

London Rent Assessment Panel and Leasehold Valuation Tribunal

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

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
ON AN APPLICATIONS UNDER SECTION 24 of the LANDLORD AND TENANT ACT 1987
TO VARY AN ORDER APPOINTING A MANAGER
SECTION 27A and SECTION 20C of the LANDLORD AND TENANT ACT 1985**

Property:	4 Ennismore Gardens, London SW7 1NL
Applicants:	Mrs M Barros Mrs M Gladstone Mr M Ziman (tenants)
Respondent:	(1) Four Ennismore Ltd (in liquidation) (landlord) (2) Ms Nahla Murad (3) Mr Nigel Cross BSc MRICS, Manager
Appearances:	For the Applicants: Mrs Barros in person For the Respondents: No attendance
Also in attendance:	Mr R L Welfare MRICS MI Arb Mr M J Ashton MRICS
Date of Application:	14 May 2005
Directions:	8 June 2005
Hearing:	12 September 2005
Decision:	23 October 2005

Members of the Leasehold Valuation Tribunal

Ms J A Talbot MA
Mr L Jacobs FRICS
Mrs S Friend

Applications

Section 24(9) Landlord and Tenant Act 1987 Variation of an Order appointing a Manager

1. The Applicants are three of the twelve leaseholders at 4 Ennismore Gardens, London SW7 1NL. There were two applications dated 12 May 2005. The first was for the variation of the management order dated 8 April 2004, which was itself a variation of the original management order dated 22 August 2002, made under Section 24(1) and (2) of the Landlord and Tenant Act 1987 ("The 1987 Act"), and previously varied on 20 June 2003. A further Order was made on 24 November 2004.
2. The application was made under Section 24(9) of the Act, and sought to vary the previous order appointing a manager by the substitution of a new manager, Mr Roderick Welfare, chartered surveyor, of Fifield Glyn, 26 Wilfred Street, London, SW1E 6PL, in place of Mr Nigel Cross, appointed manager by the LVT with effect from 13 April 2004.
3. The second application made under Section 27A of the Landlord and Tenant Act 1985 ("The 1985 Act"), in relation to service charges for the current year and future years.
4. Directions were given in both matters on 8 June 2005. In respect of the first application, the issues to be determined were identified as follows:
 - 1] whether Mr Cross had complied with the provisions of the Orders dated 8 April and 24 November 2004;
 - 2] whether those Orders should be varied so as to appoint Mr Welfare in place of Mr Cross;
 - 3] whether there should be any further or other variations to the Orders.
5. In addition, the Directions provided that Statements of Case should be prepared by the Applicants and Respondents. The Applicants and Mr Cross complied with these Directions, but the other Respondents did not.

Section 27A and Section 20C Landlord and Tenant Act 1985 Service Charges and Limitation of Costs

6. In respect of these applications, Mrs Barros had indicated at the Pre-Trial Review that it was likely they would be withdrawn, and therefore that application was adjourned pending clarification in writing from all the Applicants, without Directions being made. In the event, however, the Applicants decided that they did not wish to withdraw.
7. Therefore, at the hearing on 12 September 2005, the Tribunal was not in a position to deal with these applications, but decided that they should be set down for a separate future Pre-Trial Review. Accordingly, no further steps were taken at the hearing in respect of these matters. The rest of this Decision relates solely to the application to vary the manager appointment.

Preliminary Matters

Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003

8. Mrs Barros expressed concern to the Tribunal about the fact that several observers wished to attend the hearing. The Tribunal heard representations from Mrs Barros, in the presence of the parties only, to the effect that she and the other Applicants in the previous proceedings had taken advice from one of the observers, who regularly attended Leasehold Valuation Tribunal hearings. She and the other Applicants were no longer taking advice from him. The adviser relationship had broken down some months ago.

9. The Tribunal accepted Mrs Barros' representations that in the circumstances she would feel constrained in presenting her case if observers were to be present. She was a lay person, not legally represented, and indeed was presenting the case for all the Applicants. Mr Cross, the only Respondent present, did not object to excluding the observers.
10. The Tribunal took the view that the interests of justice were paramount, and that in the particular circumstances of this case, the presence of the observers would have an adverse effect on the ability of Mrs Barros to present her case. A fair hearing could be compromised if any observers were present. The Tribunal therefore took the unusual step of deciding to hold the hearing in private, pursuant to its powers under the Leasehold Valuation Tribunal (Procedure)(England) Regulations 2003, reg.14(6). This meant of course that all potential observers were excluded. The hearing took place in the presence of the parties and witnesses only.

