FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	CHI/00ML/LUS/2024/0003
Property	:	21 Sillwood Road Brighton East Sussex BN1 2LF
Lead Applicant	:	Massimo Tamburini and Ms Ritto on behalf of Sillwood Phoenix RTM
Respondent	:	ML Property Co Limited
Representative	:	GWCA Solicitors Kyle Fournillier Counsel
Type of application	:	Uncommitted Service Charges – section 94(3) Commonhold and Leasehold Reform Act 2002 ("CLRA 2002")
Tribunal	:	Mr D Jagger MRICS Ms C Barton MRICS Miss T Wong
Date of hearing	:	31 January 2025
Date of Determination	:	24 February 2025

DECISION

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Decisions of the Tribunal

1. The Tribunal determines that the sum of £5,267.66 is the payment that falls to be made to the Applicant by the Respondent under section 94(2) of the Act.

The Proceedings

2. This is an application concerning 21 Sillwood Road Brighton BN1 2LF ("the Property"). The Property is a mid-terrace Victorian three storey building plus semi basement which was converted to form 4 flats. The Respondent instructed Austin Rees Limited as 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 on the 11 July 2023.

3. The Applicant applied to this Tribunal on the 22 March 2024 for an order under section 94 of the Commonhold and Leasehold Reform Act 2002 ("the Act") that the Respondent pay to the Applicant the sum of £4,012.70 being the balance of the Reserves as at 9 August 2023. 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. This is stated to be the estimate of the amount of the accrued uncommitted service charges and the Tribunal will consider the precise amount at the date of the formation of the RTM later in this decision.

4. The Tribunal was not shown any of the leases between the Respondent and the flat owners. However, the application proceeded on the basis that the service charge regime was operated by the Freeholder who in turn engaged a firm of managing agents who will be referred to as Austin Rees Limited.

5. Based upon the Service Charge Account, the service charge year was the calendar year, expiring on 24 March each year.

6. The directions made by the Tribunal on 25 September 2024 (Judge Jutton) confirm that the treatment of the sum of £4,112.70 in terms of section 94 is that single issue.

7. The Tribunal was provided with an agreed bundle which extended to 76 pages which included a Witness Statement from Daniel Paige of Austin Rees Limited, the Respondent's Case Summary from Abigail Forrest GWCA Solicitors and a letter form the Applicant in response. The Tribunal heard evidence and submissions from Ms Gabriela Ritto on behalf of the Applicant and from Mr Daniel Page of Austin Rees Limited who made points on behalf of the Respondent, although no longer retained by them in relation to the Property.

8. The application was heard at a face-to-face hearing on 31 January 2025. The Applicant was represented by Ms Ritto and the Respondent was represented by Mr Kyle Fournillier of counsel.

The Facts

9. The essence of the issues raised by the leaseholder of Flat B on behalf of RTM Company at the hearing on 31 January 2025 is that when they purchased the flat in December 2019, they were completely unaware of the first loan provided to the service charge account by the freeholder between exchange and completion of the transaction. Further, the leaseholders were not consulted regarding the second loan in 2020. There is no documentation for the sums in question, it is not known precisely where the monies were spent and therefore it is not recoverable by Respondent.

10. The Tribunal will first set out the facts that it has found.

11. On the 9 January 2023 a Claim Notice seeking the RTM by Sillwood Phoenix RTM Company Limited was filed and the freeholder Mr Lovegrove (ML Property Co Ltd) confirmed his consent to this application and the right to manage was acquired on the 11 July 2023. On this date Austin Rees Ltd ceased management of the building.

12. The Service Charge Account for the year ended 24 March 202o show an entry under Liabilities in the sum of £4,100 "due to freeholder". The following years' Service Charge Accounts show an entry of £8,500 "due to freeholder". An Accountant's Report of Factual Findings was prepared on the 23 September 2021 by Auguste & Auguste Chartered Accountants.

