



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

Case Reference : **CHI/18UB/LVM/2021/0006**

Property : **21 Morton Crescent, Exmouth,
Devon EX8 1BG**

Applicant : **Vanessa Freeman (Flat 21D)**

Representative :

Respondents : **Ogden Kibble Ltd (Freeholder)
Joyce Ogden and Charles Kibble
(Leaseholders Flat 21C)
Christopher Michael Tonge & Lisa
Dawn Tonge (Leaseholders Flat 21B)
Dan Higgins & Sarah Higgins
(Leaseholders Flat 21A)**

Representative :

Type of Application : **Variation of an existing order for the
appointment of a manager by
extending the term under section
24(9) of the Landlord and Tenant Act
1987**

Tribunal Member(s) : **D Banfield FRICS
Judge Tildesley OBE**

**Date and venue of
hearing** : **15 December 2021 at Havant Justice
Centre and by cloud video platform**

Date of Decision : **3 February 2022**

DECISION

Background

1. The Applicant sought a variation of the order made on 17 April 2020 by extending the term of the current manager, Stephen Ralph Opie, beyond the expiry of the term of his appointment. The application was received on 2 July 2021.
2. The Applicant stated that the circumstances which preceded the granting of the order have not changed and the original factors contributing towards Mr Opie's appointment by Judge Rai are still in force and the return of the buildings management to the current freeholders would not resolve the current ongoing disrepair still present in the building, nor resolve any of the disputes that exist between the leasehold parties.
3. Directions were made on 6 July 2021 setting out a timetable leading to a determination on the papers.
4. Mr Opie then advised that he wished to withdraw from consideration and on 13 August 2021 the Tribunal gave permission for an alternative manager to be proposed.
5. On 16 September the Applicant advised that she had been unable to identify a manager willing to accept the appointment and asking that the Tribunal identify a suitable person. This being outside the Tribunal's jurisdiction and in the absence of a nominee the Tribunal indicated on 4 October 2021 that it was minded to strike out the application.
6. In an email of 26 October 2021 the Applicant proposed Mr Samuel Milne MIRPM as the Tribunal appointed manager and the Tribunal made directions dated 28 October 2021 for the matter to be heard by a video enabled hearing.
7. Further directions were made on 10 November 2021 for the hearing to be conducted on 15 December 2021 and confirming that Mr Opie's appointment would terminate on 29 December 2021 whether or not a further appointment had been made. The freeholders advised that they were unable to attend the hearing and written submissions were invited.

THE HEARING

8. The hearing was conducted from the Havant Justice Centre with Judge Tildesley and the parties participating by video through the medium of Cloud Video Platform. Once initial connection issues had been

satisfactorily resolved the hearing proceeded smoothly and without unintended interruptions.

9. The hearing was attended by the Applicant Ms Freeman, Mr Milne the proposed manager and Respondents Mr Tonge and Mr & Mrs Higgins.
10. The case officer explained that the proceedings would be recorded and that no other recordings must be made.
11. The Tribunal explained that the purpose of the hearing was to determine whether to allow the existing appointment to expire and management to revert to the freeholders or to appoint a replacement manager in the person of Mr Milne
12. The Tribunal indicated that it would first of all determine whether it was minded to appoint a Tribunal appointed Manager and then determine the suitability of Mr Milne for such an appointment.
13. The Tribunal summarised the current position as that since Mr Opie was appointed very little actual work has been carried out although a survey report with 5-year plan and budget has been prepared by Croft Surveyors.
14. Ms Freeman accepts that the Croft report fairly sets out the works required although, despite her asking for it to be investigated the issue regarding the front door has not been identified.
15. Mr Tonge and Mr Higgins accepted the Croft report as fair and a good starting point and was a snapshot of the position in September 2020 when the report was prepared. It was also accepted that as time passes additional issues were likely to arise.
16. The property comprises a mid terrace “Victorian” style house located on the sea front and situated on lower ground, raised ground and 2 upper floors. The walls are stucco rendered and the roofs pitched and slate covered. At some stage the property has been converted into four flats, 21A,21B and 21C with access from a communal entrance hall and 21D with its own access from the front light well.
17. Ms Freeman is the lessee of the basement flat, 21D, Mr & Mrs Higgins are lessees of the raised ground floor flat at 21A, Mr & Mrs Tonge are lessees of 21B on the first floor and Ms Ogden and Mr Kibble are lessees of the top floor flat 21C as well as being the freeholders.

