Southern Rent Assessment Panel and Leasehold Valuation Tribunal

Case No. CHI/00BK/LVM/2005/0004

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
ON AN APPLICATION UNDER SECTION 24 of the LANDLORD AND TENANT ACT 1987
FOR AN ORDER APPOINTING A MANAGER**

Property:	60 Sackville Road, Hove, East Sussex BN3 3HA
Applicants:	Ms K Medina (tenant)
Respondent:	60 Sackville Road Management Company Limited
Appearances:	For the Applicant: Ms K Medina in person Mr M Gargett For the Respondent: Mrs J Wredden (Director of the Respondent company) Mr Shrade (on behalf of Miss D Spurgeon)
Also in attendance:	Mr G Pickard of Jacksons (Managing Agents)
Date of Application:	20 January 2006
Directions:	1 March 2006
Hearing:	12 June 2006
Decision:	7 July 2006

Members of the Leasehold Valuation Tribunal

Ms J A Talbot MA Solicitor
Mr B H R Simms FRICS
Ms J Dalal

CHI/00ML/LAM/2006/0001

60 Sackville Road, Hove, East Sussex BN3 3HA

Background to the Application

Section 24 Landlord and Tenant Act 1987
for an Order appointing a Manager

1. The Applicant Ms Medina is the tenant of the basement flat at 60 Sackville Road, Hove, East Sussex BN3. The Application is dated 20 January 2006. At a previous hearing on 16 February 2006 of an Application relating to service charges, Ms Medina asked the Tribunal to deal also with her appointment of manager application. However, the Tribunal declined to do so because she had not served the required preliminary Notice under Section 22 of the 1987 Act. The Tribunal refused to dispense with that requirement for the reasons given in the Decision dated 5 April 2006.

2. Ms Medina subsequently served Notice in the form of a letter dated 26 February 2006 which was sent to Miss Spurgeon and Mrs Wredden in their capacity as Directors of the freehold owning company 60 Sackville Road Management Limited. This is a tenant owned management company set up for the purpose of acquiring the freehold in December 2002. Ms Medina is also a Director of the company but has made this Application in her capacity as tenant.

3. Directions were given on 1 March 2006 requiring that Statements of Case should be prepared by both the Applicant and Respondents together with all relevant documents, and that a letter should be prepared by the proposed manager, Mr Pickard, setting out various details of his experience and qualifications and the terms upon which he would accept the position of manager if appointed. All parties complied with the Directions.

4. The Tribunal did not inspect the property before the hearing, but noted the description of the property in the Decision dated 5 April 2006 referred to above.

The Law

5. The relevant law is to be found in Section 24 of the Landlord and Tenant Act 1987 ("The 1987 Act") which provides (*inter alia*) as follows:

> *Appointment of Manager by the tribunal*
>
> *(1) 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 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) A leasehold valuation 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*
> *(ii)* ...

(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;

(abb) where the tribunal is satisfied –

(i) that there has been a failure to comply with a duty imposed by or by virtue of section 42 of 42A of this Act, 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.

...

(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.

The Hearing

6. Ms Medina's case for appointing Mr Jackson as manager is set out in her Statement dated 11 March 2006. Ms Medina gave oral evidence in support of her Statement assisted by her partner Mr Gargett (not a lessee) who also prepared a Statement and spoke. Mrs Wredden and Miss Spurgeon, the other tenants and Company Directors, had prepared Statements. Mrs Wredden gave oral evidence. Miss Spurgeon was unable to attend the hearing but her husband Mr Shrade attended on her behalf.

7. Broadly, Ms Medina contended that she had lost confidence in the 60 Sackville Management Company's ability to manage the property properly, and that she felt outnumbered by the other Directors, Miss Spurgeon and Mrs Wredden, who effectively had control over the property because they were always in a majority of two while she was in a minority of one in making decisions.

8. The situation was unusual in that Mr Pickard was already employed by the Company as managing agent. Mr Pickard had previously managed the property under Evergreen, the former freeholder. The three tenants and co-Directors ended his contract by agreement and attempted to manage the property themselves for the first few months after buying the freehold December 2002. It soon became apparent however that they were not able to agree and a lack of trust and breakdown of communication unfortunately arose.

