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First-tier Tribunal
Property chamber
(Residential Property)

Case reference	:	**CAM/22UB/LCP/2015/0001**
Property	:	**Park Lodge,** **Queens Park Avenue,** **Billericay,** **Essex CM12 0QH**
Applicant **Represented by**	:	**Genesis Housing Association Ltd.** **Liam Varnam of counsel (Winckworth Sherwood)**
Respondent **Represented by**	:	**Park Lodge (Billericay) RTM Co. Ltd.** **Dudley Joiner (lay representative)**
Date of Application	:	**9th January 2015**
Type of Application	:	**To determine the costs payable on service of an RTM notice (Section 88 of the Commonhold and Leasehold Reform Act 2002 ("the Act")**
Tribunal	:	**Judge Edgington (solicitor, chair)** **Judge Jones LLM MA (CANTAB)**
Date and venue for Hearing	:	**28th April 2015 at Unit 4C Quern House, Mill Court, Great Shelford, Cambs. CB22 5LD**

DECISION

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1. The reasonable costs incurred by the Applicant landlord ("Genesis") in consequence of a Claim Notice given by the Respondent in relation to the property are assessed at £1,937.50.

Reasons

Introduction

2. The Respondent is a Right to Manage company ("RTM") which served a claim notice on the Genesis on or about the 10th April 2014 giving the 26th August 2014 as the date for it to take over management. Genesis readily accepted that the RTM was entitled to take over management and served a counter-notice to that effect on or about the 16th May 2014.

3. The Genesis claims costs against the Respondent RTM in the sum of £27,400.08 including VAT. This figure is not agreed and this application has therefore been made. All of these costs were incurred by Winckworth Sherwood LLP, a London firm of solicitors which appears to have been instructed by Genesis to handle matters from beginning to end.

The Law

4. Section 88(1) of the Act says that *"a RTM company is liable for reasonable costs incurred by a person who is....a landlord under a lease of the whole or part of any premises....in consequence of a claim notice given by the company in relation to the premises"*

5. The method of assessment is on the basis of what is sometimes called the indemnity principle. In other words the costs payable are those which would be payable by the client *"if the circumstances had been such that he was personally liable for all such costs"* (Section 88(2) of the Act).

6. Costs for assessment fall into two categories: contentious and non-contentious. The criteria for assessing each category are slightly different.

7. Because "Contentious Business" is defined in the Solicitors Act 1974 s.87 (1) as "business done...in or for the purposes of proceedings begun before a court or before an arbitrator..." work before First - Tier Tribunals, however litigious in nature, has always been treated as non-contentious. In **Tel-Ka Talk Limited v The Commissioners of Her Majesty's Revenue & Customs (HMRC)** [2010] EWHC 90175 (Costs) the Senior Costs Judge rejected an attempt to characterise work before the VAT and Duties Tribunal as contentious.

8. Non-Contentious Work (for bills delivered after 11 August 2009) is assessed by reference to the Solicitors' (Non-Contentious Business) Remuneration Order 2009 (as amended), the relevant parts of which are:-

> *"A solicitor's costs must be fair and reasonable having regard to all the circumstances of the case and in particular to—*
>
> *a. the complexity of the matter or the difficulty or novelty of the questions raised;*
>
> *b. the skill, labour, specialised knowledge and responsibility involved;*
>
> *c. the time spent on the business;*
>
> *d. the number and importance of the documents prepared or considered, without regard to length;*
>
> *e. the place where and the circumstances in which the business or any part of the business is transacted;*
>
> *f. the amount or value of any money or property involved;*
>
> *g. (n/a)*
>
> *h. the importance of the matter to the client;"*

9. Moreover, the costs claimed in this case are not the costs of the application before the Tribunal but costs incurred in dealing with the Respondent's Claim Notice of 10th April 2014, complying with the legal requirements of the Act and transferring management of the block to the Respondent. These are clearly non-contentious costs.

The Hearing

10. The Tribunal indicated at the outset that it would be content for this dispute to be dealt with on a consideration of the papers and any written representations made by the parties. However, the Respondent RTM, as it is entitled to, asked for a hearing.

11. Those attending the hearing were just the representatives of the parties i.e. Messrs. Varnam and Joiner. At the suggestion of the Tribunal chair, the first point of dispute was treated as a preliminary issue i.e. is the totality of the claim – leaving aside any individual item of claim – proportionate and reasonable?

