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First-tier Tribunal
Property chamber
(Residential Property)

Case references	:	**CAM/22UH/LUS/2016/0001**
Property	:	**Brook Lodge,** **High Street,** **Ongar,** **CM5 9JX**
Applicant	:	**Brook Lodge Ongar RTM Co. Ltd.**
Representative	:	**Mr. Ian Leith (lay representative)**
Respondent	:	**Beech Management (Brook Lodge) Ltd.**
Representative	:	**Messrs. Barry and Darren Penman (lay representatives)**
Date of Application	:	**20th November 2016**
Type of Application	:	**For a determination of the amount of any accrued uncommitted service charges (section 94(3) Commonhold and Leasehold Reform Act 2002 ("the Act"))**
Tribunal	:	**Bruce Edgington (lawyer chair)** **Roland Thomas MRICS** **John Francis QPM**
Date and place of Hearing	:	**29th March 2017, Harlow Magistrates' Court, The Court House, Harlow CM20 1HH**

DECISION

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1. In view of the lack of evidence supplied by the parties, the Tribunal is unable to determine the amount of any uncommitted service charges to be handed over to the Applicant by the Respondent.

Reasons

Introduction

2. The Applicant took over management of the property on the 28th January 2015. This application is for the Tribunal to determine the amount of uncommitted service charges to be handed over to the Applicant by the Respondent. The previous manager of the estate under the terms of the leases, the Respondent, denies that there are any

uncommitted service charges. It says that moneys are still owed by the leaseholders.

3. The copy lease seen by the Tribunal states that the Respondent is the management company and is a party to the lease. However, the evidence suggests that in about 2012, the relationship between the landlord, the Respondent and the leaseholders broke down for reasons which are not relevant. The landlord purported to appoint London Wall Securities and/or Ongar Estates to manage the property from September 2013 and then Brook Lodge Ongar Management Ltd and/or Brook Lodge RTM Co. Ltd. until the Applicant took over. Mr. Leith seems to have been involved in these intermediate companies/partnerships as well as representing the Applicant.

4. The Tribunal issued a directions order on the 20th December 2016 timetabling this case to the hearing. This included a direction for the Applicant to file bundles for the Tribunal 10 days before the hearing to include a copy of the application and all documents filed and served. It was ordered that the bundle should have an index and that the pages should be numbered. None of this was fully complied with. Indeed no further copies of the Respondent's evidence were sent in and the copy lodged by the Respondent had to be shared by the Tribunal members.

The Law

5. Section 94 of the Act provides that where the right to acquire the right to manage is obtained by an RTM company, any accrued uncommitted service charges held by the landlord or manager on the acquisition date i.e. 28th January 2015 in this case, must be paid by the landlord or manager to the RTM Company.

6. The section goes on to say:-

> "*(2) The amount of any accrued uncommitted service charges is the aggregate of---*
> *(a) any sums which have been paid to* (the manager) *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* (this 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.*

7. Sections 41-42B of the **Landlord and Tenant Act 1987** ("the 1987 Act") deal with service charges held in a reserve or sinking fund. They

are held on trust for the leaseholders and must be held in a designated account 'at a relevant financial institution' i.e. a bank.

The Property and the Leases

8. Although there was no pre-hearing inspection of the property, it is important to understand that this is a development of 27 flats to be let on long leases plus a caretaker's dwelling. The planning permission refers to the 'erection of sheltered flats (30 units with wardens accommodation and common room)'. At the hearing, the Respondent explained that the warden did not live on site and therefore there were 28 flats. The difference is that the planning permission shown was for 30 one bedroom flats but the developer thought that there should be 6 2 bedroom flats which cut down the overall total.

9. The legal situation is fairly straightforward but the parties and the landlord appear to have made matters extremely complex. How much the Respondent has contributed to this is unclear. Much of the evidence as to how matters have transpired is contested. Doing the best it can, the position seems to be as follows.

10. The only copy lease seen by the Tribunal is dated 20th May 2004 and is made between Grayson (Butling) Ltd. (landlord), Nora Maud Alice Ginnaw (tenant) and the Respondent (the manager). It is for a term, of 125 years commencing 1st October 2003. It should be said that this is not a copy of a signed or sealed lease and there is no evidence of payment of stamp duty. It has a number of errors. In the evidence, the landlord is referred to as Grayson Building Ltd. although there is no suggestion that this is a different company. The copy appears to be continuous up to page 23 but the pages thereafter seem to be from a different document. Fortunately, the important pages all seem to have been included. There was no dispute about this at the hearing.

