FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/45UG/LVM/2019/0001**
Property	**:**	**Ditton Place School, Brantridge Lane, Balcombe, West Sussex RH17 6JR**
Applicant	**:**	**Mr Gary Pickard**
Representative at hearing	**:**	**Mr Anthony Tanney instructed by Dean Wilson LLP**
Respondent	**:**	**Ms Lorraine Nunes-Carvalho and others (full list on page 2)**
Representative at hearing	**:**	**Mr Christopher Heather QC instructed by Fladgates LLP for Mr Urwick/Ms Yrazu-Bajo** **Ms Nunes-Carvalho and Mrs Roche in person**
Type of Application	**:**	**Variation of management order: section 24(9) Landlord and Tenant Act 1987**
Tribunal Members	**:**	**Judge E Morrison** **Mrs J E Coupe FRICS**
Date and venue of hearing	**:**	**19 March 2019 at Havant Justice Centre**
Date of decision	**:**	**5 April 2019**

DECISION

List of original respondents

1. **Lorraine Nunes-Carvalho (Flats 3 & 9)**
2. **Richard Urwick and Caroline Yrazu-Bajo (Flat 1)**
3. **Marion Vincent (Flat 5)**
4. **Michele Hodgkinson (Flat 8)**
5. **Tony Jones and Margaret Jones (Flat 11)**
6. **Walter Gans and Katherine Gans (Flat 6)**
7. **Keith Sellers (Flat 2)**
8. **Gerard Burton and Michael Rosenfeld (Flats 4,7,10,12)**
9. **Paul Roche and Jo Roche (Waterside)**
10. **John Price and Liz Price (Middle Cottage)**
11. **William Lynch and Kelly Lynch (The Lodge)**
12. **Spencer Carter & Michelle Carter (Bungalow 1)**
13. **Robert Taylor and Susan Taylor (Bungalow 2)**
14. **Ian and Joanne Broomfield (Bungalow 3)**
15. **Ditton Place Management Company Limited**
16. **Mr D Riches (Old Jarretts Farmhouse)**
17. **Mrs G Hickey (Jarretts Farm)**

List of participating respondents

1. **Lorraine Nunes-Carvalho (Flats 3 & 9)**
2. **Richard Urwick and Caroline Yrazu-Bajo (Flat 1)**
3. **Marion Vincent (Flat 5)**
4. **Michele Hodgkinson (Flat 8)**
5. **Tony Jones and Margaret Jones (Flat 11)**
6. **Paul Roche and Jo Roche (Waterside)**

The application and its background

1. By an application dated 20 December 2018 the applicant Mr Pickard applied for a variation of the Order dated 24 January 2017 by which he was appointed, pursuant to section 24 of the Landlord and Tenant Act 1987 ("the Act"), as Manager for the Ditton Place estate.

2. The factual background to the application is complex. Appendix 1 to this decision is the previous decision of this Tribunal dated 7 December 2018, which dismissed an application, made by some lessees, to vary the management order by removing a large portion of the estate from the scope of the order. The Tribunal decided that the entire estate should remain subject to the order. There has been no application for permission to appeal. Mr Pickard now asks the Tribunal to clarify and extend his powers under the original order.

3. In the interests of brevity, this decision will, rather than repeat what has already been said, refer when necessary to paragraphs in the previous decision ("PD") which was made by the same tribunal members as make this decision. However the chronology, at PD para. 14, is now set out again for ease of reference, with some updating:

2007-10	Sale of six freehold houses and conversion of Main House and Coach House at Ditton Place into twelve flats demised on long leases. Under the house sale transfers a rentcharge is payable by the house owners to the freeholder of the estate. Under the flat leases the lessees pay a service charge to the freeholder.
23.12.10	Ditton Place Management Company Limited ("ManCo"), the management company under the tripartite leases, was registered as freehold proprietor of the entire estate in place of the developer Brickcrest Limited. Each of the flat lessees and some of the house owners were shareholders in ManCo.
11.11.15	Application made by three flat lessees (Urwick/Bajo, Gans and Sellers) under section 22 of the Act for the appointment of a manager to carry out the management duties of ManCo.
24.1.17	Order of Tribunal appointing Mr Gary Pickard as Manager for three years, the order reciting that ManCo had admitted "that the conditions specified in [section 24] were met".
12.17 – 2.18	By a series of actions, led principally by Ms Carvalho, a number of lessees gained control of ManCo (the propriety of which actions is strongly disputed by other lessees/house owners), and formed Ditton Place Freehold Company Limited ("NewCo").
23.3.17	The first six applicants served an initial notice under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 seeking to acquire the freehold of the buildings containing the flats, together with surrounding land including the flats' private

