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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : LON/00AW/LAM/2015/0019

Property : 65 Cadogan Square, London SW1X
0DY

Applicant : Mr Bechara Madi and Ms Helen
Lawton

Representative : Mr B Madi

Respondent : Nearfine Limited (1)
Mr Turaj Ettehadieh (2)

Representative : Mr Adam Rosenthal, Counsel for
Nearfine

Type of application : Mr Ettehadieh attended in person

Tribunal members : Section 24 Landlord and Tenant
Act 1987 the appointment of a
Manager

**Date and venue of
paper determination** : Tribunal Judge Dutton
Mr M Mathews FRICS

Date of decision : 10 Alfred Place, London WC1E 7LR
on 21st and 22nd June 2016

Date of decision : 1st August 2016

DECISION

DECISION

The Tribunal determines that it will not appoint a manager under Section 24 of the Landlord and Tenant Act 1987 (the Act) in respect of the property 65 Cadogan Square, London SW1X 0DY (the Property) for the reasons set out below.

BACKGROUND

1. This is an application for an appointment of manager by Mr Madi and his partner Miss Lawton under the Act proposing Mr Robert Oakey of 5th Street Management Limited to be the Tribunal appointee.
2. The Property comprises six flats which have been sold off on long leases and a flat occupied by a resident caretaker. Mr Madi and Miss Lawton occupy Flat 1. The head lease is owned by the first respondent, the director being Dr Reza Etminan, and we were told that the second Respondent, Mr Ettehadieh, also spoke on behalf of the lessees of Flats 2 and 3, he being the owner of Flat 4. It was understood that together these three flats pay approximately two thirds of the service charge costs for the Property.
3. This matter has taken a while to come before us for hearing on 21st and 22nd June. Directions were given in September 2015 and the matter originally came before the Tribunal on 1st February 2016 for hearing. However, because the second Respondent remained opposed to the appointment and had not filed evidence the matter was adjourned. Further directions were given at that hearing which by and large have been complied with and the matter came before us on 21st June for consideration.
4. There is a wealth of paperwork. In the original bundle for the hearing in February there is the application and the preliminary notice under Section 22 together with various statements. The head lease of 65 Cadogan Square and the under lease of Flat 1 was included as were various exchanges of correspondence mostly by email. In addition we were provided with copies of three other determinations, two of which involved 65 Cadogan Square and the other involving 69 Cadogan Square. In 2014 under case number LON/OOAW/LSC/2013/0368 (65 Cadogan Sq) the Tribunal was asked to deal with service charges for the years 2009 to 2013. This decision did address an issue which came before us relating to a commission /mark up of 15% on works undertaken by Mr Stubbenhagen. Certain findings were made by the Tribunal in 2014 but on their own admission were hampered by a shortage of written evidence. We will have to deal with this commission point in the course of this decision and therefore say no more about it at the moment. There were also claims made in connection with gas costs, accountancy fees, heating maintenance and other service charge matters.

5. The other decision relating to the Property is under case number LON/OOAW/LSC/2015/0337. This was in October 2015 and related to works in respect of the lift. Again this was raised in the course of the proceedings but we would not propose to interfere with the decision made by our colleagues in October of 2015 as it is not a relevance to this application before us.
6. The other case referred to in the proceedings before us was involved Flats 1 and 4, 69 Cadogan Square. The case reference is LON/OOAW/LSC/2015/0128. It appears that Mr Madi represented three tenants and we will refer to the decision insofar as it is relevant but bear in mind it relates to another property.
7. As well as the original bundle for the hearing due to take place in February, the parties had, as a result of the adjournment and the fresh hearing date, produced further bundles running to some 600 plus pages with a supplemental bundle of another 22 pages, which includes what appears to be an application for permission to appeal the decision we mentioned relating to 69 Cadogan Square above. Within these bundles were various witness statements made by the parties including Mr Stubbenhagen who was a builder and who undertook works on behalf of Nearfine and Dr Etminan who is the director of Nearfine and who attended the hearing and gave evidence. In addition to the statements there are a vast number of emails passing between the applicants and others and a good deal of documentation, which in truth was not referred to in the course of proceedings. Insofar as any other documents are relevant to our determination we will make reference to them as we proceed.

HEARING

8. The hearing commenced on 21st June 2016 somewhat delayed because the original members of the Tribunal had both been taken ill. At the hearing Mr Madi represented himself and Ms Lawton and was accompanied on the first day of the hearing by Mr Silfyou who was assisting Mr Madi in presenting the case and by Mr Stubbenhagen. For the first respondent Mr Rosenthal attended accompanied by Dr Etminan the director of Nearfine. He was also accompanied by Ms Ryman who is Nearfine's in-house solicitor and representative in the UK. Mr Ettehadieh was present representing both himself and the two other lessees referred to above.
9. Originally Nearfine had not objected to the appointment of Mr Oakey as the manager. They did not accept that the grounds made out in the Section 22 notice were correct but had taken the view that it would make economic sense to agree to the appointment of a manager. We were told, however, that because Mr Ettehadieh was objecting and that serious allegations had been made against Nearfine and Dr Etminan they had altered their position and now opposed the application.

