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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/LVM/2016/0013**
Property	:	**47 Compayne Gardens, London NW6 3DB**
Applicant	:	**Ms Christian Benzie (Flats 1 & 6)**
Representative	:	**Ms C Benzie In Person**
Respondents	:	**Mr Darren Powell (Present Manager)** **Ms Mary-Anne Bowring (a Proposed Manager)** **Mr Joel Zausmer (Flat 2)** **Dr S Eghtesadi & P Kompani (Flat 3)** **Ms Catherine Haworth (Flat 4)** **Mr Mahan Namin (Flat 5)** **47 Compayne Gardens Limited (Landlord)**
Representative	:	**Various**
Type of Application	:	**Section 24(9) Landlord and Tenant Act 1987 – variation of an order appointing a manager**
Tribunal Members	:	**Judge John Hewitt** **Mr Luis Jarero BSc FRICS** **Mrs Rosemary Turner JP**
Date and venue of Hearing	:	**23 September 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**18 October 2016**

DECISION

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Decisions of the tribunal

1. The tribunal determines that:

   1.1 Mr Edward Grant Fifield BSc FRICS shall be appointed manager pursuant to section 24 of the Act (in place of Mr Darren Powell) for a term of years commencing on 1 November 2016 and expiring on 31 December 2020; and

   1.2 Appendix 2 to the First Order (defined in paragraph 3 below) shall be varied as set out in paragraph 50 below.

2. The reasons for our decisions are set out below.

Procedural background

3. By an order dated 2 March 2015 (the First Order) and made in Case Reference: LON/00AG/LAM/2014/0021 in an application made by Ms Benzie (lessee of flats 1 & 6), the tribunal appointed Mr Ben Preko to be manager for a period of three years from 31 March 2015. The First Order was made pursuant to section 24 Landlord and Tenant Act 1987 (LTA 1987).

4. By an order dated 24 March 2016 (the Second Order) and made in Case Reference: LON/00AG/LVM/2015/0014 in application brought by Mr J Zausmer (lessee of flat 2), Ms C Haworth (lessee of flat 4) and 47 Compayne Gardens (the landlord), the First Order was varied in three respects:

   1. Mr Darren Powell was appointed manager in place of Mr Preko for a term of three years from 24 March 2016;
   2. Mr Powell's remuneration was set at £500 per flat + VAT (£3,000 + VAT) per annum payable quarterly; and
   3. An on account service charge of £500 per flat was to be paid not later than three weeks from the date of the decision to Mr Powell in respect of any future service charge liability.

5. At time of the appointment of Mr Powell held a senior position with Ringley Chartered Surveyors (Ringleys), based in London NW1. Shortly after his appointment Mr Powell's employment circumstances changed and he went to a firm based in Kent. Since Mr Powell's appointment minimal management has been undertaken but he did commission Ringleys to prepare a specification of internal and external major works required and to give the lessees notice of intention to carry out works being the first stage of a consultation process made pursuant to section 20 Landlord and Tenant Act 1985. The notice of intention is dated 16 August 2016.

6. Mr Powell indicated a desire to cease to be the tribunal appointed manager because he did not consider he could properly fulfil that role given the change in his employment circumstances.

7. On 3 June 2016 the tribunal received an application from Ms Benzie made pursuant to section 24 LTA 1987 which sought an order that the Second Order be varied so that Mr Powell was replaced as manager by Ms Mary Anne Bowring FRICS FIRPM FCABE FARLA, a principal of Ringleys.

8. Directions were duly given and the application came on before us on Friday 23 September 2016.

9. In terms of papers we had before us:

   1. The applicant's statement which appears to have been prepared by or on behalf of Ms Bowring and which is paged numbered 1- 76;
   2. A statement of case submitted on behalf of Mr Zausmer and Ms Haworth and which is page numbered 1-21;
   3. A letter dated 13 September 2016 submitted by Mr Edward Fifield BSc FRICS at the request of the landlord which nominated him to be appointed manager in place of Mr Powell.
   4. The specification for the proposed major works and the notice of intention

10. In terms of attendees and representation:

    Ms Benzie attended and represented herself;
    Ms Benzie was accompanied and supported by Ms Bowring;

    Mr Zausmer and Ms Haworth attended and were represented by Mr Simon Pocock, an accountant, who had evidently prepared the landlord's accounts for a number of years. Mr Zausmer and Ms Haworth are the two directors of the landlord company. Mr Zausmer and Ms Haworth saw no conflict of interest in their status as long lessees and as directors of the landlord and the submissions they made reflected both interests.

