FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference **HMCTS Code**	**:**	**CAM/00KB/LUS/2020/0001** **V:CVP REMOTE**
Property	**:**	**46-130 Wheelwright House, Palgrave Road, Bedford MK42 9BX**
Applicant	**:**	**Wheelwright House (46-130) RTM Company Limited**
Respondents	**:**	**Sinclair Gardens Investments (Kensington) Limited**
Type of Application	**:**	**Payment of uncommitted service charges – section 94(3) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**:**	**Judge Wayte** **Regional Surveyor Hardman FRICS**
Date of Decision	**:**	**4 March 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing by video and telephone which has been consented to by the parties. A face-to-face hearing was not held due to the pandemic. The documents that the tribunal was referred were in four lever arch files and several emails sent both before and after the hearing. The order made is described below.

The Tribunal determines £25,992.10 is payable by the respondent in respect of the balance due of uncommitted service charges as at the acquisition date.

The application

1. The applicant seeks an order pursuant to s.94(3) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") for determination of the amount of uncommitted service charges held by the respondent on the acquisition date.

2. Directions were ordered on 18 August 2020 for the proceedings to be consolidated and heard with a separate application by Sharon Murray for a determination under s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the payability of certain service charges for 2017, 2018 and 2019, case reference CAM/00KB/LSC/2020/0035. As a result of further information provided after the hearing, that matter is still ongoing and will be the subject of a separate decision in due course, unless the parties can resolve their dispute.

3. The application also requested a determination of the landlord's costs under section 88(4) of the 2002 Act. Those costs were agreed shortly before the hearing in the sum of £1,500.

4. A hearing was held on 26 November 2020. At the hearing the applicant was represented by Mr Dudley Joiner of RTMF Services Limited, with Ms Murray in attendance as a witness and applicant in respect of the section 27A application. The respondent was represented by Mark Kelly of First Management Ltd trading as Hurst Managements. Although all parties initially joined the hearing by way of video, Mr Hurst had some issues with his internet connection and therefore subsequently continued the hearing by telephone.

5. There had been some delays on the part of both parties in complying with the directions. This led to documents being sent to the tribunal after the hearing bundle and, in some instances, after the hearing itself. All of those documents have been considered by the tribunal in making this decision. Page numbers in square brackets refer to documents in the hearing bundle, starting with A-D to reflect the four lever arch files, other documents will be identified in this decision as appropriate.

The background

6. The property is part of the Omega Riverside development consisting of two buildings called Britannia House and Wheelwright House, with substantial grounds including car parking areas and gardens. Each building has 130 flats, arranged in six blocks, numbered A to F. Flats 46-130 comprise blocks D to F.

7. Flats 46-58 Wheelwright House are held on a single Housing Association lease with service charge liability for estate management, insurance and management fees only. Flats 59-130 are let on

individual long leases with service charge liability for a wider range of expenditure in accordance with their floor area.

8. The freehold interest in the estate was purchased by the respondent on 22 December 2016. The respondent received £179,048.44 from the previous managing agents, CS2, together with a schedule of arrears and payments for each tenant and a balance sheet for each building.20. The balance sheet for Wheelwright House stated that the service charges were £8,837.19 in debit [B/109], primarily due to a loan from Britannia House. The respondent states that the debt was not pursued from the leaseholders as insufficient evidence was provided by CS2.

9. By way of contrast, the balance sheet for Britannia House showed a credit of £110,193.94 [B/142]. This credit was allocated to each tenant in July 2017 based on the percentage liability towards the reserve fund confirmed to the respondent by CS2.

10. In early 2018 the respondent recalculated the floor areas for each flat as it became aware that some of the previous calculations were incorrect [B/219].

11. On 5 January 2019 the tenants of 1-24 Wheelwright House acquired the right to manage that block, together with the external communal areas of the estate. The respondent therefore arranged a further re-calculation of the service charge for the remaining flats in their estate: 25-130 Wheelwright House and 1-130 Britannia House [C/467].

12. On 14 September 2019 the applicant acquired the right to manage 46-130 Wheelwright House.

13. In October 2019 the respondent calculated that £33,189.58 was held to the credit of the relevant leaseholders. Following various deductions, including £24,000 held back for unquantified service charges to the acquisition date, just £2,843.77 was paid to the applicant on 7 October 2019 [D/764A].

