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**HM COURTS & TRIBUNALS SERVICE  
LEASEHOLD VALUATION TRIBUNAL**

Commonhold and Leasehold Reform Act 2002

CASE NO.BIR/00FY/LUS/2011/0002

**DETERMINATION OF THE LEASEHOLD VALUATION TRIBUNAL**

**In the matter of**

**The Warehouse RTM Company Limited (the Applicant)**  
**and**  
**Holding and Management (Solitaire) Limited (2) (the Respondent)**

**on the Applicant's application under section 94 (3) of the Commonhold and Leasehold Reform Act 2002 ('the Act') for a determination as to the amount of the accrued uncommitted service charges held by the Respondent at the acquisition date which are payable to the Applicant under section 94 (1) of the Act**

**Property: 1 – 23 The Warehouse and 1 – 7 The Warehouse Too, 4 – 10 Plumpton Street, Nottingham NG1 1JL**

**Date of Hearing: 25<sup>th</sup> August 2011**

**Representation: Applicant - Mr J Crampton**  
**Respondent - Ms C McQueen Prince**

**TRIBUNAL: Mr W J Martin, (Chairman)**  
**Mr J Dove**

Date of determination: 25<sup>th</sup> August 2011

**DETERMINATION: The amount to paid by the Respondent to the Applicant under section 94 (3) of the Act is £2747.65**

## **REASONS FOR THE TRIBUNAL'S DETERMINATION**

### **Background**

1 On 9<sup>th</sup> December 2010 (the **Acquisition Date**) The Warehouse RTM Company Limited (the **Applicant**) acquired the Right to Manage thirty flats known as 1 – 23 The Warehouse and 1 – 7 The Warehouse Too at 4 – 10 Plumpton Street Nottingham NG1 1JL (the **Property**) under the provisions contained in Part 2 of the Act. The Landlord is Holding and Management (Solitaire) Limited (the **Respondent**) and the manager at the Acquisition Date was OM Property Management Limited (**OM**).

2 On 2<sup>nd</sup> June 2011 the Applicant applied to the Tribunal for a Determination under section 94 of the Act of the amount of the accrued uncommitted service charges required by that section to be handed over to the Applicant by the Respondent.

### **The Statutory Provisions**

3 Section 94 of the Act provides:

#### **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 the lease of the whole or any part of the premises,
  - (b) party to such a lease otherwise than as landlord or tenant, or
  - (c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,

must make to the company a payment equal to the amount of any uncommitted service charges held by him at the acquisition date.

- (2) The amount of any uncommitted service charges is the aggregate of-
- (a) any sums which have been paid to a 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 upon 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

4 Section 96 of the Act provides for the transfer of management functions under the lease to the RTM Company, which steps into the shoes of the landlord or manager in relation to management functions. These are functions with respect to services, repairs, maintenance, improvements, insurance and management. However certain functions are excluded such as those relating to re-entry or forfeiture as specified in section 96 (6).

5 Section 97 makes various supplementary provisions. Subsections (4) and (5) provide as follows:

- (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 the function of the RTM company by virtue of section 96, and

(b) is exercisable in relation to a person who is the landlord under the lease or a party to the lease otherwise than as landlord or tenant,  
it is instead exercisable in relation to the RTM company.

(5) But subsection (4) does not require or permit the payment to the RTM company of so much of any service charges payable by a tenant under a lease of the whole or any part of the premises as is required to meet costs incurred before the right to manage was acquired by the RTM company in connection with matters for which the service charges are payable

### **Submissions and Hearing**

6 Both parties made written submissions in accordance with the Directions of the Tribunal. Oral submissions were made at the Hearing held on 25<sup>th</sup> August 2011. This was attended by the following persons:

For the Applicants: Mr Crampton, A Director and the Secretary of the Respondent and Mr Marley an accountant with the firm of Weaver Root, instructed by the Applicant.

For the Respondent: Ms Mcqueen Prince, a solicitor employed by the Respondent, Mr Doherty, an accountant employed by OM and Mr Mugal and Mrs Walsh, property managers employed by OM.

