



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

- Case Reference** : CHI/29UL/LAM/2019/0017
- Property** : The Grand, The Leas, Folkestone,  
Kent CT20 2LR
- Applicants** : Ms Alison Mooney (1)  
Mr Barry Bushell and  
Mr Paul Ollerenshaw (2)
- Representative** : In person
- Respondents** : Hallam Estates Ltd (1)  
Mr Michael and Ms Doris Stainer (2)  
The Association of the Residents in the Grand,  
through their Chairperson Mr Peter Cobrin (3)  
Mr Robert Moss  
as trustee of the Stainer Trust (4)  
Ms Heather Greenwood  
as attorney for Ms Millie Tomlinson (5)  
Mr Steve Bispham (6)  
Ms Jennifer Bostock and Mr Julian Daggett (7)  
Mr Mark Foley (8)
- Representatives** : Ms Rea Murray of Counsel, instructed by M &  
M Solicitors, Cardiff, for the Second  
Respondents
- Tribunal  
Member(s)** : Judge M Loveday  
Mr K Ridgway MRICS  
Mr P Gammon MBE
- Date of  
hearing/venue** : 5 May 2020 (video proceedings)
- Date of decision** : 29 May 2020

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**DECISION**

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**Introduction**

1. This is a relatively unusual application by a Tribunal-appointed manager for directions under s.24(4)(b) Landlord and Tenant Act 1987. The application was dealt with by video proceedings on 5 May 2020. An oral hearing was originally listed for 17 March 2020, but it was adjourned in the early days of the Covid-19 pandemic restrictions. Arrangements were made for the matter to be heard as video proceedings and the remote hearing took place on 5 May 2020 using the CVP/Kinly platform.
2. The application dated 25 February 2020 relates to The Grand, a former hotel on the seafront at the Leas in Folkstone. The premises have a long and sorry history of disputes. Apart from several sets of leasehold management proceedings in this Tribunal, we were referred to the appointment of a receiver as long ago as the 1980s<sup>1</sup>, two appeals in the Lands Chamber of the Upper Tribunal (LRX/137/2019 and LRX/109/2018), a judicial review application in the High Court (CO/1298/2019), a County Court injunctions, criminal proceedings in the Crown Court at Canterbury, various insolvency cases and at least one defamation claim. Alongside this matter, the Tribunal has been case managing an application to discharge the manager (CHI/29UL/LVM/2020/0001), which is due for hearing in June/July 2020.
3. There are several parties. The application was made by Ms Allison Mooney ARICS (“the Manager”), who was appointed as receiver and manager by a previous order of the Tribunal on 5 July 2018 (CHI/29UL/LVM/2018/0001). The Application originally referred to only three respondents:
  - (a) The First Respondent, who is the registered freehold proprietor of the premises, and appeared at the hearing through its director Mr. Robert Moss.
  - (b) The Second Respondents, who apparently own some 19 residential flats as leaseholders and have previously acted as a director and company secretary of the First Respondent. They were represented at the hearing by Ms Rea Murray of counsel, instructed by M&M Solicitors of Cardiff.
  - (c) The Third Respondent, which is a Recognised Tenants Association under section 29 Landlord and Tenant Act 1985 and appears through Mr. Peter Cobrin. Mr Cobrin is the joint registered proprietor of a flat known as the Chilham Suite. He provided the Tribunal with a list of 34 members of the Third Respondent, although Mr Cobrin accepted that not every member supported the position he advanced at the hearing. On 17 February 2020, the Tribunal joined several other parties. Messrs Bushell and Ollerenshaw (Ivychurch Suite) were joined as applicants. Mr Moss was joined as a respondent in his additional capacity as trustee of the Stainer Trust (the lessee of several Suites). Other respondents were joined, including Ms Greenwood, as attorney for Ms Tomlinson (Kendall Suite), Mr Bispham (Marlow) and Mr Daggett and Mr Foley (Ilchester Suite).

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<sup>1</sup> As referred to in Morgan v Stainer (1993) 25 H.L.R. 467.

4. In the event, the active participants at the hearing were the Manager (supported by the Second Applicants), the Third Respondents and the Second Respondents (supported by the remaining respondents).
5. Case management proved challenging: see, for example, directions given on 17 February, 15 April, and 17 April 2020. The remote hearing itself largely went ahead without incident. The Tribunal is grateful to all the parties for their co-operation in ensuring matters were dealt with efficiently on the day. Indeed, notwithstanding this was a private hearing for the purposes of emergency Rule 33(2A), there was a relatively high degree of public participation, with numerous parties and interested persons remotely accessing the hearing. The Tribunal is particularly grateful to counsel for the Second Respondent, who was instructed late in the day, but who nevertheless produced a helpful skeleton argument at short notice supported by relevant authorities. This was of considerable assistance to the Tribunal.

## **History**

6. The premises comprise a 7-storey grade II listed Edwardian building which includes some 64 residential flats (or “suites”) and commercial premises. This Tribunal was unable to view the premises<sup>2</sup>, and no objection was made to it reaching its decision without an inspection. At the hearing, the premises were described as forming a roughly rectangular building with a large sun lounge or conservatory facing southwards over the English Channel. The western elevation at Metropole Road includes the former main entrance to the hotel and the hotel reception. There are outbuildings and a car parking area to the north, and formal gardens the east. Access to the car parking area is through a passageway leading from the former hotel reception area to a doorway in the northern elevation. This passageway passes the foot of one of the stairwells with a staircase and lift leading to the upper corridors, where numerous residential flats are located.
7. Each suite is let on a long lease, which it was agreed are in similar terms. The bundle included a lease of the Jersey Suite dated 30 October 2008. The Lease granted a term expiring on 28 September 2164. The following were the material terms of the Lease:
  - (a) By clause 3.9 that the tenant was “Not at any time during the term without the previous written consent of the Landlord to underlet or part with possession of Property as a whole whether furnished or unfurnished for a period shorter than three months”.
  - (b) By clause 4.5 that the tenant was “Not at any time during the term to use or occupy or permit to be used or occupied the Property otherwise than as a single private residence and not to do or permit or suffer to be done on any part of Property any act or thing which may be or become a nuisance disturbance injury annoyance or

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<sup>2</sup> See Pilot Practice Direction: Contingency arrangements in the First-Tier Tribunal and the Upper Tribunal (19 March 2020), paras 10-11.

inconvenience to the Landlord or the Landlord's other lessees or occupiers of any adjoining or neighbouring premises or which may deteriorate or tend to deteriorate the value of an adjoining or neighbouring property.”

- (c) By clause 6.3, the landlord covenanted “to require any tenant of a flat (but not the other premises) in the Building (other than a tenant holding under a lease for a term not exceeding twenty one years granted at a rack rent) to enter into covenant upon the same terms mutatis mutandis as the terms contained in this lease (save the terms as to rent and the length of term granted)”.
  - (d) By clause 6.4, the landlord covenanted “(subject to being suitably indemnified and secured against cost and expenses by the Tenant and any other Tenant requesting such steps) take all reasonable steps to compel the performance and observance by the Tenant of any other flat in the Building of any covenant or obligations imposed upon him in respect of such flat under the lease under which he may hold same (save that in respect of costs and expenses of enforcing a payment of maintenance contributions this shall be borne by maintenance under the provisions of clause 4 hereof and the second schedule hereto as therein provided)”.
  - (e) By para 1 of Pt.2 of Sch.2, the flats benefitted from an express right “in common with the Landlord and the tenant and occupiers of the other part of the Building and persons authorised by them ... to pass and repass over and along the main west and north entrances to the Building the paths and ways giving access thereto and all common passages stairs calls landings and lift other common spaces in or about the Building (provided that north entrance maybe temporarily closed if reasonably necessary during any building works on for so long as may be reasonable)”.
8. As already explained, the premises have a long and depressing history of legal disputes. But for present purposes it is only necessary to deal with the management orders made by previous tribunals under the Landlord and Tenant Act 1987.
  9. The first order under s.24 of the Act was made by the Tribunal on 11 June 2014. Following a three-day hearing, the Tribunal appointed Mr D Hammond MRICS as manager and receiver (CHI/29UL/LAM/2013/0019). The appointment was made for a period of 5 years.
  10. In 2018, Mr Hammond and the Third Respondents applied to vary the management order, and a two-day hearing took place with further written submissions (CHI/29UL/LVM/2018/0001). On 5 July 2018, the Tribunal varied the 2014 management order under s.24(9) of the Act.
  11. The varied management order was included in the bundle for this hearing, but the decision of the previous Tribunal was omitted. However, the Tribunal explained it could not realistically make directions under s.24(4) without having regard to the decision itself. The reasoned decision ran to some 214 paragraphs. The previous Tribunal concluded that Miss Mooney

should be appointed as manager in place of Mr Hammond, it extended the management order for a further two years and made substantial revisions to the existing terms of management. In reaching its decision, the Tribunal made express findings about the conduct of the First and Second Respondents and their approach to the management of the premises: see, for example, paras 156(b) and 208. The Tribunal attached a penal notice to the order.

