



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

Case Reference : **MAN/00BY/LCP/2015/0001**

Property : **Liberty Place, Block C, Kent Street, Liverpool
L1 5FD**

Applicant : **Sarnia Construction Limited (represented by
J B Leitch, Solicitors)**

Respondents : **Liberty Place RTM Management Company
Limited**

**Type of
Application** : **Application in respect of Landlord's costs
under Section 88 Commonhold and
Leasehold Reform Act 2002**

Tribunal Members : **Mr J R Rimmer
Mr W T M Roberts**

Date of Decision : **28th September 2015**

Order : The landlord may recover costs from the Respondent in the sum of £10557.54 (including VAT) in accordance with paragraphs 22-29, herein.

Application and background

- 1 The Applicant is the leasehold owner of the property situated at and known as Liberty Place, Block C, Kent Street, Liverpool and the Respondent is the management company established to seek the right to manage the block under the no-fault right to manage provisions of the Commonhold and Leasehold Reform Act 2002
- 2 On 27th August 2014 an earlier Tribunal convened to consider the Respondent's application in respect of the right to manage they determined that the application should be dismissed (on the basis that Block C did not satisfy the statutory requirements relating to a self-contained building for the right to be granted). Within that determination the Tribunal refused applications for costs made by both sides under Rule 13, Tribunal Procedure (First-Tier Tribunal)(Property Chamber) Rules 2013.
- 3 Whilst that was without doubt a correct decision, given the jurisdiction conferred by that rule, the Applicant here, (the Respondent to those proceedings) sought leave to appeal against the decision in respect of the landlord's costs. Having been refused leave to appeal, the Applicant then made a further application under Section 88 Commonhold and Leasehold Reform Act 2002 to recover all the landlord's costs incurred in relation to the right to manage application.
- 4 As Section 88 informs this Tribunal's decision to a very considerable extent it is set out here in full:
 - (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 the 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.
 - (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 the 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 such costs.
 - (3) A RTM company is liable for any costs which such a person incurs as a 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 Directions as to the future conduct of the proceedings under Section 88 were given by a Deputy Regional Judge of the Tribunal on 1st May 2015 and thereafter the matter was set down for a determination by this Tribunal. As a hearing was requested by the parties the matter was listed at the Civil Justice Centre, Vernon Street, Liverpool on 29th July 2015 where the Applicant was represented by Miss Caoimhe McKearney of counsel and the Respondent by Mrs Anne Aubrey, a member of the RTM Company, acting with the consent of the other members. She was assisted by her husband. Two very large volumes of documents, clearly indexed and paginated by the Applicant were helpfully provided, within which were the detailed submissions of the parties.
- 6 It should be noted that the Tribunal was unable to conclude its determination on 29th July in view of the issues raised at the hearing, the time that was taken to go through the information provided in detail and the lack of some details of recent work carried out by the Respondent's solicitors. The Tribunal therefore took the opportunity to give further directions to the parties in relation to that last matter, both in seeking the information and giving the opportunity to the Applicant to comment upon it. To the extent that further information was provided, not covered by the direction, and to the extent that further observations were made upon matters that were dealt with at the hearing the Tribunal emphasises that it has not taken those matters into account in reaching this determination.
- 7 Miss McKearney did provide the Tribunal with a 9-page skeleton argument on behalf of the Applicant, together with details of two tribunal decisions that she thought might assist the Tribunal. Having been given the opportunity to consider the same, Mrs Aubrey indicated that she was willing to accept the same but might in due course seek the indulgence of the Tribunal in clarifying matters if there were matters which, when more fully explored, were not immediately clear. The Tribunal offers no criticism of Miss McKearney who appears to have provided the document as soon as practicable after receiving her instructions.