12. The hearing was clearly intended to follow the normal course with costs assessments which is to rely upon submissions only. Mr. Varnam, representing Genesis, was asked to address the Tribunal and to deal with concerns raised by the Tribunal members which arose from a consideration of the papers. These issues included:-

    (a) Why solicitors were instructed when Genesis is a large professional landlord with its own legal department? The Tribunal chair put it to Mr. Varnam that, quite by coincidence, he had seen a letter arrive at the Tribunal office from Genesis Legal Services the day before the hearing relating to an entirely different case and this was produced. The address for Genesis Legal Service was the same as Genesis and the letter had been signed by a solicitor.

    (b) Why such solicitors were instructed to deal with the whole matter from beginning to end when most of the work involved transferring management from one manager to another? Once the right to manage process had been accepted at the very outset, as in this case, the transfer was going to happen and had little, if any, need for input from lawyers.

    (c) What advice had the solicitors given Genesis about the likely costs which would be involved?

    (d) What was controversial about the documents in the 7 lever arch files of documents to be handed over which needed any specific legal advice about what should be disclosed? This was not a litigious matter at that stage.

    (e) If, as was suggested by the Respondent RTM's representative in his skeleton argument, the leaseholders were retired and elderly in this sheltered accommodation, why wasn't consideration given to the likely cost of dealing with the matter

in this way, bearing in mind the overriding objective to consider the resources of the parties?

(f) The knowledge and experience of the Tribunal chair was that he had been involved in at least 12 similar RTM cases in the last couple of years and no award of costs had been more than £2,000

13. Mr. Varnam tried to answer these points He said that as far as an estimate of costs were concerned, he had seen the initial client letter and in the section were there would normally be an estimate, it simply said "TBA" which he accepted meant 'to be advised'. He said that it was up to Genesis how they determined the procedure in this case. Right to manage was a complex matter and Genesis had to comply with the law in all respects.

14. He submitted that they had acted reasonably. There must have been a reason why they didn't instruct in-house people. They may possibly have been too busy. They had not done anything wrong in instructing these solicitors. The instructions had gone through a Genesis Portal which suggested an ongoing relationship with the solicitors involved. He had no instructions as to how Genesis knew that the particular solicitors' firm chosen had sufficient expertise.

15. As far as the documents were concerned, Mr. Varnam emphasised the quantity of documents and size of the building which had 80 flats. He could not say what, in particular, about the documents required the detailed involvement of solicitors. He added that as the overriding objective sought to undermine the assessment criteria set out in section 88 of the Act, it did not apply which meant that the means of the leaseholders was irrelevant. He was challenged about this bold submission but maintained his position.

16. He also maintained that the solicitors involved were experienced. However, it was put to him that the first 6 entries on the 'time spent' schedule for the 12th-15th May 2014 were all about considering the claim notice and the law. The entries totalled nearly 10 hours. Then on the 11th August a further 42 minutes was spent considering the Act and on the 27th August, 3 hours more had been spent to include analysing the Act. From this it seemed clear that the fee earner was not particularly familiar with the law which was contained in one Chapter in one Part of the Act. Mr. Varnam did not respond to this and did not seek to challenge a suggestion from the Tribunal that it would not take more than about an hour to fully absorb all the relevant part of the Act.

17. Mr. Varnam conceded that Genesis were registered for VAT purposes and could recover the VAT as an input. They would therefore not be claiming VAT on the costs.

18. Mr. Joiner was then asked to address the Tribunal and he said, amongst other things, that he had compared the conveyancing form LPE1 which was used to supply information about management to leaseholders

proposing to sell their leases. That contained 62 questions and asked for 15 documents. The section 93 questionnaire contained only 48 questions and asked for 15 documents. Genesis charged a standard sum of £270 including VAT for completing LPE1. Mr. Varnam responded that the questions asked in the section 93 document were more complex and needed more research. Many of the LPE1 questions had tick box answers, unlike the section 93 document. The questionnaire also asked sub-questions so that there were more than 48.

19. At the end of the submissions on the first point of dispute, Mr. Varnam accepted that the decision of the Tribunal would have an effect, one way or the other, on the remaining points which would therefore not need as much time. Mr. Joiner indicated that he was happy to leave the Tribunal to make its decision on the preliminary point and the 'hearing' could then resort to being based on the written representations. Mr. Varnam sought instructions and such instructions were that he was to remain, even in the absence of Mr. Joiner, which proved to be what happened.

