

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2017] UKUT 0190 (LC)
UTLC Case Number: LRX/31-32/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – APPOINTMENT OF MANAGER – exercise of discretion over terms of appointment – insurance – consequences for landlord and third party of direction prohibiting involvement in insurance – appeal allowed

IN THE MATTER OF APPLICATIONS FOR PERMISSION TO APPEAL AND AN
APPEAL AGAINST A DECISION
OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

- (1) Octagon Overseas Limited
(2) Canary Riverside Estates Management Limited
(3) Palace Church 3 Limited

Appellants

and

Mr Alan Coates

Respondent

Re: Canary Riverside Estate,
Westferry Circus,
London E14

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice
London WC2A

on

22 March 2017

Mr Justin Bates, instructed by Trowers & Hamlin LLP, represented the first and second appellants
Mr Nik Yeo, instructed by Chris Christou, represented the third appellant
Christopher Heather QC and *Miss Amanda Gourley*, instructed by Downs, Solicitors, represented the respondent

The following cases are referred to in this decision:

Octagon Overseas Ltd v Leaseholders of Canary Riverside ([2016] UKUT 0470 (LC))

G v. G (Minors: Custody Appeal) [1985] 1 WLR 647

1 In an *ex tempore* decision delivered at the conclusion of a hearing on 22 March 2017, I granted permission to appeal and allowed the appeals of Octagon Overseas Ltd (“Octagon”), Canary Riverside Estate Management Ltd (“CREM”) and Palace 3 Ltd against a decision of the first-tier tribunal (Property Chamber) made on 6 March 2017 relating to the insurance of a group of commercial and residential buildings comprising the Canary Riverside Estate at Westferry Circus, London E14. The reasons I gave on that occasion were intended to record in summary form why I considered it necessary to vary directions which had originally been given by the FTT to the tribunal-appointed manager, Mr Alan Coates (the respondent to the appeal) which the FTT had declined to alter. A transcript of my reasons was prepared from which I now produce this decision.

2 The background to this matter is contained in the Tribunal's previous decision of 30 September 2016 in proceedings between Octagon and CREM on one side and a substantial group of the leaseholders of residential flats which form part of the Canary Riverside Estate on the other ([2016] UKUT 0470 (LC)). Octagon is the owner of the freehold interest in the Estate, while CREM is a party to the occupational leases of residential flats on the Estate and is obliged under those leases to provide services in return for which it is entitled to collect a service charge from the leaseholders. The Tribunal's 2016 decision concerned an application by CREM for permission to appeal and for a stay of an order made by the FTT on 15 September 2016 by which it appointed Mr Coates as manager of the Estate under the power conferred by section 24, Landlord and Tenant Act 1987. Mr Coates' appointment took effect on the following day, 1 October 2016.

3 The directions to the manager contained in the FTT's original management order were in a form taken by the leaseholders from a precedent book and the order was made without full consideration of those detailed directions by the parties. When I refused permission to appeal against the FTT's decision to appoint the manager, I suggested that any dissatisfaction concerning the detailed terms of the order should be the subject of an application under s.24(9) of the Landlord and Tenant Act 1987 to vary the terms of the manager's appointment or provide him with additional directions. That course has subsequently been followed in relation to the terms of the order concerning insurance of the Estate, which is due to be renewed by 31 March 2017.

4 The management order made Mr Coates responsible for insuring the Estate. In its decision of 6 March 2017 the FTT considered an application by the appellants to modify the terms of the management order so that CREM should be responsible for arranging insurance. The applicants' case was that were the FTT to insist on the manager assuming responsibility for insurance both CREM and the third appellant, Palace 3 Ltd, would be at serious risk of being in breach of covenants in a loan Agreement with Santander Corporate Banking which they had entered in 23 March 2015; it was said that such a breach would expose both CREM and Palace to a joint liability to repay £40 million which they had borrowed from Santander. Palace is a company in the same corporate group as CREM but has no interest in the Estate; its involvement in these proceedings is solely because a property belonging to Palace, the Palace Hotel, Southend, is part of the property portfolio on which repayment of the Santander loan is secured.

5 Despite the applicants' concerns, by its order of 6 March the FTT declined to vary its original order and directed that Mr. Coates should be responsible for taking out the necessary insurance, but it directed him to comply with all the requirements in respect of insurance contained in the appellants' loan Agreement with Santander and a debenture also relating to the Estate.

6 The applications now before the Tribunal are for permission to appeal that decision and for a stay of its implementation while the subsequent appeal was determined thus allowing CREM to the insurance arrangements for this year. Given the shortness of time before the expiry of the existing insurance policy I directed that the application would be considered at a hearing, with the appeal to be heard on the same occasion if I was minded to give permission to appeal.

