UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2010] UKUT 342 (LC)
LT Case Number: LRX/85/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – RTM company – whether costs of forming and running RTM company recoverable under lease – view expressed that they were not – appeal dismissed for other reasons

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT COMMITTEE

BETWEEN **MRS J E WILSON** **Appellant**

and

LESLEY PLACE (RTM) COMPANY LIMITED **Respondent**

Re: 8 Claire House,
Lesley Place,
Maidstone,
Kent ME16 0OE

Before: The President

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 16 September 2010

Mr Fergus Wilson with permission of the Tribunal for the appellant.
The respondent did not appear and was not represented

No cases referred to

DECISION

1. This is an appeal against a decision of a leasehold valuation tribunal for the London Rent Assessment Committee on an application made by the appellant under section 27A of the Landlord and Tenant Act 1985 for a determination of her liability to pay actual and estimated service charges for the years 2005 to 2009. The appellant is the leaseholder of a flat in Claire House, Leslie Place, Buckland Hill, Maidstone, which is one of four blocks of flats in a modern estate development. The landlord is an RTM company which on 1 January 2005 acquired the right to manage the estate. It manages the estate through a managing agent, Chaine Hunter.

2. The appellant disputed her liability to pay certain elements of the service charge. Under her lease she is liable to pay 178% of the lessor's annual expenditure in carrying out its obligations under the lease. The disputed items of such expenditure were as follows:

	2005	2006	2007	2008	2009 (estimate)
Secretarial fee	150	150	150	150	150
Companies House and Hall hire	105	80	115	120	15
Directors & Offices Insurance	383.25	217.35	199.50	199.50	200
Accounts fees	310	310	310	310	310
Formation of Company and RTM Notice	1,400				
Legal and professional fees			600.25	3,813.88	

3. The appellant's contention was that these items of expenditure were costs associated with the running of RTM company and not with management of the estate, and that they were not relevant expenditure for the purposes of the service charge.

4. The relevant provisions of the lease are these. Under clause 3(1) the lessee covenants to pay a yearly sum equal to 1.78% of "estimated expenditure to be incurred by the Lessor in carrying out its obligations under clause 5 hereof". Clause 3(3) provides for an adjustment of the amount payable to reflect any excess of actual over estimated expenditure in a 12 month accounting period and for the carrying forward of any surplus where the expenditure is less than that estimated. The lessor's covenants at (A) to (E) in clause 5 are to keep in repair the development, including the foundation, structure, roof, and external walls of the block; to paint; to insure; to keep the common parts in good order and condition; and to light the common parts. Covenant (F) is in these terms:

> "(F) Deal with the general management of the blocks including the provision of any services or carrying out of any function not specifically falling under any of the preceding heads of or incidental to the management of the blocks and in the interest of the Lessee generally"

5. Covenant (G) is to maintain the gardens. Covenant (H) requires proper accounts to be kept of all expenditure under the clause. Covenant (I) requires the lessor to impose in the leases of other flats lessee's covenants similar to those in the lease. Covenant (J) provides:

> "(J) That the Landlord will at the written request of the Lessee or any mortgagees of the Lessee enforce by all means available to the Landlord at the entire cost of the Lessee the covenants entered into by the Lessees the other flats comprised within the Building PROVIDED THAT:-
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> a) the Landlord shall not be required to take any action or incur under this clause until such security as the Landlord shall not be required to take any action or incur under this clause until such security as the Landlord in the Landlord's absolute discretion may require shall have been given by the Lessee or the Lessees mortgagees requesting action
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> b) the Landlord may in the Landlord's absolute discretion require the Lessee or the persons requesting such action at their expense to obtain for the Landlord from Counsel to be nominated by the Landlord advice in writing as to the merits of the contemplated action in respect of allegations made and in that event the Landlord shall not be bound to take action unless Counsel advises that such action should be taken and that it is likely to succeed
>
> c) the Lessee shall indemnify the Landlord against all costs and expenses incurred by the Landlord arising out of this clause"

6. In its decision the LVT noted that in 2008 the RMT company had brought proceedings against the appellant to recover service charge arrears in relation to the years 2005 to 2007. In those proceedings the applicant had agreed that she did not seek to challenge the sums claimed on the basis that they were not reasonably incurred, and in its decision following a hearing on 27 August 2008 the LVT determined that she was liable to pay them. In relation to those years, therefore, the LVT held that the appellant's liability was res judicata.