10. We heard from Mr Madi that he had been in dispute with Nearfine since 2010 and that there had been instances of intimidation. He referred to the three Tribunal decisions, which we have outlined above. Mr Rosenthal confirmed no appeals had been made in respect of those decisions but that they were different parties involving different matters and therefore were not binding on us. There was an issue, however, concerning works undertaken by Mr Stubbenhagen allegedly involving secret commission which we will return to in due course.
11. Mr Madi responded that in his view the major issue was the commission and complained that a 'criminal level of proof' had been introduced in a previous proceeding which he maintained was not appropriate and in that regard produced a finding of the House of Lords in the case of *Re B Children (FC)* where discussions were had concerning the standard of proof in civil proceedings which we do not need to spend time upon.
12. Mr Ettehadieh had confirmed that he also represented the tenants of Flats 2 and 3 and that these three flats, that is to say flats 2, 3 and 4 paid approximately two thirds of the service charges. He told us that Nearfine had a contract with "Cadogan and with the six sub-tenants" and that he and his fellow tenants were satisfied with the management, which he believed to be good. He accepted there had been some problems with expenses but since 2013 those had reduced and he considered the Property to be well controlled and managed. He also complained that too much paperwork had been produced.
13. We then heard further from Mr Madi and in addition to his various witness statements and documentation he told us as follows. There was, it appears, no dispute that Section 22 notices had been served and that set out the grounds upon which the application for the appointment of a manager was made. At this point Mr Rosenthal confirmed on behalf of Nearfine that they accepted one of the grounds relating to unreasonable service charges at paragraph 24.2 (a) and (b) had been made out. He told us, therefore, that in his view the only matter we needed to consider was whether it was just and convenient to make an order in the circumstances of the case. Mr Madi was not prepared to let the matter lie at that point and wished to deal with the various allegations that he had made concerning the actions of Nearfine and Dr Etminan.
14. He told us that he had been subject to harassment and incitement. The harassment has started in 2010, although he had moved into the building with Ms Lawton it seems in 1996. Until 2010 there had been an excellent relationship but when he had started questioning service charges matters became somewhat fraught.
15. It appears that in 2010 an issue was raised by one of the tenants that there was concerns over the use by Mr Madi in his flat of a wood burning fire. The suggestion is that this was causing problems to the tenant of the flat above. The complaint by Mr Madi seems to be that

instead of directing the concerns to him matters were escalated by referring the issue directly to the local authority. In fact, this particular issue went no further as it seems the local authority did investigate and concluded that there was nothing untoward with regard to the use of the wood burning fire. This, however, prompted what we understood to be the first letter of complaint which was dated 1st March 2010 written for some reason with a “without prejudice” heading raising a number of issues.

16. It is said that there then followed the history of harassment. In particular, reference was made to a letter from Nearfine of 5th March 2010 to Mr Madi and Ms Lawton asking them to cease the use of a store room in the under-pavement cellars. In fact, the letter says that if they do not enter into some form of licence and agree a payment of rent, the amount of which is not clear, then they would be asked to vacate. In a witness statement that Dr Etminan made on 22nd April 2016 he explained this particular issue as being a requirement for them to vacate a communal storage area to ensure that they did not acquire any rights. It seems that the storage area has been vacated.

17. It was said by Mr Madi that Nearfine had made threats in relating alleged breaches of covenant which was not pursued and in this regard we were directed to a letter of 4th May 2010 which responds to an email from Mr Madi again written “without prejudice” which refers to issues relating to the problems with the flat above and the suggestion of carbon monoxide poisoning. The last three paragraphs of this letter perhaps succinctly reflect Mr Madi and Ms Lawton’s position:
“Unless Nearfine can provide the above requested evidence to substantiate the allegations and also provide explanation for Richard’s conduct, we can only conclude that the allegations of CO poison were made by Nearfine with malicious intent.

Taking into account the above matter and also the inflammatory actions that Nearfine and you personally have taken in recent weeks it is our belief that we have been subjected to a systematic campaign of harassment in response to our questioning the professionalism of Nearfine and the probity of the financial management of our building.

We hereby put you on notice that due to extreme level of emotional distress and anxiety that Nearfine has created for us in recent weeks, all matters have now been passed to our solicitors for review and consideration to determine what actions we should take.”

18. Mr Madi then went on to set out briefly the various issues and threats that he had faced from Nearfine and Dr Etminan. The first was the threat of forfeiture in 2011 as a result of Nearfine writing to his mortgagees in an attempt to obtain service charge monies. There was also an allegation that a threat was made of double charging of ground rent, which is suggested in a letter by Graham Marks to Dr Etminan of 5th May 2010. It does not appear, however, that such a suggested double ground rent recovery was ever pursued to payment, the more

so as Mr Madi and Ms Lawton refused to pay. Mr Madi referred us to a letter written by Nearfine of 11th October 2010 in which reference is made to the double ground rent provisions and certainly includes something of a threat to Mr Madi in that it indicates in this letter that they have the right to be recover back six years but do not have to apply this to any other lease in the building if they did not wish to do so.

