UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – APPOINTMENT OF MANAGER – RIGHT TO MANAGE - scope of power to vary the appointment of a manager – position of RTM company acquiring te right to manage after a tribunal-appointed manager has been appointed.

BETWEEN:

DAVID BENTHAN
LINDSAY COURT SECURITIES LTD

Appellants

and

(1) LINDSAY COURT (ST ANNES) RTM COMPANY LIMITED
(2) to (7) THE LEASEHOLDERS OF BLOCK 1, LINDSAY COURT

Respondents

Re: Lindsay Court,
New Road,
Lytham Street,
St Annes,
Lancashire, FY8 2SR

Judge Elizabeth Cooke
7 January 2021 by video platform

Mr Justin Bates for the appellants, instructed by Scott Cohen Solicitors
Mr Brynmor Adams for the respondents, instructed by WHN Solicitors Limited

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The following cases are referred to in this decision:

Cawsand Fort Management Limited v Stafford [2007] EWCA Civ 1187
Eaglesham Properties Limited v Jeffrey [2012] UKUT 157 (LC)
Maunder-Taylor v Blaquiere [2002] EWCA Civ 1633
Meon Gardens Residents' Association v Brown (Southern Rent Assessment Panel and Valuation Tribunal, 4 April 2011)
Orchard Court Residents Association Limited v St Anthony's Homes Limited [2003] EWCA Civ 1049
Urwick v Pickard [2019] UKUT 365 (LC)

Introduction

1. This appeal is about the interaction of two statutory schemes for the management of leasehold property: the provisions of the Landlord and Tenant Act 1987 for the appointment of a manager, and those of the Commonhold and Leasehold Reform Act 2002 for the acquisition of the right to manage by a company (an "RTM company") formed by qualifying leaseholders.

2. They are very different schemes. The 1987 Act scheme enables a tribunal to appoint a manager when, for example, the landlord is in breach of its obligations to the tenants. By contrast, the 2002 Act enables an RTM company to acquire the right to manage on a no-fault basis, when the correct procedures have been followed, without any requirement to show that anything has gone wrong or that any obligation has been broken.

3. The present appeal is about Lindsay Court, a development comprising 96 flats in 16 blocks. The first appellant Mr David Bentham was appointed as manager of the whole development, by the First-tier Tribunal ("the FTT") in 2014, on the application of the second appellant, the freeholder; his appointment has since been extended and remains in force. On 31 July 2020 the FTT decided that the first respondent, Lindsay Court (St Annes) RTM Company Limited, was entitled to acquire the right to manage block 1 of the development, and it will acquire that right on 22 January 2021. Block 1 comprises six flats and the long leaseholders are the other respondents to the appeal. The first and second appellants seek a variation of the order appointing Mr Bentham as manager so as to ensure that he continues to manage Block 1 despite the first respondent's acquisition of the right to manage on 22 January next.

4. The FTT decided that it did not have jurisdiction to vary the order in that way, and the appellants appeal that decision.

5. The appeal was heard by remote video platform on 7 January 2021. The appellants were represented by Mr Justin Bates and the respondents by Mr Brynmor Adams, both of cou nsel, and I am grateful to them both. The appeal was only about jurisdiction; the FTT did not decide whether, if it had jurisdiction, it should exercise its discretion to make the variation sought. Had this appeal been successful it would have been necessary to remit the matter to the FTT for that decision to be made. However, the appeal fails, for the reasons set out below.

The legal and factual background

6. In the paragraphs that follow I introduce the provisions of the two statutory regimes in the context of the factual background to the appeal.

The provisions of the 1987 Act about tribunal-appointed managers

7. In 2014 Lindsay Court was under the management of Lindsay Court RTM Company Limited – not the respondent to this appeal – and things were not going well. The building

had fallen into disrepair and a lot of work needed to be done. The freeholder applied to the FTT for the appointment of a manager under Part II of the 1987 Act.

8. Sections 21 to 23 of the 1987 Act set out the procedural requirements for such an appointment, which may be made on the application of a tenant of a flat in a building, or part of a building, containing two or more flats. The procedural requirements include giving notice to the landlord and to anyone else responsible for the management of the building. In addition, there are substantive requirements in section 24, which provides that a tribunal may only appoint a manager on the application of tenants of flats in the circumstances set out sub-section (2). They are, broadly, fault-based, including the case where the landlord:

> "(a) (i) … either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them …, and …
>
> (iii) that it is just and convenient to make the order in all the circumstances of the case."