14. In response to a query by the tribunal as to progress on the quantification of the remaining service charges, Mr Kelly confirmed by letter dated 24 November 2020 that only a small amount had actually been incurred, leaving a balance of £22,826.40 due to the applicant.

The Law

15. Section 94 is set out in full as an appendix to this decision. *OM Limited v New River Head RTM Company Ltd* [2010] UKUT 394 (LC), relied on by the applicant, is authority that the scope of that section is strictly limited to the sums held by the landlord (in terms of paid service

charges) on the acquisition date that are not committed to fund the payment of costs that have been incurred before that date.

16. It follows that any issues of alleged overpayment must be resolved separately. As His Honour Judge Mole QC stated in *OM Limited* at paragraph 24 "*…there is to be no argument so far as the payment is concerned about whether or not the charges are in fact justifiable and reasonable service charges; if they were paid 'by way of service charges' they are service charges for the purpose of section 94*".

17. As set out above, the tribunal had previously directed that an application made by Ms Murray under section 27A of the Landlord and Tenant Act 1985 in respect of some of the service charges for 2017-2019 be consolidated and heard with this application. In hindsight, although that made sense in terms of efficiency, the application has complicated the issues to be decided under section 94. In the circumstances the Judge has directed that the 27A application should continue separately to decide any further payability issues between the parties, unless an agreement can be reached between them following this decision.

18. The idea in *OM Limited* was that the relevant bank accounts would be able to confirm the amounts held. The directions for this application therefore sought copies of bank statements for the 12 month period pre-dating the right to manage. Unfortunately, none were disclosed by the respondent, on the basis that there were no individual bank accounts for the property. The respondent is a well-known freeholder of thousands of properties and produced evidence from its bank confirming the existence of several client accounts which Mr Kelly stated held service charge monies for all the respondent's properties. Mr Kelly therefore provided some 871 pages of documents as proof of the respondent's calculation of the payment due to the applicant.

The issues

19. The principal issue is to determine the amount of uncommitted service charge held by the respondent at the acquisition date. In the absence of a bank account for the relevant property, that sum has to be ascertained from the respondent's documents. Although the applicant may not pursue a s27A type challenge to payments made as a service charge, it is entitled to test the respondent's evidence as to how it has calculated the sum due, including the calculation of any deductions. An issue was also raised in respect of the deduction by Hurst Management of a 3 month notice fee for alleged termination of their management services but that was conceded during the hearing, leading to £4,665.70 being added back to the sum in dispute.

Amount held as at 14 September 2019

20. Mr Kelly set out how he had originally calculated the uncommitted service charge in his witness statement dated 15 September 2020. In summary, he provided copies of accounts for each flat which he stated produced a figure of £26,428.32 as the sum held to the credit of the property as at 14 September 2019. The service charge year runs from 1 January to 31 December and therefore, further credits were due in respect of pre-paid insurance and management fees, which increased the sum to £33,189.58. Mr Kelly provided a copy of his letter to the respondent's solicitors dated 8 October 2019 which confirmed that figure. We will deal with the adjustments to that amount in the next section below.

21. The applicant's statement of case challenged the format of the service charge accounts provided, which were statements of income vs expenditure rather than "proper" service charge accounts including a balance sheet. In particular, Mr Joiner queried the treatment of the reserve funds, which he stated indicated a much higher uncommitted service charge payment was due. His alternative figure in excess of £100,000 also included rebates in respect of certain disputed service charges from 2017-2019 but as discussed above, that is a matter for the s27A application rather than section 94.

22. In response to the applicant's statement of case, Mr Kelly stated that the accounts had been prepared in accordance with clause 8.3 of the lease [B/88], which requires a statement of income vs expenditure rather than Mr Joiner's preferred accounts on an accrual basis. He pointed out that Mr Joiner's calculation of the reserve fund also assumed that all tenants had paid the service charges previously billed and therefore Mr Joiner was falling into the trap outlined in *OM Limited* of equating sums billed with sums paid.

23. In the absence of an individual bank account, the receipts need to be tracked through the leaseholder statements of account from the date the respondent purchased the freehold to the acquisition of the RTM. At the hearing the tribunal requested further information from the respondent, which was received on 9 December 2020 and further clarified on 19 January 2021.