7 In common with most leases of blocks of flats, the scheme adopted by the leases of flats at the Property is for the manager to estimate the service charge due at the beginning of the service charge year, which in the case of the Property is 1<sup>st</sup> June to 31<sup>st</sup> May. This sum is then collected in two half yearly amounts and then any balance (either credit or debit) is calculated when the actual service charge costs are known at the end of the year.

8 At the Hearing it was agreed that the starting point for the oral submissions should be a document entitled 'Closing Position' prepared by OM. This is essentially a summary of the accounts at 3<sup>rd</sup> February 2011, this being the earliest date that OM were able to produce accounts by. The Closing Position shows that the Service Charges demanded of the leaseholders at the Property totalled £38,562.96, which had been demanded in accordance with the lease provisions by two half yearly amounts. The Applicant agreed this figure. The Tribunal were told by Mr Crampton that after the right to manage had been conceded all of the Leaseholders were contacted and provided with a calculation showing a time apportioned breakdown of the second half yearly demand, requesting payment of the proportion from the Acquisition date to the Service charge year end, which is 31<sup>st</sup> May 2011, the remaining proportion being due to OM. In the event some of the Leaseholders complied with this request, which provided the Applicant with some cash with which to commence the management of the Property. Having taken advice, Mr Crampton confessed that the Applicant had been incorrect in its approach, and a statement had been prepared detailing the sums received and which the Applicant considered should be credited against the sums alleged as owing by the Respondent or OM to it.

9 Of the £38,562.96 demanded, £8000 was allocated to the reserves, which according to the Closing Position, totalled £31,788.48 at the Acquisition Date. This leaves a total of £30,562.96 demanded against current service charge expenses. The maintenance expenses to 'closure' are listed on the statement. The total was £32,948.79 leaving a net deficit for the period of £2,385.83. In the Respondent's bundle were copies of the receipts and vouchers making up the expenses. There was no challenge from the Applicant as to the Respondent's accounting, although the Applicant submitted that the expenses were too high, particularly up to the Acquisition date. The Applicant had prepared a schedule of certain of the expenses which 'stood out' as having increased during the

current year to the Acquisition Date, as against the average of the three previous years. The Applicant felt that the Tribunal should be able to disallow the alleged excess, which it had calculated as £12,655.

- 10 The Applicant also alleged that certain of the expenses were not recoverable by the Respondent or OM because they had been incurred more than 18 months before their demand, and were thus not payable because of the operation of section 20B of the Landlord and Tenant act 1985 (the ‘1985 Act’). The Applicant also referred to two large debits relating to non-payment of service charges due to water damage. This is the debt of the leaseholder concerned, but on his behalf the Applicant has ascertained that a credit in settlement is due from the insurers of £4375.06.
- 11 Returning to the Closing Position document, below the income and expenditure summary outlined above is section entitled ‘Summary of Funds’. Ms McQueen Prince explained that whilst the Reserve Funds were shown as £31,788.48 at ‘closure’, it should be understood that, because of substantial non payment of service charges, OM had, in accordance with powers contained in the leases, used the reserve funds to cover the current expenses. The Summary of Funds shows these as ‘Tenant Debtors’ as per a schedule provided. The total of these is £24,023.06. The Summary of Funds also includes certain other items, such as the ‘Bank’ representing funds in the bank account at ‘closure’ and also an item listed simply as ‘OM’ which is effectively a debit to OM. Although not actually in the Respondent’s bundle Mr Doherty was able to provide a schedule as to how this sum is made up.
- 12 Using the figures contained in the Statement of Funds, the final section of the Closing Position document is entitled ‘Payment to New Agents’. This is a calculation of the amount the Respondent believes is due to be paid over, and is reproduced below:

<u>Payment To New Agents</u>				
			<i>Bank</i>	9,855.28
<i>Less</i>	<i>OM</i>	1727.67		
	<i>Fees not collected</i>	449.87		
	<i>Purchase ledger creditors</i>	6283.02		8,460.56
				<u>1,394.72</u>

A cheque for this amount was sent to the Applicant, but the cheque had not been cashed as the Applicant believed that the words ‘final payment’ in the letter sending it meant that there would be a deemed acceptance of the Respondent’s calculations if it did so.

