UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – reserve fund – whether tribunal's order appointing a manager conferred power to demand contributions to a reserve fund for future expenditure – whether lease conferred power – effect of concession in previous County Court proceedings – s.27A, Landlord and Tenant Act 1985 – s.24, Landlord and Tenant Act 1987 – appeal allowed in part

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

BETWEEN:

PHILIP JOHN WHALE & OTHERS

Appellants

-and-

BRUCE RODERICK MAUNDER TAYLOR

Respondent

Re: Northwood Hall,
Hornsey Lane,
London N6

Martin Rodger QC, Deputy Chamber President

27 April 2021

by remote video platform

Christopher Heather QC, instructed by Payne Hicks Beach, for the appellants
Thomas Cockburn, instructed by Gisby Harrison, for the respondents

The following cases are referred to in this decision:

Chuan-Hui v K Group Holdings Inc [2021] EWCA Civ 403

Maunder Taylor v Blaquiere [2003] 1 WLR 379

Sans Souci Ltd v VRL Services Limited [2012] UKPC 6

St Mary's Mansions Ltd v Limegate Investment Co Ltd [2002] EWCA Civ 1491; [2003] 1 EGLR 41; [2003] HLR 24

Introduction

1. The issue in this appeal is whether an order made by the First-tier Tribunal (Property Chamber) (the FTT) under section 24, Landlord and Tenant Act 1987, appointing a manager to manage a block of flats, gave the manager power to demand contributions towards a reserve fund to meet anticipated future expenditure on the maintenance of the building.

2. The appeal turns on the proper construction of the management order in this case.

3. Mr Bruce Maunder Taylor was appointed to manage Northwood Hall, a troubled block in North London, by an order of the FTT made on 14 September 2016 and subsequently varied on 27 January 2017. In a decision given on 20 September 2019 (and reviewed on 10 March 2020) the FTT decided that the manager had had power to demand contributions towards a reserve fund from the leaseholders of the 194 flats in the building; in particular in 2018 he had been entitled to demand £200,000 towards a general reserve and a further £1.2m towards an anticipated programme of internal decorations and other works.

4. The 35 appellants, whose names are listed in a schedule to this decision, are the leaseholders of 29 of the flats at Northwood Hall. Mr Maunder Taylor is the sole respondent to the appeal (although a number of lessees of flats in the building were also respondents to the proceedings before the FTT).

5. The FTT granted permission to appeal its reviewed decision on the basis of grounds of appeal settled by the appellants' lay representative. At the hearing of the appeal the appellants were represented by leading counsel, Mr Christopher Heather QC, who pursued only one of the points raised in the grounds of appeal. The manager was represented by Mr Thomas Cockburn who had also appeared on his behalf before the FTT. At the conclusion of the appeal both parties made further submissions in writing on points which had arisen in the course of argument.

6. Despite the determination with which the appeal has been pursued, the issue which it raises may now to be largely academic. That is for two reasons. First, because it was agreed before the FTT that the manager had failed to make valid demands for any of the service charges which were the subject of the application, including the disputed contributions to the reserve fund, so that nothing had yet become payable (it is however possible that valid demands were made in the final weeks of the manager's appointment after the defects were identified but, if so, these were not in issue in these proceedings). And secondly, because the order appointing the manager has now expired, his appointment has not been renewed, and the management of the building has reverted to the landlord. The manager is no longer in a position to make valid demands towards a reserve fund even if previously he had power to do so.

7. I was told that after his term as tribunal appointed manager came to an end Mr Maunder Taylor was appointed for a period of a few months as managing agent on behalf of the landlord of Northwood Hall. Any steps he took during that period were on behalf of the

landlord and relied on its rights under the leases of flats in the building, not on the terms of the management order. The landlord is not a party to this appeal, nor was it a party to the proceedings in the FTT, or earlier proceedings in the County Court to which I will refer, and its rights are not affected by the outcome of the appeal.