13. Reverting to the chronology, the 11 July 2023 was the relevant date for the acquisition by the Applicant of the right to manage the property. Thus, from 11 July 2023 the right to manage the property passed from the Respondent to the Applicant.

14. A bank statement from Barclays Bank confirms the closing balance on the 11 July 2023 was £5,267.66.

15. The Tribunal expressly finds that at the acquisition date this was the balance held in an account on behalf of the Respondent and to which section 94 of the Act can apply if its criteria are otherwise met.

The Case for each Party

16. The Applicant says that the balance held on that account is accrued, uncommitted service charges held by the Respondent on the acquisition date being 11 July 2023. The debt of £8,500 owed to the freeholder cannot be transferred to the RTM Company. It is stated by the Applicant that any necessary major works were undertaken without Section 20 Consultations and therefore the leaseholders were not provided the opportunity to consider the nature and cost of the proposed works and therefore why was it necessary for a loan to be provided by the freeholder.

17. The Respondent says the case is quite simple: the loan provided by the Respondent was committed service charges and is therefore repayable by the RTM Company.

18. It is stated that the Respondent paid £8,500 into the service charge account in two traches on the 13 December 2019 and the 30 June 2020. It is averred that the monies were provided to assist a substantial shortfall in the service charge account, due to non-payment of service charges by the leaseholders and to allow for urgent works to take place.

19. Mr Fournillier provided the Tribunal with a copy of the case "OM Limited v New River Head RTM Company Ltd" which was considered the lead caselaw in this matter.

<u>Section 94</u>

20. Against that background, the Tribunal will now consider the test for ordering payment from the former managers to the RTM company.

21. 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.

22. The sum of £5,267.66 is held in the Managing Agents account for accrued service charges on the acquisition date.

<u>Case Law</u>

23. 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."

24. 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.

25. 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).

26. Now, turning to *OM Ltd v New River Head RTM Co Ltd [2010] WL4276050.* In this case The Upper Tribunal Judge Mole QC held that " the natural meaning of those words (Section 94) is that what has to be paid is what the landlord or manager has actually got, not what he was entitled to have but failed to get or had at one stage but does not have now" The charges must be "uncommitted" service charges, so if they had been committed to a particular management debt, they would be outside the scope of Section 94.

<u>The law applied to the facts</u>

27. It is not disputed between the parties that the Respondent deposited £8,500 into the service charge account in two traches during 2019/2020. However, what is disputed was the need and purpose of the monies. There was no evidence to confirm why the money was deposited into the service charge account. Surely, it is the duty of the managing agents to secure sufficient funds from the leaseholders for any major works. Further, there is no supporting evidence by way of Section 20 consultation for such major works.

28. There is nothing in the service charge accounts to confirm the monies were actually committed and the Tribunal thinks it could be a reasonable assumption that the monies form part of the uncommitted sum on the 11 July 2023. That factor provides some support for the absence of any evidence of anything having been done. Further, no documentation was submitted confirming a loan agreement between the parties.

29. On the facts of this case, there is insufficient evidence to confirm the debt owed to the Respondent were "committed" service charges. At best, this was a discretionary payment made by the Respondent without consultation with the leaseholders.

30. Individual accounts for the leaseholders show there were total service charge arrears in the sum of £5,377.40. However, the balance of uncommitted service charges was £5,267.66 which is a positive figure and once again leads the Tribunal to suggest the monies paid in by the Respondent were uncommitted.

31. Thus, no deduction is to be made from the £5,267.66 accrued uncommitted service charges in the service charge account as at 11 July 2023. 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) on the facts as found.

32. Finally, the Applicant states that during the years 2023 and 2024 there was a fire testing service contract with Brighton Fire Alarms Ltd for the sums of £695.46 and £740.59 respectively. Fire safety testing and risk assessment to a converted building are paramount and there is a duty on the RTM provide this in to order to comply with current legislation.

Decision

33. The Tribunal determines that £5,267.66 is the payment that falls to be made to the Applicant by the Respondent under section 94(2) of the Act.

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, 7

(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.