12. For present purposes, the material parts of the Tribunal's 2018 decision relate to consents and permissions. The Tribunal found the premises were in part used for commercial purposes including meeting spaces, wedding venues and food and drink outlets. It also found that the 19 leaseholds owned by the Second Respondents had been used as holiday flats, that they were widely advertised on the internet and that they were managed by its commercial operations. The commercial operators occupied around 25% of the building (para 77). As in this application, the Third Respondents maintained that use of premises for commercial purposes by the First and Second Respondents in respect of a holiday lettings compromised leaseholders' rights to quiet enjoyment and they argued the Second Respondents were in breach of covenants which required them to use each flat as a single private residence and not to permit anything which might become a nuisance disturbance injury or annoyance to other leaseholders (para 112). Evidence was given by two leaseholders about noise emanating from flats controlled by the Second Respondents and uncontrolled access to the common parts (paras 113-4). The Tribunal found the First Respondent and its employees had "significantly" compromised the leaseholders' rights to peaceable enjoyment over a period of time and this was "further exacerbated by the unwillingness of Hallam Estates and its employees to cooperate with the current manager of The Grand" (para 172). It considered the appropriate way forward was to make Ms Mooney manager and receiver of the residential flats and residential common parts of the building, together with the rights of way that the leaseholders enjoyed over the external areas (para 182). The 2018 management order clearly identified and distinguished between the parts of the premises which were subject to the management order ("the Residential Part") and the parts which were outside the scope of the management order ("the Commercial Part").
13. The Tribunal imposed several conditions on the varied order. The material conditions were dealt in paras 192-195:
  192. The Tribunal now turns to the powers of the manager to enforce covenants under the lease and to take legal proceedings.
  193. The Tribunal draws a distinction between the covenants to pay rent, service charges and other monies due under the leases and tenant's other covenants under the lease.
  194. The Tribunal considers the proposed Order gives the manager adequate powers to enforce the payment of monies due including the power to apply for a charging order, and if need be sell the leasehold.
  195. The Tribunal, however, wishes to place a restriction on the manager's power to act in respect of alleged breaches of covenants not to do with payment of monies. In this regard the Tribunal is

content for the manager to draw alleged breaches of covenant to the attention of a leaseholder, and if need be to give a leaseholder an opportunity to put matters right. The Tribunal, however, requires the manager to seek the direction of the Tribunal if she intends to take legal proceedings against the leaseholder for alleged breaches of covenant not to do with the payment of monies.”

14. These findings were reflected in the terms of the amended management order attached to the decision, which granted two qualified powers to the Manager at paras 3(l) and 3(p):
  - (a) “The power or duty to carry out the obligations of the landlord contained in the Leases and in particular and without prejudice to foregoing ... (iii) the landlord’s power to grant consent which includes the right to revoke such consent previously granted by the landlord where it is reasonable and necessary for the proper performance of her functions under this Order and/or to secure the peaceable enjoyment of the flats by the Tenants or to remedy any breach of the covenants contained within the lease. The power to revoke is **subject to the direction of the Tribunal**”.
  - (b) “The power in her own name to incur legal expenses and or to bring or defend any legal action or legal proceedings in connection with the Leases or the Property or her role as manager and to make any arrangement including but not limited to ... (ii) legal action to determine that a breach of covenant has accrued **subject to the direction of the Tribunal** [and] (iii) legal action to prevent a further breach of covenant has occurred **subject to the direction of the Tribunal**.”
15. At this stage, it is only necessary to mention one further provision of the order. At paragraph 5 was a direction that:

“That the Landlord and its employees and agents shall give all reasonable assistance and cooperation to the Manager in pursuance of her functions, rights, duties and powers under this order, and shall not interfere or attempt to interfere with the exercise of any of their said rights, duties or powers by due process of law.”
16. It is worth noting that litigation about the 2018 management order had not been completed by the time of the present application:
  - (1) On 25 July 2019, the Tribunal made a Rule 13 costs order against the First Respondent.
  - (2) The First Respondent sought permission to appeal the 2018 order, but permission to appeal was refused by the Deputy President of the Upper Tribunal on 8 January 2019.
  - (3) An application for permission to judicially review this decision was refused by HHJ Karen Walden-Smith (sitting as a High Court judge) on 27 September 2019, with the judge making a “totally without merit” finding.
  - (4) An application for permission to appeal the Rule 13 costs order was refused by the Upper Tribunal on 17 December 2019.

## **The application**

17. The Manager’s application dated 24 October 2019 sought directions only under the first of these two conditions Paragraph 11 framed the application in these terms:

“I request the Tribunal’s authorisation by direction to revoke the following consents, licences or waivers by the freeholder, whether express or implied:

  - i) For the use of flats otherwise than as a single private residence, in accordance with the lease.
  - ii) For use of the north residential entrance for public access to commercial events.
  - iii) For access to the common parts of the Residential Parts by anyone except residents, their guests, the manager, and those duly authorised by the manager.”
18. The Manager confirmed at the outset of the hearing that she only sought directions under para 3(l)(iii) of the 2018 management order to revoke any consents – and did not seek directions permitting her to take legal action as a result of any breaches under para 3(p). The Tribunal considers the distinction is an important one. Even if the Tribunal authorises her to revoke consents, the Manager cannot take steps to enforce any obligations imposed on the First or Second Respondents without returning for further directions under para 3(p) of the 2018 management order.

### **Preliminary procedural matters**

19. At the start of the hearing, the Tribunal disposed of three outstanding formal written applications.
20. The first application concerned a statement from Mr Stainer dated 22 February 2020 which is dealt with below.
21. The second application was made by the Third Respondents on 30 April 2020. It sought to restrict the Second Respondents’ participation in the proceedings. It was argued the Second Respondents should not be permitted to represent the First Respondent or appear (other than as a witness) at the hearing. The Tribunal would have had considerable sympathy with this application, but it too resolved itself. In the event, the Second Respondents chose to be represented by solicitors and counsel, and the First Respondent did not ask to be represented by anyone else.
22. The third application dated 29 April 2020 was effectively a mirror image of the second application. The Manager asked to be represented at the hearing by Mr. Cobrin, but the Second Respondents (through counsel) objected to this, referring to Rule 14(5) of the Tribunal Procedure Rules. The Tribunal heard submissions on the point and withdrew for a short period before indicating it would not give permission under Rule 14(5). The brief reasons for reaching this decision are as follows:
  - (1) The Manager is in an unusual position, quite unlike most parties to Tribunal or court proceedings. Having been appointed as manager and receiver of the building, she is a “court appointed official” and

an officer of the Tribunal: see Maunder Taylor v Blaquiére [2003] 1 W.L.R. 379 at 392 para 41. The Tribunal is primarily interested in hearing from the manager herself directly about the course of management, albeit that as a party she is entitled to representation.

- (2) The Tribunal was satisfied the Manager was able to participate fully in the proceedings without representation. She submitted a detailed written application, a witness statement and supporting evidence. Indeed, as matters turned out, the Manager’s cross-examination proved robust and her submissions ultimately successful (see below).
- (3) It was inappropriate for the Manager, as the Tribunal’s appointee, to be represented at the hearing by a leaseholder who also a lay party to the application. The Tribunal considers the remaining parties to the application – or indeed other interested persons – would have reasonable grounds for perceiving the Manager had compromised her independence. This will not (in the Tribunal’s view) help further the general objectives of the 2018 management order.

### **The approach to directions under s.24(4)**

23. Counsel for the Second Respondents accepted there was no reported decision of a higher court or tribunal about the exercise of powers under s.24(4) of the Act. The Tribunal will therefore first consider the nature of this power.

#### *The Act*

24. The right to apply for the appointment of a manager under Pt.II Landlord and Tenant Act 1987 is a fault-based right exercisable “for cause” where statutory fault-based grounds are made out and it is “just and convenient” to appoint a manager: *Service Charges & Management* (4<sup>th</sup> Ed.) at para 23-01. These provisions implemented a key recommendation of the *Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats* chaired by Sir Edward Nugee Q.C. Pt.II of the Act prescribe a process for a tenant or tenants to seek the appointment of a manager, a process which has recently been described as a “problem-solving jurisdiction”<sup>3</sup>.
25. The principal operative provisions are at s.24(1) and (2).

#### **“24 Appointment of manager by a tribunal**

(1) [The appropriate tribunal] may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies-

- (a) such functions in connection with the management of the premises, or
- (b) such functions of a receiver, or both, as [the tribunal] thinks fit.

