

01775



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/29UG/LSC/2013/0032
CHI/29UG/LSC/2013/0054

Property : 1-3 Lansdowne Square, Northfleet
Gravesend, Kent, DA11 9LX

Applicant : BM Samuels Finance Group Plc

Representative : Mr Thornton (Hurford Salvi
Carr)

Respondent : (1) Mr & Mrs McCrow (Flat C)
(2) Mr & Mrs Graham (Flats F and H)
(3) Mr Corrigan (Flat D)
(4) Midas RTM Company Limited
(‘the Company’)

Representative : Mr Wellings (counsel)
instructed by
The Merriman Partnership

Type of Application : ss 20C, 27A LTA85, s94CLRA02

Tribunal Members : Judge D Dovar
Mr R Wilkey FRICS

**Date and venue of
Hearing** : 30th September 2013
Holiday Inn, Rochester

Date of Decision : 16th October 2013

DECISION

Introduction

1. There are four related matters before the Tribunal:
 - a. An application dated 26th March 2013, for the determination of service charges for the years ending 2012 and 2013 under section 27A of the Landlord and Tenant Act 1985 and in particular whether the proposed cost of redecorations referred to in the application is reasonable ('the s27A Application');
 - b. A transferred in application from proceedings in the Dartford County Court between the Applicant and the Third Respondent ('the Transferred in Application');
 - c. An application under section 94 of the Commonhold and Leasehold Reform Act 2002 in relation to the sums which should be paid over to the Company pursuant to the exercise of the right to manage under that Act ('the s94 Application');
 - d. An application under section 20C of the 1985 Act in relation to the costs of the s27A application ('the s20C Application') and under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI2013/1169) ('the TPC Rules'), subject to the transitional provisions).
2. Standard directions were given on 5th April 2013 allowing for statements of case, factual and expert evidence and setting a target date for a hearing around the week of 24th June 2013.
3. Further directions were made on 15th May 2013, setting the matter down for a pre-trial review on 10th June 2013.
4. At that hearing, the Applicant accepted that their application was limited to the redecoration costs for future works. Given that these were for future works and given that the Company had exercised the right to manage, the Tribunal expressed concern over whether the s27A Application had any continuing relevance and pointed out that they may

be considered to be acting unreasonably and causing costs to be unnecessarily incurred by continuing with the s27A Application.

5. On 17th June 2013, the s94 Application was made. That had been anticipated and provided for in the directions given by the Tribunal at the pre-trial review which directed:

2. *If, an application pursuant to s94(3) of the Commonhold and Leasehold Reform Act 2002 ('the s94 Application') is made by the Company on or before **4pm on 24th June 2013**, then the following directions shall apply: ...*

*2.3 The Applicant shall by **4pm on 8th July 2013** serve on the Company and any other party to the s94 Application a Statement in Reply (with all supporting documentation) setting out:*

2.3.1 The date they contend is the acquisition date for the purposes of s94;

2.3.2 Details of all notices of contracts given under s92 of the 2002 Act and where they have not complied with that section, details of all contracts in relation to which they should have served a notice;

2.3.3 A running statement of account for the Property showing the accruals, income and expenditure position up to both the acquisition date contended for by the Company and the date contended for by the Applicant (collectively referred to as 'the Dates');

2.3.4 The account balance and bank statements for at least one year prior to the Dates;

2.3.5 As at the Dates, the amount, if any, which they contend is payable under s94 to the Company or to the extent that there is a deficit, the amount, if any, they say is owed to them under the terms of the lease. The Applicant is to provide full documentation showing in respect of their calculation all relevant contracts, job sheets, invoices and payments together with an explanation as to how those amounts have been applied to the Property.

The Property

6. The Property is a building containing eight flats with basement, ground, first and second floor. There is a communal hallway which serves all but

the basement flats. It is one of four similar on Lansdowne Square all of which until recently had been in the management of the Respondent.

