Neutral Citation Number: [2021] EWCA Civ 403 Case No: C3/2020/1045

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
JUDGE SIOBHAN McGRATH
[2019] UKUT 371 (LC)

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 19/03/2021

Before :

LORD JUSTICE HENDERSON
LADY JUSTICE ROSE
and
LORD JUSTICE LEWIS

- -

Between :

OUNG LIN CHUAN-HUI & OTHERS	**Appellants**
- and -	
(1) K GROUP HOLDINGS INC	**Respondents**
(2) ALDFORD HOUSE (PARK LANE) MAINTENANCE TRUSTEE LIMITED	
(3) PARK LANE HOLDINGS INC	

- -

Mr Jonathan Upton (instructed by **Forsters LLP**) for the **Appellants**
Mr Michael Walsh (instructed by **Stephenson Harwood LLP**) for the **Respondents**

Hearing date : 14 January 2021

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Judgment Approved by the court

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2pm on Friday 19th March 2021

Lord Justice Henderson:

Introduction and background

1. This appeal raises significant issues about the powers of managers who are appointed by the First-tier Tribunal ("the FTT"), on the application of a tenant, to act in relation to premises containing flats under Part II of the Landlord and Tenant Act 1987 ("LTA 1987" or "the 1987 Act"). In particular, we need to examine the relationship between the powers conferred on such managers and the statutory regime relating to service charges contained in sections 18 and following of the Landlord and Tenant Act 1985 ("LTA 1985" or "the 1985 Act"), which Parliament first enacted some two years before the 1987 Act. That regime (as amended) continues to govern the operation and recoverability of service charges payable by tenants of residential property in addition to their rent, but if the arguments advanced by the tenants in the present case are correct, the regime has no direct application to similar sums which are payable to a manager appointed under the 1987 Act.

2. The issues arise in relation to a block of flats on Park Lane in Mayfair, Central London, called Aldford House. Despite its prime location, the property has had a troubled history for well over twenty years, leading to numerous disputes and court or tribunal proceedings. That history was summarised by Judge Siobhan McGrath sitting in the Upper Tribunal (Lands Chamber), in the decision now under appeal ([2019] UKUT 0371 (LC)) ("the UT Decision"), in terms which I gratefully adopt:

> "4. Aldford House is a purpose-built block comprising commercial units on basement, ground and mezzanine floors, two flats on the ground floor and twenty-eight flats on the first to eighth floors (the Flats) with a BMW showroom located on the ground floor. Disputes about the management of the property, service charges and a collective enfranchisement claim have continued for at least 20 years.
>
> 5. Each of the residential flats is held on an underlease in similar terms where it is the Maintenance Trustee, and not the landlord, who is responsible for repairing and maintaining the premises, and providing the works and services set out in the Fifth Schedule. Maintenance charges (service charges) are calculated by reference to the "Maintenance Year" being the period of twelve months beginning on 1st April and ending on 31st March.
>
> 6. During the 1990s it was clear that the building was in need of extensive external works of repair, maintenance and

> redecoration. In October 2000, service charge demands were levied which totalled in excess of £3,000,000 in relation to proposed major works. Scaffolding was purchased and remained around the building for several years. Although some attempt was made to carry out the works no real progress was achieved and during that time at least two High Court actions were commenced and compromised.
>
> 7. In 2010 an application was made by seven lessees for the determination of the payability of service charges under section 27A of [*LTA 1985*] and for the appointment of a manager under section 24 of [*LTA 1987*]. In July 2011 the application was considered by the Leasehold Valuation Tribunal (the "LVT" which is the predecessor of the FTT). At the hearing the section 27A application was stayed on terms agreed by the Tribunal. Furthermore, all parties were content for the Tribunal to make a finding that it was just and convenient to appoint a manager."

3. The manager initially appointed by the LVT was Mrs Jane Munro of Douglas & Gordon Ltd. The LVT said it was satisfied that "she possessed the necessary experience and competence to manage the property effectively". She was appointed for a period of eighteen months from 7 July 2011. Her appointment extended over all the "residential premises" as defined in the underleases of the flats at Aldford House, but excluded all the commercial parts and the basement and ground floor of the building. Paragraph 1 of the LVT's order ("the 2011 Order") defined the residential parts of the building which Mrs Munro was to manage as "the property".

4. The operative part of the 2011 Order included the following provisions:

> "3. During the period of her appointment, the Manager shall demand collect and apply all the various funds made payable to the maintenance trustee by the residential underleases including but not limited to:
>
> (a) Rent.
>
> (b) Insurance rent.
>
> (c) Service charges.
>
> (d) Arrears of any of the above insofar as the Manager considers it reasonable to do so.
>
> 4. To ensure the proper management of the Property and its Service Charge Account, the Manager shall be entitled to all reports, bank statements, invoices, accounts and other documents relating to the property in the possession or control of the Maintenance Trustee from time to time, its solicitors, accountants, employees or agents (to the extent that legal or litigation privilege does not apply).

5. Upon it being noted that the Landlord has no management obligations pursuant to the underleases, during the period of appointment the Manager shall carry out the obligations of the Maintenance Trustee in accordance with the provisions of the Underleases and in particular and without prejudice to the generality of the foregoing:

(a) She should establish a Service Charge Account and Major Works Account for the Property. Any monies received from the current Maintenance Trustee ring fenced pursuant to the 2005 Consent Order shall remain ring fenced and utilised only in accordance with the terms of the 2005 Consent Order.

…

(c) She shall observe the Maintenance Trustee's covenants under the Underleases with regard to insurance, repairs, services, and alterations to the property.

(d) She shall enforce the Underlessees' covenants.

…

(f) She shall comply with the requirements of (1) the RICS Service Charge Residential Management Code…

(g) The manager shall be under a duty to account to the Landlord for the ground rent and any other monies received and lawfully due to the Landlord pursuant to the Underleases.

6. The manager shall be entitled to charge the Service Charge Account the sums set out in Schedule 1 to this order in respect of her management of the Property.

7. The Manager will be entitled to appoint, if she thinks fit any Surveyor Architect, Engineer and other appropriate persons to assist her in carrying out any duties contained in clause 2.5 of the RICS Service Charge Residential Management Code and will be entitled to recover the cost thereof from the Underlessees of the Property through the Service Charge provided that always such costs are reasonably incurred and that the services of such a person are of a reasonable standard.

…

9. The Manager shall have permission to apply to the Tribunal or any other body for further directions or orders in relation to the above matters.