	formal gardens, tennis courts, parking areas and the "north drive" which runs through the estate. On the same date Ms Carvalho, as director of both ManCo (the transferor) and NewCo (the transferee) executed a transfer of the freehold of the land requested for a premium of £2.00. (This land is now referred to as "the NewCo land").
29.3.18	At a general meeting of ManCo called by Mr Burton, new directors (Mr Burton, Mr Price, Mr Taylor and Mrs Roche) were appointed, and Ms Carvalho was removed as a director.
24.5.18	Meeting at which some lessees asked Mr Pickard to consent to the discharge of his appointment.
4.6.18	Application made to the Tribunal by the participating lessees in NewCo to vary the management order by removing the NewCo land from its scope.
2018	Some leases varied by NewCo, removing the lessee's obligation to pay a service charge in relation to the estate other than the NewCo land ("the Amenity land").
7.12.18	Previous decision of the Tribunal.

Procedural history, evidence and representation

4. The Tribunal issued directions relating to the present application on 9 January 2019, providing for a determination on the papers unless a party objected. Subsequently Mr Urwick's solicitors requested an oral hearing.

5. The application and directions were served on all lessees, house-owners, ManCo, and two other persons with an interest in the estate. The directions stated that respondents who did not provide a statement of case would be removed as parties. Those who did provide a statement of case or witness statement are listed above as participating respondents.

6. The hearing was dealt with on submissions. Participating respondents attending without legal representation were given the opportunity to make submissions, but in the main the points at issue were addressed by Mr Heather, counsel for Mr Urwick/Ms Yrazu-Bajo, and Mr Tanney, counsel for Mr Pickard. The Tribunal has taken all the written evidence and written/ oral submissions into account in reaching its decision.

The existing management order

7. Under the management order

- "The Premises" means all that property known as Ditton Place School… freehold title to which is registered under title number WSX295988.

  (WSX295988 is ManCo's title which, until the March 2018 enfranchisement, extended to the whole estate)

- By clause 8 "For the duration of the Manager's appointment, no other party shall be entitled to exercise a management function in respect of the Premises where the same is the responsibility of the Manager under this order, save where the same has been lawfully delegated by the Manager in accordance with the terms of the lease"

- By clause 9 "The Respondent [ManCo] and the lessees and any agents or servants thereof shall give reasonable assistance and cooperation to the Manager in pursuance of his duties and powers under this Order and shall not interfere or attempt to interfere with the exercise of any of his duties and powers"

- By clause 15 "The Respondent is directed forthwith to register this Order against its freehold estate registered under title number WSX275988"

- By clause 16 "The obligations contained in this Order shall bind any successor in title to the Lessees or the Respondent and the existence and terms of this Order must be disclosed to any person seeking to acquire either a Lease (whether by assignment or fresh grant) or freehold"

- Clause 17 permits the Manager to apply to the Tribunal for further directions in accordance with section 24(4) of the Act. These may include "(i) [directions arising out of] any failure by a party to comply with an obligation imposed by this Order (ii) for directions generally; and (iii) directions in the event that there are insufficient funds held by him to discharge his Obligations under this Order/or to pay his remuneration".

8. The Manager's powers include the power to bring legal proceedings for recovery of monies due under the leases, and to demand and collect rentcharges from the house owners. He is also authorised to take such action as may be necessary to manage the service charge accounts and reserve funds, if appropriate to have the accounts audited, and to ascertain the correct proportions of the estate costs to be recovered from the Lessees and house owners. The final two powers were particularly apposite because (i) the service charge accounts were not in order, and serious allegations had been made, including to the police by Mr Urwick, of misappropriation of funds, and (ii) at the time the Order

was made, there was a long running dispute over apportionment, some lessees contending that the house-owners should be paying 60% of the costs of the lessees' buildings and private grounds [see eg paras. 33 and 42 PD).