7. The decision continued:

> "12. … Moreover, the ruling also applies to the years 2008 and 2009 even though they were not considered in the earlier determination because the issue regarding the Applicant's liability to pay the same costs is identical in relation to those years. In other circumstances it is arguable whether the professional and legal costs were recoverable because some of the costs related to debt recovery which may be recoverable from the lessee concerned. However, the RTM company was set up and continues with one function, namely, the management of the blocks of flats. Any of the costs incurred must be part of the overall management function. In the Tribunal's judgement this falls within clause 5(E) in the lease and the general management of the blocks.
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> 13. Further, and in the alternative, the Tribunal considered that the Applicant was now *estopped* from asserting that the costs in issue were not contractually recoverable by the Respondent. From the evidence before the Tribunal, it does not appear that the

Applicant had raised, whether in correspondence or otherwise, the issue regarding her liability to pay the costs which are the subject matter of this application. Indeed, in the earlier proceedings, the Applicant agreed that all of the costs claimed from 2005 to 2007 had been reasonably incurred and the only challenge made was by way of a set off for overpayments made in relation to earlier years. By continuing to incur the costs that are now been challenged in this application, by the Respondent had acted to its detriment. Therefore, in the Tribunal's judgement, the Applicant was now prevented from asserting that she had no contractual liability to pay those costs.

14. For the avoidance of doubt, the Tribunal accepted the submission made by Mrs Heads that the costs issue are recoverable variously under clauses 5(E) and (H) of the Applicant's lease. In particular, the Tribunal considered that clause 5(E) was sufficiently wide in its ambit to provide the lessor with an absolute discretion to recover those costs, such as the RTM company costs, which are incidental to its management function and which it considered to be in the lessees interests generally. If the alternative view were taken the RTM company would be left with no method of recovering those costs and, as a company limited by guarantee, may potentially become insolvent as a consequence. This, in the tribunal's judgement could not have been intended by the RTM legislation. On balance and having regard to the other compelling points the Tribunal has found in favour of the Respondent. However, this case raise a novel point on whether or not the RTM costs per se are recoverable as relevant service charge expenditure and it does not appear to have been considered in any earlier cases. It potentially raises a point of general public importance, which may require clarification by the Lands Tribunal. Therefore, if an application for permission to appeal is received by the Tribunal would look favourably upon it."

8. The LVT later granted the appellant permission to appeal. In doing so it said:

"2. Permission is limited to the point of general importance of whether the direct and indirect company costs of creating and administering an RTM company are recoverable as service charge expenditure and as part of the overall cost of management.

3. Save for paragraph 2 above, the other grounds of the application for permission to appeal are refused as disclosing no reasonable prospect of success on the basis that the Tribunal does not consider that it has erred in its finding of fact and/or law."

9. The LVT concluded, as I have said, that the appellant's liability for the sums claimed for the years 2005 to 2007 was res judicata by reason of the LVT decision in 2008; that that decision on liability applied also to the years 2008 and 2009 even though they were not then before the LVT for determination; and that the appellant was in any event estopped from asserting that the costs in issue were not contractually recoverable from her. The appellant has not sought permission from this Tribunal to challenge these conclusions. Mr Fergus Wilson, appearing for the appellant, his wife, said that the conclusions were not challenged because there was no question of the appellant's liability to pay but only about how much she had to pay.

10. The LVT's conclusions on liability were reached in relation to the amounts claimed by the landlord as service charges, the very amounts which the appellant now seeks to challenge. It has thus determined, irrespective of the arguments that the appellant now advances, that the amounts claimed are payable. Although I would doubt the correctness of the LVT's conclusion that the 2008 decision was determinative of the appellant's liability for 2008 and 2009 and that she was in any event estopped from asserting that the costs in issue were not contractually recoverable from her, the fact is that these conclusions are not the subject of the present appeal, and it is far too late for any application for permission to contest them. Since neither they nor the conclusions on liability for 2008 and 2009 are challenged, and cannot now be challenged, it follows that, whatever conclusion I might reach on the point on which to appeal was granted, the appeal must necessarily be dismissed. I have considered, therefore, whether I ought to express a view on a matter that cannot affect the outcome of the appeal. It seems to me that I should do so as the facts are sufficiently clear for this purpose and the point is seen as being of wide importance. But the views I express inevitably do not form part of the ratio of this decision.

11. The appellant is not a member of the RTM company. She was entitled to be a participating tenant when the right to manage was acquired but she chose not to be. Mr Wilson expressed doubts about the competence of RTM companies. His contention on behalf of his wife was the simple one: that a lessee should not be liable for the costs of an RTM company if he is not a member of the company and that he should not have to pay more by way of service charges than he would have had to pay to any other landlord under the terms of his lease.

12. The lease under which the appellant holds the flat was made on 25 November 1986 between Gorgerealm Limited as lessor and the appellant's predecessor in title. On 1 January 2005 the RTM company acquired from the lessor's successors the right to manage the estate, with its four blocks of flats and its grounds, under Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002. In relation to the present issue the relevant provisions of the Act are contained in sections 96 and 97. So far as material these provide:

> "96. Management functions under leases
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> (1) This section and section 97 apply in relation to management functions relating to the whole or any part of the premises.
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> (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 …
>
> (5) 'Management functions' are functions with respect to services, repairs, maintenance, improvements, insurance and management.
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> (6) But this section does not apply in relation to –
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> (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
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> (b) functions relating to re-entry or forfeiture.

