FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BH/LCP/2019/0008**
Property	:	**Bridge Court South, Lea Bridge Road, London E10 7JS**
Applicant	:	**Triplerose Ltd**
Representative	:	**Mr Simon Allison, counsel** **Scott Cohen solicitors**
Respondent	:	**Bridge Court South RTM Co Ltd**
Representative	:	**Ms Amanda Gourlay, direct access counsel**
Type of Application	:	**To determine the amount of any accrued uncommitted service charges to be paid and for costs**
Tribunal	:	**Judge Nicol** **Mr MC Taylor FRICS**
Date and venue of Hearing	:	**24th October 2019** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**31st October 2019**

DECISION

The Tribunal has determined that:

1) The amount of accrued uncommitted service charges to be paid by the Applicant to the Respondent in accordance with section 94 of the Commonhold and Leasehold Reform Act 2002 is £69,633.72.

2) The costs payable by the Respondent to the Applicant in accordance with section 88 of the Commonhold and Leasehold Reform Act 2002 are £6,100.

Relevant legislation is set out in an Appendix to this decision.

The Tribunal's reasons

1. By a decision dated 25th September 2018 the Tribunal determined that the Respondent is entitled to exercise the Right to Manage in respect of Bridge Court South. The Applicant has now applied for two determinations as to:

   (a) The amount of accrued uncommitted service charges to be paid by the Applicant to the Respondent in accordance with section 94 of the Commonhold and Leasehold Reform Act 2002; and

   (b) The costs payable by the Respondent to the Applicant in accordance with section 88 of the 2002 Act.

Accrued service charges

2. Under section 94(1) of the 2002 Act, the Applicant must make to the Respondent a payment equal to the amount of any accrued uncommitted service charges held by him on the date of acquisition of the right to manage.

3. At the acquisition date, 30th April 2019, the Applicant's agents, Y & Y Management Ltd, held £12,214.75 in general service charge funds and £139,798.11 in the reserve fund.

4. Under section 94(2), so much of these funds as are required to meet the costs incurred before the acquisition date in connection with the matters for which the service charges were payable must be deducted. Y & Y Management have paid out £12,745.42 for liabilities incurred prior to 30th April 2019.

5. These figures produce a total of £139,267.44 (£139,798.11 + £12,214.75 - £12,745.42).

6. However, these funds are held not only for Bridge Court South but also for its sister block, Bridge Court North. The two blocks each have 24 flats and the only significant difference is that one also has some shop premises on the ground floor. They are together defined in each lease as "the Building" in respect of which services are to be provided by the lessor and service charges are to be payable by the lessees. Therefore, at most, the Respondent is only entitled to part of these monies.

7. The Applicant is trustee of the service charge funds, governed by section 42 of the Landlord and Tenant Act 1987. In paragraph 9 of its Statement of Case, the Applicant argued that it would be "inappropriate … to make an estimate or apportionment" of the funds to be paid to the Respondent. That is obvious nonsense. Quite the opposite is true. While the main

purpose of the funds is to provide the services directed by each lease, the duty of a trustee includes re-distributing the trust funds wherever and whenever the law requires them to do so. It is the very essence of a job of a trustee to calculate how much should go to whom. The Applicant argued in paragraph 10 that this was the Tribunal's duty. This is further nonsense – the Tribunal resolves disputes, it does not make decisions instead of parties to whom the duty to do so has been delegated.

8. Otherwise, the Applicant argued that nothing is payable by the following reasoning:

   (a) The amount to be paid requires the identification of the amount of uncommitted service charges paid "in respect of the premises";

   (b) "premises" has one meaning throughout all of the 2002 Act;

   (c) It means the self-contained building or part of a building over which the RTM has been acquired;

   (d) No monies have been paid in respect of the block comprising flats 26-48;

   (e) The money has all been paid in respect of the entire development (known as "the Building" in the residential leases).

9. This argument is so obviously wrong as to do no credit to the experienced lawyers who managed to convince themselves that it was appropriate to waste the Tribunal's time with it. The service charges held on the Applicant's behalf include sums paid in respect of the premises, Bridge Court South. The fact that the lease does not require any apportionment to each block is entirely beside the point. When the right to manage is exercised, the funds must be apportioned. Depending on the circumstances, this might not be an easy task but such difficulties are not relevant to the principle.

10. Mr Allison pointed out that, under their respective leases, the lessees in Bridge Court North have the benefit of a covenant requiring the Applicant to maintain Bridge Court South and vice versa. The argument appears to be that the Applicant needs to retain funds in order to provide for this obligation. In relation to Bridge Court South, such management functions have become functions of the Respondent under section 96 of the 2002 Act. Section 96 does not cover the aforementioned obligation in the leases of Bridge Court North but that is not realistically an issue. No court would enforce the obligation while the Respondent was responsible for Bridge Court South.