9. Ms Medina considered that Mr Pickard was doing a good job and wished to retain him as manager, but appointed by the Tribunal rather than directly employed by the Company. She felt this would make management of the property easier and more effective as Mr Pickard would be able to take his own decisions in the best interests of the property rather than taking instructions from the Company.

10. The Tribunal heard evidence on each of the grounds set out in Ms Medina's Application. The first ground was that "*since the freehold company has taken control of the building, unreasonable service charges have been made*". The only charges mentioned were legal costs of Howlett Clarke Cushman incurred in 2004. The Tribunal pointed out to the parties that these charges had been partly the subject of the previous Application under S.27A of the Landlord and Tenant Act 1985, brought by the Company against Ms Medina, in which it was decided by a different Tribunal that these were costs of the Company and not service charges under the terms of the lease. There were no other service charges alleged to be unreasonable.

11. The second ground was that "*since the freehold company has taken control of the building unreasonable administration charges have been made*". The charges in question were charges raised by Mr Pickard of £65 per hour plus VAT for attending Company meetings and preparing the Minutes. He was also on hand to give advice if needed. The total cost for the year ending 28 September 2005 was £877.57, with an estimate of £900 for the following year, which Ms Medina thought was excessive. There had been too many meetings, they had been very long and taken up with discussion about the disputed legal costs.

12. Of 16 meetings between January 2003 and March 2006, Mr Pickard had facilitated 11 of them. Ms Medina had only attended a few of them. She acknowledged, however, that it had been necessary for Mr Pickard to act in this capacity because of a lack of agreement between her and the other Directors about the accuracy of recording previous meetings.

13. There was some confusion between the parties, and indeed on Mr Pickard's part, as to whether he had attended these meetings as meetings of the Company, or as lessee's meetings. The people attending the meetings were of course both Directors and lessees. Mr Pickard accepted, under questioning, that with the benefit of hindsight, the distinction, and therefore his role at the meetings, could have been clearer. He thought his charges were reasonable, charged at an hourly rate and in addition to his usual management fee. He thought in normal circumstances one meeting a year should be sufficient.

14. For the landlord Company, Mrs Wredden explained that she and the other tenants had tried to meet regularly to resolve issues and deal with necessary repairs. The question of the legal costs had become contentious and been discussed at 7 meetings, but the Agendas and Minutes showed that other items had also been addressed. Under the circumstances, and with major works as well as minor repairs to consider, she contended that the meetings were necessary, and that there were no time constraints in order to allow for a free and frank exchange of views.

15. The third ground was that "*since the freehold company has taken control of the building I believe that one or more of the Directors of the freehold company have attempted to use their position for personal gain instead of for the good and effective*

management of the building". The Tribunal explained to Ms Medina that it would not entertain personal attacks and that she should present her case with due care.

16. Ms Medina contended that Miss Spurgeon had waited until the Company had purchased the freehold to report a roof leak and make an insurance claim for internal damage. The insurance claim was successful but she later tried to recover funds from the reserve fund. Ms Medina further alleged that Miss Spurgeon had made "several attempts to claim the reserve fund".

17. Ms Medina referred to a letters from Miss Spurgeon dated 5 February and 3 July 2003 in which she stated that any costs she incurred in relation to the roof repair and water damage would have to be met by the freehold company. Ms Medina took these letters as threats to claim money from the reserve fund. In another letter dated 23 March 2003, dealing with several issues, Miss Spurgeon sought to obtain from Ms Medina one third of the cost of instructing a surveyor to prepare a valuation report for the purchase of the freehold and wrote: "*This is to advise that I will be seeking reimbursement of the money from the reserve fund once the management issues have all been resolved. If you wish to settle this matter separately then a cheque of £107.71would be gratefully received*". Ms Medina has not contributed towards this cost and confirmed that she has no intention of doing so.

