MAUNDER TAYLOR
Chartered Surveyors • Estate Agents • Managing Agents
Brosnan House, 175 Darkes Lane, Potters Bar, Herts EN6 1BW
T: 01707 665 666 F: 01707 660 197

RESIDENTIAL SERVICE CHARGE MANAGEMENT

Manager by FTT Order: s.24 Landlord and Tenant Act 1987

Background **Updated February 2018**

This is a **fault-based method** of resolving an incompetent, dishonest, oppressive, defective or absent service charge management of a block of flats. (It is not available for houses.)

Any **one lessee** or group of lessees **can apply** to the First-Tier Tribunal (FTT) for a Manager to be appointed. A Notice in accordance with s.22 must be served identifying the faults complained of (amongst other things) and it is important to comply with the detailed requirements of s.22.

The **Applicant must nominate a proposed Manager** (who can be nominated after the application has been made). The powers of the FTT are discretionary and the FTT will first consider if it is **just and convenient** to make the Order, secondly **whether the proposed Manager is suitable** and thirdly, the **terms of the Order**.

Experience indicates that the FTT regards the making of an Order as a Draconian method of resolving the faults and will usually expect an explanation of why other resolution possibilities have not been adopted – e.g., enfranchisement, Right To Manage, etc. **The FTT has wide discretionary powers under s.24** and there appears to be no standardisation or conventional approaches. It is difficult to see how standardisation could be applied. Decisions, reasons and any Order tend to be **case-specific** and worded very much around the circumstances before that FTT on the day of the hearing for that block of flats.

The Proposed Manager

For the proposed Manager (a person not a firm), the responsibilities are likely to extend not only to be **personally responsible** for the service charge management function, but also to resolve the management faults identified in the s.22 Notice. Experience indicates that various parties do not appreciate the levels of responsibility being contemplated and the main opportunity for the proposed Manager to communicate that (as well as to himself, his partners, and his insurers) is to accurately describe them in a **management plan**.

For instance, in relation to Orchard Court –v- St Anthony's Homes Limited dealing with **Orchard Court, Stonegrove, Edgware** HA8 7SX (LON/00AQ/LVM/2004/0008) the Manager was criticised as being reactive rather than proactive (paragraph 31) with the result that even some of those supporting his continuance as Manager were still in arrears with their service charge payments due to his inability or reluctance to force the issue and institute legal proceedings. The FTT observed that the Manager appeared to have no real understanding of the rights and duties of a Manager. **His first duty is to the FTT** but it did not appear to the FTT that this was fully appreciated or accepted by the Manager (paragraph 35).

The proposed Manager should view the property, and read the lease, the recent financial information and the s.22 Notice. It is important to speak to the persons driving the intended application to understand the full extent of the problems as well as possible different agendas of different people or groups, to **manage expectations** and to prepare the ground for when the Manager will have to find common ground and majority views.

The proposed Manager must expect to assure the Tribunal that he/she is **conversant and knowledgeable with the RICS Service Charge Residential Management Code**.

The Practical Effect

In broad practical terms, there are two types of Management Orders:

a) All interested **parties work sufficiently cooperatively** to make the Order successful.

b) At least **one party behaves obstructively**, uncooperatively, or actually wants the Order to fail. Occasionally, that party is one of the applicants for the Order to have been made in the first place, particularly if that party has a personal agenda as to how the Manager should perform.

Manager's Fees

The proposed Manager will be asked for a fee quotation. If the Order is made, the relevant fees will be built into the Order. A **fee quotation** should be provided to the applicants detailing:

a) What fees the proposed Manager will charge for his involvement in the application and hearing because those **pre-Order fees** will be the liability of the applicants and will not be a service charge cost.

b) What **management fees** the proposed Manager will charge for the function of managing agent (usually as described in the RICS Code).

c) What **additional fees** the proposed Manager expects to charge for work outside the normal function of the managing agent – e.g., major works, insurance, etc.

d) On what basis the proposed Manager will charge for **further work (if any)** which, on the one hand is outside the normal managing agent's duties, on the other hand is particular to resolving the s.22 faults in this specific building- e.g., involvement in Tribunal and Court cases, etc.

