



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

<b>Case Reference</b>	: CHI/45UG/LAM/2020/0010
<b>Property</b>	: 38 Ferndale Road, Burgess Hill, West Sussex, RH15 0HG
<b>Applicant</b>	: Maria Gabriela Russell
<b>Representative</b>	: In person
<b>Respondents</b>	: James Charles Russell (1) Roland Graeme St Clere-Smithe (2) Julian Michael St Clere-Smithe (3)
<b>Representative</b>	: First Respondent, in person Second Respondent, in person Third Respondent, Counsel Mr Mark Smith
<b>Type of Application</b>	: Appointment of Manager
<b>Tribunal Members</b>	: Judge N Jutton, Mr M J F Donaldson FRICS, Mr M Jenkinson
<b>Date and Venue of Hearing</b>	: 24 November 2020, Video-enabled hearing
<b>Date of Decision</b>	: 30 November 2020

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DECISION

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1     **Introduction**

2     This is an Application under section 24(1) of the Landlord & Tenant Act 1987 (the Act) for the appointment of a Manager in relation to 38 Ferndale Road, Burgess Hill, West Sussex, RH15 0HG (the Property). A preliminary Notice pursuant to section 22 of the Act was served on the Respondents on 27 January 2020.

3     The Property is a period semi-detached house that has been converted into two flats. The Applicant and the three Respondents together own the freehold. The Applicant is the registered proprietor of the leasehold interest in the first floor flat known as 38B Ferndale Road and the Second and Third Respondents are the registered proprietors of the leasehold interest in the ground floor flat known as 38A Ferndale Road.

4     The application for the appointment of a Manager was submitted to the Tribunal on 5 August 2020. Directions were made by the Tribunal on 4 September 2020 and 22 September 2020.

5     There was before the Tribunal a bundle of documents running to some 288 pages. The bundle included the preliminary Notice served under section 22, the Application, Witness Statements made by the Applicant and the First Respondent, correspondence from the proposed manager, HM Land Registry Official Copy Entries of the freehold title and the two leasehold titles, copy correspondence between the parties and between the parties' representatives, a Witness Statement made by the Second Respondent, a Statement made by the Third Respondent and a draft form of Order and terms of appointment of a Manager. References in this Decision to page numbers are references to page numbers in the bundle.

6     By reason of the Covid-19 pandemic restrictions, the hearing took place remotely using the CVP Platform. For the same reason, the Tribunal did not inspect the property. The Directions provided that if a party contended that an external inspection of the Property was necessary, then they must make an Application to that effect no later than the date provided for in the Directions for the provision of the hearing bundle. No such Application was made.

7     **The Law**

8     Section 24 of the Act provides:

(1) *The appropriate 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) *The appropriate 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 ...*

(ii) *...*

(iii) *that it is just and convenient to make the order in all the circumstances of the case;*

(ab) *...*

(aba) *...*

(abb) *...*

(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) .....*

*(2B) .....*

*(3) .....*

*(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) .....
- (9A) .....
- (10) .....
- (11) *References in this Part to the management of any premises include references to the repair, maintenance, improvement or insurance of those premises.*

## 9 **The Lease**

- 10 There is a copy of the Applicant's Lease of the first floor flat known as 38B Ferndale Road at pages 118-130. It was originally for a term of 99 years from 1 December 1971 but that was extended by a Deed of Variation dated 14 March 2008 (pages 149-152) to a term of 999 years.
- 11 There is a copy of the Second and Third Respondents' Lease of 38A Ferndale Road at pages 131-148, dated 4 May 1978. The Leases are in like terms.

12 By clause 5(4) the Lessor covenants as follows:

*“That subject to contribution and payment as is herein provided and except to such extent as the Lessee or the tenant of the other flat in the building shall be liable in respect thereof under the terms of this lease or of any other lease the Lessor will maintain repair redecorate and renew (a) the structure of the building and in particular the roof foundations walls (but not the plaster or internal covering or lining of the walls which bound the premises nor any internal walls completely within the premises) balconies and the main beams and timbers and the gutters and rainwater pipes of the building and (b) the pipes sewers drains and electric cables and wires cisterns and tanks in under and upon the building except such as are within the premises and are enjoyed or used only for the premises”.*

13 Clause 7 of the Lease provides as follows:

*“IT IS HEREBY MUTUALLY COVENANTED by and between each of them the Lessor and the Lessee as follows:-*

*(1) On or before the first day of January in each year commencing 1979 the Lessor shall send to the Lessee an account (hereinafter called ‘the annual account’) showing the amount actually spent on maintaining and managing the building during the year ended on the previous 31<sup>st</sup> day of December and the lessee shall on the following 1<sup>st</sup> day of January 1979 pay to the Lessor one half of the annual account”.*

14 The dates in clause 7 of the Lease set out above are included in the copy Lease for 38A Ferndale Road (page 141) but in the copy Lease for 38B Ferndale Road (page 124) are left blank.

