FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LAM/2019/0005**
Property	**:**	**Flat 4, 22/23 Hyde Park Place, London, W2 2LP**
Applicants	**:**	**Mr & Mrs Renton**
Representative	**:**	**Mr Renton in person**
Respondent	**:**	**22/23 Hyde Park Freehold Limited**
Representative	**:**	**DAC Beachcroft LLP**
Type of Application	**:**	**Appointment of a manager**
Tribunal Members	**:**	**Tribunal Judge Rahman** **Mr P Roberts DipArch RIBA**
Date and venue of hearing	**:**	**18/7/19 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**10/10/19**

DECISION

Decisions of the tribunal

(1) The applicants have not satisfied the tribunal of any ground(s) for making an order as specified by section 24 (2) of the Act.

(2) In the alternative, the tribunal finds that no circumstances exist which make it just and convenient to appoint a manager under section 24 and therefore declines to do so.

(3) The tribunal declines to make an order under section 20 C.

The application

1. The applicants seek an order appointing Mr Mark Chapman of Sloan Block Management as a manager under section 24 of the Landlord and Tenant Act 1987 (the "Act").

The hearing

2. The applicant Mr Renton appeared in person and gave evidence. He was accompanied by his son and his daughter to provide moral support only. Mr Gareth Targett (the previous managing agent) and Mr Chapman also attended to give evidence on behalf of the applicants. The respondent was represented by Mr Rupert Cohen of counsel. Ms Katy Williams (current managing agent) and Mr Mark Arena (respondents Chairman) also attended and gave evidence on behalf of the respondent.

3. The tribunal had before it 3 bundles (A, B, and C), a skeleton argument from the applicants dated 16/7/19, and an additional witness statement dated 17/7/19 served on behalf of the respondent.

4. The hearing finished late and both parties agreed to make written closing submissions by 26/7/19. The tribunal received closing written submissions from both the parties and the additional new evidence relied upon by the applicants (not opposed by the respondent).

5. The tribunal reconvened on 10/9/19 for its deliberation.

The background

6. The property which is the subject of this application is a purpose built mansion block constructed around 1900 consisting of a basement, ground floor, and four upper floors. The top floor flat was constructed around 1960 under a mansard roof. The building comprises 11 self-contained flats (five in the basement, two on the ground floor, and one on each of the four upper floors).

7. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

The issues

8. At the start of the hearing the parties identified the relevant issues for determination as follows:

   (i) Is the preliminary notice compliant with section 22 and, if not, should the tribunal still make an order in exercise of its powers under section 24 (7) of the Act?

   (ii) Have the applicants satisfied the tribunal of any ground(s) for making an order, as specified by section 24 (2) of the Act?

   (iii) Is it just and convenient to make a management order?

   (iv) Would the proposed manager be a suitable appointee and, if so, on what terms and for how long should the appointment be made?

   (v) Should an Order be made under s20C of the Landlord and Tenant Act 1985?

9. Having heard evidence, the oral and written submissions from the parties, and considered all of the documents provided, the tribunal has made determinations on the issues as follows.

Validity of the section 22 notice?

10. The notice is dated 26/11/18. The material parts of the contents of the notice can be summarised as follows:

    On 17/8/18, the applicants notified the managing agents of a leak into their flat from the roof and made a claim on the building insurance. The insurers confirmed that they would require confirmation of where the leak came from and a leak repair invoice before they would allow any repairs to be carried out. The insurers confirmed that the cost of investigating the source of the leak would be covered by the insurance.

    However, the applicants had been unable to repair and redecorate their flat because the respondent had unreasonably delayed taking steps to determine the cause of the leak and to fix it. The respondents' failure to allow the applicants to reinstate their flat as speedily as possible is a breach of the respondent's duty under paragraph 9 of the second schedule of the relevant lease ("the insurance covenant").

The applicants indicated an intention to make an application to the tribunal to appoint a new manager unless the respondent remedied their complaint within a reasonable period. The applicants requested, at paragraph 15, that the respondent:

(a) arrange for a CCTV survey of the internal rainwater pipes in flat 5 and provide the applicants and the buildings insurer with evidence that the pipes are clear and flowing freely within three weeks from the date of the notice. The applicants also require reasonable notice of the inspection so that they or their nominee can make arrangements to witness it.

