SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

CHI/00HN/OC6/208/0004

Decision of the Leasehold Valuation Tribunal on application under Sections 33 and 91 of the Leasehold Reform, Housing and Urban Development Act 1993

Applicant	Lawn Court Freehold Limited
Respondent:	Jeremy Ryton Plunkett-Ernle-Erle-Drax
Re:	**Lawn Court, 9 Surrey Road, Bournemouth**
Date of Application	10th October 2008
Date of Inspection	None
Date of Hearing	25th February 2009
Appearances	Mr Gerard Van Tonder, of Counsel, for the Respondent Ms S Foye, Solicitor, Preston & Redman, for the Respondent Mr J Drax, the Respondent The Applicant was not represented
Also attending	Mr Lawrence The Penthouse Mr & Mrs Banin Flat 3 Mr Baker, Foxes Property Management

Members of the Leasehold Valuation Tribunal

M J Greenleaves	Lawyer Chairman
E G Harrison FRICS	Valuer Member

Date of Tribunal's Decision: 21st March 2009

Decision

1. The costs payable to the Respondent in respect of Lawn Court, 9 Surrey Road, Bournemouth under Section 33 of the Leasehold Reform, Housing and Urban Development Act 1993 are £3,923 legal fees and £270 Valuer's fees (all plus VAT as applicable).
2. The Tribunal makes no Order for the Applicant to contribute towards the Respondent's cost of these proceedings.

Reasons

Introduction

1. This was an application made by the Applicant to the Tribunal under Section 91 of the Leasehold Reform, Housing and Urban Development Act 1993 (the Act) for the determination of the amount of the Respondent's costs payable by the Applicant under Section 33 of the Act arising from a claim for enfranchisement of Lawn Court, 9 Surrey road, Bournemouth (the property).

2. Terms of acquisition of the property had been in dispute but all had been settled by the parties prior to the hearing and the transaction completed, save for the costs of the Respondent payable under Section 33 of the Act.

3. The Tribunal's consideration was therefore limited to

    a. determination of the costs payable by the Applicant to the Respondent under Section 33 of the Act in respect of legal fees and valuer's fees;

    b. an application for the Applicant to contribute to the Respondent's costs of these proceedings.

Inspection.

4. The Tribunal did not, in the circumstances, inspect the property.

Background

5. The application arises from a claim by the Applicant to enfranchisement of the freehold of the property, a claim which was completed by transfer on 17th October 2008.

6. The property comprises a block of 9 flats.

Hearing

7. The Tribunal heard evidence from Mr Drax and Ms Foye and also submissions made on behalf of the Respondent by Counsel, Mr Van Tonder. The Applicant was neither present nor represented.

8. The points central to the Respondent's case were:

    a. The Applicant had issued two notices under Section 13 of the Act, but the first of those had not been properly served. Despite their efforts to obtain a copy of that notice from the Applicant, the Applicant had not co-operated; the Respondent had thereby incurred costs as a result of that failure and those costs were recoverable under Section 33 on the basis of a passage in Hague on Leasehold Enfranchisement at paragraph 28-22 which states: "It is considered that where a purported Initial Notice is served which turns out to be invalid, the nominee purchaser and participating tenants are estopped from denying that Section 33 costs are payable at any time while they assert that it is a valid notice".

    b. The work done, as set out in the amended and supplemental breakdowns of costs was necessary and proportionate to queries (largely about service charges) received

from the Applicant's solicitors, Coles Miller (CM) who had been very demanding. That such work came within the terms of Section 33(1) as incidental to the items specified in that Section.

c. While the total of legal fees claimed, to include work resulting from the first notice, was £9,227.50 (ex VAT), the only offer made by the Applicant was for £300.50.

d. The court rates submitted by CM were only guidelines for Courts. Ms Foye's hourly rate had increased during the transaction from £215 to £225 per hour.

e. The Respondent had been concerned about mounting costs and had sent a lengthy email to CM as a result on 3rd November 2008.

f. CM were corresponding with Preston & Redman (PR) who, as a result, had to read it, take instructions and respond thereby increasing costs.

g. Just because a letter refers to the Tribunal proceedings does not disqualify its cost from being payable under Section 33.

h. Mr Drax's evidence that he had sent his email to CM to deal with all queries from them; he had at one stage stood down Ms Foye; CM continued to write to PR although they were reminded to write direct to him. The work related almost entirely to service charges. He said that CM wrote to him more than was necessary, demonstrating "a zeal beyond what was necessary". Mr Drax, who had dealt with the accounting side of service charge matters, produced the service charge information on spreadsheet and CM did not challenge that information.

i. Miss Foye, in reply to the Tribunal said that the costs were so high because of work done in relation to service charges matters raised by CM.

j. Counsel applied for an order also that the Applicant should pay the Respondent's costs of this application limited to £500 on the basis that the Applicant was not acting reasonably by making this application rather than making a worthwhile offer.

