



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

Case Reference : **CHI/00HN/LCP/2015/0006**

Property : **Winston Court, 14 Melville Road, Winton,
Bournemouth, Dorset, BH9 2PL**

Applicants : **Avon Ground Rents Limited**

Representative : **Scott Cohen Solicitors**

Respondent : **Winston Court 14 Melville Road Winton
RTM Company Limited**

Representative : **Nantes Solicitors**

Type of Application : **Section 88 costs application
in re (No Fault) Right to Manage**

Tribunal Members : **Judge Paul Letman**

Date and venue : **Paper determination**

Date of Decision : **24 May 2016**

**DECISION ON COSTS
WITH REASONS**

The Application

1. By application notice dated 10 December 2015 the Applicant landlord seeks a determination under section 88 of the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') of the amount of its costs payable by the Respondent in consequence of notices of claim dated 16 July 2015 and 12 November 2015 given thereunder by the Respondent.
2. In summary the costs claimed by the Applicant in relation to the claim notice dated 16 July 2015 are solicitors fees in the sum of £967.74 (inclusive of VAT) for time spent of 3 hours and 12 minutes at the rate of £250 per hour, plus disbursements of £6.45, and management fees charged by its agent of £350 plus VAT. The costs claimed in relation to the claim notice dated 12 November 2015 are solicitors fees in the sum of £847.74 (inclusive of VAT) for time spent of 2 hours and 48 minutes at the rate of £250 per hour, plus disbursements of £6.45, and management fees charged by its agent of £350 plus VAT. A total claim of £2,212.90 plus VAT.
3. On 23 December 2015 the tribunal gave directions for the determination of this application on paper, making provision amongst other things for the Applicant to send a statement of case no later than 29 January 2016 setting out its claim for costs in detail with supporting documentation, and for the Respondent to reply by 26 February 2016. Pursuant to these directions the Applicant served a statement of case dated 05 February 2016, and each party has subsequently set out in schedule form (the 'Schedule of Disputed Costs') its detailed submissions on every element of the claimed costs that is challenged by the Respondent.

The Law

4. Section 88 of Chapter 1 of Part 2 of the 2002 Act makes provision for the respondent to any notice of notice to recover costs as follows:

'88 Costs: general

(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 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 such a person incurs as party to any proceedings under this Chapter before a leasehold valuation 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.

(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.'

5. Further, section 89 of the 2002 Act, in so far as is material, provides under subsections (1) and (2) as follows:

'89 Costs where claim ceases

(1) This section applies where a claim notice given by a RTM company—

(a) is at any time withdrawn or deemed to be withdrawn by virtue of any provision of this Chapter, or

(b) at any time ceases to have effect by reason of any other provision of this Chapter.

(2) The liability of the RTM company under section 88 for costs incurred by any person is a liability for costs incurred by him down to that time.'

The Disputed Costs

6. As appears from the Schedule of Disputed Costs (a copy of which is annexed hereto for ease of reference), there are a number of primary issues between the parties over

the costs claimed, and these are considered in turn below (before coming to the more detailed challenges to each sum claimed).

1) Second Notice Current

7. In relation to the first notice (dated 16 July 2015), the Respondent contends that whilst the claim made by the second notice is ongoing there is no entitlement to recover the costs associated with the prior notice. This is disputed by the Applicant, who points out that upon the deemed withdrawal of the first notice the right to costs accrues. The Tribunal agrees with the Applicant in this regard. Section 89 specifically provides as much (see above). In any event this decision is issued at the same time as the decision on the claim under the second notice, so that as a matter of fact also the objection cannot be sustained.

