



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference	:	CHI/29UQ/OC9/2015/0022
Property	:	Beechurst, Hurstwood Lane, Tunbridge Wells TN4 8YA
Applicant	:	Fry Limited
Representative	:	William Heath & Co
Respondent	:	John Dymoke and Gay April Dymoke; James Robert Brown and Kulsoom Brown; Jane Emma Baker
Representative	:	Healys (Baker)
Type of Application	:	Landlords costs Leasehold Enfranchisement Sections 33 and 91(2)(d) Leasehold Reform Housing and Urban Development Act 1993 (LRHUDA)
Tribunal Members	:	Judge Cindy A. Rai Michael Woodrow MRICS (Chartered Surveyor)
Date of Decision	:	11 January 2016

DECISION

1. The Tribunal determines that the Respondent is liable to contribute the sum of Three Hundred Pounds (£300) + value added tax (VAT) towards the costs incurred by the Landlord in relation to the application for enfranchisement from the date of the Notice until the date of the receipt of the notice of withdrawal and a contribution of Four Hundred Pounds (£400) + VAT towards the Applicant's valuation Fee. The costs are payable jointly and severally by the leaseholders of Flats 2, 3 and 4 at the date the application for enfranchisement was made.
2. The reasons for its decision are set out below.

Background

3. A notice under section 13 of LRHUDA dated 2 December 2014 (the section 13 notice) was served by Beechurst Limited, a nominee purchaser, for the Respondent on the Applicant, to acquire the freehold of the premises described in the notice.
4. The Applicant served a counter notice under section 21 of LRHUDA dated 5 February 2015 (the section 21 notice) admitting that the Respondent was entitled to buy the freehold but disputing both the extent of the property specified in the notice and the amount of the premium payable.
5. Subsequently it was not possible for the parties to reach any agreement regarding the disputed matters and on the 3 August 2015 the Respondent withdrew its Notice.
6. Fry Limited (the Applicant) made an Application dated 3 September 2015 for the Tribunal to determine how much of its costs were recoverable from the Respondent under section 33 of LRHUDA. The legal costs claimed, set out in the schedule attached to the Application, total £4,362.50 plus VAT and disbursements, which costs include costs relating to two Deeds of Variation of the leases of the basement and garden flats.
7. The Applicant, mindful that the latter costs may not be recoverable, provided a separate schedule of its legal costs, excluding those relating to the Deeds of Variation, which total £3,375. In addition it claimed its valuation fee of £600 + VAT and Land Registry fees, although these are itemised only on the invoice relating to the Deeds of Variation.
8. Directions dated 9 September 2015, made by the Tribunal, required the Applicant to set out full details of its costs and the Respondent to identify which items were disputed and why and to indicate what costs it was prepared to pay. Those Directions stated that if the Tribunal made a provisional determination it might issue further directions and require a hearing.
9. The Tribunal received a “determination bundle” prepared by the Applicant together with a letter from its Representative, William Heath & Co dated 26 October 2015, which stated that neither party objected to the determination being made without an oral hearing. That letter also referred to other issues identified by the Applicant’s Representative as being relevant to the Applicant’s case.
10. The Tribunal has determined the Application on the basis of the written evidence and documents contained in the determination bundle referred to in paragraph 9 above.

The Applicant’s Case

11. The Applicant’s statement of case describes the Property as a building within substantial grounds converted, at some time, into 6 flats. The Applicant’s Representative considers that the title is complex; not all the

leases were granted at the same time and parts of property originally demised by various leases have subsequently been surrendered. The Respondents were leaseholders of Flat 2, (Dymoke) Flat 3 (Brown) and Flat 4 (Baker). Flat 4 was subsequently sold.

12. It is relevant to note that between 5 February 2015 and 3 August 2015 other legal issues relating to the freehold were ongoing. The Applicant states that the leaseholder of Flat 1 wished to redevelop his garden and that the Respondents were opposed to this. Therefore prior to it serving the counter notice the Applicant varied the lease of Flat 1 and the lease of the garden/ basement removing from the leases all clauses that might have been relied upon by the Respondent, had it successfully acquired the freehold, to prevent the development. For that reason it considered the costs associated with the variation reasonable costs **of and incidental** to the Respondent's claim. [Tribunal's emphasis].
13. The Applicant has also stated that the Respondent's leases were for terms of 999 years and that the Respondent had previously formed a Right to Manage Company which had successfully acquired the right to manage the Property.
14. The Applicant's Representative concluded, partly in reliance on an opinion from Ms Baker's counsel, (a copy of which is included in the determination bundle), that the Deeds of Variation were not prohibited dispositions under LRHUDA.

