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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **MAN/00CJ/LCP/2014/0005**

Property : **Forth Banks Tower, Forth Banks, Newcastle-upon-Tyne, NE1 3PN**

Applicant : **Triplerose Ltd.**
Represented by : **Scott Cohen**

Respondent : **Forth Banks RTM Company Ltd.**
Represented by : **Punch Robson**

Type of Application : **Determination of costs under s.88(4) of the
Commonhold and Leasehold Reform Act
2002**

Tribunal Members : **Judge P Forster**
I. Jefferson TD BA BSc MRICS

Date of Decision : **16 April 2015**

DECISION

Decision

1. The Tribunal awards the Applicant the sum of £666.00 in respect of the management fees and £4,200.00 in respect of counsel's fees.
2. The Tribunal does not allow the Applicant's claim for legal fees in the sum of £4,276.00

Background

3. On 3 February 2011, Forth Banks Right to Manage Company Ltd. ("the Respondent") gave a notice of claim under s.79 of the Commonhold and Leasehold Reform Act 2002 ("the Act") to acquire the right to manage Forth Banks Tower, Forth Banks, Newcastle-upon-Tyne, NE1 3PN ("the Property"). A counter-notice was served by Triplerose Ltd. ("the Applicant") and the Respondent then made an application to the Tribunal under s.84(3) to determine its entitlement to acquire the right to manage. The application was opposed by the Applicant. On the afternoon before the hearing the Respondent's solicitors gave notice under s.86 withdrawing the notice of claim. As a consequence, at the hearing on 15 September 2011, the Tribunal dismissed the Respondent's application.
4. The Applicant has now applied under s.88(4) of the Act to recover from the Respondent the costs it incurred:
 - (1) £1,239.26, as a consequence of the claim notice given by the Respondent, and
 - (2) £3,036.74, as a party to the proceedings, and
 - (3) £666.00, being management agency fees charged by Y&Y Management Ltd., and
 - (4) £4,200.00, counsel's fees.
5. The application for costs was received by the Tribunal on 18 June 2014. Directions were given on 21 July 2014 providing for the service of statements of case incorporating an itemised schedule showing the work done; the status of the person carrying out the work; the charge rate applied and the time taken; and the reasons, if any, for disputing the claim. The initial timetable for that to be done was subsequently extended in correspondence. The parties did not request a hearing and therefore the application is determined on the papers. On 25 February 2015 the Tribunal asked the Applicant for more information.

6. The Applicant's case is set out in its statement of case dated 18 August 2014 and is supported by the documents exhibited and subsequently added to it. The Applicant did not adopt the use of a schedule which would have assisted the assessment process. The Applicant's solicitors' response to the Tribunal's request for further information was set out in its letter of 13 March 2015.
7. The Respondent's case is set out in its statement of case dated 3 December 2014.

The Law

8. S.88 of the Act makes general provision for costs:
 - (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.
9. S.89 of the Act, so far as relevant, makes provision for costs when the claim ceases:
 - (1) This section applies where a claim notice given by a RTM company—
 - (a) is at any time withdrawn or deemed to be withdrawn by virtue of any provision of this Chapter, or
 - (b) at any time ceases to have effect by reason of any other provision of this Chapter.
 - (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).

Decision

10. Under s.88(1), the Respondent is liable for the reasonable costs incurred by the Applicant as a consequence of giving the claim notice. Under s.88(2), the costs of professional services are to be regarded as reasonable if and to the extent that those costs might reasonably be expected to have been incurred in circumstances where the Applicant would have been personally liable for all such costs. Under s.88(3) the Respondent is liable for any costs which the Applicant incurred as party to the proceedings because the Tribunal dismissed the application under s.84(3). These statutory costs are to be assessed on the indemnity basis. Any element of doubt as to the reasonableness of costs is to be resolved in favour of the receiving party rather than, as on the standard basis, the paying party. Costs are not liable to be reduced because they are disproportionate.

Delay in Making the Application

11. The Respondent states that there has been inexcusable delay in making the claim for costs. The Respondent's claim was dismissed on 11 September 2011. Conway & Co.'s invoices are both dated 15

November 2012. The application for costs was made on 18 June 2014. The Respondent says that it has been prejudiced by the delay and that the Applicant's costs should be reduced or disallowed because of the delay.