The background facts and the management proceedings in the FTT

8. The proceedings out of which this appeal arose began on 20 August 2018 with an application to the FTT by the manager under section 27A, Landlord and Tenant Act 1985 in which he sought a determination concerning service charges for the year ending 30 June 2018. Specifically, he asked the FTT whether the expenditure shown in the service charge accounts prepared on his behalf for that year had been reasonably incurred and whether the sums he had demanded were payable. Mr Maunder Taylor also sought the FTT's approval of budgeted service charges for the year ending 30 June 2019. That part of his application was not pursued and the FTT hearing was concerned only with expenditure shown in the 2017/18 service charge accounts.

9. Northwood Hall is an eight-storey purpose-built block of 194 flats, constructed in about 1935. The supply of central heating and hot water was originally by means of communal gas-fired boilers in the basement of the building from which hot water was distributed through risers to the individual flats. The replacement of this system has been a controversial and expensive exercise and this appeal is the latest of many court and tribunal hearings triggered by the disagreements it has provoked. The details of the dispute in its various stages are summarised in the FTT's decision and in a judgment given in May 2019 by Recorder McGrath in proceedings between the same parties in the County Court.

10. The freehold interest in Northwood Hall is held by Triplark Ltd. Most of the flats are let on long leases but 34 flats are held by Triplark with the freehold. Until 2011 the building was managed by Triplark but in January of that year management responsibility was assumed by an RTM Company. Plans were then already under consideration for the replacement of the heating and hot water system and work began on that project in earnest in 2014. The early stages of the project were managed by the RTM Company's managing agents, Canonbury Management, but when the project ran into difficulty the directors of the RTM Company sought the assistance of Mr David Wismayer whom the FTT described in its decision as "a divisive figure".

11. A struggle between rival factions for control of the RTM Company and the management of the project culminated in April 2016 in an application by Triplark under section 24 of the Landlord and Tenant Act 1987 for the appointment of Mr Maunder Taylor as manager. That application provoked a counter application by the leaseholders of 27 flats who put forward Mr Wismayer as their candidate for the role of manager.

12. After a contested hearing the FTT decided in principle to appoint Mr Maunder Taylor. It explained its reasons in a decision of 26 August 2016 in which it referred to stark differences of opinion between the leaseholders on how to proceed with the heating and communal hot water renewal project, which could only be resolved by the tribunal

appointing an independent and professional property manager to manage the property. That person was to be Mr Maunder Taylor.

13. The terms of Mr Maunder Taylor's appointment were settled by a management order made on 14 September 2016 and subsequently varied on 27 January 2017 (subsequent references to the order are to it in its varied form). The order was not renewed when it expired on 13 September 2019.

The management order

14. The order comprised 10 paragraphs and a schedule. Paragraph 1 confirmed the appointment of Mr Maunder Taylor for a period of 3 years until 13 September 2019 and conferred on him for the duration of his appointment:

> "All such powers and rights as may be necessary and convenient and in accordance with the Leases to carry out the management functions of Triplark Limited and in particular …."

There then followed a list of specific powers and rights including the power to receive service charges and to carry out the management functions of Triplark contained in the leases, including the provision of services and performance of its repairing and maintenance obligations. The list also included power to undertake a comprehensive review of the project to renew the heating and communal hot water system.

15. The list of powers and rights did not mention a power to collect contributions to a reserve fund, but paragraph 1(j) of the order conferred the following powers concerning banking and the handling of funds received:

> "The power to open and operate client bank accounts in relation to the management of the Premises and to invest monies pursuant to their appointment in any manner specified in the Service Charge Contributions (Authorised Investments) Order 1998 and to hold those funds pursuant to s.42 of the Landlord and Tenant Act 1987. The Manager shall as soon as and as far as is reasonably practical deal separately with and shall distinguish between monies received pursuant to any reserve fund (whether under the provisions of the lease (if any) or to power given to him by this Order) and all other monies received pursuant to his appointment and shall keep in a separate bank account or accounts established for that purpose monies received on account of the reserve fund. Nothing in this provision shall prevent the Manager applying any individual lessee's contribution to the reserve fund held from time to time to other unpaid elements of the Service Charge Contributions due from the same lessee when reasonable necessary to enable the Manager to comply with his other duties under this Order."

16. The manager's powers also included, by paragraph 1(n) of the order, power to provide an estimated budget of service charge expenditure and to use it as the basis for collecting the quarterly contributions in advance towards expenditure required under the leases of the flats.