11. The Respondent says that the first 16 flats were let on what it refers to as a 'master' lease but subsequent leases were in different terms. The only difference pointed out is that the subsequent leases omitted reference to the NHBC Sheltered Housing Code. The Respondent says that Grayson Building Ltd. has been fined and struck off the NHBC Register.

12. The scheme created by the copy lease produced is that the flats can only be occupied by people of 55 years or above unless there is shared accommodation when the other person(s) must be 50 or above. The following clause is important although maybe not relevant to the issues in this case:-

> *"The Lessor and the Manager have prior to the letting of any dwelling on the Estate entered into a management agreement as required by the NHBC Sheltered Housing Code and which (inter alia) contains an option in favour of the Manager to call for the transfer of the Lessor's freehold interest in the Estate following the completion of the letting of the last*

of the Dwellings on the Estate and the completion of a new management agreement as required by the NTIBC Sheltered Housing Code"

13. In some respects, the lease is a fairly standard tri-partite lease with the manager being responsible for insuring the property and keeping it and the grounds maintained and in good repair. The provisions enabling the manager to collect service charges are comprehensive and allow managing agents' fees to be recovered as well as fees and expenses incurred in the recovery of service charges.

14. On each sale of the leasehold interest, clause 12 of Schedule 5 of the lease requires the leaseholder to pay a sum of money to the manager 'immediately after completion' based on a formula set out in the Schedule. Paragraph 11 of Schedule 8 requires the manager to hold these monies "*as a contribution to a reserve or sinking fund as permitted by the NHBC Sheltered Housing Code*" and all such monies together with all service charge monies shall be held on trust for the leaseholders and shall be used by the manager in its running of the estate. These are called 'exit fees'.

15. Whilst the development has been proceeding, the landlord should have been contributing to the service charges and, of course, the sinking fund. Clause 10 of Schedule 8 deals with the point by containing an express agreement between all parties that "*the Lessor will be responsible on a daily basis for the payment of void service charges in respect of the Dwellings on the Estate which are intended to be let but remain unlet from the date of the letting of the first of the Dwellings on the Estate until the date of the letting of the last of the Dwellings on the Estate*".

The Hearing

16. Those attending the hearing were the representatives mentioned above and Debbie Tyler-Curtis who said that she was the only director of the freehold owner, Grayson Building Ltd., which had been acquired in September 2016 when she had been appointed as director.

17. She was asked questions by the Tribunal members about why there were no invoices for the works undertaken by her company – particularly in 2010 and 2011 – and what investigations had been carried out to ascertain the validity of handwritten ledgers provided. She was asked in particular what concerns she had about the lack of invoices bearing in mind possible tax implications. Apart from saying that there were company accounts and that her solicitors had dealt with the investigations, she was really unable to answer.

18. The Tribunal members then asked Messrs. Penman and Mr. Leith about the building and the development in general. As far as the building is concerned, the window frames and doors were wooden and it was agreed that they and the internal halls, landing and common room had been decorated in 2011 and 2012. This had involved scaffolding costs of some £15,000 and work to roof valleys and

guttering costing some £5,000 plus all the other usual costs of decoration work. The figures given by the Respondent as to the cost of these works varied from £57,324.58 (written statement headed 'sinking fund') to £64,299.10 (draft sinking fund account to 31st August 2013 supplied by the Respondent to the Applicant). The Tribunal's view is that both these figures are extremely high.

19. There is a lift and the garden is surrounded by some listed walls and fences none of which had required any work.

20. The developer was Grayson Building Ltd. The Tribunal was somewhat surprised to hear that Messrs. Penman had a financial interest in the development as they, or at least one of them, managed the construction of the site and received a profit on the sale of each flat, although they said that they did not receive any profit from the last 10 sales. They either did not appreciate or did not take any notice of the obvious potential conflict of interest in such an arrangement.

21. The Respondent, as management company, had to oversee the service charge regime and the sinking fund. The developer was contractually obliged to pay service charges in respect of the unsold flats but did not. Instead, it said that it had undertaken works and then claimed the cost of these as a set off against its liabilities without any invoices or other paperwork save for the handwritten ledgers which give no real information at all. The conflict of interest between Messrs. Penman and the developer may explain why no action was taken to make the developer comply with the terms of the leases.

22. It gradually emerged during the hearing that the main problem in this development was that the flats did not sell and the developer had no money. Having said that, Mr. Penman explained that the first 4 flats were sold to a company which then sold them on immediately for double the price. If the flats were so undervalued, he could not explain why the others did not sell. The Tribunal understands that this was a period when property prices were reacting to the global financial crisis but prices did not drop by half, particularly in a popular area so close to Ongar High Street.

