



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

<b>Case reference</b>	<b>:</b>	<b>LON/00AG/LVM/2022/0015</b>
<b>Property</b>	<b>:</b>	<b>Melrose Apartments, 6 Winchester Road, London NW3 3NT</b>
<b>Applicant</b>	<b>:</b>	<b>Mr Michael Maunder Taylor, Tribunal-appointed manager</b>
<b>Respondent</b>	<b>:</b>	<b>Cantelsa (IOM) Limited, freeholder</b>
<b>Interested persons</b>	<b>:</b>	<b>Mr Ewan Mackie &amp; Mr Joseph Pitt of Fraser Real Estate, LPA receivers</b>
<b>Type of application</b>	<b>:</b>	<b>Variation of order for the appointment of a manager</b>
<b>Tribunal members</b>	<b>:</b>	<b>Judge Timothy Powell, Kevin Ridgeway FRICS &amp; Mark Higgin FRICS</b>
<b>Venue</b>	<b>:</b>	<b>10 Alfred Place, London WC1E 7LR</b>
<b>Date of decision</b>	<b>:</b>	<b>3 March 2023</b>

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**DECISION**

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**SUMMARY OF THE TRIBUNAL'S DECISIONS**

- (1) The Tribunal has made the variations to the Management Order sought by the Applicant Tribunal-appointed manager, with some drafting changes that are explained in the decision below.
- (2) The accumulated variations are incorporated into the Varied Management Order annexed to this Decision

**BACKGROUND**

1. This was an application under section 24(9) of the Landlord and Tenant Act 1987 (the "Act") by Mr Michael Maunder Taylor, the Tribunal-appointed manager, who sought variations to an existing order appointing him as manager of Melrose Apartments, 6 Winchester Road,

London NW3 3NT (the “Property”). The existing order of appointment is dated 15 March 2021 and it expires on 14 March 2024. It was previously varied by the Tribunal on 16 June 2021 and 21 December 2021.

2. In summary, Mr Maunder Taylor sought variations that would require the Respondent freeholder, Cantelsa (IOM) Limited, to: notify him of any sale, transfer or surrender of any of its interests in the property; obtain covenants from purchasers to contribute to the service charge; be liable for shortfalls in payments of service charges by any purchaser or leaseholder; pay to him the current and any future service charge arrears in respect of commercial units A-B and C-D; and provide information regarding the occupation of those units. In addition, the manager sought a Penal Notice to be added to the beginning of the Management Order to ensure future compliance.
3. The Respondent freeholder, Cantelsa (IOM) Limited is a limited company registered in the Isle of Man. The development owned by the Respondent comprises 76 residential flats, several houses and two commercial units on the ground floor of the main building.

#### **Case management hearing**

4. A case management hearing took place on Tuesday, 18 October 2022 by video conferencing. The Applicant did not appear in person, but he was represented by Mr Daniel Dovar of counsel. The Respondent did not appear and was not represented, though its solicitors were aware of the hearing. Mr Stan Gallagher of counsel appeared on behalf of a Mr Trimmatis, said to be the “ultimate beneficial owner of the Property” though his exact relationship to the Respondent company was not known. On that occasion, the Tribunal permitted Mr Gallagher to make observations on the application and the directions sought, albeit that he did not act for any of the parties. Although also notified of the hearing, neither of the fixed charge receivers of the Property appointed under the Law of Property Act 1925 attended, nor were they represented.
5. In discussion with those present, directions were given that, amongst other things, provided for: the Respondent to file and serve a statement of case by 4 November 2022 or be debarred; the fixed charge receivers, Mr Ewan Mackie and Mr Joseph Pitt, to be joined as Interested Persons and, if they wished, to file and serve a statement of case and/or observations on the application; the Applicant to reply and/or submit further evidence; and dates to avoid to be provided for a hearing.
6. On 4 November 2022, the Respondent filed and served a Statement of Case, drafted by Mr Gallagher and signed by its solicitor, Mr Pattihis of AxiomDWF solicitors. By the same date, the Interested Persons filed and served a Statement of Case.

#### **Hearing**

7. A hearing was arranged on Wednesday, 8 February 2023. On 7 February, the solicitors acting for the Interested Persons, Weightmans LLP, wrote

to the Tribunal to say that, in the interest of saving costs, their clients did not intend to be represented at the hearing but they would like the Tribunal to take account of the points made in their Statement of Case, together with the Statement of Case filed by Respondent “who we expect will be represented.”

8. At the hearing, the Applicant appeared and was represented by Mr Dovar of counsel. There was no appearance from the Respondent. The Tribunal delayed the start of the hearing by 30 minutes, in case travel difficulties were to blame; but, when called by the Tribunal’s case officer, the Respondent’s solicitors said they were not instructed in relation to the hearing.
9. The hearing then proceeded in the absence of the Respondent and Interested Persons, but with the benefit of live oral evidence from the Applicant, together with a late witness statement from him (largely updating figures), and a very helpful skeleton argument from Mr Dovar. Despite their non-appearance, the Tribunal nonetheless considered the Respondent’s and Interested Persons’ Statements of Case throughout the hearing.
10. The background to the application was set out in the detailed Grounds for Variation. The Tribunal’s decisions on the variations sought were informed by the following facts found on the basis of the evidence presented at the hearing.

