FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	:	**LON/00BG/LVM/2021/0010**
Property	:	**Canary Riverside Estate, Westferry Circus, London E14 (the "Estate")**
Applicant	:	**Mr Sol Unsdorfer**
Respondents	:	**(1) Octagon Overseas Limited ("Octagon")** **(2) Canary Riverside Estate Management Limited("CREM")** **(3) Riverside CREM 3 Limited ("Riverside")** **(4) Circus Apartments Limited ("CAL")** **(5) Leaseholders represented by the Residents Association of Canary Riverside ("RACR")**

Represented by	**:**	**Wallace LLP for Mr Unsdorfer** **Freeths LLP for Octagon, CREM, and Riverside** **RACR for the leaseholder Applicants** **Norton Rose Fulbright LLP for CAL**
Type of application	**:**	**Applications to vary the terms of a Management Order**
Tribunal	**:**	**(1) Judge Amran Vance** **(2) Judge Nicola Rushton QC**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of directions	**:**	**13 May 2022**

DECISION

Description of hearing

The hearing of this application took place, by way of video conferencing, on 27 April 2022. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and no party requested the same. We were referred to documents in an electronic bundle prepared by the Applicant. References in square brackets in this decision are to page numbers of that bundle. The bundle comprised 4,375 pages. We were also referred to a supplemental bundle prepared by the Applicant which comprised 199 pages. References in bold below to pages in that supplemental bundle contain the prefix "**Supp:[xx]**"

Background

1. This is an application **[3447]** by Mr Unsdorfer, the tribunal-appointed Manager of the Canary Riverside Estate to vary the existing Management Order made pursuant to s.24 Landlord and Tenant Act 1987. The tribunal first made a Management Order on 15 August 2016 **[1]**. That Order was subsequently varied on several occasions, most recently by Orders dated 16 September 2019 **[23]** and 28 April 2021 **[97]**. In this decision, we will refer

to the current version of the Management Order as the Existing Management Order ("EMO") .

2. Prior to expiry of the EMO on 30 September 2021, RACR applied for an extension for a further three years (application LON/00BG/LVM/2021/0003), and CAL and RACR applied for a new management order (applications LON/00BG/LVM/2021/0011 and 12).

3. By directions dated 1 May 2021 **[115]** the tribunal extended Mr Unsdorfer's current appointment, and the duration of the EMO, so that both are to continue until final determination of RACR's application for an extension of the Order.

4. In a decision dated 3 November 2021 (corrected on 20 December 2021) **[49]** Judge Vance determined a joint application made by CAL and RACR (LON/00BG/LVM/2021/0014) seeking that an interlocutory management order be made under the provisions of s.24(2) Landlord and Tenant Act 1987. He determined that it was just and convenient to make an Interim Management Order ("IMO") in the terms set out in Annex 2 to his decision **[69]** Subject to certain amendments, the terms of the IMO are the same as the EMO. Most of the amendments were to specifically provide for the IMO to be binding upon Riverside, who was not a party to the EMO, and who had contended that it was not bound by it.

5. There are therefore two extant management orders, running concurrently, namely the EMO and the IMO. This will be the case until such time as the extension application and the applications for a new management order are determined by the tribunal. It follows that any variations that the tribunal makes to the EMO, as a result of this application, should also be reflected in the IMO and an appropriate application should be made to the tribunal for such an order.

The Variations sought by the Manager

6. In his application, Mr Unsdorfer seeks five variations to the EMO, concerning:

   (a) the grant of additional powers in relation to forfeiture of leases ("the Forfeiture variation");

   (b) the grant of additional powers for the recovery of bad debts ("the Bad Debt variation");

   (c) his ability to recover legal costs (to the extent that the EMO makes unsatisfactory provision) ("the Legal Costs variation");

   (d) an indemnity he is obliged to provide in respect of a Building Safety Fund contract and which he considers should pass to the landlord or any succeeding manager after his appointment ends ("the BSF variation"); and

(e) arrears of charges owed by Car Park and Wash Limited ("the Car Park & Wash"), as well as proposed variations allowing the Manager and his staff to use welfare facilities currently enjoyed by the Car Park & Wash ("the Car Park & Wash variation").

7. Only the Forfeiture, Legal Costs and BSF variation were considered by the tribunal at the hearing on 27 April 2022. Prior to the hearing the tribunal agreed to the Manager's proposal that the Bad Debt variation be postponed over to the substantive hearing of RACR's application for an extension of the EMO and RACR, and CAL's application for a new Management order. Those applications will be heard together. As for the Car Park & Wash variation, the tribunal was informed at the start of the hearing that Mr Unsdorfer had reached agreement (subject to contract) with the Respondents on this issue. This part of the application was therefore adjourned.

