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H M COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of an application under Section 27A of the Landlord and Tenant Act 1985 (Liability for Service Charges)

Case No: CHI/29UH/LSC/2011/0119

Property: **Flat 4, Ruth House, Lesley Place, Maidstone, Kent ME16 0BU**

Between:

JUDITH WILSON

(the Applicant/Tenant)

-and-

LESLEY PLACE (MAIDSTONE) RTM LTD

(the Respondent)

Members of the Tribunal:	Mr MA Loveday BA(Hons) MCIArb	Lawyer/Chairman
	Mr R Athow FRICS MIRPM	Valuer Member

Date of the Decision: 29 November 2011

INTRODUCTION

1. This is an application under Landlord and Tenant Act 1985 s.27A in respect of service charges relating to Flat 4, Ruth House, Lesley Place, Maidstone, Kent ME16 0BU. The applicant is the lessee of the flat. The respondent is an RTM company that has managed four blocks at Lesley Place since 1 January 2005.

2. A claim was issued by the applicant on 13 July 2011 seeking a determination in respect of service charge liability for the years 2005-2011.

3. The Tribunal gave directions on 18 August 2011. The applicant served a statement of case dated 21 August 2011 and the respondent served a statement of case that was received by the Tribunal office on 17 October 2011. A hearing took place on 7 November 2011 at which the applicant appeared by her husband Mr Fergus Wilson and the respondent appeared by Mr John Hunter of the chartered surveyors Chaine Hunter Management Ltd.

4. Service charges for this flat have been the subject of extensive litigation over the years. The application itself refers to a recent decision of the President of the Lands Tribunal dated 22 September 2010 in respect of service charge liability (***Wilson v Lesley Place (RTM) Ltd*** [2010] UKUT 342 (LC), a decision of the LVT dated 1 March 2010 in the same matter (***Wilson v Lesley Place (RTM) Ltd*** (2010) CHI/29UH/LSC/2009/0128) and a judgment of HHJ Caddick (***Wilson v G&O Rents Ltd and Urbanpoint Property Management Ltd*** (2011), Maidstone CC unreported, 3 June 2011), of which only the order of the judge was available. In turn, the LVT decision dated 1 March 2010 refers to a previous decision of the LVT in relation to the same property (CHI/29UN/LSC/2008/0024) and there was also a passing reference to an even earlier LVT decision made on 8 July 2005. The Tribunal was not provided with copies of either of these two determinations.

THE STATUTORY PROVISIONS

5. The general jurisdiction of the Tribunal is under LTA 1985 s.27A:

> **"27A.** Liability to pay service charges: jurisdiction
> (1) An application may be made to a leasehold valuation 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."

6. Service charges are limited by Section 19 of the Act:

> **"19. Limitation of service charges: reasonableness**
> (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. "

7. Section 20C of the Landlord and Tenant Act 1985 provides that:

> "(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 or leasehold valuation tribunal, or the Lands 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.
> ...
> (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."

INSPECTION

8. Neither party requested an inspection and the Tribunal did not consider an inspection was necessary to determine the issues in this matter.

ISSUES

9. The first questions were the charges which were in dispute and the precise extent of the Tribunal's jurisdiction.

10. The Tribunal was provided with a copy of the lease of the flat dated 23 September 1987. By clauses 3(2) and clause 5 the tenant was liable to pay an annual maintenance charge equal to 1.78% of the landlord's "annual cost" in respect of the estate in the landlord's "accounting year". It was common ground that the landlord had at all material times adopted an accounting year based on the calendar year.

11. The application stated that for the years 2005-10 the applicant sought a determination in respect of "costs associated with running the company" and whether "the management fee (currently £180 inc VAT) [should] be allowed". The application referred to a "matrix" or table of relevant costs for the subject property that was referred to in both the Upper Tribunal determination (at paragraph 2) and the LVT decision dated 1 March 2010 (at paragraph 3). For the sake of convenience, the table is attached to this determination at Appendix A. The application also included particulars (headed "Grounds for Appeal") stating that the 2010 accounts prepared by the respondent appeared to take into account of the decision of the Upper Tribunal, but that there still remained the questions of (i) insurance charges in 2009 and (ii) charges for the managing agent. The former "should be £5,000 and not £15,000". The latter charge of £180 inc VAT per flat could not be charged "as Mr Hunter was an officer" of the respondent company.