### **FINDINGS OF FACT**

11. The Tribunal last considered variations of the Management Order at a hearing on 20 September 2021, resulting in the written decision of 21 December 2021. On that occasion, the Tribunal made all the variations sought by the manager, but not that relating to outstanding service charges owed by the commercial lessee of Unit A-B, Huggle Limited.
12. That company had vacated the premises on 28 July 2021, owing some £17,265.04 in unpaid service charges. The manager sought an order requiring the Respondent freeholder to pay that shortfall to him. The Tribunal, at paragraph 47 of its decision, declined to make the requested variation as it considered that “it is premature to make an order in the terms sought and that the Applicant [manager] should seek to collect the service charges from Huggle that it considers it is owed.”
13. Following the Tribunal’s indication, the manager sought to recover the service charges from Huggle through court proceedings, copies of which were shown to this Tribunal. On 5 May 2022, the manager obtained a judgement in default against Huggle in the sum of £59,751.84, representing the accumulate arrears owed by the company since its departure. However, on 30 March 2022, Valentine & Co, licensed insolvency practitioners, had given notice of intention of the directors of Huggle to enter a creditors voluntary liquidation.
14. On 13 April 2022, Valentine & Co published Huggle’s Statement of Affairs from which it was said that there was a deficiency of £884,709

and, accordingly, there was no prospect of the manager being paid the sums outstanding to him.

15. Prior to this, in about January or February 2022, the Applicant was made aware of the fact that another entity may be in occupation of Unit A-B. The Applicant asked the Respondent on various occasions to provide him with information regarding the occupation of that unit and whether the entity in question had any liability to pay service charges. However, the Applicant said, and the Tribunal accepts, that the Respondent ignored these requests.
16. Now, by paragraph 9 of its own statement of case, the Respondent has admitted that an entity known as The Fencing Academy is occupying Unit A-B, “under licence”. However, no further details have been provided and the Applicant does not know when The Fencing Academy started to occupy that unit, nor whether it has a liability to pay service charges.
17. Turning to Unit C-D, the Respondent’s statement of case says this is run as a convenience store. The unit had been occupied by Fairfield Capital Limited (‘FCL’) pursuant to a lease dated 8 February 2011. The Applicant issued proceedings against FCL in October 2021 for outstanding service charges. On 18 February 2022, the lease for unit C-D was terminated by way of a deed of surrender with the Respondent. That deed of surrender provides for FCL to be released from certain liabilities, including service charge arrears. In particular, the deed included a release to pay charges in relation to the replacement of cladding of block B at the property.
18. Further, on the same day as the deed of surrender, the Respondent granted a new lease to a company known as building structure limited (‘BSL’). That lease excluded BSL from contributing to certain charges and placed a cap on the insurance contributions that could be collected (clause 3.2). The directors and shareholders of FCL and BSL are the same persons.
19. The Applicant submitted that by releasing FCL from its obligations and adjusting the sums recoverable under the new lease to BSL, the Respondent had interfered with his ability to manage and had therefore breached paragraph 3 of the Management Order and paragraphs (vii) and (viii) of the Insurance provisions and paragraphs (vii) and (ix) of the Additional Powers for the Manager provision of the Schedule of Functions and Services.
20. According to the Respondent, the deed of surrender “was an arms’ length transaction actuated by ordinary commercial motives”. While admitting that the new lease to BSL has a restricted lessees liability to contribute to service charges, the Respondent submitted in its statement of case that the management order did not prevent the grant of the BSL lease, nor did it prevent the Respondent from accepting a surrender of fcl’s lease , whether as a matter of principle, or in the terms of the deed of surrender that was entered into.

21. The Respondent's position was summarised as follows: "The Respondent is the freehold owner of the commercial units. It has acted reasonably, pragmatically and entirely in accordance with ordinary commercial principles and motives in the letting of the commercial space that it owns. Accordingly, the allegations ... as to "repeated attempts of the Respondent to frustrate the management order" are without foundation and are denied."
22. At the hearing, the Applicant referred to two documents that he had prepared for the interested persons (as joint fixed charge receivers over the property). These showed that the current service charge arrears in respect of unit A-B were £100,846.98 and in respect of unit C-D, £58,235.52. The Applicant expressed grave concern about the impact of these arrears on the finances of the development and his ability to manage it, if he were not able to recover the shortfalls from the Respondent. The shortfalls affected not only the day-to-day management and insurance of the property, but also the contributions to be paid toward the planned renewal of cladding on the building, which was likely to cost in the region of £6 million.
23. Accordingly, among the variations sought, the Manager sought three variations the effect of which would make the Respondent landlord liable to the manager for any shortfall in service charges that were not paid by its tenants. One variation would cover any bad debt owed by any leaseholder and the other two specific sums owed by way of outstanding service charges in respect of the two commercial units, Unit A-B and Unit C-D.

### **DECISIONS ON THE VARIATIONS SOUGHT**

24. The Tribunal determines that the Management Order shall be varied as sought in the Grounds for Variation, with certain textual adjustments mentioned below. As a result, the current paragraph 6 will be replaced with a new paragraph 6; new paragraphs 7 to 12 will be inserted after it; and the current paragraph 7 will be re-numbered paragraph 13.
25. The accumulated variations are incorporated into the Varied Management Order annexed to this Decision.
26. Each of the variations is dealt with below, in turn, together with the reasons for making them.

