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		**FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)**
Case Reference	:	**LON/00/AU/LSC/2014/0094**
Property	:	**3 Benwell Road, London, N7 7AY**
Applicant	:	**Benwell Road RTM Company Limited (RTM company appointed by the leaseholders)**
Representative	:	**Mr P. Cleaver of Urang Managing Agents (who was accompanied by Ms H. Morrison a leaseholder and a director of the RTM company)**
Respondent	:	**Mr A. Davies (leaseholder)**
Representative	:	**In person**
Type of Application	:	**Liability to pay service and or administration charges (made under section 27A of the Landlord and Tenant Act 1985)**
Tribunal Members	:	**Professor James Driscoll, solicitor, (Tribunal Judge), Mr Michael Taylor FRICS and Mr Paul Claburn (Tribunal Members)**
Date and venue of Hearing	:	**28 August 2014**
Date of Decision	:	**17 October 2014**

DECISION

The Decision summarised

1. The tribunal determines that the applicant was entitled to acquire the right to manage recover service charges as an RTM company.

2. The service charges proposed for the year 2014- 2015 are reasonable estimates and recoverable in full from the leaseholder.

3. The applicant was entitled to demand service charges for the period 2014 - 2015 and the sum claimed from the leaseholder (**£1,279.02**) should be paid by him to the managing agents by **19 November 2014.**

4. No order on the applicant's costs is made under section 20C of the Landlord and Tenant Act 1985.

Background to the application

5. This application is made on behalf of the RTM company which manages the subject premises (a development of 28 flats with some 'live/work units') under the provisions in Part 2 of the Commonhold and Leasehold Reform Act 2002. It seeks to recover service charges from one of the leaseholders, Mr Davies who owns the lease of unit number 3 which is one of the 'live/work' units. Mr Davies does not live or work in that unit and he rents it out on assured shorthold tenancies. He lives elsewhere. The application is made under section 27A of the Landlord and Tenant Act 1985. It raises certain issues relating to compliance by those advising the applicants under the provisions in Part 2 of the Commonhold and Leasehold Reform Act 2002.

6. It is common ground that the leaseholder has a long residential lease and that one of his covenants in that lease is to contribute to the landlord's expenses in managing the block in discharge of the landlord's own leasehold covenants. In fact he covenants to pay 3.6065% of the expenses specified in maintenance schedule 1 of his lease. He is not required to pay anything under any costs incurred by the landlord under schedules 2 and 3 of the lease.

7. The landlord is Mizen Developments and the management tasks are, under the leases of the units, to be discharged by Trinity (Estates) Property Management Limited which is a management company and a third party to the leases. However, the applicant claims that a majority of the leaseholders have established the right to manage under the 2002 Act. As a result, it is

the RTM company, not the landlord or the third party to the lease, that is empowered to manage.

8. In the ordinary course of events the RTM company, having assumed the landlord's management functions in accordance with the provisions in the 2002 Act, will seek to recover its costs through a service charge claim. Ordinarily it would take this over from Trinity (Estates) Property Management Limited. It is also common ground that the RTM company has appointed a company called Urang Managing Agents to act as its managing agents.

9. On behalf of the RTM company the managing agents applied to this tribunal on 20 January 2014 seeking a determination of the playability of the charges for the service charge years 2011-2012, 2012- 2013 and 2013-2014.

10. A case management conference was held on 13 May 2014 when directions were given. At that hearing, which was attended by Mr Cleaver of the managing agents and by the leaseholder Mr Davies, the tribunal noted that a claim in the Clerkenwell and Shoreditch county court seeking recovery of service charges in the sum of £3,847.27 had been dismissed. The county court decided that the applicant had not satisfied it that it was a properly constituted RTM company and the court was also concerned that the applicant has not substantiated that the service charges were due.

11. Accordingly, the tribunal determined at the case management conference that the sum of £3,847.27 could no longer be pursued as a service charge. It also determined that the court had not made a substantive decision on the issue of whether or not the RTM company has been properly established. Accordingly, the only service charges before the tribunal are the sums claimed for the year 2014-2015 which is the sum of £1,279.02 being the RTM's estimated expenditure for that period.