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<sup>3</sup> Chaun-Hui v K Group Holdings Inc [2019] UKUT (LC) 371; [2020] L.& T.R. 5 at para 34.



- (2) [The appropriate tribunal] may only make an order under this section in the following circumstances, namely –
- (a) where [the tribunal] is satisfied –
    - (i) that [any relevant person] either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and
    - ...
    - (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”.

There is a further important provision which emphasises the Tribunal’s continuing control of the premises at s.24(9), which permits the tribunal, on the application of any interested party, to apply to vary or discharge an order made under s.24.

26. Subsections 24(3)-7) set out the scope of the management order a tribunal may make to address the problem or difficulty in management it has identified.

“(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 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.”

27. As already explained, the present application relates to para 3(l) of the 2018 management order, which was in turn made by a variation under s.24(9) of the Act. There is direct authority about a Tribunal's approach to s.24(9) variation applications, namely the Court of Appeal judgment in Orchard Court Residents Association v St Anthony's Homes Ltd [2003] EWHC 1049; [2003] 2 E.G.L.R. This case was referred to by counsel at the virtual hearing and in her skeleton argument. In Orchard Court, the appellant argued that to successfully vary a management order under s.24(9), an applicant had to establish that one of the thresholds in s.24(2) was met - as if a s.24(9) application was a fresh application to appoint a manager. But the court disagreed. It dealt with the issue as follows:

“11. It is to be noted that the legislature has not thought it fit to embody in section 24(9) the various criteria set out in section 24(2) . There is a clear contrast between the requirements when an order is made and when an order is varied. It seems to me that the section is drawing a distinction between making an order and varying an order. Although it might perhaps be said that in some circumstances the court is always making an order when it varies an existing order, that cannot be the correct interpretation in the context of this statutory provision.

12. There are no explicit criteria in section 24(9) in contrast to section 24(2) . Moreover, if an application is made by a relevant person (such as a landlord) to vary or discharge an existing order, the legislature has expressly required the Tribunal to be satisfied of certain matters (see section 24(9A) ). The inclusion of those express requirements in (9A) and the omission of anything of that sort in subsection (9) itself must be seen as deliberate and confirms the contrast between section 24(2) and section 24(9).

13. Section 24(2) and section 24(9) deal with quite different situations. Section 24(2) is concerned with making an order where one does not exist, whereas section 24(9) is dealing with an order which is already in existence because the Tribunal has already been satisfied that the tests in section 24(2) have been met.

14. I quite accept that, in exercising its discretion under section 24(9) , a Tribunal must have regard to relevant considerations; that is trite law. But when one looks at paragraphs 20 and 21 of the Tribunal's decision, it is quite clear that this Tribunal did have such regard. However, section 24(2) did not require it to be satisfied that at least one of those thresholds had been passed. Nor can I see any reason why this particular type of variation, the extension of a manager's term, should have to meet the criteria in section 24(2) . Mr Heather has conceded that there is no limit on the length of time for which a manager may be appointed in the first place. In those circumstances, why should one require the section 24(2) tests to be

met all over again simply because a variation is sought which will extend his term of appointment?”

28. As always with the 1987 Act, one must contend with some slightly opaque phraseology<sup>4</sup>. The power to apply for directions in s.24(4) sits uncomfortably within the context of a provision which otherwise relates to the making of an original management order under s.24(2). But s.24(4) plainly gives the manager power to apply for “directions”, and the word “directions” must mean something other a “provision” in the original order (s.24(4)) or “conditions” in it (s.24(6)). But the intention of s.24(4) is nevertheless clear enough. An original management order may include “matters” which are “incidental or ancillary” to “the exercise by the manager of his functions under the order” and any s.24(4) “directions” should relate to those “incidental or ancillary matters”. Parliament plainly intended s.24(4) “directions” to concern the routine day to day management of a property which enabled the order to be implemented.
29. In doing so, the Tribunal evidently has a wide discretion, given its specialist expertise. As with s.24(9), parliament did not include any explicit criteria for the making of directions in s.24(4) - a point highlighted in Orchard Court in relation to the former provision (indeed, s.24(4) does not even include the limitations in s.24(9) set out in s.24(9A)). In her skeleton argument, counsel (rightly) noted that the Tribunal must have regard only to “relevant considerations”, (as explained in para 14 of Orchard Court). But provided those considerations relate “to the exercise by the manager of his functions under the order” the Tribunal has the widest possible powers to give directions.
30. As to what those relevant considerations are, neither the Manager nor the Second Respondents attempted to provide a comprehensive list. Perhaps understandably, they each suggested different considerations were relevant. The Tribunal will deal with these after considering the evidence provided by the parties.

### **Evidence of fact**

31. The Manager gave evidence herself and relied on 3 other witnesses of fact. The Second Respondents relied on five witnesses of fact.

#### *Ms Mooney*

32. Ms Mooney referred to a witness statement dated 24 October 2019 and gave oral evidence by video link.
33. Ms Mooney stated that several flats in the Residential Part were used for commercial events. For example, she referred to courses and seminars run

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<sup>4</sup> In Denetower v Toop [1991] 1 W.L.R. at 945 at 952G, Sir Nicholas Browne-Wilkinson described the 1987 Act as “ill-drafted, complicated and confused”. In Belvedere Court Management v Frogmore Developments [1997] QB 858, 881D, Sir Thomas Bingham MR described that criticism as perhaps “understated”.

by the Ershamstar School of Mediumship on various dates in 2019 and 2020. Miss Mooney produced links to their website. In addition, the Second Respondents (or a related organisation) ran a weekly 'grand tour' which involved paying customers being taken through the corridors and other parts of the Residential Part. Mr Moss had confirmed these were "run on behalf of the leaseholders of the 'short let flats' Mr Michael Stainer and Mrs Doris Stainer". Moreover, the north residential entrance of The Grand was used as a means of access by the public to commercial events in the Commercial Part, such as a monthly antiques fair. This involved going down the passageway which ran through the Residential Part. Finally, several flats controlled by the Second Respondents were used for short stay holiday lets. Commercial use of the Residential Part was not covered by liability insurance. The commercial use disrupted tenants, caused noise etc., and caused leaseholders to feel a lack of privacy and security.

34. Ms Mooney was cross-examined in some detail. She stated that she understood all the leases were in similar form. She was taken to the alienation covenant at clause 3.9 of the Lease. She stated there had never been any evidence of written consent being given in relation to any of the Second Respondents' properties. She had asked to see written consents on many occasions, but they had never been provided. It was put that the Second Respondents had such consents. Ms Mooney said that if that were the case, she would seek to revoke them. Ms Mooney was asked which flats were let on agreements for less than 3 months. She stated this information was available on the Booking.com website, where the flats were listed as being available for rent on a 'night by night' basis. It was every single flat (other than the flat the Second Respondents lived in). She believed the subletting led to other breaches of covenant, such as the covenant against permitting or suffering a nuisance or annoyance etc. to the lessees. Ms Mooney accepted there was no evidence in the papers of problems with insurance being invalidated by the commercial use of the Residential Part. As to the alleged nuisance, Ms Mooney visited 2-3 days a month and was well acquainted with the building. Counsel asked about the Third Respondents. Ms Mooney suggested it represented a huge body of residents, the majority of people in the Grand. At least another thirty stood behind the four residents who were giving evidence at the hearing. She had attended meetings and knew fully well what the body of opinion was.

*Ms Shi*

35. Ms Hui Shi is lessee of the Keswick Suite. She referred to a witness statement dated 11 December 2019 and gave oral evidence by video link.
36. Ms Shi referred to "illegal" use of apartments as holiday lets, and commercial use by Ershamstar. Ms Shi had frequently complained about lack of security in some areas of the building, particularly in the residential private areas and the disturbance this caused. For example, an antiques fair was held on the first Sunday of each month in the Ballroom (in the Commercial Part). Access for the public was through the residential north entrance. This was a private entrance for leaseholders only, and it was

always supposed to be kept locked . But during the hours of the antiques fair the doors were wedged open, allowing the public to have access to all the private residential areas. Requests to the First Respondent to use other entrances had been ignored, and duct tape had been applied to locks to prevent the doors to the north entrance being secured. At one stage, the Manager arranged a staple and hasp for a padlock to be fitted to the doors, but this had been removed. In addition, there were regular paid tours of the premises including the Residential Part, despite objections. As to sub-letting of the flats, holiday guests were provided the keys to the building which was infringement of privacy and a security risk.

37. In cross examination, Ms Shi stated that use of the Commercial Part and the passageway raised both nuisance and security issues. Use of the flats raised different issues because there was a specific provision in the lease. She had asked the Manager whether she could let out her own flat but was told she could not.

