RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

S.94(3) Commonhold and Leasehold Reform Act 2002

DECISION

Case Number:	CHI/21UC/LSC/2005/103
Property:	20 Carlisle Road Eastbourne East Sussex BN21
Applicant:	Redstone Mansions RTM Company Limited Mr Dominic Ashford, Director
Respondent:	St Mary's Homes Limited
Application:	29 January 2006
Hearing:	24 March 2006
Decision:	11 April 2006
Tribunal Members:	Ms J A Talbot MA (Cantab) Chairman Mr A O Mackay FRICS

Summary of Decision

The Tribunal made no determination under Section 94 of the Commonhold and Leasehold Reform Act 2002 for the reasons given in this Decision.

Case No. CH1/21UC/LSC/2005/103

Property: 20 Carlisle Road, Eastbourne, East Sussex BN21

Application

1. An application was made on 29 January 2006 by the RTM company to the Leasehold Valuation Tribunal under Section 94(3) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") for the Tribunal to determine, where the right to manage premises is to be acquired by a RTM company, the amount of any payment to be made by the landlord to the RTM company equal to the amount of any accrued uncommitted service charges held by him on the acquisition date.

Jurisdiction

2. Section 94 of the 2002 Act provides as follows:

"Duty to pay accrued 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,
(c) a manager appointed under Part 2 of the 1987 Act to act in relation to 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 a leasehold valuation 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.

Inspection

3. The members of the Tribunal inspected the exterior of the property, unaccompanied, before the hearing. The property was situated on level ground in a pleasant residential area of Eastbourne. It comprised a substantial 4 storey double-fronted detached house, built in the 1890's, of brick construction under a tiled roof, with decorative brick-work and tile hung bays. At the rear was a large rear addition and a long garden. The property has been converted into 6 flats. Externally the property was in poor condition and in need of renovation and redecoration. The wooden windows were poor throughout. There was evidence of some patch repair to the brick-work, but further re-pointing is necessary.

Background

Hearing

4. The hearing took place in Eastbourne on 24 March 2006. It was attended by Mr Ashford, Mr Platten and Mr Palmer, all tenants of flats in the property, on behalf of the RTM company. Mr Bowler, sole director of St Mary's Homes Ltd, appeared in person.

Preliminaries

5. Mr Bowler's solicitors, acting for him in current divorce proceedings, wrote to the Tribunal office on 20 March requesting an adjournment on the basis that Mr Bowler's funds and assets were subject to a worldwide freezing order within matrimonial finance proceedings, and also that any documents and monies were being held by Mr Baker, who was refusing to part with them.

6. The Tribunal refused to adjourn the proceedings. There was no indication as to when the worldwide freezing order would be lifted, or when, if at all, Mr Baker would co-operate. The RTM company was entitled to seek to protect its position and pursue its application.

7. At the hearing, Mr Bowler was given the opportunity to renew his application to adjourn. However, he appeared to know nothing of his solicitors' letter and did not ask for an adjournment. Accordingly the hearing proceeded.

Facts

On the basis of the written and oral evidence before it, the Tribunal made the following findings:

8. Documents were provided showing that Mr Dominic Ashford, the tenant of Flat 3, had set up a Right to Manage (RTM) Company, Redstone Mansions RTM Company Limited ("the RTM company"), registered at Companies House in June 2005. All the tenants at the property were members of the company. The Company Secretary was Mr Ashford and the directors were Mr Ashford and M Paul Platten, tenant of Flat 4.

9. The company was set up pursuant to the provisions of Chapter 1 of the 2002 Act, designed to give a no-fault right to manage to tenants who meet the statutory criteria and set up an RTM company to acquire and exercise the right to manage their property.

10. On 23 June 2005 a Notice of claim to acquire the right to manage was served by the company on the landlord, the freehold owning company St Mary's Homes Limited. The sole director of this company is Mr Bowler. A copy of the Notice was also served on the former managing agent, Mr Nigel Baker of La Maison 1066.

11. The landlord failed to respond to the Notice and accordingly the RTM company acquired the right to manage on 25 October 2005, the acquisition date.

12. In 2002 the tenants received a Section 20 Notice from Mr Baker proposing works to the property at a cost of £240,000. Alarmed by this, the tenants decided to object to the Notice and took legal advice from Gaby Hardwicke ("GW") on the

prospect of purchasing the freehold by collective enfranchisement. It turned out that the freehold interest in the property had been transferred some years before for nil consideration from Mr Bowler in person to the Respondent company, in breach of the legal requirement in Section 5 of the Landlord and Tenant Act 1987 to give the right of first refusal to the tenants.

13. Accordingly, pursuant to Sections 11 and 12B of that Act, the tenants were entitled to acquire the freehold on the same terms. Protracted negotiations ensued between GH and with the solicitors for St Mary's Homes Limited, Mayo & Perkins ("MP") to establish the financial position regarding the management of the property, but these broke down.

14. The transfer has not yet taken place. The only reason Mr Bowler could give for failing to comply with this legal requirement was that he was prevented from doing so by the terms of the worldwide freezing order.

15. The tenants discovered from a document in the annual accounts for the period 23 March 2003 to 24 June 2003 that an insurance claim had been made and monies received of £44,145.25 for works needed to the property. According to the "Statement of Account re Insurance Claim (July 2002)" sent by Mr Baker to the tenants, the net amount after deducting professional fees was £38,000.

16. According to the tenants, no work was carried out to the property, and they did not know what had happened to the money. Mr Bowler said he was aware of the insurance claim but blamed Mr Baker for the failure to carry out the work. He recalled Mr Baker telling him that he had spent the money on other properties. He did not know what had happened to the money, but accepted that it was rightfully due to the RTM company to be spent on much needed works to the property.

