

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL
COMMONHOLD AND LEASEHOLD REFORM ACT 2002, SECTION 94

113 AND 115-117 LONDON ROAD, REDHILL, SURREY RH1 2JG

Applicant: Triangle Residential Management RTM Co Ltd (RTM Company)

Represented by: Neil Sowden (Flat 3)

Respondent: Shuttleworth Property Management Co Ltd (landlord)

Represented by: Mr Martin Paine, of Circle Residential Management Ltd (managing agent)

Date of Application: 20 July 2009

Date of hearing: 14 October 2009

Members of the Leasehold Valuation Tribunal:

MA Loveday BA Hons MCI Arb

Miss CD Barton BSc MRICS

Mrs J Playfair

1. This is an application under section 94 of the Commonhold and Leasehold Reform Act 2002 in relation to uncommitted service charges. The matter relates to three houses at 113 and 115-117 London Road Redhill which are converted into twelve leasehold flats. The properties are subject to the right to manage which (we are told) became effective on 22 January 2007. The applicant is the RTM company and the respondent is the freehold reversionary owner.
2. The application dated 20 July 2009 was made on the RPTS Form LVT4 – a form appropriate for applications to determine liability for service charges under s.27A of the Landlord and Tenant Act 1985. However, on 22 July 2007 the Tribunal directed that the issue to be determined was *“the amount of any payment which falls to be made under section 94 of the 2002 Act”*. Those directions have not been challenged by any of the parties and the application has proceeded on the basis that this is the only issue for the Tribunal to decide.
3. A Tribunal convened for a hearing on 14 October 2009 and inspected the property before the hearing. The applicant was represented by a director, Mr Neil Sowden (joint leaseholder of flat 3) and 9 other lessees who attended to support the applicant. The respondent was represented by Mr Martin Paine of Circle Residential Management Ltd (agent for the respondent). The applicant relied on a statement of case dated 19 August 2009 and a bundle of documents running to 293 pages. The respondent relied on a statement of case dated 22 September 2009 which also had attached supporting documentation.

INSPECTION

4. The premises comprise three houses on a busy route in Redhill. The houses form three of the four parts of a pair of semi detached houses c.1900 of brick under pitched and tiled roofs. Nos. 115-117 were in good decorative condition externally, but there was evidence of a lack of general maintenance (e.g. plants in the guttering and re-pointing needed to boundary walls). No. 113 was in similar condition but in a slightly better state of maintenance. Internally, the Tribunal was only able to inspect the common

parts of no.115. The hallway was carpeted and the walls were in good decorative condition, although again maintenance appeared poor, with dirt and leaves on the carpet and marks to the walls. The properties enjoyed a communal parking area to the rear which was surfaced in pea shingle.

THE APPLICANT'S CASE

5. The statement of case was not in conventional form and did not directly address the issue of "*the amount of any payment which falls to be made under section 94 of the 2002 Act*". However, it raised issues under six headings:
 - (a) Service charges for the year ending September 2008 purportedly owed by the lessees of 9 flats. Demands for these charges had been raised by the respondent on 20 July, 9 September and 30 September 2009. These totalled £3,075, but had not been paid by any of the lessees.
 - (b) Charges for the supply and fitting of sash locks purportedly owed by the 6 lessees. These totalled £87.24, but had not been paid by any of the lessees.
 - (c) Service charges purportedly owed by the lessee of Flat 4 at 113. A sum of £375 had been taken from a credit on the lessee's service charge account, but the lessee had paid the respondent £1,422.85.
 - (d) Service charges purportedly owed by the lessee of Flat 1 at 115-117. These included £325 for service charges, £14.24 for a sash lock and £1,486.19 for external works. All these sums had been paid by the lessee.
 - (e) Service charges purportedly owed by the lessees of twelve flats. These included £4,600 for service charges. However, the gist of the complaint was that sums credited to the service charge accounts had been depleted without any explanation.
 - (f) Buildings insurance. The applicant complained that it had not been provided with details of the insurance when it took over management of the properties. When it subsequently insured the property, the cost of insurance proved much less than had been the case before the right to manage came into effect.