7 As a preliminary matter it is appropriate to consider the nature of the proposed appeal. The terms on which a manager is appointed by a tribunal are a matter of discretion for the tribunal. Mr Heather QC reminded the Tribunal that where a first-tier tribunal has properly directed itself in law and has exercised a discretion vested in it, a decision to overturn that discretion may only be made by this Tribunal in exceptional circumstances. He referred to the dictum of Lord Fraser in *G v. G (Minors: Custody Appeal)*[1985] 1 WLR 647 at 562 that in such a case an appellate court may only intervene when it considers that the judge or tribunal at first instance “has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.” Mr Heather suggested that the same restraint should be shown in relation to any issue of law on which the exercise of the FTT’s discretion was predicated, but that cannot be so. If the FTT has misdirected itself in law in some fundamental respect the basis on which it has exercised its discretion will have been compromised; in those circumstances it will be the task of this Tribunal either to correct the misapprehension on the law and send the matter back to the FTT for reconsideration or, if it is more convenient, to remake the decision itself.

8 The loan Agreement contained a number of terms on which the appellants relied in support of their general submission that the Agreement not only required that the insurance of the Estate must be on certain specified terms, or possess certain attributes, but required also that the insurance must be procured by the appellants themselves. The management order prohibits the appellants from taking any step which Mr Coates has been directed to take and the main ground of the appellants’ case was that they were not prevented from being in breach of their own obligations to Santander by Mr Coates performing the same obligations as he had been directed by the FTT. Even if Mr Coates did everything which the appellants themselves were obliged to do, the appellants would nevertheless be in breach because their obligations could only be fulfilled by them and not by Mr Coates. The result would be that the appellants would be in default of their obligations, giving Santander the right under the loan Agreement to demand immediate repayment and to enforce its security over the Estate and the Palace Hotel if the loan was not immediately repaid.

9 On behalf of the Palace Mr. Yeo submitted that the FTT had made a number of errors of law in its decision. In particular he criticised the FTT’s appreciation of the effect of its decision on the loan Agreement. It is not necessary for me to consider each of those criticisms separately but a number of them seem to me to go too far. Contrary to the submissions of Mr Yeo I do not consider that the FTT misunderstood the legal effect of what it was doing, nor did it believe that it could substitute Mr. Coates for the borrowers in the loan Agreements so that his acts would be treated for the purposes of the applicants’ contracts with Santander as their acts. The FTT used the terms of the loan Agreement to define the tasks which it wanted Mr. Coates to perform, identifying them by reference to the obligations in the Agreement. I am quite sure the Tribunal’s intention was to minimise the risk to the applicants of the loans being called in on the grounds that they were in default of their own obligations. I do not read its decision as suggesting that it believed it had eliminated that risk and, to the extent that the application is based on the proposition that the FTT erred in law by assuming that its directions to Mr Coates would have that effect I do not accept it.

10 The conclusion I have come to is nevertheless that, for the reasons advanced by Mr Yeo, both Palace and CREM are likely already to have been put in breach of the loan Agreement as a result of the appointment of Mr Coates on the terms of the FTT's original order, and that they will certainly be in breach of the Agreement if, as the FTT intends, the responsibility for all insurance matters is taken out of their hands and given to Mr. Coates. The Agreement requires that the borrowers must procure that the insurance complies with certain attributes (clause 23.11); they must represent to Santander every quarter that they are able to comply with their own obligations and that these do not conflict with any law, regulation or instrument binding on them (clause 18.4). When Mr Coates was appointed on terms which prohibited the appellants from insuring the Estate it became impossible for the appellants to make the necessary representations because they are no longer in a position lawfully to obtain insurance.

11 I am also satisfied that the FTT made three errors in reaching its decision to direct Mr Coates to take responsibility for insuring the Estate.

12 The first of these is that the FTT did not reach any firm conclusion on whether there would or would not be a breach by the applicants of their obligations to Santander if Mr Coates was left with responsibility for insurance. Nor did they try to assimilate the consequences for CREM, and more importantly for Palace, of there being such a breach. The FTT made no assessment of the likely effect of its order, or the degree of risk to which it was exposing the appellants. I consider that omission to have been a significant flaw in the exercise of its discretion.

13 The FTT was obviously alive to the risk that putting the manager in charge of insurance might cause the appellants to be in breach of their obligations to Santander, but it appears to have regarded that risk as one which need not be taken seriously. It suggested that if there really was so significant a risk as the applicants suggested then Santander, their lender, would have reacted very much more decisively to the news that a management order had been made and would have been represented before the FTT to explain its own position. I accept the appellants' submission that, in this respect, the FTT's approach was naïve and commercially insensitive and formed an inappropriate basis for the exercise of its discretion.