Legal Framework

8. The tribunal summarised the relevant general legal framework in its decision of 28 April 2021, and this summary is taken from that decision.
9. Section 24(1) of the 1987 Act confers power on this tribunal to make an order, appointing a manager to carry out, in relation to any premises to which Part II applies, such functions in connection with the management of the premises, or such functions of a receiver, or both, as the tribunal thinks fit.
10. Under section 24(4) an order of the tribunal may make provision with respect to such matters relating to the exercise by the manager of his functions under the order and such incidental or ancillary matters as the tribunal thinks fit.
11. Section 24(9) of the 1987 Act provides as follows:

> "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; and if the order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 2002, the tribunal may by order direct that the entry shall be cancelled."

12. S.24(9A) says as follows:

> 9A "The tribunal shall not vary or discharge an order under subsection (9) on the application of any relevant person unless it is satisfied:
>
> (a) that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and
>
> (b) that it is just and convenient in all the circumstances of the case to vary or discharge the order.

13. In *Maunder Taylor v. Blaquiere* [2003] 1 W.L.R. 379 Aldous LJ observed [at 35] that the 1987 Act was a radical piece of legislation which in a number of respects impinged upon the contractual rights of landlords, and [at 41] that its purpose is to provide a scheme for the appointment of a manager

who will carry out the functions required by the court [or tribunal]. At paragraph 38 he said that there is no limitation as to the management functions of the manager, and, in particular, those functions are not limited to carrying out the terms of the leases. The scope of any management order should, however, be "proportionate to the tasks which the tenants are entitled under their leases to look to their landlord to perform" (*Sennadine Properties v Heelis [*2015] UKUT 0055 (LC), para 51).

14. In *Chuan-Hui and others v. K. Group and others* [2021] EWCA Civ 403 at [39] Henderson LJ referred to *Maunder Taylor* as 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. Part II is, he said, a "problem-solving jurisdiction" [29].

15. A manager's powers or functions need not be confined to the premises which qualifies under s.21 of the 1987 Act. Although a causal link, or nexus, between the functions to be carried out by the manager and the particular premises is required, the functions to be exercised are not confined to the building and its curtilage, and can extend to amenity land (see *Cawsand Fort Management Co v Stafford* [2008] 1 WLR 371 (CA) at para.31).

16. Further, as held in *Queensbridge Investments v Lodge* [2016] L&TR 19. [42-48] a management order can extend to giving a manager powers to manage commercial units and to collect rents from commercial tenants. As stated in *Queensbridge Investments* [31] the purpose of s.24 is not to have regard to the rights and obligations under the lease and to make sure that the manager carries out the provisions of the lease. It is directed towards creating a scheme of management which will ensure that the relevant premises are properly managed.

The Hearing

17. At the hearing, Mr Dovar represented Mr Unsdorfer. Mr Morshead QC and Mr Bates represented Octagon, CREM, and Riverside ("the Landlords"). Mr Rainey QC represented CAL. Also present were Ms Jezard for RACR, Mr Louca and Mr Christou, in-house lawyers with the Yiannis Group, Mr Marsden, Ms Virdee and Ms Willis, solicitors for the Landlords, Ms Patel, solicitor for Mr Unsdorfer, Mr Stevens, solicitor for CAL, and Mr Smith, in-house counsel for Residential Land.

18. In his skeleton argument Mr Morshead queried CAL's locus to make submissions at this hearing. He suggested that in the absence of a Statement of Case from CAL, it was inappropriate for Mr Rainey to make submissions, other than to support the application for the reasons advanced by Mr Unsdorfer. Mr Rainey assured the tribunal that he would not be advancing a statement of case other than that advanced by Mr Dovar and that he would not be trespassing on his case. Given that assurance, and given that CAL is a Respondent to this application, we were satisfied that it was appropriate

for Mr Rainey to participate in the hearing in order to comment on the application within the parameters he described.

19. Between 25 April 2022, up to and including the day of the hearing on 27 April, the tribunal received a total of eight letters or emails from commercial lessees on the Estate, objecting to the Legal Costs variation. During the course of the hearing, Mr Morshead expressed concern that the commercial tenants may not have had adequate notice of this application and/or this hearing, and that it may be inappropriate for the tribunal to proceed to determine the variation. He suggested that we may wish to adjourn the hearing to allow the commercial lessees the opportunity to consider their position. We declined to do so for the reasons we will give below when we consider the Legal Costs variation.

