FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/LRM/2020/0025**
HMCTS code (paper, video, audio)	**:**	**PAPER**
Property	**:**	**52-58 (Even) Commercial Road, London E1 1LP**
Applicant	**:**	**52-58 (Even) Commercial Road RTM Company Limited**
Respondent	**:**	**Roquefort Properties Limited**
Type of Application	**:**	**Supplemental cost application under section 88 CLARA 2002 following RTM application**
Tribunal Members	**:**	**Judge P Korn** **Ms L West**
Date of Decision	**:**	**26th August 2021**

SUPPLEMENTAL DECISION ON SECTION 88 COSTS

Description of determination

This has been a determination on the papers alone, without a hearing, which has been consented to by the parties. The documents to which we have been referred are in an electronic bundle, the contents of which we have noted. The decision made is set out below under the heading "Decision of the tribunal".

Decision of the tribunal

The tribunal determines that the Applicant shall pay to the Respondent costs in the sum of £69,348.50 pursuant to section 88 of the Commonhold and Leasehold Reform Act 2002 ("**CLARA**").

The background

1. This application is supplemental to an application (the "**Main Application**") made by the Applicant for a determination that it was entitled to acquire the right to manage the Property. The tribunal's decision in respect of the Main Application was that the Applicant did not acquire the right to manage in relation to the Property on the relevant date.

2. The Respondent has now made a cost application pursuant to section 88(4) of CLARA.

Summary of written submissions

Is the Applicant a RTM company for the purposes of section 88 of CLARA?

3. Quoting section 88(1) of CLARA, the Applicant notes that section 88(1) states that *"A RTM company is liable for reasonable costs incurred … in consequence of a claim notice given by the company …"* and submits that in order to be liable the company in question has to be a RTM company. At the hearing in relation to the Main Application the Respondent itself argued that the Applicant was not an RTM company and the tribunal agreed with the Respondent on this point in its decision. The Applicant goes on to state that the Respondent cannot "have it both ways" by arguing that the Applicant was not a RTM company for the purposes of serving a claim notice but is a RTM company for the purposes of a section 88 cost application. In the Applicant's submission, that cost application must therefore fail.

4. The Respondent submits that the Applicant's argument on this point is circular and cannot succeed in the light of the decision of the Upper Tribunal in *Plintal SA and another v 36-48A Edgewood Drive RTM Co Ltd and another (LRX/16/2007)*. In *Plintal* it was held that having relied on a purported initial notice which turns out to be invalid the party giving the notice is estopped from denying that costs are payable by that party.

Reimbursement of costs under the tribunal's rules

5. The Respondent argues that if the tribunal does not agree with it on the 'RTM company' point then the tribunal has power to award reimbursement of fees by one party to another under its rules.

Should an issue-based approach be taken?

6. If the tribunal is not with the Applicant in respect of its primary submission the Applicant submits that, in the alternative, an issue-based approach should be taken to this cost application. The case involved a number of discrete issues. The Applicant succeeded on certain of these issues, including the evidential issue that took up a large proportion of the hearing and the preparation for it. The Applicant submits that it would be reasonable for the tribunal only to award the Respondent costs relating to those issues on which it had been successful or to apply some form of set-off as between the issues on which the Respondent had been successful or unsuccessful.

7. The Respondent disagrees and argues that there was only one issue before the tribunal. It also states that in any event section 88 of CLARA, unlike the Civil Procedure Rules, makes no provision for an issue-based costs order. Furthermore, it is a fact of litigation that the winning party is unlikely to be successful on every issue but that should not by itself deprive that party of a proper and fair costs order.

Distinction between section 88(1) and section 88(3) of CLARA

8. The Respondent states that its costs were reasonably incurred but that whilst the requirement of reasonable costs is referred to in section 88(1) there is no equivalent provision in section 88(3) in relation to the recoverability of costs on the dismissal of an application by a RTM company.

Quantum generally

9. The Respondent has presented a detailed bill of costs amounting to a total of £77,955.50. The Applicant has offered £44,145.00 in the event that its primary submissions fail.

10. The Applicant has made some overall points and several detailed points on quantum. It submits that the Respondent must prove its claim for costs pursuant to a statutorily compliant retainer. It also submits that the solicitors' hourly rates are excessive, that higher grade fee earners were involved in too much of the work and that much of the time spent was excessive. It further submits that nothing should be payable in relation to those issues on which the Respondent was unsuccessful. In addition, it identifies some costs as relating to matters which, in its

submission, are either vague or unproductive/non-progressive or duplicative or otherwise irrecoverable.

