UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – APPOINTMENT OF MANAGER – whether landlord in breach of obligation under tenancy – sufficiency of FTT's findings of fact and reasons – failure to consider whether just and convenient to make appointment – ss.22-24, Landlord and Tenant Act 1987 – appeal allowed

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

BETWEEN:

INVERGARRY COURT LIMITED

Appellant

-and-

CHRISTOPHER ANTHONY CONNOLLY (1)
VALERIE HENDRY (2)
JOSEPH AHERN (3)

Respondents

Re: Invergarry Court,
74 Station Road,
New Barnet

Martin Rodger QC, Deputy Chamber President

Heard on 27 July 2022 by CVP

Ian Rees Phillips, instructed by Derrick Bridges & Co, for the appellant
Edward Blakeney, instructed by Bruce Maunder Taylor, for the respondents

The following case is referred to in this decision:

Treloar v Bigge (1874) L.R. 9 Ex. 151

Introduction

1. Invergarry Court is a modern block of flats in New Barnet. It was constructed in 1987 and originally contained eight flats. In about 2003 a ninth flat was created at basement level.

2. By an order made on 1 November 2021 the First-tier Tribunal (Property Chamber) (the FTT) appointed Mr Martin Kingsley of K & M Property Management Limited as manager of Invergarry Court following an application under section 24 of the Landlord and Tenant Act 1987 (the 1987 Act) made by the lessees of four of the flats in the building. Those lessees, Mr Connolly, Ms Hendry and Mr Ahern are the respondents to this appeal against the FTT's decision.

3. The appellant, Invergarry Court Ltd, owns the freehold of the building and is the immediate landlord of each of the flats. The lessees of the eight original flats each hold one share in the company. The lessee of the penthouse flat, Mr Norman Barrs, is the company secretary and a director. A company which he controls owns the lease of another flat in the building. The lessees of the remaining three flats have not participated actively in the proceedings, but they have generally aligned themselves with Mr Barrs' position and have objected to the appointment of a manager.

The background to the appeal

4. The FTT made few findings of fact and I take the background to the application from the witness statements and documents that I have read, recognising that parts of the evidence are contentious.

5. The appellant acquired the freehold of Invergarry Court in about 2000. For most of the time since then, the conduct of the appellant's affairs has been assumed by Mr Barrs, whom the FTT described as "the *de facto* manager".

6. The footprint of the building is large enough to accommodate two flats on each floor, but when the building was constructed the developer created only one flat on the lower ground floor and left an undeveloped void in the remainder. That area may have been earmarked as a store or to provide an additional flat, but in its original form the ceiling height was too low to provide habitable accommodation and it remained incomplete.

7. In his witness statement Mr Connolly suggests that after the appellant acquired the freehold of the building it refused an offer by Mr Barrs to purchase the lower ground floor void and sold it instead to Mr Ahern for a much higher price. The space was then demised to Mr Ahern pursuant to a development agreement and a lease, both dated 3 September 2003, which required works to be carried out in accordance with agreed plans and a specification. Mr Ahern proceeded to convert the void to form a new flat, Flat 1A, which was completed in May 2004. In his witness statement Mr Ahern said that all of the work was completed with planning permission and building control approval. He also referred briefly to an unsuccessful attempt by Mr Barrs to stop the development by injunction; he did not explain why that attempt had been made, but it may have been related to a complaint by Mr Barrs

that unauthorised work had been carried out. The fact that some unauthorised works had taken place appears not to be in dispute since as long ago as March 2008 it was acknowledged by the surveyor appointed by Mr Ahern that there had been minor variations to the work shown in the agreed plans.

8. The other flat on the lower ground floor of the building is Flat 1 which was demised in 1988 by a lease in the building's standard form. That lease was acquired by Ms Hendry in 1998. Flat 1 was originally a one-bedroom flat but in 2005 Mr Ahern carried out work on behalf of Ms Hendry to create an additional bath or shower room (and possibly other work) which enabled the unit to be occupied as a two-bedroom flat.

9. The leases of the flats in the building are in conventional form. They include a covenant by the lessee not to make structural alterations without the previous consent in writing of the landlord and a covenant to permit the landlord to have access to the flat to view its condition. More unusually for residential premises, each lessee also covenants not to assign their lease without the consent in writing of the landlord, such consent not to be unreasonably withheld.

10. It is common ground that the appellant did not give its consent in writing to the alterations carried out by Ms Hendry to Flat 1. Evidence was given to the FTT by Ms Hendry's husband, Mr Peter Tolaini, of a conversation he had with Mr Barrs and Mr Ahern before the work began in which he had informed Mr Barrs "precisely what was intended to do with Flat 1", in response to which "Mr Barrs said there was no problem". Mr Ahern did not mention that conversation in his own brief statement, although he did describe the works he had undertaken as having been done "with the agreement" of Mr Barrs. In his evidence Mr Barrs denied having given his consent in such a casual manner.

