FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AM/LCP/2015/0010**
Property	:	**54 & 56 Great Eastern Street, London EC2A 3QR**
Applicant	:	**Winnett Investments Limited**
Representative	:	**Herbert Smith Freehills LLP**
Respondent	:	**34 Charlotte Road RTM Company Limited**
Representative	:	**Sterling Estates Management Ltd**
Type of application	:	**For the determination of landlord's costs under section 88(4) and an application for costs under Rule 13**
Tribunal members	:	**Judge S O'Sullivan**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**4 December 2016**

DECISION

Decisions of the tribunal

The tribunal makes the determinations as set out under the various headings in this Decision.

The application

1. This is an application made on two alternative grounds. First under section 88(4) of the Commonhold and Leasehold Reform Act 2002 (the "Act") to determine the costs payable by the RTM Company in respect of the property known as 54 & 56 Great Eastern Street London EC2A (the "Property"). Secondly under Rule 13 of the Tribunal Procedure (First tier Tribunal) (Property Chamber) Rules 2013 (the "Rules").

2. The costs in issue amount to £51,266.02 (revised from £57,074.94). Directions were made in this matter dated 23 June 2016 and 26 July 2016.

3. Those directions provided that this matter be considered by way of a paper determination unless an oral hearing was requested. No such hearing having been requested the application was considered on the basis of the two bundles received.

The background

4. By way of background the substantive application which was made by the RTM Company on or around 10 February 2015. This sought a determination of the payability of service charges pursuant to section 27A of the Landlord and Tenant Act 1985. That application was heard at the same time as a very similar application concerning 132-136 St John's Street RTM Co Ltd, both RTM companies being represented by the same managing agents, Sterling Estates ("Sterling"). The respondent landlords (who are connected) were both represented by Herbert Smith Freehills LLP. Similar issues were raised in both applications and the applications were opposed by both landlords on the basis that the RTM companies had not acquired the right to manage as it was denied that a claim notice had been given under section 79 of the Act. After hearing that application the tribunal found that the claim notice had been given in respect of the premises at 132-136 St John Street but not in relation to the Property. It is that substantive application which has given rise to the applications for costs.

Preliminary issue

5. The tribunal first considered the preliminary issue raised in respect of the application under section 88(3). The Respondent raised the question as to whether the costs were incurred *"in consequence of a*

claim notice being given" and this was considered as a preliminary issue. This issue is relevant only to the application under section 88(4) of the Act.

6. The Respondent says that the application under section 88(3) is misconceived as the wording under section 88(3) makes clear that the section only applies to costs under Chapter 1 of Part 2 of the 2002 Act and there has been no such application. The application before the tribunal was an application for a determination of payability of service charges and there was no application by the RTM Company for a determination that it had acquired the right to manage the premises. It is therefore said that Winnett cannot now claim costs under section 88(3).

7. The Respondent also says that section 88(3) does not give rise to an entitlement to costs but rather section 88(1). However it is said that if the tribunal treats the application as having been made under section 88(1) it submits that the crucial words are *"in consequence of a claim notice given by the company"* and that no notice was given at all and secondly that the costs incurred were not incurred *"in consequence of"* any claim notice within the meaning of section 88(1). In this regard the Respondent relies on the tribunal's decision in the substantive application at paragraph 30 and emphasises that the tribunal found that no notice had been given at all. On its plain language the Respondent says that section 88(1) cannot apply to a situation where no claim notice is given. As a matter of logic it is said that costs cannot be incurred in consequence of a notice being given if no notice was given.

8. If the tribunal were to find that a claim notice was given or should be treated as having been given, it is said by the Respondent that the costs claimed by Winnett are alternatively not incurred *"in consequence"* of such notice but rather incurred as a result of the section 27A application. This is said to be a very different thing as save for an application under Rule 13 these costs are irrecoverable.

9. In any event even if the costs were recoverable it is further said by the Respondent that those envisaged under section 88 would be those directly connected with actions taken as a consequence of the notice having been served. Such costs may include the costs of considering the notice, taking advice as to the validity of the notice, serving a counter notice, corresponding about the notice and opposing any application under section 84(3).

