

**IN THE UPPER TRIBUNAL (LANDS CHAMBER)**



**Neutral Citation Number: [2019] UKUT 365 (LC)  
Case No: LRX/61/2019**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***LANDLORD AND TENANT – APPOINTMENT OF MANAGER – manager appointed by FTT – no restriction entered on register of title – property acquired by nominee on behalf of tenants exercising right of collective enfranchisement – whether nominee taking free of management order – whether participating tenants in breach of management order – whether FTT should make orders to reverse effect of breach - s.24, Landlord and Tenant Act 1987 – ss.29, 87, 132(3) Land Registration Act 2002 – appeal allowed***

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE  
FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)**

**BETWEEN:**

**RICHARD URWICK (1)**

**CAROLINE YRAZU-BAJO (2)**

**Appellants**

**- and -**

**GARY PICKARD**

**Respondent**

**Re: Ditton Place School,  
Brantridge Lane,  
Balcombe,  
RH17 6JR**

**Martin Rodger QC, Deputy Chamber President**

**Royal Courts of Justice**

**12 November 2019**

*Christopher Heather QC*, instructed by Fladgate LLP, for the appellants  
*Anthony Tanney*, instructed by Dean Wilson LLP, for the respondent

The following cases are referred to in this decision:

*Clark v Chief Land Registrar* [1994] EWCA Civ 12

*Clayhope Properties Ltd v Evans* [1986] 1 WLR 1223

*Coles v. Samuel Smiths Old Brewery Tadcaster and another* [2008] 2 EGLR 159

*Curzon v Wolstenholme* [2018] 1 P & CR 9, [2017] EWCA Civ 1098

*Halifax plc v Curry Popok* [2008] EWHC 1692 (Ch)

*Marathon Estates Ltd v Coates* [2018] UKUT 31 (LC)

*Maunder Taylor v Blaquiere* [2003] 1 WLR 379

*Midland Bank v Green* [1981] AC 513

*Wiggins v Regents Wealth Ltd* [2015] 1 WLR 1188

## Introduction

1. If a tribunal's order appointing a manager under Part II, Landlord and Tenant Act 1987 is not mentioned on the register of title of the property to which the order relates, does a purchaser of that property for valuable consideration acquire it free of the effect of the order? That is the principal question in this appeal from a decision of the First-tier Tribunal (Property Chamber) (FTT) made on 5 April 2019.

2. The question arises in this way.

3. Ditton Place School, at Brantridge Lane in Balcombe, West Sussex was last used as a school in the 1990s. It is a Grade II listed country house built in 1904 and set in extensive grounds. After a period of institutional use the main house and an adjoining coach house were acquired by a developer who converted them to provide twelve self-contained flats. The flats were then let on long leases, each for a term of 999 years, the last in about 2010.

4. The owners of the leasehold flats share communal grounds and gardens with the owners of six freehold houses within the original grounds. All of the residents contribute to the upkeep of the grounds through rent charges or service charges; the leaseholders' service charges also provide for the maintenance of the main house and the coach house.

5. There were three parties to the leases of each of the flats: the developer (a company named Brickcrest Ltd), the lessee, and a management company, Ditton Place Management Company Ltd ("DP Management") which covenanted to maintain the buildings and their grounds. In 2010, after the sale of the last of the leases, DP Management was registered as freehold proprietor of the estate in place of the developer.

6. DP Management did not make a success of its management of the estate and there were complaints of misuse of service charge funds. On 11 November 2015 the lessees of three of the flats applied to the FTT for the appointment of a manager, under Part II of the Landlord and Tenant Act 1987 ("LTA 1987"). The applicants to the FTT included the appellants, Mr Urwick and Ms Yrazu-Bajo, who are the lessees of Flat 1. Such an application requires proof of fault but, in the event, DP Management admitted that there were grounds for the appointment of a manager.

7. On 24 January 2017 the FTT made an order under section 24, LTA 1987, appointing the respondent, Mr Gary Pickard, as manager for a term of three years. Mr Pickard was tasked with carrying out the management responsibilities of DP Management under the leases and was given power to collect service charges and, if necessary, to commence proceedings to recover arrears.

8. The FTT's management order, which was drafted by counsel for the applicants, was expressed to apply to DP Management and to any successor in title. The company was directed "forthwith to register this Order against its freehold estate registered under title number WSX275988". No attempt seems to have been made to comply with that direction (although, as I will explain, strictly speaking it would not have been possible to "register" the order). The management order also required DP Management and the lessees to cooperate with the manager and prohibited them from interfering or attempting to interfere with the exercise of any of his powers and duties.

9. On 23 March 2018 the lessees of seven of the flats, including the appellants, served an initial notice under section 13, Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”) seeking to exercise their right of collective enfranchisement by acquiring the freehold of part of the estate; I will refer to this group as “the participating lessees”. They nominated a company controlled by them, Ditton Place Freehold Company Ltd (“DP Freehold”), to acquire the freehold on their behalf. The participating lessees had by this time also acquired control of DP Management, and it did not resist the acquisition.

