



Residential
Property
TRIBUNAL SERVICE

**RESIDENTIAL PROPERTY TRIBUNAL
LEASEHOLD VALUATION TRIBUNAL
(LONDON RENT ASSESSMENT PANEL)**

No. LON/00AU/LUS/2008/0001

Section 94 of the Commonhold and Leasehold Reform Act 2002
(Section 94)

Applicant:- New River Head RTM Company Limited
(represented by Mr Hawksley)

Respondent:- OM Limited
(represented by Mr Carr of counsel)

Premises:- New River Head
173, Rosebery Avenue,
London EC1 4UJ

TRIBUNAL

MR. A.J.ENGEL M.A. (Hons.)

MR. T.SENNETT M.A. F.C.I.E.H

DECISIONS

- 1. £122,192-39 (plus compound interest thereon @ 4% per annum from 1st October 2004 until payment) is the amount of the payment which falls to be made by the Respondent to the Applicant under Section 94.**

2. **The parties have liberty to apply in respect of the calculation of the interest.**
3. **Permission to appeal is granted.**

REASONS

Introduction

1. The premises comprise 129 flats. The building was converted in the 1990s. Formerly it was the headquarters of the Thames Water Board. The leases are for 999 years from 1st February 1996. The Respondent is a party to the leases and managed the premises until 1st October 2004 when the Applicant took over the management of the premises from the Respondent.
3. In September 2004 and January 2005, the Respondent paid to the Applicant a sum of over £150,000 in respect of money received from tenants of flats in the building by way of service charges but not expended on services prior to 1st October 2004. It appears that these payments meant that nothing remained in the Respondent's (trust fund) account held by the Respondent in respect of the service charges for the premises (the service charge account).
4. However, in 2006, (another) Leasehold Valuation tribunal found that £60,418-12 was an amount which had been deducted from the service account by the Respondent (prior to 1st October 2004) which was not payable for service charges. The sum of £60,418-12 was increased, in 2008, by the Lands Tribunal, to £100,642-21.

Further sums of £1,600-28 and £19,499-90 were conceded by the Respondent before the (previous) Tribunals – making a total of £121,742-39
5. In November 2008, the Applicant applied to the Tribunal claiming £123,457-28 (plus interest) against the Respondent under Section 94. The amount of the claim was later varied – several times.

6. A hearing was held before this Tribunal on 5th February 2009. At the hearing, I raised the issue of Section 27A of the Landlord and Tenant Act 1985 (Section 27A) and I suggested that this section should be considered as an alternative (if it was decided that an Order under Section 94 was not appropriate).
7. At the conclusion of the hearing, I announced that the Tribunal had determined that it was appropriate for an Order to be made in favour of the Applicant under Section 94 and/or Section 27A and that the Order would be made after the issue of quantum had been determined.
8. On 30th April 2009, a further hearing took place. At that hearing, Mr Hawksley declined to make an application under Section 27A.

As Section 27A requires an application to be made thereunder, the Tribunal has not determined whether or not Section 27A is relevant.

Section 94

9. Section 94 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 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.

10. It is agreed that the “acquisition date” is 1st October 2004.

The main issue

11. The main issue is whether it is appropriate for this Tribunal to make an Order, under section 94, in respect of the £121,742-39 referred to at No.4 above.

12. The Tribunal has reached the firm view that it is appropriate for such Order to be made.

13. Mr Carr, on behalf of the Respondent, made a number of submissions to the contrary, including:-

- (i) That an Order under Section 94 can only apply to money which is in the trust fund on the acquisition date. Mr Carr referred to the words “held by him” in the last part of Section 94(1) and submitted that only the amount (if any) which was in credit in the fund, on the date of acquisition, could be the subject of an Order under Section 94.

[Mr Carr did not shrink – or flinch – from the corollary that if money was stolen from the fund – even by a trustee – then only any amount remaining in credit could be the subject of an Order under Section 94.

We consider that such a construction cannot have been the intention of Parliament.]

- (ii) That when the (previous) Tribunals decided that the amounts totalling £100,642-21 were not payable, they ceased to be “service charges” and, therefore, Section 94 did not apply.

[We consider that this submission is contrary to the wording of Section 94(2)(a) in that the amounts were, in our view, paid “by way of service charges”.

We also consider that it cannot have been the intention of Parliament to allow a party which has been paid money by way of service charges to retain that money if a Tribunal decides it was not payable.]