20. The members of the Tribunal then retired and considered their decision on the preliminary issue. They decided that whilst they were going to allow something for the Applicant taking appropriate legal advice, the preliminary issue was to be decided in favour of the Respondent. The costs were grossly excessive and no case had been made for instructing solicitors to do anything other than give appropriate legal advice when it was needed. Mr. Varnam was told about the decision and that his clients would receive the full reasons in due course.

21. The remaining items of dispute were then discussed and Mr. Varnam emphasised that this transaction had taken a long time and the objections about correspondence and telephone calls were unreasonable. When it was put to him that one of the reasons for the length of time was that the information and contractors letters had not been supplied until well after the time limits in the Act, he was really unable to say why that had been so.

Discussion

22. The charging rate of £165 per hour for a Grade A solicitor is not disputed. This will be allowed as it is reasonable for this grade of fee earner.

23. The point of principle made by the Respondent is, in essence, that the costs are disproportionate and "*contrary to the intention of Parliament, which was to provide leaseholders with a straight forward inexpensive process to take over the management of their estate*". The tribunal is not sure what information the Respondent relies upon for the assertion that Parliament intended an inexpensive process. Mr. Joiner referred to it being in the White Paper leading to the Act. In this tribunal's experience, leaseholders taking over the management of a block of 80 or so flats on an uncontested basis would not expect to pay their landlord legal fees of over £27,000 including VAT.

24. The problem in this case is that Genesis, which is a large landlord and property manager claiming on its website to own or manage 'around'

33,000 properties, has just instructed outside solicitors to undertake all the work involved in the handing over of management. This was no doubt at huge cost to itself in that its employees would obviously have to spend a great deal of time appraising the solicitor of the practice of property management. The question for this tribunal is whether that is reasonable and proportionate. In other words, using the wording of section 88(2) of the Act, might a large experienced landlord "*reasonably be expected to*" have done this "*if the circumstances had been such that he was personally liable for all such costs*".

25. Of course, there is no question that such a landlord may well have sought legal advice – external or otherwise when it has its own legal department – on whether to contest the Claim Notice. That would involve an investigation to find out whether the RTM was a properly constituted company, whether more than half the lessees were members of the RTM, whether the others had been sent an invitation to participate, whether the Claim Notice was correctly worded, whether the block of flats was self contained and so on. Advice may also have been needed on how to deal with contractors and in providing information pursuant to section 93 of the Act.

26. However, for the remainder of the work, the Act is quite clear in saying that the management changes hands on a set date at least 3 months after the Claim Notice and, absent any dispute about the right to manage itself, as in this case, the Genesis must comply. An experienced manager will have the service charge regime on specialised computer software able to cope with a change in management part way through a service charge year. Freeholders do sell their properties and the right to manage provisions have existed for many years.

The Overriding Objective

27. In **Christoforou and others v. Standard Apartments Ltd.** [2013] UKUT 0586 (LC), the Deputy President of the Upper Tribunal, Martin Rodger QC, looked at proportionality, amongst other things. The freehold owner of a property, Standard Apartments Ltd., issued proceedings in the LVT under section 27A of the 1985 Act. That case finished and they then tried to recover costs as a variable administration charge.

28. The sole ground of appeal was whether the lease allowed for such an administration charge to be made. However, the then President of the UT, George Bartlett QC, added additional grounds, one of which was whether the LVT failed to consider whether the costs were proportionate to the amount in dispute in the original proceedings.

29. In fact the respondents tried to argue that as Schedule 12 of the 2002 Act only mentioned that the costs should be 'reasonable', proportionality was irrelevant. However, in the decision itself, the Deputy President did feel it appropriate to make the following comments at paragraph 44:-

> *"In any context not overshadowed by the approach to litigation costs which developed before the introduction of the Civil Procedure Rules, the suggestion that proportionality had nothing to do with reasonableness would seem unreal or counterintuitive. The LVT routinely has to consider whether the costs of professional or other services are reasonable or have been reasonably incurred, and routinely it does so by examining closely the work undertaken, the result achieved, and the magnitude and importance of the object to which the work was directed. Those considerations are all relevant to an assessment of the reasonableness of professional costs and I do not think that paragraph 2 of Schedule 11 to the 2002 Act requires a different approach to the reasonableness of administration charges."*

30. This Tribunal takes the same view about the word 'reasonable' used in section 88(2) of the Act and applies the whole of the overriding objective. Therefore, when dealing with any aspect of these costs, this Tribunal must "*seek to give effect to*" the overriding objective at rule 3 of the **Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013**. The requirement to deal with cases fairly and justly includes dealing with them in ways which are proportionate to the case's importance and complexity and, of relevance to this case, "*...the anticipated costs and the resources of the parties....*".

