FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/26UN/LPC/2018/0002**
Property	**:**	**27-34 Kilby Road, Stevenage SG1 2LT**
Applicant	**:**	**Notting Hill Genesis**
Representative	**:**	**Winckworth Sherwood LLP Solicitors**
Respondent	**:**	**27-34 Kilby Road RTM Company Limited**
Representative	**:**	**Mr Jason Anderson**
Type of Application	**:**	**S88(4) Commonhold and Leasehold Reform Act 2002 – to determine the amount of costs payable by the respondent to the applicant**
Tribunal Member	**:**	**Judge John Hewitt**
Date of Determination	**:**	**3 December 2018**
Date of Decision	**:**	**7 December 2018**

DECISION

The issue before the tribunal and the decision of the tribunal

1. The sole issue before the tribunal was the amount of costs payable by the respondent to the applicant pursuant to s88(4) Commonhold and Leasehold Reform Act 2002 (the Act).

2. The decision of the tribunal is that the amount of costs so payable is £3.062.16.

3. The reasons for the decision are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

4. The respondent sought to acquire the right to manage the subject property. The claim notice dated 11 July 2018 and given pursuant to s79(1) is at [5].

5. The applicant landlord gave a counter-notice (without making any admissions as to the validity of the claim notice). It is dated 9 August 2018 [10]. The counter-notice stated (so far as material):

    1. *I allege that, by reason of Section 72 of Chapter 1 of Part 2 of the [Act], namely that the premises are not a self-contained building of part of a building, on 11 July 2018 [the respondent] ('the company') was not entitled to acquire the right to manage the premises specified in the claim notice.*

6. On 16 August 2018 the respondent made an application to the tribunal pursuant to s84(3) in which it sought a determination that it was on the relevant date entitled to acquire the right to manage the premises. The application was allocated Case Ref: CAM/26UH/LRM/2018/0004 (the RTM proceedings).

    Directions were given on 22 August 2018 [49].

    On 14 September 2018 the respondent in the RTM proceedings (the applicant in these costs proceedings) filed and served its statement of case in answer [54].

    By an email dated 17 September 2018 from Mr Anderson to the tribunal, the RTM company indicated a wish to withdraw the RTM proceedings. That email was taken as a request for a consent pursuant to rule 22 and consent was duly given. Thus the withdrawal took effect on or about 18 September 2018.

7. On 19 September 2018 the applicant made this costs application pursuant to s88(4) of the Act [71].

Directions were given on 21 September 2018 [1]. The parties were notified that the tribunal proposed to determine the application on the papers without an oral hearing pursuant to rule 31 unless an oral hearing was requested. The tribunal has not received any such request.

Pursuant to the directions the applicant's solicitors have lodged with the tribunal a file of material papers which includes the schedule of costs claimed the parties' rival submissions and the documents relied upon by them in support of their respective submissions.

The costs claimed

8. The costs are claimed pursuant to s88 which, so far as material, provides:

> ***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 the appropriate tribunal.*

9. The schedule of costs claimed is at [105].It is sufficiently detailed for summary assessment purposes and may be summarised:

Item	**Amount**	**VAT**
Solicitors' costs	£2,441.50	£488.30
Postage, telephones etc	£ 30.00	£ 6.00
Photocopying	£ 22.80	£ 4.56
HM Land Registry fees	£ 69.00	£ -
Sub-totals	**£2,563.30**	**£498.86**
VAT	**£ 498.86**	
Total	**£3,062.16**	

10. The applicant's solicitors are based in London SE1 and the following charge-out rates have been adopted:

Grade A	£230
Grade B	£165
Grade C	£125
Grade D	£ 90

11. The respondent's statement of case in answer is at [169-174]. The respondent's case is twofold:
11.1 The (original RTM tribunal) application could have been avoided; and
11.2 The reasonableness of the costs incurred.

Application avoided

12. The gist of the arguments are:

12.1 The counter-notice merely stated the premises did not comprise a self-contained building or a part of a building – but did not expand or explain why that was asserted.
12.2 In January 2017 an adjoining block acquired the right to manage and in respect of that block the landlord did not make the same assertion.
12.3 By email dated 13 August 2018 Mr Anderson sought clarification from the applicant's solicitors and stated that if no reply was received by 15 August 2018 an application would be made to the tribunal.
12.4 By letter dated 21 August 2018 [48] the applicant's solicitor explained the part of the building comprising 27-34 Kilby Road could not be independently developed **and** the water supply is shared with other parts of the larger building and cannot be separated. The letter went on to seek confirmation that position was accepted and stated that at that time the applicants costs stood at £1,080 incl of VAT.
12.5 By email of the same day Mr Anderson replied and challenged what has been asserted and he sought further clarification. Mr Anderson asserts clarification was not forthcoming. He submits that if clarification had been given at the outset the original RTM application would not have been issued and if clarification had been given following the email of 21 August 2018, it would have been withdrawn sooner and the costs incurred in the preparation of the landlord's statement of case would have been avoided.
12.6 Having received the landlord's statement of case on Friday 14 September 2018 the RTM company sought to withdraw its application as soon as possible on Monday 17 September 2018. Mr Anderson complains that the landlord did not disclose vital information prior to service of its statement of case.
12.7 Mr Anderson also makes submissions as to some merits in the RTM application and seeks to cast some doubt on the landlord's assertions about independent redevelopment of the building and

the water supply, but as the RTM application was withdrawn and not pursued by the RTM company, I will not take them into account now.

