

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



**Neutral Citation Number: [2019] UKUT 371 (LC)  
Case No: LRX/1/2019**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***LANDLORD AND TENANT – Appointment of Manager; Service Charges under  
Management Orders; Powers and duties of Managers; Pleadings; Points of Law and the FTT***

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

**BETWEEN:**

**OUNG LIN CHAUN-HUI AND OTHERS**

**Appellants**

**- and -**

**K GROUP HOLDINGS INC AND OTHERS**

**Respondents**

**Re: Aldford House,  
Park Lane,  
London,  
W1K 7LG**

**Judge Siobhan McGrath**

**Royal Court of Justice, Strand, London WC2A 2LL  
on  
18 September 2019**

For the Appellants: Mr Jonathan Upton of counsel, instructed by Forsters LLP

For the Respondents: Mr Michael Walsh of counsel instructed by Stephenson Harwood LLP

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The following cases are referred to in this decision:

*Singh v Dias* [2019] EWCA Civ 360

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

*Kol v Bowring* [2015] UKUT 530 (LC)

**DECISION**

**Introduction**

1. This appeal raises important issues concerning the powers of managers appointed by the First-tier Tribunal, under section 24 of the Landlord and Tenant Act 1987. It also raises a point of significance concerning the approach which First-tier Tribunals (FTTs) should take where parties raise issues of law not clearly identified prior to the hearing of an application.

2. The Appellants in the case are lessees of flats at Aldford House, Park Lane, London W1K 7LG (Aldford House). The flats are let on tripartite leases in similar form. The First Respondent is the head lessor of Aldford House and the Second Respondent is the current Maintenance Trustee. The Third Respondent is the registered proprietor of two leases pursuant to overriding leases from 2015.

3. At the hearing of this appeal the Appellants were represented by Mr Jonathan Upton and the Respondents by Mr Michael Walsh. I am grateful to counsel for their helpful submissions.

**Background**

4. Aldford House is a purpose-built block comprising commercial units on basement, ground and mezzanine floors, two flats on the ground floor and twenty-eight flats on the first to eighth floors (the Flats) with a BMW showroom located on the ground floor. Disputes about

the management of the property, service charges and a collective enfranchisement claim have continued for at least 20 years.

5. Each of the residential flats is held on an underlease in similar terms where it is the Maintenance Trustee, and not the landlord, who is responsible for repairing and maintaining the premises, and providing the works and services set out in the Fifth Schedule. Maintenance charges (service charges) are calculated by reference to the “Maintenance Year” being the period of twelve months beginning on 1<sup>st</sup> April and ending on 31<sup>st</sup> March.

6. During the 1990s it was clear that the building was in need of extensive external works of repair, maintenance and redecoration. In October 2000, service charge demands were levied which totalled in excess of £3,000,000 in relation to proposed major works. Scaffolding was purchased and remained around the building for several years. Although some attempt was made to carry out the works no real progress was achieved and during that time at least two High Court actions were commenced and compromised.

7. In 2010 an application was made by seven lessees for the determination of the payability of service charges under section 27A of the Landlord and Tenant Act 1985 (the 1985 Act) and for the appointment of a manager under section 24 of the Landlord and Tenant Act 1987 (the 1987 Act). In July 2011 the application was considered by the Leasehold Valuation Tribunal (the “LVT” which is the predecessor of the FTT). At the hearing the section 27A application was stayed on terms agreed by the Tribunal. Furthermore, all parties were content for the Tribunal to make a finding that it was just and convenient to appoint a manager.

8. It was also agreed that the manager proposed by the lessees, Mrs Jane Munro of Douglas & Gordon, would be an appropriate appointee. The Tribunal was content that Mrs Munro was suitable for appointment stating that:

“It was satisfied that Mrs Munro possessed the necessary experience and competence to manage the property effectively.... importantly she had visited the property and was acquainted with its management history and the particular difficulties she would face ... furthermore she appeared to have an effective 18 month management plan to carry out the immediate responsive repairs and maintenance the building required...”

9. Mrs Munro was appointed for a period of 18 months with effect from 7<sup>th</sup> July 2011. The Management Order was in unusual terms and in fact made provision for Mrs Munro to be the appointed manager “or such other person appointed from time to time of Douglas & Gordon Ltd.” I should say immediately, that this is an irregular approach as it is for the Tribunal to be satisfied of the competence of a manager and that responsibility may not be delegated. Nine days after the order came into effect Mrs Munro left Douglas & Gordon and ceased to act as the appointed manager. That role was then taken up by Mr Calum Watson who had become the Head of Block Management at Douglas & Gordon.

