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

| | | |
|---|---|---|
| **Case Reference** | **:** | **CHI/45UG/LVM/2019/0011** |
| **Property** | **:** | **Ditton Place School, Brantridge Lane, Balcombe, West Sussex RH17 6JR** |
| **Applicant** | **:** | **Gerard Burton and Michael Rosenfield (Flats 4,7,10,12)** |
| **Representative** | **:** | **Gerard Burton** |
| **Respondents** | **:** | **Lorraine Nunes-Carvalho and Others (list on page 2)** |
| **Legal Representatives** | **:** | **Mr Christopher Heather QC instructed by Fladgates LLP for Mr Urwick/Ms Yrazu-Bajo**<br><br>**Ms Claire Whiteman,Dean Wilson LLP for Mr G Pickard** |
| **Type of Application** | **:** | **Variation of management order: section 24(9) Landlord and Tenant Act 1987** |
| **Tribunal Members** | **:** | **Judge E Morrison**<br>**Judge M Tildesley OBE**<br>**Mrs J E Coupe FRICS** |
| **Date and venue of hearing** | **:** | **24 January 2020 at Havant Justice Centre** |
| **Date of decision** | **:** | **23 March 2020** |

---

**DECISION**

---

**List of Respondents**

1. **Lorraine Nunes-Carvalho (Flats 3 & 9)**
2. **Richard Urwick and Caroline Bajo (Flat 1)**
3. **Walter Gans and Katherine Gans (Flat 6)**
4. **Ross Bradshaw and Sophie Bradshaw (Flat 8)**
5. **Paul Roche and Jo Roche (Waterside)**
6. **John Price and Elizabeth Price (Middle Cottage)**
7. **Ditton Place Management Company Limited (Freeholder of part)**
8. **William Lynch and Kelly Lynch (The Lodge)**
9. **Spencer Carter & Michelle Carter (Bungalow 1)**
10. **Robert Taylor and Susan Taylor (Bungalow 2)**
11. **Ian and Joanne Broomfield (Bungalow 3)**
12. **Gary Pickard (Tribunal- appointed Manager)**

**The application**

1. On 18 September 2019, an application was made by Mr Gerald Burton and Mr Michael Rosenfeld, the lessees of four flats at Ditton Place, to extend the term of a management order made on 24 January 2017 for a further period of three years, the original order being made "for a term of three years from and including 24 January 2017".

## Background

2. The factual background to the application is complex and is set out in two previous decisions of this tribunal dated 7 December 2018 (Case No. CHI/45UG/LVM/2018/0003) and 5 April 2019 (Case No. CHI/45UG/LVM/2019/0001). On 12 November 2019 the Upper Tribunal allowed an appeal by two lessees against the second decision, The Upper Tribunal found that, as a result of a transfer of the freehold of the main house and coach house and their immediate grounds on 23 March 2018 by way of statutory enfranchisement, at a time when the management order had not been protected by entry of a restriction at the Land Registry, the new freeholder was not bound by the management order. The order could therefore apply only to the remainder of the land on the Ditton Place estate ("the amenity land") as from that date. All twelve leasehold flats are within the newly enfranchised land. Six freehold houses on the estate pay a rentcharge in respect of the amenity land. The new freehold company and/or the flat lessees are also required to contribute to the upkeep of the amenity land.

3. This tribunal found that the purpose of the enfranchisement, in which the lessees of seven flats participated, was to evade the management order. Permission to appeal against that finding was refused by the Upper Tribunal.

4. On 3 January 2020 the Upper Tribunal refused an application by the manager, Mr Pickard, for permission to appeal to the Court of Appeal. At the hearing on 24 January 2020, the tribunal was told that the application for permission had been renewed to the Court of Appeal.

## Representation and evidence at the hearing

5. Mr Burton attended, representing himself and his co-lessee Mr Rosenfield.

6. Mr Pickard, the manager, attended, represented by his solicitor Ms Claire Whiteman.

7. Mr Christopher Heather QC represented Richard Urwick and Caroline Bajo, the lessees of Flat 1.

8. The other respondents had all submitted a written response to the application and the following attended the hearing: Ms Nunes-Carvalho (Flats 3 & 9), Mrs Roche (Waterside), Mr and Mrs Price (Middle Cottage), Mr Lynch (The Lodge) and Mr Taylor (Bungalow 2).

9. All were given the opportunity to make oral submissions. The tribunal also heard directly from Mr Pickard on a number of points.

