



FIRST-TIER TRIBUNAL

**PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case References : **LON/00BJ/LUS/2022/0006**

Property : **46 Falcon Road, London SW11 2LR**

Applicant/Tenant : **46 Falcon Road RTM Company Ltd**

Representative : **Mr Jesus Rodriguez Rodriguez**

Respondent/Landlord : **Boccel Management Ltd (1)**
Bredasdorp Investments Limited (2)

Representative : **Mr Davidoff of ABC the managing
agents**

Type of Application : **Application for the determination of the
amount of any uncommitted service
charges**

Tribunal Members : **Tribunal Judge Roger Cohen**

Venue : **By video conferencing using the VHS
platform**

Date of hearing : **27 November 2023**

Date of Decision : **18 December 2023**

DECISION

Background

1. This is an application concerning 46 Falcon Road, London SW11 2CR (“the Property”). The Property comprises 25 flats and some space let for commercial use. The First Respondent is the management company for the Property, although it no longer has management functions. The Applicant has acquired these functions, being the Right to Manage (RTM) company for the Property. The Second Respondent is the freehold owner.
2. The Applicant has applied to this Tribunal for an order under section 94 of the Commonhold and Leasehold Reform Act 2002 (“the Act”) that the Respondents pay to the Applicant the sum of £1,200. The Applicant says that it is entitled to that sum under section 94(1) and applies to this Tribunal under section 94(3) to determine the amount of any payment that falls to be made under section 94.
3. The Tribunal was not shown any of the leases between the Respondents and the flat owners. However, the application proceeded on the basis that the service charge regime was operated by the First Respondent who in turn engaged a firm of managing agents who will be referred to as ABC.
4. The service charge year was the calendar year, expiring on 31 December each year.
5. There have been many disputes between the parties as to service charges and some documents and comments concerning those other disputes were produced to and made to this Tribunal. Those other disputes have been disposed of, leaving the application under section 94 of the Act as the single issue for determination at this time. The directions made by the Tribunal on 4 August 2022 (Judge Brilliant),¹⁷ August 2022 (Judge Carr),¹⁰ January 2023 (Judge Dutton) and 26 September 2023 (Judge Korn) confirm that the treatment of the sum of £1,200 in terms of section 94 is that single issue.
6. The Tribunal was not provided with an agreed bundle. It was shown about 400 pages of documents (some documents being duplicated) under various digital tabs in the case file. The Tribunal heard evidence and submissions from Mr Rodriguez on behalf of the Applicant and from Mr Davidoff of ABC who made points on behalf of the Respondents, although no longer retained by them in relation to the Property.

The facts

7. The Tribunal will first set out the facts that it has found.
8. On 26 October 2021, the Tribunal decided that the Applicant was entitled to the right to manage the Property. The Tribunal’s decision was made in case reference LON/00BJ/LRM/2021/0019. On 26 November 2021, a firm of accountants, SKS Ramon Lee Limited issued an invoice to its client, the First Respondent for its fees of £1,140 for producing the service charge accounts for the year ended 31 December 2020. The accounts were service charge accounts to comply with the lease rather than statutory accounts for filing at Companies House. In this decision, a reference to “the accountants” is to this firm.
9. On 31 December 2021, the 2021 service charge year closed.
10. On a date not known with precision but on or before 17 January 2022, ABC sent to SKS Ramon Lee Limited a bundle of documents so that the accountants could draw

the service charge accounts for the service charge year 2021 (see the email dated 17 January 2022 from Charlotte Cameron of ABC to Jamie Fisk of BW Residential, on behalf of the Applicant). The Tribunal has not been shown any engagement letter agreed between the accountants and the First Respondent (or ABC on the First Respondent's behalf) or any correspondence between the accountants and ABC and/or the First Respondent.

11. Reverting to the chronology, 27 January 2022 was the relevant date for the acquisition by the Applicant of the right to manage the Property pursuant to the 26 October 2021 decision of this Tribunal. Thus, from 27 January 2022 the right to manage the Property passed from the First Respondent to the Applicant.
12. To date, the accountants have neither produced the service charge accounts for the year 2021 nor any invoice for any work in respect of that instruction. The anticipated fee for the accountants to produce the 2021 service charge accounts was £1,200.
13. There stands to the credit of an account with Barclays Bank in the name of ABC the sum of £1,200. It is clear from the evidence and not disputed that this balance accrued to the First Respondent by payments made by flat owners under the service charge regime. As at 27 January 2022 the balance was held in another account in the name of ABC. The Tribunal expressly finds that at the acquisition date the balance was held in an account on behalf of the First Respondent and to which section 94 of the Act can apply if its criteria are otherwise met.

The case for each party

14. The Applicant says that the balance held on that account is accrued, uncommitted service charges held by the First Respondent on the acquisition date being 27 January 2022.
15. The Respondent says that it has held and continues to hold this amount on account of the fees payable to the accountant for the preparation of the 2021 service charge accounts as and when the accounts and the invoice are received.