15 Clause 7(2) of the Lease of 38B Ferndale Road contains an additional provision in relation to management fees which is not included in the Lease to 38A. Clause 7(3) of the Lease to 38A and clause 7(4) in the Lease to 38B provide:

*“the items in respect of maintaining and managing the building which may be included in the annual account and without limiting the generality of the foregoing shall include:-*

*(a) the costs of and incidental to the performance and observance of each and every covenant on the Lessor’s part contained in paragraph 5 sub-paragraphs 3 and 4(a) and (b).*

*b) the costs of and incidental to compliance by the Lessor with every notice regulation or order of any competent local or other authority in respect of the building or any part thereof.*

16 Neither Lease contains a provision which allows for collection by the Lessor of estimated service charges in advance or for the provision of a reserve or sinking fund. In essence, the Lessor has to carry out its

obligations to maintain, repair, redecorate and renew the building and then seek to recover the costs of doing so from the Lessees at the end of the financial year on the production of an annual account.

**17 The Applicant's Case**

18 The Applicant's case is that there has been a long-standing failure by the freeholder Respondents to comply with their obligations under the terms of the Lease in respect of the management of the Property. That in the circumstances it is just and convenient for an Order to be made to appoint a Manager. More particularly, it is the Applicant's case that there has been a failure on the part of the Second and Third Respondents to maintain repair and carry out works to the Property as required by the repairing covenant at clause 5(4) of the Lease as set out above. The Applicant says that no works have been carried out to the fabric of the building since 2011 other than works to the guttering which the Applicant and the First Respondent (who is the Applicant's husband) have carried out at their own cost. The Applicant says that she has sought without success to persuade the Second and Third Respondents to take responsibility for their joint liability as freeholders to maintain the building in accordance with clause 5(4) of the Lease.

19 The Applicant says that she has owned the top floor flat at the Property (38A) since February 2010. That despite maintenance issues arising from that time, the Second and Third Respondents have failed to address the need to maintain, repair and upkeep the Property or to contribute towards the costs of doing so. That in order to keep the Property from falling into disrepair, or further disrepair, or indeed to become structurally unsound, the Applicant and the First Respondent have been obliged to carry out works of repair and maintenance to the Property without any input or financial contribution from the Second and Third Respondents. That many attempts have been made by the Applicant and the First Respondent to engage the Second and Third Respondents in the repair and maintenance of the Property but that these have been ignored or rejected. The Second and Third Respondents have been, the Applicant says, completely unwilling to enter into any discussion regarding the maintenance or upkeep of the Property. The Applicant told the Tribunal that she has found the last 10 years to be extremely arduous and emotional for her and her family. That her wish is simply to ensure that her flat and the building which contains it is properly maintained. That the Application to the Tribunal could have been avoided had the Second and Third Respondents engaged in the repair and maintenance of the Property and paid their share of the costs of doing so.

20 The Applicant commissioned a form of report from a Surveyor, a Mr Voller of a company called Ditchling Surveying Services, dated 11 December 2019, a copy of which is at pages 14-17 of the bundle. The report identifies areas at the Property which require repair or redecoration and those parts which will require such works within the next year or two years. There is exhibited to the Witness Statement of the First Respondent dated 23 September 2020, a number of estimates

for works which it is stated are required to the Property which range from £7,680 to £11,016.