*Mr Bliss*

38. Mr Robert Bliss is joint lessee of the Devonshire Suite and referred to a witness statement dated 11 December 2019. He was unable to give evidence remotely, but no objection was made to the Tribunal reading his witness statement.
39. Mr Bliss essentially corroborated the evidence of Ms Shi. The Exeter Suite (above his flat) and the Dorchester Suite (next to his flat) were used as holiday lets and various other commercial purposes. Bookings were arranged through various internet booking sites. The ‘ever changing occupancy’ made him concerned about security in the building. Mr Bliss and his wife felt constant insecurity, never knowing who was upstairs or next door. He also objected to the Residential Part being used for paid tours, causing wear and tear. Mr Bliss had complained several times to both management and the occupants of the flats themselves, but it was a permanent problem “week after week”.

*Ms Dudova*

40. Ms Tatiana Dudova is lessee of the Inverness Suite. She referred to a witness statement dated 12 December 2019 and gave oral evidence by video link.
41. Ms Dudova stated that the commercial staff gave keys to the building to holiday let clients on a daily basis. There was no evidence the identity of such visitors was ever checked, and their presence in the building often caused noise, disturbance, littering and false fire alarms. Keys were also routinely provided to organisers of the antiques fairs and other events, and some regular participants had their own keys. Old locks on the doors made it impossible to prevent keys from being copied, or to estimate how many copies had been made over the years. There was noise and nuisance from antiques and craft fair exhibitors who accessed the premises at all hours through a residents-only entrance, which disturbed them. The doors were

left open for public access, which was unacceptable. Attempts by the Manager to divert such access to more appropriate entrances had been ignored. When a lock was placed on the doors, it was removed. Paid tours of the building, including the Residential Part, were permitted, despite protests by residents. The Residential Part and the retail areas of the building, and the responsibilities of the manager, were carefully addressed in the 2018 management order, which came into force on 8 January 2019.

42. In cross-examination, Ms Dudova stated they had tried to get the keys and locks changed and there were injunction proceedings about the locks. There was no reason for anyone other than residents to use the northern entrance. She gave an example of how the holiday lets were unreasonable. Ms Dudova lived on the north side of the premises where there were no holiday lets, but she had still found strangers wandering along the corridor outside her flat who said they were holiday let tenants. This was unacceptable. She accepted she could, as a leaseholder, allow her own guests to use the corridors, but these people were not her invitees. She accepted her security concerns could be met using other means – such as by having separate entrances. She also accepted the antiques fairs had been going on for a very long time, and that they predated her lease. But visitors to these fairs had access to the whole building, and though some were “nice people”, some were not.

*Ms Magnus-Lewinska*

43. Ms Mayotte Magnus-Lewinska is joint lessee of the Churchill Suite. She referred to a witness statement dated 11 December 2019 and gave oral evidence by video link.
44. Ms Magnus-Lewinska gave further evidence of use. In particular, she stated that the Dorchester Suite, which was owned by the Second Respondents, was not only used as a holiday let. It was also used by the Ershamstar School of Mediumship for its courses, and sometimes 15-20 people attended meetings there.
45. In cross-examination, it was put to Ms Magnus-Lewinska that in any shared space, there was inevitably some give and take when it came to noise. But Miss Magnus-Lewinska referred again to the schools taking place in the Dorchester Suite. “We call them the elephants”, she said. “They are ‘mediums’, not ‘light mediums’. It sounded like children were using roller skates in the Dorchester Suite.

*Mr Moss*

46. Mr Robert Moss is the sole director of the First Respondent and has been director for 1.5 years. He referred to a witness statement dated 22 January 2020 and gave oral evidence by video link.
47. The statement refers to a letter to the Manager’s solicitors dated 11 November 2019, which in turn refers to an incident where some doors had allegedly been removed from the common parts and put in a storeroom.

The letter argued that “the access routes serve both commercial and residential areas” and that the residential access areas were not “exclusive to the residents”. The First Respondent was not responsible for any organised tours. All the leases in the building specifically permit the First Respondent to grant consent for existing uses, which have been present continuously since the first leases were granted. There had therefore never been any breach of lease. The letter argued the Tribunal-appointed manager had been “in breach of the criminal law” and threatened that “claims for damages would follow” and sought details of the Manager’s complaints procedure. There was a further email dated 21 January 2020, which argues the leases permitted shared use of the main west and north entrances to the building and that the leases of the flats specifically permitted the landlord to consent to short-term lettings. In the body of the statement, Mr Moss dealt in some detail with events which occurred at a meeting on 20 February 2016. He contended that the Grand is and always had been a mixed used property, and that accessways were shared between the Residential Part and the Commercial Part. He rejected any suggestion of noise and nuisance.

48. In cross-examination, the Manager asked what steps the First Respondent had taken against the Second Respondents to recover service charges, and he replied he had “no comment on that”. It was put to him his firm had taken no action, and he again replied he had “no comment”. When pressed by the Tribunal, Mr Moss accepted he had taken no action to recover service charges from the Second Respondents. The Manager then asked what had happened to copies of permissions and consents granted by the First Respondent. Mr Moss accepted the First Respondent had granted written consents but stated he “had no access to these documents”. He had not asked for the documents and admitted “it was of no consequence” to him “whether the documents existed or not”. He insisted that as a Director he would “still have my say and stay my ground”. Management of the premises had been “running beautifully” for 25 years and “it’s just fine”. After 25 years, “I don’t know why someone has to come in and disrupt it ... and I am not having someone disrupting the commercial side of it.” When asked by the Manager whether he would co-operate with her by providing copies of written consents, Mr Moss said he “would consider what I want to do”. The Tribunal referred Mr Moss to the obligation to co-operate in para 11 of the 2018 management order, and asked whether he considered that withholding written copies of consents from the Tribunal-appointed Manager was giving “all reasonable assistance” with the management of the property. He confirmed he had not co-operated because he had his “own commercial considerations”. Mr Moss was also asked how (if he had only been a director for 1.5 years), he was able to give evidence about events over the “almost four years [Mr Cobrin] has been at The Grand” or about events in February 2016. He said he was unsure where he had got the information from in his statement, but accepted it was hearsay.

*Mr Stainer*

49. Mr Michael Stainer referred to a brief witness statement dated 22 January 2019, which simply adopted Mr Moss's statement.
50. In examination in chief, Mr Stainer immediately volunteered he had helped Mr Moss compile his statement, which was a collaborative effort. Mr Stainer then explained the reasoning behind the user restrictions on short lettings in the leases. He accepted the flats were sub-let using documented licence agreements. There was a "rolling consent from the landlord" to grant these licences, and this had all been documented for the purposes of the mortgage companies. HMRC had been given these documents but appeared to have lost them. The Manager had not asked Mr Stainer for copies, although he had been asked for them by mortgage companies and the HMRC (which already had them). The sub-lettings were all for less than three months – a mix of holiday lets and people working locally for short periods.
51. Mr Stainer was cross-examined by Mr Cobrin. He stated he had paid some service charges, but no proper accounts had been produced. The licenses to sublet were given about 20 years before, but the records had been passed over to the HMRC about 2 years before.

*Mr Daggett*

52. Mr Julian Daggett is lessee of the Ilchester Suite and provided a witness statement dated 21 January 2020. He was available to give evidence remotely, apparently from the same room as Mr Stainer and Mr Moss. Unfortunately, there was considerable audio interference, apparently from other devices in the same room. It eventually proved impossible to hear Mr Daggett. The Tribunal therefore agreed with counsel that she could rely on Mr Daggett's written statement. The Tribunal indicated it would give it such weight as was appropriate considering the fact Mr Daggett had been unable to give 'live' evidence.
53. Mr Daggett stated that the premises were mixed use – part residential, and part 'hotel' with bars and function rooms. Indeed, the commercial facilities and operations had been one of the reasons his family had purchased his flat. Mr Daggett accepted the commercial activity "created a degree of background noise - deliveries, guests and visitors using facilities; jazz and classical music events; the excitement of a wedding". But so did residential activity such as "home deliveries, cabs, frequent coming and goings of carers, [and] refurbishment works being carried out on apartments". The apartment above had a holiday let, and in 9 years there had only been two occasions when he had needed to contact reception to ask for noise levels to be kept down. Conversely, the apartment above was residential for several years, but Mr Daggett and his family had had to put up with noise, parties etc. The antiques fair took place at the grand once a month. It had been running for over 20 years and was widely advertised. Residents used the fair and some even had stalls. The fair always used the north entrance access, and until 2016 it had enjoyed a good relationship with residents. There was no security risk caused by the fair, indeed two security staff were on site throughout the



event. As far as holiday lets were concerned, this appeared to be an attempt to extend the already “draconian” powers the Manager had over The Grand. He opposed extension of the Manager’s powers. The Third Respondent did not represent all the leaseholders. Indeed, Mr Daggett had been banned from membership.