- 8 A particular concern now put forward by the Respondent is the disposal by the Applicant of its interest as landlord about one week prior to the Tribunal hearing on 27th August 2014. This apparently was to a new landlord in relation to which there may be a connection with the solicitors acting for the Applicant. Whatever that situation might be the disposal was not communicated to the Respondent, who only found out about it some time later. The point being made that with effect from 21st August the Applicant ceased to be the landlord and, put broadly, ceased to be entitled to landlord's costs.

The issues

- 9 It is useful to adopt Miss McKearney's skeleton argument for the purposes of identifying the issues arising between the parties, summarising as it does the views put forward by the Respondent, now by force of circumstance being unrepresented in these proceedings. The principal concerns identified are:
- (1) That raised in paragraph 8, above, as to the Applicant's disposal of its interest as landlord. Miss McKearney indicates that
 - (a) The Applicant was the landlord when the claim notice was served and costs were incurred "in consequence of a claim notice"
 - (b) The Act makes no provision for recovery of costs where a party ceases to be landlord prior to the proceedings being concluded
 - (c) It does make clear provision for costs where a claim is dismissed
 - (d) The Applicant therefore needs to continue to contest the proceedings to protect its exposure in relation to its own costs
 - (e) It would be unfair if parliament had intended to deprive the Applicant of this right simply if it disposed of its interest.
 - (f) The Respondent misreads section 88(2) in suggesting that the Applicant loses the right to recover costs once it has disposed of its interest. Section 88(2) is intended to deal with the mischief of a party incurring costs, reasonable or not, in the knowledge they will be met by the RTM company, rather than preclude the costs of a party being reasonably incurred in proceedings where it has a legitimate interest.
 - (2) The Respondent suggests that the costs in relation to the application to the previous Tribunal are unreasonable as that application was unnecessary.
 - (a) Miss McKearney suggests those costs were still costs consequential upon the claim notice being given and the seeking of leave was a continuation of those proceedings arising in respect of the notice
 - (b) The effect of the previous tribunal's decision in relation to costs may have been to prevent the recovery of costs entirely so an appeal was necessary, particularly as the Respondent continued to rely on that decision to contend that it was not liable to pay.

- 10 The further issue is then that of the amount of the costs recoverable and Miss McKearney argues that the approach to be adopted should be to determine the reasonableness of the costs by asking in relation to each item claimed whether the work needed to be done, whether it was done and whether it was charged at a reasonable rate. Those questions, she felt would be answered in the affirmative when the submitted schedule of costs was examined.
- 11 Thereafter the Tribunal considered with the Miss McKearney and Mrs Aubrey those issues and others raised by the Respondent. The Tribunal was appraised of concerns by the Respondent in the submissions it had made. The history of the right to manage process in relation to Liberty Place would appear to be somewhat convoluted and, if the Tribunal understands the situation correctly, commenced with an approach by Sarnia Construction Ltd to tenants to consider forming a RTM company. In that process Sarnia's solicitors, who may have been the current solicitors whose costs are now being considered, were perceived as advising the tenants. Thereafter, when proceedings in relation to the claim notice were commenced, the successors to those solicitors acted against the RTM company that had been formed to seek the right to manage. Perhaps somewhat confusingly those solicitors acted on the incorporation of a different RTM company with a similar name, of which no qualifying tenant was a member. Shortly before the final hearing Sarnia disposed of its interest as landlord to a company which may have a family connection with a solicitor in that firm, or, more properly, the limited company operating the business.
- 12 The Respondent was also concerned to express its concern as to the totality of the Applicant's claim for costs and the difficulties envisaged should anything approaching that amount be found to be payable, emphasising the point that Miss McKearney had anticipated in her skeleton argument.
- 13 The Tribunal itself raised the issue of the terms of engagement between the Applicant and its solicitors, commonly termed the "client care letter", as no such document had been produced. Miss McKearney suggested it was privileged as between client and solicitor and that it was not necessary as here was clearly a contract between them and the work done was identified in the schedule provided. The Tribunal considers that the terms of engagement may have been useful information, given that the hourly rates now being justified by the Applicant are somewhat above the levels usually recoverable in litigation. The Tribunal did, however note from the First-tier Tribunal case referred to by Miss McKearney in her skeleton argument (*Springquote Ltd v Brixton hill Court RTM Company Ltd* LON/00AY/LRM/2013/0015) the hourly rates sought there by the same solicitors, in so far as they relate to similar levels of expertise, are

considerably lower than in this current case and more in line with those usually encountered in court proceedings. The Respondent refers to the rates being sought in its response to the application at paragraph 13.

