FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAX/LRM/2013/0018**
Property	:	**18 and 18A Ravenscar Road,Tolworth Surrey, KT6 7PL**
Applicant	:	**Ravenscar Road RTM Company Ltd.**
Representative	:	**Pro-Leagle Ltd.**
Respondent	:	**Assethold Ltd.**
Representative	:	**Eagerstates Ltd.**
Type of Application	:	**RTM costs pursuant to S84(4), 88 and 94(3) of Chapter 1 of the Commonhold and Leasehold Reform Act 2002.**
Tribunal	:	**Judge Goulden** **Mr T W Sennett MA FCIEH**
Date and venue of Hearing	:	**Wednesday 11 September 2013 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**21 October 2013**

DECISION

Decision of the Tribunal

(1) The sum of £274.80 is payable by the Respondent to the Applicant in respect of RTM costs, being £274.80 in respect of solicitors' fees.

(2) The managing agent's fees are disallowed.

(3) There are to be no handover costs.

(4) Uncommitted service charges are payable.

(5) The Tribunal makes no Order for penal costs

The application

1. The Applicant seeks a determination pursuant to S 84(4) of Chapter 1 of the Commonhold and Leasehold Reform Act 2002 ("the Act") for a determination in respect of any question in relation to the amount of costs payable by a RTM company. The (revised) application was dated 14 June 2013, and was stamped as having been received by the Tribunal on the same date.

2. The relevant legal provisions are set out in the Appendix to this decision.

3. Directions of the Tribunal were issued on 19 June 2013. The Tribunal did not consider an oral pre-trial review to be necessary.

The issues

4. By a Claim Notice dated 16 April 2013, the Applicant had claimed the right to manage ("RTM") 18 and 18A Ravenscar Road, Tolworth, Surrey KT6 7PL ("the property").

5. By a Counter Notice dated 29 May 2013, the Respondent had maintained that by reason of S80(8) and S80(9) of the Act, the Applicant was not entitled to acquire the RTM.

6. By an application dated 14 June 2013, the Applicant made the following applications to the Tribunal:

   (a) For a determination that it was entitled to acquire the RTM

   (b) For a determination of the amount of costs payable by the Applicant pursuant to S88(4) of the Act.

(c) For a determination of the amount of any payment due upon acquisition of the RTM in respect of uncommitted service charges pursuant to S94(3) of the Act.

7. Entitlement to the RTM was agreed by the Respondent in a letter dated 25 July 2013. The Applicant will therefore acquire the RTM on 26 October 2013.

8. The issues which remain for determination by the Tribunal are therefore limited to the amount of costs payable by the Applicant pursuant to S88 (4) of the Act and the amount of uncommitted service charges payable upon the acquisition date pursuant to S94(3) of the Act.

The hearing

9. Although both parties had requested a paper determination, after consideration of the correspondence and/or documentation, the matter was listed for an oral hearing by a Tribunal Judge. The oral hearing took place on Wednesday 11 September 2013 at 10 Alfred Place, London WC1E 7LR.

10. The Applicant, Ravenscar Road RTM Company Ltd., was represented by Ms H L Sargent of Counsel, instructed by Pro-Leagle. Ms Sargent provided the Tribunal with a skeleton argument, together with a supplementary bundle. The Respondent, Assethold Ltd., was represented by Mr R Gurvitz of Eagerstates Ltd., the Respondent's managing agents.

11. Mr Gurvitz' challenge was as set out in the Respondent's statement of case, namely that *"these applications are premature and* (sic) *unnecessary waste of resources"* on the basis, inter alia:-

(a) *"No costs have been demanded from the Applicant arising from the RTM notice. The legislation provides for application to the LVT in the event that matters are not agreed, and the Applicant has pre-empted proceedings prior to even being aware of any dispute or indeed notified of any cost".*

(b) *"It is impossible to determine an application under section 94 prior to the handover to the Right to Manage Company. It is obviously impossible because section 94 looks at the funds available at the date of handover. As that date is in the future one cannot predict the expenditure that will be necessary on the property in the intervening months nor the income that will be received".*

12. The Applicant's case as set out in Ms Sargent's skeleton argument was *"the application is not premature either in relation to S88 costs or in*

relation to uncommitted service charges....Nothing in the relevant provisions of CLRA 2002 precludes the Tribunal from determining the issues prior to the Acquisition Date".

The Applicant's case in respect of costs

13. The Applicant's case as set out in Ms Sargent's skeleton argument was that the Applicant had been invoiced in respect of professional fees, and there was no justification for waiting until a later date to determine the S88 issue.

