FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/OOAW/LAM/2019/0002**
Property	**:**	**1 Palace Gate, Kensington, London W8 5LS**
Applicant	**:**	**Mr Neil Maloney FRICS**
Representative	**:**	**Justin Bates of counsel instructed by Northover Litigation**
Type of Application	**:**	**Appointment of Manager**
Members of Tribunal	**:**	**Judge D Jackson** **Mr V Ward FRICS**
Hearing	**:**	**21st January 2020** **CCT – Birmingham**
Date of Decision	**:**	**12th February 2020**

DECISION

The Background to the Application

1. This application, to set aside parts of the decision of a previous Tribunal made on 26th July 2018, is an unusual one in that it is made by an applicant who was not a party to those proceedings. Before dealing with the issues it is necessary to explain the history and circumstances that have given rise to the present application.

2. References in square brackets relate to the page reference in the Applicant's bundle.

3. The Property is a seven-storey building on the corner of Kensington High Street and Palace Gate with views over Hyde Park to the north. The entrance to the communal hall and stairs is on Palace Gate. The Property comprises 5 flats and 3 commercial units. The commercial units occupy the basement and ground floor with the flats above [1190].

4. On 26th June 2015, the Leaseholders of Flat 2 (Wayland Investments Inc.) and Flat 3 (Trustees of the Palace Gate Discretionary Trust) ("the Leaseholders") made an application to the Tribunal for the Appointment of a Manager under section 24 of the Landlord and Tenant Act 1987 [1-15]. The Respondent to the application was the freehold owner of the Property, Winchester Park Limited ("WPL"). It is also necessary at this stage to introduce Mr Alon Mahpud whom the Leaseholders allege is the "controlling mind" of WPL.

5. In August 2015, shortly after the application was made to the Tribunal, the Applicant, Neil Maloney FRICS (trading as "My Home Surveyor"), was appointed by WPL to act as managing agent at the Property.

6. On 26th June 2017, a Tribunal (BIR/00AW/LAM/2015/0001) issued "Preliminary Decision, Adjournment and Directions" [1187-1197]. The determination was an unusual one. At paragraph 45, the Tribunal said [1195]:

> "The Tribunal finds as set out above, that of the applicant's four grounds three pass the gateway or threshold but the Tribunal further finds that this is not a clear-cut case where it would be just and convenient to appoint a manager at this time. In the Tribunal's view, it would have been clear-cut in favour of an appointment had Mr Mahpud continued to manage the Premises given the findings of the previous Tribunal as to his managerial competence and given the breaches that have occurred"

The Tribunal continued at paragraph 47:

> "But the landlord had, at the time of the hearing, taken one significant step by way of improvement, namely the appointment of Mr Maloney to manage the premises."

And at paragraph 49:

> "Before considering finally whether or not the point of no return has been reached and it is just and convenient to appoint for the better future management of the property, the Tribunal would like to see how Mr Maloney goes on for another six months. He has to date had at least six months or more, to become familiar with the premises and the parties. He came across to the Tribunal as experienced and personable and able to deal with difficult personalities and thus the Tribunal would like to see him continue in his present role for a further six months to see if matters settle down between the parties. After that further period the Tribunal considers it will be in a better position to consider whether it is just and convenient to appoint or not and to issue its final decision dealing with that point"

7. Having reached its Preliminary Decision and decided to adjourn, the Tribunal gave the following Directions at paragraph 51 [1196]:

> "The Tribunal, therefore, directs the parties to make further written submissions to the Tribunal by 15th January 2018 on whether it is just and convenient for the appointment to be made, such submissions to be accompanied by updated witness statements (signed and containing statements of truth) from Mr Grace, Mr Mahpud and Mr Maloney whereupon the Tribunal will exchange submissions, invite any counter submissions within 14 days and reconvene in early February 2018 to consider whether an appointment should be made at that date. Such submissions should also set out the up-to-date service charge position together with details of any arrears of service charge, who owes the same and the reasons given for non-payment. Mr Maloney's additional witness statement should contain his proposals for recovery of any outstanding service charge …."

The Tribunal then went on to say:

> "The Tribunal considers that, having been provided with updated submissions and witness statements, it can deal with the matter by paper determination without a further hearing…. The parties and Counsel are thus asked to write to the Tribunal within the next 21 days either confirming that they are happy for the matter to be dealt with on paper or their availability for a further hearing…."

8. On 26th July 2018 the Tribunal issued its Final Decision [1586-1598] under section 24(1) of the 1987 Act appointing Mr Michael Maunder Taylor as Manager of the Property for a period of two years in accordance with the attached Management Order. What is described by the Tribunal as "Method of Submission" is set out at paragraphs 7-9 of the Final Decision [1587]:

> "7. The Tribunal heard the case over two days in 2017 with both parties represented by Counsel. In view of the potential cost another day's hearing which the Tribunal regarded as disproportionate, the Tribunal suggested the final decision could be made by written submissions and witness statements and invited the parties to comment.
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> 8. Both parties agreed, Solicitors for the Applicant by email on 14 February 2018 and Solicitors for the Respondent by email on 21 February 2018. It is therefore surprising to find that in his final submission, Counsel for the Respondent complains "*Unfortunately the procedure adopted by the Tribunal (determination without a hearing) means that R and its legal advisers will not have had the opportunity to test the evidence advanced by Mr Grace in cross examination or otherwise, or to respond to a new set of submissions advanced by A1/2"*
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> 9. The Tribunal refutes this, the parties have been given ample opportunity to air their views, there have been three rounds of witness statements, timetables have been relaxed to accommodate the parties and Teacher Stern Solicitors for the Respondent have agreed the procedure. The Tribunal therefore proceeds on the basis agreed by the parties"

9. It can readily be seen that the seeds of the present application were sown by the decision of the Tribunal to reach its Final Decision without a hearing. Much criticism has been made of the Tribunal. However, we feel compelled to repeat the observations made by the Judge of the present Tribunal who issued Directions on 26th September 2018 [1599-1601]:

> "I am wholly unable to understand why two specialist firms of solicitors should have agreed that this application, involving vigorously contested matters of fact and complex legal issues, should be considered in any way suitable for determination without a hearing under Rule 31. Both parties have a duty to help the Tribunal to further the overriding objective (Rule 3(4)). They have failed in that duty in consenting to a paper determination. The indication tucked away at paragraph 61 of the Respondents Submissions dated 16th April 2018 is insufficient. Both parties should specifically have withdrawn their consent and requested an oral hearing."

