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HM COURTS & TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/00HP/LCP/2012/0002

REASONS

Application : Section 88 Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”)

Applicant/Freeholder : Regisport Limited

Respondent/RTM Company : 36 Joliffe Road RTM Co Limited

Building : 36 Joliffe Road, Poole, Dorset, BH15 2HD

Date of Application : 29 March 2012

Date of Directions : 2 April 2012

Hearing : considered by the Tribunal without a hearing pursuant to Regulation 13 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 as amended, and in accordance with the directions given by the Tribunal

Member of the Leasehold Valuation Tribunal : Mr P R Boardman MA LLB

Date of Tribunal’s Reasons : 25 June 2012

Introduction

1. This is an application by the Applicant/Freeholder under section 88 of the 2002 Act to determine the liability of the Respondent/RTM Company for the costs of the Applicant/Freeholder in relation to work carried out in response to a claim notice under section 79 of the 2002 Act
2. The grounds of the application were that :
 - a. the Respondent/RTM Company served a right to manage claim notice on the Applicant/Freeholder on 6 August 2011
 - b. on 8 August 2011 the Applicant/Freeholder served a counter-notice admitting [sic] the Respondent/RTM Company’s right to acquire the management of the Building

- c. on 19 January 2012 the Applicant/Freeholder sent the Respondent/RTM Company an invoice for the legal fees incurred by the Applicant/Freeholder, totalling £1,062.60

Inspection

3. Neither party had requested the Tribunal to carry out an inspection, and, in light of the limited issues in this case, the Tribunal did not do so in the circumstances

Documents

4. The documents before the Tribunal are :
 - a. the Applicant/Freeholder's bundle, pages 1 to 172
 - b. the Tribunal's decision dated 22 December 2011 that the Respondent/RTM Company was entitled to acquire the right to manage on the relevant date

The Legal background

5. The material parts of the 2002 Act are as follows :

Section 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).....

(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

Schedule of Applicant/Freeholder's costs 25 January 2012

6. The Applicant/Freeholder stated that by virtue of section 88 of the 2002 Act, the Respondent/RTM Company was liable for reasonable costs incurred by the Applicant/Freeholder in consequence of the claim notice. The effect of the words “in consequence of a claim notice” in section 88(1) was to allow the recovery of all costs which flowed as a result of an application for the right to manage, subject to the test in section 88(2) that costs were to be regarded as reasonable only if they might reasonably be expected to have been incurred by the Applicant/Freeholder if the Applicant/Freeholder had been personally liable for all such costs : the LVT decision in Woodgrange House, quoting the LVT decision in Thornbury Court
7. The fee earner having conduct of the Applicant/Freeholder’s response to the claim notice was Robert Plant, who was a grade B fee earner with 7 years’ post qualified experience and was a partner in Tollhurst Fisher Solicitors, based in Essex. Tollhurst Fisher Solicitors used computerised time recording. Time charged was at the rate of £200 an hour, in units of 6 minutes. Tollhurst Fisher Solicitors sent a letter to the Applicant/Freeholder setting out the hourly rate to be charged, which the Applicant/Freeholder agreed, thus satisfying the test in section 88(2)
8. The Applicant/Freeholder was not to be out of pocket in respect of inevitable expenditure incurred in a transaction forced upon it, such as the right to acquire the management of the Building : LVT decision in Sandringham Lodge
9. Costs were presumed to be reasonably incurred and reasonable in amount if they were incurred with the express or implied approval of the client : CPR Part 48.8
10. Costs recoverable under section 60 of the Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”), for which the test of reasonableness was the same as that under section 88(2) of the 2002 Act, were those which the Applicant/Freeholder was contractually liable to pay insofar as recovery could not be obtained by the Respondent/RTM Company : LVT decision in 12 Regency Lodge
11. Such contractual liability could only be on an indemnity basis : Court of Appeal decision in *Gomba v Minorities Finance* [1992] 4 All ER 588
12. The Respondent/RTM Company was required to prove beyond a shadow of a doubt that the Applicant/Freeholder would not have paid the costs if it had been personally liable for them, and any doubt was to be resolved in favour of the Applicant/Freeholder, in accordance with CPR Part 44.4 : *Gomba v Minorities Finance*
13. In a case under section 24 of the 1993 Act, which had the same underlying ethos as section 88 of the 2002 Act, the LVT was not prepared to determine the costs as unreasonable as no evidence had been provided to suggest that the solicitors would not have been employed on the same terms if the reversioner in that case had been liable for the costs : LVT decision in 1-30 Hamden Court

