UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 137 (LC)

UTLC No: LC-2022-456

Royal Courts of Justice,
Strand, London WC2A

26 June 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL
(PROPERTY CHAMBER)

LANDLORD AND TENANT – APPOINTMENT OF MANAGER – interpretation of FFT management order – scope of manager's power to recover costs of proceedings from commercial lessees – appeal dismissed

BETWEEN

SOLOMON UNSDORFER

Appellant

-and-

OCTAGON OVERSEAS LIMITED (1)
CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED (2)
RIVERSIDE CREM 3 LIMITED (3)
CIRCUS APARTMENTS LIMITED (4)
RESIDENTS' ASSOCIATION OF CANARY RIVERSIDE (5)

Respondents

Re: Canary Riverside Estate,
Westferry Circus, London E14

Martin Rodger KC, Deputy Chamber President

25 April 2023

Daniel Dovar, instructed by Wallace LLP, for the appellant
Justin Bates, instructed by Freeths LLP, for the first to third respondents

The following cases are referred to in this decision:

LB Tower Hamlets v Khan [2022] EWCA Civ 831

Maunder Taylor v Blaquiere [2003] 1 WLR 379

Queensbridge Investments Ltd v Lodge [2015] UKUT 635 (LC)

Sennadine Properties Ltd v Heelis [2015] UKUT 55 (LC)

Introduction

1. This appeal is about the meaning of a badly drafted tribunal order appointing a manager of the Canary Riverside estate under Part II, Landlord and Tenant Act 1987.

2. Canary Riverside is a large mixed estate in East London containing both residential and commercial premises. It already had a history of litigation when Mr Alan Coates was appointed as manager by the First-tier Tribunal (Property Chamber) (the FTT) on 1 October 2016 and many additional chapters of that history have been written since then. The current manager, Mr Unsdorfer, was appointed in place of Mr Coates in September 2019.

3. The present dispute is about the extent to which the manager can recover his costs of proceedings from the tenants of the commercial premises. The manager wants the commercial tenants to contribute towards the costs of any litigation in which he becomes involved (to the extent that they are not recovered from other parties to the proceedings). The first, second and third respondents, who are landlords of the commercial premises, think their commercial tenants should only contribute to the costs of litigation about the services provided to them by the manager. The other respondents are tenants of residential parts of the estate and support the manager's position. The commercial tenants are not parties to the proceedings but a number of them informed the FTT, unsurprisingly, that they did not want to contribute to any of the manager's litigation costs.

4. In two decisions issued on 13 May and 27 July 2022 the FTT found largely in favour of the landlords (as I will refer to the first to third respondents), but it granted the manager permission to appeal.

5. At the hearing of the appeal the manager was represented by Mr Daniel Dovar, and the landlords by Mr Justin Bates. I am grateful to them both for their submissions. The fourth respondent filed a statement of case supporting the manager's appeal but limited itself to the general proposition that the order appointing the manager should be interpreted purposively in such a way as to maximise the prospects of his appointment being successful.

The Management Order

6. The management order of 15 August 2016 (the Order) is a poorly drafted document, repetitious, grammatically incoherent and peppered with second thoughts and qualifications. It has been amended from time to time and the version I was shown is dated 12 April 2019, but I was told that the key provisions for this appeal have remained unaltered.

7. The original manager was appointed by the FTT at the request of a group of residential tenants because of breaches by the landlords of their obligations under the leases of residential units on the estate. In a decision of 5 August 2016 the FTT explained that it was satisfied that the landlords had failed to provide copies of service charge accounts, had misallocated funds, had failed to provide access to accounting records, had not

followed the RICS Code of Practice on Residential Service Charge Management, had not provided service charge credits in a timely manner, had no planned maintenance programme or adequate reserve fund, had mismanaged the maintenance of service installations, had failed to keep the common parts in a condition appropriate to a high class residential estate, and had acted through managing agents who employed too few staff and had insufficient experience.

8. The manager was appointed principally to manage the provision of services to the residential parts of the estate and the FTT did not require him to be responsible for the commercial premises (which include a hotel, restaurants, a health club and retail units). Those areas remained largely under the control of the landlords. But the supply of electricity and the other utilities to the estate is through service installations which serve both the commercial and the residential parts. The FTT put the manager in charge of those shared services and authorised him to collect services charges from the commercial tenants as their contribution towards the cost.