    Mr Fifield attended.

    Mr Powell attended.

    The long lessees of flats 3 and 5 did not attend the hearing and were not represented. We were satisfied that they had both been notified of the hearing arrangements and that it was in the interests of justice to proceed with the hearing. Accordingly, and pursuant to rule 34, we went ahead with the hearing.

The hearing

The issues

11. In opening and with the assistance of the parties present we sought to establish the issues to be determined. It was common ground that there was no objection to Mr Powell being replaced as manager. It was recognised that his current employment circumstances preclude him from carrying out effective management of the property.

Ms Benzie nominated Ms Bowring to replace Mr Powell and Mr Zausmer and Ms Haworth (and the landlord) nominated Mr Fifield.

The question for the tribunal was whether either or both of the nominees were considered to be suitable persons to appoint and, if both of them were considered to be suitable, which of them should be appointed.

12. It may be helpful to record here that each leaseholder has one share in the landlord company. A search at Companies Registration Office reveals that the company was incorporated in July 1987 and that Mr Zausmer was appointed company secretary on a date prior to 31 March 1992 and he was appointed a director on 8 July 2010. Ms Haworth was appointed a director on a date prior to 31 March 1992.

13. Thus the landlord company has been run by Mr Zausmer and Ms Haworth for a good number of years. Over the years there has been friction and disagreement between Mr Zausmer and Ms Haworth on the one hand and Ms Benzie on the other, concerning a number of matters to do with 47 Compayne Gardens and the manner in which it has been repaired, maintained and cared for. Evidently Mr Zausmer and Ms Haworth have preferred a minimalist or frugal approach and Ms Benzie takes the view that has not been sufficient or appropriate and that compared with its neighbours 47 Compayne Gardens now looks shabby and poorly maintained.

One of the issues which Ms Benzie has taken up with some energy is whether a rear extension to Mr Zausmer's flat was dealt with properly and formally by the landlord company and whether it is compliant with planning and associated legislation. Apparently this has been something of a long running issue.

It was a result of the long standing enmity which built up and the respective stances taken by those parties that rendered the building unmanageable and caused the lessees to conclude that the only way forward was the appointment of an (independent) manager.

14. As noted Ms Benzie has nominated a prospective manager, Ms Bowring, and Mr Zausmer and Ms Haworth (and the landlord) have nominated Mr Fifield.

Both sides have some concerns that the other's nominee might be 'in their pocket' and might pursue an agenda directed by the party nominating him or her.

Thus when the two nominees gave their oral evidence they faced some questions that focussed on their partiality, their independence and their approach to the management of the building.

15. As the hearing went on it became apparent that due to the passage of time since Mr Preko and Mr Powell had been appointed some relatively minor adjustments would be required to terms of appointment and the powers and functions of the manager as set out in the First Order.

16. One of the adjustments concerned funds held by the manager. It was common ground that the handover by Mr Preko to Mr Powell did not go that well both in terms of papers and funds. Evidently no funds or accounts were handed over. It is not known what sums Mr Preko collected and from whom and how any sums collected have been expended by him.

17. Ms Bowring explained that the only funds held by Ringleys was the sum of £3,750.00 sent by Ms Benzie by way of payment of service charges which had accrued to the landlord in respect of a period prior to the appointment of Mr Preko as manager. Ms Bowring said that the sum was held in Ringleys' client account pending clarification of its status.

    Evidently there is litigation between the landlord and Ms Benzie concerning alleged historic arrears of service charges and a court hearing had been scheduled.