18. More recently Miss Spurgeon had reimbursed from the service charge account fees paid to the LVT for the previous service charge Application but had subsequently refunded them following the Decision dated 5 April 2006, which ordered that the fees should be paid equally by all three parties in their capacity as Directors. Ms Medina has disappointingly not complied with this Order.

19. Apart from the letters, Ms Medina had no concrete examples of any actual attempt by Miss Spurgeon, or Mrs Wredden, to withdraw money from the reserve account. Mr Pickard confirmed that the reserve fund was held in a designated account by his firm, no request had been received for any payments from the reserve, and in any event no such payments would be made without due authority. Mr Shrade strenuously denied any dishonesty on his wife Miss Spurgeon's part and Mrs Wredden similarly strongly objected to any suggestion of dishonesty on her part.

20. The fourth ground was that "*although the Company currently employs a managing agent they are only employed to act under the instruction of the Company and could be released at any time*". Ms Medina argued that in the interests of fairness and to ensure the smooth running of the building she felt it would be fairer to appoint Jacksons under the instruction of the LVT. She felt that the other Directors had not managed the building effectively.

21. Mrs Wredden confirmed that the Company had no intention of ending Mr Pickards' management contract. On the contrary, as far as she and Miss Spurgeon were concerned they were happy with Mr Pickard's work and intended to instruct him indefinitely. Mrs Wredden helpfully conceded that she had no objection in principle for Mr Pickard to be appointed as manager by the LVT instead of engaged by the Company. Her motivation in opposing the Application had been to object to the grounds put forward by Ms Medina.

22. The Tribunal then heard evidence from Mr Pickard, who attended the hearing, in support of his letter to the Tribunal dated 31 March 2006 in compliance with the Directions. He was not a Chartered Surveyor but had worked for the firm of Jacksons since 1970 specialising in residential property management since 1991. A Chartered Surveyor, Mr J Davis FRICS, was a consultant to the firm. Mr Pickard currently managed 91 buildings, the majority of which were owned by tenants' management companies. He was committed to consulting lessees and acting within legislative requirements. He aimed to manage in accordance with the RICS Code.

23. In response to questioning from the Tribunal, Mr Pickard confirmed that separate designated bank accounts were held for each property held on trust for the lessees. As he was not a Chartered Surveyor his accounts were monitored not by the Royal Institution of Chartered Surveyors but by arrangement with the National Association of Estate Agents. His professional indemnity insurance cover was RICS compliant. he already held one other Tribunal appointment. He preferred to be appointed as a manager only rather than as a receiver. He thought his insurance cover did extend to covering him to act as receiver but he would check this point and, if necessary, arrange an endorsement on the PI policy. Subsequently he has written to the Tribunal and confirmed that his policy does cover him acting as a receiver.

24. Mr Pickard told the Tribunal that his terms of remuneration were £150 per flat per year, together with an hourly rate of £85 for work done over and above the management contract. He had not brought a copy of his standard terms and conditions with him, somewhat to the Tribunal's surprise, but he recalled that included in the basic fee was: paying and recording invoices, issuing service charge demands and recording tenants' payments, maintaining of property accounts, handling of insurance claims, dealing with minor repairs, and arranging for cleaning contracts for common parts. For repairs costing over £500 an extra fee was payable. He preferred to charge at his hourly rate but was aware that LVT appointments generally favoured a percentage approach.

25. Finally Mr Pickard expressed his view on the fundamental question as to what difference it would make if he were to be appointed as manager by the Tribunal rather than simply to continue in his current position as managing agent engaged by the Company. He said that he was aware of the tensions between the co-tenants and co-Directors. He was hopeful that these might dissipate and that he could work towards ending the lack of trust with the element of independence conferred by the LVT appointment. If there were still irreconcilable problems then it would be possible to revert to the LVT for further Directions, though he understood that the LVT did not micro-manage the property. He would deal matters in the best interests of the property and would not have to take instructions from the Company. He would liaise with and consult the parties in their capacity as tenants. If the appointment were not made, he feared that no further progress could be made.