6. Mr Sowden opened his oral submissions by stating that the respondent had not complied with its obligations to provide contractual documentation and moneys to the applicant when the right to manage commenced. The applicant had come to the Tribunal to force the respondent to address these issues. At the acquisition date (which it was agreed was 22 January 2009), the respondent claimed the balance on the service charge account was nil. On 6 November 2008, the applicant requested *"comprehensive accounts for both 113, 115-117 London Road..."* On 2 December 2008, Ms Lorraine Parker replied on behalf of the respondent that the information was held by Circle and that she had *"instructed them to oblige"*. No accounts were produced. On 22 December 2008, the applicant's solicitors wrote to the respondent and to Circle enclosing an information notice under section 93 of the 2002 Act. These included a request for the following information:

"(10) (a) Please advise the amount of unspent service charge moneys and reserve fund held by you or any managing agents whether or not held directly or in a trust account.

(b) Please confirm whether the monies referred to in part (a) of this question are likely to be spent at any time before the Right to manage is acquired by the RTM company. If any monies are spent, please provide full particulars."

Circle replied on behalf of the respondent on 16 January 2009, 30 March 2009 and 9 April 2009, but no accounts were forthcoming. The information notice was followed by similar requests in writing dated 7 April, 21 April and 30 April 2009 from the applicant, and one dated 29 April 2009 from Martin & Co (managing agents employed by the applicant). No proper statement of account had been handed over. The first time that the applicant saw any proper statements of the balances in the service charge accounts were when the respondent served its statement of case in September 2009 – just two weeks before the hearing.

7. Mr Sowden referred to the cash statements headed *"property account summary statements"* served with the respondent's statement of case which listed relevant costs posted to the service charge accounts between 2004 and 2009. He objected to six matters shown in these statements:

(a) Two charges of £293.75 for serving section 20 notices posted on 20 February 2008 (external redecorations 113 London Road) and another charge for the

same amount on 26 February 2008 (external redecorations and boundary wall repairs to 115-117 London Road). These were excessive for simply sending out a limited number of notices to the flats.

- (b) Contract administration fees of £682.97 and £1,426.74 in respect of works to 113 London and 115-117 London Road respectively posted on 14 May 2008. It was unfair to have charged these sums since no works in fact took place.
 - (c) The supply and fitting of sash locks to 115-117 London at a cost of £116.31 on 22 July 2008. These should have been added to the service charges and not charged as an additional sum on top of the service charges.
 - (d) Risk assessments in relation to 115-117 London Road charged at £58.75 (health and safety), £205.63 (asbestos) and £205.63 (fire safety) posted to the account on 17 August 2007. These were carried out by Circle's staff and should have been done by independent consultants.
 - (e) Property management fees of £581.39 and £415.29 posted to the account of 115-117 London Road on 1 July 2008. These were some 40% higher than the charges made in 2006-7, and were excessive.
 - (f) A credit of £1,422.85 made to the account for 113 London Road on 17 June 2008. This was an overpayment which should have been returned to the tenant concerned.
8. The Tribunal took Mr Sowden to the wording of the Act and to the decisions of previous tribunals in **Barrington Court** (22 November 2006) LON/00AP/LIS/2006/0091, **164 Willesden Lane** (8 January 2009) LON/AE/LSC/2008/0256 and **New River Head** (16 May 2009) LON/00AU/LUS/2008/0001. He submitted that the respondent had "*deliberately run dry the service charge account*". The Tribunal was in a position to make this good by way of an application under section 94 of the 2002 Act. He referred to a passage from **Woodfall** at 7.175 cited by the Tribunal in **Barrington Court**:
- "Profit not allowed**
The general purpose of a service charge clause is to enable the landlord to recoup the cost of services supplied. It is thought that, in the absence of a special context or clear words, service charge provisions will not be construed as entitling the landlord to recover a profit element over and above the costs actually incurred in providing services. In one case, provisions for the recovery

from tenants of the increased cost of fuel for central heating were construed as entitling the landlord to recover only the actual cost of fuel supplied."

