

Ref: LON/00AZ/LCP/2007/0001

**LEASEHOLD VALUATION TRIBUNAL**

LONDON RENT ASSESSMENT PANEL

**DETERMINATION**

RE APPLICATION AS TO COSTS

UNDER SECTION 88 OF COMMONHOLD AND LEASEHOLD REFORM  
ACT 2002

**PREMISES:**

**Belmont Hall Court & Elm Court, London SE13 5DX**

**Applicant:**

Halliard Property Company Limited

**Representatives**

Mr S Serota of Wallace LLP Solicitors  
with Ms L Hillier

**Respondent:**

Belmont Hall & Elm Court RTM Company Limited

**Representatives**

Mr N L Wager of Hurford Salvi Carr Property  
Management Limited  
also Mr P Luck Company Secretary of Respondent and  
Mr S Sumner Tenant

**Hearing:**

Thursday 12 July 2007

**Tribunal:**

Professor J T Farrand QC LLD FCIArb Solicitor  
Mr J R Humphrys FRICS  
Mr C S Piarroux JP CQSW

## Introduction

1. The originating Application, dated 22 May 2007, submitted on behalf of the Applicant Company was headed: 'APPLICATION FOR DETERMINATION OF THE COSTS PAYABLE'. It stated that the Applicant was the freeholder of the Premises and that the Respondent was "the Right to Manage Company that served Notice seeking to acquire the right to manage the property on 6 February 2007 and withdrew the same on 4 May 2007". Copies of the Claim Notice and the letter of withdrawal were attached, as was the Counter Notice, dated 6 March 2007, served on behalf of the Applicant alleging, for reasons indicated rather than explained, that the Respondent was not entitled to acquire the right to manage.

2. Also attached to the Application was: "Applicant's Schedule of Costs", totalling £2,733.64 (including VAT). This Schedule comprised columns headed: Date, Activity, Description, Fee Earner, Hours, Rate and Amount which plainly related to the work and charges of the Applicant's Solicitors and totalled £2,326.50 (plus VAT), to which were added disbursements consisting of Land Registry Fees (£16) and Courier fees (£17.10 plus VAT). Accordingly, the Application stated: "The Applicant considers that the appropriate fees payable are: Legal fees £2,733.64."

3. The relevant provisions as to the Respondent's liability to pay costs and as to the Tribunal's jurisdiction are contained in ss.88 and 89 of the 2002 Act.

4. Under s.88 -

"(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. When a Claim Notice is withdrawn, under s.89 of the 2002 Act –

“(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.

(3) Each person who is or has been a member of the RTM company is also liable for those costs (jointly and severally with the RTM company and each other person who is so liable).”

6. An initial decision by the Tribunal (differently constituted), having considered the Application and attached documents, was that this matter might be dealt with by way of documents only, without an oral hearing and without an inspection. The parties were notified of this intention by Directions dated 8 June 2007 in compliance with reg.13 of the LVT (Procedure) (England) Regulations 2003. Additional Directions were made at the same time that the Respondent and the Applicant should, in effect, prepare and submit their respective statements of case and reply together with the evidence and documents on which they would wish to rely.

7. However, by letter dated 11 June 2007, the Applicant’s Solicitors wrote: “We are of the view that this matter is not suitable for a paper determination and accordingly we now request that this matter be set down for an oral hearing.” No reasons were indicated. Mr Wager for the Respondent wrote a letter dated 14 June 2007 objecting that an oral hearing was “unnecessary and superfluous on a straightforward matter of costs”. In a second letter dated 18 June 2007 he complained that “the lessees are simply facing further costs which seem both unnecessary and a further attempt by the landlord to frustrate/deter them from proceeding”. Notwithstanding these objections, if there is a request such as the Applicant’s, “the application shall be determined” by arranging an oral hearing (reg.13(4) referring to reg.14, of the 2006 Regulations). The Tribunal is not able to insist upon the initial decision to deal with the matter ‘off the papers’.

8. Subsequently, in pursuance of the other Directions, the Respondent submitted a Statement of Reply to the Application, dated 22 June 2007, and the Applicant submitted a Statement in Reply to the Respondent’s reply/case, dated 26 June 2007. However, despite the terms of the Directions, no supporting documentation, witness statements or other evidence has been submitted to the Tribunal by either side.