19. Mr Madi also told us of the problems that had arisen with regard to the garden which can be used by the leaseholders of the Property. This, it seems was in fact one of the major threads of the dispute between the parties. As we understand it the garden was originally owned by Cadogan Estate and was transferred to another company of which Nearfine were part-owners. The company was Cadogan Square Small Garden Limited and it seems that as a result of the alleged behaviour of Mr Madi and Ms Lawton a letter was sent on 9th March 2011 purporting to ban them from entering the garden. This ban, however, was ignored by Mr Madi and Ms Lawton and did not appear to have been taken any further. There was also a suggestion that there had been defamation and incitement of others to turn against Mr Madi and Ms Lawton. Certainly a letter sent by Nearfine on 22nd March 2010 to all tenants of the Property raises the concerns and says as follows: *"Managing your building has been a pleasure over the years except for one single tenant flat No 1 and it has proved to be impossible to satisfy them. Furthermore, there has been unreasonable behaviour and insults have become intolerable."* This letter went on in the final paragraph to say that they were proposing that the lessees took over the management of the building, although that did not in fact happen. We were also referred to a somewhat vitriolic letter sent by Ivor and Sarah Braka concerning Cadogan Square Small Garden. It is not necessary for us to go into any detail but it is quite clear that there was no love lost between Mr and Mrs Braka and certainly Ms Lawton. It seems that building works were undertaken to the garden without warning and generally the change of ownership of the garden has caused considerable distress to Mr Madi and Ms Lawton and forms a major part, it would seem, of their concerns in relation to the management of the Property.
20. In addition to the various threats Mr Madi said that there was a complaint that gas prices had not been reduced sufficiently to reflect the reduction in gas prices at source. He was of the view that consultants should have been involved and that the tariffs being paid were excessive.
21. On specific items, Mr Madi drew our attention to works undertaken to drains at the property at pages 403 and 404 of the bundle. As far as he could recall, the drains had only been cleaned once but that there were no problems with guttering downpipes or the drains, although his view was the landlord should inspect on a regular basis and this was part of his complaint that there was a lack of pre-emptive maintenance by Nearfine. He accepted that there used to be regular management inspections until Mr Stubbenhagen stopped but there is no regular

planned management and for his part he could not recall when the building had last been inspected. In addition, he did not consider the fire equipment had been checked. He confirmed that he worked from home but did not want to be a “policeman for the building.”

22. He told us that he was speaking on behalf of two other lessees. Within the bundle there were two letters dealing with this point. The first was what purported to be a letter from Blue Stone Limited who appear to be the leaseholders of Flat 6, a property which, as we understand it, is let out on short term lettings. The letter from Blue Stone bears no name, date or signature but appears to have been attached to an email in March of 2016.
23. Insofar as Flat 5 at the building was concerned, owned by Armande Cohen, we were provided with a letter from Greenhouse Stirton and Co Solicitors. This letter told us that sadly she was now under the jurisdiction of the Court of Protection and that Eva Lai of Greenhouse Stirton and Co was her property and affairs deputy.
24. The letter went on to say *“I have reviewed the various documentation including the previous Tribunal determinations and the Applicant’s statement of case. I agree that the current management is short of the standards required to manage a building in one of the prime areas of London. In the light of the information provided to me I believe it is neither reasonable nor in the interest of Ms Cohen for Nearfine to remain as managers for 65 Cadogan Square.”* The letter went on to support the application for a new manager.
25. Continuing with the concerns on a more specific basis Mr Madi referred to problems with the CCTV that was not functioning. Although he confirmed that it was not a service within the lease it had been installed by the landlord and was paid for by the lessees. There was no evidence of any inspection and it had apparently taken three months for the CCTV camera to be repaired at which time there had been apparently some thefts from the Property.
26. The next item concerned the question of the lift. There had, as we have indicated above, been a decision on the works required to the lift by our colleagues in October of 2015. An application had been made by Nearfine for a determination as to whether the costs of replacing the lift would be reasonably incurred which the Tribunal found would not be the case, although the costs of asbestos removal would be so covered. There was also a finding as to the management charge which is not relevant to this determination.
27. It appears that the lift is inspected on a regular basis and we were provided with the report carried out by Zurich in 2013 and we believe in 2016. The defects requiring corrective action as soon as reasonably practicable are not dissimilar in the two reports but there is no finding that corrective action is required before a specific date and as we understand it Zurich continue to insure.

