LON/00AT/LUS/2005/0001

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 94 OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Premises: Thornbury Court, Church Road, Isleworth, Middlesex, TW7 4PP

Applicant: Thornbury Court RTM Company Limited

Representative: Mr. Faizal Faizi (Secretary)

Respondent: Thornbury Court Limited

Representative: Castlebar Managament Limited

Dates of Hearing: 4 August 2005

Date of the Tribunal' s Decision:

Tribunal: Mr. S. E. Carrott LLB
Mr. P. A. Copland BSc FRICS
Mrs. S. E. Baum JP

1. **Background**

This is an application for a determination under section 94(3) of the Commonhold and Leasehold Reform Act 2002 as to the amount of accrued uncommitted service charges to be paid by the Respondent to the Applicant. The Applicant is Thornbury Court RTM Co Ltd and the Respondent landlord is Thornbury Court Limited.

2. The hearing of this application took place on 4 August 2005. The Applicant was represented by Mr Andrew Skelly of Counsel and the Respondent was represented by Mr L Read of Castlebar Management Limited. Mr Gibbons who is one of the shareholders of the Respondent landlord also attended the hearing.

3. Unfortunately, this application takes place against a background of many years of animosity and dispute (including court proceedings and proceedings before this Tribunal) between the Respondent and the Secretary of the Applicant Company Mr F H Faizi, in Mr Faizi's capacity as a lessee. The animosity is evident by the terms of the Applicant's application to this Tribunal in which Mr Faizi as Secretary of the Company has accused the Respondent of 'being driven by obsession' and as having 'orchestrated a campaign of lies and distortions with hysteria' and has accused Castlebar Management as being 'dubious...inconsistent, wary and evasive.'

4. Notwithstanding the terms in which the application has been made the issues before the Tribunal are twofold -

   (1) whether in calculating the amount of accrued and uncommitted service charge, the Respondent is entitled to deduct legal costs incurred as a result of proceedings in the County Court and this Tribunal against Mr Faizi; and

   (2) whether the Respondent is entitled to deduct the disputed costs of the RTM transfer from the amount to be paid to the applicant;

5. **The Applicant's submissions**

Mr Skelly on behalf of the Applicant relied upon the initial information provided by the Respondent in a letter dated 22 November 2004 written by the

Solicitors acting for the Respondent at that time. This amount was put at £33,869.20 together with a further sum of £1,224.19, which the Respondent itself conceded that it was liable to pay. In the letter dated 22 November 2004 the Respondent's Solicitors contended for the following deductions -

Service charge expenses paid after 12 October 2004	£2531.38
Prince Evans invoice March - October 2004	£5028.14
Prince Evans, estimated invoice November 2004	£4000.00
Judgment interest to 19 February 2004	£1647.87
Castlebar Management Fees re: flats 1&10	£7000.00
Costs of RTM transfer	£5000.00

6. Mr Skelly conceded that the expenses paid after 12 October 2004 could be deducted from the amount to be paid over to the Applicant. He contended however that the others sums, save for the costs of the RTM transfer, constituted the costs of litigation between the Respondent and Mr and Mrs Faizi who are the lessees of flats 1 and 10. He submitted that the sums which the Respondent were now seeking to deduct were not properly deductible from the accrued uncommitted service charge, that much of this sum had in fact been paid by Mr Faizi's mortgagee and that in any event the County Court and this Tribunal had previously determined that the Respondent's legal costs and various management fees were not recoverable by way of service charge.

7. With regard to the costs of the RTM transfer Mr Skelly submitted that there should be no set off in respect of this amount because the costs included not only the transfer costs but also appeared to cover the costs of litigation when there was in the instant case no right to recover such costs. The costs therefore were disputed.

8. The Applicant accepted that a payment of £9886.00 was paid in September 2004 and £6,983.37 in July 2005 and accordingly the sum contended for by the Applicant was £18,224.02.

9. Mr Skelly made two further submissions, which were not in the event pursued. First, he submitted that the five lessees who were in fact the shareholders of the Respondent Company owed service charges of £14000 between them and that the amount to be paid under section 94(2) of the Commonhold and Leasehold Reform Act 2002 by the Respondent included those arrears. Secondly, he argued that the Applicant was entitled to interest under section 69 of the County Courts Act 1984 on any sum that the Tribunal determined.