- 21 The Applicant proposes the appointment of Mr Marcus Staples BSc MRICS Dip Prop Inv of M J Staples Property Management (Brighton) Limited t/a Deacon Crickmay Asset Management as a Manager of the Property pursuant to section 24 of the Act.
- 22 There is at page 166 of the bundle an email from Mr Staples confirming that he would be pleased to accept the appointment of Manager of the Property and that he understands the duties and obligations owed by a Manager appointed by the Tribunal under section 24 of the Act. At page 167 is a letter from Mr Staples to the Applicant's Solicitors dated 21 September 2020 outlining his experience, stating that he has been appointed as a Manager by the Tribunal on two previous occasions in recent years, and outlining his proposed fees.
- 23 As ordered by the Tribunal, the Applicant included in the bundle a draft form of Management Order setting out the terms upon which the Applicant proposed the Tribunal appoint Mr Staples (pages 221-239).
- 24 **Mr Marcus Staples BSc MRICS Dip Prop Inv**
- 25 Mr Staples explained to the Tribunal that he had been a Chartered Surveyor since 1988. That he specialises in property management. His company have two offices, one in Horsham in West Sussex and one in Hove in East Sussex. That he manages a number of residential properties in the Hove area and in Sussex. He confirmed that he had inspected the Property and that it was similar to a number of properties that he manages. He was familiar with properties of this type and how to manage them.
- 26 In answer to a question put to him by the Tribunal, Mr Staples confirmed that he understood that although if he were appointed, he would be appointed by the Tribunal, he would need to communicate and liaise with all four of the freeholders being the Applicant, the First, Second and Third Respondents. He said he would certainly hope and expect that all four would cooperate with him in the management of the Property and he stated that he would treat all four the same.
- 27 The Tribunal referred Mr Staples to the Certificate of Professional Indemnity Insurance at page 169 of the bundle which expires on 29 November 2020. Mr Staples confirmed that he had addressed the renewal of the policy with the same limits of indemnity cover of £5m for any one claim and that a new policy was now in place which he could provide to the Tribunal if required.
- 28 Mr Staples explained that his company use an accounting and management system called 'Tramps'. That service charge demands are sent out by post but can be sent by email if requested by a lessee. His preference was to send demands by post. In answer to a question from the Tribunal, he said that demands were sent out without an

accompanying letter so the only record of a demand being sent was that the Tramps system would tell him so.

- 29 Mr Staples said that he understood from reading the Lease that there was no provision to recover estimated service charges on account from lessees. That under the terms of the lease the lessor incurred the costs of the repair and maintenance of the Property which were then recovered from the lessees as service charges at the end of the financial year. He said that he understood there had been some discussion as to whether or not in the circumstances the parties might consider an Application to the Tribunal to vary the two Leases of the Property so as to allow for the recovery of estimated service charges in advance. (In passing the Tribunal notes that given the Applicant and three Respondents are both lessors and lessees, that they could presumably if they were all so minded put in place a variation by agreement).
- 30 Mr Staples confirmed that his proposed basic management fee would be £200 plus VAT per flat per year. In addition, he would charge 10% of the net cost of works of repair and maintenance. The latter would cover his fees for dealing with all aspects of proposed works including the preparation of specifications, putting works out to tender, the appointment of a contractor and project managing the work. In answer to a question from the Tribunal, he confirmed that the 'trigger point' as he put it for the 10% charge would be works of repair which would require the need to consult with the lessees pursuant to section 20 of the Landlord & Tenant Act 1985. He did not undertake CDM work but would instruct another consultant to do so for an additional fee. That he proposed to put together a 3-year maintenance plan for the Property. That the cost of doing so would be included within his basic fee of £200 plus VAT per flat. That any further work that fell outside of the basic management of the Property he proposed to charge at the rate of £120 per hour plus VAT.
- 31 The Tribunal pointed out to Mr Staples that the draft Order provided for an inspection of the Property once a year and suggested that it would be more appropriate, given the nature of the Property and the apparent need for works to be carried out, for there be inspections four times a year. Mr Staples agreed that if appointed he would inspect four times a year and that the cost of doing so would be included within his proposed fees.
- 32 As to buildings insurance, Mr Staples explained that his company ran two block insurance policies and if appointed, he would look to arrange insurance for the Property through one of those block policies but confirmed that if alternative insurance quotes were provided by the lessees, he would be happy to consider those.
- 33 In answer to a question from the Tribunal, Mr Staples confirmed that it was his practice to carry out a reconciliation of client account amounts on a monthly basis in accordance with the Royal Institute of Chartered Surveyor Rules. As to a complaints procedure, he said that his firm had a complaints procedure which they operated as members of the Property



Ombudsman Scheme but could also apply the RICS Complaints Procedure Scheme.

