UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – APPOINTMENT OF MANAGER – s24 Landlord and Tenant Act 1987 – powers and procedures on appointment

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER) FOR THE LONDON REGION

BETWEEN:

(1) MS D KOL
(2) MR I SADEH
(3) MS C EBBORN

Appellants

and

MARY-ANNE BOWRING

Respondent

Re: Flats 1, 2 and 3,
66 Rosslyn Hill,
London
NW3 1ND

Before: His Honour Judge Gerald

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
23 September 2015

The First and Third Appellants in person, the Second Appellant represented by Isaac Sadeh
The Respondent did not attend and was not represented

The following cases were referred to in this decision:

Maunder Taylor v Blaquiere [2002] EWCA Civ 1633 (2003) 1 WLR 379.

DECISION

Introduction

1. This appeal concerns the appointment of a manager in respect of the small mixed residential and commercial building situated at and known as 66 Rosslyn Hill, London NW3 1ND. The property comprises three residential flats with a commercial unit on the ground floor and basement.

2. By Order made on 4 August 2011 the Leasehold Valuation Tribunal as it then was appointed Ms Mary-Anne Bowring, a partner of Ringley Chartered Surveyors of Ringley House, Royal College Street, London NW1 9QS, receiver and manager of the premises for a period of two years from 4 August 2011 until 4 August 2013.

3. That Order, made under section 24 of the Landlord and Tenant Act 1987, was made on the application of the first appellant, Miss D Kol. There were two applications before the LVT on that occasion: LON/00AG/LSC/2010/0725 and LON/00AG/LSC2011/0007.

4. The material parts of the Order are as follows:

" 3. The Manager shall manage the Property in accordance with:

"(a) The respective obligations of the landlord and tenants in the leases by which Flats A, B, and C at the Property are demised by the landlord and in particular but without prejudice to the foregoing with regard to repair, decoration, provision of services and insurance of the Property.

"(b) The duties of Manager set out in the current Service Charge Residential Management Code (the "Code") … published by the Royal Institute of Chartered Surveyors and approved by the Secretary of State pursuant to section 87 of the Leasehold Reform Housing Urban Development Act 1993.

"4. Without prejudice to the generality of the foregoing it shall be the duty of the Manager:

"(a) To collect and receive all sums by way of ground rent, service charge, insurance premiums or otherwise arising under the leases…

"(e) To maintain on trust an interest bearing client account into which service charge money will be paid together with such other accounts as the Manager shall think necessary in connection with the management of the Property…

"(g) To maintain official records and books of account that will be open to inspection together with relevant vouchers at all reasonable times by all persons interested…

"(i) To deal with all enquiries, requests, reports and correspondence with the lessees, the landlord and with solicitors, accountants and other professional persons in connection with the management of the Property."

5. After providing for the manager's remuneration at a basic fee of £1,750.00 plus VAT and making other provisions in respect of remuneration, the Order goes on to further provide:

"6. In accordance with section 24(4) of the Act the Manger shall have liberty to apply to the Tribunal for directions.

"7. In accordance with section 24(9) of the Act any person interested has liberty to apply for the variation or discharge of this Order.

"8. This Order shall remain in force until 4 August 2013."

6. On 26 July 2013, the First-tier Tribunal (Property Chamber) (Residential) ("the F-tT"), as the LVT had by then become, issued a decision in respect of two new applications LON/00AG/LSC/2012/0803 and LON/00AG/LVM/2013/0001. The first application, issued by the appellants in 2012, challenged the reasonableness of certain elements of the service charge raised by Ms Bowring. The second application was a cross application issued by Ms Bowring seeking a variation of the management order which had been made on 4 August 2011.