14. The costs challenged were £490.80 inclusive of VAT in respect of solicitors' fees, £300 inclusive of VAT in respect of managing agent's fees and handover costs (as yet unquantified).

15. With regard to the legal fees, it was contended that the Tribunal could not be satisfied that the fees were reasonable, since the invoice provided no breakdown, and it would be insufficient for the Respondent to produce a breakdown since this could not be corroborated. In the alternative, it was argued that the sum was excessive given the experience of the solicitor undertaking the work and the time which it was reasonable to spend on the matter.

16. In respect of the managing agent's fees it was contended that they did not constitute reasonable costs incurred by the Respondent *" since the managing agent is the alter ego of the Respondent. The Respondent has not been upfront about the relationship between itself and the managing agent".* It was also stated that there was no evidence provided to confirm that the management fees have been paid by the Respondent to the managing agent. The Applicant argued that the fees should be disallowed in their entirety.

17. The Applicant also argued that handover costs should not be permitted under the Act and *"handing over management of a property would not ordinarily or reasonably require an additional payment by a landlord".*

18. Ms Sargent had set out a calculation of the uncommitted service charges payable on the Acquisition Date pursuant to S94(3) of the Act, which she went through in some detail with the Tribunal. Some amounts were amended.

19. In the Applicant's skeleton argument, it was argued that the management of the property which the Respondent or its agents were required to undertake was limited and *"no works are required or proposed between today's date and the Acquisition date....The only impediment to calculating the amount which will fall to be paid*

pursuant to S94(3) on the Acquisition Date is the Respondent's failure to provide information to that calculation".

The Respondent's case

20. Mr Gurvitz referred to the Respondent's statement of case (see paragraph 11 above) and said that making an application under S88(4) of the Act before any costs had been demanded was *"presumptuous"*. The invoices had been drawn up at the last minute. He said *"this is not the usual way to deal with costs"*. He said that Assethold Ltd. and Eagerstates were completely separate companies and Eagerstates acted for other companies, and was a bona fide company. He contended that having the same directors/shareholders did not prevent a company from being bona fide.

21. He denied that there had been any duplication of fees, but confirmed that the fees had not yet been paid by Assethold. Assethold was not registered for VAT but Eagerstates was registered for VAT. Mr Gurvitz referred to a previous Tribunal decision in support of his contention that managing agents' fees were payable

22. In respect of the handover costs, Mr Gurvitz said *"I don't know the handover costs. I don't know if there will be any"*. He maintained that the Tribunal could not determine uncommitted service charge costs.

The Tribunal's Decision

23. In respect of the legal costs, the invoice from Conway & Co dated 19 August 2013 is sparse and the narrative states merely *"undertaking works in relation to RTM claim notice upon 18-18a Ravenscar Road, Tolworth 1 hour and 48 minutes"*. The fees were £405 plus £81 VAT. Under the disbursements it is stated *"office"* at £4 plus 80 pence VAT. The disbursements were not challenged. The Respondent's statement of case was said by Mr Gurvitz to have been prepared by Conway & Co. The statement of case was dated the same date as the Conway & Co. invoice and the Eagerstates invoice.

24. The charge out rate appears to be within an acceptable band, but the Tribunal considers the time spent to be excessive for what is a simple and straightforward transaction relating to two flats only in a converted house. In addition some of the work could well have been carried out by a paralegal at lower cost. The Tribunal determines the legal fees at £274.80 (being fees of £225 plus VAT of £45 and plus disbursements of £4 plus 80p VAT)

25. In respect of the fees of Eagerstates, the invoice is also dated 19 August 2013. Whilst the narrative is more extensive, it does not set out the period covered and, in any event, the time take is considered excessive

and furthermore it appears that there has been duplication with work properly to be carried out by solicitors. The fee is stated to be *"agreed costs"* at £250 plus VAT of £50, but with no explanation of how such costs were agreed. Mr Gurvitz had referred to a previous Tribunal decision but this Tribunal is not bound by the decisions of an earlier Tribunal.

26. A provision was included within the management agreement to cover these charges, but the parties are referred to Section 88(2) of the Act which has been set out in the appendix attached. In this particular case, with the Respondent and its managing agents being inextricably entwined, the Tribunal cannot accept that the Respondent might reasonably expect to pay for such costs.

27. The management fees are disallowed.

28. In respect of handover costs, Mr Gurvitz said that the Respondent does not usually charge for this. The Tribunal notes that there were no contracts in place, the S20 consultation procedure had apparently been started in January 2013 but such consultation had not been completed and, in addition, appears to be identical to that prepared in 2010. In addition, no works had been started and of course the Respondent loses the Right to Manage very shortly, namely on 26 October 2013.