2) Invoices Unpaid

8. Secondly, the Respondent contends that where an invoice is not receipted as paid, there can be no liability on the Respondent for those costs under section 88 of the 2002 Act. On the contrary the Applicant submits that liability is not dependent on payment. In the Tribunal's view the Applicant is correct. Section 88 provides that the RTM company is liable for reasonable costs 'incurred' by the landlord etc.,. Costs will normally be incurred when the landlord receives the invoice for payment, and there is no apparent justification for adding a requirement that the invoice should have been paid in order to satisfy the terms of section 88(1), and the Tribunal so decides.

3) VAT Query

9. Thirdly, the Respondent notes that the Applicant has not provided any certification with regard to VAT and queries whether this is payable. In response the Applicant states that it is not VAT registered in respect of this property and, therefore, VAT is properly charged. The Tribunal is prepared to accept the Applicant's statement at face value, and will provide that the Respondent's liability is plus VAT. Of course, if this information is not correct, then any sums duly paid in respect of VAT pursuant to this decision would not have been properly payable.

4) Solicitor's Charge Rate

10. Fourthly, the Respondent contends that the Applicant's solicitor's charge out rate of £250 per hour is unreasonable, and proposes instead an hourly rate of £195 on the basis that the generality of the work required in response to the notice merited no more than a Grade B solicitor at that rate. The Applicant states that Miss Scott of Scott Cohen who did the work is a Grade B fee earner, and asserts that it is reasonable for the Applicant to use her services as a specialist in dealing with 1987

Act matters, and that as a sole practitioner her charge out rate of £250 per hour plus VAT is reasonable.

11. The tribunal considers that the use of a Grade B fee earner is justified in dealing with this highly technical area of the law. However, as a matter of impression the fee of £250 per hour seems high, even for a sole practitioner who converted to be a solicitor from a non-practising barrister (called in 1999). The Tribunal is fortified in this view by reference to the SCCO Summary Assessment table, which gives £192 as a guideline hourly rate in 2010 for Band B, Region 1 (given Scott Cohen's offices are in Henley-on-Thames). It is acknowledged, however, that this guidance was for summary court assessment and is now a few years old. Taking these matters into account, in the Tribunal's view an appropriate rate to use that meets the section 88(2) test is £225 per hour.

5) Managing Agent's Charges

12. As regards the sums claimed in respect of Avon Estates (London) Limited, the freeholder's managing agent (see paragraphs 3(b), 4(d) and 11 to 15 of the Applicant's statement of case) the Respondent appears firstly to contend that these should be covered by its normal management functions. In response, aside from relying on standard industry practice, the Applicant relies upon its (disclosed) fee agreement with its manager. This expressly provides under 'additional services,' that a charge may be raised for services to the client '..in relation to the exercise by the lessees of.. the Right to Manage...Any associated work required in dealing with the application, including inspection, dealing with RTM enquiries, advising, attending hearing etc.' In the circumstances the Tribunal accepts that the Applicant's manager may properly raise additional charges as described in the said fee agreement.
13. However, the Respondent raises the further point in respect of the managing agent's invoices, that the evidence of those charges in this case are merely pro forma invoices (each for £350 plus VAT and dated 21 August and 18 December 2015 respectively), so it is said there is an issue whether they are true liabilities incurred by the Applicant for which it is entitled to be indemnified under section 88. The Applicant maintains that the pro-forma is the invoice submitted for payment by the freeholder.
14. As noted above any cost or charge will normally be regarded as incurred when the invoice is raised. This is certainly the position under the Landlord and Tenant Act 1985 (see the decision of the Upper Tribunal to this effect in *Ground Rents (Regisport) Limited v Dowlen* [2014] UKUT 144 (LC)). However, under section 88 of the 2002 Act the Tribunal is concerned to quantify all of the costs incurred in consequence of a notice, and to that end must in practical terms collect in all of those costs; otherwise a landlord might be unfairly deprived of some costs or tenants might face more than one claim for costs.