Background Facts

11. There is a history of previous management orders at the property which it may be helpful to summarise here. Briefly, the original management order was made on 22 August 2003, appointing Mr Paul Chater of County Estate Management Limited as manager for three years with effect from 12 August 2002. The Tribunal which heard that case was satisfied that it should make an order to appoint a manager under Sections 24(1) and (2) of the 1987 Act.
12. That appointment was varied by an order made on 30 June 2003 when Equity Asset Management Limited ("EAM") was appointed as manager for a period of three years with effect from the same date. It appears there was no named individual identified.
13. On 13 April 2004, a second variation order was made appointing a third manager, Mr Nigel Cross, in place of EAM, for a period of three years with effect from 13 April 2004. In view of the fact that this was the third manager who had been appointed, the Tribunal required Mr Cross to produce a written progress report for the Tribunal by 15 October 2004. On 12 November, having considered the report, the Tribunal gave further Directions, which included permitting Mr Cross to take legal advice on the duties of the landlord and lessees in respect of certain listed matters.
14. Two further background matters are relevant and worth repeating. First, Four Ennismore Limited, the landlord, was placed into voluntary liquidation on 10 September 2004 and a Liquidator appointed. The Tribunal on 12 November 2004 had directed that Mr Cross should treat the Liquidator as the landlord/respondent and keep him fully informed. Second, The Applicants had put forward Mr Cross as the substitute Manager, in the previous proceedings before the Tribunal.
15. The Tribunal did not inspect the property before the hearing, but noted the description of the property in the original Decision dated 22 September 2002, and paragraphs 14 to 16 of the Decision dated 21 April 2004.

The Hearing

The Applicants' Case

16. The Applicants' case for substituting Mr Welfare as manager in place of Mr Cross is set out in her Statement dated 15 July 2007. In addition, Statements were provided by the joint Applicants, Mr Ziman and Mrs Gladstone. Mrs Barros gave oral evidence in support of her Statement, on behalf of all the Applicants. A summary of her evidence is set out here.

17. Broadly, Mrs Barros contended that the Applicants had lost confidence in Mr Cross's ability to manage the property effectively, and that no progress had been made in resolving the long-standing problems at the property. Mr Cross had failed to comply with the terms of his appointment, as set out in the Order of the previous Tribunal dated 13 April 2004. In response to questions from the Tribunal, Mrs Barros addressed each of these points in turn.
18. Paragraph 5 of the Order required Mr Cross to collect ground rent funds payable by the lessees under the terms of their leases, including service charges, ground rent, insurance contributions and any arrears. Mrs Barros accepted that some service charge demands had been sent. There had been some confusion over payment of ground rent to the Liquidator.
19. Paragraph 7 of the Order was broken down into eight points, (a) to (h). It required Mr Cross to carry out the management obligations of Four Ennismore Gardens Limited in accordance with the leases. Under points (a) and (b) Mr Cross was to establish the current balance in the service charge and reserve accounts, to appoint an independent firm of accountants to undertake a review of those accounts for the years 2001, 2002 and 2004 and to present their report to the lessees by 24 June 2004.
20. Mrs Barros contended that although Mr Cross had appointed accountants Lees Buckley, she was not satisfied with their report, which had not been prepared until November 2004, and she doubted the accuracy of the figures. In particular, she thought there were two versions of the accounts, and did not understand why certain sums appeared to have been written off.
21. Under point (c) Mr Cross was to ensure that the building was fully and properly insured. Mrs Barros accepted that an insurance policy was in place, but was concerned that it might be affected by a non-functioning fire alarm.
22. Under point (d), Mr Cross was to draw up an action plan for the property with a planned maintenance programme, and prepare a service charge budget for the year ending 31 December 2004. This was to be done in consultation with the lessees with copies of the action plan and service charge budget to be sent out by x date.
23. Mrs Barros contended that Mr Cross had not consulted, apart from a meeting she had organised on 20 May 2004 which focussed on the accounts. She had not seen an action plan, apart from a summary of the meeting, and several letters received since June 2005. In general, she was not satisfied that Mr Cross had taken lessees' views into account, or got to grips with the problems at the property.
24. For example, he had failed to ensure that Mr Ziman's flat (flat 8) was re-connected to the communal hot water and heating system. He had not responded promptly to a weekend emergency water leak in one of the flats. There had been no progress in relation to electrical wiring issues.
25. At points (e) and (f), Mr Cross was required to observe the landlord's covenants in respect of repairs, insurance, services and alterations to the property, and to enforce the lessees' covenants. Mrs Barros contended that Mr Cross was in breach of these obligations, but was unable to give examples in support of her assertion. There were some recent minor disrepair items reported within the previous week, and also a recent letter from Westminster City Council regarding possible rat infestation, but this had not been sent to Mr Cross, but to Mapletoft & Co, solicitors to the Liquidator.
26. At point 7(g), Mr Cross was required to comply with all statutory requirements, including the RICS Residential Property Management Code (the RICS Code). Mrs Barros contended that Mr Cross had failed to comply with certain aspects of the RICS Code. Evidence had already been given regarding consultation. He had not responded promptly to requests for

information (4.3 of the Code), such as letters from Mr Ziman. He had loaned £1,000 to the service charge account from his business account, which she thought improper.

