9233

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/22UN/LUS/2013/0001**
Property	:	**Quayside Court, The Quay, Harwich, Essex CO12 3HH**
Applicant	:	QC Management RTM Ltd
Representative	:	Mervyn Arthur Lambert (Chairman)
Respondents	**1)**	Mrs Hayley Carter
	2)	Mr & Mrs J Farmer
Representatives	:	each in person
Type of Application	:	Application for a determination of the amount of accrued uncommitted service charges to be paid to RTM Company [CLRA 2002, s.94(3)]
Tribunal Members	:	G K Sinclair, G F Smith MRICS FAAV REV & R Thomas MRICS
Date and venue of Hearing	:	Wednesday 18th September 2013, at The Tower Hotel, Dovercourt, Harwich CO12 3PJ
Date of Decision	:	25th September 2013

DECISION

Summary

1. None of the parties to this application are legally represented or have taken legal advice. It is perhaps understandable that none of those originally named as parties have been correctly joined. The applicant is not Mr Lambert personally but an RTM company of which he is chairman, viz QC Management RTM Ltd. The landlord at all material times was not Mrs Carter but Countrywise Property Management Ltd, of which she is a director and shareholder. The lease also refers to another party, Quayside Court (Harwich) Management Co Ltd, of which Mrs Carter is again a director and – through a Class A share – has control. After the events concerned Countrywise Property Management Ltd sold the freehold reversion to Mr & Mrs J Farmer, who are named as Second Respondent. They are irrelevant to the matters in issue. Mr Farmer attended the hearing but largely in the capacity of observer. Mrs Carter was also present and, with everyone's consent, the tribunal agreed to deal with the case on the basis that the correct entities were parties.

2. For convenience they shall be referred to hereafter as :
   a. Applicant — the RTM company
   b. Landlord — Countrywise
   c. Management Co — QCH

3. In addition, to add further confusion, as a sole trader Mrs Carter also trades as Countrywise Property Management, acting as managing agent for QCH.

4. The RTM company was incorporated on 23rd May 2011 with the intention of assuming responsibility for the management of a large, imposing block of flats, ground floor offices and other premises at The Quay, Harwich. It eventually took over management of the building on 1st March 2012 and entered into negotiations for the transfer to it of accrued but uncommitted service charges already collected and in the hands of QCH.

5. In the course of negotiating the sale of the freehold reversion to Mr & Mrs Farmer Countrywise received legal advice that altered its understanding of its liability to contribute to the service charge. Various other accounting mistakes were seized upon to withhold, by way of adjustments, the sum of £15 053 from the amount paid by QCH to the RTM company.

6. The dispute before the tribunal concerned four specific issues :
   a. An alleged overcharge by QCH of management fees for the first two months of 2012 (immediately before the RTM company took over)
   b. A claim by the landlord to recover six years' service charges wrongly paid for Unit 1, which was never let as a flat
   c. Bank interest & charges going back six years and legal fees from 2005 & 2006
   d. Legal fees from 2010 & 2011.

7. For the reasons which follow the tribunal determines that :
   a. On the evidence before it no management fees are due to QCH for January and February 2012
   b. Service charges in respect of the unlet Unit 1 were paid and received under a mutual mistake of fact and are recoverable by Countrywise from QCH. The sum of £7 888.39 is therefore "committed" and not available for transfer to the RTM company
   c. Insofar as bank interest and charges and historic legal fees are concerned
      i. No attempt has been made to amend the annual service charge accounts, each of which were signed off as accurate by Mrs Carter as director of QCH
      ii. The legal fees fell due more than six years previously, and they are outwith the contractual limitation period
      iii. Liability for most of the sums was incurred outwith the 18 month period mentioned in section 20B of the Landlord and Tenant Act 1985
      iv. Insufficient proof of liability was produced
      v. The whole of this amount is payable to the RTM company
   d. Insofar as the more recent legal fees are concerned
      i. No attempt has been made to amend the annual service charge accounts, each of which were signed off as accurate by Mrs Carter as director of QCH
      ii. Nevertheless, as legal advice was sought at the request of lessees, the sum of £420.65 is not challenged and may be retained by QCH
      iii. The court fees and legal fees incurred by Countrywise in respect of a dispute with a lessee over the net sum of £120 – which claim Countrywise then discontinued – were not reasonably incurred
      iv. Save for the £420.65 conceded by it the whole of this amount is payable to the RTM company.