The Lease

18. The Tribunal referred to the lease in the bundle, which it understood was representative of other leases within the building.
19. Clause 2 set out the lessee’s covenants and in particular:

2c During the said term sufficiently to repair uphold cleanse and keep in good repair and condition the interior of the said flat and the internal walls thereof and all fittings and fixtures therein including the coal bins and all glass in the windows and doors thereof and it is hereby declared and agreed that included in this covenant as repairable by the Lessee are the ceilings of in the said flat and the joists or beams to which the said ceilings are attached

2(d) In every ninth year of the said term and in the last year thereof to repaint redistemper varnish stain and repaper with paper of good quality”

2(g) Not during the said term to make any structural addition or alteration to the said flat without the consent in writing of the Lessor first obtained.

2(h) To pay a fair proportion to be conclusively determined oy the surveyor for the time being of the Lessor (including the reasonable fee of such surveyor for such determination) of the insurance against fire and tempest (including architects fees in connection with rebuilding and reinstatement) of the said block of flats and of the reasonable expense incurred by the Lessor in performing her covenant hereinafter contained regarding the repair and maintenance of the said block of flats (except as regards damage thereto to any pipes or or water apparatus or electric and gas installations caused by or resulting from any act or default or negligence of the Lessee her servants or licensees which damage the Lessee shall make good at her own expense)

20. Clause 4 set out the Lessor’s covenants. The Tribunal refers in particular

4(a)The Lessee paying the yearly rent and observing and performing the' covenants by the Lessee herein contained may peaceably hold and enjoy the said demised premises without any interruption by the Lessor or by any, person claiming under or in trust for her

4(c) At all times during the said term to keep in tenantable repair. structurally and decoratively the roof timbers and outside walls boundary walls fences and gates and entrance doors and other outside parts of the said block of flats and all the drains and water pipes and sanitary and water apparatus thereof and the main electric and gas. installations thereof" and the common entrance hall internal walls and ceilings and main timbers staircases landings and passages except as provided in Clause 2 (c) hereof

21. The Tribunal notes that Lessor's peaceable enjoyment of the property is subject to the lessor complying with the lessor's covenants. The Tribunal also notes that the lease is silent on whose responsibility it is to repair the window frames. Although the parties believed that this was part of the lessor's responsibilities, the lessees in the property except for Ms Freeman had replaced the windows in their flats at their own cost.

The Law

22. The relevant legislation is contained in the Appendix.

The Evidence

23. A hearing bundle including the Respondents' submissions and extending to 477 pages was provided by the Applicant and references to page numbers therein is shown as [*]
24. In support of her application Ms Freeman said that Judge Rai, in her decision dated 14 April 2020 had accepted that she had demonstrated the existence of disrepair in the building making it just and convenient to make the appointment.
25. Ms Freeman said that the disrepair remained and referred to extensive written evidence within the hearing bundle including;
 - i) The schedule of works dated July 2010 [245] and tender Report from Andrew Mills Surveyors dated September 2010[257] with quotations from £54,465 to £89,505 for the proposed works. Nothing however was said to have been done.
 - ii) A letter from Andrew Mills to the freeholders dated 20 August 2012 [265] commenting on the outstanding works at the time of their purchase from the previous freeholders for whom Mr Mills acted.
 - iii) The letter from Heritage preservation dated 28 July 2014 who dealt with the dry rot referring to the poor maintenance at the rear of the property [269]
 - iv) The reports from Croft Surveyors dated 15 September 2020[271 & 293] with a 5-year maintenance schedule totalling £39,675 [281] and subsequently revised to £40,422.50 [301]
 - v) A letter from Croft dated 17 December 2020 with photos illustrating the potential sources of water penetration around the front door affecting the ceiling void to her flat and recommending repairs. [303] Ms Freeman says the door has leaked from 2012 and it was accepted by the freeholders that the workmanship was poor.
 - vi) A report dated 2/6/21 from Exe Terminators and Co Ltd indicating that there were no signs of rising damp but that cracks in the external render and ill-fitting windows may be allowing penetrating damp. [326]
 - vii) A report dated 4/6/21 from Timberwise referring to defective pointing, cracked rendering above the bay, repairs needed to

lead flashing above bay and rainwater goods and high ground levels/paths.[330]

