

In the Leasehold Valuation Tribunal
Ref: LON/OOAT/LCP/2006/0001

Applicants	Thornbury Court Limited
Represented by	Mr Simon Serota, solicitor of Wallace LLP Solicitors
Respondents	Thornbury RTM Company Limited
Represented by	Mr Faizal Faizia, (RTM Secretary)
Property	Thornbury Court, Church Road, Osterly, Middlesex, TW7 4PP

Tribunal
Ms E Samupfonda LLB (Hons)
Mr. C Kane FRICS
Mrs S Justice

1. This is an application under section 88 of the Commonhold and Leasehold Reform Act 2002, (the 2002 Act) for a determination of the Respondent's liability to pay the Applicant's reasonable costs incurred in relation to the Respondent's application to acquire the right to manage the subject property. The Applicant is the Freehold owner of the property. The Respondent is the Right to Manage Company that acquired the right to manage the property on 12th October 2004.
2. An oral pre-trial review was held on 31st May 2006, Directions made for the future conduct of the case and a hearing fixed for 27th July 2006. That hearing was adjourned with further Directions.
3. The hearing of this application took place on 6th December 2006. Mr Serota represented the Applicants and Mr Faizia represented the Respondents. Mr Gibbons, a shareholder in the Freeholder's company also attended the hearing. Both parties submitted detailed statements of case. We have therefore only referred to the salient points in this decision.
4. **Summary of the Applicant's case.**

Briefly, Mr Serota, on behalf of the Applicant stated that in his view a RTM company is liable under s88 (1) of the 2002 Act for all the costs incurred by a landlord and managing agent where they are incurred following a right to manage application. The landlord is under a

statutory duty to comply with obligations that flow from a right to manage application under ss91 to 94. The costs incurred in doing so should be regarded as costs "in consequence of a claim notice" He submitted that an unwilling landlord being asked to give up the right to manage should not have to bear the cost himself. He referred the Tribunal to a previous Tribunal decision **LON/ENF/1005/03 Chivleston, 78 Wimbledon Parkside, London SW19** and relied on the statement made by Professor Farrand QC in which he said in relation to Freeholder's costs arising from an application by tenants for collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993 "*Accordingly, it would be surprising if freeholders were expected to be further out of pocket in respect of their inevitable incidental expenditure incurred in obtaining the professional services of valuers and lawyers for a transaction and proceedings forced upon them*" He added that the recoverable costs under s33 of the 1993 Act are subject to the same reasonableness test to be applied under s88(2) of the 2002 Act since the sections to all intents and purposes contain identical provisions. He invited this Tribunal to find that it was reasonable for the Applicant to instruct Wallace LLP and engage managing agents in respect of the right to manage application and to find that the hourly rates were reasonable as determined by a leasehold valuation tribunal in relation to proceedings involving the same parties in **Thornbury Court, Church Road, Osterley, Middlesex LON/ENF/10610/04**.

He explained that the Applicant incurred additional costs in complying with the statutory obligations under s91 to 94 of the 2002 Act. He said that these costs should be recoverable, subject to the reasonableness test because they were incurred in consequence of the claim notice.

The Applicant sought to recover (i) Legal costs £6,585 plus VAT, (ii) Managing agent's fees £3,328.75 and (iii) Accountants' fees £400 + VAT.

Legal costs

Mr Serota referred to Samantha Bone's (a solicitor of Wallace LLP) witness statement. This outlined the work that was undertaken by his firm, by whom and the hourly rate charged. In response to the Respondents' challenge over the time spent on various activities, he said that the alternative time estimates suggested by the Respondent were unrealistic, for example the 20 minutes suggested for inspecting the company register excluded travelling time.

In response to the application for costs to be awarded under paragraph 10 Schedule 12, Mr Serota said that this Tribunal did not have jurisdiction to make such an order as the claim related to the Respondent's right to acquire application. That application was disposed of without a hearing. He then submitted a copy of the order dated 14 July 2004.

Accountant's costs.

The invoice dated 4. 11. 05 from Pridie Brewster states that they were retained "to assist the Applicant and the managing agent in connection with the accounting records of maintenance costs and amounts collected in respect of flats 1 and 10 Thornbury Court. Reconciling these records to enable the Statement of Estate Management and Maintenance Costs for the period ended 12 October 2004 to be prepared and calculating the balance to be paid to the RTM Company" The work was carried out in response to the Respondent's request under section 94 of the 2002 Act.

Management fees

The Applicant engaged Castlebar Management Ltd. Mr Serota conceded that two invoices, 5891 and 5863 were not recoverable. Invoice 5838 was recoverable because this related to the work carried out in response to the Respondent's request under sections 92, 93 and 94 of the 2002 Act.

5. Summary of the Respondent's case

Briefly, Mr Faizi contends that s88 (1) of the 2002 limits the recovery of reasonable costs incurred up to the service of the counter notice. In his view, these are the only costs that are incurred "in consequence of a claim notice given by a company in relation to the premises." Therefore, a RTM company's liability ceases after the counter notice has been served. He therefore conceded that the Respondent is liable for the Applicant's costs from 16th January 2004 to 4th October 2004. However he sought to limit the amount that is recoverable on the grounds of reasonableness. He referred the Tribunal to number of previous leasehold valuation tribunals. In particular he relied on the decision 69 Oxford Gardens, London W10 5UJ LON/OOAE/LCP/2005/0003, paragraphs 11, 16, 17, 22, and 24.