Material lease provisions

8. The sample lease provided, for flat 7, is dated 2nd November 1988. It has three parties : Lodgeday Properties Ltd as lessor, QCH as management company, and Princedown Properties Ltd as lessee. By clause 3(9) the lessee covenants to pay the management company or its duly appointed agent in respect of each year ending on 31st December ("the maintenance year") the total percentage applicable to the demised premises as specified in Part IV of the First Schedule of the costs charges expenses and management fees from time to time incurred by the management company in carrying out or procuring the carrying out of its obligations under the Fifth Schedule. Payment is to be made in advance by two half yearly instalments, followed by a final balancing payment (or credit).

9. Clause 3(12) does allow for the percentage payable for the demised premises to be variable in certain prescribed circumstances, in particular :
   (i) If the lessor's property or the building shall be altered reduced or extended so as to comprise more or less than the present number of flats the part of the maintenance charge apportioned in respect of the demised premises shall be the said percentage or such higher or lower percentage as the surveyor shall determine.

   See also sub-clause (ii), which refers to the surveyor forming the opinion that it

is necessary or equitable to do so by reason of any of the flats ceasing to be habitable ... or for any other reason whatsoever...

10. However, a common feature of Lodgeday leases of this vintage appears at clause 7(3), which provides that :

> Nothing in this lease shall impose any obligation on the lessor to pay or contribute to the maintenance charge fund or account operated by the management company or any other body or person in respect of any flats and car spaces which have not been sold on long lease at a premium.

Relevant statutory provisions

11. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> an amount payable by a tenant of a dwelling as part of or in addition to the rent... (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management...

12. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
    a. only to the extent that they are reasonably incurred, and
    b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

13. In order that leaseholders can keep track of what they may owe, and to discourage tardiness by freeholders or their managing agents, section 20B provides that :
    (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
    (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

14. Two further provisions, concerning demands for payment of service charge, have been put in issue or are relevant to this case. First, by section 47 of the Landlord and Tenant Act 1987, where any written demand is given to a tenant of premises for rent or other sums payable under the lease (which expression would include a demand for payment of service charge), the demand must contain the name and address of the landlord.

15. Secondly, since 1st October 2007 section 21B of the 1985 Act provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. The content of that summary is prescribed by the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.

The document must contain the prescribed heading and text and must be legible in a typewritten or printed form of at least 10 point.

16. Part 2 of the Commonhold and Leasehold Reform Act 2002 enabled lessees to assume responsibility for the management of their block or building without having to show fault on the part of the lessor. If the transfer of responsibility takes place partway through an accounting period, or if there is a reserve fund in existence, then the Act provides for the transfer of accrued but uncommitted funds held by the lessor or outgoing managing agent. Section 94 states :

(1) Where the right to manage premises is to be acquired by a RTM company, a person who is –
   (a) landlord under a lease of the whole or any part of the premises,
   (b) party to such a lease otherwise than as landlord or tenant, or
   (c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,

   must make to the company a payment equal to the amount of any accrued uncommitted service charges held by him on the acquisition date.

(2) The amount of any accrued uncommitted service charges is the aggregate of –
   (a) any sums which have been paid to the person by way of service charges in respect of the premises, and
   (b) any investments which represent such sums (and any income which has accrued on them),

   less so much (if any) of that amount as is required to meet the costs incurred before the acquisition date in connection with the matters for which the service charges were payable.

(3) He or the RTM company may make an application to a leasehold valuation tribunal to determine the amount of any payment which falls to be made under this section.

(4) The duty imposed by this section must be complied with on the acquisition date or as soon after that date as is reasonably practicable.

Since 1st July 2013 the reference in (3) to a leasehold valuation tribunal now refers, in England, to the Property Chamber of the First-tier Tribunal.

Hearing

17. In view of the nature of the issues involved no inspection of the property had been arranged. This was unfortunate, as it may have enabled the tribunal better to understand the location and nature of unit 1 and why it had not been fitted out and let as a flat. However, the parties were able to provide an oral explanation.

18. As well as the application, and each party's detailed statement of case, the bundle comprised a number of accounting documents, court papers and correspondence. In addition, the tribunal had been provided with a copy of the lease and, for each of QCH and the RTM company, its Memorandum and Articles of Association.

19. The tribunal heard from Mr Lambert and Mrs O'Farrrell for the Applicant and Mrs Carter for both Countryside and QCH. The bundle also contained several written statements, including two from Mr John Webb of Webb Accountancy Services Ltd, the accountancy firm acting for Mrs Carter's two companies.

20. At the tribunal's request the parties' representatives (who confirmed at the outset, when asked, that they had not sought any legal advice) focussed on each of the four disputed items in turn, referring where appropriate to relevant documents.

