FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AA/LSC/2023/01153**
Property	**:**	**Flats 1-10, White Horse House, 1 Little Britain, London EC1A 7BX**
Applicant	**:**	**The lessees of Flats 1 – 10 (1)** **White Horse House RTM Co Ltd(2)**
Representative	**:**	**Lease Law Ltd**
Respondent	**:**	**Proxima GO Properties Ltd OM Ltd (1)** **OM limited (2)**
Representative	**:**	**JB Leitch Ltd**
Type of application	**:**	**To determine the amount of any accrued uncommitted service charges to be paid under section s.94(3) of the Commonhold and Leasehold Reform Act 2002** **To determine the reasonableness and payability of service charges**
Tribunal members	**:**	**Judge H Carr** **Ms A Flynn**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**10th October 2024**

DECISION

Decisions of the tribunal

(1) The tribunal determines that there are no service charges payable by the Applicant Leaseholders to the Second Respondent following the acquisition of the Right to Manage on 12th October 2022 as the Applicant Right to Manage Company has acquired the right/responsibility to carry out all services under the leases for which service charges are payable.

(2) The amount of accrued uncommitted service charges held by the Respondent at the date of acquisition of the RTM which it is liable to pay to the Applicant pursuant to s.94 of the Commonhold and Leasehold Reform Act 2002 is £149,516 plus any further uncommitted service charges as the parties may agree following this decision.

(3) The tribunal makes the determinations as set out under the various headings in this Decision/

(4) The sum is payable within 14 days from today.

The application

1. The application relates to a block (The Block) containing 10 flats which is part of a larger building (the Building) that includes 3 other blocks, Franklin House, Wesley House and Buckley House (the Neighbouring Blocks). The Building is a terrace of non-identical blocks of varying heights and styles which are attached to one another but are self-contained. There are 43 flats in the Building (including the 10 flats that are in the Block).

2. The first Respondent holds each of the blocks in the building under a separate headlease. The freehold of each of the blocks in the building is held by the City of London.

3. The 10 flats in the block are all held on tripartite leases in near identical terms. The relevant terms of the lease will be referred to as and when relevant.

4. The first Applicants are all the leaseholders of the block. The second Applicant is an RTM company which is the no-fault manager of the building. The acquisition date was 12th October 2022. All the Applicant Lessees are members of the Applicant RTM Company.

5. By an application dated 6th April 2023 the Applicant RTM company made an application to the tribunal to determine

(i) the reasonableness and payability of service charges under s.27A of the Landlord and Tenant Act 1985

(ii) the amount of any payment which fell due under s.94 of the Commonhold and Leasehold Reform Act 2002(CLRA)

6. The Applicant has asked that the tribunal answer the following question:

(i) Whether the Applicant RTM Company has acquired the right/responsibility to carry out all services under the leases for which service charges are payable?

(ii) If not, which services are still to be provided by the Respondents and paid for by the Applicant Lessees as a service charge?

(iii) Whether the Applicant Lessees are liable to pay service charges for major works carried out to neighbouring premises?

(iv) The amount of any service charge payable by the Applicant Lessees to the Second Respondent following the exercise of the right to manage;

(v) The payability of service charges for the period 1 August 2021 to 31 July 2022 (and specifically, the proportion of the service charge payable in respect of reserve fund contributions for major works that have not been carried out)?

(vi) The payability of service charges for the period 1 August 2022 to the acquisition of the right to manage on 12 October 2022 (and specifically, the payability of the sums in respect of reserve fund contributions)?

(vii) The quantum of any service charges payable by the Applicant Lessees to the Second Respondent for the period 1 August 2021 to 31 July 2022 and 1 August 2022 to 12 October 2022 and after the 12 October 2022?

(viii) Whether the Second Respondent has to account to the Applicant RTM Company for the sums paid by the Applicant Lessees towards reserves collected for major works (but not expended) before the exercise of the right to manage?

(ix) The sums, if any, that are to be paid to the Applicant RTM Company under s.94 Commonhold and Leasehold Reform Act 2002 (CALRA 2002)

7. On 5th February 2024 Judge Nichol issued directions on the applications. He directed the Respondent to send to the Applicant the following:

(i) A copy of the most recent buildings insurance policy or a summary of cover, a copy of the schedule and evidence of payment of the premium;

(ii) Brief details of the claims history for the last 3 years;

(iii) The final accounts for the two years prior to the handover of management from the Respondents to the Applicant;

(iv) A list of service charges due from or held on account in respect of each flat;

(v) Details of any surplus monies held on account of service charges; and

(vi) The percentages of service charges payable in respect of all the flats contained at the premises.

8. The Second Respondent has provided the documents requested.

9. The directions did not refer to the s.27A application, nor provide any directions in connection with that application. However the parties have agreed to continue with that application as it needs to be resolved to enable the tribunal to determine the s.94 application.

10. The application named two Respondents. The parties are agreed that the First Respondent can be removed from the proceedings and the Tribunal agrees that the First Respondent has no role in these proceedings. It therefore uses its powers under Rule 22(1) (b) of the procedural rules and directs that the First Respondent is removed from the proceedings.

11. For clarity the remaining Respondent is referred to in this decision as the second Respondent.

The Law

12. Section 94 of the CLRA provides as follows:

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 2 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 [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

13. Guidance on the proper approach to the jurisdiction under s.94 was provided by HHJ Mole KC in *OM Ltd v New River Head RTM Ltd* [2010] UKUT 394 (L) in particular at [21] – [26]

14. Section 96 of the CLRA provides as follows:

Management functions under leases

(1) This section and section 97 apply in relation to management functions relating to the whole or any part of the premises.