Statement of Experience

The proposed Manager will usually be directed by the FTT to give a statement about his experience, qualifications, PI insurance cover and administrative resources available within his firm and for emergency call-outs, access to specialist consultants, as appropriate to the needs of the block. The proposed Manager will be directed to **appear before the FTT and answer questions**.

Dealing with Service Charge Arrears

It is sometimes the case that substantial service charge arrears are an issue. **The Manager must have access to funding for arrears recovery** and for continuing the management with adequate income to do so. Either the applicants are going to have to provide the Manager with some temporary funding, or the Manager is going to have to organise a loan facility for the time necessary to resolve those service charge arrears issues. If so, the Order will need to give the Manager the powers to borrow and the Manager will need to consider what security he requires. That may take the form of asking the Tribunal to include a power to create a Charging Order in the Manager's favour over the interests in the property of the defaulting lessees or defaulting landlord. It is critical to the success of a Management Order for the Manager to have adequate cash resources and cash flow, as was made clear by the Tribunal in the Orchard Court case (see above).

In the case of Hollows and Others –v- Sunfell Limited and Gable Lodge Management Limited (LON/00AU/LAM/2010/0020) dealing with Gable Lodge, 334/338 Essex Road, London N1 3PB, the LVT required all of the applicants to pay their arrears as a pre-condition of making the Order. The applicants did not trust the landlord (which is why they had withheld payments) and so made their payments to the proposed Manager which was accepted by the Tribunal.

In the case of Palace Court, London NW3 (LON/00AG/LAM/2010/0009), the Manager had to open a loan account to finance the service charge shortfall on takeover, and **take an action against the Freehold Company** (a lessee-controlled management company) **and its lead Director** to obtain a Court Order for necessary financial information, documents and service charge information, in order to have complete or adequate management records for recovery actions and management generally.

In a subsequent case concerning Palace Court, London NW3 (LON/00AG/LAM/2013/0027), the Manager was questioned by a Tribunal member about the **appropriate degree of pressure to recover arrears** from a particular lessee. The Manager exhibited a schedule of arrears amounting to a total of £73,000 (over 19 flats) and submitted that the block could not be managed unless those arrears were recovered by proper and prompt procedures.

Registering of Orders at Land Registry

In the case of Leroy and Others –v- SHG-SH20 LTD (LON/00BK/2013/0015) dealing with Church House, 73 Bolsover Street, London W1W 5NP, the Tribunal provided in their Order for the Manager to register the Management Order at the Land Registry. The Land Registry would not accept that as authority to register the charge and the applicants had to return to the Tribunal **for a specific Order drawn in a manner acceptable to the Land Registry**.

S.24 (8) applies with regard to registering a Management Order at the Land Registry. HM Land Registry strictly require such application to be made under Land Registry Form N. A typical form of words is to be found in an amendment to the Management Order in respect of 73 Bolsover Street, London W1 (Ref LON/00BK/2013/0015) as follows:

"The Manager is directed to register a restriction in Land Registry standard form N against the Respondent's leasehold estate registered under Title Number (.....) in the following words: "No disposition of the registered estate by the proprietor of the registered estate or by the proprietor of any registered charge is to be registered without a written consent signed by either (names and address of the joint Managers)*".*

Enforcing the Order

There have been occasions when the party previously responsible for delivering the management function fails or refuses to hand over the documents and information necessary for the appointed Manager to manage.

In the Central London County Court Claim No. 3CL02066 regarding Church House, 73 Bolsover Street, London W1W 5NP, the joint Managers applied by way of a Part 8 claim to enforce the Order in the same way as an Order of the County Court and included a request that a penal notice be attached by the Court. The Court pointed out that it does not have jurisdiction to add a penal notice and the claim was dismissed. The Court observed that the proper procedure for adding a penal notice, or for seeking clarification on the interpretation or application of a Management Order, is not to apply to the County Court but to apply to the First-Tier Tribunal under s.24(4) or s.24(9) of the Landlord & Tenant Act 1987. Further, the Management Order contained an express liberty to apply. Then, if the landlord continues to refuse to cooperate, the appropriate forum for committal proceedings, if it gets to that stage, would be the County Court.

In the case of Integrity Property Management Ltd v Demeshgi, the defendant landlord failed to comply with an Order of the First-Tier Tribunal appointing the claimant as Manager and requiring a handover of the management of the subject property. The defendant was held to be in contempt of Court, **committed to HM Prison Holloway for twelve months and ordered to pay costs of £27,890.50**. (Central London County Court: Claim No. A02CL434.)