- 34 The Applicant further seeks an order that the individual freeholders make a payment to Mr Staples, if he is appointed on account of his fees and anticipated costs of repairs. The Applicant submits, bearing in mind the terms of the lease which do not allow for the recovery of service charge payments on account, that the Manager would need funds to cover his fees and so as to provide the means to carry out works of repair and maintenance to the Property during his first year of appointment. The Applicant proposes that the funds requested be divided in four equal ways between the four freeholders, all of whom are parties to these proceedings. Such a payment is necessary, the Applicant says, to ensure that the Property can be properly managed. If the Manager were not put in funds, he would be unable to arrange for works of maintenance and repair, which would be to the detriment of all parties.
- 35 Mr Staples was asked by the Tribunal as to the level of funds that he felt would be necessary to be paid on account, if so ordered by the Tribunal, to allow him to progress with the management of the Property and in particular, to carry out necessary repairs and maintenance during the first year of an appointment. He suggested a figure of £1000 per flat which would be inclusive of his basic management fee of £200 plus VAT per flat. That would equate to £500 from each of the individual freeholders. After deducting the basic management fee proposed by Mr Staples of £400 plus VAT (£480), that would leave a balance of £1520 available to fund repairs and maintenance.
- 36 Mr Staples was asked what he would do if one or more of the freeholders failed to make a payment. He said that although he would consider court proceedings to recover payment, his preference would be to reach an amicable agreement with the party concerned. Further, a decision as to whether or not to pursue court proceedings against a defaulting payor would depend upon the amount involved taking a pragmatic approach and bearing in mind the issue of proportionality. Given there had been an indication by more than one of the parties that they wished to sell their interest in the Property, he suggested that in the event that there were arrears of payments, that might be addressed upon a sale.
- 37 The Applicant also asks the Tribunal to make an Order that the Second and Third Respondents make a payment to the Manager of the total sum of £692.50 representing half of the costs, the Applicant says, that were incurred by her and the First Respondent in carrying out works to the guttering at the Property and in respect of pest control. That on receipt of those monies, the Manager then reimburse the Applicant and the First Respondent.
- 38 **The First Respondent's Case**
- 39 The First Respondent, Mr James Russell, supports the Application. He said that since the time that he had acquired the Property with his wife in 2010, that neither the Second nor Third Respondent had accepted any

responsibility for the maintenance or repair of the Property. He had, he said, together with the Applicant tried desperately hard to avoid having to make an application to the Tribunal. That both the Second and Third Respondents had had an opportunity to acknowledge and respond to the Notice served pursuant to section 22 of the Act dated 27 January 2020 (pages 5-13). He said that he had found the failure of the Second and Third Respondents to engage in the repair and maintenance of the Property extremely stressful and emotional. He felt that the Applicant could not have done anything more to avoid the necessity of making the Application to the Tribunal. He said that he appreciated the apology made by the Third Respondent contained in his Statement of Case (page 108) but it was, he felt, too late in the day. He felt that he and the Applicant been prejudiced by an apparent family dispute between the Second and Third Respondents. He was sympathetic as to the difficult time that both had endured following the sad death of their parents but that he said was irrelevant. He said that since the Application had been made, there had been a roof leak which had affected the neighbouring property (the Property being a semi-detached property) which had required works to be carried out to the roof to be shared between the two properties. Those works had been carried out and he together with the Applicant had paid their share but neither the Second nor Third Respondent had acknowledged liability or made any payment.

- 40 The First Respondent said that he together with the Applicant had incurred considerable legal costs in taking advice which they had paid for from their hard-earned savings. He supported the Applicant's Application for an Order to be made which would provide for the freeholder to put the Manager if appointed in funds immediately so he could proceed with the proper management of the Property.

41 **The Second Respondent's Case**

- 42 The Second Respondent's case is set out in a Witness Statement that appears at pages 99-107 of the bundle and which he further addressed to the Tribunal. The Second Respondent says that he believes that the Applicant and the First Respondent simply want to buy the ground floor flat. That is their ulterior motive. He does not accept that there has been a failure to properly maintain and repair the Property for 10 years. His late father who had been a successful builder, understood houses of this nature and had been of the view that repairs were not necessary. He accepted however that there may have been a failure to maintain and repair during the 2½ years following his father's death. He said that he was keen to sell his interest in the Property to include his interest in the freehold title. He said that he did not accept that any failure to repair or maintain the Property amounted to a serious breach of the terms of the Lease. He said he did not want to see the value of the Property decrease due to a want of repair. His main concern was to achieve a sale of the Property and he very reasonably said that if the appointment of a Manager would help achieve a sale, that would please him hugely. He felt that if the Property was sold, all four of the freeholders would benefit. He was, he said, concerned that if Mr Staples was appointed, he would report just to the Applicant and the First Respondent and not to himself