7. In broad terms the upshot of that decision was that the management order was varied but the challenges to the reasonableness of the service charge were dismissed. That decision was appealed by the tenants who are also the appellants in the matter before me. That appeal came before the Upper Tribunal whose decision was issued on 17 August 2015. In broad terms the appellants were at least partially successful and two of the sums challenged, namely management charges and insurance premiums, were referred back to the F-tT for fresh hearing. In fairly short order, on the 20 August 2015, the F-tT issued directions relating to the determination of those two issues. Thus, the appellants' application issued in 2012 remains in September 2015 undetermined.

8. On 30 September 2014, the F-tT heard application LON/00AG/LVM/2014/12 being an application by Ms Bowring for in broad terms payment of certain fees. The appellants' cross application sought, amongst other things, an order that surplus monies held by Ms Bowring be paid to them. So far as the application of Ms Bowring is concerned, by the time matters came before the F-tT Ms Bowring had changed her position and sought to withdraw the whole of her application. The F-tT acceded to that application to withdraw conditional upon the following order:

"The manager, Ms Bowring will use her best endeavours to provide to the Tribunal and to the Respondents a fully itemised statement of the service charge account for the property and the individual accounts for Flats 1, 2 and 3 for the period from 1 January 2013 to 4 August 2013 within 28 days of the date of this Order."

9. That order I am told has not been complied with. It follows that there remains no general or fully itemised statement of service charge account for that period in time, and astonishing as it may seem over two years after conclusion of her appointment, Ms Bowring has not produced any final accounts or paid over the balance of any monies held by her.

10. With regard to the appellants' cross application, that was refused. It is this part of the decision which is appealed against. The decision, and its reasoning, are short and provide as follows:

"13. We refuse the order requested under paragraph 50 of the respondent's statement "the respondent specifically asked the Tribunal for their cash property to be returned to them immediately." We have no jurisdiction to make the order requested. However Ms Kol told us the reimbursements that were ordered by the Tribunal in their decision dated 4 August 2011 were credited to the service charge account and since then have been spent on current service charge items. The lessees have received service charge accounts for the years ended 31 December 2011 and 2012 and we have ordered a breakdown of the expenditure for the period January 2013 – 4 August 2013…"

11. Although phrased as a request for their "cash property" to be returned to them, the appellants were in actual fact asking for an order that any surplus monies held by Ms Bowring on the termination of her appointment on 4 August 2013 be handed to them, it of course being a statement of the obvious that before that sum could be determined there would have to be a full and proper accounting by Ms Bowring of the financial aspects of her tenure as manager and receiver over the two year period as well final determination of any challenges thereto.

12. At the point in time of this decision dated 30 September 2014, as I have already said, there had been no final accounting of the two year tenure in the sense either of final accounts having been provided by Ms Bowring *vide* the order that she produce a statement of accounts from 1 January 2013 to 4 August 2013 and also the fact that the appeal against the 26 July 2013 decision of the F-tT in respect of the management fees and insurance premiums remained and remain extant and in fact has only just been determined by this Tribunal only to be remitted back to the F-tT.

13. The appellants accept however that they have received a statement of expenditure for the year ended 31 December 2012 from Ms Bowring which shows the total received or owing by each of the three flats and also the commercial premises on the ground and basement floors. That shows that Ms Bowring had received £7,451.89 from the previous freeholders which after crediting further payments received from the tenants by Ms Bowring and deducting repayments by Ms Bowring to the tenants and also the expenditure for that year, resulted in a surplus held by Ms Bowring of £3,599.34. I should say here that the management fee and insurance premium of £2,100 and £1,521.30 referred to in that statement of expenditure were the subject of 26 July 2013 decision of the F-tT which is appealed to this Tribunal and has now been remitted back for determination by the F-tT.

14. The £3,599.34 therefore comprises a mixture of money handed over by the freeholder to Ms Bowring at the outset of her appointment as well as new money which had been received by her prior to 31 December 2012 from the tenants. I am told that since then further

monies have been paid to her and no doubt further expenditure has been incurred by her. In the absence of any finally resolved final account up until 4 August 2012, it cannot be said what the surplus, if any, is.