(2) Management functions which a person who is landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company.

(3) And where a person is party to a lease of the whole or any part of the premises otherwise than as landlord or tenant, management functions of his under the lease are also instead functions of the RTM company.

(4)Accordingly, any provisions of the lease making provision about the relationship of—

(a) a person who is landlord under the lease, and

(b) a person who is party to the lease otherwise than as landlord or tenant,

in relation to such functions do not have effect.

(5)"Management functions" are functions with respect to services, repairs, maintenance, improvements, insurance and management.

(6)But this section does not apply in relation to—

(a)functions with respect to a matter concerning only a part of the premises consisting of a flat or other unit not held under a lease by a qualifying tenant, or

(b)functions relating to re-entry or forfeiture.

(7)An order amending subsection (5) or (6) may be made by the appropriate national authority.

15. Service charge liability

The Lease

16. The relevant clauses of the lease are set out below.

17. The lease defines 'the Building' at Clause 2 (a), as

'the building comprising several flats and commercial premises including the Demised Premises and all structural parts thereof including the roofs gutters rainwater pipes foundations floor all walls bounding individual properties therein and all external parts of the Building and all Service installations not used solely for the purpose of an individual property edged green on the Plan'.

18. The definition of 'the Building' is also included in the First Schedule of the lease

The Building

ALL THAT piece of land known for development purposes as Block G Little Britain London EC1 shown edged green on the Plan with any buildings or structures erected or to be erected hereon or on some part

thereof together also with any adjoining land which may be added thereto within the Perpetuity Period and together with any buildings or structures erected or to be erected thereon or on some part thereof.

19. The Plan attached to the Leases shows the Building as including the White Horse block with Franklin House, Wesley House, Buckley House and the commercial unit.

20. The Block is defined at clause 2(b) as 'that part of the Building containing the Demised Premises as is more particularly edged blue on the Plan.

21. The Maintained Property, the property for which maintenance expenses are expended or reserved by the Second Respondent in fulfilling its obligations specified in the Sixth Schedule is defined in the Second Schedule

The Maintained Property

FIRST the entrance halls passages landings and staircases and the other parts of the Building which are used in common by the lessees or occupiers of any two or more of the Dwellings therein including any lift or lifts and the glass in the windows of such common parts and such other parts of the Building not intended to be comprised in the leases of the flats in the Building **SECONDLY** the structural parts of the Building including the roofs gutters rainwater pipes foundations floors all walls bounding individual dwellings therein and all external parts of the Building and of Service installations not used solely for the purpose of an individual Dwelling **THIRDLY** the external surface(for the purpose of cleaning only) of the glass in the windows of the Dwellings EXCEPTIMG AND RESERVIMG from the Maintained Property the glass in the windows of the individual Dwellings and interior joinery plaster work tiling and other surfaces of walls and the floors down to the upper side of the joists slabs or beams supporting the same and the ceilings up to the underside of the joists slabs or beams to which the same are affixed to the Dwellings and the Service Installations which exclusively serve individual Dwellings and the exterior doors and window frames of the Dwellings' .

22. The Maintenance Expenses are set out in the Sixth Schedule of the lease. There are three parts to the maintenance expenses, Part A, Part B and Part C.

23. The Part A expenditure comprises:

1. Providing inspecting maintaining renting renewing reinstating replacing and insuring the fire fighting appliances (if any) communal telecommunication reception apparatus electronic door entry system(s) and such other equipment relating to the Maintained Property by way of

Rent or Service Contract of otherwise as the Management Company may from time to time consider necessary or desirable for the carrying out of the acts and things mentioned in this Schedule. 80 4

2. Keeping cleaned as often as in the opinion of the Management Company it shall be reasonably necessary the external windows of the Properties and of the common parts of the Building.

3. Inspecting rebuilding repointing renewing or otherwise treating all the external common parts of the Building forming part of the Maintained Property including all doors door frames windows and window frames and carrying out all remedial work to the structure of the Building (including the foundations roof space and roof) and replacing all worn or damaged parts thereof so often as in the opinion of the Management Company it shall be reasonably necessary.

24. The Part B expenditure includes:

1. Providing inspecting maintaining cleaning renting renewing reinstating replacing and insuring the lift(s) (if any) and such other equipment relating to the Maintained Property by way of Rent or Service Contract or otherwise as the Management Company may from time to time consider necessary or desirable for the carrying out of the acts and things mentioned in this Schedule.

2. Inspecting cleaning redecorating or otherwise treating as may be reasonably necessary all the external and internal common parts of the Building forming part of the Maintained Property including all doors door frames windows and window frames and replacing all worn or damaged parts thereof including the internal carpeted areas or part of parts thereof so often as in the opinion of the Management Company it shall be reasonably necessary.

3. Repairing maintaining inspecting and as necessary reinstating or renewing the Service Installations forming part of the Building forming part of the Maintained Property.

25. Part 'C' expenditure is for services such as staff costs, collection of rents, preparation of service charge accounts and general management.

26. The seventh schedule to the lease sets out the Lessee's proportion of maintenance expenses at paragraph 1 of the Schedule. In the specimen lease provided the provisions were as follows:

1. The Lessee's Proportion means:

(a) A 2.326% part of the costs in connection with the matters mentioned in Part A of the Sixth Schedule hereto and whatever of the matters referred to in Part C of the said Schedule as are expenses properly incurred by the Management Company which relate to the matters mentioned in Part 'A' of the said Schedule

(b) A 5.51% part of the costs attributable to the Block in connection with the matters mentioned in Part 'B' of the Sixth Schedule hereto and whatever of the matters referred to in Part 'C' of the said Schedule as are expenses properly incurred by the Management Company which relate to the matters mentioned in Part 'B' of the said Schedule.