The jurisdiction of the tribunal

9. Subject to certain qualifications not relevant in this case, section 21 of the Act permits a tenant of a flat to apply to the tribunal for an order appointing a manager.

10. Under section 24(3) the premises in respect of which an order is made may be more or less extensive than the premises specified in the application.

11. Section 24(4) provides:

> 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.

12. Section 24(9) provides that the tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under section 24.

The issues now before the Tribunal

13. Mr Pickard sought a number of additions to the Order which he submits are necessary to progress his management. However the principal area of dispute arose out of the following proposed amendment:
"The Premises" as defined in the Management Order includes all Premises forming part of the original estate held under title number WSX275988 whether or not subsequently transferred and for the avoid of doubt includes the title now held under title number WSX398297" .

WSX 398297 is the title number of the NewCo land following the transfer on enfranchisement.

14. At first sight this would appear to be non-contentious, reflecting the Tribunal's previous decision. However the statement of case of Mr Urwick/Ms Yrazu-Bajo took issue with it, on a point of law. The greater part of the hearing was concerned with this issue and its effect, namely

whether the Manager could continue to manage the land enfranchised by NewCo.

Can the Manager continue to manage the NewCo land?

15. The point taken by Mr Heather on behalf of Mr Urwick/Ms Yrazu-Bako was entirely new. It was not raised in the previous proceedings, although it could have been. In that sense it may be regarded as a collateral attack on the previous decision. However Mr Tanney for Mr Pickard accepted it could be taken.

16. Mr Heather submitted that due to the failure to register the Management Order by entry of a Restriction at the Land Registry, NewCo, as a matter of law, was not bound by the Management Order. Although Mr Tanney accepted that submission, the analysis is set out here because the Tribunal is unaware of any previous judicial decision on the issue.

- By virtue of section 24 (8) of the Act, the Land Registration Act 2002 ("the 2002 Act") and Land Charges Act 1972 apply to a management order under that section as they apply to an order appointing a receiver or sequestrator.

- By virtue of section 87 (1) of the 2002 Act an "interest affecting an estate or charge" includes an order appointing a receiver or sequestrator.

- Under section 29(1) of the 2002 Act, if a registrable disposition 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 *i*mmediately before the disposition whose priority was not protected at the time of registration.

- Under section 29(2) of the 2002 Act, priority of an interest is protected if it is the subject of a notice in the register [or in various other situations which do not apply here].

- Pursuant to section 87(3) of the 2002 Act, a management order cannot be protected by a Notice. Under section 42 it can be protected by a Restriction.

- Entry of a Restriction will in practice prevent registration of a disposition unless the conditions in the Restriction have been met. The Restriction does not give priority but physically prevents disposition without consent of the manager. This enables the manager to negotiate with the transferee so as to obtain compliance with the order.

17. Initially Mr Tanney had queried whether the transfer from ManCo to NewCo had been made for "valuable consideration". However, after

considering valuation evidence which Mr Urwick was permitted to introduce, he conceded that it had. Mr Tanney therefore accepted that the Management Order had lost priority as regards NewCo.

18. However, there was disagreement as to whether that loss of priority meant that the Manager could no longer manage the NewCo land.

(i) The Manager's submissions

19. Despite the transfer of land to NewCo, and the loss of priority between the Manager and NewCo, the Management Order remains in place. It remains a valid interest over the NewCo land, even if it has lost priority as regards NewCo. Furthermore, it remains in effect as regards the lessees.

20. The purpose of the enfranchisement was to stultify the Management Order as it applied to the lessees' flats and grounds. The Tribunal was referred to:

(a) The Valuation Report prepared by Mr Julian Wilkins, a registered valuer, dated 23 March 2018, prepared on behalf of ManCo. Having arrived at a valuation of £1.00 for the block and £1.00 for the other land, he noted "We understand that in this instance the desire to enfranchise is simply due to the management/maintenance issues in relation to the current freehold situation and that the normal reasons for purchasing the freehold such as the need to extend leases are not in place in this case".

(b) The previous tribunal application made in June 2018 and signed by Ms Carvalho stated, as a reason for urgency: "The leaseholders have control of the Landlord and wish to resume control of the management of their part of the Estate and Buildings as soon as possible".