Mr Sowden adopted the reasoning of the LVT in the *New River Head* decision and submitted that the LVT had jurisdiction under section 94 to determine the six matters he was challenging. In his closing, Mr Sowden stated that the applicant (and the 11 out of 12 leaseholders who had come to support the applicant) wished to have the matters determined today. He accepted the arithmetic of the accounts as put forward by Mr Payne, namely that there were debit balances on the two service charge cash statements on the acquisition date. The "*real bone of contention*" was that Circle Management had "*engineered*" this situation.

THE RESPONDENT'S CASE

9. In its statement of case, the respondent contended that on the acquisition date the amount of accrued uncommitted service charges held by the managing agent was nil. The respondent had maintained two separate service charge accounts for 113 and 115-117 London Road. The last certified service charge accounts for the properties was for the year ended March 2004 showed cash deficits of £1,395.46 (113) and £2373.89 (115-117). The respondent produced cash statements for these two accounts from March 2004 to the acquisition date which showed a closing debit balance of £655.91 (for 113) and £1,388.88 (for 115-117). Mr Paine stated that there were service charges owed by lessees for the period prior to the acquisition date. He stated that in the event that these were paid to the landlord, any excess would be passed on to the applicant once the balance of the two accounts was satisfied. However there were no "*accrued uncommitted service charges*" on the acquisition date.
10. Mr Paine submitted orally that the application was confused. There were three sets of parties involved, the landlord, the tenants and the RTM Company. This was not a case about services charges and the lessees (who were the only parties who could properly apply to determine liability for service charges) were not parties to this application. The sole issue was one of the uncommitted service charges. Whereas the balance on

the service charge accounts may not have been nil, the “*accrued uncommitted service charges*” for the purposes of s.94 of the Housing Act 2004 was nil. Mr Paine submitted that there was clear evidence to show the balance on the account at the acquisition date.

11. Mr Paine submitted the principle in s.94 was that no party should get a windfall. The sole purpose was to ensure that any cash balance was remitted to the RTM company. If there was an issue relating to service charges before the acquisition date, that should be dealt with by way of a separate application by a lessee or the landlord under s.27A of the Landlord and Tenant Act 1985. There was no jurisdiction in s.94 for the LVT to order any repayment to the tenants. Mr Paine accepted that it was still open to any leaseholder to make a s.27A application in relation to a number of the matters complained of. As far as the three LVT decisions referred to above are concerned, ***Barrington Court*** had started off life as a s.27A application. In ***New River Head***, the sums involved were very significant. However, the reasoning in ***Barrington Court*** was to be preferred. Mr Paine disputed that the landlord had failed to provide information. Mr Paine referred to letters from Circle Residential Management dated 18 March 2008, 6 June 2008, 26 June 2008 10 July 2008 and an email dated 11 December 2008. The information notice served just before Christmas 2008 ran to several pages. He believed that a full response to this notice was given by a member of his staff to the agents for the applicant over the telephone – but Mr Paine accepted he had no record of this conversation. He also accepted that the full statement of the service charge accounts was not provided until two weeks before the hearing. The respondent submitted that each of the six matters individual items referred to by Mr Sowden, were service charge costs which had been incurred reasonably, save that he accepted that one of the charges of £293.75 for serving s.20 notices posted to the account for 113 London Road in 2008 was an error. However, even this adjustment would not have put the account for 113 London Road into credit on the acquisition date.

THE LAW

12. Section 94 of the Commonhold and Leasehold Reform Act 2002 is as follows:

“94 Duty to pay accrued uncommitted service charges

(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.”