23. When the decoration work was being undertaken in 2011 and 2012, the empty flats were refurbished in the hope that they could be sold, although Mr. Penman said that the cost of such works had not been part of the expenses set off against service charges. How he could tell that in view of the sparse information about these costs which had been supplied to him was difficult to understand.

24. He also explained that several leaseholders had not paid service charges and he had obtained judgments against them which were registered against their titles. This brought no response from Mr. Leith who seemed to accept this.

25. Finally, the parties were asked how they expected the Tribunal to determine the issue in this case when it had such little information

supplied to it. Mr. Leith referred to the accounts supplied for the year ending 31st August 2015. He was told that those accounts were not in the bundle.

26. He attempted to e-mail them in to the Tribunal after the hearing. The Tribunal would not normally consider evidence supplied after the hearing but the document supplied was not a set of accounts. It was one page and the section dealing with the sinking fund simply had a note that working papers had been submitted to accountants that week and a 'draft' result was that the annual contribution from leaseholders and voids was a total of £54,000 plus the exit fees of £14,243.70 leaving a balance of £68,243.70 less work undertaken by the developer of £64,299.10 leaving a balance of £3,944.60. These were the figures given in another document in the bundle – see below.

Discussion

27. The scheme of the right to manage company was controversial when implemented. It is, after all, a draconian step to allow leaseholders to form a company which takes away the right to manage from the owner of the property or a management company on a no fault 'compulsory' basis.

28. Management takes planning and the transfer of management will take thought and preparation. This is presumably why the scheme provides for a step by step approach. There has to be a Claim Notice and then a gap of at least 3 months. The purpose of this is to enable the existing manager to plan the handover so that the RTM company can start to manage the property as from the date set out in the Act. The extra cost incurred in this process can be recovered from the RTM company.

29. Accordingly, whilst it must obviously be more complicated when there appear to have been 2 managers other than the Respondent since September 2013, there is still time for the necessary financial matters to be addressed within the 3 month period. They have clearly not been. It was put to Messrs. Penman that they could have prepared a statement of account setting out exactly what was owed by the various lessees so that the exact position as at 28th January 2015 could have been seen. They had no answer to this save to say that the Applicant had been asked for information but had not supplied it. It was pointed out that accounts could have been provided with the information available. Reservations about lack of information could have been applied, if necessary.

30. The case of **OM Ltd. and New River Head RTM Co. Ltd.** [2010] UKUT 394 (LC) helpfully sets out some views on what should be handed over. Some of the comments of HHJ Mole QC may well have been *obiter* but they are still of assistance. In essence it confirms what is in the Act i.e. that at the take-over date or as soon as is reasonably practicable thereafter, the landlord must hand over to the RTM company all accrued uncommitted service charges so that the RTM company can take over the management on a day to day basis.

31. As to unpaid service charges, the New River Head case does provide assistance by making it clear, in the words of HHJ Mole QC at paragraph 23, *"The payment of accrued uncommitted service charges is confined to those accrued uncommitted service charges 'held by' the landlord or manage on the acquisition date. The natural meaning of those words is that what was to be paid is what the landlord or manager has actually got; not what he was entitled to have but failed to get or had at one stage but has not now".*

32. Thus, it seems quite clear to this Tribunal that as soon as was reasonably practicable after 28th January 2015, the Respondent should have handed over all the accrued uncommitted service charges it then held. 3 months before then it should have instructed its accounts department or its outside accountants to work on preparing the necessary figures for the property. Any extra costs involved plus any liability from the leaseholders could have been charged to the RTM company. The word 'reasonably' in this context must surely be an objective test bearing in mind the 3 month lead in period.

The Sinking Fund

33. The two arguments made by the Applicant are (a) there should be some money in the sinking fund and (b) the costs allegedly incurred by the landlord to reduce its contribution to the debt it owes have not been detailed. It is said that no major works have been undertaken. There is no mention of any works having been done by the landlord save for development of the site which would not ordinarily be service charges.

34. In the accounting documents supplied by the Respondent, it would appear, on the face of it, that the service charge calculations up to 31st August 2014 appear to be accepted save for the involvement of the landlord. Certainly, there is no challenge as to their reasonableness and payability. In any event, the Tribunal had no detail at all about how the figures were made up.

35. The Respondent's comments about the sinking fund are set out in a statement. However, it contains little detail about what is supposed to be in the fund. The Applicant has produced a statement which attaches what it describes as 'the last accounts prepared by the Respondent, for the year ending 31/8/2013'. This records that the money paid into this account should have been £68,243.70 being 9 years at £6,000 plus the exit fees of £14,243.70.