## The parties' submissions

10. Mr Burton, who did not participate in the enfranchisement, wanted the management order to continue. While he accepted that as a result of the Upper Tribunal's decision it could not extend to the enfranchised land, it could remain in effect for the amenity land. This would enable Mr Pickard to complete all those matters which still required sorting out, notably collecting in the historic service charge arrears. Mr Pickard had a deep knowledge and it would be difficult to find anyone else who would take on this task. Mr Burton was also concerned that whereas the other flat leases had now been varied by the new freehold company ("DP Freehold"), the leases of his four flats had not, so there were now two different service charge regimes. He would accept a varied lease but only if he was given a share in DP Freehold and this had not been agreed. He implied that if Mr Pickard were kept on as manager, he could assist in sorting this out. Arrangements were also needed to work out how DP Freehold would interact with the original freeholder of the entire estate ("DP Management") with regard to the amenity land.

11. Mr Heather represented Mr Urwick and Ms Bajo, the lessees of Flat 1, who made the appeal to the Upper Tribunal. Although Mr Urwick applied for the management order in the first place, he became opposed to Mr Pickard's continued management shortly afterwards and that has remained his position. In a statement of case in response to the application, his position was that although he was neutral as to whether Mr Pickard should remain as manager for the amenity land alone, he had concerns about the service charge accounts for the periods up to 31 December 2016, provided in November 2019. These can be summarised as concerns that:
    (i) The accounts were not a forensic audit as had been expected
    (ii) There was a mistake on apportionments with respect to the shared driveway
    (iii) The Flat 1 lessee's balance for 2013 was incorrect as it understated lessee payments for that year.

12. Although not mentioned in the statement of case settled by counsel, Mr Heather also submitted at the hearing that the tribunal had no jurisdiction to vary the original order by extending it, because it had already expired, at midnight on 23 January 2020, a few hours earlier. In support of this proposition he relied on *Eaglesham Properties Limited v Jeffrey* [2012] UKUT 157 (LC). In that case the tribunal had made an

interim management order for 12 months. After the expiry of 12 months, one of the lessees requested a hearing. The Upper Tribunal held that once the original order had lapsed at the end of 12 months, there was no jurisdiction to extend it. Mr Heather acknowledged that *Service Charges and Management*, Tanfield Chamber 4th ed. reaches the opposite conclusion, stating at para.23-53 "On expiry of the management order, management reverts to the landlord, unless … an application has been made before the expiry date for an extension of the order".

13. Miss Nunes-Carvalho took the same position as Mr Urwick (at para. 11 above).

14. Mr Taylor and Mr Lynch confirmed that they, along with their co-owners and the owners of two of the other freehold houses, opposed continued management of the amenity land by Mr Pickard. They wanted DP Management to resume control of the amenity land. While believing that the problems at Ditton Place had been caused by a few flat lessees, they alleged that Mr Pickard had been incompetent.

15. Mr and Mrs Price did not support an extension of the term of the management order, but were concerned that there were many loose ends that needed to be tied up, including collection of service charge arrears, the use of the fund for debt recovery proceedings, and confirmation that apportionments between flat lessees on the one hand, and house-owners on the other hand, were now agreed. Mr and Mrs Price acknowledged that one apportionment issue remained in dispute, namely whether Middle Cottage and The Lodge should have to contribute to the upkeep of the sewerage system, to which these two properties are not connected. The problem is that while the house transfer deeds appear to impose an obligation to contribute, Mr and Mrs Price believe this is a drafting mistake requiring rectification, and until Mr Pickard began managing they had never been required to contribute. They also objected to paying legal fees incurred by the manager due to actions of flat lessees which had nothing to do with the house owners.

16. Mr and Mrs Roche's written submission set out a summary of the issues that have affected the management of Ditton Place and focussed on matters where clarification and completion was required, whether or not the management order was extended. These matters included finalisation of all service charge accounts, recovery of arrears, and clarification of who should pay all the legal costs incurred by Mr Pickard due to actions taken by the lessees. They supported Mr and Mrs Price's position as regards the sewerage contribution and responsibility for the manager's legal costs.

17. Ms Whiteman said that Mr Pickard was willing to continue to manage the amenity land. In light of the ongoing application for permission to appeal, she asked that in any event the management order should not be "dismissed"; it needed to remain alive in some sense so that any successful appeal would have "something to bite on".

18. She explained that she was taken by surprise by Mr Heather's point on jurisdiction, mentioned for the first time at the hearing. She suggested that the position taken in *Service Charges and Management* was correct. *Eaglesham* could be distinguished because here Mr Burton's application had been made before the order expired, and if the order were extended on 24 January 2020 there would be no "gap" in any event.

19. In response to criticisms about the service charge accounts, she submitted that the management order did not mandate a forensic audit. The accountants had said this was not possible, but they had carried out a "forensic exercise" which was extensive and detailed. As regards queries on the accounts, the parties needed to raise all their queries so the accountants could consider everything at one time, rather than piecemeal.