- (iii) That the tenants who had made the “overpayments” would be able to reclaim them from the payee.

[We consider that such a system would be unworkable in practice – especially as a number of the tenants will have changed since 1st October 2004.

The submission also fails to take into account the likelihood that previous tenants who have assigned their tenancies will have made arrangements in the transfer deeds in respect of service charges.

We consider that such a system is likely to result in the payee benefitting from an unjustified “windfall” which would be better applied to the credit of the RTM’s service charge account for the premises.

Although it does not apply in this case, one can easily imagine devices by which managers who were in similar positions to the Respondent could reduce assets to avoid payment to a RTM.

Further, such a system would be likely, in our view, to lead to unnecessary duplication of proceedings in the Tribunals and the Courts, with the concomitant extra costs, possibility of conflicting decisions and inevitable delay.

In addition, this submission contradicts the Respondent’s (successful) submission on other issues to the effect that services provided to tenants who do not pay their service charges are, nevertheless, deductible under the last part of Section 94(2).]

Previous Tribunal Cases

14. A number of previous Leasehold Valuation Tribunal cases were brought to our attention, including the case of Barrington Court - LON/00AP/LIS/2006/0091 – (Barrington), a decision, dated 22nd November 2006.
15. In Barrington, the Tribunal determined the same issue as that which we have determined in this case – but took the contrary view to that which we take.
16. The relevant part of the reasons in Barrington are at Paragraphs 46 to 52, vis:-

“ Overpaid Service Charges

46. The Tribunal has determined that the following amounts were not reasonably incurred or for other reasons not properly payable by Lessees as service charges in the years 2000-2004:

Management Fees -	£104,517
Legal Costs -	£ 40,191
Entry Phone Rental -	<u>£16,658</u>
	<u>£161,366</u>

47. These amounts have been included in payments of service charges already made and repayment is sought. It was not suggested by Mr Joss that the Tribunal had any power to direct repayments to Lessees. Instead, the contention was that payment of the overcharged sum should be made to the Applicant 'Right to Manage' Company as "accrued uncommitted service charges" within s.94 of the 2002 Act, which imposes a duty as to such payments.

48. By way of definition, it is provided that (s.90(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."

49. Under s.90 (sic) of the 2002 Act the amount of any payment to be made may be determined by a Leasehold Valuation Tribunal, although no power is conferred on a Tribunal to direct or enforce payment.

50. Mr Joss's essential argument was as follows (Closing Submissions dated 25 October 2006):

“It is submitted that amounts paid as a service charge which is subsequently found not to be recoverable should be treated in exactly the same way as any other amounts of advance or interim service charge paid to landlord which is subsequently found to have been overpaid and repayable to lessees i.e. under the annual accounting provisions in a lease (such as in paragraph 5 of Part 1 of the Fourth Schedule to the Barrington Court leases).”

51. Persuasive though this argument appeared, the Tribunal prefers Mr Gallagher’s opposing position (Closing Reply dated 7 November 2006):

“If it is correct (as the Applicants contend) that any overpayments (resultant upon the Tribunal disallowing sums that have been charged and paid) are recoverable by the lessees [or former lessees who made the overpayment] – that is a compelling reason why the sums should not be paid over to the RTM Company – on what basis does the RTM Company operate as trustee or collection agent for the current and former leaseholders? 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’, 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 RTRM Company by an ingenious, though 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.”

52. Accordingly, the Tribunal confirms that it has only determined the sum of £161,658 was not payable by Lessees as service charges (ie under s.27A of the 1985 Act) and that it has not determined that such sum is the amount of accrued uncommitted service charges (ie for the purposes of s.94 of the 2002 Act).”

17. It is of note that the Tribunal in Barrington gave no reasons for its preference and describes the contrary view as persuasive.

On the other hand, we have given reasons for our view and we regard the contrary view as wrong in law and unworkable in practice.

Other amounts claimed

18. In addition to the £121,742-39, the Applicant claimed other amounts should be added to amount of the payment to be determined under Section 94(3), as follows:-

- A) £1,719-46 – arrears of service charges – alleged by the Applicant to be due in respect of Flat No.36 prior to 1st October 2004 and uncollected.