17. Paragraph 2 of the management order instructed the manager to manage the premises in accordance with, amongst other things, the directions of the FTT, a schedule of functions and services attached to the order, and the obligations of all parties under the leases.

18. The schedule of functions and services formed part of the order and comprised 19 separate functions of the manager, of which the first six were concerned with financial management. It is necessary to refer only to the first three:

    1. Prepare an annual service charge budget ….
    2. Demand and collect service charges and any other payments due from the Lessees …
    3. Maintain the existing reserve funds and continue with prudent provision for the same.

19. It is common ground that the reference in paragraph 3 of the Schedule of the Order to "the existing reserve funds" was to funds collected by Canonbury Management, on behalf of the RTM Company, following its assumption of responsibility for the management of the building in 2011. The total value of the reserve fund carried forward from Canonbury in June 2016 (i.e. at the time of the manager's appointment) was £1,755,030, of which £1,251,227 was cash held at the bank, with the remainder being deficit, arrears, debtors and pre-payments.

The leases

20. The management order made several references to the leases of flats in the building, and the leases clearly form part of the relevant context in which the order must be understood. I was shown a specimen lease (of flat 6/21) and told that the terms of the leases of other flats were substantially the same with only slight variances in the numbering of certain provisions.

21. The sample lease is an underlease granted in 1984 for a term of a little over 117 years expiring in 2101. The seeds of the dispute were sown by the way the lease divided responsibility for the central heating and hot water system between lessor and lessee. The lessee is required to keep the flat in good and substantial repair and condition (clause 3(3)(a)), with the flat being defined as including all water gas electrical and central heating apparatus solely applicable to it. By clause 5(8) the lessor covenanted to maintain and renew when required the central hearing and hot water apparatus and all ancillary equipment thereto other than that contained in the flat. This division of responsibility for the different components of what are integrated systems lies at the heart of the litigation which has bedevilled the building. In practice it has meant that a comprehensive renewal or replacement of the heating and hot water systems would only be possible with the unanimous agreement of the lessees of all 194 flats.

22. Clause 4 includes provisions for the collection of service charges. By clause 4(2)(a) the lessee covenants to pay "the maintenance charges", meaning a specified percentage of the expenditure incurred by the lessor in carrying out its obligations in clause 5.

23. Clause 4(2)(b) obliges the lessee to pay the yearly sum specified in Part 6 of the second schedule as a contribution towards the maintenance charges, payment to be by equal quarterly instalments in advance on the usual quarter days. In the sample lease I was shown that sum was £717.08. Clause 4(2)(i) gives the lessor or its managing agent the opportunity to revise the fixed sum in the light of actual expenditure with the effect that the revised sum will then become payable yearly under clause 4(2)(b). To achieve that revision the lessor is required to serve a notice specifying that the revised and adjusted sum is to be deemed to be incorporated in Part 6.

24. At the end of each service charge year (the year ending 30 June) the amount of the maintenance charge is to be ascertained and certified by a certificate signed by the lessor or its agent (clause 4(2)(d)). An account is to be provided to the lessee as soon as practicable after the end of the year showing the maintenance charge payable after giving credit for the advance payment. If the balance is in the lessee's favour clause 4(2)(c) requires the lessor to treat it as an advance payment for the following year.

25. Certification of the maintenance charge and the furnishing of the account are conditions of the lessee's liability to pay any balance shown in the account, and I understand that it was the manager's omission to provide an account in the form required which forced him to agree at the hearing before the FTT that none of the 2017/18 charges in dispute had yet become payable.

26. The lease also includes the following provision at clause 4(2)(h):

> "The expenditure incurred by the Lessors in carrying out their obligations as set out in clause 5 hereof shall be deemed to include not only the actual expenditure incurred during the lessors' financial year but also such reasonable anticipated expenditure which is of a periodic or recurring nature as the Lessors or their Managing Agents may in their sole discretion allocate to the financial year in question as being fair and reasonable in the circumstances."

27. I digress at this point to refer to a puzzling feature of this case. That is that at some time after the manager was appointed, a consensus emerged between the manager and the leaseholders opposed to his plans for the building to the effect that the lease includes no provision for the accumulation of a reserve fund.

