

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL**

SOUTHERN LEASEHOLD VALUATION TRIBUNAL

In the matter of Applications under

- (a) Sections 94 of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) (duty to pay any accrued and uncommitted service charge funds to the RTM Company and
(b) Paragraph 9 of the Leasehold Valuation Tribunals (Fees)(England) Regulations 2003 (“the 2003 Regulations”) (that the Respondent should refund to the First Applicant the Fees of £500 which he has paid to the Tribunal)

Case No. CHI/00ML/LIS/2009/0043

Property: Sandringham Lodge, Palmeira Avenue, Hove, East Sussex, BN3 3GA

Between:

Mr Robert Gellman (Flat 11)
 (“the First Applicant/Tenant”)

and

Sandringham Lodge RTM Company Limited
 (“the Second Applicant”)

and

Anstone Properties Limited
 (“the Respondent/Landlord”)

Members of the Tribunal: Mr J.B. Tarling, MCMI, Lawyer/Chairman
Mr R.A. Wilkey, FRICS FICPD

Date of the Decision: 1st October 2010

**THE DECISION
OF THE LEASEHOLD VALUATION TRIBUNAL**

- 1. The Tribunal determines under Section 94 of the Commonhold and Leasehold Reform Act 2002 that the Respondent/Landlord shall forthwith make a payment of £16,602.00 to the Second Applicant in respect of accrued uncommitted service charges held on the acquisition date**
- 2. The Tribunal makes an Order under Paragraph 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 that the Respondent shall forthwith refund to the First Applicant the fees of £500 that the First Applicant has paid to the Tribunal**

REASONS FOR THE TRIBUNAL'S DECISION

1. Background to the matter

This Decision follows a Decision made by the Tribunal on 5th July 2010 which relates to the same matter and was in respect of Applications under Sections 20C and 27A of the Landlord and Tenant Act 1985.

There remain Two further Applications to the Tribunal:

- (a) One Application under Section 94 of the Commonhold and Leasehold Reform Act 2002 for a determination of whether and, if so, how much of any accrued and uncommitted service charges held by the Landlord should be paid to the RTM Company.
- (b) Under Paragraph 9 of the Leasehold Valuation Tribunals (Fees)(England) Regulations 2003 for an Order that the Respondent reimburses the First Applicant the fees of £500 that he has paid to the Tribunal.

2. Following the previous Hearing on 14th June 2010 the Tribunal had made Further Directions as to the preparation and exchange of various documents with a view to the determination of the two outstanding Applications. The parties had each prepared further Bundles of documents and these had been exchanged and copies had been forwarded to the Tribunal prior to the determination. The Tribunal had given notice to the parties that it intended to make the two final determinations on paper without an oral Hearing unless either party requested a hearing. No party had requested an oral Hearing and the Tribunal proceeded to deal with matter by way of a paper determination.

Application under Section 94 of the 2002 Act

3. The matters in dispute

Both parties Solicitors had agreed that the only item remaining to be decided by the Tribunal in respect of this application was whether or not the Respondent was liable to pay to the RTM Company the sum of £16,602 which was the amount of Management fees which the Respondent's Managing Agent had unlawfully taken from the Service Charge Account. The Managing Agent had taken these Management fees in advance and before he had been entitled to them. To that extent they were unlawfully taken from the service charge account.

4. The Documents before the Tribunal

The Tribunal had before it the Bundles of documents which had been produced at the earlier Hearing which together amounted to a total of over 700 pages. In addition the Tribunal had received further Bundles prepared with documents submitted by both parties. Both parties had submitted written submissions.

5. The Relevant Law

Section 94 of the 2002 Act.

“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) a landlord under a lease of the whole or any part of the premises, or
- (b) a party to such a lease otherwise than as a 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 as possible after that date as is reasonably practicable”

6. The agreed facts

The facts were not in dispute. The RTM Company acquired the Right to Manage on 1st June 2008. At that date there were no funds in the service charge account. In fact the bank account was in debit to the extent of £5,366. The landlord’s Managing Agent, Mr C. Basley (trading as Eric Marchant) was made bankrupt in 2008. Prior to 1st June 2008 the landlord’s Managing Agent had taken the sum of £16,602 from the service charge account. This amount represented an advance or prepayment to the Managing Agent to which he was not entitled. The matter which the Tribunal was asked to determine was whether the landlord was now under a duty to pay the sum of £16,602 to the RTM Company. Both parties had made written submissions as to their respective positions.