24. Starting from the purchase of the freehold by the respondent, the tribunal asked for further information to support the claim that of the monies initially received from CS2, none was due to Wheelwright House. Mr Kelly confirmed that he relied on the information received from CS2 and was unable to assist the tribunal further. Mr Joiner has never really challenged that evidence and in the circumstances, we accept the respondent's case for the account balance as at 31 December 2016.

25. CS2 had billed for the interim service charges due in January 2017 and Mr Kelly explained how the payments received were allocated to each

leaseholder from CS2's Detailed Aged Report which listed the credits and debts for each individual tenant. Wheelwright House as a whole had a credit of £24,079.79 as at 31 January 2017 and Britannia House £29,241.80. Again, there is no challenge from Mr Joiner as to this evidence.

26. The first statement of service charges produced by the respondent was for the period ended 31 December 2017 [B/177]. Mr Kelly confirmed that no service charges were demanded by Hurst Management until the end of the year, which was the reason for the zero figure for "service charges previously billed". With his letter dated 19 January 2021 Mr Kelly provided an updated statement showing service charges billed of £233,010.44 (CS2 having requested interim service charges in January and July on the respondent's behalf). That statement shows an excess service charge of £97,979.56 for 2017, primarily due to insurance, as the respondent's block policy runs from November. This meant that for 2017 the insurance costs looked disproportionate as the whole premium had been recorded as expenditure for 2017, despite the fact that the policy ran until 19 November 2018.

27. Mr Kelly's witness statement dated 15 September 2020 explained how the leaseholders' accounts for 2017 had been calculated, using a combination of CS2's Service Charge Contribution and Detailed Aged Debt Reports as at 31 December 2017. Copies of the respondent's Tenant Account Summary were produced for that calendar year, showing the amounts billed and paid. Using 59 Wheelwright House as an example [B/208], as the excess service charge was only invoiced on 31 December 2017, the account was in debit for that amount (£2,041.08) at that date, having started at zero – reflecting the initial balance on the transfer of the freehold to the respondent.

28. At the hearing, Mr Joiner had requested that the respondent provide a Statement of Income and Expenditure in his preferred format, recommended by the ICAEW. Mr Kelly sought to provide that with his letter dated 9 December 2019. In his response to that evidence, dated 4 January 2021, Mr Joiner amended the Statement to reflect the monies originally received from CS2 in respect of the 2016 service charge year. This produced a much smaller deficit/excess service charge for 2017. The tribunal is not clear of the relevance of this process and would point out again that the question here is the amount held on the basis of charges paid, rather than whether a different amount was due in the first place. If Mr Joiner considers his clients have a case against the respondent, that must be for an application under s27A of the 1985 Act rather than s94. In the circumstances, the tribunal accepts the respondent's case for 2017.

29. Moving to the service charge year for 2018, the respondent has produced confirmation of the service charge demanded from each leaseholder for each building [C/464]. Again, using flat 59

Wheelwright House as an example, the Tenant Account Summary for 2018 [C/373] shows an opening balance of -£2,041.08, reflecting the excess service charge for 2017, £2,469.48 charged for 2018 as listed on [C/464] and a closing balance of £5.23. That reflects the overall credit for the development of £89,197.86 as shown on the Statement of Service Charges [B/222]. This amount, less amounts unpaid, is shown on the statement as forming part of the "reserve fund", although Mr Kelly admitted that the respondent did not operate a reserve fund on a ring-fenced basis as recommended by the RICS Code of Management. The money is more accurately described as a surplus, carried forward to the next service charge year.

30. Mr Joiner did not specifically attack the respondent's figures for 2018, although his Income and Expenditure account showed a deficit for the year – due mainly to the addition by him of a line recording the deficit from the previous year. Again, the tribunal is not clear of the relevance of this process. The respondent's accounts comply with the lease and as *OM Limited* confirms, the relevant figure must be calculated from the balance on each leaseholder's account. An extrapolation from the accounts for the development, however prepared, will only show the amount of service charges billed rather than the amount paid. Any dispute as to the respondent's accounting methodology for the calculation of its service charges is for an application under s27A rather than a determination under s94 of the 2002 Act. In the circumstances, the tribunal accepts the respondent's figures for 2018.

