

CHI/29UH/LSC/2009/0128

**DECISION OF THE LEASEHOLD VALUATION
TRIBUNAL ON APPLICATION UNDER SECTION 27A OF
THE LANDLORD & TENANT ACT 1985**

Address: Flat 8, Claire House, Lesley Place, Buckland Hill,
Maidstone, Kent, ME16 0UE

Applicant: Mrs Judith Elizabeth Wilson

Respondent: Lesley Place (RTM) Company

Application: 29 August 2009

Inspection: Not Applicable

Hearing: 15 December 2009

Appearances:

Tenant

Mrs J. Wilson Leaseholder

Mr F. Wilson

For the Applicant

Landlord

Mrs S. Heads

Solicitor

Mr J. Hunter

Chaine Hunter, Managing Agents

For the Respondent

Members of the Tribunal

Mr I Mohabir LLB (Hons)

Mr B Simms FRICS MCI Arb

Mr P Gammon MBE BA

IN THE LEASEHOLD VALUATION TRIBUNAL

CHI/29UH/LSC/2009/0128

**IN THE MATTER OF SECTION 27A OF THE LANDLORD & TENANT ACT
1985**

**AND IN THE MATTER OF FLAT 8, CLAIRE HOUSE, LESLIE PLACE,
BUCKLAND HILL, MAIDSTONE, KENT, ME16 0UE**

BETWEEN:

MRS JUDITH ELIZABETH WILSON

Applicant

-and-

LESLEY PLACE (RTM) COMPANY

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. This is an application made by the Applicant pursuant to section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of her liability to pay various actual and estimated service charges for the years 2005-2009. The Applicant does not contend that the costs in issue are unreasonable.
2. The Applicant is the present lessee of the subject property. The present lessor is G & O Rents Ltd. On 1 January 2005, the Respondent acquired the right to manage the estate of which the subject property forms part. Chaine Hunter is the present managing agent instructed by the Respondent.

3. The actual and estimated service charge costs in issue can be set out as follows:

	2005	2006	2007	2008	2009 (estimated)
Secretarial fee	150	150	150	150	150
Companies House and hall hire	105	80	115	120	15
D.&O Insurance	383.25	217.35	199.50	199.50	200
Accounts fees	310	310	310	310	310
Formation of Company and RTM Notice	1,400				
Legal and professional fees			600.25	3,813.88	

The Relevant Law

4. The substantive law in relation to the determination of this application can be set out as follows:

Section 27A of the Act provides, *inter alia*, that:

"(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.*

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

Subsection (3) of this section contains the same provisions as subsection (1) in relation to any future liability to pay service charges.

Decision

5. The hearing in this matter took place on 15 December 2009. The Applicant, Mrs Wilson, attended in person and was represented by her husband, Mr Wilson. The Respondent was represented by Mrs Heads, a Solicitor from the firm of Susan Heads & Co and Mr Hunter, a Surveyor from the managing agents, Chaine Hunter.
6. Mr Wilson submitted that the costs in issue had been conflated with other service charge costs. They were costs directly attributable to the Respondent company and as company costs *per se* they were not contractually recoverable as relevant service charge expenditure under the terms of the Applicant's lease.
7. Mrs Heads submitted that the company and at legal and professional costs incurred by the Respondent were recoverable under the terms of the Applicant's lease in the following way. By clause 3(1) the lessee covenanted *inter alia* to pay to the lessor or its managing agents the maintenance charge equal to 1.78% of the estimated or actual expenditure incurred by the lessor in carrying out its obligations under clause 5.
8. Clause 5 of the lease sets out those costs that may be recovered by the lessor as relevant service charge expenditure. In particular, Mrs Heads relied on clause 5(F) which includes the costs of:

“... 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 preceding heads of or incidental to the management of the blocks and in the interests of the lessee generally.”
9. Mrs Heads said that the secretarial costs, as part of the total management and secretarial costs was £150 in each of the service charge years and formed a very small part of the overall cost. She submitted that the company costs were recoverable under clause 5(E) of the lease because they were part of the management function and the Respondent company was the vehicle by which the management services are provided. Moreover, it was in the interests of the Applicant and the other lessees for the Respondent to exist.

10. Mrs Heads further submitted that the accounts fees incurred for the preparation of the service charge accounts were recoverable under clause 5(H) because it entitled the lessor to recover the costs of keeping:

“...proper accounts of all expenditure under this clause..... and be lessor shall be free to employ any agent to carry out any of its obligations hereunder and the reasonable fees charged by such agents shall be deemed to have been properly incurred and recoverable from the lessees of the block.”