10. Mr Watson continued as manager until the beginning of 2012 when the LVT made a further order. By this time Mr Watson had encountered a number of difficult challenges. In June 2011 Westminster City Council had served the Landlord and others with a dangerous structure notice in relation to loose or insecure stonework due to the corrosion of steel structural elements in the façade of the building. In December 2011, the council issued a complaint to the Westminster Magistrates' Court for an order requiring the Landlord to remedy the defects. Additionally, Douglas & Gordon held insufficient funds to carry out the Major Works partly because of lack of reserves and partly because of the non-payment of maintenance contributions by some of the Lessees.

11. An agreement was therefore reached that, in effect, the Landlord would pay for the major works and that the cost would ultimately be recovered from the Lessees. The LVT therefore decided that Mr Watson and the Landlord should be jointly appointed as section 24 managers and stated that "The appointment of the Landlord as manager is solely for the purpose of securing the carrying out of the Major Works and recovering payment in respect thereof... Mr Watson's appointment lasts until 30<sup>th</sup> June 2013. The Landlord's appointment lasts until its functions under this Order have been discharged."

12. This is another unusual order in two respects. Firstly, although understandable in the unusual circumstances in the case, the appointment of two managers rather than one is irregular and likely to lead to confusion. The position should probably have been dealt with by including appropriate provisions within the Management Order itself. Secondly, the term of the Landlord's appointment is vague and unhelpful.

13. In any event, Mr Watson continued to act as the appointed manager until 30<sup>th</sup> June 2013. Control of the building then reverted to the Maintenance Trustee, appointed from 1<sup>st</sup> July 2013. The Maintenance Trustee is the Second Respondent in this appeal. On appointment the Maintenance Trustee engaged Douglas & Gordon and Mr Watson as managing agents of Aldford House.

14. Disputes about the payability of the Maintenance Charge still continue. On 10<sup>th</sup> August 2016, a Deed of Assignment was entered into between Mr Watson and the Second Respondent. The purpose of the Deed was to transfer the entitlement to arrears of maintenance charge owed to Mr Watson up until the end of June 2013 to the Maintenance Trustee and also to transfer the right to demand and sue for and to take such other proceedings necessary to enforce payment of those arrears.

15. In October 2016, the Respondents to this appeal, issued proceedings in the county court for recovery of alleged arrears of maintenance charge and ground rent in a total sum of £1,030,337.31. Of that sum, it is said that £369,113.10 related to arrears accrued in the period prior to the Second Respondent's appointment. The particulars of claim alleged that in breach of covenant, the lessees failed to pay the Maintenance Charge to the Second Respondent as

detailed in the statements of account. Importantly the arrears claimed by the Second Respondent included those that accrued during Mr Watson's term as a tribunal appointed manager.

16. Having regard to the history of the case, it is unsurprising that those proceedings were complex. In December 2016, an application was made to have the case transferred from the county court to the FTT and HHJ Saggerson made an order for its transfer in March 2017. One of the bases for seeking transfer is to be found in the Defence at paragraph 64 where it is stated that "the 2012 Order dealt with Major Works and provided any disputes as to the same should be dealt with by the FTT." It will be recalled that those works were to be carried out by the Landlord. At paragraph 34 of their Reply, the Respondents stated: "The Defendants' averments relating to the appropriate forum of these proceedings are noted. The Claimants consent to a transfer to the FTT, though this is without admission to the Defendants' statements that the current proceedings or future planned major works are subject to the Management Orders, as set out in paragraphs 64 to 76 of the Defence or otherwise."

### **The FTT Proceedings**

17. In the FTT there were three case management conferences with directions given at each on 9<sup>th</sup> May 2017, 24<sup>th</sup> November 2017 and 9<sup>th</sup> July 2018. One of the issues in the appeal relates to the pleadings and amendments of case which I will deal with below.

18. The hearing of the claim took place over four days in September 2018. At the outset, the FTT made a number of rulings on amendments sought by the parties. Specifically, it was contended on behalf of the Lessees that they had included in the pleadings (which were not drafted by Mr Upton) a denial that the Second Respondent was entitled to recover any arrears of service charge said to have arisen during Mr Watson's appointment. The Respondents disputed this assertion and said that the matter had not been pleaded. The FTT decided that the matter had not been pleaded and refused to allow an amendment. The conclusion is to be found at paragraph 58 of the FTT's decision where it said:

"58. In all the circumstances, the Tribunal accepts the applicants' submission that it is not open to the respondents to seek to argue that the second applicant is not entitled to recover service charges falling due prior to its appointment as Maintenance Trustee because the point now taken has not been pleaded and is not before the Tribunal."

The FTT then turned to the substantive issues and in summary made findings on the payability of the disputed amounts.

### **The Appeal**

19. The lessees sought permission to appeal the Tribunal’s decision on two grounds which were both rejected by the FTT. The application was renewed to the Upper Tribunal and permission was granted on the ground that the decision set out in paragraph 58 was made in error. In granting permission, the Deputy President, Judge Martin Rodger QC said:

“Ground 1 is arguable for the reasons stated in the applicants’ submissions. It raises a point of general significance concerning the powers of tribunal appointed managers and the status of sums claimed by them but not paid by the end of their appointment. It may also raise a secondary point of some general significance concerning the approach which first-tier Tribunals should take to the raising of issue of law not clearly identified in statements of case.”