27. At point (h), Mr Cross was required to account to the landlord for ground rent and any other sums due. There had been some confusion in that for some reason the Liquidator had demanded ground rent direct without informing him. This had been resolved, in that Mr Cross was now, quite correctly, collecting ground rent and accounting to the Liquidator for it.
28. The Tribunal heard oral evidence from Mr Welfare, the Applicants' proposed new Manager, in support of his Witness Statement. He was a Member of the Royal Institution of Chartered Surveyors and Associate of the Chartered Institute of Arbitrators. He was a Director of Fifield Glyn Limited, Chartered Surveyors and had worked in property management since 1978.
29. Mr Welfare told the Tribunal that his management experience was mainly in the commercial sector. None of the properties managed by his firm were solely residential. Only 3% of the properties were mixed commercial and residential user. He was familiar with the RICS Code. His firm's level of Public Indemnity cover was £1m. If appointed, he proposed to draw up an alternative action plan. He recognised that the property needed attention and could be difficult to manage, but was prepared to take on the role at a fee of £3,000 per year. This was the same as the fee payable to Mr Cross under the management order.
30. Also before the Tribunal was a brief Report on the condition of the property by Mr M J Ashton, who also attended the hearing. Although Mr Welfare was in contact with Mr Ashton, he had not commissioned the Report. Mrs Barros clarified that she had asked Mr Ashton to prepare the Report, in support of her evidence that repair and maintenance works were needed to the building.

The Respondents' Case

31. The first Respondent, Four Ennismore Ltd (in liquidation), was not represented. A letter dated 1 September 2005 was sent to the Tribunal office by Mr Hickman, a former Director of the company and a lessee, opposing the Application on the basis that another change in the Manager was unnecessary. In his view the Application was "a complete waste of time". No specific or substantive points were made.
32. The second Respondent, Mrs Nahla Murad, also a former Director and lessee, did not appear and was not represented, despite having been represented by Counsel at the Pre-Trial Review. Neither of these Respondents complied with the Direction to prepare a written Response to the Applicants' Statement.
33. Mr Cross was named as the Third Respondent. His Response to the Application was set out in his Statement dated 4 August 2005. He opposed the Application. Broadly speaking, he took the view that the property was difficult to manage, due partly to long-standing disputes and an unfortunate degree of animosity between some of the lessees, not helped by frequent changes of Manager since 2002.
34. Mr Cross accepted that the property was in need of attention, especially with regard to the matters flagged by the previous Tribunal, namely, the communal heating and hot water system, lift, electrical system, and decoration of common parts. In his view, to resolve these issues was a long term project.
35. In addition, he had been hampered at the start of his appointment by the lack of assistance, and even obstruction, from the former managers. It took an unduly long time to get all the necessary information, documents and files from EAM, who did not comply with the time scales set down by the Tribunal.

36. With regard to the service charge accounts, Mr Cross submitted that he had instructed accountants as ordered by the Tribunal, although it had proved impossible, for the reasons stated above, to provide a Report by the deadline. The service charge account was in deficit to an unexpected level when he took over.
37. Mr Cross had sent out service charge demands in June and December 2004, and in June 2005. Despite this, the account was still in deficit at the end of 2004. Some lessees, but not all, were withholding payment. During 2005 he had instigated a sinking fund and planned to increase the level of service charges to bring the account into credit by 2006.
38. With regard to an action plan for the property, Mr Cross could not point the Tribunal to a specific document. He had devised a strategy and set this out in his Report to the previous Tribunal, and in correspondence, such as his letter of 1 July 2005 to all lessees. In essence, his action plan was in three stages: to deal first with external works, secondly the lift, and finally the common parts. In his view this was the most logical and cost effective sequence.
39. In furtherance of these objectives Mr Cross had prepared a Specification of external works and carried out a tender exercise. He had obtained a report on the common parts lighting. He was considering options regarding the lift. He accepted that a full electrical survey was not carried out at the start because of insufficient funds. He also regretted lack of progress in connecting Mr Ziman's flat (flat 8) to the communal hot water and heating system and said this would be pursued.
40. Mr Cross submitted that he communicated regularly with the lessees, responded to their concerns and consulted where necessary. He did comply with the RICS Code. The purpose of the £1,000 loan was to prevent the client account going overdrawn and had been a proper course to take. The loan had subsequently been repaid. He had sought legal advice in accordance with previous Directions.
41. In conclusion, Mr Cross contended that progress had been made at the property, and in putting the service charge in good order. He had complied with the terms of the Management order and Directions from the previous Tribunal. In his view, frequent changes in management were not beneficial. The majority of the lessees did not support the Application.

