



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

Case Reference : LON/00AM/LVM/2015/0016

Property : 89 Downs Park Road, London E5
8JE

Applicants : Mr D Lloyd (leaseholder and joint
freeholder), Ms L Clegg
(leaseholder and joint freeholder),
Ms A Sheriff (leaseholder and joint
freeholder) and Mr M Fiori
(leaseholder)

Representative : Mr Lloyd in person

Respondents : Mr S Wainwright of J Peiser
Wainwright (existing manager) and
Ms H Martyn (leaseholder)

Representatives : Mr S Wainwright and Ms H Martyn
in person

Type of Application : For the determination of an
application for the discharge of the
existing manager and the
appointment of a new manager

Tribunal Members : Judge P Korn (chairman)
Mr C Gowman MCIEH MCMI

**Date and venue of
Hearing** : 6th January 2016 at 10 Alfred Place,
London WC1E 7LR

Date of Decision : 22nd January 2016

DECISION

Decisions of the Tribunal

- (1) The application to discharge the existing manager and the application to appoint Mr David Yates as a new manager are both refused. Mr Simon Wainwright therefore continues as manager of the Property under the terms of the existing appointment.
- (2) Mr Wainwright's cost application is refused.

The application

1. Mr Lloyd, one of the Applicants, originally applied to the Tribunal simply seeking the discharge of the existing manager of the Property, Mr Simon Wainwright of J Peiser Wainwright, pursuant to section 24(9) of the Landlord and Tenant Act 1987 ("**the 1987 Act**"). Mr Wainwright was appointed as manager of the Property on 28th April 2014 by a differently constituted tribunal. The hearing of the application to discharge the current manager was set down for 6th January 2016.
2. On 23rd December 2015 Mr Lloyd applied for permission to amend his application so as to turn it into an application for the appointment of Mr David Yates of Hurford Salvi Carr as new manager in addition to the discharge of Mr Wainwright. The other Applicants then wrote to the Tribunal between 29th December 2015 and 5th January 2016 (the day before the hearing) in support of the application. The Tribunal's case officer wrote to Mr Lloyd stating that Mr Yates would need to attend the hearing in order to be questioned by the Tribunal and by the Respondents regarding his experience and suitability as an alternative manager, but Mr Yates was unable to attend due to a prior commitment.
3. Ms Martyn, one of the leaseholders, is opposing the application.
4. The Property comprises a Victorian house converted into four separate flats.

Applicants' case

5. The Applicants' position is that Mr Wainwright has not been a competent manager. He has failed to perform repairs and maintenance in a timely manner, failed to reply to emails and requests for information in a timely manner, failed adequately to supervise contractors, failed to bill correctly and treated the instruction as "pro bono" work.
6. The hearing bundle contains some copy photographs of damaged parts of the Property in support of the application. There are also copies of emails which the Applicants state were not replied to. In addition there are details of an incident in which a firm was called in by the manager to fix certain drains but the firm in question did not (in the Applicants' submission) have the competence to carry out the task competently and in any event should have known that the matter would have been handled free of charge by Thames Water.

7. At the hearing Mr Lloyd said that it was generally difficult to get hold of the manager and that he had done very little to remedy the various problems at the Property. He also felt that J Peiser Wainwright as a firm was more suited to dealing with large blocks and he wanted a manager who was used to dealing with small blocks.