28. That consensus does not appear to have existed when the management order was made on 14 September 2016, nor when it was varied on 27 January 2017. A reserve fund had been accumulated by the RTM Company's agents and subsequently transferred to the manager. In his submissions to the FTT at the hearing in July 2019 Mr Wismayer, then representing the appellants, asserted that the management order had been made on the assumption that the lease did provide a power to establish a reserve fund (although he maintained that that assumption was mistaken). That is clearly right, as the schedule of functions which forms part of the order requires the manager to "maintain the existing reserve funds and continue with prudent provision for the same".

29. The consensus seems to have become established during a trial in the County Court at the beginning of April 2019 of claims and counterclaims between Mr Maunder Taylor and a group of leaseholders (including the appellants). I was shown a transcript of submissions made during that trial in which leading counsel for the leaseholders (not Mr Heather QC) said that it was common ground that the lease did not allow the lessor to maintain a reserve fund. When the learned Recorder demurred and pointed to clause 4(2)(h) of the lease leading counsel retreated a little from his original submission and acknowledged that the lessor had the right to collect payments in advance for matters "of a periodic or recurring nature". The example discussed in exchanges between the Recorder and counsel was the cyclical redecoration of the exterior of the building.

30. Although clause 4(2)(h) had been the subject of discussion in the course of argument, it was not one of the provisions of the lease referred to by the Recorder in her decision handed down on 22 May 2019. Nor was she apparently referred to relevant authorities on provisions in almost identical terms to clause 4(2)(h) (one of which is a decision of the Court of Appeal, *St Mary's Mansions Ltd v Limegate Investment Co Ltd* [2002] EWCA Civ 1491). Counsel for the manager nevertheless conceded that the lease gave the lessor no power to collect contributions towards a reserve fund; counsel coupled that concession with an alternative argument that the manager was nevertheless entitled to collect a reserve in reliance on the terms of the management order. Following the concession the Recorder gave as one of several reasons for dismissing the manager's claims the fact that they included a demand for a contribution to a reserve fund which was not payable because "the lease makes no provision for the collection of such a fund." She expressed no view on the effect of the management order, but I infer that she did not accept the manager's alternative argument either.

31. The pleadings in the County Court did not include a claim by either party for a formal declaration as to the effect of clause 4(2)(h) or the entitlement of the manager (or anyone else) to accumulate a reserve fund, and the Recorder made no such declaration.

The service charge proceedings and the FTT's decision

32. The proceedings before the FTT concerned the sums demanded by the manager for the year ending on 30 June 2018. They were conducted expressly on the basis, agreed by all parties, that the lease did not include any provision entitling the lessor to accumulate a reserve fund. No reference is made by the FTT in its decision to clause 4(2)(h) of the lease. The FTT was nevertheless aware that a reserve fund had been accumulated by the RTM Company's agents, Canonbury, and that the fund had been transferred to the control of the manager following his appointment. In 2018 the manager had sought to add further sums to the reserves.

33. The FTT concluded that the management order did indeed make provision for a reserve fund. It was clear from the order itself that it had been presumed that there was provision in the lease for a reserve fund and that the fund was going to be used as a "mechanism to pay for the various works that were needed at the Block". The schedule of functions and services to be performed by the manager "in unequivocal terms, states that the Manager is not only to maintain the existing reserves but is to carry on making provision for the same". In the

FTT's view, "it cannot have been plainer that the intention of the order was to allow the Manager to operate a Reserve Fund".

34. The FTT also ruled on two specific components of the maintenance charges, which had been sought by the manager at the end of the year as contributions towards reserve funds for future works.

35. First, it accepted Mr Maunder Taylor's explanation that £200,000 had been claimed as a contribution towards "long term expenditure … decorations and roof repairs, rainwater pipes, lighting, decorating and carpets". Mr Maunder Taylor had estimated that the total cost of work required to the building was in the region of £5 million (which I assume included the hot water and heating works) and the FTT described the sum sought by the manager as "prudent and reasonable".

36. Secondly, the FTT found that a demand for £1.2 million which the manager had made was "a prudent provision" for the cost of "fire works". The FTT specifically accepted Mr Maunder Taylor's explanation that these works included the replacement of the doors to each flat, which were not fireproof, new lighting, new carpets, and false ceilings in the corridors where new pipe work had been installed. The work was said to have been tendered and to be ready to start.