- 13 Ms McQueen Prince informed the Tribunal that after the statement had been produced a further account had come to light. This is an account, amounting to £2199.60 including VAT, due to Hunnington Limited for work to the gutters. It had been thought that this work would be covered by an insurance claim but the Loss Adjusters had rejected it as a maintenance item. Unfortunately, despite the efforts of OM to obtain all outstanding invoices, this one had not been submitted until 31<sup>st</sup> December 2010. Ms McQueen Prince submitted that the amount of this invoice falls within section 94 (2), as the work was commissioned before the Acquisition Date.
- 14 The Applicant highlighted a query relating to the Tenant Debtors. This is in relation to Mr Auckland, the Leaseholder of Flat 7. The statement relating to Flat 7 shows that Mr Auckland has not paid the last half yearly payment of £606.88 demanded by OM, which left a debit balance on

his account of £588.71. A copy of Mr Auckland's bank statement was provided with the Applicant's bundle. All of the entries on the statement have been obliterated except the debit of cheque no 062336 for £606.88 on 27<sup>th</sup> October 2010. There is also a photocopy of the cheque stub for cheque no 062336 made out to Solitaire Property Management (OM's predecessor) for £606.88. The Applicant submitted that this was evidence that the money had been received by the manager but had been misposted, perhaps to another development. At any rate, whatever had happened, the Applicant should not be debited with this amount in the section 94 calculation.

- 15 Ms McQueen Prince rejected this submission. She argued that further time was required to investigate the position. The cheque might have been dishonoured, it was impossible to tell because of the obliteration of the remaining entries. If upon investigation it were established that OM or Solitaire had received the cheque it would of course be credited.
- 16 The statement marked 'OM' in the Closing Position document was, at the Tribunal's request, explained by Mr Doherty. This document is reproduced below:

**OM Account**

	<i>Dr – owed by OM</i>	<i>Cr – owed to OM</i>	<i>Balance</i>
<b><u>2010 Accounts</u></b>			
<i>Bank diff b/fwd from 2009</i>		527.26	
<i>Management fees</i>			
<i>o/s from 2009</i>		2375.00	
<i>Tenant recoverability b/fwd</i>		43.39	
<i>Management fee Vat adj</i>	59.11		
<i>W/o sundry debtor bt fwd</i>	239.43		
<i>W/o debt coll fee</i>	169.75	2945.65	2,477.36 CR
<b><u>Closing Period</u></b>			
<i>Management fees under billed</i>		282.27	
<i>W/o sundry debtor b/fwd</i>	1031.90		
<i>W/o off deficit b/fwd</i>	0.06		
	1031.96	282.27	749.69 CR
<b><i>Balance owed to OM</i></b>			<b><u>1,727.67</u></b>

- 17 On being questioned by the Tribunal Mr Doherty explained that the first item, £527.26 had been thrown up as a result of a change in computer software and was connected with bank reconciliation. He was satisfied that the bank position was correct however. He was unable to explain this figure. Mr Marley referred to the OM document as what accountants regard as a 'sin bin', i.e. a repository for unexplained balances. Mr Marley highlighted that the next item, £2,375 for management fees had appeared in the accounts since at least 2007. Mr Doherty was unable to explain why these fees had not been collected. Similarly Mr Doherty was unable to explain the item for tenant recoverability of £43.39. The final item in the column CR 'owed to OM' was explained as the balance at the end of the period, following monthly invoicing of the annual management fee.
- 18 In her written and oral submissions, Ms McQueen Prince drew the Tribunal's attention to the Upper Tribunal case of *OM Limited v New Riverhead RTM Co Limited [2010 UKUT] 394 (LC)*