20. Mr Pickard stated that he currently manages about eight properties pursuant to tribunal appointment. He acknowledged that without support from lessees, it was difficult to achieve anything. In hindsight, a three year term for the management order had been ambitious. However he still saw a way forward to collect in the arrears; this had to be done, otherwise those who had paid would effectively pay for those who had not. During the period prior to his appointment, the reserve fund contributed by some lessees had been used to fund current expenditure, due to other lessees not paying their share. Mr Pickard did not think that the owners of the eighteen properties on the estate would be able to resolve the arrears situation themselves. The accountants put the arrears as at 31 December 2016 at £158,534.38.

21. In response to criticisms of the service charge accounts for the periods up to 31 December 2016, finally made available in November 2019, Mr Pickard said that while not a formal audit (which would have cost even more), the accountants had examined every invoice and expenditure voucher available, and reconciled them to the bank account, doing the most thorough job they could. It was accepted that there was a minor apportionment error regarding the driveway. Mr Pickard wanted to receive all queries before going back to the accountant to consider these and to finalise the accounts.

22. In respect of sewerage Mr Pickard explained that having taken advice he felt he had no option but to follow the transfer deeds as regard to Middle Cottage and The Lodge, even though these properties did not benefit from the sewerage system. If not resolved by agreement, the only option was to apply to the court. He confirmed that other disputes about apportionment between the flat lessees on the one hand and the house owners on the other hand had largely been resolved (this was also confirmed by Mr Heather).

23. Mr Pickard stated that he personally was owed more than £37,000.00 for heating oil provide to the flats, and his firm was owed about £25,000.00.

24. Notwithstanding that apportionment in respect of usual service charge items appears to be resolved, it was clear from various comments made to the tribunal that there is no agreement about apportionment of the manager's own fees and the legal costs he has incurred.

## Discussion and determination

25. In the tribunal's decision of 7 December 2018 (paras. 39-40), we considered whether it was appropriate to vary a management order in circumstances where, going forward, there would be no leasehold flats within its scope. We concluded that even if there were no absolute prohibition on so doing, it would be wrong to do so, because the purpose of the legislation was to address management problems involving flats.

26. Even if that conclusion was incorrect - and none of the parties to this application have sought to rely on it - the tribunal decides that the application to extend the order should be refused, for the following reasons.

27. Given the decision of the Upper Tribunal, any management order could remain in effect only as regards the amenity land. The tribunal is not and never has been aware of any significant issues affecting the management of this land. So far as can be ascertained (and unfortunately the original tribunal decision to appoint a manager dated 24 January 2017 does not make findings of fact) the main problems leading to the original application were: (i) lack of service charge accounts (ii) an allegation of misappropriation of funds and (iii) a dispute about the extent to which the house-owners should contribute to the maintenance of what is now the enfranchised land (the main house and coach house comprising the flats, and their immediate grounds).

28. Three years on (i) there are now service charge accounts for all years up to 31 December 2016 (ii) there is no evidence of misappropriation of funds (iii) the apportionment of usual service charge items between the flats and the house-owners is very largely agreed.

29. What has not been achieved is the collection of very substantial service charge arrears owed by some lessees for the periods up to 31 December 2016, the amounts of which have only recently been ascertained. The tribunal accepts that this is an important matter which, in fairness to

30. those lessees (and to a lesser extent the house-owners) who have paid what they owe, should not be left unresolved. There are also significant arrears in relation to service charges demanded by the manager, non-payment of which has posed a significant obstacle to the manager in carrying out his functions.

31. Therefore the tribunal has considered whether it would be right to extend the management order in relation to the amenity land, in order to provide further time for these arrears to be collected by the manager. We have nonetheless concluded that there should be no extension for two reasons.

32. Firstly, although ongoing management of the amenity land alone should be relatively straightforward, our experience is that successful management by a tribunal-appointed manager is usually dependent on the cooperation of the majority of lessees, or at least those who wield the most influence. There is, to put it at its very lowest, a lack of positive support for ongoing management by Mr Pickard from either the lessees or the house-owners, except on the part of Mr Burton.

30. Secondly, collection of the arrears can be addressed otherwise than through a continuation of the management order. Winding up directions can give the manager powers in this respect should it be necessary: *Kol v Bowring* [2015] UKUT 530 (LC) *Chan-Hui & Others v K Group Holding Inc & Others* [2019] UKUT 0371(LC). Furthermore, the relevant freeholder's right to collect the arrears will revive once the management order comes to an end. This point is considered in more detail in our further decision following the hearing of 2 March 2020.

33. For the sake of clarity, we note that neither the tribunal nor the manager can resolve:

    (i) the issue arising from the variation of all leases except those of Mr Burton, resulting in two different service charge regimes as from 23 March 2018;

    (ii) the issue raised by Middle Cottage and The Lodge as regards the sewerage system. Mr Pickard has been entitled to demand rentcharges in accordance with the house transfer deeds unless all relevant parties agree otherwise.