### **Respondent’s Case**

9. The Respondent’s Statement began with the following explanatory paragraph:

“By way of background to this matter, the lessees of the two buildings, Belmont Hall and Elm Court, wish to acquire the Right to Manage, and there are two adjoining buildings involved with some common services but administered together. The premises fall within the requirements of the Act in relation to qualifying for the Right to Manage, but for the respondents there is an issue as to how to acquire the Right to Manage with the least difficulty. The only practical issue for the RTM company is whether we are dealing with one or two applications by the RTM company when it comes to the service of the Notice of Claim; the initial Notice was on the basis of one Claim Notice. Following withdrawal of the first Claim Notice, a further Notice has now been served (where a further Counter Notice has been received).”

10. On behalf of the Respondent, it was accepted that ss.88 and 89 of the 2002 Act applied in relation to costs incurred by the Applicant but concerns were expressed as to the amount. The two primary concerns were the following:

- “Section 88 refers to an RTM company being liable for reasonable costs incurred "in consequence of a claim notice given by the company in relation to the premises". This is a clear statement of costs incurred after the notice of claim, not before. The cost Schedule includes costs prior to the service of the claim notice, to the sum of £735 + VAT, a total of £863.63.”
- “The Respondents consider the rate of charge to be excessive for the type of work involved when charged at £375 per hour. We would consider this to be excessive in respect of both:
  - a. Grade, and
  - b. The level of rate involved. The Respondents question whether it is reasonable for the lessees to be expected to pay legal costs on the basis of the most expensive Band of Grade applicable for legal charges (City of London), for work of this nature?”

11. After this the Statement queried certain items in the Applicant’s Schedule of Costs, including the comparatively insignificant cost of a Trainee “Attending at registered office to inspect Register of Members – 1 hour £105”. Also generalised views were expressed about the purpose of the legislation and the motives of landlords, before the Respondent’s Statement concluded as follows (para.7):

“Subject to the Tribunals views and decision in relation to [the] above, the Respondents believe that if the landlord is entitled to incur such costs at the expense of the RTM company then costs of between £500 and £1,000 would have been more appropriate.”

12. Finally, the Respondent’s statement added two applications:

“The Respondents considered this matter could have reasonably been dealt with by correspondence. Accordingly it is requested that:

- a. A Section 20c application is considered by the Tribunal in relation to all costs arising in relation to the determination of this issue, and
- b. The Tribunal makes an award against the Applicant of £500 to the Respondent in relation to costs in attending this hearing.”

### **Applicant’s Reply**

13. The Statement in Reply on behalf of the Applicant began by stressing the importance of the matter to the Applicant as justifying the costs incurred generally so as to preserve the premises as a valuable investment asset and, in particular, as to inspecting the Register of Members and as to the charging rate. The following extracts are quoted as embodying the substance of the Applicant’s position:

“It is important to a Landlord company to ensure that a right to manage company is properly constituted and the right to manage claim has been properly made. There is a risk that for example allowing an invalidly constituted company to

exercise the right to manage could leave a Landlord exposed for failure to provide services in the period in which the right to manage was purportedly being exercised.”

“The legislation is complex. The need to ensure the Counter-Notice is correct is of particular importance in circumstances where there are decisions of the Leasehold Valuation Tribunal holding Counter-Notices to be invalid and where the legislation does not provide for defective Counter-Notices to be saved in the way Section 81(1) saves an otherwise defective Notice of Claim.”

“The importance of the matter to the client, the complexity of the legislation and the potential consequences of getting the Counter-Notice wrong justify the work being carried out by a Grade A fee earner.”

“Inspection of the Register of Members goes to the heart of the entitlement to exercise the right to manage. Section 79 of the 2002 Act provides that a claim to exercise the right to manage can only be made if on the date Notice of Claim is given the membership of the RTM Company includes a number of qualifying tenants which is not less than one half of the total number of flats in the premises.

Section 84(2) of the 2002 Act requires a Counter-Notice to contain a statement either admitting or disputing that the RTM Company was on the date the Notice of Claim was given entitled to acquire the right to manage. A Landlord will accordingly need to determine the number of members of the RTM Company at the date the RTM Claim was given. The Register of Members is the only relevant evidence of who were members of the RTM Company on the date the Notice of Claim was given. (See Sections 22 and 352 of the Companies Act 1985).

