UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2021] UKUT 0173 (LC)
UTLC Case Number: LC-2021-19

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – APPOINTMENT OF MANAGER – variation of an order under section 24, Landlord and Tenant Act 1987 – power to demand an additional service charge – jurisdiction to vary an order – relevant considerations on variation

BETWEEN:

ANTHONY ORCHARD
JACQUELINE ORCHARD **Appellants**

-and-

ALISON MOONEY **Respondent**

Re: a property in London

Upper Tribunal Judge Elizabeth Cooke
Determination on written representations

The appellants were unrepresented
Mr Justin Bates for the respondent

Introduction

1. This appeal concerns a property in London, of which the name has been redacted by the Tribunal at the appellant's request. It is a Victorian house converted into three flats held on long leases, flat A on the ground-floor by Mr and Mrs Lambert, Flat B on the first floor by Ms Orkin, and Flat C on the second floor by the appellants Mr and Mrs Orchard. On 18 February 2019 the respondent Ms Mooney was appointed by the First-tier Tribunal ("the FTT") as manager of the property pursuant to section 24(1) of the Landlord and Tenant Act 1987.

2. This appeal is not from the appointment of the manager, but from an order made by the FTT on 18 August 2020 which gave her power to demand of the leaseholders an interim service charge in the sum of £15,000. The FTT gave permission to appeal its order and the Tribunal on 22 January 2021 directed that the appeal be determined under the written representations procedure. I have read the appellants' statement of case dated 1 January 2021, the respondent's grounds of opposition dated 23 February 2021, a reply by the appellants dated 26 March 2021, and further submissions of 6 April 2021 from the respondent and of 21 May 2021 from the appellants. The appellants have represented themselves, and Mr Justin Bates of counsel wrote the respondent's submissions. I am grateful to them all.

3. I make it clear at the outset that this decision contains no findings of fact. The parties' written submissions illustrate their differing perceptions of the facts and bear witness to the bitterness of the dispute surrounding the management of this property, none of which has any relevance to this appeal which is solely about whether the FTT had power to make the order of 18 August 2020 and, if it had, whether it should have done so. There are other proceedings pending between the parties and they should not seize on anything said in this decision by way of ammunition in their other quarrels.

The background

4. Section 24 of the Landlord and Tenant Act 1987 enables the FTT to make an order appointing a manager of a building containing flats, on the application of a tenant of a flat. In 2019 the lessees of all three flats agreed that a manager was needed and were joint applicants to the FTT in the proceedings that led to the respondent's appointment.

5. In March 2020 the respondent made an application to the FTT for directions authorising her to enter the appellants' flat on notice, for any purpose "connected to the investigation and remedy of the ongoing water ingress issue" and to spend service charges and raise further sums "on this matter and on these works" insofar as the management order did not already authorise her to do so. Jumping to the end of that episode, the FTT on 21 September 2020 determined that there was no need for it to make any order on that application because the management order enabled her to exercise the power contained in the leases of the flats for the lessor to enter the flats on notice and to raise and spend a service charge.

6. However, before her application was heard on 17 September 2020, on 3 August 2020 the respondent wrote to the FTT. She said that she needed legal representation for the hearing on 17th September and had "simply run out of funds", because she did not anticipate how

long the application would take or the extent of her need for legal advice when setting the service charge budget and was unable to borrow to fund her representation. She said she needed an additional £5,000 to £10,000, and asked for:

> "a direction as to whether the Management Order can be altered to include the right for me to make an interim demand from the leaseholders to cover legal costs expended in the pursuance of my responsibilities."

7. The FTT on 4 August 2020 directed her to tell the FTT and the leaseholders "immediately" the exact amount she required, and directed the other parties to comment by 5pm on 7 August 2020. The respondent on 7 August indicated that she needed £15,000, noting that she had misread the service charge budget which included £2,500 for professional consultancy and not £5,000 as she originally thought. The appellants wrote to the FTT on 7, 11 and 18 August. On 18 August the FTT made an order in response to the application.

The FTT's order of 18 August 2020

8. The FTT granted the application. Its order stated:

> "The Manager is given the power to raise an interim Service Charge demand in the sum of £15,000 in addition to the existing provisions in the leaseholders' leases."