32. There remains the issue as to jurisdiction raised by Mr Heather, who invited the tribunal to determine it, even though we have decided for other reasons not to extend the term of the order. We do not consider it is necessary or right for us to decide the jurisdiction point. It was made without any prior notice; the other parties had no opportunity to consider and respond to it. The facts in the authority relied on by Mr Heather are clearly distinguishable from the situation in this case, and his submission is not supported by the commentary in *Service Charges and Management*. We note that although a party can control when he makes an application, the listing of a hearing is entirely outside his control. The point deserves full argument; we do not need, or choose, to decide it in this case.

Judge E Morrison

Dated: 23 March 2020

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.

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

| | | |
|---|---|---|
| **Case Reference** | **:** | **CHI/45UG/LVM/2019/0011** |
| **Property** | **:** | **Ditton Place School, Brantridge Lane, Balcombe, West Sussex RH17 6JR** |
| **Applicant** | **:** | **Gerard Burton and Michael Rosenfield (Flats 4,7,10,12)** |
| **Representative** | **:** | **Gerard Burton** |
| **Respondents** | **:** | **Lorraine Nunes-Carvalho and Others (list on page 2)** |
| **Legal Representatives** | **:** | **Mr Christopher Heather QC instructed by Fladgates LLP for Mr Urwick/Ms Yrazu-Bajo and Ditton Place Freehold Company Limited**<br><br>**Mr Anthony Tanney instructed by Dean Wilson LLP for Mr G Pickard** |
| **Type of Application** | **:** | **Variation of management order: section 24(9) Landlord and Tenant Act 1987** |
| **Tribunal Members** | **:** | **Judge E Morrison**<br>**Judge M Tildesley OBE**<br>**Mrs J E Coupe FRICS** |
| **Date and venue of hearing** | **:** | **2 March 2020 at Havant Justice Centre** |
| **Date of decision** | **:** | **23 March 2020** |

---

**DECISION AND DIRECTIONS**

---

**List of Respondents**

1. **Lorraine Nunes-Carvalho (Flats 3 & 9)**
2. **Richard Urwick and Caroline Bajo (Flat 1)**
3. **Walter Gans and Katherine Gans (Flat 6)**
4. **Ross Bradshaw and Sophie Bradshaw (Flat 8)**
5. **Paul Roche and Jo Roche (Waterside)**
6. **John Price and Elizabeth Price (Middle Cottage)**
7. **Ditton Place Management Company Limited (Freeholder of part)**
8. **William Lynch and Kelly Lynch (The Lodge)**
9. **Spencer Carter & Michelle Carter (Bungalow 1)**
10. **Robert Taylor and Susan Taylor (Bungalow 2)**
11. **Ian and Joanne Broomfield (Bungalow 3)**
12. **Gary Pickard (Tribunal- appointed Manager)**
13. **Ditton Place Freehold Company Limited**

1. At the conclusion of the hearing on 24 January 2020 the tribunal communicated its decision not to extend the term of the management order. Directions were issued requiring the parties to exchange proposed directions for the winding-up of Mr Pickard's management, with any submissions in support, and listing a further hearing on 2 March 2020. The parties were directed to seek to agree matters so far as possible.

2. Written submissions were received from Mr Burton, Mr Heather QC on behalf of Mr Urwick/Ms Bajo and Ditton Place Freehold Company Limited, Mr Tanney on behalf of the manager, and some of the house-owners: Mr Taylor, Mr and Mrs Roche, Mr and Mrs Price. There was no significant degree of agreement between the position advocated by Mr Heather and the views of the other parties.

3. On 20 February 2020 Ditton Place Freehold Company Limited ("DPF") was joined as a party to the application as requested by that company and by the manager.

4. On 2 March 2020 the tribunal heard a full day of submissions as to what winding-up directions should be made. In reaching its conclusion as to what is required and proportionate, a number of principles have guided the tribunals' consideration. Firstly, we have considered the position of the owners of the six freehold houses on the estate. They were made subject to the management order because the freeholder, Ditton Place Management Company Limited ("DPM") was responsible both for the buildings comprising the twelve flats and their private grounds, and the amenity area which benefits all those on the estate. However, the house-owners are not responsible for the extensive and expensive litigation which has ensued as a result of the lessees' enfranchisement, and should not have any liability to meet the costs incurred in connection with that litigation.

5. Secondly, in the Order of 13 January 2020 the Deputy Chamber President of the Upper Tribunal, in refusing the appellants' request for a section 20C order against the manager, stated:

   *The respondent is a tribunal appointed manager, appointed on the application of the leaseholders of the Ditton Place development, including the appellants. He has discharged his responsibilities in that capacity on behalf of the leaseholders and freeholders. It has not been suggested that he has acted improperly in relation to these proceedings and it cannot sensibly be suggested that he should be personally responsible for the costs incurred.* ***By one route or another*** *[emphasis added] he is entitled to be indemnified in respect of the reasonable costs incurred.*

6. At the hearing on 2 March 2020, Mr Heather conceded the effect of this was that the manager's legal costs in relation to both the second First-tier tribunal hearing in March 2019 and the appeal to the Upper Tribunal should be recoverable through the service charge. In our view there is no reason why the same principle should not apply to the First-tier tribunal

hearing in November 2018. This was the hearing of an application by the lessees who had participated in the enfranchisement, and it arose wholly as a result of it. We come to the same conclusion in relation to the hearings on 24 January 2020 and 2 March 2020. We note that paragraph 4 of the management order explicitly provides that the manager is entitled to recover legal costs through the service charge.

