



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

<b>Case Reference</b>	: (1) CHI/21UF/LUS/2020/0001 (2) CHI/21UF/LSC/2020/0029
<b>Property</b>	: Villandry, West Quay, Fort Road, Newhaven, BN9 9GD
<b>Applicants</b>	: (1) Villandry RTM Company Limited (2) Richbusy Limited, M Allen, J Small, M and M Winning, S de Beaulieu, R Wallis, G Hamon, K Joyce
<b>Representative</b>	: Mrs Susan Massingham.
<b>Respondent</b>	: Villandry Property Limited
<b>Representative</b>	: Christopher Hudson and Mark Carter
<b>Type of Application</b>	: (1) Liability to pay and reasonableness of service charges, section 27A Landlord & Tenant Act 1985 (2) Determination of Landlord's costs and accrued uncommitted service charges, sections 88(4) and 94(3) Commonhold and Leasehold Reform Act 2002
<b>Tribunal Members</b>	: Judge N P Jutton and Mr Roger Wilkey FRICS
<b>Date of Hearing</b>	: 10.00 am Thursday 23 July 2020 by video enabled hearing
<b>Date of Decision</b>	: 23 July 2020

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DECISION

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1     **Background**

- 2     The property known as Villandry, Fort Road, Newhaven, East Sussex, BN9 9GD (the Property) is a development comprising 13 residential flats and 6 commercial units. The Respondent, Villandry Property Limited, is the Freeholder of the Property. The First Applicant, Villandry RTM Company Limited, is a right to manage company incorporated on 17 June 2019 pursuant to the provisions of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act).
- 3     On 10 March 2020 the 1<sup>st</sup> Applicant submitted an application to the Tribunal seeking: Firstly, a determination pursuant to section 88(4) of the 2002 Act of the amount of costs payable by the 1<sup>st</sup> Applicant to the Respondent in consequence of a claim notice to acquire the right to manage the Property. Secondly, a determination pursuant to section 94(3) of the same Act as to the amount of uncommitted service charges held by the Respondent which fell to be paid to the 1<sup>st</sup> Applicant (the 2002 Act Application).
- 4     On 10 March 2020, the 2<sup>nd</sup> – 9<sup>th</sup> Applicants submitted an application to the Tribunal pursuant to section 27A of the Landlord & Tenant Act 1985 (the 1985 Act) for the determination of liability to pay and reasonableness of certain service charges (the 1985 Act application).
- 5     By Directions made by the Tribunal on 27 April 2020, it was ordered that the two applications be heard together. On 25 June 2020, the Tribunal further directed that in the circumstances because of the Covid-19 emergency, it was appropriate and right for the hearing to take place by Cloud Video Platform.

6     **Documents**

- 7     There was before the Tribunal a bundle of documents prepared in accordance with Directions which ran to approximately 300 pages. The bundle was broken down into 5 schedules and the pages to each schedule separately numbered. The numbering of pages referred to in this Decision is reference firstly to the appropriate schedule and secondly to the page number within that schedule. For example, 2(23) is a reference to page 23 of the second schedule of the bundle. The bundle comprised the applications, a sample residential lease (Apartment 5), the Tribunal's Directions, the parties' respective statements of case, and witness statements. A few days before the hearing the Respondent filed and served two further witness statements dated 16 July 2020. Mrs Massingham said that although she had received the statements by email, she had not read them assuming that they were copies of documents already received. The Directions provided that the Tribunal would only consider documents contained in the bundle. Given the late

service of the two statements and the fact that they had not been read by Mrs Massingham the Tribunal declined to allow the two late statements into evidence.

## **8 The Issues**

- 9 At the start of the hearing it was agreed between the parties that the issues to be determined were as follows:

### **The 1985 Act application**

- i. Whether the sum of £3,787.84 which appears in the service charge accounts for the year ending 31 December 2015 and is described as 'amount due to freehold company' properly did form part of the service charge payable by the lessees and if so, whether it was reasonable in amount.
- ii. Whether the sum of £6,690.00 that appears in the service charge accounts for the year ending 31 December 2016 and which is described as 'accountancy fees' was payable as part of the service charge and if so, was reasonably incurred.
- iii. Whether the sum of £3,929.70 which appears in the service charge accounts for the year ending 31 December 2018 and which is described as 'professional fees' was payable as part of the service charge and if so, whether it was reasonably incurred.
- iv. Whether the Tribunal should make an Order pursuant to section 20C of the 1985 Act that the costs incurred by the Respondent in connection with the proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the 2<sup>nd</sup> Applicants.
- v. Whether the Tribunal should make an Order pursuant to section 5A of Schedule 11 of the 2002 Act reducing or extinguishing any liability of the 2<sup>nd</sup> Applicant to pay a particular administration charge in respect of the proceedings before the Tribunal.