11. In response, the Respondent states that the matter was funded pursuant to a private retainer and that the bill of costs has been signed and certified by an officer of the court (i.e. the tribunal) as to validity and compliance with the indemnity principle. As regards hourly rates, the Respondent is prepared to concede a reduction of the hourly rate for the partner involved to £300.

12. The Respondent objects that much of the Applicant's challenge, particularly as to time spent, is vague and unhelpful, but the Respondent is nevertheless prepared to make certain concessions on points of detail, principally by agreeing to a reduction in time spent in relation to various stages of the process. In total it has conceded £6,141.00, reducing the amount of costs being claimed to £71,814.50.

Relevant legislation

13.

Section 88 of CLARA

(1) A RTM company is liable for reasonable costs incurred by a person who is –

(a) landlord under a lease of the whole of 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 the appropriate 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 the appropriate tribunal.

The tribunal's analysis

The issue of whether the Applicant is a RTM company for the purposes of section 88 of CLARA and the connected issue of estoppel?

14. In our decision in relation to the Main Application we determined that the Applicant was not a RTM company when it served its first claim notice or its second claim notice. As it was not a RTM company for the purposes of serving a valid claim notice, it would seem to follow that it is also not a RTM company for the purposes of section 88 and the recovery of costs by other parties. After all, both section 88(1) and section 88(3) begin with the words "A RTM company is liable", and it would therefore appear to follow that an entity which is not a RTM company is not liable under either of these sub-sections.

15. The Respondent has referred us to the decision of the Upper Tribunal in *Plintal*. In that case, it was common ground between the parties that the claim notices relating to a claim to the right to manage had not been served and therefore had not been "given" for the purposes of section 79(1) of CLARA. The President of the Upper Tribunal, George Bartlett QC was of the view that if the claim notices had not been given for the purposes of section 79(1) then equally they had not been given for the purposes of section 88(1) which permits a person falling within the categories specified in that sub-section to recover reasonable costs incurred *"in consequence of a claim notice given by the company"*. It therefore followed that if a claim notice had not been given there was no entitlement to costs under section 88(1). This is consistent with the proposition that if a company is not a RTM company for the purposes of section 73(4) then equally it is not a RTM company for the purposes of section 88 and again there is no entitlement to costs.

16. George Bartlett QC then considered the alternative argument put to him by the appellants, namely that of estoppel. The argument was that the RTM companies in *Plintal* were estopped from denying the appellants' right to costs under section 88, having maintained until the first hearing before the LVT (as it was then) that the claim notices were valid and properly served. He concluded by agreeing with the appellants' argument, stating that by maintaining their application to the LVT the RTM companies were asserting that the claim notices were valid and had been validly served. The RTM companies' primary contention was that they had the right to manage the premises, and only when the LVT found itself unable to determine in their favour in

relation to the right to manage did they seek to rely on the appellants' own contention that the notices had not been validly served.

17. In our view the facts of the present case are analogous to those in *Plintal*. The Applicant's primary argument was that it had acquired the right to manage in relation to the Property and this was the basis on which the Main Application proceeded. The Applicant is therefore estopped from denying the Respondent's right to costs under section 88, those costs having been incurred as a direct result of the Applicant having asserted, and then maintained up to and at the tribunal hearing, that it was a RTM company and that it had acquired the right to manage.

Reimbursement of costs under the tribunal's rules

18. The Respondent argues that if the tribunal does not agree with it on the 'RTM company' point then the tribunal has power to award reimbursement of fees by one party to another under its rules. We have in fact agreed with the Respondent on the 'RTM company' point but will briefly deal with this separate point nonetheless.

19. Under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (property Chamber) Rules 2013 ("**the Tribunal Rules**") the tribunal may order a party to reimburse "any fee paid by the other party". This relates to fees such as application and hearing fees and is therefore not relevant to the fees being claimed by the Respondent in this case.

20. Paragraph 13(1)(b) of the Tribunal Rules allows the tribunal to make a cost order in certain circumstances where a party has acted unreasonably in bringing, defending or conducting proceedings. It is possible that this is what the Respondent has in mind but the Respondent has not argued the point properly and we do not accept that the Applicant has acted unreasonably for the purposes of paragraph 13(1)(b) of the Tribunal Rules to the extent that they apply to this type of case.

21. Accordingly, we do not accept the Respondent's position on this point.

Should an issue-based approach be taken?

22. If the tribunal is not with the Applicant in respect of its primary submission the Applicant submits that, in the alternative, an issue-based approach should be taken to this cost application.