10. In this order:

…

(e) "Service Charge" and "Service Charge Account" respectively shall be the maintenance contribution and the maintenance fund as defined and referred to in the Underleases;

…

12. In the event of any ambiguity in the powers rights obligations or duties of the Manager, the provisions of the Underleases shall prevail."

5. In the event, Mrs Munro left Douglas & Gordon only nine days after the 2011 Order came into effect, and her role as manager was taken over by Mr Callum Watson, a colleague who had become the Head of Block Management at Douglas & Gordon. Initially, his appointment as manager in place of Mrs Munro was not formalised, presumably in reliance on a provision in paragraph 1 of the 2011 Order which purportedly extended the appointment to "such other person appointed from time to time of Douglas & Gordon Ltd". As Judge McGrath rightly observed in the UT Decision at [9], this was "an irregular approach" because it was for the Tribunal to be satisfied of the competence of a manager and that responsibility could not be delegated. In any event, nothing turns on the irregularity, because a further order was made by the Residential Property Tribunal on 23 January 2012 ("the 2012 Order") which confirmed Mr Watson's appointment as manager until 30 June 2013, and expressly provided by paragraph 2:

> "Save as varied by this Order, the Original Order [*i.e. the 2011 Order*] shall continue to have effect as if Mr Watson had been appointed by the Original Order. Mr Watson shall, subject to the powers specifically conferred on the Landlord by this Order have all the powers conferred on Jane Munro by the Original Order."

6. The main purpose of the 2012 Order was to deal with a programme of major works made necessary by a dangerous structure notice which had been served on the landlord and others by Westminster City Council in June 2011. It was eventually agreed that the landlord would pay for the necessary works, and the cost would ultimately be recovered from the lessees. To that end, the LVT decided that Mr Watson and the landlord should be jointly appointed as section 24 managers, but the landlord's appointment should last only until its functions under the 2012 Order had been discharged: see paragraph 1 of the 2012 Order. As Judge McGrath again rightly observed in the UT Decision at [12], this was another irregularity which was likely to lead to confusion, but nobody has suggested that it invalidated the appointment of Mr Watson who remained in office as manager until 30 June 2013. Control of the building then reverted to the Maintenance Trustee (Aldford House (Park Lane) Maintenance Trustee Ltd, the second respondent to this appeal) which was appointed with effect from 1 July 2013. Upon its appointment, the Maintenance Trustee engaged Douglas & Gordon and Mr Watson as managing agents of Aldford House.

The residential leases

7. The appellants are long leaseholders of flats in Aldford House. The freehold is owned by the Grosvenor Estate. There are long headleases vested in the first and third respondents, K Group Holdings Inc and Park Lane Holdings Inc. Technically, therefore, the residential leases with which we are concerned are underleases, but for convenience I will refer to them as "the Leases" and to the individual tenants as "the Lessees". The Leases are all in a similar "tri-partite" form, as described in the UT Decision at [5]. By clause 4 of the Lease which the parties have agreed to take as typical, the Lessee covenants with the Maintenance Trustee, and separately with the head lessor, to pay the Maintenance Contribution in respect of every Maintenance Year to the Maintenance Trustee by two equal instalments, on the 31 March immediately preceding the commencement of the Maintenance Year and on 29 September during the Maintenance Year. Clause 6 contains the covenant by the Maintenance Trustee to apply the Maintenance Fund for the purposes specified in the Fifth Schedule, which contains comprehensive provisions for the decoration, repair and maintenance of the premises "as a block of first class residential flats". *The present proceedings*

8. By the end of Mr Watson's tenure as manager on 30 June 2013, many of the Lessees were substantially in arrears with the payment of their maintenance charges. The total amount of the arrears at that date was approximately £650,000. Disputes about the payability of the charges continued, although for present purposes the details do not matter. Some three years later, on 10 August 2016, a Deed of Assignment was entered into between Mr Watson as assignor and the Maintenance Trustee as assignee, whereby Mr Watson purported to assign the right to payment of the arrears which had accrued as at 30 June 2013. The deed provided for notice of the assignment to be given by the Maintenance Trustee to all of the Lessees who owed arrears as at that date. There is an issue about the validity of this assignment, which I will call "the 2016 Deed of Assignment", principally based on the fact that Mr Watson's appointment as manager had terminated over three years before it was executed. On the assumption that Mr Watson still had title to the arrears which he could validly dispose of by way of assignment without being directed or authorised to do so by the FTT, the intention clearly was that the assignment should constitute a legal assignment pursuant to section 136 of the Law of Property Act 1925.

9. In October 2016, the respondents to the present appeal (i.e. the two head lessors and the Maintenance Trustee) issued proceedings in the County Court at Central London for recovery of the alleged arrears of maintenance charge and ground rent in a total sum of approximately £1.03 million. Of that sum, approximately £369,000 represented arrears which had allegedly accrued in the period before 1 July 2013. The particulars of claim (settled by Mr Michael Walsh of counsel) alleged that, in breach of covenant, the defaulting Lessees had failed to pay the maintenance charge to the Maintenance Trustee as detailed in the annexed statement of account, including those arrears which had accrued during Mr Watson's term of office as a tribunal-appointed manager. The particulars did not plead, or rely upon, the 2016 Deed of Assignment, although it is reasonable to infer that notice of the assignment had by then been duly given by the Maintenance Trustee to the relevant Lessees.

10. On 8 March 2017, a collective defence of all ten defendants (i.e. the present appellants) was filed by their then solicitors. It was settled by counsel, Mr Michael Buckpitt. Paragraph 1 stated that it was filed "without prejudice to the contention… that the claim

is an abuse of process insofar as it relates to sums incurred and/or demanded prior to 30 June 2013…". Those sums (together with various other matters)

were said to be subject to the 2011 and 2012 Orders, and as such subject to the jurisdiction of the FTT. Paragraphs 3 and 4 then stated that:

> "3. Further or in the alternative this claim should have been issued in and in any event should be transferred to the First-tier Tribunal.
>
> 4. Provided proper proof of compliance with the Residential Leases is established, the Defendants are willing to pay sums properly due to the party entitled to receive the same."