9. Under "Background and reasons" the FTT set out the procedural background and referred to the comments received from the leaseholders of Flats A and B supporting the application. It noted that the appellants had "raised various significant questions regarding the application" and that they had suggested that the Manager agree to a draft order proposed by them in response to the substantive application. In conclusion the FTT said that its order allowed the demand of an additional £15,000 because:

> "(a) it would appear that if the order is not made, the Manager will not have the funds to be legally represented at the hearing on 17 September;
>
> (b) The Manager's substantive application raises important questions which require urgent resolution;
>
> (c) Ultimately, the leaseholders' position is protected in the long-term given that their rights to: (i) challenge the reasonableness of any service charge; (ii) seek an order pursuant to section 20C Landlord and Tenant Act 1985 and/or pursuant to Schedule 11 Commonhold and Leasehold Reform Act 2002 and (iii) seek other costs orders – remain unaffected this decision."

The grounds of appeal

10. The applicants raise a number of grounds of appeal which I discuss and decide upon in turn. In doing so I make no comment on the narrative in the parties' submissions relating to the

reasons for the respondent's appointment as manager and the history of problems in the building, which are irrelevant.

11. The applicants preface their numbered grounds of appeal with the observation that they have difficulty ascertaining on what basis the FTT's order was made. It is true that the FTT did not say under which sub-section of section 24 of the 1987 Act its order was made, although it may reasonably have regarded it as obvious. It is worth sorting this out before looking at the detailed grounds. Section 24(4) and (9) are as follows:

12. Section 24(4) of the 1987 Act says this:

> "(4) An order under this section may make provision with respect to—
>
> (a) such matters relating to the exercise by the manager of his functions under the order, and
>
> (b) such incidental or ancillary matters,
>
> as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters.
>
> (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 …"

13. The order of 18 August 2020 was clearly a variation of the management order made under section 24(9), rather than a direction under section 24(4), because it gave the manager an additional power, namely to demand an additional service charge.

14. The front page of the FTT's order bears the heading "Interim Order". I attach no significance to that label, which I think may have been used because the order authorised a demand for an interim service charge. It makes no sense to regard it as an interim order; it was not an order made for the time being that could come to an end, like an interim injunction. Unless successfully appealed, that order stands and is not going to be changed, although of course the lessees might later challenge the reasonableness of the expenditure on legal fees, as the FTT expressly contemplated.

15. In the light of those observations some of the grounds of appeal can readily be disposed of.

(i) The FTT had no jurisdiction to make this order under section 24(4) of the 1987 Act

16. The applicant says that the FTT had no power to make a costs order under section 24(4) of the 1987 Act, nor to make an order under that section extending the manager's powers. As to the latter point, I have explained above that this was a variation of the management order made under section 24(9). As to the former point, as Mr Bates says on the respondent's behalf this was not a costs order, in the sense of an order made between the parties to litigation that one party pay the other's costs. It is an authorisation for the manager to demand

a service charge of the lessees. That service charge is able to be challenged as to its reasonableness in due course. There is no substance in this ground.

(ii) The FTT had no power to make an interim order in these circumstances

17. I agree that section 24 gives no power to make an interim order. I have said above that I attach no significance to the label "interim order" as this order was a once-and-for-all authorisation (subject to appeal, and to the potential reasonableness challenge). There is no basis for an appeal here.

(iii) The FTT failed to consider the matters set out in section 24(9A)

18. This point was rightly abandoned in the appellants' later written submissions since section 24(9A) is relevant only to the discharge or variation of a management order on the application of a "relevant person", namely someone to whom the initial notice under section 22 was addressed. It is not relevant to this variation.

(iv) The manner in which the FTT dealt with the application was highly unusual and constituted a substantial procedural defect

19. The point made here is essentially that the FTT did not give the appellants long enough to respond, in light of the fact that the charge authorised by the order more than doubled their annual service charge and had a significant impact upon them. Moreover, the respondent's application was made by letter without supporting documentation or evidence, and she did not say how much she wanted "immediately" as required by the judge.

20. I agree that the procedure adopted by the FTT was relatively swift and informal, but in the light of the short time available before the hearing of 17 September that was appropriate. The manager's response by 7 August was an acceptable response to the FTT's requirement, although it would have been helpful had she specified precisely what she wanted initially. But there was no substantial procedural defect.

