UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – APPOINTMENT OF MANAGER – whether a challenge to the FTT's power to vary a management order could be raised for the first time on an appeal – principles applicable to consideration of new points on appeal – appeal dismissed

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

RIVERSIDE CREM 3 LIMITED

Appellant

-and-

SOL UNSDORFER (1)
CIRCUS APARTMENTS LIMITED (2)
LEASEHOLDERS REPRESENTED BY THE RESIDENTS ASSOCIATION OF CANARY RIVERSIDE (3)
OCTAGON OVERSEAS LIMITED (4)
CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED (5)

Respondents

Re: Canary Riverside Estate,
Westferry Circus,
London E14

Martin Rodger QC, Deputy Chamber President

3-4 March 2022

Royal Courts of Justice

Justin Bates, instructed by Ince Gordon Dadds LLP, for the appellant and for the fourth and fifth respondents
Daniel Dovar, instructed by Wallace LLP, for the first respondent
Philip Rainey QC, instructed by Norton Rose Fulbright LLP, for the second respondent
Jonathan Upton, instructed directly, for the third respondents

The following cases are referred to in this decision:

Benthan v Lindsay Court (St Annes) R.T.M. Co Ltd [2021] UKUT 4 (LC)

Jones v MBNA International Bank Ltd [2000] EWCA Civ 514

Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] A.C. 850

Mullarkey v Broad [2009] EWCA Civ 2

Orchard Court Residents Association v St Anthony's Homes Ltd [2003] EWCA Civ 1049

Pittalis v Grant [1989] QB 605

Prudential Assurance Co Ltd v HMRC [2016] EWCA Civ 376; [2017] 1 WLR 4031

Singh v Dass [2019] EWCA Civ 360

Urwick v Pickard [2019] UKUT 365 (LC); [2020] L.&T.R. 9

Introduction

1. This is the fourth occasion on which the Tribunal has had to consider the long running dispute over the management of the mixed residential and commercial estate known as Canary Riverside. At the conclusion of argument on the appeal, and so that the parties would know the outcome before yet another impending hearing in the First-tier Tribunal, I announced that I would dismiss the appeal for reasons which I would explain at a later date. I now provide those reasons.

2. The appellant, Riverside CREM 3 Ltd (Riverside), appeals with the permission of this Tribunal against a decision of Judge Vance, sitting in the First-tier Tribunal, Property Chamber (the FTT) given on 28 April 2021, by which the Judge agreed to the request of the first respondent, Mr Unsdorfer (the Manager), to vary the terms of his appointment as manager of parts of the Canary Riverside Estate (the Estate). Mr Unsdorfer had been appointed to that role by the FTT under s. 24 of the Landlord and Tenant Act 1987 ("the 1987 Act") in September 2019, replacing a previous tribunal appointed manager who had held office since 2016.

3. The supply of electricity and the provision of certain other services to the Estate are organised centrally by the Manager, who collects contributions from both commercial and residential tenants. The effect of the variation of the management order was that Riverside was required to make good a shortfall in contributions payable to the Manager towards the cost of shared services, including electricity, which were due to be made by one of Riverside's commercial tenants of part of the Estate. The tenant, Virgin Active Health Clubs Limited (Virgin), was about to enter a restructuring plan under Part 26A of the Companies Act 2006, thereby avoiding paying its debt to the Manager, who feared that his ability to secure a supply of electricity for the Estate at a reasonable price would be prejudiced if the required shortfall was not met.

4. Riverside relied on a number of different arguments to persuade the FTT that the variation proposed by the Manager should not be made. Some of those arguments were successful and the FTT made a more limited order than the Manager had requested. But the single ground of appeal which Riverside now advances was not mentioned at the hearing before the FTT and did not feature until it sought permission to appeal.

