Midland Leasehold Valuation Tribunal

BIR/00CS/LVM/2006/0001

IN THE MATTER OF
Princess Gardens, 1-54 Churhfiels Avenue, Tipton, West Midlands DY4 9NF
('the property')

Peter Neville Dening

Applicant

And

Beamsafe Limited

and the Lessees of the Property

Respondents

And in the matter of the Applicant's application to the Leasehold Valuation Tribunal under section 24(9) Landlord & Tenant Act 1987 for an order that his appointment as manager of the Property be discharged ('the Application').

Order:-

1. That Mr Peter Dening FRICS of Pennycuick Collins, 9 The Square, 111 Broad Street, Birmingham B15 1AS be discharged from his appointment as manager and receiver of the Property with effect from 1st September 2006.

Midland Leasehold Valuation Tribunal **BIR/00CS/LVM/2006/001**

In the matter of Princess Gardens, 1-54 Churchfield Avenue, Tipton, West Midlands DY4 9NF ("the Property")

Peter Neville Dening

Applicant

And

Beamsafe Limited

and the Lessees of the Property

Respondents

And in the matter of the Applicant's application to the Leasehold Valuation Tribunal under section 24(9) Landlord and Tenant Act 1987 for an order that his appointment as manager of the Property be discharged ("the Application").

Date of application:-	19th April 2006
Date of hearing:-	19th July 2006
Tribunal:	Mr J.H.L. de Waal, M.A., Barrister Mr. J. Ravenhill, M.A., FRICS, ACIArb Mrs. C. Smith

Attendances:

For the Applicant:	Mr Justin Bates, Counsel Instructed by Messrs. Brethertons.
For Beamsafe Limited:	Mr Marc Wilkinson, Counsel Instructed by Messrs. Buller Jeffries.
For the Lessees:	Mr David Taylor, Counsel Instructed by Messrs. Geldards LLP on behalf of A.D. Curtis & C. Curtis (no. 10), H. Roberts (no. 5), S.C. Mansell (no. 31), A. Baker (no. 54), M.J. Barnes (no. 37), and J. Philpotts (no. 2). Mrs S. Davies representing herself and Mr. M.Davies (no. 25), Mr. Coates (no. 4), Mr and Mrs Robinson (no. 46).

DECISION

1. For the reasons given below the Tribunal allows the application and discharges Mr Dening from his appointment as manager and receiver of the Property with effect from 1st September 2006.

2. An Order confirming the decision of the Tribunal follows.

Preliminary matters;

(a) adjournment application

3. At the commencement of the hearing Mr Taylor on behalf of the seven tenants (of six tenancies) represented by Geldards LLP applied for the hearing to be adjourned. An application by letter (12th July) requesting an

adjournment had been refused by the Tribunal (13th July) with the proviso that the application could be renewed at the hearing should the tenants so wish.

4. Mr Taylor's submissions on this application and on the substantive issue were helpfully set out in his written skeleton argument. The gist of the argument for an adjournment was that were the Tribunal to go ahead with the hearing and allow Mr Dening's application there would then be a void in the management of the Property allowing it to return to the unsatisfactory state that obtained before Mr Dening was first appointed. Mr Taylor referred to the fact that there was a pending claim (received by the Tribunal on 7th July) by Churchfield Avenue RTM Company Limited to acquire the right to manage the Property. He also suggested that there might be a further application under s24 of the Landlord and Tenant Act 1987 to appoint a new manager in the place of Mr Dening. All of these applications could, he suggested, sensibly be heard together to avoid returning control of the Property to Beamsafe Limited ("Beamsafe") or their agents SM Properties.

5. The application to adjourn was opposed by Mr Bates for Mr Dening and Mrs Davies on her on behalf and that of the tenants for whom she was speaking. Mr Wilkinson for Beamsafe was neutral on the matter.

6. Whilst sympathetic to the logic behind Mr Taylor's application, we refused the application for these reasons:

(1) Directions for the hearing of Mr Dening's application had first been given on 26th April 2006 for a proposed hearing on 15th June and then revised on 31st May (when it appeared that Beamsafe had not been properly served at its registered office) for the hearing on 19th July. There had already been one adjournment of the Application.

(2) Tenants of the Property had therefore had nearly three months in which to make an application to appoint a manager or for the right to manage

but had not done anything to progress matters until very much the last minute.

(3) It would be a waste of legal costs and the resources of the LVT to adjourn the hearing listed for 19th July.

(4) In all the circumstances it would not be fair to grant the adjournment.

