

381

COSTS ONLY

Ref LON/LVT/1937/05

**LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT
ASSESSMENT PANEL**

**APPLICATION UNDER SECTION 21 OF THE LEASEHOLD REFORM,
HOUSING AND URBAN DEVELOPMENT ACT 1967**

Applicants: Martin L Butler & Judith E Butler

Respondents: The Earl Cadogan & Cadogan Holdings Ltd

Re: 22 CHELSEA SQUARE, LONDON SW3 6LF

Hearing date: 1st November 2005

Appearances for Applicant : Willem Baars (Solicitor)
Katherine Holland (Counsel)

Appearances for Respondent : Andrew Stevens (solicitor)
Andrew Post (Counsel)

Members of the Leasehold Valuation Tribunal:

Miss S J. Dowell

Mr. F W James

Mr. D D Banfield

Date of Decision: 30 November 2005

IN THE MATTER OF:

22 CHELSEA SQUARE, LONDON SW3 6LF

THE APPLICATION

1. This is an application dated 17th June 2005 made by Mr and Mrs M. Butler to determine the amount of costs payable to the Respondent, the Earl of Cadogan and Cadogan Holdings Limited pursuant to section 9(4) of the Leasehold Reform Act 1967 ("the Act").

THE LAW

2. The jurisdiction of the Leasehold Valuation Tribunal to determine costs payable under section 9(4) of the Act is derived from section 21 of the Act.

Section 9(4) of the Act reads as follows:

Where a person gives notice of his desire to have the freehold of a house and premises under this Part of this Act, then unless the notice lapses under any provision of this Act excluding his liability, there shall be borne by him (so far as they are incurred in pursuance of the notice) the reasonable costs of or incidental to any of the following matters:

- (a) any investigation by the landlord of that person's right to acquire the freehold;
- (b) any conveyance or assurance of the house and premises or any part thereof or of any outstanding estate or interest therein;
- (c) producing, evidencing and verifying the title to the house and premises or any estate or interest therein;
- (d) making out and furnishing such abstracts and copies as the person giving the notice may require;
- (e) any valuation of the house and premises;

but so that this section shall not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void.

- 4A. Subsection (4) above does not require a person to bear the costs of another person in connection with an application to a Leasehold Valuation Tribunal except in relation to any application made to an LVT or any proceedings transferred to an LVT by a county court before 30th September 2003.

BACKGROUND

3. The Applicant served a notice of claim to acquire the freehold of 22 Chelsea Square, London SW3 on 25th July 2003. The Respondent served a notice in reply on 21st August 2003. An application was made to the Leasehold Valuation Tribunal on 22nd October 2004. In March 2005 terms were agreed save for the legal costs. The agreed premium was £1.3 million and the transfer was completed on 1st June 2005.
4. Directions in these costs proceedings were issued on 16th September 2005 for a determination without an oral hearing. By a letter dated 21st September 2005 the Respondent's solicitors requested an oral hearing because they did not believe this case was suitable for a paper determination. The basis for this request was that this case would deal with the principle of scale fees and that the arguments needed to be aired before the Tribunal and that the Respondent intended to instruct Counsel. In those circumstances an oral hearing date was fixed and new directions were issued on 27th September 2005.

THE HEARING

5. The hearing took place on 1st November 2005. The Applicant was represented by Miss K. Holland of Counsel. In attendance was Mr W. Baars, a partner in the firm of Rokeby Johnson Baars. Mr Baars had submitted a witness statement and gave evidence at the hearing. The Respondent was represented by Mr A. Post of Counsel and Mr A. Stevens, in-house costs draftsman for Pemberton Greenish, solicitors was in attendance but did not give evidence.

DOCUMENTS

6. The Tribunal was provided with:
 - (a) witness statements of Adriaan Willem Baars on behalf of the Applicant and Laura Blackwell on behalf of the Respondent.
 - (b) Bundle of documents which included a breakdown of the landlord's costs payable by the tenants and the Respondent's agreement in respect of charging rates.
 - (c) Skeleton arguments.