The Forfeiture Variation

20. The EMO already grants the Manager powers concerning forfeiture. Paragraph 13 of the order reads as follows:

> "13. Permit the Manager, such permission not to be unreasonably withheld, and on prior notice, to serve upon the Lessees, Commercial Tenants, or any other occupiers, any Notices under section 146 of the Law of Property Act 1925 or exercise any right of forfeiture or re-entry or anything incidental or in contemplation of the same, but only in so far as the Notice relates to Shared Services and service charges;

21. Mr Unsdorfer's position is that the existing provision is inadequate and ineffective. In his first witness statement **[3512]** he describes it as "toothless" because he is only able to instigate forfeiture with the consent of the relevant Landlord, and because he derives no benefit from doing so. In his view any benefit accrues to the Landlord because if the lease is forfeit it reverts back to the Landlord. In addition, it is the Landlord who would have conduct of any application for relief from forfeiture, and who would receive any monies recovered from a tenant through such an application. The existing provision, is, said Mr Dovar, therefore a fairly empty threat, especially where a defaulting tenant is a company that is connected to the Landlord.

22. In his witness statement dated 23 December 2021 **[3354]**, Mr Jonathan Smith, an in-house solicitor at Residential Land, who manage the Circus Apartments on behalf of CAL suggests that BVI-registered leaseholders, linked to the Landlords, have deliberately withheld payment of service charges as part of a strategy to deprive the Manager of the funds he needs to properly manage the Estate. Mr Unsdorfer also highlights the large arrears owed to him by these BVI-registered companies at paras. 38-42 of his second witness statement **[Supp:9]** where he states that he inherited approximately £800,000 of accumulated debt owed by these companies on handover of the managerial function to him.

23. The amendments to the EMO proposed by Mr Dovar **[3493]** seek to grant to the Manager a unilateral right to pursue forfeiture, including the issue and conduct of proceedings, as well as dealing with any applications for relief from forfeiture, without the need for any consent from the relevant Landlord. They also give him the power to settle any relief from forfeiture application on terms that relief be given on payment to him of any outstanding sums due for Shared Services and/or service charges.

24. In the event of a lease becoming forfeited to the Landlord, the proposed amendments provide for the Landlord to elect whether to retain possession of the unit, or to grant a short, or long lease. If the Landlord decides to retain the unit, or grant a short lease, then it is required to pay the Manager the total sums outstanding in respect of Shared Services and service charges and an equivalent future contribution as provided in the forfeited lease. If it decides to grant a long lease, then any outstanding sums owed for Shared Services or service charges are to be paid by the Landlord to the Manager on completion of the new lease (or within 42 days of forfeiture, whichever is the sooner), and the new lease is to replicate the service charge provisions in the forfeited lease.

25. Mr Morshead objected to the variations for four principal reasons. Firstly, he contends that Mr Unsdorfer has failed to show that alternative remedies currently available to him are inadequate or ineffective. In his submission, ordinary debt recovery measures provide the Manager with an effective remedy against any solvent tenants, and Mr Unsdorfer has not shown that any defaulting tenants are insolvent. Where debts are contested, then litigation, rather than forfeiture, is, according to Mr Morshead, the appropriate route for Mr Unsdorfer to take. That, said Mr Morshead, is what Mr Unsdorfer has sought to do. He drew our attention to the schedule exhibited to Mr Unsdorfer's second witness statement which indicates that on handover of the role of Manager to him in 2019, total arrears stood at £5,837,541. According to the schedule, as at 21 December 2021, Mr Unsdorfer had managed to reduce these arrears to £3,697,474. This, Mr Morshead argued, indicated that Mr Unsdorfer's existing powers of debt recovery were adequate, and that the proposed variations to paragraph 13 were unnecessary.

26. Secondly, he argued that Mr Unsdorfer has not, to date, approached the Landlords for permission to serve a s.146 notice, or to exercise a right of peaceable re-entry, as he is currently entitled to do under paragraph 13 of the EMO. As such, he has not demonstrated that the existing provisions, providing for forfeiture, with permission not to be unreasonably withheld, are inadequate.

27. Thirdly, he objects to the terms of the proposed variation. The current wording of paragraph 13 was, said Mr Morshead, carefully drafted after discussions between the Landlords and Mr Coates and, crucially, avoids any potential breach of the terms of the loan agreement entered into between the Landlords and Santander UK PLC dated 23 March 2015, amended and restated on 21 November 2018. Paragraph 23.3(a)(iv) of that agreement **[3625]** requires a borrower to obtain the bank's written consent before

commencing any forfeiture proceedings in respect of a lease. That requirement is subject to an exception identified in paragraph 23.3(b). The exception applies where the action is in relation to a lease which, if it were to be granted now, would constitute a permitted letting, and where the action constitutes "good estate management", and where no default under the loan has occurred or is likely to occur as a result of the action. Mr Morshead submitted that the variations proposed by Mr Unsdorfer would inevitably amount to a breach of the loan covenants because it would be his decision alone to commence forfeiture proceedings.