11. A more detailed and near contemporaneous account of the works to Flat 1 was also before the FTT in the form of a "case history" prepared for the directors of the appellant in 2005 or 2006 by Mr Barrs. It suggests there was much more to their exchanges with the appellant than Mr Ahern or Ms Hendry appear to have recalled when they made their brief witness statements. The case history refers to a meeting on site between the appellant's surveyor, Mr Williamson, and the "leaseholder/developer" at which it was suggested underpinning of structural walls would be required. In light of that suggestion Ms Hendry and Mr Ahern were reported to have amended their proposals which were then implemented; the case history does not state whether approval to those amended proposals was given by the appellant. After the works the flat was first occupied in July 2005 but problems with drains were then experienced. Further work was carried out, funded by the building's insurers; those remedial works altered the original arrangement of the drains serving Flat 1. Mr Williamson was said to have prepared a "comprehensive building report" but had not been involved in supervising the works funded by insurers. Although the case history was annexed to the application for the appointment of a manager, neither party dealt with it or the events it records in their evidence.

12. Since the works in Flat 1 and Flat 1A were carried out in 2004 and 2005 a near continuous state of disagreement has existed between Mr Barrs on the one hand and Ms Hendry and Mr Ahern on the other. The underlying subject of the disagreement related to the works which Mr Barrs says were unauthorised. The lessee's covenant preventing the sale of the flats

without the consent of the appellant has provided Mr Barrs with leverage, as he has been able to discourage prospective purchasers by informing them that works were done to both flats without the landlord's approval.

13. Two actions are said to have been commenced by Ms Hendry in the county court alleging that the appellant was behaving unreasonably; one of these was dismissed in 2017 because Ms Hendry was not ready for trial, and I assume the other was equally inconclusive although no information about it is included in the evidence. The dismissal of proceedings in 2017 encouraged Mr Barrs' confidence in the strength of the appellant's position. Shortly after the claim was dismissed the appellant's solicitor wrote to Ms Hendry's solicitor that "my client can continue to withhold its consent to an assignment and there is nothing your client can do about it."

14. According to the respondents, the existence of the dispute has prevented Mr Ahern and Ms Hendry from selling their flats for 14 years. That is not really disputed by the appellant, although it is denied that there has been any formal request for consent since 2007. Through Mr Barrs, the appellant has indicated a number of conditions which would have to be satisfied before it would be prepared to give its consent to any assignment. Those conditions include inspections of each of the flats to ascertain whether the work carried out now almost 20 years ago was done properly, rectification of any defects identified by the appellant's surveyor, payment of professional fees and the execution of deeds of variation making changes to the original leases which Mr Barrs considers are necessary in view of the alterations which have been carried out. One such variation, in the case of Flat 1, would be to demise the floor of the flat, which Mr Barrs suggests was not included in the original demise (he is clearly wrong about that, since the demise is of the whole flat and the express inclusion of the ceiling of the demised premises and exclusion of the floor of the flat above cannot be read as an implicit exclusion of the floor from the demise).

15. More recently a second source of disagreement has emerged between the appellant and the lessee of Flat 4, Mr Connolly, this time concerning Mr Barrs' administration of the service charge. In his evidence to the FTT Mr Connolly complained that for many years the appellant had failed to provide the annual service charge reconciliations required by the lease. In a decision of the FTT in January 2019 it found that on-account charges demanded of Mr Connolly for 2017/18 were reasonable in amount (as Mr Connolly had always accepted) but were not payable because the proper accounting procedures had not been followed and because contributions had been demanded based on inaccurate apportionment. The 2019 tribunal criticised Mr Barrs and said that "not even lip service" was paid to the contractual accounting requirements.

The relevant statutory provisions

16. The power to appoint a manager is conferred on the FTT by section 24(1) of the 1987 Act. So far as relevant, the power is to "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." The reference to the management of premises includes the repair, maintenance, improvement or insurance of those premises (section 24(11).

17. The FTT may only exercise the power to appoint a manage in the circumstances described in section 24(2), namely (omitting irrelevant parts):

> "(a) where the tribunal is satisfied –
>
> (i) that any relevant person 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 …; and
>
> (ii) ….
>
> (iii) that it is just and convenient to make the order in all the circumstances of the case;
>
> (ab) where the tribunal is satisfied—
>
> (i) that unreasonable service charges have been made, or are proposed or likely to be made, and
>
> (ii) that it is just and convenient to make the order in all the circumstances of the case;
>
> (aba) where the tribunal is satisfied—
>
> (i) that unreasonable variable administration charges have been made, or are proposed or likely to be made, and
>
> (ii) that it is just and convenient to make the order in all the circumstances of the case;
>
> (ac) where the tribunal is satisfied—
>
> (i) that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and
>
> (ii) that it is just and convenient to make the order in all the circumstances of the case; or
>
> (b) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made."