### **Variation 1: Shortfall**

27. The Management Order shall be varied to include the following wording:

*The Manager shall be entitled to recover from the Respondent any bad debt, which arises by way of a shortfall in recovery of service charge from a leaseholder for any reason, including but not limited to, insolvency or any insolvency or company related legislation. The Respondent shall be liable to pay any bad debt within 21 days of a demand by the Manager, where:*

- a. *There is no reasonable prospect of the Manager recovering the bad debt; and*
- b. *The Manager serves on the Respondent a demand identifying:*
  - i. *The total sum claimed;*
  - ii. *The manner in which it has been calculated;*
  - iii. *The unit to which it relates;*
  - iv. *The reasons why it is said to be a bad debt.*

### **Reasons**

28. While the interested persons had no comment on this variation, the Respondent submitted that “The proposed variations so as to make the Respondent liable in default of payment by any of the leaseholders is excessive and disproportionate and should not be upheld: it is unjust for the Respondent to stand surety for its tenants. As contended above, shortfalls should be made up by the sponsoring tenants who elected to apply to have a statutory manager appointed so as to displace the Respondent’s powers and duties under the terms of the leases ... The manager too elected to accept the appointment by allowing himself to be put forward upon the application of the Applicant lessees. It is respectfully contended that the manager should have only done so if the sponsoring lessees were prepared to underwrite both his remuneration, and any shortfalls and, to generally indemnify him in the exercise of his appointment as the statutory manager of the building.”
29. The Tribunal rejects the Respondent’s submissions. Adopting the submissions by Mr Dover in his skeleton argument, the Tribunal is satisfied that it has power to make a landlord liable for shortfalls in recovery of service charges from any of the leaseholders.
30. The Tribunal’s jurisdiction under section 24 of the Landlord and Tenant Act 1987 is a wide one, as was made clear in *Maunder Taylor v Blaquiére* [2003] 1 WLR 379, CA. As stated by Aldous LJ in paragraph 38: “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.” (and see also paragraphs 41-43). More specifically, the issue of a manager recovering leaseholders’ service charge arrears from a landlord was considered by the FTT in *Unsdorfer v Riverside Crem 3 Limited*, LON/00BG/LVM/2021/0005 (28 April 2021). Judge Vance, referring to the relevant authorities, held at paragraph 44 that there was no fetter on the Tribunal that prevents it from varying a management order to allow for the recovery from the landlord of service charge arrears of a leaseholder (in that case, a commercial leaseholder facing a Companies Act restructuring plan that affected creditors). There was no appeal against the Tribunal’s jurisdiction to make such an order. However, on appeal to the Upper Tribunal on other issues in *Riverside*

*Crem 3 v Unsdorfer* [2022] UKUT 98 (LC), Judge Vance's decision was referred to several times, including at paragraph 44, where Deputy Chamber President, Martin Rodger QC said that the order made by the FTT was undoubtedly of a type which it has power to make and there was no question of the FTT having exceeded its jurisdiction. Indeed, the previous Tribunal in this matter, at the September 2021 hearing, accepted they had such power and in respect of sums accrued prior to the management order (see paragraphs 46-47 of the decision).

31. This Tribunal is satisfied that had the current management order not been imposed in respect of these premises, then in the normal course of events, the Respondent would be liable to provide such services or works as are required under the leases and to make up any shortfall in recovery of complying with the costs of them. Mr Dovar suggested that this would be so, whether any shortfall was due to either: (a) the service charges not aggregating to 100%; or (b) a default in payment. In relation to the former, no manager would take on such an appointment unless the management order required the landlord to meet that shortfall. The same principle applies, he said – and the Tribunal accepted – in relation to where a tenant has defaulted: the landlord must meet that shortfall as they would do if no management order had been imposed.
32. The Tribunal also accepted that a risk of insolvency is one that the landlord must take, not the manager. To find otherwise would be to enable the Respondent to avoid a risk, which it had already accepted when it granted the lease of Unit A-B to Huggle Limited, by the fact that it had so poorly managed its estate that a management order was made; and that would be a perverse outcome.
33. It is also relevant that the Respondent has chosen the various tenants of the estate and the terms upon which they are granted leases. The Respondent also continues to have significant rights in relation to all the tenants; not least the ability to forfeit. The Tribunal therefore accepts Mr Dovar's submission and holds that there is no unfairness in passing on the ultimate liability for any shortfall to the Respondent.
34. In this case, the variation seeks to ensure that the manager can carry out the functions required of him under the management order. The provision of the services or works, for which a contribution is recoverable, arises from the management order. It follows that, as part of the scheme of management imposed by a management order, those works or services are ones which the leaseholders are entitled to receive. If the costs of providing those works or services are not recovered or paid in full, then the services or works will not be provided or will be provided at a much greater cost. In short, the scheme of management will be frustrated. In *Queensbridge Investments Ltd v Lodge* [2015] UKUT 635 (LC), the risk of underfunding justified an order that the manager in that case could retain the commercial rents (see para 50). While, as Mr Dovar said, this remains an option in this case, the Tribunal considers that it is far less an imposition to make the landlord liable for shortfalls.