5. Mr Justin Bates (who was not instructed before the FTT) now submits on behalf of Riverside that the FTT had no power to make any order against it. It is said that Riverside was not bound by the original management order as it had acquired its interest in the Estate after the order was made. The only way in which the Manager could acquire any rights against it, Riverside argues, is by serving the necessary preliminary notice under s. 24, 1987 Act, and applying to the FTT for a new management order. That is said to be the result of *Urwick v Pickard* [2019] UKUT 365 (LC), a decision of this Tribunal published in November 2019, 18 months before the FTT's decision.

6. The respondents to the appeal are the Manager, represented at the hearing by Mr Daniel Dovar; Circus Apartments Ltd (Circus), the leaseholder of a number of apartments in one of the residential buildings on the Estate, represented by Mr Philip Rainey QC; a number

of individual leaseholders who are members of the Residents Association of Canary Riverside (the leaseholders), one of whom, Dr Steel, is represented by Mr Jonathan Upton; Octagon Overseas Ltd (Octagon), which owns the freehold of the Estate, and Canary Riverside Estate Management Ltd (CREM), which owned head leases of various parts of the Estate when the management order was first made and which subsequently transferred its interest in the commercial parts to Riverside. Octagon and CREM are supportive of the appeal and both are represented by Mr Bates.

7. The Manager and Circus have also applied to the Tribunal for permission to cross appeal part of the FTT's order by which it refused to vary the management order to make Octagon and CREM contribute to the costs of shared services in the event of non-payment by Riverside. They wish to pursue that application only if Riverside is successful in its appeal and thereby avoids liability for the charges left unpaid by Virgin. The Tribunal directed that their application, and the cross-appeal if permission is granted, should be determined at the hearing of Riverside's appeal.

The issues

8. The following issues arise for consideration:

    1. Whether Riverside should be permitted to raise a new point for the first time on the appeal.

    2. If it is permitted to do so, whether Riverside is bound by the management order.

    3. If Riverside is not bound by the management order, whether the Manager and Circus should be granted permission to cross-appeal and (if so) whether the management order should be varied so that the liability which the FTT intended Riverside to bear should fall instead on CREM and Octagon.

The statutory provisions

9. Before considering the facts and issues in the appeal it is convenient to refer to the source of the FTT's power to appoint a manager which is found in Part II of the 1987 Act.

10. By s. 21(1) the tenant of a flat contained in any premises to which Part II of the 1987 Act applies may apply to the appropriate tribunal for an order under s. 24 appointing a manager to act in relation to those premises. The appropriate tribunal in England is the FTT. Subject to exceptions, Part II of the Act applies to premises consisting of the whole or part of a building if the building or part contains two or more flats.

11. Before an application can be made for an order for the appointment of a manager in respect of any premises, s. 22(1) of the Act requires that a preliminary notice be served by the tenant on the landlord. The notice must inform the landlord of the tenant's intention to make an application and specify the grounds on which the tribunal will be asked to make an order and the matters on which the tenant will rely to establish those grounds. If the

matters complained of by the tenant are capable of being remedied the notice must also require the landlord within a reasonable period to take steps specified in the notice for the purpose of remedying them. By s. 22(3) the appropriate tribunal may dispense with the requirement to serve a preliminary notice in a case where it is satisfied that it would not be reasonably practicable to serve such a notice. No application may be made to the tribunal for the appointment of a manager until after any time specified in the preliminary notice for taking remedial steps has expired (s. 23(1)).

12. By s. 24(1) of the 1987 Act, the tribunal has power to appoint a manager by interlocutory or final order to carry out in relation to any premises to which Part II of the Act applies such functions in connection with the management of the premises, or such functions of a receiver, or both, as the tribunal thinks fit. The tribunal may make such provisions as it thinks fit concerning the exercise of the manager's functions in the order appointing the manager and may give further directions on any subsequent application by the manager (s. 24(3)). The tribunal also has power, on the application of any person interested, to vary or discharge a management order (s. 24(9)).