Background

7. On 1st October 2012, the Applicant issued service charge invoices for the period 29th September 2012 to 24th December 2012. In respect of Flat D, they sought £1,764.81 for a share of: Reserve Fund 1, Reserve Fund 2, Service Charge 1; and Service Charge 2. On 1st January 2013, further service charge invoices were issued for the period 25th December 2012 to 24th March 2013. In respect of Flat D, they sought a total of £1,615.89.
8. On 24th October 2012, a notice of intention to acquire the right to manage was served on the Applicant with a copy being sent to their managing agent. This gave notice of an intention by the Company to acquire the right to manage on 27th February 2013. No counter notice was served in response. The Applicant accepts that it received the notice both at its address and at the address of its managing agents. However, it states that both recipients managed to, independently of each other, misfile the notice, with the result that nothing was done in response.
9. On 19th February 2013, the Applicant issued proceedings against the Third Respondent in the county court. The full particulars of that claim have not been provided but there is a reference to the claim being for 'Arrears of service charge relating to Flat D 1-3 Lansdowne Square' and the total claimed was £3,941.58. The Tribunal was informed that this was the same claim as the Section 27A Application in that it related to sums for the redecoration works.
10. On 26th March 2013, the Applicant issued the s27A Application. That named Mr & Mrs Crow and Mr & Mrs Graham as Respondents. It did not name any of the other leaseholders of the Property.
11. In respect of the year 2012, the determination is sought as to

'the proposed redecoration works that have been tendered as part of the Section 20 process. The cost of the winning tender was

£33,960.55. The Tribunal is asked to determine whether the costs of redecoration are reasonable.'

It was further stated that

'To pay for the redecoration works the collection of the fund was split over three quarters, the last two quarters of 2012 and the first quarter of 2013. The Reserve fund collection for the last two quarters of the 2012 financial year was £9,695.83.'

For the year 2013, it was said that the reserved fund collection is £13,000 with £10,000 being collected in the first quarter.

12. On 8th April 2013, the Respondents' solicitors wrote to the Applicant pursuant to the exercise of the right to manage, requesting, amongst other matters, the transfer of uncommitted funds.
13. On 24th April 2013, the Respondents put in their response to the s27A Application. They raised a number of issues. These included: a failure to follow the statutory consultation procedure; the exercise of the right to manage by service of a notice on 24th October 2012.; and the reasonableness of the charges.
14. On 3rd May 2013, the county court proceedings were transferred the Tribunal for the amount of service and administration charges payable to be determined.
15. On 13th May 2013, the Applicant indicated that the s27A Application would not be withdrawn until all the arrears were paid. Further it was stated that there was not likely to be any sum transferred to the Company.
16. On 10th June 2013, there was a pre trial review in this matter at which the Applicant confirmed that the right to manage had been exercised, however, the Applicant was unclear as to the date that the right had been acquired.

17. On 9th July 2013, the Applicant wrote to the Respondents' solicitors stating that:
 - a. They were concerned because some of the flats owners had contributed and that in light of that, they were going to reimburse those owners the sums and draw the accounts up on that basis;
 - b. They would withdraw the s27A Application if the Respondent withdrew their s94 Application and that they would not seek to recover their costs under the service charge;
 - c. There was £63.72 in the service charge account;
18. The Respondents rejected the offer, but counter proposed that:
 - a. The s27A Application be withdrawn;
 - b. The s94A Application would be withdrawn, after:
 - i. The Applicant provide full accounts and documentation for the accounts;
 - ii. If they were not agreed a third party be appointed to determine what is payable to the Company.
19. The Applicant did not agree to those terms.
20. On 26th July 2013, the Applicant provided the bank statements for the service charge account. This showed that as at 27th February 2013, the bank account balance was £12,128.72 in credit. Since that date various payments out had been made, including sums to the Applicant's managing agents and two sums of £3,900 to those leaseholders who had paid the contribution to the reserve fund.
21. On 29th July 2013, the Respondents filed a statement in reply setting out their concern that the Applicant had failed to comply with the directions given on 10th June 2013. In particular, that they had failed to state the date that the Company had acquired the right to manage or how much was to be transferred under s94 or provide full bank accounts. They also

raised the point that the managing agents had taken management fees after the date of acquisition.

22. On 13th August 2013, the Respondents made an application to strike out the s27A Application on the basis that there was no reasonable prospect of it succeeding. Three days later the Applicant wrote to the Tribunal seeking to withdraw the s27A application.
23. On 17th September 2013, the Applicant provided the Respondents with further information on the s94 Application. They provided revised service charge accounts for the year ending 31st December 2012 and a balance sheet for the year ending 31st August 2013.
24. The accounts provided referred to contain a signed statement from the accountants, which read

'We have examined the Service Charge Statement of account ... together with the books and records maintained by the Managing Agent. Our work has been undertaken to enable us to make this report to the Landlord and for no other purpose. To the fullest extent permitted by law, we do not accept responsibility to anyone other than the Landlord for our work or for this report.

