

		FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)
Case Reference	:	LON/OOAU/LCP/2012/0003
Property	:	Imperial Hall, 104-122 City Road, London EC1V 2NR
Applicant	:	Columbia House Properties (No. 3) Limited (former landlords)
Representative	:	Mr S. Madge-Wyld of counsel
Respondent	:	Imperial Hall RTM Company Limited
Representative	:	Ms K. Helmore of counsel
Type of Application	:	The determination of the costs payable to the applicant by the respondent under section 88 of the Commonhold and Leasehold Reform Act 2002 ('the Act')
Tribunal Members	:	Professor James Driscoll, solicitor, (Tribunal Judge) and Lady Davies FRICS (Tribunal Member)
Date and venue of Hearing	:	The hearing took place on 15 May 2014 at 10 Albert Place, London
Date of Decision	:	11 June 2014

The decision summarised

1. The respondent is to pay the applicant the sum of £705 (plus VAT) in respect of its costs under section 88 of the Act. These costs should be paid by 14 July 2014.

Background

2. The applicant is the former freehold owner of the subject premises which is a block of 63 flats. It was also formerly the landlord under the leases of those flats. The respondent is an RTM company which has acquired the right to manage the premises under the Act. We were told at the hearing, that the freehold has now been acquired by Imperial Hall Freehold Limited following a claim collectively to enfranchise made under Part I of the Leasehold Reform, Housing and Urban Development Act 1993.
3. We will refer to the parties to this application as the 'applicant' and the 'RTM company' respectively. The applicant acquired the property on 14 October 1996 and until 4 April 2011 the property was managed on its behalf by Sterling Estates Management Limited. Since that date it has been managed by the RTM company.
4. This is a renewed application under section 88 of the 2002 Act for a determination of costs. It is claim for the costs of using managing agents in connection with various RTM claims. Although the parties reached an agreement which established the entitlement to acquire the RTM and the payment of the landlord's professional costs under section 88 of the Act, later the applicant also claimed the costs of using its managing agents in connection with the claims.
5. As the parties did not agree on these additional costs an application was made to the tribunal which determined that no such costs were payable (LON/OOAU/LCP/2012/0003). Allowing the applicant's appeal, the Upper Tribunal directed the application should be remitted to this tribunal for a fresh determination of whether the costs incurred were reasonable (see, LRX/138/2012, a decision given on 31 January 2014).

The hearing

6. A hearing took place on 15 May 2014. The applicants were represented by Mr Madge-Wylde of counsel. He was accompanied by Mr P. Sherrard a property manager employed by Sterling Estates Management, the former managing agents. We were told that Mr Sherrard would give evidence to explain how his company was involved in advising and assisting the landlords in the course of the RTM claim. However, the other witness counsel was going to call, Mr S. Ahmed could not attend the hearing because of a family illness.

7. Ms Helmore of counsel appeared on behalf of the RTM company and she was accompanied by Mr S. McCabe a director of the RTM company and Mr P. Burditt one of the leaseholders.
8. Both counsel prepared a written summary of their submissions for which we are grateful.
9. Counsel for the applicant outlined their case and summarised the procedural history (which we set out in the next paragraph). In essence the applicant claims that it is entitled not only to tit legal and other professional costs but also for the costs incurred by the managing agents in connection with the RTM claim. We were told that two employees of the managing agents worked on the RTM claims and that their costs amounted to £10,360 (exclusive of VAT) (in addition to the legal and surveyor costs which have already been agreed).
10. The procedural history may be summarised in the following way. In 2006 the RTM company served a notice of claim to acquire the right to manage and a counter-notice denying their entitlement was served. The RTM company applied to the tribunal for a determination under section 84 of the 2002 Act. At the hearing the application was withdrawn and the RTM company was ordered to pay the applicant's costs in the sum of £700 plus VAT.
11. A second RTM claim was made in February 2010 to which the applicant responded by serving a counter-notice denying the entitlement to the right to manage.
12. A third RTM claim notice was served without prejudice to the second claim and although the landlord again served a counter-notice denying the entitlement to the right to manage, the parties reached agreement. They agreed that the RTM company would acquire the right to manage the premises as of 27 October 2010, that their application to the tribunal would be withdrawn and that the company would pay the landlord £6,312.69 in full and final settlement of their legal and surveyor's costs. The consent order was agreed on 27 October 2010.
13. In August 2011 the landlord claimed additional costs originally in the sum of £16,488 later reduced to £15,036 in relation to the work of their managing agents in advising and assisting them in the RTM claims. (We pause simply to note that the total costs claimed by the applicant at that stage amounted to approximately £22,000).
14. Counsel for the applicant also told us that any costs incurred by the managing agents were no longer an issue for the 2006 claim and that the revised claim had now been reduced from £10,346 to £6,122.50. This reduction was necessary, he told us, as the applicant accepted that some of the costs could not be claimed under section 88 as they were occasioned by preparation for the hearing. Such costs can only be claimed where the application by the RTM is rejected (see section 88(3) of the 2002 Act).