26. Ms Freeman accepted that some of the works included in the Mills report have been carried out, but only being those that benefitted the upper three flats. Ms Freeman accepted that the later Croft report gave a better picture of the current position but said that reference to the front door issue had not been addressed.
27. Ms Freeman referred to an Improvement Notice dated 21 June 2013 [339] which included reference to removing a fire escape ladder; work which had not been done. In answer to a question from the Tribunal however Ms Freeman confirmed that no enforcement action had been undertaken by East Devon District Council. Ms Freeman disagreed with the decision taken by the Council not to enforce the removal of the fire escape ladder which remained.
28. As evidence of inappropriate behaviour by the freeholders Ms Freeman referred to various letters described as wild or spurious from 2012 to 2014 from the freeholders to her mortgage company and a letter from the freeholders to Ms Freeman referring to unpaid service charges and offering to purchase her flat [353 - 364]
29. In evidence that the freeholders accepted there was disrepair Ms Freeman referred to a letter from them dated 3 April 2014 referring to their “total dissatisfaction” with the installation of “the door” and the continuing ingress of water [375] and a Section 20 Notice dated 3 November 2015 to replace the front windows and, if necessary the front door to Flat 21D [383]. The work was not however done.
30. With regard to the unauthorised alterations to her hot water system comprising the reduction in size of her water storage tank Ms Freeman referred to the various reports from different plumbing contractors [311,313,315,317, 323,and an email from Ms Ogden dated 11 October 2019 accepting liability and confirming that the lessees of Flat 21A will pay for any repairs necessary.[393 & 399]. In clarification Ms Freeman confirmed that she accepted that responsibility for these works lay with Ms Ogden and Mr Kibble in their capacity as leaseholders of Flat 21A, not as Freeholders.
31. Ms Freeman also referred to alleged unauthorised works in the “communal roof void” and stairwell carried out by Ms Ogden and Mr Kibble which she said took place in between 2014 and 2017 subsequent to which Ms Freeman has noted cracking in her flat, hence her request for a structural survey to be carried out on the whole building. Ms Freeman said that whilst the works were carried out by Ms Ogden and Mr Kibble in their capacity as lessees this was only possible due to their position as freeholders.
32. The photographs appended to the Croft reports were then examined and Ms Freeman referred specifically to;

- i) Photos 11 and 12 [289] showing the Turnerised roof to her utility room and its corroded and undecorated gutter.
- ii) Photos 14 [290] and 16[291] showing weathered and eroded brickwork to the rear boundary wall piers and a small crack to the front steps.
- iii) Photo 17 showed chips in the concrete edging to the front boundary and photo 18 indicated isolated cracks in the front lightwell threshold.
- iv) Photos appended to Crofts letter of 17 December 2020 [303] showed the cracked mastic around the exterior of the door frame and an area inside the front door with the floorboards removed showing evidence of damp penetration, debris in the floor void and damp staining to the ceiling below in 21D.[306-309]
- v) Photos at [425 – 428] showed the result of the removal of her water tank and the gap left in the floor giving a view into her flat beneath.
- vi) Photos at [429 – 431] were of the fruiting bodies present when she bought the flat in 2007 and in July 2010 [432] which Ms Freeman said was caused by a blocked hopper and leaks from a shower in 21B. Ms Freeman said that her reason for including these photos was to demonstrate the long term disrepair that had affected her flat some of which remained.
- vii)[433-436] are photos of a dilapidated rear pillar and gate both of which are said to be freeholder responsibilities.
- viii) [437 -439] are said to be examples of the poor workmanship to the front elevation of her flat and [440-445] shows the dilapidated state of the flat's window frames.
- ix) [446] is a photograph of the front garden part of which has been tarmacadamed to provide additional parking which Ms Freeman says she has no access to in contravention of her rights referred to in paragraph 1 of the lease [463]
- x) The remaining photos [447-456] are said to be examples of poor workmanship and use of inappropriate materials in decorating the front elevation, damp penetration above the window in her daughter's bedroom and water damage to her front bay taken October 2021.
- xi) [458 and 459] show water damage to her bay window said to be caused by a leak from 21 A above and [459] the poor repair of one of her windows.