13. Provision is made by s. 24(8) for the Land Charges Act 1972 and the Land Registration Act 2002 to apply in relation to an order under s. 24 "as they apply in relation to an order appointing a receiver or sequestrator of land". By s. 29 of the Land Registration Act 2002 if a registrable disposition is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition "any interest affecting the estate" (which by s. 87, 2002 Act includes an order appointing a receiver or sequestrator).

14. In *Urwick v Pickard* at [41], [45], I concluded that, by reason of ss. 29 and 87 of the 2002 Act, the effect of a transfer for value of a registered estate to which a management order related was that the transferee took the land free of the management order. I also held that the FTT had not been entitled, in that case, to make an order that the transferee (DP Freehold) should observe and perform the terms of the management order as they had applied to the transferor (DP Management). I explained why, at [56]:

> "In my judgment the FTT did not have jurisdiction to make its original order effective by this indirect route. It could make a new management order, but only with prospective effect and only if the procedure under Part II was implemented. An order under section 24(1), LTA 1987 appoints a manager to carry out functions "in relation to any premises" to which Part II applies. Such an order may only be made if a preliminary notice under section 22 has been given to the landlord or other person with management responsibilities (section 22(1)), or the need for such a notice has been dispensed with (section 22(3)). No notice had ever been served on DP Freehold (the notice given to DP Management was in June 2015) and DP Freehold was not even a party to the application to vary the order. After the registration of the transfer to DP Freehold on 23 March 2018, the land comprised in the transfer was not subject to a management order binding on the person who was landlord of the leasehold flats and responsible for the management of the premises, namely DP Freehold. Although in form the FTT's order of 5 April 2019 purported to vary its original management order, it was intended to enable Mr Pickard to resume management of DP Freehold's land. In substance, therefore, it

was an order appointing Mr Pickard to manage without any of the necessary procedural steps having first been taken to give the FTT jurisdiction."

The facts

15. The Canary Riverside Estate is a prime residential and commercial development situated in Canary Wharf. The Estate comprises 325 apartments in four towers, a hotel, various restaurants, a cafe and a health club.

16. The Estate was completed in 2000 but in 2003 an unsuccessful attempt was made by residential leaseholders to secure the appointment of a manager under Part II of the 1987 Act. A second attempt was made in 2009, again without success.

17. By 2004, Octagon had become the registered freehold proprietor of the Estate, and CREM was the registered proprietor of a long headlease comprising both residential and commercial parts of the Estate.

18. In 2015 a third application was made by leaseholders to have a manager appointed by the FTT; this time they were successful. By a decision finalised on 29 September 2016, the FTT identified a number of failures in the management of the Estate and considered it just and convenient to appoint a manager under the 1987 Act. Mr Alan Coates of HML Andertons was appointed, initially for a period of 3 years.

19. The management order made the manager responsible for managing the provision of shared services to both the residential and commercial parts of the Estate. The order included a number of other provisions of relevance to this appeal. The expression "the Landlord" was defined to include both CREM and any successors in title to its leasehold estate. The obligations imposed by the order on CREM were also stated to bind its successors in title and the management order was to be disclosed to anyone seeking to acquire a leasehold interest, whether by assignment or grant.

20. On 21 November 2018 CREM assigned a number of commercial leasehold interests on the Estate to Riverside as part of a restructuring of the group of companies of which CREM, Octagon and Riverside are all members. As a result of the assignment the reversion to the lease under which Virgin occupied the health club on the Estate became vested in Riverside.

21. Notice of the various assignments was given by CREM to Mr Coates on 21st November 2018 in a letter which also explained the consequences for CREM's liability to pay for shared services, as follows:

> "Liability for service charge payments relating to shared services is with Canary Riverside Estate Management Limited up to 21st November 2018 and Riverside CREM 3 Limited going forward."

22. The management order was varied and extended from time to time, including by a decision of the FTT on 16 September 2019, appointing the Manager in place of Mr Coates.