(v) Lack of clarity in the order

21. The applicants say that the FTT's failure to state the basis on which the interim order was made and the lack of clarity in the decision constituted a substantial procedural defect. This is, I believe, a further reference to the applicants' uncertainty whether the order was a direction under section 24(4), or a variation of the management order under section 24(9).

22. I agree that the description of the order as "interim" was perhaps unhelpful. But the real question is what the order did and whether the FTT had power to do it. As I have said, I agree with the respondent that the order was clearly a variation of the management order, giving her power to demand an additional service charge outwith the service charge procedure in the leases. That much was unambiguous and the form of the order did not give rise to a procedural defect.

(vi) The FTT took account of irrelevant considerations or failed to take account of relevant considerations or evidence

23. This is the substantive challenge to the decision which, as we have now seen, was neither made without jurisdiction nor marred by serious procedural irregularity.

24. The applicants say that nevertheless it was wrongly made. They say that they FTT failed to take account of the fact that the additional service charge (costing £5,000 per flat) would prevent them getting legal representation for the hearing. Instead, it prioritised the manager's needs over the leaseholders'. They say that this was particularly problematic in view of the "undisputed financial impact" of the Covid-19 pandemic; and that the FTT failed to question the manager's need for representation as she had appeared unrepresented in previous similar hearings. The appellants acknowledge what was said about their long-term protection by the right to challenge the reasonableness of the service charge, to make a section 20C order or to seek other costs orders, but they say that that left them over-burdened in the short term. They also say that the FTT erred in regarding the manager's need as urgent, and did not explain what it meant by its finding that the manager's application raised important questions.

25. As Mr Bates points out, the appellants did not suggest to the FTT in their communications of 7 and 11 August 2020, which were before the FTT when it made its decision (nor in their letter of 18 August 2020, which was not), that the order sought would prevent them getting legal representation. Their letter to the FTT on 7 August said that they did not believe the manager's request should be granted without the Tribunal first reviewing the existing financial management of the service charge monies. They complained about the short notice. They queried why the manager had run out of funds, and why she had spotted the shortfall so late in the day, and they asked for service charge accounts, bank statements and details of service charge expenditure. As Mr Bates observes, these are matters relevant to a challenge to the reasonableness of the charge under section 19 of the Landlord and Tenant Act 1985. But the appellants' letters say nothing about any hardship to them or any impact on their own ability to prepare for the hearing on 17 September. The FTT cannot have erred in failing to consider matters that were not raised. The appellants' letters did not suggest that the pandemic made matters more difficult for them financially, nor do they explain in their grounds of appeal why that was so.

26. As to the importance of the manager's application, I see no reason to criticise the FTT for making this point. The manager's ability to enter Flat C was crucial to her ability to resolve the issue of water ingress – and there can be no dispute that that issue required a solution, however bitter the dispute as to the cause of the problem or the ultimate responsibility for solving it.

27. In their later representations the appellants made a number of new points. They say that the FTT gave no consideration to whether the power granted by the order of 18 August 2020 was "proportionate to/within the scope of the leases; or proportionate to what tenants might expect in light of the 1987 legislation." This is without merit. The FTT is not limited by the terms of the lease in granting powers to the manager.

28. The appellants also say that the effect of the order of 18 August 2020 was to give the manager a "blank cheque" to incur litigation costs without any need to consider whether the section or the costs she was incurring were reasonable. Again, the appellants ignore their right to challenge the reasonableness of the service charge. As Mr Bates observes, they are also entitled to apply to have the manager removed, and indeed have now done so.

29. The appellants say that the manager's inability to borrow to fund her legal costs raised serious concerns as to whether that was a sign of lack of confidence in her or her firm's financial stability or competence. This is far-fetched and, again, was not a matter raised by the appellants in their submissions to the FTT.

30. The FTT had a discretion whether to grant the application, and it cannot be said that it took into account irrelevant considerations or failed to consider relevant ones. There is no basis on which to set it aside.

Conclusion

31. None of the grounds of appeal raised by the appellants has any merit and the appeal is dismissed.

Judge Elizabeth Cooke

14 July 2021

Redacted on 13 October 2022

(signature 1) (signature 2)

(Judge Name) (Member Name)

Dated: (insert date)