11. Paragraphs 26 and 27 then explained why no sums were said to be due to the Maintenance Trustee:

> "26. The matters above are repeated.
>
> 27. It is denied that the [*Maintenance Trustee*] and/or its predecessor has operated the Maintenance Fund as required by the Residential Leases and/or as required by reason of the trust arising thereunder and/or that the sums claimed are due.
>
> PARTICULARS
>
> …
>
> (vi) Following its appointment the [*Maintenance Trustee*] has purported to demand (and claims herein) sums purportedly incurred and/or demanded prior to and/or during the appointment of Mrs Munro (and later Mr Watson) as Manager and Receiver and/or in respect of Major Works.
>
> (vii) The [*Maintenance Trustee*] has no entitlement to claim such sums it being noted that it does not plead or set out any facts or matters giving rise to any such entitlement. The Defendants reserve the right to plead further in the event that the Claimants feel able and/or choose to plead the facts and matter upon which they rely in this regard."

12. On 22 March 2017, HH Judge Saggerson made an order, on the defendants' application, transferring the claim to the FTT.

13. On 30 March 2017, the claimants filed a reply, again settled by Mr Walsh. This pleaded, among other matters, that the sums claimed in the proceedings did not "come within the remit" of the 2011 and 2012 Orders, and that the right to recover service charge arrears had been assigned by Mr Watson to the Maintenance Trustee by the 2016 Deed of Assignment (which was here mentioned for the first time).

14. Following the transfer of the claim to the FTT, no fewer than three case management conferences took place, with directions given at each, on 9 May 2017, 24 November 2017 and 9 July 2018 respectively. At the second CMC, on 24 November 2017, the FTT directed the respondent Lessees to particularise their case on the service charge account and the alleged individual service charge liabilities, by reference to one or

more spreadsheets, so that the applicants (i.e. the former claimants) were "aware of the effect of the Defence". It was further directed that, if this particularisation involved setting out a case additional to the current defence, "the same is to be set out with particularity and identified clearly as a new case".

15. The further particulars ordered by the FTT were supplied on 26 April 2018, and the applicants replied to them on 22 June 2018.

16. One of the matters for consideration at the third CMC, on 9 July 2018, was an application by the Lessees for permission to amend the defence to include a contention that a lease of staff accommodation in 2014 was a qualifying long term agreement within the meaning of certain provisions in LTA 1985, and as such required consultation which had not taken place. In its directions, the FTT said that it was "minded to grant the amendment", on the basis that it was a legal challenge which was "unlikely to require much in the way of evidence", it being understood that no consultation did in fact take place. The applicants were, however, given an opportunity to object to the amendment, of which they took advantage in a letter from Stephenson Harwood dated 11 July 2018. On 17 July 2018, the FTT granted permission to make the amendment sought.

17. Further proposed amendments by the Lessees were then discussed in correspondence in August 2018. No objection was made to one of them, but the remainder were opposed, and that remained the position when the five day hearing before the FTT began on 3 September 2018.

18. In its decision released on 1 November 2018 ("the FTT Decision"), the FTT dealt with the outstanding amendment applications at [19] to [37]. The FTT then turned to the question whether the Maintenance Trustee could recover service charges falling due prior to its appointment, i.e. during the period when Mr Watson was manager and the 2012 Order was in force. The arguments upon which the Lessees wished to rely as showing that such arrears were not recoverable by the Maintenance Trustee were developed in their skeleton argument, from which the FTT quoted substantial extracts at [40]. In particular, it was argued that Mr Watson carried out his functions while manager in his own right as a tribunal-appointed official, deriving all his powers from the 2011 and 2012 Orders. Reference was made to the decision of this court in Maunder Taylor v Blaquiere [2002] EWCA Civ 1633, [2003] 1 WLR 379.
Accordingly, it was said, after the termination of his appointment on 30 June 2013, Mr Watson's powers lapsed, and there was nothing which he could assign to the Maintenance Trustee. Furthermore, he had not been given any power by the FTT to assign the right to recover service charge arrears, and in the absence of an order conferring such a power, he ought to have applied to the FTT for further directions pursuant to paragraph 22 of the 2012 Order and/or section 24(4) of the 1987 Act. Since

he had not done so, the 2016 Deed of Assignment was of no effect, and the Maintenance Trustee had no right to recover service charges referable to the management period.

19. The principal response to these arguments of the Maintenance Trustee was that this case had never been pleaded by the Lessees. The closest they had come to raising this issue was in paragraph 27(vii) of the defence, quoted at [11] above. Read in context, the reference to "such sums" in that paragraph as sums that the Maintenance Trustee had no entitlement to claim was confined to the context of major works, and nowhere

had the Lessees pleaded any detailed grounds for contending that the arrears of service charges referable to the management period were irrecoverable.

20. The FTT then stated its conclusions, in a passage which I need to set out in full:

> "51. The context in which the issues concerning the pleadings fall to be considered is as follows. This is a high value case in which complex issues have been raised and (although the respondents have changed their legal representatives) all parties have been legally represented throughout. There have been three separate Tribunal case management hearings in this matter and the respondents were given the opportunity to further particularise their case in November 2017.
>
> 52. The Tribunal has been informed, and accepts, that the applicants' legal representatives spent two full weeks preparing for the final hearing in this matter at very considerable expense. For the reasons set out above, the Tribunal permitted the respondents to make some extremely late amendments to their pleadings at the commencement of the final hearing.
>
> 53. The Tribunal is of the view that, following the late amendments which the respondents were permitted to make, the entirety of the case which the applicants have to meet in these proceedings should be clear on the face of the pleadings and that, if the respondents take issue with an assertion made by the applicants, they should plead their reasons for doing so.
>
> 54. The Overriding Objective at rule 3 of the 2013 rules [*i.e. the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, SI 2013 No. 1169*] provides that dealing with a case fairly and justly includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.
>
> 55. The Tribunal considers that this includes ensuring that the applicants are not forced, in complex litigation of this nature, to attempt to meet a case which is not clearly set out in a pleading. The applicants considered the issues to be defined by the pleadings and the Tribunal is of the view that they were entitled to do so.

> 56. Further, pursuant to the Overriding Objective, the limited resources of the Tribunal are a relevant factor. The Tribunal commenced its pre-reading prior to receipt of the respondents' skeleton argument on the basis that the issues which fell to be determined were those which had been pleaded… The Tribunal should also have been able to place reliance upon the pleadings when carrying out its pre-reading.
>
> 57. The Tribunal is not satisfied that either the applicants or the Tribunal could reasonably be expected to understand from the respondents' pleadings that the issues set out in the respondents' skeleton argument were to be raised. If this had been apparent to the applicants, they would have issued an application under the 1987 Act (without prejudice to the case that the assignment was not void).
>
> 58. In all the circumstances, the Tribunal accepts the applicants' submission that it is not open to the respondents to seek to argue that [*the Maintenance Trustee*] is not entitled to recover service charges falling due prior to its appointment as Maintenance Trustee because the point now taken has not been pleaded and is not before the Tribunal."