9. I say "broadly fault based", because the sub-section goes on to list further fault-based criteria, for example where unreasonable service charges have been made, but concludes with the final alternative:

> "(b) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made. "

10. The FTT made an order appointing Mr Bentham as manager on 13 March 2014, on the grounds set out in section 24(2)(a) above.

11. The powers of such a manager derive from the FTT's order and not from the lease; they may even be wider than those of the landlord (*Maunder-Taylor v Blaquiere* [2002] EWCA Civ 1633). They may extend to property over which the relevant leaseholders have rights but which is not demised to them (*Cawsand Fort Management Limited v Stafford* [2007] EWCA Civ 1187). Section 24(4) and (5) enable a wide range of orders to be made, for example transferring to the manager rights and liabilities under contracts to which he or she is not a party, requiring the landlord to pay the manager, enabling the manager to prosecute causes of action, and so on. As Mr Bates put it, the manager is neither the landlord's man nor the tenant's man but is appointed by a tribunal to manage the property in whatever way is needed.

12. Provision is also made by section 24 for the variation of an order appointing a manager:

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

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

(a) that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and

(b) that it is just and convenient in all the circumstances of the case to vary or discharge the order."

13. When considering a variation to the order there is no need for the FTT to be satisfied that any of the conditions set out in section 24(2) are met; that is clear from the words of the statute and in *Orchard Court Residents Association Limited v St Anthony's Homes Limited* [2003] EWCA Civ 1049 the Court of Appeal confirmed (in refusing an application for permission to appeal) that an application for a variation cannot be opposed on the basis that those conditions are not met. The only requirements are those set out in section 24(9A), and they apply only when an application for a variation is made by a "relevant person", namely someone who has received notice under section 22; the idea is to restrict the ability of a landlord whose poor management led to the appointment of a manager to frustrate that appointment by getting it varied.

14. One obvious variation that may be needed is the extension of a manager's appointment; Mr Bentham applied in 2017 for an extension to his initial three-year term of office. The application was not opposed, and on 16 March 2017 the FTT made an order extending his appointment to 12 March 2020.

15. Mr Bentham applied on 21 January 2020 for a further three-year extension, on the basis that he has scheduled extensive major works of repair and renewal, with the approval of the FTT which determined (in April 2018 following an application under section 27A of the Landlord and Tenant Act 1985) that the sums demanded of the leaseholders were reasonable.

16. Mr Bentham in his application explained that he was taking steps to find funding for the work, that the funding issues were expected to be resolved within a year and that the work would take 18 months to complete. He requested an urgent determination before the expiry of his term in March 2020, and a four-month handover period if his application was refused. The freeholder was a respondent to the 2020 variation application but did not oppose it.

17. Before that application could be determined, the first respondent gave notice of its claim to be entitled to acquire the right to manage Block 1. On 28 February 220 the FTT extended Mr Bentham's appointment until further order so as to enable the resolution of the first respondent's claim before any decision was taken about the manager's position.

The provisions of the 2002 Act about RTM companies

18. Chapter 1 of Part 2 of the 2002 Act sets out the procedural requirements for the formation and membership of an RTM company and its acquisition of the right to manage premises containing two or more flats held by qualifying tenants. There is no substantive requirement,

no "just and convenient" qualification, and no discretion. Once the procedural requirements have been met, an RTM company is entitled to acquire the right to manage; there is no scope for the landlord to resist except on procedural grounds.

19. There was a dispute about the first respondent's entitlement to manage block 1, which focussed on the validity of the notices served in February 2020. The dispute was determined by the FTT on 31 July 2020; it found that the notices were valid and all other requirements had been met. The first respondent will acquire the right to manage Block 1 on 22 January 2021 – later than would otherwise have been the case because there have been applications for permission to appeal the FTT's decision, which were refused.

20. Sections 96 to 103 of the 2002 Act set out the position where an RTM company has acquired the right to manage premises. Section 96(2) and (3) states:

> "(2) Management functions which a person who is landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company.
>
> (3) And where a person is party to a lease of the whole or any part of the premises otherwise than as landlord or tenant, management functions of his under the lease are also instead functions of the RTM company."

21. So rather than taking on responsibilities crafted by the FTT in a management order (see paragraph 11 above) an RTM company takes on the management functions created by the relevant lease or leases.