35. Therefore, not to make the variation sought would undermine the entire purpose of the scheme of management and make all such schemes under the 1987 Act readily susceptible to failure.
36. The Respondent's overall contention is that having made the management order, it is now not just to make it liable for shortfalls in relation to Huggle Limited. In relation to Unit C-D the Respondent's contention seems to be based on the fact that it was only acting out of commercial motives and that, in respect of the more general provision, it is excessive and disproportionate. The Respondent suggests that in fact it is the leaseholders who should pay. However, that is not what the leasehold structure that it set up provides for; and there is no ability to adjust the service charges to make up for shortfalls in recovery. The Tribunal agrees with Mr Dovar that that is not surprising, as it was the landlord who took the risk of a shortfall.
37. The test that the Tribunal must apply is whether the term (variation) sought is proportionate '*to the tasks which the tenants were entitled to look to their landlord to perform under their leases*' (see *Sennadine Properties Ltd v Heelis* [2015] UKUT 55 (LC)). Without more, for the above reasons, the Tribunal concludes that it is proportionate to make an order that the manager shall be entitled to recover from the Respondent any bad debt, which arises by way of a shortfall in recovery of service charge from a leaseholder. However, the Tribunal is strengthened in its view of proportionality – and fairness – by its findings in relation to the Respondent's conduct to date, which may be summarised as follows:
- (i) In respect of Unit A-B, the Respondent did not collect service charge debt owed to it by Huggle Limited before the management order was made;
  - (ii) Once Huggle Limited vacated the unit, the Respondent failed to keep the manager informed about the new occupant, the terms of their occupation, or contact details
  - (iii) As set out in the manager's witness statement, since the making of the manager's application, a further shortfall of £44,650 has arisen in respect of Unit A-B as a result of R 'licencing' that unit, but not providing any details;
  - (iv) In respect of Unit C-D, the Respondent let FCL off its service charge arrears when it accepted a surrender of the lease;
  - (v) The Respondent granted a new lease to the unit to a new corporate entity, run by the same individuals;
  - (vi) The new lease had much reduced service charge obligations and the insurance rent was capped; and
  - (vii) As set out in the manager's witness statement, since the making of the manager's application, a further shortfall of around £2,448.61 for the year ending 30 June 2021 has arisen in respect of Unit C-D as a result of the re-letting of the unit with lesser service charge provision; for the year ending March



2022, the sum is around £22,464.55; and for the budget for the year end March 2023, £20,541.23.

38. The Tribunal finds that the Respondent's actions not only materially interfere with the management order but constitute deliberate meddling on the Respondent's part; and those actions have created a shortfall in the service charge account to the detriment of the management and development of estate. Absent a management order, the Respondent would have had to cover the shortfall thus created; and it is only fair and proportionate that the Respondent meet that shortfall now, by way of a variation to the management order.

### **Variation 2: Unit A-B Huggle**

39. The Management Order shall be varied to include the following wording:

*In respect of Unit A-B, the Respondent shall by 24 March 2023 pay to the Manager, the sum of £59,751.84 in respect of the outstanding service charges and costs owed by Huggle Limited to the Manager.*

### **Reasons**

40. As mentioned previously, in its written decision of 21 December 2021, the earlier Tribunal declined to order the variation sought by the manager relating to outstanding service charges owed by Huggle Limited in Unit A-B, because it was felt to be premature. Instead, the Tribunal said the manager should seek to collect the service charges from Huggle, i.e. through proceedings. The manager did as directed, obtaining a judgement in default for £59,751.84, but, as has been seen, there is no prospect of payment.
41. The manager therefore sought an order to recover from the Respondent the areas of service charges due from Huggle Limited. While the interested persons had no comment on this variation, the Respondent submitted that it "cannot be liable for service charges properly due and payable by the tenant during that period. It is not the Respondent landlord's role to provide an indemnity, or a substitute recourse, for the non-payment of the service charges by its tenants."
42. The Respondent contended that the Applicant tenants who had applied to the Tribunal for the appointment of a manager in the first place should bear the financial risk of Huggle not paying its service charges and that "having displaced the Respondent's power to manage the building (that the Respondent owns) it is simply not just to hold the Respondent liable for the debt ('shortfall') claimed by the manager, i.e. for the Respondent to stand as a surety of its insolvent tenant."
43. For many of the same reasons relating to Variation 1 above, the Tribunal rejects the Respondent's submissions. The Tribunal is satisfied that Huggle limited had a liability to pay service charges up to the point when its lease terminated and that, absent a management order, the Respondent would have been liable to meet any shortfall in payments;

and, after the termination of the lease, liability for the share of service charges owed by Unit A-B would fall on the Respondent's shoulders. The Tribunal agrees with Mr Dover that the other leaseholders have no obligation to meet such a shortfall. To order them to do so would not only be grossly unfair but, for reasons given above, would also undermine the entire purpose of Part II of the 1987 Act, in that it would mean that leaseholders would not make applications under section 24 if, as a result, they would have to pick up any shortfall and/or it would deter managers from taking appointments if they had to carry that burden.

44. The Respondent's position is undermined by the fact that a new entity was let into occupation of Unit A-B, but the Respondent refused to provide any details, even in the face of the current application, so as to permit service charges to be recovered. It is conduct designed to frustrate the management order.
45. It is therefore just, reasonable and proportionate to make the variation sought.
46. The Applicant no longer required the second limb of the original proposed variation, for the Respondent to provide the manager with a copy of the written agreement governing the occupation of the unit, because the manager had just received news that the fixed charge receivers had taken possession of the unit by changing the locks; and there were likely ongoing negotiations, because of the investment made by The Fencing Academy in the unit.