12. The Applicant's explanation for the delay is that Forth Banks Tower is adjacent to Hanover Mill which is also owned by the Respondent and was also subject to a right to manage claim. Some of the qualifying tenants were common to both properties. The notice in respect of Hanover Mill was withdrawn and there was a claim for costs which had to be determined by a Tribunal on 12 December 2012. The costs were not paid until May 2014 after a statutory demand had been served on the Respondent. The Applicant decided to wait until the costs in respect of Hanover Mill had been recovered before making the current application.
13. There is no prescribed procedure for making a claim for costs under s.88(4). That can be compared with the position under the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, where an application for costs must be made within 28 days after the date on which the Tribunal sends a decision notice finally disposing of the proceedings. That rule does not apply in the present case where the costs fall to be determined under the Act and an award is not discretionary. The Act does not require that the claim must be made within any specified period. In the civil courts there is a rule that a claim for costs should be commenced within 3 months (CPR 47.7). The sanction for delay in making the claim is limited so that the court may only disallow all or part of the interest payable on the costs (CPR 47.9). To disallow the costs entirely would be draconian in the context of a right to manage application. Under the 2002 Act, the Tribunal does not have the power to reduce or disallow the Applicant's costs nor to penalize the Applicant.

General Objections

14. The Respondent stated that no covering invoices had been disclosed. In fact, copies of the relevant invoices were exhibited to the Applicant's statement of case but they were not receipted. The relevant point is that the Respondent wanted proof of payment. That needed to be addressed by the Applicant and the Tribunal asked for the production of receipted invoices.
15. The Respondent put the Applicant to proof that the indemnity principle had been complied with. That is fundamental to any assessment of costs and particularly so when the assessment is on the indemnity basis.

16. The Tribunal asked the Applicant's solicitors to certify that the indemnity principle had been satisfied and that the Applicant had paid all the sums that are claimed from the Respondent.
17. After being asked to do so, the Respondent's solicitors produced receipted invoices in respect of Y&Y Management Ltd.'s fees and counsel's fees. They did not provide the Tribunal with receipted invoices in respect of the Conway & Co's legal fees. Conway & Co are the Respondent's previous solicitors.
18. The Respondent's solicitors have not certified that the legal fees claimed have been paid but they state that the Applicant is liable to pay its solicitors notwithstanding recovery from a third party.
19. In civil proceedings, the signature of a statement of costs or a bill for detailed assessment by a solicitor is in normal circumstances sufficient to enable the court to be satisfied that the indemnity principal has not been breached in respect of costs payable under a conventional bill: *Bailey v IBC Vehicles Ltd [1998] 3 All ER 570*. In proceedings before the Tribunal under the 2002 Act there is no requirement for a formal bill of costs to be provided in a prescribed form. In these circumstances, it is incumbent on the Tribunal, particularly when the paying party has put the Applicant to proof, to establish compliance with the indemnity principal.
20. In civil proceedings, if two firms of solicitors have dealt with a matter, the bill of costs is split and both firms sign the bill of costs to confirm that the indemnity principle has not been breached (*CPR PD 47.5.8*). That rule does not apply in the present case but the point that lies behind it should have been addressed by the Applicant. The Tribunal has nothing from Conway & Co other than its unreceipted invoices.
21. The Applicant's solicitors submit that in relation to the solicitor's fees the indemnity principal does not require payment. They point to the fact that Conway & Co's invoices are addressed to the Applicant and they rely on the extract provided from the solicitor's terms of appointment. Reference is made to the decision in the Hanover Mill case which allowed Conway & Co's fees.
22. The right to manage proceedings were concluded on 11 September 2011 but Conway & Co's invoices were not raised until 15 November 2012 and have not been paid.
23. Conway & Co's letter of engagement dated 16 April 2010 provides that it is usual practice to ask clients to make payments on account of anticipated costs and that the file will be reviewed on a monthly basis and normally a bill would be raised at that time. If a substantial amount of work is carried out a bill may be raised before the monthly review.