18. Three points can conveniently be emphasised at this stage. First, the FTT is given power to appoint a manager to carry out "such functions in connection with the management of the premises" as it thinks fit (section 24(1)(a)). Secondly, it may only make an order where it is satisfied that one of the threshold conditions in section 24(2) is made out. Thirdly, each of those threshold conditions requires the FTT to be satisfied that it is just and convenient to make the order.

The application for the appointment of a manager

19. The application for the appointment of a manager was made by the respondents on 25 February 2020. It was preceded by a notice under section 22 of the 1987 Act prepared for the respondents by Maunder Taylor, Chartered Surveyors and served on 6 February 2020.

The notice informed the appellant that the respondents intended to apply for an order under section 24 on grounds set out in schedule 1 to the notice, and that the matters to be relied on to establish those grounds were set out in schedule 2.

20. Schedule 1 identified eight grounds or allegations, which formed the basis of the respondents' case before the FTT. I summarise them:

(1) The appellant had unreasonably refused consent to the sale of Flats 1 and 1A.

(2) The appellant had wrongly asserted that Flats 1 and 1A contained unfinished or defective building works which required to be remedied.

(3) The service charge had been mismanaged and had not been administered in accordance with the terms of the lease; in particular financial balances going back to 2010 needed to be calculated.

(4) The service charge and reserve fund monies had not been treated as trust funds and had been combined with company monies; additionally, "there is evidence that not all income has been accounted for in the financial statements which have been disclosed".

(5) A sum of £5,000 to cover legal fees had been wrongly included in the estimated service charge for 2020, when those fees had in fact been incurred in 2019 and should not have been repeated.

(6) There had been a breakdown in trust between the landlord and the applicants.

(7) There had been a history of court and tribunal cases over many years which have not brought resolution so that the appointment of a manager was necessary to resolve the issues and restore a "cooperative management function".

(8) It was just and convenient to make a management order.

21. Schedule 2 to the notice, identifying the matters relied on in support of the grounds, comprised a letter of 20 January 2020 from Mr Bruce Maunder Taylor to the respondents. The letter was not a concise statement of the respondents' complaints but summarised Mr Maunder Taylor's instructions, recited documents which he had been shown, and recommended a number of possible courses of action which were open to the respondents, including making an application for the appointment of a manager.

22. In his letter Mr Maunder Taylor recorded what he had been told about the work done to Flats 1 and 1A. The work was said to have been carried out with the appellant's consent. The problems with drains was described and was said at least to have been contributed to by a depression in the original drainage system located outside the flat. Remedial works had been paid for by the building's insurers and no further blockage had been experienced. Despite that the sale of Flat 1 had been prevented by unhelpful replies given by the landlord to enquiries by prospective purchasers.

23. As for Flat 1A, Mr Maunder Taylor referred to the case history prepared by Mr Barrs and pointed out that complaints about incomplete and unsatisfactory work had never been backed up with a detailed list. He also referred to the conditions which the appellant sought to impose on any permission to assign the lease of flat 1A and took issue with Mr Barrs'

complaints. Minor variations to the work were said to have been approved by the local building control officer. A leak at the junction of the access ramp leading to the raised ground floor of the building was said to have first been identified in 2003 and was outside the demise of Flat 1A. Mr Maunder Taylor concluded that there was no reasonable ground on which the appellant could refuse to consent to the assignment of the lease of Flat 1A.

24. Mr Maunder Taylor finally referred to the January 2019 FTT decision. He recorded that Mr Connolly had subsequently been supplied with bank statements which had enabled him to track service charge income and expenditure going back to 2012. That exercise was said to have shown that some money had not been properly accounted and that some was missing; according to Mr Maunder Taylor "significant sums of money are involved."

25. Each of the respondents made a witness statement for the FTT. Ms Hendry's statement was extremely brief and dealt only with a single proposed sale of Flat 1 in 2007 which had been frustrated by Mr Barrs communicating with her agent. Mr Ahern's statement was in general terms and explained that the work to create Flat 1A had all been approved by the local authority planning and building control departments. He had been unable to sell the flat because the appellant would not agree to the minor variations signed off by the local authority. The work he carried out to Flat 1 had been approved by building control and had been undertaken with the consent of Mr Barrs.