23. In about October 2019, Circus became aware that Riverside had acquired an interest in the Estate. Its information was initially incomplete, but on 24 October its solicitors applied to the FTT for an urgent order that Riverside be joined as a party to the proceedings under the 1987 Act in which the management order had been made and that it be bound by the order. If necessary, it was proposed that the management order be further varied under s. 24(9) to state specifically that it was binding on Riverside.

24. Judge Vance, who has supervision of this long-running litigation, directed Freeths, the solicitors for Riverside, to respond to the application and to state "whether Riverside, CREM and Octagon consent to the Management Order being varied to specifically state that CREM's successors in title, including Riverside, are bound by the Management Order."

25. On 31st October 2019, Freeths responded to the Judge's direction, setting out its understanding of the effect of the transaction between Riverside and CREM the previous year. Contrary to Circus's fears, there had been no assignment of the residential parts of the Estate:

> "CREM has, however, undertaken a restructuring exercise and assigned the commercial parts of the estate to Riverside CREM 3 Limited in November 2018. This includes the retained commercial parts which are located within the residential towers. ... Where there was no underlessee, Mr Coates was notified that Riverside CREM 3 Limited had become liable for the service charge so that he could invoice the correct party for the shared services. ... The Management Order, as currently drafted, already binds CREM's successor in title to its obligations under the Management Order. ... It is therefore completely unnecessary for CAL [Circus] to seek to vary the Management Order when CREM's successor in title is already bound...."

26. Following that explanation Circus responded to Freeths and to the FTT on 6th November 2019 withdrawing their application to join Riverside to the management order. They made it clear that they were doing so 'in reliance upon Freeth's letter, which unequivocally accepts that Riverside is bound already ...'.

The current proceedings

27. Early in 2021, Virgin gave notice that it wished to utilise the provisions of Part 26A of the Companies Act 2006 which allow for arrangements with creditors and restructuring of companies in financial difficulty. Such an arrangement had the potential to create a shortfall of £355,000 in the service charges paid by Virgin to the Manager.

28. In response the Manager made an urgent application to the FTT on 8 April under s.24(9) of the 1987 Act the relevant part of which sought to vary the management order to enable him to collect any shortfall in service charges from the landlords of occupational

leaseholders who failed to pay what was due from them for shared services. Riverside was named as one of the respondents to the application.

29. On 13 April, solicitors for Riverside wrote to the Manager's solicitors, inviting him to make common cause with them in opposing the Virgin restructuring proposal. They explained their shared interest by pointing out that "... any arrears of service charge that Virgin haven't paid, … would then back up upon my client..."

30. The FTT issued its decision which is the subject of this appeal on 28 April. Judge Vance concluded that it was proportionate, just, and convenient to vary the management order to insert a new paragraph permitting the Manager to recover any service charges owed by Virgin from Riverside, its immediate landlord. The Judge did not consider it necessary or proportionate to make any other party liable in default of payment by Riverside at that time; instead the Manager should wait to see if Riverside complied with the demand for payment, and if it did not do so he could then apply for a further variation of the management order.

Issue 1: Should Riverside be allowed to raise a new point for the first time in this appeal?

31. Mr Bates submitted that his single ground of appeal raised an issue of jurisdiction. The FTT did not have jurisdiction to vary the original management order so as to impose any obligation on Riverside. Management orders do not of themselves bind successors in title. An order made under the 1987 Act against landlords A and B cannot later be varied to impose an obligation on landlord C. The only permissible route to imposing obligations on landlord C was by compliance with the notice provisions in s.22 of the 1987 Act and then seeking a fresh order with landlord C as the respondent to a new application under s.24. The FTT was therefore wrong to vary the management order to bind Riverside.

32. Mr Bates acknowledged that the proposition that the management order was not binding on Riverside had not been raised before the FTT, but that, he submitted, should not be an impediment to the success of the appeal. The argument goes to jurisdiction and if the FTT had no power to make the order, the fact that it had not been pointed out until after the FTT's decision did not prevent the Tribunal from allowing the appeal and setting the order aside. It was not uncommon for new points of law to be raised for the first time on an appeal. In *Urwick v Pickard*, for example, it was accepted by the respondent's counsel that although the argument that the management order was rendered void by the transfer to a new owner had not been raised before, the point could be taken on the appeal, because it was a point of law which did not depend on additional evidence.