### **The Submissions**

20. The case for the Appellants is in two parts. Firstly, it is said that after the expiry of a Management Order made by an FTT, the appointed manager has no further power to deal with payments, or arrears of payment arising during the term of that order, unless specific provision is made within the Management Order itself. As an adjunct to this contention, it is also said that payments made by lessees during the course of a Management Order are not “service charges.” Since that is the case, it was argued, the purported assignment of the arrears of service charge made by Mr Watson to the Maintenance Trustee in 2016 was of no effect and that portion of the service charge claim should not be recoverable by the Respondents. The second aspect of the challenge is against the FTT’s determination that the matter was not pleaded.

21. As a preliminary matter, Mr Upton was concerned to establish that the Upper Tribunal considered it to be appropriate to deal with an appeal where it might be said that his contentions amount to a “new point” and he referred me to the test set out in *Singh v Dias* [2019] EWCA Civ 360 at [15-18]. In my view the issue here was canvassed before the FTT and although not argued (as it was not allowed in) there is no relevant prejudice to the Respondents in it being considered by this Tribunal.

22. I will deal with the two aspects of the appeal in turn. Mr Upton described the first aspect as the “substantive issue.” On behalf of the appellants, he based his argument on the structure and purpose of Part II of the 1987 Act. He pointed out that in exercising his functions, a tribunal appointed manager carries them out in his own right. He is not appointed as the manager of the landlord or even of the obligations of the landlord. It is the Management Order itself (and not the leases of the flats) which forms the entire basis of the manager’s functions and powers: *Maunder Taylor v Blaquiére* [2003] 1 WLR 379.

23. He submitted that the appointment of a manager is a wholly self-contained regime and that monies paid under a Management Order are not “service charges” within the meaning of section 18. He said that when a Management Order is made, the costs are incurred by a

manager and are payable in accordance with the terms of the order. Therefore, he said the regime of protection under sections 18-30 of the 1985 Act does not apply to sums payable under a Management Order. He said that the amount payable is not limited to costs which are reasonably incurred or to the costs of works and services which have been provided to a reasonable standard. Furthermore, he said, a manager is not required to consult tenants in accordance with section 20 unless the Management Order specifically provides that the consultation requirements apply. Supervision of the payability of those costs lies with the Tribunal and can be addressed in the Management Order. In this respect he relied on the decision of the Upper Tribunal in *Kol v Bowring* [2015] UKUT 530.

24. In this case, he said Mr Watson's rights and duties ceased on 30<sup>th</sup> June 2013 when his appointment as a manager ended. He contended that as a matter of general principle, in the absence of any directions from the Tribunal, Mr Watson had no right to collect any monies due as from 1<sup>st</sup> July 2013 and could not, for example, sue a defaulting tenant for any sums owed to him under the Management Order without the express authority of the Tribunal. Therefore, he says, there was nothing to assign.

25. In Mr Upton's submission the 2011 and 2012 Management Orders did not make satisfactory provision about what should have happened upon the termination of the manager's appointment. Mr Upton again referred to *Kol v Bowring* where Judge Gerald explained the importance of preparing final accounts up to the date on which the appointment as manager terminates and what should happen to the surplus funds.

26. Here, and in the absence of an order from the Tribunal, Mr Upton said that Mr Watson ought to have applied in 2013 for further directions either under the terms of the Management Order or under section 24(4) of the 1987 Act. He said that it was for the tribunal to consider how arrears owing at the end of the term of a Management Order should be collected. He suggested that the cleanest approach would be to authorise the manager to recover those arrears despite the fact that he no longer has day-today responsibility for managing the premises. He said this approach is consistent with the manager's ongoing duty to the tribunal after his period of management has expired.

27. In conclusion on this point, he said that for present purposes, the fact that the tribunal did not make any directions about the recovery of any arrears owing to the manager as at 30<sup>th</sup> June 2013, is sufficient to dispose of the appeal: it must follow, he argued, that the Deed of Assignment is of no effect. As things stand, the Second Respondent is not entitled to recover any sums due to the manager under the Management Order.

28. On behalf of the Respondents, it is Mr Walsh's case that the issue was not pleaded and in those circumstances the question of the powers of a manager was not engaged. He also said that it was not necessary to decide the nature of payments made under a Management Order to determine this appeal.

29. However, he wished to reserve his position on the section 24 issues and made a number of associated points. Firstly, he said that *Maunder Taylor v Blaquiére* establishes that the rights and liabilities incidental to the appointment of a manager are vested in him personally. Consequently, the sums paid by the lessees and the debts they owed to the manager during the management period vested in him absolutely, subject to the supervisory jurisdiction of the Tribunal. The manager carries out his functions in his own right as a Tribunal-appointed official. On that basis the manager was entitled to assign to the Maintenance Trustee the debts owed to him from the management period because they were legally vested in him and therefore the assignment took effect at law.