9. The Order contained the terms on which the manager would discharge his responsibilities for five years (subsequently extended and now the subject of an application to the FTT for renewal). It must be interpreted with that purpose in mind and against the background of the many years of dispute between the landlords and the residential tenants of the estate which preceded it.

10. The Order is in four parts, beginning with recitals and definitions, then substantive terms appointing the manager and giving him certain powers and requiring certain steps to be taken by the landlords, a schedule of "functions and services", and finally an annex listing 15 commercial tenants. In the main body of the Order clause 1 appointed Mr Coates to fulfil the functions of manager of the residential leasehold properties and common parts and any "Shared Services", an expression defined as including conduits and service media on the estate which benefit two or more residential units, or which benefit both commercial and residential tenants.

11. Clause 4 then conferred on the manager "all such powers and rights as may be necessary and convenient in accordance with the Leases to carry out the management functions of the Landlord under the Leases" (meaning only the residential leases). After the words "and in particular" 14 sub-clauses then listed specific powers which the manager was to have. These included, at clause 4(a), the power to receive all service charges payable under the residential leases and under the commercial leases where they are required to contribute to the cost of Shared Services.

12. The expression "Service Charges" is defined in paragraph (n) in the preamble to the Order as meaning:

> "the service charges paid by the residential occupiers; the shared service charges payable in relation to the Shared Services, including the reserve fund collections in relation to both the residential units and the Shared Services …"

13. The power to collect service charges is matched, at clause 4(e), by the power and duty to carry out the obligations of the Landlords contained in the residential and commercial leases in relation to Shared Services.

14. It was explained to me that, in practice, the services are divided into residential services which are paid for only by the residential tenants, and estate services, to which both residential and commercial tenants contribute in the proportion 72 to 28. The Shared Services are part of the estate services.

15. Clause 4(g) authorised the appointment of solicitors and other professionals to assist the manager in the performance of his functions.

16. Clauses 4(i), (j) and (k) then conferred on the manager a general power to conduct litigation and ancillary rights, as follows:

> "(i) The power in his own name, …, to bring, defend or continue any legal action or other legal proceedings (other than those in connection with any requests for licences or other permissions …), in connection with:
>
> (i) This Management Order;
>
> (ii) The Leases;
>
> (iii) The Commercial Leases and/or
>
> (iv) Any Occupational Agreement,
>
> in relation to any services shared by the foregoing with the Lessees."
>
> (j) The Manager shall be entitled to an indemnity for his own costs reasonably incurred and for any adverse costs order out of the service charge account;
>
> (k) In the event that the Landlord or Lessees shall be in breach of their covenants in the Leases, or, in the case of the Commercial Leases or Occupational Agreements, in breach of their covenants in relation to any Shared Service Charges or services shared with the Lessees and/or their obligations as provided in the Management Order, the Manager shall be entitled to recover from the Landlord or any such Lessee, Commercial Tenant or other occupier on a full indemnity basis any costs, fees, charges, expenses and/or disbursements reasonably incurred or occasioned by him in the appointment of any solicitors, counsel, surveyors or any other professional reasonably retained by the Manager for the purposes of enforcing such covenants or obligations whether or not the manager brings any proceedings in court or before any tribunal.
>
> PROVIDED THAT in default of recovery of the same from the Landlord, Lessee, Commercial Tenant or other occupier in breach of the covenants in the Lease, or, in the case of the Commercial Leases and/or any other Occupational Agreement, in relation to services shared with the Lessees and/or obligations as provide in this Management Order, the Manager shall be entitled to recover the same through the service charges"

17. By clause 18 the manager was given the right to apply to the FTT for further directions in accordance with section 24(4) of the 1987 Act. These proceedings are one of a number of examples of the manager exercising that right.

18. The Order required the manager to manage "the Premises" (an expression meaning the whole Canary Riverside estate) in accordance with the directions of the FTT, the schedule of functions and services forming part of the Order, the obligations of all parties under the residential leases and "under the Commercial Leases … where services are shared …", and the RICS Code (clause 5).