Such terms are common between solicitors and their clients. The letter goes on to state that in the event that the Applicant instructs another solicitor Conway & Co may decline to release any papers until payment of bills has been made in full.

24. In this case, no payment on account was made, no monthly bills were raised and the invoices were not paid when the Applicant changed its solicitors. The Applicant's current solicitors state that Conway & Co agreed to delay the payment terms to allow for costs to be paid at the conclusion of proceedings. They say, normally, that would have extended payment by three or four months but in this case there has been unusual delay. In fact the delay is very substantial. The work was done more than four years ago and the invoices have been outstanding since November 2012. The Applicant is no longer a client of Conway & Co. and it is very unusual for a firm of solicitors to defer payment even after it has been replaced by new solicitors.
25. The decision in the Hanover Mill case is not binding on this Tribunal. One of the many points of objection raised was that the Applicant had not produced evidence to show that the pro-forma invoices had been paid. The Tribunal did not expressly address that point and the decision in that case does not help this Tribunal.
26. Proof of payment by the production of a receipted invoice is good evidence of compliance with the indemnity principal. The Tribunal has that evidence in respect of counsel's fees and the management company's fees.
27. The Tribunal can only make its decision on the basis of the evidence before it. The Tribunal is not satisfied on the evidence that the indemnity principal has been complied with in respect of Conway & Co's fees. The circumstances are unusual and the Applicant has left a great deal unexplained. The Tribunal does not allow the claim in respect of the legal fees.
28. Even though the Tribunal has not allowed Conway & Co's fees it would still help the parties to set out the findings in respect of the amounts claimed.

The Charge Rate

29. The work was undertaken by Miss Scott, an associate solicitor. The Respondent does not take issue with the charge rate applied of £185.00 per hour. The Tribunal notes that Miss Scott was previously a non-practicing barrister and that she qualified as a solicitor in 2009. In terms of the published guidelines for charge rates in the civil courts she was a grade C fee earner having less than 4 years post qualification

experience. The guideline rate for her in band 2 is £120.00 per hour which is below the rate claimed. The guidelines have not been up dated since 2010. The charge rate of £185.00 per hour for a fee earner of Miss Scott's standing is not outside the range of commercial rates that might be expected. The Applicant's costs stand to be assessed on the indemnity basis. The rate of £185.00 is provided for in Conway & Co.'s terms of appointment. That is the contractual rate which the Tribunal has allowed.

30. When assessing costs on the indemnity basis the Tribunal must consider the reasonableness of the charges in the context of the Applicant's liability to pay its solicitors, counsel and managing agents.
31. The claim and the items in dispute could very easily have been set out more conveniently in a schedule.

Invoice LS8671-01

32. The Respondent says that the 5 hours 32 minutes claimed is "manifestly excessive and that the charges claimed should be substantially reduced". The Respondent does not state how much it would consider to be reasonable. Of the time claimed, the Respondent specifically challenges 2 hours 19 minutes.
33. The Respondent's approach to the assessment of the Applicant's costs appears to be based on the standard basis rather than on the correct indemnity basis.
34. The Tribunal has had the benefit of seeing the invoices raised by Conway & Co in respect of the Hanover Mill case. The issues appear to have been very similar and the work undertaken very much the same as in the present case. Two fee-earners of different seniority and at different charge rates were engaged on Hanover Hill whereas in the present case all the work claimed for was done by a single more senior fee earner.
35. The Tribunal found that overall the time claimed by the Applicant was not more than might have been expected and not more than the Applicant would have been liable to pay for. The Tribunal found that it would have been reasonable for the more senior fee earner to have undertaken 4.5 hours at a rate of £185.00 per hour and the more junior fee earner to have done 1 hour at £165.00 per hour. That produces a total sum of £997.50 plus VAT of £199.50. The Tribunal would have allowed disbursements of £5.05 for postage and £4.00 for Land Registry fees but would not have allowed VAT on those items because they are not VAT supplies.
36. In respect of invoice LS8671-01 the Tribunal would have allowed a total of £1,206.05.