33. In answer to a question from the Tribunal Ms Freeman says the evidence shows the freeholders are unwilling to properly manage the building despite receiving reports of disrepair and they had expressed their willingness to appoint a manager such as Mr Opie although he proved he did not have the skills to carry out that task.
34. Ms Freeman said that the other lessees were not willing to agree to works affecting her flat such as the damp ingress from the front door to be done Ms Freeman relied on the Zoom meeting organised by Mr Opie

when it was suggested that she should pay to replace her windows and repair her hot water system; a most unprofessional suggestion.

35. Ms Freeman considers that an impartial tribunal appointed manager with knowledge of the law and in accordance with the lease would be able to address the disrepair and mediate between the parties where works are communal.
36. Ms Freeman accepts that the considerable amount of money that it is likely to cost to carry out the outstanding repairs can only be recovered from the lessees despite Mr Opie's report that it had been difficult to obtain funds from the lessees. Ms Freeman says that despite what has been said by others she has never refused to pay any sums demanded. Her right of peaceful enjoyment has been denied by the alliance of the other lessees with the freeholder.
37. Mr Higgins wanted to know whether all of the issues are down to the freeholder's neglect or are the likely costs to be met by the freeholders or the lessees as well. Ms Freeman says that there is also the failure of Mr Opie to manage properly and there be issues between her and other lessees although that is not the case on which she is seeking determination. She would hope any issue between her and Mr Higgins could be sorted out between them.
38. The Tribunal explained that the freeholder's responsibility was to organise works to the common parts and that each lessee's liability for their share of the costs incurred was set out in the lease. Although any failure of the freeholder to effectively manage the building was an essential element in whether an appointment was to be made the Tribunal also had to be satisfied that the person appointed would receive the support of the parties.
39. In answer to questions by the Tribunal Ms Freeman;
 - i) Accepted that Judge Rai's decision made no findings of fault on the freeholder's part and the appointment was made due to the agreement between the parties and that it was "just and convenient". Ms Freeman however referred to the Tribunal's reference to the freeholder's lack of understanding of the duties of management and of the Management Code.
 - ii) accepts that the water supply issue is a matter between leaseholders.
 - iii) disagrees with the comment in the supplemental report by Mr Buse on behalf of Croft Surveyors dated 17 December 2020[303] which refers to a structural survey not being needed and says that she raised it with Mr Opie but received no response. A structural surveyor to whom she spoke said that it was similar to that which would be expected in a building of this age but without access to the building he couldn't put a report in writing.

