FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/45UC/LSC/2022/0041** **CHI/45UC/LUS/2022/0001**
Property	:	**Flats 1-3, 23 Upper Bognor Road, Bognor Regis, West Sussex, PO21 1JA**
Applicant	:	**23 Upper Bognor Road RTM Company Ltd**
Representative	:	**Mark Lyons (Southernbrook Estate Management Ltd)**
Respondent	:	**Assethold Limited**
Representative	:	**Ronni Gurvits (Eagerstates Ltd)**
Type of Application	:	**Section 27A, 1985 Act and Section 94(3) 2002 Act**
Tribunal Member	:	**Judge Dovar** **Mr Woodrow MRICS** **Mrs Wong**
Date and venue of Hearing	:	**3rd March 2023, Remote**
Date of Decision	:	**21st March 2023**

DECISION

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Introduction

1. These two related applications concern the exercise of the Right to Manage by the Applicant under the provisions of the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act'). The Applicant acquired the right to manage from the Respondent on 8th June 2021.

2. The first application is for the determination of the payability of service charges under s.27A of the Landlord and Tenant Act 1985 ('the 1985 Act') in relation to expenses asserted by the Respondent totalling £12,190.45 for the period December 2020 to 7th June 2021; the last date being the date when the Applicant acquired management under the 2002 Act.

3. The second application is for the payment of accrued uncommitted service charges under s.94(1) of the 2002 Act. This is connected to the s.27A application in that if, as a result of that application, this Tribunal considers that sums claimed are not payable, whether in part or in whole, because they have not actually been paid or incurred, then it follows that they are not sums that should be taken into account when determining the s.94(1) application.

4. The Tribunal had received a 201 page bundle which contained both applications as well as a witness statement dated 31st January 2023 from Mr Gurvits on behalf of the Respondent together with two statements of account and a number of supporting vouchers.

Adjournment Application(s)

5. A few days before the hearing the Respondent sought to adjourn.

6. That was refused for the following reasons, which were then sent to the parties :

"*The Respondent's last minute application to vacate the hearing is refused. The parties were asked for their dates to avoid on 13th January 2023 between 27th February and 17th March. The Respondent said they had no availability in that period. In his further directions on 20th February 2023, Judge Dobson noting that, set the matter down for a hearing on 3rd March 2023 and the parties were notified on that date. He considered that the Respondent could sort out representation for that date.*

By an application dated 1st March 2023, the Respondent asks again for the hearing to be vacated and relisted due to unavailability. They have given no explanation of any steps they have taken to arrange for representation nor have they given any dates they are available. They have said they were not provided with a listing timeframe; they were. They have said it was listed at short notice; sufficient notice was given. It is also said that bundle is incomplete but does not identify which documents are missing. The Respondent raises nothing materially new to that which was before Judge Dobson when he listed the hearing. No good reason has been given for not arranging representation and the hearing will proceed."

7. On the morning of the hearing a further application was made by the Respondent to adjourn the matter to a date convenient to them. It was additionally asserted that it was a violation of their religious rights as they do not attend hearings on Fridays and that the Tribunal has an obligation to comply with those rights. The actual infringement of their religious rights was not stated. However, it had been known that this matter was listed on a Friday prior to the first application to adjourn, and that had not been put forward as a reason. It also did not address the point that the Respondent was at liberty to obtain representation.

8. No other new grounds were put forward in relation to the renewed application and the application was refused.

Service Charge

9. The first application relates to the payability of service charges for the period December 2020 to 7th June 2021.

10. The items initially challenged were:

    a. Insurance of £2,263.40;

    b. Cleaning of £840;

    c. FHS works of £4,304.64

    d. Handover fee of £360; and

    e. Emergency line of £36

11. Most of the issues fell away by the time of the hearing. The first and major challenge was to the fire safety works in the sum of £4,304.64, which the Respondent accepted had not been carried out and to which no commitment had been made and this was removed from their final final account.

12. The Applicant accepted the cleaning costs of £840 as they had been provided with invoices and they were prepared to accept the amount claimed for insurance.

13. The Applicant did object to paying £360 for the handover fee. The Respondent had not provided any invoice to support this sum. It is not clear how it was arrived at and the Tribunal was told that the handover was far from helpful and was incomplete, indeed no sums had been paid over under s.94 despite the Respondent accepting that £477.58 was due.

14. The Applicant also objected to paying for an emergency line at £36. No information had been provided as to what this was for and no invoices had been provided.

15. The Tribunal accepts these last two challenges. Neither charge is supported by any invoice or other form of evidence. The handover appears to have created more confusion and frustration for the Applicant and the leaseholders and there was no evidence to support what was provided for by the £36 emergency line nor whether it had been paid or incurred.

Section 94 Determination

16. Section 94(1) provides that any landlord (or third-party management company or manager) must pay to the RTM company a sum equal to the amount of any "accrued uncommitted service charges" held by them on the acquisition date.