19. The schedule of functions and services ran originally to 34 paragraphs (more were added later). Paragraphs 20 to 26 concern the manager's remuneration. Paragraph 27 then deals with the reimbursement of litigation costs, as follows:

> "The Manager is entitled to be reimbursed in respect of reasonable costs, disbursements and expenses (including for the avoidance of doubt, the fees of Counsel, solicitors and expert witnesses) of and incidental to any application or proceedings (including these proceedings) whether in Court or First-tier Tribunal, to enforce the terms of the Leases, the Commercial Leases and/or any Occupational Agreement of the Premises. For the avoidance of doubt, the manager is directed to use reasonable efforts to recover any such costs etc directly from the party concerned in the first instance and will only be entitled to recover the same as part of the service charges in default of recovery thereof."

20. It can be seen that paragraph 27 of the schedule of functions and services covers much the same subject matter as clauses 4(j) and (k) in the main body of the Order. Nothing in the Order explains the intended relationship between the different provisions nor what is to be done in the event of any inconsistency between them, but as far as possible a sensible meaning must be found for them all.

The FTT's decision

21. The manager applied to the FTT to vary the Order in five separate respects. The only part of the application relevant to this appeal was a request to add a reference to legal and professional fees arising out of the manager's appointment to the definition of "Shared Services". The manager explained that he had experienced great difficulty in recovering contributions towards the costs of legal proceedings from the commercial tenants. He maintained that the Order already allowed for such recovery through the manager's general entitlement to collect Service Charges or through paragraph 27 of the schedule of functions and services (no reliance was placed on clauses 4(j) and (k)). He wanted to put that entitlement beyond doubt.

22. In its original decision the FTT rejected the manager's argument that litigation costs were already recoverable as costs of a Shared Service (the suggestion being, as I understand it, that since all tenants of the estate benefitted from the manager being able to conduct proceedings, litigation was a shared service). The rejection of that submission is not challenged in this appeal, and it was clearly correct. Although "Shared Services" is

defined as "any services or shared services provided to the Premises" it is clear from the words which follow ("including any pipes, wires, conduits, service media or similar …") that "services" is here used in the sense of service installation or conduits, rather than in the sense of things done for the benefit of someone else.

23. The FTT then considered the meaning of paragraph 27 of the schedule of functions and services. The manager's submission was that it permitted the manager to recover the costs of proceedings "as part of the service charges" payable under both the residential and the commercial leases. The landlords argued, first, that the only proceedings for which the manager could recover litigation costs were proceedings concerned with enforcement, such as the collection of service charges (the sole "carve out" from that limitation being the costs of the original section 24 application to the FTT which are specifically referred to in paragraph 27); and, secondly, that costs of proceedings could not be recovered from commercial tenants at all because litigation was not a Shared Service, and the manager was only entitled to collect contributions towards the cost of Shared Services.

24. The FTT did not accept either party's submissions. It proceeded on the basis that the reference in paragraph 27 to "service charges" was a reference to the capitalised definition of "Service Charges" (see paragraph 12 above) and therefore included "the shared service charges payable in relation to the Shared Services". Those were charges payable by the commercial tenants. The FTT continued, at [60]:

> "We recognise that it was the residential lessees who applied for the Manager to be appointed over the Estate, but it would make no sense for the Manager's ability to recover legal costs incurred in enforcing a commercial lessee's obligations regarding Shared Services, to be restricted to recovery from residential lessees only. As such, we determine that paragraph 27 allows for the recovery of legal costs from commercial lessees where:
>
> (a) the legal costs were incurred in enforcing the terms of the Leases, including the Commercial Leases and/or any Occupational Agreement;
>
> (b) the costs are of, or incidental to, any application or proceedings whether before a Court or this tribunal. We do not agree that the paragraph accords a carve out solely in respect of the original s.24 application. There is nothing in the wording that excludes the costs of any subsequent application under s.24(9) to vary the [Order];
>
> (c) the Manager has been unsuccessful in attempts to recover those costs from the defaulting lessee; and
>
> (d) the enforcement action taken related to the provision of a Shared Service by the Manager."

25. Having explained its interpretation of the Order, the FTT then refused to make the variation suggested by the manager. There is no appeal against that refusal.

26. When they received the FTT's original decision the manager's advisers first claimed to be confused, then purported to apply for further directions under section 24(4) of the 1987 Act to resolve their confusion. Those further directions amounted, in effect, to a request that the FTT explain how its decision would apply to costs of five different proceedings in

which the manager was involved, namely: (1) ongoing proceedings between the manager and certain residential tenants; (2) the original application to appoint the manager; (3) the continuing application to extend the term of the Order; (4) proceedings before the FTT arising out of the insolvency of one of the commercial tenants; and (5) the application to vary the Order which had given rise to the FTT's decision now under appeal.