23. There are circumstances where an issue-based approach to costs may have some merit. For example, if there are separate financial claims or separate other remedies sought and a party is successful on some of those matters but is unsuccessful on others then one can see the logic of

arguing that the party in question has not been wholly successful and that this might impact on costs. Even in those circumstances, though, it could still be argued that it is rare for a claim to be 100% successful and that the test of whether a party has won is simply whether that person has been awarded a financial or other remedy. Therefore, the argument would run, the party in question should not be penalised in costs merely because not all of their arguments were 100% successful.

24. However, in the present case there was only one issue, namely whether on the relevant date the RTM company had acquired the right to manage in relation to the Property. The Respondent was successful on this issue, and the fact that the Respondent's success was only because of some of the reasons advanced by it rather than because of all of those reasons is in our view – by itself – not relevant to the level of costs to which it is entitled.

25. In principle we can see that there might be circumstances in which one could argue that a particular argument was an unreasonable one to run and that this itself should impact on costs, but this is not the argument being advanced here by the Applicant.

26. Accordingly, we do not accept that an issue-based approach should be taken in this case, and we do not accept that costs relating to arguments on which the Respondent was unsuccessful should be irrecoverable simply by virtue of the fact that those arguments were unsuccessful.

Distinction between section 88(1) and section 88(3)

27. The Respondent states that whilst section 88(1) of CLARA refers to "reasonable costs" there is no equivalent provision in section 88(3) in relation to the recoverability of costs on the dismissal of an application by a RTM company. The Respondent's argument seems to be that its costs are recoverable even if unreasonable because section 88(3) of CLARA applies.

28. We do not accept the Respondent's analysis on this point. Section 88(1) sets out the general position, namely that a RTM company is liable for reasonable costs incurred by certain categories of person in consequence of a claim notice being given. Section 88(2) then clarifies a specific point about what "reasonable" means in the context of professional services.

29. Section 88(3) then covers costs incurred by a person as party to proceedings before the tribunal, stating that the RTM company is only liable for such costs if its application for a determination that it is entitled to acquire the right to manage has been dismissed. The focus of section 88(3) is therefore on those costs incurred by a person as party to tribunal proceedings. Under section 88(1) costs need to be

reasonable to be recoverable, and the purpose of section 88(3) is not to contradict the need for costs to be reasonable but rather to add a further condition in relation to costs incurred by a person as party to tribunal proceedings, namely that such costs are only recoverable where the RTM company's application for a determination that it is entitled to acquire the right to manage has been dismissed.

Quantum generally

30. The Applicant in its response to the Respondent's bill of costs refers to the Civil Procedure Rules Practice Directions, but these are not relevant to decisions by a tribunal under section 88(4) of CLARA.

31. In relation to the Applicant's point about a statutorily compliant retainer, we do not accept that a substantive point is being pleaded here and we prefer the Respondent's position, noting that there is a bill of costs which has been signed and certified by an officer of the court/tribunal.

32. The parties have made written submissions on quantum and the Respondent has made certain concessions.

33. A significant part of the Applicant's case on quantum is the proposition that an issue-based approach should be taken and therefore that costs incurred in connection with points on which the Respondent was unsuccessful should be disallowed or significantly reduced. As noted above, we do not see any merit in this argument on the facts of this case and therefore we do not accept the Applicant's position on this point.

34. As regards the Applicant's other arguments on quantum, these are in the main lacking in any meaningful detail. This was a complex matter in which both parties saw fit to employ a QC and therefore, for example, more detail was needed to make a persuasive case that certain aspects should have been dealt with by someone more junior.

35. Specifically on the issue of hourly rates, the guidelines have not been updated since 2010 but we note that under draft guidelines which are currently out for consultation the proposal is that rates for Grade A fee earners in this area should be £255 per hour. The Respondent argues that the guideline rates should not apply here as this matter was very complex, but in our view the complexity is more relevant to the amount of time spent and to the seniority of the fee earners used than to the hourly rate itself. In the absence of any better evidence as to appropriate hourly rates we consider that the Grade A rate should be reduced from £300 per hour to £255 per hour. The other rates are acceptable in our view (the partner time having been conceded as not chargeable).

36. The concessions offered by the Respondent reduce the costs from £77,955.50 to £71,814.50. Taking those concessions into account the total amount of Grade A fee earner time is reduced to 54.8 hours. Applying the reduced rate of £255 per hour, this makes for a further reduction of £2,466.00. Therefore, the total costs payable by the Applicant to the Respondent under section 88 of CLARA are £69,348.50.

Name: Judge P. Korn **Date:** 26th August 2021

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

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

D. 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.