31. Mr. Varnam tried to suggest that because the leaseholders were in sheltered accommodation and were retired and elderly did not necessarily mean that they were poor. That may be right, but the Tribunal does consider that it gives at least an indication that they may be on fixed incomes with limited savings. Unless the right to manage company has a benefactor – and there is no evidence that it has – its assets and income will therefore be limited by the assets and income of the leaseholders.

32. The Tribunal does not suggest that Genesis was being malicious when it instructed Winckworth Sherwood. However, it should have stood back and thought about what it was doing. An organisation of that size should have known that the right to manage provisions are not that complex and if a decision was to be made that the Claim Notice was not being contested, it should have realised that the rest of the work was just a matter of transferring management to a management company. There was simply no need to use solicitors throughout. If it had decided to change managing agents, virtually the same process would have been involved and they are very unlikely to have instructed solicitors.

33. As solicitors are obliged to give information to clients about costs in advance, Genesis should have known how they were increasing disproportionately, long before they reached nearly £23,000 excluding VAT. If the solicitors did not in fact provide such information (and there is no evidence before the Tribunal to show that they did), their failure to do so ought not to prejudice the Respondent.

Conclusions

34. Having come to its decision on the main issue, the Tribunal considered how to approach the assessment i.e. whether to go back to the original objections and assess each item or whether to start, as it were, 'from scratch'. As so much of the decision applied to the issue of whether solicitors should have been instructed in the first place to do all the work they did, the Tribunal decided on the latter course i.e. to start from the beginning.

35. There is no doubt that Genesis needed advice on the Claim Notice so that a decision could be made about whether to just accept the position or dispute it. The solicitor involved should have been reasonably well acquainted with the Act in the first place. It is a well known adage that a client should not expect to have to pay for the solicitor's training in a particular subject. To consider the Claim Notice together with the various issues set out above, and then to sit down with the client to discuss whether to contest the matter should have taken no longer than 2 hours. The counter-notice is a single sheet of paper with one of two alternatives to be crossed out depending on whether the case is to be contested. This will take no more than half an hour to prepare and send off.

36. Then to provide advice on the contractor notices in accordance with section 92 of the Act would involve drafting 2 very short notices which would then involve the client filling in the names and addresses and sending them off. Receiving instructions and drafting the notices should not have taken more than half an hour.

37. Finally, is the issue of the section 93 information and documents. The main work should have been done by Genesis employees as the relevant person would have all the information at his or her fingertips. The solicitor would not have to check all the facts, but merely check a draft response to ensure that section 93 was being complied with. The Tribunal would allow 4 hours of the time of a Genesis employee and 1 hour of the solicitors' time for checking both the replies and scanning the index of documents bundles to ensure that there was compliance.

38. As far as the time of Genesis staff is concerned, the Tribunal concludes that this would have to be someone fairly senior. On the basis of someone earning about £60,000 per annum and chargeable hours of 1,250 in a year, an hourly rate of £50 will be allowed. 1,250 hours a year is what solicitors would generally say were the optimum number of chargeable hours one can work in a year.

39. On the question of letters and telephone calls, the Tribunal takes note of the comments in the objections. It considers that the above times would include non routine letters. It would allow 25 routine letters and telephone calls and 1 hour of time in non routine telephone calls.

40. Time has been claimed for preparing the bill of costs. A client would not expect to have to pay for a solicitor to provide a schedule of the time he or she had spent on a case. In any event, the time we have allowed would be

very easy to set out and, for these reasons, no time is therefore allowed for preparing the costs schedule.

41. The last item is the copying of the documents to be handed over. It did occur to the Tribunal that there really was no need to copy everything as the originals should really be handed over. However, as section 93 specifically refers to copies, charges for the copies should be allowed. There are 7 lever arch files. Mr. Varnam helpfully suggested that if they had 350 pages per file, then one is talking about a figure of some 2,500 copies. At 20p per copy this amounts to £500. The Tribunal considers this to be a reasonable amount.

42. The final allowed figures are therefore 4 hours of solicitor's time at £165 per hour (£660), 4 hours of Genesis employee's time at £50 (£200), 25 letters (£412.50) and 1 hour of telephone calls (£165). This totals up to £1,437.50. The £500 copying charge brings it up to £1,937.50.

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Bruce Edgington
Regional Judge
7th May 2015