10. On 17th September 2018, WPL sought to appeal the Final Decision to the Upper Tribunal. This was not a happy time for the freeholder. It dispensed with the services of Teacher Stern LLP who had represented WPL throughout the proceedings. It briefly engaged Fletcher Day but by December 2018, was acting in person. By the time of the hearing of the present application Joseph Pitt and James Davies of Fraser CRE had been appointed as fixed charge receivers of the freehold of the Property.

11. On 7th February 2019, HHJ Gerald, sitting as a Judge of the Upper Tribunal, refused to admit the application for permission to appeal by WPL primarily on grounds of delay [1613-1618].

12. On 21st January 2019, an "Application on behalf of Neil Maloney FRICS to be joined as a party and for permission to appeal" was made to the Upper Tribunal [1607-1612]. Two points arise here. First, it does not appear that application was received in time to be referred to HHJ Gerald when he refused WPL permission to appeal on 7th February 2019. Second, in another of the highly unusual procedural applications which bedevil this case, the Applicant did not apply to the First-tier Tribunal to be joined as a party or for permission to appeal, instead he applied directly to the Upper Tribunal.

13. The Final Decision of July 2018 contained significant criticism of the Applicant as managing agent prior to the Appointment by the Tribunal of Mr Maunder-Taylor. The Tribunal criticised his management of the Property and questioned his professional competence. Those criticisms were made without an oral hearing, without warning of the adverse view formed by the Tribunal and without giving the Applicant the opportunity to respond. The Applicant submitted that this amounted to procedural unfairness and that his Article 8 ECHR rights were engaged (respect for private life). The Applicant seeks that the offending parts of the Final Decision be expunged.

14. On 15th February 2019, the Deputy President of the Upper Tribunal postponed further consideration of the application to allow the Applicant to consider whether, and if so advised, to make an application to the First-tier Tribunal under Rule 51 [1619-1620].

15. The Applicant then requested the Upper Tribunal to convene an oral hearing of his application for permission to appeal. On 26th March 2019, the Deputy Chamber President Ordered [1621-1623]:

> "1. The applicant shall, within 14 days, make a written request of the First-tier Tribunal (Property Chamber) that it should consider whether to exercise its power under rule 51, Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to set aside and remake parts of its decision of 26 July 2018 in case number BIR/OOAW/LAM/2015/0001 (including paragraphs 11, 18, 19) so far as they relate to Mr Maloney.

2. Further consideration of the application for permission to appeal is stayed pending the outcome of that request."

16. On 8th April 2019 the "Application under Rule 51 Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013" was made [1624-1642].

Who should hear the Application?

17. On 24th April 2019, Directions were issued to the Applicant and also to Collyer Bristow solicitors (on behalf of the Leaseholders), WPL and to Michael Maunder Taylor in the following terms [1643- 1645]:

> "The application has been drafted by counsel who, at paragraph 12, indicates 'This is a very unusual application (likely the first of its kind in this Tribunal). Careful consideration needs to be given to the future management of this application'.
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> I entirely agree and have given considerable thought as to who should hear this application.
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> The starting point is the Practice Statement "Composition of Tribunals in the Property Chamber on or after 15th November 2013" issued by the Senior President of Tribunals on 15th November 2013 provides at paragraph 11 that any applications under Part 6 of the Tribunal Procedure Rules 2013 must be decided by the same Members of the First-tier Tribunal as gave the substantive decision.
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> Paragraph 12 of the Practice Statement provides that paragraph 11 does not apply where complying with it would be impractical or would cause undue delay. Paragraph 12(b) allows for the matter to be determined by another Judge of the First-tier Tribunal nominated by the Chamber President. Under paragraph 5 the powers of the Chamber President under the Practice Statement may be exercised by a Regional Judge.
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> I take into account the following:
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> a) The legally qualified panel member retires, by reason of age, in May 2019.
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> b) The application is based on ECHR Article 8 and bristles with potentially complex legal argument. The application should therefore be heard by a Tribunal Judge.

c) One of the reasons behind the strictures of Paragraph 11 of the Practice Statement is that any Part 6 application should be determined by the same Tribunal that received oral evidence and heard oral submissions. Here the very basis of the application is that the Decision was made without a hearing.

d) The Applicant does not seek to disturb the Management Order itself.

e) The application under Rule 51 was preceded by a complaint of judicial misconduct made by the Applicant against all three Members of the Tribunal. That complaint was summarily dismissed by the Chamber President. However, I note that the complaint is repeated by way of attachment at paragraph 10 and Exhibit 3 to the application. This places the Members of the Tribunal in an invidious position.

f) Counsel who appeared for both Wayland Investments Inc and the Trustees of Palace Gate Discretionary Trust and counsel who appeared for Winchester Park Limited are both fee paid Judges of the First-tier Tribunal (Property Chamber). The Applicant is himself a former fee paid Member of the Tribunal. This application therefore gives rise to potential conflicts of interest.

g) Under Rule 3(3)(b), the Tribunal must seek to give effect to the overriding objective when interpreting any rule or practice direction. This is an application which is important and raises complex issues. I am mindful of the substantial costs already incurred by all parties and the likely anticipated costs.

I am therefore of the preliminary view that this application should be determined by a salaried Judge sitting with a salaried Deputy Regional Valuer. Having regard to the resources of the Tribunal I am minded to hear this application myself."

18. No objections have been made to the Tribunal and accordingly this matter has been heard by a salaried Judge and the Deputy Regional Valuer.