Mr Wainwright's response

8. In his written statement Mr Wainwright states that he has encountered resistance from, and difficulties with, Mr Lloyd since he was appointed manager in 2014 and that Mr Lloyd is in arrears with his service charge payments. The statement also lists details of works carried out during the 12 months prior to the hearing and addresses the specific complaints raised in the application.
9. At the hearing Mr Wainwright said that the service charge provisions in the leases were seriously defective, and this point was acknowledged by the Applicants. As manager he has had to establish what the priorities are, and in the first year he addressed fundamental issues such as putting in place comprehensive building insurance and dealing with health and safety issues such as failed wiring and the absence of emergency lighting and an alarm system.
10. As regards his firm's ability to deal with small blocks, he said that it does have some small blocks within its portfolio. He is near enough to the Property to be able to reach it within 25 minutes. In acknowledgement of the fact that it is a small block and that the leaseholders want their service charges to be kept as low as reasonably possible, he has been charging a relatively low management fee and has tried where possible to use contractors whose turnover is below the VAT threshold so that leaseholders do not have to pay VAT.
11. Mr Wainwright added that he conducted a building survey in May 2015 and has put together a 10 year planned maintenance programme. In September 2015 he began a Section 20 consultation process in respect of planned major works. The reason for the delay in relation to these works was that Mr Lloyd had been excavating his garden and this had delayed the putting up of scaffolding. In his view it was best to carry out all works at the same time so as not to duplicate scaffolding costs.
12. Regarding the complaint that he has been difficult to get hold of and has not responded to emails, Mr Wainwright said that the Applicants had raised a lot of detailed issues and had sent him a large number of emails and that it was simply not practical to debate and discuss every single item with leaseholders.
13. Ms Derby, Mr Wainwright's assistant, has visited the Property several times.

Ms Martyn's response

14. In her written statement Ms Martyn states that she disagrees with the application to discharge the existing manager. Parts of her statement have been superseded by the recent amendment to the application to include a request for the

appointment of a new manager, but parts remain relevant. She considers that to remove the existing manager because of complaints which are mostly about cost would be disproportionate, particularly as procedures exist for dispute resolution.

15. At the hearing she said that she was happy with the existing manager. Whilst she would have preferred things to have been dealt with more quickly, they were being dealt with now and she wanted Mr Wainwright to be allowed to follow things through. The proposed alternative manager seemed to her to be more expensive, and also he had not seen the leases and might well have second thoughts when he did see them.

Further exchange of comments

16. Mr Lloyd said that two key pieces of maintenance had not been done. The flashing on the flat roof had not been attended to, causing water ingress in the storeroom, and there was also a crack in the coping which was allowing water to get into the brickwork.
17. Mr Wainwright disagreed with Mr Lloyd's analysis on both of the above issues, and he reiterated the point that in his view (in the absence of emergencies) it would be best to carry out all works together in order to save on scaffolding costs. In addition, as the Section 20 threshold was quite low it would probably be necessary to go through more than one consultation process if the works were split, which again would increase costs.

Tribunal's analysis

18. Under sub-section 24(9) of the 1987 Act "*A tribunal may, on the application of any party interested, vary or discharge (whether conditionally or unconditionally) an order made under this section ...*". Under sub-section 24(9)(A) "*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*".
19. As explained at the hearing, as regards the proposed appointment of Mr Yates it is not realistic to expect a tribunal to appoint someone as manager of a property without first having met that person and having had an opportunity to ask questions about that person's experience, approach and understanding of the issues involved in managing the property in question. Similarly, anyone opposing the application also needs to be afforded the opportunity to ask questions. Whilst this was not his fault, as it was due to the late notice given to him by the Applicants, Mr Yates (the Applicants' proposed manager) was unavailable to attend the hearing.
20. In principle there are circumstances in which it would be reasonable to ensure that the hearing was held on a date which was convenient for the proposed manager. However, in this case the application initially was simply for the discharge of the existing manager. A hearing date was set and the process was

continuing on the basis that the application was simply for the discharge of the existing manager. At a very late stage the nature of the application changed, and we do not consider that it would have been appropriate at that very late stage to postpone the hearing.

