FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/00KF/LUS/2014/0002**
Property	:	5–7 Kings Road, Westcliff-on-Sea, Essex SS0 8BH
Applicant	:	Kingsview Court RTM Company Ltd, c/o Flat 2, Kingsview Court, 5–7 Kings Road, Westcliffe-on-Sea, Essex SS0 8BH
Representative	:	Mark Shrimpton (Director), of Flat 2 above
Respondent	:	Westleigh Properties Ltd, Lion House, 36 Clarence Street, Southend-on-Sea, Essex SS1 1BD
Representative	:	Gateway Property Management Ltd, Gateway House, 10 Coopers Way, Southend-on-Sea, Essex SS2 5TE
Type of Application	:	Application relating to (No Fault) Right to Manage, viz a determination of the amount of any payment of accrued uncommitted service charges [CLRA 2002, s.94(3)]
Tribunal Members	:	G K Sinclair and R Thomas MRICS
Date and place of determination	:	Thursday 24th April 2014 at the tribunal office, Great Shelford
Date of Decision	:	30th April 2014

DECISION

Summary

1. In this case the amount in dispute is relatively small, neither the applicant RTM company nor the respondent freeholder have sought a hearing and the tribunal has therefore had to do its best to reach a decision upon the material provided.

2. The RTM company was incorporated on 6th February 2013 with the intention of assuming responsibility for the management of the subject block of flats and premises at Kings Road, Westcliff-on-Sea. It took over management of the building on 1st September 2013 and entered into negotiations for the transfer to it of accrued but uncommitted service charges already collected and in the hands of the freeholder's managing agent, Gateway Property Management Ltd.

3. Upon transfer of control from Gateway to the RTM company the former was able to achieve a rebate of £3 055 on that year's buildings insurance premium, which was more than enough to cover Gateway's actual service charge expenditure in that part-year. Adding the surplus of £51 to the first half year's service charge of £6 983 (which, according to the accounts for 25th March 2013 to 1st September 2013, had been collected) the amount in hand totals £7 034.

4. According to the respondent, however, the service charge account is in arrears to a significant amount, and in order to achieve a nil balance the RTM company – instead of receiving money – would need to pay it back the sum of £4 326.96. It relies upon the statutory provisions and a decision of HH Judge Mole QC sitting in the Upper Tribunal (Lands Chamber), viz *OM Ltd v New River Head RTM Company Ltd*[1].

5. Taking into account the documents placed before it, and for the reasons which follow, the tribunal determines that :
   a. The whole of the £7 034 balance is payable to the RTM company
   b. In addition, any sums invoiced for by Gateway in August 2013 and paid to it by leaseholders for the half year commencing on 24th September 2013 (ie after the RTM company was due to take over control) are also payable to the RTM company
   c. The alleged arrears relied upon by the respondent, the most substantial part of which it attributes to flat 10, ignore past tribunal decisions and are both inflated and simply wrong
   d. Legal costs, court fees, etc (none of which have been proved) were not "incurred before the acquisition date in connection with the matters for which the service charges were payable".

Material lease provisions

6. The tribunal had before it a copy of the lease dated 22nd November 2000 for flat 2, granted for a term of 199 years from 25th December 1998 at a fixed annual rent of £125 payable annually in advance. By clause 4(b) the lessee covenants to pay

[1] [2010] UKUT 394 (LC)

one equal tenth part of the costs expenses outgoings and matters referred to in the Third Schedule. The lessor's obligations to insure, and to maintain, repair, decorate, and renew the structure and common parts (including the communal garden) are to be found in clause 5(b), (d) and (e) inclusive. The Third Schedule sets out a list of items, broadly mirroring those parts of clause 5, for which the lessees must pay; but the lease makes no provision at all for accounting periods, when and how this expense is to be assessed and paid, whether payment should be in advance or in arrears of actual expenditure, or for the payment of interest on any arrears. In these respects the lease is defective. Legal costs are also not mentioned, although the reasonable costs and professional fees of managing agents are.