28. Mr Madi felt that the Respondents Nearfine had not undertaken management in accordance with the RICS code particularly with regard to the lack of visits, he suggesting that Dr Etminan had not been to the building since 2010 and did believe that Ms Ryman had ever attended the building. His concern was that the management was inadequate with Dr Etminan based in Monaco and Ms Ryman based in Bath. There was, he said, no hands-on management and although he had requested a meeting he had been told that the parties were too busy to meet with him.
29. He then moved on to the question of allegations of commission being charged. This involved the relationship of Dr Etminan and Mr Stubbenhagen in his role as the previous Property Manager/Maintenance Operative. It was not clear that Mr Stubbenhagen, who had been in effect managing the property, had any professional qualifications, although during this period it seems there had been no specific complaints concerning the management. Certain findings had been made in the 0368 case in 2014. Mr Madi was of the view that Mr Stubbenhagen had reduced his charges to Nearfine or Dr Etminan but that those reduced charges had not been passed on to the leaseholders.
30. We then heard from Mr Stubbenhagen who had made statements which were within the bundle and confirmed that those were true. He told us that he had been in the building business for some 50 years and had known Dr Etminan for 30 years. He was not a building manager but he did undertake maintenance for various buildings owned by Nearfine. He had no management qualifications. We then heard evidence from him as to the relationship he had with Dr Etminan and how their fees were arranged. An agreement had been entered into by Nearfine and Cavendish Offices and Houses Investments Limited,(Cavendish) a company now no longer trading, and Mr Stubbenhagen in November 2002. This listed the properties that Mr Stubbenhagen would be required to maintain at an annual fee of then £1,280 plus VAT per building. This set out the requirements and was signed by both. The contract was said to be for a period of five years from 1st January 2013. He was then asked about commission arrangements that it was said he had entered into with Dr Etminan. He said that he had started informally doing work for flats owned by Dr Etminan and there were times when he would not charge him for that. He complained that payment of invoices had not been prompt and indeed the relationship with Dr Etminan had broken down to such an extent that proceedings were now either imminent or underway concerning payment of monies or non-payment as the case may be. The case put forward by Mr Madi through Mr Stubbenhagen was that Mr Madi paid the full invoice price as a service charge but Dr Etminan was in fact receiving a 15% reduction from Mr Stubbenhagen which he used to offset against costs on his other properties. There were different rates apparently and confusion as to how the set off had occurred.

31. After Mr Stubbenhagen had given his evidence in chief he was asked questions by Mr Rosenthal. His attention was drawn to a witness statement he had made in other proceedings in May of 2014. Asked whether he had any supporting documentation to show how the alleged 15% had been dealt with he said that there was nothing before us and no list of works to reflect the commission. We were referred to a document at page 338 which shows sums paid and claimed in respect of properties at 34 and 40 Pont Street and at 69 Cadogan Square. It appeared that Flats 6 at 34 Pont Street and Flat 3 at 40 Pont Street were owned by Nearfine. We will return to this document in the recounting of the evidence given by Dr Etminan. Mr Stubbenhagen was asked whether he had written the witness statement and said he had done so between himself and his daughter, although Mr Madi had retyped it. There then followed some further cross examination relating to the dispute between Dr Etminan and Mr Stubbenhagen and also the question of a transcript of a meeting that had been recorded by Mr Stubbenhagen initially it seems without Dr Etminan's knowledge and which was included within the papers before us. One matter which was drawn to our attention by Mr Rosenthal was at page 647 in a supplemental bundle showing invoices for 65 Cadogan Square of an amount of £3,691.86 for works which coincided with the amount shown in the 2010 accounts.
32. On the second day of the hearing we heard from Dr Etminan who had made a number of statements both for the original hearing and subsequently. There were also a number of statements made in connection with the other Tribunal hearings to which we have referred. Perhaps the most relevant for our purposes was contained at pages 48 to 55 onwards dated 22nd April 2016. The witness statement confirmed the initial acceptance that Mr Madi and Ms Lawton's proposed manager should take over the responsibilities for management. However, since Mr Ettehadih had been joined opposing the application he considered it was necessary for Nearfine to participate to rebut the numerous allegations made by the Applicants. We noted what was said. On questioning from Mr Rosenthal Dr Etminan confirmed that he was the sole director of Nearfine but he was not living in the UK for health reasons. Helen Ryman was now the General Manager and who could, for example, sign cheques. It was accepted that she lived in Bath but there was a presence in the building in the form of a caretaker. Also, he told us of a recent problem concerning a leak which had occurred in the week before the hearing that had been dealt with, he said, extremely quickly to the extent that the leak was raised on Sunday night but by 11 o'clock the next morning the matter had been investigated.
33. He told us that he had not visited the Property since 2010 because he was not welcome and was not, therefore, prepared to visit under those circumstances. He said he had a wonderful relationship with all his tenants apart from Mr Madi and Ms Lawton. He confirmed that he had now changed his mind about giving up and was asked to say why. He

said that he had an emotional attachment to 65 Cadogan Square. It was, he said, "my baby." He had also been contacted by the other three tenants wishing Nearfine to stay on. He said there were liabilities which Nearfine had under the head lease and that other tenants in the building had their problems with Mr Madi. He thought that it would be difficult to deal with Mr Madi and to manage the Property whoever did it. There was hatred on the part of Mr Madi and Ms Lawton but he didn't really know why and didn't know what he had done wrong to cause this. He complained that Mr Madi interfered with the managing of the Property. He gave an example of Mr Madi requesting the caretaker to turn off the heating which was inappropriate and not within his remit. He also said that Mr Madi would by the end of June owe some £21,000 in service charges. He said that this was the seventh time he had returned to the United Kingdom in a year to deal with Mr Madi's issues and that Nearfine had only one case in 30 years until Mr Madi became involved and that there had been apparently seven in the recent past.