12. In her statement of case, the applicant repeated that her challenge "essentially only applies to 2009 with the exception of Management Fees which apply to all six years". She asked the LVT to "look at 2009 and determine what I ow[e]" together with "one further point ... relating to the Management Fee".

13. In its statement of case, the respondent produced "maintenance fund statements" for both the 2009 and 2010 accounting years. The 2009 statements included expenditure of £9,349.22 for "insurance" and £9,836.62 for "Management & Administration". The 2010 accounts included expenditure of £17,110.74 for "insurance" and £9,870 for "Management Agents Fee". Audited accounts for the 2005-2008 accounting years had already been provided to the applicant, but they were not produced to this Tribunal.

14. At the hearing, the Tribunal sought clarification of the issues that properly fell to be decided in this application. The parties were referred to paragraph 11 of the decision of the LVT dated 1 March 2010 which stated as follows:

> "In 2008, the [RTM Company] had brought proceedings against the [tenant] to recover service charge arrears (CHI/29UN/LSC/2008/0024) and was subject to a determination by an earlier Tribunal ("the earlier determination"). In the course of those proceedings, it was agreed and admitted by the [tenant] that no sums claimed from 1 January 2005 were being challenged on the basis that they had not been reasonably incurred. The only issue, therefore, that the Tribunal in that case was being asked to determine was the [tenant's] liability to pay the service charges claimed for the years 2005 to 2007. These are the very same years and service charges in respect of which the Applicant has made this application and has taken the same point on liability to pay again."

Although a copy of the decision in the earlier LVT was not produced, both parties accepted that liability for all the applicant's service charges for the 2005-2007 accounting years had now been fully been disposed of by case nos. CHI/29UN/LSC/2008/0024 and CHI/29UH/LSC/2009/0128 (as appealed to the Upper Tribunal). However, the parties disagreed about whether the Tribunal had jurisdiction to decide any relevant costs for the 2008 service charge year.

15. At the hearing, Mr Wilson submitted that the decision of the LVT dated 1 March 2010 did not deal with either insurance or managing agent's fees, and that the appeal to the Upper Tribunal had been limited to the relevant costs of "direct

and indirect company costs of creating and administering an RTM company": see permission to appeal granted on 10 May 2010. By contrast, Mr Hunter submitted that liability for all the 2008 service charges had been disposed of in the earlier decisions. He referred to the table at Appendix A. The LVT and the Lands Tribunal were considering all the relevant costs in both years, since at that time the landlord had not broken down the service charge expenditure into the various line items. The previous decisions therefore dealt with all relevant costs in 2008, including any liability to contribute to insurance and management costs.

16. As to jurisdiction, the Tribunal accepts the submissions of Mr Wilson. The insurance premiums and management costs that are being challenged are not expressly referred to in the table at Appendix A. The LVT decision dated 1 March 2010 (at para 3 of its determination) describes the table as "the actual and estimated service charge costs in issue", not all the relevant costs incurred by the landlord. On appeal, the Upper Tribunal (at para 2 of its decision) described the table as "the disputed items of expenditure". Neither decision records any admission as to liability to contribute to relevant costs in 2008 or 2009 other than those in the table. Moreover, as far as the 2009 'expenditure' figures in the table are concerned, Mr Hunter did not challenge the Tribunal's jurisdiction dispute that they dealt with a different type of service charge. The Tribunal notes that the table describes these costs as an "estimate" of expenditure. In other words, the previous decisions of the LVT and the Upper Tribunal relating to the 2009 service charge costs related to estimated relevant costs, which formed part of the tenant's liability for interim service charges. By contrast, the present application deals with the landlord's actual expenditure in 2009, which forms part of the balancing service charges. It follows that the Tribunal has jurisdiction to determine liability for service charges for the 2008-10 accounting years. The items included in the application that fall within those years are the insurance costs in 2009 and the management costs in 2008-10.

17. It is nevertheless unsatisfactory that the previous decision of the LVT and the Upper Tribunal did not dispose of all aspects of the tenant's liability for service

charges for the 2008 accounting year. It cannot be proportionate for the parties to dispute service charge expenditure by piecemeal applications to the Tribunal to resolve liability to pay charges for the same accounting year.

INSURANCE COSTS

18. Under clause 3 and 5(C) of the lease the "annual cost" may include the cost to the landlord of insuring the estate and keeping it insured "with an insurance company and through an agency of repute against such risks as are usually contained in a comprehensive Policy and such other risks as the Lessor may think fit to the full reinstatement value thereof...".

