

RESIDENTIAL PROPERTY TRIBUNAL SERVICE**LEASEHOLD VALUATION TRIBUNAL**

Property: Hillcrest, King Harry Lane, St Albans, Hertfordshire AL3 4AT

Applicant: Michael Broad, 6 Hillcrest, King Harry Lane, St Albans, Hertfordshire AL3 4AT

Respondent Landlord: Hillcrest Management (St Albans) Limited, 11 Hillcrest, King Harry Lane, St Albans, Hertfordshire AL3 4AT

Respondent's Solicitor: Sherrards Solicitors, 45 Grosvenor Road, At Albans, Hertfordshire AL1 3AW

Case number: CAM/26UG/LAM/2006/0006

Application: An application for the appointment of a manager (Section 24(1) Landlord and Tenant Act 1987)

Tribunal: Mr JR Morris
Miss M Krisko BSc(Est Man) BA FRICS
Mr R Thomas MRICS

Date of Hearing: 19th January 2007

Representatives attending Hearing:

Applicant: Mr M Broad:

Respondent: Ms V Osler (Counsel)
Mr S Braun, Sherrards, Solicitors
Mr Harrison Chairman and Treasurer of Respondent's Management Committee
Ms A Nicol, Secretary of Respondent's Management Committee

DECISION

The Application

1. On the 25th July 2006 the Applicant applied to this Tribunal under s 24(1) of the Landlord and Tenant Act 1987 for the appointment of a manager

The Law

2. Under s 24(10) of the Landlord and Tenant Act 1987:
 - a) A Leasehold Valuation Tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this part [of the Act] applies -
 - a) such functions in connection with the management of the premises
 - or
 - b) such functions of a receiver
 - or
 - c) both as the Tribunal thinks fit.
- (2) A leasehold valuation Tribunal may make an order under this section in the following circumstances, namely-
 - a) where the Tribunal is satisfied-
 - i) that the landlord is either in breach of any obligations owed by him to the tenant under his tenancy and relating to the management of premises in question or any part of them (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
 - (ab) where the Tribunal is satisfied -
 - (i) that unreasonable service charges have been made or are proposed to be made and
 - (ii) that it is just and convenient to make the order in all the circumstances
 - (ac) where the Tribunal is satisfied-
 - (i) that the landlord has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under s87 of the Leasehold Reform, Housing and Urban Development Act 1993 (Codes Management Practice), and
 - (ii) that it is just and convenient to make the order in all the circumstances;
 - or
 - (b) where the Tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made.
3. Where a tenant relies upon a notice served under section 22 of the Landlord and tenant Act 1987 it must:
 - (a) specify the tenant's name and address for service of notices
 - (b) state that the tenant intends to make an application for an order under section 24 in respect of the subject property but will not do so if the landlord complies with the requirements specified
 - (c) specify the grounds on which the Tribunal would be asked to make an order and the matters that would be relied on by the tenant for establishing those grounds
 - (d) where matters are capable of being remedied by the landlord, require the landlord within a reasonable time specified in the notice to take such steps for the purpose of remedying them as are to be specified

Description of the Property and Inspection

4. The Property is a three-storey building of brick under a flat roof constructed in 1972 containing 15 purpose-built flats in communal grounds with parking allocated to each flat.
5. The Property is in fair condition externally and internally. The interior common parts are generally well maintained. The Tribunal was directed to the Applicant's Flat. It was noted on entering the bathroom that there was a smell of smoke, which seemed to be cigarette smoke. It was noted that there was a conduit and vent in the bathroom. The Tribunal also inspected Flat 3, which is directly below the Applicant's Flat. It was noted that there was no floor covering and the wooden boards were exposed. An inspection of the bathroom was made and the position of the extractor fan indicated that the conduit was shared between the two Flats 6 and 3. The Tribunal also inspected the flat above and it was noted that this had a separate conduit.

Identification of Issues

6. The issues identified in the Application are:
 - a) That a Chartered Surveyor has not been appointed to manage the Estate and the Respondent is therefore in breach of Schedule 3 Clause 1 of the Lease, which states that the respondent is obliged "To employ or retain a chartered surveyor for the purpose of managing the Estate and supervising the performance by the Company of the obligations hereinafter specified".
 - b) As a result of a manager not being appointed certain repairs and management duties have not been carried out.

The parties should note that in relation to this Application the Tribunal only has jurisdiction to appoint a manager where "it is just and convenient to make the order in all the circumstances of the case" pursuant to Section 24(1) Landlord and Tenant Act 1987. It does not have jurisdiction to order the remedying of any breaches of the Lease by any of the parties.