### **Variation 3: Unit C-D**

47. The Management Order shall be varied to include the following wording:

*In respect of Unit C-D, the Respondent shall by 24 March 2023 pay to the Manager, the sum of £37,904.39 in respect of the outstanding service charges and costs owed by Fairfield Capital Limited to the Manager, including the costs of the proceedings brought in the County Court.*

### **Reasons**

48. As indicated above, the Respondent admitted accepting a surrender of the lease from FCL and granting a new lease to BSL; a lease which restricted the lessee's liability to contribute to service charges. The Respondent justified its actions by saying that the management order did not prevent the grant of the lease to BSL, nor did it prevent the Respondent from accepting a surrender of the FCL lease; that "...the surrender of FCL's Lease was an arms' length transaction actuated by ordinary commercial motives"; and that it had "acted reasonably, pragmatically".
49. Again, for many of the same reasons relating to Variations 1 and 2 above, the Tribunal rejects the Respondent's submissions. The Tribunal is satisfied that the Respondent was entitled to accept a surrender of the FCL lease and grant a new lease to BSL; however, the Respondent has to

live with its choices regarding the terms of both transactions as they affected the respective companies' liability to pay service charges and for any shortfall created. By releasing FCL from its obligations and adjusting the sums recoverable under the new lease to BSL, the Respondent has interfered with the manager's ability to manage, and has breached paragraph 3 of the Management Order and paragraphs (vii) and (viii) of the Insurance provisions and paragraphs (vii) and (ix) of the Additional Powers for the Manager provision of the Schedule of Functions and Services.

50. Once again, the Tribunal finds that the Respondent's conduct is designed to frustrate the management order; and, as Mr Dovar rightly points out, the Respondent is plainly liable for any shortfall that has occurred. The full arrears balance of service charges owed by FCL to the date of the deed of surrender, as evidenced in a statement of account produced by the manager for the fixed charge receivers, was £29,795.20. To this, the Tribunal has added the sum of £2,448.61, which the manager in his witness statement said had been foregone for the year ending 30 June 2021, as a result of the Respondent's conduct; that is, by the fact that the Respondent, in the deed of surrender, released FCL from its obligations to contribute to the renewal of cladding costs. Finally, the Tribunal has added the £5,660.58 court costs incurred by the manager in pursuing FCL for the arrears it owed up to the date of the deed of surrender.
51. It is therefore just, reasonable and proportionate to make the variation sought.

#### **Variation 4: Information and Service Charge Provisions**

52. The Management Order shall be varied to include the following wording:

*The Respondent shall:*

- a. Within 14 days of the sale or transfer or surrender of any of its interests in the Property notify the Manager of the completion of the sale/transfer/surrender thereof and provide him with the name and contact details of the third party purchaser; and*
- b. Within 14 days of the said notification, provide the Manager with a copy of any lease or other agreement or document governing the occupation of that interest.*

*Save for the sale of the freehold, the Respondent is not to sell or transfer or otherwise dispose of any of its interests in the Property without obtaining a covenant from the purchaser to contribute to the service charge for the Property in accordance with the percentages set out on the Apportionment Schedule.*

*If the Respondent grants any such rights without obtaining such a covenant, then to the extent that that gives rise to a shortfall in recovery of the expenses incurred or to be incurred, the Respondent shall be liable to the Manager for such shortfall*

*and shall pay such sum within 21 days of a demand by the Manager. For the avoidance of doubt, this provision applies to the arrangements made with the current occupiers of Unit A-B and Unit C-D.*

*In default of payment within 21 days of demand, interest shall accrue at 4% above the Base Rate set by the Bank of England.*

### **Reasons**

53. The Applicant sought variations that would require the Respondent: to notify him if it sold, transferred or surrendered any of its interests in the property; to provide him with a copy of any lease, other agreement or document governing the occupation of that interest; to prevent a disposal of its interest in the property without first obtaining a covenant from the purchaser to contribute to the service charge; and, if it fails to do so, to be liable for any shortfall.
54. The Respondent contended that “the imposition of these covenants on any disposition by the Respondent of its property is a grave and disproportionate interference with the Respondent’s property rights. Such covenants, if imposed, would gravely interfere with the marketability of the premises and impose unnecessary requirements on any buyer. It is contended that it would be normal practice in a transfer of the Respondent’s interests in the property that the purchaser covenant to observe the covenants on the part of the lessor in the (residential and commercial) leases and that is all that the Respondent ought to do, anything more is an unwarranted and impermissible interference with the Respondent’s property rights. If need be Convention rights shall be asserted.” The Respondent also criticised any seven-day deadlines which it claimed would be “unreasonable, unworkable and penal in effect.”
55. The interested persons also opposed these variations. While they understood that the purpose of the variations was to prevent the Respondent from granting leases which do not include a provision as to service charges, they considered that the original drafting was wider than that purpose. In particular, it would affect the situation where the Respondent sought to sell the freehold title in its entirety. They submitted that the management order would not survive such a sale in any event; and that a management order does not confer on the manager a proprietary interest, but the proposed variations approached the nature of a proprietary interest and were therefore inappropriate. However, if the Tribunal was minded to make the variations sought, the interested persons submitted that they should be edited to make clear that the interests the subject of the requirement for the Respondent to obtain a covenant relating to the service charge are *leasehold* interests granted out of the property and not a total disposition of the property itself.
56. The Tribunal considers that the proposed variation requiring the provision of information and documentation about any sale, transfer or surrender is unobjectionable and amounts to no more than good business practice and proper estate management. As such, this variation

is reasonable and entirely justified in the light of the Tribunal's findings that the Respondent had previously refused to give details about the occupant of Unit A-B, had delayed doing so in relation to Unit C-D, and clear evidence that the Respondent had tried to frustrate the management order. The requirements sought by this variation and those relating to purchaser covenants were directed squarely at those actions.