- 14 The Tribunal also explored in some depth the situation that pertained after 21st August 2014 when the freehold interest in Block C was disposed of by the Applicant, which therefore ceased to be the landlord.
- 15 Miss McKearney referred to her skeleton argument and the need for the Applicant to protect its costs position by continuing to resist the proceedings, as to do otherwise would risk any later attempt to recover costs. The Commonhold and Leasehold Reform Act is silent as to how such a situation should be viewed, in contrast to other situations where the disposal of a relevant interest is made the subject of expression provisions; for example in relation to enfranchisement under the Leasehold Reform Act 1967, or the service of enforcement and prohibition notices under the Housing Act 2004.
- 16 The Respondent presented, as might be expected, a straightforward layman's argument that once a landlord has ceased to be a landlord then they were no longer liable for further legal costs incurred after that cessation. The Respondent's members were, the Tribunal was told, aggrieved by the lack of information provided as to the disposal of the freehold until a considerable time after the hearing on 27th August 2014.
- 17 Further consideration was also given to the application for leave to appeal the decision of the Tribunal and whether that was an appropriate course for the Applicant to have followed. Miss McKearney put forward firmly the view that the Tribunal decision conceivably closed the door to any costs being recovered by the Applicant and that the manner in which the Tribunal refused leave suggested that to have been a valid viewpoint up to that time. So far as the Respondent was concerned, if the Tribunal was questioning the reasonableness of that course of action and in consequence of that the reasonableness of the costs associated with it then the Respondent was happy to adopt that argument, having made the point that it seemed an unnecessary phase introduced into the process.
- 18 Subject to those issues being determined in due course the Tribunal then spent a considerable time going through with Miss McKearney and Mrs Aubrey the individual entries on the "Scott Schedules" provided by the Applicant and the Tribunal was grateful for the patience and input of the Respondent given the lack of previous experience and expertise.

- 19 There were some factual matters that could not be resolved on 29th July in relation to the length of the first Tribunal hearing and also the costs of the landlord in relation to this costs application, particularly those at page 583.2 of the landlord's bundle of documents. The Tribunal therefore sought further views upon the latter whilst indicating its willingness to see what record the Tribunal Office had in relation to the former. (This turns out not to be particularly helpful in terms of any accurate recording of the length of the hearing).
- 20 The Applicant's solicitor filed a "Scott Schedule" in relation to those costs on 3rd August 2015 and there was a response from the Respondent by letter dated 14th August. As indicated in paragraph 6, above, the Tribunal has limited its consideration of that, and further correspondence to those matters upon which it sought further observations in its directions on 29th July. The Tribunal noted that within that new "Scott Schedule" there were a number of items that appeared in the second schedule presented at the earlier hearing. Where necessary the Tribunal has identified those items and sought to avoid any element of either a double claim, or indeed a duplicate downward assessment.
- 21 Thereafter the hearing concentrated upon the examination of the entries upon the "Scott Schedules" provided and the Tribunal was grateful for the input on behalf of the Respondent given the time taken (until after 5pm on the day) in very unfamiliar circumstances for them.