(*'New Riverhead'*). This case is relied upon by the Respondent for the contention that the powers of the Tribunal under section 94 of the Act are limited to a determination of the cash position. The following extract from *New Riverhead* (paragraph 23) is set out in the written submissions of the Respondent:

*"The words of section 94 (1) are deliberately limited. The payment of accrued uncommitted service charges is confined to those accrued uncommitted service charges 'held by' the landlord or manager on the acquisition date. The natural meaning of those words is that what is to be paid is what the landlord or manager has actually got: not he was entitled to have but failed to get or had at one stage but does not have now. Quite how broadly 'held by him' should be interpreted in any particular case will depend on the facts of that case. In dealing with an argument which appears to have troubled the LVT, I would have little hesitation in deciding that such charges were 'held by him' within the section in a case where a manager for his own reasons, dishonest or not, decided to put the service charges in cash in a box under his bed. That will be a matter for the LVT to determine under section 94 (3). Nor am I concerned that, as the LVT said, 'one can easily imagine devices by which managers who were in similar positions to the respondent could reduce assets to avoid payment to a RTM'. Managers could lawfully and properly reduce the payment by making sure they used the accrued service charges to make sure they had paid their suppliers what they owed them by the acquisition date. There would be nothing wrong with that. Apart from that it is difficult to see how managers could lawfully and honestly, bearing in mind their position as trustees, reduce the payment. Indeed it is difficult to see why a rational and honest manager would wish to do so."*

The underlining in the passage above is not added for emphasis, but to indicate that these words were not included in the extract quoted in the Respondent's written submissions.

- 19 Ms McQueen Prince makes the point that the references to various issues raised by the Applicant, such as the fire alarm, health and safety, repairs, insurance, section 20B of the 1985 Act are not matters which the tribunal may consider. They are matters which may be considered in an application under section 27A of the 1985 Act, but the Tribunal has no jurisdiction to consider any of these issues as part of its determination under section 94 of the Act.

#### **The Tribunal's Determination**

- 20 In principal, the Tribunal accepts the Respondent's analysis of its jurisdiction in respect of the Application. The judgement of HH Judge Mole QC in *New Riverhead* is admirably clear, and this Tribunal accepts fully the guidance of the Upper Chamber in respect of its role. However, the Tribunal considers that the ambit of that guidance extends to determinations of (a) whether the monies shown as a debit on Mr Auckland's bank account as referred to in paragraph 14 above, (b) whether the items shown as 'owed to OM' on the OM document are properly deductible from the adjusted bank balance and (c) whether it is proper to allow a deduction in respect of the guttering account referred to in paragraph 13 above, despite its discovery after the Closing Position document was produced.
- 21 Accordingly, many of the matters raised by the Applicant are not matters which can be considered by the Tribunal as part of the Application. At paragraph 28 of *New Riverhead* HH Judge Mole QC says:

*"28. The relationship of the management company and the tenants and the rights that have arisen between them up to the acquisition date, are preserved. If a tenant succeeds in demonstrating to the*

*County Court or the LVT that service charges paid or demanded are unreasonable, he will recover his payment for himself or successfully resist a claim against him for payment. The Act gives the RTM company no power, still less a right, to take over a tenant's claim or take over a defence of a claim properly made against a tenant. That does not involve a duplication of proceedings: it keeps things as they are."*

