# Accrued uncommitted service charges

*Philip Rainey QC and Michael Walsh review of the decision in* OM Ltd v New River Head RTM Company Ltd

Where tenants of a property exercise their right to manage ("RTM") and they establish a company for that purpose, the RTM company is entitled to a sum equal to the amount of any "accrued uncommitted service charges" held by any landlord, third party to the leases or manager on the acquisition date (see the Commonhold and Leasehold Reform Act 2002(CLRA 2002), s 94(1)).

CLRA 2002, ss 90 to 94 deal with the acquisition by an RTM company the right to manage any premises.

OM Limited v New River Head RTM Company Ltd [2010] UKUT 394 (LC) concerned a building containing 129 individual flats, known as New River Head, all held on long leases with the terms of 999 years. The leases named OM Ltd as the management company of the premises. OM had no legal or beneficial interest in the property, their only function was to manage. In 2004, the tenants set up the New River Head RTM Company Ltd, which company acquired the right to manage the premises on 1 October 2004. Before that date OM sent the RTM company a cheque for £100,000 on account of accrued uncommitted service charges and then on the 31 January 2005 sent a letter enclosing a "Closing Statement of Account" and a cheque for £54,390.87 in respect of the balance of the accrued uncommitted service charges.

After the acquisition of RTM, some of the tenants made an application to the Leasehold Valuation Tribunal against OM Ltd, under the Landlord and Tenant Act 1985, s 27A seeking a determination whether service charges collected by OM Ltd in the years from 1998 until the acquisition were properly payable. The LVT and UT disallowed a total of £98,635.90. To that figure other sums, which were conceded by OM Ltd in either correspondence or at the LVT hearing, were added, bringing the grand total to £121,742.39.

The RTM company brought an application against OM under CLRA 2002, s 94(3) and argued that the whole of the £121,742.39 was to be construed as an "accrued uncommitted service charge" within the meaning of s 94. The RTM company also claimed interest on that sum. The LVT found in favour of the RTM company and, after some adjustments, ruled that the amount of accrued uncommitted service charges was £122,192.39. The LVT also awarded interest at 4% per annum compound from 1 October 2004 until payment.

OM appealed arguing that: (1) the sum was not an accrued uncommitted service charge; (2) that if it were then OM was not obliged to pay the RTM company the whole of that sum, given that only 35 out of 129 tenants were applicants in the proceedings; (3) the LVT had no power to award interest on an accrued uncommitted service charge. The RTM company also appealed, seeking a determination; (4) whether OM is obliged to pay it the service charges it did not collect from tenants prior to the acquisition date; and (5) where during its period of management OM paid a bill using funds held in the service charge fund although some of the tenants had not paid their service charges, whether the money used to settle that proportion of the bill which benefited those tenants who had not paid their charges is recoverable as an accrued uncommitted service charge from OM.

The UT reviewed the operation of CLRA 2002, s.94 and concluded: "[23] … The words of s 94 (1) are deliberately limited. The payment of accrued uncommitted service charges is confined to those accrued uncommitted service charges 'held by' the landlord or manager on the acquisition date. The natural meaning of those words is that what has to be paid is what the landlord or manager has actually got; not what he was entitled to have but failed to get or had at one stage but does not have now. Quite how broadly 'held-by-him' should be interpreted in any particular case will depend upon the facts of that case …

[24] The sums must have been paid 'by way of service charges'. Those underlined words, to my mind, are there to make it plain that 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 s 94 ... They also have to be uncommitted service charges, so if they have been paid or committed to a particular management debt or function they do not fall within s 94."

It followed that all the issues were disposed of in OM's favour:

"(1) … the sum of £121,742.39 is not an amount of accrued uncommitted service charges held by OM Ltd on the acquisition date." (2) The issue was not decided. (3) The LVT has no power to award interest. (4) Uncollected service charge is not within s 94. (5) It does not matter that the service charge fund has been run down by paying bills out of the money contributed by those tenants who have complied with their obligations to pay."

The meaning of "held-by-him" is the subject of an appeal to the Upper Tribunal in the case of *Gellman and Sandringham Lodge RTM Company Ltd v Anstone Properties Ltd* (CHI/00ML/LIS/2009/0043) where the managing agent stole £16,000 from the service charge account shortly before acquisition. The LVT held that under s 94 the landlord was liable to pay that sum over to the RTM company. The landlord has appealed this decision, arguing that the stolen monies were not "held-by-him". Presumably the obiter observations of HHJ Mole QC in OM, on the question of the meaning will be considered in this forthcoming appeal:

"I would have little hesitation in deciding that such charges were 'held by him' within the section in a case where a manager had for his own reasons, dishonest or not, decided to put the service charges in cash in a box under his bed" (see [23]).

The principles decided in the instant case can be summarised as follows: Where a service charge sum is collected by the former manager and not committed to a particular bill it is accrued and uncommitted and must be paid over to the RTM company in accordance with s 94. An RTM company is not concerned with the pre-acquisition uncollected service charges. Where the former manager does not have sufficient funds to meet its liabilities for bills incurred before the acquisition date it can sue the tenants for the unpaid service charges but the RTM company cannot do so (see CLRA 2002, s 97(5)). It may, however, be possible for the former manager to appoint the RTM company as its agent to recover those fees or assign the right to do so.

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