36. From that is deducted £64,299.10 for expenditure leaving a credit balance of £3,944.60. The problem, as identified by the Applicant, is whether the expenditure is a debt properly due to the landlord. In its statement, the Respondent agrees that up to 31st August 2010, the landlord's liability was £162,497.61 of which £113,300.65 had been paid 'in kind'. It is said that *"the deficit (£49,249.43) which, in turn, was secure in the fifteen unsold dwellings".* In other words the Respondent is suggesting that the debt is secure which does not seem to be the case.

37. It is then said by the Respondent that in 2010/2011, the landlord undertook medium term maintenance amounting to £57,324.58 which, it says, negated the voids service charge deficit i.e. what the landlord should have paid towards the service charges. The statement then refers to details of the work but these details consist of a handwritten ledger listing (mostly) the names of contractors, including labour charges, without saying what the work is for. The total is not £57,324.58 and it is confirmed specifically that the landlord produced no invoices to cover this work.

38. The Applicant purports to provide evidence that the landlord did nothing other than develop the site during this period.

39. There is a copy of bank statements from the Respondent from AIB Bank from 18th February 2004 until 25th April 2013 and then from Barclays Bank from 4th January 2013 until 10th May 2013. These accounts are in the name of the Respondent but there is no other information on them or with them to suggest what either the statements or the payments in and out relate to. The end balance as at 10th May 2013 is £1,004.05. At the hearing, Messrs. Penman said that amount now in the account was about £100.

Conclusions

40. The Applicant has not produced any forensic analysis to challenge the figures produced by the Respondent. The only issue for determination seems to be whether the relationships between the landlord and both the service charge fund and the sinking fund have been legitimate. Should the landlord have just claimed to 'off set' his liability to the service charges by doing work? Should and/or has the landlord undertaken substantial works and just claimed a credit instead of particularising the works and supplying invoices?

41. What is clear from the documents supplied is that the service charge claims against the individual leaseholders over the years have been very high. For the 2 bedroom flats, the charges start at £1,671.50 in 2005 and finish at £2,223.10 in 2013 according to the figures supplied by the Respondent. These are extremely high. For a relatively new 2 bedroom flat on an estate of this size, this Tribunal would expect to see figures of £1,000-1,500 for service charges to include a caretaker's salary.

42. As has been said, the Respondent's evidence is that up to 31st August 2010 i.e. before the decoration works, the amount owed by the landlord was £162,497.61 and the amount 'contra'd' with works undertaken by such landlord was £113,300.65. No evidence was produced to either confirm what was done by the landlord or whether the figures were correct and reasonable.

43. As to the sinking fund it is said that £3,944.60 was a credit balance on the 31st August 2013. The bank statements provided say that the balance was £1,004.05 on the date of the last entry i.e. 10th May 2013.

The correct figure is now said to be 'about' £100. The date to be considered by the Tribunal is the 28th January 2015 and the Tribunal simply has no knowledge of what the Respondent was actually holding on that date because there has been no evidence supplied.

The Future

44. From the history of this development and the litigation that has already been undertaken, the parties have a choice. Either resolve matters without expensive litigation or accept that they will be in and out of the courts and Tribunals over the next few years.

45. Now that Grayson Building Ltd. is apparently in the hands of the leaseholders, they can commission a forensic examination of its books and make comparisons with the handwritten ledgers supplied to the Tribunal.

46. It seems probable, to put it no higher, that the freeholder has no money to (a) pay damages to the leaseholders for breaching the terms of the leases by failing to pay voids or (b) pay damages to Messrs. Penman for failure to pay them anything on the sale of the last 10 flats. If the Respondent also has no uncommitted service charges, the parties might just prefer to draw a line under things to save expense and for peace of mind.

47. The Respondent claims that it is owed unspecified moneys for e.g. attendance at Tribunal and court hearings but those administration charges are open to scrutiny by this Tribunal. As the Respondent has clearly not attempted to prepare any proper closing accounts as at 28th January 2015, so that everyone has a starting point in any negotiation, it can expect little sympathy at the commencement of such scrutiny.

48. The Tribunal does not know how many leaseholders have judgments against them which are registered against titles, but if the amounts are not too great, it may be possible for the RTM to just to pay these or persuade its members to pay them.

49. Finally, the leaseholders might also like to consider an examination of the percentages of service charges if, as the Tribunal was told, the caretakers flat has been let on a long lease making it 28 flats in total. Thus, if there are 6 two bedroom flats (6 x 4.26% = 25.56) and 22 one bedroom flats (22 x 3.55 = 78.10), then the total percentage of service charges claimed is 103.66%.

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Bruce Edgington
Regional Judge
30th March 2017

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.