(c) In Mr Urwick's witness statement dated 14 February 2019 he stated; "I was one of the participating tenants and I believed the conclusion of the process of enfranchisement would give us (the participants) control of the management of the buildings in which we lived, and some of the grounds in which they are set".

21. Mr Tanney submitted that for the participating lessees to procure the transfer of the land to NewCo was a clear breach of clause 9 of the Management Order in circumstances where NewCo would not be bound by the Order, and where their objective was to stultify it. Clause 9 was addressed to ManCo and the lessees, and it continued to bind them. There was an earlier breach of clause 15 by ManCo when it failed to register a Restriction. It was the combined effect of these two breaches which had resulted in the Order losing priority against the NewCo land.

22. If Mr Heather was right in his contention that the manager had lost all rights to recover monies from the lessees as from 23 March 2018, the date of the transfer, this would mean that all obligations incurred by Mr Pickard that had not crystallised by that date would have to be paid by Mr Pickard personally and/or by the six house owners. This would permit the lessees brazenly to profit from their own wrong. The Tribunal has the jurisdiction to make orders undoing the effect of the lessees' breach, pursuant to sections 24(4) and (9) of the Act, and also clause 17 of the Management Order.

23. Mr Tanney therefore sought, in addition to the redefinition of "The Premises" as set out paragraph 13 above, additional clauses in the Management Order which (i) would require the lessees who had participated in the enfranchisement and were members of NewCo to procure that NewCo observed the Management Order as if the Order enjoyed priority (ii) would require those lessees to procure the transfer back of the NewCo land to ManCo (iii)would require the Lessees and ManCo not to interfere with the Manager but give him all reasonable cooperation and assistance. He also requested that a penal notice be attached to (i) and (iii).

(ii) Submissions on behalf of Mr Urwick/ Ms Yrazu-Bajo

24. As a result of the transfer on enfranchisement, the Manager has lost the right to manage the NewCo land. Only NewCo can demand and receive service charges after 23 March 2018. The lessees remain liable to the Manager only in respect of the Amenity land. They have no obligations to the Manager in respect of the NewCo land. The definition of "The Premises" should therefore be amended so as to exclude the NewCo land.

25. The lessees had a statutory entitlement to enfranchise and it is wrong to characterise the transfer as a breach of clause 9 of the Order. Exercising statutory rights cannot be an interference with the manager's duties. The lessees' motivation is irrelevant.

26. It is the fault of ManCo, not the lessees, that the Restriction was not entered at the Land Registry. There is no evidence that Ms Carvalho (the lessee executing the Transfer on behalf of both Manco and NewCo) knew that it had not been entered. If it had been entered, enfranchisement would not have had the same legal effect on the Management Order. Mr Pickard should have made sure it was entered.

27. Although the powers in section 24(4) of the Act are wide, and the Tribunal can direct persons to do things, the powers are not so wide as to allow the additional clauses proposed by Mr Pickard (see paragraph 23 above).

28. The first clause would allow Mr Pickard to get by the back door what he cannot get by the front door. It would be a wrong exercise of the

Tribunal's discretion to order the lessees to require the directors of NewCo to act in a certain way. The directors have statutory duties, which could be inconsistent with compliance with such an order. Furthermore it would interfere with the rights of NewCo, who was not a party to the application. Under section 24(4) orders must either relate to the exercise of the manager's functions under the order, or be with respect to such incidental or ancillary matters as the tribunal thinks fit. Mr Pickard no longer has functions in relation to the NewCo land, and so the proposed clause would not be incidental or ancillary to the order. Section 24(4) should not be stretched to allow the manager to unpick the unintended consequences of the failure to enter the Restriction. The situation is simply the unfortunate consequence of a series of events unforeseen by all parties.

29. The second clause requiring a transfer back of the land to ManCo is outside the scope of section 24(4) or (9) of the Act. There was no power to direct a transfer of property. It would be an expropriation of property without statutory authority and without paying compensation (unlike the enfranchisement scheme under the 1993 Act).

30. The third proposed clause is an unnecessary repetition of clause 9 of the Order.

31. Although it was conceded that the Tribunal had the power to attach a penal notice, this should not be done where the lessees had not been in breach. Enfranchisement was not a breach of clause 9, and other incidents of non-cooperation referred to in the manager's written evidence post-dated 23 March 2018, so they could not be breaches either.