### **The 2002 Act Application**

- i. Pursuant to section 88 of the 2002 Act, the amount of reasonable costs incurred by the Respondent and payable by the 1<sup>st</sup> Applicant in consequence of a claim notice to acquire the right to manage the property served by the 1<sup>st</sup> Applicant on the Respondent.

- ii. The amount of uncommitted service charges payable by the Respondent to the 1<sup>st</sup> Applicant pursuant to section 94 of the 2002 Act following the acquisition by the 1<sup>st</sup> Applicant of the right to manage the property.

## 10 The 1985 Act Application

## 11 The Law

- 12 The statutory provisions relevant to 1985 Act Application are to be found in sections 18, 19, 20C and 27A of the 1985 Act and at Paragraph 5A of Schedule 11 to the 2002 Act. They provide as follows:

## The 1985 Act

- 18 (1) *In the following provisions of this Act “service charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent –*
  - (a) *which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord’s costs of management, and*
  - (b) *the whole or part of which varies or may vary according to the relevant costs.*
- (2) *The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.*
- (3) *For this purpose –*
  - (a) *“costs” includes overheads, and*
  - (b) *costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.*
- 19 (1) *Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –*
  - (a) *only to the extent that they are reasonably incurred, and*
  - (b) *where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;*

*and the amount payable shall be limited accordingly.*
- (2) *Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise*
- 27A (1) *An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –*

- (a) *the person by whom it is payable,*
- (b) *the person to whom it is payable,*
- (c) *the amount which is payable,*
- (d) *the date at or by which it is payable, and*
- (e) *the manner in which it is payable*

(2) *Subsection (1) applies whether or not any payment has been made.*

(3) *An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to –*

- (a) *the person by whom it would be payable,*
- (b) *the person to whom it would be payable,*
- (c) *the amount which would be payable,*
- (d) *the date at or by which it would be payable, and*
- (e) *the manner in which it would be payable.*

(4) *No application under subsection (1) or (3) may be made in respect of a matter which –*

- (a) *has been agreed or admitted by the tenant,*
- (b) *has been, or is to be, referred to arbitration pursuant to a post dispute arbitration agreement to which the tenant is a party,*
- (c) *has been the subject of determination by a court, or*
- (d) *has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.*

(5) *But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.*

20C

(1) *A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the First-Tier Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.*

(2) *The application shall be made –.....*

*(ba) in the case of proceedings before the First-Tier Tribunal, to the Tribunal.*

(3) *The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.*

Paragraph 5A of Schedule 11 of the 2002 Act provides as follows:

- “(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant’s liability to pay a particular administration charge in respect of litigation costs.*
- (2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.*
- (3) In this paragraph –*
  - (a) ‘litigation costs’ means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind and mentioned in the table, and*
  - (b) ‘the relevant court or tribunal’ means the court or tribunal mentioned in the table in relation to those proceedings”.*

The table referred to provides that the relevant Court or Tribunal in respect of proceedings before this Tribunal is this Tribunal.

### 13 **The Lease**

14 A copy of the lease appears at pages 2(1-29).

15 By clause 3.1 the tenant covenants as follows:

- “(b) to pay on the 1<sup>st</sup> January 2007 and on the succeeding 1<sup>st</sup> July and 1<sup>st</sup> January in each year such sum on account of the Tenant’s Proportion of the Service Charge as the Management Company may reasonably demand.*
- (c) To pay the Tenant’s Proportion within 28 days of the same being demanded following production of the accounts in accordance with the provisions of the Second Schedule credit being given for all sums on account paid under the provisions of the foregoing causes 3.1(a) and 3.1(b)”.*

16 The ‘Service Charge’ is defined as those items of expenditure set out in schedule 2 to the lease. It includes expenditure incurred by the management company in performing and observing the covenants and obligations on its part contained in the lease. Those obligations and covenants are set out at clause 4 and include keeping in good and substantial repair, reinstating, replacing and renewing the retained parts (as defined in the lease), decorating both external parts and internal communal parts, and for insuring the Property. The second schedule further includes as part of the service charge, expenditure:

*“(2) in the payment of the expenses of management of the Estate of the expenses of the administration of the Management Company of the proper fees of surveyors or agents appointed by the Management Company or in default by the Landlord in connection with the performance of the Management Company’s obligations and powers and with the apportionment and collection of those expenses and fees between and from the several parties liable to reimburse the Management Company for them and of the expenses and fees for the collection of all other payments due from the tenants of the apartments in the Building not being the payment of rent to the Landlord.*

*(3) In the provision of services facilities amenities improvements and other works where the Management Company in its or the Landlord in the Landlord’s absolute discretion from time to time considers the provision to be for the general benefit of the Estate and the tenants of the apartments and whether or not the Management Company has covenanted to make the provision”.*

17 Clause 5.6 of the lease provides:

*“that if the Management Company fails to perform any of its obligations at the request in writing of the Tenant to the Landlord the Landlord will perform those obligations subject to payment being made by the Tenant in advance and on demand to the Landlord of an amount equal to the Service Charge which would have been paid to the Management Company on account of the performance of those obligations whether or not payment has been previously made to the Management Company”.*

18 **Year Ending 31 December 2015**

19 The Applicants make reference to the sum of £3,787.84 which the Tribunal was told appears in the service charge accounts for this year and which is described as *“amount due to the freeholder”*. In their application, the Applicants enquire as to what this sum relates, whether it is for legal costs and if so, they contend that it is not payable from the service charge account.

20 The Respondent says that the sum relates to ground rents historically collected by the lessor’s managing agents and then lent to the service charge account to fund insurance cover. That it was an interest free loan that was subsequently repaid and as such no longer featured in the service charge accounts. Further, that the issues raised in relation to this sum had been resolved in previous proceedings before the Tribunal (reference CHI/21UF/LSC2016/0015).

21 The Applicants make no reference to this sum in their statement of case. At the hearing Mrs Massingham on behalf of the Applicants confirmed that this issue was agreed and no longer fell to be determined by the Tribunal.

22 **Year Ending 31 December 2016**  
**Accountancy charges £6,690.00**

23 **The Applicants' Case**

24 Mrs Massingham said that she runs a small business and that her annual accountancy fees were in the region of £1,300. The amount that appeared to be claimed by the Respondent was in her view extravagant and unreasonable. She accepted that time had been spent on the preparation of accounts by the Respondent's Accountant Mr Carter.

25 The Tribunal referred the parties to the handwritten form of agreement in relation to previous proceedings before the Tribunal which appeared at pages 4(13, 14 and 15). Those were proceedings between Richbusy Limited and Villandry Property Limited. Richbusy Limited appears to be the only applicant in those proceedings. Mr Hudson confirmed on being questioned by the Tribunal that was his understanding. The Tribunal referred to a paragraph in the form of agreement which is dated 11 July 2016 which states:

*"That it was agreed that the accountant's fees incurred in respect of Friend James Limited in respect of the First Tier Tribunal of 11 July 2016, be met by the service charge fund of Villandry".*

26 Mrs Massingham said that it was the amount of the fees that she disputed. That was no disrespect to Mr Carter. That she had no authority to agree a figure on behalf of the other Applicants (i.e other than Richbusy Limited). It was, Mrs Massingham said, the amount of the Accountant's invoice in relation to the previous Tribunal proceedings, a copy of which is at 4(8) dated 14 July 2016 in the sum of £4,770, which she felt was unreasonable. That was she contended an unreasonable level of fees to incur given the nature of the dispute.

27 **The Respondent's Case**

28 Mr Carter confirmed that the said invoice of 14 July 2016 related solely to the previous proceedings before the Tribunal. It included time spent in answering questions put by the Applicant and in attending the Tribunal.

29 Mr Hudson said there were two items of accountancy fees which formed part of the service charge. They were the said invoice in relation to the previous Tribunal proceedings and the accountancy fees for the preparation and



production of the service charge accounts. Mr Hudson confirmed that the fees of £4,770 related directly to the previous Tribunal proceedings. That they were in his view reasonable in amount by reference to the number of documents produced by the Applicant upon which advice had to be sought from the Respondent's accountant and time spent addressing questions raised by both Richbusy Limited and its own accountants.