(b) <u>s20C application</u>

7. The second matter which was raised was an application by letter dated 4th July by ten tenants for an order under section 20C Landlord and Tenant Act 1985 that costs incurred by Mr Dening in connection with (i) the forfeiture proceedings that had been before Dudley County Court and (ii) the hearing of the Application were not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person specified in the application. The ten tenants whose application it was were those seven represented by Mr Taylor at the hearing and also J. Miller, M. Rowe and Elina Khan.

8. This matter resolved itself. On point (i) Mr Taylor accepted, on behalf of the seven tenants he represented, that we had no jurisdiction to make a s20C order in relation to the forfeiture proceedings since that order could only be made by the County Court.

9. On point (ii) Mr Bates for Mr Dening indicated helpfully that his client did not intend to seek to recover his costs in connection with the Application. It was suggested by Mr Taylor that the Tribunal perhaps seek an undertaking from Mr Dening to that effect. We felt no need to do this. We are content to take Mr Dening at his word.

10. Since three of the tenants who made the s20C application were not represented at the hearing we make it clear that, had Mr Taylor's concession on point (i) not been made, that would have been our finding and insofar as it is necessary we dismiss the s20C application

(c) **Mr Purshouse**

11. A copy of the Application had been served upon Mr Purshouse at no. 38. On 17th May Mr Purshouse (apparently) wrote to the Tribunal in opposition to the Application. On 30th May S.M. Properties (Beamsafe's agents) wrote to the Tribunal stating that Mr Purshouse's lease had been forfeited on 23rd November 2004 and saying that he therefore had no standing to make any submission to the Tribunal. The letter also said that SM Properties did not believe that Mr Purshouse had actually written the letter apparently sent by him since he had declined all knowledge of it.

12. The Tribunal indicated that we would deal with the question as to whether Mr Purshouse was a tenant at the Property at the hearing itself. In the event Mr Purshouse was unable to attend due to ill health so we were not able to resolve the mystery of whether he was a tenant or not and whether he had indeed sent the letter of 17th May. In the circumstances the Tribunal decided that it could not take the representations made in that letter into account, and it played no part in our decision making process.

Evidence

13. The Tribunal read Mr Dening's witness statement and heard oral evidence from him. We do not think it necessary to rehearse the detail of his witness statement. In oral evidence to the Tribunal Mr Dening made the following relevant points:

(i) When appointed as manager he discovered that there were debts of £44,977.72. He had not anticipated this level of debt. He had previously been told that there was a sinking fund in the region of £20,000. Had he known about the debt he would have declined the appointment.

(ii) He had been unable to obtain the documentation he required from Beamsafe including copy leases; that a schedule requiring relevant information he had provided to Beamsafe had never been completed;

no certified accounts beyond those for the year 2001/2002 had been provided.

(iii) Because of the paucity of information provided to him he had problems with the tenants. He didn't know if or what any arrears of rent or service charge were. He did not know whether specific tenants had or had not paid sums towards a major works claim.

(iv) He had been joined against his will into County Court forfeiture proceedings brought by Beamsafe with the result that he had personally been ordered to pay costs by a County Court Judge. He was surprised by this conclusion since he understood that he was a court appointed official.

(v) He, or rather his firm, was now substantially out of pocket to the tune of about £10,000 in prospective fees. The appointment was uneconomic.

(vi) There were two separate residents association and neither offered information as to the identity of their members.

(vii) He had not received the advice and clarification he had anticipated from the LVT. He felt unsupported.

14. Mrs Davis on behalf of herself and the tenants she was speaking for said that Mr Dening had given the tenants a very good service and that whilst she understood his reasons for wishing to be discharged she did not wish to see SM Properties resume management of the Property. The Tribunal also read letters from Magnarent Limited (18th May) and Gary Coates (17th May) as well as Mr and Mrs Davis themselves (17th May).

Law

15. The Application was brought under section 24 Landlord and Tenant Act 1987 ("the Act"). For the benefit of the parties we have set out the full text

of section 24 at the end of this Decision, with the parts that are relevant to the Application highlighted in bold.

16. We were also referred (by Mr Bates) to one relevant case, the decision of the Court of Appeal in Maunder Taylor v Blaquiere [2002] EWCA Civ 1633; [2003] 1 WLR 379. Mr Bates referred us to this case to make the point that a manager appointed by the Leasehold Valuation Tribunal under the Act is appointed to carry out the functions required by the court in his own right as a court appointed official.

Submissions

17. Mrs Davis spoke from typed notes and was kind enough to give the Tribunal a copy of her notes. She said again that she sympathised with Mr Dening's position. She said that the order of the Tribunal that appointed Mr Dening has not been complied with by Beamsafe and/or SM Properties. She was very critical of the refusal of Beamsafe and SM Properties to disclose documents. She said that the majority of the tenants had been let down *"by the failure of a legal system that allows the landlord, and their previous managing agent, to blatantly abuse and evade the law.."*.