27. Each of the Applicant leaseholders pays 2.236% for the total Part A service charge expenditure for the Building (making a total of 23.26%). The Applicant Lessees service charge proportions for the Part B service charge expenditure vary from 5.51% to 11.29% but total 100%.

28. Paragraph 2 of the Seventh Schedule provides a mechanism to recalculate the proportions in particular circumstances.

2. If due to any re-planning of the layout of the Building by the Lessor it should at any time become necessary or equitable to do so the Management Company shall recalculate on an equitable basis the percentage appropriate to all Dwellings and notify the lessees accordingly and in any such case as from the date specified in the notice the new proportion notified to the Lessee in respect of the Demised Premisses shall be substituted for those set out in Paragraph 1 above and the new percentages notified to the lessees in respect of the Dwellings shall be substituted for those set out in the Seventh Schedule of their leases

The hearing

29. The hearing took place on 8th July 2024.

30. Both Applicants were represented by Ceri Edmonds of Counsel at the hearing.

31. The Second Respondent was represented by Sonia Rai of Counsel.

32. On 4th July 2024 the Respondents' solicitors applied for two new witness statements to be considered by the tribunal and for the witnesses to give oral evidence.

33. On 5th July 2024 the Applicants' representative objected to the adducing of additional evidence and asked for a supplemental bundle to be admitted.

34. The tribunal decided to allow the witness statements to be considered and to allow the witnesses to give oral evidence. It also allowed the supplemental bundle to be admitted. It did so on the basis that there was no prejudice caused to the parties by its decision, and that the tribunal wished to have access to as much evidence as possible in reaching its decisions. In the event the additional evidence was of little material significance to the tribunal reaching its decision.

35. During the course of the hearing the Second Respondent made reference to a Purchase Order. The Tribunal asked the Respondent to produce the Purchase Order and gave the Applicants an opportunity to make submissions, and for the Respondent to respond to those submissions subsequent to the hearing.

The chronology and background

36. In 2021, the Second Respondent's managing agents, First Port, proposed a major works programme for the Building and on 27 May 2021 the Second Respondent served a notice under s.20 LTA 1985 of their intention to carry out major works on all lessees of the Building. Each of the Neighbouring Blocks had their own unique and individual repair issues.

37. On the 28 May 2022 the Applicant Lessees commenced their claim under the Commonhold and Leasehold Reform Act 2002 to acquire the Right to Manage and informed First Port of the same. The Applicant Lessees advised the Second Respondent and their agents to exclude the Block from the major works programme.

38. First Port wrote to the Applicant RTM Company's managing agents on 22 July 2022 to confirm that they had instructed the coordinator of the major works project not to proceed any further in respect of any major works to the Block.

39. The Applicant leaseholders served a notice of their intention to acquire the right to manage of the Block on 12th October 2022. The second Respondent served notices admitting the lessees' right to manage and the lessees duly acquired the right to manage on 12th October 2022.

40. After serving their notice the Applicant leaseholders sought and received confirmation from the second Respondent in July 2022 that the Block would be removed from the planned major works and that their previous contributions to the reserve fund would not be used towards the major works project.

41. After the acquisition of the RTM the second Respondent wrote to the Applicant leaseholders acknowledging that it was not responsible for the repair and maintenance of the Block including roof repairs and suggesting that second Respondent should continue to provide services to the Applicant leaseholders under a shared services agreement. The Applicant leaseholders declined the offer on the basis that they submitted there were no shared estate services.

42. The second Respondent carried out the major works to the rest of the building and claimed service charges in connection with those works.

Service charge liability

The Applicants' arguments

43. Prior to the acquisition of the Right to Manage the Second Applicant accepts that they, alongside all the other leaseholders of the Building were collectively liable to pay for 23.26% of the Part A expenditure (and those Part C expenses that relate to the matter mentioned in Part A and 100% of Part B expenditure and those Part C expenses that relate to the ,matters mentioned in Part B.

44. The Applicants' position is that, following the acquisition of the right to manage, the First Applicant became solely responsible for carrying out works to the Block, including the Part A expenditure and Part B expenditure, and solely entitled to collect service charges for the same from the lessees. The second Respondent accepts in its statement that the Applicants have the exclusive right to maintain the Block but contend that Applicant leaseholders remain liable under the Lease to pay for the costs of works carried out to the Neighbouring Blocks

45. The Applicant leaseholders argue that the starting point for calculating the service charge liability is for the tribunal to determine whether the Applicant RTM company has acquired the right/responsibility to carry out all services under the leases for which service charges are payable. If not, then the tribunal must determine which services are still to be provided by the Respondents and paid for by the Applicant lessees as a service charge.

46. The Applicants submit as follows.

(i) The block is a self-contained part of a building that can be managed entirely independently and does not have any shared amenities or services with any other premises.

(ii) The Building does not include any garden area or common amenity areas and the Applicant lessees do not have any rights of access to the common areas in the other blocks in the Building nor any right to use an appurtenant land outside of the Block itself.

(iii) Insurance costs do not form part of the dispute. Insurance is the responsibility of the freeholder and not the second Respondent In any event since the acquisition of the RTM the Block has been removed from the Building insurance policy and the Applicant leaseholders have insured the Block.

(iv) The Applicant Lessees agree that they previously used a shared refuse area but since the acquisition of the right to manage they have reinstated and used a bin storage area located within the Block itself.