The Respondent's case

15. Only Mr and Mrs Brown and Ms Baker submitted statements, the latter being represented and the former acting in person. Both parties agree that the nature of the freehold interest the nominee purchaser, Beechurst Limited, sought to acquire was altered by the actions of the Applicant during the period between the date of service of the Respondent's notice and the date of service of the Applicant's Counter Notice and that was the reason for the withdrawal of the Respondent's claim.
16. Mr and Mrs Brown do not believe that the Respondent should be liable for any costs because the Applicant had varied the terms of the leasehold interest in the two flats comprising the basement and Flat 1. They state that although there are six flats only five leases were granted and the lease of the basement includes the basement flat and the garden flat, the leaseholder of both currently being David Fry.
17. Deeds of Variation dated 27 January 2015 made between the Applicant and David Fry varied the terms of the leases of both basement and garden flats which resulted in an alteration to the value of the freehold and diminished the Respondent's desire to buy it.
18. For all of those reasons Mr and Mrs Brown do not believe that the Respondents should be liable to pay **any** of the Applicant's costs. Their justification is that the counter-notice was defective because did not refer to the alteration to the freehold interest which clearly impacted on its value. Furthermore the variations were undertaken by the Applicant to

block the Respondent's attempt to buy the freehold. Permission for the Deeds of Variation was not sought from BHL RTM Company Limited (the RTM Company which had previously acquired the right to manage the freehold property). Had permission been sought it would have been refused. The Applicant must have been aware of the Respondent's opposition to any development of the garden of the Property. The statement confirms that planning permission for the development was refused and that the refusal was upheld on appeal.

19. In particular it is stated that the costs of the Deeds of Variation were not relevant to the claim for enfranchisement. It is also stated that the Deeds of Variation effectively altered the original claim, and therefore section 33 of LRHUDA should be interpreted as if the claim was withdrawn at the date of the Deeds of Variation because these diminished the value of the freehold. This was Mr and Mrs Brown's justification for none of the Applicant's costs being recoverable from the Respondent.
20. In addition Mr and Mrs Brown also questioned the content of the time charge schedule supplied by the Applicant which refers to costs which they suggested do not fall within those costs itemised as recoverable under section 33 of LRHUDA.
21. Finally it was also stated that fees incurred which related to conversations between the Applicant's lawyer and David Fry cannot be recoverable costs under LRHUDA. The Respondent can only be liable for the reimbursement of relevant costs (under LRHUDA).
22. Ms Baker stated that the effect of the Deeds of Variation was to make it impossible for the Respondent to properly manage the two flats the leases of which had been varied. The provisions of section 33(1) of LHRUDA are set out in paragraph 8 of her statement, [Page 33 of the Bundle].
23. It is also suggested that the Application was not complicated so that it would have been reasonable for a more junior lawyer than that employed by the Applicant to have dealt with the matter, reducing the costs incurred.
24. Detailed analysis of the time schedule led her to question validity of the time spent in relation to the application for enfranchisement and the Tribunal is invited to conclude that the vast majority of the time spent by the Applicant's solicitor does not relate to the review of the section 13 notice but related instead to ensuring that David Fry could pursue his proposed development without encountering difficulties with the new freeholder.
25. It was proposed that £400 + VAT be payable towards the Applicant's costs of reviewing the section 13 notice, preparing a counter notice and preparing the costs schedule and that the valuation fee of £600 + VAT be reimbursed as well.

The Law

26. Any costs incurred by the Applicant in relation to the section 13 notice are only recoverable if these fall within section 33 of LRHUDA. The Tribunal's jurisdiction to determine the amount of costs recoverable by a landlord under section 33 is conferred by section 91 of LRHUDA.
27. Section 33 of LRHUDA is set out below:-

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.

