in accordance with the terms of the lease, he requested certificates of the service charge payable by him for the years 2007/08 and 2008/09. Despite further requests, he has received no certificates.

52. The Respondent accepted that it had not provided any such certificates. Mr. Gannon's reply was that the company was unable to provide certificates when it was unable to agree a schedule of work. In 2007, the Respondent had suggested employing a surveyor, Mr. Gill, to draw up a schedule of work and a list of priorities but the Applicant had refused to agree to that. The Respondent accepted that it had no service charge accounts other than the tenants' ledgers showing what had been paid by each leaseholder and the cash book which showed details of expenditure. The level of service charge had last been agreed in 2005. The leaseholders looked at anticipated expenditure based on the experience of previous years and fixed an amount which they felt comfortable with. That amount was £200 per month divided between the 4 leaseholders and it had not been changed since 2005. There had been a conscious decision not to build up a sinking fund for future work.

53. **Compliance with the code:** The Applicant's statement sets out approximately 48 specific allegations (over 17 pages) as to how the Respondent has failed to comply with the Code. The Applicant's Section 22 notice lists a similar number of allegations. These range from a failure to produce annual spending estimates, a failure to arrange periodic fire and health and safety checks to a failure to run the Respondent's affairs in accordance with the provisions of the Companies Act 1985. At the hearing, the Applicant summarised his complaints by saying that the Respondent had no plan for carrying out future maintenance work, that all work was driven by events, that the routine service charge merely covered routine items and that all other expenditure was funded on an "as required" basis.

54. The Respondent said that prior to the arrival of the Applicant, the Property had been managed on a consensual basis by the 4 leaseholders. A video survey had been carried out in 2000 and a planned programme of work had been undertaken, including a considerable amount of work on the South gable wall and chimney. When the Applicant had arrived, they were happy to accept his

enthusiastic approach to dealing with the Property and appointed him as secretary of the company. However, the relationship soon soured as they realised that the Applicant was working to a different agenda. Their attempts to run the company and manage the Property had been frustrated. The company had become dysfunctional and their attention had been diverted elsewhere. On specific issues the Respondent says that the cash book is not reconciled every 14 weeks because the pass book is available for inspection by all leaseholders at any time; that no health and safety checks have been carried out; and that a contract was made for servicing fire extinguishers during the last month. Finally, the Respondent points out that the Applicant was the company secretary for much of the time about which he complains.

55. **Is it just and equitable to make an order?** The Applicant says that it is just and convenient to appoint a manager because the Respondent is failing to adhere to basic points in the code such as setting budgets, planning work schedules, setting appropriate service charge levels, dealing with health and safety checks including fire and asbestos reports and failing to conduct meetings of the company in an appropriate way. He accepted that if a proper proposal was put forward for a programme of works and he was out-voted, then it would be binding on him. As matters stand, he has lost confidence in the ability of the Respondent to manage the Property and any relationship of trust that existed between him and the other leaseholders has broken down. He accepted that the appointment of a manger would involve extra cost for all parties but he was prepared to accept that extra cost.

56. The Respondent said that it was not fair to impose a manager against the wishes of the other 3 leaseholders. It would involve them in unnecessary additional cost. The present position has arisen because the Applicant has objected to and subverted the decisions of the company. The Respondent has the necessary skills to manage the Property and if the Applicant would respect the will of the majority, it could run the company in a proper manner.

57. **Other circumstances under Section 24(2)(b):** The Applicant relied on a letter sent to him on 10 September 2008 threatening to remove him as a director of the company. He said that if that happened, he would receive no information as to what was happening and he would not be a party to any decisions.

58. The Respondent said that the Applicant's fears were groundless because it was recorded in a company minute dated 16 October 2008 that any decision on the proposal to remove him as a director had been deferred pending a legal opinion.

59. **Suitability of nominated manager:** The manager nominated by the Applicant is Caroline Jane Forsyth, a non-practising solicitor, a member of the Institute of Residential Property Management and a director of The Flat Managers Ltd. A copy of the directions made on 16

December 2008 had been served on her and, in reply, she had submitted her CV and details of her proposed remuneration and her insurance. She appeared at the hearing and confirmed that she was willing to accept an appointment.