10. The Respondent submits that it is clear that the costs being claimed do not directly result from the giving of a notice but rather from demands for service charges and the application under section 27A. Ultimately the Respondent says that this was a section 27A application and that normal costs rules should apply under rule 13.

11. In response the Applicant invites the tribunal to treat its costs application as a request for a determination under section 88(4) of the Act.

12. The Applicant says that the RTM companies did make an application under section 84(3) and that this request was made at a case management conference on 5 March 2015. This was recorded in the directions. They also rely on the fact that the decision of the tribunal records a paragraph 1 that the RTM companies sought a determination under section 84(3) of the Act. Reliance is also placed on the statement of case attached to the application form which sets out as one of the issues for consideration *"has the applicant acquired the right to management of the building in accordance with the 2002 Act"*. The applicant therefore says it is plainly wrong that there was no application under section 84(3) of the 2002 Act. In any event it is said that without such an application the RTM Company had no standing to make an application under section 27A.

13. As far as the assertion that as no claim notice was given no costs are payable, the Applicant says that it cannot be right that the finding that no notice was "*given*" deprives Winnett of its costs. The premise of the RTM Company's application was that it had acquired the right to manage. The applicant relies on the Upper Tribunal's statement in *Post Box Ground Rents Limited v The Post Box RTM Company* Ltd in which it was said that;

"The underlying policy of section 88 is tolerably clear: if the RTM Company is successful in its application then it should not be liable for costs incurred by the freeholder in defending it. But if it is not, and the application fails, then it should face the consequences and be liable for its opponent's costs."

14. The Applicant says that the better reading of section 88(1) is to treat *"given"* as including a claim notice *"purportedly given"* by the RTM Company. This is said to be consistent with section 88(3) and section 84(3) and would give effect to the underlying policy of section 88.

15. The Applicant says it is unnecessary to consider the issue of remoteness as Winnett does not dispute the type of costs which would be recoverable to include costs incurred in opposing the application. The applicant says that is precisely the type of application here and the costs claimed by Winnett.

16. In response the Respondent says that is accepts that is did ask the tribunal to determine whether it had acquired the right to manage but reiterates that there was no application under section 84(3). It is said

that this determination was sought only in the context of the section 27A proceedings. It is said that the application could not be an application under section 84(3) as this is a very specific provision which specifies an application can only be made *"following service of a counter notice"*. It is common ground that no counter notice had been served and thus an application could not be made under section 84(3). It is further said that the CMC directions do not expressly refer to an application under that section and although the decision does refer to that section as a matter of law no such application can be made.

17. As far as the wording of section 88(1) is concerned if no notice was given then no costs can have been incurred in respect of a claim notice having been given. The Respondent says that *Post Box* is irrelevant.

Preliminary issue – the Tribunal's decision

18. The Respondent says that the tribunal did not have an application under section 84(3) before it and that as a result the costs provisions cannot have been triggered. However as can be seen from the statement of case attached to the application, the directions and decision it is clear that it was agreed between the parties that the tribunal was considering whether the RTM company had on the relevant date acquired the right to manage. No issue was raised at that hearing by the Respondent RTM Company as to the tribunal's jurisdiction to consider that issue. An appeal was made to the Upper tribunal in respect of the tribunal's decision and permission to appeal was refused. No issues on the tribunal's jurisdiction were raised in that application. As a result the parties have effectively conceded that the tribunal had jurisdiction to consider that issue. It is this tribunal's view that the costs application under section 88(4) flows from that substantive decision and it is considered that the parties have effectively accepted the tribunal's jurisdiction in this matter.

Quantum of the costs

19. The Applicant landlord seeks the sum of £51,266.02 which represents half of the costs incurred in the proceedings.

20. The Respondent submits that only costs directly incurred in relation to the notice can be recovered not costs in dealing with the dispute as to the amount/unreasonableness/payability of service charges. It is pointed out that the case was heard over 2 days to consider the applications in respect of both properties and to consider both the RTM notice and the payability of the service charges. It is pointed out that all of the service charge issues apart from the insurance were conceded at the commencement of the hearing.