57. However, the Tribunal has considered the objections by the Respondent and the interested persons that the drafting of the later variations was too wide and would affect the sale of the entire freehold interest, not just a disposition of leasehold interests. Mr Dover accepted that the proposed variation would catch a sale of the freehold, but submitted it was warranted in the light of the Respondent's conduct; and any difficulty experienced on a sale of the entire interest does not outweigh the need to protect the management order. He also disputed that a sale of the freehold would terminate the management order on the registration of any new owner.
58. Given the paramount need to protect the management order as regards dispositions by the Respondent of leasehold interests, and the disputed status of the management order upon the sale of the freehold interest, the Tribunal proposed a drafting amendment to the variation sought, to exclude from it any sale of the freehold interest. After discussion, Mr Dover did not object to such an amendment. The drafting change therefore removed the difficulty foreseen by the Respondent and the interested persons and the Tribunal does not need to carry out a balancing exercise between the Respondent's exercise of his proprietary rights, if it chooses to sell the entire freehold, and the manager's legitimate desire to protect the management order; nor does it need to make a finding about whether the management order is or is not terminated by the sale of the freehold.
59. The Tribunal also met the Respondent's objection to 7-day deadlines by extending them to 14 or 21 days, as appropriate.

#### **Variation 5: Penal Notice**

60. The Management Order shall be varied to include the following wording at the beginning of the order:

***Penal Notice: If you, Cantelsa (IOM) Limited (or your director or officer) disobey this order, you (or your director or officer) may be held in contempt of Tribunal and punished by a fine, imprisonment, confiscation of assets or other punishment under the law.***

#### **Reasons**

61. The interested persons made no comment on the proposed variation to include a penal notice at the beginning of the management order. The Respondent submitted that "A Penal Notice should not be affixed. It is unwarranted and wholly excessive and disproportionate. Moreover, it carries a stigma and it is in any event unnecessary as the Management

Order (as an order of the FTT) may be enforced by the County Court as if it were an order of the County Court.”

62. The Tribunal rejects the Respondent’s submissions. The Tribunal is satisfied that it has power to attach a penal notice to a management order and the process for doing so is set out in *Coates v Octagon Overseas Limited* [2017] 4 WLR 91 (ChD) (paras 35-37), as expanded upon in *Coates v Marathon Estates Limited* [2018] UKUT 0031 (LC) (paras 84–88). The Tribunal will do so and very limited and deserving cases. The Respondent’s conduct in this case, both procedurally and substantively, more than justify a penal notice being affixed to the management order. The question for the Tribunal is: how likely is the Respondent to continue to breach the management order? On the basis of what the Respondent has done so far, the answer to that is “very likely”. The Tribunal agrees with Mr Dover that if the Respondent genuinely considers it is able to breach the management order to gain financially (“actuated by ordinary commercial motives”), then it is clearly not taking the management order seriously.
63. The fact that a management order can be enforced as an order of the county court does not minimise the utility of a penal notice; if anything, it will enhance enforcement of the Tribunal’s order. The penal notice is not unwarranted and excessive on the present facts. It merely warns the Respondent of the consequences of continuing to breach the management order. That approach was explicitly endorsed by the Deputy President of the Lands Chamber, Martin Rodger QC in *Coates v Marathon Estates Limited*.
64. The Tribunal therefore attaches a Penal Notice in the terms sought to the beginning of the management order.

### **Conclusion**

65. The accumulated variations are incorporated into the Varied Management Order annexed to this Decision.

**Name:** Timothy Powell                      **Date:** 3 March 2023

Appendix: Varied Management Order, as further varied by this decision.

## APPENDIX

### Varied Management Order

**The terms of the management order dated 8th March 2021, as varied by Tribunal decisions dated 16th June 2021, 21st December 2021 and 3 March 2023 (with paragraph numbers updated following the two most recent decisions).**

***Penal Notice: If you, Cantelsa (IOM) Limited (or your director or officer) disobey this order, you (or your director or officer) may be held in contempt of Tribunal and punished by a fine, imprisonment, confiscation of assets or other punishment under the law.***

1. In accordance with section 24(1) Landlord and Tenant Act 1987 Mr Michael Maunder Taylor of Maunder Taylor ('the Manager') is appointed as manager of the property at Melrose Apartments, 6 Winchester Road, London, NW3 3NT ('the Property').
2. The order shall continue for a period of three years from 15th March 2021. Any application for an extension must be made prior to the expiry of that period. If such an application is made in time, then the appointment will continue until that application has been finally determined.
3. The Manager shall manage the Property in accordance with:
  - (a) The directions and schedule of functions and services attached to this order;
  - (b) The respective obligations of the landlord and the leases by which the flats at the Property are demised by the Respondent and in particular with regard to repair, decoration, provision of services and insurance of the Property; and
  - (c) The duties of a manager set out in the Service Charge Residential Management Code ('the Code') or such other replacement code published by the Royal Institution of Chartered Surveyors and approved by the Secretary of State pursuant to section 87 Leasehold Reform Housing and Urban Development Act 1993.
4. The Tribunal additionally requires the Manager, in his initial report to the Tribunal, to set out how management charges are to be apportioned.
5. The Manager must register this Order against the Landlord's registered title as a restriction in accordance with section 24(8) of the Land

Registration Act 2002, or any subsequent Act that replaces it. The wording of the restriction shall be:

“No disposition of the registered estate (other than a charge) by the proprietor of the registered estate, or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction, is to be completed by registration without a certificate signed by the Applicant for registration [or their conveyancer] that the provisions of this Order of the Tribunal dated 8th March 2021 have been complied with”.