The Lease

7. Originally each Tenant had a 99-year Lease commencing 25th December 1972. The Respondent owns the Property and each Tenant is a director of the Respondent Company and holds equal shares in the Respondent. Five years ago the Respondent agreed that each Tenant might apply to amend the Lease to a term of 999 years and most have done so. In all other respects the Leases remain the same as the original Lease a copy of which was provided.
8. The Clauses of the Lease relevant to the Application are as follows:

Clause 1 of the Lease: "by way of further rent a fair proportion (to be determined by the Lessor's Surveyors for the time being) of the amount from time to time to be expended by the Lessor in insuring all the buildings on the Estate in pursuance of the Lessor's covenant"

Clause 4 of the Lease

(a) The Tenant hereby covenants with the Company and with the Lessor that the Tenant will in every year ...pay... a sum equal to one fifteenth of the total cost paid or payable by the Company in respect of the performance by the Company of the obligations set forth in the Third Schedule hereto during the previous calendar year ... (hereinafter called "the maintenance contribution")

(b) The total cost paid or payable by the Company in each year as aforesaid shall be ascertained by the Surveyor and he shall as soon as may be after the thirty first day of December each year cause to be sent to the Tenant a certificate of the same.

Clause 9 of the Lease

In case of dispute between the Tenant and any Lessee tenant or occupier of any part of the Estate or between the Tenant and any owner or occupier of any adjoining or neighbouring property relating to any part of the Block or Estate such dispute shall be referred (if the Company or the Lessor require) to a surveyor nominated by the Lessor whose decision (as between the Tenant and any other Lessee tenant or occupier of any part of the Estate) shall be final and binding

9. The Paragraphs of the Schedules to the Lease relevant to the Application are as follows:

Paragraph 1 of the Third Schedule:

To employ or retain a chartered surveyor (hereinafter called the "Surveyor") for the purposes of managing the Estate and supervising the performance of the Company of the obligations hereinafter specified

Paragraph 3 of the Third Schedule:

At all times during the said term to keep such parts of the buildings and structures on the Estates as are used in common by any of the tenants and occupiers of the flats ... and all conduits now laid or to be laid in or upon the Estate or any part thereof (other than those serving exclusively individual flats) in good and substantial repair ...

Paragraph 5 of the Third Schedule:

To provide and supply such other services for the benefit of tenants of flats on the Estate and to carry out such repairs and works ... as the Company consider necessary or convenient to maintain an Estate of good quality residential flats...

Paragraph 6 of the Third Schedule:

If reasonably required by the Tenant to enforce the covenants and conditions similar to those contained herein on the part of the Tenant entered into or to be entered into by the tenants of the other flats...

Paragraph 8 of the Third Schedule:

A certificate signed by the Surveyor under Clause 4 of the Lease stating the amount of the total cost for any calendar year shall be conclusive of such amount ...

Paragraph 10 of the Fourth Schedule:

Not to reside or sue or permit any other person to reside in or use the Flat unless the floors thereof (excluding the entrance hall) are covered with carpet and under felt or in linoleum or sound absorbing tiles except while the same shall be removed for cleaning repairing or decorating the Flat or for some temporary purpose.

Applicant's Case

Section 22 Notice

10. On the 9th June 2006 the Applicant served on the Respondent a Notice pursuant to Section 22 of the Landlord and Tenant Act 1985 of 32 pages informing the Respondent that he intended to apply for the appointment of a manager.