Decision

26. The Tribunal took full account of the fact that this was a highly unusual context for such an Application. In general, Sections 22 and 24 of the 1987 Act envisaged a situation in which the landlord and tenant were not only separate legal entities but also completely different people or companies. Applications were normally made where a tenant was unhappy with a landlord's choice of manager and wished to propose a different manager of their own choice.

27. In the Application before it, however, the situation was that not only was the Applicant, Ms Medina, a co-Director and member of the freehold Company, she was also happy with the current manager, but wanted him to be appointed by the Tribunal rather than the Company, for the reasons given in evidence and outlined above.

28. This meant that the Tribunal had to be satisfied that changing the *status quo* would benefit the parties and make a difference to the effective management of the property. The Tribunal was also mindful that it could only make an order appointing a manager in accordance with the provisions of Section 24 of the 1987 Act.

29. Turning to the grounds specified by Ms Medina, the Tribunal having carefully considered all the written and oral evidence, was unable to conclude that any of the grounds had been made out.

30. First, there were no unreasonable service charges. The Decision of the previous Tribunal had dealt with that issue. Secondly, on the question of administration

charges, the Tribunal did not agree that the charges in question – Mr Pickard's fees for attending and minuting meetings – necessarily amounted to administration charges under the terms of the lease or within the statutory meaning. The distinction had been blurred, but it appeared to the Tribunal that the meetings were not lessees meetings but Company meetings, and the fees were therefore Company expenses. Either way, the breakdown in communication between Ms Medina and Mr Gargett on the one hand and Miss Spurgeon and Mrs Wredden on the other had unfortunately become so entrenched that it became necessary for Mr Pickard to be present to enable any progress to be made, and in these circumstances it was not unreasonable for him to charge for his time.

31. Thirdly, the Tribunal completely rejected any allegations of dishonesty against Miss Spurgeon and Mrs Wredden. Their personal integrity was not in doubt. Such unsupported allegations are not to be encouraged. Plainly, neither of them attempted to take money for their own benefit from the reserve fund. Indeed it would be impossible for them to do so even if they had intended to because it was held on trust by Mr Pickard's firm.

32. Perhaps with the benefit of hindsight, Miss Spurgeon could have chosen her words more carefully in her letters, as she did give the impression that if her costs were not met then she would seek reimbursement from the Company or the reserve fund. It was still clear to the Tribunal that this was a tactic designed to elicit payment of certain items from Ms Medina, and borne out of frustration at her lack of co-operation over the roof repair and valuation costs. The letters were firm but not threatening in tone, and in the Tribunal's view Ms Medina and Mr Gargett had over-reacted by reading too much into them. Mrs Wredden's tone had been sensible and measured throughout.

33. It is worth noting that the correspondence perpetuates the confusion evident from all parties throughout this case (and the previous case) between their roles, rights and responsibilities as tenants and Directors of the freehold owning Company, and between Company expenses payable by the Company and service charges payable by the parties as tenants to the Company as landlord under the terms of the lease.

34. Fourthly, the Tribunal rejected the argument that the Company could at any time release Mr Pickard from his appointment. Mrs Wredden made it quite clear that this was not contemplated by the Company. The Tribunal made it clear that any appointment it might make would not be permanent and that any one of the parties could apply to vary or discharge it. In addition, the Tribunal does not micro-manage the property or give the manager instructions. The manager takes his own management decisions in the best interests of the property. He should manage in accordance with the RICS Code, and should have regard to lessees' views through consultation, but does not take instructions from eithers the tenants or the landlord.

35. It is therefore entirely possible that Ms Medina might still find herself in a minority of one if she takes an unreasonable stance in relation to management issues, but it appears likely to the Tribunal from her demeanour at the hearing, that for her own reasons, she is more likely to co-operate with Mr Pickard than she is with her co-tenants and co-Directors. Mrs Wredden and Mr Shrade (for Miss Spurgeon) made it clear that if the Tribunal saw fit to make the order, they would co-operate fully.