26. Mr Connolly provided a more substantial statement in which he concisely summarised the issues concerning Flats 1 and 1A. In particular, he acknowledged that after the initial works a new drainage run had been constructed for Flat 1, and that "very minor amendments" had been made to the works undertaken to create Flat 1A. He also referred to "financial matters" and to the bank statements provided in October 2019 from which, he said, "a number of discrepancies were identified". A meeting of the directors had been convened, attended by Mr Barrs, at which a resolution had been passed requesting him to provide an explanation for those discrepancies, but in January 2020 "a majority of the freehold company decided to ignore the resolutions". The appellant had provided a balancing account as at 31 December 2019 which showed a credit balance, but, according to Mr Connolly, "a transparent account of the service charge for each flat" had not been provided and some items (including legal costs) had not been included in the certificates supplied by the appellant's accountant.

27. Mr Barrs also prepared a witness statement for the FTT. It was a clear and carefully structured document running to 21 pages. Amongst the matters it dealt with was Mr Barrs' belief that the works carried out by Ms Hendry in Flat 1 had trespassed on parts of the structure of the building (the floor) which were not demised to her. The suggested trespass included the installation of under floor heating in the new bathroom, the excavation of the floor, the floor screed and a vapour barrier to accommodate new pipework, and redirection of the drains necessitating cutting a hole in the external structural wall of the building. Those works had required the prior written consent of the appellant which had never been given. Mr Barrs also suggested that the only occasion when Ms Hendry had sought consent to assign her lease had been in 2007 and that the appellant had withheld its consent at that time because of the suggested trespass. The solution, Mr Barrs suggested, was for the appellant to grant retrospective consent after it was satisfied that the alterations had been properly carried out, any remedial works recommended by its surveyor had been completed, the lease

had been varied to provide that the floor of the flat was now demised and its costs had been paid.

28. As for flat 1A, Mr Barrs stated that the work carried out by Mr Ahern had differed from the permitted work in three respects. Mr Williamson had reported on the works but Mr Barrs claimed that Mr Ahern had "always denied access" to enable specialist engineers to ascertain whether the work had been carried out properly. As far as he was aware the flat had never been put on the market and Mr Ahern had never sought the appellant's consent to an assignment. The appellant would consent to an assignment on condition that its costs were paid, its surveyors (including sound proofing, drainage and plumbing experts) were given access to the flat to carry out tests and surveys, any remedial work that was recommended was carried out, and a retrospective licence for the alterations was completed by deed.

29. As for service charges, Mr Barr explained that the sum of £5,000 included in the estimated charge for 2020 for legal fees was not a mistake, as had been suggested in the section 22 notice, but was in anticipation of disputes which had indeed eventuated. Bank statements had been supplied after the previous FTT hearing and in November 2019 Mr Connolly had paid all of the outstanding service charges demanded of him. A reconciliation from 2005 to 2019 had then been supplied showing that, far from being in credit, Mr Connolly had underpaid by £760 which Mr Connolly had paid. Similar reconciliations had been supplied to all other lessees none of whom had questioned them. Mr Barrs therefore refuted Mr Connolly's suggestion that there were discrepancies or funds missing from the service charge account and denied that it would be just and convenient for the FTT to appoint a manager.

The FTT's decision

30. I have summarised the relevant evidence which was provided to the FTT at some length because the FTT did not do so; nor did it make findings of fact on most of the points which were in issue, despite having heard oral evidence and cross examination of the main witnesses.

31. The FTT began its decision by describing the proceedings as an application for the appointment of a manager "due to alleged breaches of the applicants' leases by the respondent over an extended period." It recited seven of the eight grounds of application in the section 22 notice before summarising the applicants' case in three short paragraphs. It referred specifically to building regulations approval having been given for the work in Flat 4 (which I assume is a mistake for Flat 1); to the 2003 development Agreement relating to Flat 1A; to the absence of formal written requests for consent to assign and the respondents' evidence that written requests would have been pointless because Mr Barrs had made it clear that consent would be refused unless his conditions were met; and to the report by a surveyor instructed by Mr Ahern in 2008 that the work to Flat 1A had "substantially complied with the Agreement" and that all necessary local authority consents had been obtained.

32. The FTT dealt equally concisely with the appellant's case. It noted Mr Barrs' role as "*de facto* manager" and recorded that the owners of five of the nine flats objected to the appointment of a manager to replace him. It did not mention Mr Barrs' written evidence

that all service charge money was held by the company on trust but said that in his oral evidence he had accepted that the service charge was not "held in a trust account". He was said sometimes to have used his own money to pay insurance premiums "and thereafter had not paid his contribution to the service charge". He had repeatedly asserted that the works to Flat 1 had caused damage to the drains and that those to Flat 1A had not complied with the original Agreement.