- 30 In answer to a question put to him by the Tribunal, Mr Hudson very fairly said that he did not believe that the settlement which appears at page 4(15) as set out above bound the other Applicants to these proceedings, just Richbusy Limited.
- 31 The Tribunal asked Mr Hudson if he could take the Tribunal to the provisions in the lease that he says would allow accountancy fees in relation to Tribunal proceedings to be recovered as part of the service charge. The Tribunal asked Mr Hudson if he would like time to consider. Mr Hudson said that he was satisfied that the Judge in the previous proceedings had approved the settlement and the withdrawal of those proceedings. Mr Carter said that he understood the Judge in the previous proceedings had suggested that the fees be settled from the service charge account.
- 32 The Tribunal explained to Mr Carter that its understanding of the figure of £6,690, which appears as accountancy fees in the service charge accounts, was that it was calculated by taking the deficit for the previous financial year (the difference between the budgeted figure for accountancy fees and the actual figure) adding to that the said invoice for £4,770 which were known incurred accountancy fees, and then adding a provision for accountancy fees for the year ending 31 December 2016. Mr Carter said that was correct. That in effect, the figure in the accounts is a budgeted figure. That if the actual figure is less, as indeed happened in this case, there is in effect a credit to the service charge account. If it is more, there is a further payment due from the lessees. The Tribunal asked Mr Carter why it was that there was a delay between the production of the accountancy fees for the preparation of service charge accounts and the completion of those accounts. Mr Carter said that when he produces the accounts, they are in a draft form. He anticipates that thereafter further fees will be incurred in answering questions that may be raised by his client or by the lessees. In the event he said that the actual accountancy fees for the production of the service charge accounts for the year ending 31 December 2016 was £1,080. That was less than the figure of £1,800 provided in the accounts as a provision. Mrs Massingham confirmed that was correct and that she agreed that the figure of £1,080 was a reasonable figure for the production of service charge accounts. She said that was not in dispute. It was the invoice for £4,770 at 4(8) that was in dispute.

**33 The Tribunal's Decision**

- 34 What the Tribunal is asked to determine is firstly, whether accountancy fees incurred in the year ending 31 December 2016 may be recovered as part of the service charge and if so, secondly whether they are a reasonable amount.
- 35 There are two elements to the accountancy fees incurred for that year. They are the sum of £1,080 in relation to the fees for the preparation of service charge accounts. Those are not in dispute. The other sum of £4,770 as set out in the invoice at 4(8) relates to accountants' fees in respect of proceedings before a previous Tribunal. The total actually incurred in accountancy fees claimed therefore for that year is £5,850.
- 36 As regards Richbusy Limited, the Tribunal is satisfied by reason of the form of Agreement that appears at 4(14 and 15) that the Richbusy Limited has agreed that those fees are payable as part of the service charge payable by it. However, what was not agreed was the amount of those fees.
- 37 As regards the 3<sup>rd</sup> to 9<sup>th</sup> Applicants inclusive, in the view of the Tribunal fees incurred by the Respondent of a professional nature in relation to proceedings before the Tribunal are not recoverable as part of the service charge. That there is no provision in the lease which would allow such recovery. Items of expenditure which can be recovered by the Respondent as service charges are set out in the second schedule to the lease 2(26-28). The second schedule does not provide that the lessor can recover as part of the service charge expenditure professional fees incurred by it in respect of proceedings before a Court or Tribunal. That had that been the intention of the draftsman, he would no doubt have included such a provision in the lease.
- 38 It follows that the Tribunal determines that the sum of £4,770 does not form part of the service charge which is payable by the 3<sup>rd</sup> to 9<sup>th</sup> Applicants (more particularly in the tenants' proportion applicable to them as defined in their respective leases) for the year ending 31 December 2016. It is however payable by the Richbusy limited in relation to the three lessees held by it (again however in the tenants' proportions as defined in those leases) by reason of the agreement 4(14 and 15). Further, upon the basis of the evidence before it and in particular having regard to the time ledger at page 4(10), the Tribunal is satisfied that the invoice for £4,770 is reasonable in amount.
- 39 The Tribunal determines that the amount of accountancy fees that can be recovered by the Respondent as service charges for the year ending 31 December 2016 in relation to the 3<sup>rd</sup> to 9<sup>th</sup> Applicants inclusive is £1,080. The amount that can be recovered from the Richbusy Limited is £4,770 plus

£1,080, total £5,850.00, (in both cases in the tenants' proportions as defined in the Applicants' respective leases).