33. Mr Dovar and Mr Upton made submissions in response to this part of the appeal.

34. The principles which an appellate court or tribunal should apply when a party seeks to take a new point on an appeal are very well established.

35. The permission of the appellate court or tribunal is always required when an appellant wishes to withdraw a concession or raise a new point which was not relied on at the hearing below: *Jones v MBNA International Bank Ltd* [2000] EWCA Civ 514, at [38].

36. A respondent may object to the taking of a new point on procedural grounds even where permission to appeal has been given. That was explained by Lloyd LJ in *Mullarkey v Broad* [2009] EWCA Civ 2 at [29], where it was sought to challenge a trial judge's decision on grounds not previously raised:

> "Points of this kind more often arise at the stage of an application for permission to appeal or, if permission has been granted, on seeking to amend the grounds of appeal. Here, by contrast, permission to appeal has been given on grounds which include the new points. However, the grant of permission, on which the Respondent was not heard, only shows that there were thought to be reasonable prospects of success. It does not amount to a grant of leave, binding on both parties, to rely on the new point. All it means is that the Appellant was given the right to argue in favour of this at a full hearing."

37. The same principles are applied in this Tribunal, although rule 21(8), Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 requires that, before granting permission to appeal, the Tribunal must give the respondent the opportunity to make representations. The respondents did make representations in this case and the Tribunal was therefore aware that the single point on which permission was sought was new, but nevertheless granted permission to appeal. In doing so it did not form a view of the merits of the appeal other than that it was arguable, and the respondents are still entitled to object to the point being taken.

38. A concise and frequently cited summary of the relevant principles to be applied in deciding whether a new point may be advanced on appeal was provided by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360, as follows:

> "[16] First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> [17] Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial…
>
> [18] Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs."

39. I was also referred to passages from the judgment of the Court of Appeal (Lewison, Christopher Clarke and Sales LJJ) in *Prudential Assurance Co Ltd v HMRC* [2016] EWCA Civ 376, which discussed these principles and explained them in greater detail. The approach to taking new points is justified on a number of grounds, which include: the right of the parties to define in their statements of case the issues on which the court is invited to adjudicate; the unfairness of exposing a party to issues and arguments of which fair warning has not been given; the expectation, for reasons of fairness and proportionality,

that parties will put before the trial judge all questions both of fact and of law upon which they wish to have an adjudication; and the general public interest in the finality of litigation.

40. Particular reliance was placed by the respondents on what was said in *Prudential v HMRC* at [25]:

> "[25] If the point is a pure point of law, and especially where the point of law goes to the jurisdiction of the court, an appeal court may permit it to be taken for the first time on appeal. But where the point, if successful, would require further findings of fact to be made it is a very rare case indeed in which an appeal court would permit the point to be taken. In addition before an appeal court permits a new point to be taken, it will require a cogent explanation of the omission to take the point below."

41. Mr Bates characterised the issue he now raises as a matter of jurisdiction and submitted that the FTT had made an order which it had no power to make and that it was the duty of this Tribunal to correct that error (referring to *Pittalis v Grant* [1989] QB 605 in which Nourse LJ said that cases where the court had acted without jurisdiction were exceptions to the usual rule). But as the Court of Appeal made clear in the passage just cited from *Prudential v HMRC*, even where a point of law goes to the jurisdiction of the tribunal, it does not follow that permission to raise it will necessarily be given ("an appeal court *may* permit it to be taken"). Mr Bates was clearly not right when he submitted that there could be no restriction on the right to raise a new point on an appeal where that point went to the jurisdiction of the tribunal to make the decision which was challenged.