11. The Tribunal is aware that the criticism made of the Applicant's representatives here is, for good reason, rare but, with this particular landlord, it appears to be part of a pattern. Despite claiming to have carried out careful and thorough checks following receipt of the original notice claiming the right to manage (see further below in relation to costs), the Applicant's solicitor saw fit to put 11 separate grounds of objection in to the Counter-Notice with no particulars of any of them. In

the subsequent Tribunal proceedings, this had been whittled down to 3 without any attempt to explain why the other 8 had been included in the first place. The first of those 3 points was equivalent to the first point here, namely that it was all too difficult for the Applicant and so the Tribunal should make the decisions instead. The second point, that the Applicant was unable to identify which of two blocks the Respondent was referring to, was at least as hopeless as the argument made here (see paragraph 8 above).

12. The Tribunal does not know why the Applicant and its lawyers chose to pursue such obviously weak points or to raise objections in the Counter-Notice which they had no realistic option to pursue. However, as referred to in paragraph 9 of the Tribunal's decision of 25th September 2018, there is a danger that, in resisting the acquisition of the right to manage, a reluctant landlord may stray into putting up obstacles without any genuine foundation. Parties must be aware that arguments raised purely for such tactical reasons will be given short shrift and may have costs consequences (see further below).

13. That still leaves the question of how the funds are to be apportioned. Given the great similarity between the two blocks, both parties suggested that the starting point should be an equal split. Neither party was able to identify any reason for ascribing a greater proportion of funds to one block or the other save that Ms Gourlay, counsel for the Respondent, made two points:

    (a) She suggested account should be taken of service charge arrears – the lessees of Bridge Court North apparently owed more than those in Bridge Court South at the acquisition date and any adjustment to take this into account would be in the Respondent's favour. However, as correctly pointed out by Mr Allison, the 2002 Act makes no provision for any such adjustment.

    (b) The Respondent's managing agents appear to have taken over the management of appurtenant property common to both blocks, such as the car park. However, that has been the Respondent's choice. There is nothing which compels this. The parties would do well to reach agreement as to how best to manage these areas and to pay any consequent costs.

14. In the circumstances, the Tribunal is satisfied that the Applicant should pay half of the relevant funds to the Respondent, namely £69,633.72 (£139,267.44 ÷ 2).

Costs

15. Under section 88(1) of the 2002 Act, the Respondent is liable for reasonable costs incurred by the Applicant in consequence of a claim notice given by the Respondent in relation to the premises. Under subsection (2), reasonable means such costs as might reasonably be

expected to have been incurred by the Applicant if the circumstances had been such that they were themselves liable for all such costs.

16. The Applicant has claimed solicitor's fees and management fees under three heads:

(a) Costs incurred in relation to a claim notice dated 4th February 2018 which was subsequently withdrawn: £2,184.

(b) Costs of the initial assessment and response to the claim notice dated 25th June 2018: £5,581.80. (The costs of the subsequent Tribunal proceedings resulting in the decision dated 25th September 2018 are excluded under section 88(3)).

(c) Costs undertaken in relation to the hand over of management records, functions and preparations of accounts: £6,267.

First claim notice

17. When the Respondent sought to rely on the notice dated 4th February 2018, the Applicant denied receipt and, on that basis, denied its validity. The Respondent eventually withdrew it and sought to rely instead on the later notice dated 25th June 2018.

18. The Respondent argued that the Applicant was not entitled to recover costs under section 88(1) given that it was their own case that no notice had ever been served. However, the Applicant pointed to the Lands Tribunal's decision in *Plintal SA v 36-48A Edgewood Drive RTM Co Ltd* (2008) LRX/16/2007 that the RTM company was estopped from denying the landlord's entitlement to costs so long as they asserted that the claim notice was valid.

19. The Tribunal is satisfied that *Plintal* compels the conclusion that the Applicant is entitled in principle to their costs up to the withdrawal of the claim notice but that still leaves the amount in question.

20. The management fees of £500 are specified in Y & Y Management's contract for this work and the Tribunal is satisfied that they are reasonable in the sense of section 88(2).

21. In relation to the solicitors' costs of £2,584, the Applicant instructed Scott Cohen, the trading name of Miss Lorraine Scott, a sole practitioner and an experienced landlord and tenant lawyer. She charged £275 per hour. The Respondent contended that this rate was unreasonably in excess of the guidance rate of £217 per hour but the Tribunal disagrees. The guidance rate is exactly that – guidance. Miss Scott's rate is not out of line for an expert in this field these days (the guidance dates from 2010) and the kind of rate a landlord would expect to pay and be comfortable with paying.