19. Mr Wilson submitted that the insurance costs had crept up to £9,349.22 per annum in 2009 and £17,110 per annum in 2010. In 2005 the insurance costs had amounted to an average of £120 per unit for the 56 flats on the estate but in 2009 it had become £167 per flat and it was now £350 per unit. Mr Wilson submitted that the costs incurred in 2009 were unreasonably incurred under LTA 1985 s.19. Mr Wilson submitted that the Tribunal should use its own experience of insurance premiums to limit the amount of the relevant costs. He referred to a previous decision in which he had been involved, ***Greengates, Marine Parade, Littlestone, New Romney, Kent*** (2009) CH1/29UL/LIS/2009/0054, where another Tribunal used its own experience to limit the insurance premiums to £150 per flat. The increase in premiums in 2009 and 2010 could not be attributed to the claims history for the estate. Mr Wilson referred to the schedule of insurance claims produced by the landlord (see Appendix B to this decision) which showed that the increase was not explained by the claims history for the estate. According to the landlord's own documents, insurers had settled insurance claims of only £790 in 2009 and £968.13 in 2010. The 2008 claims had been higher at £43,462, but these were not very high claims in the context of an estate of this size. In any event, Mr Hunter had not declared the claims history to the brokers. An earlier LVT decision of 8 July 2005 made it clear that the agent had not declared the claims record that included fires in the garages.

20. Mr Hunter submitted that the applicant had not put forward any alternative quotations for building insurance. The RTM Company placed insurance through insurance brokers Residents Line who tested the market at each renewal. Since 2005, insurance has been placed with Norwich Union, Zurich and AXA depending on which offered the best terms on renewal. Any alternative quotations should be on a like for like basis ensuring that the insurer was aware of the full claims history. In this case the claims history was poor. Mr Hunter referred to a schedule of the claims history for the estate dated 15 September 2011, details of which are given in Appendix B to this determination. This showed a total of £109,666.08 in claims settled by insurers for losses sustained between 12 October 2005 and 7 July 2011. The claims included a car set on fire in August 2007 (£51,954), an escape of water in January 2008 (£12,371) and a fire in June 2008 (£36,991.74). The increase in premiums was due to this poor claims history.

21. As stated above, the issue under this head is whether the insurance premiums of £9,349.22 in 2009 were reasonably incurred. The fact that the premiums rose to over £17,000 in 2010 is therefore not relevant to the present application. The Tribunal notes there is no evidence at all from the applicant in relation to the quantum of the relevant costs of insurance in 2009. The Tribunal accepts that in the absence of such countervailing evidence, it need not accept the evidence of the landlord without deduction: see ***Country Trade v Noakes*** [2011] UKUT 407 (LC). However, it is a material factor that the applicant has not advanced in this application any at all evidence to show that insurance could have been secured for this estate at a lower premium in 2009. The only "evidence" advanced was a determination of another Tribunal in respect of another property in a different part of the country. No copy of that decision was provided to the present Tribunal, and in any event that decision is not binding upon us.

22. The Tribunal accepts the evidence of Mr Hunter that the insurance was placed through brokers who tested the market each year. There is some support for this from the fact that the insurers in fact changed from year to year. The only

point that called for an explanation by the landlord was the increase in premiums between 2005 and 2009. The fact that premiums increased sharply in 2010 is not really of any relevance since this occurred after the end of the 2009 service charge year. The increase from £120 per flat to £167 per flat over four years was far less marked. The Tribunal accepts the evidence of the landlord that this was largely attributable to the poor claims history. There were undoubtedly major claims in both 2007 and 2008 (in both years these exceeded £50,000) that would expect to be reflected in increased premiums in 2009. The respondent has therefore provided a satisfactory explanation for the increase in the insurance premium to 2009. The Tribunal rejects Mr Wilson's submissions on the point. It is entirely possible that there would have been some delay between the 2007 claims being made and the claims history being reflected in an increase in premium in 2009. The claims in 2007 and 2008 are significant, and amount to a substantial percentage of the annual gross insurance premiums. Moreover, there is no evidence Mr Hunter failed to declare insurance claims in earlier years to the insurers, and it is difficult to see how any such failure could in any event have increased premiums in 2009. Finally, standing back, the Tribunal does not consider that a gross premium of £167 per flat is (in its experience) manifestly excessive for an estate of 56 flats in 2009.