10. On 23 March 2018 DP Management transferred the freehold of the main house and coach house, together with their immediate grounds (about 40% of the total), to DP Freehold for consideration of £2 (a sum determined by a valuer applying the valuation provisions in Schedule 6, 1993 Act). By section 32(5) of the 1993 Act the transfer was deemed to have been made for valuable consideration. The land which remained vested in DP Management comprised the remaining parts of the grounds of the estate which have been referred to as “the Amenity Land”.

11. On 28 March 2018 DP Freehold became registered at HM Land Registry as proprietor of the house, coach house and their immediate grounds under a new title numbered WSX398297.

12. The FTT found that the purpose of the participating lessees in obtaining the freehold was to find a way to evade the management order. That conclusion was based on statements made by the participating lessees and others instructed by them. The appellants applied for permission to appeal the FTT’s conclusion on their purpose, but permission was refused by this Tribunal.

13. In June 2018 the participating lessees made an unsuccessful application to the FTT to vary the management order to exclude from it the land comprised in their newly acquired title. Before that application was determined they also entered into deeds of variation with DP Freehold, the effect of which was to divide the property in respect of which they were required to make service charge contributions into two parts, which were treated differently. They remained liable to pay service charges to DP Freehold in respect of its land, but not in respect of the Amenity Land. Their obligation in respect of the Amenity Land was to contribute proportionately to any sum which DP Freehold was required to pay DP Management under the terms of the Transfer in respect of its management of the Amenity Land.

14. On 20 December 2018 the manager made his own application, seeking clarification that he was still required to manage the whole estate, including the land and buildings comprised in DP Freehold’s registered title. The manager also sought enhanced powers and clarification of his entitlement to be reimbursed his litigation expenses.

15. In the course of the manager’s application it became apparent that the FTT’s January 2017 direction to DP Management to register the management order against its freehold title had not been complied with. That led the participating lessees to argue before the FTT that, as against DP Freehold, the management order was “void”.

### **The FTT’s decision**

16. The FTT noted that the suggestion that the management order was rendered void by the transfer to a new owner of the greater part of the property subject to it had not been raised before,

despite there having been a hearing to consider the participating lessees' June 2018 application (at which they had not been legally represented). Nevertheless, Mr Tanney, who appeared before the FTT on behalf of the manager, as he did on the appeal, accepted that the point could be taken.

17. On behalf of the participating lessees Mr Heather QC, who also appeared before the FTT as he did before me, submitted that DP Management's failure to enter a restriction on the register of title meant that DP Freehold was not bound by the management order and the manager had lost the right to manage its property. Mr Tanney accepted that DP Freehold was not bound, but nevertheless argued that the order remained binding on the participating lessees who, it was suggested, had breached their obligation to cooperate with the manager by exercising the right of collective enfranchisement and entering into the deeds of variation.

18. The FTT was satisfied that the purpose of the collective enfranchisement had been to evade the management order (the lessees already had 999-year leases). That purpose, and the practical effect of the enfranchisement, were both said to be relevant to the remedial orders the FTT was being asked to make. The FTT accepted that the participating lessees had interfered with the manager's exercise of his functions in breach of the management order and held that they remained bound by it. The "loss of priority" for the management order did not discharge any of the manager's obligations. The order itself said explicitly that it would bind successors in title. Unless remedial orders were made a service charge audit, which had been one of the main purposes of the management order, would remain incomplete, a dispute between lessees and freeholders over apportionment of charges would remain unresolved, the manager would be unable to raise funds to collect the arrears of current or historic service charges and would be liable for commitments entered into by him since the transfer, and the management order would have to be discharged.

19. To avoid these consequences the FTT made an order varying the original management order. The first variation which is challenged in this appeal was in paragraph 1 of the order, which changed the definition of the premises to which the management order applied by incorporating a reference to DP Freehold's title. The second contentious variation, in paragraph 6, required that the participating lessees "shall procure that [DP Freehold] shall observe and perform the terms of the Order and abide by the same in all respects as if at the date of the registration of the said transfer the Order had continued to enjoy priority over the company's interest." It applied a penal notice to the order, warning the participating lessees that failure to comply with paragraph 6 of the order might lead to them being held to be in contempt of the tribunal and liable to imprisonment, a fine, or seizure of their assets.

20. The FTT refused a request by the manager that the former ownership structure be restored by an order requiring the participating lessees to procure the transfer of the enfranchised property by DP Freehold back to DP Management.

21. The FTT also refused the appellants permission to appeal, but permission was granted by this Tribunal, which identified the effect of DP Management's failure to protect the management order by the entry of a restriction on the register as an issue of general importance. The manager also sought permission to cross appeal against the FTT's refusal to order that the freehold be transferred back to DP Management, and it was directed that that application be determined at the same time as the appeal.

## **The issues**

22. The following issues must be considered:

(1) What are the consequences of the failure to protect the management order by the entry of a restriction against the freehold title?

(2) Was the FTT entitled to vary the management order to include a reference to the land in DP Freehold's registered title and to require the participating lessees to procure that DP Freehold comply with the management order?