15. However, it appears, on the information before me, but this is not a determination, that it is more likely than not that Ms Bowring holds a surplus for the tenants. Assuming that there was or is or will be a surplus after determination of all outstanding issues, the effect of the decision being appealed is that the F-tT is powerless to order a receiver and manager to return monies which have been paid by or on behalf of tenants and is beneficially theirs.

16. Just to complete the picture, since 4 August 2013 new managing agents Salter Rex have been appointed and they have raised new service charges, a line being drawn under that which has gone before. The present position therefore is that once the accounting for the 2 years of Ms Bowring's tenure as receiver and manager has been completed, whatever surplus remains will be held on trust and should quite obviously be repaid to the tenants in appropriate proportions.

17. Permission to appeal was granted by the Deputy President of this Tribunal on 5 February 2015, in part to provide clarification as to the relationship between the F-tT and an appointed receiver and manager. The material parts of the permission provide as follows:

"1. The proposed appeal raises important questions concerning the relationship between the [F-tT] and a manager appointed by it pursuant to section 24, Landlord and Tenant Act 1987, and remedies available to the lessees of premises which have been made the subject of a management order. In particular the appeal raised the question whether the F-tT has any jurisdiction or responsibility (a) to resolve disputes between such lessees and a manager at the conclusion of the manager's appointment or (b) to satisfy itself that the manager has properly accounted for sums which it has received in the course of the appointment, or whether any such dispute must be the subject of separate proceedings in the county court.

"2. It is arguable that, having appointed the manager, the F-tT had jurisdiction to consider the applicant's claim that the manager had failed to account for sums received by her to the landlord.

"3. Disagreements between the Tribunal appointed managers and lessees are not uncommon and the issues raised by the proposed appeal are of some wider significance.

"4. The appeal will be dealt with by the Tribunal as a review of the decision of the F-tT.

"5. The application for permission to appeal may stand as the appellant's notice, with the document dated 27 October 2014 and Ms Kol's letter dated 23 January 2015 as the grounds of appeal.

"6. If Ms Bowring attends to respond to the appeal a respondent's notice and grounds of opposition to the appeal should be served in one month from the date on which this order is sent to her."

18. The respondent Ms Bowring set out her position in the respondent's notice dated 4 March 2015. Before me appeared Ms Kol, Ms Caroline Ebborn and Rima Farah representing Mr Isaac Sadeh who is presently residing in Israel. Ms Bowring chose not to attend, her solicitors writing to the Tribunal by letter dated 17 September 2015 with the following explanation:

"We have previously indicated that our client will not take any active part in the appeal because the costs of so doing would be very large and out of proportion to the matters in issue. For this reason we requested a paper review.

"Our client's costs would not be paid by the First Tier Tribunal who appointed her or any other party.

"In the circumstances our Client is content to rely on the statement set out in the Respondent's Notice dated 4 March 2015.

"In view of the above it is not intended to appear at a hearing. No discourtesy is intended."

19. The material provisions of section 24 of the 1987 Act are as follows:

"(1). A leasehold valuation tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies –

(a) such functions in connection with the management of the premises, or

(b) such functions of a receiver,

"or both, as the tribunal thinks fit.

"(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) A leasehold valuation tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section…".

20. The nature of the appointment of a manager in this case, also a receiver, under the 1987 Act has been considered by the Court of Appeal in *Maunder Taylor v Blaquiere* [2002] EWC Civ 1633 (2003) 1 WRLR 379. Aldous LJ said as follows:

"41. In my view the purpose of Part II of the 1987 Act is to provide a scheme for the appointment of a manager who will carry out the functions required by the court. The manager carries out those functions in his own right as a court appointed official. He is not appointed as

the manager of the landlord or even the landlord's obligations under the lease. That being so, Mr Maunder Taylor was a court-appointed manager appointed to carry out duties required by the order appointing him. He did not carry on the business of Guernsey [the landlord]. His claims were made in his capacity as manager.