28. Mr Morshead also objected to the terms of the variation on the ground that only a person entitled to the reversion can forfeit, and a management order cannot confer such an interest on a manager. Finally, he submitted that there has been no relevant change of circumstances since the original order was made, to justify the variation sought and that even if the tribunal considered that new provisions in relation to forfeiture were required, it would be wholly disproportionate to entrust questions of relief against forfeiture to the Manager, especially acting on his own.

Reasons for Decision on Forfeiture Variation

29. It is not disputed that paragraph 13 of the EMO **[38]** permits the Manager, with the Landlords' consent, and on prior notice, to serve a s.146 notice on lessees, whether residential or commercial, and also to exercise a right of forfeiture or re-entry, but only in relation to sums due in respect of Shared Services or service charges. Both parties agree that the Manager has not, to date, sought to exercise these rights.

30. We accept as accurate Mr Unsdorfer's evidence that substantial arrears of sums due to him for Shared Services and service charges are outstanding. His evidence on this point was not challenged, and the fact that large sums are owed it is self-evident from the litigation currently before this tribunal and in the courts, as referred to at paragraphs 36 – 46 of Mr Unsdorfer's second witness statement **[Supp:9]**. Mr Unsdorfer was not the Manager in place when the Management Order was first made and we are satisfied that it is appropriate for us to review the operation of paragraph 13, and whether it accords him effective and appropriate powers, in the light of the substantial arrears that have arisen both before and after his appointment.

31. As Mr Dovar recognised, forfeiture is a tool of last resort, and its primary purpose is not that of a tool for debt collection. Mr Unsdorfer already has an unfettered right to issue and conduct litigation for sums owed to him under the EMO. He does not need the Landlords' consent to do so; if necessary, he can take enforcement action, such as seeking a charging order against a solvent tenant. We agree with Mr Morshead that the Manager does, therefore, have significant existing powers of debt collection already available to him. However, the ability to pursue forfeiture is, we consider, an appropriate additional tool in the armoury to be accorded to a Manager managing a large and complex mixed-use development such as this Estate. The fact that Mr Unsdorfer has not, to date, pursued it as a remedy is not a reason to deprive him of the ability to do so in future.

32. For example, the situation regarding the Car Park & Wash, as referred at paragraphs 30 - 37 of Mr Unsdorfer's second witness statement **[Supp:9-10]** is one where Mr Unsdorfer might, in future, consider the pursuit of forfeiture to be appropriate. Here, we have a tenant on a short lease, with very substantial arrears, said to be £188,000 in November 2020. If the debt remains unpaid, and Mr Unsdorfer considered that debt collection, winding up or other insolvency proceedings were unlikely to give him an effective remedy, then forfeiture, as a last resort, might be a legitimate course of action he would want to pursue.

33. However, in our determination, paragraph 13, as currently drafted, is deficient in that it does not address what should happen if proceedings are required once a s.146 notice is served, who is to have conduct of those proceedings and any subsequent relief from forfeiture application, and how sums recovered through such proceedings, or application for relief, should be dealt with.

34. We agree, therefore, that these points should be addressed in a variation to the EMO. We do not, however, agree with Mr Dovar that the Manager should be accorded a unilateral right to serve a s.146 notice or to pursue forfeiture. We agree with Mr Morshead that only a reversioner can pursue forfeiture and given that Mr Unsdorfer lacks that reversionary interest, he can only proceed with the Landlords' consent, although such consent should not be unreasonably withheld. Although Mr Dovar suggested that Mr Unsdorfer could pursue forfeiture in the Landlords' name, we cannot see how he could do so without their consent. We therefore see no reason to move away in principle from the position on Landlords' consent as set out in paragraph 13 when the Management Order was first drafted.

35. We also agree with Mr Morshead that the Manager's interests and the Landlords' interests may not always co-align. For example, a landlord may prefer to have a tenant remain in situ even though they are in arrears of service charges but where they are up to date with their rent. The Manager's priority, on the other hand, may be that the service charge arrears are paid. The Landlords will therefore need to weigh up both their own interests, and that of the Manager, when deciding whether to consent to the Manager's request to pursue forfeiture. If consent is refused, the Manager may apply to this tribunal for a determination on whether it has been unreasonably refused. Both parties accepted that the tribunal had jurisdiction to determine such a question, and we are satisfied that our jurisdiction under s.24 of the 1987 Act is wide enough to accommodate this.