40 **Year Ending 31 December 2018**  
**Fees of Philip Gocher Associates £3,923.70**

41 **The Applicants' Case**

42 The Applicants' case is set out in some detail in their written statement of case at 5(1-5). The Tribunal has read that carefully. At the hearing, Mrs Massingham said that she was shocked that what she described as a 3 line email instruction, would generate such a large amount of work and thus fees. She questioned whether or not it was appropriate and reasonable for the Respondent to have instructed a structural engineer as opposed to a surveyor. That in her view, consideration should have been given by the managing agents to appointing their own in-house surveyor which would she believed have saved substantial fees. The building was, she said, only 14 years old. That the exercise carried out by the structural engineer in inspecting the property and producing a schedule of works was excessive. That the engineer in her view made errors in his schedule of works, for example by making allowances for wooden balconies when in fact the balconies in the property were faux balconies. That the extent of works identified by the engineer was excessive and/or unnecessary. Mrs Massingham said that the building, although only 14 years old, was not in a good state and that very little money she believed had been spent on it over those 14 years. She did not accept that the engineer's fees were reasonable. They were in her view too much.

43 **The Respondent's Case**

44 Mr Hudson said that the engineer's fees were in his view reasonable. The invoice is at page 4(18). It shows a total time spent of 24.25 hours at a charge out rate of £130 per hour. Mr Hudson said that it was entirely appropriate to approach this particular firm because they were known to the managing agents and had some knowledge of the property. He believed that Mrs Massingham had a degree of personal animosity towards the engineer. It would need, Mr Hudson said, a forensic approach to un-pick the fees claimed by the engineer which he felt was not appropriate and that in any event, he felt that the fees were reasonable for the work carried out.

45 Upon being questioned by the Tribunal as to what she would regard as a reasonable amount to pay for the engineer's fees, Mrs Massingham said nil on the basis that it was not necessary to instruct the engineer at all. She did not, she said, have any form of grudge with the engineer, this was purely a professional matter.

46 **The Tribunal's Decision**

47 The issue for the Tribunal is whether or not it was reasonable for the Respondent in 2018 to instruct a structural engineer to carry out an inspection of the property, to prepare a schedule of proposed works and to begin the process of inviting tenders with a view to those works being undertaken.

48 The invoice is at page 4(18). The work carried out is described as follows:

*“To detailed inspection of the various elevations, preparation of a Schedule of Works on individual elevations, obtaining competitive tenders and liaising with tendering contractors, obtaining tenders and undertaking tender analysis”.*

The time claimed is 24.25 hours at £130 per hour which totals £3,152.50. When disbursements and VAT are added, the total invoice is £3,923.70.

49 In the view of the Tribunal, it was reasonable and a matter of good estate management for the Respondent to have instructed a structural engineer to carry out the work set out in the invoice. That a responsible landlord will seek advice as to the condition of a property, as to what works may be required immediately or in the foreseeable future, and to seek a schedule of those works. That where works are found to be necessary, it was appropriate to instruct a surveyor or engineer to undertake the tendering process in relation to those works.

50 The Tribunal does not accept that it would have been reasonable instead or more appropriate for the Respondent to have instructed the managing agent's in-house surveyor to carry out the work. There was no evidence before the Tribunal as to the qualifications, experience or ability of that surveyor, nor any evidence as to whether or not that surveyor would be prepared to carry out such work or as to what he or she would charge.

51 In the Applicants' statement of case, reference is made to a statement of one Christopher Tunbridge a Chartered Surveyor, who has produced a form of report which appears at 4(55-76). Mr Tunbridge is critical of the work carried out by the engineer Mr Goacher. He is critical of the specifications produced and of the tendering process adopted. As such, the Tribunal understands it is the Applicants' case that the fees paid to Mr Goacher are in effect fees that have been entirely wasted.

52 The Tribunal does not agree. On the basis of the evidence before it, the Tribunal is satisfied that it was reasonable for the Respondent to instruct a Structural Engineer to inspect the property and to produce a schedule or

specification of works and to undertake the tendering process. Notwithstanding that the Applicants may be critical of Mr Goacher and Mr Tunbridge may be critical of the work carried out by Mr Goacher, that does not mean that the fees incurred by Mr Goacher were unreasonably incurred.