Section 94

16. Against that background, the Tribunal will now consider the test for ordering payment from the former managers to the RTM company.
17. The Tribunal refers to section 94(2) of the Act. This in effect defines the amount of any accrued uncommitted service charges as any sums which have been paid to the former manager by way of service charge 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.
18. The sum of £1,200 held in the ABC account is accrued service charges. The extent to which the funds are committed depends on what amount is required to meet the costs incurred before the acquisition date.
19. On the facts of this case what amount was required to meet the costs incurred before 27 January 2022? All that had occurred before 27 January 2022 was that a bundle had been sent by ABC to the accountants. No evidence was provided as to the terms of the engagement of the accountants by ABC nor was the Tribunal shown any communications between ABC and the accountants.

The case law

20. The question becomes what costs were incurred before 27 January 2022? In directions made by the Tribunal prior to the hearing, the parties were referred to *OM Limited v New River Head RTM Company Limited* [2010] UKUT 394 LC. This case does not discuss the meaning of “costs incurred” within the meaning of section 94(2). The Tribunal holds that it is not necessary to analyse this authority to come to its decision.
21. In *Burr v OM Property Management Limited* [2013] 1 WLR 3071 the Court of Appeal considered when costs were “incurred” for the purposes of section 20B of the Landlord and Tenant Act 1985. In his judgment, which the other two members of the Court agreed, Lord Dyson MR said at [11]

“... there is an obvious difference between a liability to pay and the incurring of costs ... a liability must crystallise before it becomes a cost.”

and at [15] that

“... costs are not incurred within the meaning of [section 20B] on the mere provision of services or supplies.”
22. In *Capital & Counties Freehold Equity Trust Limited v BL plc* [1987] 2 E6LR 49 Judge Baker QC held that, on the true meaning of a lease of office premises, costs were incurred when they were expended or became payable.
23. The Westlaw summary is as follows. In a lease of an office building, T covenanted to pay by way of a service charge a proportion of all sums "which may...during the said term be expended or incurred or payable by the landlord." Held, that T was not liable to contribute such a proportion of the cost of relevant work which L had contracted with builders to have carried out, but which had not yet been done by the end of the term. It could not be said that L had "incurred" such costs within the meaning of T's covenant. The Tribunal acknowledges that *Capital & Counties* was a case in which the High Court construed a lease and so a different context. Equally, *Burr* is a case in which the Court of Appeal construed a statute other than the Act. Nevertheless, both cases provide guidance to what must occur in order for costs to be “incurred” before the acquisition date within the meaning of section 94(2).

The law applied to the facts

24. There was no evidence as to what works the accountants had undertaken prior to the 27 January 2022. The Tribunal thinks it a reasonable assumption that no work had been done in the period from 17 to 27 January 2022 as a firm such as the accountants in this case may well have been busy dealing with client’s tax returns given the 31 January deadline. That factor provides some support for the absence of any evidence of anything having been done.
25. On the facts of this case, the accountants did no more before 27 January 2022 than receive a bundle of documents. That would not satisfy the approach in *Burr* nor the approach in *Capital & Counties*. Accordingly, as at that date, there was no amount required to meet costs incurred before that date.
26. Thus, no deduction is to be made from the £1,200 accrued uncommitted service charges in the ABC account. The entirety of that amount is accrued uncommitted

service charges. There is no scope for any reduction or retention on the true meaning of section 94 (2) and the facts as found.

27. The Respondents would say that this conclusion is unfair in its effect when the accountants do deliver the accounts and an invoice. The Respondents will not have accrued service charges with which to settle the accountants' invoice. Recovery from the flat owners direct or via the Applicant may be difficult to achieve. In evidence, Mr Davidoff said that he did not chase the accountants for the accounts as he did not want to remind them to complete their work. Also, he did not instruct the accountants to stop work because they may have issued an invoice for work done on a time basis. The fact is that once the Tribunal decided that the Applicant would acquire the right to manage there was a 3-month transitional period in which a decision could and should have been taken as to what accountancy services the Respondents should engage and what they should leave to the Applicant to deal with from the acquisition date. The Respondents did themselves no favours by instructing the accountants as they had done in prior years without paying regard to the transfer of the right to manage to the Applicant. Against that, the Applicant expressed its understandable concern that absent any invoice from the accountants the balance of £1,200 might remain in the ABC account for some long time when it could be used to defray service costs.

Decision

28. The Tribunal determines that £1,200 is the payment that falls to be made to the Applicant by the Respondents under section 94(2) of the Act.

Tribunal Judge R Cohen

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case..
2. The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

5. If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

STATUTORY PROVISIONS

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 [the appropriate tribunal]¹ 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.

97 Management functions: supplementary

(1) Any obligation owed by the RTM company by virtue of section 96 to a tenant under a lease of the whole or any part of the premises is also owed to each person who is landlord under the lease.

(2) 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,

is not entitled to do anything which the RTM company is required or empowered to do under the lease by virtue of section 96, except in accordance with an agreement made by him and the RTM company.

(3) But subsection (2) does not prevent any person from insuring the whole or any part of the premises at his own expense.

- (4) So far as any function of a tenant under a lease of the whole or any part of the premises—
- (a) relates to the exercise of any function under the lease which is a function of the RTM company by virtue of section 96, and
 - (b) is exercisable in relation to a person who is landlord under the lease or party to the lease otherwise than as landlord or tenant,

it is instead exercisable in relation to the RTM company.

(5) But subsection (4) does not require or permit the payment to the RTM company of so much of any service charges payable by a tenant under a lease of the whole or any part of the premises as is required to meet costs incurred before the right to manage was acquired by the RTM company in connection with matters for which the service charges are payable.