(iii) Responding submissions of the Manager

32. Although the effect of the failure to register the Restriction was unknown to the lessees at the time, and their objective would not have been achieved had it been registered, the lessees should not be able to take advantage of the fortuitous position they have now been advised they are in, when their whole objective was, from the start, to interfere with the manager's powers in breach of clause 9 of the Order. The Respondents' argument pulls itself up by its own bootstraps. The fact that the lessees achieved their objective by a route they didn't have in mind is irrelevant.

33. Even if the Tribunal absolves the lessees of any improper motive at the time of the transfer, there is a continuing breach of clause 9 because the lessees want to rely on the recent adventitious turn of events (i.e. the discovery of the point of law arising from non entry of the Restriction), which itself is a breach of clause 9.

34. The reality is that the participating lessees control NewCo. The lessees continue to be bound by the Management Order and are under an obligation to assist Mr Pickard. Clause 17(i) of the Management Order

is specifically directed at remedying breaches of the Order. Clause 9 of the Order continues to oblige the lessees to assist Mr Pickard. This is unaffected by the effect of non-entry of the Restriction on NewCo.

35. If the Management Order were ineffective as regards the NewCo land, the Order could not survive as there would be no leasehold properties subject to it (paras. 39-40 PD). The situation would be one of utter chaos. The proposed amendments to the Order are the only way to restore order.

36. The intended effect of clause 15 of the Order was to prevent a transfer to evade the effect of the Order. Requiring a transfer back of the land is ancillary to that and therefore there is explicit jurisdiction to make such an order. The original transfer was not a genuine commercial transaction. The consideration of £2.00 could be refunded. NewCo was just a receptacle; in reality the transfer was to the lessees. NewCo has no interest in the situation separate from the interests of the lessees who own and control it.

37. In reply to these points, Mr Heather said he was not sure that chaos would result if his submissions were accepted. He suggested that NewCo's covenants as set out in the Transfer provided a scheme whereby the two parcels of land could interact. NewCo had covenanted in the Transfer to contribute to the costs of the Amenity land.

Discussion and determination

38. In the leading case of *Maunder Taylor v Blaquiere* [2002] EWCA Civ 1633 the Court of Appeal stated:

> "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. The manager carries out those functions in his own right as a court-appointed official. …
>
> 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. It follows that there was no mutuality between his claim and that of Mr Blaquiere. That being so, set off is not possible.
>
> 43. …[I]t must be possible for the manager to obtain funds to manage the property even though the tenants, or some of them, had a right to refuse 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…".

39. In *Kol v Bowring* [2015] UKUT 530 (LC) the Upper Tribunal stated:

" 22. The purpose of the power granted by section 24 of the 1987 Act to appoint managers or receivers in respect of residential property is to enable that property to be managed subject to the control of the tribunal in circumstances where the landlords' management or discharge of its obligations under the provisions of the lease have been found wanting. Looking at matters very broadly, the whole purpose of the jurisdiction is to enable the F-tT to ensure that that what has hitherto been done inadequately and perhaps improperly is done adequately and properly. It is for that reason that the F-tT is granted very wide powers as to how the manager should exercise his functions under the order and also such incidental or ancillary matters as it thinks fit: see section 24(4). Those are expanded by subsection (5) which lists other matters which the order may encompass, all of which are "without prejudice to the generality of subsection (4) ".

40. The Tribunal has no doubt whatsoever that the purpose of the lessees who participated in the enfranchisement was to find a way to evade the Management Order. The lessees already had 999 year leases at a peppercorn rent. In addition to the evidence referred to at paragraph 20 above, reference is made to paras. 1 and 22 PD. Indeed it has never been suggested that there was any other motivation. In our view motivation is a relevant consideration when acts or omissions taken in furtherance of that motivation result in an undermining of the purpose and effectiveness of the Order, and when the Tribunal is being asked to make remedial orders.

41. Even if , as Mr Heather submits, motivation is irrelevant, the Tribunal should consider the practical effect of the enfranchisement.

42. Mr Heather is entirely correct in suggesting that the lessees were entitled to enfranchise, and that, if the Restriction had been entered, no harm would have been done. However, the Tribunal is not required to apply the "but for" test of causation. The fact is that the enfranchisement has undermined the intended effectiveness of the management scheme and the ability of the manager to fulfil his obligations.