14. Similarly, in a case under section 60 of the 1993 Act, which had the same underlying ethos as section 88 of the 2002 Act, the absence of the required evidence resulted in the tenant in that case being liable for the landlord's costs in full : LVT decision in 1 Willow Court
15. The evidence had to be strong and sufficient, and it was not enough to submit mere subjective opinion. The use of weak evidence could amount to unreasonable behaviour giving rise to a claim for costs : LVT decision in 9 Camarthen Green, a case under section 60 of the 1993 Act, which had the same underlying ethos as section 88 of the 2002 Act
16. The legal services provided to the Applicant/Freeholder were :
- a. correspondence :
 - it was reasonable for the Applicant/Freeholder to seek comprehensive advice from its solicitors and for the solicitors to give advice and keep the Applicant/Freeholder informed throughout
 - it was therefore reasonable for the Applicant/Freeholder to pay the costs in connection with obtaining instructions and giving advice; such costs were incidental to the investigation and were reasonably expected to have been incurred if the Applicant/Freeholder were personally liable for such costs
 - b. preparation :
 - a review of the Land Registry entries was undertaken to ensure that the participating tenants were registered proprietors and to establish the qualification of the Building and the participating tenants; it was also necessary to ensure that there were no adverse entries on the Register which might affect the participating tenants' right to manage
 - it was essential to consider the Respondent/RTM Company's claim notice and determine the validity of its content and service
 - a review of the Building on Google Earth and Street View and a review of a sample lease for a flat in the Building was undertaken to consider the qualification of the Building
 - it was necessary to consider the Respondent/RTM Company's constitution to ensure that it had been formed in compliance with sections 73 and 74 of the 2002 Act to determine the number of subscriber members and the premises it would manage : LVT decision in Belmont Hall Court and Elm Court
 - a counter-notice was then drafted
 - the law and statutory provisions were complex, and required particular attention to detail : LVT decision in Sandringham Lodge
17. The breakdown of costs was as set out in the Appendix to these reasons

Respondent/RTM Company's points of dispute 21 May 2012

18. The Respondent/RTM Company stated that the relevant chronology was :
- a. 6 July 2011 claim notice

- b. 8 August 2011 counter-notice denying right to manage
- c. 30 September 2011 Respondent/RTM Company applied to the Tribunal for determination that it was entitled to the right to manage
- d. 22 December 2011 Tribunal determined that Respondent/RTM Company was entitled to acquire the right to manage
- e. 7 February 2012 Respondent/RTM Company acquired the right to manage

19. The fact that time had been spent on a task did not necessarily mean that the time was justified or that the cost of that time was recoverable. Section 88(2) of the 2002 Act acted as a check against the risk that both time spent and costs claimed would increase unreasonably in a case as the costs were to be paid by a third party

20. The LVT decisions referred to by the Applicant/Freeholder were not binding on the Tribunal. In any event, the LVT decisions dealing with cases under the 1993 Act referred to did not assist with this case, which was under the 2002 Act. The *Gomba v Minorities Finance* case related to a provision in a mortgage deed, and was of no assistance in this case. The Civil Procedure Rules did not apply to the Tribunal

21. The Applicant/Freeholder's solicitor's hourly rate was not considered unreasonable. The solicitor who had dealt with the matter was Robert Plant, who had vast experience in these matters

22. In the schedule of costs there were some discrepancies between the dates of letters and the dates when time was recorded. Copies of the complete exchange of correspondence were before the Tribunal

23. Comments on individual items in the schedule of costs were as follows :

24. Correspondence

- a. 22 July 2011 letter to client : this was likely to be a client care letter in standard form : allow 1 unit and reduce to £20
- b. 22 July 2011 letter to Respondent/RTM Company : this merely enclosed a 2-page document headed "schedule of responsibilities"; the members of the Respondent/RTM Company perceived this to be intimidatory and intended to discourage them from continuing with the claim to be entitled to acquire the right to manage; this letter was not "in consequence of" the claim notice but mainly consisted of advice which was for the Respondent/RTM Company's own solicitors to give to the Respondent/RTM Company; disallow
- c. 29 July 2011 letter to Respondent/RTM Company's solicitors (actually dated 1 August 2011) : this was merely a letter of acknowledgment which did not advance the right to manage process and was therefore not "in consequence of" the claim notice, and if the Applicant/Freeholder had been personally liable for the cost the Applicant/Freeholder would not have been reasonably expected to incur that cost; disallow