27. In its second decision, issued on 27 July 2022, the FTT provided the clarification requested. It considered that a contribution to the costs of (1) was not recoverable from the commercial tenants because the proceedings were not to do with Shared Services. The landlords had acknowledged that, to the extent that they related to Shared Services, the costs of (4) would be recoverable, in part, from the commercial tenants. The FTT agreed. Whether those tenants could be required to contribute to the costs of (2), (3) and (5) depended on whether conditions (a), (b) and (d) in its original decision were satisfied in respect of those proceedings. The FTT took the view that condition (c) did not need to be satisfied where there was "no defaulting lessee from whom such costs could be recovered".

The appeal

28. The manager now appeals, with the permission of the FTT.

Submissions

29. On behalf of the manager, Mr Dovar argued that the FTT had illegitimately narrowed the scope of paragraph 27 by overlooking the significance of the words "of and incidental to" and thereby restricted the recovery of costs to those of proceedings directly involving the enforcement of terms relating to the provision of shared services. That had had the effect, in practice, of excluding the costs of the original section 24 proceedings for the appointment of the manager, which were expressly referred to in the clause and were recoverable from both residential and commercial tenants without any other condition needing to be satisfied. The same was true of proceedings (3) and (5), which were applications brought under section 24 to vary or extend the original Order and were therefore "incidental" to it.

30. Mr Dovar proposed that paragraph 27 also allows the recovery from the commercial tenants of a contribution to legal costs of, or incidental to, any proceedings to enforce the terms of a lease, including a commercial lease; where the costs were incurred in the direct enforcement of a lease, that entitlement depended on the manager first having tried and failed to recover the costs from the defaulting party.

31. For the landlords, Mr Bates accepted that the commercial tenants could be required to contribute to the costs of proceedings relating to the enforcement of residential or commercial lease terms concerning shared services (which had not been the landlords' original position before the FTT). The only service charges the manager was entitled to raise against the commercial tenants were charges related to the shared services, and the recovery of legal costs should be limited in the same way. The FTT had correctly identified the conditions to which any such recovery was subject.

32. Puzzlingly, neither Mr Dovar nor Mr Bates made any reference to clauses 4(i), (j) or (k) in their written argument, nor despite my invitation did they develop much in the way of submissions on them orally. They appear to have taken the same approach before the FTT and, as a result, none of those clauses are mentioned in the FTT's decisions. That is not a sensible approach to the interpretation of a complicated document. Any document should be interpreted as a whole, as different parts may shed light on each other. It is particularly important to take account of provisions concerning the same subject matter even though found in different parts of the document, since the parties must be taken to have intended not to contradict themselves.

33. I will therefore begin by considering clauses 4(i), (j) and (k), which I have already quoted at [16] above.

The manager's powers under clause 4

34. Clause 4(i) gives the manager power to bring, defend or continue proceedings in connection with the Order or the residential or commercial leases/occupational agreements. The drafter has botched a further qualification ("in relation to any services shared by the foregoing with the Lessees") by tacking it on at the end of the clause without making it clear what it is intended to qualify. It seems to me to be both clear and necessary that those words be read as qualifying only the last two entries in the list of instruments in connection with which the manager may litigate, namely, the commercial leases and any occupational agreement. It would hamstring the manager to limit his right to bring proceedings in connection with the Order itself or the residential leases by requiring that those proceedings relate to shared services, since it would leave him unable to enforce the collection of the purely residential service charges. That would make no sense and cannot have been intended. The reference to services shared "by the foregoing with the Lessees" (meaning the residential tenants), suggests that "the foregoing" are those listed after the residential tenancies in the list of instruments i.e. the commercial leases and occupational agreements. That qualification is consistent with the manager's narrow terms of reference so far as the commercial premises are concerned. It means that the manager has no power under clause 4(i) to engage in litigation with the commercial tenants on any matter other than the shared services. That, of course, does not necessarily mean that the commercial tenants may not be required to contribute to the manager's costs of proceedings against others concerning different matters.