(v) The wording of the Act makes clear that the Applicant RTM Company now has the sole right to provide the services under the Lease and collect service charges for the same. Following the acquisition of the RTM, all the second Respondent's management functions are instead functions of the first Applicant (ss.96(2) and (3)), and any provisions of the Lease about the relationship of the second Respondents in relation to such functions do not have effect (s.96(4)). This means that the second Respondent is not entitled under the Leases to provide services to the Applicants nor to collect service charges for the same.

47. This transfer of responsibility applies to both Part A and Part B services under the Leases. All of them are "Management functions" within the meaning of s.96(5) of the Act. They relate to services, repairs, maintenance, improvements, insurance and management, all of which can be provided independently to the Block by the Applicant RTM Company (and insurance costs are not part of this dispute).

48. There are no 'Estate Services' under the Lease in contrast to the situation in *Firstport Property Services Ltd v Settlers Court RTM Company Ltd* [2022] UKSC 1) and the second Respondent's reference to the same is misleading. All of the services in Part A and Part B are or can be provided on a block-by-block basis. There are no common facilities or services – The Applicant leaseholders do not have access to the Neighbouring

Blocks, and there are no 'common parts' which are used by the lessees of the Block in common with the lessees of the Neighbouring Blocks.

49. The Applicants say that after the acquisition of the RTM the Second Respondent and its agents sought to change position in relation to the payability of service charges in relation to major works. The Second Respond argues that the Leases provide for Estate Service Charges and these remain payable to the Second Respondent.

50. This suggestion is strongly rejected by the Applicants.

51. The key determining factor is whether the services are capable of being provided on a block-by-block basis (*Oakwood Court (Holland Park) Ltd v Daejan Properties Ltd* [2006] 12 WLUK 451 and *St Stephens Mansions RTM Co Ltd v Fairhold NW Ltd* [2014] UKUT 541 (LC)). Given that all the Part A and Part B services can be provided on a block-by-block basis, responsibility for doing so has now passed to the Applicant RTM Company. Any provision in the Leases requiring the Applicant leaseholders to pay the second Respondent for such services is of no effect following the acquisition of the RTM (s.96(4)).

52. The responsibility for block management services was clarified by the Supreme Court in *Firstport Property Services Ltd v Settlers Court RTM* Co & Ors [2022] UKSC 1. The Applicant RTM Company has the exclusive right to manage the structure of the Block, the facilities within it and any facilities outside it that are exclusively used by the Applicant Lessees. For the avoidance of doubt, the Applicant RTM Company has the exclusive right to carry out works to the structure and exterior of the Block, including major works. If there were any communal areas or facilities shared with the rest of the Building, these would remain the responsibility of the Respondents. However, in the instant case, there are no such communal areas or shared facilities.

53. There is thus no basis on which the Second Respondents can purport to continue to be entitled to continue to provide services under the Leases or charge for the same. Rather, per *Settlers Court*, the Applicant RTM Company has the exclusive right to manage the structure of the Block, the facilities within it and any facilities outside it that are exclusively used by the Applicant leaseholders.

54. The apportionment under the Leases is not relevant to whether the services are 'estate-wide' or block-by-block. Proxima GO Properties Ltd OM Ltd (originally the First Respondent) holds the blocks in the Building under separate headleases. The fact that Proxima GO Properties Ltd OM Ltd.'s predecessor-in-title chose to structure the leases of all the blocks so that some services are charged under one apportionment structure and some services are charged under another is not a reason to prevent Applicant RTM Company from exercising its statutory RTM. If the second Respondent is concerned that the service

charge provisions no longer allow them to recover 100% of the service charge costs then the correct course is to seek agreement from the lessees of the Neighbouring Blocks to vary their leases and, if necessary, make an application under s.35 LTA 1987.

55. In any event, there is no clear logic to or distinction between the Part A and Part B services under the Lease. Insurance comes under Part B (charged on a block basis) whereas window cleaning comes under Part A. Maintenance of doors and windows comes under both Part A and Part B. All of these are services provided to the Block (and not in relation to any external shared areas), and so all of them are 'Management Functions' that have passed to the Applicant RTM Company.

56. The approach contended for by the second Respondent would undermine the whole statutory purpose of the Act. It would allow a landlord to prevent its tenants from ever exercising the RTM by choosing to apportion service charges across multiple premises, and then permanently tying them to pay for the services provided to the other premises. This is also not in line with the clear wording of the Act, including s.96(4).

57. Even if the Applicant leaseholders did remain technically liable to pay for works to the Neighbouring Blocks, any such charges would not be reasonable. The second Respondent had nearly 5 months' notice of the Applicant leaseholders' intention to acquire the RTM (and did not oppose the same), and could and should have made arrangements for the costs of any major works to be apportioned solely among the lessees of the Neighbouring Blocks. The Second Respondent removed the Block from the major works programme and has not provided any services to the Applicant leaseholders.

58. The Applicants argue that the second Respondents are estopped from seeking to recover service charge costs from the Applicant leaseholders in relation to the major works. The Applicant leaseholders were given a clear assurance that the Block would be removed from the major works programme and that none of the reserve fund contributions made by the Applicant leaseholders would be used towards the major works. The Applicant leaseholders have acted in reliance on this assurance by continuing to exercise their right to manage.