Mr Hawksley submitted that the Respondent used money in the service charge account to provide services to all the flats – including No. 36 and that this was wrong as the service charges in respect of No. 36 – for the relevant period – have not been paid. Mr Hawksley referred us to Section 97 of the 2002 Act.

[We consider that the last part of Section 94 (2) includes costs incurred for services for the premises – not just for those tenants who have paid service charges due from them.

Accordingly, we refuse this claim.]

- B) £1,910 -68 – being the legal costs of recovering part of the arrears of service charges alleged to be due in respect of Flat 36 (prior to 1st October 2004).

We considered that the amount of the legal costs was reasonable but Mr Hawkesley did not know whether the Court had made any Order in respect of these costs.

[In any event, we considered that these costs did not come within the definition of uncommitted service charges in Section 94(2) and we refuse this claim.]

Mr Hawkesley further submitted that if we refused this claim, we should add to the amount payable under Section 94(3) the amount (approximately £20,000) of service charge payments collected by the Applicant since 1st October 2004 in respect of service charges due before 1st October 2004.

[However, this request is not within Section 94 and we have no jurisdiction to consider it.]

C) £1,914-88 – being:-

- (i) £587-14 – amended at the second hearing to £505-17 in respect of alleged uncollected arrears (accrued prior to 1st October 2004) in respect of Flat 125.

[We refuse this claim for the reasons set out at A) above.]

- (ii) £ 587-52 (being 4 x £146-88) in respect of (uncollected) Property Debt Collection Fees alleged by the Applicant to have been incurred by the Respondent prior to 1st October 2004. Documentation to support these 4 amounts was not brought to our attention, although Mr Hawksley informed us that one of the amounts was in respect of a car parking space where the Applicant thought that the charge had been levied by the Respondent against the wrong person.

[However, Mr Carr brought to our attention provisions of the Lease(s) – in particular No.8 of Part F of the Sixth Schedule which refers to:-

“Enforcing or attempting to enforce the obligations of covenants on the part of the transferees and tenants of the Units”.

- which appeared, on the balance of probabilities, to justify the Respondent deducting these amounts under Section 94(2).

- (iii) £290 -22, being the (admitted) cost of investigating a water leak but alleged by the Applicant to have been charged to the wrong flat – by the Respondent.

[We consider that even if this cost was allocated to the wrong flat, it was, nevertheless, clearly within the last part of Section 94(2) and we refuse this claim.]

- (iv) £450 in respect of ground rents which were in arrear on 1st October 2004.

[We agree that the Respondent was not entitled to deduct this amount under Section 94(2)]

D) Costs incurred in respect of the previous Tribunals.

[As we explained at the second hearing we have no jurisdiction to award such costs and they are not within Section 94.]

- E) £50 – found to be missing from the petty cash box when it was opened after 1st October 2004 but which the Respondent had deducted – from the payments it made to the Applicant.

[We consider that it would be wrong to assume any nefarious activity and that the probable explanation is that the £50 was spent on petty cash items of services prior to 1st October 2004. Accordingly, we refuse this claim.]

19. Thus the amount of accrued uncommitted service charges (under Section 94(2)) is £ 121,742-39 plus £450 = £122,192-39.

Interest

20. The Respondent submits that this Tribunal has no jurisdiction to award interest. However, we consider that Section 94(2)(b) should be construed to allow the award of interest in the circumstances of this case.
21. The Applicant has put forward various alternative bases for the calculation of interest. In our view, the fairest solution is for interest @ 4% per annum compound (on the sum of £122,192-39) to run from 1st October 2004 until payment.

We trust that the parties will agree the mathematics but in case that is not possible, we grant liberty to apply to this Tribunal on this issue (only). Such application must be in writing setting out the matters in dispute. 3 copies must be served on the Tribunal and one copy on the other party.

Permission to Appeal

22. Between the 2 hearings, the Respondent made written application to the Tribunal for permission to appeal. On 6th March 2009, we refused permission to appeal on the (primary) ground that the application was premature.
23. Although we are of the firm view that our decision (on the main issue) is correct, we recognise that another Leasehold Valuation Tribunal has decided otherwise (in Barrington). In these circumstances, we consider that permission to appeal should be granted.
24. If an appeal is pursued, we recommend that it is expedited as it is now over 4 ½ years since the date of acquisition and limitation issues may soon become relevant.

SIGNED:



(A.J.ENGEL – Chairman)

DATED:

16th MAY 2009