21. In the remainder of the FTT Decision, the FTT dealt with the specific issues which had been raised in relation to the recoverability of various charges and the state of accounts between the parties, none of which is relevant for present purposes.

The appeal to the Upper Tribunal

22. The Lessees were refused permission to appeal to the Upper Tribunal by the FTT, but on 22 February 2019 the Deputy President of the Upper Tribunal (Lands Chamber) (Martin Rodger QC) granted permission on the single ground that the FTT had been wrong to hold in [58] of the FTT Decision (quoted above) that it was not open to the Lessees to argue that the Maintenance Trustee was not entitled to recover services charges falling due prior to its appointment because the point had not been pleaded and was not before the FTT.

23. In his decision granting permission to appeal, the Deputy President said of this ground:

> "It raises a point of general significance concerning the powers of tribunal appointed managers and the status of sums claimed by them but not paid by the end of their appointment. It may also raise a secondary point of some general significance concerning the approach which First-tier Tribunals should take to the raising of issues of law not clearly identified in statements of case."

24. The hearing before the Upper Tribunal took place on 18 September 2019. By then, the Lessees had in their skeleton argument sought to add a further new argument to their arsenal, namely that the debts to the manager which had accrued during the management period were not service charges at all within the meaning of LTA 1985.

The Upper Tribunal allowed the contention to be argued as an adjunct to the single ground of appeal, taking the view that the issue had been canvassed before the FTT and there was no relevant prejudice to the head lessors or the Maintenance Trustee in its consideration by the tribunal: see the UT Decision at [20] and [21].

25. The Upper Tribunal dismissed the Lessees' appeal, for the reasons given at [52] to [64] of the UT Decision. In summary, it held that:

(a) payments made by reference to the lease are service charges falling within the statutory regime of the 1985 Act, whether during the term of a manager's appointment under section 24 of the 1987 Act or not;

(b) the imposition of a section 24 management order does not displace the covenants under the lease, and the lessees remain bound by them during the management period;

(c) although a management order may make provision for payments and other matters which do not fall within the provisions of the lease, the basic position remains unaltered to the extent that the provisions of the lease remain in force and the manager has the right to enforce them;

(d) it would be "verging on the absurd" if lessees seeking the protection of an order under section 24 of the 1987 Act were to find that, in consequence, they were unable to rely upon the protections of the service charge regime in the 1985 Act;

(e) it would not be either practicable or sensible to attempt to reproduce the effect of that regime in orders made under section 24 of the 1987 Act; and

(f) when a management order is made under section 24, attention must be given to what happens at the end of the term, and the duty owed by the manager to the FTT continues until all matters have been resolved to its satisfaction.

26. One of the authorities considered by the Upper Tribunal was the decision of HH Judge Gerald sitting in the Upper Tribunal (Lands Chamber) in Kol v Bowring [2015] UKUT 530 (LC), where the main issue was whether the FTT had jurisdiction to give directions to a manager appointed under section 24 as to the disposition of surplus monies in his hands after the termination of his appointment. Judge Gerald held, at [37], that the FTT "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."

27. I will need to return to the decision in Kol v Bowring later in this judgment, but the brief summary of it which I have given suffices to place in context the final conclusions of the Upper Tribunal in the present case:

> "63. In this case, the Tribunal is not concerned with a matter where there are surplus payments. If there had been, then as Judge Gerald recognised, it would be necessary to consider to whom any such surplus should be transferred. Here there are substantial arrears. In my view, the arrears that are "service

> charges" accrued to the Maintenance Trustee when the Management Order appointing Mr Watson came to an end. The ability of the Maintenance Trustee for the time being, to recover payments due under the leases was suspended by the Order and not extinguished. In those circumstances, there was no need for a Deed of Assignment, although given the entrenched position of the parties in this case, it is understandable why it was executed. In my view, the better course would have been for Mr Watson to apply to the Tribunal for directions and an endorsement of his actions.
>
> 64. In this case, if there are arrears of payments other than service charges then it will be necessary for an application to the FTT to be made either for a variation of the order or for directions as to how those arrears should be dealt with."

28. In the light of that conclusion, it was unnecessary for the Upper Tribunal to consider whether the FTT had been correct to refuse permission to the Lessees to argue that the Deed of Assignment was of no effect: see [65]. Judge McGrath nevertheless considered that it might be useful if she made some observations, which she proceeded to do at [65] to [71]. It is enough at this stage to note that, in her view, the point had not been pleaded, and the matter was one of mixed law and fact: see [66]. Although Judge McGrath did not say so explicitly, I infer from those conclusions that she would, if necessary, have dismissed the Lessees' appeal on that ground too.

The jurisdiction under Part II of the Landlord and Tenant Act 1987

29. As the Upper Tribunal rightly observed at [34], Part II of LTA 1987 "is a problemsolving jurisdiction". It was enacted following the recommendations of a Committee chaired by Mr Edward Nugee QC in 1985, the terms of reference of which were:

> "To collect and examine evidence of the nature, scale and incidence of problems for landlords and tenants arising from the management of privately owned blocks of flats; to assess the difficulties caused by these management problems and to make recommendations on how they might be resolved."

30. Sections 21 to 24 of the 1987 Act set out the procedure for a tenant to apply to the FTT (previously the LVT) for the appointment of a manager. Under section 21, as amended and now in force:

> "(1) The tenant of a flat contained in any premises to which this Part applies may, subject to the following provisions of this Part, apply to the appropriate tribunal for an order under section 24 appointing a manager to act in relation to those premises.
>
> (2) Subject to subsection (3), this Part applies to premises consisting of the whole or part of a building if the building or part contains two or more flats.

…

(8) For the purposes of this Part, "appropriate tribunal" means—

(a) in relation to premises in England, the First-tier Tribunal…"

31. Section 22 then provides for the service of a preliminary notice by the tenant, before an application for an order under section 24 may be made. The notice must be served on the landlord and "any person (other than the landlord) by whom obligations relating to the management of the premises or any part of them are owed to the tenant under his tenancy". The notice must specify the grounds on which the tribunal would be asked to make such an order, and the matters relied on by the tenant to establish

those grounds; if the matters are capable of being remedied by any recipient of the notice, it must also require specified steps for that purpose to be taken within a specified reasonable period: section 22(2)(c) and (d). Under section 23(1), no application for an order under section 24 may be made unless the period specified for remedial steps has expired without result, or the matters relied upon were not capable of remedy by a recipient of the notice.