15. On this basis the Tribunal accepts, that whilst generally a pro forma invoice may be regarded as something less than the actual invoice for payment, they are here sufficient evidence of a liability to pay so as properly to be regarded as incurred for the purposes of section 88 of the 2002 Act. The position might be different in a case where there is evidence of an agreement by the managing agent not to charge the freeholder in any event, but there is no such evidence here. Further, and in any event, as a matter of fact the Tribunal is prepared to accept that the 2 invoices in the bundle from the managing agents to the Applicant are in reality the only commercial invoices to be raised and as such are the invoices for payment, so that on any view the sums stated therein have been incurred, and the Tribunal so decides.
16. Yet further the Respondent submits that there is no evidence to support the claim that the managing agent had actually undertaken any work in connection with the claims or how the charges are calculated or otherwise that they are reasonable. In particular the Respondent notes that the managing agent shares the same address and registered office as the Applicant and that the officers of each are the same, so that 'the notice would only need to pass from one hand to the another.' In reply the Applicant refers to the decision in *Columbia House LRX/138/2012* and confirms that in accordance with that decision there is clearly sufficient evidence before the Tribunal to justify and substantiate the 2 sets of charges.
17. The Tribunal is not assisted by the *Columbia* decision in this case because there was no issue in that case, as there is here, over the extent of any work carried out and costs claimed by the managing agents, the issue was over the lack of evidence as to the landlord's liability for the agent's costs (see paragraphs 28 to 30 of the decision). The evidence before the Tribunal of work done in support of the 2x £350 plus VAT charged in the instant case is within the Applicant's statement of case. Further, the charge in each case appears from the managing agent's contract to comprise a 'minimum of £200 + VAT plus £100 + VAT per hour for court/LVT appearance.'
18. Reviewing this evidence in support of the charges, in the Tribunal's judgement the description of work at paragraphs 12 to 15 of the Applicant's statement of case is formulaic and internally repetitive. For example, there are repeated and duplicative references to liaising with the client (freeholder) and solicitors across these paragraphs. Also in this regard the Tribunal accepts the Respondent's criticism that as between the managing agent and freeholder in reality liaison would be equivalent to passing a notice 'from one hand to another.'
19. Further, the Tribunal does not accept that the freeholder needed both the managing agent and specialist solicitors such as Scott Cohen to 'assist.. in the assessment of the claim' or indeed the managing agent 'to advise on the impact of the RTM claim..' where the Applicant is an experienced landlord aided again by experienced solicitors. In addition, in relation to the second notice it would be contrary to section 88(3) to include any element of costs (expressly included in the description of works

done at paragraph 15 of the Applicant's case) incurred after the application to the tribunal was made.

20. In summary, therefore, in the light of the points made above the Tribunal does not accept that the 3.5 hours of work or its equivalent charged in respect of each notice is reasonable. Nor, for completeness, does the Tribunal accept that a fixed charge of £200 plus time spent is necessarily reasonable. The Tribunal does though accept that there was some work to be done by the managing agent, like the checks described at paragraph 12 of the Applicant's statement of case and collating information for instructing solicitors. But given there are only 4 flats in the subject premises and the relative simplicity of the claims, in the Tribunal's view this should have taken the agents no more than 1.5 hours in respect of the first notice and 1 hour in respect of the similar second notice. The Tribunal accordingly allows as reasonable only these times charged out at the rate indicated in the management contract of £100 per hour.

6) The Detailed Challenges

21. On the basis of the conclusions above, the Tribunal set out below its determination of the costs allowable pursuant to section 88 in respect of each item of cost broken down in the Schedule of Disputed Costs, together with brief reasons (in response to the parties' comments in the schedule):