21. The Respondent further says that the costs are totally disproportionate considering the complexity of the dispute given it is said that this was a straightforward matter.

22. The charge out rates used are Grade A at £500, Grade B at £400, Grade C at £340 and Grade D at £160. The Respondent says that these are higher than the appropriate guideline rates which are £409, £296, £226 and £138 respectively. The Respondent also says that a fee paying party would have appointed a cheaper firm and says that HSF has no particular expertise in this field to justify its fees. The lack of use of Counsel is also criticised and it is said there is much duplication. It is said that there is no justification why a single lawyer could not have dealt with this matter. The Applicant says that it was entitled to use HSF as this was its general counsel. It also points out that the Respondent does not give examples of any specialist firms which could have been used and their charge out rates.

23. Another general point made is that by using a firm with such high rates one would expect a specialist firm with the result that fewer hours are spent. In this case it is said a firm with high charge out rates has been retained but that this has not resulted in any saving in hours. The Applicant says that it used a solicitor advocate instead of external counsel. It is also said that the Applicant does not say how much time it considers would have been reasonable. The Applicant says HSF is a full service firm with a specialist real estate dispute team and is experienced in disputes of this nature.

24. The Respondent's objections in relation to individual items and the Applicant's reply are set out in some detail in a schedule prepared by the parties. The tribunal does not find it necessary to repeat those in this decision and in considers the most salient points below.

Quantum – the tribunal's decision

25. The tribunal is satisfied on the evidence that the costs have been incurred and paid by the landlord.

26. The tribunal notes firstly that the proceedings were made up of both an application in relation to the validity of the RTM notice and an application in relation to the reasonableness and/or payability of service charges. The Applicant does not split the costs to differentiate between the time spent on service charges and time spent on the right to manage issue. Given the majority of the service charges were conceded at the commencement of the hearing such information is highly relevant to the reasonableness of the costs.

27. The Respondent's objections in relation to individual items and the Applicant's reply are as mentioned above set out in some detail in a

schedule prepared by both parties. Taking into account the points raised the tribunal would comment as follows on the costs claimed;

a) Costs claimed in relation to the case management conference on 5.3.15 – this was a case management hearing. It is the tribunal's view that there was no need for 2 lawyers to attend. The preparation of a bundle was totally unnecessary and the total time spent preparing for a straightforward procedural hearing of less than 1 hour was totally disproportionate. Various entries are claimed in relation to the cmc the majority of which are excessive;

b) The time spent on personal attendances with Mr Ricker are unreasonable given that he made no witness statement and the tribunal expressed disappointment in the quality of the evidence overall;

c) 43 routine letters to the client are excessive;

d) Time spent on documents for a 2 day hearing with an emphasis on legal issues of over 176 hours in total was totally disproportionate. The service charges (save for insurance) were conceded at the commencement of the hearing. The issue in relation to the RTM claim notice went to legal issues and it is difficult to understand how the time was spent;

e) The Applicant's solicitors are said to be specialist solicitors in this field and as such no claim should be included for any checking or research of legislation. Various entries are included for checking legislation, making a note on that review of the legislation, considering the note and so on. Given the charging rates adopted one can expect the solicitors to be fully conversant with the relevant legislation and any such costs are not recoverable in these circumstances;

f) Time claimed for the preparation of witness statements was wholly unreasonable especially given the tribunal's comments on the paucity of the evidence;

g) The time spent preparing for a 2 day hearing of some 35.57 hours (17.79 claimed in relation to this property) by a Senior Associate was wholly excessive. This is duplicated by time spent by both the Associate and the trainee of 29.94 and 4 hours respectively. Total costs claimed are £7,114 which it is said equates to a brief fee;

h) The cost of the experts report is not recoverable as the issue of the major works was settled and in any event these costs were incurred in connection with the proceedings.

Quantum – the tribunal's decision

28. The tribunal's jurisdiction in this matters flows from section 88(3) which provides as follows;

"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."