or his brother. He is unfortunately estranged from his brother, the Third Respondent. He was concerned that these proceedings may hinder a sale. The Tribunal suggested to him that there may be an argument that the appointment of a Manager might assist a sale on the basis that it may demonstrate that the Property was being properly managed.

43 As to the suggestion that each of the freeholders make a payment to Mr Staples if appointed of £500 each, the Second Respondent said that he did not have the funds to make a payment but if he had, he would make the payment.

#### 44 **The Third Respondent's Case**

45 The Third Respondent had filed a Statement of Case (page 108) in which he also confirmed his wish for the ground floor flat to be sold without delay. He was concerned that it had been empty and deteriorating since his father had died. He does not oppose the Application. In his Statement of Case he says that he agrees with the appointment of a Manager and to pay his share of the repair costs that are required to the Property. Mr Smith on behalf of the Third Respondent confirmed that the Third Respondent wished to sell his interest. As to the terms of the appointment of a Manager, he invited the Tribunal to appoint a Manager for a term of 2 years but no longer on the basis that hopefully within that time span the repairs could be dealt with and the Property (or at least the ground floor flat leasehold interest and his client's interest in the freehold) sold. A 2 year term would mean that an incoming buyer would not be encumbered with the costs of a Property Manager in the longer term. He made the point that it was always open to the Applicant to return to the Tribunal to make an Application to extend the term if necessary.

46 As to the Applicant's proposal that payments be made by the freeholders to the Manager in advance to cover the costs of repairs, he said he accepted that the Lease does not allow for the recovery of advance estimated service charges from the lessees. However, his client recognised the seriousness of the situation and the need for the Property to be properly managed and for works of repair to be carried out. As such, his client was agreeable to making a payment in advance. Whether the Tribunal was able to make such an Order he said was a matter for the Tribunal, that he was not in a position to make any legal submissions on the point. His client had no issue with a payment on account equivalent to £1000 per flat (or £500 from each individual freeholder).

#### 47 **The Tribunal's Decision**

48 The Tribunal is satisfied upon the basis of the evidence before it, that there has been a long-standing failure on the part of the Second and Third Respondents as joint freeholders of the Property to engage in the proper repair and maintenance of the Property as required by the Leases of the two flats. There has been a failure generally on the part of the Second and Third Respondents to respond to communications from the Applicant and the First Respondent. Where responses have been made,

they have been unproductive and often unhelpful. There is clearly a large element of mistrust between the Applicant and the First Respondent on the one hand, and the Second and Third Respondents on the other.

- 49 The Tribunal concludes that there has been a failure on the part of the Second and Third Respondents to comply with the lessors' repairing obligations owed to the lessees contained in the Lease of each flat. In all the circumstances of the case, the Tribunal is satisfied that it is just and convenient to make an Order for the appointment of a Manager pursuant to section 24 of the Act.
- 50 The Tribunal notes that both the Second and Third Respondents have made it clear that they wish sooner rather than later to sell their leasehold interest in the ground floor flat and their interest in the freehold title. The Tribunal also bears in mind and acknowledges that the Application is not resisted by the First and Third Respondents. Further, the Second Respondent quite fairly said to the Tribunal that if a Manager were appointed and an Order were made for him to make a payment to the Manager on account of the Manager's fees and anticipated costs of repair and maintenance, that he would make that payment if he had the funds to do so (although at this time he did not).
- 51 The Tribunal is grateful to Mr Staples for taking the time to appear before the Tribunal. Having carefully considered Mr Staples' qualifications and experience and his answer to questions put to him at the hearing, the Tribunal is satisfied that Mr Staples possesses the requisite knowledge and experience to be appointed as a Manager of the Property.

