



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

<b>Case Reference</b>	:	<b>LON/00AG/LSC/2013/0768</b>
<b>Property</b>	:	<b>Queen Court, Queen square, London WC1N 3BA</b>
<b>Applicant</b>	:	<b>Queen Court RTM Company Ltd</b>
<b>Representative</b>	:	<b>Ms Gourlay of Counsel instructed by the Applicant RTM Company</b>
<b>Respondent</b>	:	<b>West End District Properties Limited</b>
<b>Representative</b>	:	<b>Stuart Armstrong of Counsel instructed by Gisby Harrison Solicitors</b>
<b>Type of Application</b>	:	<b>For the determination of the reasonableness of and the liability to pay a service charge</b>
<b>Tribunal Members</b>	:	<b>Mrs S O'Sullivan Mr M Cartwright Mr C Piarroux</b>
<b>Date and venue of Hearing</b>	:	<b>11 and 12 May 2015 at 10 Alfred Place, London WC1E 7LR</b>
<b>Date of Decision</b>	:	<b>30 July 2015</b>

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**DECISION**

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## **Decisions of the tribunal**

- (1) The tribunal makes the determinations as set out under the various headings in this Decision
- (2) The tribunal had no application for reimbursement of fees before it and thus makes no order.

## **The application**

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (“the 1985 Act”).
2. The Applicant is a RTM company which acquired the right to manage the property known as Queen Court, Queen Square, London WC1N 3BA (the “Property”) on 12 July 2012.
3. The application arises out of a request made by the Applicant for the Respondent to account for some £79,000 of service charges recorded in the accounts as “*freeholder debts*”. In short according to the Applicant invoices were given to the Applicant by way of account for the sum after the amount was queried at a meeting shortly before the right to manage was acquired.
4. The relevant legal provisions are set out in the Appendix to this decision.

## **The hearing**

5. The Applicant appeared was represented by Ms Gourlay and the Respondent by Mr Armstrong, both of Counsel.

## **The background**

6. At a case management hearing held on 5 December 2013 the issue of jurisdiction was raised. There was some discussion as to whether the tribunal had jurisdiction to consider the issues raised by the Applicant and on what basis. It was agreed at that hearing that a preliminary hearing would take place at which the issue of jurisdiction would be considered. However subsequently in January 2014 the Respondent agreed that the tribunal had jurisdiction and the preliminary hearing was vacated. It was recorded that both parties agreed that the tribunal had jurisdiction on 13 February 2014. The application was withdrawn on 30 April 2014 but was successfully reinstated on 19 May 2014. At a further case management hearing on 26 February 2014 the Respondent appeared to reverse its position in relation to jurisdiction. Further

directions were made on that date. Since that date the tribunal has further directed that any jurisdictional issues could be raised at the commencement of the hearing.

7. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

### **The issues**

8. The parties identified the relevant issues for determination as follows:
  - (i) Preliminary issues in relation to jurisdiction;
  - (ii) Whether the application should be restricted to 2012; and
  - (iii) The payability and/or reasonableness of the sums raised in the 24 invoices
9. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

### **Jurisdictional issues**

10. Prior to hearing the parties on the issue of jurisdiction the background to the dispute was summarised as follows. The Respondent is the freeholder of the Property. Until February 2013 Mr Roger Fearnley, was the sole director and shareholder of the Respondent. The Applicant acquired the right to manage on 12 July 2012. In anticipation of acquiring the right to manage 2 directors of the Applicant Company met with Mr Fearnley on 20 June 2012. An issue had arisen in respect of a sum of money of £79,791 which had been paid to Mr Fearnley and described in the 2012 accounts as a "freeholder debt". The Applicant wished the freeholder to account for this amount. The explanation given at the meeting was that he/the Respondent had paid various sums to third parties which should have been paid out of the service charges. This was said to have been necessary as several leaseholders had not paid their service charges and there were insufficient service charges. As a result when service charge arrears were recovered from leaseholders by solicitors these sums were forwarded to Mr Fearnley and not passed through the service charge account. In support of his explanation Mr Fearnley had produced various documents, mainly consisting of invoices/emails to evidence the payments. Copies of these documents were provided to the Applicant by letter dated 7 November 2013.