Rule 51 – Setting aside a decision which disposes of proceedings

19. Rule 51 provides:

> **51.**— (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
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> (a)the Tribunal considers that it is in the interests of justice to do so; and
> (b)one or more of the conditions in paragraph (2) are satisfied.
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> (2) The conditions are—

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
(b) a document relating to the proceedings was not sent to or was not received by the Tribunal at an appropriate time;
(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
(d) there has been some other procedural irregularity in the proceedings.

(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received—

(a)within 28 days after the date on which the Tribunal sent notice of the decision to the party; or
(b)if later, within 28 days after the date on which the Tribunal sent notice of the reasons for the decision to the party.

20. Concern has been expressed, not least by the Applicant's solicitors [1621], that the Applicant may not have standing to make an application under Rule 51. In particular, Rule 51(3) specifically refers to "a party".

21. We have been referred to **Re: W (A child) (Care Proceedings: Non Party Appeal)** [2016] EWCA Civ 1140. The central issues in that appeal were:

"1. Can a witness in Family proceedings, who is the subject of adverse judicial findings and criticism, and who asserts that the process in the lower court was so unfair as to amount to a breach of his/her rights to a personal and private life under ECHR Art. 8, challenge the judge's findings on appeal?

2. If so, on what basis and, if a breach of Article 8 is found, what is the appropriate remedy?"

22. In that case, McFarlane LJ identified a number of "substantive and procedural legal landmines". Although the application before the Tribunal relates to set aside under the Tribunal Procedure Rules and not an appeal in Family Proceedings, the difficulties are the same. Can a non-party challenge a decision and is a challenge possible where the only complaint relates to subsidiary internal findings within a Decision rather than the Order itself?

23. In relation to the non-party point, McFarlane LJ held at paragraph 42:

"….where it is established that an individual's rights under ECHR, Art 8 have been breached by the outcome of proceedings in the lower court, then this court

has a duty under HRA 1998 to read down s31K and the court rules in such a manner as to afford that individual a right of appeal".

24. However, the position in relation to challenging subsidiary internal findings rather than the substantive Order is more complicated. In **Re M (Children) (Judge's finding of fact: jurisdiction to appeal)** [2013] EWCA Civ 1170 Macur LJ held that "Findings of fact do *not* comprise determination, order or judgement unless they concern the issue upon which the determination of the whole case ultimately turns or are otherwise subject of a declaration of the whole case ultimately turns or are otherwise subject of a declaration within the order".

25. McFarlane LJ cites other authorities referring to findings of fact which are "pregnant with legal consequences" (see paragraphs 52 and 53). In the case before us the Applicant at paragraph 2 of his Witness Statement [1650] states:

> "At a professional level, I had to decline work and business opportunities and I am aware that I have not been considered for possible s24, 1987 Act appointments. I have had to notify my business partners, existing clients, and my insurers of the decision".

The Tribunal also notes that the criticisms of the Applicant in the Final Decision came "out of the blue" (see paragraph 89 of **Re: W**) in that the Tribunal in its Preliminary Decision said of the Applicant: "He came across to the Tribunal as experienced and personable and able to deal with difficult personalities"

26. At paragraph 67 of **Re: W** it was accepted that ECHR, Art. 8 extends in the context of private life to a person's professional life as well:

> "No issue was taken before this court as to the potential applicability of ECHR, Art 8, in the context of private life, to the professional lives of SW and PO. It is not necessary to do more than draw attention to the relevant domestic and Strasbourg case law on the point."

The conclusions of the Court of Appeal on procedural unfairness and Article 8 are set out at paragraph 97. Two of those conclusions apply with considerable force to the application before the Tribunal:

> "a) In principle, the right to respect for private life, as established by Article 8, can extend to professional lives.
>
> d) At its core, fairness requires the individual who would be affected by a decision to have the right to know of and address the matters that might be held against him before the decision maker makes his decision"

27. We set out in full "Remedy on appeal" and "Conclusion" in **Re: W**:

> *"Remedy on appeal*
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> 119. Where, as I have found to be the case here, the adverse findings complained of have been made as a result of a wholly unfair process and where, again as here, the consequences for those who are criticised in those findings are both real and significant, it is incumbent on this court to provide a remedy and, so far as may be possible, to correct the effect of the unfairness that has occurred. In the present case what is sought is the removal from the judgment of any reference to the matters that were found by the judge against SW, PO and the local authority that fell outside the parameters of the care proceedings and had not been raised properly, or at all, during the hearing.
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> 120. Mr Feehan accepts, as I understand it, that if this court reaches the stage that, in my judgment, it has indeed reached, then redaction from the judgment must follow, subject to any submissions as to detail. I agree that that must be the case. So that there is no ambiguity as to words such as 'removal' or 'redaction' in this context, I make it plain that the effect of any change in the content of the judge's judgment that is now made as a result of the decision of this court is not simply to remove words from a judgment that is to be published; the effect is to set aside the judge's findings on those matters so that those findings no longer stand or have any validity for any purpose. The effect is to be as if those findings, or potential findings, had never been made in any form by the judge.
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> **Conclusion**
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> 121. For all of the reasons that I have now given I hold that each of these appellants was, by the conclusion of the first instance process, a 'party' to the proceedings and that the Court of Appeal has jurisdiction to entertain their appeals on the basis that they each assert that the judge has acted in such a way so as to amount to a breach of their rights under ECHR, Arts 6 and/or 8 pursuant to HRA 1998, ss 7 to 9 . I have further held that there was, most unfortunately, a wholesale failure to achieve a fair trial in relation to the matters that the judge went on to find proved against them, which are outside the parameters of the issues in the case and are the subject of this appeal.
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> 122. I therefore allow the three appeals and hold that, if my lords agree, those parts of the judge's judgment which record those matters are to be set aside on the basis that they are to have no further validity and are to be regarded as if they had never been made."