60. In answer to questions at the hearing, she gave further details of her experience in dealing with difficult situations and of the type of properties which she had managed. It had been suggested that she be appointed by the parties but she had indicated that she preferred to be appointed by the Tribunal so that she had the authority of the Tribunal behind her when dealing with directors who were in dispute. She confirmed that she would comply with the Code if appointed as manager.

61. **Functions of manager and period of appointment:** Jane Forsyth confirmed that she anticipated being appointed to carry out all the obligations of the landlord listed in clause 4 of the lease and the 5th schedule including collecting pre-existing arrears of rent and service charge. She would be prepared to take on existing contracts if appropriate. Although she would normally deal with issues involving construction of the lease, in view of the fact that lawyers had been instructed in relation to the beam, she would want agreement on that issue before taking on responsibility for it. If she were to advise on insurance for the Property, she would want to be appointed as secretary of the Respondent company. She thought that a 2 year appointment would give her a good opportunity to make headway in the management of the Property.

62. The Applicant said that he wanted the manager to have sufficient powers to manage the Property in accordance with the terms of the lease and the Code. He would like to see her managing the service charge accounts. He would also like her to be involved in resolving the dispute about the beam even if it was only to guide the parties towards an independent means of dispute resolution. He would want the manager to be appointed as secretary of the company. He would accept a 2 year appointment but would prefer a 3 year appointment.

63. The Respondent had no specific views on the functions but would prefer a 2 year appointment.

64. **Section 20C:** The Applicant said that he was asking for an order because making the application was the only option available to him in view of the lack of response from the Respondent. He had been forced to come to the Tribunal as a result of the company's actions and he did not consider that it would be fair for him to contribute to the company's costs.

65. The Respondent relied on the submissions at pages 10 and 11 of its statement and particularly the fact that the Applicant, having been company secretary from 2005 to 2008 could not divorce himself from any deficiencies in the company's management of the Property.

Conclusions

66. **The beam:** The Tribunal informed the parties early on in the hearing that it was unlikely that the Tribunal would determine the dispute about who is responsible for maintaining the beam because the function of the Tribunal is to determine the question of whether or not it is appropriate to appoint a manager. Whilst it may be relevant to construe the lease to determine whether or not the Respondent is in breach of an obligation to repair the beam, it is unlikely that the Tribunal would find itself in a position where it would consider it just and equitable to appoint a manager if that was the only breach and there existed a genuine dispute about the obligation. Clearly, there is a genuine dispute about the construction of the lease. Any decision reached by the Tribunal in this application on that issue would not be binding on Mr. Gannon, Mr. Champion and Miss Almond in their capacities as leaseholders and so would not resolve the argument for all purposes. The dispute about the beam has been instrumental in destroying the relationship between the parties and the Tribunal is of the strong opinion that until the dispute is resolved in a way that binds all parties, including the individual leaseholders, (whether by independent determination, mediation or court proceedings) the parties are not going to be able to move forward with constructive management of the Property.

67. The Tribunal's conclusions on the beam are that the beam needs attention, that there is a dispute about liability for maintaining the beam and that the Respondent is not being unreasonable in disputing that liability. Even if it is eventually determined that the Respondent is liable to repair and maintain the beam, the Tribunal would not find it just and equitable to appoint a manager relying just on that breach.

68. **The porch:** It was clear from the Tribunal's inspection of the Property that the porch is in disrepair and needs attention. The Fraser Glennie report records the existence of settlement cracks in 2005. There is no evidence that any work has been done to the porch since then. The Respondent accepted that the porch needs attention and has put forward proposals for dealing with the existing problems. However, no work has been done and there was no suggestion that there is any plan for carrying out work to the porch in the near future. The Tribunal is satisfied that the Respondent is in breach of its obligations to repair and maintain the porch.

69. **Woodworm infestation:** The Respondent accepted that it had received a copy of the Frampton report in 2005 which put it on notice of an existing woodworm infestation. The Respondent produced no evidence to show that the infestation does not require treatment. On the basis of the Frampton report, the Tribunal finds that there is an infestation which requires treatment. Maintenance of the roof is the responsibility of the Respondent. The Tribunal would have expected the Respondent to have commissioned its own report at the very least. It has not done so and, as Mr. Champion said, there has been no

collective will to remove the rubbish from the roof space. The Tribunal is satisfied that the Respondent is in breach of its obligations to maintain the roof space.