Although we have conducted a number of tests on the reasonableness of the costs included within this statement, there are limitations which prevent us from forming any opinion on this matter and the standard of the services or works provided. ...

We planned and performed our examination so as to obtain all the information and explanations that we considered necessary in order to provide us with sufficient evidence to give reasonable assurance that the service charge statement is a fair summary of costs incurred during the period. ...'

25. The accounts show the following:
 - a. For the year end 31st December 2012:

- i. The assets included: £10,231 cash at bank; prepayments of £1,741 and £6,589 due from the landlord;
 - ii. There were liabilities of £11,574, which was made up of: Creditors and Accruals; surplus for the year to be refunded to lessees; other creditors; and deferred income;
 - iii. The net assets were £26,493 but this included £19,050 said to be net balances due from Lessees.
- b. As at 31st August 2013, there was £64.21 Cash at bank and £404.22 total liabilities.

Section 27A Application

26. The Applicant wishes to withdraw this application and the Tribunal consents to that application under Rule 22 of the TPC Rules.

Transferred in Application

27. Despite requesting a withdrawal of the section 27A Application, the Applicant wished to continue with the Transferred in Application. The substantive issue was the same as that in the Section 27A Application; namely the payability of the cost of intended works of redecoration.
28. Section 19 of the Landlord and Tenant Act 1985 places a statutory limit on service charges by only allowing their recovery to the extent that they are reasonably incurred and where the service or work is to a reasonable standard. Under section 19 (2) where sums are due before the costs are incurred, 'no greater amount than is reasonable is so payable'.
29. Section 27A confers jurisdiction on the Tribunal to determine whether a service charge is payable and if so, (amongst other matters) the amount which is payable and the date at or by which it is payable. The determination can be made whether or not any payment has been made and also in respect of anticipated expenditure.

30. The issue is whether the Applicant is entitled to recover sums under the service charge in respect of major works for works that it would never carry out. These were for major works that, given the exercise of the right to manage (for which see below) would never be carried out by the Applicant.
31. At the hearing, Mr Thornton for the Applicant suggested that this claim included sums which had already been incurred, but he was not able to point to sufficient evidence of that fact to satisfy the Tribunal that this was the case. This was also inconsistent with the way in which the s27A Application had been drafted and with the Applicant's position at the Pre-Trial Review. Further, the Applicant had been candid in stating that the reason for not withdrawing this application was because it did not want to compromise its position on costs in the county court.
32. In relation to the Transferred in Application, the Tribunal determines that no sums are payable. The Tribunal considers that all the sums were in respect of prospective works which the Applicant will never carry out. On that basis the Tribunal does not consider that it is reasonable for these sums to be payable in advance under s19(2) of the Landlord and Tenant Act 1985.

Section 94 Application

Challenge to the RTM Acquisition

33. At the hearing, Mr Thornton on behalf of the Applicant queried the validity of the acquisition of the right to manage. He claimed that notice inviting participation under s78 of the 2002 Act had not been served on all the qualifying tenants and therefore no notice of claim could have been given under s79.
34. Prior to serving a notice of claim on the freeholder, section 78 of the Act needs to be complied with:

“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.

35. Under s.79(2) of the Act, the Notice Inviting Participation must be served at least 14 days before the Notice of Claim. The Notice of Claim must also be served on the qualifying tenants:

79 Notice of claim to acquire right

...

(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.

...

36. If the Landlord seeks to challenge the validity of the right to manage process, they have an opportunity to serve a counter notice.

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 –

...

b) alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled to acquire the right to manage the premises specified in the claim notice.

(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 the appropriate tribunal for a

determination that it was on the relevant date entitled to acquire the right to manage the premises.