11. In the Notice the Applicant stated that since early November 2006 he has suffered from the incursion of second hand tobacco smoke. This appears to be due to defective (leaking) ventilation ducts in the shared a conduit with his flat and flat 3. The Tenant of Flat 3 is a Mr Porter. The Respondent's Management Committee was made aware of this problem on 7th April 2006. In addition Mr Porter has bare boards in his flat, which is in breach of the Lease. The Respondent's Management Committee were alleged not to have taken any action to remedy the disrepair of the conduit or take action to remedy the breach by the tenant of Flat 3.
12. The Grounds were set out in the First Schedule to the Notice and in summary were that the Respondent was in breach of the Lease and were in breach of the Code of Practice approved by Secretary of State under the terms of section 87 of the Leasehold Reform, Housing and Urban Development Act 1993.
13. The Applicant set out the facts relied upon in the Second Schedule to the Notice.
14. In summary, the Applicant stated that the Respondent was in breach of provisions contained in the Third Schedule to the Lease for the following reasons:
 - Clause 1 Lease requires that the Respondent retain a chartered surveyor and the Applicant submitted that no surveyor had been retained.
 - Clause 3 requires the Respondent to maintain all conduits not exclusively serving individual flats. The Applicant submitted that the common conduit containing ventilation ducts, foul waste pipes and electrical cables is leaking causing the incursion of cigarette smoke into the Applicant's flat. The Respondent has failed to investigate and repair the conduit following a request to do so dated 7th June 2006. The Applicant had deduced that the smoke was emanating from Flat number 3 tenanted by Mr Porter.
 - Clause 5 requires the Respondent to carry out necessary repairs. The Applicant submits that the incursion of the smoke is due to a defective conduit, which the Respondent has failed to repair in breach of this Clause.
 - Clause 6 requires the Respondent to enforce tenant's covenants if reasonably required by a tenant. The Applicant referred to the alleged breaches above together with others including the failure by the tenant of Flat 3 to provide a floor covering as required by the Lease.
 - Clause 8 requires the Respondent to obtain a signed surveyor's certificate as to the maintenance contribution. The Applicant submitted that the Applicant had requested copy of such certificate on 25th June 2006 but there had been no response.
 - Clause 9 requires the Respondent to consider arbitration by referring disputes to a surveyor. Arbitration was requested by the Applicant on the 7th April 2006 and no response has been received and therefore no reason given for the refusal to refer the matter to arbitration.
 - Clause 6 (vi) requires the Respondent as the Lessor to produce a policy of insurance on the 16th February 2006 but that this was refused because the Applicant had withheld the last service charge due to the dispute relating to the incursion of smoke.

- The Applicant finally stated that the Respondent was in breach of the Covenant of Quiet Enjoyment.
15. The Applicant also set out a number of the alleged Breaches of the Code of Practice as follows:
- Para 4.1 requires a manager to comply with the law. The Applicant submitted that the Respondent has been in breach of the lease. In addition the Respondent's Management Committee are in breach of its fiduciary duties in that Mr Porter is a member of the Management Committee and is also the tenant of the flat from which the smoke complained of is emanating and which does not have a floor covering as required in the Lease. It is therefore submitted that there is a conflict of interest if Mr Porter remains a member of the Management Committee while these matters are being considered.
 - Para 4.3 requires independent advice to be sought where there is a conflict of interest and this does not appear to have been done.
 - The Applicant also has no clear policies or procedures contrary to: 4.9 (Clear Policies), 4.17 (Procedure for Inspection), 4.28, 4.29, 20.1, 20.2, 20.3 and 20.4 (Investigation of complaints and Disputes), he also referred to other paragraphs where he stated there had been deficiencies or a lack of compliance including: paragraphs 4.10 (Clear communication), 14.7 (Deal promptly with reports of disrepair).
16. In the Third Schedule the Applicant set out a time scale for the remediation of the breaches which in relation to the main elements was as follows:
- An aggregate of 10 weeks to commission a surveyor to research and investigate the incursion of smoke
 - 5 weeks to commence arbitration on the disputes relating to the breaches
 - 4 weeks to rectify the floor covering in Flat 3
 - 2 weeks to provide copies of procedures and certificates in order to comply with the Lease and Code of Practice.

Applicant's Evidence

17. From the Section 22 Notice and correspondence it appeared that the Applicant's submission was that he had suffered incursions of cigarette smoke from Flat 3 since early November 2005. This appeared to him to be due to defective (leaking) ventilation ducts in the shared a conduit with the Applicant's flat and Flat 3. In a letter date 2nd January 2006 the Applicant proposed that an air purifier installed. The Tenant of Flat 3 did not accept the proposal. The Applicant informed the Respondent's Management Committee of the problem of the smoke on 7th April 2006 intending them to investigate and remediate the matter on the basis that the shared duct was a common part. After some discussion the Tenant of Flat 3 installed carbon filters in the bathroom vent of Flat 3 in May 2006.
18. It was stated that after a good deal of correspondence Mr Richard Hodgson was instructed to research and investigate the matter. He made an inspection on the 19th October 2006 and reported on 26th October 2006. Mr Hodgson concluded that the

problem was likely to be that the individual ventilation ducts from the bathroom extractor fans were leaking into the void containing them and infiltrating the adjacent rooms. He recommended that further tests be carried out. These have now been undertaken although at the time of the Hearing the results had yet to be received. The Applicant stated that he was present when the test was conducted and the initial indications were that the duct was defective. If a surveyor had been employed the test would have been conducted sooner and with less acrimony.