7. Thirdly, we do not accept Mr Heather's submission that, apart from the concession mentioned above, the lessees cannot be required to pay management fees or to reimburse the manager for other costs incurred for the enfranchised land in relation to the post-enfranchisement period. The manager carries out his functions "in his own right as a court-appointed official": *Maunder-Taylor v Blaquiere* [2002] EWCA Civ 1633 at [41]. Until the Upper Tribunal decision of 12 November 2019 the manager was acting with the full sanction of the tribunal, a stay pending appeal having been requested and refused. He is entitled to be paid for his work, and to be reimbursed/indemnified in relation to other reasonable expenditure/liabilities he has incurred during this period. Aside from the lessees the only other persons to whom the manager can look for reimbursement are the house-owners. Recourse only to them would be unconscionable; the majority of the general management tasks have been directed to the enfranchised land, and we have explained at paragraph 4 why the house-owners should not be burdened with the litigation-related costs.

8. Fourthly, we take into account how the present difficult circumstances have come about. Mr Heather puts forward no solution to procure funds to meet the manager's liabilities. We consider that in attempting to provide a solution to that problem it is right to acknowledge the following:

- Mr Urwick, who owns the largest flat and is liable for the greatest proportion of service charges, was the lead lessee in applying for the appointment of a manager. He, and another of the lessees who made the application, Mr Keith Sellers, have the greatest service charge arrears in relation to the periods prior to the manager's appointment.

- Mr Urwick's advisers drafted the management order. It was flawed, in that it wrongly placed responsibility for registration of the restriction on the respondent DPM, whose alleged mismanagement was the basis for the application. It is this very error which has been exploited by the lessees.

- Having obtained a management order some of the lessees, led by Mr Urwick and Ms Carvalho, did not support him, and increased costs by making continual challenges and complaints.

- Mr Urwick made allegations of fraud and misappropriation of funds by the previous management, resulting in a very expensive forensic accounting exercise (which found no evidence of misappropriation)

- Mr Urwick and Ms Carvalho were the prime movers in bringing about the enfranchisement, which was itself a breach of the management order and the purpose of which was to evade it

- Mr Urwick has financed the lessees' litigation consequent upon the enfranchisement

- Mr Urwick and Ms Carvalho are the principal debtors in relation to service charges demanded by Mr Pickard.

9. Fifthly, it is essential to bring about finality and avoid further satellite litigation in respect of the winding-up and the manager's liabilities. Mr Heather's suggestion that the parties simply revert to the contractual position does not solve the real issues and creates continuing uncertainty.

10. With those principles in mind we turn to specific areas addressed in the winding up directions and explain our reasoning.

Preparation of outstanding service charge accounts

11. There are no accounts for the period of the management order; they must be prepared without delay as part of the winding-up, keeping costs to a minimum. Mr Heather's suggestion that DPF should prepare the accounts for the enfranchised land for the period 23 March 2018 onwards is rejected because (as explained below) these service charges are to include costs which Mr Urwick/DP Freehold object to paying.

Apportionment of general management fees (and associated legal advice) – excluding the cost of the tribunal proceedings

12. There has been no agreement on the apportionment of these costs. The variations to the management order made on 5 April 2019 provided that pending any determination of apportionments due or until further order the manager could continue to collect charges in accordance with an attached schedule of apportionments. That schedule did not specify management fees but they were understood to fall under a category marked "shared equally – 1/18th each". It was the tribunal's understanding that the purpose of the schedule was to note concessions finally made by Mr Urwick regarding other aspects of apportionment[1], and to set out a basis for future interim demands which it was hoped would persuade people to start paying.

13. Mr Heather proposes that the costs should be recovered on a 1/18th basis in accordance with that schedule. We disagree. This is neither the contractual nor a reasonable position.

[1] Mr Urwick continued to contend, until c. March 2019, that the house-owners should be contributing to the cost of maintaining the extensive private grounds of the flats.

14. Schedule 6-3.12 and 3.15 of the lease provide that the costs of employing persons to carry out the landlord's obligations under the lease, administering the Main House and the Coach House, and performing and preparing service charge accounts are recoverable through the service charge. The landlord's obligations extend to the entire estate. The service charge is payable by the lessees in specified proportions which add up to 100%. There is a proviso to clause 1.1.19 of the lease that the amount payable is net of any contributions from the owners of the freehold units on the estate.