MATTERS IN DISPUTE

7. The Tribunal was asked to decide,
 - (a) the reasonableness of the costs for the investigation of the right to acquire the freehold under section 9(4)(a). These were claimed at £940 plus VAT and based on an hourly rate charged by a partner.
 - (b) The reasonableness of the costs of the conveyancing work under section 9(4)(b), (c) and (d) of the Act. These were claimed on a scale fee being 0.375% of the premium i.e. £4,875 plus VAT.

8. The Applicant contended the total reasonable costs of or incidental to the matters set out under section 9(4) of the Act were £2,250 plus VAT.

THE APPLICANT'S CASE

9. Counsel for the Applicant submitted that the costs claimed under section 9(4)(a) were excessive and the scale fee for the conveyancing costs was inappropriate. In the alternative if the scale fee was appropriate a fee of 0.375% was excessive. She emphasised that the test was what was "reasonable". The solicitor with conduct of this case on behalf of the Respondent had not produced time recording records, or attended court to give evidence and her witness statement merely consisted of submissions and assertions rather than adducing evidence to support costs claimed.
10. However the solicitor had provided a breakdown of the work carried out and her hourly charging rates over the period in question. On this basis the fees which would have been charged at an hourly rate by the Respondent were considerably less than the scale fee. Even on this basis, the Applicant rejected some of the costs claimed and the breakdown had been marked accordingly.
11. Mr Baars gave evidence in support of his witness statement. He said that some of the works should have been delegated and also that in his view there was no substantial work taking the case forward between August 2003 and November 2004.
12. Counsel replied on the cases of Blendcrown Limited -v- Church Commissioners (2004) 1EGLR143 to support her argument that the charging of a scale fee was not appropriate. She also produced a Leasehold Valuation Tribunal decision dated 8th September 1999 in respect of 6 Stonehouse, 9 Weymouth Street, London NW1 where Mr D. A. Greenish then of Lee and Pembertons and now of Pemberton Greenish had submitted that a tribunal should apply a wider and more objective test with regards to reasonableness of professional charges and the fact that there may be agreed rates between a client and an adviser should not be the end of the enquiry. This particular Tribunal had agreed with Mr Greenish that the costs agreement between Howard De Walden Estates Limited and its professional advisers was not their concern. Further Counsel relied on a Leasehold Valuation Tribunal decision dated 30th September 2004 in respect of 47 Lordswood Square which included a statement by the Tribunal that "*we accept we should not conduct a "taxation"*" [when dealing with costs].
13. Counsel rejected the contention that because scale fees were appropriate between a solicitor and a client that they therefore must be appropriate under section 9(4) of the Act. Counsel pointed out that the paying party played no part in the negotiations of the level of the scale fee and that the fees to be paid had a statutory basis. She objected to the Tribunal scrutinising the file of the Respondent which had been made available to the Tribunal by the Respondent. In her view it could not be fair for the Tribunal to look at the file. The Applicant had been asking for a breakdown of costs for six months and that if the Respondent had not presented its case fully and could not prove that the costs came within section 9(4) then they should not be entitled to their costs.