13. Previous LVT decisions are not apparently consistent. In ***Barrington Court*** (22 November 2006) LON/00AP/LIS/2006/0091, a Tribunal chaired by Professor JT Farrand QC considered an application by lessees and an RTM company to determine liability for service charges. The Tribunal found that relevant costs of £161,366 were not reasonably incurred by the landlord, and the issue arose as to the remedies available to the lessees. Their counsel contended that s.90(2) gave the Tribunal power to order that sums which had been overpaid by the lessees should be paid over to the RTM Company. However, the Tribunal refused to make such an order. It adopted the landlord’s argument that the RTM company was plainly not the right party to whom any overpayment should be made. However, it went on to decline to make an order under s.94 on the following basis put forward by the landlord’s counsel:

“Similarly, if the payments were (when paid and prior to being declared not properly due and payable) not in fact recoverable, that does not convert the payments into ‘uncommitted service charges’ [under s.94], rather it would convert these sums from being service charges at all.

If there have been overpayments then, subject to equitable defences, the remedy is for the overpaying party to seek restitution (in the Civil Courts) not for the RTM Company by an ingenious, thought it is submitted, wrong argument, to stake a claim to the overpayments. Rightly or wrongly, Parliament has not given the LVT jurisdiction to entertain restitutionary claims. To use section 94 as the basis to garner such jurisdiction by a side wind (at best) cannot reflect Parliament's intention".

14. **164 Willesden Lane** (8 January 2009) LON/AE/LSC/2008/0256 was a s.94 application by an RTM Company. The first issue identified by the Tribunal was whether "the liability of the landlord is limited to the sums of money held by him at the time of the acquisition or whether the section of the Act could be construed as including any choses in action which he might have to recover the monies by way of debt." The landlord contended that the tribunal only had jurisdiction to decide what "*monies physically held by the [landlord] company on [the acquisition date] can be brought into account.*" The LVT agreed with this assessment.

15. In the more recent case of **New River Head** (16 May 2009) LON/00AU/LUS/2008/0001, the Tribunal was again dealing with an application under s.94. A previous LVT had decided that the lessees were not liable for relevant costs totalling £100,642.21. In the subsequent application under s.94, the Tribunal rejected arguments by the landlord's counsel that its jurisdiction was limited to considering whether there was a balance in the service charge account on the acquisition date. The reasoning was that:
 - (a) One could not construe "*held by him*" in s.94 to mean only moneys actually held by the landlord on the acquisition date. Otherwise sums stolen from the service charge account by someone (even the landlord) could not be taken into account in a s.94 application.
 - (b) The previous Tribunal's decision did not mean that the overpaid relevant costs ceased to be service charges within the meaning of s.94 because s.94(2)(a) covered any moneys which were paid "by way of service charges".
 - (c) It was unworkable in practice to expect the lessees to seek restitution of overpaid service charges through the courts. This would mean a windfall to a

defaulting landlord and much duplication of work between the courts and the tribunals.

(d) It considered the decision in *Barrington Court* was not properly reasoned.

It should be noted that permission to appeal was given by the LVT in the last of these cases, but it is understood that the matter has not been listed for hearing before the Lands Tribunal.

DISCUSSION

16. There is a fundamental dispute as to the function of the Tribunal under s.94. The issue is whether a determination under s.94 in relation to the “uncommitted service charge” means that the LVT should simply assess the amount of money held by the landlord on the acquisition date (as contended by the landlord) or whether the LVT may go behind this arithmetical calculation and determine other sums which the Tribunal considers ought to be held by the landlord (as argued by the RTM Company).

17. The three previous LVT decisions referred to above appear inconsistent. They are not of course binding on this Tribunal, but this Tribunal prefers the reasoning adopted by the LVT chaired by Professor Farrand QC in *Barrington Court* for the following reasons:

(a) The words used in s.94(1) are “*uncommitted serviced charges held by him*”. It is difficult to construe this phrase to mean sums which are not in fact “held” by the landlord on the acquisition date, but which could or should be.