42. Mr Bates relied on what I said in *Urwick v Pickard* at [56] about the jurisdiction of the FTT to make an order binding on a purchaser of the landlord's interest (see [14] above). But it is necessary to distinguish the different senses in which a tribunal may be said to lack jurisdiction to make an order. The FTT's jurisdiction is limited by statute and it may not determine disputes which have not specifically been allocated to it; it may not, for example, make an award of damages for breach of contract. But in cases which the FTT has been given jurisdiction to determine, such as those concerning the appointment of managers under the 1987 Act, its power to do so in a particular case may nevertheless depend on proof or admission of additional facts. There will often, for example, be preliminary procedural steps which must be taken before a particular dispute can be considered by a tribunal which has jurisdiction over disputes of that variety. Until the required steps have been taken the FTT may be said to lack jurisdiction to determine the dispute.

43. A procedural requirement which has been included in a statute for the protection or benefit of one party may generally be waived. In *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] A.C. 850 the House of Lords held in relation to the right of a tenant to apply for a new business tenancy under the Landlord and Tenant Act 1954 that the direction to the Court in section 29(3) that "no application .. shall be entertained" unless it was made not less than two months after the giving of the landlord's notice under section 25 was a procedural requirement which the landlord could ignore where the tenant's application was made prematurely. Lord Pearson said this, at p.877 E-F:

> "The provision is solely for the benefit of landlords and not for the benefit of other suitors or the rest of the Queen's subjects, and it has no discernible public policy for its object. Accordingly I am of the opinion that the requirements of section 29(3) are only procedural and consequently the landlords had a right to ignore or object to the tenants' premature application but could waive that right."

44. The notice provisions in section 22 of the 1987 Act seem to me to be of the same character and may therefore be waived by the landlord (or any other person with management obligations on whom notice must be served). It is not necessary to finally determine that question because the order made by the FTT was undoubtedly of a type which it has power to make. There is no question in this case of the FTT having exceeded its jurisdiction in the sense of making an order which it simply has no power to make; Riverside's points are procedural rather than jurisdictional. It is therefore enough to consider how the dispute might have developed if Riverside had adopted its current stance when it first became known to Mr Coates, the then manager, to the leaseholders and to Circus that it had acquired the reversion to Virgin's lease of the health club.

45. Mr Coates was informed of the transfer by CREM to Riverside on 21st November 2018. He was given no reason to think that any action was required of him, or any application to the FTT for directions; on the contrary, he was reassured (by CREM) that liability for service charge payments relating to shared services would henceforth fall on Riverside.

46. Circus did not become aware of the transfer until October 2019. It immediately applied to the FTT for a variation of the management order and for Riverside to be joined as a party to the proceedings so that there would be no doubt that it was bound by the terms of the management order. That application was withdrawn in reliance on Freeth's letter of 31 October 2019 which unequivocally represented and acknowledged that the management order applied to Riverside as CREM's successor in title.

47. If Riverside had not provided that acknowledgement, or if it had withdrawn it when, only two weeks later, the Tribunal's decision in *Urwick* was published on 12 November 2019, or if it had asserted that it was not liable to make all the same payments as had been liabilities of CREM before the transfer, at any time before the Manager's application to vary the management order to make it liable for service charges payable to the Manager by Virgin, I have no doubt the matter would have been raised with the FTT by the Manager and by Circus, and probably by the other residential leaseholders. The original application would have been reinstated, if necessary after notice had been given to Riverside under section 22(1). If Riverside resisted the making of an order joining it as a party and binding it to the obligations originally imposed on CREM, the application to vary the order to make Octagon and CREM responsible in its place (which is the subject of the cross-appeal) might have been made earlier. Alternatively, the Manager might have insisted on a contractual obligation being entered into by Riverside to meet any shortfall. One way or another, the Manager would have taken steps to avoid the outcome which Riverside now claims to have achieved by which he, and not Riverside or its superior landlords, is said to have become responsible for meeting the shortfall in service charges as a result of the default of one of Riverside's commercial tenants. That outcome would have been avoided, I have no doubt, and it would be grossly unfair in the circumstances for Riverside to be able now to wriggle out of the assurances which it willingly gave.