43. By clause 9 of the Order the lessees were required to give reasonable assistance and cooperation to the Manager and "shall not" interfere or attempt to interfere with the exercise of his powers and duties. The effect of the enfranchisement clearly constitutes an interference with that exercise. Unless remedial orders are made, the manager will be unable to resolve the issues which led to the order being made in the first place and the estate management and finances will be left in a state of severe disarray (see paragraphs 47 -48 below).

44. The Tribunal finds that the lessees remain bound by the Management Order, and so clause 9 continues to apply to them. Mr Heather suggests that clause 9 can only apply to the lessees in relation to the Amenity land. We do not find that a loss of priority between the manager and NewCo discharges any obligations of the lessees to the manager.

Furthermore, even if Mr Heather is correct, the Tribunal finds that at least some of the lessees continue to breach clause 9 in relation to the Amenity land. Those lessees who have entered into lease variations with NewCo have sought to terminate their obligation to pay towards the upkeep of the Amenity Land. This is an obvious interference with Mr Pickard's ability to collect service charges from them.

45. It should not be overlooked that clause 16 of the Management Order explicitly states that the obligations in the Order should bind any successor in title. The Tribunal has an interest in ensuring that its orders are obeyed.

46. As the Tribunal is being asked to make orders remedying the effect of the enfranchisement, it is right to consider the consequences of so doing or not so doing.

47. Mr Heather sets out some of the consequences if the Tribunal takes no remedial action in his client's statement of case:

- As from 23 March 2018 Mr Pickard has no right to manage the NewCo land; only NewCo has that right;
- Mr Pickard can only collect service charges in relation to the NewCo land which had crystallised by that date.

48. The Tribunal notes further consequences:

- The situation in relation to the historic service charges will remain unresolved. This was a major reason for making the Management Order in the first place. As explained in the previous decision, a forensic audit has been commissioned by Mr Pickard and has been ongoing for some considerable time. It has not been completed because there been insufficient funds available to pay the accountants. This in turn is due to the failure of (principally) some lessees to pay service charges demanded by Mr Pickard since his appointment. The accountants are owed c. £28,000.00 and an estimated further sum of £16,400.00 is required to cover costs to complete the work. If the lessees have no obligation to contribute, the liability to the accountants will fall on Mr Pickard, or possibly the house owners, a wholly unjust result. Even if the exercise is completed, Mr Pickard will have no power to recover the historic arrears from the lessees, which will result in paying parties having unfairly subsidised defaulters. The draft accounts indicate historic arrears in the region of £115,000.00 (para. 33 PD).

- Mr Pickard will be unable to raise funds, other than from the house owners, to fund proceedings to collect the arrears of service charges arising out of his own demands. The arrears as of 17 March 2019 were £266,502.64, the principal debtors being the lessees of Flats 1,2,3,6 and 9. That figure of course includes monies demanded since 23 March 2018, but it is likely that the arrears arising before that date are also substantial. If not collected, it is the paying parties who suffer the loss.

- All other obligations entered into since 23 March 2018 relating solely to the NewCo land will fall to be met by Mr Pickard without recourse to anyone else.

- In all likelihood the Management Order itself will be discharged, because this Tribunal does not believe it can continue if there are no leasehold properties to manage (paras. 39-40 PD).

- The long-running dispute over apportionment of costs for the estate between lessees and house owners will remain unresolved.

49. These are serious consequences. In reality the Management Order will have been a toothless but very expensive exercise. The intention of the Tribunal in making the order will have been thwarted. The manager, whom this Tribunal appointed, and who appears to have acted throughout in good faith, will be left in a very difficult financial position.

50. It is right that if the Tribunal now requires the participating lessees to procure that NewCo observes the Management Order as if it were bound by it, this is an interference with the contractual rights of NewCo, and with the contractual rights of those who have entered into varied leases. However the Appointment of Manager jurisdiction is itself an interference with contractual rights and the manager's powers can exceed those granted by leases. We find that we have the power, within the wide ambit of discretion granted by section 24(4), to make the following order, namely:

The lessees who control Ditton Place Freehold Company Limited (the registered owner of the land comprised in Title number WSX 398297 pursuant to the Transfer from the Respondent dated 23 March 2018) shall procure that the company shall observe and perform the terms of the Order and abide by the same in all respects as if at the date of registration of the said Transfer the Order had continued to enjoy priority over the company's interest.