Consideration

9. The Tribunal considered the case papers to which it had been referred, including written statements, the evidence of the Respondent and Ms Foye and the submissions in writing of both parties and those made by Counsel for the Respondent.

10. *NB. All sums referred to below are exclusive of VAT*

11. As to the rate of charge for work done, the Tribunal considered the court rates, rates allowed in other Tribunal cases (for example Ballard –v- Cooper Dean and others (CHI/00HN/OC9/2008/006)), the submissions of the parties and took into account also its own knowledge and experience of rates of charge of law firms in the Bournemouth area. It did not consider that the court rates were particularly pertinent to this type of work and the charge rate should not be restricted in that way. Unless otherwise stated below it considered that the hourly rate for any PR fee earners involved in the transaction would therefore reasonably be £215 per hour.

12. This case is most unusual. There are two particular features:

a. The issue concerning non-service of the first Initial Notice. The legal fees now claimed arising from that notice total £1,423 and Valuer's fees of £270.

b. The costs claimed are, in the Tribunal's experience, far higher than a range which might be considered as usual. The legal fees claimed, (other than those relating to the first notice) total £7,804.

13. The relevant law is set out in the Appendix to these reasons.

The first notice costs.

14. The Applicant purported to serve an Initial Notice under Section 13 on or about 5th September 2007. The Respondent and PR only became aware of it by receiving notice of registration of that Initial Notice from HM Land Registry on 12th September 2007. From then until 12th October 2007 PR made repeated attempts to ascertain from CM whether such a notice had been served and to obtain a copy of that notice from CM. We note also that on 24th September 2007 CM sent an email to PR stating "Notice under Section 13 was given in accordance with Section 99(3)". It is plain on the correspondence that CM failed to co-operate in any way and indeed not until their letter dated 12th October 2007 did CM admit that the first notice was not properly served.

15. The Respondent produced a written statement made by Mr B S Lawrence dated 18th February 2009. He was an owner of the Penthouse Flat at the property but was not a participating tenant. In that statement Mr Lawrence says that CM had been instructed by Mr Hughes, one of the participating tenants, to send the first notice to an address "in the hope that it would be mislaid or that it would not be forwarded to Mr Drax" so that Mr Drax would miss the deadline for service of a Counter Notice, so that the price to be paid would be that stated in the first notice.

16. That is a remarkable allegation, but it is not contradicted by any subsequent submission or evidence on behalf of the Applicant. The Tribunal found that it was consistent with CM's conduct in relation to the first Notice and accepts that it is true and at least goes some way to explaining their subsequent conduct.

17. The Tribunal found that all of the costs incurred by the Respondent for legal and valuer's fees were caused by conduct by or on behalf of the Applicant.

18. However, the issue that follows is whether those costs are nevertheless payable under Section 33. That Section provides for Respondent's costs under that Section to be payable "where a notice is given under Section 13". On the face of it, the first notice was not *given* because it was not correctly served. The Applicant submits that the quotation above from Hague does not apply because that quotation related only to a notice which is served but is then found, for other reasons, to be invalid. They also submit that no work needed to be done by PR because time did not start to run against the Respondent because the notice had not been served. The Applicant also cites decisions of other Tribunals. The Tribunal also took into account all of their other arguments concerning costs in relation to this notice.

19. The Tribunal found that there is no case, binding or otherwise, on the non-service point and that the quotation from Hague, which is an opinion of learned editors, is not directly on the

point. The present case is wholly unusual and is a situation which the Tribunal found was initially created by deliberate mis-service which was then compounded by CM's subsequent total lack of co-operation until they finally admitted in their letter of 12th October that the notice was "given to the wrong address and is of no effect". The Tribunal gained some assistance from the Hague quotation and, by extension, found that it should make no difference if a notice is invalid whether by lack of service or its content: it is nevertheless "given". On that basis the Tribunal's adopts the Hague opinion that "the Applicant is estopped from denying that Section 33 costs are payable at any time while they assert that it is a valid notice". The Applicant and especially CM must have realised that their conduct would cause work to be done by PR. They had it in their hands to avoid that work being done but completely failed to take every opportunity given to them by PR.