Legal costs

Mr Faizi did not dispute the hourly rate charged. He challenged the costs on the basis that of the 92 items of costs in the solicitor's costs schedule, only 15 items are directly consequential to the Notice of Claim. The remaining items relate to the cost of litigation between the parties under s94 of the 2002 Act. Of the 15 items that he considered payable, he challenged payability on the grounds of reasonableness as he considered that the time spent was excessive or there was duplication of work, for example he said that it should not have taken 42 minutes to peruse the Notice of Invitation or 3 hours to inspect the company members' register. He scrutinised the schedule, reduced the

time spent as he saw fit. He concluded that the costs should be £400 plus VAT based upon his revised figures.

He made an application for an order under paragraph 10 Schedule 12 that the Applicant pays the Respondent £500 costs incurred in the Respondent's Right to Manage application. He considered that the Applicant acted unreasonably by initially denying the right to acquire and subsequently admitting it. He said that he incurred additional legal costs as a result. He relied on a leasehold valuation tribunal decision **Enville Manor RTM Limited BIR/41UF/LRM/0001** in which such costs were awarded.

Managing agent's fees

Mr Faizi contended that these costs were not recoverable because they were included in the £2,775.75 paid by the Respondents for the service charge expenditure after 12 October 2004. He did not have any evidence to support this contention. He alleged that the agents supplied information in the letters dated 20th October and 6th December 2004 at their own behest.

Accountant's fees

Mr Faizi stated that the Respondent has already paid £880.01. He did not have any evidence to support this.

6. Decision

There were two main issues that required the Tribunal's determination. Firstly, does s88 (1) permit the recovery of all the reasonable costs incurred by a Freeholder following an application for the right to acquire. Secondly, of the recoverable costs, what are the amounts recoverable. In determining this application, the Tribunal had regard to the relevant law and the submissions. Although helpful, we considered that we were not bound by previous leasehold valuation tribunals.

S88 provides

- (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 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) Not relevant to this application

(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.

We decided to adopt a common sense approach to the interpretation of s88. It is our view that the effect of the words "in consequence of a claim notice" in section 88(1) is to allow the recovery of all costs that flow as a result of an application for the right to manage. Section 88(2) provides that any costs incurred are recoverable but are subject to the reasonableness test. It is apparent that a landlord has statutory obligations that only arise as a result of a claim notice being served. Section 93 imposes an obligation upon a landlord to provide information and section 94 imposes a duty to pay accrued uncommitted service charges. An existing manager also has a statutory duty under section 92 to supply details of contracts. We consider that all of this work is related to the claim notice and as such it is carried out "in consequence of a claim notice being given"

In determining the amounts that are recoverable we were in some difficulties because we did not know the context in which say letters, emails and telephone calls were made. There were legal proceedings under s94 of the 2002 Act before a leasehold valuation tribunal commenced in June 2005 in which the Applicant instructed the same professionals. Also, in respect of the legal costs there appeared to be a lot of contact between the solicitors, Peter Gibbons and the managing agents over a very short space of time. Relying on the totality of the evidence before us we adopted a rather broad brush approach. We had in mind the limitations imposed by section 88 (2). We found that it was reasonable for the Applicant to use the professional services of solicitors, accountants and managing agents. We considered that the legal costs whilst being on the high side, the hourly rate charged was not challenged and was therefore considered reasonable. The test is not whether the work could have been done cheaper, but rather whether the costs that were incurred were reasonably incurred. We did not accept that the time spent was excessive. We do however find that some of the work could have been carried out by the managing agent to save legal costs.

We considered that we did not have jurisdiction to make an order under paragraph 10 schedule 12 in respect of the Respondent's right to manage application as such an order can only be considered in the context of current proceedings before a leasehold valuation tribunal.

Determination

Legal Costs

We concluded that the costs incurred from 16th January to 29th November 2004 were recoverable as we are satisfied that they were incurred in consequence of the claim notice. There was insufficient evidence upon which we could safely find that the costs incurred thereafter were closely or sufficiently related to the notice of claim. The amounts that are recoverable have been limited as we disallowed £2980 leaving £3605 + VAT.

Accountant's fees

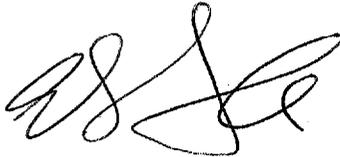
We determined that these costs are recoverable in their entirety.

Management fees.

Of the costs claimed we determined that all were recoverable with the exception of the costs incurred on 9th and 13th December 2004 £622.00 as they appeared unconnected with the RTM application. There was insufficient information provided regarding sundry calls. This left a balance £2706.25

Thus the Tribunal determined under section 88 (4) that the reasonable costs payable by the Respondent to the Applicant is the sum of £7412.13 inclusive of VAT

Chairman



Dated

13/12/06