(6) In this section references to the nominee purchaser include references to any person whose appointment has terminated in accordance with section 15(3) or 16(1); but this section shall have effect in relation to such a person subject to section 15(7).

(7) Where by virtue of this section, or of this section and section 29(6) taken together, two or more persons are liable for any costs, they shall be jointly and severally liable for them.

Reasons for the Decision

28. The Tribunal determines that no costs associated with the Deeds of Variation of the leases of the basement flat and garden flat are recoverable under section 33. Such costs do not fall within s.33(1) above; these are not reasonable costs incidental to the section 13 notice.
29. The costs of the valuation of any interest in the specified premises fall within section 33, and would, prima facie, be recoverable if reasonable.
30. Fees relating to conversations between the Applicant and/or his lawyer and David Fry are not relevant costs which can be recovered from the Respondent.
31. It is not clear what interest in the specified premises was valued. Prior to the service of the section 21 notice the Applicant had completed both Deeds of Variation. Michael Rogers (valuer) invoice is dated 16 January 2015. The date of the Deeds of Variation as shown in the Land Registry entries was 21 January 2015, so although the valuer may have been instructed to value the premises specified in the section 13 notice it is not clear whether his valuation took any account of the impact of the Deeds of Variation. The Tribunal suspect that it could not have done as the Deeds were not completed until after he submitted his invoice. It is assumed therefore that his report is likely to have pre-dated the Deeds of Variation and thus take no account of any effect on the value of the freehold interest.
32. The Tribunal accepts that it is reasonable to take account of Ms Baker's Representative's argument and limit the amount of legal costs recoverable to £400 but in the light of the what subsequently occurred it has also considered the arguments put forward by Mr and Mrs Brown that none of the Applicant's costs should be recoverable. The Tribunal considers that, following receipt of the section 13 notice, the Applicant embarked upon what amounted to "a frolic of its own" seeking to protect the interest of David Fry in respect of the two flats he owned at the potential expense of the Respondent for having the temerity to serve the section 13 notice. Comments made by the Respondent that this was an attempt to frustrate its objectives are justifiable, given what ensued, as is evidenced in the content of the costs schedule submitted by the Applicant and its tacit acknowledgement in its statement that some of its costs may not be recoverable.
33. The Tribunal determines that because of the actions of the Applicant, following receipt of the section 13 notice, it may recover only £300 + VAT in respect of its legal costs and two thirds of the valuation fee being £400 + VAT. The deduction from the invoice for the latter takes account of the absence of any evidence as to the nature of the premises the valuer was instructed to value. No disbursements claimed are recoverable as these all appear to relate to the Deeds of Variation. The amount of the legal costs it has allowed reflects the view of the Tribunal as to the reasonable time which should have been spent by an appropriately qualified fee earner in considering the validity of the claim and the relatively simple title to the freehold.

34. Other matters have been raised by the parties which, whilst not directly relevant to its conclusions, have been considered by the Tribunal in reaching its decision and are briefly referred to below.
35. It is appropriate that the individual leaseholders be responsible for the Applicant's recoverable costs as the section 13 notice was withdrawn by the Respondent.
36. Mr and Mrs Brown suggested that the actions taken by the Applicant effectively changed the nature of the claim so a "deemed withdrawal" of the section 13 application should be assumed or implied, thus limiting the period referred to in section 33(3). The Tribunal has considered that argument as section 33(3) refers to the notice ceasing to have effect at any time **subject to** section 33(4) which refers to other subsections, being an order of the Court, (sic Tribunal) (s. 23(4)) or a compulsory purchase order, (s.30(4)). The Tribunal has concluded that it cannot be possible for subsequent actions taken by a freeholder to alter the validity of a section 13 notice.
37. Section 33(3) refers to costs down to the date of withdrawal. For that reason any costs incurred by the Applicant's in preparing the application or preparing the schedule of costs are not recoverable as these would have been incurred after the date of withdrawal of the claim.
38. Neither Respondent has suggested that any analysis by the Tribunal as to whether the Deeds of Variation are prohibited dispositions under LRHUDA is relevant to the Application before it so the Tribunal takes no account of paragraph 2 of the Applicant's Representative letter dated 26 October 2015, referred to in paragraph 9 above.

Judge C A Rai

Appeals

1. 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.
2. 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.
3. 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.

4. 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.