51. There will be a penal notice attached to this order, addressed to those individuals who are the current directors of NewCo. The Tribunal has power to attach a penal notice: *Coates v Octagon Estates Ltd* [2017] EWHC 877 (Ch); *Alan Coates v Marathon Estates Ltd* [2018] UKUT 0031 (LC). Its use is justified because of the clear intention of those lessees to subvert the Management Order, not only through the enfranchisement but also by the subsequent variation of the leases.

52. The Tribunal declines to make an order requiring the lessees to procure that NewCo re-convey the NewCo land back to ManCo. This amounts to an interference with property rights, and even if it were human-rights compliant, it goes further than is necessary to restore the effectiveness of the Management Order. It should not be forgotten that the

management regime put in place by the Tribunal will not last forever. As noted in the previous decision, all parties want an eventual separation of the management of the Ditton Place estate. There is no reason why NewCo should not manage the NewCo land once the issues set out at paragraph 51 PD are resolved.

53. The Tribunal also declines to make an order that the lessees must not interfere with the Manager and must give him reasonable assistance. This is simply a repetition of clause 9 of the Order, which remain in force.

54. As a consequence of the above, we also make an order amending the definition of "The Premises" to include *all Premises forming part of the original estate held under Title number WSX 275988 whether or not subsequently transferred*.

Other proposed amendments to the Management Order

55. The Tribunal was provided with a statement of the cash flow position as of 23 January 2019. After ring-fencing monies collected for major works, there was £27,594.92 cash available against debts to third party suppliers of £89,243.73, producing a deficit of £61,648.81. Since that date the deficit has increased to £69,641.00.

56. The Tribunal was also provided with a statement of service/rent charge arrears, not including the historic arrears. The arrears as of 17 March 2019 were £266,502.64, the principal debtors being the lessees of Flats 1,2,3,6 and 9. The sum of £122,423.54 relates exclusively to the NewCo land. A considerable proportion of the arrears relate to monies demanded for major works, the need for which does not appear to be disputed.

(i) <u>Funding for legal proceedings</u>

57. The manager seeks an order requiring the lessees/ house owners to pay £3000.00 each (per dwelling) on account of the costs of funding litigation to recover non-historic arrears of service charges. This sum is based on a budget prepared by the manager's solicitors Dean Wilson on the assumption that proceedings would be required against six persons. The budget covers costs up to but not including trial. Any recovered costs would be credited upon receipt.

58. Subject to the argument regarding the scope of the management order (dealt with above) no party objected to this, aside from Ms Carvalho who thought that Mr Pickard had sufficient funds already. We do not accept that Ms Carvalho's financial calculations are correct. The Tribunal is of the view that the solicitors budget is very generous, and is encouraged by the confirmation, at the hearing, that Mr Urwick is no longer contending that the house owners should pay towards the upkeep of what is now the NewCo land. That concession will hopefully

assist in reducing any argument about the demands made by Mr Pickard, and will reduce the legal costs that may have to be incurred in recovering arrears. However in the absence of real objection the Tribunal will order that each lessee/ house owner pays the sum of £3000.00 per dwelling by 8 May 2019. In so doing the Tribunal also notes that paragraph 4-14 of Schedule 4 to the original leases permits the lessor to recover the full amount of all costs incurred in the recovery or attempted recovery of arrears from the defaulting lessee.

(ii) No set-off

59. Mr Pickard requested an order stating that no Respondent should be entitled to set-off against sums demanded any sum alleged to be owed before 1 January 2017. Ms Carvalho objected to this. However it is in accordance with the legal position as set out in *Maunder Taylor v Blaquiere* and the order will be made.

(iii) Costs protection for Mr Pickard

60. Mr Pickard sought an addition to the Order providing that costs payable to him as manager should include costs reasonably incurred by him in court proceedings including any adverse costs order. On his behalf it was said that the clause 3 of the Order obliges him to use his reasonable endeavours to collect arrears, and that he was entitled to be protected from an adverse costs order so long as he acted reasonably in doing his duty.