59. The Applicants therefore argue that the proper answers to the questions it asked the tribunal to determine are as follows:

    (i) In relation to questions (i) to (iv), above, it is the Applicants' case that responsibility for providing all management functions, including all services under the leases, has now passed to the Applicant RTM Company. Since the date of acquisition of the right to manage, the Respondents have no rights or

obligations to provide services to the Applicant Lessees nor to receive service charges for the same

(ii) In relation to questions (v) to (vii), above, the Applicants' position is that any sums that have been paid by the Applicant Lessees in respect of reserve funds or as contributions towards major works that had not been commenced at the date of acquisition and which the Applicant was reassured by the Respondents would not be used towards the major works project, fall to be transferred to the Applicant RTM Company, where they will stand to the credit of the accounts of the paying lessees. Any sums that had been demanded by the Respondents in relation to such reserve funds or major works, but which have remained unpaid, are not payable or recoverable from the Applicant Lessees.

(iii) The Applicants also argue that the amounts of any service charge payable for the period 1 August to 12 October 2022 should be limited to such sums as were actually expended during that period and that any charges for services such as management should be limited to a reasonable charge for a 2 ½ month period.

60. The Applicants say they have been unable to calculate the exact sum as they have not been provided with the necessary information by the Respondents, but as far as the Applicants are aware a total of £149,516 has been accrued in relation to the reserve funds, in addition to any uncommitted accrued service charges for other items (questions (viii) to (ix)).

The Second Respondent's arguments

61. The starting point for the Second Respondent is the position prior to the acquisition of the right to manage of the White Horse House block on 12th October 2022. At that point the second Respondent was entitled to recover the service charge expenditure from all the leaseholders of the building, including the Applicant leaseholders as set out in the Sixth Schedule of the Leases, including provision for a reserve fund.

62. The Second Respondent accepts that as from the date of acquisition as clarified by the Supreme Court in *Firstport Property Services Limited v Settlers Court RTM co & Ors [*2022]UKSC 1 (Settlors Court) the First Applicant had, and has, the exclusive right to manage the structure of the White Horse House block and as such the Second Respondent cannot seek to recover, by way of service charge, Part B expenditure (under the Sixth Schedule) from the Applicant leaseholders insofar as it relates to

the White Horse House block or Part A expenditure to the extent it relates to the structure of the White Hours House block.

63. This has major consequences as the First Applicant is only able to recover the cost from the Second Applicants at the Second Applicant's fixed percentage set out in the leases each being 2.326% resulting in a shortfall in recovery in respect of Part A services under the Sixth Schedule of the Leases.

64. It was for this reason that the Second Respondent pointed out to the Applicants that a shared facilities agreement was necessary but the First Applicant declined to entertain that proposal.

65. The Second Respondent argues that from the date of acquisition, insofar as the remaining Part A services under the Sixth Schedule are concerned, the Second Respondent continued, and continues to provide those services which it remains responsible for and the change of status of the White Horse House block does not exempt the Second Applicant from contributing to those costs demanded in accordance with the Leases.

66. This means that the Second Applicant would continue to contribute towards the services listed in Part A of the Sixth Schedule, including paragraph 2 insofar as it related to the Neighbouring Blocks. The Second Respondent continues to provide a shared refuse area and to maintain the car parking area in one of the Neighbouring Blocks which the Second Applicant still utilises.

67. This was explained to the Applicants by the Second Respondent's appointed managing agent, Firstport Property Services Limited (Firstport) by way of letter dated 4th November 2022 and an email dated 2nd February 2023.

68. In response to the Applicants' suggestion that the White Horse House block can be managed independently from the Neighbouring Blocks such that no Estate service charge is payable to the Second Respondent and the suggestion that the issue concerning the recovery shortfall can be cured by reliance upon paragraph 7 of the Seventh Schedule of the leases, the Second Respondent says that the suggestion is misconceived. This is because

    (i) It is not possible to rely on paragraph 7 of the Seventh Schedule to recalculate the service charge percentages since there has been no replanning of the layout of the Building by the Lessor. The Second Respondent relies on *Arnold v Britton* [2013] EWCA Civ 902 to argue that the clause cannot be interpreted other than in its natural meaning.

(ii) Neither is it workable for an application pursuant to section 35 Landlord and Tenant Act 1987 in these circumstances whereby the status of the First Applicant is liable to change.

(iii) Whilst the predicament here is not ventilated in *Settlers Court* parallels can be drawn from the sentiments of the Supreme Court in unworkable circumstances whereby there would be a shortfall recovery for expenditure.

(iv) This is not the purpose of the RTM regime.

The amount of accrued uncommitted service charges

The Applicants' argument.

69. The Applicants seek a determination that the Second Respondent must pay to the Applicant RTM Company under s.94(1) CALRA 2002 a sum equal to the amount of any "accrued uncommitted service charges" held on the acquisition date which includes the amounts paid by the Applicant Lessees towards the reserve funds and collected for major works, and any interest received upon the monies held by the Respondents (s.94(2)(b) CALRA 2002).

70. The Applicants have been unable to calculate the exact sum as they have not been provided with the necessary information by the Respondents, but as far as the Applicants are aware a total of £149,516 has been accrued in relation to the reserve funds, in addition to any uncommitted accrued service charges for other items (questions (viii) to (ix)).

71. The Applicants' position is that there are accrued uncommitted service charges that are payable by the Second Respondent to the Applicant RTM Company including sums that have been paid by the Applicant Lessees in respect of reserve funds or as contributions towards major works that had not been commenced at the date of acquisition and which the Applicant was reassured by the Respondents would not be used towards the major works project. These monies must be transferred to the Applicant RTM Company, where they will stand to the credit of the accounts of the paying lessees.