53 There was nothing in the evidence before the Tribunal to suggest that the fees charged by Mr Goacher were unreasonable. Indeed, as an expert Tribunal the Tribunal is satisfied that they appear reasonable. That in terms of both the time spent and the hourly rate charged (which the Tribunal notes is less than that proposed by Mr Tunbridge).

54 In all the circumstances, upon the basis of the evidence before it, the Tribunal determines that the professional fees of Philip Goacher Associates which appear in the service charge accounts for the year ending 31 December 2018 in the sum of £3,923.70 are recoverable as part of the service charge payable by the Applicants, and are reasonable in amount.

55 **Applications pursuant to section 20C of the 1985 Act and paragraph 5A of schedule 11 of the 2002 Act**

56 Mr Hudson at the hearing confirmed to the Tribunal that the Respondent was not seeking to recover from the Applicants whether by way of service charges or administration charges any of the costs or fees that it incurred in relation to these proceedings.

57 The Tribunal therefore orders as follows:

- i. That any costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.
- ii. That the Applicants will not be liable to pay to the Respondent as administration charges any litigation costs incurred by the Respondent in respect of these proceedings.

58 **The 2002 Act Application**

59 **Section 88 Application**

60 Section 88 of the 2002 Act provides as follows:

*“(1) A RTM company is liable for reasonable costs incurred by a person who is –*

- (a) landlord under a lease of the whole or any part of any premises,*

- (b) *a party to such 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*

*in consequence of a claim notice given by the company in relation to the premises.*

- (2) *Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.*
- (3) *A RTM company is liable for any costs which such a person incurs as a party to any proceedings under this chapter before the appropriate tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.*
- (4) *Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by the appropriate tribunal”.*

## 61 **Background**

62 On 9 August 2019, the 1<sup>st</sup> Applicant served on the Respondent a notice of claim pursuant to section 79 of the 2002 Act to acquire the right to manage the property. Mr Hudson confirmed at the hearing that the claim was not resisted and that the acquisition date for the purposes of section 90 of the 2002 Act was 31 December 2019. The Respondent instructed solicitors. Those solicitors were a firm called Guillaumes LLP of Weybridge in Surrey. There are invoices from those solicitors addressed to the Respondent at pages 4(22-29) of the bundle and with each invoice there is a corresponding time ledger printout. The Respondent seeks total costs inclusive of VAT and disbursements of £2,757.

## 63 **The Applicants’ Case**

64 Mrs Massingham said that this was an uncontested claim by the 1<sup>st</sup> Applicant to acquire the right to manage the Property. That the process was straightforward. That she understood that the solicitor who the Respondent consulted in turn sought advice from the Leasehold Advisory Service for which he charged. That he spent time advising in relation to a parking contract. On the Applicants’ statement of case are copies of the time ledgers produced by the Respondent’s solicitors in support of their invoices upon which the 1<sup>st</sup> Applicant’s solicitor had highlighted in green the costs that he felt are reasonable. On that basis, the 1<sup>st</sup> Applicant’s solicitor had made an offer in respect of costs of £1075 plus VAT and a Land Registry disbursement of £6 (5(77)).

65 **The Respondent's Case**

66 The Respondent says in its statement of case that the service of the right to manage claim notice "*triggered the liability to pay costs*". That the costs incurred were reasonable in amount. Mr Hudson said that the Respondent had approached its solicitors prior to service of the claim notice once it had been made aware of the 1<sup>st</sup> Applicant's intention to make a claim. That the advice received related to the process to be followed but also to the status of certain contracts including a parking contract that was held by the Respondent in particular as to whether or not that would form part of the right to manage process or be retained by the Respondent.

67 **The Tribunal's Decision**

68 There are 4 invoices from the Respondent's solicitor in the bundle. They are:

- i. 29 July 2019: £528
- ii. 11 September 2019: £1,095
- iii. 30 October 2019: £594
- iv. 27 November 2019: £540.

69 The hourly rates applied are that of £230 for a Mr Tigwell and £210 for a Mr Thibault. The Applicants do not challenge the hourly rates and in the view of the Tribunal they appear reasonable.