35. Clause 4(j) then gives the manager an indemnity "out of the service charge account" for "his own costs reasonable incurred and for any adverse costs order". This abbreviated provision begs the obvious question: costs of what? But its location after clause 4(i) answers that question clearly enough: the manager is entitled to an indemnity from the service charge account for the costs of his participation in the proceedings identified in clause 4(i). But who is to meet that indemnity?

36. We are told that the manager's indemnity is to come from "the service charge account", but that is not a defined expression. Nor may money collected as a service charge lawfully be used to defray expenses other than those for which the relevant service charge was payable, since service charges are held on a statutory trust for that purpose (section 42(2)-(3), 1987 Act). The reference to a service charge account, suggesting a bank account to which the manager can have access, obscures the meaning of the clause. The

manager collects, holds and disburses funds for specific purposes, and there is no fund on which he can draw without authority; the expression "service charge account" is simply a reference to the manager's entitlement to use money which has been collected as a service charge. An indemnity for litigation costs "out of the service charge account" is therefore a right given to the manager to collect a service charge to pay for litigation.

37. The manager's right to draw on the service charge account to satisfy the indemnity given him by clause 4(j) must either refer to a right which is conferred on the manager by the leases, authorising him (in place of the landlords) to collect money to meet the costs of the relevant litigation, or it must be an entitlement given to him by the Order itself to collect funds to cover those costs.

38. Mr Dovar did not rely on any provision of the commercial leases as entitling the manager to recoup his costs of proceedings from the commercial tenants. I was also shown the head lease of the health club (which I assume is typical) which included a provision requiring the tenant to contribute to the cost of certain services so far as they were attributable to "shared items" (meaning plant and machinery serving the demised premises and other parts of the estate). Those services did not appear to me to cover professional fees incurred in litigation with the tenant or third parties.

39. It follows that if the manager has the right to recoup the costs of proceedings from the commercial tenants, it must be contained in the Order itself. There is no doubt that the FTT can make an order going beyond the terms of the leases of the premises. Under section 24(1), 1987 Act, the manager is appointed to carry out such functions in connection with the management of the premises as the FTT may determine. As Aldous LJ explained in *Maunder Taylor v Blaquiere* [2003] 1 WLR 379, at [43], the FTT decides what rights the manager is to have, and it is not confined to the terms of the lease. In two previous decisions of this Tribunal it has been recognised that a manager may be given power in relation to commercial parts of the premises (*Sennadine Properties Ltd v Heelis* [2015] UKUT 55 (LC); *Queensbridge Investments Ltd v Lodge* [2015] UKUT 635 (LC))

40. It is nevertheless significant that the commercial tenants were not made parties to the proceedings in which the manager was appointed. It is one thing for the FTT to direct that the manager should collect the service charges payable by tenants who have not had an opportunity to participate in the proceedings; that simply involves those tenants redirecting a contractual payment to a different service provider. But it would be quite another matter for the FTT to make an order purporting to impose *additional* obligations on the commercial tenants without giving them an opportunity to make representations. That would be surprising (and it would be unfair). For that reason if the Order is open to an interpretation which does not impose additional obligations on the commercial tenants who were not parties to the proceedings in which it was made, that interpretation should be preferred.

41. The Order does not contain any provision expressly imposing additional obligations on the commercial tenants; in particular, clause 4(a) does not add to the services for which the commercial tenants are required to pay their service charges. Instead, it confers rights on the manager to stand in the position of the landlords and to receive service charges from the commercial tenants "where [they] are required, under the terms of their leases and/or Occupational agreements to contribute towards the costs of those Shared Services". That

limited intervention in the relationship between the commercial tenants and the landlords is consistent with the fact that the commercial tenants were not parties to the appointment application.

42. It does not, therefore, appear to me that the indemnity given to the manager by clause 4(j) to recover the costs of proceedings through the service charge allows him to recoup any contribution towards those costs from the commercial tenants (unless there is some provision in one or more of the commercial leases which I have not seen which allows such recovery).