17. 'Accrued service charges' are the aggregate of sums paid as service charges, and investments representing those sums including any income which has accrued on them; i.e. interest. Accrued uncommitted service charges therefore include reserve funds, sinking funds and other contributions otherwise carried over from previous years.

18. Section 94(2) then provides for deductions to be made to arrive at the "accrued uncommitted service charge". The permitted deductions are such sums as are required to meet the "costs incurred" before the acquisition date in connection with the matters for which the service charges were payable.

19. Finally, s.94(4) provides that these sums must be paid over on the acquisition date or as soon as reasonably practicable thereafter.

20. The Upper Tribunal have considered this section in *OM Ltd v New River Head RTM Co Ltd* [2010] UKUT 394 (LC), in which they applied a narrow approach to the determination of the sum to be paid. Reflecting the approach set out above, the first consideration was what sums did the landlord actually hold on the acquisition date and

the second was should any sum be deducted from that in light of additional costs that have been incurred up to the acquisition date.

21. Against that statutory provision, the Respondent was required to provide the bank balance at the date of acquisition. They did not. That deficiency was picked up in the course of the proceedings and directions were given to remedy that. The failure by the Respondent to comply with directions was to say the least unfortunate, if not a slight to the Tribunal and the Applicant. For precisely the reasons set out above, at the directions hearing, which Mr Gurvitz attended on behalf of the Respondent, it was made clear that he was to provide bank statements showing what the balance was of the sums held.

22. The following was part of the pre-amble to the directions:

> "*The Respondent confirmed that in respect of the closing bank balance at the Date of Acquisition, which is necessary to provide in order to deal with the s.94(3) application:*
>
> a. *It had not held the service charge sums for this property in a separate account;*
>
> b. *It held them in a general client account;*
>
> c. *It had its own internal spreadsheets and information from which it could determine what the closing balance was;*
>
> d. *It had already provided that to the Applicant;*
>
> e. *It could provide that again.*"

23. As the Respondent is no doubt aware, it holds the service charge monies collected in from the leaseholders on trust under s.42 of the Landlord and Tenant Act 1987. If funds from this property's service charge collection were to be intermingled with funds from other properties managed by the Respondent's managing agents then sufficient records should have been kept in order to differentiate clearly the money held for this property from that held for others.

Indeed that was what was understood by the Tribunal when at the directions hearing the Respondent said that although it did not hold the funds in a separate bank account it had its own internal spreadsheets and information from which it could determine what the closing balance was.

24. Unfortunately what eventually arrived bore no relation to the documents described at the directions hearing. There was no bank statement for the general client account, there were no spreadsheets. Instead there was a one page summary final account setting a list of 'Expenses' and the cost for each, and then, in relation to each of the three flats in this building, the amount each had paid, their share and the balance. Finally there was a line 'Total left on account'. In its latest iteration this stated £477.58; i.e. that £477.58 was due. Accompanying that document were a number of vouchers in respect of some, but not all of the expenses claimed. As highlighted above, there was no voucher for the handover fee or the emergency line.

25. Prior to this, and prior to this application, the Respondent had produced an almost identical one page sheet, save that it had included the cost of the FHS works which had tipped the total left on account into deficit by £3,827.06.

26. However, neither final account summary provided any account for either interest that had accrued given that sums are paid in advance or any balance on the account carried over from previous years.

27. This put the Applicant in a rather invidious position. Should it spend more time and money on pursuing the Respondent for proper disclosure, by requesting a penal notice be attached to a disclosure order and then adjourning this hearing. Alternatively should it accept the account given by the Respondent and start the position from the basis that there was no interest payable and that there was no surplus balance from previous years. Proportionately and sensibly (although no doubt frustratingly) it opted for the latter.

28. The starting position is therefore taken as the figure suggested by the Respondent of £477.58. However, in light of the fact that there was no supporting evidence to show either that costs had been incurred nor had been paid in respect of either the handover fee nor the emergency line, the Tribunal considers that on the evidence before it, it is entitled to consider that these sums have neither been paid nor been incurred and so should be added to the s.94 sum; i.e. a total of £873.58, which should be paid immediately.

Conclusion

29. The Tribunal determines that the following sums are not payable: £4,304.64 for the FHS works which were never carried out; £36 for the emergency line, which remains a mystery and for which no invoice or other voucher or evidence has been provided and £360 for a handover fee which again is devoid of evidence and seems inappropriate in any event in the circumstances of these applications. Further, given that there was no evidence that either of those sums had been incurred or paid, they are not accounted for in the s.94 sum and against the admission by Respondent that at least £477.58 is due, brings the total to be paid to £873.58.

30. The Applicant also made applications under s.20C of the 1985 Act and paragraph 5A of Schedule 11 to the 2002 Act in respect of the Respondent's costs of these proceedings. The Application from at box 9 included the names of the long leaseholders, Hannah Lambourne, Richard Bleathman and Edyta Bukowska. For the reasons set out above (notably both the substantive issues and the conduct of the Respondent during these proceedings), the Tribunal makes orders under both preventing the Respondent from seeking to recover the cost of these proceedings through either the service charge or by way of administration charge.

JUDGE DOVAR