28. At the hearing, Mr Bates also helpfully referred the Tribunal to the decision of the Upper Tribunal (Tax and Chancery Chamber) in **Pierhead Drinks Limited v Commissioners for HMRC** [2019] UKUT 7 (TCC). Paragraph 21 confirms that Article 8 protection extends to protection of reputation provided that it is sufficiently serious (citing **Axel Springer v Germany** (2012) 55 EHRR 6 applied in **Yeo v Times Newspapers Limited** [2015] EWHC 3375 (QB)). The Tax and Chancery Chamber also confirmed at paragraph 24:

> "The proceedings in *Re W* were care proceedings in the Family Court but much of the discussion in the judgement of McFarlane LJ applies equally to other proceedings including appeals in the FTT"

29. We are therefore satisfied that, subject to finding a breach of ECHR Art 8, that the Applicant has standing to make an application to the Tribunal under Rule 51 even though not originally a party to the proceedings. We also find that, subject to the terms of Rule 51, the Applicant is entitled to the remedy of setting aside those parts of the Final Decision which impugn his professional reputation even though he does not seek to challenge the Management Order itself.

30. We note that the Deputy Chamber President [1623] suggests that "the FTT is entitled to consider exercising its power to set aside in part on its own initiative". However, having considered **Re: W** we are satisfied the Applicant has standing to make a Rule 51 application rather than merely inviting the Tribunal to act on its own initiative.

31. As has been observed above, this is an unusual application. What is the position in relation to the 28 day time limit set out in Rule 51(3)? The Applicant argues that he was not a party and not a recipient to whom "the Tribunal sent notice of the reasons for the decision to the party". There is therefore a strong argument for holding that, in these circumstances, no time limit applies. However, the absence of a time limit could have potentially very serious consequences in a case like the one before us. To set aside a Management Order many months after it was made would have a very serious effect both on the management of the Property and the residential and commercial leasehold occupiers. There has been delay by the Applicant. We note that the Applicant must have been aware of the Decision in August 2018 because on 3rd September 2018, counsel instructed by him made a detailed complaint of judicial misconduct [1637-1642]. The application under Rule 51 was not made, as it should have been, to the First-tier Tribunal, until 8th April 2019 – a delay of 7 months. However, we take into account the reasons given by the Deputy Chamber President for extending time for making an application for permission to appeal [1622]. Under those circumstances we do not find that delay in making the application should in any way prejudice its consideration. However, our Decision should not be taken as authority for the proposition that delay will not be a relevant consideration in any future applications made on similar grounds. Delay is clearly a relevant consideration in relation to the interests of justice test in Rule 51(1)(a).

Concession as to the scope of the application and the position of other parties

32. At paragraph 2 of his Application, the Applicant makes it clear [1607]:

> "He does *not* seek to overturn the substantive decision (i.e. that a manager should be appointed under section 24, Landlord and Tenant Act 1987) but is concerned only to ensure that his professional reputation is not unfairly sullied."

33. That concession is well made. However, it is clear that the Leaseholders as well as the WPL and the Tribunal Appointed Manager, Mr Maunder- Taylor (referred to as "the Interested Parties" within Directions) are potentially affected by the application.

34. By letter dated 15th May 2019, Collyer Bristow solicitors on behalf of the Leaseholders indicated, on the basis that the application does not seek to disturb the Management Order, that their client neither supports nor objects to the application [1647].

35. No correspondence has been received by the Tribunal from WPL. However, as noted above, Fixed Charge Receivers have been appointed. Their solicitors Addleshaw Goddard have confirmed that they neither object to nor support the application [1702].

The Application

36. The Applicant seeks set aside of paragraphs 11, 18 and 19 of the Final Decision.

37. Paragraph 11 contains 6 findings [1588]:

> "1. Mr Maloney has not issued revised statements of account to the tenants by 11 October 2017 although the service charge year ended on 31st May 2017. The Tribunal finds this delay unreasonable.
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> 2. The Tribunal has difficulty understanding how Mr Maloney could have managed the building without a basic survey of the structure and services, particularly where there was a lift. This would be essential for any proper management involving service charge expenditure and the lack of a basic survey is regarded by the Tribunal as a failing.
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> 3. Mr Maloney had failed to produce a service charge budget for the year ending 31 May 2018 by 8 February 2018 according to Counsel for the Applicants of that date, even though it had been promised in June 2017. The Tribunal finds this unacceptable.

4. Mr Maloney has clearly not been in control of the service charge. At para. 2.2.3.1 he said the Freeholder was paying the cleaning costs directly. The Tribunal finds this unacceptable.

5. Mr Maloney has taken instructions from Mr Fisher, a new party not referred to at the January 2017 Hearing and apparently introduced at a later date, who he described as "*the main point of contact now for the Landlord*", but it is not clear from either his or Mr Fisher's statements whether it is Mr Fisher who is acting as primary agent or his company, Pegasus Advisory Ltd. The Tribunal finds this unacceptable.

6. Mr Maloney's statement fails to give reasons for the non-payment of service charges or recovery of outstanding sums despite being required to do so by the Tribunal's Preliminary Decision. All he says is "*These matters continue to be handled by the client's appointed solicitors and Counsel*". Mr Maloney has not provided the Tribunal with the required information which the Tribunal finds unacceptable."

38. Paragraph 18 reads as follows:

"Mr Maloney, despite having had well over a year to do so, has not convinced the Tribunal that he is effectively managing the property for the following reasons:

a) Service charge demands and year-end statements are being sent too late;

b) There has been no proper survey to identify the major costs of repair expected in the future (which are essential to set a budget);

c) The way the service charge accounts have been presented is confusing;

d) No evidence of substance has been presented to demonstrate that the property is subject to regular estate management inspections and

e) The Tribunal asked for Mr Maloney's specific proposals to recover outstanding service charges and his answer has simply to refer to his client's solicitor and Counsel when this should clearly be within a managing agent's control – if not direct control, then indirect control by way of instructions to third parties to recover the debt but certainly not derogated entirely."