43. Clause 4(k) is concerned with costs incurred by the manager in enforcing covenants in residential and commercial leases (but limited in the case of commercial leases to covenants in relation to shared services and shared service charges). The scope of the clause is wider than clause 4(j) because it is not limited to the costs of legal proceedings and covers professional fees incurred "whether or not the Manager brings any proceedings in court or before any tribunal". The manager is given the right to recover those costs from the tenant in default. He also has the benefit of a proviso allowing a wider right of recovery: to the extent that the relevant costs are not recovered from the defaulting tenant "the Manager shall be entitled to recover the same through the service charges". For the reasons I have already given in relation to the clause 4(j) indemnity, I do not think the manager is given additional rights against the commercial tenants by clause 4(j) or the proviso to clause 4(k). Unless the commercial leases include some provision entitling the landlords to obtain a contribution through the service charge towards the irrecoverable costs of litigating against other tenants, the manager (standing in the place of the landlords) cannot do so under clause 4(j)-(k).

44. I should make it clear, to avoid any uncertainty, that the position of the residential tenants is different. The Order was addressed directly to those of the residential tenants and the landlords who were parties to the original application to appoint the manager and who were therefore in a position to influence its terms, so it applies to them directly. It also applies to other residential tenants because the service charge provisions in their leases include relatively wide clauses allowing the landlords to recover the cost of legal and other professional fees "in connection with the general overall management and administration and supervision of the Building" as well as a sweeper clause covering any costs and expenses the landlords may incur in providing other services or carrying out works for the benefit of the building or its tenants or in the interests of good estate management. The manager's entitlement to an indemnity for litigation costs "out of the service charge account" is covered by one or other of those provisions (or so far as necessary, the Order must be taken to have added those costs to the categories of expenditure recoverable through the residential service charges).

The manager's rights under paragraph 27 of the schedule of functions and services

45. In general, paragraph 27 appears to me to go no further than clause 4(j). In some respects it is narrower than the earlier provision, since it does not cover the costs of proceedings brought against the manager and deals only with proceedings "to enforce" the terms of the leases, rather than proceedings "in connection with" them. Nor does paragraph 27 allow the recovery of costs which the manager is ordered to pay, whereas clause 4(j) does. Both

provisions oblige the manager to seek to recover costs from a defaulting tenant before recouping any shortfall through the service charge.

46. It is clear that the first sentence of paragraph 27 is concerned only with proceedings to enforce the terms of the residential and commercial leases. Mr Dovar nevertheless submitted that it deals with two separate types of proceedings, namely enforcement proceedings and section 24 proceedings generally. I assume the purpose of that submission was to ensure that the costs of the original application to appoint the manager were not in doubt, and that the costs of these proceedings and of the ongoing application to renew the manager's appointment for a further period of years on different terms would be recoverable, in part, from the commercial tenants.

47. The manager is entitled to be reimbursed in respect of his costs of "any application or proceedings (including these proceedings) whether in the Court or First-tier Tribunal to enforce the terms of the Leases, the Commercial Leases [etc]". There is no doubt in my mind that any costs incurred by the manager or his predecessor in connection with the section 24 application to the FTT are within the scope of this provision without the need for the manager to satisfy any additional condition. There are a number of reasons for that being the only plausible interpretation of paragraph 27.

48. First, the section 24 proceedings themselves were proceedings to enforce the terms of the Leases and their inclusion in parentheses is not an exception to, or "carve out" from, the requirement that the manager's recoverable costs must have been incurred in connection with enforcement. The fact that the general description of proceedings covered by the right of reimbursement is stated to include "these proceedings", shows that "these proceedings" are within the scope of that general description. Had the drafter thought that proceedings under section 24, 1987 Act (or at least the particular proceedings which led to the making of the Order) were not about enforcing the terms of the leases, they would presumably have identified them as a specific category of proceedings which were separately covered by the right of reimbursement, rather than referring to them as included within enforcement proceedings.

49. There is nothing problematic about recognising the original section 24 proceedings as being about enforcement. From the description in paragraph 7 above it will be apparent that the residential tenants were not being provided with the services they were entitled to on the terms they had contracted for. The object of the section 24 application was to enforce those terms by removing the landlords from control and substituting the manager who would manage the estate "in accordance with … the respective obligations of all parties" (clause 5).

50. The reference to proceedings "whether in the Court or First-tier Tribunal" is a further indication that the drafter is using the term "proceedings … to enforce the terms of the Leases" in a wider sense than it might ordinarily have. The FTT has no powers of enforcement and only a court can give a judgment for a disputed sum or order specific performance of an obligation. Yet paragraph 27 obviously contemplates that enforcement proceedings, as that expression is there used, will include proceedings in the FTT.