19. The Applicant submitted a number of Witness Statements. In his own statement date 14th September 2006 the Applicant noted that Mr Porter the tenant of Flat 3 has put a carbon filter in the bathroom vent of Mr Porter's flat but that this is only temporary and was only placed there after 6 months after the Applicant raised the issue. The Applicant indicated in various statements both oral and written that members of the Management Committee including Mr Porter had been less than helpful in seeking to remedy the problem of the defective conduit.
20. A statement made by Michelle Ballinger stated that when she visited the Applicant's Flat during mid-December 2005 and April 2006 she had noticed that the air quality in the bathroom is poor and smells of stale tobacco smoke. Sometimes it was a very strong smell. A similar statement by Patricia Broad, made the same day, confirmed this.
21. A written Statement of Case produced by the Applicant commented that the residents of the Property are predominantly retired and that two members of the six person Management Committee had themselves said that they were bowing out of the role and two others spend large periods of time abroad. It was submitted that a Surveyor would give continuity as the membership of the Committee changed. It was further submitted that under the Lease a chartered surveyor in Paragraph 1 of the Third Schedule takes the primary role in regards to the management and the directors of the Respondent Company play a secondary role.
22. The Applicant said that three firms of Surveyors were willing to manage the property and submitted the name of Mrs Teresa Tuck of Ringleys of Ringley House, 349 Royal College Street, London NW1 9 QS. They manage 5,000 units and manage blocks in Ware and Cheshunt. The Applicant included in the bundle a letter dated 19th November 2006 from him to the Respondents attempting to settle the matter by proposing that Ringley's be appointed as the Surveyors. With the letter was enclosed a letter from Teresa Tuck of Ringley's setting out information regarding their services and charges.
23. The Applicant stated in oral evidence that he did not want to be the manager but wished to have Ms Teresa Tuck of Ringleys appointed as the manager. The current committee run the Block but use a low level of managing agent interference. The Committee does all day-to-day management. Mr Broad considered that there is a need for someone to oversee the management who is independent. Where there is a problem or if a complaint is made then when the matter is referred to the committee the members take umbrage.
24. On the point of interpretation of the Lease Mr Broad said that it was drafted in 1972 when the block was built. The Lease requires the landlord to employ or retain a chartered surveyor. It is understood that the Landlord employed its own management company at the time the Lease was granted and that a surveyor was part of that company whom it was presumably intended would undertake the obligation as set out in the Lease. It was not intended that a surveyor should be appointed spasmodically as when required in the manner now done by the Management Committee.

25. It was suggested that Clause 1 of Schedule 1 of the Lease should be amended or varied. This indicates that the Committee are aware that they be doing things incorrectly by not employing a surveyor. Mr Hodgson was appointed to deal with the duct problem, which Mr Broad has raised. He stated that in the last 2 years Mr Hodgson is the only surveyor who has been appointed.
26. It was submitted that Clause 1 of Schedule 1 that requires a surveyor to be employed or retained was linked to Clause 4(b). The idea was that the surveyor would know the building. It is not enough to have a person who can be called in at a moment's notice to sign a certificate as to the appropriateness of the service charge. The surveyor is there to manage the block.
27. The Applicant referred the Tribunal to the following Tribunal Decisions as relevant to the case:
- CAM/22UB/LSC/2004/0050 where it was stated that service charges were not payable as a certificate signed by the Manager's Auditors had not been obtained as required by the Lease. He drew an analogy with the requirement of a Surveyor's Certificate being required in relation to his own Lease.
- CAM/00KF/LAM/2006/0001 where it was stated that a manager is usually someone who is professionally qualified with appropriate experience, professionally qualified with professional indemnity insurance and independent of the parties. He commented that this was presently not the case at the Property.
- LON/00AF/LAM/2005/001 where it was stated that the obligations had not been carried out for 14 years and that the applicant in the case could not sell his flat.
28. The Applicant said that no certificate as signed by a Surveyor as required by the Lease has been produced.
29. The Applicant stated that the main problem for him was the incursion of cigarette smoke, which had been exacerbated by the failure of the Committee to appoint a Surveyor who could have dealt with the matter promptly and without conflict.
30. The problem first arose in 2005. He did not recognise the problem as emanating through the duct from Flat 3 immediately but when eventually he concluded that this was causing the problem he, with some difficulty, contacted Mr Porter who is the Tenant of Flat 3. Although initially the Tenant of Flat 3 was not helpful he did agree to fit carbon filters although these will need replacing. The Applicant additionally offered to install an air purifier and to stand the cost of £225 to £275 but this was not agreed to. As mentioned above the Committee have now instructed Mr Hodgson and tests have taken place.
31. The Applicant stated that he needed to obtain the support of the management committee because the duct related to the common parts and he would not otherwise have a right of access and any repair might be a matter to be undertaken under the service charge provisions.

