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

Case Reference : **LON/00AZ/LUS/2014/0002**

Property : **17 Eastdown Park, Lewisham,
London SE13 5HU**

Applicant : **17 Eastdown Park RTM Ltd**

Representative : **Nat Ado Solicitors**

Respondent : **Powell & Co Property Ltd**

Representative : **Mr Powell accompanied by Mr
Michael Lee**

Type of Application : **Application for a determination of
the amount of any accrued
uncommitted service charges to be
paid to the RTM company**

Tribunal Members : **Judge Sonya O'Sullivan
Mr Peter Roberts DipArch RIBA**

**Date and venue of
Hearing** : **10 Alfred Place, London WC1E 7LR**

Date of Decision : **8 December 2014**

DECISION

Decisions of the tribunal

The tribunal determines that pursuant to section 94 of the Act the landlord may properly deduct the cost of meetings and travelling costs in the sum of £35.80 plus 15% in respect of management costs making a total of £41.17. The sum therefore to be paid to the RT M company is £24,511.37

The application

1. The Applicant RTM company seeks a determination pursuant to s.94(3) of the Commonhold and Leasehold Reform Act 2002 (the "Act") for a determination of the amount of any service charges to be paid under this section to the RTM company.
2. The Applicant acquired the right to manage the premises known as 17 Eastdown Park London SE13 (the "Property") on 18 March 2014.
3. The application made under section 94(3) is for;

"A determination of the amount of any payment which falls to be made under section 94 of the 2002 Act, viz such sum as is equal to the amount of any accrued uncommitted service charges held by the Respondent as Landlord of the premises on the acquisition date where the right to manage such premises is acquired by the RTM company."

4. Directions were made dated 3 June 2014 further to which both parties filed statements of case and a hearing took place on 22 October 2014.

The hearing

5. The Applicant RTM company was represented by Ms Adojutelegan, a solicitor in the employ of Nat Ado solicitors and also the leaseholder of Flat 3 at the property. The Respondent was represented by Mr Powell, a director and Mr Michael Lee, who described himself as a legal officer.

The background

6. The subject of this application is a large 3 floor plus attic level Victorian property, brick built under a slated roof; originally semi-detached it now has a 2 storey linked block at upper ground and 1st floor levels over a side vehicular access way. There are 4 flats in the main building with 2 in the adjoining block.

7. Neither party requested an inspection and the tribunal did not consider that one was necessary given the issues in dispute.

The issues

8. The only issue before the tribunal was the amount of any accrued uncommitted service charge held by the landlord which should now be paid to the RTM company pursuant to section 94 of the Act. It was agreed between the parties that as at the acquisition date the amount of service charge held by the landlord was £24,552.54.
9. Mr Powell submitted as a preliminary point that the right to manage could not succeed given that he said the Property is not a qualifying property under the Act as it is not self-contained as there are entrances to two other flats within the stairwell of the building which are held under another freehold title. However a differently constituted tribunal had previously determined on 12 March 2014 that the Applicant would assume the right to manage the Property on 18 March 2014. The Respondent's application for permission to appeal that decision was refused by the Upper Tribunal on 16 April 2014. This tribunal does not have the jurisdiction to re-consider the issue of whether the Property constituted qualifying premises for the purposes of the 2002 Act. It is unfortunate that the point now relied upon by the Respondent was not raised before the tribunal at first instance.
10. The Respondent had prepared a schedule of the amounts it considered it could properly deduct from the service charges included at page 53 of the bundle and the tribunal took the parties through it as set out below.

Addison Lee – delivery of files

11. A cost had been apportioned against each of the flats in relation to this item. Mr Powell explained that this related to the cost of delivering files to Nat Ado's solicitors in relation to the claim for possession of Flat 3 in the County Court. The Respondent relied on the section 146 provision in the lease pursuant to which the lessee covenants at paragraph 2(12)

"To pay to the Lessor all costs charges and expenses (including legal costs and fees of the Lessor's Surveyor) which may be incurred by the Lessor in or in contemplation of any proceedings under sections 146 and 147 of the Law of Property Act 1925 notwithstanding that forfeiture shall be avoided otherwise than by relief granted by the Court and all such costs charges and expenses which may be incurred by the Lessor in connection with the Lessee's covenant pursuant to clause 3 hereof or in connection with any Lessors Consent or Licence required by the Lessee."