7. The Respondent’s Submissions

The Respondent points to the words in Section 94(1) of the 2002 Act which say “held by him on the acquisition date.” They say that as there was no money in the service charge account at the acquisition date, then there is no duty to make any payment. The Respondents say the sum of £16,602 was in respect of sums

misappropriated by the Managing Agent “under the guise of requesting the payment of service charges in advance.” The Respondents refer the Tribunal to the Decision of the Upper Chamber (Lands Tribunal) in Case Number LRX/140/2008 relating to various properties at Maidstone, Kent between Judith Elizabeth Wilson and Lesley Place (Maidstone) RTM Company Limited.

8. The Applicant’s Submissions

The Applicants submit that the sum of £16,602 falls within the definition of uncommitted service charges. They say that these monies should have been sitting within the service charge accounts and should have been held by the Respondent, and should have been paid over to the RTM Company on the acquisition date. The Applicants say that whether or not the monies were physically held in the account at the acquisition date is irrelevant. They go on to say “If such an argument was to succeed, this would very easily allow landlords to siphon money off and run the argument that because they physically hold the monies at the date of RTM takeover, monies were not due to the RTM company. That cannot have been the intention of Parliament. These monies were of course held by the Respondent’s properly appointed agent, Mr Basley, and it is of course no concern of the applicant that Mr Basley has not refunded the said monies to the Respondent. Mr Basley was, and it is accepted by the Respondent, at all times acting as the Respondent’s authorised agent.”

9. Review of Case Law

(a) The Respondents had directed the Tribunal to the Decision of the Upper Chamber in the Maidstone case referred to above. The Tribunal first of all reviewed the Decision in that case to see if it was helpful in making the current determination. The issue in that case was an appeal against a decision of the LVT that a Lessee was not entitled to set off against unpaid service charges such part of an amount previously paid by her which were for future service charges. The Upper Chamber held that the appeal must fail. In other words, the LVT was right to determine that there could be no such set off. The Tribunal has been directed to paragraph 18 of that Decision. This reads as follows: “What the LVT had to determine was the Lessee’s service charge liability to the RTM company for the years 2005, 2006 and 2007. If the payment made by the Lessee to the managing agent in February 2007 included an amount in respect of reserves for the years up to and including 2004, that amount was and is held by the managing agent on trust for the Lessee. The RTM company does not hold the money, nor is it entitled to receive it from the managing agent under section 94, which relates only to money held on the acquisition date. Since the RTM company does not hold the money and is not entitled to it, it is not under any liability to the Lessee in respect of such money, and so no right of set-off can arise.”

(b) The Tribunal having reviewed the Maidstone Decision, came to the conclusion that the issue in that case was a matter of whether a claim for set-off was valid, or not. The Upper Chamber decided that such a claim for set-off could not be upheld. That is a completely different issue from the one which the Tribunal is now being asked to determine. The issue that is before the

Tribunal now is whether an amount which had been in the service charge account, but was no longer there, due to the unlawful act of the Respondents managing agent, should be paid over to the RTM company. The Tribunal took the view that the comments made in Paragraph 18 should be looked at in the context in which they had been made and not automatically apply them to a set of different circumstances. For this reason the Tribunal decided to distinguish the Decision in the previous case from the present case and decided not to follow that previous Decision.