11. Mr Armstrong confirmed that the Respondent sought to strike out the Applicant's application. He accepted that in principle the tribunal had jurisdiction to consider the matter. However he submitted the real question was whether the tribunal in the exercise of its case management powers should decline to exercise its jurisdiction and therefore strike out the application pursuant to rule 9(3)(d) on the grounds that it was a vexatious or abusive application. The basis for this application was that the Applicant has no interest in the amount of service charges payable as it did not pay any of the service charges it now wishes to challenge. Further it was said that any finding on the payability of the service charges was likewise not affect the leaseholders given that they were not parties to the application.
12. Counsel further submitted that this was not a service charge dispute at all but rather a claim against the Respondent for the sum of £79,791. Any attempt to recover this sum would have to be made in the county court as none of the possible course of action lie within the tribunal's jurisdiction. It was also submitted that there was no dispute in relation to the 2012 accounts as none of the costs evidenced by the receipts fall within the 2012 service charge year.
13. It was also denied that any demand for the service charges had been made but rather the receipts were provided by way of an explanation only.
14. Mr Armstrong was asked by the tribunal if there were any documentation which set out the arrangements in relation to what effectively appeared to have been a loan to the service charge account by Mr Fearnley. He confirmed that as far as he was aware no such documentation existed. As far as the service charge invoices were concerned Mr Armstrong accepted that the position in relation to documentation was not ideal but that in broad terms Mr Fearnley had assumed that the invoices he had paid had been demanded from the leaseholders in the normal course of events.
15. In response Ms Gourlay began by stressing that Mr Fearnley was a chartered accountant and more qualified than the average landlord.
16. She submitted that the Respondent would rather the dispute be resolved in the County Court. However given the invoices in issue relate to service charges the Applicant had considered it most sensible to have this issue resolved before issuing proceedings in the County Court. Although the Respondent's position appeared to be that the leaseholders would never be asked to pay the invoices in question the reality of the position was that if the Applicant ever asked for the loan to be repaid there would be a set off in relation to the invoices. The handing over of the invoices in 2012 was a demand.

17. Mr Gourlay further submitted that if the invoices have not been passed through the service charge account the RTM is the trustee and has a legitimate interest in those invoices. Further as a trustee the Applicant should know the terms of any loan in the accounts. The Applicant was trying to work out which invoices could properly be passed through the service charge account. The Applicant did intend to make a demand for repayment of the loan.

### **Jurisdiction - the tribunal's decision**

18. The tribunal declined to strike out the application.
19. The grounds set out in rule 9(3) (d) are a high bar. The tribunal was not satisfied that the application was vexatious or frivolous as suggested by the Respondent.
20. The sum in issue of £79,971 was a large sum of money and was shown in the accounts as a freeholder debt. The RTM company is clearly in an unsatisfactory position. As a trustee of the service charge account it has a clear duty to the beneficiaries of that account to seek recompense for any loan made and clarify details of any claims for set off. The tribunal accepted that it could not solve all of the issues between the parties as much did not fall within its jurisdiction. However the tribunal was persuaded by Ms Gourlay's submissions that any proceedings in the County Court were likely to raise issues of service charge which may well be referred to the tribunal for its determination in any event. Thus the tribunal was of the view in considering the issue of the invoices as potential service charges it will be of some assistance to the parties. The tribunal was not convinced by the suggestion that the proceedings related solely to 2012 whereas the invoices related to dates before then. The tribunal is able to amend proceedings to allow for the earlier period to be considered and did not consider either party would be prejudiced by such an amendment. In reaching this decision the tribunal also considered issues of proportionality, the parties were at the tribunal and were prepared to proceed and we considered it to be in the interests if justice to proceed.
21. The hearing was then adjourned to the following day to allow the parties an opportunity to narrow the issues and reconvened at 10.30am to consider the substantive issues

### **Reasonableness and payability of the invoices**

22. The parties had prepared a table of the various invoices which was handed to the tribunal. Of the invoices listed the following were conceded as not having been demanded/put through the service charge account;

- i. All invoices rendered by Schulman's solicitors, some 16 out of the total of 24 invoices;
  - ii. An invoice dated 20 February 2009 from MDS Electrical Contractors;
  - iii. An invoice dated 1 January 2011 from Barra accountancy services;
23. The tribunal heard evidence from Mr Fearnley. He confirmed that three different managing agents had acted over the relevant period of 2004 to 2012. At all times professional managing agents had been instructed. His evidence was that he had been advised that he was entitled to set off sums received against loans made. He also confirmed that he considered that he was entitled to have the total sum as evidenced by the invoices in the sum of £79,971 repaid. It was his understanding that those invoices had been passed through the service charge and properly demanded from the leaseholders.
24. Of the remaining invoices the evidence heard and the tribunal's decision is as set out below. The tribunal would comment that the lack of documentary evidence made its task particularly difficult and the tribunal did its best in the absence of such evidence;

- i. Dunwoody invoice dated 28 January 2005 in the sum of £13,571.25

This was heard to be a payment made in respect of major works and appeared in the accounts at tab 8 of the bundle.

The tribunal allowed this invoice on the basis that it appeared in the accounts and formed part of a major works contract and on the balance of probabilities was likely to have been demanded.