51. Secondly, the costs of "these proceedings" which are recoverable under paragraph 27 will necessarily have been incurred after the FTT's order of 15 August 2016. The manager did not make an application to be appointed and if he incurred any costs prior to his appointment (such as in drawing up a management plan or preparing to answer questions at the hearing) he would not be entitled to recover them pursuant to the Order. Once he had been appointed, however, one would expect that he would be remunerated for his own services and indemnified for any disbursements he incurred in carrying out his functions.

52. The FTT did not express a concluded view about this point, suggesting in paragraph 18 of its second decision that "these proceedings" might be limited to the original section 24 application and not subsequent applications by the manager. But if a narrow interpretation was given to "these proceedings", to cover only the proceedings up to the making of the Order, paragraph 27 would be empty of content. The fact that the manager's costs of the section 24 proceedings themselves can only begin from the date of his appointment indicates that the reference in paragraph 27 to "these proceedings" must include any later steps taken by him in connection with his current appointment to obtain directions from the FTT under section 24(4), 1987 Act, or in participating in any application under section 24(9) to vary or discharge the Order. The FTT cannot have intended that the Manager would have to meet the cost of obtaining any necessary directions from his own pocket. That is also consistent with paragraph 18 of the Order, which gives the manager "permission to apply" for further directions under section 24(4); when a court or tribunal gives permission to apply it means permission to raise further issues in the same proceedings without the need to start new proceedings. The FTT must therefore have intended that such applications would be treated as part of the original proceedings and would be made in "these proceedings" and so would be covered by the right of reimbursement in paragraph 27. I do not think an application for a further appointment (which in any event would presumably be made by the lessees and not by the manager) would be within the reference to "these proceedings", but they would still be proceedings to enforce the terms of the leases.

53. Thirdly, the qualification that the manager may only be reimbursed for his costs as part of the service charge after using reasonable efforts to recover them directly "from the party concerned", does not represent an obstacle to the recovery of the costs of section 24 proceedings. I agree with the FTT on the substance of that point, although not on its proposition that the requirement did not need to be satisfied. That is for two reasons.

54. The second sentence of paragraph 27 does not say that the manager will only be entitled to recover costs from the general body of tenants if he has a right of recover from an individual defaulting tenant but has been unable to enforce that right. The condition is different and does not relate to the nature of the proceedings. The manager is required to use reasonable efforts to recover the costs from the party concerned. The extent of those efforts will depend on the circumstances. If the costs were incurred in proceedings where an order for the payment of the manager's costs is available, then such an order would have to be applied for and, if obtained, enforced. If the costs were incurred in proceedings where no costs order could be obtained, then the manager would need to make full use of any provision in the lease (such as clause 17 of the residential leases) allowing recovery from another party. But if the nature of the proceedings was such that no costs could be obtained either by order or contract, the obligation to use reasonable efforts to recover costs from the party concerned would be satisfied by the manager considering the terms of

the Order and of the relevant leases and concluding that there is nothing that could be done to recover them.

55. Additionally, the qualification is stated to be "for the avoidance of doubt". Those words imply that what follows is already capable of being understood without the need for the additional explanation and cannot therefore have been intended significantly to narrow the type of proceedings in respect of which reimbursement is to be available. They simply draw attention to the expectation already created (in particular by clause 4(k)) that in the case of some proceedings the manager will be entitled to recover his costs from a defaulter and will not need to be reimbursed by other tenants.

56. I do not think the reference in paragraph 27 to costs "of and incidental to" any application or proceedings will bear the burden which Mr Dovar appeared to place on it in his grounds of appeal. It did not feature significantly in his oral argument, except in connection with the meaning of "these proceedings" which seems to me to be clear enough and to cover continuing applications under section 24. As Mr Bates pointed out, the words "incidental to" suggest something subordinate or lesser, and they are usually given a limited meaning (as recently explained by Newey LJ in *LB Tower Hamlets v Khan* [2022] EWCA Civ 831, at [49]). They are not apt to expand the meaning of the primary subject to any great extent.

57. I have considered whether the first sentence of paragraph 27 is capable of being interpreted as a free-standing right to reimbursement of the relevant costs, giving the manager an unfettered entitlement to his costs of proceedings to enforce the various leases. On that basis the second sentence would be relevant only where the manager sought to recover those costs as part of the service charge. I have rejected that interpretation, as it is inconsistent with clause 4(j) which allows recovery out of the service charge account alone.