7. In *Commercial and Residential Service Charges*,[2] at 23–02, the authors argue that :

> If there is no specific wording in a lease entitling the landlord or manager to recover monies on account, then it is generally considered that the courts will not wish to imply such an obligation.

In support they cite the cases of *Daiches v Bluelake Investments Ltd*[3] and *Capital & Counties Freehold Equity Trust Ltd v BL plc*[4].

Applicable law

8. The acquisition by leaseholders of the no-fault right to manage is governed by Part 2 of the Commonhold and Leasehold Reform Act 2002. Section 93 provides that :

> Where the right to manage premises is to be acquired by a RTM company, the company may give notice to 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,
>
> requiring him to provide the company with any information which is in his possession or control and which the company reasonably requires in connection with the exercise of the right to manage.

9. If the transfer of responsibility takes place partway through an accounting period, or if there is a reserve fund in existence, then the Act provides for the transfer of accrued but uncommitted funds held by the lessor or outgoing managing agent. Section 94 provides that :

> (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

[2] Rosenthal and others (Bloomsbury – 2013)

[3] [1985] 2 EGLR 67

[4] [1987] 2 EGLR 49

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.

10. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :

a. only to the extent that they are reasonably incurred, and

b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

Documents before the tribunal

11. In addition to the application form and an explanatory letter accompanying it the tribunal had Gateway's statement in reply by Mr Ben Day-Marr MIRPM dated 18th February 2014, Mr Shrimpton's response to that on behalf of the applicant dated 24th February and Mr Day-Marr's reply to that dated 10th March 2014. Of the documentary evidence supplied the most important were the lease, service charge accounts for the year ended 24th March 2012 and those for the period 25th March 2013 to 1st September 2013,revealing also the figures for the year ending 24th March 2013. Crucially, individual statements of account were provided for five of the ten leaseholders, the others apparently having paid in full. Two past decisions of the Leasehold Valuation Tribunal relating to flat 10 for the years 2004–2005 and 2005–2009 were also included.

12. The respondent provided the applicant and tribunal with a copy of the decision in *OM Ltd v New River Head RTM Company Ltd*[5], but the applicant had not seen fit to include this in the application bundle.

Findings

13. The applicant bases its case on the fact that Gateway had collected a substantial amount in advance for the half year beginning on 25th March 2013 (and some more from a few leaseholders which was invoiced in August for the period after the RTM company would have taken over control). None of this was actually required, as an insurance rebate more than covered the actual expenditure incurred during the period ending 31st August 2013, leaving a small balance of £51 to add to the service charge contributions already collected. All of this should therefore be transferred to the applicant as accrued uncommitted service charges.

14. Not so, says the respondent. The applicant can only have what has actually been collected – not that which ought to have been collected, or which the freeholder

5 [2010] UKUT 394 (LC)

was entitled to collect. Of the sums received it can also set off any arrears that should have been paid, and for which it relies upon its service charge accounts and individual leaseholder statements of account. In his statement in reply Mr Day-Marr argues, at paragraph 3.8, that

> At the time of the acquisition date, the property's service cahrge account was in deficit to the sum of £4 826.96 this is now £4 326.96 as the £500 retention has been released) and as such being funded by Gateway Property Management Limited until such time as the arrears are collected. Accordingly, no surplus service charge monies were held by Gateway at the handover date and indeed the position remains unchanged save for the retention which reduces the deficit by £500 to : – £4 326.96.

15. The service charge accounts produced show no such accumulated deficit. Rather, Gateway seems to be relying on the individual leaseholder statements of account, in respect of which the most significant deficit is recorded against flat 10 in the sum of £7 817.82. As two previous tribunal decisions have dealt specifically with flat 10 this tribunal is in a good position to know that the statement of account for Ms St Pierre is complete nonsense and fails to recognise the decisions made already. Further, these decisions refer to periods before Gateway took over the management of the Westleigh Properties estate and when any loss would fall either upon the freeholder (able to recover service charges only insofar as they were reasonably incurred) or upon the then managing agent, BLR.