Decision

42. Sections 24 (9) and (9A) of the 1987 Act provide that the Tribunal has power to vary a management order, but only if 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 to vary or discharge the order.
43. In addition, the Tribunal when making its decision the Tribunal is not required to consider the criteria under Section 24(2) of the 1987 Act in relation to the first appointment of the manager. These Sections deal with quite different situations. The current Application, under Section 24(9), deals with a situation in which the substantive management order is already in existence, because a previous Tribunal has already been satisfied that the tests in Section 24(2) have been met (*Orchard Court Residents Assn –v- St Anthony's Homes Ltd*).
44. On the written and oral evidence before it, the Tribunal had no hesitation in deciding that the Management Order appointing Mr Cross should not be varied, and that he should therefore continue as the Manager of the property on the terms set down by the previous Tribunal.

45. The Tribunal did not consider that Mrs Barros had successfully established any failure by Mr Cross to comply with the terms of the Management Order. Some of the points raised by Mrs Barros, although reflecting her genuine concern for the property, were misconceived. For example, the loan of £1,000 to the account was not a breach of the RICS Code, which at 5.9 specifically provides that manager may pay some of his own money into a client account in order to maintain it, but at his own risk. There was no requirement for Mr Cross to consult before taking this step.
46. With regard to the service charge accounts, it was clear that Mr Cross had provided accounts for the year 2004, and had properly sent out service charge demands to the lessees in accordance with the leases. The position relating to the previous years was less clear. It appeared to the Tribunal that the accountants appointed by Mr Cross, in their analysis, had endeavoured to produce a profit and loss account for the company Four Ennismore Limited, showing alternative scenarios depending on whether certain sums were written off or not. This is not the same as the service charge account. The Tribunal accepts that establishing the figures and putting the service charge account in order was a mammoth task, given the highly unsatisfactory state of affairs that existed when Mr Cross took over and the difficulty of obtaining accurate information.
47. Any issues of liability to pay the service charges demanded, or the reasonableness of the amount, are separate from the management order, and fall to be dealt with under the Section 27A Application which is adjourned for a Pre-Trial Review as explained above.
48. The Tribunal accepted that Mr Cross had formulated a sensible strategy for dealing with the property, and agreed that this was likely to be a long term project. The Tribunal observes that regular progress reports to the lessees, to keep them informed, would be sensible, but the lessees should realise that Mr Cross is not obliged to consult them on every step taken. Mr Cross does not take instructions from either the lessees or the freeholder (the liquidator in this case). He acts independently to manage the property in accordance with the terms of the management order.
49. The Tribunal considered that Mr Cross had generally responded reasonably to requests for information from lessees. He had also liaised with the Liquidator as best he could, but had not always been kept abreast of developments. For example, Westminster City Council had not directly contacted him about the property.
50. There were some points which Mr Cross accepted he needed to address, such as the fire alarms and insurance policy, and the hot water supply to Flat 8. The Tribunal was aware that the latter situation, although unsatisfactory, was not as urgent as might first appear, in that the flat did have hot water and heating supplied from an alternative source.
51. The Tribunal also accepted that the property was difficult to manage, and that consistency and continuity of management was essential. There had been three changes of manager since 2002. It would not be beneficial to the property or the lessees for yet another change at this stage. The Tribunal observes that, even if it had been minded to make the order sought, it would not have regarded Mr Welfare as a suitable Manager, simply because he had very little relevant experience in managing residential property of this sort. His professional qualifications and commercial experience were of course not in doubt.
52. Mr Cross had asked the Tribunal to make certain further Directions. It was not appropriate to do so, as they related to the ongoing management of the property, which is a matter for the manager's own judgment. The Tribunal noted that Mr Cross has taken legal advice, the content of which is again not for the Tribunal to comment upon. If any lessees disagree with that advice, they are at liberty to obtain their own. However, in order to assist, the Tribunal would observe that any manager appointed by the Tribunal starts with a clean sheet. If tenants have claims for damages against the landlord, accruing either before or after the

appointment, these cannot be set off against the manager's claim for service charges, or repaid from the service charge account (*Maunder Taylor –v- Blaquiere*). Any disputes about service charge costs would, as mentioned, have to be the subject of a separate application.

53. In conclusion, for all the above reasons, the Tribunal was not satisfied that a variation of the order would not lead to a recurrence of the circumstances which led to the original order being made; it would not be just and equitable, in all the circumstances of this case, to vary the order dated 13 April 2004, which accordingly remains in force.

Section 20C

54. The Applicants 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 Applicants. At the hearing, Mr Cross confirmed that he did not intend to charge any costs to the service charge account. Accordingly, it was not necessary for the Tribunal to make any order under Section 20C.

Dated 23 October 2005



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Ms Jane Talbot
Chairman