33. In paragraph 9 of its decision the FTT said that it found "the breaches alleged by the applicant have been proved" but it did not identify what those beaches were. It explained that decision in four further paragraphs.

34. First, it said that it preferred the evidence of the applicants to that of Mr Barrs, but did not mention any specific conflicts of evidence or explain why the applicants' evidence was to be preferred. It said that Mr Barrs had "repeatedly ignored or been unaware of the RICS Code and the terms of the lease as to how to collect and keep service charge/reserve funds."

35. Next, the FTT said that it did not accept that Mr Barrs could accurately recollect the contents of documents written several years ago. It went on:

> "Further, the tribunal finds that the respondent's failure to act in respect of the applicant's alleged breaches and damage caused to the drains and ramp which are alleged to have arisen over 15 years ago, is indicative of Mr Barrs' intransigence and preference to retain control over the respondent company and unreasonably withhold consent to assignments of leases."

The FTT said that it did not accept that the absence of any formal written request for consent meant that there could not have been an unreasonable withholding of consent. It found that Mr Barrs had acted unreasonably in making known that he required "unsubstantiated conditions to be met before consent to an assignment would be given". It did not accept that the lessees of Flats 1 and 1A had caused the damage alleged by Mr Barrs and found that the work had been carried out in accordance with the required planning and building consent.

36. The FTT did not say whether it found that the work to Flat 1 had been carried out in accordance with the terms of the lease (i.e. with prior written agreement), or in the case of Flat 1A, in accordance with the 2003 Agreement.

37. Nor did the FTT say that it had considered whether it was "just and convenient" to make an order appointing a manager. There is no reference anywhere in its decision to the statutory conditions for making an appointment. Indeed, when it recited the grounds relied on in the section 22 notice it omitted the eighth and final ground which the lessees had included, namely, that it was just and convenient to make a management order.

The appeal

38. The appeal was based on the proposition that the only statutory ground which the FTT had relied on as giving it jurisdiction to appoint a manager was that in section 24(2)(a), i.e. that

the appellant was in breach of an obligation relating to the management of the premises which it owed to the respondents under their tenancies and that it was just and convenient to make the proposed order in all the circumstances of the case. The only obligation which the FTT had identified as having been breached was the undertaking in the lessee's covenant that the lessor's consent to an assignment would not be unreasonably withheld. The FTT's finding that "the breaches alleged by the applicants have been proved" was an error of law because, as the FTT appears to have accepted, there had never been any formal written request for consent to assign either of the leases. Contrary to the FTT's conclusion, a pre-emptive indication of the conditions which the appellant would impose if a request for consent was made was incapable of amounting to an unreasonable refusal of consent. Apart from the suggested breaches of obligation, the FTT had identified no other ground under section 24(2) which would permit the appointment of a manager.

39. Mr Phillips' submissions in support of the appeal largely followed his original grounds. He pointed out that the FTT had failed to make findings of fact on the allegations in the section 22 notice relating to service charges. The detailed account of the relevant facts which had been provided by Mr Barrs had not been engaged with at all. There was no finding that unreasonable service charges had been demanded, or that any particular provision of a statutory code of management practice had been breached, or that any circumstances existed which made it just and convenient to appoint a manager.

40. In their grounds of opposition to the appeal the respondents challenged the narrow reading of the FTT's decision propounded by the appellant. The FTT had recited all of the grounds in the section 22 notice, only the first two of which were concerned with the refusal of consent to assignment. It had found that the breaches alleged by the lessees had been proved, which must include the complaints in relation to service charges. In any event, the FTT had been right to find that the appellant's approach to requests for consent for assignments had been unreasonable and amounted to a breach of covenant. The absence of formal written requests was immaterial because, unlike the statutory duty under section 1(3) of the Landlord and Tenant Act 1988, the leases did not refer to a written request. There was ample evidence that the appellant had frustrated applications for consent by making known that they would be refused unless unreasonable and unspecified conditions were met.

41. On behalf of the respondents, Mr Blakeney (who did not appear below) invited me to read the FTT's decision as a "blanket endorsement" of all of the lessees' complaints, and not simply as being based on the finding of unreasonable refusals of consent. Moreover, the decision of the previous FTT in January 2019 was sufficient to make out the grounds relating to mismanagement of service charges. Collectively the lessees' complaints provided ample "other circumstances" making it just and convenient for a manager to be appointed. As for the FTT's failure to mention whether it found it just and convenient to make an appointment, the fact that it made the order in the form proposed by the respondents which recited that it was just and convenient to appoint a manager meant that it should be inferred that it must have turned its mind to that requirement.

