11446

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00MR/LSC/2014/0105** **CHI/00MR/LUS/2014/0003**
Property	:	**18 Cavendish Road, Southsea, Hants, PO5 2DG**
Applicant	:	**18 Cavendish Road (Southsea) RTM Company Limited**
Representative	:	**Mrs Michelle Burgess (Director)**
Respondent	:	**Mrs Rashid (as executor of the estate of Mr K G Rashid)**
Representative	:	**Mr Jones of Tiger Consultants**
Type of Application	:	**Section 27A 1985 Act (Service Charges)** **Section 94 2002 Act (RTM uncommitted service charges)**
Tribunal Members	:	**Judge D Dovar (Chairman)** **Judge D Agnew** **Mr P D Turner-Powell FRICS**
Date and venue of Hearing	:	**25th June 2015, Chichester**
Date of Decision	:	**7th July 2015**

DECISION

Introduction

1. These are two applications brought by the Applicant RTM Company. The first is for a determination under section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable for the years ending 2011 to 2014. The second is for a determination under section 94 of the Commonhold and Leasehold Reform Act 2002 of the amount of uncommitted services charges that are payable to the Applicant following the exercise of the right to manage. The right to manage took effect on 28th June 2014.

Inspection and representation

2. The Tribunal inspected the premises on the morning of the hearing. It comprised a property converted into four flats: one accessible through a side entrance, the other three from a communal stair case. The Tribunal were shown areas of the roof and pipework which were said to be substandard and internal areas of significant damp in the top floor flat. The common parts and exterior were generally in poor condition with the areas of the roof that were observable appearing to have been neglected and those areas that had been repaired, the repair had been to a poor standard.

3. The Applicant was ably represented by Mr and Mrs Burgess of Flat 3. Ms Lewis of Flat 4 also attended the hearing. The Respondent was represented by Mr Jones who was keen to make it clear that he had limited involvement or instructions on this matter; his input was helpful nonetheless.

Scope of the applications

4. The Applicant has brought these two applications together in order to have a final determination as to the sums to be transferred to it from the Respondent. The Applicant was of the understanding that any adjustments made in the course of the section 27A application would be reflected in the section 94 determination. However, at the outset of the

hearing the Tribunal expressed its initial view that this was not necessarily the case and read out the following excerpt from Service Charges and Management 3rd Edition, Tanfield Chambers, paragraph 38-019:

> "Section 94 of CLRA 2002 initially gave rise to difficult issues with the Tribunal not finding it easy to construe the section. At a fundamental level, it is was unclear whether s. 94 was intended to be limited to an accounting exercise, or whether it is intended to go further and to be a remedial exercise whereby the tribunal could determine that the service charge accounts can be "put right".
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> An obvious potential dispute is where it is plain that the landlord has incurred a particular cost, but the lessees and/or the RTM company dispute whether that cost was properly incurred. In particular, it was not clear whether this sort of dispute can be resolved under s.94, particularly given that the consequence of a finding in favour of the tenants would logically be that the landlord must "top up" the monies held be-fore accounting to the RTM company.
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> This issue has been largely resolved by the decision of the Upper Tribunal in OM Ltd v New River Head RTM Co Ltd, which held that the scope of s.94 was strictly limited.
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> ...
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> As a result, all sums that have been paid to the landlord by way of service charges before the acquisition date that remain "uncommitted", and only such sums, are to be paid over to the RTM Company. Consequently:
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> ...
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> - a finding that sums paid as service charge were not properly due and payable as service charges, and hence were overpaid, is immaterial to the obligations under s.94. In such cases the remedy of the overpaying leaseholders is a restitutionary claim in the civil courts against the recipient landlord.
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> - a general sinking fund can be brought into account by the landlord in the discharge of liabilities and consequently in reduction of the amount to be accounted for, although funds impressed with a trust for specific purposes could not be treated in this way.