37. Although the FTT found that the management order did authorise the manager to operate a reserve fund, and that the sums demanded as contributions towards reserves were reasonable, it had previously made it clear in paragraph [19] of its decision that the parties were in agreement that none of the charges for the year in question were currently payable, as none had been properly demanded.

The appeal

38. In *Maunder Taylor v Blaquiere* [2003] 1 WLR 379 the Court of Appeal confirmed that the management functions of a tribunal appointed manager are not limited to the terms of the lease. More recently, in *Chuan-Hui v K Group Holdings Inc* [2021] EWCA Civ 403 the Court of Appeal agreed with the Tribunal that the imposition of a management order under section 24, 1987 Act does not displace the lease covenants and the lessees remain bound by them, although to the extent that the terms of the order are in conflict with the underlying contract, the order must prevail while it remains in force.

39. Mr Heather QC and Mr Cockburn therefore agreed that the FTT itself could have directed Mr Maunder Taylor to accumulate a reserve fund, whether or not the lease made provision for such a fund. The question they both addressed in their original submissions was whether on a proper interpretation of the management order it had done so.

40. The interpretation of a court or tribunal order is no different from the interpretation of any other instrument. Mr Heather referred to a statement by Lord Sumption in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 at [13]:

> "[T]he construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve."

41. Mr Heather's fundamental point was that the management order frames the powers and duties of the Manager almost exclusively by reference to the contractual obligations of the parties in the Lease. By paragraph 1 of the order the manager had been given "all such powers and rights as may be necessary and convenient and in accordance with the Leases to carry out the management functions of Triplark Limited …". By paragraph 1(a) he was to receive monies "payable under the leases" and had no power to receive other funds; nor did the schedule of functions and services give him power to instruct solicitors to recover money other than where it was "due under the leases". Other powers were also described by reference to the provisions of the leases.

42. There were exceptions, but these were restricted and clearly defined. Thus, paragraph 1(g) gave the manager an indemnity in respect of any costs he incurred and provided that these were to be "payable by the Lessees as a service charge according [to] the provisions of the Leases and this Order".

43. Mr Heather recognised that paragraph 1(j) of the order (see paragraph 15 above) was a more significant exception to his proposition that the manager's powers were limited by reference to the leases. This referred specifically to the manager receiving monies "pursuant to any reserve fund (whether under the provisions of the lease (if any) or to power given to him by this Order)". Monies received on account of the reserve fund were to be kept in a separate bank account. Mr Heather submitted that this was essentially a banking provision which did not empower the manager to collect a reserve fund but simply told him what to do with funds which had already been collected and which subsequently came into his hands.

44. Paragraph 3 of the schedule of functions referred to in the order required the manager to "maintain the existing reserve funds and continue with prudent provision for the same". This meant, Mr Heather submitted, that the manager was to preserve the funds he had received from Canonbury. He recognised that the direction to continue with prudent provision for the reserve fund might, as he put it, "linguistically mean" that the manager was to continue to collect further funds, but he argued that this interpretation was not correct.

45. Mr Heather gave twelve reasons why paragraph 3 of the schedule of functions did not mean what it appeared "linguistically" to mean, but meant instead that the manager was simply to manage the reserve fund which had come into his hands without seeking to add to it. The premise of all of these submissions was that the leases did not include a power to collect reserve funds, as the parties had agreed in the County Court and before the FTT, so any such power would have to be found in the management order itself. If such a substantial departure

from the leases had been intended by the FTT it would have said so clearly in its decision and would have made detailed and specific provision in its order.

46. I do not accept Mr Heather's submissions about the meaning of the management order. I will deal first with the effect of the order when it was made.

47. I agree that paragraph 1(j) of the order is not itself a free-standing power to accumulate a reserve fund, and it is neutral on the question whether the leases include (or the lease includes) provision for such a fund. But paragraph 3 of the schedule of functions is quite unambiguous in its direction to the manager to manage the existing reserve funds and to "continue with prudent provision for the same". The context in which that direction was given included that a very substantial capital project was required to remedy defects in the service installations in the building, and that the then current managers of the property, Canonbury, had collected reserve funds. I agree with the FTT that the management order clearly intended that the manager should do the same, and that he should collect further funds for the reserve.