70 Section 88 of the 2002 Act provides that the costs that are payable by the RTM company are those reasonable costs that are incurred by the landlord "*in consequence of a claim notice given by the company in relation to the premises*". The claim notice was served on 9 August 2019. It follows that the costs incurred prior to that date cannot be costs incurred in consequence of the service of the notice. The Tribunal therefore disallows all costs claimed prior to 9 August 2019. Those are the entirety of the costs set out in the invoice of 29 July 2019 in the sum of £528 and the first two items set out in the time ledger attached to the invoice dated 11 September 2019 which total £231 plus VAT. That is a total reduction of £805.20 inclusive of VAT.

71 The Tribunal accepts that it was reasonable for the Respondent to seek advice from Solicitors in relation to contracts such as the parking contracts referred to in the invoice of 30 October 2019. As to the advice received by the solicitors from the Leasehold Advisory Service, although that is referred to in the invoice of 30 October 2019, there appears to be no time claimed in the corresponding time ledger for seeking that advice.

72 On the basis of the evidence before it, the Tribunal is satisfied that the costs claimed by the Respondent (save for those prior to the service of the claim

notice) pursuant to section 88 of the 2002 Act are reasonable to the extent (applying the test in section 88(2)) that the Respondent would have regarded such costs as reasonable had the Respondent been personally liable for them.

73 The Tribunal therefore determines, taking account of the above deductions, that the amount of costs payable by the 1<sup>st</sup> Applicant to the Respondent pursuant to section 88 of the 2002 Act inclusive of VAT and disbursements are £1,951.80.

74 **Uncommitted Service Charges  
Section 94 of the 2002 Act**

75 Section 94 of the 2002 Act provides as follows:

*“(1) Where the right to manage premises is to be acquired by an RTM company, a person who is –*

*(a) a landlord under a lease of the whole or any part of the premises,*

*(b) a party to such 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 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 the appropriate 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”.*

76 **The Applicants’ Case**

77 Mrs Massingham said that despite the date of acquisition being 31 December 2019, funds were not transferred to the RTM company until 14 February 2020. The amount transferred she said was £41,254. That the Respondent had



previously paid back to lessees the sum of £7,406 as credits in respect of their individual service charge accounts. Mr Carter confirmed that those credits were paid back on 6 November 2019, that is prior to the acquisition date. Mrs Massingham explained that some lessees received refunds and others elected for the funds to remain in the service charge account as credits to their individual accounts.

78 The 1<sup>st</sup> Applicant says that to date it has still not received a balancing statement supporting the amount transferred. That the 1<sup>st</sup> Applicant is not aware of any additional costs whether for accountancy or otherwise being committed service charges which should have been retained by the Respondent. The whole process had been, she described, as something of a “*mish-mash of accountancy muddle*”.

### 79 **The Respondent’s Case**

80 Mr Carter said he understood that the amount of uncommitted service charges as at 31 December 2019 was that shown in the balance sheet for the 2019 service charge accounts of £40,682.31. That what he did not have as at 31 December 2019 and still does not have, were details from the managing agents of any committed service charges save for his own firm’s accountancy fees. He explained that there had historically been errors made by managing agents in passing monies between the service charge account and what he described as the freehold account. That he understood there was a sum of £8,777.48 shown in the service charge account which was in effect payments made on account of future service charges by lessees. In his witness statement of 5 June 2020 (4(77-79)) Mr Carter refers to sums which he believed were due from the Respondent to the 1<sup>st</sup> Applicant as well as sums due from the 1<sup>st</sup> Applicant to the Respondent. Further in his statement he says that he needs further account statements from the managing agents. In short, it is the Respondent’s case that it has insufficient information to calculate the amount of uncommitted service charges to be paid over as at 31 December 2019 to the 1<sup>st</sup> Applicant pursuant to section 94 of the 2002 Act.

### 81 **The Tribunal’s Consideration**

82 The Tribunal suggested to the parties at the hearing that an over-consideration of the accounting exercise in relation to service charges was not the right approach. The Tribunal referred the parties to the Decision of the Upper Tribunal (Lands Chamber) in **OM Limited & New River Head RTM Company Limited** (2010) UKUT 394 (LC). In particular, to paragraph 23 of the judgment of His Honour Judge Mole QC. The Tribunal read out to the parties the following extract:

*“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 has 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 does not have now”.*

- 83 What has to be paid by the Respondent landlord to the Applicant RTM company are those monies that are held by the Respondent as at 31 December 2019 which are sums received by way of service charges (whether or not the service charges are in fact justifiable and reasonable) less any committed service charges. Committed service charges are those charges that relate to a bill or invoice which the Respondent is obliged to pay from the monies that it holds. As it was put by His Honour Judge Mole QC at paragraph 27 of the said Decision:

*“If he (ie the landlord) knows he will have a bill to pay he is entitled to hold enough to pay it as money representing committed accrued service charges. If there still remains an accrued uncommitted balance held by him at the acquisition date, that is the money that must be paid to the RTM”.*

- 84 In the view of the Tribunal it does not have sufficient evidence before it in order to determine for the purposes of section 94 of the 2002 Act the amount of uncommitted service charges that fell to be paid by the Respondent to the First Applicant as at 31 December 2019. The Tribunal explained to the parties that that exercise may be as simple as determining the amount of monies held by the Respondent or its managing agents in their service charge bank account retaining such element as is required to meet committed service charges and then paying the balance. (Mr Hudson said that he had been told by the managing agent, a Mr Halls, that the only amount of committed service charges that should be held back were the accountants’ fees.)

- 85 The Tribunal therefore told the parties that it would make Directions to allow for the provision of further evidence in relation to the uncommitted service charges and then with the consent of the parties, once those Directions had been complied with, would determine this part of the application on paper without a hearing. Both parties confirmed that they were happy to proceed on that basis.

- 86 The Tribunal therefore **Directs** as follows:

1. The Respondent shall by **4.00 pm on 7 August 2020** send to the Tribunal and to the Applicants’ representative, the following documents:

- a. A bank statement or bank statements showing the amount of monies held in the Respondent's service charge bank account (whether that be in the name of the Respondent or the Respondent's managing agents) as at 31 December 2019.
  - b. A statement setting out details of all unpaid committed accrued service charges to the Respondent's knowledge due for the financial year ending 31 December 2019. That means details of all bills/costs incurred prior to 31 December 2019 which have not been paid but which the Respondent is committed to pay from the service charge account.
  - c. Copy invoices in respect of known unpaid committed accrued service charge bills as referred to above.
2. The 1<sup>st</sup> Applicant may if it wishes, send to the Tribunal and to the Respondent a written statement in response by **4.00 pm on 21 August 2020**.
  3. The Tribunal will after **21 August 2020** in accordance with rule 31 of the Tribunal Procedure Rules 2013 determine the application pursuant to section 94 of the 2002 Act in respect of uncommitted service charges on paper without a hearing, both parties having indicated at the hearing that they were content for it to do so.

## 87 **Summary of Tribunals Decision**

### 88 **The 1985 Act application**

1. The incurred amount of accountancy fees that can be recovered by the Respondent as service charges for the year ending 31 December 2016 in relation to the 3<sup>rd</sup> to 9<sup>th</sup> Applicants inclusive is £1,080 (in the tenants' proportion as defined in each applicant's lease).
2. The amount of service charges in relation to accountancy fees incurred for the year ending 31 December 2016 which can be recovered from the 2<sup>nd</sup> Applicant are £5,850 (in the tenant's proportion as defined in the 2<sup>nd</sup> Applicant's lease).
3. The professional fees of Philip Goacher Associates which appear in the service charge accounts for the year ending 31 December 2018 in the sum of £3,923.70 are recoverable as part of the service charges payable by the 2<sup>nd</sup> to 9<sup>th</sup> Applicants and are reasonable in amount.

4. Pursuant to section 20C of the 1985 Act the Tribunal orders that any costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of the service charge payable by the 2<sup>nd</sup> to 9<sup>th</sup> Applicants.
5. That pursuant to paragraph 5A of Schedule 11 of the 2002 Act the Tribunal orders that the 2<sup>nd</sup> to 9<sup>th</sup> Applicants will not be liable to pay to the Respondent as administration charges any litigation costs incurred by the Respondent in respect of these proceedings.

#### **89 The 2002 Act Application**

- 90 Pursuant to section 88(4) of the 2002 Act the Tribunal determines that the amount of costs payable by the 1<sup>st</sup> Applicant to the Respondent inclusive of VAT and disbursements is £1,951.80.
- 91 In respect of the application pursuant to section 94(3) of the 2002 Act as to the amount of uncommitted service charges be paid by the Respondent to the 1<sup>st</sup> Applicant the Tribunal Directs as set out above.

Dated this 23<sup>rd</sup> day of July 2020

Judge N P Jutton

#### **Appeals**

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.