Inspection of the Register indicated that on the date the Notice of Claim was given there were no members of the RTM Company. Under the relevant Companies Act legislation the Register of Members has to be available for inspection by Members of the public on each working day. There is no provision or entitlement to require a copy of the Register to be produced. Inspection is necessary in order to prevent backdated entries being made in the Register of Members.”

“There is an entitlement as of right to an oral hearing. In these circumstances it cannot be said that there is anything improper in the conduct of the Applicant in seeking such an oral hearing. In any event an oral hearing is justified in this matter because of the issues of principle raised by the Respondent in its case.”

14. In addition, the Applicant’s Reply included (para.8) a statement addressing the first point made for the Respondent: “The Decision of the Tribunal in Chaucer Street expressly held that cost of work done prior to receipt of a Claim Notice could be recoverable.” This refers to the decision of a different LVT in *St Leonard’s Properties Limited v Chaucer Court (Guildford) RTM Company Limited* (16 January 2007; Ref CHI/43UD/LCP/2006/0001), a copy of was attached. The relevant passages of the decision were the following:

“11. Mr Serota defended the inclusion in the Schedule of preliminary costs of £270 incurred for work done by him personally on receipt of the initial letter but before the service of the first Notices of Claim. This work involved reviewing Office Copy Entries, 2 letters and a telephone call. It was a necessary part of the overall work on the case, and it was reasonable for him to deal with these initial matters before passing it to a partner and assistant. He also argued that it was work done *“in consequence of a claim notice”* within Section 88(1) of the 2002 Act.”

“18. In relation to the preliminary work, Mr Percy contended that these costs were beyond the scope of Section 88(1). In his submission the words *“costs incurred ... in consequence of a notice of claim”* meant costs restricted to work carried out after the service of the Notices and not before, and to issues of entitlement and validity of the Notices.”

“23. On the construction of Section 88(1), the Tribunal took the view that the recoverable costs were wider in scope than the equivalent statutory provisions in respect of enfranchisement under the 1993 Act. Giving the words *“in consequence of”* their natural meaning, the Tribunal considered that costs incurred as a result of the acquisition of the RTM were not limited to those incurred after the service of the Claim Notice, but could in principle include preliminary work, provided it was directly relevant.”

15. The Applicant’s Reply also conceded (para.10) that the inclusion in the Schedule of costs of 1.3 hours at £225 per hour – for 28 February 2007 and charged at £292.50 plus VAT – was an error, stating: “Time involved in preparing the Counter-Notice is included in the 1 hour spent on the 2nd March.”

16. Reliance was also placed on behalf of the Applicant upon a previously perceived principle referred to by LVTs in enfranchisement cases that because a form of compulsory purchase was involved “between an unwilling seller and at a price below market value” freeholders should not be expected to be “further out of pocket in respect of their inevitable incidental expenditure”. In accordance with this principle, it was said, Parliament had provided that such expenditure is recoverable “subject only to the requirement of reasonableness” (citing s.33(1) of the Leasehold Reform, Housing and Urban Development Act 1993). It was submitted that the same principle applies to a claim for recovery by a landlord of its costs of a right to manage claim (see para.s 6 and 16 of the Applicant’s Statement in Reply).

### **Hearing**

17. At the Hearing, which lasted less than one hour, Mr Serota essentially repeated the submissions already made in the Applicant’s Reply about the importance of such a claim to his client and the need to investigate the membership of an RTM Co.

18. He also repeated his point about there being “an entitlement as of right to an oral hearing”. In these circumstances, he asserted, it was not improper for the Applicant to seek such a hearing from which it followed that it could not be found “just and equitable” for the Tribunal to make an order limiting the recovery of costs of the proceedings as a

service charge under s.20C of the Landlord and Tenant Act 1925. On the basis of the same point, he submitted as that it was "necessarily reasonable" for the Applicant to request an oral hearing from which it followed that the Tribunal would not be justified in making a costs order against the Applicant under para.10 of Schedule 12 to the 2002 Act.