40. Mr Opie in his report on 2 August 2021 [155] criticises Mrs Ogden for not accepting his role as property manager and trying to influence reports and inspections and Ms Freeman for not accepting independent findings made and going on to commission her own inspections. Mr Opie also considers that unless reports are exactly as Ms Freeman would like she is not happy. Mr Opie reported that he had received numerous calls from Ms Freeman which had become increasingly antagonistic.
41. Ms Freeman disagrees with Mr Opie and says she has co-operated with him fully but as he hadn't investigated everything required she had to commission her own reports. Ms Freeman said Mr Buse's report failed to observe the penetrating damp in her flat and the crack in her hallway thereby obliging her to obtain an additional report.
42. The Tribunal then referred to Mr Tonge's emailed submission made on behalf of himself and his wife, Mr & Mrs Higgins and Ms Ogden and Mr Kibble [243] and an email from the freeholder at [241].
43. Mr Tonge said that he could not see that a different building manager would make any difference to get the required work done as animosity overrides everything.
44. Whilst accepting that there have been issues with the freeholders in the past, recently where he, his wife, Mr and Mrs Higgins and the freeholders have agreed a course of action Ms Freeman has disagreed. He would reluctantly accept a one-year appointment but remained unconvinced of the benefit.
45. In answer to questions from Ms Freeman Mr Tonge accepted that she had always paid sums due including the decoration to the front of the building when the rear had not been touched for 30/40 years.
46. The Tribunal referred to an email from Ms Ogden [241] saying that the freeholder is more than capable of managing the building. Mr Tonge said that although they made mistakes in the past the freeholder and three other parties working sensibly together would be more than capable of managing the building but with the ongoing animosity it was unlikely to succeed.
47. Mr Tonge has looked at the schedule of works at [281] and the various works identified as required which were discussed at a meeting with all the parties (Mr and Mrs Higgins had not yet purchased). It was agreed to start on the most urgent and then move forward.
48. Mr Higgins agreed with Mr Tonge's submissions pointing out that they are caught up in the crossfire. He doesn't believe that any new building manager will have any more success than Mr Opie and it is all dependent upon the freeholders and Ms Freeman sorting out their differences.

49. Mr Higgins accepts the survey as competent and the expenditure of £20,00 or so in the first year is not an issue being no problem with the finance. There may be an issue if Ms Freeman considers there are costs that the freeholder should bear due to any past failures on their part.
50. He would reluctantly agree to a one-year appointment but considers success to be unlikely.
51. In answer to Ms Freeman's question as to where she had failed to agree with any proposal Mr Higgins did not provide an example.
52. Mr Higgins confirmed to the Tribunal that the flat was a holiday home and agreed that the freeholder is capable of managing the building in cooperation with the other parties. He had seen the schedule which he considered to be reasonable, being prepared by a competent surveyor but hadn't discussed it with Mr Opie as he hadn't purchased their flat until after the previous Tribunal decision in April 2020.
53. Mr Milne referred to his statement at [117] and confirmed that he remained willing to undertake the appointment. He confirmed that he did not hold any other tribunal appointments. He referred to the 5-year schedule of works which he hoped would be completed in the time allowed. Referring to progress during Mr Opie's tenure he said that he had been faced with both personal difficulties but also the pandemic.
54. Mr Opie had not enforced payment of the costs of the proposed works and hence little was done. The Cross report sets out the estimated costs which may be slightly higher or lower than reported. What is needed is to collect the money and then commence with the works. Any issues between the freeholder and Ms Freeman should be resolved between them. Whilst it would be good to carry out works with agreement of all the parties in this case the schedule timetable should be followed and payment from lessees must be enforced.
55. Mr Milne thought it may be worth obtaining a structural surveyor's opinion but otherwise the Croft survey remains relevant.
56. On his practice Mr Milne said that Modbury Estates was a new company and managed 4 sites. He had 1000 units in the pipeline and had a listed building in Plymouth with 26 units, commercial and residential properties in South Hams with one in Modbury and two in Salcombe.
57. He has dealt with sea facing buildings and is aware of the issues that may involve.
58. Where works are needed such as ridge tiles, slates etc he wouldn't need a third party to manage but in a larger scale contract he would want to instruct a surveyor to supervise. He gave examples of previous contracts in which he has been involved.