(3) Was the FTT right to add a penal notice to the management order?

(4) Should permission to appeal be granted on the cross-appeal, and if so, was the FTT right to reject the manager's application for an order that the participating lessees procure that DP Freehold transfer the enfranchised property back to DP Management?

### **Issue 1: The effect of non-registration of the management order**

23. As Mr Heather QC pointed out, it was common ground before the FTT that the effect of DP Management's failure to enter a restriction on its own title, as it had been directed to do by the FTT, was that DP Freehold was not bound by the terms of the management order. That is an important and, in some respects, a surprising conclusion, and the Tribunal indicated when giving permission to appeal that it wished to consider it. Mr Tanney helpfully set out the argument to the contrary and invited the Tribunal to accept that the consensus between the parties at first instance had been mistaken. In the event, I am satisfied that the agreed position before the FTT was indeed based on a proper appreciation of the effect of the relevant statutory provisions. Because of the practical importance of the point I will explain why I have reached that conclusion.

24. By section 24(1), LTA 1987 the FTT may, by order, appoint a manager to carry out in relation to any premises to which Part II, LTA 1987 applies, such functions in connection with the management of the premises and such functions of a receiver as the FTT thinks fit. Before it may make such an order the FTT must be satisfied of one of the grounds in section 24(2), each of which involves some element of fault or mismanagement.

25. LTA 1987 contains no bespoke provisions concerning the effect of a change of ownership of premises which have been made the subject of a management order. Instead, section 24(8) states that:

“(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.”

26. As this appeal concerns registered land it is necessary to consider how an order appointing a receiver or sequestrator is dealt with under the Land Registration Act 2002 (“LRA 2002”).

## *The protection of interests under LRA 2002*

27. The general scheme of protection provided by LRA 2002 is described in Megarry & Wade: *The Law of Real Property* (9<sup>th</sup> Ed) at 6-069. Interests in registered land are capable of being protected by a notice or a restriction.

28. A notice is “an entry in the register in respect of the burden of an interest affecting a registered estate or charge” (section 32(1), LRA 2002) and is the appropriate means of protecting any incumbrance intended to bind any owner of the land. It protects the priority of the interest, even though it does not guarantee its validity (section 32(3), LRA 2002).

29. A restriction, by contrast, is “an entry in the register regulating the circumstances in which a disposition of a registered estate or charge may be the subject of an entry in the register” (section 40(1), LRA 2002). It does not protect the priority of an interest, but may give the holder of an interest some protection, for example by giving them notice of a sale, or enabling them to prevent registration by withholding consent to a sale where the interest confers that right (for example under the terms of a trust). Standard forms of restriction are provided for by rule 91 and Schedule 4, Land Registration Rules 2003.

30. Where a restriction is entered in the register, no entry in respect of a disposition to which the restriction applies may be made in the register otherwise than in accordance with the terms of the restriction (section 41(1), LRA 2002). Thus, the transferee of land in respect of which a restriction has been entered on the register will not be registered by HM Land Registry unless the conditions specified in the restriction have been satisfied (for example, by the provision of a certificate, or the giving of notice, or the obtaining of a consent). Section 42(2) provides that no restriction may be entered on the register for the purpose of protecting the priority of an interest which is, or could be, the subject of a notice.

31. On a disposition of a registered estate, the priority of interests is governed by sections 28 and 29, LRA 2002. Section 28 establishes the “basic rule” that the priority of an interest affecting a registered estate is not affected by a disposition of the estate, whether the interest is registered or not. This basic rule is subject to the “special rule” provided by section 29. So far as relevant this provides:

### **“29. Effect of registered dispositions: estates**

(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

(2) For the purposes of subsection (1), the priority of an interest is protected –

(a) in any case, if the interest

(i) is a registered charge or the subject of a notice in the register,

(ii) falls within any of the paragraphs of Schedule 3, or

(iii) ...”

32. Before the commencement of the LRA 2002, an order appointing a receiver would have been protected by the entry of a caution on the register (section 59(1), Land Registration Act 1925; in unregistered land the relevant protection would have been supplied by registration of the order in the register of writs and orders affecting land, section 6(1)(b), Land Charges Act 1972). The effect of a caution was to give the cautioner the opportunity, before a disposition was registered, to assert their interest; but a caution did not protect the priority of the cautioner's interest (section 54, Land Registration Act 1925; *Clark v Chief Land Registrar* [1994] EWCA Civ 12).

33. The use of cautions to protect an order appointing a receiver (or for any other purpose) was abolished by LRA 2002. Such an order is now classified as "an interest affecting an estate or charge" by section 87, LRA 2002 which states:

**"87. Pending land actions, writs, orders and deeds of arrangement**

(1) Subject to the following provisions, references in this Act to an interest affecting an estate or charge include –

...

(c) an order appointing a receiver or sequestrator.

(2) No notice may be entered in the register in respect of –

(a) an order appointing a receiver or sequestrator.

(3) None of the matters mentioned in subsection (1) shall be capable of falling within paragraph 2 of Schedule 1 or 3."

