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First-tier Tribunal
Property chamber
(Residential Property)

Case references	:	**CAM/00KF/LUS/2014/0003**
Property	:	**99 Cumberland Avenue, Southend-on-Sea, Essex SS2 4LG**
Applicant	:	**99 Cumberland Avenue RTM Co. Ltd.**
Respondent	:	**Forcelux Ltd.**
Date of Application	:	**16th June 2014**
Type of Application	:	**For Orders (a) to determine the amount of costs payable by a RTM company (section 88(4) Commonhold and Leasehold Reform Act 2002 ("the Act")) and (b) to determine the amount of any accrued uncommitted service charges (section 94(3)**
Tribunal	:	**Bruce Edgington (solicitor, chair)** **Roland Thomas MRICS** **David Cox**
Date and venue for Hearing	:	**17th July 2014, at the Court House, 80 Victoria Avenue, Southend-on-Sea Essex SS2 6EU**

DECISION

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1. The reasonable legal costs of the Respondent in dealing with the matters set out in Section 88 of the Act are not ascertainable as the Tribunal has insufficient detail of the claim for costs. This part of the application is adjourned for the parties to comply with a directions order to be made and issued.

2. The application to determine the amount of accrued uncommitted service charges to be handed over to the 99 Cumberland Avenue RTM Co. Ltd. by Forcelux Ltd. is dismissed.

Reasons

Introduction

3. The Applicant has served at least 2 Claim Notices which have failed. As everything seems to be in issue in this case – including the number of such Notices that have been served – the Tribunal will simply note that this was not the first such Notice. It now seems that a successful Notice has been served which is the reason for this application.

4. The Respondent has made 2 previous claims for costs arising out of the service of Claim Notices. Each has produced an application to this Tribunal and its predecessor for a determination of whether the claims for costs have been reasonable. The second has been heard and determined at the same time as this application as part of the hearing described below.

5. This application is for the Tribunal to determine 2 matters i.e. to assess the solicitors' costs claimed as a result of the last Claim Notice and to determine the amount of uncommitted service charges to be handed over to the Applicant by the Respondent.

6. It will be seen that there was not a great deal of time between this application and the hearing. The Tribunal and the Applicant had hoped that everything could be dealt with at the same time but as the claim for costs was only made on the 8th July, there has been insufficient time to deal with that part of the application. No specific objections have been raised and there is no real detail of the claim itself. Thus, this part of the application is adjourned and directions will be issued timetabling that matter to resolution.

7. Having said that, the Tribunal would just point out to the Respondent that claiming for the cost of serving a Counter-notice is unlikely to succeed if it was wrongly served. As the solicitors will know the Upper Tribunal has been critical of landlords who serve Counter-notices which just contain blanket assertions which put the onus on the RTM company to prove something (**Assethold Ltd. V 14 Stansfield Road RTM Co. Ltd.**[2012] UKUT 262 (LC); LRX/180/2011).

8. They will also know of the recent case which confirmed, in effect, that service of a notice of invitation to participate on every qualifying tenant is not actually mandatory, despite what the Act says (**Avon Freeholds Ltd. v Regent Court RTM Co. Ltd.** [2013] UKUT 0213 (LC)).

9. Finally, the Applicant should take on board the fact that any correspondence concerning the section 93 and section 107 matters may be chargeable because such time is expended "in consequence of a Claim Notice".

The Law

10. Section 94 of the Act provides that where the right to acquire the right to manage is obtained by a RTM company, any accrued uncommitted service charges must be paid by the landlord to the RTM Company and

subsection (3) provides that either party may apply to this Tribunal to "*determine the amount of any payment which falls to be made*".

The Hearing

11. On behalf of the Applicant, directors Hayley Carter and Mark Brook attended. The Respondent did not attend and was not represented, having, through its solicitors, written to the Tribunal beforehand to ask for their attendance to be excused.

12. Ms. Carter described how obstructive the Respondent had been throughout this matter. The last Claim Notice had produced a generally worded Counter-notice. When the actual allegation was made, it turned out to be a claim that one of the qualifying lessees, Regis, had not been served with a notice. The Applicant produced evidence countering this allegation and the Counter-notice was withdrawn.

13. A lengthy notice had been served under section 93 of the Act asking for information. A reply had been sent but, claimed Ms. Carter, this was not sufficient. She wanted to see bank statements and annual service charge accounts.

14. The response to the notice had produced a statement from the Respondent that there were no uncommitted service charges because any work at the property was funded by the Respondent and then re-claimed from the tenants in arrears. It was said that one tenant, Mr. Bond from flat 2, had not paid the last service charge demand but a subsequent letter confirmed that this had now been paid.

15. It was also said that there was an outstanding electricity account in the sum of £46.11 but as this bill had arrived after the last service charge demands went out for the period up to 31st January 2014, the Respondent would pay this as, in effect, a gesture of goodwill.

16. In addition the Respondent produced statements of account certified by a firm of chartered accountants for the year ending 31st March 2013 plus the 9 month period ending on the 31st January 2014. When asked whether the Applicant had asked for facilities to inspect the books and invoices supporting the claims for service charges, Ms. Carter claimed to be unaware of these rights. Accordingly, there had been no such request.

17. It was put to Ms. Carter that if no service charges were being collected on account and there was no sinking fund so that the maintenance etc. was being undertaken at the Respondent's own expense, there was no requirement to keep separate bank accounts. This may be something recommended by the Royal Institution of Chartered Surveyors as part of its management code for managing agents, but it was not a legal requirement. Thus, if the property was being managed out of the Respondent's own bank account in the circumstances described above, it would not be unreasonable for access to be denied. She seemed to be unaware of this.

Conclusion

18. The position revealed by the documents is that the RTM Company has served a notice on Forcelux asking detailed questions about the development which include questions about service charges. Forcelux has replied in detail. With regard to such service charges, it says that there are no accrued uncommitted charges as the property is maintained at the expense of Forcelux and the service charges are then collected in arrears.

19. In particular, they say that there is no reserve or sinking fund and all the present demands are paid by the tenants. There is a small amount due for electricity charges but the Respondent was not claiming recovery of this. There are 2 statements of service charge expenditure certified by a chartered accountant for the period since 1st February 2012. For these reasons, the Tribunal cannot see any evidence that the Respondent has any uncommitted service charge funds and the application in that regard is therefore dismissed.

20. Ms. Carter confirmed that the Applicant had given notice to the Respondent pursuant to section 107 of the Act in preparation of its intention to seek enforcement of these provisions through the county court. Perhaps before the Applicant proceeds along this route it should ask for permission to inspect the accounts and invoices. Unless it can produce some persuasive evidence that the Respondent's assertions are wrong, either from these documents or some sort of forensic examination of the tenants' own documents of the last few years, the Applicant may want to consider whether it wants to risk the time and both the emotional and financial cost of such a course.

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Bruce Edgington
Regional Judge
17th July 2014