*Mr Foley*

54. Mr Mark Foley is the owner of the Buckingham Suite. He provided a witness statement dated 2 January 2020 and attempted to give video evidence from the same room as Mr Moss and Mr Stainer. Audio interference again prevented this, and the Tribunal dealt with his evidence in the same way as Mr Daggett.
55. Mr Foley states that, as far as he was aware, at no time over the last 18 years had there been any disturbance caused by short term residential guests. Various family members had benefited from being able to stay in the holiday let apartments over the years, and he considered the Commercial Part, public events and hotel facilities contributed positively to the fabric of Folkestone. He also considered the abolition of commercial activity at The Grand would cause an additional security and maintenance cost. Mr Foley opposed any application to restrict short term holiday lets and public events at The Grand.

*Mr Bispham*

56. Mr Stephen Bispham is lessee of the Marlow Suite and provided a witness statement dated 21 January 2020. Regrettably, he was unable to give evidence remotely for the same reasons given above. The Tribunal nevertheless was able to consider the evidence in his statement.
57. Mr Bispham stated that the commercial concerns were responsible for guests renting their apartments and where those guests (on rare occasions) caused undue noise, the commercial concerns resolve the issued. He had never suffered inconvenience. Similarly, he had not experienced any problem with the antiques and craft fairs and, as a resident, he had always been warmly welcomed by the organisers. Visitors to the event used the shared entrance on the north side of the building, where the entry fee was collected. For many years, these arrangements worked well but there had more recently been problems between a small number of residents and the organisers.

*Evidence: conclusions*

58. Notwithstanding that this was a remote hearing, the Tribunal is satisfied it was able to make a proper assessment of the evidence of the witnesses, and that the parties were able fully to participate in the proceedings. The Tribunal considers it could deal with the remote and written evidence fairly and justly.

59. In general, the Tribunal accepts the witnesses who gave evidence orally did so carefully and that they were trying their best to tell the truth. The same general comment applies to the witnesses who gave their evidence solely by way of written statements. The various witnesses on each side were largely corroborated by others.
60. The main exception to this was Mr Moss, who the Tribunal did not find a particularly satisfactory witness. It was obvious from the face of his written statement that Mr Moss did not prepare the bulk of it himself (despite the statement of truth). Almost half the statement related to events which pre-dated his involvement in The Grand. Despite this, he was reluctant to admit the obvious inference that his statement was a collaborative effort with Mr Stainer – even though Mr Stainer himself volunteered the fact without any prompting at the very start of his own evidence. Worse still, Mr Moss’s answers to questions about co-operating with the Manager were evasive and failed to recognise the clear requirements of para 11 of the 2018 management order (to which a penal notice was attached). The Tribunal notes the 2018 Tribunal referred to findings that the First and Second Respondents had done “everything in their power to frustrate Mr Hammond in the performance of his duties under the [management] orders”: see 2018 decision at para 153. This Tribunal finds there has been a similar lack of co-operation by the First Respondent with the Manager in relation to consents since then, and Mr Moss’s responses to answers about his obligation to co-operate were wholly unsatisfactory. In short, the Tribunal cannot accept the evidence of fact given by Mr Moss, except where it is supported by documentary evidence. As to Mr Stainer, his evidence largely relied on Mr Moss’s statement. Although he gave evidence more confidently, his case generally suffered from the fact he adopted a statement by a witness who the Tribunal considers to be unreliable.
61. The Tribunal finds the following facts:
- (a) Since the 2018 order, there have been numerous short lettings or licences of the suites at the Grand that are controlled by the Second Respondents. These short lettings and licences include holiday lets (through Booking.com and other portals) and lettings or licences for commercial events (such as the School of Mediumship). This evidence was not disputed. On the evidence given by Ms Mooney, the lettings or licences were for periods of less than 3 months.
  - (b) Since 2018 the First Respondent has licenced numerous commercial activities such as antiques fairs in the Commercial Part. These events have frequently involved permitting members of the public to use the northern doorway and the passageway through the Residential Part. Once again, this is not really disputed. There was some evidence given about propping open and/or removal of doors and locks, but for present purposes, the Tribunal need not resolve that issue. Suffice it to say the First Respondent has asserted a purported right to allow others to use the passageway through the Residential Part, and on occasions it has taken active steps to keep the route open to members of the public attending events. Again, Mr Moss essentially accepts this.

- (c) Licenses have also been given to third party commercial operations to organise guided tours along the corridors and other common areas of the Residential Part. Although there was scant evidence about it, the Second Respondents' submissions proceed on the basis that they were the licensors. The objective of the tours is to enable members of the public to view the interior of The Grand for cultural purposes, rather than to enable them to use any of the flats for residential purposes.
- (d) The significant disputes of fact relate to the effect of the above activities.
- (e) There is a dispute about the effect of short-term lettings and commercial use of the flats owned or controlled by the Second Respondents. Plainly, as counsel submitted, this is a matter of fact and degree, Ms Shi, Ms Bliss, Ms Dudova and Ms Magnus-Lewinska (and Mr Cobrin) gave evidence there was excessive noise and disruption and a lack of security. Mr Moss, Mr Stainer, Mr Daggett, Mr Foley and Mr Bispham considered there was not. As counsel pointed out, there was no expert evidence of noise levels or disruption, and the evidence of nuisance was limited to three lessees and the Chair of the Third Respondent. The Tribunal has carefully listened to the witnesses and read the statements of those who were unable to give evidence by video link. But ultimately, it is satisfied there is real evidence that use of flats for short-term lettings has actually caused a nuisance and a feeling of insecurity to some leaseholders in the parts of the premises subject to the 2018 management order. The evidence of nuisance is not fanciful.
- (f) There was also some evidence about the effect of guided tours through the common parts, although the general thrust of the Second Respondents' case was the alleged problems with the tours were exaggerated. Nevertheless, the Tribunal accepts that regular commercial guided tours through the corridors and staircases of the Residential Part the premises inevitably cause some nuisance to leaseholders and interfere with security. Insofar as it is relevant to the application, the evidence of nuisance is not fanciful.
- (g) For similar reasons, use of the passageway and the north door by visitors to commercial events have caused a degree of nuisance to some of the leaseholders, although the extent of the disruption is in dispute. There is at least *prima facie* evidence of this. However, the Tribunal finds it is a necessary inference from the layout of the premises (as described to it) that public access to the corridor compromises the security of the Residential Part managed by the manager. It is perfectly reasonable to expect residential flats to have the corridors and internal common parts to have access to the street secured with lockable street doors. There was no dispute the passageway gave open access via the stairway to the flats above.
- (h) There was also evidence that the First Respondent gave consents to the Second Respondents permitting them to sub-let or licence of flats and/or permitted the public to use the passageway and north entrance. There is no documentary evidence to support the bare assertion that such consents and licences exist, and it may well be that a fuller investigation into the facts of the case would add to or

alter this evidence. But at this stage it is not fanciful to suggest that consents and licences have been given.

### **The Manager's case**

62. The Manager referred first to the debt situation. The 19 flats, which include the marital home and flats which were the subject of their bankruptcy proceedings owed £345,000, stemming from the decision of the FTT determined in March 2018 (CHI/29UL/LIS/2017/0049). The First Respondent's debt was in the order of £170,000. As a result of the £500,000 of debt, no major works had been undertaken, other than some initial fire prevention work. The condition of The Grand was far worse than in 2018. Approximately £225,000 worth of fire enforcement works were outstanding. Since 2018, not a penny had been paid by the First or Second Respondents. Meanwhile, the Second Respondents continued to rent out 18 flats on short lets through one of Mr Moss' businesses. As of September 2019, the advertised day rates for these flats amounted to £2,647. This suggested an annual income of over £250,000 per hundred days' occupancy from the flats alone.
63. The application was quite straightforward. Para 3(l) of the 2018 management order gave the manager the specific power "to carry out the obligations of the landlord "to grant consent" and this included "the right to revoke such consent previously granted by the landlord where it is reasonable and necessary for the proper performance of her functions under this Order and/or to secure the peaceable enjoyment of the flats by the Tenants or to remedy any breach of the covenants contained within the lease". The Manager suggested there were consents which she wished to revoke, and that revocation was necessary for the reasons given in para 3(l). She sought the power because she had been unable to get the First Respondent to end various breaches. These were (i) use of the 18 flats as short-term holiday lets and as a base for commercial activities (ii) paid guided tours of the areas which were under her sole control, and (iii) use of the residential entrance areas for commercial purposes. In the meantime, there had been a pattern of obstruction and obfuscation by the Mr Stainer, who had recently embarked on a second complaint to the RICS in an attempt to destroy her career.
64. There were First-tier Tribunal decisions confirming that short-term lettings were breaches of user covenants of a lease, including Nemcova v Fairfield Rents Ltd [2016] UKUT 303 (LC). The continuing use of the flats for short-term leases and other commercial purposes was in breach clause 4.5 and other provisions in the Lease. For example, the Ershamstar School of Mediumship paid a rent or licence fee of about £40,000pa. It had been suggested the First Respondent had consented to short-term lettings and commercial use, but there was no evidence of this. The manager had never seen a consent letter or piece of paper that gave confidence such consent was ever given. The First Defendant could not waive this kind of covenant. This was because there was a covenant by the landlord at clause 6.4 of the Lease that it would enforce the obligations in the leases of any other flat in the building. The Manager referred to Duval v 11-13 Randolph Crescent

Ltd [2018] EWCA Civ 2298, CA<sup>5</sup>, which suggested a lessor could not lawfully put it out of its power to perform an absolute covenant by licence or waiver if the Lease included a provision such as clause 4.5. The Manager sought the directions because she was struggling to deal with the constant nuisance and harassment of residents.