"42…. The manager acts in a capacity independent of the landlord. In this case the duties and liabilities laid down in the order are defined by reference to the lease, but do not alter his capacity. In my view Mr Maunder Taylor's right to the money claimed arose from his appointment not from the lease….

"43…. Further, it must be possible for the manager to obtain funds necessary to manage the property even though the tenants, or some of them, had a right to refuse further payment e.g. where they have paid and the landlord has absconded with the money. In such a case the tribunal decides the rights. Their jurisdiction is not confined to the terms of the lease…"

21. It will be apparent that the actual point upon which I have to decide this appeal is very narrow. Namely whether or not the F-tT has jurisdiction to order a manager or indeed a receiver appointed under section 24 of the 1987 Act to pay any surplus monies over to the tenants or indeed any other suitable or appropriate party. Implicit within or underlying that decision is a question as to whether or not the F-tT has jurisdiction to determine any disputes which may arise between any of the material parties, usually tenants and the manager or receiver, and that is of course part of a wider question of the nature and extent of the jurisdiction of the F-tT to control and give directions to managers or receivers which it has appointed.

22. The purpose of the power granted by section 24 of the 1987 Act to appoint managers or receivers in respect of residential property is to enable that property to be managed subject to the control of the tribunal in circumstances where the landlords' management or discharge of its obligations under the provisions of the lease have been found wanting. Looking at matters very broadly, the whole purpose of the jurisdiction is to enable the F-tT to ensure that that what has hitherto been done inadequately and perhaps improperly is done adequately and properly. It is for that reason that the F-tT is granted very wide powers as to how the manager should exercise his functions under the order and also such incidental or ancillary matters as it thinks fit: see section 24(4). Those are expanded by subsection (5) which lists other matters which the order may encompass, all of which are "without prejudice to the generality of subsection (4)".

23. Part of that process requires the maintenance of accounting information and all proper records and the provisions of those or making available of them to all relevant parties, which would include the paying tenants, and upon the completion of the period of management a determination of precisely how much remains in the account –which in these sort of situations would usually be a surplus simply because managers will generally not manage unless they are in funds, which may be different from the position of a landlord who might be prepared to self-fund or borrow.

24. During the currency of the period of tribunal-ordered management, it is possible that disputes might arise. If they cannot be resolved by agreement, the only port of call for their

resolution is the F-tT. Whilst as in this case disputes might arise during the currency of tenure or appointment, they may occur after expiry or completion of the period of appointment simply because it would not be until immediately after completion of the period of appointment that final accounts can be produced and circulated and scrutinised by the tenants.

25. Once all matters relating to the service charge and monies raised during the period of the tribunal-appointed manager have been determined, the matter will need to be wound up or concluded by an order stating to whom the monies should be paid. In the ordinary course of things those monies will be reimbursed to the paying parties, usually the tenant, and not transferred to whoever takes over from the manager or receiver. This is because, as *Maunder Taylor* makes clear, monies paid to the manager are by dint of statutory and tribunal authority and are not paid as service charge under the terms of the lease in the strict and very narrow sense of how that is understood.

26. Therefore, to complete the circle, there needs to be an opening balance which would usually be zero or a sum ordered to be transferred to the manager on appointment and a closing balance which would usually have a surplus with all transactions iterated in between and any surplus should be paid to the tenant(s). There may of course be circumstances where it is appropriate or indeed agreed that that surplus will be paid to a new court or other appointed manager or otherwise.

27. What in my judgment should also be borne in mind when making management or receiver orders is that the process of accounting and challenging to any accounts or conduct of the manager or receiver should be as simple and straightforward as possible so as to avoid as far as possible a proliferation of applications heard by different F-tT's and then appealed separately. That is not only wasteful of resources of time and money but it unnecessarily prolongs what should be a very simple and straightforward process particularly in the circumstances of a very small block with a very small service charge such as this case.