36. As to the loan agreement with Santander, Mr Dovar argued, and Mr Rainey agreed, that there was no risk of the proposed variations enabling a potential breach of the Landlords' lending covenants because the prohibition is on the "Borrower" commencing forfeiture proceedings, not another party, such as the Manager. Mr Dovar also contended that the exception at paragraph 23.3(b) concerning good estate management may well apply. In an addition he asserted that we should not simply refuse to countenance a variation to

the EMO that might jeopardise the Landlords' lending covenants. Rather, we should properly weigh up the risks and benefits of allowing the variation.

37. Mr Morshead submitted that in the event of a dispute between Santander and the Landlords, a Court was very likely to conclude that the reference to a "Borrower" in clause 23.3 included someone with the right to forfeit, such would be the case with Mr Unsdorfer if we were to allow the variations sought by Mr Dovar. Mr Morshead also argued that it would be wrong for us to conclude that any use of the forfeiture power would be for the purposes of good estate management, and that it would be wrong and disproportionate for Mr Unsdorfer to be the sole arbiter on this issue.

38. Given that we are satisfied that Landlord's consent is, in any event, needed before that Manager can initiate forfeiture, there is no need for us to decide whether giving the Manager an unfettered right to pursue forfeiture could result in a breach of the lending covenant. It is a court, rather than this tribunal, that is best placed to decide on the interpretation of the loan agreement, plus Santander is not a party to the present applications. As there is no need for us to embark on this exercise, we decline to do so. We also bear in mind the decision of the Deputy President in *Octagon Overseas Limited v Coates* [2017] UKUT 0190 (LC), in which he criticised this tribunal for failing to take the threat of action by Santander against the Landlords for breach of their lending covenants seriously, and for failing to weigh up the consequences of its proposed order. It suffices for us to say that in our view to accord Mr Unsdorfer an untrammelled right to pursue forfeiture *might* result in a potential breach of the Landlords' lending covenants, with potentially serious consequences for the Landlords. Even if we had otherwise been satisfied that it was appropriate to grant him that right, which we are not, we would have required compelling evidence from Mr Unsdorfer that there was no risk of a breach of the lending covenants.

39. Although we decline to vary the EMO to enable Mr Unsdorfer to pursue forfeiture without the Landlords' consent, we are satisfied that paragraph 13 of the EMO needs to be amended to address the consequences of forfeiture. We consider the following amendments (underlined below) to be proportionate, and are satisfied that they balance the respective interests of both the Landlords and the Manager.

> "13. <u>The Manager is permitted with the consent of the Landlord, such consent not to be unreasonably refused,</u> to serve upon the Lessees, Commercial Tenants, or any other occupiers, any notices under section 146 of the Law of Property Act 1925 or exercise any right of forfeiture or re-entry <u>(whether peaceably or by action)</u> or anything incidental or in contemplation of the same, but only in so far as they relate to Shared Services and service charges. <u>Any request for consent is to be made by written notice to the Landlord, and the Landlord is to reply in writing indicating whether consent is given or refused within 14 days. If consent is refused the Manager has the right to apply to the tribunal for a determination as to whether consent was unreasonably refused</u>

and if so for a direction that the Landlord give such consent, and if so on what terms."

40. We also consider that a new paragraph 13A is required but amend the wording proposed by Mr Unsdorfer as follows:

"13A. In respect of any notice or the exercise of any right under the preceding paragraph, where consent has been given or directed to be given, the Manager is permitted ~~and has the sole right, either~~ in ~~his own~~ the joint names of the Manager and the Landlord to

a.) commence and continue proceedings for forfeiture;

b.) deal with any application for relief from forfeiture in the Courts including, to request and or settle any application on the basis that relief is given on payment to the Manager of any outstanding sums owed by way of Shared Services and/or service charges, unless the Manager and Landlord agree or the tribunal determines some other priority of payment.

For the purposes of s.138 (1), (2), (3)(b), (5)(b), (6), (7)(b), (8) and 9(b) of the County Court Act 1984, references to the Lessor shall be references to the Manager, but shall not be substituted otherwise. If any sum in excess of the sums due to the Manager is paid pursuant to s.138, then the Manager shall pass the balance onto the Landlord, unless some other priority of payment has been agreed or determined.

41. It would, in our view, defeat the original intended purpose of paragraph 13, which must have been intended to grant the Manager a power that he could use to persuade a defaulting lessee to remedy their default, if the Manager were not to have conduct of forfeiture proceedings initiated by him, and any ensuing relief from forfeiture application. Also, where it is the Manager that commences forfeiture proceedings, it will follow that in most cases it will be right that any monies realised as a result of a relief from forfeiture application should be first applied to outstanding sums owed in respect of Shared Services and/or service charges. If the Landlords consider that there is good reason for a different split or priority of payment, it is open to them to propose this as a condition of consenting to the forfeiture, which can be referred to the tribunal if not agreed.