1) July 2015 Notice

- 3(b) managing agent's costs claimed in the sum of £350, in accordance with paragraphs 11 to 19 above the Tribunal allows the sum of £150.
- 19(1)(a), cost claimed £225, the Tribunal adopts the concession made by the Respondent in respect of this item and duly allows £202.50.
- 19(ii)(b) costs claimed £125, the Tribunal adopts the concession made by the Respondent in respect of this item and duly allows £112.50.
- 19(iii)(a) costs claimed £125, the Tribunal adopts the concession made by the Respondent in respect of this item and duly allows £112.50.
- 19(iii)(b) costs claimed £150, the Respondent's complaint that the Applicant should have identified the error in the Articles does not in the Tribunals' view provide any logical basis for disallowing any part of the time spent. The sum allowed is accordingly, £132.
- 19(iii)(c) costs claimed £150, whilst the counter notice is available as a standard form, nonetheless its preparation in each case is bespoke and requires careful

attention. The time taken of 36 minutes seems reasonable for the task. The sum allowed is accordingly, £132.

- 19(IV) costs claimed £25.00, checking delivery of the counter notice is a prudent and reasonable step. Further, as a sole practitioner it is inevitable and by the same token not unreasonable for Ms Scott to attend to this. The sum allowed is accordingly, £22.50.
- 19(V) costs claimed £6.45, the Tribunal accepts that the solicitor's rate should normally cover such costs, and that the expense of say next day delivery will also be taken as included unless it can be shown the urgency was not the fault of the solicitor. In the circumstances the sum allowed is £nil.

2) November 2015 Notice

- 4(d) managing agent's costs claimed in the sum of £350, in accordance with paragraphs 11 to 19 above the Tribunal allows the sum of £100.
- 20(I) costs claimed £175, given the service of a previous notice the time summed under this head does appear to be a little excessive. In the Tribunal's view, applying the section 88(2) test, a time of 30mins only should be allowed. The sum allowed is accordingly, £122.50.
- 20(II) costs claimed £125, the Tribunal adopts the concession made by the Respondent in respect of this item and duly allows £112.50.
- 20(III)(a) costs claimed £100, the Tribunal accepts that in discharging her professional obligations Ms Scott could not omit to review the second notice, and notes that the time taken was less, at 24 minutes rather than 30 minutes. Nonetheless, the Tribunal accepts that it would not have taken even that long to identify any changes from the first notice. The Tribunal allows 18 minutes for this task, and duly allows £67.50.
- 20(III)(b) costs claimed £100, the Tribunal repeats its observations above, and allows again 18 minutes for this task, and thus £67.50.
- 20(IV) costs claimed £125, the Tribunal repeats its comments in relation to preparation of the first counter notice above. Whilst the service of that prior notice should have shortened the time spent this time around, the Tribunal accepts that the additional 6 minutes to prepare a second notice was justified and that in total the time spent is acceptable. The sum allowed is accordingly, £122.50.
- 20(V) cost claimed £75, the Tribunal repeats its reasons stated under item 19(v) above. Further, as regards the added 12 minutes for querying the registration

details of the company, the Tribunal accepts that this enquiry was reasonably made and that there is no duplication. The sum allowed is accordingly, £67.50.

- 20 (VI) the Tribunal repeats its observations in respect of postage charges above, and again rejects the claim for this sum. The sum allowed is accordingly £nil.

Decision

22. For the reasons set out above the Tribunal determines that the sum for which the Respondent is liable pursuant to section 88 of the 2002 Act in consequence of the July and November notices herein is the sum of £1,524 plus VAT (£864 on the July notice and £660 on the November notices plus VAT).

Appeal

23. Pursuant to rule 36(2)(c) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169) ('the Rules') the parties are duly notified that they have a right of appeal against the decision herein. That right of appeal may be exercised by first making a written application to this tribunal for permission to appeal under rule 52 of the Rules. An application for permission to appeal must be sent or delivered to the tribunal so that it is received **within 28 days** of the latest of the dates that the tribunal sends to the person making the application (a) written reasons for the decision or (b) notification of amended reasons for, correction of, the decision following a review (under rule 55) or (c) notification that an application for the decision to be set aside (under rule 51) has been unsuccessful.

Dated: 24 May 2016