- Any interest actually accruing on the uncommitted service charges held by the landlord must be paid over pursuant to s.94(2)(b), but there is no question of a tribunal making an order for the payment of interest on late payment under s.94 to the RTM company.

A question that is yet to be answered is what happens if a balance held to the service charge account is, before the acquisition of the RTM, misappropriated e.g. by the criminal activity of the landlord's managing agent and without the involvement of the landlord. The Upper Tribunal in New River Head considered (obiter) the dishonest concealment or misappropriation of service charge monies by the landlord and, unsurprisingly, suggested that there would be a remedy in such cases. But what if the wrongdoing is committed solely by a dishonest managing agent?

5. Accordingly, the Tribunal indicated that unless the Applicant managed to persuade it otherwise, the section 27A application was unlikely to have any impact on the s94 determination. The Applicant did not seek to argue against this approach and so whilst the Tribunal has made the findings set out below in relation to the section 27A application, the sums to be transferred under s94 are those held by the Respondent (less any service charges incurred but not yet paid up to the date of acquisition).

Section 27A

6. The challenges to the service charges broke down into three broad headings: insurance costs, maintenance costs and electrical costs.

Insurance

7. The challenge to the insurance was the same for each year: the insurance premiums were excessive compared to the quotations obtained by the Applicant.

8. The Applicant had obtained a like for like insurance with the same insurer for 2014 at a significantly less premium that than charged by the Respondent. The Applicant had a quote for £571.22, the Respondent one for £1,880. The Respondent could not explain the difference. It was accepted that the Respondent had insured through a group policy and

whilst it was suggested that that usually meant lower premiums it was accepted that it could mean that this property was suffering because of poor claims histories from other properties in the group. The Respondent did suggest that the late Captain Rashid had no doubt relied on his reputable brokers who, it was accepted, would have been paid a commission on the basis of percentage of premium.

9. The Applicant had taken this premium and adjusted it over time to work out the difference in premium over the years between what was paid and what should have been paid. The Respondent proposed no alternative method of adjustment.

10. The Applicant also relied on a previous decision of the Tribunal in which other leaseholders had successfully challenged this Respondent's high insurance premiums. It does not appear that the Respondent had since that decision done anything to test the market or challenge the premiums provided by his brokers.

11. The Tribunal is satisfied that the premium for 2014 was unreasonably incurred in that the Respondent could easily have obtained cheaper insurance with an identical level of cover. The Tribunal also considers that Applicant's approach to historical payments should be adopted as: it was not seriously challenged by the Respondent, was reasonable approach to the issue and it was not proportionate for the sums involved to test against any other method of retrospective valuation.

12. Accordingly the Tribunal determines that:

    a. For the year end 2009 the insurance premium payable is £569 rather than the £1760 charged;

    b. For the year end 2010 the insurance premium payable is £569 rather than the £1800 charged;

    c. For the year end 2011 the insurance premium payable is £575 rather than the £1840 charged;

d. For the year end 2012 the insurance premium payable is £605 rather than the £1880 charged;

e. For the year end 2013 the insurance premium payable is £609 rather than the £1920 charged; and

f. For the part of the year end 2014 (prior to the exercise of the right to manage) the insurance premium payable is £351.50.

Maintenance charges

13. The Respondent put up no challenge to the claims that the works of maintenance were sub-standard and overpriced. The Tribunal on viewing the works themselves and by reference to the photographs in the hearing bundle and hearing the Applicant's evidence on the issue considers that the challenges are well made. Dealing with each challenge in turn:

    a. For the year ending 2012, the charge of £1,350 for roofing services, were not to a reasonable standard, the photographs shown to the Tribunal show very poor repair work. The Tribunal allows £225 for the flashing that was installed;

    b. For the year ending 2013:

        i. the first charge of £700 for replacement tiles and rendering. The pictures and the inspection showed that the standard of workmanship was poor. The Applicants were prepared to pay £400 and that is the sum the Tribunal allows;

        ii. the second charge was for £2,200 for works to a valley in the main roof. The works were not only limited in scope but were carried out to a poor standard. Further the workmen used the scaffolding erected by the leaseholders. The work had no effect as leaks continued.