The hearing

12. The hearing of the application took place on 28 August 2014. This was to determine the reasonableness of the service charge demand for the service charge year 2014 - 2015 in accordance with section 27A of the 1985 Act.

13. As this falls outside the original application the parties agreed at the hearing we held on 28 August 2014 that we should hear that claim as our decision could affect future service charge claims. This was also the approach taken at the case management conference which was attended by the parties, an approach they agreed to.

14. The leaseholder accepts that the demand we are considering is an interim demand and he does not question its validity except that he contends that the appellant company was not properly constituted and as a result it cannot validly claim service charges. He also has complaints about

the managing agents and he told us that he proposed to call a witness (who was present at the hearing) to give evidence on this issue. We told him that this evidence was not relevant to the fundamental issue of whether or not the applicant company has assumed the management responsibilities under the lease in accordance with the provisions in Part 2 of the 2002 Act.

15. At the hearing held on 28 August 2014 the applicant was again represented by Mr Cleaver who was accompanied by Ms Morrison one of the directors of the applicant RTM company and a leaseholder of one of the flats in which she lives. Mr Davies represented himself.

16. From the outset of the hearing it became apparent that the main issue dividing the parties was whether the applicant has been properly constituted and whether it has, in fact, assumed responsibility for the management of the whole building.

17. A bundle of documents was prepared by the managing agents. Additional documentation was produced during the hearing.

Evidence and submissions made on behalf of the applicant RTM company.

18. Mr Cleaver spoke to his written statement (undated) in which he describes the steps taken to establish the applicant company. He told us that the participating leaseholders resolved to set up the company and later changed its name to fully reflect the address of the development. Participation notices, were sent, he told us, to all leaseholders who were not already members of the company.

19. Once more than one-half of the leaseholders had become members, notice seeking to acquire the RTM was given to the landlord and to Trinity (Estates) Property Management Limited. He recalls receiving a call from someone representing the landlord raising certain queries but no counter-notice was given by the landlord.

20. He suggested to us that once the period proposed in the notice of claim expired that the company automatically took over the management functions for the building. Trinity (Estates) Property Management Limited passed over the papers and the running of the building once that period expired. He produced several documents relating to the RTM company including its certificate of incorporation, a copy of the participation notice, and other documents. The documents disclosed also included a letter from St Giles Insurance & Finance Services Limited with an insurance certificate for the building. We were given a copy of the letter that was sent to Mr Davies enclosing the participation notice. Mr Davies responded by claiming that he had not received the notice and that it should have been sent to his home address and not the address of the subject property.

21. Overall, argued Mr Cleaver the management of the building has improved. He added that the leaseholders (apart from Mr Davies) are

happy with the quality of management and that they have all paid their service charge demands.

22. We took the opportunity to ask Ms Morrison some questions about the management of the premises. She lives in one of the residential units (a flat). Ms Morrison owns the lease of that flat, she is both a member of the RTM company and one its directors.

23. She told us that before the RTM was initiated the building was not properly managed and that complaints from her and other leaseholders were treated with contempt (as she put it). The entry phones had not worked for months and the lift was not working either. There appeared to be no fund for contingencies. All of this has now improved she says. The lift and entry phones are now working. She told us that there are currently 16 leaseholders who are members of the RTM company and that the other 12 are entitled to become members.

24. Ms Morrison, who lives in her flat, told us that she and her fellow leaseholders are very happy with the quality of the management services provided by the managing agents. They are particularly grateful for the prompt attention the managing agents took to restore the lift service and entry phone services. She told us that all leaseholders who are not already members of the RTM company are welcome to join and to become members. She told us that Mr Davies should consider becoming a member. All qualifying leaseholders, she told us (correctly in our view), are entitled to become members.

25. In a short closing submission Mr Cleaver told us that it is essential to the proper management of the premises that all leaseholders accept that the RTM company has assumed responsibility for management and is entitled to manage the building instead of Trinity (Estates) Property Management Limited. Without such a determination it will be impossible to continue to manage the premises. He repeated that all of the leaseholders bar Mr Davies have accepted that the premises should be managed by his company which has been properly appointed by the RTM company which represents the majority of the leaseholders.

