FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LAM/2018/0018**
Property	**:**	**16 Electric Avenue, Brixton, London SW9 8JX**
Applicants	**:**	**Mr T Nordanstad (of 16a) and Ms K Christiansen (of 16b)**
Representative	**:**	**Mr C Last of Leasehold Law LLP at original hearing and first reconvene and Mr Mertens of Counsel at second reconvene**
Respondent	**:**	**Milegate Limited**
Representative	**:**	**Mr Glover of Counsel at first and second reconvenes (not present or represented at original hearing)**
Type of application	**:**	**Appointment of Manager**
Tribunal members	**:**	**Judge P Korn** **Mr P Roberts DipArch RIBA**
Haring Date and Venue	**:**	**21st February 2019 (original hearing), 21st March 2019 (first reconvene) and 20th May 2019 (second reconvene) all at 10 Alfred Place, London WC1E 7LR**
Deadline for oral submissions on costs	**:**	**5th June 2019**
Date of decision	**:**	**21st June 2019**

DECISION

Decision

1. The Tribunal declines to make an order appointing a manager over the Property.

2. The Respondent's cost application (in connection with the adjournment of the hearing on 21st March 2019) is refused.

Background

3. On 27th June 2018 the Applicants made an application to the Tribunal for the appointment of a manager in relation to the Property under section 24 of the Landlord and Tenant Act 1987 ("**the Act**"). A preliminary notice under section 22 of the Act had been served on the Respondent on 12th April 2018.

4. The application did not specify any details of the proposed appointee, and this was pointed out to the Applicants. Subsequently the Applicants notified the Tribunal and the Respondent that they wanted the Tribunal to appoint Mr Murray John of Murray John Architects.

5. The Property comprises two residential flats and commercial premises below.

The original hearing

6. The Applicants attended the original hearing on 21st February 2019 and they were represented by Mr C Last of Leasehold Law LLP. The Respondent was not represented at the original hearing and nobody from the Respondent company was present. The Respondent had also not offered any written submissions prior to the hearing.

7. Mr Last made oral submissions at the hearing and we also considered the Applicants' written submissions. On the basis of those submissions, none of which had been challenged by or on behalf of the Respondent, we were satisfied that in principle it would be appropriate to appoint a manager over the Property. The Applicants had identified some significant problems which, on the basis of the evidence before us, were not being properly dealt with. It seemed – in principle at least – that appointing a competent manager would be a course of action which would be just and convenient in all the circumstances.

8. However, the Applicants' proposed manager, Mr John, did not attend the hearing. Mr Last said that there had been a mix-up in relation to dates, but we explained that it was inappropriate for us to appoint a manager without first meeting and having an opportunity to cross-examine that person and to gauge that person's suitability for the role. The fact that it seemed appropriate in principle to appoint a manager did not mean that it was necessarily right to appoint the person chosen by the Applicants.

9. In the course of the original hearing there was also some discussion of Mr John's qualifications and of the role that he would be expected to play. Mr John was an architect who specialised in heritage issues and it emerged that the Applicants did not necessarily envisage him taking on the role of generally managing the Property. In response, we invited the Applicants to consider carefully whether Mr John was necessarily suited to the role of manager. Following the original hearing we issued further directions confirming our 'in principle' decision but requesting further information in relation to the proposed manager's suitability and fee structure and setting a further hearing date (the first reconvene) to enable us to assess Mr John's suitability.

The first reconvene

10. The first reconvene was again attended by the Applicants and by Mr Last, but this time the Respondent was represented by Mr Glover of Counsel. The Applicants were accompanied by Mr John and also by a Mr Vitalis.

11. Mr Last for the Applicants addressed the Tribunal and explained that the intention was now for Mr John and Mr Vitalis both to be managers of the Property, this being due to the concern that Mr John would not be capable of fulfilling the duties of a manager on his own. Mr Glover for the Respondent objected that the Applicants had only advised the Respondent at a very late stage of their intention to seek the appointment of Mr Vitalis (jointly with Mr John) and that the Respondent had therefore not been afforded an opportunity to consider Mr Vitalis' suitability and to take advice.

12. Mr Glover also argued that there was a potential problem with the Applicants' proposals in relation to the commercial premises, as the commercial tenant had not been given notice of these.

13. We agreed with Mr Glover on the above points. Whilst it was true that the Respondent had not engaged initially, this was an application to take away the Respondent's power to manage its own building and the Respondent was now belatedly engaging with the process. The Applicants had given the Respondent almost no notice of a material change of approach, for reasons that they could not adequately explain, and this had not left the Respondent with enough time to take proper advice and to provide a considered response. We also accepted the validity of the concern that had been expressed regarding the failure to engage with the commercial tenant.