“*Holding*” a sum suggests that it is currently in the landlord’s possession or control. It does not suggest a chose in action which requires some further step before it is converted into a sum held by the landlord.

(b) Section 94(2) carefully defines the “*amount of any accrued service charges*”. The three elements are (i) “*any sums “which have been paid”*”, and (ii) any investments representing those sums less (iii) an amount to meet the landlord’s costs incurred before the acquisition date “*in connection with the matters for which the service charges are payable”*. In s.94 itself the draftsman plainly gives the words “*paid*” and “*payable*” in different senses.

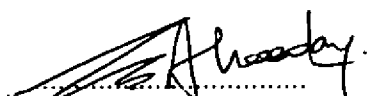
However, in order to enable the LVT to determine potential liable for past service charges, the two words would have to have the same meaning, namely that they are both "*sums which are payable*".

- (c) The words "*accrued uncommitted*" and subsection 94(2) must have some meaning. If the only exercise was to decide what service charges ought to have been held by the landlord, then these words would be unnecessary. The draftsman would have simply provided that there was a duty to pay "*service charges*" to the RTM company.
- (d) The suggestion that it is impracticable for the lessees to go through the courts to obtain restitution is wrong. The LVT has no power to make any restitutionary order. This is indeed the only means of enforcing an order of the tribunal in the vast majority of service charge cases under s.27A of the Landlord and Tenant Act 1985 where the LVT finds that service charges have been overpaid. Indeed, the 2002 Act specific provides for enforcement of LVT decisions by the court: see Schedule 12 para 11. See also paragraph 19 of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 and CPR 70.5 and CPR PD 70.
- (e) In any event, s.94 is a wholly inappropriate mechanism of achieving this aim. s.27A of the 1985 Act enables an LVT to make an assessment of matters such as by whom charges were payable, to whom they were payable, the amount payable, the date for payment and so on: and it does so separately by reference to relevant costs which have been incurred and costs which have not yet been incurred. By contrast, the machinery in s.94 is relatively simple one. This tends to suggest that it was never intended that the LVT should make an extensive examination of liability for service charges as part of the s.94 process. In our view, the 'side wind' argument in *Barrington Court* has considerable force.
- (f) The parties to a section 94 application are also inappropriate. An RTM has no *locus standi* to make any application to determined liability for service charges under s.27A of the 1985 Act, and lessees are not generally parties to a s.94 application.

- (g) Overpayments of sums paid as service charges are not “*service charges*” at all. They cease to be “*service charges*” once a Tribunal determines that there was no liability for them. The words “*sums which have been paid ... by way of service charges*” in s.94(2) cannot render something which was never a service charge into a service charge. In any event, in this case the uncontroverted evidence of the landlord is that the service charges demanded by the landlord before the acquisition date were not in fact paid by the lessees.
- (h) Insofar as any weight should be attached to the determinations in ***Barrington Court*** and ***New River Head***, it should be noted that permission to appeal was given in the latter case and that it is subject to appeal.
18. It follows that the Tribunal does not consider that it has jurisdiction to determine liability for service charges as part of any assessment under s.94 of the 2002 Act. The Tribunal’s role is purely confined to a calculation of the cash sums actually ‘held’ by the landlord at the acquisition (or the investments representing those sums) subject to the statutory allowance in s.94(2).
19. The Tribunal has some sympathy with the lessees in this matter, especially given the way in which the application was originally framed. We note that Mr Paine agreed that an application by the lessees for a determination of liability for pre-acquisition date service charges would be appropriate if made under s.27A of the Landlord and Tenant Act 1985. Nevertheless, a s.94 application in relation to uncommitted accrued service charges is not the appropriate manner of resolving that issue.

CONCLUSIONS

20. In these circumstances, the Tribunal determines that the payment which falls to be made to the RTM company under s.94(3) of the Act is nil.



Mark Loveday BA(Hons) MCI Arb

Chairman

17 November 2009