29. In respect of the uncommitted service charges, there were 4 principle headings, namely provision for emergency repairs, insurance, routine management and administration costs for an emergency line. Mr Gurvitz said that there was no reserve fund.

30. The Tribunal rejects the Respondent's contention that *"it is impossible to determine an application under section 94 prior to the handover to the Right to Manage Company"* particularly in this case where the handover is to take place within a very short period of time.

31. If no emergency repair work has been carried out in the intervening period between the hearing and Acquisition Date and, on the basis that the Tribunal was informed at the hearing that no draw had been made on that budgeted sum, the sum of £400 in total (ie £200 per flat) should be handed over to the Applicant. If however, emergency repair work has been carried out in the intervening period, then the appropriate sum should be deducted.

32. In respect of uncommitted service charges for insurance, the sum shown in the estimated service charge account for 2013 was £935.39, part of which sum was an accrual from the previous year. Mr Gurvitz would have to apportion the insurance if the Applicant does not wish to carry on with the insurance until the renewal date (1 April 2014). If the Applicant wishes the insurance to be cancelled, there may be a

cancellation fee by the insurers and, if this is the case, the cancellation fee must be borne by the Applicant. Mr Gurvitz had said that no commission had been paid or was payable.

33. Routine management will cease on the Acquisition Date. Management fees appear in the estimated service charge account in the sum of £492 and are invoiced and paid in advance. The Tribunal determines £90.31 is to be returned.

34. Administration costs for the emergency line of £24 including VAT is in the estimated service charge account for the year ending 31 December 2013. It was stated to be a one off annual charge of £10 plus VAT per flat and was administered by the loss adjusters, Cunningham Lindsey. Reimbursement of a similar sum was also requested for the service charge year 2012, although this appears to be in error. The sum involved is considered de minimis. The Tribunal determines that no sum is to be returned.

Application for penal costs

35. Cross applications were made under Paragraph 10 of Schedule 12 to the Act.

36. The Applicant's case was that the Respondent had acted vexatiously disruptively or otherwise unreasonably in several respects. It was stated that the Respondent *"has deliberately and repeatedly attempted to delay acquisition of the RTM, increasing the Applicant's costs and extending collection of management fees. As a consequence of the Respondent's conduct, what should have been a particularly straightforward case has been unnecessarily costly for the Applicant".*

37. The Respondent's case was that the Applicant had acted vexatiously disruptively or otherwise unreasonably in that Mr Gurvitz had tried to negotiate outside the hearing. An offer of settlement had been made in an email to the Applicant's solicitors dated 29 August 2013, and an improved without prejudice offer was made , but rejected.

The Tribunal's Decision

38. His Honour Judge Huskinson in the Lands Tribunal case of Halliard Property Co. Ltd v Belmont Hall and Elm Court RTM Co. Ltd. (LRX/130/2007 and LRA/85/2008) stated **"So far as concerns the meaning of the words "otherwise unreasonably" I conclude that they should be construed *ejusdem generis* with the words that have gone before. The words are "frivolously, vexatiously, abusively, disruptively, or otherwise unreasonably". The words "otherwise" confirm that for the purpose of paragraph 10 behaviour which was frivolous or**

vexatious or abusive or disruptive would properly be described as unreasonable behaviour. The words "or otherwise unreasonably" are intended to cover behaviour which merits criticism at a similar level albeit that the behaviour may not fit within the words frivolously, vexatiously, abusively, disruptively....Thus the acid test is whether the behaviour permits a reasonable explanation."

39. The Applicant brought this case before the Tribunal and must be expected to prosecute it. It is felt that the litigation behaviour complained of must go beyond what is acceptable and, in considering this, there must be a margin of tolerance. The threshold is high. Cost powers should not be used to penalise a party or parties who may be found to have been unsuccessful but have acted in good faith. Although the Tribunal understands the Applicant's concerns, it has not been persuaded in this particular case, that the Respondent has acted in bad faith. The Tribunal considers the Respondent's arguments are without merit.

40. In the circumstances of this particular case, the Tribunal does not intend to exercise its discretion under this head and declines to make any order for penal costs against either party.

Name: J Goulden **Date:** 21 October 2013

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 88

(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 RTM 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 a landlord incurs as party to any proceedings under Part 2, Chapter 1 of the Act, before a tribunal if the tribunal dismisses an application by the RTM 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 a leasehold valuation tribunal.

Section 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 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 tothe 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 a leasehold valuation 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.

Schedule 12, paragraph 10

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—

(a) £500, or
(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.