18. Mrs Davis asked the Tribunal to order that Mr Dening remain as manager of the Property until the conclusion of the Right to Manage application.

19. Mr Taylor spoke to his skeleton argument, agreeing with Mrs Davis's submissions. He submitted that the Tribunal had three options: (i) to dismiss the application; (ii) to allow it on terms that Mr Dening should remain in office for some time to allow a 'handover' to a RTM company; (iii) to permit Mr Dening to resign immediately. He submitted that option (ii) was preferable.

20. We asked Mr Taylor if the Tribunal had jurisdiction to allow the Application but to defer the date of Mr Dening's discharge. He referred us to s24(9) of the Act which permits us to vary as well as discharge the order

for Mr Dening's appointment and invited us vary the Order of 13th June 2005 appointing Mr Dening to provide that he be discharged from his appointment at a date when the right to manage application had been decided.

21. Mr Taylor also addressed us on s24(9A) of the Act. That is a sub-section which sets out criteria on which the Tribunal must be satisfied if an order is to be varied or discharged. We had asked the advocates at the beginning of the hearing for their submissions on whether the provisions of s24(9A) were relevant to the Application. They agreed that s24(9A) applies on an application by "*any relevant person*" which in turn is defined by s24(2ZA) which refers us to s22 of the Act. Section 22 is concerned with the preliminary notice served by a tenant on:

" *(i) the landlord, and*

(ii) any person (other than the landlord) by whom obligations relating to management of the premises or any part of them are owed to the tenant under his tenancy. "

In summary, the effect of all of these sub-sections is that the criteria set out in s24(9A) only apply if the application to vary or discharge the order is made by the landlord or a managing agent with obligations under the lease.

22. Mr Taylor nonetheless submitted that we should take into account as a relevant consideration the fact that, were Mr Dening's appointment to be discharged straightaway, there would be a recurrence of the circumstances which led to the order being made.

23. Mr Wilkinson on behalf of Beamsafe did not oppose the Application. He told us that we could not be sure that the right to manage application would be completed by November this year. He said that his clients had already identified some matters which would lead them to argue that the notices served by the RTM company were invalid. Beamsafe were not opposed to the Application.

24. Mr Wilkinson also invited the Tribunal to attach conditions to the Order, if made, including conditions that Mr Dening account to Beamsafe for service charge and ground rents received.

25. Mr Bates submitted that his client was entitled to be discharged from his appointment straightaway. Whilst he accepted that we had power to postpone the date for Mr Dening's discharge he submitted that as a matter of principle it would be capricious to refuse the Application. We should also make it clear that Mr Bates told us in opening when explaining the reasons behind Mr Dening's Application that it was not his intention to apportion blame. Implicit in that submission was the point that it was not necessary to identify a blameworthy person as a condition for allowing the Application.

26. Mr Bates said that it would not be right to attach conditions to the Order. He said that Beamsafe's rights at common law were preserved and that the Tribunal should not interfere. He opposed the suggestion that the date of discharge be 'suspended' as it were until the conclusion of the right to manage application, reminding us that that date was in any event uncertain.

27. The Tribunal wishes to record its gratitude to all of the four representatives (Messrs. Bates, Taylor and Wilkinson of counsel and Mrs Davis) who addressed us. Their very focussed submissions meant that the hearing was able to proceed with great economy and have given great assistance to the Tribunal.

Our decision

(a) Should the Application be allowed?

28. We consider that the approach taken by Mr Bates to this Application is the correct one. We consider that it would indeed be capricious for the Tribunal to require Mr Dening to carry on acting as manager of the Property when he does not wish to.

29. Whilst Mr Bates made it clear that it was not his intention to apportion blame (and we agree that it is not necessary to find any particular person at fault in order to allow the Application), we consider that the reasons given by Mr Dening are *bona fide* reasons. In simple terms he is unable to act as manager of the Property because he has not been given the information he needs to do the job.

30. Mr Wilkinson suggested to Mr Dening that the 'real' reason he wished to be discharged from the appointment was that he was not making enough money out of it. We reject that suggestion. Quite properly Mr Dening's firm required payment for his services but we are certain that he put himself forward as manager of the Property principally in order to assist the tenants. It was clear from what Mrs Davis said that what Mr Dening has been able to do for the tenants has been very well received and the Tribunal regrets that due to circumstances beyond his control Mr Dening has not been able to carry out the appointment in the way he had hoped to.

(b) Should the date for discharge of the appointment be postponed?