42. Mr Blakeney also submitted that even if the FTT had been in error in finding that the appellant's pre-emptive conditions for consent to assign amounted to a breach of obligation, there was still ample material on which it could have made a management order and its order ought not to be set aside. Alternatively, if I concluded that the FTT's decision ought to be

set aside I ought not to dismiss the application for the appointment of a manager, or remit it to the FTT for reconsideration, but ought instead to remake the decision based on the material I had been provided with and make a further order appointing the same manager on the same terms.

Discussion

43. At the conclusion of the argument, I indicated to the parties that I would allow the appeal and remit the application to a differently constituted FTT panel for reconsideration. These are my reasons for that decision.

44. The long running but relatively straightforward situation in which the parties find themselves has become excessively complicated by unnecessarily technical legal arguments, particularly in relation to the works to Flats 1 and 1A. The relevant facts concerning those works appear not to be seriously in doubt and I can summarise them from the documents without making any positive findings on points of detail which remain in dispute.

45. In relation to Flat 1, initial works were carried out which the appellant and its surveyor were aware of but for which no formal written consent was granted. Consent was required for so much of the work as comprised "structural alterations" (which at least some is likely to have done). It is not unusual for a formal licence to be granted only after the completion of works and there is nothing which I have seen to suggest that the appellant objected to the original works or would have been in a position to complain that they were undertaken in breach of covenant. The absence of prior written consent was waived by the involvement of Mr Williamson; the same involvement makes the debate over what Mr Barrs did or did not say to Mr Tolaini or Mr Ahern irrelevant.

46. After the original work was completed and the flat was occupied serious problems were experienced with drains. Further works were then carried out by contractors engaged by the building insurer (it is unclear whether these works were arranged by or with the approval of the appellant, but they appear not to have been supervised by its surveyor). There are different views on what caused the original problems but it has never been established that they were the result of poor design or defective work by Mr Ahern. The willingness of the insurer to pay for remediation suggests the problem was not the result of recent defective work. Whether it was or not no longer matters, as any defects were remedied in 2005 and there has been no suggestion that problems have recurred. The appellant has had the right under the lease to inspect the flat, but has chosen not to do so, preferring instead to raise suggested uncertainties over the sufficiency of the original or remedial works whenever Ms Hendry has indicated that she wishes to sell her flat. No formal request for consent seems ever to have been made. The most important point is that this all happened seventeen years ago, and any ground of complaint or cause of action which the appellant may have had has long since expired.

47. In relation to Flat 1A, the facts appear to be even simpler. The Agreement of 3 September 2003 authorised the carrying out of work in accordance with specific plans attached to the Agreement (BA560B and BA561B) and a further specification in the fifth schedule. The work was supervised by the appellant's surveyor Mr King, who recorded in a letter to Mr

Ahern on 9 December 2003 that the junction between the exterior wall of the building and the ramp giving access to the raised ground floor was not watertight and dampness was being caused in that wall. It is clear this problem was not caused by the conversion of Flat 1A as it had already been noted in a report on the condition of the original void by Mr Hook, a civil engineer. Nor did Mr King suggest the leaking ramp was the result of Mr Ahern's works; on the contrary, he stated that it would need to be attended to by the "Management Company" (which can only be a reference to the appellant). However, under the fifth schedule of the Agreement Mr Ahern was responsible for ensuring that the new flat was "a completely waterproof enclosure". Whether this required him to remedy the defective ramp or not depends on whether the area which was not watertight was within Flat 1A.

48. Three minor variations were made to the works which had originally been approved: a proposed door opening below the existing ramp was replaced by a window; the lintels over the doorway and windows were formed of concrete rather than brick; and the canopy over the front door was formed of timber rather than glass. The appellant was aware of these variations and on 9 June 2006 Mr Williamson advised that it could insist on them being reversed. Mr Williamson did not suggest that the works were defective although in the case history prepared by Mr Barrs at about the same time, Mr Barrs asserted that "much incomplete and unsatisfactory work remains outstanding".

49. The Agreement included an arbitration clause (clause 10 of the fourth schedule) and if the appellant had been dissatisfied with the works it could have referred the dispute to an arbitrator. It did not do so. Any cause of action which the appellant may have had for breach of the Agreement became barred by limitation many years ago. The appellant also has the right under the lease to inspect the flat and to give notice of any defects or wants of repair, which the lessee is then required to remedy within three months. The appellant has chosen not to make use of that right, preferring once again to use the suggested variations or defects as the basis of its proposed conditions for consent to any assignment.