Proposed Manager's Evidence

32. Mrs Teresa Tuck stated that she was a chartered surveyor for 18 years. She said that Ringley's had been appointed as manager to a number of properties by Leasehold Valuation Tribunals. They offered a Basic Management Package for blocks that

already had a Management Committee. The package provided the tools for managing a block. There were information sheets informing management committees on serving s146 notices and carrying out the procedure pursuant to section 20 Landlord and Tenant Act 1985 as amended by the Commonhold and Leasehold Reform Act 2002 for major works. Leaseholders are able to continue to use the contractors they have been happy with or assistance in contacting contractors directly can be given. Accountants can be employed separately to prepare company and service charge accounts. No site visits would be made although staff are available to give advice over the telephone.

33. The cost was £825.00 for 10 units with an additional £75 for each unit thereafter plus VAT. The charge for the Property would be £1,410 including VAT.

Respondent's Case

34. The Respondent's Management Committee submitted a Statement of Facts together with a Witness Statement by Mr Brian Harrison the Chairman and Treasurer of the Respondent's Management Committee. This stated that the Management Committee is appointed through the Annual General Meeting of the Respondent. The Committee comprises a Chairman, a Treasurer and a Secretary and three other members one of whom liaises with the gardeners and another deals with repairs and maintenance. When special circumstances arise there are more frequent meetings such as five years ago when the roof required recovering and more recently when the common parts need redecorating and refurbishment.
35. In the past Rumball Sedgwick were appointed to manage the property but only held the basic records and deal with secretarial tasks. There continued to be a treasurer and the Committee members continued to liaise with the gardeners and maintenance workmen. Therefore it was decided to end the arrangement. Also previously Stimpson of St Albans were appointed to deal with the accounting. They also had a surveyor on the staff however when they closed the St Albans office the arrangement came to an end.
36. In addition the property is surveyed whenever there is a new purchaser of a flat and there has never been any problem with these transactions so far as the Management Committee are aware.
37. In relation to the alleged problem concerning the smoke incursion the Committee took the view that this was a matter between the owners of the two apartments concerned and that if it had been a general problem than the Committee would have accepted responsibility.
38. Several attempts had been made to resolve the problem. A Special meeting was held on the 11th July 2006, the minutes of which were provided, to consider the matters raised concerning Flat 6 where it was agreed that this was a matter for the individual flat owners. The Committee were ready to instruct the electrician to inspect and Mr Michael Evans of Michael Evans, Chartered Surveyors of Hemel Hempstead was contacted on 25th September 2006 with a view to him researching the problem.
39. The Respondent listed the persons employed to maintain the Property and cited several examples of maintenance work that had been carried out as examples of good management. The Reserve Fund of £33,500 was also referred to as an indication of sound management.