34. He told us that the number of flats that he now managed had reduced to 22 in four buildings as a result of enfranchisement. He was then asked about the commission issue and was taken to page 339 which we have referred to before. This is a document which he had seen last year. He gave explanations as to the relationship he had with Mr Stubbenhagen who he said had made substantial sums of money from his involvement with Nearfine. In 1997 Nearfine had bought a portfolio of property and from then onwards had probably given Mr Stubbenhagen some £8m in work. He had suggested to Mr Stubbenhagen that there should be some discount for this extent of work and 15% had been the suggested figure. Using the properties on page 339 of the bundle he told us that 40 Pont Street had undergone a complete refurbishment, which Mr Stubbenhagen had undertaken having provided the most competitive tender. He told us that flat 3 at 40 Pont Street was his own flat which had been modernised by Mr Stubbenhagen but at no cost to the lessees. This work had been undertaken by Mr Stubbenhagen as part of the 15% discount. The same applied to Flat 6 at 34 Pont Street owned by Nearfine where there had been certain extension works undertaken. The other works undertaken at 32, 34 and 40 Pont Street and 69 Cadogan Square were service charge matters which had been properly billed based on tenders put forward by Mr Stubbenhagen, although in one instance, we think 34 Pont Street, it was the leaseholders who had asked for Mr Stubbenhagen to undertake the work notwithstanding his tender was higher. He confirmed that in his view only the properly charged tendered works were included as a service charge. Accordingly, therefore, leaseholders had not paid more but he accepted that he had had the benefit of works being undertaken for his own flats a lower or at no cost.
35. He was then asked questions by Mr Madi and elicited the response that Dr Etminan had not visited since 2010. Asked how he managed, he said that since 1983 he had never had a problem and he was proud of

the management. A caretaker inspected regularly and she contacted Ms Ryman who would also deal with matters if necessary. He believed that the relationship he had with Mr Madi had gone cold since he had moved to Monaco for health reasons in 2009.

36. Asked about allegations of harassment he said that insofar as the storage was concerned, he had instructed the managing agents to get the storage situation resolved and it was a coincidence that this had arisen at the same time as the allegation of the wood burning issue and other allegations of threats. Dr Etminan said that it was perfectly reasonable to approach a mortgagee to obtain service charges if a tenant stopped paying and to stop the tenant from acquiring rights to the storage area was also a reasonable management step. There had not, he said, been any real contact between Mr Madi and Dr Etminan on issues since 2011. Dr Etminan said that in 2,009 days Mr Madi had sent him 4,687 emails although Mr Madi denied this. Dr Etminan said that he had fulfilled the role of manager coming from Monaco to the United Kingdom as necessary.
37. Insofar as the lift he was awaiting the outcome of these proceedings before dealing with that any further and there was an exchange concerning safety brushes which we do not need to record any detail. It was Dr Etminan said accepted that the lift needed upgrading and indeed three tenants had said they might pay for it themselves.
38. Questions were then raised about the CCTV, again about the allegations in respect of the wood burning issue, storage and other matters.
39. Mr Madi then turned to what he considered perhaps was the most important issue the garden. Dr Etminan confirmed that Nearfine owned 20% of the garden as head lessor and that he was a director of the company with Mr Braka who he let run it. Asked why Mr Madi and Ms Lawton had been banned he said that this was small garden run by an independent company. He had been asked by Mr Braka to ban Mr Madi for breaching the regulations and had done so on that basis.
40. There were then discussions concerning Cavendish, a company that had previously been involved in the management and which was now no longer trading. Questions were raised as to the legality of the dissolution of the company when it owed money and we noted all that was said in that regard. There then followed questions concerning the involvement that Mr Stubbenhagen had with Dr Etminan. In response Dr Etminan said that he had not taken commission from tenants. He said they had paid what was due under the tender and no more. He confirmed that works had been carried out at 34 Pont Street, not on the lowest tender, but that the leaseholders had insisted that Mr Stubbenhagen did the job. He confirmed that the full invoices were sought to be recovered from service charges but that any discounts were maintained purely for the purposes of private work. He accepted that this had not been disclosed to the tenants but did not consider that the tenants had suffered as they pay the same amount of money that

they would have done. In cross examination Dr Etminan confirmed that the 15% value was attributable to the total of the project works for which service charges were claimed but that this 15% was then used to offset against private work.