- d. 5 August 2011 letter to Respondent/RTM Company's solicitors (actually dated 8 August 2011) : this merely enclosed a letter of the same date to the Respondent/RTM Company and a copy of the counter-notice; paragraph 5 of the claim notice, which was a prescribed form, provided for counter-notice to be given at the registered office of the Respondent/RTM Company; copying to the Respondent/RTM Company's solicitors was not "in consequence of" the claim notice, and if the Applicant/Freeholder had been personally liable for the cost the Applicant/Freeholder would not have been reasonably expected to incur that cost; disallow
 - e. 10 August 2011 and 13 September 2011 letters to Respondent/RTM Company's solicitors (actually dated 17 August 2011 and 16 September 2011) : both letters related to the reason why the Applicant/Freeholder denied the right to manage in the counter-notice; those reasons were not upheld by the Tribunal, which found that the Respondent/RTM Company was entitled to acquire the right to manage; costs incurred in pursuing an argument which was found to be incorrect were not "in consequence of" the claim notice, and if the Applicant/Freeholder had been personally liable for the cost the Applicant/Freeholder would not have been reasonably expected to incur that cost; disallow both letters
 - f. 3 January 2012 letter to client : this would have been a letter informing the Applicant/Freeholder of the result of the Tribunal's decision that the Respondent/RTM Company was entitled to acquire the right to manage, which was received on that date; disallow
 - g. 5 January 2012 letters to client and Respondent/RTM Company's solicitors : the Respondent/RTM Company's solicitors had not received a letter of that date; there was a letter dated 4 January 2012, which the Respondent/RTM Company's solicitors acknowledged on 11 January 2012, but there was no contact between the solicitors between those dates, and therefore no development requiring the Applicant/Freeholder's solicitors to write to their client on 5 January 2012; disallow both letters
25. Telephone calls : 19 August 2011 to Respondent/RTM Company's solicitors : the call was from Lisa and stated that they had received the Respondent/RTM Company's solicitors' letter, but Robert Plant was on holiday until 1 September and asked for an extension of the deadline for a couple of days; this was not "in consequence of" the claim notice, but purely in relation to the internal administration of the Applicant/Freeholder's solicitors; disallow
26. Preparation : the time spent on preparation was not considered unreasonable
27. Anticipated costs :
- a. the application for membership of the Respondent/RTM Company was not drafted by the Applicant/Freeholder's solicitors but by the Applicant/Freeholder's managing agents, as was evident from their letter dated 24 February 2012 sent direct to the Respondent/RTM Company; disallow £20
 - b. otherwise the costs were not considered unreasonable
28. Disbursements : these were not considered unreasonable

29. Summary : the Respondent/RTM Company considered that its liability was £777 :

a. fees	£640
b. VAT	£128
c. disbursements	<u>£9</u>
d. total	£777

The Tribunal's findings

General

30. The Tribunal makes the following general findings about costs which are payable under section 88 of the 2002 Act :

- a. in the first place, it would have been very easy for Parliament to have provided for an RTM company to have been liable for all the other party's costs, and then on an indemnity basis, if that had been Parliament's intention
- b. in the second place, and on the contrary, subsection 88(1) provides only that an RTM company is to be liable for :
 - reasonable costs
 - incurred by the other party in consequence of a claim notice given by the RTM company
- c. in the third place, the test of reasonableness is that set out in subsection 88(2)
- d. in the fourth place, the Court of Appeal decision in *Gomba v Minorities Finance* is of no assistance to the Tribunal in this case, as it related to a mortgagee's contractual entitlement to costs under the terms of a mortgage deed
- e. in the fifth place, the previous LVT decisions referred to by the Applicant/Freeholder are not binding on the Tribunal
- f. in the sixth place, and in any event, the previous LVT decisions relating to costs in enfranchisement and lease extension cases under the 1993 Act are of no assistance to the Tribunal in this case as the provisions of sections 33 and 60 of the 1993 Act are in different terms from those in section 88 of the 2002 Act
- g. in the seventh place, the Civil Procedure Rules do not apply to the Tribunal