Evidence and submissions by the leaseholder.

26. As we mentioned earlier in this decision the leaseholder agreed at the hearing to the application being broadened to include the current service charge year. We repeat that he has no challenges to the reasonableness of the proposed charges. His main objection is that he is not convinced that the applicant is a properly constituted company. In this connection he relies on the county court decision which he submitted binds this tribunal to a finding that in his favour. Mr Davies has other objections as well including complaints about the managing agents which we will return to later in this decision.

27. He gave evidence and spoke to his statement dated 11 July 2014, to a transcript of the county court decision and to other documents. As mentioned above, we were told that he wished to call as a witness to the effect that the current managing agents had behaved unprofessionally.

28. We repeated our view that such evidence is not relevant to the basic issue in this application that is the validity of the appointment of the applicants as an RTM company under the 2002 Act.

29. He told us that he did not receive a copy of any notice to participate by becoming a member and that other leaseholders have the same complaint. He has very detailed complaints about the conduct of the managing agents but we reminded him that this is not relevant to the issue of whether the applicant is a properly constituted RTM company or not. He also objects to the applicant assuming management functions as this, in his opinion, conflicts with the provisions in his tripartite lease under which Trinity (Estates) Property Management Limited has been appointed to manage the premises.

Reasons for our decision

30. We repeat that the fundamental issue that divides the parties in this case is the appointment of the RTM company.

31. The leaseholder maintained his view that it is not a properly constituted RTM company despite the production of documents both those in the bundle and others produced at our request during the hearing. These documents include a certificate of incorporation of the company, a copy of its constitution, a copy of the participation notices given to non-participating leaseholders (including a copy of the covering letter to the leaseholder with his copy. We were also shown an entry in the Land Registry referring to the existence of the RTM company which, according to Mr Cleaver, was added with the consent of the landlord (to make it easier for a leaseholder who wishes to sell their flat).

32. Other documentary evidence includes copies of the service charge demands and like evidence and evidence of the insurance cover that has been arranged by the managing agents on behalf of the company.

33. We have read the transcript of the county court judgement and, like Judge Martynski, we consider that on fair reading, the court ruled quite simply that on the basis of the evidence before it, the applicant had not established that it is a properly constituted RTM company. Putting this another way, it remained open to the applicant to produce such evidence in these proceedings.

34. In our judgement they have succeeded in establishing that the applicant is a properly constituted RTM company by producing documentary evidence that the company has been correctly incorporated as an RTM company, that it complied with the statutory procedures relating to

the claim to exercise the RTM and that crucially the landlord chose not to challenge the claim to take over management of the premises under the provisions in the 2002 Act.

35. We accept Mr Cleaver's evidence that participation notices were sent to the addresses of the individual leaseholder's flats including Mr Davies. Of course, Mr Davies told us that he did not receive a copy, but this might be due to the fact that he is not living in his flat which he sublets. Although he refers to emails from two other leaseholders claiming that they did not receive a copy of the notice, he did not call them to give evidence and to answer questions. In any event we agree with Mr Cleaver that the fact that some leaseholders may not have received a copy of the participation notice does not of itself invalidate the RTM claim.

36. Mr Davies's objections also overlook, in our view, the clear machinery in Part 2 of the 2002 Act for the resolution of any disputes over the entitlement to acquire the RTM. The landlord may give a counter-notice under section 84 and if the landlord does not admit the claim it must say so in the counter-notice. In such a case the RTM company must apply to this tribunal for a determination as to its entitlement to acquire the RTM.

37. It is common ground that the landlord did not give a counter-notice in this case. That being the case section 90 (1) to 90(3) of the 2002 Act applies. So, as there was no dispute over entitlement since no counter-notice was given, the RTM is acquired on the acquisition date proposed in the RTM claim.

38. It is possible, in principle, that someone other than the landlord could claim that the RTM has not been established. We were not addressed on this point and there is no need for us to express a view other than to state that such a challenge is almost certainly possible. As we stated above, the county court rejected the claim for unpaid service charges as it was not satisfied as a matter of evidence that either the RTM procedures had been complied with, or that the service charges claimed were properly demanded. As a result of that decision the appellant has decided not to pursue that claim but with the agreement of the leaseholder it has asked this tribunal to make a determination for the current service charge year.

