FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00HP/LRM/2016/0006**
Property	:	**7 Whitecliff Road, Poole, Dorset, BH14 8DU**
Applicants	:	**(1) Whitecliff Park RTM Co Ltd** **(2) Joan Marie Brunt** **(3) Teresa & Stephen Town**
Representative	:	**Coles Miller LLP, Solicitors**
Respondent	:	**Whitecliff Freehold Ltd**
Representative	:	**Laceys, Solicitors**
Type of Application	:	**For the determination of the Applicants' liability to pay the Respondent's RTM costs and for the Respondent to pay to the Applicants costs under Rule 13**
Tribunal Members	:	**Judge I Mohabir** **Mrs H Bowers MRICS**
Date of Determination	:	**21 November 2016**
Date of Decision	:	**28 November 2016**

DECISION

Introduction

1. The Applicants make two applications in this matter. These are:

   (a) under section 88(1) of the Commonhold and Leasehold Reform Act 2002 (as amended) ("the Act") for a determination of their liability to pay the Respondent's costs having exercised their right to manage in respect of 7 Whitecliff Road, Poole, Dorset, BH14 8DU ("the property").

   (b) under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules").

   These are considered in turn below.

2. On 7 July 2016, the Applicants made an application to the Tribunal for a determination that they were entitled to acquire the right to manage the property. Having initially, contested that the Applicants were entitled to acquire the right to manage, on 15 August 2016, the Respondent conceded the point.

3. The costs claimed by the Respondent are £1,900 for solicitor's fees plus £380 for VAT.

4. A breakdown of the costs together with supporting documentation has been provided by the Respondent in its statement of case. The work has been undertaken by a Grade A fee earner at an hourly rate of £260 plus VAT.

5. In their points of dispute dated 6 October 2016, the Applicants do not challenge that a Grade A fee earner was the appropriate level of fee earner to carry out the work on the Respondent's behalf. They do, however, challenge the hourly rate claimed by the Respondent's solicitors. They contend for an hourly rate of £217, being the guideline rate for a Grade A solicitor in the Bournemouth area.

6. The Applicants go on to contend that costs claimed prior to the claim notice dated 18 April 2016 and various items of costs set out in the points of dispute were not incurred as a consequence of the RTM claim and it is submitted, therefore, that those items of costs are not recoverable under section 88 of the Act.

Section 88

7. This provides:

> *"(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) ...*
> *(c) ...*
>
> *in consequence of a claim notice given by the company in relation to the premises.*
>
> *(2) Any costs incurred by 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)..."*

Decision

8. Pursuant to the Tribunal's directions, the determination of this application took place on 21 November 2016 and was based solely on the documentary evidence before it.

RTM Costs

9. As to the hourly rate challenged by the Applicants, the guideline rate of £217 is exactly that. It is not a prescribed or absolute rate to be adopted in every case. The rate has not in fact changed since 2010 and does not in reality any longer represent the commercial hourly rate being charged

by firms of solicitors for doing this type of work. Indeed, the Applicants accept that it is highly technical in nature and warranted instructing a Grade A fee earner.

10. Having regard to these matters, the Tribunal concluded that the hourly rate of £260 for the Respondent's solicitor was reasonable.

11. The Tribunal then turned to consider the work carried out by the Respondent's solicitor. The Tribunal accepted the general submission made by the Applicants' solicitor that the only costs recoverable by a landlord under section 88(1) of the Act is in consequence of a claim notice and is limited in scope accordingly.

12. Having carefully considered the points of dispute at pages 30-33 and other documentation in the bundle, the Tribunal found that the work carried out by the Respondent's solicitor was as a consequence of the claim notice, save for the following items:

    (a) All work from 13.04.16 to 15.04.16, as this was incurred prior to the service of the claim notice.
    (b) 20.04.16 – letter to Applicant's solicitors, as this related solely to the installation of a boiler.
    (c) 09.05.16 – telephone call from client and letter to Applicants' solicitor regarding the boiler.
    (d) 13.05.16 - telephone call from Applicants' solicitor regarding the boiler.
    (e) 16.05.16 – telephone call from client and letter to Applicants' solicitor regarding the boiler.

13. The total deductions from the Respondent's costs amount to £806. Deducted from the sum of £1,900 claimed, leaves a net figure of £1,094 to which VAT of £218.80 should be added. The Respondent's total costs recoverable under section 88(1) of the Act and payable by the Applicants is £1,312.80.

Rule 13 Costs

14. The costs claimed by the Applicants under Rule 13 (1)(b) are £2,443.20. The unreasonable conduct of the Respondent relied upon is set out in the Applicants' statement of case dated 20 September 2016 made in support of this application.

15. Essentially, the Applicants complain that the Respondent served a counter notice dated 25 May 2016 denying the Applicants' entitlement to acquire the right to manage the property and refused to specify in open correspondence the basis on which the entitlement was being denied under the Act. On instructions, the Respondent's solicitors maintained this stance thereby necessitating an application to be made to the Tribunal to determine the point on 7 July 2016.

16. On 15 August 2016, the Respondent conceded that the Applicants were entitled to acquire the right to manage. They submit that the application to the Tribunal and wasted costs incurred thereby was unnecessary because the denial of the entitlement to acquire the right to manage was wholly without merit.

17. For any application under Rule 13(1)(b) to succeed, the 3 stage test set out in the Upper Tribunal decision of ***Willow Court Management Co Ltd v Alexander*** [2016] UKUT 0290 (LC) and conjoined appeals has to be satisfied. These are:

    (a) firstly, a Tribunal has to find that a person has acted unreasonably;

    (b) if so, secondly, a discretionary power is then engaged and a Tribunal has to go on to consider whether, in the light of the unreasonable conduct, it ought to make an order for costs or not;

    (c) if so, thirdly, what the terms of the order should be.

18. In ***Willow Court***, the Upper Tribunal concluded[1], firstly, that the fact that a party had been unsuccessful was not determinative of what amounts to unreasonable conduct. Secondly, that the threshold of what can amount to unreasonable behaviour within the meaning of Rule 13 is a high one.

19. In the Tribunal's judgement, the conduct of the Respondent by initially denying the Applicants' entitlement to acquire the right to manage the property and reasonably promptly conceding the point thereafter did not amount to such a degree of unreasonable conduct as to bring it within the meaning of Rule 13. It represented what can be regarded as no more than the usual conduct of litigation where, routinely, points are taken and abandoned by parties, often for strategic purposes. In any event, the Tribunal is not intended to be a costs shifting jurisdiction, as is the case in the higher courts.

20. Accordingly, the Tribunal concluded that no order should be made under Rule 13 and the application is dismissed.

21. It is noted that the Respondent has conceded that it cannot recover its costs under the leases through the service charge and, therefore, no order is required to be made by the Tribunal under section 20 of the Landlord and Tenant Act 1985 (as amended) on the assumption that such an application was made by the Applicants.

Appeals

22. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office, which has been dealing with the case.

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[1] at paragraphs 61 and 62 of the judgement

23. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

24. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

25. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Judge I Mohabir
28 November 2016