



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

Case Reference : LON/00AG/LAM/2015/0015

Property : 27 Broomsleigh Street, London
NW6 1QQ

Applicant : Mrs Penny Louise Marshall

Representative : In person

Respondent : Mrs Anna Elizabeth Susan Mary
Gregory (1)
Mr David St John Gregory (2)
Mr P Galway-Cooper of Counsel

Representative : instructed by Lewis Nedas Law
Solicitors

Type of Application : Application by the Tribunal
appointed manager for further
directions

Tribunal Members : Judge N Hawkes
Mr W R Shaw FRICS

**Date and venue of
hearing** : 20th July 2017 at 10 Alfred Place,
London WC1E 7LR

Date of Decision : 3rd August 2017

DECISION

Decisions of the Tribunal

- (1) The Tribunal makes no order in respect of relief sought by the parties which does not form any part of the Manager's application.
- (2) The Tribunal does not vary the Management Order so as to enable the Manager to recover historic service charges.
- (3) The Tribunal makes no determination regarding the Manager's standing in any other potential proceedings.
- (4) The respondents' application for an order for costs against the Manager pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 is dismissed.

The application

1. By a Decision dated 11th April 2016, the Tribunal made a management order appointing a Ms Gillian Clyne as the Manager of the property.
2. The Management Order of 11th April 2016 was varied by a Decision dated 30th September 2016 which, in particular, substituted Ms Alison Mooney MIRPM AssocRICS of Westbury Residential Limited ("the Manager") as the Manager.
3. On 15th February 2017, the Manager indicated that she wished to apply to the Tribunal for further directions. Directions in respect of the Manager's application for further directions were given at an oral case management hearing which took place on 28th March 2017.

The background

4. The property which is the subject of this application is a mid-terrace, Victorian house which has been converted into two flats. The respondents are the freehold owners of the building.
5. The applicant is the leasehold owner of a flat which occupies the ground floor of the property ("the ground floor flat") and the first respondent is the leasehold owner of a flat which occupies the first and second floors of the property ("the first and second floor flat").

The issues

6. The Manager seeks:

- (i) A determination that paragraph 1.4 of the Schedule to the Management Order permits her to collect and/or take action to recover service charge arrears which pre-date the Management Order, alternatively, an extension of her powers in order to enable her to recover historic service charge arrears.
 - (ii) Clarification as to whether, by paragraph 1.4 of the Schedule to the Management Order, the Manager is permitted to take action against any defaulting lessee to enforce various covenants contained in the lease.
7. Further, the applicant seeks an extension of the duration of the Management Order and the respondents seek an order for its discharge on the basis that they will instruct a firm of managing agents to manage the property.

The hearing

8. The Manager attended the hearing, acting in person. The applicant also attended the hearing acting in person. The first respondent attended the hearing and the respondents were represented at the hearing by Mr Galaway-Cooper of Counsel, instructed by Mr Creasy of Lewis Nadas Law Solicitors, who was also present. The first respondent's partner attended the hearing but played no part in these proceedings.

The Determination

9. As stated above, the applicant seeks an extension of the management order and the respondents seek an order for its discharge on the basis that they will commit to instructing a particular firm of managing agents to manage the property.
10. Neither the applicant nor the respondents have issued any application for the relief sought and neither applicant nor the respondents raised the possibility of seeking such relief at the oral directions hearing in this matter, notwithstanding that they were present and/or represented at that hearing.
11. Accordingly, no issue fee has been paid by either the applicant or the respondents and Directions have not been given which are directed at the determination of either proposed application.
12. The Tribunal expressed the preliminary view that neither the applicant's proposed application nor the respondents' proposed application was before it and that, in all the circumstances, it would not be appropriate make a determination in respect of either party's

proposals. The parties did not seek to persuade the Tribunal otherwise. The Tribunal therefore makes no determination in respect of either matter.

13. The Manager sought a determination that paragraph 1.4 of the Schedule to the Management Order permits her to take action to recover historic service charges which pre-date the Management Order, alternatively a variation of the Management Order to permit her to do so.
14. Under the terms of the Management Order, the Manager was appointed from the date of the order until 28 September 2019 and the respondents had 28 days from the date of the order in which to transfer all accounts books, records, survey reports and funds to the Manager.
15. Paragraph 1.4 of the Schedule to the Management Order provides:

“The Manager shall be entitled to take such action and Court or Tribunal proceedings as may be necessary to collect the service charges or rent arrears and to take such action in the Courts or Tribunals as may be necessary or desirable to secure compliance with the Lessees’ obligation under the Leases relating to the flats in the Property.”
16. The Tribunal expressed the preliminary view that it would not be appropriate to vary the Management Order so as to provide that the Manager may recover historic service charges when the current service charges should be sufficient to cover the current expenditure.
17. Neither the Manager nor the parties sought to persuade the Tribunal otherwise. Accordingly, the Tribunal does not vary the Management Order so as to enable the Manager to recover historic service charges.
18. The Manager sought a direction that paragraph 1.4 of the Schedule to the Management Order permits her to take action in respect of various alleged breaches of covenant. The Tribunal expressed the preliminary view that it is for the Manager to seek her own independent legal advice as to the legal action, if any, which she is able to take. If an application is made to a Tribunal or Court and an issue arises in relation to the Manager’s standing and/or the Court or Tribunal’s jurisdiction, it will be for the Court or Tribunal which is hearing the matter to determine the issues of standing and/or jurisdiction.
19. Neither the Manager nor the parties sought to persuade the Tribunal otherwise. Accordingly, the Tribunal makes no determination in respect of the request for a determination as to whether the manager has standing to enforce the various covenants in other proceedings.

20. The Tribunal records that, following a short adjournment to enable discussions to take place, the parties and the Manager have agreed that save that for (i) an immediate payment to the Manager in the sum £200 from the applicant and in the sum of £150 from the first respondent to create a contingency fund for minor matters and (ii) an immediate payment in the sum of £360 from the applicant and in the sum of £360 from the first respondent to cover the Managers' fees, the parties will pay other sums due under the lease as and when required to do so by the Manager. The Manager confirmed to the Tribunal that she is now in a position to proceed with her Management Plan.

The respondents' application for an order for costs against the manager pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

21. At the conclusion of the hearing, the respondents applied for an order for costs against the Manager pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("Rule 13") on the grounds that the Manager acted unreasonably in pursuing her application to the Tribunal for further directions.

22. Rule 13(1)(b) provides:

13.—(1) The Tribunal may make an order in respect of costs only—

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

(i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case

23. The respondents provided the Tribunal with a Schedule of Costs which totalled £9,300 and sought to recover the sum of £9,300, alternatively, such sum as the Tribunal considered, appropriate from the Manager. The respondents submitted that the Manager's application was wholly misconceived.

24. The Tribunal provided the Manager and the respondents with a copy of Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC) and considered paragraphs [23] to [32] during the course of the hearing.

25. The Tribunal notes, in particular, that at [24] to [26], the Upper Tribunal stated:

“... An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in *Ridehalgh v Horsefield* at 232E, despite the slightly different context. “Unreasonable” conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham’s “acid test”: is there a reasonable explanation for the conduct complained of?”

It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the examples he gave would justify the making of an order under r.13(1)(b). For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent’s case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable.

We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event...”

26. We do not accept the submission that the Manager’s application was “wholly misconceived”. The Tribunal has the power to vary the Management Order and we consider that it would have potentially been within the Tribunal’s power to vary the Management Order so as to enable the Manager to recover historic service charges. In our view, the Manager was not requesting, as submitted by the respondents, that an account be carried out by the Tribunal but rather she was seeking an extension of her powers in order to enable her to recover any historic service charges.
27. On hearing the Tribunal’s preliminary view, the Manager reassessed her prospects of success and decided not to press this point. The Tribunal then found against the Manager on this issue. However, it does not follow from the fact that the Manager was unsuccessful that her application was “wholly misconceived.” We note that no party applied for the Manager’s application to be struck out in advance of the hearing.

28. Further, the Manager's conduct in bringing this application was not "vexatious" and/or "designed to harass the other side rather than advance the resolution of the case". We have no doubt whatsoever that there is a reasonable explanation for the Manager's conduct in bringing this application, namely, that the Manager (who is not legally qualified) wished to facilitate her management of the property and to ensure that she was acting appropriately and that she was not exceeding her powers. Accordingly, Sir Thomas Bingham's "acid test": "is there a reasonable explanation for the conduct complained of?" is met.
29. In addition, we note that both of the parties have sought to raise significant matters which they did not ultimately pursue at the hearing (namely, the proposed extension of and discharge of the Management Order). Unlike the parties who did not seek to raise either matter formally with the Tribunal in advance of the final hearing, the Manager, very properly, sought Directions from the Tribunal on 28th March 2017 for her application to be progressed and listed.
30. It is apparent from the documents contained in the hearing bundle that the Manager has spent a substantial amount of her time considering the respondents' case that the Management Order should be discharged, as part of her preparation for the hearing. The Tribunal is in no doubt that the Manager did not act unreasonably. Further, it would not, in the circumstances, have exercised its discretion to make an order for costs in favour of the respondents pursuant to Rule 13 in any event.

Judge N Hawkes

3rd August 2017

Appendix of relevant legislation

Landlord and Tenant Act 1987

Section 24

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.

(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

...

(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;

(aba) where the tribunal is satisfied—

(i) that unreasonable variable administration 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).

(2B) In subsection (2)(aba) “variable administration charge” has the meaning given by paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

(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 2002 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) The appropriate 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 2002, the tribunal may by order direct that the entry shall be cancelled.

(9A) The tribunal 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 the appropriate 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, improvement or insurance of those premises.