39. It is also relevant to note Mr Cleaver's evidence that Trinity (Estates) Property Management Limited co-operated in the handover after the RTM had been established.

40. We were also impressed by the evidence of Ms Morrison. As one of the founding members of the RTM company and someone who remains active in its management in its management as a director she is in an excellent position, particularly as a leaseholder who lives in the flat that she owns, to speak to both the circumstances leading up to the appointment of the RTM company and to the appointment of the managing agents to assist them.

41. To summarise, we determine that on the evidence made available, and considering also the submissions made by the parties, the applicants have

assumed the management responsibilities of the landlord and the third party to the lease, as the procedures in Part 2 of the 2002 Act were complied with in full. Mr Davies is entitled as a leaseholder to become a member of the RTM company a course we would respectfully commend to him if he wishes to participate fully in the management of the premises.

42. As the demand for 2014 - 2015 was correctly made by the applicant RTM company through its appointed managing agents and as the leaseholder accepts in principle that the sums are reasonable and recoverable under the lease we determine that these sums (that is the sum of **£1,279.02)** is currently due and it should be paid by the leaseholder to the managing agents by **19 November 2014.**

Costs

43. At the close of the hearing we were briefly addressed on the question of the costs incurred by the applicant in these proceedings. Mr Cleaver argued that no order should be made under section 20C of the 1985 Act whilst the leaseholder argued the contrary.

44. As the leaseholder denied the claim, and given the importance of the issues relating to the RTM for the management of the premises, we have concluded that the applicant had little option but to seek a determination. Provided there is power in the lease to recover costs relating to proceedings we do not think it appropriate to make an order limiting recovery of costs under section 20C of the 1985 Act.

Appendix of the relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 78
Notice inviting participation
(1)
Before making a claim to acquire the right to manage any premises, a RTM company must give notice to each person who at the time when the notice is given—
(a)
is the qualifying tenant of a flat contained in the premises, but
(b)
neither is nor has agreed to become a member of the RTM company.
(2)
A notice given under this section (referred to in this Chapter as a "notice of invitation to participate") must—
(a)
state that the RTM company intends to acquire the right to manage the premises,
(b)
state the names of the members of the RTM company,
(c)
invite the recipients of the notice to become members of the company, and
(d)
contain such other particulars (if any) as may be required to be contained in notices of invitation to participate by regulations made by the appropriate national authority.
(3)
A notice of invitation to participate must also comply with such requirements (if any) about the form of notices of invitation to participate as may be prescribed by regulations so made.
(4)
A notice of invitation to participate must either—
(a)
be accompanied by a copy of the memorandum of association and articles of association of the RTM company, or
(b)
include a statement about inspection and copying of the memorandum of association and articles of association of the RTM company.
(5)
A statement under subsection (4)(b) must—
(a)
specify a place (in England or Wales) at which the memorandum of association and articles of association may be inspected,
(b)

specify as the times at which they may be inspected periods of at least two hours on each of at least three days (including a Saturday or Sunday or both) within the seven days beginning with the day following that on which the notice is given,

(c)

specify a place (in England or Wales) at which, at any time within those seven days, a copy of the memorandum of association and articles of association may be ordered, and

(d)

specify a fee for the provision of an ordered copy, not exceeding the reasonable cost of providing it.

(6)

Where a notice given to a person includes a statement under subsection (4)(b), the notice is to be treated as not having been given to him if he is not allowed to undertake an inspection, or is not provided with a copy, in accordance with the statement.

(7)

A notice of invitation to participate is not invalidated by any inaccuracy in any of the particulars required by or by virtue of this section.

Section 79
Notice of claim to acquire right

(1)

A claim to acquire the right to manage any premises is made by giving notice of the claim (referred to in this Chapter as a "claim notice"); and in this Chapter the "relevant date", in relation to any claim to acquire the right to manage, means the date on which notice of the claim is given.

(2)

The claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before.

(3)

The claim notice must be given by a RTM company which complies with subsection (4) or (5).

(4)

If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company.