12. The Respondent further relied on paragraph 4 of the Fifth Schedule to the lease which provides as follows;

“All charges assessments and other outgoings (if any) payable by the Lessor in respect of all parts of the Property (other than income tax).”

13. The tribunal did not consider that this was a committed service charge. Any sum claimed pursuant to a section 146 provision as at paragraph 2(12) was an administration charge, that is a charge made against only one leaseholder, which is not a service charge item. The tribunal also did not consider that this was an amount which fell to be recoverable by the Lessor as a service charge pursuant to paragraph 4 of the Fifth Schedule. The Respondent may be able to recover this sum from the leaseholder in question as an administration charge and should take legal advice in this regard.

Electricity

14. The cost of electricity had been deducted at a cost of £7.50 per month for a period of 10 months. Mr Powell confirmed that this sum was reimbursed to the leaseholder of Flat 2 who provided electricity to the common parts as there was no separate landlord's supply. He did not however provide any evidence of this arrangement of evidence that any sums had in fact been paid to the leaseholder in question.
15. Accordingly in the absence of any evidence that any sums were in fact paid to any leaseholder in respect of electricity this sum was disallowed as it was not in the tribunal's view a committed service charge item.

Meeting and travelling costs

16. Meeting and travelling costs were claimed and these were not challenged by the Applicant.

Section 146 costs

17. Costs described as “section 146 costs” were deducted in excess of £1,610. These were heard to relate to the legal costs of Mr Lee in connection with the dispute with one of the leaseholders, Ms Adojutelegan.
18. The Respondent relied on the section 146 provision in the lease and on clause 4 of the Fifth Schedule, set out above.
19. The tribunal did not consider that this item was a committed service charge which could properly be deducted from the monies held on account at the time of

the acquisition date. Any sum claimed pursuant to a section 146 provision as at paragraph 2(12) was an administration charge, that is a charge made against only one leaseholder, which is not a service charge item. The tribunal also did not consider that this was an amount which fell to be recoverable by the Lessor as a service charge pursuant to paragraph 4 of the Fifth Schedule. The Respondent may of course be able to recover this sum by way of an administration charge directly from the leaseholder in question and should take legal advice in this regard.

Tribunal fee

20. A total sum of £440 had been deducted in relation to costs awarded by a previous tribunal on an application under section 27A of the Landlord and Tenant Act 1985 case reference LON/OOAZ/LSC/2013/0581. This sum was ordered to be paid by the leaseholders of Flat 3. The Respondent again relied on the section 146 provision and clause 4 of the Fifth Schedule referred to above.
21. We found that this was not a service charge item and thus could not be deducted as a committed service charge item. The tribunal's order could be enforced in the same way as a County Court judgement against the leaseholder.

County Court Judgement

22. The sum of £11,617.89 had been deducted in respect of a judgment obtained against Ms Adojutelegan which represented judgement for an estimated invoice in respect of major works. The Respondent again relied on the section 146 provision and clause 4 of the Fifth Schedule.
23. We found that this was not a service charge item and thus could not be deducted as a committed service charge item. The County Court judgement can be enforced against the leaseholder in question.

Court fee/costs awarded by court

24. The sums of £175 and £650 had been deducted which represented costs awarded by the county court in respect of the proceedings against Ms Adojutelegan. The Respondent again relied on the section 146 provision and clause 4 of the Fifth Schedule.
25. We found that this was not a service charge item and thus could not be deducted as a committed service charge item. Any costs awarded by the County Court can be enforced against the leaseholder in question.

Professional fees

26. The sum of £5,040 had been deducted in respect of professional fees. This was a total of a variety of invoices which was produced to the tribunal.
27. Three of these invoices related to charges in respect of one leaseholder and thus were potentially administration charges rather than service charge items. We concluded that these were not service charge items and therefore not capable of being deducted as such.
28. Of the remaining invoices these related to costs incurred by the landlord in relation to the right to manage process. We found that these were not therefore service charge costs falling due under the lease and could not be deducted from the amount held. The costs may be recoverable pursuant to section 88 of the Act which provides that the RTM company is responsible for the landlord's reasonable costs which can include professional costs. However the landlord has not as yet served these invoices on the RTM company with a request for payment. Once these invoices have been served the landlord can make an application to this tribunal for an order for its costs under section 88. The Respondent is however advised to take legal advice in relation to these matters.