23. The Tribunal therefore finds under LTA 1985 s.19(1) that the landlord's relevant insurance costs of £9,349.22 in 2009 were reasonably incurred. This is the only ground of challenge by the applicant. Her liability is to contribute 1.78% of these costs in 2009, namely £166.42.

MANAGEMENT COSTS

24. Under clause 3 and 5(F) of the lease the "annual cost" may include the cost to the landlord of dealing "with the general management of the blocks including the provision of any services or carrying out of any function not specifically falling under any of the" obligations imposed on the landlord. By clause 5(H) the landlord was expressly permitted "to employ any agent to carry out its

obligations hereunder and the fees charged by such agents shall be deemed to have been properly incurred and recoverable from the lessee of the block."

25. The application suggests that the management fees are "currently £180 inc VAT" per flat (i.e. £10,080) whereas the respondent's statement of case suggests it is £12.50 per flat per calendar month plus VAT. Mr Hunter gave figures for management costs £6,430 in 2008, £9,376.62 in 2009 and £9,870 in 2010 (the last of these being the figure shown for "Management Agents Fee" in the 2010 service charge statement). Mr Wilson accepted that those figures were correct. Mr Hunter explained that part of the difference between the figure of £9,376.62 he relied upon and the figure of £9,836.62 stated in the 2009 maintenance fund statement was that the latter included payment of £310 for company secretarial services. These had been ruled as irrecoverable by the Lands Tribunal: see Appendix A "accounts fees".

26. Mr Wilson submitted that it was commonly held that a freeholder could not charge management fees if he undertook the management himself. In this instance, the directors of the RTM company were undertaking the management themselves through a firm of managing agents. Mr Hunter was the company secretary of the RTM Company as well as being the principal of Chaine Hunter, which managed the property. It was not an "arm's length" arrangement. Mr Wilson relied on the LVT decision in ***Arora v Boultbee-Brooks*** (2004) LON/00AW/LSL12004/059 and ***Finchbourne v Rodrigues*** [1976] 3 All ER 581, CA - although Mr Wilson did not produce either case report for the Tribunal. The management company was the alter ego of the RTM company. Mr Wilson did not object to the agent being paid for its work in managing the property, but that cost should fall on the shareholders of the RTM Company, not the lessees. Mr Wilson relied on the Upper Tribunal decision in ***Wilson v Lesley Place (RTM) Ltd*** [2010] UKUT 342 (LC) at para 15 where the President stated:

> "I do not see how it can possibly be said that the costs of complying with [clause 5(F) of the lease] include the costs of establishing and running the landlord company. Those are not costs of dealing with the general

> management of the block in terms of their maintenance etc and their insurance. It is always for the landlord, if he wishes to impose a charge upon the tenant, to spell it out clearly in the lease. I do not imagine that it would ever be argued that the company costs of a commercial landlord are spelt out clearly as falling within (F). On the contrary it is clear that they do not do so, and it is, as I have said, immaterial for the purpose of construing the lease whether the landlord is an RTM company or a commercial company."

In essence, there was "too close a connection" between the RTM company and the managing agent. Mr Wilson stated that Mr Hunter had more than slight interest in the property. He attended board meetings and he was not "sufficiently remote" from the RTM Company. If he gave up being company secretary, the applicant would have no problem with contributing to the management costs.

27. Mr Hunter stated that Chaine Hunter was a conventional firm of managing agent employed by the RTM Company to manage the property. Although there was no need for the respondent to have a company secretary, it was 'administratively convenient' for someone connected with the managing agent to be the secretary and he fulfilled that role. Chaine Hunter was not a member of the RTM Company and had no interest in it. Indeed, Mr Hunter himself had no financial involvement. The managing agent's fees were clearly recoverable under the terms of clause 5 of the lease. They related to the ordinary costs of managing the property.