The interaction of the two statutory schemes

22. When an RTM company acquires the right to manage, those who formerly had the right to manage the premises – including a manager appointed under the 1987 Act - lose it. That is the consequence of section 96 (and in particular of the word "instead" in subsections (2) and (3) above) but section 97(2) of the 2002 Act makes it explicit:

> "(2) A person who is—
>
> (a) landlord under a lease of the whole or any part of the premises,
>
> (b) party to such a lease otherwise than as landlord or tenant, or
>
> (c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,
>
> is not entitled to do anything which the RTM company is required or empowered to do under the lease by virtue of section 96, except in accordance with an agreement made by him and the RTM company."

23. So the acquisition of the right to manage by an RTM Company broadly speaking puts paid to management by a tribunal-appointed manager, although the order made under the 1987 Act does not come to an end and the manager will retain any functions that the RTM company does not have.

24. Conversely, such a manager may be appointed to take over from an RTM company. The provisions of the 1987 Act relating to the appointment of a manager by the FTT were enacted when RTM companies had not yet been thought of. But RTM companies are not always successful, and the FTT may appoint a manager to take over from an RTM company, which is what happened here in 2014. Paragraph 8 of Schedule 7 to the 2002 Act makes amendments to the provisions of the 1987 Act so as to adapt it to the case where responsibility for management of the premises rests with an RTM company; it provides, for example, that

> "(2) References to the landlord are to the RTM company.
>
> (3) References to a tenant of a flat contained in the premises include a person who is landlord under a lease of the whole or any part of the premises."

25. That latter provision means that once an RTM Company has acquired the right to manage, a landlord (as well as a tenant) can apply for the appointment of a manager under the 1987 Act.

26. The paragraph goes on:

> "(5) The references in paragraph (a)(i) of subsection (2) of section 24 to any obligation owed by the RTM company to the tenant under his tenancy include any obligations of the RTM company under this Act."

27. That enables the landlord to enforce the RTM company's obligation to manage, just as the tenants can.

28. The following is particularly important:

> "(7) The power in section 24 to make an order appointing a manager to carry out functions includes a power (in the circumstances specified in subsection (2) of that section) to make an order that the right to manage the premises is to cease to be exercisable by the RTM company."

29. Section 105 of the 2002 Act makes provision for when the right to manage ceases to be exercisable by an RTM company, for example when a winding up order is made with respect to the company or when its name is struck off the companies register or - relevant to the present appeal – when a manager appointed under the 1987 Act begins to act, or when an order of the kind referred to in paragraph 8(7) (quoted in the preceding paragraph) is made:

> "(4) The right to manage the premises ceases to be exercisable by the RTM company if a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises, begins so to act or an order under that Part of that Act that the right to manage the premises is to cease to be exercisable by the RTM company takes effect."

The issue in this appeal

30. So it is uncontroversial that on 22 January 2021 when the first respondent acquires the right to manage Block 1 of Lindsay Court, Mr Bentham will no longer be able to manage Block 1, unless he can secure the order he seeks; that is the effect of section 97(2)(c). It is also uncontroversial that following the acquisition of the right to manage by an RTM Company the FTT could appoint a manager to displace it if, and only if, the conditions set out in section 24(2) of the 1987 Act are then made out; that is the effect of section 105(4).

31. Following the FTT's decision about the first respondent's claim on 31 July 2020, the FTT heard Mr Bentham's application for variation of the order appointing him. Obviously since the application for variation was made, the situation had changed radically, and Mr Bentham therefore sought a second variation, in addition to the extension of the length of the appointment: he sought an order that his management powers would continue to extend to Block 1 following the acquisition of the right to manage by the first respondent – in effect requiring the first respondent, immediately on its acquisition of the right to manage the premises, to cede the management of Block 1 back to Mr Bentham.

32. So what the appellants seek to do in these proceedings is to have an order made now that will displace the first respondent from the management of Block 1 as soon as it takes office on 22 January 2021. It is argued that such an order can be made as a variation of the order appointing the manager, which of course can be made without establishing that any of the conditions in section 24(2) exists.

33. The appellants say that it would be right vary the order in this way so as to enable a coherent scheme of management to continue and to ensure that the work planned for the whole premises can go ahead rather than having Block 1 torn out of those plans and indeed the scheme as a whole put in jeopardy.

34. The appeal relates only to jurisdiction and not to the merits of that argument, because the FTT decided that it did not have jurisdiction to make that second variation. I gratefully reproduce Mr Bates' summary of its decision:

> "(a) It is not possible to apply under the 1987 Act for an order which removes the right to manage from an RTM company until *after* the RTM company has acquired the management (paras.30, 31).
>
> (b) In particular, s.105(4), Commonhold and Leasehold Reform Act 2002 was not broad enough to achieve this result (para.33).