10. **The Respondent's Submissions**

Mr Read submitted on behalf of the Respondent that the Respondent was entitled to recover what he called the excess costs of litigation under the terms of the lease, including the costs of the managing agent during such course of such. He further submitted that although the County Court and Tribunal had made orders under section 20C of the Landlord and Tenant Act 1985 limiting the recovery of costs, the Order of District Judge Jenkins dated 24 February 2005 was made in relation to Mr and Mrs Faizi only and did not prevent the recovery of service charges from the other lessees. He conceded that the District Judge had assessed costs in such a way as to disallow certain sums (the excess legal costs) but that did not prevent the recovery of the excess legal costs from the other lessees by way of service charge.

11. Mr Read also submitted that it would be wrong not allow the set off in respect of the costs of the RTM transfer. He submitted that the Respondent was entitled to its reasonable costs under section 88 of the Commonhold and Leasehold Reform Act 2002 and that the Respondent has issued an application for the determination of those costs on 13 July 2005, which was to be consolidated with the present proceedings.

12. Mr Read also relied upon draft audited accounts which had been prepared on 13 July 2005 or shortly before that date.

13. **Determination**

The Tribunal determined that the Respondent was not entitled to set off its litigation costs against the accrued and uncommitted service charge funds.

Paragraph 7 of the Order of District Judge Jenkins dated 24 February 2005 provided as follows -

'And it is certified pursuant to section 20C of the Landlord and Tenant Act 1985 that those costs and fees disallowed by the Court ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge(s) payable by the First Defendant and Second Defendant under the provisions of their leases of Flat 1 and/or Flat 10.'

That order was made in the context of forfeiture proceedings against Mr and Mrs Faizi. The Court assessed the costs, which were to be paid as a condition of Mr and Mrs Faizi obtaining relief against forfeiture and was concerned that the Respondent might then be able to recover the excess costs, that are the very same costs, which were disallowed under the terms of the order. The intention behind the order was clear, namely that the excess or disallowed costs could not be clawed back by way of a service charge demand. Mr Read's construction of the order was that although the excess or disallowed costs could not be recovered from the Mr and Mrs Faizi, it could nevertheless be recovered from the other lessees (and by seeking to recover these through the service charge he would in fact be charging Mr and Mrs Faizi a proportion thereof).

14. Those costs that were allowed were to be paid as part of the conditions imposed by the Court for relief from forfeiture. Those costs disallowed which related to the litigation costs and the extra costs incurred by the managing agents were never intended by District Judge Jenkins to be paid by the other lessees and neither indeed could they have been made to pay under the terms of the leases. In proceedings between Mr Faizal and other lessees against the Respondent LON/00AT/LSC/2004/0073 the Tribunal held that the terms of the lease did not provide for the recovery of litigation costs. Having scrutinized the relevant terms of the leases nothing in the submissions made by Mr Read has led this Tribunal to conclude that the earlier and very recent decision is wrong. Indeed Mr Skelly correctly pointed out that the very same words used in the leases and relied upon by the Respondent in the present case were considered in St Mary's Mansions Limited v Limegate Investments and Ors [2002] EWCA Civ 1491, and held not to permit the landlord to recover legal costs under the service charge.

15. Accordingly the Respondent could not deduct from the service charge account the excess legal charge.

16. Moreover with regard to the costs of the RTM transfer the Respondent could not rely upon a set off in this regard. As part of it's statement of case the Respondent had included amongst the many documents that it had produced, an application under section 88(4) of the Commonhold and Leasehold Reform 2002, which additionally requested consolidation with the present proceedings. There was no covering letter to the Tribunal concerning the proposed application and further more no application or hearing fee was paid. The Tribunal determined that the proposed application had never been issued and could not be considered. In the instant case, such an application would in any event have required the making of further procedural directions to ensure that all of the matters in dispute were before the Tribunal. Accordingly the Respondent was not entitled to exercise a set off in respect of the disputed sum.