42. We do not consider it appropriate to incorporate the wording of paragraphs 13B, C, and D as proposed by Mr Unsdorfer. These provide for the Landlords to take certain steps including payment to the Manager of sums outstanding in respect of Shared Services and service charges following forfeiture of a lease. If a lease is forfeited, it is for the Landlords to decide what they wish to do with the subject flat or unit. The extent to which the Landlords can, or should, be made liable to pay to the Manager any sums owed by third parties

by way of Shared Services or service charge is a matter to be decided when the Bad Debt Variation is considered.

The Legal Costs variation

43. As stated above, between 25 April 2022, up to and including the day of the hearing on 27 April, the tribunal received a total of eight objections from commercial lessees on the Estate, objecting to the Legal Costs variation. The theme running through all of the objections is that it is not appropriate for the commercial lessees to have to contribute towards Mr Unsdorfer's or Mr Coates' legal and professional costs given that it was the residential lessees who had applied for a management order and not them. Although Mr Morshead suggested that the tribunal might wish to adjourn the hearing to allow the commercial lessees the opportunity to consider the application further, we declined to so. We concluded that the commercial lessees had received proper notice of the application and that they had been accorded appropriate opportunity to make representations on the application.

44. The tribunal's directions of 1 October 2021 **[133]** required Mr Unsdorfer, by 5 October 2021, to write to the tribunal with proposals as to how notice of his application was to be given to all leaseholders on the Estate. The directions specified that notice could be sent by email, with an indication as to where copies of the application and the tribunal's directions could be downloaded, and that leaseholders should be notified that they had the opportunity to make representations in respect of the applications by writing to the tribunal requesting permission to do so.

45. In an email from Mr Unsdorfer's solicitors, Wallace LLP, to the tribunal sent on 4 October 2021, the solicitors stated that Mr Unsdorfer intended to serve the application on the residential and commercial lessees by email. It was also stated that there were a few tenants who did not have an email address and to whom Mr Unsdorfer would write with details of a link to a secure Dropbox to enable them to view the application. The tribunal has been provided with a copy of the subsequent letter sent by Parkgate Aspen dated 8 October 2021, to all leaseholders on the Estate, in which the Dropbox link was provided and in which the lessees were notified of their right to make representations regarding the application by writing to the tribunal and requesting permission to do so.

46. We are content that the tribunal's directions of 1 October were complied with, and that appropriate notice of the application was given to all the lessees, including the commercial lessees. Despite that, no commercial lessee wrote to the tribunal asking for permission to make representations. In addition, none of the commercial lessees who made late representations complained about lack of notice of the application, and none sought an adjournment of the hearing, or attended the hearing to do so or to make further representations. Mr Morshead, of course, did not represent any of the commercial lessees, and was therefore unable to advance such a request on their behalf. In the circumstances, we were satisfied that it was appropriate to proceed to consider the variation requested.

47. The variation sought by Mr Unsdorfer concerns legal and professional costs he has incurred, and will incur in future, in respect of the s.24 applications he has been involved in since his appointment as Manager. He has, it appears, passed on some of these costs to all lessees on the Estate, as Estate Costs, but some of the commercial tenants have refused to contribute towards them.

48. Mr Morshead raised a jurisdictional issue, namely whether s.24(4) and/or s.9 of the 1987 Act enables this tribunal to make a determination as to whether the existing provisions of the EMO made commercial lessees liable to contribute to the costs in question. In our determination, there is no jurisdictional bar. Section 24(4) specifies that an order made under the section may make provision with respect to such matters relating to the exercise by the manager of his functions under the order, and such incidental or ancillary matters as the tribunal thinks fit. Under s. 24(9) the tribunal may vary or discharge an order made under this section. In our determination, when a tribunal is considering making an order under either s.24(4) or s.9 it is entitled to interpret the terms of any previous management order by the tribunal, including how the terms of that order impact on the lessees of the premises that are the subject of the management order.

49. Mr Unsdorfer's primary position was that his s.24 costs are recoverable under the EMO as currently drafted, either as a 'Service Charge' under paragraph 4, or under paragraph 27 of the Schedule of Functions and Services. He therefore seeks a direction from the tribunal as to his ability to recover such costs through either, or both, of these paragraphs. His secondary position is that if the current provisions do not permit such recovery, there should be a variation to paragraph 4(a) to enable him to do so. Mr Dovar explained that if a variation was needed, he was only seeking it for future legal costs, not costs that have already been incurred.

<u>Paragraph 4</u>

50. So far as is relevant, paragraph 4 of the EMO reads as follows:

> "4 .....the Manager is 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 the Landlord under the Leases and in particular;
>
> (a) To receive all service charges, and interests payable under the Leases and to receive all service charges and interests payable under the Commercial Leases where the Commercial Leases and/or other occupiers have Shared Services with the residential lessees, and are required, under the terms of their leases and/or Occupational agreements to contribute towards the cost of those Shared Services, and any arrears due thereunder the recovery of which shall be at the discretion of the Manager.