65. In closing the Manager submitted there was no “draconian” extension of the Tribunal’s powers. In fact, the leaseholders who gave evidence for the Second Respondents either lived on the south side of the property or were “weekend residents”. They did not experience the full problems with the matters complained about – and in any event some other residents on the south side of building supported the application. It was not “draconian” to limit special advantages granted to one leaseholder or to uphold the terms of the leases.

### **The Second Respondents’ case**

66. Counsel essentially made five points.
67. First, she submitted that the circumstances in which it might be appropriate to make an original s.24(1) management order which directly intervened in the relationship between a landlord and a third party (such as by granting the manager the power to terminate or grant a lease of such commercial premises) were likely to be exceptional<sup>6</sup>. In the light of this, the management order “was already a draconian order”, which exceptionally intervened in the relationship between the First Respondent and third parties, such as licensees and the Second Respondents. It would not be just and convenient to extend it any further.
68. Secondly, the evidence was not there to support the application. In particular, the evidence of nuisance was insufficient. This issue is addressed above.
69. Thirdly, there was no guarantee the directions would lead to the objectives which the Manager sought. The starting point was the terms of the Lease, and clauses 3.9, 4.5, 6.3 and 6.4:
- (1) None of the covenants expressly prohibited “commercial” use of the flats or any part of the premises. The only covenant against short-term lettings of any kind was at clause 3.9, which prohibited a letting of a flat for less than 3 months “without the previous consent of the landlord”. But the covenant must be construed against the background that the whole building was (historically) used in large part as a hotel, with commercial uses such as antiques fairs etc. This all pointed to “commercial” uses of the flats being permitted.
  - (2) It was unlikely the Manager would be able to rely on clause 3.9 to enforce covenants in the Second Respondents’ leases. The

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<sup>5</sup> Since the remote hearing, the Supreme Court delivered its long-awaited judgment in the appeal from that case, Duval v 11-13 Randolph Crescent Ltd [2020] UKSC 18. This upheld the Court of Appeal’s decision.

<sup>6</sup> Counsel referred to Woodfall at 28.084.

“reasonable steps” in clause 6.4 would not include issuing proceedings against the Second Respondents for breach of covenant – because the building was at all times in commercial use – indeed famously so.

- (3) As to use of the common parts, Para 1 of Pt.2 of Sch.3 to the Lease was permissive and gave use of the common parts to the Second Respondents and their “invitees”.
  - (4) As to the requirement to use as a “single private residence” in clause 4.5, it was necessary to consider the context of the grant of the lease, and the relationship between the lessor and the lessee and take account of the obligations entered into. It was necessary to determine the length of the period for which the property was sublet for the tribunal to determine whether the occupation was so transient that it could not be considered to be as a residence: see Nemcova. In construing the terms of a lease, the emphasis was on the meaning of the words used in their fact specific context. Given the context, the user as ‘holiday lets’ is not contrary to the terms of the lease.
  - (5) The second limb of clause 4.5 dealt with “nuisance disturbance injury annoyance” etc. The evidence did not support there being a “nuisance” as a matter of law. Counsel referred to the famous (though to modern ears, antiquated) observation of Thesiger L.J. in Sturges v Bridgman [1879] 11 Ch.D. 852 that “...what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey”. Given the context of a busy mixed used property, use of the flats could not amount to a “nuisance” under clause 4.5.
70. Fourthly, counsel submitted that less draconian remedies would be available other than permitting existing licenses and consents to be terminated. Action could be taken under the penal notice, or the management order could be varied under s.24(9).
71. Finally, counsel asked the Tribunal to take care with the levels of support for the proposed directions. It was clear from the witnesses who gave evidence that a substantial number of residents opposed the application and who were happy with the building’s use. There was potentially a low level of support for the application.

## **Determination**

72. As explained above, Pt.II of the 1987 Act is a “problem-solving jurisdiction”, and the “problem” the previous Tribunal identified in para 195 of its 2018 decision was that of “alleged breaches of covenants not to do with payment of monies”. The reference to “covenants” in para 195 was to breaches of covenants in the leases of the flats within the Residential Part of the Grand, rather than to any dispute or issue involving the First Respondent as freeholder.
73. The Tribunal considers the power to revoke consents in para 3(l)(iii) of the 2018 management order is not one of the primary “functions” of the manager under s.24(1) of the Act. This primary function is laid down by

the opening words of para 3(l) of the 2018 order, namely the “power and duty to carry out the obligations of the landlord contained in the Leases”. The power to “revoke consents” in para 3(l)(iii) can therefore properly be characterised as “incidental or ancillary” to the primary functions of the manager. One of the “incidental or ancillary” matters provided for in the 2018 order was that the Manager’s power to revoke existing consents was to be subject to “the direction of the Tribunal”. The Tribunal is therefore satisfied it has the power under s.24(4) to make directions with respect to the revocation of “consents previously granted by the landlord”.

74. In giving directions in respect of the matters in para 3(l)(iii) of the 2018 order, this Tribunal does not consider its role is to step into the shoes of the Manager and itself revoke any consent previously granted by the First Respondent. That is clear enough from the wording of the 2018 order and from para 195 of the 2018 decision. The 2018 order states any directions should relate to the “power to revoke” and “the manager’s power to take action”. The Tribunal’s control by way of directions is exercised (prospectively) over the manager’s power, not (retrospectively) over the decision itself.
75. It follows from the above that the Tribunal does not consider that when making directions permitting the Manager to exercise her powers to terminate existing consents, it must first be satisfied she is necessarily entitled to do so (whether legally or evidentially). No doubt, if the Tribunal gives directions permitting the Manager to exercise her power to revoke, and she exercised those powers, the licensee might seek to challenge the revocation in the County Court. At that stage, the further conditions in para 3(p)(iii) of the 2018 would be engaged. At that stage, a tribunal might be more concerned with the strength of the legal and evidential arguments about revocation before it permitted the Manager to incur legal costs. But the Manager is only in the very preliminary stages of a dispute about consents or breaches of covenant. In making its directions under para 3(l)(iii) at that preliminary stage, the Tribunal will principally be concerned with management issues, not legal ones. The Tribunal will need to be satisfied that the Manager is exercising powers which are legally open to her and has a real prospect of revoking the existing consents. But the test which would be applied would be akin to summary judgment under CPR 24. That approach is reinforced by the special circumstances of this case, where the Manager asserts that the First Respondent has withheld details of the relevant consents, and where it is therefore almost impossible for a court or tribunal to decide if the consents can properly be ended.
76. Turning to the relevant considerations, the application is for directions permitting the Manager to exercise her powers to revoke existing permissions and consents given by the First Respondent in three categories, broadly speaking (i) consents given to the Second Respondents to use flats for short-term ‘holiday lets’ and commercial events such as the School of Mediumship (ii) licenses to third parties to conduct guided tours through the Residential Part and (iii) permissions

granted to third parties to use the passageway leading to the north entrance through the Residential Part. The Tribunal will deal with each in turn.

