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

Case Reference : **CHI/29UG/LUS/2013/0003**

Property : **Crawley Court & Marriotts Wharf,
West Street, Gravesend, Kent, DA11**

Applicant : **MWCC RTM Co**

Respondent : **Longmint (in administration)**

Type of Application : **s94 CLRA02**

Tribunal Members : **Judge D Dovar**

Date of Decision : **6th February 2014**

DECISION

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1. This is an application for the determination of the amount of uncommitted service charges payable to the Applicant in accordance with section 94 of the Commonhold and Leasehold Reform Act 2002.
2. Directions were given on 3rd October 2013 which provided for the Respondent to set out their case on the s94 sum and then for the Applicant to put in their response. Notice was also given under Rule 31 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (2013/1169) that the Tribunal intended to deal with this matter as a paper determination unless either party requested an oral hearing. Neither party has requested such a hearing.
3. The application is made in respect of two blocks, Crawley Court and Marriotts Wharf. The Respondent has provided a separate completion statement for both and the parties have dealt with them separately. The Tribunal will therefore, where appropriate, deal with them individually.

4. Section 94 of the 2002 Act provides:

94(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 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.

94(2) the amount of any accrued uncommitted serve 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 ... less so much (if any) of that amount is required to meet the costs incurred before the acquisition date in connection with the matters for which the service charges were payable.

5. Section 90 of the 2002 Act provides that the date of acquisition is the date specified in the claim notice.

6. Both parties state that management was transferred on 3rd May 2013 and the Tribunal considers that in the absence of any other evidence as to the date specified in the claim notice, that is the date for the purposes of s90.
7. Following s94, the Tribunal must determine what sums had been paid to the Applicant in respect of service charges and then deduct from that amount any sum that the Applicant had incurred by way of service charge before the acquisition date ('the s94 sum').
8. The Respondent contends that in respect of Marriotts Wharf, the s94 sum is £66,240.47 and for Crawley Court it is £25,186.03. The Applicant has not given the specific figures, but has made a number observations on the figures provided by the Respondent.

Marriotts Wharf

9. In arriving at its proposed figures, the Respondent states it has carried out the following calculation:
 - a. Firstly it has taken the final balance set out in the year end September 2012 balance sheet (£67,187.71);
 - b. Secondly it had deducted from that the service charge debtors identified in that account (£18,255.81). In addition to that further credit has been given for service charge creditors (£2,832.79);
 - c. Thirdly, it has added all cash received between the year end September 2012 and the date of acquisition (£47,129.72);
 - d. Fourthly, it has deducted costs incurred between the year end September 2012 and the acquisition date (£24,093.50) and has included in those cost the costs of dealing with the transfer, being an administration fee for dealing with RTM transfer (£1,000) and its solicitors fees (£2,101.44);
 - e. Finally it has added the sum in the reserve fund (-£5,159: it appears that the reserve fund was in deficit).

10. The Respondent therefore maintains that the s94 sum is £66,540.47 less a retention of £300 for solicitor's fees. It states that that sum was transferred to the Applicant's solicitors.
11. The Applicant makes a number of challenges to the sum proposed by the Respondent. The material challenges are (set out in italics):
 - a. *That only £66,240.45 has been received.* The actual sum received is not a matter for this determination. The Tribunal determines the sum that should be transferred;
 - b. *The completion statement deducts £5,159 being the balance of the section 20 fund.* The Tribunal agrees that a reserve fund should not result in a deduction. Either there are sums held in reserves or not, there is no basis for reducing the figure. The Tribunal notes that for the year end September 2012 the general reserves were £52,181.02 and the major repairs reserve was £15,006.69. Further, the total expenditure for the period between the year end 2012 account to the acquisition date is said by the Respondent to be £24,093.50 and the cash received to be £49,962.51. Of the expenditure items, none appear to be s20 / reserve items. The Tribunal does not therefore see how the reserve fund could have been used in their entirety, let alone fallen into deficit. The Tribunal considers that at the very least £5,159 should not have been deducted and therefore disallows this figure as a deduction from the sum to be transferred;
 - c. *Service charge creditors are shown as £2,832.79 on the completion statement, yet the balance sheet for the income and expenditure shows invoices received and not paid of £16,577.07.* This is not comparing like with like. The Respondents have explained that the service charge creditors is an excess of service charge paid by some tenants over what was due at the end of the year end 2012. This is reflected in the balance sheet for the year end 2012. The £16,577.07 figure is in relation to sums invoiced

but not paid by the Respondent. The Tribunal therefore does not consider that an adjustment needs to be made on this basis;