40. In addition the Counsel for the Respondent submitted a written Statement of Case. It was noted that the Management Committee meets three to four times a year and its duties are amongst other things to deal with the daily running of the Property.
41. The Statement referred to each of the grounds for the Application.
42. The Respondent stated that Paragraph 1 of the Third Schedule does not require the employment of a surveyor on a permanent basis. The employing of a surveyor as and when necessary meets the obligation. In addition the Applicant has not suffered any loss or damage due to the Respondent not employing a surveyor.
43. Counsel said in an oral statement that the Respondent had a choice and could either employ or retain. It was claimed that the word employ enabled the Respondent to instruct a surveyor as necessary. However retain had a degree of permanence. The words meant different things otherwise there would be not point in having them both. The Respondent chose to employ a surveyor as and when necessary.
44. In addition it was stated that Clause 9 required the Respondent to nominate a surveyor and therefore this showed that it was not required to have a surveyor employed full time.
45. In relation to Clause 4(b), which relates to the obtaining of a certificate by a surveyor in respect of the maintenance contribution Counsel stated that this did not require that a surveyor be employed. In oral evidence it was admitted by Mr Harrison that no surveyor's certificate had been obtained as required by the Lease.
46. Mr Harrison stated that the management of the Company was efficient and that the accounts were audited. He said that the accounts were company accounts and that no separate service charge accounts were drawn up, as this was not necessary. He added that there was a substantial reserve.
47. The Tribunal asked Mr Harrison whether the reserve was kept separate from the service charge accounts and he indicated that the company accounts were the only accounts.
48. The Tribunal asked if a section 20 procedure had been undertaken when major works had been proposed and he said that decisions about such works were made in General Meeting.
49. The Respondent denies that it is in breach of paragraph 3 of the third Schedule. The Applicant has not proved that the ventilation system is in disrepair and that the smoke complained of is a result of the disrepair. If there is any disrepair the Applicant has not shown that it is a matter, which the Respondent is liable to remedy under its obligations under the Lease.
50. The Respondent submits that the Applicant has unreasonably refused an offer to employ an electrician to investigate the ventilation system and has denied access to an independent surveyor to investigate the matter. The smoke has been ameliorated by the installation of a carbon filter by the Tenant of Flat 3.
51. The Respondent stated that the Applicant had not proved that the Tenant of Flat 3 was in breach of the Lease. In addition even if the Tenant of Flat 3 was in breach the Applicant has not shown that it would be reasonable to require the Respondent to enforce the covenants in the Lease against him.

52. The Applicant has claimed that he has not been allowed to inspect the accounts and insurance documents. The Respondent denies any breach of obligation any refusal was justified as he had failed to pay the service charge.
53. The Applicant has failed to particularise the Breaches of the Code of Practice referred to.
54. An extraordinary meeting of the Respondent was held on the 9th June 2006 and any issues regarding information and other complaints could have been voiced then but the Applicant chose not to attend. Mr Harrison, the Chairman and Treasurer of the Respondent sent the conclusions of the meeting to the Applicant on 12th July 2006.
55. The accusations by the Applicant such as the Respondent having misled the leaseholders, been rude or threatened violence have a high standard of proof; if the Applicant has been given short shrift then this was provoked by the Applicant's own conduct.
56. With regard to the various allegations of mishandling of the dispute the Counsel for the Respondent submitted that an offer was made for the electrician to inspect the ventilation problem and this was rejected. In the event Mr Hodgson, a chartered surveyor was instructed and his report was obtained and acted upon.
57. The management structure and meeting such as the Annual General Meeting are adequate forums for hearing and dealing with complaints and grievances.
58. The Respondent submits that there were no breaches but if there were any they were minor and would not justify an appointment of a manager.
59. The Respondent then submitted that the Applicant would not be an appropriate manager.
60. With regard to the appointment of a manager being just and convenient Counsel for the Respondent submitted that the purpose of such an appointment was to prevent mismanagement, which damages an interest in the property. Reference was made to *Maunder Taylor v Blaquiére* [2003] 1 WLR 379 quoting Longmore LJ at para 49. This indicated that a high level of proof was required to justify a manager being appointed.
61. It was added that it was a fundamental right that property owners should manage their own property and the making of a management order was a very serious step in depriving a property owner of that right: *Quaif & Steadman v Sahram & Boone* LON/00AS/LAM/2005/0015, para 28.
62. Reference was also made to *Mottalib v Regisport Limited* LON/00AY/LAM/2005/0029 that where only one lessee applies for the Appointment of a manager a cautious approach should be adopted: "To make an order on the application of one lessee could result in an appointment which did not have the support of a majority."
63. The Representations then raised a number of objections to the Applicant being appointed as manager. In the event the Applicant proposed a professional manager.
64. Counsel for the Respondent stated that given that the current system has been in place for thirty years, has been run efficiently during that time, that the property is in good order and that the accounts run with a sinking fund then the appointment of an external manager is not just. If a manager was appointed there would inevitably be an increase in costs and therefore such an appointment is not convenient.

65. In support of the Statement of Case a witness Statement was submitted by Mr Harrison the Chairman and Treasurer of the Respondent's Management Committee.
66. In conclusion the Respondent submitted that the property had been run for 30 years by the Management Committee and that the current management is economical and efficient. With regard to the requirement in the Lease that a certificate needed to be signed to approve the service charge the Respondents argued that a manager employed on an occasional basis could sign a certificate.
67. Counsel stated that the respondent considered the Application to be without merit, frivolous and vexatious and requested that costs be awarded against the Applicant.