41. We then heard briefly from Ms Ryman who responded to Mr Madi's concerns about the gas costs. She said the figures shown on the schedule produced by Mr Madi at page 430 of the bundle were correct but the figures have now been reduced from 7th May 2016, they being reviewed annually. She said she had been to three major suppliers and had now received a tariff from N Power at "2.008 with a standing charge of 34p". This was fixed for a year as had the previous arrangements with British Gas.
42. As to the CCTV, she said this had been reviewed earlier this year. It was not possible to obtain a contract for maintenance as there was only one camera at the Property and the contract price was about the same as a replacement camera. It was, however, indicated that if the lessees wished to have maintenance contracts for the CCTV camera that could be undertaken. She told us that there had been health and safety inspections and there was a report on file through Jim Evans and that there had been inspections for asbestos, electrical systems and fire. However, these had probably not been undertaken for a while and certainly not since her employment which started in 2013. Unfortunately, Richard Brayham who had been the manager had died some 18 months ago and now she was taking on the full responsibilities. Jim Evans of Epsalon Management was a company in the south of England who assisted. She confirmed that she was a non-practising solicitor and had not returned to the profession after maternity leave having qualified in 2005.
43. After the luncheon adjournment Mr Ettehadieh set out his position. His view was that the Respondents, certainly those he represented wished to retain Nearfine. He thought the bundles were 90% irrelevant. There were six flats in the building. The two other flats that Mr Madi purported to represent one was sub-let and there was a failure by the managing agent to notify any tenants about the regulations. Miss Cohen on the fourth floor sadly suffered from dementia and therefore was not participating. This, therefore, left four flats three of which were represented by Mr Ettehadieh and were in perfect harmony. They said there was a good relationship with the building manager, with Nearfine, Dr Etminan and Ms Ryman. He said this left only Flat 1 who were the divisive people in the application. He confirmed that three flats that he was involved in paid nine fourteenths of the building charge and that they strongly believed the building was in good repair. Indeed, he said it would have been immaculate if it had not been the subject of these proceedings.
44. He believed there needed to be modernisation works to deal with the old fashioned heating system and also the old fashioned lift. Apparently a meeting had been agreed with regard to the boilers but Mr

Madi had objected afterwards. Also Mr Madi, who lives on the ground floor never uses the lift but nonetheless objects to it being modernised. He felt that the building manager should be allowed to carry out what was needed and when. For example, the entrance door needed repainting having been done some eight years ago. Mr Madi objected to this but when Mr Ettehadieh said that he would pay his share, he agreed. His view was that the hearing was to deal with the current and future issues. The documents before us had little to deal with the life of the building today and were largely historical issues. He did not think that the transcript of the meeting between Mr Stobbenhagen and Dr Etminan had anything to do with the building and many of the issues raised have now been settled. As to the commission point, Mr Stubbenhagen was no longer 'employed' by Nearfine or Dr Etminan and therefore this issue would not arise. The lease that the lessees had inherited provided for no management contract as such. Cadogan had granted Nearfine the responsibility and this is a situation that they have bought into. He said that tenants had favourable financial arrangements in that there was no definite contract with the head lessee, Nearfine was obligated to finance the expenses and bill six months later. There was no sinking fund. If a lessee didn't pay, then Nearfine was left to carry the burden. His view was that they would be seriously disadvantaged if an independent manager was appointed. He was certain that an outside manager would charge more, in advance and would want to be financed. He said that if there should be a change then perhaps they should manage themselves. There are others who are qualified but did not want Mr Stubbenhagen to have any involvement.

45. He was asked why there were certain letters apparently supporting Mr Madi in his efforts at raising certain issues. He felt that Mr Madi should put aside the bad feelings and not involve himself in the day to day management. At this point Mr Madi asked whether it was fair that he had been put in the position of having to deal with acrimonious issues whilst accepting that he had been able to improve certain matters for the leaseholders but taken the flack for doing so. Mr Ettehadieh suggested that Mr Madi had won the war and that there should now be peace.
46. We then heard from Mr Oakey who was the proposed manager. As a result of our findings it does not seem necessary for us to go into any detail as to the evidence he gave. We would, however, say that in other circumstances we would consider that Mr Oakey would be a fit candidate to take on the management of a building. His answer to a question by Mr Ettehadieh as to what would happen if a leaseholder did not pay was that the Property would become unmanageable. Certainly he would be looking for payments on account to deal with the management of the Property and had sought appointment for two years which he thought would be a reasonable period of time.
47. We then had the closing submissions from both Mr Rosenthal and Mr Madi. Mr Rosenthal's submission was that 'just and convenient' within

the Act was curative and not penal. He asked us to consider the current position and the shortcomings and whether the appointment of Mr Oakey was necessary to deal with those. Indeed, the question was whether he could. He said that the issues raised were generally historical and that the RTM suggestion raised some time ago could not be pursued because the relevant majority could not be obtained. He asked us to consider the position of the leaseholders, this being highly relevant. Nearfine now continued to want to manage the premises and three lessees wished Nearfine to do so. Nearfine through Dr Etminan wished to continue the management and the breakdown in relationship would not be sorted by a short term appointment of an independent manager.