61. Mr Heather did not consider that Mr Pickard needed further protection. The Tribunal's view is that, given the difficulties encountered to date, it is appropriate to include an explicit provision which protects Mr Pickard from an adverse costs order unless that order has been made on the ground of his unreasonable conduct. The lessees' rights to apply for an order under section 20C of the Landlord and Tenant Act 1985 would be unaffected.

(iv) Funding to complete forensic audit

62. As explained above the accountants need to be paid c. £44,400.00 to complete the audit. An order was sought that each lessee/house owner should contribute £2500.00 per dwelling to cover this cost. There was no objection to this and the Tribunal will order that this sum is paid by 8 May 2019.

(v) Heating oil/ hot and cold water

63. This affects only the lessees' flats. Each lessee is liable under the lease to pay for their own supply, independently of the service charge. However there is disagreement as to how the overall cost should be apportioned, and there is evidence that not all meters (for which the lessees are responsible) are working correctly. Mr Pickard asked the Tribunal to make orders permitting him to require the lessees to pay, as

an interim measure, on the basis of the floor area of their flats. Some lessees objected to an apportionment based on floor area because eg their consumption is low due to absence. However the Tribunal agrees that the proposed orders should be made to ensure the water and oil bills can be paid until the dispute is resolved. The schedule setting out the interim apportionment is Appendix II to this decision.

64. Ms Carvalho indicated she would like to manage the supply and billing of the water and oil supply. The Tribunal pointed out that there is nothing whatsoever preventing her proposing an alternative method of apportionment which covers payment of past and future bills, or even taking over the supply contracts if all the other lessees and Mr Pickard agree. The parties are referred to clause 8 of the Management Order in this regard. They are encouraged to communicate to resolve this issue.

(vi) Service charge/ rent charge apportionment

65. Mr Pickard sought an order permitting him to take court proceedings to resolve the dispute regarding apportionment of costs between the lessees and the house owners. Mr Heather suggested this was unnecessary as he already has this power. The Tribunal finds that although clause 5 permits him to bring proceedings to recover monies or enforce covenants, it does not explicitly cover proceedings for a declaration, which might be required. The order will therefore be made.

66. However the Tribunal wishes to make clear its view that such proceedings should not be necessary. The principal dispute about apportionment, namely whether the house owners should contribute to the costs of what is now the NewCo land, appears finally to be resolved. The other areas of dispute should be capable of resolution by sensible discussion and negotiation. Litigation should be a last resort.

67. Mr Pickard also sought an order that, pending any determination of apportionment, he could continue to collect service charges/rent charges in accordance with a schedule provided. A copy of this schedule is Appendix III to this decision. There was no specific objection to this and the Tribunal will make this order.

68. Finally Mr Pickard sought an order providing that for a period of 12 months he could collect the service charges in accordance with the original leases, and not the varied leases. In our view this is a necessary corollary to the order we are making to preserve the effectiveness of the Management Order.

69. The amendments to the Management Order are set out in full at Appendix IV to this decision.

Concluding remarks

70. What follows is not part of our decision, but is included in the hope that it will encourage the parties to cooperate. The one matter on which all are agreed is that, in the longer term, there should be a separation of the management. The Tribunal believes that the lessees who wish to rid themselves of the Tribunal's management would best achieve their objective by working pro-actively with Mr Pickard, instead of seeking to obstruct him. The matters to be resolved remain those set out at paragraph 51 of our previous decision:

- apportionment of all costs for the estate is fully agreed or determined, and formally recorded
- the historic service charges are ascertained, balances established and arrears collected
- any positive reserve balance is apportioned between NewCo and ManCo
- current service charges are paid up to date, or liability for them agreed between ManCo and NewCo
- agreements are in place between NewCo and ManCo for payment/recovery of future costs
- the management of NewCo, as successor in title to ManCo in respect of leasehold flats, is on a proper footing.

71. The Management Order remains in force until 24 January 2020, although it could be extended. However there is no reason why all the above matters could not be resolved, with good will on the part of all, before that date, in which case the Tribunal could be asked to discharge the order. That outcome is infinitely preferable to continued litigation, with its attendant substantial costs, and the real risk that it will simply prolong the current management regime.

Dated: 5 April 2019

Judge E Morrison

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an

extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.