50. The facts concerning the service charge are less clear. It is established by the decision of the FTT in January 2019 that the sums being demanded (at least in 2018) were reasonable, but that proper apportionments were not being applied and annual balancing calculations were not being carried out. Mr Barrs' evidence was that in November 2019 proper reconciliations were carried out for all lessees for the years 2005 to 2019 which showed that the only lessee who had complained, Mr Connolly, had underpaid. He had subsequently paid the modest sum which was revealed to have been outstanding. On the other side of the argument the respondents' section 22 notice insinuated (through Mr Maunder Taylor) that "substantial sums of money" were unaccounted for. No details of those sums were given in the notice or by Mr Connolly in his evidence in which he continued to assert in only the most general terms that no transparent account and reconciliation had been provided. Mr Connolly did not comment on the reconciliation which had been supplied in November 2019 or the payment which he has now been shown to have made to bring his own account up to date.

51. The issue which occupied most of counsels' written submissions before the hearing was a rather technical issue of law which is really neither here nor there. That issue was whether a landlord could unreasonably withhold its consent to a proposed assignment before a formal written request for consent to assign has been made. On that point Mr Phillips seems to me clearly to be correct, and the FTT clearly to have been wrong. Until a frequest for consent

is made a landlord is under no obligation to do anything. There is no evidence of consent to a specific assignment having been requested since 2007. It is impossible to say that a prospective indication of the grounds on which a landlord intended to refuse any request for consent would itself be an unreasonable refusal of consent, where no request had yet been made.

52. The FTT addressed the issue of consent on the mistaken understanding that a landlord will commit a breach of the usual form of qualified covenant if it refuses consent unreasonably. That is not the law. The standard proviso that consent will not be unreasonably withheld does not impose an obligation on the landlord not to refuse its consent unreasonably. The proviso operates as a condition rather than as an obligation. If the conditions is not satisfied, because a refusal is unreasonable, the tenant is free to assign without consent, but it does not have a claim based on a breach of obligation: see Woodfall, at 11.128 and *Treloar v Bigge* (1874) L.R. 9 Ex. 151. Both at common law and under section 19(1), Landlord and Tenant Act 1927 a landlord is under no obligation to give consent to a tenant's request. It was for that reason that Parliament introduced a series of statutory duties (not implied covenants) under the Landlord and Tenant Act 1988, which give a tenant a new statutory right to sue for damages or for an injunction in response to an unreasonable refusal of a written request for consent.

53. Mr Ahern and Ms Hendry did not rely on any example of a formal request in writing for consent to assign, and there can therefore be no question of the appellant having been in breach of its statutory duty under the 1988 Act, nor did it breach any obligation under the leases by making clear what its conditions would be if it was formally asked for consent. Whatever informal discussions might have taken place they created no relevant obligation. To the extent that the lessees' case was based on alleged breaches of obligation, and therefore on section 24(2)(a), it was bound to fail. But the behaviour which the FTT mistakenly described as a breach by the appellant could have been relied on as providing grounds for the appointment of a manager under section 24(2)(b), 1987 Act which allows an order to be made where "other circumstances exist which make it just and convenient" to make the appointment. The appellant had undoubtedly discouraged potential purchasers and had made clear that it would only grant consent if its conditions were met. If the FTT considered that that behaviour and those conditions were unreasonable, and that it was just and convenient to appoint a manager, it could have made the appointment under section 24(2)(b).

54. The closest the FTT came to making any relevant finding which could have supported the making of an order under the "other circumstances" ground in section 24(2)(b) was when it described Mr Barrs as having acted unreasonably in making known that he required "unsubstantiated conditions to be met before consent to an assignment would be given". It also referred to the suggested breaches and damage caused to the drains and ramp as having arisen over 15 years ago. But what it did not do was consider whether it was just and convenient for a manager to be appointed.

55. The making of a management order is a draconian remedy, which takes away contractual rights and obligations and imposes expense on the parties. Such an order cannot be made unless the statutory conditions are satisfied. Whether an application is based on breaches of obligation by the landlord under section 24(2)(a), or on other circumstances which make it just and convenient to make the appointment under section 24(2)(b), the FTT's power to

appoint a manager depends on it being satisfied of the justice and convenience of making an appointment. There is nothing in the FTT's decision to indicate that it had that requirement in mind or gave it any consideration.