(b) Also to repair or replace the blocked rainwater stack at the back of the premises and take any other measures that may be necessary to stop any residual leaking into the applicants flat and provide the required leak repair invoice to the buildings insurer within three months from the date of the notice so that the applicants can get on with repairing their flat.

11. The respondent relies upon paragraphs 10 - 13 of its statement of case, which the tribunal has noted.

12. The tribunal found paragraph 15 (a) to be unreasonable. Whilst it is reasonable for the applicants to demand that the leak be remedied, it is not reasonable to dictate to the respondent how it is to be remedied. Furthermore, providing a period of three weeks only is not a reasonable period. To arrange a CCTV survey of a rainwater pipe in a third parties flat, which would require the third party's consent to gain access, would reasonably require more than three weeks. Finally, it is not reasonable to demand that any inspection be carried out in the applicants or their nominees' presence.

13. The tribunal found the first part of paragraph 15(b) to be unreasonable as it is not reasonable to dictate to the respondent how the leak should be remedied. However, the remaining part of paragraph 15(b), which essentially tells the respondent to take any other measures necessary to deal with the leak and to provide the repair invoice to the buildings insurer within a period of three months from the date of the notice, is clearly a reasonable period for the respondent to deal with the issue of the leak. The tribunal is therefore satisfied that the notice is valid.

Have the applicants satisfied the tribunal of any ground(s) for making an order, as specified by section 24 (2) of the Act?

14. The applicant's state that the respondent is in breach of the insurance covenant contained in paragraph 9 of the second schedule to the lease, the

material parts of which states: *"Keeping the property insured in accordance with the requirements of the Superior Lease against loss or damage by fire storm and other insured risks… and against damage or breakage arising from any cause whatever in the full reinstatement value thereof for the time being in some Insurance Office of repute and in case of destruction or damage by any such cause to the demise premises… to rebuild or reinstate the same as speedily as possible…"*

15. In particular, the applicants state that the respondent has been in breach of the insurance covenant since 23/6/19 as the lessees have no insurance covering the first £10,000 of escape of water losses because of the buildings poor claims history. The applicants state that the lessees are entitled to be insured for full replacement value and nowhere in the lease had they agreed to a £10,000 excess.

16. The tribunal notes that this specific matter was not raised in the notice dated 26/11/18 and therefore this cannot be material to the outcome of this application. In any event, the tribunal notes that the respondent does in fact have the required buildings insurance in place. Although there is a £10,000 excess, which relates to any claims for water damage only, this does not mean that the building does not have the required insurance cover as required under the terms of the lease. The excess does not invalidate the insurance cover and is not inconsistent with the terms of the lease as it does in fact have the required insurance for the building. It is not unusual for an insurance policy to have an excess. Due to the history of previous water damage, it is inevitable that there would be an increased excess with respect to any claims for water damage. The respondent has obtained the best insurance available in the circumstances. The tribunal therefore found no breach of the insurance covenant.

17. The applicants also state that the respondent is in breach of the insurance covenant as the respondent failed to reinstate the applicants flat "as speedily as possible".

18. The tribunal notes the following sequence of events:

19. The applicant first notified the respondents managing agent regarding the water leaks by email on 17/8/18. In particular, the applicant identified what he thought may have caused the leakage (the applicant identifies a particular section of a gully, states that these gullies needed to be cleared out regularly to avoid insurance claims, and asks when was the last time this was done).

20. The managing agent provided a reply by email on 20/8/18, confirming the gullies that had already been cleared on 8/8/18, the further works that would be carried out once access was provided by flats 5, 4, 3, and 2, that a contractor would attend to investigate the leak to confirm the exact cause, and that the insurers would be notified about a prospective claim from the applicant.

21. An email from the relevant insurer dated 20/8/18 confirms that the matter had been logged.

22. A further email from the managing agent to the applicant dated 20/8/18 states that there may be further issues unrelated to the gullies and therefore the managing agent proposed sending N Compass to investigate both leaks, N Compass could also provide a quote to repair and decorate the damaged area, and that the managing agent was struggling to get hold of the owner of flat 5.