### *Short-term licences of the Flats*

77. The Tribunal rejects the contention that terminating any existing consents given by the First Respondent to the Second Respondents would be an “extension” to what is already a draconian interference with the freeholder’s interest. As with any management order under Pt.II of the 1987 Act, the 2018 order was a significant fetter on the First Respondent’s legitimate right to deal with the freehold interest and grant consents to the occupiers of the leasehold flats. In that sense, it is true that the powers of the manager in para 3(l) of the order were exceptional (if not “draconian”). The legislation justifies this interference because s.24(2) requires a finding of ‘fault’ on the part of the landlord. But in any event, the 2018 management order has not been overturned on appeal, and there is no application to vary it. The sole question for this Tribunal is whether to give directions with respect to the exercise of the Manager’s functions in paras 3(l). Such directions cannot legitimately be described as an “extension” to those functions, since the evident statutory purpose is that the directions should give effect to the order and those functions. Indeed, the logical consequence of the Second Respondents’ argument is that no Tribunal should ever permit the Manager to revoke an existing consent - something which would be the very opposite of the Tribunal’s function under s.24(4), which is to give “directions with respect to” the “exercise” of the Manager’s express power to revoke set out in para 3(l) of the 2018 management order.
78. Further, it is a necessary corollary of the above that the Tribunal does not need to be satisfied it is “just and convenient” to make directions. That phrase is borrowed from the various grounds on which original management orders are made which appear in s.24(2). It is clear enough that the tests to be applied post-management order are not the same as the tests applied in making the original order: see Orchard Court. All the Tribunal is required to do is to consider any “relevant considerations”: see above. The distinction recognises that the functions of the Tribunal under s.24(4) is a different one. The function is no longer one of deciding matters in issue between the parties, but it is rather to give effect to a management order already made. The Tribunal has a wide discretion, and no doubt will seek to act fairly and justly between the parties, but its role in giving directions is essentially one of enforcement, not review.
79. The first consideration relates to the legal submissions made by the parties. The most important is whether the Lease permits revocation of the consents which the First Respondent has apparently granted in this case. Much discussion took place about the provisions in the Lease relating to alienation and user. Clause 3.9 is a qualified covenant against alienation. It prohibits short term lettings and licenses (whether residential, commercial, or otherwise), provided such arrangements amount to a letting of the whole flat or a parting with possession of the



whole flat. Clause 4.5 is an absolute user covenant, requiring use at all times as “a single private residence” and prohibiting nuisances. Broadly speaking, the First Respondent may properly consent to short term lettings and licences under clause 3.9. But it may not waive or permit use otherwise than as a “single private dwelling” or use which is a nuisance under clause 4.5: see clause 6.4 and Duval (*supra*). The Tribunal agrees with the Second Respondents that neither clause 3.9 nor clause 4.5 specifically prohibits “commercial” use. But, returning to para 3(l)(b) of the 2018 order, that is not the issue the Tribunal must deal with. The question is rather whether the Lease permits the Manager (exercising the functions of the landlord) to grant or withdraw consent to short-term lets. Such consents cannot be granted under clause 4.5 since this contains an absolute prohibition against certain uses. It follows the Tribunal need not deal with the interesting issues which arise about the meaning of clause 4.5, the Nemcova case and Duval. But clause 3.9 is clear enough. It is a qualified covenant which permits the landlord to grant consents for short-term lettings. Since the Manager is exercising these powers of the landlord, it follows the Manager has power to under clause 3.9 to deal with short-term lets in the Second Respondents’ flats.

80. A subsidiary question is whether any consents which have been given may properly be revoked. In dealing with this, the Tribunal was hampered by not having sight of the consents are alleged to have been given. Indeed, the Manager is evidently sceptical that written consents exist at all. But assuming (as the First and Second Respondents maintain) that permission was given by the landlord for short-term sub-lettings and licenses for events, the issue arises as to whether they are revocable. Suffice it to say there is at least *prima facie* evidence any consents which were previously granted are revocable, since the holiday lets and schools of mediumship etc. appear to involve a series of individual lettings/parting with possession which would each require an individual consent. The Second Respondents maintain that “rolling” consents were given, but it was not suggested they were irrevocable. On present evidence, the Tribunal is therefore satisfied the Manager has a reasonable prospect of being able to revoke any consents given under clause 3.9 of the Lease.
81. There is also the interesting legal argument about the effect of clause 6.4 of the Lease on the exercise of the Manager’s remedies. Clause 6.4 requires the landlord to take “reasonable steps” to enforce compliance with covenants, and the argument is that enforcement would not be a “reasonable step” in view of the mixed-use nature of the premises. But the Tribunal does not accept clause 6.4 is of any direct relevance. The provision is a covenant by a landlord to a tenant, and limits the landlord’s obligations to enforce covenants in the leases of other tenants. It does not limit the landlord’s ability to take action to protect its own interests as reversionary owner and its right to enforce the covenants in the Second Respondents’ leases is unaffected by the provision.
82. The second consideration concerns the very extensive evidence of nuisance etc. It was not explained by either party quite how this evidence

fitted into the making of directions under s.24(4). But it appears the broad question is whether there any real problem caused by short lets and commercial events in the flats which justifies any revocation of consents already given. It may well be that (legally) this issue could emerge as a potential question under s.19(1)(a) Landlord and Tenant Act 1927 or s.1 Landlord and Tenant Act 1988 (although none of the parties raised it quite that way). But since the parties placed a great deal of weight on this evidence, it is necessary to explain how the Tribunal approaches it.

83. The Tribunal discussed the standard of proof with counsel during the hearing, and it has already indicated above its conclusions on the evidence. In considering the evidence of nuisance etc., the Tribunal considers it is inappropriate to require the Manager to prove facts to the usual civil standard at this interlocutory stage. The witness evidence of fact may well be dealt with in a future claim in this Tribunal or a court, in such proceedings, a judge or tribunal might prefer the evidence of Mr Moss, Mr Stainer, Mr Daggett, Mr Foley and Mr Bispham to the evidence given by the witnesses for the Manager. But this is not a final trial of a nuisance claim in the court. At the stage of giving s.24(4) directions, the Tribunal considers it should require a standard of proof similar to that required by a court under CPR 24. Indeed, counsel did not demur from this suggestion at the hearing. In other words, is there some credible evidence that short-term lettings by the Second Respondents had caused nuisance and interference? On this basis, the Tribunal finds the Manager's evidence of fact, taken at its highest, could succeed. It is not an "unwinnable" argument that short-term lettings have interfered with the enjoyment of The Grand by other residents, and that the Manager is therefore justified in controlling them.
84. In the light of this evidence, the Tribunal is further satisfied that revocation of consents is "reasonable and necessary ... to secure the peaceable enjoyment of the flats by the Tenants", and the condition in para 3(l)(iii) is met.
85. The Tribunal next considers whether directions would further the objectives of the 2018 management order. It has no hesitation in saying they would. The control of sub-lettings and sub-licenses in leasehold properties is an important function of estate management. Paras 77 and 112 of the 2018 Tribunal decision indicated that it specifically had in mind short-term lettings and licences operating in the Second Respondents' flats and the difficulties such lettings could cause in terms of nuisance etc.
86. For these reasons, the Tribunal is satisfied that revocation of consents is "reasonable and necessary for the proper performance of [the Manager's] functions under the Management Order" under para 3(l)(iii) of the 2018 Management Order.
87. A fourth consideration is the evidence presented that the leaseholders are divided in their support for the application. Counsel rightly urged

caution about the degree of support, and the Tribunal is acutely aware this is not simply a voting exercise amongst leaseholders. But the Manager has received complaints of substance from a substantial number of leaseholders – even a majority of leaseholders – about the failure to exercise control of short-term holiday lets and commercial events in the Second Respondents’ flats. The Third Respondent is a statutory-recognised tenants’ association, and although its members cannot be expected to be unanimous in their support for its leadership, some weight needs to be given to the broad support it gave the application.

88. A fifth consideration is the conduct of the First and Second Respondents. One cannot avoid the fact that successive tribunals have made adverse findings about their conduct over the years. Indeed, some additional findings are made above in relation to the First Respondent. The Tribunal does not find the evidence of service charge arrears (and lack of enforcement of the charging covenants) and the repeated reference to other proceedings to be of direct relevance to this application, although it provides a useful backdrop. But it is certainly relevant that the First Respondent’s director does not recognise any obligation to provide copies of consents to the Manager.
89. A sixth consideration is that these are complex premises to manage, involving a mix of residential and other uses. There has been a lamentable history of litigation and disputes, including challenges to both Mr Hammond and the present Manager. Caution needs to be exercised before adding another front to the warfare at the Grand. But the Manager has already (unsuccessfully) asked for copies of written consents, and it is hard to see how the issue can be taken forward without making specific directions permitting revocation.
90. Seventhly, the Tribunal itself raised issues of proportionality. Consents to underletting are important management matters, but there are other equally and possibly more pressing issues at The Grand. There are significant arrears, outstanding major works, and a pending challenge to the Manager’s appointment. The withdrawal of consents will almost inevitably involve cost and probably legal expenses as well. Although the 2018 management order imposes some controls on legal costs under para 3(p) of the 2018 management order, the Tribunal would wish to ensure that any expenditure incurred on the issue of consents to underletting is proportionate to the issues involved. It deals with this issue below.
91. Finally, counsel submitted that less draconian remedies would be available other than permitting existing consents to be revoked. She suggested action could be taken under the penal notice, or the 2018 management order could be varied under s.24(9). There is no application for either of these before this Tribunal. In any event, it can hardly be said that directions permitting the revocation of consents would be less draconian than proceedings for contempt. In terms of variation of the order, the directions in clause 3(l) are clear and this Tribunal’s function is

to give directions to give effect to those provisions under s.24(2)(b) of the Act, not to vary them under s.24(9).