48. I also agree that the management order makes no detailed provisions for the reserve fund. It was unnecessary for it to do so because sufficient provisions were already contained in the lease. Clause 4(2)(h) enabled the lessor, and therefore the manager, to allocate reasonable anticipated expenditure of a periodic or recurring nature to the current financial year even though it was not actual expenditure in that year. Money allocated in that way was deemed to be expenditure incurred by the lessor in carrying out its obligations and could therefore be included in the calculation of the maintenance charges payable by the lessees.

49. In *St Mary's Mansions v Limegate Investment* the Court of Appeal was required to determine whether the landlord of a mansion block was entitled to apply any year end service charge surplus to a reserve fund or was obliged either to repay any surplus or credit it to the accounts of the leaseholders. The leaseholders were required to contribute towards the "expenses and outgoings incurred by the lessor"; that expression was deemed by clause 2(c)(v) to include not only those items of expenditure which has been actually disbursed, but also:

> " … such reasonable part of all such expenses, outgoings and other expenditure hereinbefore described which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed, incurred or made and whether prior to the commencement of the said term or otherwise including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the lessor or its accountants or managing agents (as the case may be) may in their discretion allocate to the year in question as being fair and reasonable in the circumstances and relates pro rata to the demised premises."

50. The landlord had transferred any surplus on the service charge account to a reserve each year for a number of years in anticipation that major refurbishment works to the building would soon be required. Ward LJ was in no doubt that the lessor was entitled to retain the surplus as a reserve:

> "Under clause 2(c) the amount of the service charge is to be ascertained and certified by a certificate signed by the lessor's auditor. Subclause (iv) sets out that the certificate should contain a summary of the expenses and outgoings incurred but that phrase is defined in subclause (v). It is deemed to include not only expenditure actually incurred but also such reasonable part of the expenses of a periodically recurring nature including sums by way of reasonable provision for anticipated expenditure as the lessor or its accountants or managing agents allocate to the year in question as being fair and reasonable. Differing from the judge, I conclude that limb C is not separate from but simply an example of the expenditure included within limb B. It does not seem to me to matter much. Indeed I did not understand Mr Cousins to be suggesting that provision cannot be made in advance to cover expenditure of a recurring nature whether it be, for example, a sinking fund to provide every five years for the repairs to external doors and windows and the redecoration of the building or to make longer term provision for the greater expenditure which fortunately recurs less frequently such as the judge's example of replacing the slates on the roof."

51. Although the lessor in *St Mary's Mansions* was entitled to maintain a reserve fund and to transfer any surplus to it, the Court of Appeal held that if it wanted to do so it must follow the accounting procedure required by the lease. An overpayment in respect of expenses actually incurred could not be taken into a reserve account for future expenses unless those expenses were identified and designated as such in the certificate, having first been specifically allocated by the lessor to the project to be undertaken.

52. There does not seem to me to be any material difference between the clause considered by the Court of Appeal in *St Mary's Mansions* and clause 4(2)(h) of the leases in this appeal. If the rights of the parties were to be determined without regard to the decision in the County Court proceedings I would therefore have no doubt that FTT was right to conclude that the manager had power to collect a reserve.

53. Despite rejecting Mr Heather's submissions about the meaning of the management order, I nevertheless agree with him that the parties to the County Court proceedings are bound by the Recorder's finding that the leases make no provision for a reserve fund. There was no appeal against that decision, and it is not open to the parties to ask this Tribunal to interpret the management order on the understanding that the leases bear a meaning different from that given them by the County Court.

54. In his skeleton argument for the appeal Mr Cockburn recorded that it was common ground for the purpose of the appeal that the leases of flats at Northwood Hall made no provision for the landlord to maintain and operate a reserve fund. He argued that the management order nevertheless permitted the manager to collect a reserve, and he relied on paragraph 3 of the schedule of functions as having that effect independently of the terms of the lease. I do not agree. The management order assumed that the powers of the landlord under the leases included the power to accumulate a reserve fund (as in my judgment they did). The order itself did not provide an independent power, but only one contingent on the machinery supplied by the leases.