6. The Respondent shall:
  - a. Within 14 days of the sale or transfer or surrender of any of its interests in the Property notify the Manager of the completion of the sale/transfer/surrender thereof and provide him with the name and contact details of the third party purchaser; and
  - b. Within 14 days of the said notification, provide the Manager with a copy of any lease or other agreement or document governing the occupation of that interest.
7. Save for the sale of the freehold, the Respondent is not to sell or transfer or otherwise dispose of any of its interests in the Property without obtaining a covenant from the purchaser to contribute to the service charge for the Property in accordance with the percentages set out on the Apportionment Schedule.
8. If the Respondent grants any such rights without obtaining such a covenant, then to the extent that that gives rise to a shortfall in recovery of the expenses incurred or to be incurred, the Respondent shall be liable to the Manager for such shortfall and shall pay such sum within 21 days of a demand by the Manager. For the avoidance of doubt, this provision applies to the arrangements made with the current occupiers of Unit A-B and Unit C-D.
9. In default of payment within 21 days of demand, interest shall accrue at 4% above the Base Rate set by the Bank of England.
10. In respect of Unit A-B, the Respondent shall by 24 March 2023 pay to the Manager, the sum of £59,751.84 in respect of the outstanding service charges and costs owed by Huggle Limited to the Manager.
11. In respect of Unit C-D, the Respondent shall by 24 March 2023 pay to the Manager, the sum of £37,904.39 in respect of the outstanding service charges and costs owed by Fairfield Capital Limited to the Manager, including the costs of the proceedings brought in the County Court.
12. The Manager shall be entitled to recover from the Respondent any bad debt, which arises by way of a shortfall in recovery of service charge from a leaseholder for any reason, including but not limited to, insolvency or any insolvency or company related legislation. The Respondent shall be



liable to pay any bad debt within 21 days of a demand by the Manager, where:

- a. There is no reasonable prospect of the Manager recovering the bad debt; and
  - b. The Manager serves on the Respondent a demand identifying:
    - v. The total sum claimed;
    - vi. The manner in which it has been calculated;
    - vii. The unit to which it relates;
    - viii. The reasons why it is said to be a bad debt.
13. An order shall be made under section 20C Landlord and Tenant Act 1985 that the Respondent's costs before the Tribunal shall not be added to the service charges.

#### **DIRECTIONS**

1. From the date of the appointment and throughout the appointment the Manager shall ensure that he has appropriate professional indemnity cover in the sum of at least £1,000,000 and shall provide copies of the current cover note upon a request being made by any lessee of the Property, the Respondent or the Tribunal.
2. That no later than four weeks after the date of this order the parties to this application shall provide all necessary information to and arrange with the Manager an orderly transfer of responsibilities. No later than this date, the Applicants and the Respondent shall transfer to the Manager all the accounts, books, records and funds (including, without limitation, any service charge reserve fund).
3. The rights and liabilities of the Respondent arising under any contracts of insurance, and/or any contract for the provision of any services to the Property shall upon 1st February 2021 become rights and liabilities of the Manager.
4. The Manager shall account forthwith to the Respondent for the payment of ground rent received by him and shall apply the remaining amounts received by him (other than those representing his fees) in the performance of the Respondent's covenants contained in the said leases.
5. The Manager shall be entitled to remuneration (which for the avoidance of doubt shall be recoverable as part of the service charges of leases of the Property) in accordance with the Schedule of Functions and Services attached.

6. By no later than 15th March 2022, the Manager shall prepare and submit a brief written report for the Tribunal on the progress of the management of the property up to that date, providing a copy to the lessees of the Property and the Respondent at the same time. This report shall include details of the apportionment of the management fees.
7. Within 28 days of the conclusion of the management order, the Manager shall prepare and submit a brief written report for the Tribunal, on the progress and outcome of the management of the property up to that date, to include final closing accounts. The Manager shall also serve copies of the report and accounts on the lessor and lessees, who may raise queries on them within 14 days. The Manager shall answer such queries within a further 14 days. Thereafter, the Manager shall reimburse any unexpended monies to the paying parties or, if it be the case, to any new Tribunal-appointed manager, or, in the case of dispute, as decided by the Tribunal upon application by any interested party.
8. The Manager shall be entitled to apply to the Tribunal for further directions.

## **SCHEDULE OF FUNCTIONS AND SERVICES**

### **Insurance**

- (i) Maintain appropriate building insurance for the Property.
- (ii) Ensure that the Manager's interest is noted on the insurance policy.
- (iii) The duty and power to take out in the manager's own name, in accordance with the terms of the leases, insurance policies in relation to the buildings and the contents of the common parts of the Premises with a reputable insurer and provide a copy of the cover note to all lessees and the Respondent on request
- (iv) The duty and power to manage or provide for the management, through a broker, of any claims brought under the insurance policies taken out in respect of the Property with the insurer(s).
- (v) The power to appoint professionally qualified persons (such as insurance brokers) as the manager may reasonably require to assist him in the performance of his functions.
- (vi) The power to appoint any agent to carry out any such function or obligation which the manager is unable to perform himself or which can be more conveniently done by an agent.
- (vii) The Respondent is prohibited from exercising any management functions (which includes placing the insurance) in respect of the Property where the same are the responsibilities of the Applicant under the Order.
- (viii) The Respondent and any agents thereof shall give reasonable assistance and cooperation to the Applicant in pursuance of his

duties and powers under the Order and shall not interfere or attempt to interfere with the exercise of any of the said duties and powers.

- (ix) The Applicant has the power to receive payments arising from insurance claims and to apply them to the reinstatement of any loss to distribute such payments as appropriate to the beneficiaries of such claims.