Decision

68. The Tribunal considered all the evidence put before it and applied it to the issues identified:
1. That the Respondent was in breach of the Lease by failing to appoint a chartered Surveyor
 2. As a result of a manager not being appointed certain repairs and management duties have not been carried out and
 3. That it was just and convenient to appoint a manager
69. The Tribunal noted Schedule 3 Clause 1 of the Lease, which states that the respondent is obliged "To employ or retain a chartered surveyor for the purpose of managing the Estate and supervising the performance by the Company of the obligations hereinafter specified".
70. The Tribunal agreed that the Respondent had a choice to either employ or retain. The Tribunal were of the opinion that a literal meaning of the words should be applied. A dictionary definition of the words applied to the particular circumstances refers to both words meaning to use the services of a person. Whether the words in the context of the lease have some difference between them enabling the Respondent to use the services of a chartered surveyor either permanently or as and when required makes little difference to the facts of the current case in that the services of a chartered surveyor have not been used:
- To determine a fair proportion of the amount to be paid for insurance in accordance with Clause 1 of the Lease
 - To ascertain and certify the total cost of the maintenance contribution in accordance with Clause 4 of the Lease and Paragraph 8 of the Third Schedule
 - To refer a dispute (notwithstanding the proviso that the Respondent may or may not require it to be so referred) in accordance with Clause 9 of the Lease
 - To manage the Estate and supervise the performance of the obligations of the Respondent as specified in the third Schedule in accordance with Paragraph 1 of the Third Schedule
71. The Tribunal therefore determined that there had been a breach of the Lease. The Tribunal found that this was not a minor breach and using the services of a chartered surveyor was not a mere power to be exercised by the Respondent but was also a safeguard for the Tenants, particularly in relation to the determining and certifying of the total cost of the maintenance contribution.
72. The Tribunal found on inspection that the tenant of flat 3 was in breach of Paragraph 10 of the Fourth Schedule of the Lease by not having any floor covering. The Respondent put no explanation forward as to why the request by the Applicant to

enforce this Paragraph under Paragraph 6 of the Third Schedule was considered not to be reasonable by either the Management Committee or the Respondent in General Meeting. In the absence of such evidence the Tribunal were of the opinion that the Respondent should have sought to enforce Paragraph 10 of the Fourth Schedule a part of the management obligations under the Lease. The duties referred to in Para. 70 above require a semi permanent employment. A Chartered Surveyor would not be able to carry out these duties on an ad hoc basis.

73. The Tribunal found on inspection that there was a smell of smoke in the Applicant's bathroom, as had been identified by Mr Hodgson. The Tribunal were of the opinion that the Respondent should have investigated whether the smell was a result of a want of repair of the common part in accordance with its obligation to repair under the Lease and its management obligations under the Code of Practice. The Tribunal noted that the Respondent had now instigated such inspection with a view to remedial action.
74. The Tribunal found that a dispute had arisen between the Applicant and the Tenant of Flat 3 in respect to the smell. The Applicant had sought to have a surveyor appointed to determine the matter pursuant to Clause 9 of the Lease but the Respondent submitted that it was not obliged to do so. The Tribunal interpreted Clause 9 in relation to the Code of Practice. The word "require" does not grant the Respondent discretion as to whether or not to nominate a surveyor but a means of enforcing the resolution of disputes. The failure of the Respondent to impose its authority in relation to Clause 9 has led to the dispute being exacerbated.
75. The Tribunal found that there was a potential conflict of interest in respect of the Tenant of Flat 3 as a member of the Management Committee, which was to determine whether or not to enforce Paragraph 10 of the Fourth Schedule and in resolving the dispute that had arisen between the Applicant and the Tenant of Flat 3.
76. The Tribunal is satisfied that the Respondent is in breach of its obligations owed to the Applicant under the Lease relating to the management of the Property which were identified in a notice pursuant to section 22 dated 9th June 2006 served by the Applicant on the Respondent in that a Chartered Surveyor has not been appointed to carry out management duties specified in Clause 1, Clause 4 and Paragraph 8 of the Third Schedule and Paragraph 1 of the Third Schedule to the Lease.
77. The Tribunal is satisfied that it is just and convenient to appoint a manager who is a chartered surveyor to carry out the management obligations specified in Clause 1, Clause 4 and Paragraph 8 of the Third Schedule and Paragraph 1 of the Third Schedule to the Lease.
78. The Tribunal is satisfied that it is just and convenient to appoint a manager to ensure that matters such as the enforcement of breaches of the Lease by Tenants, disputes between a tenant and the Respondent or another tenant or occupier of a flat in the Property will be dealt with expeditiously. Also from the answers provided by the Respondent it was clear that he was unaware of legal requirements such as S20 consultation, the need for a separate service charge account and separate accounts for reserves held on trust. It should also be noted by the Respondent that there is no provision within the Lease for a reserve fund and therefore any monies raised in this way must be held as part of the company funds and agreed by the Tenants as shareholders under the Memorandum and Articles not as Tenants under the Lease. The Respondent cannot require a Tenant to pay into the fund as part of the Maintenance Contribution under the Lease.