14. In addition, in our view the proposal that Mr John and Mr Vitalis be appointed as joint managers was misconceived and unworkable, as there needed to be a single person with the powers required to do the job and with responsibilities accompanying those powers such that the person concerned could properly be held to account.

15. For all of the above reasons we therefore concluded that it was premature to consider the suitability of Mr Vitalis as a manager at that

first reconvene and that, in any event, the Applicants needed to choose a single person (whether Mr John, Mr Vitalis or someone else) to put forward as the proposed manager. In addition, it was appropriate for the commercial tenant to be given an opportunity to comment on the extent of the proposed management order and on the proposed management arrangements generally.

16. Mr Glover invited us simply to dismiss the application at this stage, but we considered that this would be unfair on the Applicants. Whilst it was true that the Applicants had failed to prepare properly for both the original hearing and the first reconvene, it was also the case that the Respondent had not engaged with the process at all up to and including the original hearing. It was therefore, in our view, appropriate in the circumstances to allow the Applicants a further opportunity.

17. Accordingly, following the first reconvene we issued yet further directions requiring the Applicants to clarify who they were seeking to have appointed as manager and on what terms, and to provide further information on the proposed manager (unless the proposed manager was to be Mr John), and to write to the commercial tenant. The directions also required the Respondent to comment on the further information to be provided by the Applicants. A further hearing date (the second reconvene) was also set.

The second reconvene

18. At the second reconvene it became clear that the Applicants were now putting Mr Vitalis forward as their sole proposed manager.

19. Mr Glover and the Tribunal put various questions to Mr Vitalis in connection with his fitness or otherwise to be appointed as manager. In the light of his answers, and as stated at that second reconvene, we did not consider Mr Vitalis to be a suitable manager. He showed a very poor understanding of residential property management – for example, he did not know what a section 20 consultation was, did not know what the service charge residential management code was, had no experience of managing leaseholders (as distinct from managing short lets) and did not realise that his role would involve dealing with the service charge and with leaseholders.

20. Having established that we would not be appointing Mr Vitalis as manager of the Property we invited the parties' representatives to make oral submissions as to what they considered should happen next.

21. After taking instructions, Mr Mertens for the Applicants applied for a stay of 21 days to enable the parties to try to reach a compromise or to enable the Applicants to propose an alternative manager, the short timeframe being linked to a time-limited opportunity to secure a grant towards the cost of certain works. He argued that the Tribunal had already recognised that there were management problems and that there was a need in principle to appoint a manager. History suggested

that the Respondent would be unresponsive to the need to tackle the building issues.

22. Mr Glover for the Respondent submitted that the Tribunal should instead now dismiss the application in its entirety, and the Tribunal agreed with him. We had given the Applicants a second chance after they had failed to bring the proposed manager to the original hearing, despite our reservations as to whether he was the right person for the job. As noted above, the Respondent had failed to engage with the process and it was entirely appropriate, in our view, to give the Applicants a second chance in view of the concerns expressed about the state of the building. Then, after the Applicants had failed to give adequate notice of their choice of Mr Vitalis as one of two joint managers such that it was not appropriate to proceed any further at the first reconvene, we were prepared – albeit with slightly more reluctance – to allow the Applicants a third chance, despite the existence of other failings as well.

23. However, to give the Applicants a fourth chance is in our view not appropriate in the circumstances. Whilst Mr Vitalis came across pleasantly and whilst we have no reason to doubt that he is good at what he actually does specialise in, it was obvious from a few basic questions that he was unsuited to being a property manager dealing with residential leaseholders, service charges, and potential disputes between the leaseholders and their landlord. By this stage of the process, having been given several chances to get their application and their case in order, the Applicants should have been in a position to present a robust case as to why the Tribunal should appoint their chosen person as manager of the Property, and yet they were unable to do so.

24. There is no particular basis for the Tribunal to conclude that the Applicants would necessarily present a stronger case if given yet another chance, but in any event we have to consider the overriding objective under paragraph 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the Tribunal Rules**"), namely to deal with cases fairly and justly. This involves weighing up various factors, including proportionality and the respective resources of the parties and the Tribunal. In our judgment, it is not proportionate to allow further tribunal time and resources to be taken up with a further reconvene in these circumstances and nor is it fair on the Respondent who – after initially failing to engage with the process – has already instructed Counsel to attend two hearings and has also incurred other costs.