28. This case viewed albeit with the benefit of hindsight provides an abject example of just how complicated matters can become in a small block of flats with one commercial premises in respect of which they are a mere 7 separate annual charges for services provided. It is quite extraordinary that there have been no final accounts produced by the manager, now over two years passed expiry of the management order. In this respect it must be borne in mind that whilst the appointment of the manager only lasts for the duration of the management order, the manager or receiver remains under the control of and accountable to the tribunal for his or her conduct even after expiry of the period of management. This is self-evident and implicit in the need and requirement of the manager or receiver to account which of necessity will continue past the last date of his or her powers to manage. How this works is that the manager has power to manage throughout the currency of the two year period but thereafter has no such power save that he is required to account for and explain his or her actions and hand over any surplus monies as agreed or ordered by the court. It is not open to the manager or receiver to refuse to engage and fail to attend tribunal, for whatever reasons, because he or she has accepted appointment by the tribunal: he or she must remain accountable until the whole matter has been concluded and final distribution made or he or she is released by tribunal order in the meantime.

29. It follows from what I have said, and in my judgment falls within the specific wording of section 24(4) of the 1987 Act, that the F-tT has power to determine what the final account is and if there is a surplus order the manager or receiver to pay that over to the tenants or other appropriate parties. If the F-tT has no such power or jurisdiction it would mean that there would be no mechanism for completion of the management and resolution of any disputes relating to his tenure. In my judgment can not be and would be unnecessarily cumbersome for such matters to have to revert to the county court – who no doubt would remit such issues back to the F-tT if appropriate.

30. As I understand it, the order which was made was a generic standard form order issued by the F-tT in these sorts of cases. In my judgment, particularly in a simple straightforward case such as this involving as it does a modest amount of money, that is not appropriate as it is not tailor made to the original application determined back on 4 August 2011. Whilst the order sets out in general terms what the manger is to do, it does not set out with adequate precision precisely what accounts and accounting are required to be kept and maintained. Whilst the reference to the RICS service charge regulations is generally helpful, the problem is that that is an 82 page document which most tenants will not have a copy of, is largely irrelevant to the task of the manager and receiver and again makes it unclear as to precisely what needs to be done.

31. The order which should be made should in my judgment have simplicity and practicality as its hallmarks. In this case it should have been explicitly stated that accounts would be produced by the receiver-manager for the duration of her tenure starting with an opening balance on 4 August 2011 and a closing balance on 4 August 2013 with appropriate entries in relation to expenditure during the intervening period. It should also have provided for accounts during that period, the most sensible approach being that the receiver-manager shall produce accounts from 4 August – 31 December 2011, that being the end of the service charge year under the lease, then accounts from 1 January 2012 – 31 December 2012 and then for final accounts from the 1 January 2013 – closing accounts on 4 August 2013 with an order that any surplus monies shall be paid to the tenants without further order.

32. There should have been a timetable for provision of those accounts and also a timetable within which the tenants could seek to request further information or raise queries on those accounts and for the manager to respond and in the event that such response was unsatisfactory for the relevant tenants to apply to the F-tT in respect of any matters they disputed. That application could take the form of a challenge to the reasonableness of the amounts claimed in the sense made under section 19 of the Landlord and Tenant Act 1985 or in relation to the application or mis-application of monies received or any other matters pertaining to the discharge by the manager or receiver of his or her functions as the tribunal appointed manager or receiver, irrespective of whether or not such challenges fell strictly or within the provisions of section 20C or otherwise. This is because it is necessary, and is the meaning and effect of section 24 of the 1987 Act, that all matters within the ambit of the appointment of the receiver-manager be brought within and determined by the single jurisdiction of the F-tT in order to ensure efficient, expeditious and cost-effective resolution and dispatch of tribunal-appointed manager-receivers by one tribunal.