32. Section 24 then provides materially as follows:

"24. **Appointment of manager by the tribunal**.

(1) The appropriate 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.

(2) The appropriate tribunal may only make an order under this section in the following circumstances, namely-

(a) [*This paragraph provides that the tribunal may make an order in four fault-based circumstances, where it is satisfied that they are made out and 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.

…

(3) The premises in respect of which an order is made under this section may, if the tribunal thinks fit, be either more or less extensive than the premises specified in the application on which the order is made.

(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.

(5) Without prejudice to the generality of subsection (4), an order under this section may provide—

(a) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager;

(b) for the manager to be entitled to prosecute claims in respect of causes of action (whether contractual or tortious) accruing before or after the date of his appointment;

(c) for remuneration to be paid to the manager by any relevant person , or by the tenants of the premises in respect of which the order is made or by all or any of those persons;

(d) for the manager's functions to be exercisable by him (subject to subsection (9)) either during a specified period or without limit of time.

(6) Any such order may be granted subject to such conditions as the tribunal thinks fit, and in particular its operation may be suspended on terms fixed by the tribunal.

…

(9) The appropriate tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section…

….

(11) References in this Part to the management of any premises include references to the repair, maintenance, improvement or insurance of those premises."

33. It is worth noting, as the Upper Tribunal pointed out at [41], that section 24(11) was amended to include the word "improvement" by the Commonhold and Leasehold Reform Act 2002, at the same time as a similar amendment was made to the definition of "service charge" in section 18(1)(a) of LTA 1985: see section 140 of the 2002 Act and schedule 9, paragraphs 7 and 8 respectively.

34. The leading authority on the interpretation of Part II of the 1987 Act is the decision of this court in Maunder Taylor v Blaquiere, loc. cit. The issue in that case was whether the tenant, Mr Blaquiere, on whose application the LVT had appointed a manager, Mr Maunder Taylor, was entitled to a set off against sums which the manager sought to recover from him, by way of a counterclaim for damages for breach of the landlord's repairing covenants. The sums claimed from Mr Blaquiere by the manager were service charges due under the lease totalling some £62,000. The order appointing Mr Maunder Taylor as manager authorised him, inter alia, "to receive any rents, profits, service charges and other money payable by the tenants of the building…": see [2003] 1 WLR 379 at 382A.

35. Upholding the decision of the LVT, this court held that Mr Blaquiere was not entitled to set off his claim for damages against the service charges, because there was no mutuality between the manager's claim and his own. The leading judgment was delivered by Aldous LJ, with which the other two members of the court (Tuckey and Longmore LJJ) agreed: see [45] and [46].

36. As Aldous LJ explained, after observing that nothing contained in the Nugee Committee report nor in Hansard threw any light upon the issue the court had to consider:

> "35. The Landlord and Tenant Act 1987 was a radical piece of legislation which in a number of respects impinged upon the contractual rights of landlords. Part I gave to certain tenants a right of first refusal. Part II to which I will come in detail enables the court (by amendment, the leasehold valuation tribunal) to appoint managers. Part III provided for compulsory acquisition by certain tenants of the landlord's interest. Part IV enabled variation of leases and Part V enabled certain service charges to be varied.
>
> 36. Section 21 is the first section of Part II. It was amended by section 86 of the Housing Act 1996. As amended it enabled the tenant of a flat contained in premises to which Part II applies to apply to the tribunal for an order under section 24 appointing "a manager to act in relation to the premises". It is worth noting that the manager is not said to act in carrying on the business of the landlord… He is "to act in relation to the premises"."

37. After quoting the relevant provisions of section 24, Aldous LJ continued:

> "38. In my view Mr Fancourt [*counsel for the manager*] is correct in his submission that the purpose of Part II of the Act is to enable the tribunal to appoint a manager, who may not be

confined to carrying out the duties of a landlord under the lease. The tribunal is enabled under subsection (1) to appoint a manager to carry out in relation to any premises to which Part II applies "such functions in connection with management" of the premises as the tribunal thinks fit…. There is no limitation as to the management function of the manager; in particular the functions are not limited to carrying out the terms of the leases…

39. Subsection (2) restricts the ability of the tribunal to make orders. But subsection (2)(b) is of great width in that it enables the tribunal to appoint a manager when satisfied that circumstances exist which make "it just and convenient" to do so. That also suggests that the tribunal is concerned to provide a scheme of management not just a manager of the landlord's obligations.

40. Subsection (5) is also indicative of the position of a manager appointed under section 24. If he was the equivalent of the receiver and manager in [*Parsons v Sovereign Bank of Canada [1913] AC 160*], then he would claim in the name of or on behalf of the company. But subsection (5)(a) suggests that that is not the position of a manager appointed under section 24(1). That subsection envisages that rights and liabilities can become rights and liabilities of the manager.

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. That 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 of the landlord's obligations under the lease. That being so, Mr Maunder Taylor was a court-appointed manager appointed to carry out those duties required by the order appointing him… His claims were made in his capacity as manager.

42. As I have said, Mr Dowding [*counsel for the tenant*] relied on the wording of the order appointing the manager. He submitted that it made it clear that the manager was acting as receiver of the monies due to [*the landlord*] and as a manager to carry out the duties of [*the landlord*] under the lease. That submission is, I believe, inconsistent with the scheme of Part II and in particular the effect of section 24 of the 1987 Act. 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. It follows that there was no mutuality between his claim and that of Mr Blaquiere. That being so, set-off is not possible.

> 43. That conclusion reflects the practicalities. Of course it is possible for a manager to seek to protect his position in respect of a claim that a tenant may have against a landlord that has failed to carry out activities appropriate to his position as landlord, but if that be a requirement of the law there could be cases when managers would be reluctant to be appointed. That could not have been the intention of Parliament. 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. Part II envisages interim appointments, when action needs to be taken urgently. If so, the possibility of a set-off could obstruct that which Parliament intended Part II of the Act to achieve. Section 24 provides a mechanism for appointing a suitable person to manage the functions of flats when needed with the rights as needed."