The Determination

- 22 The Tribunal has adopted the "Scott Schedules" where appropriate as the manner of showing its determination and reasoning therefore subject to the more general findings set out below.
- 23 In the absence of any details of the hourly cost rates established between the Applicant and its solicitors, the hourly rates previously relied upon by the solicitors in other proceedings and the observations of the Respondent in its submissions the Tribunal has taken the view that the rates applicable generally as guideline rates in litigation and which match those previously relied upon should be adopted as the appropriate rates for the relevant level of fee earner in these proceedings. As there is no reference to a grade A fee earner there the Tribunal has taken the view that the hourly rate sought of £245, although higher than might usually be expected, is not beyond the realms of reasonableness and it is not the Tribunal's role simply to consider an alternative as being more reasonable.

- 24 The Tribunal was greatly concerned by the situation whereby shortly before the hearing by the first Tribunal the freehold interest of the landlord was disposed of, given that the Commonhold and Leasehold Reform Act 2002 gives no guidance as to how a matter should proceed in such circumstances. Whilst expressing a view that it finds it somewhat baffling that the situation was not re-laid to the Respondent, or the solicitors acting at that time and noting the observations of the Respondent that views might have changed had that information been available, the Tribunal accepts that there is again no guidance within the Act as to how that situation should be approached.
- 25 The Act is however quite clear in its terms so far as Section 88 is concerned. The section is set out above at paragraph 4 and so far as the Tribunal is concerned the wording of Subsection (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 the premises” quite explicitly, in the absence of any other guidance, refers in the present tense to costs incurred whilst the landlord is the landlord.
- 26 The Tribunal would take the view that this necessarily includes any subsequent action required to recover costs incurred at the relevant time as landlord, even though the landlord’s interest may have been disposed of.
- 27 The situation in relation to the costs of the application for leave to appeal against the costs determination of the first Tribunal (paragraphs 28-29 thereof) is considered in the following way:
- (1) Those paragraphs clearly deal with the issue of costs under Rule 13 Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and the Tribunal at that time was dealing with cross applications under that rule and finding that neither side had acted in a way which invoked the application of that rule.
 - (2) Nowhere in the decision of that Tribunal, nor in any other documentation before this Tribunal is there a suggestion that at the first hearing the Tribunal was asked to consider the more general application of Section 88 Commonhold and Leasehold Reform Act 2002.
 - (3) The Applicant’s solicitors were clearly aware of how an application under Section 88 might properly be dealt with, having made such an application in the “Springquote” case (see above) and having received a determination in that case not long before the first Tribunal considered this matter.
 - (4) In the light of the above this Tribunal is of the view that the application for leave was unnecessary and the costs incurred are not reasonable costs to be paid by the Respondent.
 - (5) There is however an appropriate element of costs where the Applicant’s solicitors have reported the findings of the first Tribunal

and considers those with both counsel and client as they will relate in part to those elements of the proceedings when Sarnia Construction Ltd were the landlords.

- 28 Thereafter there is the issue of the costs relating to the application for costs. On the basis of the determinations made above the Applicant has recovered a significant proportion of its costs, but equally the Respondent has successfully challenged a significant amount of what was being sought from it. The Tribunal is of the view that having received the further submissions sought from both parties after the hearing of 29th July, insofar as it related to the information requested and no more, it is appropriate and reasonable for the Applicant to receive one-half of the costs sought in that element of its claim, subject to those general observations in paragraph 23, above. For the avoidance of doubt, given the issues raised and the time taken at the hearing on 29th July it was reasonable for counsel to be instructed on the costs hearing.
- 29 The detailed workings of the Tribunal on the "Scott Schedules", in the light of the above determinations, are annexed hereto. The Tribunal has identified the schedule relating to the costs of the Applicant in relation to recovering its costs at Schedule "C" and it should be borne in mind that in accordance with the preceding paragraph one-half of the total costs shown there are recoverable.

30 The amounts recoverable are:

Schedule A		£7433.90
Schedule B	£ 19.20	
	1/2 x £2132.40	£1085.40
Schedule C	1/2 x £ 556.80	<u>£ 278.40</u>
		£8797.70
	Add VAT	<u>£1759.54</u>
		£10557.54