37. Finally, the 2002 Act provides for service of notices. By section 111 (5) a RTM company may give a notice to a person who is a qualifying tenant of a flat at the flat, unless it has been notified of a different address.
38. Mr Thornton's questioned the right to manage process on the basis that the notice inviting participation had not been served on Mr Martin, who was the owner of one of the flats in the Property. A few days prior to the hearing, Mr Martin had emailed stating that he was unaware of the exercise of the right to manage and had not received a notice inviting participation. The Respondents did not accept that the notice had not been served and maintained that it had been served on Mr Martin's flat in the Property.
39. The Tribunal does not consider that the exercise of the right to manage is open to challenge for the following reasons:
 - a. This is a matter which has been raised for the first time at the hearing by the Applicant and without any evidence in support. Not only do the Respondents disagree with the allegation of non-service, but they were given no prior warning of this challenge. If the Respondents had served at the flat, then this would be sufficient following s111(5) of the 2002 Act;
 - b. No counter-notice was served under s84 of the 2002 Act. That was the time in which any challenge to the right to manage should have been set out, as that triggers the procedure for having the Tribunal determine whether the right to manage has been acquired. In the absence of such a notice, the Tribunal is entitled to proceed on the basis that the right to manage has been acquired pursuant to a claim notice;
 - c. Even if the Applicant were right and Mr Martin had not been served, such a failure is not automatically fatal to the service of a

claim notice. It would be incumbent on the Applicant not only to prove a failure of service but also to show that the failure caused sufficient prejudice so as to render the right to manage process invalid. The Applicant produced no such evidence.

Date of Acquisition

40. Section 90 of the 2002 Act provides that the date of acquisition is the date specified in the claim notice.
41. The Applicant put forward no date of acquisition. The Respondent contended for 27th February 2013, being the date in the Notice of Claim. The Tribunal determines that pursuant to s90 of the 2002 Act, that was the date of acquisition for the purposes of s94.

Sum to be transferred

42. Section 94 of the 2002 Act provides:

94(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 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.

94(2) the amount of any accrued uncommitted serve 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 ... less so much (if any) of that amount is required to meet the costs incurred before the acquisition date in connection with the matters for which the service charges were payable.
43. Following s94, the Tribunal must determine what sums had been paid to the Applicant in respect of service charges and then deduct from that amount any sum that the Applicant had incurred by way of service charge before the acquisition date.

44. Adopting the 27th February 2013 as the acquisition date, the Tribunal considers that the first part of this task can be determined by reference to the service charge bank account for the Property provided by the Applicant. This showed a balance of £12,128.72 in credit as at 27th February 2013.
45. The next step is to determine what outstanding sums the Applicant had incurred by way of service charge prior to the date of acquisition.
46. Despite giving clear directions on this issue and despite the Respondents pointing out the Applicant's failure to adhere to those directions, the Applicants have failed to provide sufficient evidence of the sums which they say have been incurred by way of service charge costs prior to the acquisition date.
47. The Applicant did not provide as the Tribunal had required
- 'A running statement of account for the Property showing the accruals, income and expenditure position up to ... the acquisition date'*
- or
- 'full documentation showing in respect of their [the Applicant] calculation all relevant contracts, job sheets, invoices and payments together with an explanation as to how these amounts have been applied to the Property'.*
48. The Applicant sought to place reliance on the accounts for 2012 and 2013 and a general ledger.
49. The Tribunal was not satisfied that there was sufficient evidence of sums to be deducted under s94 (2). The accounts did not show evidence of outstanding liability for service charge expenditure at the acquisition date. It was also not an account that was made for anyone other than the landlord. Finally, the Tribunal was not aware of the basis upon which the account had been made. The accountant had not given evidence as to their instructions. It was not clear what made up the liabilities relied

on and whether they fell within relevant service charges. Finally the general ledger was incomprehensible without further details as to the underlying payments; which were not provided.

50. The only sums the Tribunal was prepared to take into account were the two sums repaid to the leaseholders of Flats A and C. These were the sums of £3,900 paid out on 8th July 2013. Although it appears to the Tribunal that these sums ought not to have been paid out, had they remained in the service charge account, a corresponding credit would have to have been applied to those leaseholders' service charge accounts.
51. Accordingly, the Tribunal is not satisfied on the evidence before of any sums which should be deducted from the £12,128.72 other than £7,800 and therefore determines that £4,328.72 should be transferred or paid by the Applicant to the Company.

Section 20C and costs

52. Given the acquisition of the right to manage, whether or not the Applicant could recover costs under the service charge may be academic. However, no objection was made to the Tribunal making an order under section 20C in relation to the Section 27A Application and accordingly the Tribunal does make such an application. Further, given the outcome of the Transferred in Application, the Tribunal also makes an order under section 20C.
53. The Tribunal also considers that the Applicant's conduct in this matter has been unreasonable in that it has pursued the section 27A Application in the face of the right to manage application which effectively rendered that application redundant. Further, it not only brought the section 94 Application on itself, but failed to adhere to the directions. The Applicant accepted that it had misfiled the right to manage notices and had not acted on them as it was sceptical as to whether they had been served. Had it been less sceptical and made further enquiries it would have realised that the right to manage had been acquired in February

2013. On that basis the proper course would to have finished the county court proceedings and not to have commenced the s27A Application.