10. Although both parties had an opportunity to do so, neither had referred the Tribunal to any other Case law or other legal authorities. The Tribunal reviewed the general law relating to service charge monies held by a managing agent on behalf of a landlord/principal. The provisions of Section 42 of the Landlord and Tenant Act 1987 clearly says that such service charge money is held in trust and has to be held in a "trust fund". The Tribunal was also assisted by general guidance given by Halsbury's Laws of England (Fourth Edition). In respect of relations between a Principal and Third persons in Paragraph 148 it says "As a general rule, a principal is responsible for all acts or his agents within the authority of the agent." In Paragraph 149 it says "a principal is not exempt, where he would otherwise be liable in respect of an act done or bound by a contract made by his agent, by reason of the fact that the agent in doing it was acting in fraud of the principal, or otherwise to his detriment." The Tribunal interpreted this as meaning that if the agent unlawfully takes money in breach of his contract, then the principal is liable to any third party for any such loss. The Tribunal also reviewed the provisions of Part 4 of the RICS Service Charge Residential Management Code. This says that Service Charge money "belongs to someone else". The Tribunal interpreted this as a reminder to managing agents that the money does not belong to their principal or to the agent, but someone else, namely that it is held in trust for the Lessees.
11. The Tribunal then went on to consider the meaning of the words "accrued" and "uncommitted" in Section 94 of the 2002 Act. Clearly the word "accrued" meant service charge money that had been collected from lessees in the past. In other words it was the balance of any service charge trust fund at any one time. The word "uncommitted" was a little more difficult. There was no definition of that word in the 2002 Act. The Oxford English Dictionary defines it as "not pledged or set aside for future use." The Tribunal reached the conclusion that the word "uncommitted" meant "not required for any current or immediate future liability" or "not currently required to be paid to any third party." There is no evidence before the Tribunal that there is any current or recent repair work or other service charge expenditure which has not been paid for or any other outstanding liabilities or expenses which remain unpaid.
12. Arrears of service charge. In a footnote on Page 2 of the Respondent's written submissions the Respondents refer to a spreadsheet "attached". No such spreadsheet was attached and the Tribunal have not had an opportunity of

reading it. The narrative of the footnote refers to “uncollected arrears of service charge of £9,633) and seeks to deduct them from the £16,602. The Tribunal reviewed whether the matter of uncollected arrears of service charges was material to the decision of whether an amount should be paid to the RTM Company and if so how much. The wording of Section 94, or indeed any other Section in Chapter 1 of the 2002 Act, makes no mention of how any uncollected arrears of Service Charge are to be dealt with at the acquisition date. Instead Parliament seems to have concentrated simply on requiring the Tribunal to determine the amount which is “held” at the acquisition date without considering who is to collect any such arrears or who they belong to. For that reason the Tribunal determines that any such uncollected arrears are irrelevant to the current decision.

13. The question to be decided was whether the sum of £16,602 was “held” by the landlord even though it did not physically exist at the date of the acquisition of the RTM. The Tribunal reviewed all the arguments made by the parties in their written submissions. The Tribunal agreed with the comments made by the Applicants in Paragraph 14 of their written submissions that Parliament could not have intended to allow a Landlord (or its agent) to unlawfully remove moneys from the service charge fund to reduce any balance which is to be paid to the RTM Company on acquisition of the RTM. It is not known what debates took place in Parliament at the time this Clause was being debated (if at all) and no extracts from Hansard were before it to persuade the Tribunal that its instinct was wrong. For that reason and the matters referred to above, the Tribunal reached the conclusion that the amount that had been unlawfully misappropriated by the landlords agents should be replaced and paid over to the RTM Company. It was considered quite unfair and bad law to allow a RTM Company to suffer purely because the landlords agent had acted unlawfully through no fault of the RTM Company.

14. Refund of Fees Application.

This application was made in respect of not only the current application, but also the previous matters concerning Applications under Sections 20C and 27A of the Landlord and Tenant Act 1985. Both parties had made written submissions as to this matter. The Respondent says it “does not believe this is an appropriate case to remit the fees to the Applicant.” It does not give any reasons or other arguments in support of its position. The Applicant maintained that he has largely succeeded in his application, the application had become essential and he was entitled to be reimbursed for the Fees of £500 which he has paid to the Tribunal. The Tribunal agrees with the Applicants submissions and orders that the Respondent shall forthwith refund to the First Applicant the fees of £500 which he has paid to the Tribunal.

Dated this 1st day of October 2010

J.B. Tarling

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John B. Tarling, MCMI Lawyer/Chairman

A member of the Panel appointed by the Lord Chancellor

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