THE RESPONDENT'S CASE

14. The Respondent's solicitors' charging rates were set out in a letter dated 23rd July 1996 but had been updated. Schedules of hourly charging rates for the years relevant to this application had been appended.
15. The Respondent's solicitors had made it clear in their letter to the Tribunal dated 21st September 2005 that they considered the question of the scale fees needed to be "aired". The essence of the Respondent's case was that it is proper for the Respondent's solicitors to charge the Respondent a scale fee, that this form of charging comes within the definition under the Solicitors (Non-Contentious Business) Remuneration Order 1994 and the Applicant is liable to indemnify the Respondent for these fees. Counsel for the Respondent submitted that in assessing whether a fee based on a scale charge is reasonable, the essential test is whether the Respondent acted reasonably in agreeing the terms of the retainer which provided for a scale fee. The benefit of a scale fee approach was that the fee charged to the client and therefore to the Applicant was to be consistent and therefore predictable. The Applicant could at the outset of the transaction telephone the Respondent's solicitors and find out the fees for which he would be liable if he decided to seek to purchase the freehold under the terms of the Act. Counsel went on to submit that a fee based on a scale fee is not merely fair as between solicitor and client but it also has the benefit for applicants and for Tribunals that the fees are predictable and should be capable of agreement without the need for Tribunal determination. Counsel submitted that the Respondent acted reasonably in entering into the terms of the retainer which provided for a scale fee and that the reasonable legal fee should be determined at the sum of £5,845 plus VAT.
16. Laura Blackwell, the partner in the firm of Pemberton Greenish who had conducted this matter, signed a witness statement dated 31st October 2005. She confirmed that it was a requirement by the Respondent that work in connection with a purchase under the 1967 Act should be dealt with at partner or senior assistant level. She did not accept that there would have been any savings if the work had been delegated to a junior because this junior would have taken longer and needed supervision. Neither did she accept there were considerable economies of scale as a result of other claims relating to properties in Chelsea Square as every purchase was dealt with on an individual basis and it would be negligent to do otherwise. Miss Blackwell explained that time which had been challenged between 21st August 2003 and 22nd November 2004 was in respect of reasonable costs of and incidental to the valuation of the property pursuant to section 9(4)(e) of the Act.
17. Counsel relied on three cases, notably Jemma Trust -v- Liptrott (2004) 1WLR 646 when the Court of Appeal considered whether a scale fee was appropriate in respect of non-contentious work carried out by solicitors. This was a probate case where the Court of Appeal held it was open to a solicitor to charge by way of a value element on the basis of a reducing percentage of the value of the estate. Counsel for the Respondent rejected the approach in the Blendcrown case as this was valuation fees rather than legal fees and in any event did advocate the advantage of certainty in the amount which would be charged by a valuer. Counsel conceded that a scale fee for conveyancing work based on a percentage of the premium, in some cases the scale fee would exceed the fee that would have been charged on a time basis but he pointed out in other cases the scale fee would be less than the fee based on time charges. The fact

that in any particular case the scale fee is higher does not establish that the fee is unreasonably high. Counsel argued that if that proposition was valid then applicants could cherry pick the cases to challenge.

18. The Respondent's position in respect of the Leasehold Valuation Tribunal decision on 6 Stonehouse was that in that particular case the tenant's advocate had agreed that the costs agreement between the landlord and its professional advisers was not the concern of the tribunal but in that case the test was whether particular work fell within section 60 of the Leasehold Reform Housing and Urban Development Act 1993. As far as the Lordswood Square case was concerned, the tribunal's comment that it was not conducting a "taxation" supported the Respondent's contention that the Tribunal should be looking at the overall aspects of the costs claimed under section 9(4).
19. Mr Stevens had Pemberton Greenish's file available for the Tribunal to inspect.

DECISION

20. We looked first at the claim for legal costs of £940 plus VAT for investigating the claim for the freehold of 22 Chelsea Square under section 9(4)(a) of the Act. Pemberton Greenish had provided a breakdown of this work which ran from 29th July 2003 to 21st August 2003. The amount claimed was three hours fifty-four minutes of a partner's time at £245 per hour making a total of £955.50 but reduced to (as billed to client) £940.
21. The Tribunal considered the status of the fee earner carrying out the legal work on behalf of the landlord. The Tribunal acknowledged that the consequences of the failure to obtain the correct advice would be serious for the landlord. The Tribunal determined the landlord was entitled to have the work done by the level of fee earner he considered appropriate in view of the complexities in the legislation and the serious consequences if errors were made. A mid-ranking partner was appropriate. We did not consider it appropriate for any of this work to be delegated to a junior fee earner who would in any event have to be supervised.
22. We then went on to consider the hourly rate of this partner, Laura Blackwell. Her charging rate as notified to the Respondent, was an hourly rate to 31st March 2004 of £245, to 31st March 2005 of £265 and to date of £275. The Tribunal from our own knowledge and experience consider that these hourly charging rates for a mid-ranking partner in a Central London firm were reasonable.
23. We then considered whether all the work fell within section 9(4)(a) and concluded that it did. We therefore allowed a total of £940 net in respect of work under section 9(4)(a).
24. We then considered the essential question in this case which is whether a tenant is liable to indemnify the landlord under the terms of section 9(4) in respect of a costs agreement into which the landlord has entered with his solicitor. Our jurisdiction is to decide "the reasonable costs of or incidental to" the matters set out in section 9(4). These costs are a hybrid of both contentious and non-contentious solicitors costs because as soon as a notice is served by the tenant both parties are aware that if agreement cannot be reached an application will be made to the Leasehold Valuation