31. Turning to 2019, the respondent again provided a list of the service charges demanded from each leaseholder for both Britannia and Wheelwright [C/567]. Again, using flat 59 Wheelwright House as an example, £2,116.16 was requested by way of interim payments. 2019 was complicated by 1-24 Wheelwright House exercising the RTM in January 2019 and this led to a transfer of £29,726.63 to that company, somewhat confusingly referred to as "net opening income to hand" in the Statement of Service Charges [D/677]. A further complication is that the statement of service charges runs to 14 September 2019, reflecting the acquisition date by the applicant. As this was before the November renewal date, no insurance was payable in this period. The Statement of Service Charges for the development [C/469A] therefore shows a large surplus – reflecting the fact that service charges would already have been demanded for the full year's expenditure, including the insurance premium. The individual statement of service charge for 59 Wheelwright [D/677] confirms credits for unallocated reserves and service charges previously billed for that year of £2,116.16, producing a credit of £1,244.48. However, this statement contains no information as to payments made by the leaseholder.

32. Again, Mr Joiner's attack is really on the format of the accounts and to the mind of the tribunal, aimed at the wrong target. He also raised a number of challenges to the expenditure claimed in 2019 but that is of course not relevant to section 94. Mr Joiner has maintained that

accounts for the period should be prepared on an accruals basis and independently audited. As discussed above, this is not required by the lease. The tribunal considers that the respondent has demonstrated that their accounts marry with the individual statements of account and in those circumstances, accepts their evidence in relation to the service charges demanded in 2019.

33. That said, in order to calculate the uncommitted service charges due to the applicant, we need to know the actual balance of the relevant leaseholder accounts prior to the RTM date. For this information, the respondent relied on printouts for the development confirming the outstanding credit/debit totals for each account at the acquisition date [D/760-3]. Added together that amounted to a credit balance of £26,428.32. Mr Kelly then added the credit for management fees and insurance of £6,761.26 from the acquisition date to the end of the year, which produced £33,189.58.

34. Again, Mr Joiner did not really engage with this calculation, preferring to produce his own figures from his adjusted Income and Expenditure Account, further adjusted by various credits reflecting challenges to the 2019 service charge statement. That cannot be the correct approach and is rejected by the tribunal. In the circumstances we accept the respondent's calculation as that appears to be the next best thing to a copy of a bank statement. Whether it was necessary to provide some 800 pages of documentation to get to that stage is another matter.

Adjustments to the initial sum

35. Having calculated that £33,189.58 was due to the applicant, the respondent made a number of deductions from that sum to reflect previously unbilled service charge expenditure up to the acquisition date. As mentioned above, that initially included £4,665.70 for termination of the management agreement but during the hearing Mr Kelly conceded that sum should not have been deducted as the management agreement continued, albeit in relation to fewer flats.

36. Following the submission of further information shortly before the hearing as to various credits and debits and the agreed landlord's costs, together with the deduction of the original payment of £2,843.77, that left an uncommitted service charge balance due of £25,992.10 as set out in the calculation annexed to this decision. At the hearing, Mr Kelly agreed to pay this sum to the applicant on the 27 November 2020.

37. On that day, Mr Kelly sent an email with copies of various Anglian Water invoices which he said meant that £12,500 now needed to be withheld pending resolution of an ongoing dispute in respect of water rates due before the acquisition date. This claim was in direct conflict with the information given to the tribunal both shortly before and at the hearing that no further charges were due. In the circumstances and

having taken into account the applicant's objections, the tribunal ordered Mr Kelly to make the agreed payment in full, which he confirmed by email dated 2 December 2020. Any further charges claimed by the respondent can be added into the section 27A application, assuming the parties are unable to resolve that dispute.

Costs

38. Mr Joiner raised the possibility of an application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. That is a matter for the applicant but Mr Joiner will be aware that unreasonable or wasted costs are a high bar. As mentioned in this decision, an extraordinary amount of documents were produced by the respondent to prove this claim and it may be that some rebate of Mr Joiner's charges for the production of the bundles are due, particularly in light of the respondent's failure to comply with the directions. That said, the tribunal has largely found in favour of the respondent on the basis of their evidence.

Name: Judge Wayte **Date:** 4 March 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix: section 94 CLARA 2002

Duty to pay accrued uncommitted service charges

(1) Where the right to manage premises is to be acquired by a RTM company, a person who 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 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.