Management fees for January and February 2012

21. The monthly management charge of £500 was non-contentious. Instead, the dispute concerned whether, as Mrs Carter and Mr Webb asserted, management fees were charged on a calendar year basis. They relied upon an undated invoice on Countrywise headed paper appearing at page 9 in the bundle. However, despite Mr Webb's assertion in his second statement that fees were charged on a calendar basis, every other accounting document and reference – even in his first statement and the Respondent's statement of case, was to an accounting year end of 30th April. The only exception were the final accounts drawn to 28th February 2012, immediately before the handover.

22. It is true that the lease refers to a calendar year accounting period, but Mrs Carter did not even know if Mr Webb had been provided with a copy of the lease, and was unable to explain why accounts were always drawn to the end of April.

23. The Applicant contended that as the accounts were usually drawn to 30th April (and in 2012 to 28th February) management fees would be calculated likewise. There was no evidence showing how these charges were paid.

Refund of service charges paid for unit 1

24. The lease presumed that the building included 34 flats, but unit 1 on the ground floor was never fitted out as a flat and let as such. Mrs Carter said that instead a grant of £40 000 had been obtained for exterior repairs (to the rather fine frontage?), seemingly on condition that the two units on the ground floor be let as commercial units. That on the left of the building (viewed from the street) is let to a company involved with the shipping industry and – although it pays ground rent and some contribution to repairs – is not included within the regime of percentage shares set out in the residential leases. Unit 1, to the right of the main entrance, had been let only briefly and recently, for about a year, as an art gallery.

25. When selling the freehold, Mrs Carter informed the tribunal, her solicitors pointed out that the lessor had no obligation to pay a contribution towards the service charge. For years, without realising the true position, Countrywise had done so. She now sought to recoup the sums paid for the last six years on the basis that payment had been made by mistake.

26. The Applicant's response was to comment on limited evidence of repayments to Countrywise, and wondering how the total reclaimed had been calculated. On a mistaken interpretation of advice received about section 20B it was queried how this amount could be recovered for the whole six years.

Bank charges and interest and legal fees

27. In his first statement Mr Webb sets out the amounts sought, with an explanation. However, very few bank statements were either disclosed to the applicant or to the tribunal. Evidence was limited. The Applicant challenged the sums claimed,

drawing the tribunal's attention to the apparent surplus in favour of lessees in the annual accounts prepared by QCH. How, in these circumstances, could interest and charges be due? If they had been incurred then why had this been missed in the annual accounts prepared by Mr Webb and signed as accurate by Mrs Carter acting as director of QCH?

28. As for legal fees, these are listed in Mr Webb's statement and in the Respondent's statement of case, but with one possible exception no documentary evidence for them is produced other than some cheque stubs. That exception is an entry on page 49, an analysis of expenses for the year ended 30th April 2005. Under "professional expenses" is an entry :

Percy Blackman	Surveyor re grant	£822.50

This sum had already been claimed, said Mrs O'Farrell, although that referred to in Mr Webb's statement was apparently dated 17th December 2005. That would fall into the following accounting period.

29. The legal fees concerned had invoice dates ranging from 27th June 2005 to 17th January 2006, and their omission was not raised until late 2012. No explanation was offered for the failure to include them when preparing the relevant accounts. As well as a contractual limitation issue the amounts fell due or were incurred more than 18 months before the date on which they were first mentioned as being something which the lessor (not the management company) wished to reclaim.

Recent legal fees

30. Legal fees of £1 144.83 are sought to be retained by QCH in respect of legal fees incurred much more recently. They are set out in the Respondent's statement of case as follows :

Ellisons	30 June 2010	£420.65
Court fees	15 Sept 2010	£65.00
Ellisons	9 March 2011	£659.18
		£1 144.83

31. The Applicant accepts that the first item was incurred following an AGM when lessees requested that legal advice be obtained. The sum of £420.65 was thus admitted.

32. The remaining amounts concerned legal proceedings that Countrywise issued in the Colchester County Court against Mr O'Farrell. He tendered payment of a lower sum but this had been rejected, leaving a net amount in dispute of £120. Mrs Carter discontinued her claim, she told the tribunal, on the grounds of her ill-health at the time. The Applicant objected to costs of £659.18 being incurred on advice in respect of a small claim where only £120 was at stake, especially when the claimant later declined to proceed with it.

Findings

33. Although formal accounts were prepared in the name of QCH, it is clear from the documents disclosed that letters were being written on Countrywise headed paper, cheques were being written by Countrywise, and legal proceedings were commenced in its name. This despite the fact that the party responsible under the lease for management, and to whom service charge payments are to be made, is QCH. Quite where the sole trader entity becomes involved is unclear.