15. Ms Helmore told us that the RTM company continued to oppose this application for costs. She drew our attention to the decision of the Upper Tribunal which allowed the landlord's appeal against the earlier decision of this tribunal referred to in paragraph 5 above and noted that it might be appropriate to order that the costs of using the managing agents be determined as nil.
16. In making these submissions she relies on previous decisions of this tribunal (BIR/00CN/LCP/2013/0001 and DD/LON/OOAU/2013/0075) which we considered but we did not find them of assistance for this application.
17. Mr Sherrard gave his evidence and he spoke to his written statement dated 28 April 2014. Attached to this statement is a document headed 'Supporting Timesheet' a copy of which is appended to this decision. He told us that the claim for costs is based on the work undertaken by his firm to advise and assist the applicant in dealing with the RTM claims. He and others in his firm have experience in advising on such claims. They have acted for groups of leaseholders making RTM claims and they have acted for landlords facing RTM claims in other cases.
18. The applicant has a large portfolio of properties and it relies on its managing agents to deal with various matters on its behalf. Referring to the attached timesheet he told us that he prepared it by considering the files that had been kept. There are no time sheets or similar documents showing how much time was actually spent on a particular item of work. In the absence of such records, he has estimated how much time was spent by reading through the files. Having undertaken this task he then consulted Mr Ahmed to check over his estimates. This work was carried out in 2014 which he acknowledges is some four years after the work he claims was undertaken.
19. He told us that not all of the items on the sheet were now claimed. These items relate to (with three exceptions) the work undertaken between 11 May 2010 and 31 August and on and after 2 September 2010 which he accepts on reflection represented charges for works undertaken for the hearing of the then application to this tribunal. Mr Sherrard told us that he accepts that the RTM company can only be ordered to pay the landlord's costs if the application to the tribunal is dismissed (section 88(3) of the Act). As that is not the case here, no costs in relation to the tribunal proceedings can be claimed.
20. As can be seen from the attached copy of the time sheet, it is claimed that work was undertaken by the managing agents between February and October 2010. Mr Sherrard confirmed that he estimates that, in all, some 108 hours were spent dealing with the RTM claims. Of this 90.5 hours work was undertaken by Mr Ahmed and 17.50 hours by Mr Sherrard. Mr Ahmed charges his time at £150 per hour whilst Mr Sherrard charges £90 for his time.

21. Mr Sherrard was pressed on the compilation of the charges by counsel for the RTM company and he also replied to questions from ourselves. He accepts that he is not legally qualified though he reminded us that he has experience in advising on the RTM and that the applicant had instructed his firm to undertake this work.
22. He denied that the work duplicated work undertaken by the landlord's solicitors (and surveyors).
23. Counsel for the applicant reminded us that Mr Ahmed was unable for personal reasons to attend the hearing. However, counsel urged us to consider the contents of the statement signed by Mr Ahmed and dated 28 April 2014. Counsel for the RTM company submitted that we should disregard this evidence as the witness was not available to answer questions on the content of the statement.