38. It is also relevant to note the concurring judgment of Longmore LJ, especially since Tuckey LJ agreed with "the reasons given in both judgments": see [45]. After pointing out that Part II of the 1987 Act "was enacted by Parliament to deal with a particular problem", namely the failure of the landlord of a multi-tenanted block of flats to perform his obligations under the lease, "despite the existence of a fund or potential fund of money intended to be used for the purpose", Longmore LJ said, at [50]:

> "It is clear to my mind that Parliament intended that a manager should, when appointed pursuant to section 24(1) of the Act, come in with a clean sheet and be able to collect service charges due from the tenants and use the money so obtained for repair of the premises. It would make a nonsense of the legislation if any or all of the tenants could set off, against that claim for service charges, claims that they might have against the landlord. Most tenants would have such claims. Some of those claims will have accrued before the appointment of the manager; other claims may be for continuing breaches and thus continue to accrue after the manager's appointment… In my judgment, the use of such claims to prevent service charges being paid to the manager would be an attempt to thwart the plain legislative intent displayed in the relevant sections of Part II of the 1987 Act."

39. It can be seen, therefore, that the Maunder Taylor case is clear authority for the proposition that a manager appointed under Part II of LTA 1987 is a court-appointed official who is not necessarily confined to carrying out the duties of the landlord under the lease, and who performs the functions conferred on him by the tribunal in his own right. That is so even if the order appointing the manager defines some (or even all) of his duties and obligations by reference to the lease, as do paragraphs 3 and 5 of the 2011 Order in the present case. If, however, that step is taken in relation to the collection and application of service charges, then it was clearly Parliament's intention, as Longmore

LJ explicitly stated, that the manager "should… come in with a clean sheet and be able to collect service charges due from the tenants and use the money so obtained for repair of the premises."

40. In Kol v Bowring, loc. cit., questions arose about the rights and duties of a manager after her appointment had come to an end. The manager in that case was appointed in respect of a small mixed residential and commercial building containing three flats above a commercial unit, for a period of two years expiring on 4 August 2013. Her duties under the order included the collection and receipt of all sums due by way of ground rent and service charges under the leases, and to maintain a client account into which the service charges would be paid together with such other accounts as she should think necessary in connection with management of the property. Disputes arose about the service charges raised by the manager, which led to two sets of proceedings before the tribunal which were eventually determined or compromised. The issue which finally came before HH Judge Gerald in the Upper Tribunal in September 2015 concerned the jurisdiction of the FTT to resolve disputes after the termination of the manager's appointment, and in particular whether the FTT had an ongoing duty or responsibility to satisfy itself that the manager had properly accounted for sums which had been received during the course of the appointment.

41. In that context, Judge Gerald said at [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."

42. Judge Gerald went on to observe, at [28]:

> "It is quite extraordinary that there have been no final accounts produced by the manager, now over two years [*past*] 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… 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."

The grounds of appeal

43. The Lessees advance six grounds of appeal (brought with permission granted by the Upper Tribunal) which may be summarised under three headings:

(1) Was the Upper Tribunal right to hold that the service charges paid to Mr Watson during the management period were (a) service charges within the meaning of section 18 of LTA 1985, and (b) "paid under the lease" as stated in the UT Decision at [53]?

(2) Even if the amounts so payable were service charges within the meaning of section 18, was the Upper Tribunal right to hold at [63] that the arrears at the end of the management period "accrued" to the Maintenance Trustee when the management order came to an end, and did the Upper Tribunal give proper and adequate reasons for so holding?

(3) Was the Upper Tribunal right to hold at [65] that the issue in relation to the validity and effect of the 2016 Deed of Assignment had not been pleaded, and (again) did it give proper and adequate reasons for so holding?

44. By a respondent's notice, the Maintenance Trustee contends that the order of the Upper Tribunal should be upheld on two additional grounds:

(1) The 2016 Deed of Assignment was effective at law to vest the debts owed to the manager by the Lessees for the management period in the Maintenance Trustee, which was therefore entitled to recover the debts thus assigned to it. Further, the manager's rights and liabilities incidental to his appointment were vested in him personally, with the consequence that the debts owed to him by the Lessees in respect of the management period were vested in him absolutely subject to the supervisory jurisdiction of the FTT. The manager was therefore entitled to assign those debts to the Maintenance Trustee.

(2) The Lessees also failed to plead that the Maintenance Trustee was not entitled to enforce payment of the debts accrued during the management period.

45. I will deal with the grounds of appeal in turn, incorporating the points raised in the respondent's notice to the extent that it is necessary to do so.

Issue (1): were the relevant sums paid by the Lessees to the manager "service charges" for the purposes of LTA 1985, and were they paid under the Leases?

46. Mr Upton on behalf of the Lessees placed at the forefront of his submissions the proposition that the sums paid by the Lessees to the manager pursuant to the service charge obligations in the Leases were not "service charges" within the meaning of section 18 of LTA 1985, and were therefore not subject to the detailed regime regulating the operation and recovery of such charges laid down in the 1985 Act as amended. He maintained this submission even though the terms of the 2011 Order explicitly provided that during the period of Mr Watson's appointment he should "demand collect and apply" all the funds made payable to the Maintenance Trustee by the Leases, including "service charges" and "arrears of" service charges: see [4] above. Furthermore, during the period of his appointment Mr Watson was obliged to "carry out the obligations of the Maintenance Trustee in accordance with the provisions of the Underleases", and to

comply with the requirements of the RICS Service Charge Residential Management Code: see paragraph 5 of the 2011 Order.

47. Mr Upton's argument, in short, was that the conclusion for which he argues is mandated by the decision of this court in Maunder Taylor, because the powers of a manager appointed under section 24 of LTA 1987 derive exclusively from his appointment by the tribunal as an officer of the tribunal, and cannot therefore derive from the Leases even if the order appointing him defines the content and scope of those duties by reference to the Leases. The source of the tenant's liability to pay during the management period arises under the management order, not the lease; and the order therefore suspends, or displaces, any covenants relating to the exercise of the manager's functions while it remains in force.

48. "Service charge" is defined for the purposes of LTA 1985 by section 18 as follows: "(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—

> (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
>
> (b) the whole or part of which varies or may vary according to the relevant costs.
>
> (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
>
> (3) For this purpose—
>
> (a) "costs" includes overheads, and
>
> (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period."