(5)

In any other case, the membership of the RTM company must on the relevant date include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained.

(6)

The claim notice must be given to each person who on the relevant date is—

(a)

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

(b)

party to such a lease otherwise than as landlord or tenant, or

(c)

a manager appointed under Part 2 of the Landlord and Tenant Act 1987 (c. 31) (referred to in this Part as "the 1987 Act") to act in relation to the premises, or any premises containing or contained in the premises.

(7)
Subsection (6) does not require the claim notice to be given to a person who cannot be found or whose identity cannot be ascertained; but if this subsection means that the claim notice is not required to be given to anyone at all, section 85 applies.
(8)
A copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises.
(9)
Where a manager has been appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises, a copy of the claim notice must also be given to the leasehold valuation tribunal or court by which he was appointed.

Section 80
Contents of claim notice
(1)
The claim notice must comply with the following requirements.
(2)
It must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies.
(3)
It must state the full name of each person who is both—
(a)
the qualifying tenant of a flat contained in the premises, and
(b)
a member of the RTM company,
and the address of his flat.
(4)
And it must contain, in relation to each such person, such particulars of his lease as are sufficient to identify it, including—
(a)
the date on which it was entered into,
(b)
the term for which it was granted, and
(c)
the date of the commencement of the term.
(5)
It must state the name and registered office of the RTM company.
(6)
It must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice under section 79(6) may respond to it by giving a counter-notice under section 84.
(7)
It must specify a date, at least three months after that specified under subsection (6), on which the RTM company intends to acquire the right to manage the premises.
(8)

It must also contain such other particulars (if any) as may be required to be contained in claim notices by regulations made by the appropriate national authority.

(9)

And it must comply with such requirements (if any) about the form of claim notices as may be prescribed by regulations so made.

Section 84

Counter-notices

(1)

A person who is given a claim notice by a RTM company under section 79(6) may give a notice (referred to in this Chapter as a "counter-notice") to the company no later than the date specified in the claim notice under section 80(6).

(2)

A counter-notice is a notice containing a statement either—

(a)

admitting that the RTM company was on the relevant date entitled to acquire the right to manage the premises specified in the claim notice, or

(b)

alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled,

and containing such other particulars (if any) as may be required to be contained in counter-notices, and complying with such requirements (if any) about the form of counter-notices, as may be prescribed by regulations made by the appropriate national authority.

(3)

Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the company may apply to a leasehold valuation tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises.

(4)

An application under subsection (3) must be made not later than the end of the period of two months beginning with the day on which the counter-notice (or, where more than one, the last of the counter-notices) was given.

(5)

Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the RTM company does not acquire the right to manage the premises unless—

(a)

on an application under subsection (3) it is finally determined that the company was on the relevant date entitled to acquire the right to manage the premises, or

(b)

the person by whom the counter-notice was given agrees, or the persons by whom the counter-notices were given agree, in writing that the company was so entitled.

(6)

If on an application under subsection (3) it is finally determined that the company was not on the relevant date entitled to acquire the right to manage the premises, the claim notice ceases to have effect.
(7)
A determination on an application under subsection (3) becomes final—
(a)
if not appealed against, at the end of the period for bringing an appeal, or
(b)
if appealed against, at the time when the appeal (or any further appeal) is disposed of.
(8)
An appeal is disposed of—
(a)
if it is determined and the period for bringing any further appeal has ended, or
(b)
if it is abandoned or otherwise ceases to have effect.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

13. (1) The Tribunal may make an order in respect of costs only—
(a)
under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
(b)
if a person has acted unreasonably in bringing, defending or conducting proceedings in—
(i)
an agricultural land and drainage case,
(ii)
a residential property case, or
(iii)
a leasehold case; or
(c)
in a land registration case.
(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
(3) The Tribunal may make an order under this rule on an application or on its own initiative.
(4) A person making an application for an order for costs—
(a)
must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
(b)
may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a)

a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b)

notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

(a)

summary assessment by the Tribunal;

(b)

agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");

(c)

detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998(1), section 74 (interest on judgment debts, etc) of the County Courts Act 1984(2) and the County Court (Interest on Judgment Debts) Order 1991(3) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.