48. On the question of commission, he confirmed it seemed that this was isolated and there was no evidence of commission, if that be the right phrase, since 2011. Mr Stubbenhagen had not worked for Nearfine for two years. The findings of previous Tribunals were not an issue for us and findings of evidence at previous hearings should not be relied upon. He confirmed that on the question of the burden of proof the civil standard applied and referred us to Halsbury 5th edition at paragraph 708 where if matters such as fraud were being alleged then the standard of evidence must be that much higher. As it says in paragraph 708: *“However, it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but that the gravity of the issue becomes part of the circumstances which the Court has to take into consideration when deciding whether or not the burden of proof has been discharged: the more serious the allegation, the more cogent is the evidence required to overcome the likelihood of what is alleged and thus to prove it.”*
49. Mr Rosenthal referred to the isolated arrangements for 34 and 40 Pont Street and that Dr Etminan had given clear evidence and had been open with the Tribunal. The transcript of the meeting was no assistance and in any event it was not put to Dr Etminan by Mr Madi. Reference to other decisions was not of assistance to us. The alleged breaches, harassment, discrimination issues were historic. He then dealt with the gardening issues and that the appointment of a manager would not resolve this issue as the manager would not be maintaining the garden nor in reality have any involvement with same. As to the lift, he referred to the decision last year and that there may well be refurbishment works with funds provided by those lessees who wished to proceed. He pointed out that Zurich had not refused insurance. The fact that nothing had happened with regards to the lift could be explained by the fact that the hearing was due to take place in February but now adjourned to June and it was understandable if works had not been carried out pending the outcome of the hearing.
50. The fact that Dr Etminan had lived in Monaco and Ms Ryman in Bath did not he said affect the management and relied on the examples given with regard to the leak and other issues that we had heard at the

hearing. He dealt also with the question of CCTV, the RICS code and gas costs.

51. He then went on to address certain issues should Mr Oakey be appointed, for example rent payable in respect of the caretaker's accommodation and employment issues. By reason of our finding we do not need to recount these issues any further. He also referred us to Mr Ettehadieh's comments that Nearfine finances the costs and recovering service charges in arrears. One tenant not paying could not result in a building being unmanageable. These matters had all been covered without a financial risk to the tenants and as Mr Oakey had said without service charges being paid the building would be unmanageable.
52. Mr Madi in response said 'just and convenient' was not punitive but curative. The building he said had been unmanageable from his position for some time. There are three people opposing and three people supporting. He said that the historical issues had not been resolved but that Mr Oakey was independent and would be able to deal with matters. Mr Madi said he wanted nothing to do with the management of the building or communication with other lessees. It was not right that lessees should be deciding what was done. An independent manager should do that particularly as the RTM could not proceed. He had made the application because he had had enough. An independent manager would manage the building for all and it was not until February that Nearfine had indicated that from being neutral they now wished to oppose the application. Others had left him in the confrontational position but had taken the benefit. He is the only person who confronts Dr Etminan but Mr Ettehadieh and Mr Haythe, another tenant, had agreed with his position. The commission issue was not one for which he was asking for a finding of fraud. His view was that the story there was no commission went to the integrity and the veracity of Dr Etminan. He then briefly touched on the wood burning fire issue, storage, double rent and other issues he has raised.
53. On the lift he thought the Zurich recommendation should have been implemented by now and that inspections and shortcomings were as a result of Dr Etminan being away from the Country. He said, however, he had no issue with Ms Ryman on a personal level and agreed that in the last three months Nearfine had responded to the question of gas costs but it was not his job to tell her what to do. He did at this point say that he would have wished to have asked questions but had not done so although the opportunity was there for him.
54. As to the management order, he thought that Mr Oakey should step into the shoes of the landlord and take on all responsibilities so that Dr Etminan could enjoy life in Monaco. His preference was for all contracts to be taken over by the manager including control of Nearfine's share in the garden and the caretaker. He was hopeful that the appointment of the manager would solve problems and that the splits within the building could be healed.

THE LAW

55. The law applicable to this application is set out in the appendix attached.

FINDINGS

56. We start our consideration on the basis that the Respondents accept there have been failures under Section 24 of the Act, which would justify the appointment of a manager. The question for us is to determine whether it would be just and convenient so to do.
57. Mr Madi sought to raise issues beyond the admission made by the first Respondent. We have heard all that was said. We would briefly comment on those matters.
58. It does not seem to us that the manner in which the first Respondent handled the concerns with regard to the alleged carbon monoxide problem arising from the wood burning fire was inappropriate. If a complaint is made by one tenant that there is a potential for some form of poisonous gas creeping into their property even though that may be farfetched, requesting a body such as the local authority's environmental health department to investigate is not unreasonable. The position with regard to the storage is perhaps unfortunate that it came to light at the time when the relationship between Mr Madi and Dr Etminan had descended to a low. However, it is perfectly reasonable, it seems to us, for the landlord to ensure that a tenant does not acquire property rights to an area in the common parts and therefore we do not consider that this is an issue. The allegations relating to the double ground rent and the defamation and problems with the garden are not we consider matters that would of themselves result in the appointment of a manager. It is clear that there is no love lost between particularly Ms Lawton and the Brakas' but it does not seem appropriate for us to go into the whys and wherefores of the garden. We understand that proceedings may be afoot in that regard in any event. It does not go, in our finding, to the management of the Property.
59. What is clear is that there has been a breakdown in the relationship between Mr Madi and Ms Lawton and Dr Etminan and Nearfine. We were not overly impressed with the supporting letters for Mr Madi. One is based on an email that is not signed, dated or bears any person's name. The other is a letter from a solicitor acting on behalf of Miss Cohen who appears to have made her decision based solely on documentation provided to her by Mr Madi, which may have been somewhat selective.
60. For Mr Ettihadieh, although it is clear under certain circumstances he was quite happy to let Mr Madi plough his own furrow in connection with disputes involving Dr Etminan where it produced a favourable