59. Mr Milne would organise Section 20 works arrange quotations and collect funds.
60. Mr Milne said that in addition to his quoted fee of £2,000 pa he would charge 10% for monitoring works where he had not sub instructed a surveyor.
61. The business is him and his fiancée but as business grows he would employ an administrator around Feb '22 and further staff as required.
62. Mr Milne would at the early stages visit the site once a month, later on once per quarter as issues were dealt with.
63. In answer to the Tribunal's question Mr Milne confirmed that he had not visited the property and was originally contacted by Ms Freeman and had then spoken on the phone with Ms Ogden who raised matters that did not appear to be relevant to his potential appointment. He did offer to visit the property but at a cost which he wasn't sure the lessees would bear. Mr Milne said that the firm had its own complaints procedure and if unresolved the matter could be referred to the Property Ombudsman his application for membership being under current consideration.
64. He is a member of the IRPM and chair of the Southwest chapter of ARMA although his firm being new cannot yet be a member. He has public liability insurance of £1,000,000 and bank protection over funds deposited but no RICS client money protection.
65. With regard to whether a structural surveyor should look at the property in addition to the Croft survey Mr Milne said it was no bad thing to receive a second opinion.
66. Ms Freeman and Mr Tonge had no questions of Mr Milne.
67. Mr Higgins asked at what point Mr Milne would step in if funds were not received. Mr Milne said he would chase after the due date and after another month would proceed to their standard recovery process. He explained that if multiple contractors were proposed by lessees and no agreement reached as manager they would pick the contractor. Disputes between Ms Freeman and Ms Ogden would have to be set aside unless relevant to his duties as manager.
68. The Tribunal clarified that it was up to any tribunal appointed manager or freeholder to choose the contractor subject to S.20 consultation and not for lessees to decide.
69. The Tribunal confirmed in answer to a question that if Mr Milne was not appointed it was up to the freeholders and not lessees to instigate any recovery proceedings through the courts.

70. The Tribunal said that if an appointment was made it would send a draft order to Mr Milne for his comment and agreement.
71. Mr Tonge suggested that the reason Ms Freeman did not live at the property was that she lived near her daughter's school, Millfield, in answer to which she said That due to unauthorised alterations to the water tank causing flooding to her kitchen ceiling she hasn't been able to live there for four years. Ms Freeman said she moved out in August 2017 and following the removal of her ceiling the extent of the damage done by the then lessees of Flat 21A Ms Ogden and Mr Kibble became apparent. In October 2019 Ms Ogden and Mr Kibble offered to pay the contractor for any repairs necessary due to the modifications to the hot water system. Ms Freeman did not accept the offer and instead suggested mediation [393- 402].
72. Ms Freeman has not pursued legal proceedings as she had hoped to resolve the matter through the Tribunal appointed manager. If that is not successful however she is in the process of drafting proceedings.
73. Ms Freeman produced a witness statement from Martin Woodhead FRICS, a Chartered Surveyor dated 26 November 2021 which charted Ms Freeman's dispute with the previous and current freeholders from 2008. In 2016 Ms Freeman put forward Mr Woodhead as a potential manager for appointment as Manager. According to Mr Woodhead, the tribunal on 29 January 2016 decided that there was no proof that Ms Freeman had in any way breached her lease. The tribunal also decided that due to the evidently very poor relations between Ms Freeman and the freeholders and the fact that Mr Woodhead had been acting for Ms Freeman throughout the Tribunal did not consider that his appointment would help the situation.
74. Ms Freeman produced two witness statements dated 28 October 2015 and 25 November 2019 from Mr Barraclough, an experienced builder and father of Ms Freeman's daughter, one witness statement dated 16 March 2020 from Ms Abbie Freeman, Ms Freeman's daughter, two witness statements 25 November 2019 from Mr and Mrs Newman former tenants of Ms Ogden and Mr Kibble in respect of their occupation of flat 21A Morton Crescent, and a witness statement dated 30 October 2015 from Councillor Eileen Wagg. All the witnesses testify to the unreasonable behaviour of Ms Ogden and Mr Kibble, and the state of disrepair of the building
75. In closing Mr Tonge said it was unfortunate that they had become embroiled in an historic dispute and reluctantly agreed that a one-year appointment may be necessary. He says that he will be taking it up with the freeholders that the repairs should have been carried out over the last 10 years. Mr Higgins agreed although he would prefer to see the management passed back to the freeholders without appointing a manager.

