UPPER TRIBUNAL (LANDS CHAMBER)

LRX/109/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER) UNDER S.11 OF THE TRIBUNALS COURTS AND ENFORCEMENT ACT 2007

Applicant: Hallam Estates Limited

Property: The Grand, The Leas, Folkestone, Kent CT20 2LR

Decision of the First Tier Tribunal (Property Chamber) dated 5 July 2018

Permission to appeal is REFUSED for the following reasons:

1. Although the heading to the grounds of appeal include the names of Mr and Mrs Stainer as proposed appellants, the application itself has been made solely on behalf of Hallam Estates Ltd, as is clear from the covering letter dated 3 September 2018 and Form T602 completed by the applicant's solicitor, Mr Duncan. Given the previous ambiguity concerning the identity of the parties for whom Mr Duncan acted, and the order for costs made against Mr and Mrs Stainer by the FTT, the Tribunal assumes that the absence of any reference to Mr and Mrs Stainer as applicants is deliberate and that they do not seek permission to appeal.

2. There is no realistic prospect of a successful appeal in this case.

3. No application for an adjournment of the hearing on 26 and 27 April was made by the applicant. Nor did it respond to the application for the appointment of the new manager and the variation of the terms of the management order. Those matters are relevant to the current application.

4. The application for an adjournment made on behalf of Mr and Mrs Stainer was premised on an injury which had been sustained by Mr Stainer almost two months before the date of the hearing, since when both had been able to prepare submissions in response to the applications before the FTT. The only evidence presented in support of the suggested incapacity on the part of the Stainers were two statements of fitness to work for social security purposes, and although the FTT did not doubt the information contained in those certificates that information was extremely limited.

5. The FTT was entitled to refuse the requested adjournment for the reasons it gave. The decision was a discretionary case management decision balancing the interests of different parties and having regard to an extended history of which the FTT was

fully aware but of which this Tribunal knows relatively little. The Tribunal will not interfere with a decision of that nature unless it is satisfied that it was clearly wrong.

6. The matters taken into account by the FTT were all relevant. Mr Stainer had been well enough to prepare his evidence in March and whatever difficulty they may have had in attending the hearing there is no obvious reason why either he or Mrs Stainer could not have given instructions on behalf of the applicant to enable Mr Duncan or another representative to attend and represent it relying on that evidence. The applicant chose not to obtain legal representation, despite that representation being available to Mr and Mrs Stainer, and chose not to make any application of its own for an adjournment. The Tribunal did not suggest that the applicant's shareholder was under an obligation to represent the company, only that he was capable of doing so.

7. Mr and Mrs Stainer had filed evidence in response to the application on 8 March and had therefore had an opportunity to explain their objections to it and to answer the allegations made against Mr Stainer personally by the other leaseholders and by Mr Hammond. The FTT had heard evidence from the same witnesses in January 2018 (before Mr Stainer's injury) when it had determined the extent of the service charge liability of Mr and Mrs Stainer, and in paragraph 153 of its decision it recalled that it had found that they had done everything in their power to frustrate the original management order. There had been no application for permission to appeal that decision and the FTT was entitled to have regard to the facts it had found as part of the background to its consideration of the application for an adjournment. The FTT had in mind the consequences of Mr and Mrs Stainer's non-attendance in paragraph 48(i) and it did not err in principle in refusing to regard those difficulties as determinative or in concluding instead that they would suffer no significant prejudice by reason of their non-attendance.

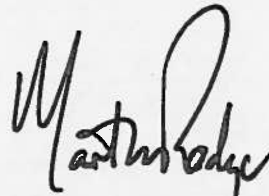
8. The fact that the applicant and the Stainers had had almost three months in which to obtain representation (and two months since Mr Stainer's injury) was clearly material to the application to adjourn, as was compliance by the other leaseholders with the procedural directions. The FTT did not suggest that it doubted that Mr Stainer had sustained an injury and dealt at length with the information provided to it and the various applications for adjournments in paragraphs 34 to 47. It cannot be said that it did not have that information in mind when it weighed the prejudice to the two parties in paragraph 48 (i) and (j). The suggestion that the FTT failed to take relevant matters into account or was influenced by irrelevant matters has no realistic prospect of succeeding.

9. The FTT was entitled to include a penal notice in its order and it was not necessary for any application to be made before jurisdiction to do so was conferred on it. The form of the FTT's order is a matter for it, and is within its ordinary case management powers; a penal notice is simply a statement of the consequences of non-compliance and the applicant can have no reasonable objection to it.

10. The requirement by the FTT that the applicant seek its permission before issuing an application to vary the management order is open to the objection that the statute itself imposes no such restriction and the requirement is therefore a nullity (which would mean there is no need for an appeal). On the other hand, given the history of obstruction and the risk to the achievement of the objectives of the management order presented by the applicant's determination to be obstructive, there could be no objection to a direction by the FTT that any application for a variation of the order would be considered by it summarily before the manager was required to incur the

expense of responding. Such a direction could be given under rule 6(1) of the FTT's Rules and an appropriate order dismissing the application could follow, if justified, under rule 9(3)(c)-(e). The FTT's intention described in paragraph 209 is therefore capable of being achieved within the Rules and no purpose would be served by an appeal to finesse the procedural route by which effect is to be given to that intention. If the applicant wishes to make an application to vary the order it should do so, notwithstanding paragraph 209, and should draw these observations to the FTT's attention to explain why it has not first sought consent.

11. The FTT had jurisdiction under section 24(4) to impose obligations on the applicant to contribute towards the costs of maintaining the building which reflected the extent to which the building was in the control of the applicant and commercially exploited by it (as the Tribunal has held in *Queensbridge* and in *Sennadine)*. Those obligations did not cause any variation in the terms of the leases, as the FTT made clear in paragraph 190. Given the extent of the obstruction and the frustration of the original management order by the applicant and Mr and Mrs Stainer, the FTT was entitled to regard the strengthening of the order as a necessary and proportionate exercise of that power. The applicant had had ample notice of the proposed variations. There is no express requirement that a preliminary notice under section 22 must be given before a manager seeks additional powers, and no reason to imply one, since the FTT must take all relevant matters into account in determining whether it thinks fit to make the variation.



Martin Rodger QC,
Deputy Chamber President

8 January 2019