72. Any sums that had been demanded by the Respondents in relation to such reserve funds or major works, but which have remained unpaid, are not payable by or recoverable from the Applicant Lessees.

73. The Applicant Lessees accept that they would be liable to pay for reasonable service charge expenditure incurred in the period 1 August to 12 October 2022, subject to any statutory restrictions, such as under ss.19, 20 and 20B Landlord and Tenant Act 1985. However, they have yet to receive any demand for the same that sets out a clear explanation of how such amounts have been calculated.

74. The Applicant Lessees reiterate that their contractual liability would only be for such service charge expenditure as had been reasonably incurred during that period, and which was reasonable in amount, per s.19 Landlord and Tenant Act 1985. Whilst the Second Respondent was entitled to request an interim service charge for this period, this was subject to the requirement in paragraph 7(b) of the Leases that there be a balancing charge and/or credit given for any overpayment.

75. The Second Respondent's agents, First Port, provided a "Closing Statement as at Acquisition Date" for the period 1 August 2022 to 11 October 2022. This suggested that there had been a total expenditure of £209,688.72 for the period, including £136,037.11 on "General Maintenance". This compares with an annual budget of £7,800 for the Building as a whole (of which the share for the Block would be £1,814.28).

76. Similarly, it is unclear whether the Closing Statement represents sums actually incurred during the period 1 August to 11 October 2022, or budgets for a 12-month period. The Applicant Lessees' position is that the costs of services provided throughout the year, such as management, should only be charged pro rata for the period up to 11 October 2022.

77. The Applicants have set out their detailed calculation in the bundle at pages 227 – 259.

78. They argue that the second Respondents have failed to hand over any funds to the Applicant RTM Company and have failed to provide any calculations to support their contention that no sums are due. The Applicants understand that the second Respondents now accept that there are some monies to be handed over but have still to receive any clear calculation of this. The Applicant leaseholders paid significant sums towards the reserve funds as well as some charges towards major works which did not take place to the Block. The Tribunal should order the second Respondent to pay over all sums paid by the Applicant leaseholders for reserve fund contributions and any contributions for major works, based on the calculations in A's statement of case [§54-56, 88].

79. The Respondents have not given any clear explanation of the service charge expenditure in the period from 1 August to 11 October 2022 (i.e. the portion of the service charge year before the Applicant RTM Company acquired the RTM). The Tribunal should therefore prefer the

detailed calculation set out in the Applicants Response and accompanying spreadsheet [545 §26, 548].

The Second Respondent's argument.

80. The Second Respondent argues that there are no accrued uncommitted service charge funds available to be paid to the First Applicant. The Closing Statement has been provided to the First Applicant. It says that insofar as any items of expenditure are dated after 12th October 2022 this is because whilst the invoice was received after the same the cost was committed prior to it such that those costs are properly required to be included in the reconciliation. This includes the amended major works completed after the acquisition date, but the costs associated were already committed prior to the acquisition date as detailed within the section on the completion statement titled section 27A application.

81. Similarly after the Applicant Right to Manage Company acquired the right to manage the White Horse House block the Second Respondent retained management of the Building and continued/continues to provide the services under Part A of the Sixth Schedule to the Leases save to the extent those services relate to the exterior and roof of the White Horse House block. As such the Applicant leaseholders are compelled to contribute towards those services in accordance with their fixed percentage proportion stipulated in the leases such that the contribution towards the estate reserve fund would remain with the Second Respondent.

82. In so far as any disallowed service charge/overpayment is determined by the Tribunal in respect of the section 27A application those sums would not convert the sums into accrued 'uncommitted service charges' so as to become payable to the First Applicant rather it would convert these sums from being service charges at all and the first Applicant has no standing to pursue any disallowed service charge sums.

The purchase order

83. During the hearing on 8th July 2024 the second Respondent produced a purchase order. The Tribunal agreed to admit the document on the basis that the Applicant would have the opportunity to respond.

84. In relation to the purchase order the Applicants submit as follows:

(i) The document entitled "FirstPort Standard Terms and Conditions for Suppliers" has not been disclosed previously and was not mentioned during the hearing. The Applicants do not understand the significance of this document and no permission has

been sought or obtained from the Tribunal for reliance on this document.

(ii) The relevance of these documents is unclear, but the Second Respondent is seeking to rely on them to support its argument that the monies it should pay to the First Applicant under s.94 CALRA do not include the reserve fund contributions that the Applicant Lessees had previously paid to the Second Respondent (and which had not been expended by the date on which the First Applicant acquired the RTM). The Second Respondent has argued that it does not have to pay over these reserve fund contributions because a contract for the major works had been signed before the First Applicant acquired the right to manage on 12 October (notwithstanding that no works had been carried out by that date, and that no works on the Block were carried out thereafter).

(iii) The Applicants' primary position remains as stated during the hearing. Namely, that the statutory meaning of "accrued uncommitted service charges" is as set out in s.94(2) CALRA 2002 and is the sums paid to the Second Respondent "*less so much (if any) as is required to meet the costs incurred before the acquisition date in connection with the matters for which the service charges were payable*". Read together with s.97 (and ss.91-92), this provision makes clear that the Second Respondent is entitled to retain funds for works that had already been carried out (as part of the service charge expenditure) before the First Applicant acquired the right to manage on 12 October 2022, but it does not entitle the Second Respondent to retain monies to pay for contracts that had been entered into but not performed by that date.

(iv) However, in response to these documents, the Applicants will save overall that they undermine rather than support the Second Respondent's contention that a contract for the major works had been formed by 12 October 2022.