97. Management functions: supplementary

(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."

13. The effect of these provisions is to transfer to the RTM company the management functions that the landlord had under the lease and to make the tenant liable to the RTM company rather than to the landlord in respect of the tenant's obligations under the lease. The provisions thus effect a transfer of rights and duties that are contained in the lease. They do not modify those rights and duties, nor do they create new ones. The liability of the tenant to the landlord in respect of service charges is to be ascertained purely by reference to the terms of the lease, and the fact that the management functions are exercisable by an RTM company does not affect the construction of the lease under these provisions.

14. Of the items of expenditure tabulated above, "Secretarial fee", "Companies House and hall hire", "Directors and Officers Insurance" and "Formation of Company and RTM Notices" were all, it appears, costs incurred in establishing and running the RTM company as an RTM company. It appears that the "Accounts fees" related to accounts that covered both the service charge and the RTM company's company costs. It appears also that "Legal and professional fees" related, or related principally, to fees incurred in recovering rent and/or service charges from tenants. I say in each instances "it appears" because the LVT made no findings of fact in these respects, and it is sufficient for present purposes to assume, on the basis of what Mr Wilson told me, that this is indeed what they related to. If dismissal of the appeal had not been inevitable for the reasons that I have given and if the point now in issue were decided in the appellant's favour, it would have been necessary to remit the matter to the LVT so that it could make the necessary findings of fact.

15. The LVT concluded that all the tabulated amounts were recoverable under clause 5(E) and (H). (It clearly meant (F) rather than (E). (E) is the duty to light the common parts.) (F) is the duty to "Deal with the general management of the blocks including the provision of any services or carrying out of any function not specifically falling under any of the preceding heads of or incidental to the management of the blocks and in the interests of the Lessees generally". The function of this covenant is thus to supplement the specific duties contained in (A) to (E), and the duty it imposes is the general counterpart of these specific duties. The duties imposed by (A) to (E) to repair, to paint, to insure and to maintain and light the common parts – relate to the management of the fabric of the blocks and to their insurance. It is these that (F) expressly supplements. It does not supplement the later duties – to maintain the gardens, to keep accounts, to impose similar tenant's covenants and to enforce the covenants of other lessees. I do not see how it can possibly be said that the costs of complying with (F) include the costs of establishing and running the landlord company. Those are not

costs of dealing with the general management of the block in terms of their maintenance etc and their insurance. It is always for the landlord, if he wishes to impose a charge upon the tenant, to spell it out clearly in the lease. I do not imagine that it would ever be argued that the company costs of a commercial landlord are spelt out clearly as falling within (F). On the contrary it is clear that they do not do so, and it is, as I have said, immaterial for the purpose of construing the lease whether the landlord is an RTM company or a commercial company.

16. As far as the accounts are concerned, the duty (in (H)) is to keep accounts of expenditure under clause 5. Since company costs are not expenditure under clause 5 it follows that the accounts for such costs are not recoverable as part of the service charge. There is no provision in the lease enabling the landlord to include in the service charge the costs of recovering from tenants amounts due from them under their obligations to pay rent and to pay the service charge.

17. As far as legal and professional fees incurred in recovering rent or service charges are concerned, these would not have been incurred under covenant (F) because of the limited scope of that covenant that I have referred to above. Nor would they have been incurred under covenant (J). That covenant obliges the landlord at the written request of the lessee to enforce the covenants entered into by the lessees of the other flats, and under (J)(c) the lessee is required to indemnify the landlord against the costs he incurs in doing so. The covenants entered into by the other lessees include the covenant to pay rent (clause 2(1)) and to pay the service charge (clause 3(1)), and I can see no reason why the obligation under (J) should not extend to such covenants even though these may not have been the reason for the obligation being imposed on the landlord. But it seems to me implicit in the provision that while a lessee who makes a written request for enforcement may be charged the costs incurred by the landlord in complying with the request, the landlord has no other power to charge an individual tenant or, through the service charge, all the tenants for the costs it ay incur in enforcing tenants' covenants.

18. It is necessarily the case that costs incurred by an RTM company that are not recoverable under the terms of the leases from which it derives its management functions must be met by the members of the RTM company. If not all the tenants are members of the RTM company this will mean that those who are not members will not contribute to those costs. There is nothing surprising in this since under the RTM provisions of the 2002 Act participation in the RTM company is voluntary.

19. For the reasons given in paragraph 10 above the appeal is dismissed.

Dated 22 September 2010

George Bartlett QC, President