33. Any such application would ideally bear the same application number or at any rate specifically refer to the application number of the application which resulted in the order, in this case of 4 August 2011 and ideally, if this is practicable, be determined by the same F-tT panel. The reason for this is to make clear that the application is within and related to the management order of the F-tT and helps promote consistency of determination and ensure that the F-tT retains proper control over all matters relating to the management generally and the receiver-manager in particular whom they have appointed. Many of the issues arising, such as disclosure of information, should be able to be disposed of on paper without hearing.

34. Had that been done in this case, I cannot help but feel that there would have come a point in time, perhaps when the matter came before the F-tT on 15 May 2013 which resulted in its decision of 26 July 2013, when the F-tT would have thought to itself that what was critical in order to properly manage and conclude the period of tribunal-appointed management that directions should be given in relation to the provision of final accounts and any challenges thereto. Indeed that might have happened at a prior case management hearing, albeit had the indications I have given been as to what should be in the original order been complied with that would all have happened as a matter of course.

35. Instead, what has happened is that the manager has been left in many respects to her own devices to decide and work out that which is appropriate and necessary. It is a striking feature of this case that, as I have said, I am told no final account has been produced for the 1 January – 4 August 2013 period notwithstanding the order of 30 September 2014. On any basis that final account should have been produced by the 30 September 2013 with the tenants being given a one month period to the end of October 2013 to raise questions or challenge those sums with a further period of 14 days for the manager to respond thereto and then for a period of 28 days thereafter for the applicants to make application within the original application to the F-tT for further determination.

36. Instead all that has happened is that Ms Bowring was ordered to use her "best endeavours" to provide such a service charge notwithstanding that she had been ordered by paragraph 4(g) of the 4 August 2011 order to maintain official records and books of accounts and also that it is a requirement of the lease that proper service charge accounts be made and it is a requirement of Part 10 of the RICS Service Charges Residential Management Code that proper accounts be produced and provided. These sort of accounts should be produced as a matter of course, it being inappropriate for a F-tT to have tolerate and sanction a manager using his or her "best endeavours".

37. In short, I allow this appeal and hold that the F-tT has power to determine all matters relating to the discharge by the tribunal appointed receiver-manager of his or her functions including, but not limited, to the provision of all, including final, accounts and the payment of any surplus. More generally the F-tT when making a management order under section 24 of the 1987 Act should consider and approach the matter in a simple, straightforward and practical way especially where relatively modest sums are involved so that it is clear precisely that which the receiver-manager must do and by when and also the ability for any elements to be challenged within a specific framework and timetable.

38. However it is not open to me to make any order for payment of any surplus to the appellants because I do not know what that amount should be. Whilst the appellants sought to persuade me that it should be their respective shares of £7,451, that has been reduced as a result of subsequent payments some of which are not challenged. Whether or not it was right that that money should be paid to the manager at the outset is now water under the bridge, and she holds it on trust. Precisely how much is now outstanding can only be determined after the final accounting has been provided and any challenges thereto resolved. In that respect, I order that the matter be remitted to the F-tT to be determined at the same time as LON/00AG/LSC/2012/0803 with any further directions being given by the F-tT as appropriate.

39. Where a person accepts the appointment as manager or receiver by the tribunal it is not only incumbent upon, but a fundamental requirement, that that person do comply with orders and attend tribunal hearings. It is not sufficient and in my judgment is a dereliction of duty to the tribunal to fail to attend this Tribunal or any other tribunal hearing. It is inadequate and insufficient for that tribunal-appointed manager to simply write to the tribunal and state that she will not attend for the reasons stated. I therefore further order that she shall fully comply with all tribunal orders and attend all further tribunal hearings unless specifically released from attendance. In that regard a specific, explicit release will be required from the tribunal, it being insufficient for the receiver-manager Ms Bowring to simply write to the tribunal and tell them she will not be turning up for whatever reason.

Dated: 14 October 2015

His Honour Judge Nigel Gerald