20. The Tribunal interpreted the relevant law with the aid of Hague in favour of the Respondent and found that all the items of work claimed fall within Section 33 and are payable, both as to legal fees and valuer's fees. We have stated above that we consider an hourly rate of £215 should apply to all work done in this matter. We make an exception so far as the first notice is concerned because of the novel nature of that matter. We consider that on that aspect where a rate of charge of £240 per hour for "DNJ" is claimed, it was wholly reasonable that a lawyer of his experience should be involved on the first Notice issues and charge at that rate.

21. We found also that it was reasonable for a Valuer to be instructed by the Respondent as a result of the first Notice to give initial advice.

22. We found that the costs claimed concerning the first Notice for both PR and Valuer were reasonable and came within Section 33(1)(a) and also came within the terms of Subsection (2) and made our decision accordingly.

<u>The second notice costs.</u>

23. We noted the points of dispute and final submissions of the Applicant. Analysis of their objections to individual items of the Respondent's costs breakdowns shows that they considered that almost every item should be disallowed and that the total value which they did not challenge amounted to a costs total of around £240. To take one example, the Applicant considered that the cost of the Respondent preparing the draft transfer should be disallowed completely. We found that on any view, that attitude was unreasonable and of no assistance to our consideration.

24. We invited the Respondent to explain why the costs were so high, indicating that in our experience we would expect them to be in the region of £2,000-£3,000. The answer that we have from Mr Drax and Miss Foye is that a very substantial amount of work had to be done because of service charge matters raised by CM.

25. We have considered all the papers tendered to us by both parties on that issue and it is fair to say that we have seen some letters but surprisingly few of those from CM. Perhaps the most significant evidence is contained in Mr Drax's email to CM of 3rd November 2008 and his letter to lessees of 3rd November 2008. The former, a nine A4 page email, indicates a number of letters from CM and deals with many service charge issues as well as costs relating to the first notice. The latter deals largely with issues relating to the first notice,

resulting costs and also refers to CM making enquiries which were "often indiscriminate, repetitive and erroneous" and resulting costs.

26. We found that those two communications were of considerable assistance in supporting Miss Foye's evidence that a substantial amount of work had to be done because of service charge matters raised by CM.

27. That raises two issues:

    a. What proportion of the second notice costs relate to service charge matters?

    b. Are those costs relating to service charges recoverable under Section 33?

28. On the first point, we found that no other reason was given on behalf of the Respondent as to why costs were so high in this case. Miss Foye did not seem to demur from our suggestion of at least 40% of the costs arising from service charge issues. There is not much reference in the costs breakdowns to service charge issues or in the documents which PR have produced to us, so we do not think we have as full a picture as we might. On the available evidence, we therefore found that a very substantial part of the high level of costs related to service charge matters. Bearing in mind that the Respondent was in control of service charge accounting it was unnecessary and inappropriate for PR to be significantly involved in those issues and we found therefore that their costs on that aspect were not reasonably incurred.

29. On the second point, we had to decide whether service charge issues were within the terms of Section 33(1). Subsection (1) contains five specific categories of work in respect of which the Respondent is entitled to reasonable costs. They relate, in summary, to investigation of whether any interest... is liable to acquisition or any other question arising out of the initial notice; deducing title; furnishing abstracts; valuation; the conveyance. They are very specific and do not, in themselves, include dealing with service charges. However, the subsection provides that the reasonable costs are payable for work done "of and incidental" to those items. We had to determine therefore whether service charge related work was "incidental" to any of those very specific items.

30. It is clear that while each of the specified items of work would result from any initial notice, the initial notice could result in other work being done. It seems to us that if Parliament intended that the Section should apply to *any* work arising from an initial notice, it would have said so. However, the Section is actually drawn restrictively and is basically limited to the specified items which are intended to ensure that the Respondent is reimbursed for work done which is necessary to ensure the enfranchisement proceeds to a conclusion. It is, however, extended to work which is incidental to those specific items. We took the view that incidental work, to fall within the Section, is to be construed tightly. For example, if documents of title were held by a mortgagee, the cost of inspecting those documents, including any travel costs, could have been "incidental" to Section 33(1)(b)&(c). While we accept that service charge issues arose as a result of the initial notice, we found that those issues did not fall within the meaning of "incidental" in Section 33(1) and that they should be disallowed accordingly. We were not, however, able on the evidence or submissions of the parties to obtain any clear view of how much those costs might be. We will return to that later.