(v) The Respondents had previously asserted that the Purchase Order was sent to their contractor on 26 September 2022. However, the Purchase Order document shows that there was in fact a chain of authorisation that took place before it was sent to the

contractors. The Purchase Order document records that it was first raised by Natalie Clare on 26 September, before passing through various stages of approval by staff working for the Second Respondent (for example, Alex Metrebian was one of the Second Respondent's witnesses during the hearing and the final approver, Mr Thwaites, is a senior executive at the Second Respondent). The document does not show the date on which the Purchase Order was sent to the contractor, but it was clearly after 26 September. As the last stage of approval was only completed on 11 October 2022, it appears unlikely that the Purchase Order was sent to the contractor before the First Applicant acquired the right to manage on 12 October 2022.

(vi) As stated during the hearing, the Purchase Order document is not a contract and does not set out the works that are to be done. It is undated and appears to be a screenshot of the Second Respondent's internal approval system.

(vii) If the Tribunal does wish to consider the "FirstPort Standard Terms and Conditions for Suppliers" the Applicants would draw attention to clause 2. This makes clear that a purchase order is an 'offer' to enter into a contract with the supplier and that the contract is only formed on the supplier issuing a written notice of acceptance any act consistent with fulfilling the order (i.e. commencing works). No written notice of acceptance has been produced and there is no evidence before the Tribunal that the contract was formed before the 12 October 2022.

(viii) Moreover, even if a contract had been formed by the 12 October 2022, FirstPort would have had a contractual right to terminate it without paying any penalty. Clause 16 of the FirstPort Standard Terms and Conditions for Suppliers provides that the Second Respondent can terminate any contract "for convenience" by giving the Supplier 1 month's written notice. This undermines any suggestion that the Second Respondent was "committed" to paying any of the "contract" sums.

85. The Tribunal gave permission to the 2nd Respondent to reply to these submissions.

86. The 2nd Respondent submits as follows:

(i) The Purchase Order was requested by the Tribunal because it had been referred to in the Second Respondent's Statement of Case. The Second Respondent complied and the Terms and Conditions are part of the Purchase Order.

(ii) The Purchase Order supports the argument of the Second Respondent that it does not have to pay over these reserve fund contributions because a contract for the major works had been signed before the First Applicant acquired the right to manage on 12 October (notwithstanding that no works had been carried out by that date, and that no works on the Block were carried out thereafter).

(iii) The Second Respondent states that it is irrelevant as to whether works had been carried out on the Block. The point is that the Contract had been entered into by the 3rd October 2022 when the works commenced and commencement of works on 3rd October 2022 is not disputed by the Applicant.

(iv) The Applicant is incorrect to state that no works had been carried out by that date and did not seek to challenge the same at the Tribunal hearing.

(v) The Applicant is correct that the Second Respondent asserts that they do not have to return such monies because, such funds were committed to the Contract which had been performed in part by the 12th October 2022.

(vi) The Applicants' primary position remains as stated during the hearing. Namely, that the statutory meaning of "accrued uncommitted service charges" is as set out in s.94(2) CALRA 2002 and is the sums paid to the Second Respondent "less so much (if any) as is required to meet the costs incurred before the acquisition date in connection with the matters for which the service charges were payable". Read together with s.97 (and ss.91 92), this provision makes clear that the Second Respondent is entitled to retain funds for works that had already been carried out (as part of the service charge expenditure) before the First Applicant acquired the right to manage on 12 October 2022, but it does not entitle the Second Respondent to retain monies to pay for contracts that had been entered into but not performed by that date.

(vii) The Second Respondent states that the Applicant has misunderstood the section. As a matter of contract, if the contract is for a range of services/goods for a set amount of money, the contractee is liable to pay the full amount regardless of whether those services/goods have been performed or received. They may be able to counterclaim for a reduction if such services/goods were not received.

(viii) This was not a series of contracts but ONE contract for a sum of money. Therefore, upon the parties entering into the contract and upon the works being commenced, the Second Applicant was committed to pay the full amount by the 3rd October 2022, when works commenced.

(ix) Therefore, the cost of the major works was committed by the 3rd October 2024 when the works commenced, and prior to 12th October 2022.

(x) The Applicant does not state why the said document undermines the Second Respondent's case. The documents supports the Second Respondent's position as set out in their Statement of Case dated 17th May 2024.

(xi) The Respondent says that when the Applicant sets out the chronology of the events it is making assertions without any evidence to support their assertions. The Applicant's counsel cannot give evidence.

(xii) The Second Respondent's Statement of Case was clear. The Applicant did not contest the Second Respondent's sequence of events at the Tribunal hearing or at all. The Applicant objected to the Second Respondent calling any witness, as they requested to do, to explain how the Contract came about. The Applicant can not now make assertions based upon no evidence, and having objected to the Second Respondent calling a witness who would have explained how the contract came about. 2.

(xiii) The Second Respondent repeats their previous submissions and their Statement of Case. Works commenced on the 3rd October 2022 (not disputed) pursuant to a contract that had been entered into. The Purchase Order is evidence of a contract.

(xiv) The Second Respondent says that it is incorrect to say that it has to produce a written contract to show that the funds were committed funds. The Second Respondent has repeatedly stated that pursuant to a consultation, a schedule of works was drawn up and tenders were received. The Second Respondent entered into a contract with the company that gave the lowest tender and works commenced on the 3rd October 2022 pursuant to that contract. A Purchase Order was sent to that company to confirm the terms on which the contract had been entered into.

(xv) Section 94 of the CLRA 2022 is clear. It does not state that funds must be returned if they are "capable of being" uncommitted. The funds were committed. Therefore the provision at Clause 2 of the Purchase Order is irrelevant.