52 **Terms of the Management Order**

- 53 The Tribunal makes an Order in the terms attached. The Tribunal is grateful to the Applicant for providing a draft form of Order. The Tribunal has considered the draft Order carefully. The parties should note the following:
- a. The appointment of Mr Staples is for a term of 2 years commencing from the date of the Order. That should be sufficient to carry out any necessary works of repair and maintenance to the Property to make it more attractive to a potential purchaser bearing in mind the Second and Third Respondents' stated wish to sell their interest.
  - b. The word 'lessees' at the end of paragraph 4.f. to the draft Order has been amended to 'lessors'.
  - c. Paragraph 12 of the Order provides that each of the Applicant, the First Respondent, the Second Respondent and the Third Respondent shall make a payment to the Manager of the sum of £500 of which in each case £120 inclusive of VAT (equivalent to £200 plus VAT per flat) shall be a payment in respect of the Manager's basic management fee and the balance of £380 shall be

on account of the costs of repairs and maintenance which in due course the Manager will seek to recover from the lessees as part of the service charge (provided the costs of the repairs and maintenance carried out are reasonably incurred). Section 24(1) of the Act enables the Tribunal to make an Order to appoint a Manager in relation to premises to which Part II of the Act applies to carry out “*such functions in connection with the management*” of the premises as the Tribunal thinks fit. There is no limitation as to the management functions of the Manager. The Manager carries out those functions in his own right as appointed by the Tribunal. He is not appointed as a Manager of the landlord and he is not confined to carrying out just the landlord’s obligations under the terms of the Lease. (**Bruce Roderick Maunder Taylor v Hugh Sean Balquiere** (2002) EW CA Civ 1633.) In the view of the Tribunal, if provision were not made for payment to be made by the freeholders/lessors to Mr Staples, then he would not be in a position to properly manage the Property for the purpose of the Application and the purpose of Part II of the Act would be thwarted.

- d. The Tribunal declines to make an Order requiring the Second and Third Respondents to make a payment to the Manager (for onward transmission to the Applicant and the First Respondent) in the sum of £692.50 in relation to expenditure which the Applicant and First Respondent say they incurred in respect of gutter cleaning and pest control. The payments were incurred prior to the appointment of the Manager. It will be a matter for the Manager as to whether or not he can seek to recover payment in that regard on behalf of the freeholders (and thus for the Applicant and First Respondent) as part of any subsequent service charge demands sent to the lessees.
- e. Paragraph 8 of the Schedule to the Order is amended to provide that the Manager will carry out regular inspections at least four times per year.
- f. Paragraph 9 of the Schedule to the Order is amended to reflect Mr Staples’ statement to the Tribunal that in arranging the buildings insurance of the Property, he will have regard to any quotations obtained by the lessees.
- g. Paragraph 14 of the Schedule to the Order is amended to provide that the 10% fee of the costs of repair work which the Manager may charge, will only relate to works of repair where the service charge contribution for such works from each lessee exceeds £250 and thus would trigger the consultation process required by section 20 of the Landlord & Tenant Act 1985.
- h. Paragraph 14 of the Schedule to the Order is further amended to delete the provision that the Manager’s fees will be subject to review in accordance with his company’s standard terms and conditions. The Tribunal bears in mind that the appointment of the Manager is for a fixed period of just 2 years. Nonetheless, if at any

time the Manager is of the view that he has grounds to make an application for an Order to increase the level of fees, then it is open for him to make that application to the Tribunal.

#### 54 **Costs Application**

55 The Applicant makes an application pursuant to rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 for costs. She is supported in that by the First Respondent. The Applicant says that these proceedings have been necessitated and costs incurred in seeking legal advice solely by reason of the Second and Third Respondents' unreasonable behaviour. In particular, their unreasonable behaviour in failing over the last 10½ years to maintain or repair the Property or to engage in any discussion to maintain or repair. That the Applicant made the Application to the Tribunal as a last resort. That the Second and Third Respondents had an opportunity to rectify matters in January following service of the Notice under section 22 of the Act. They failed to do so. That the Applicant has in effect been penalised because of what would appear to be irreconcilable differences between the Second and Third Respondents albeit those differences are irrelevant to these proceedings. That the Applicant appreciates the apology now made by the Third Respondent but it is only made now the proceedings have been instituted.

#### 56 **The Second Respondent**

57 The Second Respondent said the Tribunal must follow whatever "*the legal path must be*". That he did not have in any event the funds to settle any costs. He accepted that might change (hopefully) in the future.