39. Finally, Paragraph 19:

"In the Tribunal's opinion Mr Maloney has never been in sole control of managing the property and has been out of his depth, although in stating as such, the Tribunal recognizes the difficulties Mr Maloney has faced."

40. In determining this application, we have considered the Witness Statement of Neil Maloney dated 31st October 2019 [1650-1674]. The Applicant gave evidence to the Tribunal at the hearing on 21st January in Birmingham. He was represented by Justin Bates of counsel. None of the Interested Parties attended or made written submissions.

41. The Applicant told us that the Final Decision came as a shock to him. The Decision has been published and is in the public domain. He told us that it has harmed his business and professional reputation. He has had to disclose the Final Decision to his professional indemnity insurers and has had some difficult discussions with solicitors who would normally instruct him. He has not received as many section 24 enquiries in relation to potential appointment of manager applications as he would usually expect. He has had to disclose the Decision to the professional institutions for whom he lectures. He was particularly distressed by the suggestion that he was "out of his depth". He is a Fellow of the RICS and formerly a Valuer Member of the Leasehold Valuation Tribunal and the First-tier Tribunal (Property Chamber).

    We now deal with each of those parts of the Final Decision which the Applicant seeks to set aside.

    11.1 Mr Maloney has not issued revised statements of account to the tenants by 11 October 2017 although the service charge year ended on 31st May 2017. The Tribunal finds this delay unreasonable.

42. The Tribunal relied on paragraph 39 of the Witness Statement of Michael Grace, solicitor for the Leaseholders, dated 8th February 2018 [1282]. He complains that "the accounts for year end 31st May 2017 were not received until 12 November 2017, notwithstanding assurances that they would be received earlier". More detail of the criticism is set out at paragraph 32 of Mr Grace's Witness Statement [1281]:

    > "I had also been pressing Mr Maloney for the year end service charge accounts, 31 May 2017. On 20 June 2017 Mr Maloney told me (p15) that the draft year-end figures had been submitted to the Respondents accountants for review and for certification. He stated that the accounts would be distributed over the next two weeks i.e. by the early part of July. By October 2017 the lessees had still not received the accounts. On 11 October 2017 Mr Maloney informed me (p40) that he had been passed further documentation in the past few weeks that needs to be incorporated into the records held by them. He said that he was in the process of dealing with that and that he will be providing the certified accounts as soon as he had finalised the process. This made little sense as Mr Maloney was the Managing Agent for the entire accounting period and should have had all the expenditure documentation himself. He ought to have been controlling the expenditure."

The exhibit at page 15 [1300] is an email from the Applicant to Mr Grace of 20th June 2017 the relevant part of which states: "I have prepared the draft year-end figures (to 31st May 2017) in relation to the service charges and submitted them to our client's appointed accountants for review and certification. We shall distribute the same over the next couple of weeks to all Lessees, along with supporting invoices for their files".

The exhibit at page 40 [1325] is another email from the Applicant to Mr Grace dated 11th October 2017 which explains: "As to the financial year end March 2017, we have been passed further documentation on the past few weeks that needs to be incorporated into the records we held. We are in the process of dealing with this and will be providing certified accounts for that period as soon as we have finalised that process."

43. At the hearing the Applicant told the Tribunal that he received invoices for cleaning from Mr Mahpud after the accounts had been drafted. This meant that accounts preparation had to "go back to square one". The Applicant told us that he had many discussions with Mr Mahpud to the effect that all expenditure should go through managing agents and that Mr Mahpud should instruct him to take over arrangements in relation to cleaning. It appears that Mr Mahpud retained a caretaker from adjoining premises to carry out cleaning and who was paid directly by WPL which in turn submitted the invoices to the Applicant for inclusion within the service charge accounts.

44. Our finding is that service charge accounts for year ending 31st May 2017 were not issued to Leaseholders until 12th November 2017. This is within 6 months of the service charge year end and not of itself something that the present Tribunal would find unusual or even objectionable. To the extent that there was any unreasonable delay, the cause is attributable to the late submission of cleaning invoices by WPL. The Applicant had prepared draft year-end figures by 20th June 2017. Any unreasonable delay was not of his making.

11.2 The Tribunal has difficulty understanding how Mr Maloney could have managed the building without a basic survey of the structure and services, particularly where there was a lift. This would be essential for any proper management involving service charge expenditure and the lack of a basic survey is regarded by the Tribunal as a failing.

45. The Tribunal relied on paragraph 5.1.5 (f)(i) of the Second Witness Statement of Neil Maloney dated 16th March 2018 [1414 -1425]. The relevant paragraph and large parts of that Witness Statement are taken verbatim form "Brief Management Report to First Tier Tribunal (Property Chamber)" dated 6th February 2018 [1261-1270]. Paragraph 5.1.5 (f) needs to be read in full to understand its context:

"At my meeting with the Lessees of Flat 2 and 3 (and Mr Grace) it became clear that there was a longing for the building management to encompass the "longer term" financial liabilities that occur in a management of this nature, but the establishment of a suitable reserve fund to even out the demands on Lessees year-on-year. I believe that it was also accepted that in order to achieve these two things need to happen"

The two things were the survey at 5.1.5 (f) (i) and the setting up of a fund (ii). Neither of these desirable things happened because:

"This matter has yet to be progressed, given the continuing and unresolved financial "dispute" of Flats 2 & 3 with the Landlord"

46. Accordingly, the context of 5.1.5 (f)(i) is the ongoing dispute between WPL and the Leaseholders. In an effort to try to resolve that dispute in the context of service charge payments, the Applicant met with the Leaseholders' solicitor Mr Grace. Mr Grace said at that meeting that his clients would like to see a long term management plan. The Applicant, perfectly properly, suggested that any long term plan should be based on a detailed survey and the setting up of a fund. However, as long as the dispute between the Leaseholders and WPL continued, no progress could be made in relation to long term planning until a financial settlement had been reached. It is not for the present Tribunal to decide the merits of the Leaseholder/WPL dispute save to note that its continuance makes any long term planning virtually impossible. We find that any fault was not that of the Applicant. He was not put in funds to progress either a survey or long term management.