- 22 One of the unfortunate consequences arising from the operation of section 94 and 97 of the Act is that the Applicant is not permitted to pursue by action in the courts the unpaid service charges outstanding at the acquisition date (see section 97 (5)). The Respondent made it clear at the Hearing that once a scheme was 'lost' following a successful claim by a RTM company, all legal action against non paying leaseholders is ceased, although normal credit control short of legal action is preserved. There is clearly little incentive for the Respondent to collect the outstanding debts. It appears to the Tribunal that it might be a sensible course of action for the Respondent to authorise the collection in its name by the Applicant, subject to suitable and proper indemnities being provided.
- 23 On the question of Mr Auckland's bank account, the Tribunal find that, on the balance of probabilities, the Respondent or OM has received the sum of £606.88, even though it has not been placed in the correct bank account. The Tribunal rejects the Respondent's request for further time to investigate the issue. It was raised in the Applicant's case forwarded on 10<sup>th</sup> August 2011, and the Tribunal do not find that it would be just and equitable to delay its determination. Mr Doherty indicated that a thorough search had been made but without success. However, the Tribunal find that the evidence of the bank statement, albeit partially obliterated, and the cheque stub, is persuasive.
- 24 The Tribunal disallows the first three items in the 'owed to OM' column of the OM document. Mr Doherty was unable to satisfy the Tribunal that the Bank difference thrown up by the software change, amounting to £527.26 was in any way properly deductible from the monies actually held in the bank. Similarly there was no evidence as to the sum of £43.39 shown as 'tenant recoverability b/fwd from 2009' amounting to £43.39 as being properly deductible. With regard to the Management fees amounting to £2375.00 Mr Doherty was unable to identify why these fees had not been collected, and, as pointed out by Mr Marley, they appear on statements going back for at least five years and may not be legally recoverable in any case. There was nothing produced to the Tribunal by Mr Doherty or the Property Manager to explain or justify this anomaly and why, therefore, it was proper to deduct it from the accrued service charges held at the Acquisition Date.
- 25 The Tribunal does allow the final item in the 'owed to OM' column in the OM document. It was explained that, although the management charges are calculated on an annual basis they are billed monthly to the account. The figure of £282.27 is the balancing amount and is accepted by the Tribunal as a proper deduction under section 94 (2) of the Act.
- 26 The Tribunal allows the deduction of the late invoice amounting to £2199.60 paid to Hunnington. Although it was not disclosed in the Closing Position document, and based on that document a cheque was issued, the Tribunal do not find that it would be just and equitable for this sum to be disallowed. It clearly falls within the ambit of section 94 (2).
- 27 Applying the above determinations the Tribunal determines that the amount of the uncommitted service charges at the Acquisition Date to be paid to the Applicant is £2747.65. The calculations are

set out below, being first an adjustment to the figures shown in the OM document, and secondly a recalculation of the final section of the Closing Position document.

28 **OM Account**

	<i>Dr – owed by OM</i>	<i>Cr – owed to OM</i>	<i>Balance</i>
<b><u>2010 Accounts</u></b>			
<i>Bank diff b/fwd from 2009</i>		<i>nil</i>	
<i>Management fees o/s from 2009</i>		<i>nil</i>	
<i>Tenant recoverability b/fwd</i>		<i>nil</i>	
<i>Management fee Vat adj</i>	59.11		
<i>W/o sundry debtor bt fwd</i>	239.43		
<i>W/o debt coll fee</i>	<u>169.75</u>	<i>nil</i>	<u>468.29DR</u>
<b><u>Closing Period</u></b>			
<i>Management fees under billed</i>		282.27	
<i>W/o sundry debtor b/fwd</i>	1031.90		
<i>W/o off deficit b/fwd</i>	0.06		
	<u>1031.96</u>	<u>282.27</u>	<u>749.69DR</u>
<b><i>Balance owed by OM</i></b>			<b><u>1217.98</u></b>

29 **Payment To New Agents**

		<i>Bank</i>	9,855.28
		<i>Add Mr Auckland Cr</i>	606.88
		<i>OM</i>	<u>1217.98</u>
			11680.14
<i>Less: Fees not collected</i>	449.87		
<i>Purchase ledger creditors</i>	6283.02		
<i>Hunnington invoice</i>	2199.60		<u>8932.49</u>
<b><u>Final Payment to New Agents</u></b>			<b><u>2747.65</u></b>

30 In making its determinations the Tribunal took account of the submissions of the parties, the relevant law and their knowledge and experience as an expert tribunal, but not any special or secret knowledge.

Dated: 8 September 2011

Signed:

W.J.Martin – Chairman.