34. The expression "an interest affecting an estate or charge" is defined in section 132(3)(b), LRA 2002 as follows:

**"132. General interpretation**

(1) - (2) ...

(3) In this Act –

(a) ...

(b) references to an interest affecting an estate or charge are to an adverse right affecting the title to the estate or charge, ..."

35. Section 132(3)(b) thus identifies the basic characteristic of an interest affecting an estate or charge i.e. that it is "an adverse right affecting the title to the estate or charge". Section 87 establishes rules about the treatment of specific instruments, including an order appointing a receiver or sequestrator. Such an order is classified by section 87(1) as "an interest affecting an estate or charge". A notice is the usual method for protecting such an interest, but section 87(2) provides specifically that no notice may be entered in respect of an order appointing a receiver or sequestrator. Nor is such an order capable of being an overriding interest (section 87(3)).

36. It follows from section 87 that the only way of protecting an order appointing a receiver or sequestrator (and by extension a management order) is by the entry of a restriction. I have



explained at paragraph 29 above the limited protection which a restriction provides, and, in particular, that it does not provide priority for the rights to which it relates but instead creates a procedural barrier to the registration of a disposition. This barrier may be higher or lower depending on the type of restriction employed.

37. To understand why an order appointing a receiver is dealt with in this way it must be remembered that some orders appointing receivers or sequestrators create interests in land, and some do not. That was the accepted position before the Court of Appeal in *Clayhope Properties Ltd v Evans* [1986] 1 WLR 1223 which concerned a caution under section 54, Land Registration Act 1925 entered by the tenant of one of a block of flats to protect an order made by the Court appointing a receiver to manage the block. The owner of the block applied for the removal of the caution, arguing that only an interest in land capable of binding a purchaser could be protected by a caution. At 1228B Nicholls LJ noted that the Judge at first instance had accepted the owner's submission that an order appointing a receiver to enforce covenants for the repair of property created no interest in land binding a purchaser; the correctness of that view was not challenged before the Court of Appeal. At 1228G examples were given of some receiverships of land which did create an interest in land and which could bind a purchaser, such as a receiver appointed to enforce an equitable charge created on a judgment debtor's land by section 195, Law of Property Act 1925.

38. In its Commentary on the draft Land Registration Bill: *Land Registration for the Twenty-First Century* (Law Com No 271) at paragraphs 6.59-6.60, the Law Commission explained how the thinking behind the treatment of orders appointing receivers in LRA 2002 had been influenced by *Clayhope*. The collection of matters in section 87(1) had formerly been protected by the entry of a caution (section 59(1), Land Registration Act 1925), but the abolition of the caution meant it was necessary to make alternative provision for them. It was decided that the only entry that could be made in relation to an order appointing a receiver or sequestrator should be a restriction because such an order will sometimes be regarded as a proprietary right and sometimes it will not (*Clayhope*). The Law Commission was concerned "that there should be one method for protecting all such orders without an inquiry as to which side of the line the order fell on."

#### *The rival arguments*

39. Mr Heather submitted that by section 87(1), an order appointing a receiver (and thus an order appointing a manager under Pt II, LTA 1987) is an interest affecting an estate or charge. On the disposition for valuable consideration of a registered estate to which such an order relates section 29(1) applies, and its effect is that the order is postponed to the interest under the disposition i.e. the donee takes free of the order.

40. Mr Tanney submitted that the relationship between section 87 and section 132(3)(b) LRA 2002 should be understood differently. Rather than section 87(1) clothing an order appointing a receiver or sequestrator (which creates no proprietary interest) with the attributes of such an interest, the effect of the definition in section 132(3)(b) was that only something which was capable of being "an adverse right affecting the title to the estate" could be "an interest affecting an estate or charge" for the purpose of section 87. The Law Commission had recognised that there were different types of orders, some of which gave rise to a proprietary interest and some which did not, but its concern to avoid the need to make a choice at the point when an entry was

being made in the register did not mean that rights to which the notion of priority simply did not apply were converted into property rights.

41. I cannot accept Mr Tanney's submission. The effect of section 87(1) is clear. An order appointing a receiver or sequestrator is included in any reference to an interest affecting an estate or charge. That is not said to be qualified by section 132(3)(b) (the opening words of section 87(1), "subject to the following provisions" clearly refer only to the following provisions of section 87). Section 87(1) is, in effect, a statutory deeming provision. Whatever the general definition of an interest affecting an estate or charge, an order appointing a receiver or sequestrator is to be treated in the same way as all other interests of that type. That was clearly what the Law Commission intended, and had it felt it necessary to distinguish between different types of orders appointing receivers it would have introduced an express qualification.