18. In these circumstances we came to the view first, that it be would appropriate for Ringleys to reimburse the £3,750.00 to Ms Benzie because it was never intended to be held by the manager on account of services to be provided by the manager; and secondly, that it was appropriate and convenient to leave historic service charge arrears to be dealt with as between the lessee Ms Benzie and the landlord in the current court proceedings. Given there was court litigation in place we considered it was inappropriate for the manager to get involved in it as that would only increase costs, but to no real advantage in respect of the future management of the building. Whatever the nature of or issues concerning the historic service charge dispute between Ms Benzie and the landlord, the manager would be able to little, if anything at all

19. It may also be noted that neither Mr Zausmer nor Ms Haworth had paid any sums to Mr Preko or Mr Powell. Evidently there was some complication with Mr Preko taking over and funding the costs of the buildings insurance policy which the landlord had been paying by monthly instalments. It appears Mr Preko suggested that the landlord continue to pay the monthly premiums. The landlord has done so but has exhausted its funds. We were told that Mr Zausmer and Ms Haworth, as directors of the landlord, have made loans to the landlord to enable some premiums to be paid. They argued that they were and are entitled to set-off the amount of those loans against sums otherwise due and payable to the manager. It may that this was part of their reason not to make any payments to Mr Preko.

20. We came to the view that as a consequence of these complications it will be necessary to adjust the terms of the First Order, and effectively,

start with a clean sheet. Thus, in our view, the manager now to be appointed by us should not be responsible to collect any alleged historic arrears of service charges due to the landlord and should be able to ensure that all lessees paid a sum to him or her promptly (and without seeking to exercise any right of set off in respect of any sums allegedly due from or loaned to the landlord) so that the manager was in funds to carry out his or her functions. This was an issue which both Ms Bowring and Mr Fifield helpfully addressed in their oral evidence.

The evidence

21. Ms Benzie opened her application and called Ms Bowring to give oral evidence.

Ms Bowring

22. Ms Bowring spoke to an action plan which had been prepared by or on behalf of Ms Bowring. Unfortunately, the document was based on a generic template in the office and it contained quite a few references to tasks or positions which were irrelevant to the subject property. Inevitably this had caused Mr Zausmer and Ms Haworth quite a deal of consternation as to what exactly Ms Bowring proposed and what powers she was seeking and why. Random examples include:

    - A proposal to collect ground rents at 15% with a minimum fee of £300 +VAT; when the ground rents at the property are a peppercorn;
    - An insistence that Ms Bowring be appointed receiver to receive ground rent and receive premiums for lease extensions so that 'equity should prevail';
    - Carrying out a measured survey of all the flats and adjustment of the service charge proportions based on floor area;
    - That (unspecified) manager's costs for section 20 consultation be deemed reasonable.

    We went through the action plan with Ms Bowring, item by item, and at the end of the exercise about 30 or so entries were deleted as being unnecessary or inappropriate.

23. One item that was of particular concern to Mr Zausmer was Ms Bowring's application for power to investigate the historic circumstances in which Mr Zausmer's flat was enlarged, to recover a premium from him, (perhaps in the form of a retrospective consent to carry out works), to investigate compliance with Building Regulations in respect of the works and to adjust all of the service charge proportions to reflect floor arears as now existing. Currently the six leases granted provide for each lessee to bear one sixth of the costs of services. Evidently Ms Bowring took the view that unlawful alterations had been carried out by Mr Zausmer in 2014. This was hotly contested. Mr Zausmer complained that it was an issue which Ms Benzie had unsuccessfully sought to introduce to the first application back in 2015. He also asserted that all planning consents for the subject works were

obtained in 2003/4, were the subject of a formal licence granted by the landlord and which had been prepared by the landlord's solicitors and that the permitted works were carried out in 2006.

24. Ms Bowring denied that she had been prompted by Ms Benzie to pursue the alterations topic and that it was her usual approach to ensure current layout of developments was properly documented. She also asserted her opinion that service charge proportions should reflect floor areas because that was equitable and the current contractual arrangements were now irrational. Ms Bowring confirmed her independence and said that she had no social, or other, links with Ms Benzie.

25. The tribunal came to the view that enforcement of planning was a matter for the local planning authority and not something which the appointed manager need investigate and incur costs on. Similarly, any historic alleged breach of covenant as regards alterations was a matter for the landlord and the tenant concerned and was not something which the appointed manager should incur costs on going forward. As to service charge proportions, these are a matter of contract as set out in the leases. They total 100%. We doubted that a tribunal appointing a manager has jurisdiction to vary the proportions unilaterally. Given that the proportions totalled 100% we also doubted that a tribunal determining an application under section 35 LTA 1987 would have jurisdiction to vary the percentages.