outcome, he nonetheless, with his other lessees, seems firmly of the view that the present arrangements should not be disturbed. This may well be because the financial position is favourable to the lessees. There is limited scope for the landlord to recover monies on account if any scope at all and the funding, therefore, comes from the landlord. The costs of management are reasonably economic. Mr Ettehadieh said the building was in good order and would have been immaculate without these proceedings. There is no doubt that the appointment of a manager would impose financial obligations on the other leaseholders as it was clear that Mr Oakey would require money on account to be able to undertake the various services provided for in the lease.

61. We consider that it would be extremely difficult for Mr Oakey to manage a building where 50% of the leaseholders were averse to his involvement and could simply stymie the matter by refusing to pay service charges. It is all very well and good for him to be able to sue those leaseholders for monies but that does not solve the position. Furthermore, we are satisfied that to an extent this is a route taken solely by Mr Madi and Ms Lawton.
62. That is not to say that Dr Etminan and Nearfine are without criticism. The arrangements that Dr Etminan reached with Mr Stubbenhagen are akin to commission being paid to a landlord for placing insurance. That commission should be disclosed. The position here seems to be that Mr Stubbenhagen, either by giving the lowest tender or as a result of choice by the lessees involved, undertook works that were recoverable as a service charge for the full amount claimed. In return for that, he agreed to undertake works at either Nearfine or Dr Etminan's flats for a lower fee or for no money at all equalling 15% of the total costs charged to the leaseholders. We do not believe on the evidence before us that any leaseholder has paid more than they should have done. However, it is inappropriate for this secret arrangement to have been kept from leaseholders as it may have had an influence on their decision with regard to Mr Stubbenhagen's involvement. There is, however, no evidence that this has happened with regard to 65 Cadogan Square. In those circumstances, therefore, whilst we find the arrangements that exist historically were inappropriate, as Mr Stubbenhagen is now out of the picture, it is clearly not an issue that is going to arise again and one that Dr Etminan should ensure is avoided or, if not, at least disclosed.
63. Apart from that it seems to us that the running of the building is being carried out satisfactorily. The recent swift response to a leak and what appeared to be a road accident shows that matters can be dealt with speedily. There is a caretaker in the Property who should be able to report in respect of day to day issues and it appears that Ms Ryman, who has experience as a property lawyer and appears to be on the ball, can ensure that works are undertaken when required. This coupled with the fact that an appointment of a manager would impose substantial financial penalty on at least 50% of the leaseholders leads us to the conclusion that it would not be just and convenient to appoint

a manager in these circumstances. We are not satisfied that such appointment would be a panacea. We understand that Mr Madi and Ms Lawton are the most substantially in arrears with their service charge contributions.

64. There is something of a historic nature to the allegations and it does seem from comments made that the commission and the problems with the garden are the real issues. The commission has now stopped and did not on the evidence before us appear to affect leaseholders at the Property. The question of the garden is one that needs to be considered but is not within the remit of this application nor is it something that an appointment of a manager would resolve.
65. We were impressed by Mr Madi's detailed knowledge and the submissions that he put to us. Unfortunately, we are not persuaded that the appointment of another manager with additional financial penalties involved is going to resolve the problems and in those circumstances it is not in our finding just and convenient to make the order.

Judge: *Andrew Dutton*
A A Dutton

Date: 1st August 2016

ANNEX – RIGHTS OF APPEAL

1. 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 at the Regional Office which has been dealing with the case.
2. 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.
3. If the application is not made within the 28-day time limit, such application must include a request to 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.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie 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.

Section 24 Landlord and Tenant Act 1987 Appointment of manager by the court.

(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) where the tribunal is satisfied—

(i) that unreasonable service charges have been made, or are proposed or likely to be made, and

(ii) that it is just and convenient to make the order in all the circumstances of the case;

(ac) where the tribunal is satisfied—

(i) that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and

(ii) that it is just and convenient to make the order in all the circumstances of the case; or

(b) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made.

(2ZA) In this section “relevant person” means a person—

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

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

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

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

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

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

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

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

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

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

(b) such incidental or ancillary matters,

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

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

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

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

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

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

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

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

(a)that any period specified in the notice in pursuance of subsection (2)(d) of that section was not a reasonable period, or

(b)that the notice failed in any other respect to comply with any requirement contained in subsection (2) of that section or in any regulations applying to the notice under section 54(3).

(8)The Land Charges Act 1972 and the Land Registration Act 1925 shall apply in relation to an order made under this section as they apply in relation to an order appointing a receiver or sequestrator of land.

(9) A leasehold valuation tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section; and if the order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 1925, the tribunal may by order direct that the entry shall be cancelled.

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

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

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

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

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