58. It is therefore only in the second sentence of paragraph 27 that the source of reimbursement of any costs of proceedings which the manager has failed to recover from other sources is identified. The shortfall is to be recovered "through the service charge". This provision raises exactly the same difficulties of interpretation as the manager's right under clause 4(j) to an indemnity for those costs "out of the service charge account".

59. Mr Bates conceded that, if the manager was involved in litigation about shared services, then to the extent that he was unable to recover his costs of that litigation from the particular residential or commercial tenant concerned, he would be entitled to recovery them through the service charge from the whole body of tenants, including the commercial tenants. That was the view taken by the FTT and it was consistent with the position taken by Mr Dovar on behalf of the manager (although he does not limit the recoverable costs to costs of proceedings about shared services). Mr Bates' concession answers Mr Dovar's rhetorical submission that it is difficult to see a principled reason why the Order should require the residential tenants to be "on the hook" for part of the costs of proceedings against a commercial tenant about shared services, without a reciprocal obligation on the commercial tenants to contribute to the same costs.

60. The effect of Mr Bates' concession is that there is no challenge to the principle that under paragraph 27 the manager can recover his costs of *some* proceedings from the commercial tenants (if he cannot recoup them elsewhere). The narrow issue is whether the subject matter of the proceedings must be limited to shared services.

61. Under the terms of the Order the only service charges the manager is entitled to collect from the commercial tenants are contributions towards the costs of shared services. That is clearly stated in clause 4(a), and throughout the Order, wherever there is mention of the manager's rights and responsibilities in relation to the commercial tenants, those are qualified by a reference to the shared services alone. It is therefore entirely consistent with the general scheme of the Order for any contribution by the commercial tenants towards the costs of litigation to be limited to costs incurred in connection with the shared services, as the FTT decided and as the landlords no longer dispute.

62. The purpose both of clause 4(j) and of paragraph 27 is to identify a source from which the manager can recoup his litigation costs. That source is the service charge. As I have sought to explain, the Order does not purport to vary the service charge provisions of the commercial leases which, from the single example I have seen, do not appear to cover the landlord's costs of litigating against third parties. Subject to anything which may be in other commercial leases, and subject to Mr Bates' concession in respect of the costs of proceedings concerning shared services, it does not appear to me that the commercial tenants are liable to contribute to the manager's costs of any proceedings.

Summary

63. The FTT summarised its conclusions in paragraph 60 of its first decision. The following modified version of that paragraph reflects my own view and the landlords' concession:

> Paragraph 27 allows for the recovery from lessees of costs of court or FTT proceedings where:
>
> (a) the legal costs were incurred in enforcing the terms of the Leases, including the Commercial Leases and/or any Occupational Agreement; this condition is satisfied in the case of the original proceedings for the appointment of the manager and applications made by the manager under section 24(4) for directions or to clarify his powers;
>
> (b) the manager has been unsuccessful in recovering those costs from other parties to the proceedings by any alternative route available to him; and
>
> (c) in the case of the commercial tenants only, the proceedings related to the provision of a Shared Service by the manager.

64. Clause 4(j) allows the manager an indemnity for his own costs and for any adverse costs orders in any proceedings in connection with the residential leases or in proceedings in connection with the commercial leases in relation to shared services. The indemnity is to be met from the service charges payable under the residential leases only. Where the proceedings concern a breach of covenant, the indemnity is available only after the manager has tried but been unable to recover the costs from the tenant in breach.

65. I acknowledge the inconsistency between these formulations of the effect of the two provisions, which is due in part to the concession made on behalf of the landlords in relation to shared services and in part to the wider scope of clause 4(j). I also acknowledge that the effect of this decision will be that the manager's costs of most of the proceedings he has been involved in in the FTT will fall on the residential tenants. The fact that the Order does not also require the commercial tenants to contribute to the same costs does not seem to me to be surprising given the nature of most of those proceedings and the manager's limited responsibilities as regards the commercial premises. By far the greater omission is any power under the Order for the manager to recoup from the landlords any part of his costs of proceedings against them, with the result that he manages the estate almost entirely at the expense of the residential tenants.

66. Although I do not agree entirely with the FTT's approach to the provision it was asked to interpret, my conclusions are consistent with both of its decisions. The appeal is accordingly dismissed.

Martin Rodger KC,

Deputy Chamber President

26 June 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.