(c) The only remedy for the landlord/manager was to make a further application under the 1987 Act (*i.e.* serving a new notice, proving fresh grounds for appointment *etc*) (para.34)."

The arguments on the appeal

The arguments for the appellants

35. Mr Bates starts from the uncontroversial point that there is power to vary the management order, and there is no need for the section 24(2) conditions to be shown to exist before a variation can be ordered. What, he asks, could be the objection to a prospective variation that would take effect on the date when the first respondent takes up the right to manage, two weeks hence. In support of that he draws attention to the great breadth of the power to make a bespoke order under section 24 of the 1987 Act. There is just no limit upon variation, subject to subsection (9A) where applicable, and subject to the obvious proviso that an order cannot be varied once it has expired (*Eaglesham Properties Limited v Jeffrey* [2012] UKUT 157 (LC)). And there is no need to go through the considerations set out in section 24(2) because that work has already been done when the order was first made.

36. Mr Bates' argument assumes that it is possible to vary an order by adding a fresh party.

37. Mr Bates was unable to refer me to an example of a case where it would be possible to make an order against X and then vary it so that it is also made against Y. It is of course possible to add or substitute parties to actions, and Mr Bates referred to possession proceedings where the claimant might change its corporate identity. Closer to the present context he cited *Meon Gardens Residents' Association v Brown*, a decision of the Southern Rent Assessment Panel and Valuation Tribunal of 4 April 2011, where the tribunal varied a management order by discharging one manager and appointing another.

38. As to paragraph 8(7) of Schedule 7 to the 2002 Act, Mr Bates says that the reason why it only refers to the power to terminate an RTM company's right to manage in the context of the initial appointment of a manager is that there was no need to add a specific power to do so on an application for variation, because of the unlimited nature of the variation power. Section 105(4), quoted above, provides that an RTM company ceases to have the right to manage when a new manager starts to act, or when an order that the right to manage ceases to be exercisable by the company takes effect. Those, he says, are two different circumstances, and the second describes an order made on an application for variation such as the one sought here.

The arguments for the respondents

39. For the respondents, Mr Adams of course accepts the breadth of the power to appoint a manager and to create an order in wide-ranging terms. And he accepts the clear distinction made in the 1987 Act and confirmed in *Orchard Court* between the appointment of a manager and the variation of an order appointing him.

40. That much is uncontroversial. However, he argues, Parliament made a clear choice that the right to manage should be acquired automatically and on a no-fault basis subject only to procedural requirements. Provision could have been made, when an RTM company claims the right to manage in a situation where a tribunal-appointed manager is in post, for the tribunal to assess whether it was appropriate for the RTM company to take over. But no such provision was made. An RTM company takes over automatically, to the extent of the functions conferred by section 96, and its right to manage can only be made to cease after it acquires that right, and only on a new application under the 1987 Act, which is made possible by the provisions of Schedule 7.

41. On such an application, once the RTM company has been given the notice required by the 1987 Act and provided that one of the conditions in section 24(2) has been established against it, then a manager may be appointed and in that event section 105(4) of the 2002 Act ensures that the RTM company has to step back and let the manager operate.

42. But section 105(4) has two limbs, and Mr Bates says that the second limb refers to an order made on a variation. Not so, says Mr Adams. The purpose of the separate power to make an order that the RTM company's right to manage shall cease, conferred by paragraph 8(7) of Schedule 7 and referred to in the second limb of section 105(4), is to enable a tribunal on an application under the 1987 Act (which a landlord can make) simply to bring the RTM company's right to an end so that the landlord takes back responsibility for management. Again, that can only be done when the procedural and substantive requirements set out in sections 21 to 24 of the 1987 Act have been met.

43. Mr Adams maintains that the second limb of section 105(4) does not enable a tribunal to bring an RTM company's right to manage to an end by varying a management order; nor is there any power to bring that right to an end prospectively, before it has been acquired and thereby to circumvent the provisions of section 96(2) of the 2002 Act.

Urwick v Pickard [2019] UKUT 365 (LC

44. Both parties have made reference to *Urwick v Pickard* [2019] UKUT 365 (LC). In that case a manager had been appointed under the 1987 Act. A number of the leaseholders then exercised their right of collective enfranchisement with the result that the freehold of their flats was transferred to a nominee purchaser. The FTT determined that the new freeholder was not bound by the management order, but found that the enfranchisement had taken place in order to evade the provisions of that order and therefore ordered the leaseholders to give effect to it by allowing the manager, Mr Pickard, to continue to manage their property. The leaseholders appealed.