- ii. LPL investigations dated 22 January 2007 in the sum of £6,037.94

This was said to come within general portorage and formed part of the total cost of £18,000. The interest was conceded by the Respondent.

This was disallowed. The tribunal had no evidence that this sum had been demanded.

- iii. Amalgamised lifts claim form dated 16 July 2009 in the sum of £5,729.25

It was accepted that this figure was not shown clearly in the accounts and the Respondent submitted it was "*highly likely*" that it had been put through.

This was disallowed. The tribunal had no evidence that this sum had been either put through the service charge or demanded.

iv. Jason Salter invoices

These invoices were said to form part of the management fees. Again there was no evidence as to whether these sums had ever formed part of the service charges.

v. Banner Jones £2,238.67

It was unclear to the tribunal if this sum was a finance charge or part premium and part finance. The Respondent submitted that the sum of £1,499.80 was recoverable.

The tribunal had very little documentation to assist it and was not satisfied what the amount represented and that it had ever formed part of the service charge. Accordingly this amount was disallowed in full.

vi. Billingford

Again as there was no evidence to support the contention that this amount had been included in the accounts this sum was disallowed.

vii. Wetherby £5,000

Mr Armstrong could say no more than that this was the type of amount one would expect to see in service charge accounts. In the absence of any evidence to show this sum formed part of the service charge accounts it was disallowed.

viii. Moncton - £5,000

No invoice was provided for this sum and no evidence that they had formed part of the accounts. The sum was therefore disallowed.

ix. Burgess - £2991

There was no entry in the accounts for this sum but an entry for a greater sum. For this period 08/09 the tribunal had a statement of expenditure and it can be seen that this sum is not included. It was therefore disallowed.

x. Ellis & Moore - £5,875

This appeared to be a retainer but the tribunal had no evidence it had formed part of the accounts. It was therefore disallowed.

25. The tribunal was somewhat dismayed at the lack of information provided by the Respondent. Professional managing agents had been appointed throughout the period. However no evidence had been produced to show that any of the sums in question had been demanded. The tribunal was asked to take leaps of faith to find that it was likely sums had been demanded. Given the poor management in evidence we declined to do so.

### **Section 20B**

26. Given that all but one of the invoices was disallowed no issue arose under section 20B.

### **Applications for costs**

27. There was no application for refund of fees.
28. The Respondent had made an application for costs under Rule 13 dated 27 May 2015. However this was confirmed to be withdrawn by a letter from the solicitors for the Respondent dated 18 May 2015.

**Name:** S O'Sullivan

**Date:** 30 July 2015



## **Appendix of relevant legislation**

### **Landlord and Tenant Act 1985**

#### **Section 18**

- (1) In the following provisions of this Act "service charge" means 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, and
  - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
  - (a) "costs" includes overheads, and
  - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

#### **Section 19**

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  - (a) only to the extent that they are reasonably incurred, and
  - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

#### **Section 27A**

- (1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
  - (a) the person by whom it is payable,
  - (b) the person to whom it is payable,
  - (c) the amount which is payable,

- (d) the date at or by which it is payable, and
  - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
- (a) the person by whom it would be payable,
  - (b) the person to whom it would be payable,
  - (c) the amount which would be payable,
  - (d) the date at or by which it would be payable, and
  - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

## **Section 20**

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
- (a) complied with in relation to the works or agreement, or
  - (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

- (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
- (a) an amount prescribed by, or determined in accordance with, the regulations, and
  - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

### **Section 20B**

- (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.

### **Section 20C**

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

- (2) The application shall be made—
  - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
  - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
  - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
  - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
  - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

### **Leasehold Valuation Tribunals (Fees)(England) Regulations 2003**

#### **Regulation 9**

- (1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.
- (2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

### **Commonhold and Leasehold Reform Act 2002**

#### **Schedule 11, paragraph 1**

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
  - (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
  - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
  - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
- (a) specified in his lease, nor
  - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

**Schedule 11, paragraph 2**

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

**Schedule 11, paragraph 5**

- (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration charge is payable and, if it is, as to—
- (a) the person by whom it is payable,
  - (b) the person to whom it is payable,
  - (c) the amount which is payable,
  - (d) the date at or by which it is payable, and
  - (e) the manner in which it is payable.
- (2) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) may be made in respect of a matter which—
- (a) has been agreed or admitted by the tenant,

- (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
- (a) in a particular manner, or
  - (b) on particular evidence,
- of any question which may be the subject matter of an application under sub-paragraph (1).

**Schedule 12, paragraph 10**

- (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
- (2) The circumstances are where—
- (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
  - (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
- (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
- (a) £500, or
  - (b) such other amount as may be specified in procedure regulations.
- (4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.