The costs claimed by the Applicant/Freeholder

31. In relation to Mr Plant's charging rate, the Tribunal finds, from its knowledge and expertise in these matters, that the hourly rate of £200 an hour claimed was reasonable in all the

circumstances, and, in making that finding, the Tribunal has taken into account the concession in that respect in the Respondent/RTM Company's points of dispute

32. The Tribunal also finds, again from its knowledge and expertise in these matters, that the charging unit of 6 minutes was reasonable, and, in making that finding, the Tribunal has taken into account the fact that there is no challenge in this respect in the Respondent/RTM Company's points of dispute

33. In relation to the individual items of costs challenged in the Respondent/RTM Company's points of dispute, the Tribunal makes the following findings

34. Correspondence

- a. 22 July 2011 letter to client : there is no copy of this letter before the Tribunal, but the Tribunal accepts the submission in the Respondent/RTM Company's points of dispute that it is likely that this was a client care letter in standard form, and allows 1 unit and reduces the figure claimed to £20
- b. 22 July 2011 letter to Respondent/RTM Company : the Tribunal finds that there was no need for a separate letter to the Respondent/RTM Company in the light of the letter to the Respondent/RTM Company's solicitors of the same date, and that if the Applicant/Freeholder had been personally liable for the cost the Applicant/Freeholder would not have been reasonably expected to incur that cost; the Tribunal disallows this item
- c. 29 July 2011 letter to Respondent/RTM Company's solicitors (actually dated 1 August 2011) : the Tribunal accepts the submission in the Respondent/RTM Company's points of dispute that this was a letter of acknowledgment; however, the Tribunal does not accept the submission that it was not "in consequence of" the claim notice, or that if the Applicant/Freeholder had been personally liable for the cost the Applicant/Freeholder would not have been reasonably expected to incur that cost, in that the Tribunal finds that the letter was acknowledging receipt of documents sent by the Respondent/RTM Company's solicitors as a normal part of the right to manage process; the Tribunal allows this item
- d. 5 August 2011 letter to Respondent/RTM Company's solicitors (actually dated 8 August 2011) : the Tribunal accepts the submission in the Respondent/RTM Company's points of dispute that this merely enclosed a letter of the same date to the Respondent/RTM Company and a copy of the counter-notice; however, the Tribunal does not accept the submission that it was not "in consequence of" the claim notice, or that if the Applicant/Freeholder had been personally liable for the cost the Applicant/Freeholder would not have been reasonably expected to incur that cost, in that, as the Tribunal finds, it would have amounted to professional discourtesy if the Applicant/Freeholder's had not sent to the Respondent/RTM Company's solicitors a copy of a letter being sent direct to their client, and the letter was accordingly part of the right to manage process; the Tribunal allows this item