54. The Respondents have been represented by counsel at this hearing and at the pre-trial review and by solicitors throughout and the Tribunal considers that their costs will have been well in excess of £500, which is the sum that the Tribunal orders that the Applicant pays on or before 14th November 2013 pursuant to Rule 13 of the TPC Rules (subject to transitional provisions).

Conclusion

55. In summary the Tribunal makes the following determination:
- a. Consent is given to withdraw the section 27A Application;
 - b. The Tribunal determines that no sum is payable by the Third Respondent under the Transferred in Application;
 - c. The Applicant must pay the Company the sum of £4,328.72 on or before 31st October 2013;
 - d. No sums are to be recoverable by the Applicant by way of service charge in respect of the cost of these proceedings;
 - e. The Applicant to pay the Respondents the sum of £500 on or before 14th November 2013.

Judge D Dovar

Chairman

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.



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Representative : Mr Thornton (Hurford Salvi
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Respondent : (1) Mr & Mrs McCrow (Flat C)
(2) Mr & Mrs Graham (Flats F and H)
(3) Mr Corrigan (Flat D)
(4) Midas RTM Company Limited
(‘the RTM Company’)

Type of Application : Permission to Appeal

Tribunal Members : Judge D Dovar
Mr R Wilkey FRICS

Date of Decision : 4th December 2013

DECISION

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1. The Applicant seeks permission to appeal the decision dated 16th October 2013 on the grounds that the sum ordered to be transferred to the RTM Company under s94 of the Commonhold and Leasehold Reform Act 2002 did not take into account ground rent owed to the Applicant.
2. Further, the Applicant seeks to appeal or for clarification as to whether the determination in relation to the Transferred in Application included building insurance sums.
3. The Tribunal has considered whether to review the decision in accordance with Rules 53 and 55 of the Tribunal Procedure (First-tier) Tribunal Rules 2013 (SI 2013/1169).
4. The Tribunal does not consider that the grounds of appeal are likely to be successful and therefore determines not to review the decision. The Tribunal also refuses permission to appeal.
5. The Tribunal does not consider that the appeal has any prospect of success as the grounds of appeal raise new factual issues which were not put before the Tribunal at the hearing.

Ground 1 – Ground Rents

6. Despite being given ample opportunity to do so, the Applicant did not raise any issue of ground rent at the hearing,. The Applicant failed to adhere to the directions which were made to ensure that all the relevant facts and issues would be canvassed at the hearing.
7. Further, the Tribunal is unclear whether the Applicant is now asserting that either: a.) the ground rents had been paid into the service charge bank account; or b.) should simply be taken into account because they are owed to the landlord by the tenant. In either event, there was no evidence before the Tribunal of any ground rent that was owing.
8. The Applicant was directed to provide the bank account details containing the sums paid by way of service charge. They did so. They now appear to suggest that that account also contained the ground rents

that had been paid. If that is the case, then that is of concern given that it is inadvisable (and contrary to the Service Charge Residential Management Code 2nd Ed) to mix service charge monies with ground rent. However, in any event, there was no evidence of this before the Tribunal.

9. Alternatively, the Applicant may be saying, for the first time, that they are entitled to deduct any outstanding ground rent out of the service charge funds to be transferred to the RTM Company under s94. The Applicant did not raise any claim for ground rent at the hearing. Further the Tribunal does not accept that even if there were any arrears of ground rent, that the landlord would be entitled to deduct those sums from the sums which were to be transferred to the RTM company.

Ground 2 – insurance payments

10. At the hearing the Tribunal was not provided with the Particulars of Claim in the Transferred in Application. The Applicant was asked what that claim consisted of and was told that it was in relation to redecoration (see paragraph 9 of the decision). No mention was made of any insurance sums that were outstanding. The Tribunal's decision therefore was based on the assertion by the Applicant that this was redecoration.

Conclusion

11. Permission to appeal is refused as the grounds relied upon have no prospects of success. Both rely on new evidence which was not before the Tribunal. The Applicant had ample opportunity to provide this information, but failed to do so.



Judge D Dovar

Chairman

Appeals

In accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007 and Rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 the Applicant/Respondent may make a further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (Lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission.