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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00CN/LCP/2016/0001**
Property	:	**The Post Box, Upper Marshall Street, Birmingham B1 1LA**
Applicant	:	**Post Box Ground Rents Ltd**
Representative	:	**Brethertons LLP**
Respondent	:	**The Post Box RTM Company Ltd**
Type of Application	:	**Costs s88 (4) CLRA 2002 Rule 13 (4) (a)**
Members of Tribunal	:	**Judge D Jackson N Wint FRICS**
Date of hearing	:	**15th September 2016 Birmingham CCT**
Date of decision	:	**18 October 2016**

DECISION

Background

1. On 12th May 2012 the Respondent commenced a claim to acquire the right to manage three blocks of flats (Blocks A, B and C) known collectively as the Post Box.
2. An application for a right to manage determination was made to a Leasehold Valuation Tribunal on 25th June 2012.
3. Following investigations by the Applicant it became clear that Blocks B and C were not, as contended by the Respondent, "a self-contained building". Expert evidence obtained by the Applicant showed that Blocks B and C were not structurally detached.
4. Accordingly the Respondent wrote to the Tribunal on 12th November 2012 to withdraw the application. The Tribunal informed the parties by letter dated 20th November 2012 that the application had been withdrawn.
5. On 3rd May 2013 the Applicant made application to the Tribunal for costs under s88 (4) of Commonhold and Leasehold Reform Act 2002 ("the Act").
6. The Applicant served a Statement of Costs containing a Statement of Truth dated 9th July 2013. The total amount Claimed was £28,117.95. Solicitor's fees were £10,812, Counsel's fees were £4,106.40 and surveyor's fees £12,795.30 (inclusive of VAT). Disbursements amount to £404.25.
7. On 20th December 2013 a Tribunal determined reasonable costs for the period 12th May 2012 (date of claim) to 25th June 2012 (date of application to the LVT) in the sum of £2,883 inclusive of VAT. The Tribunal determined that the Respondent was not liable for costs after that date.
8. The Applicant appealed to the Upper Tribunal.
9. HHJ Stuart Bridge sitting in the Upper Tribunal ([2015] UKUT 0230 (LC)) allowed the appeal. At paragraph 45 he dismissed the application made to the LVT on 25th June 2012. The effect of the dismissal is that the Respondent is liable for costs from 12th May 2012 (date of claim) to date of withdrawal (12th November 2012).
10. HHJ Bridge directed (at paragraph 48):
    "The parties will be given the opportunity to agree the costs payable to the appellant as a result of this decision. In the event of no agreement having been reached within 28 days, the matter may be referred to the Ft T for determination of the appropriate amount under section 88(4). The issue that remains is the quantification of the costs incurred by the appellant as party to the proceedings. The costs payable in respect of the period prior to application being made to the Tribunal have already been assessed. In the event of agreement not being reached, it will be for the Tribunal to determine the amount of costs payable after application was made up to the date that the application was withdrawn, that is for the period between 25 June 2012 and 12 November 2012. In determining what costs are reasonable for that period, the Tribunal must take into account any misconduct on the part of either party which it considers relevant (see paragraph 43 above) as well as any material findings it may have made when it determined what costs were reasonable for the period before 25 June 2012".

11. On 7th April 2016 the Applicant renewed its s88 (4) costs application to the Tribunal.
12. Directions were issued requiring the Respondent to prepare Points of Dispute and for the Applicant thereafter to prepare a Reply.
13. As set out a paragraphs 76-82 below there was repeated failure by the Respondent to comply with Directions resulting in a barring and subsequent lifting of the bar.
14. Points of Dispute were served by the Respondent on 25th July 2016 running to 19 points in total.
15. Reply to Points of Dispute was served by the Applicant on 17th August 2016.
16. This matter was heard in Birmingham on 15th September 2016. Mr J Bates of counsel appeared for the Applicant. He was accompanied by Mr R Hardwick of Brethertons

solicitors who signed the Statement of Truth appended to the Statement of Costs. Mr Dudley Joiner of The Right to Manage Federation Ltd attended on behalf of the Respondent.

Point 1

17. Withdrawn by Mr Joiner at the hearing.

Point 2

18. Section 88(2) of the Act provides:
"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".

19. Privileged Material served in accordance with Directions contains Engagement letters and terms and conditions (see K763-793 of Applicant's bundle). We find that in accordance with those documents that the Applicant was personally liable to pay legal and surveyor's costs in the amount incurred.

Point 3

20. The Tribunal has to determine reasonable costs under s88 (1) of the Act. The Tribunal has to apply the statutory test and not a gloss to it in terms of proportionality.
21. Mr Joiner relies on a Ft T Decision CAM/22UB/LCP/2015/0001. We do not find that decision to be of assistance. We are not bound by the decision of another Ft T. The suggestion that proportionality applies because of the effect of Rule 3 (overriding objective) is wrong in law. The overriding objective is only applicable to the Rules themselves or any practice direction. It has no bearing on statute.
22. **Christoforou v Standard Apartments Ltd** [2013] UKUT 0586 (LC) is a decision in relation to administration charges but still gives some helpful indications which have some relevance in relation to the determination of s88 costs . At paragraph 44 the Deputy President of the Upper Tribunal, Martin Rodger QC observes that "the suggestion that proportionality had nothing to do with reasonableness would seem unreal or counterintuitive".
23. Mr Bates submits that any argument over reasonableness/ proportionality is a distinction without a difference. We agree. It is unlikely that costs that are not proportionate will be reasonable and vice versa.
24. On the facts Mr Joiner's argument in relation to proportionality fails. The Post Box development contains 3 Blocks and 258 flats. There are substantial legal and surveying arguments over the structure of the Blocks and whether they are structurally detached. Costs, both legal and surveyor, of under £30,000 are entirely proportionate to the determination of the right to manage of such a large and complex development.

Point 4

25. HHJ Bridge deals briefly with conduct at paragraph 43 of his decision. Before the Upper Tribunal the Respondent argued that there had been misconduct "for example, in deliberately refraining from putting a decisive counter argument until the last minute". That argument was renewed before us.

26. The Respondent's right to manage application was undone by an Expert's Report of Philip Barmby (Savills) at I626-650 of the Applicant's bundle. The crucial evidence is at I635. Blocks B and C were built as one structure:
"The concrete foundations and slabs have been designed so that they can be supported from one another, and any physical separation of a block would leave unsupported slabs that would be subject to collapse".
27. Mr Barmby also adds that Blocks B and C are not capable of being self contained without loss of common car parking or disruption of electrical, water and ventilation services.
28. We find that there was no delay in serving this vital evidence. Mr Barmby completed his Report following an inspection on 22nd October 2012 (I637). Mr Hardwick told us in evidence that Brethertons solicitors served their Expert's Report by courier on 5th November 2012.
29. The Counter Notices in relation to Block B (flats 58-108) and Block C (flats 109-258) served 12th June 2012 (D230-245) dispute that those Blocks are structurally detached as they are "connected to the car park and by virtue of the car park, also connected to the other block" (see D232 and D240).
30. The Statement of Case for the Respondent (Applicant in these costs proceedings) (G453-460) served on the LVT on 20th August 2012 clearly puts in issue "structurally detached" (see G458):
"35. Neither block can be considered structurally detached as, inter alia, they are attached to another structure, namely the car park (and in the case of 58-108 the remainder of that block)".
31. The Applicant has consistently denied throughout that Blocks B and C were structurally detached. It has maintained that the common car park is sufficient to defeat the claim. If anything the Applicant's case became stronger with the discovery of the structural engineering evidence, which it had sight of for the first time in late October 2012 and which was timeously served on the Respondent in early November 2012.
32. There is no conduct here about which the Respondent can make any complaint whatsoever. The Respondent has not raised any objections concerning the conduct of the freeholders which have been substantiated by evidence. There is no relevant misconduct by the Applicant such that the costs claim being made is not reasonable.

Point 5

33. The Respondent's argument is based on a letter dated 15th November 2012 from Brethertons to the Tribunal (J694) which indicates "we have obtained all the relief we could have possibly achieved had the hearing gone ahead". Mr Joiner also argues that Rule 22(4) of the Tribunal Procedure Rules requires a party to make all its potential applications at the time of withdrawal to enable a Tribunal, when consenting to withdrawal, to attach conditions.
34. We find both arguments misconceived. The letter of 15th November 2012 does not amount to waiver of the right to claim costs under s88 of the Act nor does it found an estoppel. Rule 22 (Withdrawal) does not in any way prevent a subsequent s88 application.

Points 6, 9, 10, 12 and 14

35. The Applicant agrees that £225 is the appropriate hourly rate to be applied to the work carried out by Mr Hardwick.

Point 7

36. When asked to expand on this Point of Dispute at the hearing Mr Joiner told the Tribunal "I leave it to an expert Tribunal; I am not an expert in costs".
37. We prefer the Reply served by the Respondent on Point 7 as it details exactly what work was carried out. Fifty two emails in six months on a matter of this legal and factual complexity is reasonable under s88 (1) of the Act.

Point 8

38. We repeat our findings at Point 7. We prefer the detail explanation given in the Reply to the Point of Dispute, which gives no reason as to why the amount claimed is not reasonable. We find 1.7 hours telephone attendance to be reasonable.

Point 11

39. Again the Respondent gives no explanation as to why the claim for attendance on counsel is "excessive". When asked to expand on this Point of Dispute Mr Joiner told us at the hearing "I can't add anymore".
40. We prefer the detailed explanation given by the Applicant and find 3.5 hours attendance on counsel to be reasonable.

Point 13

41. The Respondent seeks a reduction by 12 minutes because of duplications.
42. We were told by Mr Hardwick, at the hearing, confirmed that more than one email was sent to Mr Barmby on 12th October 2012. We find that there is no duplication.
43. We find attendance on expert to be reasonable.

Point 15

44. Mr Joiner argues that the sending of letters to the Tribunal is a matter that should properly be carried out by a paralegal.
45. There are a total of 12 letters in all. Mr Hardwick explains that until October 2012 his department did not have a paralegal and that as Mr Hardwick had conduct of this matter it was more cost effective for him to correspond with the Tribunal rather than to delegate to another fee earner who was not familiar with what was a complex file.
46. We note that Mr Hardwick accepts that his appropriate hourly rate was at the time £225 per hour. Even in 2012 that was less than other specialist practitioners were charging for right to manage work.
47. We find that £225 per hour is reasonable in relation to the letters that were sent to the Tribunal in 2012.

Point 16

48. The Respondent disputes site attendance by counsel and solicitor for the Applicant on 30th October 2012.
49. Mr Hardwick claims 1 hour travel, 2 hours at the site and 30 minutes attendance with expert and counsel following the inspection. Counsel (who travelled from London) claimed travel of 3 hours and 2 hours 30 minutes attendance together with his rail fare.
50. As far as site inspection by the Respondent is concerned Mr Joiner told the hearing that his colleague Nick Bignall had travelled from Sussex to meet the leaseholders.

However no formal inspection was carried out by the Respondent's legal advisors. The Applicant's (Respondent in these costs proceedings) Statement of Case dated 20th July 2012 (F298-F452) at paragraph 2 (F301) shows that the Respondent relied on planning information from Birmingham City Council's website and search results (see F312-317).

51. The Tribunal is bound to observe that the problems encountered by the Respondent in relation to its right to manage claim demonstrate the perils of undertaking property litigation without a site inspection in the presence of an expert. Had the Respondent instructed an expert and arranged a proper site inspection it is likely that the problems in relation to "structurally detached" would have become apparent to it at an earlier stage. The Tribunal in determining any right to manage application would, without hesitation, have insisted on inspecting the subject property.
52. Mr Barmby, the expert, inspected on 22nd October 2012. Having prepared his report he then met with solicitor and counsel for a further inspection on 30th October 2012. Solicitor and counsel were right to inspect. At the time they did so a final hearing of the right to manage application was fixed. Solicitor and counsel had to inspect prior to the final hearing not only to understand how the complex and technical Expert's Report fitted with their legal arguments but also to ensure that they in turn could assist the Tribunal at its inspection prior to the hearing.
53. We find that the inspection on 30th October 2016 by solicitor and counsel was reasonable. We find that the time taken of 2 hours 30 minutes was also reasonable. We note that the Respondent has engaged advisors based in Sussex. This is a specialist area of law and the use of London counsel by the Applicant is reasonable. We therefore find the travelling costs of solicitor and counsel also to be reasonable.

Point 17

54. The Respondent submits that preparation of bundles should have been undertaken by a paralegal, taking 5 hours at £100 per hour.
55. Mr Hardwick was unable to explain why preparation of bundles had taken his assistant solicitor (refr SXD) 9 hours 30 minutes. He suggested that it should have taken her 4 hours at £135.
56. That concession is properly made and we reduce claim for "Preparing Trial Bundle" to £540.
57. Mr Hardwick himself claims 13.7 hours for "Work done on documents". The Tribunal attaches considerable weight to the fact that he has signed a Statement of Truth to the Statement of Costs.
58. Mr Joiner was unable to specify in any way why the claim is "excessive". The Respondent has completely failed to particularise this Point of Dispute. Mr Joiner was unable to provide any further details at the hearing as to which specific items were unreasonable and why.
59. This was a complex case both legally and factually. We have seen the documentation prepared by Brethertons along with the documents prepared by the other parties. These documents filled 4 lever arch files which were produced to us at the hearing. We have no hesitation in finding 13.7 hours to be entirely reasonable having regard both to the nature of the case and the voluminous documentation.

Point 18

60. We have already determined counsel's attendance at the site inspection to be reasonable.

61. Directions issued by SJ Duffy dated 27th June 2012 (J717-719) provided, at paragraph 5(d), for the exchange of skeleton arguments not less than 14 days prior to the hearing.
62. Mr Bates had therefore properly commenced his preparation for the final hearing on 19th November 2012 when the letter of withdrawal was sent on 12th November 2012.
63. Mr Bates told us that his agreed fee for representing the Applicant at the final hearing, to include all necessary preparation, was £2000. Mr Bates claims £1400 for 7 hours work on his Skeleton Argument.
64. We find that no more than 50% of the brief fee relates to ancillary preparation. At least 50% must relate to the conduct of the hearing itself.
65. We find that £1400 for a part completed Skeleton Argument is not reasonable. We note from the Reply that the Skeleton had not even been completed and that counsel stopped preparing once it became clear that the case was not going ahead.
66. We reduce counsel's claim for work done on Skeleton Argument to £1000.

Point 19

67. A breakdown of Surveyor's fees can be found at p106 of "Core Costs Bundle".
68. Mr Barmby claims 46 hours at £175 per hour totalling £8,050.
69. Mr Joiner submits that Mr Barmby's fees should be reduced to 22 hours at £175 per hour.
70. We note that Mr Barmby claims 8 hours for the site inspection on 30th October 2012. However solicitor and counsel who also attended only claim 2 hours 30 minutes for the same inspection and discussions. We therefore find the time claimed by Mr Barmby to be excessive.
71. The work done by Mr Barmby was essentially that of collating information provided by Mr Mulryan, Mr O'Neill and Mr Spencer. The key information which destroyed the Respondent's case was in fact provided by Mr Spencer in his one page letter at I688 for which he charged £280.
72. Mr Hardwick told the hearing "P Barmby surveyor of choice. Would not consider anyone else. Costs not an object for my client in this case; wanted to win this case. Would have paid whatever he charged if it meant winning this case. No alternative quotes obtained". We find that this is a classic statement of what is not reasonable under s88 (2) of the Act.
73. We find 46 hours to be excessive. We have considered Mr Barmby's report and Appendices at I626-692. Such a report, taking into account site visits should take no more than three whole working days. We allow 25 hours.
74. Mr Joiner does not challenge the hourly rate of £175.
75. We find that the reasonable costs of the Experts Report Prepared by Mr Barmby to be 25 hours at £175 making a total of £4375 and we reduce his costs accordingly. The fees of Mr Mulryan, Mr O'Neill and Mr Spencer together with out of pocket expenses are allowed in full.

Rule 13 application by the Applicant

76. This matter has a long interlocutory history:
    a) Directions 28th April 2016
    b) Directions No 2 9th May 2016
    c) Directions No 3 2nd June 2016 issued as Respondent failed to comply with Directions No 2. Barring warning given.
    d) Directions No 4 13th June 2016. Extension of time granted to Respondent.
    e) Directions No 5 15th July 2016. Unless order against Respondent.

f) Directions No 6 19th July 2016. Respondent's request for further time refused. Respondent fails to comply by 4pm on 25th July 2016 and is automatically barred.
g) Directions No 7 15th August 2016 seeking representations on lifting the bar.
h) Directions No 8 23rd August 2016 bar is lifted.

77. It is unsurprising that against that background that the Applicant seeks a Rule 13 costs order. The grounds of the application are set out in Mr Bates' Written Submissions dated 4th September 2016. The order is sought personally against Mr Joiner under Rule 13(1) (b) (iii) and is limited to additional costs incurred as a result of failure to comply with directions. The amount sought is £1,070 plus Vat (solicitors £770 and counsel £300).
78. Rule 13(1) (b) enables the Tribunal to make an order against "a person".
79. The Respondent company is no longer in a position to fulfil its objects as the right to manage application has been withdrawn. We were told by Mr Joiner that the Directors of the Respondent have resigned. The Company secretary of the Respondent company is itself a corporate entity. That company secretary is The Right to Manage Federation Limited. Mr Joiner is a Director of RTMF Ltd.
80. A body corporate can conduct Tribunal proceedings either through a duly appointed legal representative or can act through its directors or secretary. What is Mr Joiner's position? We find that the Respondent being a body corporate appears in the person of its company secretary. As that company secretary is also a body corporate it too appears in the person of one of its Directors namely Mr Joiner. Accordingly we find that Mr Joiner is neither a "party" as defined in Rule 1 nor a representative for the purposes of Rule 14.
81. Under those circumstances although Mr Joiner is "a person" for the purposes of the widely drawn provisions of Rule 13(1)(b) he is, in fact, no more than an officer of the corporate secretary of the Respondent. There is no suggestion that he has been in any way acting in his own interests. The Applicant should have made this application against the Respondent.
82. As set out in Directions No 8 the Respondent was 26 minutes late in preparing points of Dispute by 4pm on 25th July 2016. The explanation for the failure is set out in an email of 23rd August 2016 from "Dudley Joiner, The Right to Manage Federation, and Corporate Secretary of the Respondent". That email contains an apology and explains that "the writer's PA was on holiday and the employee acting in her place was not familiar with the Apple Mac computer system".
83. We apply **Willow Court Management Company (1985) Limited v Alexander** [2016] UKUT 0290 (LC). At the first stage of the test we find that the failure by 26 minutes to serve Points in Dispute is not unreasonable. At the second stage we would, in any event, exercise our discretion in favour of Mr Joiner. We do so having regard to our analysis of his position vis a vis the Respondent as set out at paragraphs 79-81 above and also having regard to the explanation contained in the email of 23rd August 2016.

Decision

84. We determine the reasonable costs payable by the RTM company under s88(4) of the Act for the period 25th June 2012 to 12th November 2012 are as set out in the Statement of Costs signed on 9th July 2013 subject to:
a) The costs of fee earner RAH are reduced from £250 per hour to £225 per hour plus VAT.
b) The costs of fee earner SXD relating to work done on documents on 2nd and 5th November 2012 are reduced to £540 plus VAT.
c) Counsel's fees for Skeleton argument on 12th November 2012 are reduced to £1000 plus VAT.
d) Costs claimed by P Barmby (Savills) are reduced from £8050 to £4375

85. No order for costs is made under Rule 13.

Next Steps

86. In order to give finality to this long running matter we direct that within 14 days of the date of issue of this Decision that Brethertons solicitors shall provide, both to the Tribunal and the Respondent, a brief recalculation of their costs based on our Decision. This recalculation should include the sum already determined by a previous Tribunal of £2883 inclusive of VAT for the period 12th May 2012 to 25th June 2012.
87. The Respondent shall have 14 days from the date of Brethertons letter advising of the recalculation to make representations to the Tribunal as to the correctness of the calculation only.
88. Thereafter the Tribunal shall issue an addendum to this Decision confirming the s88 costs payable by the RTM company.

D Jackson
Judge of the First-tier Tribunal.

Either party may appeal this decision to the Upper Tribunal (Lands Chamber) but must first apply for permission to the First-tier Tribunal. Any application for permission must be in writing setting out the grounds on which the application is made and must be sent or delivered to the First-tier Tribunal so that it is received within 28 days after the date that the Tribunal sends to the party making the application these written reasons for the decision.