Terms of the Order

A proposed Manager must understand what responsibilities he is taking on and how he is going to discharge those responsibilities. The formation of **a management plan will be the basis upon which to assess what powers he will need** and thereby inform those responsible for drafting the Order which will be put before the Tribunal.

In the case of Trafalgar Court near Cromer in Norfolk (CAM/33UF/LVM/2009/0003), a Manager was appointed in April 2001, the Order providing that he could resign upon giving 3 months notice in writing, which is precisely what he chose to do with effect from the end of June 2002 without offering any explanation. A further Order was made in May 2003 for a different Manager for a term of 3 years. Optimism that he would have been able to proceed reasonably promptly with executing major roofing and other works to the property proved unfounded, and a 3-year extension by way of further Order was made in May 2006. Work proceeded but problems arose about payment into and release of funds from a joint account (operated by Manager and freeholder) and for various reasons the management ground to a halt. In June 2009, a third different Manager was proposed, who was opposed by the freeholder, and for various reasons the management reverted to the freeholder. The property continued to decline; a Closing Order was imposed on part of it by the Local Authority due to fire safety issues, an Enforcement Notice was also served by the local Fire Brigade due to non-compliance with the Regulatory Reform (Fire Safety) Order 2005, and other parts suffered severe storm damage (fortunately the building was adequately insured). A further application was made for yet another Manager to be appointed, and an Order was made in June 2012. On this occasion, a detailed management plan was submitted to the Tribunal, the freeholder still resisting, and part of the management plan was a **much more rigorous Order than those which had been previously determined**. Sufficient common ground and cooperation between the parties then developed, necessary monies were collected, and a £½m major works programme was well in hand before the end of 2012. By the end of 2013, the major works contract was being concluded to resolve the water penetration issues, the Closing Order had been withdrawn, the Fire Brigade had confirmed that, subject to a final inspection, they would be happy to withdraw the Enforcement Notice and, in August 2015, the Tribunal extended the Management Order for a further three years.

It is not always understood that a Manager should manage in accordance with the Order so that, **where the Order is inconsistent with the terms of the leases, the terms of the Order apply**. Effectively, that means that the tenants' covenants under the leases can be varied by the terms of the Order for as long as the Order remains in place. For instance, the Order can provide for service charge payments to be made in advance when the leases provide for arrears payments, or the Order can provide for the Manager to be able to recover legal fees (or other items of expenditure) which are not provided for under the terms of the leases. This aspect of Management Orders has the authority of the Court of Appeal case: Maunder Taylor –v- Blaquiere [2002] EWCA Civ 1633.

Subsequently in the case Taylor –v- Joshi [2006] LRX/107/2005 before the (then) Lands Tribunal, an LVT decision that a Manager could not recover legal fees because there was no provision within the lease was overturned because there was provision in the Management Order.

In the case of 1-8 Reed Place, Harpenden, Herts. (CAM/26UG/LVL/2010/0006), **the original purpose of the Order** was to rebuild or repair a dangerous part of the structure. After 2½ years, that purpose had not been fulfilled but the freeholder had obtained planning permission to comprehensively redevelop the site and had bought all interests except that of one flat owned by the original Applicant for the Order. The Tribunal called the parties and the Manager in for a hearing; both parties requested that the Order be discharged but the Tribunal brought the attention of the parties to s.24(9A)(a) which provides that the Order should not be discharged if that would lead to a repetition of the original problems. There was no prospect of agreement between the parties. The Tribunal's concerns extended to the neighbours, local community and others. At the hearing, the Tribunal explored the possibility of using their jurisdiction of giving the Manager specific receivership powers to progress the redevelopment.