45. The Deputy President had to consider the effect of the provisions in the 1987 Act that a management order can be protected on the freeholder's register of title, as if it were an interest in land. He concluded that because such protection can only be achieved by a restriction (which does not protect the priority of an interest) rather than a notice, the management order cannot bind a purchaser for value of the freeholder's interest whether or not it is noted on the register.

46. So a management order ceases to have effect when the freeholder against whom it is made sells the property. That is not relevant to this case. The Deputy President also held that the FTT did not have power to vary the management order by requiring the leaseholders to continue to give effect to it, because that would mean that the new freeholder was subjected to the management order without the procedural requirements of the 1987 Act having been complied with (paragraph 56 of the decision).

47. It was not argued in *Urwick* that the new freeholder could be made subject to the management order by varying the management order so that he became party to it and directly subject to it, and the Tribunal in *Urwick* did not decide whether such a variation was possible. However, the fact that that possibility was not even raised does nothing to encourage the view that it is.

Discussion and conclusion

48. I agree with Mr Bates that there is no reason why an order cannot be varied with prospective effect; but his argument assumes that it is possible by varying a management order to bring a third party within its scope.

49. As a matter of ordinary language and procedure that assumption would not appear to be correct; where an order has been made, following a hearing or a statutory procedure, it is difficult to see how the addition of a new individual as the person against whom the order is made could generally be achieved. Even if described as a variation, such an order would be a fresh order made against a person who was not bound by the original order. The decision in *Meon Gardens* (paragraph 37 above) substituted a new manager; but the manager is not the person against whom a management order is made. He is not protected by the notice provisions and other procedural requirements in sections 21 to 23 of the 1987 Act, and is not the party whose rights are being taken away by the statutory scheme and against whom section 24(2) must be satisfied.

50. So I take the view that an order depriving a third party of management powers over the property, where that person was not bound by the initial appointment of the manager, simply is not a variation. However described, it is a new order.

51. Mr Bates argued that there is no need for an express statutory power to bring the RTM company's right to an end by varying the management order (such a power being conspicuous by its absence) because the power in section 24(9) is so broad and so unlimited. I reject that argument; an order in those terms is simply not a variation but a fresh order. If there were such a power it would have been expressly conferred; and such a power would be a very strange one because it would subvert the policy and the other express provisions of the statutory scheme.

52. The specific procedural and substantive requirements of the 1987 Act must be satisfied before a person can be deprived of their right and responsibility to manage their own property. To take away an RTM company's right to manage when those requirements have not been met runs contrary to the policy of the 1987 Act. It is also contrary to the policy of the 2002 Act that an RTM company's acquisition of the right to manage follows

automatically from its meeting the procedural requirements, no matter how inconvenient anyone may find that to be. It is not open to a freeholder to protest that the RTM company's acquisition of the right to manage is inconvenient or will disrupt an established programme of repair work. Mr Bates argues that the provision in the 1987 Act for the establishment of a coherent scheme of management should be able to take precedence over an RTM company's automatic acquisition of rights, but if Parliament intended that then it would have made express provision, as Mr Adams says. The statutory scheme points in the opposite direction.

53. I agree with Mr Adams' clear and cogent explanation of the provisions of both statutes. The 2002 Act states clearly when the RTM company's powers can be brought to an end by an order under the 1987 Act, namely on the fault-based ground of the 1987 Act when a manager is appointed after the RTM company has acquired the right to manage.

54. If Mr Adams is right then it is essential to explain why section 105(4) has two limbs. If the second limb does not refer to an order made by way of variation, what does it mean? Mr Adams' explanation is obviously correct, and neatly explains why there is a specific power in paragraph 8(7) of Schedule 7. Without it, there would be an obvious gap in the statutory scheme because there would be no way for a freeholder to bring an RTM company's right to manage to an end on the basis of its breach of its obligations save by having a third party appointed as manager, which might not always be convenient, necessary or possible. The freeholder can, by virtue of paragraph 8(3) of Schedule 7, enforce the RTM company's obligations as if he were a tenant, but that might well be insufficient and the addition of a freestanding power under the 1987 Act to put an end to the company's right to manage is potentially a very useful one.

Conclusion

55. Accordingly the appeal fails. On 22 January 2021 the first respondent will acquire the right to manage the premises, including Block 1. If the freeholder or the tenants find that they can, in the future, make a case under section 24(2) of the 1987 Act then they will be able to apply for the appointment of a manager to take over from the first respondent, but that cannot be achieved by variation of the existing order.

Judge Elizabeth Cooke

8 January 2021