21. In any event, not only was the proposed manager not present at the hearing but we have also received very little information in respect of the proposed manager himself and as to what he would actually do. The proposed manager has produced no draft management order, no management plan and no details of his professional indemnity insurance.
22. For the above reasons alone we do not consider that it would be appropriate to appoint Mr Yates as manager to replace Mr Wainwright as manager even if we were to agree that it would in principle be appropriate to discharge Mr Wainwright.
23. For the sake of completeness it is noted that there was a debate between the parties at the hearing as to which of Mr Wainwright and Mr Yates offered a more competitive service, but the evidence was inconclusive. However, even if it is the case that Mr Yates' charges are slightly lower this would not by itself be a sufficient reason for us to discharge Mr Wainwright and appoint Mr Yates.
24. Mr Lloyd made it clear at the hearing that the Applicants were in agreement that the existing manager should be discharged only on condition that Mr Yates is appointed to replace him. Therefore, as we are not satisfied that Mr Yates should be appointed it follows for this reason alone that Mr Wainwright should not be discharged.
25. However, we consider it appropriate also to consider the merits of the application to discharge Mr Wainwright. In this regard we note the points made by the Applicants as further explained by Mr Lloyd at the hearing and we also note the response of Mr Wainwright himself and of Ms Martyn. Having considered the evidence, we prefer the analysis of Mr Wainwright and Ms Martyn to that of the Applicants. We note the problems with the service charge provisions contained in the leases and we accept Mr Wainwright's submission that he has prioritised insurance and health and safety issues and we consider that he was right to do so. We accept that it makes sense to carry out all non-urgent repairs as one job and that part of the delay in organising the works was caused by Mr Lloyd's own work to his garden. In relation to the flashing on the flat roof and the crack in the coping, we are more persuaded by Mr Wainwright's view than by Mr Lloyd's view as – whilst Mr Lloyd has some experience and knowledge of property issues – Mr Wainwright is professionally qualified to offer a view. Ms Derby has visited the Property several times.
26. We accept that Mr Wainwright has probably not been a perfect manager. It is possible that he could have commenced the consultation process for the works earlier than he has done so and the drain issue seems to have been poorly supervised. By his own admission he has not always responded to emails, although his comment that that it was simply not practical to debate and discuss every single item with leaseholders provides some context for this.

27. It is a fairly draconian step to appoint a manager, and likewise it is fairly draconian to discharge a manager who wishes to continue (as Mr Wainwright does). To discharge a manager in these circumstances would indicate that he had been inadequate and this could have implications for his professional reputation. In this case we are not at all persuaded that it would be appropriate to discharge Mr Wainwright. He has not been perfect but we are not at all persuaded that he has been inadequate, and in any event there is no plausible alternative proposal before us.
28. Following the language of sub-sections 24(9) and 24(9)(A) of the 1987 Act, we are not satisfied that a discharge of the order would not result in a recurrence of the circumstances which led to the order being made, and we are also not satisfied that it would be just and convenient in all the circumstances of the case to discharge the order

Cost applications

29. Mr Wainwright has applied for an order under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that the Applicants reimburse his costs incurred in connection with these proceedings. Such an order can only be made if the Applicants have “acted unreasonably in bringing ... or conducting proceedings”.
30. In the case of *Ridehalgh v Horsfield* (1994) 3 All ER 848 Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct admits of a reasonable explanation. This formulation was adopted by the Upper Tribunal (Lands Chamber) in the case of *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd* LRX 130 2007. Costs are therefore not to be routinely awarded pursuant to a provision such as Rule 13(1)(b) merely because one party's conduct is imperfect and/or because that party has lost the case.
31. The Applicants have not been successful and in our view they did not properly think through the implications of amending their application at such a late stage. However, they are not legally represented and we accept that their concerns about the management of the Property are genuine. In addition, whilst we consider that the existing manager has performed adequately we do not consider the Applicants' concerns to be groundless or irrational. Therefore we do not consider that their conduct has been unreasonable in the sense contemplated by Sir Thomas Bingham MR in *Ridehalgh v Horsfield* and accordingly we decline to make an order under Rule 13(1)(b) that the Applicants reimburse all or part of Mr Wainwright's costs incurred in connection with these proceedings.
32. There are no other cost applications.

Name: Judge P Korn

Date: 22nd January 2016

RIGHTS OF APPEAL

- A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
- B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
- C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.