16. The statement for flat 10 appears at page 41 in the bundle. It reads as follows :

Due date	From	To	Details	Due
20 Jul 2007	n/a	n/a	Historic Balancing Building Works	£16.33
27 Jun 2008	25 Mar 04	24 Mar 08	Historic Balancing Servicce Charge	£744.96
12 Jan 2009	4 Jan 07	24 Dec 09	Historic Ground Rent Receivable	£375.00
20 Apr 2009	25 Mar 04	24 Sep 09	Historic Service Charges	£3,219.61
20 Apr 2009	25 Mar 04	24 Sep 09	Historic Sinking Fund	£50.00
2 Nov 2011	20 Jul 09	2 Nov 11	Interest on Late Payments	£832.67
2 Nov 2011	n/a	n/a	Arrears Recovery Charges to Date	£300.00
24 Mar 2012	25 Mar 11	24 Mar 12	Balancing Charge Y/E March 12	£302.47
25 Mar 2012	25 Mar 12	24 Sep 12	Half Yearly Service Charge in Advance	£675.95
25 Dec 2012	25 Dec 12	24 Dec 13	Yearly Ground Rent in Advance	£125.00
25 Mar 2013	25 Mar 13	24 Sep 13	Half Yearly Service Charge in Advance	£698.30
30 Aug 2013	25 Mar 12	24 Mar 13	EOY balancing charge 24.03.2013	£477.53
			Balance to pay	**£7,817.82**

17. The first point to be made is that it is not enough to press a button on a computer and produce a schedule or statement of account. The figures shown do not prove

themselves. Nowhere does Mr Day-Marr seek to prove that the alleged arrears are in fact due and payable, and the first item listed is both hopelessly vague and unproven.

18. Secondly, two entries refer to ground rent. Ground rent is not recoverable by way of service charge, so cannot be set off as committed to payment of service charge liabilities.

19. Thirdly, the statement completely ignores decisions made by the tribunal to the effect that no service charges incurred in the period 2005–09 had been proved to have been reasonably incurred, as BLR had failed to provide any or sufficient information at hand-over. The loss therefore fell on the freeholder. It follows that interest and arrears recovery charges also fall by the wayside.

20. Fourthly, as the lease makes no provision for a sinking fund no contribution to one was ever claimable.

21. More generally, arrears recovery charges of £300 (claimed against both flat 2 and flat 10) are not recoverable by way of service charge but, if provable, as personal liabilities of the individual leaseholders. How are they justified? No explanation is offered.

22. That leaves four items which the service charge accounts suggest were prima facie due for the period 25th March 2012 to 31st August 2013 by the leaseholder of flat 10. The problem here, however, is that the respondent freeholder wants both to deduct those sums from the advance service charge collected by it in March 2013 but also retain the right to recover such "debts" from Ms St Pierre. (The same applies to the other leaseholders shown as being in arrears).

23. Either it retains the right to pursue recovery against those individuals or, if it seeks to deduct such sums from the amount payable to the RTM company, it must assign its rights of action to it in consideration for immediate payment. If the RTM company were prepared to enter into such a "factoring" arrangement then one suspects that :
    a. It would only be after due diligence was carried out into the enforceability of the alleged debts, and
    b. Upon extracting a substantial discount to reflect the litigation costs, risk and general hassle involved in pursuing individual recovery.

24. It is not for this tribunal to thrust such a burden on the applicant company. The fact remains that the service charge accounts show no accrued debt, and none has been proved. The amount shown in the 25th March 2013 to 1st September 2013 accounts as a surplus for the year, namely £7 034, plus any further sums collected as a result of invoices issued in August 2013, are therefore payable forthwith to the applicant company.

Dated 30th April 2014

Graham K Sinclair – Tribunal Judge