30. Mr Walsh submitted that the right to act as Mr Watson did is entirely consistent with *Kol v Bowring* where Judge Gerald encouraged Tribunals to seek to ensure that when making Management Orders, the process of accounting and that of challenging accounts or the conduct of a manager should be as simple and straightforward as possible. He said that this case is different from *Kol* where there was a surplus in the service charge fund. Here there were arrears of more than three quarters of a million pounds. The manager disposed of the right to recover this in the manner intended by the Upper Tribunal.

31. Furthermore, Mr Walsh drew my attention to paragraph 12 of the 2011 Order, which provides that “in the event of any ambiguity in the powers rights obligations or duties of the manager, the provisions of the Underleases shall prevail.” The underleases provide for maintenance contributions to be payable to the Maintenance Trustee “for the time being.” The maintenance fund is also to be held on trust and the manager was entitled to transfer the balance and debts held in the service charge account to the new Maintenance Trustee.

32. Finally, as a precaution, the Respondents have made a separate application to the Tribunal for an order giving effect to the assignment under the expired Management Order. That application is held in abeyance pending the resolution of this appeal.

### **Consideration of the First Aspect of the Appeal**

33. Before turning to the statutory scheme for the appointment of managers, it is important to reflect on the broader context of this case. There have been disputes about the management and service charges at Aldford House for many years. It is a property that remains in poor repair. The building is located on Park Lane in London and is of very high value. Finally, Mr Upton was clear that there is no dispute that the costs claimed had been incurred and the reasonableness of those costs is not in issue.

### **The Law**



34. Part II of the Landlord and Tenant Act 1987 is a problem-solving jurisdiction. The Act followed on from the recommendations in the Nugee Report in 1985 which had the following terms of reference:

“To collect and examine evidence of the nature, scale and incidence of problems for landlords and tenants arising from the management of privately owned blocks of flats; to assess the difficulties caused by these management problems and to make recommendations on how they might be resolved.”

35. Sections 21 – 24 of the Act prescribe a process for a tenant or tenants to seek the appointment of a manager. Section 24(1) provides:

“24(1) The appropriate tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies –

- (a) such functions in connection with the management of the premises, or
  - (b) such functions of a receiver,
- or both, as the tribunal thinks fit.”

36. The Tribunal is constrained from making an order by section 24(2). Section 24(2)(a) provides that an order may only be made in circumstances where there is a relevant default including where the tribunal is satisfied: that there is a breach of an obligation; or that unreasonable service charges have been made or are proposed to be made; or that unreasonable variable administration charges have been made or are proposed to be made; or where there has been a failure to comply with a relevant code of practice. In each case the Tribunal must also be satisfied that it is just and convenient to make the order.

37. Section 24(2)(b) provides for an additional ground to make an order, namely “where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made.” In this case the order in 2011 was made under section 24(2)(b).

38. Sections 24(3)-(6) contain broad powers for the Tribunal to make an order which will serve to address the problem or difficulty in management. These provide:

“(3) The premises in respect of which an order is made under this section may, if the tribunal thinks fit, be either more or less extensive than the premises specified in the application on which the order is made.

(4) An order under this section may make provision with respect to –

- (a) such matters relating to the exercise by the manager of his functions under the order, and

(b) such incidental or ancillary matters,  
as the tribunal thinks fit; and on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters.

(5) Without prejudice to the generality of subsection (4), an order under this section may provide –

- (a) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager;
- (b) for the manager to be entitled to prosecute claims in respect of causes of action (whether contractual or tortious) accruing before or after the date of appointment;
- (c) for remuneration to be paid to the manager by any relevant person, or by the tenants of the premises in respect of which the order is made or by all or any of those persons;
- (d) for the manager's functions to be exercisable by him (subject to subsection (9)) either during a specified period or without limit of time.

(6) Any such order may be granted subject to such conditions as the tribunal thinks fit, and in particular its operation may be suspended on terms fixed by the tribunal.”

39. Sections 24(9) and (9A) make provision for the variation or discharge of an order. They provide:

“(9) The appropriate tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section....

(9A) The tribunal shall not vary or discharge an order under subsection (9) on the application of any relevant person unless it is satisfied –

- (a) that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and
- (b) that it is just and convenient in all the circumstances of the case to vary or discharge the order.”

40. There is no definition of the term “any person interested” but “relevant person” is defined in section 24(2ZA) as the person on whom a notice under section 22 (notice of intention to apply for an order under section 24) has been served or would have been served. This is usually the landlord or other person with previous responsibility for management.