47. The Tribunal in its Final Decision refers to a "basic survey". In his evidence the Applicant said that as a Fellow of RICS he was qualified to inspect the Property and indeed lectures on basic building construction. He also carries out home buyer surveys. He is capable of understanding the nature of the building. The management issues at the Property do not raise any significant structural issues. A competent managing agent would be able to address most issues by way of visual inspection. In any event, the Applicant had access to reports prepared by a third party surveyor during 2016 and 2017. A more in depth survey would, of course, be required if any major projects were to be undertaken e.g. roofing works. The Tribunal agrees.

11.3 Mr Maloney had failed to produce a service charge budget for the year ending 31 May 2018 by February 2018 according to Counsel for the Applicants of that date, even though it had been promised in June 2017. The Tribunal finds this unacceptable.

48. The Tribunal relied on paragraph 4 (a) of "Applicants' Further Submissions" prepared by Daniel Dovar (counsel for the Leaseholders) on 8th February 2018 [1271-1275]. Mr Dovar submitted [1272] that the Applicant had failed:

> "To produce a budget for the service charge to the year end 31st May 2018 [MGWS para 39]. Which is a very poor indicator of future management prospects. This is despite promising one in June 2017 [MGWS exh p15]"
>
> MGWS para 39 refers to paragraph 39 of Mr Grace's Fourth Witness Statement [1281] which simply recites that "the lessees have not received from Mr Maloney a budget for the current financial year (to 31 May 2018)…"

Exhibit 15 [1300] is an email from the Applicant to Mr Grace of 20th June 2017. The relevant section reads:

> "We have also prepared the budget for the current year (at somewhat less than the previous budget) and this is currently with my client for review and agreement. It was slightly late getting to them but I hope to be able to distribute the same over the next week along with a request for payment of the first interim instalment"
>
> On 29th June 2017 the Applicant sent an email to his client's then solicitors, Teacher Stern copied to Mr Mahpud [1668-1669]. At the end of the email the Applicant chases Mr Mahpud: "cc Alon – fyi and discuss with Raj. Can I please then have the Landlord's agreement to the draft budget I present earlier?"

49. However, in making criticisms of the Applicant based on Mr Dovar's Submissions of 8th February 2018 and Mr Grace's Fourth Witness Statement, the Tribunal appears to have overlooked Mr Grace's Fifth Witness Statement dated 2nd April 2018 [1426-1518] and in particular paragraph 25 [1430]:

> "I need to correct an error in my fourth witness statement. At paragraph 39 I say that a budget for the current financial year and service charge demands have not been received. Having seen Mr Maloney's reply (paragraph 10.11 of his witness statement) I asked my IT department to search my emails to see if I had received anything from Mr Maloney in August 2017. I can confirm that as a result of that search I have found two emails from Mr Maloney dated 1st August 2017 to which he attached a Budget for 2017/18 and a request for payment of an interim service charge. I believe I overlooked the emails because I received them while I was away from the office on holiday. I apologise for the error on my part."

The email of 1st August 2017 enclosing 2018 Budget is at [1493] and forms part of Exhibit MJG 8.

50. We find that no fault attaches to the Applicant and that subparagraph 3 of Paragraph 11 of the Final Decision must be set aside.

11.4 Mr Maloney has clearly not been in control of the service charge. At para. 2.2.3.1 he said the Freeholder was paying the cleaning costs directly. The Tribunal finds this unacceptable.

51. This appears as "note (a)" on page 10 of the Applicant's Second Witness Statement [1423]: "cleaning as the Freeholder has (I understand) been paying this cost directly". This is a verbatim recital of paragraph 2.2.3.1 of the Applicant's "Brief Management Report" [1270].

52. We repeat our findings at paragraphs 43 and 44 above. The fault here lies with WPL and not with the Applicant. No managing agent can be aware of expenditure incurred by the freeholder of which he has no knowledge. The first the Applicant knew of the expenditure was when invoices were submitted to him (late) by WPL. As expenditure on cleaning is a service charge item the Applicant had no choice but to forward the cleaning invoices to the accountants for incorporation within the accounts.

53. We entirely agree with the Tribunal that for a freeholder to pay directly for services is unacceptable. All services should be under the direct control and paid for by the managing agent. However, what is unacceptable is the conduct of the freeholder and not the Applicant.

11.5 Mr Maloney has taken instructions from Mr Fisher, a new party not referred to at the January 2017 Hearing and apparently introduced at a later date, who he described as "the main point of contact now for the Landlord", but it is not clear from either his or Mr Fisher's statements whether it is Mr Fisher who is acting as primary agent or his company, Pegasus Advisory Ltd. The Tribunal finds this unacceptable.

54. At paragraph 20 of the Final Decision the Tribunal found:

> "In the Tribunal's further opinion, Mr Fisher's involvement adds nothing to the management other than adding yet another layer. Arising out of the Hearing, the Tribunal has always been concerned about the opacity of ownership of the reversionary interest in 1 Palace Gate and the management difficulties caused to the lessees that such opacity causes and the introduction of Mr Fisher does not alleviate these concerns, it merely adds to them. He appears to be acting jointly with Mr Maloney but was not previously identified as a Manager. The fact that his expertise seems to lie in tax advice and company re-structuring does not persuade the Tribunal that he is a suitable or competent property manager nor is his comment that he is Director of 'Pegasus Advisory Limited', that is to say, a company that Mr Grace ascertained had been dissolved in May 2017, calculated to reassure. When it deferred its decision, the Tribunal was hoping that Mr

> Maloney would demonstrate strong, efficient and effective management but those hopes have simply not materialised, the Tribunal finds. Instead effectively all the Respondent has done is to involve Mr Fisher."