14 The evidence of what Santander did or did not know was unclear, for the obvious reason that the applicants had a strong incentive not to draw its attention to the effect of the management order while they sought to have it varied. The order is a complex document and, on the evidence, there was no reason to believe that Santander yet appreciated its consequences. There was no reason for Santander to consider what effect the order had on the appellants' ability to comply with their own obligations in relation to insurance, and the time for renewal of the existing policy had not yet arrived. In any event, even if it fully appreciated those consequences, Santander was under no obligation to tell the appellants, let alone the FTT, what it intended to do and was entitled to keep its own counsel. The FTT was not justified, in my view, in proceeding on the assumption that Santander was taking a relaxed view and that everything would probably be all right.

15 Because the FTT did not take the threat of action by Santander against the applicants seriously, it did not weigh up the consequences of its proposed order or consider, in the light of those consequences, whether it was appropriate to make the order in those terms.

16 The management order was made under section 24 of the 1987 Act, which gives the FTT the power to make an order appointing a manager where it is "just and convenient in all the

circumstances”. Given the circumstances, which I summarised in my September decision, and the extent of the disregard by CREM of its obligations under the residential leases, the FTT had been fully entitled to conclude that it was just and convenient to make the order appointing Mr Coates. Nevertheless, it had a discretion over the terms of that appointment. Determination of the appropriate terms on which a manager should be appointed is a vital part of the FTT’s function, but it is one to which too little attention is often paid. The parties are usually most concerned about the principle of whether a manager should be appointed or not, and the terms of appointment are considered as an afterthought or it is taken as read that a standard set of terms will suffice. In this case the first and second appellants’ advisers appear to have given no real consideration to the consequences of the proposed order until after it had been made.

17 In exercising its discretion over the terms of the order, and in determining the application to vary the order, it was for the FTT to consider which management functions it was just and convenient to confer upon Mr Coates. Given that one side-effect of its order was that both CREM and Palace (which can fairly describe itself as an innocent bystander) would be put in breach of their obligations under the loan Agreement and exposed to the possibility of enforcement action, it was essential that the FTT should give proper weight to that risk when considering whether it was just and convenient to confer sole responsibility for insurance on Mr Coates.

18 In the Tribunal's September 2016 decision, I suggested that it was not the purpose of a management order to punish the landlord against whom it was made. Where there has been serious default by a landlord the policy of the Act is to place the management of the building in the hands of an independent person more willing or better able than the landlord to manage the property in the interests of all those with an interest in it. In my judgment the FTT did not resolve in its own mind whether there would be a breach, or address the remedies open to Santander if there was, and by that omission it failed to equip itself with a proper appreciation of the consequences of the order it was going to make. In its decision the FTT did not explicitly address the question whether it was just and convenient to make the order in the proposed terms and it did not identify the matters which it had taken into account. I considered that omission to have been an error of law.

19 Secondly, the FTT does not appear to have asked itself whether and if so how the function of insuring the Estate was related to the reasons justifying the appointment of Mr Coates as manager. The statutory appointment procedure is initiated by the service on the landlord of a preliminary notice of intention to apply for appointment under section 22 of the 1987 Act. The notice is required to identify the applicant’s grounds of complaint and to require that they be remedied if possible. The grounds relied on in this case made no criticism concerning the insurance of the Estate, other than a complaint about the frequency of revaluations which was not carried forward into the evidence. I am told that there was evidence from one leaseholder that CREM had abused its position in relation to insurance by requiring payment of the insurance excess before it would present a claim and by delaying the matter unreasonably. The FTT did not rely on that aspect of the leaseholders’ case in support of its decision to appoint Mr Coates.

20 Moreover, in its decision of 6 March the FTT appears to have accepted that there was no issue about the cost or form of the insurance which CREM had arranged, and it recommended to Mr Coates that instead of making changes which he had proposed, it would be prudent for him “to work together with the first and second applicants so that the same insurance as currently exists can be adopted for the coming year”.

21 In circumstances where the evidence did not suggest there was a serious problem with CREM's performance of its obligations in relation to insurance, the FTT ought to have considered whether it was appropriate to confer all the necessary insurance functions on Mr. Coates. The FTT ought, in the light of its own satisfaction with the existing insurance arrangements, to have reflected carefully on the justice and convenience of the order it was proposing to make and on its probable effect on all parties. In my judgment the FTT was in error in not relating the question it had to determine back to the original grounds of complaint which justified Mr Coates' appointment.

22 I should not be understood as suggesting that a first-tier tribunal is prevented from conferring on a manager any functions about which there had been no complaint. It will often be impractical or wasteful to divide management functions between different individuals. The arrangement of insurance may be a sufficiently discrete or self contained task to permit a different approach, but in any event, the fact that there have been no complaints is a factor which ought explicitly to be taken into account when a tribunal exercises its discretion.