15. The freehold transfers provide for payment of a rent-charge. The Fifth and Sixth Schedules include provision for each transferee to pay a proportion of the transferor's expenses of carrying out its obligations with respect to the Amenity Areas, including (at 1/10$^{th}$ each) the costs of employing managing agents and paying persons in connection with the upkeep of the Estate and the Amenity Areas. The "Amenity Areas" are defined as all parts of the Estate not contained within individual Transfers intended for the communal use of the residents on the Estate. The Estate is defined as the land now or formerly comprised in Title WSX275988. The house transfers, except in one instance, pre-date the leases of the flats.

16. The tribunal takes the view that, notwithstanding the wide definition of Estate in the transfers, the combined effect of these provisions is that the lessees pay all costs of management in relation to what is now the enfranchised land, and the lessees pay (in their specified proportions) 40% of the management costs in relation to the amenity land, the house-owners paying the remaining 60%.

17. Clause 5(vi) of the management order gives the manager the power to ascertain the correct proportions of the estate costs to be recovered from lessees and owners of the freehold units.

18. Where one person is managing the whole estate the costs will need to be apportioned between services which are provided only for the lessees, and those provided for the amenity land. It is noted that in the accounts recently prepared by Carpenter Box for years 2013-2016 on the instructions of the manager, the fees of the former managing agents have been apportioned 2/3 to the Main Building and Coach House and 1/3 to the Amenity Areas. The same approach has been used in the accounts for 2010-2012. This appears entirely reasonable and therefore the tribunal directs that this be used in the accounts to be prepared for the period 1 January 2017 – 24 January 2020. The result is that the lessees will pay 2/3 of the management fees and will pay 40% of the remaining 1/3 of the management fees, all in their respective proportions as set out in their lessees. The house-owners will pay 60% of 1/3 of the management fees (10% each as set out in the transfer deeds).

19. Further, as set out above at paragraph 7, the tribunal finds that the lessees remain liable for these costs even if incurred post-

enfranchisement. If justification for this needs to be found in the management order, we refer to clauses 4 and 10 (vi) thereof. The management order did not cease to apply to the lessees post-enfranchisement.

Payment of manager's and legal fees in relation to the tribunal proceedings

20. For the reasons set out at paragraphs 5 and 6 above we direct that these costs are to be recovered from the lessees through the service charge.

Payment of outstanding liabilities

21. The tribunal has been told that the outstanding liabilities of the manager are as follows:

**£39,707.94** as set out on schedules provided by the manager to the tribunal (including management fees)
**£1900.00** for removal of scaffolding on the Main House and Coach House following major works
**£31,949.41** for heating oil supplied to lessees purchased by the manager on a credit card
**£820.00** owed to Carpenter Box
**£84,212,22** unpaid legal fees incurred by Dean Wilson LLP (excluding the fees in relation to the request for permission to appeal and appeal notice in the Court of Appeal)
**£12,978.30** fees incurred by the manager specifically in relation to the tribunal proceedings

These figures total **£171,567.87**. The tribunal determines that this if the final sum for which provision must be made.

22. The funds potentially available to meet these liabilities comprise general service charge funds totalling £29,976.86, a major works fund of £12,939.09 (relating to the lessees' buildings), accountancy fees fund of £14.57 and over-collection reserve of £184.66. There is also £50,818.01 remaining in a fund set up pursuant to the tribunal's order of 5 April 2019 specifically to fund recovery of arrears.

23. DPF has stated it will take responsibility, subject to sight of the invoices, for the following items which are comprised in the schedules of creditors:
Cleaning - £788.50
Boiler maintenance - £874.46
Door entry system - £84.00
Common parts light and power - £411.77
In addition DP Freehold has paid the insurance premium of £2875.21 for the enfranchised land.

If DPF pays the above bills totalling £5033.94, this reduces the liability to general creditors to £34,674.00.

24. All the available funds, aside from the ring-fenced debt recovery fund, may be retained by the manager to meet these liabilities. Clearly there will be insufficient monies to meet those liabilities in full. The only way to make good the deficit is to give the manager the right to recover arrears of service charges.

Right to recover arrears of service charges and rent-charges

25. The tribunal heard submissions from Mr Heather and Mr Tanney as to who had the right to pursue non-payers for arrears. Both counsel referred to the recent Upper Tribunal decision in *Chaun-Hui & Others v K Group Holding Inc & Others* [2019] UKUT 0371(LC). In that case the management order expired in 2013. In 2016 the maintenance trustee (who was the landlord for the purpose of recovering service charges) sought to recover arrears of service charges demanded by the manager. No directions had been given by the tribunal as to recovery of those arrears and the lessees contended that the maintenance trustee had no right to collect them. The central argument was whether demands made by a manager were "service charges" (answered in the affirmative), but there was also an issue as to whether there should have been an assignment of the right to sue. At paragraph 63 Judge McGrath said "In my view, the arrears that are "service charges" accrued to the maintenance trustee when the management order… came to an end… there was no need for a Deed of Assignment…".