26. Mr Fifield was clear that he did not seek the powers in this regard that Ms Bowring sought.

27. We were clearly of the view that effective management of the building going forward did not require investigation into historic matters and consents for alterations and it did not require any adjustment to the service charge proportions payable by the lessees.

28. We made it plain that whoever was appointed manager they would not be empowered to undertake these duties.

29. Ms Bowring considered that the leases were defective or unclear as to responsibility as regards the windows. Ms Bowring contended that the window frames were demised to each lessee but the landlord was responsible for the external decoration of them. She saw potential for conflict where a lessee might not have kept the frames in good repair such that the landlord could not paint them, or where a tenant complained that the window frames were out of repair because the landlord had not painted them. Ms Bowring suggested that for the duration of the appointment the timber window frames be deemed to be within the landlord's repairing obligation and thus such repairs as may be necessary brought within the service charge regime.

30. Ms Bowring made plain that she required a four-year appointment and would only accept an appointment of that period. The parties present were content for a four-year appointment of whoever was appointed.

31. Ms Bowring spoke to her management style and the size and expertise of her firm and its staff. Ms Bowring answered a number of questions put to her by the parties present and members of the tribunal.

Mr Fifield

32. Mr Fifield gave oral evidence. He spoke to his presentation dated 13 September 2016 and answered a number of questions put to him by the parties present and members of the tribunal. He expanded on his professional experience and that of his firm and its staff. He said that his firm managed about 800 units spread over about 90 blocks of varying sizes, most of which were in London. He also referred to two current tribunal appointments of manager in respect of properties in Fulham Road and Ennismore Gardens.

33. Mr Fifield said that his personal time was split between Cheshire and London and that generally he spent 2/3 days per week in London. Modern methods of communication enabled him to keep in touch with his clients, lessees and his staff. He spoke to his firm's online reporting system.

34. Mr Fifield told us that he had carried out an inspection of the subject property. He agreed that internal and major works were required. If appointed, he would review all of the specifications and reports prepared to date and then use his professional expertise to take a view on what should be undertaken and when. He was alive to the sensitivity of a reasonable programme of works that ought to fit with lessees' ability to fund.

    Mr Fifield did not consider the property to require intensive day to day management on a routine basis and he explained the proposed role of his staff who would visit the property on a regular monthly basis as a minimum.

35. Mr Fifield also confirmed his independence and said that he had no social, or other, links to Mr Zausmer or Ms Haworth.

36. There were a number of matters on which he agreed with Ms Bowring. For example, the need for major works and the need to set up a reserve fund to pay for them, because contracts could not be placed unless sufficient funds were held.

    However, there were a number of matters on which he did not agree with Ms Bowring. For example, he did not consider it necessary to re-open the historic alterations to Mr Zausmer's flat, to adjust the service charge proportions or to adjust the responsibilities as regards the window frames (which he considered the leases were quite clear about).

Also in general terms Mr Fifield considered that the terms of the current management order were sufficient to enable proper and effective management of the building.

Fees

37. In terms of routine management both Ms Bowring and Mr Fifield were prepared to accept appointment on the basis of unit fee of £500 + VAT. That equates to £3,000 per year + VAT, which at the present rate of 20% amounts to a total of £3,600.00. Both were prepared to accept the formulae for fee increases set out in paragraph 11 of Appendix 2 to the First Order being the Management Order.

38. As to major works Mr Fifield would seek 10% of the cost of works which would include preparation of the specification, management of the tender process and a tender analysis report. In addition, he would seek 2% of the cost of works to cover the cost of the section 20 consultation exercise. This compared favourably with the fee structure proposed by Ms Bowring who proposed a fee structure of 12.5 – 15% of the cost of works + £750 for preparation of the specification + tender analysis and section 20 consultation fees based on an hourly charge-out rate of time spent.

Final submissions

39. In final submissions Mr Pocock urged us to appoint Mr Fifield who, he said, was a fair and knowledgeable person, well organised and knows what he is doing. The size and scope of his firm is also better suited to the subject property, he said.