23. A copy of the report from N Compass was sent to the applicant and the insurers in an email dated 29/8/18. The report refers to gaining access to both flats 4 and 5, the report identifies 2 possible sources resulting in 2 leaks, the source of both the leaks were unclear, boxing inside flat 5 which had pipework running through it could not be investigated as the tenant did not want any damage caused inside his flat, there was the need for a CCTV survey to the rainwater stack at the rear of the property, and if neither of these were the cause of the leaks scaffolding would have to be erected to allow other external parts of the building to be checked.

24. The contractor attended on 4/9/18 and confirmed that the rainwater stack at the rear of the property had a large build-up of lime scale and that trying to jet through this would cause the pipe to split and possibly fall apart. The contractor also believed there was a blockage at the top end of the pipe. The contractor recommended scaffolding to analyse these areas of the pipe and to potentially replace damaged sections. With respect to the second leak, the contractor was able to open the boxing in the living room inside flat 5 and found this to be dry. The contractor could not have access to the pipes within the boxing inside the bedroom of flat 5 as the tenant was reluctant to allow damage to take place. The contractor stated that they would need access inside of this particular box to see if there were pipes leaking from there.

25. A copy of this report was provided to the applicant in an email dated 25/9/18, in which the managing agent stated that flat 5 would be contacted for permission to remove the lid to the other boxing within the bedroom.

26. In an email dated 27/9/18, the insurance broker informed the managing agent that the insurers had spoken with the contractor, who had confirmed that the CCTV to the downpipe showed a minor blockage but had ruled this out as the cause, they therefore believed that the cause was either the pointing or the mastic and the insurers were therefore unable to consider the costs for the scaffolding.

27. Given the identified need for scaffolding and the insurers' refusal to pay for this, the respondent made an application to the tribunal for dispensation from the consultation requirements. The application is dated 17/10/18 and a copy is on page 221 of the bundle. (The tribunal notes that although the respondent states that it had submitted this to the tribunal, the applicant states that the tribunal did not in fact receive this application, as confirmed by the letter dated 5/2/19 from the Property Chamber to the applicant. However, the

tribunal notes that the respondents managing agent had also stated in her email dated 14/11/18 that they were applying for dispensation to erect scaffolding. Furthermore, the email dated 5/2/19 (page 273) also makes reference to the application being submitted on 17/10/18. Given the evidence provided, on balance, the tribunal accepts that the completed application had been posted to the tribunal. However, given that post can sometimes go missing, the tribunal accepts that the application was not in fact delivered to the tribunal).

28. In an email dated 13/11/18, the applicant informed the respondents managing agent of new leaks into his flat at the front and at the back, in the same general area as the previous leaks.

29. The respondents managing agent provided a reply in an email dated 14/11/18. In answer to some of the points raised by the applicant, the email explains that the gullies were last cleaned in August, they are cleaned quarterly, and therefore they were due to be cleaned again this month. The email further states that they would also be carrying out further investigation works into the various reported leaks, including the new leaks, and that they had notified the insurers of the recent leaks.

30. In an email dated 21/11/18, the managing agent informed the applicant that flat 5 had reverted back to them and they awaited confirmation of when the contractor could access the apartment, that flat 5 had been advised of the recent leak and that there was a need for access ASAP this week, once access was provided they would be able to determine if a blockage had occurred, and that the managing agent would revert back to the applicant as soon as access to flat 5 had been gained.

31. In an email dated 23/11/18, the managing agent informed the leaseholders that"1st Call Drains" would be attending on 3/12/18 to carry out clearance of the gullies and drains for the building, that whilst they would have access to the common parts flat 5 would have to provide access to the internal gullies pipework and to its terraces, and that providing such access was a requirement under the terms of the lease.

32. In an email dated 23/11/18, the managing agent informed the applicant that flat 5 had in fact been in contact and agreed to provide access either Monday or Tuesday the following week.