26. Mr Heather submitted that *Chaun Hui* was therefore authority for saying that the right to recover arrears vests in the appropriate contracting party once the management order ends. Thus in this case the right to recover any arrears accruing up to 22 March 2018 had re-vested in DPM, and the right to recover arrears accruing after that date vested in DPF for the enfranchised land and in DPM for the amenity land.

27. Mr Tanney argued that the passage referred to by Mr Heather was not central to the Upper Tribunal's decision and was not fully argued. Furthermore, the facts at Ditton Place were very different. In *Chaun - Hui* the management order had expired without any request for winding up directions and recovery of arrears was first attempted some years later. The manager had no outstanding liabilities. In this case Mr Pickard is exposed to substantial liabilities and unless he is able to recover arrears he will be left financially exposed to a significant degree. Mr Tanney said that the tribunal had the power to authorise this, not only in relation to demands he had issued as manager, but also in relation to the historic arrears otherwise recoverable by DPM. It was DPM's failure to register the restriction that had resulted in expenditure that could not be met from available funds.

28. Mr Heather then accepted that *Chaun Hui* was addressed to a situation where there had been no tribunal intervention. He conceded that the tribunal's winding-up jurisdiction could extend to directions regarding

the recovery of arrears, but urged us not to adopt this route. Collection of arrears might be met with many defences and it could take years.

29. This tribunal agrees with Mr Tanney and finds that it does have the power to make winding-up directions regarding the collection of arrears. *Chaun Hui* was concerned with the default position if no directions are given. At paragraph 62 of that decision it is noted that winding up duties can be set without limit of time, until properly discharged. Here Mr Tanney has requested directions that the manager should be permitted to pursue all arrears.

30. It cannot be right that the manager, appointed by the tribunal, is left out of pocket for services and works reasonably provided. We decide that the proportionate approach is to give the manager the right to pursue service charge and heating oil arrears arising during his period of management, to include arrears of service charges demanded after enfranchisement. These proceedings may be funded by the lessees' contributions to the debt recovery fund. The contributions made to that fund by the house-owners should be returned to them. If any lessee has not paid the previously ordered contribution of £3000.00 towards the debt recovery fund, the manager may also sue to recover this sum.

Heating oil

30. This is not a service charge. Under schedule 4-4.7 of the leases each lessee is responsible for their own utilities including oil. A variation made to the management order made on 5 April 2019 provided that sums due were to be paid to the manager on demand. If the lessees do not pay the sums invoiced to them the manager may issue proceedings for recovery, and may use the debt recovery fund to fund the proceedings.

## Directions

31. These are annexed to the Decision.

Judge E Morrison

23 March 2020

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.

**WINDING – UP DIRECTIONS**

DPF: Ditton Place Freehold Company Limited
DPM: Dittton Place Management Company Limited

Accounts

1. The service charge accounts for years ending 31 December 2013 – 31 December 2016 were signed off by the manager on 4 November 2019. They fulfil the requirements of the leases and paragraph 7.10 of the RICS Service charge residential management code 3rd ed. The manager need take no further action with respect to these accounts. No queries raised of the accountants or the manager need be addressed unless the attendant costs are paid in advance by the person raising the query.

2. Service charge accounts for the period 1 January 2017 – 24 January 2020 are to prepared by the manager by 18 May 2020. This is in accordance with the Schedule of functions and services in the management order. The accounts must fulfill the requirements of the leases and paragraph 7.10 of the RICS Code. The accountants must be instructed that their fees must not exceed £2500.00 + VAT.

3. To reduce costs, and for convenience and practicality, the accounts shall be drawn up for two periods only. The first period will run from 1.1.17 – 22.3.18 and shall clearly distinguish between costs in relation to the land which is now comprised in Title No. WSX 398297 ("the enfranchised land") and land now comprised in Title No. WSX 275988 ("the amenity land"). General management fees and legal costs not associated with any of the proceedings before the First-tier Tribunal and Upper Tribunal shall be apportioned 2/3 to the enfranchised land and 1/3 to the amenity land, consistent with the apportionment applied in the previous four years.

4. The second period will run from 23.3.18 – 24.1.20 and separate sets of accounts for (i) the enfranchised land and (ii) the amenity land must be prepared. The manager's general management fees and legal costs not associated with the proceedings as above are to be apportioned as above. The manager's time costs and the legal fees incurred in connection with all the tribunal proceedings are to be apportioned to the enfranchised land.

5. The accountancy fees for preparing these accounts are to be apportioned as stated at paragraph 3 above and included in the accounts for the second period. The manager shall not be entitled to recover any costs for his work in preparing these accounts as this is covered by the standard management fee already charged.