49. Accordingly, a service charge under the 1985 Act must satisfy the following conditions:

(a) it must be payable by a tenant of a dwelling, whether as part of or in addition to the rent;

(b) it must be payable for one or more of the matters specified in subsection (1)(a);

(c) it must be variable in amount, according to the "relevant costs"; and

(d) the relevant costs must be "the costs or estimated costs incurred or to be incurred by or on behalf of the landlord" in connection with the relevant matters.

By virtue of section 30, the term "landlord" here "includes any person who has a right to enforce payment of a service charge".

50. In respectful agreement with the Upper Tribunal, I have no difficulty in concluding that the sums paid by the Lessees to the manager during the management period retained their character as "service charges" within the meaning of the 1985 Act, even though they were payable to the manager instead of the Maintenance Trustee, and even though the source of the obligation to pay them lay in the 2011 and 2012 Orders. The sums in question were still payable by each Lessee as the tenant of a dwelling; they were payments in respect of the matters specified in section 18(1)(a); their amount was variable in accordance with the "relevant costs", provided that those costs were "incurred or to be incurred by or on behalf of the landlord"; and the manager satisfied the extended definition of "landlord" in section 30, because by virtue of the

2011 and 2012 Orders, he was "a person who has a right to enforce payment of a service charge".

51. To hold otherwise would, as the Upper Tribunal rightly recognised, lead to the absurd conclusion that the appointment of a manager under section 24 of the 1987 Act, typically in circumstances where there have been serious and unremedied failures to comply with repairing and other obligations in the leases in return for which the service charges are payable, had the result that the detailed scheme enacted by Parliament in relation to service charges would immediately cease to apply in its entirety, and would be replaced (if at all) only by such provision as happened to be made by the tribunal in the order appointing the manager.

52. Mr Upton was unable to suggest any convincing reason why Parliament should have had such a peculiar intention when it enacted Part II of the 1987 Act, only two years after it had legislated comprehensively for service charges in the 1985 Act. Nor is it a satisfactory answer to this objection to say that similar provision could always be made in the order appointing a manager under section 24. Not only would this be a wasteful and haphazard procedure to adopt, but it is in my judgment extremely doubtful whether the FTT would have jurisdiction under Part II of the 1987 Act to impose a detailed regime equivalent to that contained in the 1985 Act. I agree with Judge McGrath, who said in the UT Decision, at [58]:

> "Furthermore, I do not consider that including "liberty to apply" or seeking to provide a dispute resolution mechanism analogous to section 27A [*of the 1985 Act*] was contemplated in Part II of the 1987 Act nor that it would be practicable or sensible. There is extensive jurisprudence relating to sections 18-30 of the 1985 Act which could not simply be replicated. There is also the difficulty that the FTT has no inherent jurisdiction and I doubt whether a Management Order could, in effect, confer a whole suite of separate jurisdictions on the Tribunal to deal with complex disputes about service charges when a regime is already in existence."

53. Nor can I accept that there is anything in Maunder Taylor which even arguably supports the conclusion for which Mr Upton contends. In the first place, the issue in that case was entirely different, namely whether it was possible for a tenant who owed sums to the manager to set off against that liability a claim by way of damages from the landlord.

The court was not required to consider whether the sums recovered by the manager from the tenant were service charges within the meaning of the 1985 Act, or the precise character which such sums had in the hands of the manager. Secondly, such indications as may be found in the judgments of Aldous LJ and Longmore LJ clearly envisage that a manager appointed under Part II of the 1987 Act may be authorised to collect service charges due from the tenants and use the money so obtained for repair of the premises. This appears most clearly in the judgment of Longmore LJ at [50], but see too the judgment of Aldous LJ at [38], where he recognised that the functions of a manager "are not limited to carrying out the terms of the leases", and [39], where he relied on the width of the jurisdiction under section 24 as suggesting "that the tribunal is concerned to provide a scheme of management not just a manager of the landlord's obligations." To the extent that the manager's obligations reflect the terms of the lease and the service charge obligations which it contains, it would in my opinion be wrong to read anything which Aldous LJ said in [41] and [42] as implying that sums previously paid as service charges somehow lose their character as such upon the manager's appointment. The manager's claims to recover those sums would now be made by him in his capacity as manager, but the character of those sums as service charges for the purposes of the 1985 Act would in my judgment remain unchanged. The reason for that, as I have sought to explain, is that the definition of "service charge" in section 18 of the 1985 Act is still satisfied, because of the extended meaning given by section 30 to the term "landlord".

54. I am also unable to accept Mr Upton's argument based on the legislative history of section 18. He points out that, when it was first enacted, section 18 could not have applied to an amount payable under a management order, because such orders did not exist before the enactment of the 1987 Act. Furthermore, section 18 has been twice amended, without on either occasion Parliament taking the opportunity to provide that an amount payable under a management order is a service charge where it is payable for similar costs incurred or to be incurred by a manager. My answer to this argument is that there was no need for Parliament to legislate in order to make it clear that the 1985 Act applied to service charges levied under management orders, because the language of section 18 (read with section 30) of the 1985 Act was already sufficient for that purpose. The position is, rather, that one would indeed expect Parliament to have made express provision, but only if its intention was to *exclude* service charges levied by managers from the ambit of the comprehensive scheme relating to service charges which it had enacted in 1985.

55. Next, on this part of the case, Mr Upton prays in aid the passage in the judgment of the Upper Tribunal in assignmentssignemnt where Judge Gerald held that "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": see [41] above. This view was said to be based on Maunder Taylor, which (as I have explained) I do not consider to be authority that sums paid as service charges to a manager lose their character as such for the purposes of the 1985 Act. Moreover, as the Upper Tribunal pointed out in the present case at [59], there is nothing to indicate that this point was fully argued before Judge Gerald, and in any event there are other passages in his judgment which appear to suggest that the service charge regime in the 1985 Act would continue to apply to service charges falling within the definition in section 18 which are payable to a manager appointed under the 1987 Act.

56. The remaining point which I need to consider under this heading is the Lessees' challenge to the Upper Tribunal's conclusion at [53] that "Although the charges are *recovered* under the Management Order, they are *paid* under the lease" (emphasis in the original). In his oral submissions, Mr Upton developed this into a broader argument that the service charges cannot properly be regarded as paid under the lease, when the manager's right to recover them derives solely from the tribunal's order. To my mind, however, this is not a helpful way of looking at the problem, because the point is basically a semantic one. It is true that the manager's right to recover the charges is dependent upon the order made under section 24, but in a case (such as the present) where the manager is directed to operate the service charge machinery in the lease, it also remains true to say that the charges are paid under the lease. The important point, in my judgment, is that the provisions contained in an order made under section 24 of the 1987 Act are superimposed on the existing contractual framework of the lease, but the underlying contractual rights and obligations of the parties remain in place, subject to the terms of the management order, and they are not permanently disapplied or modified. The Upper Tribunal was in my view substantially correct to say, at [53]:

> "The imposition of a Management Order does not displace the lease covenants and the lessees remain bound by them."