    In contrast, Mr Pocock was critical of Ms Bowring in a number of respects, including her communication style and lack of response to relevant correspondence. He made reference to the confused and confusing action plan presented on behalf of Ms Bowring and the numerous errors in it. He also claimed that Ms Bowring had relied heavily on materials provided to her by Ms Benzie and that Ms Benzie had believed that Mr Preko was her manager and her appointee and he was concerned Ms Bowring might be seen in the same light.

40. Ms Benzie urged us, without a doubt, to appoint Ms Bowring because she was a much more hands on person. She considered that if Mr Fifield was only in London 2/3 days per week he would not be so hands on and she did not believe that he had the same level of experience as Ms Bowring. Ms Benzie said that the situation was severe and that she had encouraged Ms Bowring to seek extra powers so as to take the situation out of the hands of the lessees.

41. Ms Benzie also submitted that a plan was needed and that the manager must decide that plan.

Discussion

42. In essence:

Section 24 (9) of the Act provides that a tribunal may vary or discharge an order made under section 24; and

Section 24(9A) provides that a tribunal shall not vary or discharge such an order unless it is satisfied that the variation or discharge will not result in a recurrence of the circumstances which led to the order being made in the first place, and that it is just and convenient in all the circumstances of the case to vary or discharge the order.

The full text of both of those sub-sections are set out in Appendix 1 to the First Order.

43. In this case there is no proposal from anyone that the First Order should be discharged. Indeed, on the contrary, all of the parties present or represented at the hearing are anxious for the First Order to remain in place, so that there is a tribunal appointed manager in place.

44. The issue for the tribunal is the extent to which the First Order should be varied.

45. All concerned present or represented at the hearing were of the view that it was reasonable Mr Powell should be replaced by someone else in view of the changes to his employment circumstances. The tribunal agrees with that view and finds that it is just and convenient to vary the order in that respect and for that reason.

46. There are before the tribunal two persons nominated to be appointed manager. In terms of experience, expertise and professional skill and ability we find that both nominees are worthy candidates for appointment by a tribunal.

47. For quite different reasons the first two managers appointed by the tribunal have not been effective and did not make progress to get to grips with the issues. That cannot continue. The manager we now appoint must be effective.

48. We have therefore given very close consideration to the two nominees before us. They each have different personalities and styles, but both would be competent appointments. For the subject property we find that, on balance, Mr Fifield is likely to perform the better and to achieve a greater and more lasting consensus. There are several reasons that bring us to this conclusion:

    1. Ms Bowring, who is well known to the tribunal, is very positive and direct and can sometimes come over as uncompromising. Ms Bowring's action plan being confused and confusing and containing many elements wholly inappropriate to the subject property did not do her any favours, and, in our view, understandably caused Mr Zausmer and Ms Haworth to question her impartiality. Also the action plan sought to include a wide range of powers which, if exercised, would undoubtedly have run up significant professional

fees which may well have been overly burdensome in a small development of just six units.

2. In contrast, we gained the impression that Mr Fifield's more inclusive and engaging, but robust, personality would stand him in good stead in relationships with the lessees and would enable more positive progress to be made in getting to grips with the issues.

3. We were satisfied that Mr Fifield would be and would be seen by the majority of the lessees to be impartial.

4. Whilst the basic management fees for the building were the same we found that Mr Fifield was able to offer a more attractive fee structure for the major works which are required and in a small development such as this that is a key factor.

Amendments to Appendix 2 to the First Order

50. We have mentioned above that in the light of the change in circumstances since the First Order was made, there are some amendments which are required as follows:

NB (Comments are set out in parenthesis to enable the parties to understand why the amendments are made)

Paragraph 1 Mr Edward Grant Fifield BSc FRICS of Fifield Glyn of 58 Grosvenor Street, London W1K 3JB is appointed as manager in place of Mr Preko and the appointment shall be for a term of years commencing on 1 November 2016 and ending on 31 December 2020.