25. In addition, the Respondent's belated decision to instruct Counsel in connection with these proceedings, coupled with some of the comments made by Counsel on the Respondent's behalf during the course of these proceedings, offers some grounds for optimism regarding the Respondent's future willingness properly to engage with the management of the Property.

26. Therefore, we decline to make an order to appoint a manager and accordingly this application is now dismissed.

Costs

27. The Respondent has made a cost application and in support of the application has made written submissions dated 19th May 2019. Mr Glover also made oral submissions at the second reconvene. The written submissions do not specify the precise statutory or other legal basis for this cost application but, as the Respondent has argued in its written submissions that the single issue is whether the Applicants acted unreasonably in their conduct that precipitated the adjournment of the hearing on 21st March 2019, a reasonable inference would be that the application had been made pursuant to paragraph 13(1)(b) of the Tribunal Rules ("**Rule 13(1)(b)**"). However, at the hearing Mr Glover appeared initially to treat the application as solely being an application for wasted costs pursuant to paragraph 13(1)**(a)** of the Tribunal Rules ("**Rule 13(1)(a)**") but then went on to argue it as an application under either Rule 13(1)(a) or Rule 13(1)(b).

Rule 13(1)(a)

28. Rule 13(1)(a) enables a tribunal to make an order in respect of costs *"under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs"*. Whilst neither Counsel brought any legal authority on the point, they were in agreement that the basic test for a wasted cost order against the Applicants' legal representatives was whether those legal representatives had acted negligently. The Respondent's written submissions in fact focus on the conduct of the Applicants themselves, not their legal representatives, and they will be referred to below in the context of Rule 13(1)(b). As for the Respondent's oral submissions, the only comment made on the conduct of the Applicants' legal representatives was the submission that it was reprehensible for the Applicants' solicitor to have given Mr Vitalis' details to the Respondent at such a late stage. It was also stated that there was no evidence that the solicitor's failings in this regard were as a result of his having received instructions to cause a delay.

29. We do not accept that the Respondent has made its case in relation to Rule 13(1)(a). The Respondent has only pointed to one instance of alleged negligence on the part of the Applicants' solicitor and we do not accept that it is for the Applicants or their solicitor to prove that he was acting on instructions in order to avoid a finding of negligence. Furthermore, as noted by Counsel for the Applicants, the Respondent has failed to show a causal link between the solicitor's alleged negligence and the incurring of extra costs on the part of the Respondent.

Rule 13(1)(b)

30. Rule 13(1)(b) enables a tribunal to make an order in respect of costs *"if a person has acted unreasonably in bringing, defending or conducting proceedings in … a leasehold case"*.

31. In its written submissions the Respondent has listed what it describes as the Applicants' fundamental conduct failings, including making substantial changes to the draft management order, only advising the Respondent at the last moment that they were proposing a new manager, not providing certain standard information in relation to Mr Vitalis, and failing to give notice of the proposed management order to the commercial tenant.

32. In *Ridehalgh v Horsfield* Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct permits of a reasonable explanation. This formulation was adopted by the Upper Tribunal in the case of *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd LRX/130/2007* and in the case of *Willow Court Management (1985) Ltd v Alexander (2016) UKUT 0290 (LC)*. One principle which emerges from these cases is that costs are not to be routinely awarded pursuant to a provision such as Rule 13(1)(b) merely because there is some evidence of imperfect conduct at some stage of the proceedings.

33. Sir Thomas Bingham also said that unreasonable conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case, and he added that conduct could not be described as unreasonable simply because it led to an unsuccessful result.

34. In our view, the Applicants conducted their case incompetently, but their conduct did not constitute unreasonable conduct for the purposes of Rule 13(1)(b). We consider the application itself to have been made in good faith, and whilst the Applicants made a number of separate mistakes, we do not consider that any of these mistakes were vexatious or designed to harass the Respondent or were otherwise unreasonable for the purposes of Rule 13(1)(b). In addition, whilst the Respondent has referred to certain other matters in order to provide some context for its application, clearly part of that context is also the Respondent's own complete failure to engage with the application up to and including the original hearing.

35. Therefore the Respondent's cost application, whether under Rule 13(1)(a) or Rule 13(1)(b), is refused.

36. As discussed at the hearing, any **other** cost applications that either party wishes to make must be sent to the Tribunal, with a copy to the other party, within **14 days** after the date of this decision. Any response that a party wishes to make to any cost application made by

the other party must be sent to the Tribunal, with a copy to the other party, within **28 days** after the date of this decision.

Name: Judge P Korn **Date:** 21st June 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).