Tribunal. However any costs in connection with an application to a Leasehold Valuation Tribunal are specifically excluded from any liability of the tenant under section 9(4A).

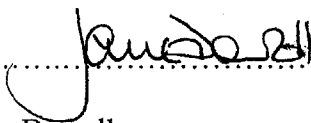
25. These costs are however different from contentious costs because in litigation no party has a right to costs, which are in the discretion of the court and from non-contentious costs because these are payable to the solicitor according to the terms of any contract he or she has made with his or her client.
26. In this case the costs are payable pursuant to a statutory provision and the only guidance the parties are given is that the costs must be "reasonable". In our view whether or not the costs are reasonable will inevitably depend on the nature and the amount of work which was required in a particular case. A scale fee is not appropriate in those circumstances. We do not accept that the wording of the statute means that a tenant is obliged to give a landlord a total indemnity for whatever costs a landlord has chosen to agree with his solicitor. Our jurisdiction is to look at the costs of an individual transaction. The "swings and roundabouts" argument may well be attractive to a client with a large and varied number of cases but the wording of the statute means that the tenant has no negotiating power and no input into what is agreed quite separately between the solicitor and his client. A scale fee depends on the value of the property alone and not on the amount of work. The Tribunal must know the nature of the work carried out and the charging rate before we can decide if those costs are reasonable and incidental to any of the matters which are listed in section 9(4) of the Act.
27. In those circumstances we confirm that we reject the argument that a scale fee is appropriate because we do not consider that the costs calculated in this way are reasonable. Our view is that reasonable costs can only be quantified by looking at an hourly rate and the amount of work carried out. We have set out above our reasons for accepting that the work in this case should have been carried out by a partner and accepting her charging rates.
28. On that basis we then went on to consider whether the costs as shown on the breakdown were reasonable and incidental to the matters set out in the Act. We were surprised that no time recording records had been produced but we were satisfied that the breakdown which had been supplied by Laura Blackwell was a true and proper reflection of the work carried out. We consider all costs claimed to be reasonable except those for work carried out between 23rd October 2003 and 2nd November 2004 (inclusive). The Respondent claims that these were reasonable costs of and incidental to the valuation of the property pursuant to section 9(4)(e) of the Act. In our view the negotiating costs of the landlord are not payable by the tenant.
29. It is not normal practice in costs cases at the Leasehold Valuation Tribunal to look at the landlord's solicitors' file and we did not consider it necessary to do so in this case.

SUMMARY

30.	Section 9(4)(a) costs		
-	as paragraph 23 above	:	£ 940.00
Other section 9(4) costs			
-	12 minutes at £240 p.h.		
-	48 minutes at £265 p.h.		
-	2 hours 54 minutes at £275 p.h.		
-	Overall	:	£1,058.50
TOTAL		:	<u>£1,998.50</u>

VAT

All figures we have referred to are exclusive of VAT. We have no jurisdiction to determine VAT matters which are a matter for HM Revenue and Customs. Our determination is exclusive of VAT, save that VAT shall be added at the appropriate rate if applicable.


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Jane Dowell
Chairman

Dated the 30 day of November 2005