76. Ms Freeman closed by referring to Mr Tonge and Mr Higgins not wishing to meet the costs involved in putting the building into repair pointing out that the leases they purchased were clear on their respective obligations to meet the cost of repairs.
77. Ms Freeman said it had always been up to her to pursue issues with both the current and previous freeholder by making applications to the Tribunal, the costs of which she had so far borne. A one-year appointment was insufficient to achieve any of the cyclical maintenance works for which a minimum of three years was required.
78. Ms Freeman said that on this occasion she would apply for her costs and that if a manager was not appointed it would be to her detriment the building being managed by Messrs Tonge, Higgins and the Freeholders.
79. No proof has been provided of her being the unreasonable party. None of the parties have considered how their actions or lack of them have been detrimental to her flat and if Mr Milne is appointed, he should, unlike Mr Opie arrange insurance rather than the freeholders. The policy should have the lessees' interest noted unlike the existing.
80. The price she paid for the flat is irrelevant and she has spent tens of thousands on improving the interior of her flat over the 14 years she has owned the flat, the exterior is not however her responsibility to maintain.
81. Ms Freeman points out that under Section 20 she has the right to propose a contractor in the same way as other leaseholders.
82. Ms Freeman confirms that the only reason for moving out of the flat was because the contractor removing the ceilings advised that she had to vacate whilst the works were carried out.

Decision

83. This is an application under section 24(9) of the 1987 Act by Ms Freeman to vary the existing Order by extending the term, and by replacing Mr Opie with Mr Milne as manager of the property.
84. The Court of Appeal in *Orchard Court Residents Association v St Anthony Homes Limited* [2003] 2EGLR 28(CA) established that there was a distinction between making and varying an Order and that they dealt with quite separate issues. The Court of Appeal said that under section 24(9) of the 1987 Act it was not necessary for the Applicant to demonstrate again that the grounds for making a management order under section 24(2) existed. The Court of Appeal observed that the legislation imposed no criteria on how the Tribunal should exercise its discretion when an application for variation was made by an interested person other than the landlord.

85. The Tribunal, therefore, has wide discretion when considering applications under section 24(9) provided it has regard to relevant considerations. The Court of Appeal in *Orchard Court Residents Association* favoured the term “just and convenient” to capture the approach that should be adopted by the Tribunal when exercising its discretion on applications for variations.
86. The preponderance of Ms Freeman’s evidence related to events preceding the appointment of Mr Opie as Manager and dated back to 2008. That evidence showed that there had been an ongoing dispute with the past and present freeholders which in relation to the current freeholders had become acrimonious.
87. Ms Freeman had decided that the best way to resolve the dispute was to seek an appointment of a Tribunal manager. Ms Freeman made an unsuccessful application in 2016, and renewed her application in 2020 when the Tribunal agreed to the appointment of Mr Opie in April 2020 for the period of 18 months. It is this order which the Tribunal is considering extending, and replacing Mr Opie with Mr Milne as manager.
88. The question for the Tribunal is whether it is just and convenient to continue with this order albeit with Mr Milne as manager.
89. The Tribunal does not consider it proportionate to dwell on the evidence of the events prior to the appointment of Mr Opie. It is sufficient for the purposes of this decision to note that there has been ongoing dispute between Ms Freeman and the freeholders about the state of the building and the relationship has broken down with each accusing the other of unreasonable behaviour. It is also clear from the history that Ms Freeman has chosen for whatever reason not to pursue the freeholders in Court for breach of the lessors’ repairing covenants under the lease.
90. The Tribunal takes the view that the focus of its enquiry should be on the evidence relating to the conduct of the current order and the current situation.
91. The Tribunal makes the following findings of fact;
- a. The Tribunal in April 2020 made no findings on whether the conditions required by section 24(2) (a) of the Act were met and agreed the Order in the light of the parties mutual agreement to the appointment of Steve Opie. (Paragraph 43 of Judge Rai’s decision of 14 April 2020)
 - b. It is common ground between the parties that Mr Opie’s appointment has not succeeded.