42. Mr Tanney sought to meet a possible objection that his interpretation of the relationship between sections 87(1) and 132(3)(b) would mean that orders appointing receivers would be treated differently than they had been under section 59, Land Registration Act 1925. Since the postponement provided for by section 29, LRA 2002 was not intended to introduce a change in the law (as the Law Commission explained at paragraph 8.10 of *Updating the Land Registration Act 2002* (Law Com 380)) that would perhaps be a surprising outcome. I suspect this objection is illusory. A caution under section 59(1) did not protect the priority of interests, and section 56(2) emphasised their limited effect, which was that a purchaser "need not be concerned" with anything not so protected – the point being to protect the purchaser from actual notice. As the Court of Appeal explained in *Clark*, the caution procedure enabled the cautioner to obtain warning of any intended dealing and thereby have an opportunity to assert priority for his own interest, but the lodging of the caution itself did not achieve priority for that interest against subsequently registered charges. In the same way, a restriction under section 40, LRA 2002 does not confer priority but provides an opportunity for the person with the benefit of the restriction to assert such rights as they may be entitled to.

43. If Mr Tanney's argument was right the position in registered and unregistered land would indeed be different, and he sought to meet that possibility. But, once again, the difference which Mr Tanney feared might undermine his argument does not represent a change brought about by the LRA 2002. The treatment of an order appointing a receiver (and therefore an order appointing a manager under Pt II, LTA 1987) was always different in unregistered and registered land. In unregistered land such an order can be registered in the register of writs and orders affecting land (section 6(1)(b), Land Charges Act 1972). This achieves priority for the order in the event of a disposition and an order which is not so protected is void against a purchaser (section 6(4)). The only protection available in registered land before the LRA 2002 was by means of a caution, which did not protect priority.

44. Mr Heather suggested that, if it is necessary to classify what sort of "interest" is created by an order appointing a receiver, it would be an equitable interest. It could not be a legal interest as it is not included within the definition of legal estates or interests in sections 1(1) and 1(2), Law of Property Act 1925, so it must therefore be an equitable interest (see section 1(3)). I do not think it is necessary to make the order fit those categories. An order appointing a receiver to carry out management functions creates no interest in land, and its treatment by the LRA 2002 as if it did is a matter of convenience and for the sake of simplification, as the Law Commission explained (see paragraph 37 above). That simplification is achieved by a statutory deeming which does not

change the character of the rights and obligations created by the order. No further classification is required.

45. I nevertheless accept Mr Heather's primary submission that the consequence of registration of the transfer to DP Freehold of the main house, the coach house, and so much of the grounds as were included in the new title was that, in accordance with section 29(1), the management order was postponed to the interest of DP Freehold which was not bound by it.

46. I will return to the subject of protecting management orders by the entry of a restriction at the end of this decision, after I have considered the appellant's grounds of appeal.

**Issue 2: Was the FTT entitled to vary the management order to include a reference to the land in DP Freehold's registered title and to require the participating lessees to procure that DP Freehold comply with the order?**

47. Although Mr Heather presented this as two distinct issues, in reality it amounts to a single challenge to the FTT's attempt to pour the spilt milk back into the bottle by ordering the participating lessees to procure that DP Freehold observe and perform the terms of the management order in all respects as if the order continued to enjoy priority over its interest (paragraph 6 of the FTT's variation order). The change to the definition of "the premises" in paragraph 1 of the variation order was ancillary to paragraph 6. That was how the FTT approached the matter, describing paragraph 1 as consequential on paragraph 6 in paragraph 54 of its decision.

48. What was the effect of the postponement of the management order? Mr Tanney accepted that (if he was wrong on section 132(3)(b)) DP Freehold was not bound by the management order when registration of its title was complete, but he submitted that the order continued in full force as against the participating lessees. Mr Heather submitted that it went further than that: not only did DP Freehold acquire the premises free of Mr Pickard's interest, but Mr. Pickard also lost the rights and obligations he had previously had in relation to the premises other than the Amenity Land. He also submitted that the FTT was wrong in principle to seek to reverse the effect of the change in ownership.

49. The usual effect of postponement under section 29(1) is clear. In its report *Updating the Land Registration Act 2002* (Law Com 380) the Law Commission summarised it as follows (at paragraph 8.20):

"In most cases, the practical effect of section 29(1) is that the postponed interest will be eliminated. The interest will not revive on a subsequent disposition of the disponent's interest, whether or not that subsequent disposition engages section 29."

50. The Law Commission referred to the explanation provided by Norris J in *Halifax plc v Curry Popek* [2008] EWHC 1692 (Ch) that a registered disposition for valuable consideration "wipes the title clean of any prior unprotected equitable interests". It nevertheless acknowledged that an interest which has been postponed is not necessarily destroyed: "it may remain valid against interests other than that of (and those created by) the disponent" (Law Com 380, paragraph

8.18). The example given was of an unprotected restrictive covenant postponed by section 29 by the grant of a lease, where the covenant would be unenforceable against the lessee but would resume in full force on the expiry of the lease.

51. Mr Heather accepted that the manager was still entitled (indeed he was obliged) to manage the Amenity Land. He was also entitled, and bound, to continue to collect arrears of service charges which had fallen due up to the registration of DP Freehold's interest on 23 March 2018, including by pursuing court proceedings. He was entitled to continue to charge for those services. The participating lessees were still bound by the management order, so far as it affected them. But Mr Pickard was not in a position to carry out his obligations so far as they related to DP Freehold's property because DP Freehold was not bound by the management order. He derived his powers from the order and once it ceased to bind the owner of part of the land he was necessarily discharged from further performance in respect of that part. He would be committing a trespass if he entered DP Freehold's property to carry out any of his functions without its permission (which was not available to him), and he could not authorise others to enter the land to undertake cleaning, gardening, maintenance or any other function. So far as DP Freehold's property was concerned his continuing functions had been neutralised and could not be performed.