19. In response to queries from the Tribunal, Mr Serota stated that instructions from his client to act in this matter had been received by letter dated 29 March 2006. He explained that this letter had not been included in the Schedule of Costs because it was not customary to charge for reading incoming letters and that it had not been copied to the Tribunal or the Respondent because it was privileged. However, he read out an extract appearing to indicate that the letter had informed him about a communication received from the Respondent RTM Co. He also corrected the date of the first "activity" listed in the Schedule of Costs from 28 April 2005 to 28 April 2006.

20. Mr Serota similarly confirmed that his client was the Applicant, a limited company with a separate legal identity although within the Freshwater Group for which his firm held a retainer for work of the sort involved in this case. He stated that companies in the Freshwater Group accepted his charging rate of £375 per hour plus VAT.

21. For the Respondent, Mr Wager had prepared "Notes on the Applicants statement in reply" for his own assistance but which he had copied for reading by the Tribunal as well as by Mr Serota.

22. In particular, it may be mentioned that the Note referred to the "principle" relied upon by the Applicant (see para.16 above) as "a red herring; there is no dispute over the principle of costs".

23. Otherwise, at the Hearing, Mr Wager challenged Mr Serota's charging rate of £375 per hour as too high, contending that a rate of £225 per hour would be reasonable. However, he produced no evidence, oral or documentary in support.

24. In addition, Mr Wager drew attention to highlighted passages of his Notes emphasising the general policy leading to the 'right to manage' legislation.

### **Decisions**

25. Firstly, it should be observed that the perceived principle of landlords not being out of pocket as to costs relied on for the Applicant and not disputed for the Respondent (see para.s 16 and 22), seems of no actual assistance to the Tribunal. At most, it is a principle which may have motivated Parliament in enacting the provisions as to recovery of costs in the 1993 and 2002 Acts the wording of which the Tribunal has to consider and apply. In any event, since service charges are not supposed to involve any profit for a landlord and management may prove onerous for the tenants' RTM Co, any comparison with compulsory purchase "at a price below market value" seems basically flawed.

26. Secondly, the Tribunal accepts Mr Serota's submission that the Applicant had a sufficient interest in the future management of the Premises to justify appropriate investigation so as to be satisfied of the Respondent's entitlement to claim the statutory right to manage. Accordingly, the Tribunal considers that the cost of employing a trainee solicitor to inspect the register of members (ie £105 plus VAT) was reasonably incurred. Indeed, the Tribunal is persuaded by Mr Serota's arguments, set out above, that such

inspections should be regarded as good practice on the part of solicitors acting for landlords on receipt of Notice of a RTM Claim.

27. Thirdly, however, the Tribunal does not accept Mr Serota's submission that costs incurred prior to receipt of the Notice to Claim are recoverable under s.88(1) of the 2002 Act. Instead, the Tribunal agrees with Mr Wager's view that to regard such costs as incurred "*in consequence of*" the Notice would be to give the words an unnatural meaning. It is appreciated that this view involves differing from the LVT decision in the *Chaucer Court* case and, therefore, the Tribunal's reasoning should be further explained.

28. The earlier LVT referred to the words "*in consequence of*" being "wider in scope than the equivalent statutory provisions in respect of enfranchisement under the 1993 Act". However, the equivalent words actually used in s.33(1) of the Leasehold Reform, Housing and Urban Development Act 1993 are "*in pursuance of*". For enfranchisement purposes, the Tribunal is not aware that costs prior to an initial notice have ever been regarded as recoverable by the freeholder/landlord and considers that the difference in words is simply semantic and not indicative of Parliament's intention to enact a wider costs rule.

29. Also the Tribunal considers that s.88(2) of the 2002 Act affords assistance in reaching the right result. This subsection provides, in effect, that costs are not recoverable by a landlord unless they "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". The Tribunal does not consider that a landlord could reasonably be expected to incur potentially wasted costs if they were payable out of his own pocket but would wait until the Notice of Claim had been received.

30. Although Mr Serota, as mentioned, has informed the Tribunal of a letter from his client dated 29 March 2006, the Tribunal did not understand this to contain instructions to start acting immediately but only information about a communication possibly calling for future action. In any event, the first scheduled activity was apparently not until 28 April 2006 and does not appear to be as a result of the letter. It is possible that the retainer which the Applicant's Solicitors have allows them, in effect, to be self-instructing in response to communications but the Tribunal has no information about the terms of their retainer.