34. As it is QCH (or Countrywise) that is seeking to claim that the disputed amounts are committed funds it is for it to satisfy the tribunal that they are lawfully due by way of service charge. In most cases this involves upsetting already settled accounts, with no application to amend the service charges for the material years or the issue of any fresh demands.

35. In the case of the two months management fees for January and February 2012 the tribunal is unimpressed by the undated invoice at page 9, and by the bald assertion that management charges are levied on a calendar year basis. That is what should happen, but for unexplained reasons the accounts have, for every full year in issue, been drawn for a period ending 30th April, not 31st December. It is hard to believe that management fees (which are not easily discernable from the accounts) would be drawn for a different period than the standard accounting one. On this reading, rather than two months being underpaid, an amount may in fact be due to the applicant as overpaid. The applicant has not sought that, and the evidence is so insubstantial that the tribunal can say only that the Respondent has not proved that any such amount is due to it.

36. The £1 000 should be remitted to the Applicant under section 94.

37. The unit 1 service charge payments are very different in character. The lessor was never under any obligation to contribute to the service charge, with the effect that unless or until the lessor's surveyor sought to adjust the percentages payable the total amount recoverable by QCH would always fall short of 100% recovery by 2.74%. The surveyor was never instructed to make any such alteration.

38. The tribunal accepts that Countrywise staff, ignorant of the provision in clause 7(3) of the lease, made payment in respect of service charges for a unit which was not liable to pay any. Mr Webb seems to have been unaware of the terms of the lease as well, so both donor and donee acted on the basis of a mistake. The law is now relatively settled that QCH has been unjustly enriched by these payments and it has no defence to their recovery.

39. The net result is that the service charge account will remain in deficit each year until :
    a. A thirty fourth flat is fitted out in the building and let at a premium, with a net service charge liability of 2.74%, or
    b. The lessor's surveyor recalculates the percentages under clause 3(12), or
    c. The lessees apply to a tribunal under sections 35 or 37 of the Landlord and Tenant Act for a variation of the lease or all the leases on the grounds that the provision for recovery of the service charge is defective. In *Brickfield Properties Ltd v Botten*[1] HH Judge Huskison said that the purpose of section 35 was to cure a defect in the lease. Where the defect concerns the inappropriate level of recovery then there is nothing in the 1987 Act indicating that the defect can only be cured prospectively rather than to deal with the defect at the time it arises. The tribunal could therefore backdate the variation to a date earlier than the application date.

40. Insofar as this application is concerned the Respondent may therefore retain, as an amount due to the lessor, the sum of £7 888.39.

[1] [2013] UKUT 133 (LC); [2013] P&CR DG8

41. The tribunal is not impressed with the evidence adduced to support the claims for recovery of bank charges and interest going back six years. It does not accept the Respondent's contention that because an accountant says that a sum is due then that must be so. Bank statements have not been produced to justify the claim. Were they ever produced to Mr Webb in the course of his preparation of QCH's annual accounts? No revised accounts have been produced or any lawful service charge demands levied. Indeed it would be hard to do so, as most of these amounts, if incurred, were incurred more than 18 months before the subject was first raised.

42. The same can be said for the legal charges dating back to 2005 to early 2006. They are not only statute-barred under the Limitation Act 1980 but fall foul of section 20B of the Landlord and Tenant Act 1985. Whether Percy Blackman was owed precisely the same amount twice in the same year, 2005, is unclear. What the Respondent and Mr Webb have failed to explain is how these amounts were ever missed in the first place.

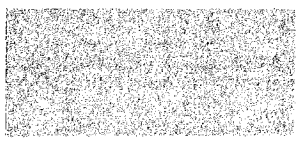
43. Neither the sums claimed as bank interest and charges nor as legal fees may be retained by the Respondent.

44. As for the more recent legal fees, it is only due to the Applicant's concession that the tribunal allows the Respondent to retain the sum of £420.65. Had the other sums been claimed as service charges then the Applicant or the lessees at the time could rightly have said that it was totally unreasonable for Mrs Carter to expect them to pay for a frolic of her own. The cost of the legal advice alone far exceeds the net amount at stake. The fact that the claim was discontinued rather than fought makes the expectation that lessees should pay even more unreasonable.

45. Again, no proper service charge demand has been made, and the costs were not included in the relevant accounts for QCH. No explanation has been offered. These amounts must be paid to the Applicant under section 94.

46. In conclusion, the only amounts that QCH may retain as committed funds are the unit 1 moneys paid over by mistake and the £420.65 legal costs conceded by the Applicant. The balance is payable to the Applicant under section 94.

Dated 25th September 2013



Graham Sinclair
Tribunal Judge