In Sennadine Properties Ltd –v- Heelis [2015] UKUT 55 (LC), the Deputy President of the Upper Tribunal confirmed that **an order allowing a Manager to let a commercial unit and collect the rent could in principle be justified but only in exceptional circumstances**. An entirely separate case, Queensbridge Investments Ltd –v- Lodge and others [2015] UKUT 635 (LC), dealt with such exceptional circumstances. The subject property contained three flats with a commercial unit on the ground and lower floors. The landlord had failed to keep the structure of the property in repair; the structural problems were potentially dangerous and therefore required urgent action. The order granted by the First-Tier Tribunal gave the Manager a number of broad powers including the right to receive rent payable by the commercial tenant to help defray the costs of repairs and maintenance, and the right to collect 25% of its costs from the landlord to ensure that the Manager could recover 100% of its costs. The First-Tier Tribunal noted in their

decision that the landlord behaved like an absentee landlord, was responsible for serious failings, had been obstructive in the proceedings, and was a landlord in whom the First-Tier Tribunal had no confidence. In dismissing the appeal, the Upper Tribunal confirmed that **the powers conferred by a Management Order should be proportionate to what the tenants are entitled to expect in accordance with the terms of the leases** when read in the light of the relevant legislation and the matters which Parliament considered tenants should be entitled to expect.

Extent of Property to be Managed

In Cawsand Fort Management Co. Ltd –v- Stafford [2007] EWCA Civ 1187, the Court of Appeal confirmed that a Management Order can extend to the buildings, their curtilages and other land over which the lessees have recreational rights. **The word '*premises*' is not limited either to the buildings only, or the building and their curtilages only.**

Mixed-Use Properties

In Sennadine Properties Ltd –v- Heelis (referred to above) the Upper Tribunal found that the LVT had exceeded its jurisdiction by directing the Manager to disclaim the lease of the commercial unit. The appropriate course was to modify the Management Order to limit it to the structure and upper floors of the building and the common parts leading to the upper floors, thereby excluding the ground-floor commercial unit, and to require that, after taking into account the contribution of the lessees, the landlord be responsible for contributing the balance of the cost incurred by the Manager in the provision of all services.

In Octagon Overseas Ltd & Others –v- Coates [2017] UKUT 0190 (LC), the Upper Tribunal reviewed the provision within the Management Order relating to the buildings insurance for a **group of commercial and residential buildings** comprising the **Canary Riverside Estate, London E14**. The landlord company and the corporate operator of a hotel within the mixed-use development sought to vary the Order insofar as allowing the Manager to arrange the the buildings insurance would put both companies in breach of a loan agreement with Santander requiring those companies to procure buildings insurance in their own names. Other cases we have come across have dealt with similar problems where the terms of the leases require the insurance to be arranged in the joint names of the freeholder, the landlord, and all lessees. When any prospective Manager agrees to be nominated, then in the course of preparing a Management Plan they should **consider any unusual lease terms**. Further, in relation to larger or mixed-use schemes, they should ask their instructing party whether there are **any known loan agreements which might affect how the insurance policies should be arranged** if the Tribunal decides to grant an Order on the terms sought.

Receivership Powers and Specific Duties

There have been many Orders which make an appointment as Manager and Receiver. In the case of Colebrook Court, London SW3 3DJ, the original Order made the appointment as Manager and Receiver. **The Manager signed certain documents in his capacity as Receiver**, which was challenged by the landlord, who made a subsequent application to the LVT (LON/00AW/LSC/2006/434NL/5417/06). The LVT determined that the Manager did not have general Receivership powers, but proceeded to vary the Order such that he did have the specific powers of a Receiver required to do the job.

In the case of Palace Court (LON/00AG/LAM/2010/0009) the Order was made as Manager and Receiver. Leave to appeal was granted by the Upper Tribunal in regard to the appointment as Receiver; that appeal never progressed but it is thought that, if an FTT intends to grant specific Receivership powers, **they must be individually specified** and it is not within the FTT's jurisdiction to grant general Receivership powers.

It is possible for an Order to be made in respect of a specific management problem and not to cover the total management function. In the case of 1-8 Reed Place, Harpenden AL5 4DE, (CAM/26UG/LVL/2010/0006), Paragraph 1 of the directions provided that: "*The functions and duties of the Manager shall be to secure the rebuilding and repair of the building to restore it to sound structural condition and to the original accommodation.* ***The Manager shall have no general management functions.***"

Indemnity Clauses

In the commercial world, it is commonly the practice for Law of Property Act receivers to be appointed **with the benefit of an indemnity clause protecting them against losses and damage**. In the more recent past, indemnity clauses have started to be incorporated into Management Orders and in the case of Mintern Close, Hedge Lane, London N13 5SX (LON/00AK/LAM/2013/0022) Paragraph 1(g) of the Order, the Tribunal acknowledged that the Manager was likely to be involved with litigation with a small group of particular lessees and agreed to an indemnity clause as follows:

> *The power in their own name or on behalf of the Respondents to bring, defend or continue any legal action or other legal proceedings in connection with the Leases of the Premises… The Managers shall be entitled to an indemnity for both its own costs reasonably incurred and for any adverse costs order out of the service charge account.*

Discharge

In the matter of Princess Gardens, West Midlands (BIR/00CS/LVM/2006/0001), the Manager applied to be discharged. On appointment he had discovered there were debts of nearly £45,000, he had been unable to obtain the documentation required including copy leases, and therefore did not have financial information to pursue debts. Further, he had been joined against his will into County Court forfeiture proceedings brought by the landlord resulting in an **Order against him personally for costs**; his firm was out of pocket to the tune of about £10,000, and he had not received the advice and clarification he had anticipated from the LVT. He felt unsupported (Paragraph 13) and the Order was discharged.

In the case of Frognal Estate, London NW3 (LON/00AG/LVM/2011/0002) there were complaints recorded in Paragraph 40 about a **heavy-handed approach to the collection of service charges** and a lack of explanation as to the use of these charges. The Manager was quick to pursue funds through the County Court, which decided that the proceedings were ill-conceived as they were not in accordance with an agreement made between the Manager and the lessees at a meeting. That Manager was discharged and a replacement Manager appointed.

A Word of Caution

In the case of Hillside Court, 409 Finchley Road, London NW3 6HG (LON/00AG/LAM/2013/0010), the freehold was owned by a lessee-controlled company. One of the lessees had resigned as a Director, she was in dispute with the Board of Directors and applied to the Tribunal for the management to be put in the hands of a Manager appointed by Order. The Tribunal determined that the Applicant had acted vexatiously, abusively and unreasonably, and ordered her to pay £500 in costs. The Tribunal said that they had no doubt that the Applicant would seek to influence any appointed Manager with a view to resurrecting her 'fiefdom' (Paragraph 17). There have been other cases in which the applicants did not appreciate that they do not control the Manager. **The Manager, if appointed, is independent and impartial**. Tribunals are alive to applicants who want control as distinct from applicants who want to restore good management to a badly managed block.

Range & Uses of Management Order Process

1. The service of a fully explained and reasoned s.22 Preliminary Notice can sometimes be all that is necessary to get warring parties to talk to each other and work towards a joint resolution. It properly identifies the important management faults which need to be addressed. It proposes what ought to be done about those faults in the opinion of the party serving the notice. It gives a time limit within which something has to be done or agreed in the absence of which the application will be made. In cases in which the real problem is apathy or neglect on the part of the person or directors in charge of the management function, the contents of that notice, accompanied by the possibility of losing management control, can promote some very beneficial changes to management practice.

2. A Management Order can have the effect of resolving management problems that stem from having unfortunate or bad lease terms which either cannot be changed because of the limits of the jurisdiction of the Tribunal, or various parties are refusing to change/taking advantage of the bad lease terms. Because a Manager's powers and duties are defined by the Order and not by

the leases, that Order can effectively vary the leases. There have been a few occasions in which landlord and co-operative lessees make a joint application for a Management Order in order to bring un-co-operative lessees within the framework of the powers and duties of an appointed Manager and thereby resolve problems arising from their failure or refusal to co-operate.

3. There are some blocks of flats with two groups of lessees, each bitterly opposed to the other. Sometimes one group has control of the Board of Directors of the Management Company, sometimes the Board of Directors has representatives from both groups and cannot conduct its management responsibilities efficiently or effectively. The appointment of an independent Manager can sometimes be a useful way to break a deadlock situation.

4. In cases of absentee landlords who cannot be found, or companies which have been struck off from Companies House where the management responsibilities and rights have been lost, the appointment of a Manager can restore management functions quickly whilst more fundamental problems are restored which often take court applications, costs and time.

For further information, please contact:

Bruce Maunder Taylor or Michael Maunder Taylor
brmt@maundertaylor.co.uk michael@maundertaylor.co.uk

If anyone reading this document wishes to bring our attention to other cases illustrating other significant points which assist parties or their advisers in future, we would be delighted to receive details.