(**Note:** This is slightly over four years, which was not controversial, and allows for a convenient end of year end date)

Paragraph 8 Sub-paragraph a) reference to 'ground rents' shall be deleted;
Sub-paragraph b) shall be deleted

(**Note:** These are no longer required as there are no ground rents to recover)

Sub-paragraph j) shall be extended to require a copy of this order to be sent to all lessees within 28 days of the date hereof

Sub-paragraphs k) and p) shall be deleted

(**Note:** For the reasons mentioned earlier Mr Fifield as manager is not to have any responsibility to recover any service charges falling due for payment prior to the date on which his appointment commences)

Paragraph 11 The manager's remuneration shall be £500 plus VAT per annum per unit with effect from 1 November 2016 (and pro rata for any period less than one year)

(**Note:** For avoidance of doubt the remuneration shall be reviewed annually in accordance with the provisions of paragraph 11)

There shall be added to Appendix 2

Paragraph 12.1 The manager shall have power to forthwith demand from each lessee the sum of £1,500 (to be paid by each lessee within 21 days of demand) such sums to be held by him on account of the costs and services to be provided by him (and the sums he is required to expend as set out in the note below). No lessee shall be entitled to set off against this obligation any sums which it may be claimed are due from the landlord to that lessee whether by way of loan, damages or otherwise.

(**Notes;**

1. This is to enable the manager to be put in funds promptly to enable him to fulfil his duties. The reasons preventing set off are explained in paragraphs 19 and 20 above. At the hearing both Ms Bowring and Mr Fifield explained what sums they would require and Mr Fifield's evidence was £1,500 which we accept.

2. For avoidance of doubt we wish to take opportunity to explain that once Ringleys have repaid to Ms Benzie the sum of £3,750 referred to in paragraph 18 above they will not be holding any funds. During the course of the hearing we were told that Mr Powell commissioned Ringleys to prepare a specification of proposed major works and to prepare and serve a stage 1 – intention to carry out works - consultation notice. The cost of doing that was put at £750 + £300 + VAT – a total of £1,260. That was not controversial or in dispute. Ringleys shall be entitled to submit an invoice in that sum to the manager and the manager shall effect payment when he is in funds to do so.

   Further since Mr Powell was appointed on 24 March 2016 he has undertaken some, but not very much, management on the building. He is entitled to a reasonable fee for the little work undertaken but not a fee at the rate of £3,000 per annum which was the fee approved for 'full service management'. The manager is authorised to defray from the funds he collects a reasonable sum to remunerate Mr Powell for the management services he has actually provided.

3. Again for avoidance of doubt we wish to make it plain that neither Ms Bowring nor Ringleys are entitled to recover from any of the lessees as a service charge any costs that may have been incurred in the preparation of the action plan prepared by or on behalf of Ms Bowring in support of her nomination as manager or in preparing for and attending the hearing in that regards. Any such costs as may

have been incurred are a personal and private matter as between Ms Bowring and Ms Benzie who nominated Ms Bowring.

4. In similar vein any costs which Mr Fifield might have incurred in preparing for and attending the hearing are not recoverable as service charges and are a personal and private matter as between Mr Fifield and those who nominated him.)

Paragraph 12.2 The manager shall have power to make a supplemental demand of each lessee at such time and in such sum as he shall consider to be reasonable (such demands to be paid by each lessee within 21 days of demand) to enable him to ensure that effective buildings insurance is in place.

(**Note:** Evidently there was some difficulty in Mr Preko effecting or paying monthly premiums towards the buildings insurance. The landlord paid some of those premiums and then it ran out of funds. That is an unsatisfactory situation. It is important that effective buildings insurance is in place, and if need be the premiums paid by the manager. Accordingly, this is an issue to be investigated by the manager and, of course, he must have the power to demand contributions from the lessees so that he is in funds to pay any premiums due.)

Paragraph 13 The manager shall have the power to make demands of each lessees at such times and in such sums as he shall consider reasonable and appropriate (such demands to be paid by each lessee within 21 days of demand) to enable him to build up and maintain a reserve fund in order to fund the costs of any proposed major works reasonably and properly required.)

(**Note:** It was not in dispute at the hearing that it was sensible that whoever was to be appointed manager they should have the clear power to set up a reserve fund in respect of proposed major works.)

John Hewitt
18 October 2016