55. In my view an attempt to make sense of the management order separately from the leases is not a legitimate exercise in interpretation; nor is it legitimate, as a matter of construction, to read the management order against the background of the assumption as to the meaning of the leases which prevailed during the County Court proceedings. When the management order was made there was no consensus between the parties to the effect that the lease did not include provision for a reserve fund. That view only became established much later, during the trial in the County Court. Nor, at the time the order was made, was there any decision of the County Court adopting that consensus and making it binding on the parties to the County Court proceedings. The management order of 14 September 2016 cannot be interpreted against the background of a judicial determination which had not yet been made. The order must be interpreted, as Lord Sumption explained, in the circumstances in which the FTT made it, so far as these circumstances were before the FTT and patent to the parties.

56. It would therefore be wrong in principle to construe the management order by taking account of the County Court decision and ignoring clause 4(2)(h) of the leases and the authorities on similar clauses, particularly the *St Mary's Mansions* case. The management order is not a private contract, it is a tribunal order, and its meaning does not change because of an agreement between some of those affected by it. Nor does the decision of the County Court bind this Tribunal, although it does determine the rights of the parties on the issues which it addressed.

57. I therefore decline Mr Cockburn's invitation effectively to interpret the management order with one eye shut. The order has expired and there is no issue between the parties about the collection of the sums with which the FTT proceedings were concerned. Those sums were not properly demanded and it was agreed before the FTT that they were irrecoverable.

58. Mr Heather developed additional arguments, along the lines of those discussed by the Court of Appeal in *St Mary's Mansions*, why the sums of £200,000 and £1,200,000 claimed as reserves were irrecoverable. The only determination the FTT made in relation to those sums was that they were a reasonable contribution to the reserve fund, not that they were payable. Since the FTT has already found that the charges were irrecoverable for want of proper certification, and since they cannot be demanded again by Mr Maunder Taylor, there is no need to consider Mr Heather's additional points. They include challenges to the FTT's findings of fact which may well fall outside the scope of the issues for which permission to appeal was given by the FTT.

Disposal

59. The proceedings in the FTT were brought under section 27A, Landlord and Tenant Act 1985, which gives the FTT jurisdiction to determine specific questions in relation to service charges. The determination which it made about the meaning of the management order was not necessary to its decision because payability of the sums demanded was not in issue; it was agreed that they were not payable. For the reasons I have given the FTT ought not to have determined that the management order, by itself, authorised the manager to operate a reserve fund. The powers in the leases authorised the reserve fund, and the management order conferred those powers on the manager, but he is bound by the decision of the County

Court that the leases did not have that effect. I therefore allow the appeal to the extent of setting aside paragraph 1(b) of the FTT's decision.

60. After seeing a draft of this decision the parties agreed that I should make an order under section 20C, 1985 Act that costs incurred by the manager in the appeal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the appellants. I will make an order in appropriate terms reflecting that consensus.

61. Finally, I emphasise that this decision does not have any effect on the rights of Triplark, the landlord, to collect a reserve fund. It was not party to the County Court proceedings or to the management order and is not bound by any of the decisions concerning the rights of the leaseholders and the manager.

Martin Rodger QC,

Deputy Chamber President

6 September 2021

Schedule of Appellants

Name	**Flat**
David Wismayer	LG.01
Martin Howard	LG.08
Lorraine Odiari	LG.13
Neil Hare-Brown	G.01
Nigel & Joy Jelly	G.10
Marco and Karen Alzapiedi	G.19
Philip Barber	G.20
Helena Mandleberg	1.02
Roger Bower	1.13
Andrew Wimbush and Belinda Sherlock	2.04
Lorraine Odiari	2.11
Lesley Pearson	2.14
Simon Haggis	2.21
Adriette Myburgh	2.22
Sharon Breen	3.09
Angelika Wienrich	3.11
Aylin Orbasli	4.03
Anthony Bross	4.09
Christopher Beecham	4.25
Mrs Dorothy Owen and Professor Adam Waldman	5.01
Anna Rose	5.11
Glen Allen and Helen Wylie	5.13
Sally Vernon	5.20
Simon Dixon and Barbara Wyllie	5.25
Valerie Hall	6.01
Michele Freedman	6.07
Barbara Donninelli	6.11
Eve Dewhurst	6.21
Kate Calvert and Philip Whale	6.23