Therefore the Tribunal does not allow any sum for this work;

c. For the year end 2014:

i. the first charge of £1,250 was for further works to the main roof. This was also substandard and failed to address the problems of water ingress (as was clear from the inspection of the top floor flat). Accordingly the Tribunal does not allow any sum for this work;

ii. the second charge was for £450 for some pipework. This was a small amount of work comprising the capping of an external pipe. Again the standard was poor and the Tribunal allows the £150 conceded by the Applicants;

iii. the third charge was £456 for the entry phone. Whilst the work was not completed, in that the top floor flat was not connected, and the work was not to a high standard (a hole was left in the wall with wires hanging out) there was some benefit obtained and so the Tribunal allows £150;

iv. the final charge was £1056. This was for a variety of different jobs, which the Applicant's accepted had been carried out (save for a query over whether a light switch had been fitted). Although they were in one invoice, the Tribunal does not consider that these disparate items would fall within section 20 of the Landlord and Tenant Act 1985 and so there was no need to consult on them and accordingly recovery is not capped at £250 per tenant. There were three charges of £125 for failure to access the top floor flat. Ms Lewis stated that no one had asked for access. On that basis, the sum of £375 will be deducted from the total claimed. The other amounts appear reasonable and the Tribunal allows this sum of £681.

Section 94

14. Given the view of the Tribunal expressed above, the approach to the section 94 determination is the ostensibly the amount left in the service charge account less service charges incurred prior to the exercise of the right to manage but not paid. That was agreed at £1,223.78.

15. Further in the course of correspondence between the parties' solicitors, the Applicant's solicitors sanctioned the deduction of the Respondent's costs of the right to manage process from the service charge account. They did that and deducted £918. The Tribunal pointed out that if the Applicant wished to challenge those costs that would have to be subject of a separate application; however it was indicated to the Applicant that this did not appear to be an unreasonable sum.

16. The Applicant was concerned that service charge expenditure had risen considerably since notice of intention to exercise the right to manage had been given in November 2014. However, there was nothing before the Tribunal to suggest that the normal application of s94 should not apply.

17. Accordingly the Tribunal finds that the s94 sum is £1,223.78. Whilst further sums were deducted, that was with the sanction of the Applicant's then solicitors.

Conclusion

18. The service charges payable for the years in question are:

    a. For the year end 2009: Insurance £569; Management Fee £500; Drains £69; Repairs £295; Electric £45: **total £1,478.**

    b. For the year end 2010: Insurance £569; Management Fee £500; Accountant £470; Repairs £550; Electric £78.75: **total £2,167.75.**

c. For the year end 2011: Insurance £575; Management Fee £500; Accountant £216; Repairs £360; Electric £89.95: **total £1,740.95.**

d. For the year end 2012: Insurance £605; Management Fee £500; AFP £85; Repairs £225; Electric £68.11: **total £1,483.11.**

e. For the year end 2013: Insurance £609; Management Fee £500; ASI £150; Accountant £114; Electrical Repairs £150; Roof repairs £400; Electric £76.16: **total £1,999.16.**

f. For the year end 2014: Insurance £351.50; Management Fee £500; Electrical repairs (entry phone £150 and other items set out above £681) £831; Roof repairs (including Pipe repairs) £150; Accountant £216; Electric £95.66: **£2,144.16.**

19. Although this determination significantly adjusts downwards the sums payable by way of service charge, this does not change the s94 sum which is £1,223.78.

20. Given the determination on the service charge issue, the Tribunal makes an order under section 20C precluding the Respondent from seeking to recover any of the costs of these proceedings from the service charge. The Respondent put up very little resistance to the issues challenged. Further, for the same reasons the Tribunal also makes an order that the Respondent do reimburse the Applicant £440 being the cost of this application and the hearing fee by 28th July 2015.

Judge D Dovar

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.