17. Mr Bowler also claimed not to know whether there was a separate designated account for the property, or even if there was, whether any money would have been in the account at any point, including the acquisition date. Again he blamed Mr Baker for failing to disclose any papers or information regarding this and other properties, but had not taken any advice on steps he might be able to take against Mr Baker for their release.

18. The tenants frankly suspected collusion between Mr Bowler and Mr Baker in respect of the missing money, especially since Mr Baker lived rent free in a property owned by Mr Bowler, but they had no direct evidence. Mr Bowler accepted that there had been a close business relationship with Mr Baker, who had managed all his properties, but he claimed that despite being the director of the freehold company, he had no detailed knowledge of day-to-day management matters, which he had left to Mr Baker. Mr Baker's firm no longer managed any of his properties and since the world wide freezing order had failed to co-operate.

19. In the solicitors' negotiations, it was agreed that an amount of £20,947.29 should be deducted from the £38,000 to reflect service charges demanded but not paid by the tenants, most of which had withheld payment since 2002. The figure was gleaned from accounts prepared in 2004, and accepted by the tenants, although none of them had calculated their own amounts.

20. By March 2004, agreement in principle had been reached between solicitors in full and final settlement, recorded by MP in a letter dated 17 March 2004, for the freehold to be transferred for nil consideration, for Mr Bowler to pay £38,000 to

the RTM company, and for the tenants to pay outstanding service charges from which an allowance of £5,319 would be made. The amount outstanding at that point was £25,833.19.

21. Despite the very clear terms, the agreement was never enforced, and on 27 January 2005, GH wrote again to MP. By then the amount owed by Mr Bowler to the RTM company had reduced to £22,871.71. There was no clear explanation for this, but it was agreed by the tenants. No further agreement was reached and the matter reached stalemate.

22. The tenants' position was that they wanted the money they felt was rightfully due to the RTM company to be properly spent on the works needed to the property. Several flats had severe damp problems, the exterior had a neglected appearance, and some elderly owners who needed to move had been unable to sell their flats.

23. Mr Bowler, throughout the hearing and in response to all questions from the Tribunal, pleaded ignorance, even to the terms agreed by his solicitors. He maintained that Mr Baker was responsible for all matters relating to the property. He did however agree that the sum of £22,871.71 was rightfully due and that as the freehold owner that liability rested with him.

Decision

24. The Tribunal had considerable sympathy with the tenants and the RTM company, who clearly had the best interests of the property at heart, and had made the application as a last resort to try to obtain the money due from the freeholder, as agreed between solicitors. The Tribunal noted with approval that Mr Bowler recognised his responsibility to the tenants.

25. Unfortunately, however, it was clear to the Tribunal that the amount of £22,671.71 did not fall within Section 94 of the 2002 Act. That statutory provision gave the Tribunal the power to make a determination only in respect of a payment "equal to the amount of any accrued uncommitted service charges held by [the landlord] on the acquisition date".

26. In this case, there were several insurmountable problems. First, the landlord, Mr Bowler of St Mary's Homes Limited, did not, according to his evidence, hold any money in relation to this property. It was impossible to decide, from the evidence available, whether there was in existence any account, whether global or designated, containing any such money.

27. It was possible, but again not certain, that Mr Baker as managing agent had at some time in the past managed such an account, but unfortunately, it seemed likely, from the evidence, that such an account did not exist at the time of the acquisition date of 25 October 2005.

28. Even if such an account had existed at the material time, it seems clear that it could not have contained "accrued uncommitted service charges", for the simple reason that no service charges had been paid by the tenants to the landlord since 2002. The Tribunal took the phrase to mean service charges that had been validly demanded, duly paid and held on trust for the lessees in a separate designated account ("accrued"), and not due to be paid out as expenditure already incurred in the management of the property, as such sums would be committed as opposed to "uncommitted".

29. Regrettably, that was not the case here. The only mention of service charges in the negotiations between solicitors was in relation to the unpaid notional charges. It was impossible to tell from the evidence whether these alleged service charges had been validly demanded or were lawfully due. They had not been the subject of an application to the LVT for a determination on payability and reasonableness.

30. The other component of the amount calculated, £38,000, related to the insurance claim. From the evidence, it was impossible to know for certain what had happened to this money. Regrettably it seemed unlikely that any of the money still remained. The Tribunal found this extremely unsatisfactory, as there was no doubt that the money should have been spent on much needed work to the property, but was not.

31. However, in any event, the insurance money did not amount to service charges. It was a claim paid out to the managing agent on behalf of the landlord, who was obliged to insure the property. As such, it was not the tenants' money. At most, if the money had at any time been placed in a designated service charge account for the property, as is required by law, then it should have been held on trust for the lessees pursuant to Section 42 of the 1987 Act; this may give rise to an action for breach of trust, but the Tribunal has no jurisdiction in this matter.

32. Nor could the insurance money be characterised as an "investment" representing service charges paid to the landlord. This provision is designed to apply to service charge accounts held on deposit.

33. It was most unsatisfactory also that the agreement reached between solicitors had not been enforced, not only in relation to money owed to the RTM company, but also in relation to the failure of the freehold transfer for nil consideration. There was no doubt that the tenants were legally entitled to, and could compel, the transfer (subject to the world wide freezing order). Again, this jurisdiction does not lie with the Tribunal.

34. The Tribunal was reluctantly bound to conclude, for each and every reason given above, that it could make no determination on an amount to be paid by the landlord to the RTM company.

Dated 11 April 2006

Signed
Ms J A Talbot MA, Solicitor
Chairman