Liabilities of the manager

6. The manager is owed £ 31,949.41 (as of 2 March 2020) for heating oil he has purchased on behalf of the lessees. Invoices have been issued by the manager to the lessees and they are payable on demand. If not paid the manager may issue legal proceedings for recovery as set out at paragraph 10 below. No further interest is to be added to the debt, other than pursuant to the County Courts Act 1984.

7. The manager is owed £39,707.94 (as of 2 March 2020) for service and rent-charge expenditure in respect of which he has a personal liability to third parties or in respect of his own management fees. Subject to sight of the original invoices DPF has agreed to take responsibility for £5033.17 of this sum as set out in the accompanying decision.

8. Such of the sum of £39,707.94 as is not met by DPF within 28 days, together with the sum of £820.00 owed to Carpenter Box, is to be met by the monies held in the general service/rent-charge funds, which stood at £29,976.86 as of 2 March 2020. The remaining balance shall be met from any other service charge funds operated by the manager, including the major works fund as a last resort.

9. The additional sum of £1900.00 owed to contractors for removing the scaffolding to the coach house is to be met from the major works fund which stood at £12,939.09 as of 2 March 2020.

10. The manager has also incurred substantial legal fees which remain unpaid in the sum of £84,212.22 and his own fees of £12,978.30 for dealing with the tribunal proceedings, which are additional to the liabilities already mentioned. Any remaining funds in the service charge accounts may be applied towards these costs. He shall also have the right to take proceedings to recover service charge arrears and unpaid heating oil charges relating to the period 1.1.17 –24.1.20 against any one or more of the lessees as he sees fit, and shall have the power to charge his reasonable costs of recovery (including legal costs, costs of and incidental to making any demand, and his time costs) to the debtor as if the same were an administration charge owed to him by the debtor in accordance with paragraph 4-14 of the lease. In order to limit the scope of any objections to payment, he may limit his claim to the sum required to reimburse him, and should seek to recover the costs of proceedings from the debtor. The lessees' contributions to the debt recovery fund may be used by the manager to fund the recovery proceedings, but must be reimbursed to the extent that the costs are otherwise recovered. The manager must consider and pursue recovery in the most cost –effective manner. Any surplus funds recovered over and above the amount required to meet the manager's liabilities must be paid over to DPM in the first instance, or if all DPM arrears are recovered, to DPF.

11. The manager may also issue proceedings against any lessee who has not made the ordered contribution to the debt recovery fund.

<u>The debt recovery fund</u>

12. The manager shall return in full the contributions to the debt recovery fund made by the house-owners by 20 April 2020, the expenditure already made from the fund to be equally apportioned between the lessees.

13. Any lessee in arrear who pays in full prior to issue of proceedings against them will be entitled to a return of their contribution to the debt recovery fund, less costs already expended on the recovery of that lessee's debt.

Entitlement to credit

14. Any lessee or house-owner who has paid more than they owe in service charges or rent charges will entitled to a credit (from DPM or DPF as the case may be) against future charges.

Recovery of arrears by DPM and DPF

15. No assignment being necessary, DPM has the right to recover arrears of service charges and rent charges in respect of all periods up to 31 December 2016.

16. Once any proceedings commenced by the manager are finally determined, the manager shall execute:

    (i) a deed of assignment to DPM of all his rights to recover service charges and rent charges for the period 1 January 2017 – 22 March 2018 and of his rights to recover such charges in respect of the amenity land for the period 23 March 2018 – 24 January 2020

    (ii) a deed of assignment to DPF of all his rights to recover service charges for the period 23 March 2018- 24 January 2020 in respect of the enfranchised land.

Handover of funds and documents

17. Subject to the above directions, the manager shall procure that any credit balances in the bank accounts he has operated are transferred to DPM as the principal creditor in relation the historic service charge arrears.

16. The manager shall by 4 May 2020 deliver to DPF and DPM identical copies (electronic copies wherever possible instead of paper copies) of all accounts, draft accounts, bank statements, books, papers, memoranda, records, computer records, minutes, correspondence, emails, facsimile correspondence, certificates, invoices, demands, notices, contracts and all other documents as are relevant to the management of the Estate that are in his possession, custody or control including (for the avoidance of doubt) copies of all documents which were supplied to Carpenter Box and/or referred to within the accounts prepared by Carpenter Box, but excluding any document to which legal professional privilege or confidentiality applies.

Manager's proposed appeal to Court of Appeal

17. If the manager elects to pursue his proposed appeal against the decision of the Upper Tribunal he will do so at his own expense and risk as to costs and shall not be entitled to seek any reimbursement from the lessees.

18. The parties should consider a compromise whereby any potential objections to the reasonableness and payability of service charges are waived in return for the manager withdrawing his notice of appeal.

Removal of Restriction at Land Registry

19. Any restriction registered against Title Nos. WSX 398297 or WSX 275988 further to paragraph 15 of the management order is to be cancelled.

23 March 2020