41. Section 24(11) states that “(11) References in this part to the management of any premises include references to the repair, maintenance, improvement or insurance of those

premises.” As in the case of section 19 of the 1985 Act, the word “improvement” was added by the Commonhold and Leasehold Reform Act 2002.

42. The nature of orders under section 24 was considered by the Court of Appeal in *Maunder Taylor v Blaquiere* [2002] EWCA 1633. The facts of the case are relatively straightforward. Mr Blaquiere lived in a large semi-basement flat in Hyde Park Gardens, London W2. After years of neglect and clear breaches of repairing covenants by the landlord, Mr Blaquiere applied to the LVT for the appointment of a manager. The LVT appointed Mr Maunder Taylor. Shortly after his appointment Mr Maunder Taylor sent out a service charge budget for the forthcoming year which included sums for major works to the building and works were commenced. Mr Blaquiere was sent service charge demands totalling £62,000. Proceedings were commenced to recover those sums and Mr Blaquiere sought to set-off sums subject to a counterclaim. He asserted that by virtue of his appointment, Mr Maunder Taylor owed Mr Blaquiere the same duties of repair as did the landlord under the lease. Since those duties had not been carried out, damage had been suffered for which he was entitled to damages.

43. At first instance, the judge rejected the claim for a set-off and the Court of Appeal upheld his determination. Giving the leading judgment Lord Justice Aldous said:

“35. The Landlord and Tenant Act 1987 was a radical piece of legislation which in a number of respects impinged upon the contractual rights of landlords. Part I gave to certain tenants a right of first refusal. Part II to which I will come in detail enabled the court (by amendment, the leasehold valuation tribunal) to appoint managers. Part III provided for compulsory acquisition by certain tenants of the landlord’s interest. Part IV enabled variation of leases and Part V enabled certain service charges to be varied.

36. Section 21 is the first section of Part II...it enabled a tenant of a flat...to apply to the tribunal for an order under section 24 appointing ‘a manager to act in relation to the premises.’ It is worth noting that the manager is not said to act in carrying on the business of the landlord.... he is ‘to act in relation to the premises.’

....

38. In my view Mr Fancourt is correct in his submission that the purpose of Part II of the Act is to enable the tribunal to appoint a manager, who may not be confined to carrying out the duties of a landlord under a lease. The tribunal is enabled under subsection (1) to appoint a manager to carry out in relation to any premises to which Part II applies ‘such functions in connection with management’ of the premises as the tribunal thinks fit. ...There is no limitation as to the management functions of the manager; in particular the functions are not limited to carrying out the terms of the leases....

....

41. In my view the purpose of Part II of the 1987 Act is to provide a scheme for the appointment of a manager who will carry out the functions required by the court. That manager carried out those functions in his own right as a court-appointed official. He is not appointed as the manager of the landlord or even of the landlord’s obligations under the lease...

42. ....The manager acts in a capacity independent of the landlord. In this case the duties and liabilities laid down in the order are defined by reference to the lease, but do not alter his capacity. In my view Mr Maunder Taylor’s right to the money claimed arose from his appointment not from the lease.

.....

43.....Further, it must be possible for the manager to obtain funds necessary to manage the property even though the tenants, or some of them, had a right to refuse further payment, eg. where they have paid and the landlord has absconded with the money. In such a case the tribunal decides the rights. Their jurisdiction is not confined to the terms of the lease.”

44. On that basis there was no mutuality between Mr Maunder Taylor’s claim and that of Mr Blaquiere and therefore set-off was not possible. The Court of Appeal judgment is clear: the rights and duties of a tribunal appointed manager to manage property and to recover sums from the lessees derive from the Management Order itself. However, the case was not concerned with the rights and duties of a manager *after* their appointment has come to an end. That issue is tackled in the Upper Tribunal case of *Kol v Bowring*.

45. Before turning to *Kol*, it is worth reflecting on the statutory protections afforded to lessees in respect of service charges. These are predominantly to be found in sections 18 to 30 of the Landlord and Tenant Act 1985 as amended by the 2002 Act. Section 18 provides a definition of “service charge” for the purposes of the Act. It provides:

“(1) In the following provisions of this Act “service charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent:

- (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord’s costs of management, and
- (b) the whole or part of which varies or may vary according to the relevant costs.”

46. Section 19 limits the recovery of “relevant costs” to sums which have been reasonably incurred or where incurred in the provision of works and services, only to the extent that they are of a reasonable standard. Section 20 gives lessees the right to be consulted about major works to buildings and about qualifying long term agreements. Section 20B imposes a time limit on the recovery of service charges. Section 27A gives the FTT the jurisdiction to determine the “payability” of service charges where costs have been incurred or are proposed to be incurred. Additionally, the 1987 Act makes further provision for the protection of lessees and service charge costs.