56. I reject Mr Blakeney's submission that the FTT must have considered it just and convenient to make the order, because the order itself said so, and it would not have made it unless it had been satisfied that the condition was met. That puts the cart before the horse. The order was drafted by the manager, not by the FTT, and the FTT did not refer to the requirement in its decision. It did not even set out the text of the statutory conditions and it edited the applicants' grounds of application to remove the reference to it being just and convenient for the appointment to be made. More significantly, it did not identify any factors which would be relevant to the necessary assessment of where the balance of justice and convenience lay. In particular, it did not consider what the purpose of the management order would be or whether that purpose could be achieved by some different route (for example by the individual lessees concerned seeking declarations that consent to a specific application had been unreasonably refused and recovering damages for breach of statutory duty). It did not refer to the fact that the application was made by the owners of a minority of the flats, and that the owners of the majority were opposed to it. This is not a case in which the appointment of a manager was the only, or even the most obvious, solution to the main issue considered by the FTT. In those circumstances it is impossible for me to be satisfied that the FTT must have had the statutory condition in mind.

57. The issue of consent to assignments was clearly an important part of the FTT's reason for appointing a manager, but there were other issues, in particular in relation to service charges. Its omission to consider whether it was just and convenient to make the order applied to all of the matters of which the lessees complained. On that ground alone it is impossible to uphold the order and I therefore set it aside.

58. Mr Blakeney invited me, if I set aside the FTT's decision, to substitute my own decision and to re-appoint the manager on the basis of the facts found by the FTT. The difficulty with that is that the FTT found very few facts. It said that it accepted the evidence of the applicants in preference to that of Mr Barrs, but it did not deal with the issues or explain why it was satisfied that Mr Barrs' explanation was wrong. The evidence of the applicants was vague and incomplete in certain important respects and a blanket acceptance of it does not go very far in establishing any facts, especially in relation to service charges. It is impossible to conclude on the evidence that substantial sums had been misapplied or were unaccounted for because Mr Connolly simply did not identify the discrepancies he was said to be concerned about. It is impossible to know whether the errors in procedure which the FTT identified in 2019 had led to overcharging as Mr Maunder Taylor had implied, or undercharging, as Mr Barrs described in his evidence and as Mr Connolly appears to have accepted by paying the shortfall found to have been due from him. It would be highly relevant to know whether Mr Barrs' procedural shortcomings had all been corrected by November 2019 as he claimed but Mr Connolly simply didn't go into that level of detail, nor did the FTT make any relevant findings.

59. It is not possible for me to decide whether the statutory conditions are made out without making additional findings of fact on matters on which the evidence is incomplete.

60. Before I could make an order, it would also be necessary for me to determine a fundamental question, namely, whether the task of giving or refusing consent to assign is a "function in connection with the management of the premises" such that it can be included in a management order. References in the 1987 Act to the management of any premises are stated by section 24(11) to include reference to the repair, maintenance, improvement or insurance of those premises. Whether they also include granting approval for assignment is a question of construction. I have in mind in particular that Parliament dealt separately in the Commonhold and Leasehold Reform Act 2002 with "management functions" (section 96) and "functions relating to approvals" (section 98) and at the very least there is a question mark over whether the former includes the latter for the purpose of the 1987 Act. The parties and the FTT assumed that a manager could be given power to grant consents, but whether such an order can be made goes to the Tribunal's jurisdiction and cannot be taken a read on the basis of a consensus which may be wrong. The point would have to be addressed before an order could be made by this Tribunal and further argument on it would be required.

61. I am not prepared to accept Mr Phillips' invitation to dismiss the application. The 2019 FTT made clear findings that the service charge was not being properly administered at that time, and it is not apparent whether those problems are now resolved and the contractual accounting requirements are being complied with. The FTT was very critical of Mr Barrs' attitude and approach and it is perfectly possible that another tribunal properly directing itself on the statutory conditions would decide that the appointment of a manager was justified.

62. The better course is to send the application back to the FTT for redetermination by a differently constituted panel. Before any further hearing takes place the parties should give serious consideration to engaging in mediation. It is quite clear that the appellant is not in a position to require further licences or deeds of variation as a condition of giving consent to a future assignment of the leases of either Flat 1 or Flat 1A. They are not required and insistence on them would be unreasonable. Any future reliance on the events of 2003 to 2005 as a reason for withholding consent would also be unreasonable and would expose the appellant to a claim for damages under the Landlord and Tenant Act 1988. If it is concerned about the condition of either of the two flats the leases give it all the rights to inspect that it requires. I very much hope that the parties will be able to reach a consensus about whether a manager is required and if so, what tasks he should perform, without the need for a further hearing before the FTT.

63. Mr Blakeney indicated that the respondents wished to apply for an order under section 20C, Landlord and Tenant Act 1985 in respect of the costs of the appeal. If the parties are unable to agree whether such an order should be made, counsel should agree a short timetable for the exchange of written submissions. The making of those submissions should not delay the remission of the application to the FTT, and the respondents should apply to it for further directions within 28 days of the date of this decision.

Martin Rodger QC,

Deputy Chamber President

3 August 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.