- d. *The completion statement shows service charge debtors totalling £18,255.81 whereas the additional sheet provided shows £15,423.02. Again the Tribunal does not consider that this is comparing like with like in that the £15,423.02 reflects debtors as at 2011 whilst the £18,255.81 reflects debtors as at the year end 2012. The Tribunal accepts the £18,255.81 figure as a figure that needs to be deducted to take into account the fact that the starting balance in the Respondent calculation of £67,187.71 was based on service charge demands and on an accruals basis; whereas in fact £18,255.81 had not been paid. No adjustment is made on this basis.*
- e. *The interim service charge was £73,182.18 however the additional sheet has serve charges at £66,787.22. The Tribunal does not consider that either of these figures is relevant to the s94 sum. The Tribunal is not concerned with the sums that ought to have been paid by the tenants, simply the sums that have actually been paid. Both of these figures are based on demands, rather than actual payments.*
- f. *Increase in 'Other debtors' and 'amount due to freeholder' in the year end 2012 accounts without explanation. The year end 2012 balance sheet was signed off by chartered accountants. The Tribunal is entitled to consider that they were provided with paperwork which satisfied them that for some reason (presumably in respect of the freeholder, because of a loan) there were significant sums owed to the freeholder and other debtors out of the service charge account. The Tribunal considers that these sums do appear large, but in the absence of any evidence to the contrary is prepared to accept the account.*
- g. *Query the sums claimed for the Caretaker. The Respondent asserts since the year end 2012 accounts it has incurred*

£34,249.82 in caretaker salary. The Tribunal notes that part of the 2012 year end balance sheet allows £36,528 for caretaker's fees. The current amount claimed is for the period end September 2012 to beginning May 2013 (7 months). This amounts to a considerable increase in salary when taken on an annual basis. The Tribunal also notes the Applicant's observations that the salary is split between Marriotts Wharf and Crawley Court and that the salary is believed to be around £18,000. Further the Tribunal also notes the entries on the list of expenditure since the year end 2012 which indicates a salary of around £13,000 per annum. In light of these conflicting pieces of evidence, the Tribunal does not consider that the sum of £34,249.82 has been incurred in respect of caretaker's salary for Marriott Wharf for the period October 2012 to May 2013. Doing the best that it can, the Tribunal considers that £21,308 (i.e. 7 months at a per annum salary of £36,528) should be allowed and the s94 sum adjusted accordingly.

12. The Respondent claims that agreement has been reached as to the s94 sum to be paid and refers to email correspondence with the Applicant's solicitor to that effect. The Tribunal does not consider that the correspondence between the Applicant's then solicitors and the Respondent is sufficient to oust its jurisdiction under s94 to make a determination as to the amount to be transferred.
13. Taking those points into account the Tribunal determines that in respect of Marriott Wharf the s94 sum is £84,641.29. The Tribunal has arrived at this figure by starting with the sum proposed by the Respondent of £66,540.47, but adjusted to remove the deduction of the s20 reserve of £5,159 and to adjust by £12,941.82 which is the difference between the cost claimed by the Respondent for the caretaker and the cost determined by the Tribunal.

Crawley Court

14. The Respondent has adopted a different methodology to the s94 figure for Crawley Court. It has approached the task in the following manner:
 - a. Firstly, it has taken the balance of the current account as set out in the year end September 2013 figures (£29,182.72);
 - b. Secondly, it has deducted further costs incurred as well as those costs incurred by transferring management (£5,918.90);
 - c. Thirdly, it has added an insurance credit (£2,882.21);
 - d. Finally, it has deducted a further sum incurred for accountancy fees (£960).
15. The Respondent therefore proposes that the s94 sum is £25,186.03.
16. All the Applicant's observations relate to previous completion statements provided by the Respondent, not the one relied on by them in this application. The Applicant has also made reference to the leases at Crawley Court, but has not provided copies of the same. Further, the Applicant refers to the Tribunal decision (CHI/29UG/LSC/2012/0169) in support of the contention that certain sums for water services and sewage are not recoverable as service charge. However, the Tribunal has considered that decision and it is clear that the reference is not to any findings made by that Tribunal, but their observation that the Respondent had misquoted parts of the lease.
17. Therefore the Tribunal only has the s94 sum proposed by the Respondent, the basis of which is not directly challenged by the Applicant.

Frivolous or Vexatious Claim

18. The Respondent requests that the application be struck out on the grounds that it is frivolous or vexatious as Marriotts Wharf had been agreed and the Applicant had not sought to reach agreement on Crawley Court. The Tribunal refuses that request. In the Tribunal's view the application was properly brought. The Respondent has produced a

variety of differing completion statements, none of which were particularly easy to follow and were based on balance sheet accounts which raised a number of queries. Further, the Tribunal has determined that in relation to Marriotts Wharf, further sums should be transferred and in relation to Crawley Court, the Respondent put forward a different case for the first time in the course of these proceedings, which suggests a s94 figure over £10,000 higher than the one proposed by them in the completion statement provided to the Applicant on 27th August 2013.

Conclusion

19. The Tribunal determines that the s94 sum for Marriotts Wharf is £84,641.29 and for Crawley Court it is £25,186.03.

Chairman
Judge D Dover

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.