- c. Mr Opie has declined to be considered for re-appointment citing amongst other reasons the lack of cooperation of both Mrs Ogden and Ms Freeman
 - d. Ms Freeman is not prepared to taken independent advice and considers that other repairs are required for which a structural survey is required. Mr Buse however in his letter of 17 December 2020 says that “I have yet to see any evidence that supports a structural survey” The Tribunal prefers the professional opinion of Mr Buse and finds as a matter of fact that a structural survey is not required and that the works now required are fairly contained in Croft’s 5 year maintenance schedule.
 - e. Ms Freeman has unreasonable expectations of what she expects from a manager such as the control of works within other lessees’ flats and resolution of the issue regarding the alterations to the front garden.
 - f. The Crofts’ schedule of works which the other leaseholders and freeholder have accepted as the basis of a plan to get the property in a reasonable state of repair has not been accepted by Ms Freeman.
 - g. All of the leaseholders except Ms Freeman consider that the freeholder understands its responsibilities and will carry out the works that have been identified.
 - h. The other leaseholders are not satisfied that an appointment will be effective and that the money spent on fees could be better utilised on repairs to the building.
 - i. The proposed manager does not have sufficient experience in managing the long standing issues between the parties and is unlikely to receive the support necessary to ensure an appointment is successful.
92. The question for the Tribunal is whether it is just and convenient to extend the order and appoint Mr Milne as the manager. The Tribunal finds that the appointment does not have the support of the other leaseholders. Although Ms Freeman has applied for a manager the Tribunal findings suggest that she will not support the manager unless he agrees to her point of view. A new manager coming into such a position would not only have to deal with the current situation but also the legacy of the longstanding acrimonious relationship between freeholder and Ms Freeman. The Tribunal does not consider that Mr Milne has the necessary level of experience and professional background to deal with such a challenging situation.
93. The Tribunal is conscious that the flat is Ms Freeman’s home. However, Ms Freeman has not lived there since 2017. Ms Freeman states that this

is because of the disrepair and unhealthy environment in the flat. Given those circumstances the Tribunal would have expected Ms Freeman to have taken urgent action to remedy the situation but she has given no explanation for not treating the matter as urgent.

94. The Tribunal recognises that work is required to the property and that a schedule of works has been prepared. The Tribunal is not satisfied that the appointment will secure this and considers the best option is for the management to revert back to the freeholder who has indicated together with the lessees of two other flats that that schedule will be done.
95. Despite some reservations the freeholders have indicated that they are capable of managing the property effectively and they have the support of Mr and Mrs Tonge and Mr and Mrs Higgins who whilst reluctantly agreeing to a one year appointment have expressed their reservations about the ability of a manager to tackle the issues.
96. Most successful manager appointments have the support of a significant proportion of the parties which is not the case here. Any manager appointed is likely to be faced with opposition from a number of the parties leading to the same situation in which Mr Opie found himself.
97. Given the guidance as to their repairing obligations provided in this decision and that the resultant costs are likely to be recoverable through the service charge the Tribunal considers that returning the management to the freeholders with the cooperation of the majority of the leaseholders is more likely to succeed than by making a tribunal appointment.
98. In view of the circumstances detailed above the Tribunal concludes that it is not just and convenient to extend the order and appoint a new manager because;
 - i) There is a strong likelihood based on past experience and current attitudes that such an appointment will fail and
 - ii) The proposed manager is not suitable for appointment.
- 99. The application is refused.**
- 100. Mr Opie must return the outstanding balance of service charges held to the Freeholder together with relevant documentation relating to the management of the property.**

Costs

101. Ms Freeman has made an application under S.20C that any costs incurred by the freeholder in respect of defending this application are not to be considered relevant costs in determining the amount of any service charge. The Tribunal are of the preliminary view that the lease

does not contain a provision whereby such costs are recoverable through the service charge and therefore such an Order is unnecessary.

102. If, however the freeholder considers such costs are recoverable it must send its reasons to the Tribunal and the Applicant following which a determination will be made.
103. At the hearing Ms Freeman also referred to making an application for her costs. Any such application must be made and copied to the other parties within 28 days of the Tribunal sending this decision.

D Banfield FRICS
Judge Tildesley O.B.E.
3 February 2022

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk 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.

Appendix of relevant legislation

Landlord and Tenant Act 1987

24 Appointment of manager by the court.

- (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 or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and
 - (ii)
 - (iii) that it is just and convenient to make the order in all the circumstances of the case;
 - (ab) where the tribunal is satisfied—
 - (i) that unreasonable service charges have been made, or are proposed or likely to be made, and
 - (ii) that it is just and convenient to make the order in all the circumstances of the case;