31. We do not consider it right to require Mr Dening to carry on as manager until conclusion of the right to manage application, quite apart from the fact that the date is uncertain. The position is that he is unable to effectively manage the Property at present and in that circumstances we consider that his appointment should be discharged as soon as reasonably possible. We have therefore set 1st September 2006 as the date for the discharge of his appointment. For the avoidance of doubt that means 31st August will be his last day in office.

32. In coming to this conclusion we do not consider we are varying the previous Order but making a new Order. We consider it implicit in s24(9) that the Tribunal can set a date other than the date of the Decision itself for an appointed manager to be discharged. There needs to be some handover period and any other conclusion would be contrary to common sense. We think a handover period of one month or so is about right.

33. We appreciate that this conclusion will be very disappointing to the tenants who are reasonably concerned that a gap of time between the date Mr Dening's appointment terminates and the date any right to manage application is successful may well cause the resumption of the occurrences which led to the order for Mr Dening's appointment in the first place. However since the criteria set out in s24(9A) do not apply we do not think that is a reason we can take into account to require Mr Dening to do a job he does not wish to do when his performance of that job is being frustrated by matters outside his control.

34. Mrs Davis told us that the tenants feel that they have been let down by the legal system. To the extent that the Order for Mr Dening's appointment has not had the effect the Leasehold Valuation Tribunal expected and the tenants hoped for, we agree and we sympathise. But that matter is out of our control.

(c) Should conditions be imposed?

35. We have also decided that it is unnecessary and inappropriate to attach conditions to our Order. The obligations Mr Dening assumed under s24 of the Act and at common law will continue until 1st September 2006 (at least). It is not necessary for us to impose any further conditions upon Mr Dening and indeed, as Mr Bates pointed out, the imposition of further conditions might cause complications in the future if the right to manage application were successful.

John de Waal
Chairman

26th July 2006

Landlord and Tenant Act 1987

s. 24 Appointment of manager by a leasehold valuation 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 or 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.

(2ZA) In this section "relevant person" means a person--

(a) on whom a notice has been served under section 22, or

(b) in the case of whom the requirement to serve a notice under that section has been dispensed with by an order under subsection (3) of that section.]

(2A) For the purposes of subsection (2)(ab) a service charge shall be taken to be unreasonable--

(a) if the amount is unreasonable having regard to the items for which it is payable,

(b) if the items for which it is payable are of an unnecessarily high standard, or

(c) if the items for which it is payable are of an insufficient standard with the result that additional service charges are or may be incurred.

In that provision and this subsection "service charge" means a service charge within the meaning of section 18(1) of the Landlord and Tenant Act 1985, other than one excluded from that section by section 27 of that Act (rent of dwelling registered and not entered as variable).

(2B) In subsection (2)(aba) "variable administration charge" has the meaning given by paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

(3) The premises in respect of which an order is made under this section may, if the tribunal thinks fit, be either more or less extensive than the premises specified in the application on which the order is 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.

(5) Without prejudice to the generality of subsection (4), an order under this section may provide--

(a) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager;

(b) for the manager to be entitled to prosecute claims in respect of causes of action (whether contractual or tortious) accruing before or after the date of his appointment;

(c) for remuneration to be paid to the manager by any relevant person, or by the tenants of the premises in respect of which the order is made or by all or any of those persons;

(d) for the manager's functions to be exercisable by him (subject to subsection (9)) either during a specified period or without limit of time.

(6) Any such order may be granted subject to such conditions as the tribunal thinks fit, and in particular its operation may be suspended on terms fixed by the tribunal.

(7) In a case where an application for an order under this section was preceded by the service of a notice under section 22, the tribunal may, if it thinks fit, make such an order notwithstanding--

(a) that any period specified in the notice in pursuance of subsection (2)(d) of that section was not a reasonable period, or

(b) that the notice failed in any other respect to comply with any requirement contained in subsection (2) of that section or in any regulations applying to the notice under section 54(3).

(8) The Land Charges Act 1972 and the Land Registration Act 2002 shall apply in relation to an order made under this section as they apply in relation to an order appointing a receiver or sequestrator of land.

(9) A leasehold valuation tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section; and if the order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 2002, the tribunal may by order direct that the entry shall be cancelled.

(9A) The tribunal shall not vary or discharge an order under subsection (9) on the application of any relevant person unless it is satisfied--

(a) that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and

(b) that it is just and convenient in all the circumstances of the case to vary or discharge the order.

(10) An order made under this section shall not be discharged by a leasehold valuation tribunal by reason only that, by virtue of section 21(3), the premises in respect of which the order was made have ceased to be premises to which this Part applies.

(11) References in this Part to the management of any premises include references to the repair, maintenance, improvement or insurance of those premises.