### **Service charge**

- (i) Prepare an annual service charge budget, administer the service charge and prepare and distribute appropriate service charge accounts to the lessees.
- (ii) Set Demand and collect ground rents, service charges (including contributions to a sinking fund), insurance premiums and any other payment due from the lessees.
- (iii) Set Demand and collect his own service charge payable by the Respondent (as if he were a lessee), in respect of any un-leased premises in the Property which are retained by the Respondent.
- (iv) Instruct solicitors to recover unpaid rents and service charges and any other monies due to the Respondent.
- (v) Place, supervise and administer contracts and check demands for payment of goods, services and equipment supplied for the benefit of the Property with the service charge budget.

### **Accounts**

- (i) Prepare and submit to the Respondent and lessees an annual statement of account detailing all monies received and expended. The accounts to be certified by an external auditor, if required by the Manager.
- (ii) Maintain efficient records and books of account which are open for inspection by the lessor and lessees. Upon request, produce for inspection, receipts or other evidence of expenditure.
- (iii) Maintain on trust an interest-bearing account/s at such bank or building society as the Manager shall from time to time decide, into which ground rent, service charge contributions and all other monies arising under the leases shall be paid.
- (iv) All monies collected will be accounted for in accordance with the accounts regulations as issued by the Royal Institution for Chartered Surveyors.

### **Maintenance**

- (i) Deal with routine repair and maintenance issues and instruct contractors to attend and rectify problems. Deal with all building maintenance relating to the services and structure of the Property.

- (ii) The consideration of works to be carried out to the Property in the interest of good estate management and making the appropriate recommendations to the Respondent and the lessees.
- (iii) The setting up of a planned maintenance programme to allow for the periodic re-decoration and repair of the exterior and interior common parts of the Property.

## **Fees**

- (i) Fees for the abovementioned management services will be a basic fee of £35,000 plus VAT per annum for the Estate and Building. This fee is to be apportioned per flat at the same percentages as the service charge. A Schedule of the apportionment to be provided to the Tribunal by 26th March 2021. Those services to include the services set out in the Service Charge Residential Management Code published by the RICS. Thereafter the fee shall be reviewed annually in line with inflation.
- (ii) Major works carried out to the Property (where it is necessary to prepare a specification of works, obtain competitive tenders, serve relevant notices on lessees and supervising the works) will be subject to a charge of 2% of the cost of the works plus VAT. In respect of any unusually large contract (such as external cladding contracts), the fee shall be a reasonable fee for the work involved and not exceed 2%.
- (iii) An additional charge for dealing with solicitors' enquiries on transfer will be made in the sum not to exceed £250 plus VAT payable by the outgoing Lessee.
- (iv) The undertaking of further tasks which fall outside those duties described above are to be charged separately at an hourly rate ranging as follows:
  - MH Maunder Taylor: £200 per hour plus VAT
  - Senior Property Manager: £175 per hour plus VAT
  - The time of employed Property Manager for additional responsibilities to be charged at £125 per hour plus VAT.

## **Additional Powers for the Manager**

- (i) The power to appoint solicitors, accountants, architects, surveyors and other professionally qualified persons as he may reasonably require to assist him the performance of his functions.
- (ii) The power in his own name to bring, defend or continue any legal action or other legal proceedings in connection with this Order. The Applicant shall be entitled to an indemnity for both his own costs reasonably incurred and for any adverse costs order out of the service charge account.

- (iii) The power to enter into or terminate any contract or arrangement and/or make any payment which is necessary, convenient or incidental to the performance of his functions.
- (iv) The power to open and operate client bank accounts in relation to the management of the Property and to invest monies pursuant to his appointment in any manner specified in the Service charge Contributions (Authorised Investments) Order 1998 and to hold those funds pursuant to s.42 of the Landlord and Tenant Act 1987.
- (v) The power to rank and claim in the bankruptcy, insolvency, sequestration or liquidation of the Respondent or any Lessee owing sums of money under his Lease.
- (vi) The power to borrow all sums reasonably required by the Applicant for the performance of his functions and duties and the exercise of his powers under this Order in the event of there being any arrears, or other shortfalls of service charge contributions due from the Lessees or any sums due from the Respondent, such borrowing to be secured (if necessary ) on the interests of the defaulting party (i.e. on the leasehold interest of any Lessee or the freehold/leasehold interests of the Respondent) PROVIDED THAT that Applicant shall not secure any borrowing as aforesaid without the consent of the defaulting party or in default of that consent, without further Order of the First-tier Tribunal.
- (vii) From the date of the Order, no other party shall be entitled to exercise a management function in respect of the Property where the same is a responsibility of the Applicant under the Order.
- (viii) From the date of the Order, the Respondent, whether by itself or any agent, servant or employee, shall not demand any further payments of service charges, administration charges such functions having been transferred to the Applicant.
- (ix) The Respondent and the Lessees and any agents or servants thereof shall not interfere or attempt to interfere with the exercise of any of his duties and powers
- (x) The right to treat the service charge financial year as commencing on 15th March 2021 and thereafter running from 15th March to 14th March in each year the Order is in place.
- (xi) The Applicant shall be entitled to an indemnity for his own costs reasonably incurred and for any adverse costs order out of the service charge account, and such costs and adverse costs shall be payable by the Respondent and/or the Lessees as a service charge according to the provisions of the Leases and the Order

### **Complaints procedure**

- (i) The Manager shall operate a complaints procedure in accordance with or substantially similar to the requirements of the Royal Institution of Chartered Surveyors.