The present Tribunal entirely understands the previous Tribunal's well founded concerns in relation to "opacity of ownership". We entirely agree that the involvement of Mr Fisher only added to those concerns.

55. However, the Applicant had no choice but to take instructions form Mr Fisher. On 6th February 2018 Jonathan David Fisher made a Witness Statement on behalf of the Respondent, WPL [1253-1258]. At paragraph 6 Mr Fisher states: "I am the principal point of contact for Mr Maloney and have authority to provide instructions to him".

56. What else was the Applicant to do? His clients instructed him to deal with Mr Fisher. We entirely agree that the addition of Mr Fisher into an already opaque situation was unacceptable. However, it is the conduct of WPL in involving Mr Fisher that is unacceptable and not the conduct of the Applicant in taking instructions from the person appointed by his client to be the principal point of contact.

11.6 Mr Maloney's statement fails to give reasons for the non-payment of service charges or recovery of outstanding sums despite being required to do so by the Tribunal's Preliminary Decision. All he says is "These matters continue to be handled by the client's appointed solicitors and Counsel". Mr Maloney has not provided the Tribunal with the required information which the Tribunal finds unacceptable.

57. Paragraph 51 of the Preliminary Decision [1196] directed that: "Mr Maloney's additional witness statement should contain his proposals for recovery of any outstanding service charge". The Applicant's "Recovery Proposals" are at paragraph 8 of his Second Witness Statement [1423]:

> "We are not currently instructed in any "litigation" matter for the collection of (disputed or otherwise arrears). These matters continue to be handled by the client's solicitors and Counsel".

58. There is a very long history of litigation at Palace Gate. In 2014, a Tribunal (LON/OOAW/LSC/2014/0112 and others) made a service charge determination arising from proceedings issued by WPL against the Leaseholders in the County Court (Case Nos. 3YL63321 and others) to recover substantial service charge arrears 2013/14 [118-163]. Following that determination, the case went back to the County Court at Wandsworth and was heard by Deputy District Judge Shelton on 27th July 2017 [1221-1225]. WPL's claim was for arrears of service charge for the years 2013/14. The Leaseholders defence is set out at paragraph 2 of the Deputy District Judge's Judgement: "It says, "We are not liable. We are in credit"; that is really the rub of it."

59. The Deputy District Judge found that Flat 3 was in credit to the sum of £25,090.05 and Flat 2 to the sum of £29,776.28. The Tribunal notes the observations at paragraph 7 of the Judgement: "it is frankly beyond me as to how the claimant can carry on. That is how inaccurate their record keeping is".

60. Having regard to the comments of Deputy District Judge Shelton, the present Tribunal can readily understand why the Leaseholders applied for the appointment of a manager and why the previous Tribunal granted that application.

61. However, none of this is the Applicant's fault. He was not appointed until August 2015 and therefore not responsible for the 2013/14 service charge. The bitterness of the dispute between the Leaseholders and WPL is apparent even from the papers. Their longstanding dispute bedevilled the Applicant's management from the outset. What was he to do? It is obvious that WPL were not going to surrender litigation to his control. Accordingly, the Applicant said in his "Recovery Proposals" at paragraph 8 of his Second Witness Statement all that he could possibly say. It is not uncommon for freeholders to keep control of service charge litigation. The Applicant told us that he would support his client with any factual evidence they required but was not obliged or required under his Management Agreement [1226-1243] to conduct litigation on their behalf.

62. The failure to deal with recovery of outstanding service charge arrears (and also to reflect credits within the accounts) is, as the previous Tribunal found, unacceptable. However, the fault appears in the judgement of Deputy District Judge Shelton to lie with WPL's inaccurate record keeping and not any unacceptable behaviour by the Applicant.

18. Mr Maloney, despite having had well over a year to do so, has not convinced the Tribunal that he is effectively managing the property for the following reasons:

a) Service charge demands and year-end statements are being sent too late;

b) There has been no proper survey to identify the major costs of repair expected in the future (which are essential to set a budget);

c) The way the service charge accounts have been presented is confusing;

d) No evidence of substance has been presented to demonstrate that the property is subject to regular estate management inspections and

e) The Tribunal asked for Mr Maloney's specific proposals to recover outstanding service charges and his answer has simply to refer to his client's solicitor and Counsel when this should clearly be within a managing agent's control – if not

direct control, then indirect control by way of instructions to third parties to recover the debt but certainly not derogated entirely.

63. Much of paragraph 18 of the Final Decision has already been covered. Paragraph 18 a) repeats the finding at paragraph 11.1. Paragraph 18 b) repeats paragraph 11.2. Paragraph 18 e) repeats paragraph 11.6.

64. In relation to paragraph 18 c) the Tribunal has considered "Unaudited Service Charge Accounts" for year ended 31st May 2015 (before the date of the Applicant's appointment) [766-770], for year ended 31st May 2016 [919-926] and for year ended 31st May 2017 [1373-1383]. Those Accounts were prepared by AJ Wheeler Limited, Chartered Certified Accountants in accordance with TECH 03/11. The present Tribunal cannot see that the way those service charge accounts have been presented is in any way confusing. In any event the Applicant is not responsible for any confusion. He has acted perfectly properly in instructing independent accountants to prepare the accounts.

65. Paragraph 18 d) relates to a lack of "evidence" to show that the property has been the subject to regular estate management inspections. Had the Applicant been given the opportunity he could have provided evidence for the Tribunal's consideration. In his Witness Statement at paragraph 32 [1654], the Applicant says that he carried out 7 inspections in the year between the Preliminary Decision and the Final Decision. He was contracted to carry out 4 visits per annum in his Property Management Agreement [1226-1243].

66. The Property is a stucco building and at least 150 years old. It has been substantially altered in common with most buildings in that part of London. It is not in poor condition but would benefit from some upgrading. We find that in the absence of any significant deterioration of condition or major works that quarterly inspections are reasonable and in accordance with the principles of good estate management. We find that the Applicant was not given the opportunity to provide evidence and had he done so the previous Tribunal would not have found a that he had failed to carry out regular estate management inspections.