Invoice LS8671-02

37. The Tribunal adopts the same reasoning to invoice LS8671-02.
38. The Applicant's claim is for 12 hours and 28 minutes. The Respondent says that is excessive and should be reduced. The Tribunal found that overall the time claimed by the Applicant was not more than might have been expected and not more than the Applicant would have been liable to pay for. The Tribunal found that it would have been reasonable for the more senior fee earner to have undertaken 8.5 hours at a rate of £185.00 per hour and the more junior fee earner to have done 2 hours at £165.00 per hour. That produces a total sum of £1,902.50 plus VAT of £380.50. The Tribunal would have allowed £53.00 plus VAT of £10.60 for photocopying and £80.00 for Land Registry fees but no VAT. The claim of £91.29 would not have been allowed because counsel's bundles could have been sent by DX or forwarded by the first barrister at no additional cost to the solicitors.
39. In respect of invoice LS8671-02 the Tribunal would have allowed a total of £2, 426.60.

Management Fees of Y&Y Management Ltd.

40. The Respondent says that the fees of Y&Y Management Ltd. should be disallowed in full. The claim as originally submitted was based on a pro-forma invoice. The Applicant has now produced a receipted invoice demonstrating that the management fees were paid on 15 December 2011. The Respondent's comment that without proof of payment these charges are "illusory", falls away.
41. The Respondent made the point that the Applicant and Y&Y Management Ltd. are run by the same persons and for that reason the relationship between them is not a genuine trading relationship. The Applicant and Y&Y Management Ltd. are separate legal entities and their relationship is subject to a management agreement that has been produced to the Tribunal. On the evidence, the Tribunal cannot go behind matters.
42. The Applicant claims the fees of Y&Y Management Ltd. in the sum of £555.00 plus VAT as detailed on invoice G1173 dated 16 November 2011. The invoice is for work done in respect of the notice of claim given on 3 February 2011. The management agreement is dated 1 July 2010.
43. A management fee is payable for the services set out in Appendix 2 at the rate of £265.00 plus VAT per unit. Appendix 3 sets out additional charges for specified works outside the general services paid for under

the general management charge. Those include services provided in relation to the exercise by lessees of the right to manage at a minimum charge of £250.00 plus VAT. The sum claimed is £525.00 plus VAT. The Respondent submits that the agent's fees are charged at £100.00 per hour and that is not reasonable.

44. The Tribunal found that overall the time claimed of 5.25 hours was not excessive and that a rate of £100.00 per hour was reasonable, particularly bearing in mind the minimum fee of £250.00. The invoice includes a charge for £30.00 in respect of photocopying which is allowed.
45. The Tribunal allows the claim for management fees in the total sum of £666.00.

Counsel's Fees

46. The Respondent states that counsel's fees were plainly excessive in view of the limited amount of work carried out and should be reduced substantially. The Tribunal noted that it was not until the afternoon of 14 September 2011 that the Respondent withdrew the notice of claim. By that time the brief had been delivered and the Applicant had become liable to pay the brief fee. The Respondent submitted that it was unnecessary and / or disproportionate for counsel to attend the hearing on 15 September 2011. The Tribunal found that the timing of the withdrawal of the notice of claim was entirely the responsibility of the Respondent and came too late to save counsel's brief fee. Until the afternoon before the hearing the application was still being contested by the Respondent.
47. The withdrawal of the claim notice did not render as merely academic the hearing on 15 September 2011. The point made by the Applicant's barrister at the hearing was that under s.88(3) an RTM company is liable for any costs which the landlord incurs as a party to the proceedings only if the Tribunal dismisses an application.
48. There is no objection to counsel's fee rate. The Applicant was liable to pay counsel the brief fee of £3,500.00 plus VAT and is entitled to recover that in full from the Respondent. A copy of Counsel's receipted fee note has been produced that shows that the fee was paid on 8 October 2012.
49. The Tribunal allows the claim for counsel's fees in the sum of £4,200.00.
50. For the reasons given, the Tribunal allows the Applicant's claim for costs under s.88(4) in the sum of £4,866.00.

Judge P Forster

Dated 16 April 2015

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