23 That brings me to the third aspect of the FTT's decision which I consider to amount to an error of law. Although there was no real complaint about the insurance which CREM had arranged in previous years, there clearly was a serious problem, with which the FTT was rightly concerned, concerning co-operation between CREM and Mr Coates and CREM's general relationship with the residential leaseholders. The FTT was entitled to be sceptical about CREM's willingness to co-operate in relation to insurance matters. It was entitled to take the view that Mr. Coates should not be dependent on CREM's co-operation for his own public liability insurance or for the handling of claims. It was therefore entitled to conclude that there should be a buffer between CREM and the residential leaseholders for the purposes of, due to the behaviour of CREM in the past.

24 Nevertheless, the FTT's concern about claims management, which was really at the heart of its decision to place insurance functions in Mr Coates' hands, was in striking contrast its satisfaction with the terms of the insurance which CREM had procured. Just because it was necessary to address the issues which Mr Coates anticipated would create problems for him and for the leaseholders, it does not follow that it was also appropriate to transfer responsibility for all insurance matters to Mr Coates, with the risks of adverse consequences for Palace in particular.

25 In my judgment the FTT was in error in failing to consider whether it was possible to provide the protection which the manager and leaseholders were entitled to in a manner which was nevertheless consistent with the obligations of CREM and Palace under the loan Agreement.

26 In the course of today's hearing Mr Bates made two proposals on instructions from CREM. The first was to deal with the problem that Mr. Coates anticipated might arise in relation to public liability insurance if the general insurance of the building was taken out of his hands. He was entitled to be concerned that it would be difficult for him to obtain public liability insurance if he was not also responsible for obtaining buildings cover. CREM proposed to meet that legitimate concern in one of two ways: either by itself procuring public liability insurance for Mr. Coates' benefit, in any reasonable sum he might specify; or alternatively by providing an indemnity against public liability. It would appear to me that one or other of these solutions should be sufficient to meet Mr Coates' concern. Neither of them was on the table at the time the FTT made its decision so it was clearly not in error in failing to consider them, but now that they have been made they merit consideration first by Mr Coates and then by the FTT.

27 The other proposal which CREM has made in the course of the hearing today is to allow Mr. Coates to deal directly with the insurers in presenting and dealing with all claims in respect of the residential parts of the building. If a sensible division of responsibility can be put in place so that Mr. Coates has direct responsibility for insurance issues for the leaseholders' benefit, and a direct relationship with the insurers so that neither he nor the leaseholders are at risk of CREM being obstructive, that would seem to me to go a considerable way towards addressing the legitimate concerns of the FTT. Once again there was no reason for the FTT to address that proposal, as it had not yet been made. Nevertheless, given the risks to which it was exposing the appellants, the FTT ought in my judgment to have turned its mind to the practicality of a division of responsibility for insurance and to have considered whether there was a more appropriate solution than the one it devised for dealing with the specific problems it envisaged.

28 For these three reasons I consider that the FTT exercised its discretion over the terms of the manager's appointment on a flawed basis.

29 All I propose to do today is to give permission to appeal, to allow the appeal and to remit the application for a variation of the terms of the order for further consideration by the FTT at a hearing which I understand is due to take place shortly. I also lift the stay which has prevented CREM from placing insurance while this appeal has been considered. In my judgment CREM is the appropriate party to be responsible for obtaining insurance cover, and the risks to which the applicants would be exposed if Mr Coates was given that responsibility are not justified given the satisfactory basis of the cover it proposes to obtain and the availability of alternative means of securing Mr Coates position with regard to public liability insurance and protecting the leaseholder from interference by CREM in the resolution of their insurance claims.

30 In remitting the application to the FTT I invite it to consider specifically how the two proposals made by CREM may be incorporated into any order it will make giving directions dealing with insurance. In principle Mr. Coates is to have the benefit of public liability insurance arranged by CREM, or an indemnity, and he should also have independent responsibility for claims handling. To reduce those two proposals to a workable draft for consideration by the FTT will require careful thought. It is not possible to do that this afternoon, but I record specifically that CREM's proposals have been an important consideration in my decision to leave it free to place insurance.

31 There are obviously a number of other drafting points which will need to be recorded in the order, but the design of satisfactory arrangements to protect and empower Mr Coates in relation to the residential and mixed parts of the Estate is a priority. By the next hearing before the FTT CREM is likely to have put new insurance arrangements in place for the forthcoming year which substantially reflect those which have applied in the current year. If his position is not sufficiently protected by the current terms I require CREM to extend to Mr. Coates the indemnity which it explicitly offered until the FTT can consider the form of any additional policy which is proposed. If there is any uncertainty about whether sufficient insurance is in place, then clearly that uncertainty needs to be covered by the indemnity offered to the Tribunal, and this decision is specifically made on that understanding which Mr Bates has confirmed.

32 For those reasons I allow the appeal and will remit the matter to the FTT for further consideration.

Martin Rodger QC
Deputy Chamber President

15 May 2017