#### 58 **The Third Respondent**

59 Mr Smith filed with the Tribunal a note in relation to the Application for costs dated 23 November 2020 which the Tribunal has considered carefully. Mr Smith referred to the two authorities include in the bundle, namely **Willow Court Management Co (1985) Limited v Mrs Ratna Alexander & Others** (2016) UKUT 290 (LC) and **Patrick Brian Matier v Christchurch Gardens (Epsom) Limited** (2017) UKUT 56 (LC). Rule 13, Mr Smith said, applies if a person has acted unreasonably in bringing, defending or conducting proceedings before the Tribunal. That the conduct of the Third Respondent complained of was not conduct incurred in these proceedings. That the Third Respondent recognised historic errors on his part in the management of the Property but that was conduct that pre-dated the proceedings. Further, when considering objectively whether the Third Respondent, who until the hearing had been unrepresented, had acted unreasonably he should be judged by the standards of a reasonable person who does not have legal advice. That the crucial question always was, in all the circumstances of the case whether a party had acted unreasonably in their conduct of the proceedings. There was, Mr Smith said, no obligation on the Third Respondent to respond to the section 22 Notice. That he had once the proceedings had started, complied with all

Directions. He had filed a Statement and he had attended the hearing. He had not opposed the Order sought by the Applicant. Further, that as the Applicant was not represented at the hearing, she did not appear to have incurred any costs in relation to the proceedings. That as such, Mr Smith submitted, it would be wrong for the Tribunal to make a Costs Order against the Third Respondent.

60 **The Tribunal's Decision in respect of Costs**

61 Rule 13 of the said 2013 Rules provide as follows:

*“(1) The Tribunal may make an Order in respect of costs only –*

*(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;*

*(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –*

*(i) .....*

*(ii) A residential property case*

*(iii) .....”.*

62 Guidance was given by the Upper Tribunal (Lands Chamber) in the Willow Court Management Co Limited case referred to by Mr Smith as to how the Tribunal should in practice exercise the Application of Rule 13.

63 The Upper Tribunal identified a 3-stage process. The first stage was for the Tribunal to determine whether or not a person had acted unreasonably. The second stage was for the Tribunal to consider in light of unreasonable conduct that it found whether or not to make an Order for costs. The third stage in the event that the Tribunal decided to make an Order was what the terms of that Order should be.

64 In Willow Court the Upper Tribunal addressed the question of whether behaviour was to be considered unreasonable as follows:

*“An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in Ridehalgh at 232E, despite the slightly different context. ‘Unreasonable’ conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or, Sir Thomas Bingham’s ‘acid test’: Is there a reasonable explanation for the conduct complained of?”.*

- 65 The Upper Tribunal went on to make it clear that the Tribunal should not be over-zealous in detecting unreasonable conduct after the event.
- 66 The conduct complained of by the Applicant does not in the view of the Tribunal appear to be conduct on the part of the Second and Third Respondents in defending or in their conduct of these proceedings. The conduct complained of is a failure on the part of the Second and Third Respondents to engage historically with the Applicant and the Third Respondent and in particular to address and comply with the lessor's maintenance and repairing obligations contained in the leases of the two flats. The Tribunal understands and appreciates the difficulty that the Applicant and First Respondent have faced and the fact that they made this Application to the Tribunal as a last resort. However, historic conduct on the part of the Second and Third Respondents is not conduct in the course of these proceedings. Both the Second and Third Respondents have filed Statements in these proceedings in accordance with Directions made by the Tribunal. There is nothing in the behaviour of the Second and Third Respondents in respect of their conduct of these proceedings that is so unreasonable in the view of the Tribunal to warrant or justify the making of an Order for Costs against them. Further, in any event, although the Applicant has undoubtedly incurred what may be substantial legal costs in seeking advice prior to these proceedings, and although a firm of Solicitors are named in the Application form as representing the Applicant, they did not appear before the Tribunal at the hearing on 24 November 2020.
- 67 In all the circumstances, the Tribunal declines to make an Order for Costs against the Second and Third Respondents.

68 **Summary of The Tribunal's Decision**

1. The Tribunal makes an Order for the appointment of Mr Marcus Staples BSc MRICS Dip Prop Inv to manage the Property pursuant to section 24 of the Landlord & Tenant Act 1987 upon the terms set out in the attached Order.
2. The Tribunal declines to make an Order for costs as requested by the Applicant pursuant to rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

Dated this 30<sup>th</sup> day of November 2020

Judge N Jutton

**Appeals**



1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.