Reasons for our decision

24. On the general issue of whether in principle a landlord can seek recovery of the costs of using managing agents to deal with a claim, we accept that such charges can be made. The applicant appears to be a substantial property company which of necessity has to appoint agents to deal with its interests. In this case the applicant chose to appoint legal advisors and a surveyor (as there was, we understand, at one point a dispute as to whether the building qualified because of the non-residential proportion of the internal floor area - see Schedule 3, paragraph 1 of the 2002 Act). The charges in advising on an RTM claim, in our view, go beyond the usual bounds of a managing agent's responsibilities to manage premises on behalf of a landlord. Accordingly, in principle, a landlord who chooses to appoint managing agents to deal with an RTM claim can recover its reasonable costs in doing so.
25. However, there are several matters that concern us and which have contributed to our decision.
26. First, we do not understand why the applicant did not raise these costs when the parties reached a compromise in 2010. Mr Sherrard in his evidence told us that the reasons for the delay was that his firm was preoccupied with the transfer of management functions once the RTM had been established. We do not find this a reasonable excuse. The applicant could easily have informed those advising the RTM company that its costs under section 88 of the 2002 Act included not only its legal and surveyor's costs but also the costs of using its managing agents. The RTM company could be forgiven for assuming that the agreement they reached was conclusive of its obligation to pay the landlord's reasonable costs under section 88. This failure was compounded, in our view, by the delay in notifying the RTM company that there are additional costs to be paid.
27. Second, we do not understand why the costs claimed have altered on several occasions. As we note above, the claim started as a claim for over £16,000 but by the time of the hearing of this application this had been

reduced to just over £6,000. It is difficult to avoid the conclusion that the applicant has found it difficult to make a plausible case for claiming the costs charged by its managing agents.

28. Although we accept that in principle, a landlord can claim the cost of employing a managing agent (either in addition to appointing professional advisors, or instead of appointing professional advisors) these costs have to be 'reasonable'. We agree with counsel for the RTM company that the issue of the reasonableness of the costs payable under section 88 must be considered for the whole of the costs claimed.

29. There is an important caveat to the costs that can be claimed under section 88. This is contained in section 88(2) which reads as follows: *'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'*.

30. In the most of general terms we accept that a landlord might reasonably incur the costs of using professional advisors and a managing agent. But any such costs must be reasonable in the sense that the landlord would have incurred them if it was personally liable to pay them.

31. We turn to the evidence proffered on behalf of the applicant. As their counsel accepted it was a difficult case to put forward as Mr Ahmed the person who had undertaken the vast majority of the work was unable to attend to give evidence and to answer questions on what he claims he did. We have read and considered Mr Ahmed's three page statement which we found of little assistance in assessing the reasonableness of his firm's charges. Mr Ahmed, far from explaining why the time he claims for was spent, simply relies on the assessment undertaken by Mr Sherrard on his behalf. As he was not present at the hearing there was no opportunity to seek clarification of his role and what he actually did. He cannot rely on time sheets or a similar record as none were prepared or kept.

32. It is for the applicant to prove that the costs were actually incurred and that they are reasonable. Without Mr Ahmed's evidence the applicants have failed to prove either of these points. Using estimates calculated by Mr Sherrard (who did little of the work which it is claimed that his company undertook) without the assistance of written records is no substitute, in our view, for a fully documented record of the work and for the person who actually claims to have undertaken the work giving evidence.

33. Nor did we find Mr Sherrard's evidence at the hearing on the work he claims to have undertaken convincing. For example, the first two items in the 'Supporting Timesheet' claim that he and Mr Ahmed together spent 14 hours considering the RTM claim notice. As we told Mr Sherrard, we could not understand how such a time estimate could be sustained. Assessing the likely time that might be justified we estimate that the very most time spent could not exceed 2 hours.

figure of £705 exclusive of VAT. We direct that this sum is paid by the RTM company to the applicant by 14 July 2014.