33. In an email dated 30/11/18, the managing agents informed the applicant that a contractor had attended flat 5 on Tuesday to check the internal gullies and had reported the following: "*Two areas were situated in the bay window area where there was a boxed in pipe for the rainwater. Removed both access lids to see if it was blocked which it wasn't. I also checked around the pipe to see if there was a leak but there wasn't a leak from there either*". The email further states that the applicant's request for a CCTV survey to be carried out to the internal pipes in flat 5 had been discussed and agreed by the Board and that the applicant could attend to witness this subject to flat 5's agreement.

The email further states that the managing agent would also like to arrange for the contractor to access the applicant's apartment to further investigate the leaks following their report that they do not believe this to be coming from flat 5.

34. 1st Call Drain Clearance & Technical Services attended on 3/12/18. The report states: "*Engineers attended site to carry out agreed preplanned maintenance works to all accessible roof outlets/balcony drains and manholes. Works carried out by combined methods of electromechanical small machine and high-pressure water jetting. Flows tested and running. Site left clean and safe on completion of works*". With respect to "Cause of blockage" it states "N/A". It recommends that access to flat 5/3 to be gained to carry out cleaning works to rainwater drainage. (Given the contents of this report, the respondent took the view that there was no need for scaffolding and therefore no need for any dispensation from the tribunal).

35. In an email dated 13/12/18, the managing agents informed the applicant that the building insurers had appointed their own leak detection specialist to carry out a survey at the applicant's property. The email further states that with respect to arranging a CCTV survey in flat 5, that this would go ahead and the managing agent await confirmation from flat 5 when access can be provided.

36. In an email dated 22/12/18, the managing agent informed the applicant that they were trying to arrange access to flat 5 to carry out the CCTV survey which the Board of Directors had agreed to. However, the managing agent had not heard back from the owner's representative and they would continue to chase this.

37. Both parties agree that there have been no further leaks into the applicants flat since 23/1/19.

38. Disaster Care Platinum carried out a survey on 3/2/19 in the applicants flat. The report states in its conclusions: "*.It appears that the sporadic nature of water ingress is relevant to periods of rainfall and the clearing or rodding of the rain guttering from outside the property. Entrance to flat 5 to inspect from above was denied by the tenant".* The report recommends: "*With the likely cause of water ingress being from guttering, initial further investigations would be to appoint a company to CCTV drainage at height, with access needed to flat 5*".

39. In an email dated 21/2/19, the managing agent informed the applicant that after a telephone call on 5/2/19 with the owner of flat 5, it was confirmed that access would be provided by his representative. However, the owner's representative had not yet responded to the managing agent's request and the managing agent had again chased this and tried to call the owner to arrange urgent access. The email further states that the managing agent would be speaking to the Board regarding this and would discuss the course of action to take due to access not having yet been provided.

40. In an email dated 21/2/19, the managing agent informed all leaseholders that 1st Call Drains would attend on 7/3/19 to carry out clearance of the gullies and drains for the building. The email stated that access would be required to flat 5's internal gullies pipework and terraces.

41. In an email dated 5/3/19, the managing agent informs the applicant that the CCTV survey of the internal gullies within flat 5 would be carried out on 7/3/19.

42. The drainage report by 1st Call Drain Clearance & Technical Services (page 286) states that a CCTV survey was carried out in flat 5 on 7/3/19. The summary and recommendations states "*The survey was carried out to establish the overall structural and flow condition of the rainwater horizontal pipes taking the roof drainage from rodding access points in flat 5. On inspection, the pipework is constructed of UPVC materials. The overall structural condition of the pipe work is good. The survey did not find any visual defects within the pipework. We recommend access to the flat which had the leak to carry out further investigation works".* A copy of this report was provided to the applicant and the insurers on 29/3/19.

43. (The applicant disputes that the inspection was carried out on 7/3/19. The applicant states that the photograph on page 285 gives the date "2019.02.25". Furthermore, the applicant stated that he and his wife sat "*all day*" in their flat "*with the door open looking into the corridor … taking it in turns to go to the toilet…from 8 AM to after 4 PM…*" and that one of them was "*always observing*" during that time. However, given that the email dated 5/3/19 referred to the survey being carried out on 7/3/19, the actual report refers to the CCTV survey on 7/3/19, and the email dated 8/3/19 (on page 299) from the insurance broker to the applicant refers to the managing agent telling the insurance broker that "*…the survey did take place <u>yesterday</u>…*", on balance, the tribunal is satisfied that the CCTV survey took place on 7/3/19).