- e. 10 August 2011 and 13 September 2011 letters to Respondent/RTM Company's solicitors (actually dated 17 August 2011 and 16 September 2011) : the Tribunal accepts the submission in the Respondent/RTM Company's points of dispute that both letters related to the reason why the Applicant/Freeholder denied the right to manage in the counter-notice; that those reasons were not upheld by the Tribunal, which found that the Respondent/RTM Company was entitled to acquire the right to manage; that costs incurred in pursuing an argument which was found to be incorrect were not "in consequence of" the claim notice; and that if the Applicant/Freeholder had been personally liable for the cost the Applicant/Freeholder would not have been reasonably expected to incur that cost; the Tribunal disallows both letters
 - f. 3 January 2012 letter to client : there is no copy of this letter before the Tribunal, but the Tribunal accepts the submission in the Respondent/RTM Company's points of dispute that it is likely that this would have been a letter informing the Applicant/Freeholder of the result of the Tribunal's decision that the Respondent/RTM Company was entitled to acquire the right to manage, which was received on that date; the Tribunal finds that this was not "in consequence of" the claim notice, but in consequence of an argument which was found by the Tribunal to be incorrect, and that if the Applicant/Freeholder had been personally liable for the cost the Applicant/Freeholder would not have been reasonably expected to incur that cost; the Tribunal disallows this item
 - g. 5 January 2012 letters to client and Respondent/RTM Company's solicitors : there is no copy of either letter before the Tribunal, and the Tribunal accepts the submission in the Respondent/RTM Company's points of dispute that the Respondent/RTM Company's solicitors had not received a letter of that date, that there was a letter dated 4 January 2012 (in respect of which the Tribunal has allowed the claimed costs on the assumption that the letter claimed as "3 January" was in fact the letter dated 4 January in the papers before the Tribunal), which the Respondent/RTM Company's solicitors acknowledged on 11 January 2012, but that there was no contact between the solicitors between those dates, and therefore no development requiring the Applicant/Freeholder's solicitors to write to their client on 5 January 2012, and that if the Applicant/Freeholder had been personally liable for the cost the Applicant/Freeholder would not have been reasonably expected to incur that cost; the Tribunal disallows both items
35. Telephone calls : 19 August 2011 to Respondent/RTM Company's solicitors : the Tribunal accepts the submission in the Respondent/RTM Company's points of dispute that this was not "in consequence of" the claim notice, but purely in relation to the internal administration of the Applicant/Freeholder's solicitors, in that the call was from Lisa and stated that they had received the Respondent/RTM Company's solicitors' letter, but Robert Plant was on holiday until 1 September and asked for an extension of the deadline for a couple of days; the Tribunal disallows this item
36. Anticipated costs : the Tribunal accepts the submission in the Respondent/RTM Company's points of dispute that the application for membership of the Respondent/RTM Company was not drafted by the Applicant/Freeholder's solicitors but by the Applicant/Freeholder's managing agents, as was evident from their letter dated 24 February 2012 sent direct to the Respondent/RTM Company; the Tribunal disallows £20

37. In relation to the other items in the schedule of costs, the Tribunal notes the concession in the Respondent/RTM Company's points of dispute that the other items were not considered unreasonable, and finds that those other items are not in issue before the Tribunal accordingly

38. The Tribunal therefore finds that the costs payable by the Respondent/RTM Company to the Applicant/Freeholder under section 88 of the 2002 Act are £680, as set out in the final column of the schedule forming the Appendix to these reasons, plus VAT, plus disbursements of £9

Signed

P R Boardman

A Member of the Tribunal
appointed by the Lord Chancellor

Dated 25 June 2012

HM COURTS & TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/00HP/LCP/2011/0002

36 Joliffe Road, Poole, Dorset, BH15 2HD

Appendix

Schedule of costs

36 Jolliffe Road Schedule of costs

Correspondence	hours	charge	charge allowed
22/07/2011 client	0.18	60	20
22/07/2011 directors	0.06	20	0
22/07/2011 solicitors	0.06	20	20
29/07/2011 client	0.06	20	20
29/07/2011 solicitors	0.06	20	20
05/08/2011 RTM Co	0.06	20	20
05/08/2011 solicitors	0.06	20	20
10/08/2011 solicitors	0.06	20	0
13/09/2011 solicitors	0.06	20	0
03/01/2012 client	0.06	20	0
03/01/2012 solicitors	0.06	20	20
05/01/2012 client	0.06	20	0
05/01/2012 solicitors	0.06	20	0
19/01/2012 solicitors	0.12	40	40
19/01/2012 contractors	0.06	20	20
19/01/2012 contractors	0.06	20	20
total		380	220
Telephone			
22/07/2011 client in	0.06	20	20
(LC) 19/08/2011 solicitors out	0.06	18	0
total		38	20
Preparation			
29/07/2011 reviewing LR entries, Google Earth, Street View, RTM Co constitution, leases, and claim notice	1.06	220	220
05/08/2011 c/notice	0.06	20	20
10/08/2011 reviewing RTM Co minutes and Article 26	0.06	20	20
13/09/2011 reviewing cases	0.06	20	20
19/01/2012 drafting contract notices drafting contractors notices	0.12	40	40
19/01/2012 drafting contractors notices	0.12	40	40
total		360	360
Anticipated			
reviewing reconciliation			
accounts	0.06	20	20
letter solicitors	0.06	20	20
letter client	0.12	40	40

36 Jolliffe Road Schedule of costs

drafting	membership application	0.06	20	0
total			100	80
Disbursements				
Land Registry	entries		8	8
Company search			1	1
total			9	9
total costs		£	878.00	680
VAT		£	175.60	
disbursements		£	9.00	9
total costs		£	1,062.60	