29. The tribunal finds itself in a difficult position. The landlord has simply claimed half of the costs in this matter which includes time spent in relation to two properties incurred by 2 different landlords albeit connected companies. It has not attempted to differentiate its costs between those incurred in relation to the validity of the notice and those incurred in relation to the service charge proceedings. It has also taken a simple split of the total costs incurred in relation to both properties without appearing to have satisfied itself that this was a fair approach. The tribunal has therefore had no option but to take a similar broad-brush approach when dealing with the quantum of the costs.

30. As a matter of principle the tribunal agrees that the only costs recoverable under section 88(4) are those incurred in relation to the validity of the notice. It can see no basis upon which the costs incurred in connection with the disputed service charges can be recovered under these provisions. It has no information available to allow it to make any meaningful apportionment of those costs between the two distinct issues.

31. Secondly in relation to the costs themselves the tribunal considers they are wholly excessive for a dispute of this nature. This was a straightforward matter. There appears to have been a great deal of duplication between the two principal fee earners involved for which it can see no reason. Time spent is also wholly unreasonable and no detailed narrative is given to explain the excessive time recorded.

32. The tribunal also bears in mind the provisions of section 88 and the intent behind those provisions. They are designed to allow a landlord to recover its costs in connection with the service of a claim notice. These would normally include receipt of the notice, consideration of title, time

spent drafting a counter notice and in some circumstances valuation fees. If a positive counter notice is served the costs would also include the costs of agreeing a lease and the costs of completion. Such costs can vary but one would expect them to fall within a range of anywhere between £1,500 to £5,000. Here however no counter notice was given as no notice was in fact received although a notice was served on the registered address at the time. The costs incurred relate to the dispute between the parties as to the validity of that notice. The tribunal's decision on this point rested on simple witness evidence as the use of a registered office at that time. It is wholly unreasonable for the landlord to expect to recover costs of this nature under the provisions of section 88(3).

33. The tribunal does however consider the landlord is entitled to recover some of its costs in relation to the claim notice which was served. Doing the best it can on the evidence before it, it finds that the landlord's reasonable costs in this matter should be limited to the sum of £5,000 plus Vat.

Application under Rule 13

34. Winnett say that the RTM acted unreasonably in bringing and pursuing its application under section 27A as it was told that the claim notice had been sent to an address not used since 2002 and that no forwarding arrangements were in place.

35. The Respondent relies on the Upper Tribunal's decision in *Willow Court Management Company (1985) Limited V Alexander [2016] UKUT 0290 (LC).* The following points are said to be relevant to the facts of this case;

(a) Whether there has been unreasonable conduct involves a *"fact-sensitive"* enquiry;

(b) The key question is whether there is a reasonable explanation for the conduct complained of;

(c) The tribunal *"ought not to be over-zealous in detecting unreasonable conduct after the event";*

(d) The tribunal may only make an order if satisfied there has been unreasonable conduct and that is the first enquiry;

(e) Even if the tribunal is satisfied there has been unreasonable conduct it then has a discretion as to whether to award costs;

(f) Once the tribunal makes an order for costs it must apply the overriding objective to deal with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the tribunal;

(g) It need not make an order in respect of all of the costs; and

(h) In deciding it is exercising a judicial discretion and must have regard to all relevant circumstances".

36. The Respondent denies its conduct was unreasonable. The claim notice was served at the address shown at HM Land Registry and should have been updated and it was perfectly reasonable to serve the notice at that address. In any event it says that the unreasonable conduct must relate to the issue or conduct of the proceedings.

37. It is further said by the Respondent that the key issue in this case is that the connected landlords in respect of both properties in the substantive application denied that the claim notices had been received. Sterling, acting for both RTM Companies was highly suspicious of this assertion. The tribunal found that the claim notice in relation to 132-136 St John Street had been validly given.