44. In an email dated 8/3/19, the applicant was informed by the insurance broker that they were awaiting the outcome of the survey that was to be carried out, that the managing agent had informed them that the survey had taken place yesterday, and that as soon as they are in receipt of the CCTV footage they would be sending it to the broker.

45. This application to the tribunal was made on 11/3/19.

46. The applicant communicated directly with the insurance broker from 29/3/19. On 22/5/19, the applicant was paid £13,000 for remedial works by the insurers. Although the applicant agreed that the respondent was responsible for the investigative work only and that he was responsible for the actual repairs, the applicant confirmed at the hearing that he had not yet carried out any remedial works.

47. Given the above, the tribunal finds that the respondent had used its best endeavours to identify the cause of the leaks. This was not an easy task as the cause of the leak was not obvious despite a number of inspections and it is still unclear what had caused the water damage. The applicants have not provided any expert evidence to show the cause of the leaks either. The tribunal notes that in relation to his previous application in 2013/2014, the applicant had also failed to provide expert evidence regarding the cause of any leaks. The respondent's task was made more difficult by the delays caused by difficulties in obtaining access to flat 5. Overall, the tribunal is satisfied that the respondent acted as speedily as possible and with due diligence in all the circumstances to address the water damage issue. The tribunal therefore found no breach of the insurance covenant.

Is it just and convenient to make a management order?

48. The tribunal has found no breach of the lease. The tribunal is satisfied that the managing agent at the relevant time had acted reasonably in dealing with the leaks and had also dealt with the complaints raised by the applicants in a reasonable and appropriate manner (see for example the email dated 5/2/19 on page 272). Although the applicants had complained about the managing agent leading up to the hearing, the applicant confirmed at the hearing that his issue was not with the managing agent but with the respondent. In any event, the tribunal notes that the managing agent [at the relevant time] has resigned and a new property manager has been appointed. The tribunal notes in particular that the respondent was happy to consider appointing the applicant's proposed manager, whom the respondent had shortlisted, but then decided to withdraw upon having discussions with the applicants. The application is opposed by seven out of the 11 leaseholders and is not supported by any other leaseholders (other than the applicants). Despite the applicants claiming the unreasonable delays caused by the respondent in remedying the damage caused to their flat, the tribunal notes that despite being paid £13,000 on 22/5/19, and the claim being settled, the applicants have failed to carry out the repairs as at the date of the hearing on 18/7/19.

49. In particular, the tribunal notes that the applicant agreed that by 29/3/19 the remedial action demanded in the notice had been met, although not within the 3 months he had given in the notice. The tribunal notes that the various inspections and reports showed that the two things the applicant had thought resulted in the leaks were not in fact the cause of the leaks and the leaks had in fact stopped by the end of January 2019. When asked why he therefore continued with the claim after 29/3/19, the applicant claimed to have suffered financial loss as a result of not being able to rent his flat out. When asked why he did not pursue a claim for financial loss at the County Court, the applicant failed to answer the question directly and instead stated that the problem with mismanagement of the building would still remain. When asked in cross examination whether he had started and continued with this application not because of the problems he had identified in the section 22 notice but because he wanted a level of service not required in the lease, the applicant stated clearly and unequivocally "yes". The applicant then clarified his answer by stating that he had not made the application because of the specific leaks

[referred to in the section 22 notice] but because he was not getting the level of service that the respondents Directors had assured him [quarterly cleaning of the pipes and gullies to prevent blockages].

50. Given the above, the tribunal is clearly of the view that it would not be just and convenient to make a management order.

51. As the tribunal is declining to appoint a manager in this case, the tribunal makes no findings on Mr Chapman's suitability as a proposed manager.

Application under s.20C and refund of fees

52. The applicants have ultimately failed with their application. Mr Renton admitted during the hearing that his real motive in making the application was for a collateral purpose. In all the circumstances, the tribunal does not order the respondent to refund any fees paid by the applicants and further considers it is just and equitable in the circumstances to not make an order under section 20C of the 1985 Act and section 5A to Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

L Rahman **10.10.19 Tribunal Judge**

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).