51. In Mr Dovar's submission, the s.24 costs incurred by Mr Unsdorfer constitute Shared Services and are therefore recoverable under paragraph 4. "Shared Services" are defined in paragraph (m) of the Interpretation section of the EMO **[31]** as follows:

> "(m) 'the Shared Services' mean any services or shared service provided to the Premises including any pipes, wires, conduits, service media or similar which benefits (1) two or more residential units which are being managed by the Manager in accordance with this Order, or, (ii) one or more Commercial Tenant, licensee or other occupier and one or more such residential unit."

52. Mr Dovar contended that the definition of the Premises included the commercial units, and that the s.24 costs Mr Unsdorfer has incurred fall within the meaning of Shared Services, as they were services provided for the benefit of the entire Estate, not just the residential lessees. He emphasised that the use of the word "including" in paragraph (m) indicated that the list of services that follows is not exhaustive.

53. We do not agree with Mr Dovar's submissions. In our view, the definition of Shared Services in paragraph (m) is not wide enough to cover legal and professional costs incurred by the Manager. Such costs are not, in our determination, services provided to the Premises. What is envisaged by paragraph (m) is a service that is physically provided to the premises, such as service media.

54. In the course of argument, Mr Dovar took us to the provisions of several existing commercial leases under which the lessees are liable to contribute towards legal and other costs incurred by the landlord in connection with the management and administration of the relevant building (an example is at **[4351])**. We do not consider these examples to be relevant to the question we have to address. The question for us is whether or not Mr Unsdorfer's legal and professional costs are payable under the EMO, not under a lease. A management order is imposed under a statutory scheme and the imposition of such an order is not something that is likely to be within the minds of the parties when they entered into their leases. In addition, the provisions of the respective leases bind only the relevant landlord and tenant, and concern a specific premises. The provisions of the leases referred to by Mr Dovar do not therefore assist in interpreting the provisions of the EMO.

<u>Paragraph 27</u>

55. Paragraph 27 of the Schedule of Functions and Services reads as follows:

> "27. The Manager is entitled to be reimbursed in respect of reasonable costs, disbursements and expenses (including, for the avoidance of doubt, the fees of Counsel, solicitors and expert witnesses) of and incidental to any application or proceedings (including these

> proceedings) whether in the Court or First-tier Tribunal, to enforce the terms of the Leases, the Commercial Leases and/or any Occupational Agreement of the Premises. For the avoidance of doubt, the Manager is directed to use reasonable efforts to recover any such costs etc directly from the party concerned in the first instance and will only be entitled to recover the same as part of the service charges in default of recovery thereof.

56. In Mr Dovar's submission, paragraph 27 enables Mr Unsdorfer to recover his legal and professional costs through the service charge provisions of each lease. He contended that under this paragraph there is no need for the costs to be specifically included within the definition of service charge in each lease, as the EMO permits recovery 'as part of the service charges'.

57. Mr Morshead's position was that the paragraph only enables the Manager to recover litigation costs concerning enforcement, such as the recovery of arrears of service charges due to him, except that a carve out was made for the costs of the original s.24 application to the tribunal (as indicated by the words "including these proceedings"). He also argued that the paragraph only entitled Mr Unsdorfer to recover such costs from the residential lessees, not the commercial lessees, because they are not included within the definition of Shared Services.

58. In our determination, paragraph 27 allows the Manager to recover his reasonable legal costs incurred in enforcing the terms of the Leases, including the Commercial Leases and/or any Occupational Agreement. It covers both costs incurred in Court proceedings or before this tribunal. As provided for in the paragraph, the Manager must first seek to recover those costs from the defaulting lessee and, if unsuccessful, he may recover them as part of the "service charge". As to what is meant by "service charge" one has to look at the definition of "Service Charges" in paragraph (n) of the interpretation section of the EMO which reads as follows:

> "(n) the Service Charges" means the service charges paid by the residential occupiers; the shared service charges payable in relation to the Shared Services, including the reserve fund collections in relation to both the residential units and the Shared Services, and for the avoidance of doubt includes any services shared with Circus Apartments. It includes utility charges in respect of the Shared Services……"

59. Incorporated within the definition of Service Charges (as capitalised) are therefore both service charges payable by the residential lessees under their leases, and charges that are payable by the commercial lessees in respect of Shared Services. As set out in paragraph 4(a), the commercial lessees have no obligation to pay service charges to the manager under the EMO, other than in respect of Shared Services. We also note that throughout the EMO

there is a distinction made between residential Service Charges and Shared Service Charges (see for example paragraphs 10 (ii) and (iv) of the EMO)