31. Further, the Tribunal sees from the Schedule of Costs that that first activity was described as "Documents Engaged in reviewing Section 82 Notice & property schedule". Similarly, the third listed activity is described as "Documents Engaged in reviewing further Section 82 Notice". Those Notices under s.82 of the 2002 Act would be from the Respondent as a RTM Co. requiring the provision of information to enable the inclusion of required particulars in the Notice of Claim. Accordingly, it appears to the Tribunal that those and subsequent costs were incurred in consequence of s.82 notices and, at best, in anticipation of a Notice of Claim. There is no provision making costs incurred by a landlord in consequence of a s.82 notice recoverable from a RTM Co. However, the Tribunal observes that, whilst it is possible that they constitute management costs recoverable by way of service charges, this question was not raised and was not one for it to determine on the present Application.



32. Accordingly, the Tribunal has decided to disallow recovery of costs attributable to activities listed in the Applicant's Schedule of Costs as occurring before 6 February 2007, the date of the Notice of Claim. This means a deduction from the sum claimed of £863.63 (including VAT).

33. Fourthly, the Tribunal is unable to find that Mr Wager has established his challenges on behalf of the Respondent against any of the remaining items listed in the Applicant's Schedule of Costs (except for the conceded item: see para.15 above). The activities described and the rates charged are, in the Tribunal's opinion, within the range of what it was reasonable to do in consequence of receipt of a Notice of Claim on behalf of a landlord and for a landlord ordinarily to expect to pay for. It is true that Mr Serota's personal charging rate is, according to the Tribunal's general knowledge and experience, well above average. Nevertheless, there are no grounds for supposing that it fails the statutory test of being more than his client, the Applicant, would reasonably have expected to be liable to pay if meeting the cost itself. It must be appreciated that there is no obligation upon a landlord to restrict costs otherwise reasonably incurred to the cheapest rates or to rates acceptable to the RTM Co and its members. Employing a solicitor of Mr Serota's established experience and expertise in this area of law and practice cannot be dismissed as unreasonable on the part of the Applicant.

34. Therefore, the Tribunal has decided that the Respondent is liable to pay the sum claimed by the Applicant for costs, namely £2,733.64, *but less* £343.69 (see para.15) + £863.63 (see para.28) = £1,207.32. This means that the amount payable under s.88(1) of the 2002 Act according to the Tribunal's determination is **£1,526.32**.

35. Finally, the Tribunal does not accept Mr Serota's submission that because a party is entitled to an oral hearing on request it follows that a request is necessarily reasonable. On the contrary, the Tribunal considers that, where there has been a considered decision of the Tribunal that the matter might be suitably dealt with by way of documents only, a party requesting an oral hearing ought to be able to show that there were good reasons for imposing the time and costs involved on the other party and, indeed, on the Tribunal and that the request was not made irresponsibly. In making the request for an oral hearing, the Applicant's Solicitors offered no explanation of why it was considered that this matter was not suitable for a paper determination. At the Hearing neither party submitted any oral or other evidence, nor was any argument made which had not already been made in writing or any additional information provided which could not have been provided in writing. In these circumstances, it is the opinion of the Tribunal that the Applicant, through its Solicitors, acted unreasonably in connection with the proceedings by requesting an oral hearing unnecessarily and for no demonstrated and justifiable purpose.

36. Accordingly, the Tribunal has determined to order that the Applicant shall pay the Respondent's costs incurred in connection with this Hearing, not exceeding £500, by virtue of the power conferred by para.10 of Schedule 12 to the 2002 Act.

37. The Respondent RTM Co. could not, in any case, be made liable for the Applicant's costs incurred in connection with these proceedings (see s.88(3) of the 2002 Act). However, it remains possible that the Applicant may seek to recover such costs from tenants as a service charge. In all the circumstances, outlined above, the Tribunal considers that this would not be just and equitable.

38. Accordingly, the Tribunal hereby orders that none of the costs incurred by the Applicant landlord in connection with the present proceedings shall be taken into account in determining the amount of any service charge payable by any tenants of flats at the Premises.

CHAIRMAN

*Julian Forward*

DATE 18 July 2007