47. Section 30 of the 1985 Act provides:

“30. In the provisions of this Act relating to service charges –  
‘landlord’ includes any person who has a right to enforce payment of a service charge”

48. Turning now to *Kol v Bowring*. In that case, the LVT made an order under section 24 in August 2011 appointing Ms Mary-Anne Bowring as manager of premises at 66 Rosslyn Hill, London NW3 for a period of two years. During this period of management, disputes arose between the lessees and the manager. In 2013, the lessees brought proceedings under section 27A of the 1985 Act challenging the payability of service charges levied by Ms Bowring. The tribunal’s determination that costs were payable was appealed to the Upper Tribunal and the lessees were partly successful.

49. The lessees also brought proceedings in respect of the Management Order where, in short, they claimed repayment of surplus service charges paid to Ms Bowring during the course of her appointment but not reimbursed to the lessees when that appointment came to an end. On this application the FTT effectively decided that it was “powerless to order a receiver and manager to return monies which have been paid by or on behalf of tenants and is beneficially theirs.”

50. On appeal by the lessees, HHJ Gerald sitting in the Upper Tribunal overturned the FTT’s decision. He concluded as follows:

“25. Once all matters relating to the service charge and monies raised during the period of the tribunal-appointed manager have been determined, the matter will need to be wound up or concluded by an order stating to whom the monies should be paid. In the ordinary course of things those monies will be reimbursed to the paying parties, usually the tenant, and transferred to whoever takes over from the manager or receiver. This is because, as *Maunder Taylor* makes clear, monies paid to the manager are by dint of statutory and tribunal authority and are not paid as service charges under the terms of the lease in the strict and narrow sense of how that is understood.

26. Therefore, to complete the circle, there needs to be an opening balance which would usually be zero or a sum ordered to be transferred to the manager on appointment and a closing balance which would usually have a surplus with all transactions iterated in between and any surplus should be paid to the tenant(s). There may of course be circumstances where it is appropriate or indeed agreed that the surplus will be paid to a new court or other appointed manager or otherwise.

.....

28.....It is quite extraordinary that there have been no final accounts produced by the manager, now over two years passed the expiry of the Management Order. In this respect it must be borne in mind that whilst the appointment of the manager only lasts for the duration of the Management Order, the manager or receiver remains under the control of and accountable to the tribunal for his or her conduct even after expiry of the period of

management. This is self-evident and implicit in the need and requirement of the manager or receiver to account, which of necessity will continue past the last date of his or her powers to manage.”

51. In order to facilitate the smooth transfer from a Tribunal appointed Manager at the end of their term, Judge Gerald said that the Management Order should make provision for how this ought to be achieved. At paragraph 32 of his judgment he said:

“32. There should have been a timetable for provision of those accounts and a timetable within which the tenants could seek to request further information or raise queries on those accounts and for the manager to respond and in the event that such response was unsatisfactory for the relevant tenants to apply to the FTT in respect of any matters they disputed. That application could take the form of a challenge to the reasonableness of the amounts claimed in the sense made under section 19 of the Landlord and Tenant Act 1985 or in relation to the application or misapplication of monies received or any other matters pertaining to the discharge by the manager or receiver of his or her functions as the tribunal manager or receiver, irrespective of whether or not such challenges fell strictly within the provisions of section 20C or otherwise. This is because it is necessary, and is the meaning and effect of section 24 of the 1987 Act, that all matters within the ambit of the appointment of the receiver-manager to be brought within and determined by the single jurisdiction of the FTT in order to ensure efficient, expeditious and cost-effective resolution and dispatch of tribunal-appointed manager-receivers by the tribunal.”

## **Consideration**

52. For the following reasons, I reject Mr Upton’s submissions on the substantive issue. I deal first with the nature of the payments made under a Management Order. I am firmly of the view that payments made by reference to the lease are service charges falling within the statutory regime under sections 18-30 of the 1985 Act whether during the term of a section 24 appointment or not. I reject the submission that when sums are recovered or sought to be recovered by a tribunal appointed Manager, they are of a different nature than when they are recovered under the terms of the lease.

53. Although the charges are *recovered* under the Management Order, they are *paid* under the lease. The imposition of a Management Order does not displace the lease covenants and the lessees remain bound by them. That this is the case is in my view clear from *Blaquiere* where the Court of Appeal was clear that the Manager was concerned only with “such functions in connection with management” as directed by the Tribunal.

54. Although a Management Order may make provision for payments and other matters which are not within the lease provisions (for example here where the Landlord was to carry

out the Major Works), the basic position is not altered. This is consistent with the definition of service charge contained in section 18 which refers to “..... an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord’s costs of management.” During the term of a Management Order the lessees’ obligation to pay such sums continues under the lease. This is also consistent with the definition of landlord in section 30 namely that, “ In the provisions of this Act relating to service charges ‘landlord’ includes any person who has a right to enforce payment of a service charge.” Where a manager is appointed under section 24, they become the person who has the right to enforce payment of the service charge and is treated for the purposes of sections 18-30 as being subject to that regime.

55. Further reinforcement for this proposition comes from section 24(11) where it is provided that “References in this part to the management of any premises include references to the repair, maintenance, improvements or cost of insurance of those premises.” This is the same description of those matters which are “service charges” for the purposes of section 18. When section 18 was amended by the 2002 Act to include “improvements”, section 24(11) was amended in the same way.

56. In any event, it would be surprising and I consider verging on the absurd if lessees who were seeking the protection of an order under section 24 of the 1987 were to find that in consequence they could not rely upon the protections of sections 18-30 of the Landlord and Tenant Act 1985. If Mr Upton was correct, they would have no right to challenge costs under section 27A, and as Mr Upton recognised, the manager would not be required to consult under section 20 and would not be limited by sections 19 or 20B or any other part of the regime.

57. Mr Upton argued that lessees would be able to rely on such rights by analogy and would have the protection of the Management Order itself which could make provision for applications to be made to the Tribunal to determine disputes. I do not accept that this is a tenable position. It is clear that applications to determine general disputes were not anticipated under section 24 itself. The only applications that can be made are by the Manager under section 24(4) for directions or by “an interested person” for the variation or discharge of an order under section 24(9). Neither type of application would be suitable to deal with, for example, a challenge to the reasonableness of service charges.

58. Furthermore, I do not consider that including “liberty to apply” or seeking to provide a dispute resolution mechanism analogous to section 27A was contemplated in Part II of the 1987 Act nor that it would be practicable or sensible. There is extensive jurisprudence relating to sections 18-30 of the 1985 Act which could not simply be replicated. There is also the difficulty that the FTT has no inherent jurisdiction and I doubt whether a Management Order could, in effect, confer a whole suite of separate jurisdictions on the Tribunal to deal with complex disputes about service charges when a regime is already in existence.

59. Insofar as Judge Gerald seems to have reached an alternative conclusion in *Kol*, I respectfully disagree. I do not consider that the Court of Appeal in *Maunder Taylor v Blaquiére* decided that payments under a Management Order fell outside of the regime of the 1985 Act. It does not appear that the point was in fact fully argued before Judge Gerald and his findings are somewhat contradictory. I think the best expression of his views are to be found in paragraph 32 where he considers that at the end of a term of management, lessees could make an application which “could take the form of a challenge to the reasonableness of the account claimed in the sense made under section 19 of the Landlord and Tenant Act 1985 or in relation to the application or misapplication or monies received or any other matters pertaining to the discharge by the manager or receiver of his other functions.....whether or not such challenges fell strictly within the provisions of section 20C” (I think that it is likely this should read section 27A rather than 20C). This suggests that the service charge regime in sections 18-30 of the Act does continue to apply to service charges falling within the definition in section 18, but that extraneous matters may not. An example of extraneous matters would be payments required from a landlord towards work carried out by a Manager or for matters other than “repair, maintenance, improvements or cost of insurance of those premises.”

60. If payments fall outside of the service charge regime, then it would be necessary for the Tribunal to make provision within the order for those payments to be subject to adjudication. It seems that this may have been the intention of the LVT when in the 2012 order provision was made for disputes about the Landlord’s conduct of the Major Works was to be referred back to it. This splitting of functions would not multiply the applications that would need to be made to the Tribunal as they could be dealt with together if both types of payment were under challenge.

61. The practicality of this approach supports the conclusion. So far as service charges under the lease are concerned, there would be continuity. If the status of service charge payments changes on the appointment of a manager then the result would be utterly confusing. For example, what would happen to arrears of service charges falling due and demanded before the appointment of a manager? Would the manager recover them as service charges or not? If so, then the funds held by the manager would have to be kept separate from those recovered and accounted for separately. If reserve funds exist prior to the appointment and the manager receives further contributions towards those reserve funds, would the payments be held on a different basis depending on when they were paid or would they become consolidated and not protected? If a manager were appointed half way through a service charge year and interim charges had been levied and paid before the appointment, could they be applied to the final charge if, as suggested, that final charge was made under the Management Order and not the lease?

62. As to the terms of Management Orders, I do not depart from the views of Judge Gerald in *Kol*. When a Management Order is made, attention must be given to what happens at the end of the term. It would be helpful if the end term of a Management Order coincided with the end of the relevant service charge year as this would make the accounting exercise more straightforward. In any event, there must be an accounting exercise and if necessary a



mechanism must be provided for this event. I agree with Judge Gerald that the duty of the Manager to the Tribunal continues until all matters are resolved. This can be dealt with in one of two ways, either provision could be made in the Management Order itself or alternatively the “winding up” duties of the manager could be set without limit of time, as contemplated by section 24(5)(d) until properly discharged. In a contentious case, the order would not be discharged until the Tribunal was satisfied that all matters had been properly dealt with and a complete handover had been achieved.