RTM fee

29. The sum of £900 had been deducted in relation to what was described as a RTM fee. The tribunal was unclear as to what this related. However this was not a service charge item and thus could not be deducted from any service charges held as a committed service charge item.
30. Further as in relation to the legal costs this may be a cost which is recoverable as part of the RTM process under section 88 of the Act (see comments above).

Anticipated legal costs

31. The sum of £6,000 had been deducted in respect of anticipated legal costs in respect of the possession proceedings against Ms Adojutelegan.
32. The Respondent again relied on the section 146 provision and clause 4 of the Fifth Schedule.
33. The tribunal did not consider that this was a committed service charge. Any sum claimed pursuant to a section 146 provision as at paragraph 2(12) was an administration charge, that is a charge made against only one leaseholder, which is not a service charge item. The tribunal also did not consider that this was an amount which fell to be recoverable by the Lessor as a service charge pursuant to

paragraph 4 of the Fifth Schedule. We also note that these are anticipated costs. The Respondent may be able to recover this sum from the leaseholder in question as an administration charge and should take legal advice in this regard.

Accountant's fees for final account

34. The sum of £900 had been deducted in respect of the estimated cost of the final account which was to be prepared by an accountant in relation to the RTM process.
35. We did not consider that this cost was a service charge item and thus could not be deducted from the monies held as at the acquisition date. This may however be a cost which can properly be claimed pursuant to section 88 of the Act.

Management Fees

36. We agree that management fees can properly be deducted on any monies allowed at 15% of the total. This management fee may be claimed in respect of the meeting and travelling costs.

Summary of tribunal's decision

37. The tribunal determines that pursuant to section 94 the landlord may properly deduct the cost of meetings and travelling costs in the sum of £35.80 plus 15% in respect of management making a total of £41.17. The sum therefore to be paid to the RT M company is £24,511.37.
38. We would comment that the landlord's defence to this application was in our view misconceived. The landlord is entitled pursuant to section 94 to deduct proper expenses incurred before the acquisition dates. Almost all of the deducted costs set out in the landlord's schedule related to either administration costs or costs incurred in connection with the RTM process. These are not costs which may properly be deducted from service charge funds pursuant to section 94 of the Act. However they may well be recoverable via an alternative route. We would suggest that the landlord take legal advice in relation to the remedies open to it for the recovery of the various costs it has incurred.

Application for costs under Rule 13

39. At the end of the hearing, the Applicant made an application for costs under Rule 13. The tribunal makes directions in relation to this application under separate cover.

Name:
Sonya
O'Sullivan

Date: 8 December 2014



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PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

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Property : **17 Eastdown Park, London SE13
5HU**

Applicant : **17 Eastdown Park RTM Ltd**

Representative : **Nat Ado Solicitors**

Respondent : **Powell & Co Property Company
Limited**

Representative : **Mr Powell , a director**

Type of application : **Costs under Rule 13 Tribunal
Procedure (First-tier tribunal)
(Property Chamber) Rules 2013**

Judge : **S O'Sullivan**

Date of decision : **26 March 2015**

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DECISION

Decisions of the tribunal

The tribunal makes no order for legal costs pursuant to Rule 13(1) of the Tribunal Procedure (First tier Tribunal) (Property Chamber) Rules 2013.

The application

1. At a hearing on 22 October 2014 the Applicant made an oral application for a determination of costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Directions were made dated 11 December 2014 which were varied on 23 February 2015. Both parties made written submissions. The application was considered by way of a paper determination on 24 March 2015. Neither party requested an oral hearing.
2. The costs in issue are those said to be incurred in bringing an earlier application to the tribunal under the same case reference but made under section 94(3) of the Commonhold and Leasehold reform Act 2002. The costs being claimed by the Applicants total £2,177.40.
3. The Applicants are referred to as the tenants throughout this application and the Respondent as the landlord.

