RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Property	:	**21 Napier Court Flamstead End Road Cheshunt Herts EN8 OJD And Parking Space 21**
Applicants	:	**Petrolux Property Services Limited**
Respondents	:	**1. Sinclair Gardens Investments (Kensington) Limited 2. Cromwell Court Management Limited**
Case number	:	**CAM/26UB/OLR/2008/0055**
Date of Application	:	**4th August 2008**
Type of Application	:	**To determine the terms of acquisition and costs of the new lease of the properties pursuant to s48(1) and s60 Leasehold Reform, Housing, and Urban Development Act 1993**
Date of Hearing	:	**15th October 2008**
Tribunal	:	

Mrs. Joanne Oxlade — **Lawyer Chairman**
Ms. Marina Krisko BSc (Est Man) FRICS — **Valuer Member**
Mrs. S Redmond BSc Econ MRICS — **Valuer Member**

DECISION AND REASONS

The Tribunal determines that the costs payable by the Applicant to the Respondent in connection with the grant of a new lease of 21 Napier Court, Flamstead End Road, Cheshunt, Herts, EN8 OJD and parking space 21 are £1526.90 (including vat).

REASONS

Background

1. The Lessee of 21 Napier Court, Flamstead End Road, Cheshunt, Herts, EN8 OJD and parking space 21 applied for a lease extension by service of a notice dated 28th January 2008, pursuant to section 42 pursuant to the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act").

2. A counter notice was served dated 11th February 2008 and the main dispute related to the premium payable. Other points were disputed, but these are not material.

3. The matter was not resolved by agreement, and so the Lessee on 1st August 2008 made application for determination of all matters by the Leasehold Valuation Tribunal ("LVT") including costs, which was due to be considered at an oral hearing on 15th October 2008.

4. By letters dated 6th and 7th October 2008, Solicitors acting on behalf of both parties notified the Tribunal that the parties had reached an agreement on the premium payable, and the terms of the lease extension. However, costs remained the only outstanding issue, and the parties agreed that the Tribunal could determine this by way of paper hearing.

Jurisdiction

5. Section 91(1) of the 1993 Act provides that the LVT shall have jurisdiction to determine the amount of costs payable.

6. Section 60 of the 1993 Act provides

"(1) Where a notice is given under section 42, then (subject to the provisions of this section) the tenant by whom it is given shall be liable, to the extent that they have been incurred by any relevant person in pursuance of the notice, for the reasonable costs of and incidental to any of the following matters, namely –

(a) any investigation reasonably undertaken of the tenant's right to a new lease;
(b) any valuation of the tenant's flat obtained for the purpose of fixing the premium or any other amount payable by virtue of section 13 in connection with the grant of a new lease under section 56;
(c) the grant of a new lease under that section;

but 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.

(2) For the purposes of section (1) any costs incurred by an relevant person in respect of professional services rendered by any person shall only be regarded as reasonable if and to the extent that costs in respect of such services might be reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs".

7. Section 60(2) makes it clear that the method of assessment is on the basis of the indemnity principle. When considering a claim where the indemnity principle applies, doubts are generally to be resolved in favour of the receiving party.

Documents

8. In preparation for the costs hearing, the parties filed with the Tribunal a bundle of documents, though not paginated as requested, and which would have been of assistance.

9. This included documents which had been prepared in compliance with paragraphs 1, 2 and 3 of the Directions made on 18th August 2008: namely, a detailed breakdown of the Respondent's costs as claimed; a document filed by the Applicants objecting to costs; a document filed by the Respondent seeking to meet the objections raised, annexed to which was an indexed bundle with numerous decisions of the Court of Appeal, High Court, Lands Tribunal, LVT, and extracts from the CPR. Along with this bundle was a covering letter from the Applicants Solicitor, helpfully summarising his client's position.

Respondents Claim for Costs

10. The Respondents' first submissions on costs can be summarised as follows:

(a) the statutory provisions do not turn on what the Applicant reasonably expects to be their liability for the Respondents costs, but what costs the Respondent has actually incurred and whether the work done giving rise to costs falls within a range of what it was reasonable to do in response to being served with a notice claiming a lease extension

(b) the Respondents Solicitor has a charge out rate of £230 plus vat, being a sole practitioner admitted in 1974, being an expert and having experience in this field; that his clients would employ him at that rate even if they expected to pay the costs themselves, rather than the Applicant being statutorily obliged to pay those costs.

11. The document sets out the steps which the Solicitor would take on receipt of a section 42 notice including the instruction of an expert, the questions and matters which he would consider, being mindful of the importance of serving an accurate counter notice.

12. Further, the documents set out the basis on which the costs have been and will be incurred as £3744.51 including the valuer's fee and VAT at 17.5%. Further details of the notices are given at paragraph 28 below. They are divided as follows:

(a) £1067.48 for considering the "first notice" served in early March 2007
(b) £499.96 for considering the "second notice" served in about May 2007
(c) £828.76 for considering the "third notice" served in late January 2008
(d) £878.31 for drafting the new lease, considering any revisions requested, preparing completion statement
(e) £470 for the valuer's fee.

Applicants Response to the Claim for Costs

13. The Applicant's first submissions on costs can be summarised as follows:

(a) it was acknowledged that the Respondents Solicitor is an expert in the field of leasehold extensions, and although his charge out rate was high, it was accepted by the Applicants
(b) however, the time claimed was excessive as much of the work was duplicated because 3 successive notices were served, and one withdrawn in July 2005 at which time the Respondents' costs of £1550 were paid. It would therefore have been unnecessary for the Respondent to repeat the entirety of the investigation, as the Respondents' response to an invalid notice has been to refuse to proceed save on onerous terms and over valued premiums, and so the time taken for taking instructions is excessive and unnecessary
(c) the claim is relatively straightforward and the premium payable is low.

14. The Applicants have made the following specific points about the claims summarised at 12(a) – (d) above.

(a) in respect of the first notice, the Applicant says that the failure to specify a response date was fatal to the notice and so it was not necessary to consider any other aspect; it was unnecessary to instruct a valuer to deal with a valuation at that stage as the section 42 notice was invalid and the Respondents' previous valuations would have been adequate to enable the Respondents to insert a reasonably accurate figure in the counter notice
(b) the Applicant has disputed the detail of the claims made, challenging the time spent (3.25 hours) and number of letters sent (5), and considers that the sum of £405.37 including vat is appropriate, which reflects 1 hour of time spent, 3 letters, and 2 telephone attendances

(c) in respect of the second notice, the Applicants point out that the second notice was served immediately on the first being withdrawn and so the claimed time taken to deal with the notice is excessive
(d) the Applicant has disputed the detail of the claims made, challenging the time spent (1.25 hours) and number of letters sent (4), and considers that the sum of £280.82 including vat is appropriate, which reflects half an hour of time spent,3 letters and 2 telephone attendances
(e) in respect of the third notice the Applicants challenge the amount of time spent by the Respondents solicitors (2 hours 10 claimed) in relation to taking clients instructions, considering the lease and OCE, considering the notice and researching questions, and the number of telephone calls and telephone attendances, and so agree that 1 hour 15 minutes is adequate, with 4 letters and 2 telephone calls, making a total of £462.95 including vat
(f) the Applicants make the point that the lease is in standard form, that no revisions are necessary, and that 1 hour of time and 3 letters should be sufficient – as opposed to 2 ¾ hours claimed, and so agree to pay £321.35 including vat
(g) finally the Applicants agree to pay half of the costs of the valuer at £235 including vat, being half of what they previously paid.

15. Accordingly, the Total costs that the Applicants assert to be reasonable are £1735.49.

Respondents Further Submissions on Costs

16. The Respondent submitted a 22 page document, in response to the Applicants' response to their submissions. The Respondent says that they did not know what points would be taken against them, the matters not having been ventilated in correspondence.

17. In summary the Respondent says that the Applicants' objections are subjective and do not satisfy the objective burden of proof which would entitle a Tribunal to disallow indemnity costs. Reference is made to CPR 44, in which any doubt as to whether costs have been reasonably incurred or are reasonable in amount will be resolved in favour of the receiving party. It is argued that proportionality is irrelevant. It is asserted that the burden of proof rests squarely on the Applicant to establish with evidence that there is no doubt that the landlord would not pay the Solicitors' costs as claimed. He says that there is no evidence on which to challenge recoverability.

18. The Respondent says (at 1.9) that the schedule of response leaves no room for him to make detailed submissions, but disagrees with the observations made.

19. The document then refers to other cases, the first of which (Hampden Court) was referred to in the first document produced. The Respondent indicates that they instruct their Solicitors for their expertise, and have

done so in at least 900 cases, and adduce a letter dated 25th September 2008 in which the Respondents agree to pay the costs as set out in the schedule.

20. In respect of previous notices, the Respondents say that a prudent Solicitor will acquaint himself with the terms of the lease, and OCE, and other documentation each time an initial notice is served and to ensure that nothing was previously overlooked. He later says that the first notice was defective because no date for service was included and the second was not signed – but these matters could have been rectified. The Landlord may not have wanted to rely on the invalidity and to proceed, in which case all usual investigations would have to be undertaken within the timescale stated in the counter notice.

21. As to costs which had not yet arisen and so could only be estimated - the claim for £878.31 for drafting the new lease, considering any revisions requested, preparing completion statement – the Respondent concedes that costs can only be estimates at that stage, but sets out the matters which he considers that he should have regard to.

22. As to Valuer's costs, he says that a prudent valuer should start from scratch where the previous valuation was made 2 years previously. He says at (21.1) that the invoice is attached – but none has been adduced. From this we infer that the Respondents have used the same valuer and valuation previously relied on.

Applicants Further Submissions on Costs

23. By letter dated 10th October, the Applicants' Solicitors meet some of the points raised by the Respondents for the first time, as follows:

(a) the Solicitor (Mr Bays) with conduct on behalf of the Applicants was admitted in 1973, with a current charge out rate of £200
(b) Mr Bays says that he has dealt with conveyancing for over 30 years, together with numerous Landlord and Tenant issues, and had only recently become involved in the area of statutory lease extensions, which partly explains the service of invalid notices
(c) that he has not sought to challenge the hourly rate of Mr Chevalier of £230 per hour, in the light of his expertise and experience.

24. On behalf of the Applicants it is said that the costs incurred by the Respondent are unreasonable, excessive, and unjustified, and are advanced to recover as much as possible by way of costs from the Applicant. The remaining points merely reinforce what was previously said in the schedule of responses set out from paragraph 12 onwards above. One new factual point is raised, and relates to the new lease, which is said to be in basic form with nothing contentious, and which will require very little drafting, and none of the original lease details have changed (copies of which were enclosed).

25. As to the valuer's report, it is said that the only valuation report is dated 25th October 2006, and that this is a re-hash of an earlier report. When the writer attempted to speak to the valuer Mr Nesbitt he was advised that Mr Nesbitt had not been instructed. A copy of a letter dated 24th September 2008 from the Respondents' Solicitors to the Applicants' Solicitors says that "Lawrence Nesbitt has not yet been instructed". It is submitted that the valuer's fee should be disallowed in its entirety.

Issues in Dispute

26. From the above, we summarise the dispute as follows:

(a) the Applicants do not accept that a valuer's fee of £470 including vat, was actually incurred, and that even if it was the costs should be half of that claimed
(b) the Applicants do not accept that the sums claimed for the first and second notices are reasonable, as they were invalid and someone of Mr Chevalier's experience would have seen that immediately. Further, the landlords' response was to proceed only on very onerous terms to the Lessees
(c) the Applicants do not accept that the sums claimed for the third (and effective) notice are reasonable, the time spent being excessive for someone of Mr Chevalier's experience
(d) the Applicants do not accept that the sums anticipated as spent on the new lease and conveyancing process are reasonable, in light to the simplicity of the transaction and the absence of dispute about the terms of the lease.

Findings of Fact

27. We make the following findings of fact:

(a) the costs claimed by the Respondent pursuant to section 60(1) are not reasonable, and so are reduced as indicated below
(b) the valuer's fee claimed at £470 including vat was not incurred.

Reasons for Findings of Fact

28. This is an unusual case, in that there appear to have been 4 section 42 notices served by the Applicants: one in 2005, two in 2007, and one in January 2008, all of which were responded to by Mr Chevalier.

29. The effect of the 2005 notice on the arguments as to what costs were reasonably incurred in 2007 and 2008 is marginal, because a Solicitor in receipt of a notice in 2007 cannot be expected to recall the matter from 2005, and so would need to look at the matter afresh.

30. However, the effect of the service of 3 notices in 2007 and 2008, two being in close proximity, and two being manifestly invalid, does have

an effect on what costs can be said to be reasonably incurred, for the following reasons:

(a) The Solicitor handling the matter on all occasions, is said to have been involved in over 900 lease extensions, and so is clearly an expert in the field. His expertise would come to the fore on receipt of an invalid section 42 notice, in swiftly identifying that it is invalid, knowing that the notice cannot realistically proceed, and knowing that it puts the Lessor in a strong negotiating position.

(b) Whilst we are aware of Mr Chevalier's submissions on the time frame, and that the notices can be cured, it was (a) not suggested that curing the notice was ever pursued by the Applicants or offered by the Respondents, and (b) the Applicants' assertions in his schedule of comments – that the Landlords used the defective notice to refuse to proceed except on onerous terms – was not challenged.

(c) We therefore conclude that the steps taken and time spent on receipt of the first notice as described in the "First Notice Engaged (3.25 hrs)", and second notice as described in the "Second Notice Engaged (1.25 hours)" were not reasonably incurred. The detailed submissions made by the Applicants' solicitors in the schedule headed "Applicants schedule of point in dispute" persuaded us as to what time should reasonably have been taken on receipt of the first and second defective notices in 2007. Whilst the Respondent challenges this by relying on arguments as to principles, and saying (at 1.9) that the Landlord disputes the detail of the dispute, the Respondent has not given any detailed response to the alternative timing suggested as reasonable by the Applicant. The explanation for this failure to respond - being due to the lack of space - is a poor reason given the volumes of submissions made on other points. We note that the Respondents arithmetical calculation of £280.82 in respect of the second notice should have been £270.25.

31. As to the claim under "Third Notice Engaged", the matter is distinct from the other two claims, because this notice was valid, and proceeded to an agreement to extend the lease.

32. We consider that the corollary of being an expert and so chargeable at £230 plus vat per hour, is that the time spent on scrutinising the section 42 notice, considering the lease and OCE and the right to extend, and then drafting a counter notice will be less than a practitioner who is not an expert. We have carefully scrutinised the claim for the third notice, the opposing submissions from the Applicants' Solicitors, and the lack of a detailed response from the Respondents' Solicitors, and we find the Applicants' arguments to be well made and indeed compelling. The detailed submissions made by the Applicants' solicitors in the schedule headed "Applicants schedule of point in dispute" are persuasive as to what time should reasonably have been taken on receipt of the third

notice in January 2008. We note that the correct figure is £499.96 including vat (the Respondent calculated this as £462.95).

33. As to the claim for Respondents' costs in connection with agreeing the new lease and attending to completion, we again consider the Applicants' points to be well made: there is no dispute about the terms of the new lease, which follows the statutory expectation that it will be granted on the same terms as the existing lease; there are no revisions requested, and so again we accept the Applicants submissions at what amount to reasonable costs. The correct calculation is £351.32 (not £351.35, which are the Respondents' calculations).

34. Finally, we turn to the question of the costs incurred in respect of a valuation. The only document which the Tribunal has seen is a document dated 25th October 2006, prepared by L Nesbitt FRICS, which has a valuation date of 6th February 2008 inserted. It does not purport to have been carried out after inspection, and amounts to a spread sheet of figures. The Respondents say (at 21.1) that a copy of the invoice is attached and (at 21.2) that a prudent valuer will start from scratch. This rather implies that Mr Nesbitt has undertaken a fresh valuation, and so can claim costs on that basis. However, the document is dated 2006, and indeed a letter dated 24th September 2008 from P Chevalier Solicitors to John Bays Solicitors does say that "Lawrence Nesbitt has not yet been instructed by our clients". Indeed we note that the detailed claim for Solicitors' fees for the "Third Notice Engaged" do not refer to instructing the valuer or receiving his report at all. In fact, as noted above no invoice from the valuer was included with the documents submitted by the Respondent.

35. Having looked at all the available evidence on the question of valuer's costs, we are satisfied that they have not been incurred at all.

Conclusions

36. For the reasons given above, we find that the Applicants are liable under section 60 of the 1993 Act to pay the sum of **£1526.90** (including vat), comprised as follows: £405.37 for the first notice; £270.25 for the second notice; £499.96 for the third claim; £351.32 for the new lease.

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Joanne Oxlade
Chairman
15th October 2008