60. It appears to us that there is a drafting error in paragraph 27, and that the reference to "service charges" should have a capitalised 'S' and capitalised 'C'. In other words, it should have read 'Service Charges'. We recognise that it was the residential lessees who applied for a Manager to be appointed over the Estate, but it would make no sense for the Manager's ability to recover legal costs incurred in enforcing a commercial lessee's obligations regarding Shared Services, to be restricted to recovery from residential lessees only. As such, we determine that paragraph 27 allows for the recovery of legal costs from commercial lessees where:

    (a) the legal costs were incurred in enforcing the terms of the Leases, including the Commercial Leases and/or any Occupational Agreement;

    (b) the costs are of, or incidental to, any application or proceedings whether before a Court or this tribunal. We do not agree that the paragraph accords a carve out solely in respect of the original s.24 application. There is nothing in the wording that excludes the costs of any subsequent application under s.24(9) to vary the EMO;

    (c) the Manager has been unsuccessful in attempts to recover those costs from the defaulting lessee; and

    (d) the enforcement action taken related to the provision of a Shared Service by the Manager.

<u>The Proposed Variation</u>

61. The variation sought **[3500]** is to amend the definition of Shared Services in paragraph (m) of the EMO, to add the words underlined below:

> "(m) 'the Shared Services' mean any services or shared service provided to the Premises including any <u>legal and professional costs arising out of or in connection with the appointment of the Manager</u>, pipes, wires, conduits, service media or similar which benefits (1) two or more residential units which are being managed by the Manager in accordance with this order or (2) one or more Commercial Tenant, licensee or other occupier and one or more such residential unit.'

62. At para 34 of his witness statement **[3515]**, Mr Unsdorfer said that a variation to the EMO should be made because there is no good reason why the commercial units, which benefit just as much from good estate management, should not also have to contribute to the costs of

implementing and maintaining the same. Mr Dovar concurred with this statement at paragraph 29 of his skeleton argument. At paragraph 89 of his second witness statement **[Supp:20]** Mr Unsdorfer said that given that the commercial lessees are totally reliant on Shared Services, particularly electricity, that can only be supplied centrally because of the way the infrastructure was designed, it was appropriate for s.24 legal costs to be treated as an Estate cost.

63. We are not persuaded that it is appropriate to make the proposed variation. We accept that there is a tangential benefit to the commercial leaseholders in having Mr Unsdorfer in place as Manager, but what this variation seeks to achieve is to make the commercial lessees liable to contribute towards future litigation costs incurred by Mr Unsdorfer in respect of further s.24 proceedings. That appears to us to be disproportionate given that this would concern proceedings over which they would have no control unless they applied to the tribunal to be joined as parties or interested persons.

64. It was the residential tenants who applied for the appointment of a Manager over the Estate. At present, the commercial lessees only have to contribute towards legal costs incurred by Mr Unsdorfer where they concern Shared Services in respect of which they obtain a direct benefit. To make the commercial lessees liable to contribute towards his costs of any, and all, future s.24 proceedings, as Estate costs, would amount to an unjustified widening of their liabilities under the EMO, and an inappropriate encroachment on their rights and obligations.

65. In particular, the commercial lessees do not have the statutory protection accorded to the residential lessees under service charge provisions of the Landlord and Tenant Act 1985, and could not, therefore, seek a determination from this tribunal, or a Court, as to the payability of any legal costs under s.27A of that Act. That puts them at a significant disadvantage, and militates against making the variation sought.

<u>The BSF variation</u>

66. Mr Unsdorfer intends entering into a contract with the Greater London Authority and the Ministry of Housing, Communities and Local Government in order to obtain grant funding for the remediation of unsafe cladding on the Estate. He states **[3489]** that as part of the contract, he is obliged to provide an indemnity. He therefore seeks variations to the EMO to ensure that after his appointment as a manager ceases, any liability is passed on to the landlord, or any succeeding manager under that contract, or that he is indemnified for any claim.

67. Mr Morshead's position was that the Respondents did not, in principle, object to an appropriate variation, but that despite asking for a copy of the proposed funding agreement in October 2021, they had only been provided with a copy the night before the hearing of this application. As such, the Respondents' lawyers had not, he said, had sufficient time to advise on the wording of an indemnity,

68. In the circumstances, we considered this part of the Manager's application needed to be adjourned for the Respondents to consider the draft agreement and proposed variation. Directions as to its future determination, without a hearing, were agreed by the parties and approved by the tribunal on 29 April 2022.

Name: Amran Vance **Date: 13 May 2022**

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.