(xvi) The Second Respondent argues that the Applicant is asking the Tribunal to find that the Major Works which were required should have been stopped and that the leaseholders of the other Blocks should suffer and be at risk of litigation and substantial litigation costs pursuant to the contract. The other leaseholders are entitled to have their blocks managed and works to be done and not to be "on hold" when the cost of the works may have increased in the interim and they may suffer further damage.

(xvii) In summary the Second Respondent argues that the Act is clear. Were the funds committed? Yes they were pursuant to a contract of which performance had commenced on the 3rd October 2022, prior to the RTM being acquired on the 12th October 2022.

The decision of the tribunal

87. The tribunal answers the questions raised by the Applicants as follows:

(i) The Applicant RTM Company has acquired the right/responsibility to carry out all services under the leases for which service charges are payable.

(ii) No services are to be provided by the Respondents and paid for by the Applicant Lessees as a service charge.

(iii) The Applicant Lessees have no liability to pay service charges for major works carried out to neighbouring premises.

(iv) There are therefore no service charges payable by the Applicant Lessees to the Second Respondent following the exercise of the right to manage;

(v) The tribunal determines that the monies paid by the Applicant lessees to the Second Respondent prior to the date of acquisition of the right to manage are not payable in so far as these monies were paid to the reserve fund and relate to the major works

(vi) The tribunal determines that the Applicant lessees are liable for monies expended on general maintenance for the period 1st August 2022 to 11 October 2022 but only to the extent that it has been reasonably incurred during that period and is reasonable in amount. This amount is not to include monies in relation to the major works.

(vii) The Second Respondent must account to the Applicant RTM Company for the sums paid by the Applicant Lessees towards reserves collected for major works (but not expended) before the exercise of the right to manage?

The reasons for the decision of the tribunal

88. The reasons for the answers to questions (i) – (iv) set out above are as follows:

(i) The tribunal prefers the arguments of the Applicants in connection with the question whether any services remain to be provided by the Second Respondent. It determines that the RTM Company has acquired the right/responsibility to carry out all services under the leases for which service charges are payable. This is consistent with the statutory framework as set out in s.96(5) of CALRA 2002 and the case law referred to by the Applicants. In in *Oakwood Court (Holland Park) Ltd v Daejan Properties Lt*d [2006] 12 WLUK 451 and *St Stephens Mansions RTM Co Ltd v Fairhold NW Ltd* [2014] UKUT 541 (LC)).it was made clear that the relevant question is whether the

services are capable of being provided on a block by block basis.

(ii) In this case the tribunal determines that all the services listed in Schedule 6 can be provided independently for the Block. It does not matter whether in the past a bin storage area was organised as a shared refuse area or that the porter to the remaining blocks has continued to collect and distribute packages to the Block. This is not a requirement of the lease and is therefore not determinative.

(iii) The answer would have been different if there were charges for services provided by the Second Respondent to the estate as a whole. However the tribunal finds that there were no services that were estate services.

(iv) It agrees with the Applicants that it would be contrary to the purposes of the legislation if a developer were able to prevent the lessees of a development from exercising the right to manage by building separate blocks but drafting the leases in such a way that all services are paid for on an estate-wide basis.

(v) The tribunal does not accept the Respondent's argument that the requirement for further legal steps to make the arrangement workable prevents the management of the block being completed transferred to the RTM company.

(vi) It therefore follows that no services are to be provided by the Respondents and paid for by the Applicant Lessees as a service charge.

(vii) The corollary of these findings is that the Applicant Lessees have no liability to pay service charges including those service charges demanded as reserves for the block and the building

(viii) The amount that is to be payable under s.94 of CALRA is £149,516

89. The reasons for determining the liability of the Applicant lessees for the period prior to the acquisition of the right to manage are as follows:

(i) The tribunal determines that the Applicant lessees are not liable for service charges relating to the major works paid by them prior to the date of the acquisition. Whilst the tribunal has considered the decision *in OM Ltd v New River Head RTM Company Ltd* [2010] UKUT 394 in this case the the tribunal determines that there is no evidence that the monies expended on major works are anything other than uncommitted service charges. Here it prefers the arguments of the Applicants. It considers that a purchase order does not equate to a contract, and as no contract to carry out the works was provided to it it does not consider that the service charges relating to the major works were committed service charges.

(ii) It also notes the argument in relation to estoppel and considers that it is persuasive. The Applicant leaseholders relied to their detriment on the clear assurance from the Second Respondent that the Block would be removed from the major works programme and that none of the reserve fund contributions made by the Applicant leaseholders would be used towards the major works. Without this assurance it is unlikely that the Applicants would have pursued the Right to Manage, at least not until after the major works were completed.

(iii) The Applicants accept they are liable to pay for reasonable service charge expenditure incurred in the period 1st August 2022 – 12th October 2022. However they argue that they are entitled to the monies paid to the block reserves and the building reserves from 2019 – 2020 to 2021 – 2022 inclusive and the estimated contributions to the to the block reserves and the non-annual expenditure for the building. The tribunal accepts the Applicants' argument.

(iv) It notes the calculations of the amount to be payable under s.94 of CALRA 2002 as £149,516 and in the absence of any argument to the contrary accepts those figures.

90. The tribunal heard no arguments about any other uncommitted service charges that may be payable under s.94 of CALRA 2002. If the parties are not able to settle the amount of any such further monies it is at liberty to apply for their determination.

Name: Judge H Carr **Date:** 10th October 2024

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

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.

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