63. In this case, the Tribunal is not concerned with a matter where there are surplus payments. If there had been, then as Judge Gerald recognised, it would be necessary to consider to whom any such surplus should be transferred. Here there are substantial arrears. In my view, the arrears that are “service charges” accrued to the Maintenance Trustee when the Management Order appointing Mr Watson came to an end. The ability of the Maintenance Trustee for the time being, to recover payments due under the leases was suspended by the Order and not extinguished. In those circumstances, there was no need for a Deed of Assignment, although given the entrenched position of the parties in this case, it is understandable why it was executed. In my view, the better course would have been for Mr Watson to apply to the Tribunal for directions and an endorsement of his actions.

64. In this case, if there are arrears of payments other than service charges then it will be necessary for an application to the FTT to be made either for a variation of the order or for directions as to how those arrears should be dealt with.

## **Second Issue**

65. As a result, it is not necessary for me to consider whether the FTT was correct in refusing to allow the Lessees to argue that the Deed of Assignment was of no effect. However, it may be useful if I make some observations. Firstly, both counsel agreed that if on behalf of the Lessees it had been pleaded that the Second Applicant was not entitled to recover service charges falling due prior to its appointment, then the Tribunal should have decided the point.

66. In my assessment, the point was not pleaded. I do not propose to recite the various arguments on this issue as it is not necessary in the light of my judgment on the substantive issue. I would observe however, that the question was a matter of mixed law and fact. It was not pure law. Mr Upton contended that there was no issue of fact as the demands made by Mr Watson during his term as Manager were clear from the schedules of account. I do not agree. If there had been any discrepancy between the payments, it would have been necessary for the Tribunal to resolve that discrepancy. At the very least, on the Lessee’s case, it would have been necessary to distinguish between demands relating to the costs incurred before Mr Watson’s appointment and demands relating to costs incurred during his appointment.

67. In reaching its decision not to allow the argument to be advanced the Tribunal stated that matters in contention should be “clearly pleaded” and treated the application by the Lessees as an application to amend. In refusing to allow the amendment they said as follows:

“51. The context in which the issues concerning the pleadings fall to be considered is as follows. This is a high value case in which complex issues have been raised and (although the respondents have changed their legal representatives) all parties have been legally represented throughout....

53. The Tribunal is of the view that, following the late amendments which the respondents were permitted to make, the entirety of the case which the applicants have to meet in these proceedings should be clear on the face of the pleadings and that, if the respondents take issue with an assertion made by the applicants, they should plead their reasons for doing so.

54. The Overriding Objective at rule 3 of the 2013 rules provides that dealing with a case fairly and justly includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.

55. The Tribunal considers that this include ensuring that the applicants are not forced, in complex litigation of this nature, to attempt to meet a case which is not clearly set out in a pleading. The applicants considered the issues to be defined by the pleadings and the Tribunal is of the view that they were entitled to do so.

56. Further, pursuant to the Overriding Objective, the limited resources of the Tribunal are a relevant factor....”

68. Where a case has reached the stage of final hearing, the Tribunal will usually be reluctant to allow one party to significantly alter their position without good notice having been given to the other party and without permission to depart from the statements of case.

69. If the issue is one of fact, then it will be necessary for the Tribunal to take a view of its importance to the overall determination of the case. This might include questions of proportionality and how much of the case might be affected by the new evidence. The Tribunal will also take into account the possible prejudice to the other side and the reason why the new material was not previously available. Although the FTT is less formal than the court, it is still necessary to impose order and discipline on the way in which cases are conducted in preparation for a hearing and at the hearing itself.

70. If the issue is one of law, then the Tribunal will need to conduct a slightly different approach. Although factors such as proportionality and prejudice will be important, an issue of law can often be dealt with without extending the time for hearing as long as parties have the opportunity to consider the point and if appropriate to seek advice.

71. The jurisdictions dealt with by the FTT are complex. They are underpinned by complicated statutory provisions, many of which have been the subject of scrutiny by appellate courts. It is unsurprising that many litigants in person find it difficult to navigate the law applicable to their case. However, if there is a clear principle of law that needs to be considered, the Tribunal should usually allow argument to be made. On the other hand, if the issue of law is obscure and tangential then the FTT is entitled to take the view that permission should not be given for it to be argued. Of course, there will be many shades of clarity and obscurity and it will be for the FTT in each case to make its own assessment. This will entail deciding of the strength of the point in a summary fashion and deciding whether it is necessary in the interests of justice to allow the point in or not. It will be a matter of fact and degree.

### **Conclusion**

72. Accordingly, the appeal is dismissed. At the end of the hearing, counsel explained that there are a number of costs issues which will require a separate reasoned determination and that argument might be required in a second hearing. If this remains the case then the parties should notify the Upper Tribunal within 14 days of the final date of this judgement and if possible, they should provide agreed draft directions.

**Judge Siobhan McGrath**  
**3<sup>rd</sup> December 2019**