79. The Tribunal appoint Mrs Teresa Tuck of Ringley's as Manager for one year during at the end of which period the Respondent shall either reappoint Mrs Tuck or appoint another chartered surveyor to carry out the duties referred to above and as specified in the Lease.
80. Both parties, in this case, should view the appointment of a manager as a means of supporting the Respondent's Management Committee in its work. The order annexed to this Decision directs that the service described as Ringley's Support Package for blocks of flats which already have a management committee should be applied at a cost of no more that £1,500 including VAT to include the fulfilling of the obligations referred to in the Lease of signing a certificate relating to the Maintenance Contribution and determining a fair proportion in respect of the insurance premium. Any other services shall be by arrangement and charged by agreement between the Respondent's Management Committee and the Manager.
81. The Tribunal appreciated that the Applicant's submissions had been exceptionally detailed but determined that his Application was not without merit, frivolous and vexatious, as is evident from the Tribunal's decision and therefore no costs are awarded against the Applicant.

Determination of Application under Section 20(c) of the Landlord and Tenant Act 1985

82. The Applicant applied for an order under Section 20(c) of the Landlord and Tenant Act 1985 that the Landlord's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant of the property.
83. The parties agreed with the Tribunal that there was no provision for charging the costs of these proceedings to the service charge in the Lease.


JR Morris Chairman

EASTER LEASEHOLD VALUATION TRIBUNAL

**IN THE MATTER OF SECTION 24(1) OF THE LANDLORD AND TENANT ACT 1987
AND IN THE MATTER OF 109A AND 109B HAVELOCK ROAD, LUTON,
BEDFORDSHIRE LU2 7PR ("THE PROPERTY")**

BETWEEN

Michael Broad (Applicant)

And

Hillcrest Management (St Albans) Limited (Respondent)

ORDER FOR THE APPOINTMENT OF TERESA TUCK AS MANAGER


UPON hearing the evidence of the Applicant and Respondent

IT IS ORDERED THAT:

1. Teresa Tuck MRICS ("The Manager") be appointed Manager and Receiver of the Property with effect from the 1st April 2007 for one year.
2. The Manager shall provide the service described as Ringley's Support Package for blocks of flats which already have a management committee which shall include the fulfilling of the obligations referred to in the Lease of signing a certificate relating to the Maintenance Contribution and determining a fair proportion in respect of the insurance premium. Any other services shall be by arrangement and charged by agreement between the Respondent's Management Committee and the Manager.
3. The Manager shall manage the Property in accordance with:
 - a) the respective obligations of the Lessor and the Lessees under the Leases by which each of the flats at the Property are demised and in particular with regard to repair, decoration and insurance of the Property and
 - b) the duties of a Manger as defined by and set out in the Service Charge Residential Management Code ("the Code") published by the Royal Institute of Chartered Surveyors and approved by the Secretary of State pursuant to Section 87 of the Leasehold Reform, Housing and Urban Development Act 1993.
4. The Manger shall be entitled to costs and incidental expenses up to the sum of £1,500.00 per annum. In this instance this sum shall include the cost of the Ringley's Support Package and the cost of ascertaining (pursuant to Clause 4(b) of the Lease) and certifying (pursuant to Paragraph 8 of the Third Schedule of the Lease) the total cost of the Maintenance Contribution and determining a fair proportion of the amount from time to time to be expended by the Lessor in insuring all the buildings (pursuant to Clause 1 of the Lease)
5. During the period of appointment the Manager shall comply with all statutory requirements, including those included in the Landlord and Tenant Act 1985 and the Landlord and Tenant Act 1987, as amended, and the Code and in particular:

6. This Order shall remain in force until 21st May 2007 or until it is varied or revoked by a further Order of the Tribunal and the Applicant and the Respondent shall each have liberty to apply to the Tribunal for further directions.

Chairman.....



Date 9th March 2007