28. The Tribunal accepts Mr Hunter's submissions and evidence on this point. There is no presumption as suggested by Mr Wilson that a freeholder could not charge management fees if he undertakes management himself. A lease may or may not permit a landlord to add 'in-house' management costs or the cost of providing other administrative functions to the service charges, and it is very much a matter of construction of the lease in each case as to whether such costs may be charged to the lessees. That was essentially the conclusion of the President in paragraph 15 of the Upper Tribunal decision set out above. The

Upper Tribunal concluded that certain administrative functions connected with the RTM Company could not be recovered under the provisions of clause 5(F) of this lease. However, in this case, the Tribunal accepts that the services provided by Chaine Hunter were ordinary management services and that these fall squarely within clauses 5(F) and (H) of the lease. Chaine Hunter was an agent employed by the landlord "to carry out its obligations" under the lease: see clause 5(H). Those obligations included "the general management of the blocks": see clause 5(F). Furthermore, the fact that Mr Hunter is the Company Secretary to the RTM Company is no reason to disallow the managing agent's costs. First, Mr Hunter and Chaine Hunter are legally distinct entities. Secondly, the position of secretary does not give rise to any improper conflict of interest. Thirdly, the Tribunal accepts that it will frequently be administratively convenient for the managing agent to provide administrative support to the lessee directors of a RTM Company. Finally, there is no overlap on fees. Mr Hunter has quite properly not sought to recover the £310 cost of providing company secretarial fees through the service charges.

29. It follows that the Tribunal allows the managing agent's fees of £6,430 in 2008, £9,376.62 in 2009 and £9,870 in 2010.

30. The applicant is liable to contribute 1.78% of these costs, namely £114.45 in 2008, £166.90 in 2009 and £175.69 in 2010.

LTA 1985 S.20C

31. Mr Wilson contended that the applicant should not have to contribute to the landlord's costs in connection with the application. The respondent's conduct had made the application more complex. Mr Wilson referred to an email dated 30 October 2010 where Chaine Hunter had sent the 2009 accounts under cover of a letter referring to the 2010 accounts. The problems with insurance and management had to be resolved by an application to the Tribunal. Moreover, it would have been simple for the agent to end the conflict of interest by Mr

Hunter ceasing to be secretary of the RTM Company. Mr Hunter submitted that the most important consideration was that costs followed the event.

32. The Tribunal considers that it would not be just and equitable to make an order under s.20C having regard to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000. The respondent has succeeded in relation to all issues. It is unclear why the matters in this case could not have (at least in part) formed part of the earlier application to the LVT which also dealt with relevant costs in 2008. The landlord quite properly incurred professional costs in resisting the application. The application itself was not entirely clear and the applicant included matters which (the Tribunal found) had already been determined in earlier determinations. The error referred to by the applicant in the email dated 30 October 2010 is relatively trivial and there is no evidence it added substantially to costs in this case. The Tribunal's findings above answer the other criticisms of the conduct of Mr Hunter and the managing agent.

OTHER MATTERS

33. The Tribunal has already commented above about the proportionality of issuing separate applications in relation to different aspects of the same service charge accounting year. Mr Wilson was asked to state whether (on behalf of his wife) he accepted liability to contribute to the remaining heads of expenditure in the 2009 and 2010 service charge statements, apart from the 2009 and 2010 management fees and the 2009 and 2010 insurance premiums. Mr Wilson stated that the applicant agreed liability to contribute to all the other heads of relevant cost set out in the 2009 and 2010 statements. This may be treated as an agreement or admission of liability for the purposes of s.27A(4)(a) of the Act.

CONCLUSIONS

34. The Tribunal determines that the applicant is liable to pay the following service charges:

    (a) Insurance costs: £166.42.

(b) Management costs: £114.45 in 2008, £166.90 in 2009 and £175.69 in 2010.

35. The Tribunal further determines that it is not just and equitable to make an order under LTA 1985 s.20C.

Signed

MA Loveday BA(Hons) MCIArb
Chairman
29 November 2011

APPENDIX A: DISPUTED EXPENDITURE	2005	2006	2007	2008	2009 (estimate)
Secretarial fee	150	150	150	150	150
Companies House and Hall hire	105	80	115	120	15
Directors & Offices Insurance	383.25	217.35	199.5	199.5	200
Accounts fees	310	310	310	310	310
Formation of Company and RTM Notice	1400				
Legal and Professional fees			600	3813.88	

APPENDIX B: INSURANCE CLAIM HISTORY	
Loss date	paid
12/10/2005	£1,440.54
26/04/2006	£1,050.00
07/08/2007	£51,954.67
01/01/2008	£12,371.00
21/05/2008	£3,366.00
19/06/2008	£36,991.74
07/08/2008	£734.00
03/09/2008	£0.00
17/05/2009	£430.00
19/08/2009	£0.00
02/09/2009	£360.00
01/01/2010	£0.00
21/04/2010	£0.00
30/11/2010	£968.13
07/07/2011	£0.00