38. The Respondent says it is a key point that at no stage prior to the issue of the application on 10 February 2015 did Winnett state that 4 St John Street (the former registered office) had not been occupied by Stepien Lake since 2002 and that no forwarding facilities had been in place. In other words the crucial facts upon which the tribunal's decision was based were not mentioned. Instead the Respondent received only a bald denial of receipt. Further when it was said that the claim notice had not been received and a copy of the claim notice and evidence of service was forwarded, the response was that the wrong registered office had been used. This however was misleading as the registered office had been changed after the service of the notice. Thus the Respondent says that the decision to bring the application cannot be unreasonable.

39. The Respondent says further that it was only the evidence of Mr Thomas in his statement of 27 May 2015 which satisfied the tribunal that the claim notice had not been received. In such circumstances it is said that it was perfectly reasonable for the RTM Company to decide to continue with the hearing and to cross examine the witnesses and explore whether the claim notice might have been received in some other way. The application was also heard at the same time as that relating to 132-136 St John Street and the RTM Company also had another legal argument in respect of the address at which a claim notice could be served. Although this argument was rejected it was not unreasonable to pursue it.

40. The Respondent further submits that even if the tribunal concludes that the RTM Company acted unreasonably in bringing or conducting the application it should refuse to make an order for costs when exercising its discretion and the above matters are relevant to the issue of discretion. Winnett could have informed the RTM Company of the relevant issues as to the use of the registered office earlier than it did. In any event given the overlap of issues it is said that the majority of costs would have been incurred in any event and it accepted by Winnett that it cannot differentiate between the costs of the two applications. The Respondent also invites the tribunal to consider the conduct of Winnett, and the comments of the tribunal in relation to the substantive application;

"We are disappointed that we had no evidence from anyone at the landlord company with any real involvement at the property".

41. In the alternative the Respondent submits that if the tribunal were minded to make an order for costs it should only be for a small amount, and that such costs should be limited to the time after the service of Mr Thomas' statement. It is also said that many of the costs have been incurred in relation to the actual service charge dispute itself and that whilst Winnett disputed these charges it ultimately agreed all amounts save for insurance. The costs claimed are said to be disproportionate. The respondent set out detailed comments in relation to the costs claimed in a schedule.

The tribunal's decision

42. The tribunal declines to make any order in respect of the applicant's legal costs pursuant to Rule 13(1).

Reasons for the tribunal's decision

43. The tribunal's power to award costs is contained in Rule 13 (1)(b)(ii) which states that;

"The Tribunal may make an order in respect of costs only-

(b) If a person has acted unreasonably in bringing, defending or conducting proceedings in-

(I) a residential property case ..."

44. The power to award costs pursuant to Rule 13 is discretionary and the wording of the provision makes it clear that the tribunal may only make such an order if a person's conduct of the proceedings is unreasonable rather than his behaviour generally.

45. The power to award costs pursuant to Rule 13 should only be made where a party has clearly acted unreasonably in bringing, defending or conducting the proceedings. This is because the tribunal is essentially a costs free jurisdiction where parties should not be deterred from bringing or defending proceedings for fear of having to pay substantial costs if unsuccessful. In addition there should be no expectation that a party will recover its costs if successful. The award of costs should therefore be made where on an objective assessment a party has behaved so unreasonably that it is fair that the other party is compensated to some extent by having some or all of their legal costs paid.

46. The fact that the Respondent was unsuccessful in the substantive application in relation to the Property does not make its conduct unreasonable. On the issue of proceedings it had not been made aware of the reason why it was said that service of the claim form had not been effected. As the claim form had been served at the address shown as HM Land Registry it was not unreasonable to issue proceedings. Oral evidence as to whether the office was in use was given at the hearing and cross examination took place. The tribunal is not of the view that the Respondent's conduct in relation to the proceedings was in any way unreasonable. The tribunal's decision rested on the oral evidence of a witness and it was not unreasonable to wish to attend the hearing and cross examine the witness on his evidence. It is considered that there was a reasonable explanation for the decision to issue and pursue the proceedings given the factual circumstances of this case.

47. Having considered the facts of this case overall and the test set out in *Willow* above I consider that it is not appropriate that an order is made under Rule 13 as I do not consider that the Respondent has acted unreasonably in issuing and conducting the proceedings.

Name: Sonya O'Sullivan **Date:** 4 December 2016

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).