36. The Tribunal gave weight to Mr Pickard's view that the independence that an appointment would confer would enable him to manage the property more effectively and also enable him to work towards resolving the communication and lack of trust issues. On balance, the Tribunal accepted that progress in managing this property could only be made if he were appointed by the Tribunal, and that in these exceptional and difficult circumstances, it would be in the best interests of all parties, and to the benefit of the property, for him to be appointed.

37. In coming to this conclusion, even though none of the grounds claimed by Ms Medina had been made out, the Tribunal was satisfied that for all the reasons set out above, other circumstances exist which make it just and convenient to make the order, in accordance with Section 24(2)(b) of the 1987 Act.

38. The Tribunal was satisfied that Mr Pickard was a fit and proper person to be appointed as manager. On balance it decided to appoint him as a manager and receiver, to carry out functions in connection with the management of the premises in accordance with Section 24(1)(a) and the Order attached to this Decision as Appendix 1. He is not appointed in relation to matters solely concerning the Company, apart from the collection of ground rent, and it is important that the roles and responsibilities are kept separate.

39. On remuneration, the Tribunal agreed that £150 plus VAT per flat was acceptable plus an hourly rate for work done over and above basic management. For major works over £500, however, a percentage rate of 10% was preferable to an hourly rate. If necessary, it would be in order for a surveyor to be employed to prepare the specification and administer the contract charging an appropriate professional rate, which was standard professional practice.

Section 20C

40. Ms Medina made an Application under Section 20C for an order that any costs incurred by the landlord in connection with these proceedings should not be regarded as relevant costs to be included in any future service charges payable by the Applicant. At the hearing, Mr Pickard confirmed that he did not intend to charge any costs to the service charge account for attending the hearing. Mrs Wredden and Mr Shrade had not incurred any professional costs. Accordingly, it was not necessary for the Tribunal to make any order under Section 20C.

Dated 7 July 2006

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Ms Jane Talbot
Chairman

Appendix 1

ORDER FOR THE APPOINTMENT OF A MANAGER AND RECEIVER

1. The Tribunal orders that Gary Pickard of Jacksons, 193 Church Road, Hove, East Sussex BN3 2AB ("the Manager") be appointed Manager and Receiver of 60 Sackville Road, Hove East Sussex BN3 3HA ("the property") with effect from 12 June 2006.

2. The Manager shall thereafter manage the property in accordance with:

   a) the respective obligations of the landlord and the lessees under the various leases by which the flats at the property are demised and, in particular, but without prejudice to the generality of the foregoing, with regard to the repair, decoration, provision of services to and insurance of the property; and

   b) in accordance with the duties of a manager set out in the Service Charge Residential Management Code (the Code) published by the Royal Institution of Chartered Surveyors and approved by the Secretary of State pursuant to Section 87 of the Leasehold Reform Housing and Urban Development Act 1993.

3. The Manager shall collect all sums whether by way of ground rent, insurance premiums, payment of service charges or otherwise arising and due under the said leases.

4. The Manager shall account forthwith to the freeholder for the time being of the property for the payments of ground rent received by him and shall apply the remaining amounts received by him (other than those representing his fees hereby specified) in the performance of the covenants of the landlord contained in the said leases.

5. The Manager shall make arrangements with the present insurers of the property to make any payments due under the insurance policy presently effected by the Respondent to the Manager.

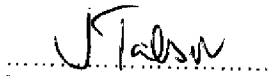
6. The Manager shall be entitled to the following remuneration by way of fees (which, for the avoidance of doubt) shall be recoverable as part of the service charges in accordance with Clause 3(2) and the Fourth Schedule of the leases) namely:

   a) a basic annual fee of £150 per flat for performing the duties set out in paragraph 2.5 of the Code; and
   b) in the case of major works with a net cost greater than £500, the manager shall further be remunerated at 10% of the net cost and in accordance with Clause 3 of the Code, for giving the necessary notices.

7. Value Added Tax shall be payable in addition to the remuneration specified in the preceding paragraph.

8. This Order shall remain in force until 12 June 2008.

Dated 7 July 2006



Ms J A Talbot (Chairman)
Member of the Southern Leasehold Valuation Tribunal and Rent Assessment Panel