40. A copy of the analysis of the work undertaken is appended to this decision.

Professor James Driscoll and Lady Davies

Exhibit PS.01 - Supporting Timesheet

Description	Date	Staff Fee Level	Time Spent (hrs)	
			Director	Property Manager
Received Claim Notice, review and forward to FH with initial advices	11.02.10	Director & Property Manager	3	3
Full review of Claim Notice and obtaining land registry and Companies House info	12.02.10	Director & Property Manager	4	4
Preparation of draft Counter Notice (CN) and issue to FH Sols	15.03.10	Director	4	
Meeting with FH, FH Sols to discuss CN	17.03.10	Director	5	
Summary email to FH, FH Sols following meeting	18.03.10	Director	1.5	
Arrange CN signed by FH and issued	29.03.10	Director & Property Manager	1.5	1.5
Forward copy CN to FH Sols, chase for comments on CN reasons	30.03.10	Director	0.5	
Receive and review letter of 22.04.10 from RTM Sols. Issue response	27.04.10	Director	3	
Receive and review letter of 29.04.10 from RTM Sols and measurements	29.04.10	Director	1.5	
Receive LVT App, review, forward copy to FH and FH Sols.	11.05.10	Director & Property Manager	2	2
Call with FH Sols re LVT App	11.05.10	Director	1	
Letter to LVT with comments and extension request	11.05.10	Director	1.5	
Forward LVT response to FH Sols, arrange meeting at Barrister Chambers	13.05.10	Director	0.5	
Copies of paperwork issued to Barrister	17.05.10	Director	1	
Prepare Measurements & IH Summary and forward to FH Sols	03.06.10	Director & Property Manager	3	3
Email to FH Sols re comments on Qualification Criteria of IH	04.06.10	Director	2	
Meeting with Barrister & FH Sols at Chambers	08.06.10	Director	4	
Agree with FH Sols draft instruction letter to Surveyors	10.06.10	Director	1	
Email to FH Sols and Barrister re Car Park Spaces comments	13.06.10	Director	1.5	
Issue instruction letter to Surveyors	14.06.10	Director	1	
Correspondence with Surveyors	17.06.10	Director	1	
Preparation of Statement of Case	18.06.10	Director	5	
Receive and review letter from RTM Sols re Adjourning Hearing and new directions	25.06.10	Director	2	
Telephone conversation with RTM Sols	28.06.10	Director	0.5	
Issue letter to RTM Sols re new directions	29.06.10	Director	0.5	
Issue letter to RTM Sols re Witness Statement exchange	28.07.10	Director	0.25	
Issue letter to RTM Sols re receipt of various enclosures	09.08.10	Director	0.25	
Receive and review new NITP from FH	12.08.10	Director	2	
Review RTM Sols letter of 09.08.10 re Surveyor appointment, follow up email	23.08.10	Director	1	
Chase RTM Sols for response	31.08.10	Director	0.25	
Received 2nd Claim Notice, review and forward to FH with initial advices	23.08.10	Director	3	
Full review of 2nd Claim Notice and obtaining land registry and Companies House info	25.08.10	Director & Property Manager	4	4
Discussions with x2 Surveying Firms proposed by RTM Sols	01 & 02.09.10	Director	1	
Attempts to contact third Surveying Firm proposed by RTM Sols - multiple messages left	01 & 02.09.10	Director	0.25	
Telephone conversation with RTM Sols re Appointment of Surveyor, fee levels, plans and measurements	02.09.10	Director	1.5	
Collected and reviewed plans, make copies, issue to and discuss with FH	02 & 03.09.10	Director	3	
Letter to RTM Sols re Joint Surveyor	03.09.10	Director	1	
Email correspondence with RTM Sols	03.09.10	Director	0.5	
Email correspondence with RTM Sols	06.09.10	Director	0.5	
Email correspondence with RTM Sols	07.09.10	Director	1	
Receive correspondence from RTM Sols re Expert Instruction and review	09.09.10	Director	2	
Issue correspondence to LVT re Issues with RTM Sols	14.09.10	Director	2	
Issue correspondence to LVT with enclosures	15.09.10	Director	1.5	
Prepare and issue 2nd Counter Notice	17.09.10	Director	3	
Issue correspondence to LVT	20.09.10	Director	0.5	
Issue correspondent to LVT re postponement	24.09.10	Director	0.5	
Discussion with FH Sols re instructing Barrister for LVT Hearing	28.09.10	Director	1	
Prepare and issue explanatory correspondence with enclosures to FH Sols	05.10.10	Director	3	
Receive and review RTM Sols fax and issue comments to FH Sols	12.10.10	Director	2	
Finalise and issue Consent Order	27.10.10	Director	4	
		Total	90.5	17.5

Note: The above is not intended to be an exhaustive list/detail of all actions/calls/correspondence/emails undertaken by SEM