31. Having considered the documents and heard the witnesses, it also appeared to us that PR's costs have increased as their client is a professional man, a Member of the Royal Institution of Chartered Surveyors and a Consultant in Commercial Property and Financial Services. We do not in any way imply criticism of him, but it is fairly clear from the evidence we have seen submitted on behalf of the Respondent that he was very fully involved in the progress of and developments arising in the course of the transaction and that that also has had a significant effect on the level of costs recorded by PR. The specific items referred to in Section 33(1) should not, in our opinion, necessitate significant input from the Respondent: of Subsection (1), subsections (a),(b) and (c) are purely legal matters for PR to deal with according to their knowledge and expertise; valuation would require little input from the Respondent as he instructed a Valuer; the terms of the conveyance would probably only need instructions from the Respondent on whether or not the Applicant was to be granted permanent rights instead under Section 1(4) of the Act, although we did note and took account of an issue about inclusion or otherwise of a patio. There would be nothing particularly unusual about the necessary involvement of the freeholder in this case as against that of the freeholder in other similar cases,.

32. In summary, the weight of the evidence and the submissions before the Tribunal are that within the restrictions of Section 33(1), the facts of this case suggest it is not materially different from the average case of enfranchisement of any other small block of flats. We would ordinarily deal with individual costs items to decide whether each such item is within the terms of Section 33, but we have not had sufficient evidence or submissions to enable us to form a view particularly as to what items (other than a few specifically stated in the breakdowns) relate to service charges. Instead we have reached the conclusion that we can only take a broad brush approach and determine what we believe, taking into account other cases and using our own knowledge and experience, a case such as this would reasonably justify as regards costs payable under Section 33. In so doing we also take account of Section 33(2).

33. We note particularly the cases to which we have been referred under Section 33:-

    a. Erinbank: the Tribunal allowed legal costs of £3,500 involving London solicitors;

    b. Wychwood: £674.50;

    c. 26a & b Derby Road:£1,798.99 and £1,565.19 respectively involving London solicitors.

34. There are other cases under Section 60, of course dealing with the grant of a new lease which we considered to be more straightforward as compared with enfranchisement of a freehold. Those cases show fees from £1,526 up to £2,000 (the latter with London Solicitors).

35. Taking all the above into consideration we believe that the circumstances of this matter in relation to the second notice and the limited amount of work provided for under Section 33, that a reasonable sum for the Respondent's legal costs does not exceed £2,500

<u>Costs of the proceedings.</u>

36. The Respondent invites the Tribunal to make an order for the Applicant to pay costs under the Commonhold and Leasehold Reform Act 2003, Schedule 12, Paragraph 10 on the basis that the Applicant has acted unreasonably in these proceedings before the Tribunal by virtue of making this application rather than making a worthwhile offer.

37. The Paragraph gives us a discretion in the matter.

38. As noted above we found that the Applicant's points of dispute resulted in them effectively suggesting that the Respondent's Section 33 cost should be around £240. That was not a helpful attitude and unless there were other considerations, we might have found a costs order to be appropriate. However, this is a case where we have found that the Respondent's claim for Section 33 costs has been very significantly overstated to the extent that we do not feel any reasonable offer (measured in terms of our determinations) from the Applicant would have achieved settlement. For that reason we decided we would not, in this instance, make such an Order.

39. The Tribunal made its decisions accordingly.

M J Greenleaves (Chairman)
A member of the Southern
Leasehold Valuation Tribunal
appointed by the Lord Chancellor

Appendix

S33 Costs of enfranchisement.

(1) Where a notice is given under section 13, then (subject to the provisions of this section and sections 28(6), 29(7) and 31(5)) the nominee purchaser shall be liable, to the extent that they have been incurred in pursuance of the notice by the reversioner or by any other relevant landlord, for the reasonable costs of and incidental to any of the following matters, namely—

(a) any investigation reasonably undertaken—

(i) of the question whether any interest in the specified premises or other property is liable to acquisition in pursuance of the initial notice, or

(ii) of any other question arising out of that notice;

(b) deducing, evidencing and verifying the title to any such interest;

(c) making out and furnishing such abstracts and copies as the nominee purchaser may require;

(d) any valuation of any interest in the specified premises or other property;

(e) any conveyance of any such interest;

but this subsection 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 subsection (1) any costs incurred by the reversioner or any other relevant landlord 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 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) Where by virtue of any provision of this Chapter the initial notice ceases to have effect at any time, then (subject to subsection (4)) the nominee purchaser's liability under this section for costs incurred by any person shall be a liability for costs incurred by him down to that time.

(4) The nominee purchaser shall not be liable for any costs under this section if the initial notice ceases to have effect by virtue of section 23(4) or 30(4).

(5) The nominee purchaser shall not be liable under this section for any costs which a party to any proceedings under this Chapter before a leasehold valuation tribunal incurs in connection with the proceedings.