11. In 2008, the Respondent had brought proceedings against the Applicant to recover service charge arrears (CHI/29UN/LSC/2008/0024) in relation to be service charge years 2005 to 2007 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 Applicant 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 Applicants liability to pay the service charges claimed for the years 2005 to 2007. Those 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.
12. At paragraph 16 of the earlier determination, the Tribunal found as a fact that the Respondent was entitled to be paid the service charges. Although it is not expressly dealt with in the Decision, it is implicit from this finding that the Tribunal also considered that the service charges for 2005 to 2007 were also recoverable as relevant service charge expenditure under the terms of the Applicant’s lease. As stated earlier, those service charges included the very same service charge costs the Applicant seeks to challenge in this application. Given that there has already been a ruling in the earlier determination that the costs are recoverable by the Respondent, they are now considered to be *res judicata* and the issue cannot be revisited by this Tribunal. Moreover, the ruling also applies to the years 2008 and 2009 even though they were not considered in the earlier determination because the issue regarding the Applicant’s liability to pay the same costs is identical in relation to those

years. In other circumstances it is arguable whether the professional and legal costs were recoverable because some of the costs related to debt recovery which may be recoverable from the lessee concerned. However, the RTM company was set up and continues with one function, namely, the management of the blocks of flats. Any of the costs incurred must be part of the overall management function. In the Tribunal's judgement this falls within clause 5(E) in the lease and the general management of the blocks.

13. Further, and in the alternative, the Tribunal considered that the Applicant was now *estopped* from asserting that the costs in issue were not contractually recoverable by the Respondent. From the evidence before the Tribunal, it does not appear that the Applicant had raised, whether in correspondence or otherwise, the issue regarding her liability to pay the costs which are the subject matter of this application. Indeed, in the earlier proceedings, the Applicant agreed that *all* of the costs claimed from 2005 to 2007 had been reasonably incurred and the only challenge made was by way of a set off for overpayments made in relation to earlier years. By continuing to incur the costs that are now been challenged in this application, the Respondent had acted to its detriment. Therefore, in the Tribunal's judgement, the Applicant was now prevented from asserting that she had no contractual liability to pay those costs.

14. For the avoidance of doubt, the Tribunal accepted the submission made by Mrs Heads that the costs issue are recoverable variously under clauses 5(E) and (H) of the Applicant's lease. In particular, the Tribunal considered that clause 5(E) was sufficiently wide in its ambit to provide the lessor with an absolute discretion to recover those costs, such as the RTM company costs, which are incidental to its management function and which it considered to be in the lessees interests generally. If the alternative view were taken the RTM company would be left with no method of recovering those costs and, as a company limited by guarantee, may potentially become insolvent as a consequence. This, in the Tribunal's judgement could not have been intended by the RTM legislation. On balance and having regard to the other compelling points the Tribunal has found in favour of the Respondent. However, this case

raised a novel point on whether or not the RTM costs *per se* are recoverable as relevant service charge expenditure and it does not appear to have been considered in any earlier cases. It potentially raises a point of general public importance, which may require clarification by the Lands Tribunal. Therefore, if an application for permission to appeal is received the Tribunal would look favourably upon it.

Section 20 & Fees

15. The Applicant had also made an application under section 20C of the Act seeking an order that the Respondent be prevented from being able to recover any costs it had incurred in these proceedings through the service charge account.
16. Under section 20C of the Act, the Tribunal has a discretion to make an order preventing a landlord from being able to recover all or part of the costs it has incurred in proceedings such as these when it is just and equitable to do so. In the present case, although the Applicant had failed in the application to which the Respondent had been obliged to respond, the underlying point has not been the subject of an earlier decision and the position on the issue is far from clear. The application was brought in good faith and the lessees should not be penalised by having to share in the Respondent's costs.
17. The Tribunal therefore makes an ORDER that all or any of the 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 charges.
18. However, the Applicant has not succeeded in this application and, therefore the Tribunal considered it appropriate to make no order for the Respondent to reimburse the Applicant any fees she had paid to the Tribunal to have this application issued and heard.

Dated the 1 day of March 2010

CHAIRMAN.....I. Mohabir
Mr I Mohabir LLB (Hons)

**THE LEASEHOLD VALUATION TRIBUNAL for the
SOUTHERN RENT ASSESSMENT PANEL**

CHI/29UH/LSC/2009/0128

S.27A OF THE LANDLORD & TENANT ACT 1985

**DECISION ON AN APPLICATION FOR LEAVE TO APPEAL
RE: FLAT 8, CLAIRE HOUSE, LESLEY PLACE, BUCKLAND HILL
MAIDSTONE, KENT, ME16 0UE**

Applicant: Mrs Judith Elizabeth Wilson

Respondent: Lesley Place (RTM) Company

1. The Tribunal has considered the Respondent's request for permission to appeal dated 8 April 2010 and determines that permission be granted to appeal to the Lands Tribunal.
2. Permission is limited to the point of general of importance of whether the direct and indirect company costs of creating and administering an RTM company are recoverable as service charge expenditure and as part of the overall costs of management.
3. Save for paragraph 2 above, the other grounds of the application for permission to appeal are refused as disclosing no reasonable prospect of success on the basis that the Tribunal does not considered that it has erred in its finding of fact and/or law.

Tribunal

Mr I Mohabir LLB (Hons)
Mr B Simms FRICS MCI Arb
Mr P. Gammon MBE BA

Signed

Mr I Mohabir LLB (Hons)
Chairman

Dated
10th May 2010