92. The Tribunal is ultimately satisfied that for all the above reasons, it would be appropriate to make directions under para 3(l) of the 2018 Order in relation to the revocation of consents to short-term lets etc. Such concerns that it has about proportionality can be dealt with by way of conditions. The Tribunal further intends to give directions to enable the Manager to assess the best possible evidence of the licences in question, by giving directions requiring the First and Second Respondents to provide copies of all previously granted consents to the Manager within a reasonable period of time.

### *Guided tours*

93. The Tribunal's general approach is dealt with at paras 77-78 above.
94. The guided tours raise different legal issues to the short-term flat lettings. This is because the main corridors, staircases and other common areas of the Residential Part are not demised to any lessee and they remain within the possession and control of the First Respondent. In theory, unless the leases say otherwise, the landlord has an exclusive right to licence anyone to use the common parts, including commercial guided tours. But since the 2018 management order plainly transfers these functions to the Manager, and it entitles her to end any permissions given by the First Respondent for the tours to use the common parts, the Tribunal is satisfied the Manager has the legal power to revoke any licences given to commercial tours to use the common parts.
95. The Second Respondents argued that any such licences were not revocable, because the Second Respondents permitted the tours to use the common areas. They argued the Second Respondents were entitled to do this under para 1 of Pt.2 of Sch.3 to the Lease, granted a right for "The Tenants and the Tenant's workmen servants and invitees ... to pass an repass over the use the "common passages stairs halls landings and lifts and other common spaces in or about the Building". But the Tribunal has no hesitation in rejecting this argument. The covenant specifically limits the class of "workmen servants and invitees" who may be permitted to use the common parts to persons using them "in connection with the use of the Property as a single private dwelling house". This is supported by the *ejusdem generis* principle, which tends to suggest the word "invitees" should be read as being in the same class of user as "workmen and servants". It is hard to see how independently operated commercial tours which went through the corridors, rather than through the flats, were "invitees" within the meaning of para 1 of Pt.2 of Sch.3 to the Lease.
96. It follows the Manager (as a matter of law) is entitled to revoke licenses given to third parties to use the common parts for commercial tours.

97. Paras 81-88 above effectively also apply to the guided tours. But for the sake of completeness, the Tribunal will summarise its conclusions in respect of the considerations other than the legal issues:
- (a) There is credible evidence the tours have caused a nuisance and interfered with privacy. Revocation of the licences is “reasonable and necessary ... to secure the peaceable enjoyment of the flats by the Tenants”, and the condition in para 3(l)(iii) is met.
  - (b) Control over commercial users of the corridors and common areas of the Residential Part would further the objectives of the 2018 management order. Revocation of the licences is “reasonable and necessary for the proper performance of [the Manager’s] functions under the Management Order” and the condition in para 3(l)(iii) is met on this basis as well.
  - (c) There are complaints of substance from a substantial number of leaseholders – even a majority of leaseholders – about the tours.
  - (d) The conduct of the Second Respondents is a material factor.
  - (e) It is hard to see how the matter can be taken forward without making specific directions permitting revocation of licences to tour operators.
  - (f) Some control over the amounts the Manager might incur in pursuing this issue is given by para 3(p) of the 2018 management order. Provided the Tribunal gives suitable further directions, it is proportionate to allow revocation of licences.
  - (g) Other remedies are not appropriate or proportionate.
98. For all the above reasons, the Tribunal is satisfied it would be appropriate to make directions under para 3(l) of the 2018 Order in relation to the revocation of licenses to tour groups to use the common parts.

### *The passageway*

99. The Tribunal’s general approach is dealt with at paras 77-78 above.
100. None of the parties specifically addressed the legal aspects of public use of the passageway to access events such as antique markets etc. This is perhaps surprising, since we were told this use was subject to separate proceedings in the courts. Nevertheless, the Tribunal is satisfied that licenses to use the passageway are covered by the same legal considerations which apply to the guided tours. The Tribunal need not repeat paras 91-92 above.
101. Paras 81-88 above apply to use of the passageway. But for the sake of completeness, the Tribunal will summarise its conclusions in respect of the considerations other than the legal issues:
- (a) There is credible evidence use of the passageway has caused a nuisance and interfered with privacy. Indeed, the Tribunal considers there has been a serious continuing interference with the security of the Residential Part. Revocation of the licences is “reasonable and necessary ... to secure the peaceable enjoyment of the flats by the Tenants”, and the condition in para 3(l)(iii) is met.

- (a) Control over the use of these areas furthers the objectives of the management order. Revocation of the licences is “reasonable and necessary for the proper performance of [the Manager’s] functions under the Management Order” and the condition in para 3(l)(iii) is met on this basis as well.
- (b) There are complaints of substance from a substantial number of leaseholders – even a majority of leaseholders – about this use.
- (c) The conduct of the First Respondent is a material factor.
- (d) It is hard to see how the matter can be taken forward without making specific directions permitting revocation of permission to use the passageway.
- (e) It is satisfied that revocation is proportionate. In particular, the commercial operations (such as the antique fairs) using the Ballroom and other areas of the Commercial Parts have sufficient alternative public access through the main doors on the western side of the building. Their operations would not be seriously affected. Some control over the amounts the Manager might incur in pursuing the issue is given by para 3(p) of the 2018 management order. Provided the Tribunal gives suitable further directions, it is proportionate to allow revocation of licences to use the accessway.
- (f) Other remedies are not appropriate or proportionate.

102. For all the above reasons, the Tribunal is satisfied it would be appropriate to make directions under para 3(l) of the 2018 Order in relation to the revocation of licenses relating to the use of the accessway through the Residential Part.

### **Directions and final observations**

103. The Tribunal gives directions in modified form to reflect the above findings. Given the precarious financial position of the service charge fund, it also intends to exercise some control over the costs incurred in relation to the revocation of consents and licences. Finally, given the uncertainty over the nature of the various licences involved, it makes a direction that the First and Second Respondents provide particulars of licences previously granted within a specified time.

104. The Directions are attached.

105. Finally, this decision is far longer than would ordinarily be necessary. This is partly because directions under para 24(4) are rare, and partly because of the difficult and litigious history of the premises. It also reflects the fact that the decision is made after hearing extensive witness evidence at a video hearing (which is believed to be the first in this Chamber of the Tribunal). In future, applications for directions under s.24(4) would generally be expected to be dealt with without a hearing and on the papers alone. These are routine technical matters relating to the performance of a manager’s functions under a management order. It is likely that in future, Tribunals will exercise case management powers to limit the scope of s.24(4) applications.

Dated 29 May 2020

Judge M. Loveday

## **Appeals**

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.



**CASE NO. CHI/29UL/LVM/2018/0001**

**AND**

**CASE NO. CHI/29UL/LAM/2019/0017**

**IN THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)**

**IN THE MATTER OF THE GRAND, THE LEAS, FOLKESTONE, KENT  
CT20 2LR**

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**DIRECTIONS UNDER s.24(4) LANDLORD AND TENANT ACT 1987**

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1. The Tribunal makes these directions under s.24(4)(b) Landlord and Tenant Act 1987, and pursuant to para 3(1)(iii) of the Management Order, as varied on 5 July 2018 (“the 2018 Management Order”).
2. The Manager is permitted to revoke consents and licences previously granted in the following categories:
  - (a) Consents to underlet or part with possession under clause 3.9 of the lease of any flat.
  - (b) Licences or permissions to third parties to use the corridors, staircases, lifts and other common areas of the Residential Part (as described in the 2018 Management Order) for the purposes of guided tours.
  - (c) Licences or permissions to third parties to use the “Residents’ Rear Entrance” marked on the plan attached to the 2018 Management Order and/or and corridors, staircase, lifts and other common areas within the Residential Part for the purposes of events in the Commercial Parts.
3. Hallam Estates Ltd, Mr Michael Stainer and Mrs Doris Stainer shall by 4.00pm on 26 June 2020 send to the Manager (by email or by post) particulars of all licences and consents previously granted in the above categories. If in writing, they should provide copies of those licences and consents (insofar as the same are within their possession or control). If oral (or if written copies are not within their possession or control) they should provide the Manager with details of:
  - (a) The time date and place the licences and/or consents were given;
  - (b) Identifying the persons who gave the licence and/or consent and the person who was given licence or consent
  - (c) Stating the period of duration of the consent, and
  - (d) Stating as fully a possible the terms of those licences or consents.
4. In connection with the revocation of consents, and/or enforcement of the same, the Manager may incur legal and other professional costs up to a

maximum of £5,000 (excluding VAT). Any costs in excess of this figure shall be subject to a further direction of the Tribunal under s.24(4) of the Act.

29 May 2020