19. In the Tribunal's opinion Mr Maloney has never been in sole control of managing the property and has been out of his depth, although in stating as such, the Tribunal recognizes the difficulties Mr Maloney has faced.

67. The suggestion that the Applicant "has been out of his depth" has been particularly upsetting to him.

68. The Deputy Chamber President has already presciently observed in relation to the Applicant [1622 and 1623], that "a number of criticisms made against him are said to be factually inaccurate … although they may be valid criticisms of his former client"

and went on to question "whether it was necessary for the FTT to make findings it did against Mr Maloney (rather than against his client from whom he received his instructions)".

69. In its Preliminary Decision of 26th June 2017, the previous Tribunal was clear where fault lay. It found that WPL had left the Property uninsured between 1st and 17th November 2014 and had failed to consult under section 20 of the 1985 Act (Ground 1 [1190]). It found that WPL had levied unreasonable service charges in 2014 and referred to breaches that were "substantial for some items" (Ground 2 [1191]). It also found breach of the Code of Practice issued under section 87 of the 1993 Act (Ground 3 [1192].

70. The Applicant was not appointed until August 2015 and therefore bears no responsibility for the failings which formed the basis of the application made in June 2015 nor for the adverse findings, Grounds 1-3, made by the Tribunal in its Preliminary Decision.

71. In its determination at paragraph 47 of the Preliminary Decision, the Tribunal found [1195]:

> "The Tribunal also have concerns (not allayed at the hearing) about the opaque nature of the ownership of the premises in which off-shore companies or shareholders appear to be involved"

72. The Leaseholders submitted (paragraph 39 of the Preliminary Decision [1194]) that the Applicant "has been unable to act independently or allowed to carry on his role without interference from Mr Mahpud of the Respondent Landlord". At paragraph 41, Mr Mahpud "acknowledged that he had made mistakes" and at paragraph 42, the Respondent acknowledged that "in the past Mr Mahpud had been the 'main face' of the Respondent". At paragraph 43, the Tribunal recorded the following undertaking:

> "Furthermore, the Respondent offered undertakings at the start of the hearing to the effect that among other matters, Mr Maloney would be given a free rein to manage the property from that date".

73. We have the advantage over the previous Tribunal in that we have received oral evidence from the Applicant about his management of the premises since the Preliminary Decision. His evidence has been consistent and we accept it. The Applicant had not been given "a free rein to manage the Property". Mr Maphud continued to be involved even to the extent of arranging minutiae such as the cleaning arrangements. The Applicant had to take instructions not only from Mr Maphud but also, and in addition, from Mr Fisher. Finally, the Applicant had been hamstrung in his management by the continuing and unresolved dispute between the Leaseholders and WPL stemming from the 2014 Tribunal Decision and the Judgement of the

Deputy District Judge at Wandsworth County Court. Many managing agents would not have persevered with a client such as WPL as the Applicant did to his credit.

74. Having heard from the Applicant we find that he was not "out of his depth". He was not given "a free rein" and was not in "sole control" of management. Mr Mahpud has remained "the main face" of WPL and the Applicant has had to act in accordance with his client's instructions. The continued problems at the Property are, we find, attributable to the failure of WPL to abide by its undertaking given to the Tribunal on 25th and 26th January 2017 and recorded at paragraph 43 of the Preliminary Decision [1195].

75. We find that the suggestion that the Applicant was "out of his depth" must be set aside. Consequently, we have also substituted "the Respondent" for the reference to the Applicant in the final line of paragraph 21 of the Final Decision.

Conclusions

76. We find that the criticisms of the Applicant made in the Final Decision of 26th July 2018 are sufficiently serious in relation to his professional reputation as to engage the protection of Article 8 of the ECHR. Those criticisms were made without an oral hearing, without warning of the adverse view formed by the Tribunal and without giving the Applicant the opportunity to respond.

77. We have had the advantage over the previous Tribunal in having heard oral evidence from the Applicant. Having done so we find that the criticisms made of the Applicant are either factually inaccurate or are instead valid criticisms of his former client, WPL, from whom he received his instructions.

78. Those criticisms were made as a result of an unfair process and amount to a breach of the Applicant's rights under Article 8 of the ECHR. Those criticisms are real and significant and pregnant with legal consequences. It is incumbent on the present Tribunal to correct the effect of the unfairness that has occurred.

79. The appropriate remedy is to be found in Rule 51 of the Tribunal Procedure Rules. We find that the condition in Rule 51(2)(d) is satisfied. There has been a procedural irregularity in the proceedings. We further find that it is in the interests of justice (Rule 51(1)(a)) to set aside and remake paragraphs 11, 18, 19 and 21 of the Final Decision.

80. In remaking part of the Final Decision, we have had uppermost in our minds the unimpeachable decision of the previous Tribunal to make a Management Order. It is not said by any party before this Tribunal that the Management Order was wrongly made or should be set aside. Accordingly, in remaking part we have striven to seek a result which does the least violence to the Final Decision. We are grateful to Mr Bates

for providing a draft of his proposed revisions. The remade Final Decision is attached as an annex to this Decision.

81. The effect of our Decision is to set aside those parts of the Final Decision which impugn the Applicant's professional reputation. The effect is that those findings no longer stand or have any validity for any purpose and are to be regarded as if they had never been made in any form by the previous Tribunal.

Decision

82. Pursuant to Rule 51 (1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 paragraphs 11, 18, 19 and 21 of the Final Decision of the Tribunal dated 26th July 2018 under Case Reference BIR/OOAW/LAM/2015/0001 are set aside and re-made in the form annexed hereto.

83. For the avoidance of doubt the Management Order appointing Mr Michael Maunder Taylor in accordance with section 24(1) of the Landlord and Tenant Act 1987 is wholly unaffected by this Decision and remains in full force and effect.

D Jackson
Judge of the First-tier Tribunal

Any party may appeal this decision to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends this written Decision to the party seeking permission.