This sentence must, however, be read subject to the proviso that it refers to the underlying contractual framework, which remains in place subject to the terms of the management order. Plainly, to the extent that the terms of the order are in conflict with the underlying contract, the former must prevail while the order remains in force.

57. There is one further clarificatory footnote that I wish to add. For various reasons, which have nothing to do with management orders under the 1987 Act, there may be contractual arrangements in place for the payment of sums referable to the provision of services in a block of flats which do not fall within the definition of "service charges" in the 1985 Act. An example, which was touched upon in argument, is a provision for payment by the landlord of sums equivalent to service charges in respect of flats occupied by the landlord. Such sums cannot qualify as service charges within the statutory regime, because they are not payable by a *tenant* of a dwelling. It follows that if such sums continue to be payable during a management period when an order under Part II of the 1987 Act is in force, any disputes in relation to them will fall outside the ambit of the 1985 Act regime and will have to be resolved, if necessary, by separate application to the FTT. Mr Upton relied on this possibility as an argument in favour of his case that service charges payable pursuant to a management order cannot be subject to the 1985 Act. It would make no sense, he says, for service-related charges in respect of the same property to be subject to two different regimes. I do not agree. Such a possibility is inherent in the terms of the definition of "service charge" in section 18 of the 1985 Act, and a division of responsibilities of this nature can occur whether or not a management order under the 1987 Act is in place. The point is therefore of no assistance in resolving the present dispute.

Issue (2): did the arrears of service charge at the end of the management period "accrue" to the Maintenance Trustee, with or without the 2016 Deed of Assignment?

58. In my view, the answer to this question largely follows from the resolution of the first issue. Once it is appreciated that the underlying contractual framework of the Leases remained in place during the management period, I see no difficulty in concluding that the right to sue for arrears automatically revested in the Maintenance Trustee upon the termination of Mr Watson's term of office as manager. During his tenure, his right to recover arrears of service charge under the Leases had vested in him under the combined effect of the 2011 and 2012 Orders, but once his powers had lapsed on expiry of the period, without recovery by him of the arrears, there was no obstacle to the Maintenance Trustee seeking to enforce its right to them under the Leases by action in the County Court in the usual way. That is what the Maintenance Trustee has done in the present case, relying on the Lessees' covenants in the Leases and the alleged failure by the Lessees to pay the relevant sums as and when they fell due.

59. I cannot see any prejudice to the Lessees in adopting this simple view of the matter, which also commended itself to the Upper Tribunal. The position is quite different

from when there is a surplus in the hands of the manager at the end of the management period. In those circumstances, it is the duty of the manager to provide an account and, if necessary, obtain directions from the FTT as to the application of the fund. But where the underlying machinery of the service charge provisions in the Leases has remained in force throughout the management period, and the Lessees have failed to comply with their obligations under it, the resumption by the Maintenance Trustee of the right to enforce those obligations amounts to no more than a restoration of the status quo under the Leases. There is no injustice to the Lessees in recovery of the arrears being sought by the very person to whom they were contractually bound to pay them under the Leases. Nor is there any risk of double recovery, because the right of the manager to sue for the arrears must have come to an end with the termination of his appointment.

60. In the UT Decision at [63], Judge McGrath described the arrears as having "accrued to the Maintenance Trustee when the Management Order appointing Mr Watson came to an end". I accept that the word "accrued" may not be entirely apt to describe the process which I have sought to explain, but there is no real doubt about what the judge meant. As she went on to say (ibid):

> "The ability of the Maintenance Trustee for the time being, to recover payments due under the leases was suspended by the Order and not extinguished. In those circumstances, there was no need for a Deed of Assignment…"

In my view, this language adequately captures the essential point that the contractual obligation to pay the relevant service charges remained in place throughout, and to the extent that it was displaced during the management period, that displacement came to an end when the management period expired without the manager having taken any steps to recover the arrears. There was no further step which the Maintenance Trustee needed to take in order to perfect its title to sue.

61. Mr Upton sensibly spent little time on this part of the case in his oral submissions, recognising that it was in practice likely to stand or fall with his argument on the first issue. The Lessees' apparent reluctance to pay the arrears is also unattractive on the

merits, once it is recognised that the Maintenance Trustee has title to sue for them. As Mr Upton made clear at an early stage of his oral submissions, it is accepted by his clients that all the arrears of service charge for the management period fell within the service charge provisions in the Leases and were reasonable in amount. One is therefore left wondering why so much time, energy and money has been expended in trying to find reasons not to pay them.

62. Since it is unnecessary for the Maintenance Trustee to rely on the 2016 Deed of Assignment, and since the question of its validity raises issues of some difficulty, I propose to say no more about it, including the arguments raised in the respondent's notice. Those points are better left for decision in a case where they are material to the outcome.

Issue (3): the pleading issue

63. In view of the conclusions which I have reached on issues (1) and (2), it is also unnecessary to rule on the question whether the validity and effect of the 2016 Deed

of Assignment were properly pleaded. As I have explained, the FTT held that they were not, and the Upper Tribunal agreed with this, while recognising that what it said on the question was unnecessary to the disposal of the appeal. In my view, it would not be helpful for us to go into detail on a question which is likewise unnecessary (if the other members of the court agree) to our disposal of the present appeal. We were pressed to do so by Mr Upton, on the basis that large amounts of costs in the tribunals below are said to turn on it. With respect, I do not consider that to be a proper reason for us to entertain the issue when it is unnecessary to our own disposal of the appeal. We were told that the question of costs of the earlier stages of the present proceedings is currently before the Upper Tribunal, and in my view it would be inappropriate for us to express an obiter opinion on the pleading issue merely in order to assist the Upper Tribunal in the discharge of its duty to resolve such costs issues as are before it.

64. I therefore propose to say no more on issue (3).

Overall conclusion

65. For the reasons which I have given, I would dismiss this appeal.

Lady Justice Rose:

66. I agree.

Lord Justice Lewis:

67. I also agree.