70. **Gutters and downpipes:** It was clear from the Tribunal's inspection of the Property that the gutters and downpipes need attention particularly those on the South and West walls and on the porch. The Respondent accepted that work needed to be done but said that funding was not available. The Tribunal is satisfied that the Respondent is in breach of its obligations to maintain the gutters and downpipes.

71. **Passages, landings and staircases:** The Tribunal noted when it inspected the Property that the common parts are dirty. They are not grossly dirty but they appear tatty. There are cobwebs on the cellar stairs. The carpet looks in need of a thorough clean. The Respondent accepted that there is no arrangement for regular cleaning in these areas. The Tribunal prefers the evidence of the Applicant on this matter and finds that the Respondent has not kept the common parts in a clean state. The Tribunal also accepts the evidence of the Applicant in relation to the lighting of the common parts and finds that the Respondent has not kept the lighting of the common parts in working order. The Tribunal is satisfied that the Respondent is in breach of its obligations to keep the common parts clean and lighted.

72. **Exterior decoration:** On its inspection, the Tribunal noted that the barge boards on the porch and the gutters and downpipes on the South and West walls and on the porch were in need of decoration. The Respondent accepted that some work needs to be done and that it had no programme for decoration on a routine basis. The Tribunal is satisfied that the Respondent is in breach of its obligations to decorate the exterior.

73. **Paths, drives and gateways:** On its inspection, the Tribunal noted that the tarmac on the drive and patio is not in perfect condition but the surface is intact and it is not yet in need of repair although it will need attention in the near future. The Tribunal was not persuaded by the Applicant's evidence that the tarmac is in disrepair nor that it is porous. The Tribunal accepts the Respondent's evidence that it is taking steps to control weeds on the tarmac. As far as the tunnel is concerned, the Respondent has installed a new gate which is in good repair. The Tribunal finds that the tunnel is merely intended to be an access to the basement door and, as such it is not in disrepair. As far as the gates are concerned, the Tribunal accepts Mr. Gannon's evidence that they have been pressure treated and need no further treatment except for a treatment of clear preservative every 2 years. The Tribunal is not satisfied that the Respondent is in breach of its obligations in respect of the paths, drives and gateways.

74. **Service charge accounts and certificates:** It is clear from the Respondent's own evidence that it has not prepared service charge accounts and certificates as required by the 5th schedule. Indeed, the

Respondent appears to have totally ignored the provisions of that schedule. The Tribunal was struck by the fact that the Respondent's evidence that the level of service charge was last set in 2005 at a figure which the leaseholders felt comfortable with. The Tribunal concludes that the Respondent has made no attempt to determine what expenditure should be incurred in order to comply with its obligations but has merely set the service charge at a level which leaseholders feel that they can afford. The Tribunal is satisfied that the Respondent is in breach of its obligations to prepare service charge accounts and certificates.

75. **Compliance with the code**: The Tribunal is satisfied that until the matter was raised by the Applicant, the Respondent had no knowledge of the Code and that the Respondent has made no attempt to comply with it. It is not every failure to comply with the provisions of the Code which will put the Respondent in breach but a failure to comply with a "relevant" provision. The Tribunal is satisfied that the Respondent has failed to comply with relevant provisions of the Code, for example, the failure to carry out health and safety checks, fire safety checks, and the failure to prepare proper service charge budgets and accounts.

76. **Just and convenient**: If a manger is appointed, there will be additional costs and those costs will be borne by the leaseholders. Given the fact that 3 of the leaseholders oppose the appointment of a manager and the extra cost that will be incurred, there is an argument for saying that it is unfair to appoint a manager. That argument would be stronger if the Tribunal were to accept the Respondent's contention that all of the existing problems have stemmed from the arrival of the Applicant at the Property and the way in which he has conducted himself with the company and the other leaseholders. However, it is clear to the Tribunal that the Respondent company is presently in a state of deadlock and that no maintenance has been carried out for at least 18 months. Furthermore, there has been a total breakdown of confidence between the Applicant and the 3 other leaseholders leading to a threat to remove him as a director. There may be ways in which the company could continue to operate effectively in the face of opposition from the Applicant but the reality is that it has not been doing so and the Tribunal is not satisfied that it has the will to do so. There are perfectly good reasons for that lack of action but the Tribunal considers that if no work is done in the near future, the Property will deteriorate and the eventual cost of maintenance will be even greater. The Tribunal is satisfied that there is no reasonable prospect of the Respondent carrying out effective maintenance work whilst the dispute about liability for the beam exists.