17. Although the Applicant did not pursue its claim for the £14000 arrears or statutory interest on the sum determined by the Tribunal under section 69 of the County Courts Act 1984, the Tribunal noted that the definition of accrued uncommitted service charges as contained in section 94(2)(a) and (b) of the 2002 Act referred to the aggregate of sums 'paid' by way of service charges and any investments which represented such sums (and any income which has accrued on them). The Tribunal also noted that it did not have power to award interest on a determination under section 94(2) as requested by the Applicant. Section 69(1) of the County Courts Act 1984 had no application to a determination by the Leasehold Valuation Tribunal under section 94(3) of the 2002 Act. The power to award interest under section 69 of the County Courts Act 1984 did not apply in the instant case and was confined to proceedings issued in the County Court itself for the recovery of a debt or damages in which judgment was given by the County Court itself.

18. The draft accounts submitted by the Respondent had been based upon the irrecoverable legal costs and the disputed RTM transfer costs and so were

unreliable. The Tribunal agreed with the Respondent that the starting point was the figure stated by the Respondent's then Solicitors in the letter dated 22 November 2004 - £33,869,20. That figure was also included in the draft accounts as being the agreed balance on 12 October 2004. Both parties agree that there was a sum due from the Respondent in the sum of £1224.19 thus making the agreed balance £35,093.39. There were four deductions to be made from this sum. The first was an amount agreed by the parties as being actual amount for service charge expenditure paid after the 12 October 2004, which was £2775.75. The second amount was the audit fee of £881.25, which the Applicant did not seriously contest. Finally two payments on account had been made to the Applicant; the first being the sum of £9886 paid in November 2004 and the second £6983.37 paid in July 2005. Accordingly the total deduction to be made and which was permissible under section 94(2) of the 2002 Act was £20,326.37 leaving a balance due of £14,767.02.

19. **Reimbursement of Fees and Costs**

Mr Skelly on behalf of the Applicant contended that if the Applicant succeeded in the application then costs should necessarily follow the event and the Respondent should therefore be required to reimburse the application fee and hearing fee. He further contended that this was an appropriate case for the Tribunal to make an award of costs under paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002 on the basis that the Respondent's conduct was frivolous vexatious or otherwise wholly unreasonable in seeking to deduct the excess legal costs from the service charge when it was clear that this was not permitted. The Respondent was under a clear statutory duty to transfer the funds.

20. Mr Read on behalf of the Respondent outlined the considerable difficulties, which the Respondent had encountered in dealing with litigation with Mr Faizi in particular with respect to non-payment of service charges. Mr Gibbons also addressed the Tribunal on this issue and stated that the five lessee shareholders had formed the Respondent Company and had been motivated to acquire the freehold from its predecessors in title owing to the fact that for over 20 years its predecessor in title had failed to carry out its obligations under the lease to

maintain the block but that they had been frustrated in their efforts at every turn by the refusal of Mr and Mrs Faizi to pay services charges since 1992.

21. The Tribunal did not consider given the unfortunate background against which these proceedings were brought that this was an appropriate case in which the Respondent should reimburse the Applicant in respect of either the application or hearing fee. The very serious allegations leveled against the Respondent and the managing agents in the application by Mr Faizi in his capacity as secretary of the Applicant were wholly unwarranted. Mr Skelly quite rightly did not pursue these allegations.

22. Likewise with regard to the application for costs the Tribunal did not consider that the conduct of the Respondent fell within the terms of paragraph 10 of Schedule 12 to the 2002 Act. The Respondent was mistaken in its interpretation of the order of District Judge Jenkins but the imposition of costs under paragraph 10(2)(b) of Schedule 12 to the 2002 requires conduct, which in the opinion of the Tribunal is frivolous, vexatious, abusive or otherwise unreasonable. The Tribunal was not satisfied that the conduct of the Respondent fell within paragraph 10(2)(b) of Schedule 12 to the 2002 Act.

23. No application was made by the Respondent for costs under paragraph 10 of Schedule 12 to the 2002 Act.

24. In the light of the above it is hoped that if any further application is made to the Tribunal by the parties that both parties will concentrate their minds on the true issues and that in any event the parties will endeavour to attempt to reach agreement on the Respondent's RTM transfer costs.

25. **Decision**

(1) The balance of the amount of the accrued uncommitted service charge which is payable by the Respondent to the Applicant is £14,767.02.

(2) The Respondent is not liable to reimburse the Applicant the application fee or hearing fee.

(3) The application by the Applicant for costs pursuant to paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 is refused.

Chairman: S E Camett

Date : 21/9/05