48. Other factual issues would also probably have been investigated before the FTT if Riverside had taken the point it now raises. In particular, the leaseholders would have wished to probe the financial arrangements associated with the transfer to Riverside of commercial reversions of substantial value. Riverside's accounts show that as at 30 April 2018, it had total assets of £1,250 and debts of £900. CREM's accounts show that at the same date, it had fixed assets of £71.45m and debtors of £6.3m. Following the restructuring, Riverside's accounts show that as at 30 April 2019 it had fixed assets worth £68.4m and net liabilities of £60.5m (mostly representing loans from group companies). The leaseholders would have challenged any claim by Riverside to be a transferee of the commercial reversions for value, which is a necessary requirement before section 29, Land Registration Act 2002 can operate in its favour. Before Riverside would have been in a position to argue that it was not bound by the management order, and that the FTT lacked jurisdiction to make any new order against it, it would have been necessary for it to identify, plead and prove facts which were not in issue, and the other parties would have prepared for and contested the application on different grounds.

49. In the passage from the decision of the Court of Appeal in *Prudential v HMRC* quoted at [40] above, it was said that where an appellant wished to raise a new point for the first time on an appeal, a "cogent explanation" ought be provided why the point had not been taken before. No evidence was provided by Riverside to explain why the FTT's power to vary the management order in the manner proposed had not previously been disputed. When I asked Mr Bates whether he was instructed to offer an explanation he said that he did not have authority to waive privilege. That answer was taken by some of the respondents to imply that the point had at least been the subject of consideration, rather than simply having been overlooked, but I make no assumption one way or the other about that. I simply take account of the absence of any explanation.

50. One of the grounds on which the Tribunal may refuse to permit a new point to be raised for the first time on an appeal is where other parties have acted to their detriment on the faith of the earlier omission to raise it. Another is where the original proceedings might have been conducted differently if the point had been taken at the proper time. A third is where no explanation has been offered for the failure to take the point at that time. I am satisfied that no jurisdictional hurdle which could not have been waived by Riverside prevented the FTT from making the order which it did. In all of those circumstances and having regard to the Tribunal's overriding objective of dealing with cases fairly and justly, I refuse to permit Riverside to rely on the single ground of appeal for which permission was granted.

Issue 2: Is Riverside bound by the management order?

51. Having refused to permit Riverside to raise this argument it is unnecessary to say much about it. The respondents advanced a range of interesting arguments, some of them far reaching (Mr Rainey QC challenged the correctness of the Tribunal's decision in *Urwick*). As all of those points are now academic it is better if I say nothing about them. It is enough that the FTT has made its order imposing obligations on Riverside and that the order has not been set aside as a result of this appeal.

52. I would add only that there was some debate over the consistency of the Tribunal's decision in *Benthan v Lindsay Court (St Annes) R.T.M. Co Ltd* [2021] UKUT 4 (LC) with the view taken by the Court of Appeal (Keene and Carnwath LJJ) in *Orchard Court Residents Association v St Anthony's Homes Ltd* [2003] EWCA Civ 1049 on the issue of the extent to which the procedural requirements of s. 21 needed to be satisfied before an order could be made varying an existing management order on an application under s. 24(9). The Tribunal (Judge Cooke) considered at [48]-[51] that an order could not be extended to apply to a new party by variation and that a new management order would be required. The Court of Appeal, in dismissing a renewed application for permission to appeal a decision of the Lands Tribunal, drew a distinction between making and varying an order (the variation in that case was to extend the term of the manager's appointment). That issue is one to which it may be necessary to return if it arises in another case.

Issue 3: the cross-appeal

53. The applications for permission to cross-appeal were contingent on Riverside's appeal being successful. It has not been, and it is unnecessary to consider the applications.

Disposal

54. For these reasons the appeal is dismissed.

Martin Rodger QC,

Deputy Chamber President

4 April 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.