The background

4. The Substantive Application related to an application by the Applicant for a determination of the amount of any uncommitted service charges to be paid to the RTM Company. In a decision dated 8 December 2014 the tribunal found that the sum payable to the RTM Company was £24,511.37.

The Applicant's case

5. The Applicant set out its grounds for the application in a statement of case. It submitted that the Applicant RTM Company acquired the right to manage on 18 March 2014 by virtue of a decision of the Upper tribunal dated 12 March 2014. By email dated 8 May 2014 the Applicant made a request for the uncommitted service charges. However the Respondent did not recognise the RTM Company and did not respond to the request. The application under section 94(3) was made on 19 May 2014.
6. The Applicant says that the Respondent was uncooperative in dealing with the tribunal's directions and only complied after being informed that a "formal report would be made to the tribunal". Between 3

September and 3 October it is said that the Respondent made four applications for an adjournment of the hearing resulting in unnecessary defence and expense on the part of the Applicant. The Applicant submits that the application should not have been necessary and that the funds should have been accounted for. The work was carried out by a solicitor at an hourly rate of £190 per hour. A brief summary of the costs has been produced.

7. The Respondent filed a statement in response dated 6 March 2015. In this statement Mr Powell sets out the background to the substantive application. He explains how the landlord wished to carry out major works and that this was opposed by the leaseholder of Flat 3. A decision of the tribunal found the major works to be reasonable. The leaseholders then instigated right to manage proceedings. Unfortunately a key ground of opposition was not included in the Respondent's counter notice. The landlord had been of the view that it could continue to raise opposition to the right to manage and this is why it had not accounted for the funds it held. Mr Powell submits that the landlord has acted reasonably at all times with support of the only owner occupier at the property. It is submitted that it would be unfair to award costs against the Respondent in the circumstances.
8. In response the Applicant submits that the Respondent's statement of cases raises no grounds which are relevant to the issue of costs under Rule 13.

The tribunal's decision

9. The tribunal declines to make any order in respect of legal costs pursuant to Rule 13(1) of the Tribunal Procedure (First tier Tribunal) (Property Chamber) Rules 2013 (the "Procedure Rules").

Reasons for the tribunal's decision

10. The tribunal's power to award costs is contained in Rule 13 (1)(b)(ii) of the Procedure Rules which states that;

"The Tribunal may make an order in respect of costs only-

(b) If a person has acted unreasonably in bringing, defending or conducting proceedings in-

(I) a residential property case ..."

11. The power to award costs pursuant to Rule 13 is discretionary and the wording of the provision makes it clear that the tribunal may only make

such an order if a person's conduct of the proceedings is unreasonable rather than his behaviour generally.

12. The power to award costs pursuant to Rule 13 should only be made where a party has clearly acted unreasonably in bringing, defending or conducting the proceedings. This is because the tribunal is essentially a costs free jurisdiction where parties should not be deterred from bringing or defending proceedings for fear of having to pay substantial costs if unsuccessful. In addition there should be no expectation that a party will recover its costs if successful. The award of costs should therefore in our view be made where on an objective assessment a party has behaved so unreasonably that it is fair that the other party is compensated to some extent by having some or all of their legal costs paid.
13. The application was made by the Applicant rather than the Respondent. The Respondent was slow to comply with the directions but the tribunal does not consider that this fact alone would have increased the Applicant's costs to any great degree. As far as the requests for an adjournment were concerned these were straight forward requests for adjournments, two of which were based on the same ground of a conflicting court appointment. Whilst it is appreciated that the Applicant spent time in responding to these applications the tribunal does consider that the making of any of the postponement applications in these circumstances was unreasonable. Having heard evidence from Mr Powell in the substantive application it was clear that he had a genuine belief that the Applicant had not acquired the right to manage and that this was something which the tribunal could consider further.
14. Having considered the facts of this case overall I consider that it is not appropriate that an order is made under Rule 13 I we do not consider that the Respondent has acted so unreasonably in defending or conducting the proceedings that the Applicant be compensated.

Name: S O'Sullivan

Date: 26 March 2015