52. Mr Heather referred to cases in which an omission to register an interest led to a loss of priority. He acknowledged that such an omission can produce harsh results but relied on Lord Wilberforce's observations in *Midland Bank v Green* [1981] AC 513 at 528:

“The case is plain: the Act is clear and definite. Intended as it was to provide a simple and understandable system for the protection of title to land, it should not be read down or glossed: to do so would destroy the usefulness of the Act. Any temptation to remould the Act to meet the facts of the present case, on the supposition that it is a hard one and that justice requires it, is, for me at least, removed by the consideration that the Act itself provides a simple and effective protection for persons in Geoffrey's position—viz.—by registration.”

Mr Heather also referred to *Wiggins v Regents Wealth Ltd* [2015] 1 WLR 1188, and to *Curzon v Wolstenholme* [2018] 1 P & CR 9, as recent examples of the application of the same approach by the Court of Appeal. None of these authorities is of any real relevance to this case since (as I have explained) the entry of a restriction under LRA 2002 is not a means of obtaining priority and DP Management's failure to enter a restriction was not the reason why DP Freehold is not bound by the management order. Nevertheless, the invocation not to “remould the Act to meet the facts of the present case” is obviously of general application.

53. I accept Mr Heather's submissions that for all practical purposes the management order ceased to apply to DP Freehold's land on 23 March 2018 because the company was not bound by it and that from that date Mr Pickard ceased to be in a position to discharge the functions conferred on him by the order. I acknowledge, as Mr Tanney pointed out, that nothing in LRA 2002, LTA 1987 or the management order itself provides that the order will be discharged in the event of postponement in favour of a purchaser, but at a practical level the order became ineffective (except as regards the Amenity Land). The order was incapable of binding successors in title to DP Management without some additional mechanism to join such a successor to the proceedings and make it the subject of a direction by the FTT that it comply. In the absence of

such a mechanism section 29, LRA 2002 left DP Freehold unconstrained in its own management of its property. In those circumstances, whatever the continuing effect of the management order as between Mr Pickard and the participating lessees, the order became ineffective. It may be that technically it continued in existence as an order of the FTT because it had not been discharged under section 24(9), LTA 1987, but it could not be acted on.

54. Mr Tanney accepted that the registration of a transfer to an independent third party would have the practical effect that the management order would be defeated and would have to be discharged. His submission was that, in this case, because the participating lessees were under an obligation not to interfere with the exercise of the manager's functions, and because the collective enfranchisement had the effect of making the performance of those functions impossible, the participating lessees were in breach of the FTT's order and it was entitled to compel them to take whatever steps were necessary to remedy that breach.

55. I agree with Mr Tanney that the steps taken by the lessees up to the date of registration of the transfer to DP Freehold were breaches of the management order, specifically paragraph 9, because they put it out of the power of the manager to perform his functions. I agree also that the FTT was entitled to make an order for the entry of a restriction on the registered title of the estate the practical effect of which might have been that the lessees could not exercise their right of collective enfranchisement without obtaining the consent of the manager or an order of the FTT discharging him. Section 24(8) implicitly contemplates the registration of a restriction, and the order made by the FTT provided for an unspecified form of restriction to be employed. Where I part company with Mr Tanney's analysis is with regard to the FTT's jurisdiction to make an order in the form of paragraph 6 of the variation order requiring the participating lessees to procure that DP Freehold should "observe and perform" the terms of the management order.

56. In my judgment the FTT did not have jurisdiction to make its original order effective by this indirect route. It could make a new management order, but only with prospective effect and only if the procedure under Part II was implemented. An order under section 24(1), LTA 1987 appoints a manager to carry out functions "in relation to any premises" to which Part II applies. Such an order may only be made if a preliminary notice under section 22 has been given to the landlord or other person with management responsibilities (section 22(1)), or the need for such a notice has been dispensed with (section 22(3)). No notice had ever been served on DP Freehold (the notice given to DP Management was in June 2015) and DP Freehold was not even a party to the application to vary the order. After the registration of the transfer to DP Freehold on 23 March 2018, the land comprised in the transfer was not subject to a management order binding on the person who was landlord of the leasehold flats and responsible for the management of the premises, namely DP Freehold. Although in form the FTT's order of 5 April 2019 purported to vary its original management order, it was intended to enable Mr Pickard to resume management of DP Freehold's land. In substance, therefore, it was an order appointing Mr Pickard to manage without any of the necessary procedural steps having first been taken to give the FTT jurisdiction.

57. An order under paragraph 4 may make provision with respect to such matters relating to the exercise by the manager of his functions, and such incidental or ancillary matters, as the FTT thinks fit. I do not accept Mr Tanney's submission that the imposition of paragraph 6 was "incidental or ancillary" to the exercise of the manager's functions. In *Staples v Cranfield* [2019] L&TR 9, the Tribunal (HHJ Huskinson) explained, at [36], that the reference in section 24(4) to making provision with respect to "such incidental or ancillary matters as the tribunal thinks fit"

meant matters which are incidental or ancillary to the exercise by the manager of his functions under the order. Once the order ceased to apply to part of premises in relation to which the manager had been appointed, he no longer had any functions as regards that part, except to the limited extent that he could continue to investigate and collect historic service charges. Albeit indirectly, the order conferred management functions in respect of land which was not the subject of an effective appointment at the time it was made.

58. Mr Tanney referred to *Coles v. Samuel Smiths Old Brewery Tadcaster and another* [2008] 2 EGLR 159 as a useful analogy, illustrating the power of the court to recreate rights lost by non-registration. In *Coles* a landlord had granted its tenants, the trustees of a working men's club, an option to purchase the freehold of the club's premises. The trustees did not protect the option by registration and after they had given notice exercising the option their landlord sold the property to its own wholly-owned subsidiary. The apparent object of the sale was to defeat the unprotected option. The trial judge refused the trustees' claim for specific performance of the option by an order directing the subsidiary to transfer the property to them, and instead awarded damages. The Court of Appeal allowed the trustees' appeal. The fact that the option had become unenforceable against the subsidiary for non-registration was no reason not to make an order against the landlord, requiring it to perform the option by procuring completion of the sale by its subsidiary which it controlled.

59. I do not think *Coles* assists Mr Tanney in this case. The Court of Appeal was there exercising the equitable jurisdiction to order specific performance of a contract which had come into existence before the transfer. The contract could not be completed because of the transfer, but it is a general principle illustrated by authority that specific performance is available against a contracting vendor that has it in its power to compel another party to convey the property. There was no procedural obstacle to the Court of Appeal's jurisdiction.

60. In this case, the FTT could not have conferred functions on the manager in respect of DP Freehold's property because its jurisdiction had not yet arisen under section 24, LTA 1987. If it could not have done so directly, I do not see how it could do so indirectly. The fact that the participating lessees had breached the terms of the management order was not a matter capable of dispensing with the jurisdictional hurdles which limit the tribunal's powers under section 24.

### **Other issues**

61. Mr Heather and Mr Tanney agreed that the FTT had had power to include a penal notice on the face of its order (for the reasons explained in *Marathon Estates Ltd v Coates* [2018] UKUT 31 (LC) at [84]-[88]). Since the order ought not to have been made, however, the addition of the penal notice raises no separate issue.

62. As for the cross-appeal, the FTT refused to order the participating lessees to procure a transfer by DP Freehold back to DP Management. I agree with Mr Heather that such an order would have exceeded the FTT's jurisdiction to make orders dealing with "incidental or ancillary matters". In any event, the effect of such an order would have been to subject DP Freehold to the management order without the procedural and substantive conditions in section 24 having been satisfied. I would therefore refuse permission to cross-appeal.

63. Finally, it is unsatisfactory that the scope of the manager's functions in respect of historic arrears and sums which he has paid out on behalf of the lessees should remain unclear. It was apparent during the hearing that the appellants considered those functions were continuing but there is still no unequivocal statement of their position on which the manager could confidently rely. The parties should agree, so far as they can, what those continuing functions are in respect of DP Freehold's land. If they are able to do so within the next 14 days I will make an order under section 24(4) giving effect to what has been agreed; if they are unable to agree, the manager should ask the FTT for further directions.

64. Before leaving the appeal, however, I would add some general comments on the consequences for the practice of the FTT.

### **Consequences**

65. Mr Heather acknowledged that, with hindsight, the order appointing Mr Pickard as manager, which placed the obligation of entering a restriction to protect the order on DP Management, could have contained more effective provisions. Not least of those would have been for the responsibility for protecting the order to have been placed on the manager, the FTT's appointee, rather than being given to the party whose inadequacies had led to the making of the order. But there are other important lessons to be learned and problems which require to be thought about.

66. The management order directed DP Management "forthwith to register this Order against its freehold estate". But what did the FTT mean by that direction, and what did the participating lessees think they would be getting when they asked for it? The FTT's direction to "register" the management order could not have been complied with, because only legal estates and interests can be registered under the LRA 2002. What was no doubt intended was that a restriction be entered on the register, but that too would have been inadequate without a further direction as to what the restriction should say. To formulate that direction would have required thought as to what the restriction was intended to achieve.

67. I suspect neither those who sought nor those who granted the order gave any real thought to those questions. It is often the case that the form of a management order is the last thing to attract attention at a contested hearing. The FTT will usually take time to consider whether to impose an order at all, and until it has done so there is usually little appetite on anyone's part to scrutinise what is being proposed. A draft order will almost invariably have been prepared by the applicants, and once a decision to appoint has been taken in principle the order may then be approved with little detailed consideration by the FTT.

68. By rule 93(s), Land Registration Rules 2003 a receiver is entitled to apply for a restriction in form L or form N in Schedule 4. Since the LRA 2002 applies in relation to a tribunal's order appointing a manager in the same way as it applies to an order appointing a receiver, a manager is also in a position to apply for a restriction in either of those forms.

69. A restriction in form L prevents the registration of a disposition without the provision of a certificate stating that the provisions of an instrument or order have been complied with. In this case the management order contained no relevant provisions, so a restriction in form L would not

have been an option. It was suggested in the course of argument that the management order could have stated that a purchaser of any part of the premises who wished their interest to be registered should first either agree with the manager that they would be bound by the order, or themselves apply to the FTT for an order under section 24(9), LTA 1987 directing the cancellation of the restriction and the discharge of the management order (with registration being delayed until the FTT had dealt with that application).

70. A lesser form of restriction, in form L, might simply have required the purchaser to give notice to the manager of its application to be registered.

71. A restriction in form N would prevent registration of a disposition without the written consent of the manager. That would be a very significant intervention in the property rights of the landlord, which might be thought to go beyond the scope of Part II, LTA 1987. As the Tribunal has repeatedly stated, a management order should be proportionate to the purpose for which it is imposed (*Senadine Properties Ltd v Heelis* [2015] UKUT 55 (LC); *Queensbridge Investments Ltd v Lodge* [2015] UKUT 635 (LC)). An order which, in effect, prevented a sale should only be made after careful consideration and never as a matter of routine. If it was decided that such an order was just and convenient, it would be essential that it specify precisely in what circumstances the manager would be required to give consent, such as if agreement was reached with the purchaser that it would treat itself as being bound by the management order, or if the majority of lessees indicated that they were content for the purchaser to assume responsibility for management. The manager might also be directed that, if called upon to give consent, or if specified conditions were not satisfied, an application should be made to the FTT for directions.

72. Each of these options presents difficulties. An agreement between a tribunal appointed manager and a purchaser of the premises would appear fundamentally to change the manager's role. As the Court of Appeal explained in *Maunder Taylor v Blaquiére* [2003] 1 WLR 379, the authority of a tribunal appointed manager derives from the tribunal's order, and not from the lease or the agreement of the parties; the manager is accountable to the tribunal and is entitled to seek its direction when problems are encountered. A manager who reached agreement with a purchaser who was not bound by the tribunal's order would depend for their status on what they had agreed. It would be questionable in those circumstances whether the manager would remain accountable to the tribunal or be able to seek further directions from it.

73. If, in the absence of an agreement, a restriction could be discharged only by an order under section 24(9), LTA 1987, the FTT might be faced with a difficult decision. When making orders under section 24 the FTT is required to consider what is "just and convenient". The purchaser, I assume, would not have been party to the original proceedings, and would not have been responsible for the defaults which led to the manager's appointment. On the other hand, it would have had notice of the restriction when it agreed to purchase, and could protect itself by the terms of its contract with the defaulting landlord. In practice, however, it may be that a restriction which made the registration of title dependent on the consent of the manager or the FTT would make the property unsaleable for the duration of the manager's appointment.

74. A restriction in form N which simply required notice to be given to the manager before a disposition could be registered would provide no real protection for the order at all. As a restriction does not protect the priority of interests, a purchaser would take the property free of the



effect of the order. The manager would cease to have any entitlement to manage the property. A requirement that the manager be given notice would do no more than inform the manager that he or she was about to be deposed. Form N does not provide for a period of notice of any particular duration, which may create practical difficulties for managers.

75. Of course, the acquisition of the property by a new landlord, genuinely at arms' length from its defaulting predecessor and able to take over responsibility from the manager, might be acceptable to all concerned, but that could not be guaranteed. Even then, the manager would require some time to prepare accounts and arrange for contracts to be handed over.

76. Some of these issues were referred to during the hearing of the appeal, but they did not arise for determination and were not the subject of considered argument. For that reason I am reluctant to do more, in this decision, than to identify some of the problems arising from the policy choice that, for the purpose of land registration, management orders should be treated in the same way as orders appointing receivers.

77. Finally, I draw attention to the Land Registry's Practice Guide 19 on the subject of notices, restrictions and the protection of third party interests on the register. Guidance is provided at paragraph 3.3.2 on the circumstances in which a request may be made for the entry of a restriction that is not in one of the standard forms found in Schedule 4 to the Land Registration Rules 2003. Such a restriction will only be entered if none of the standard form restrictions is appropriate. The FTT may wish to consider liaising with the Land Registry to devise a suitable non-standard restriction to provide clarity for managers in the event of a disposition of the property in respect of which they have been appointed, and which could then be included as part of a management order.

## **Disposal**

78. The answer to the question posed at the start of this decision is that, on registration, a purchaser of property for valuable consideration takes it free of a tribunal's order appointing a manager under Part II, Landlord and Tenant Act 1987, whether or not the order was mentioned on the register of title. It follows that the appeal must be allowed. DP Freehold is not bound by the management order and the manager's functions are limited to the management of the Amenity Land and the collection of historic arrears.

Martin Rodger QC,  
Deputy Chamber President  
22 November 2019