22. However, just because the Applicant is entitled to their reasonable costs does not mean they can recover whatever amount their solicitor sees fit to charge. Mr Allison asserted on a number of occasions that this was a complicated case, justifying higher costs, but the Tribunal does not see this at all. In relation to the abortive claim notice, the alleged lack of service was a simple point that could be simply made. No-one would expect to pay for unnecessary work or work at disproportionate cost. In the Tribunal's opinion, chargeable time would not have exceeded 3 hours at most, justifying a total cost of no more than £825 plus VAT.

23. Therefore, under the first head, the Tribunal determines the costs to be paid by the Respondent to the Applicant as £1,325 plus VAT.

Second claim notice

24. In relation to the second claim notice, the management fee claimed is £350 plus VAT, again in accordance with Y & Y Management's contract. Again, the Tribunal is satisfied that this is reasonable.

25. However, the Tribunal is not satisfied that the solicitor's costs of £2,475 plus VAT are reasonable. According to the breakdown provided in the Applicant's Statement of Case, Miss Scott spent 42 minutes assessing the claim notice, 228 minutes assessing documentation such as leasehold titles, the register of members and articles and memorandum of association of the Respondent and Google Earth, and 48 minutes preparing the Counter Notice. This is not credible for the reasons already referred to above. Despite allegedly spending 5 hours and 18 minutes in preparation, the experienced Miss Scott produced a Counter Notice which was useless for understanding her client's case and bore all the hallmarks of being printed straight from a precedent with no thought as to what was in it. If Miss Scott did carry out all the checks referred to, she did not use the information gained. Again, no client would pay for work which had no use or productive outcome.

26. Looking at Miss Scott's correspondence with the Respondent's agents, Canonbury Management, there is justification for the Applicant's complaint that they were unco-operative in disclosing relevant information and documents.

27. The Respondent complained that Miss Scott's costs included initial set-up costs which did not appear to have actually been incurred but the breakdown at paragraph 17 of the Applicant's Statement of Case does not contain costs which fit this description. However, it seems highly likely that some of the work would already have been done in relation to the first notice and would not need to be replicated – see paragraph 13 of the Applicant's Statement of Response.

28. While the second claim notice could have justified a greater amount of work and, therefore, greater costs, the Tribunal is not satisfied that Miss Scott actually did the work or, if she did, that she made any use of it. Again, in the Tribunal's opinion, chargeable time for the work actually done would not have exceeded 3 hours at most, justifying a total cost of no more than £825 plus VAT.

29. Therefore, under the second head, the Tribunal determines the costs to be paid by the Respondent to the Applicant as £1,175 plus VAT.

Handover costs

30. In relation to the handover costs, the management fee claimed is £2,500 plus VAT. In the Tribunal's opinion, it is reasonable to expect that the majority of the work on handover would be carried out by the agents, Y & Y Management. In that context, the Tribunal is satisfied that this fee is reasonable within the meaning of section 88(2).

31. Again, however, the Tribunal is not satisfied that Miss Scott's fees of £2,722.50 plus VAT are reasonable. The Applicant's Statement of Case asserted that Miss Scott spent much time reviewing and advising on complications arising from the split between the two blocks. However, as recorded above, this approach was not applied to the service charge funds on the basis that it was not the Applicant's place to address any split. Miss Scott also claims to have spoken to counsel in a number of telephone calls for a total of 2 hours and 18 minutes which counsel valued at zero, not charging for a single minute of his time.

32. The Applicant also relied on the fact that Miss Scott had to advise on planned major works but the Applicant only initiated the process for major works after becoming aware of the Respondent's intention to acquire the right to manage. At the very least, it would have been prudent to consider delaying the process until the position on the right to manage claim was clearer. To an extent, the Applicant themselves caused costs to be incurred which they had the means to avoid.

33. The Tribunal has struggled to understand what Miss Scott was advising on and seeking counsel's advice on for nearly 10 hours, particularly when the agents would be doing most of the work. The majority of attendances on both client and counsel consisted of emails or phone calls taking 6 minutes or less which cannot have conveyed much by way of useful information. This assessment of costs is a summary process; doing the best it can with the information available, the Tribunal determines that a landlord would expect to pay for no more than 4 hours of Miss Scott's time on the handover, at a cost of £1,100 plus VAT.

Total costs

34. Therefore, the Tribunal has determined that the Respondent is liable for the following costs, plus VAT:

- First claim notice: agent's fees of £500 and solicitor's fees of £825
- Second claim notice: £350 and £825
- Handover: £2,500 and £1,100

  Total: £6,100

Name: NK Nicol **Date:** 31st October 2019

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 88 Costs: general

(1) A RTM company is liable for reasonable costs incurred by a person who is—

(a) landlord under a lease of the whole or any part of any 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,

in consequence of a claim notice given by the company in relation to the premises.

(2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before the appropriate tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.

(4) Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by the appropriate tribunal.

Section 94 Duty to pay accrued uncommitted service charges

(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 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.