77. Notwithstanding the dispute about the beam, the Applicant is entitled to look to the Respondent to do other maintenance work. The Tribunal considers that the appointment of a manager at this stage will allow the parties a breathing space to resolve the dispute about liability for the beam without being burdened by other issues relating to the

management of the Property. In the meantime, the manager can put in place a proper system of management for the Property which is lacking at present. The Tribunal is satisfied that in all the circumstances, it is just and convenient to make an order. This conclusion applies equally to consideration of the arguments under Section 24(2)(ac) as it does to the arguments under Section 24(2)(a).

78. **Other circumstances:** The Tribunal is not satisfied that there are other circumstances which justify an order under Section 24(2)(b). The Tribunal considers that the Applicant's submissions under this heading are no more than an extension of his submissions as to why it is just and convenient to make an order under Sections 24(2)(a) and (ac).

79. **Suitability of nominated manager:** Having read the CV of Jane Forsyth and having had the opportunity to hear her evidence at the hearing, the Tribunal is satisfied that she is a suitable person to be nominated as manager.

80. **Functions of the manager and period of appointment:** The Tribunal is satisfied that it is appropriate to appoint a manager to fulfill the obligations of the lessor under the lease. This will include the obligations set out in clauses 4(b) and (d) to (f) as well as the obligations to set the service charge, to prepare service charge accounts and certificates as set out in the 5th schedule and to receive payments of rent and service charge. The manager will be empowered to collect in any future arrears of rent or service charge. The parties indicated that there are no existing contracts which need to be taken over. The gardener is employed on an ad hoc basis and the manager can reach a new agreement with her if appropriate. The only other contract is for servicing the fire extinguishers and there was no evidence that the contract would run for any period of time. Therefore, the manager will not be required to take over any existing contracts.

81. Part of the reasoning why it is just and convenient to appoint a manager is that it will give the parties a breathing space to sort out their dispute about liability for the beam and allow the management of the Property to move forward in the meantime. For that reason the Tribunal will instruct the manager not to become embroiled in the dispute about the beam. There is other work that needs to be done in the near future and the manager will be able to proceed with that work whilst waiting to be told by the parties how they have resolved the dispute about the beam. Likewise, the Tribunal will instruct the manager not to collect arrears of service charge. The evidence before the Tribunal is that there are arrears of service charge owed by the Applicant and that he is withholding payment due to a dispute about payment of compensation for the removal of a fir tree in his garden. There is no need for the manager to become embroiled in that dispute.

82. The Tribunal considers that an appointment for a period of 2 years will give the parties the necessary breathing space to resolve their dispute. It will also give the manager sufficient time in which to set up a system

of management which may be handed back to the Respondent at the end of that time. Any longer period would be too much of an onerous burden on the leaseholders who must bear the cost of the appointment. The appointment will start on 17 June 2009 which is specified as the start of the lessor's financial year in paragraph 2 of the 5th schedule to the lease.

83. The Tribunal considers that the level of remuneration suggested by the manager is reasonable and will provide for that remuneration in the order.

84. Mrs. Forsyth asked for her appointment to incorporate her standard terms and conditions. The tribunal considers that those terms and conditions are appropriate to a consensual appointment by a landlord but not to an appointment by the Tribunal. For that reason, the order will not refer to those terms and conditions. Mrs. Forsyth also asked to be appointed as secretary of the company. The Tribunal has no power to make such an order.

Application under Section 20C of the 1985 Act

85. During the course of the hearing, the Tribunal heard many allegations by both the Applicant and the Respondent that the other party had not co-operated or had been obstructive in some way. No point will be served by examining those obligations in detail. What is clear to the Tribunal is that any relationship of trust and co-operation which existed at any time between the Applicant and the Respondent and/or the other 3 leaseholders has broken down. Both parties have suggested reasonable ways of resolving their disputes and both parties have rejected the proposals put forward by the other. It is also clear that the Applicant has acted against the wishes of the majority, specifically in relation to the instruction of Mr. Gill as a surveyor. Although the Applicant considers that he had no alternative than to make this application the Tribunal finds that he is at least partially to blame for the current impasse in the management of the Property. In those circumstances, the Tribunal considers that it is just and equitable to make no order under this section.

Dated 8 April 2009

Signed

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Mr. J G Orme
Chairman