13. The applicant's statement of case in response is set out in paragraphs 3-7 [179-181]. On this topic the applicant submits:

13.1 It is not the role of the applicant's solicitor to provide detailed explanations or advice as to why a claim to right to manage is ineffective. It is the RTM company and its promoters to the thoroughly investigate the validity of the claim and/or to seek expert advice as to the eligibility and legality of the claim before embarking on it. It is argued that it is paradoxical of Mr Anderson's assertions that some of the costs incurred ae excessive when some of the costs reflect the time spent on explaining to the RTM company why the subject premises do not meet the statutory criteria to qualify for the right to manage.

13.2 Mr Anderson had two months from the date of the counter-notice to investigate eligibility and to submit an application to the tribunal but he was impatient, did not investigate eligibility thoroughly and submitted the application prematurely on 16 August 2018. Had Mr Anderson awaited the applicant's solicitors' letter dated 21 August 2018 and investigated it properly instead of rejecting it out of hand on the day of receipt, and proceeding in defiance of what the letter stated the original application might well have been avoided.

13.3 It may also be noted that further clarity on the technical issues of the part of the building and whether it qualified to right to manage were set out in a letter dated 7 September 2018 from the applicant's solicitors to the tribunal (copied to the respondent's representative) in the context of an application concerning expert evidence.

Discussion

14. I have given careful thought to the rival arguments. On balance I prefer those of the applicant. It is wise for an RTM company and its promoters to give careful thought to the eligibility of the building to qualify for the right to manage and to check that the premises meet the qualification test set out clearly in s72 of the Act.

That is a fundamental and basic point. I note that claim notice was given by JFM Block & Estate Management LLP on behalf of the RTM company and I infer it has some expertise in this field.

15. I find it was unreasonable of Mr Anderson to demand a reply to his email of 13 August 2018 within two days – in the middle of the holiday season – and against the threat that a failure to do so will result in an application to the tribunal. The application was received by the tribunal on 16 August 2018. On 21 August 2018 a reasonably detailed explanation was sent to Mr Anderson by the applicant's solicitors. Mr Anderson rejected it out if hand the same day. There is no evidence that

Mr Anderson sought advice on the letter or gave it any measured consideration.

16. In these circumstances I find it was not unreasonable of the applicant to proceed and draft its statement of case in answer to the original RTM application.

17. That said, whilst I am aware that some commercial landlords who regularly oppose RTM application frequently (and unhelpfully) merely state in their counter-notice that statutory requirements have not been met without explaining why or on what basis, housing association and social housing providers often take a more pragmatic approach and give some guidance to their tenants, and some positively encourage RTM. In the present case I understand that the applicant's solicitors were instructed rather late in the day and lack of full information may have constrained what they could say in the counter-notice dated 9 August 2018. They did however, give a fuller explanation by letter dated 21 August 2018 and it is unfortunate that Mr Anderson rejected that letter out of hand.

Reasonableness of costs incurred

The respondent's case

18. Mr Anderson accepts the expenses and HM Land Registry fees claimed.

19. Mr Anderson complains that the break-down set out in the schedule does not provide sufficient detail and that the time spent generally is excessive (but he does not give any examples) and again he makes the point that some costs could have been avoided. Mr Anderson also argues that the RTM had acted reasonably at all times. I am not sure about that but in any event it is not to the point. Equally not to the point are the several allegations made by Mr Anderson to the effect that the right to manage was pursued due to alleged continuous overcharging of service charges.

20. Mr Anderson also suggests that the landlord has an in-house legal team and that costs could have been limited if the matter had been dealt with in-house. No evidence was presented to show that the legal costs lawfully recoverable by an in-house legal would have been less than the costs of an external law firm.

21. S88(1) clearly imposes a statutory liability on the RTM company to pay the reasonable costs incurred by a landlord in consequence of a claim notice served by the RTM company.

The applicant's response

22. The applicant's response is set out in paragraphs 8- 19 [181-183].

23. It is submitted that it was not unreasonable of the applicant to deploy external legal advice and that it was prudent to do so because it was discovered at an early stage that the building did not qualify.

24. It is also submitted that given the complexities and the history of litigation it was not unreasonable that the matter was supervised by a grade A fee-earner and that the time incurred was reasonable.

25. The point was also re-made that a good amount of the costs incurred arose as a direct consequence with the respondent pushing on with an unmeritorious claim without taking appropriate advice.

Discussion

26. I find that it was reasonable for the applicant to engage external solicitors who specialise in right to manage matters. Very technical issues can sometimes arise. There was no evidence before me that the applicant's in-house legal team has the relevant expertise.

27. The applicant is a substantial provider of a range of housing and as regards the subject development it has used the services of Winckworth Sherwood on a regular basis. I find it was reasonable for the applicant to do so with regard to the right to manage application.

28. No direct challenge has been made to the charge-out rates claimed. I find that they are well within the rates frequently come across in central London by firms of solicitors acting and specialising in this area of work.

29. I have gone through the schedule of costs claimed carefully. A large part of the claim £1,412 concerns 5.5 hours of work done on documents. The breakdown of the seven items is well within what is reasonable for a claim such as this. The remainder of the time claimed is much as to be expected. It is supported by an invoice addressed to the applicant.

30. In my judgment the costs claimed were reasonably incurred and are reasonable in amount and I find that these costs would have been incurred if the circumstances were such that the applicant was directly liable for them.

31. Accordingly, I determine that the costs payable by the respondent to the applicant are £3,062.16.

Judge John Hewitt
7 December 2018

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.