2955

First-tier Tribunal
Property Chamber
(Residential Property)

Case Reference	:	**CHI/29UN/oC9/2014/0003, 4, 5 & 6**
Property	:	**14H and 18H Arlington House, All Saints Avenue, Margate, Kent CT9 1XS & XR**
Head Landlord	:	**Thanet District Council ("Thanet")**
Intermediate Landlord	:	**Metroplitan Property Realizations Limited ("MPR") Represented by Mr. Simon Serota (solicitor)**
Long Leaseholders	:	**Harry and Valerie Kirschner (14H) Represented by Mr. John Moss (lay representative) Timothy Patrick Spencer and Mariette Ann Castelino (18H)**
Date of Applications	:	**2nd and 9th June 2014**
Type of Application	:	**To determine the costs incurred by the landlord and head landlord in lease extensions (section 60 Leasehold Reform, Housing and Urban Development Act 1993 ("the Act"))**
The Tribunal	:	**Judge David Whitney (chair) Judge Bruce Edgington**
Date and place of Hearing	:	**19th September 2014 at Court 3, Margate Magistrates' Court, Cecil Square, Margate, Kent CT9 1RL**

DECISION

Crown Copyright ©

1. In respect of each of the 2 properties the reasonable costs of the landlords in dealing with the matters set out in section 60 of the Act are:-

   (a) The legal costs of MPR as intermediate landlord are £1,250.00 plus VAT and disbursements of £52 making a total of £1,552.00
   (b) The valuation fee of MPR is £375.00 plus VAT making £450.00
   (c) The legal costs of Thanet as head landlord are £200 plus VAT making a total of £240.00
   (d) The valuation fee of Thanet is £150.00 plus VAT making £180.00

2. Thus the total for MPR is £2,002.00 and for Thanet is £420.00 in respect of each flat.

3. The Tribunal makes no order for the re-imbursement of expenses or costs in respect of these proceedings.

Reasons

Introduction

4. These are applications to the Tribunal for the determination of the costs incurred by landlords in respect of lease extensions for flats in a large complex in Margate. The Tribunal was told that Arlington House is a 19 storey building with 140 flats above commercial premises on the ground floor. The Tribunal has also been told, at page 3(7) in the bundle relating to 14H Arlington House, that there have been previous lease extensions for flats 11B, 13D, 12C and, now, 18H.

5. Regrettably, this is not the first argument about the landlords' costs for lease extensions in this building which has ended in litigation. The Tribunal had the benefit of seeing the Leasehold Valuation Tribunal decision relating to flat 13D and an Upper Tribunal decision relating to flat 11B. The latter case just dealt with the issue of whether the long leaseholders had to pay VAT on the legal and valuation fees. As there has been some reference to this topic in these proceedings, the Tribunal makes it clear, for the avoidance of doubt, that it considers itself bound by that decision and VAT is therefore payable on the costs.

6. An application was made by Mr Spencer and Ms Castelino in respect of 18H Arlington House dated 9th June 2014.

7. An application was made by MPR and subsequently applications were also received from Mr and Mrs Kirschner and Thanet. All three applications related to determination of the costs payable for an abortive lease extension of 14H Arlington House. By way of directions dated 23 June 2014 all three applications were consolidated.

8. Both sets of applications were dealt with at the same hearing attended by the parties referred to in the header to this decision.

9. The amounts originally claimed for costs were:-

		£
Flat 14H –	Thanet legal costs (Boys & Maughan)	1,380.12
	Thanet valuation fee (Pearson Gore)	420.00
	MPR legal costs (Wallace LLP)	2,034.50
	MPR valuation fee (Chesterton Humberts)	540.00
Flat 18H –	Thanet legal costs (Boys & Maughan)	1,119.72
	Thanet valuation fee (Caxtons)	360.00
	MPR legal costs (Wallace LLP)	1,868.60
	MPR valuation fee (Chesterton Humberts)	450.00
		8,172.94

10. All the residential leases which this Tribunal has seen reference to are for 114 years from the 1st October 1961 at relatively modest ground rents and it is likely that they are all in the same or similar terms. It would therefore seem logical that the first lease extension case would involve a careful consideration of all matters and decisions would have to be taken about policy. Would there be any standard approach to the terms of the deeds of surrender and new leases, for example? For valuations there would have to be careful consideration of all available comparables in the area and policies about what capitalisation of ground rent rate to adopt; what deferment rate to adopt; what relativity to adopt and how to differentiate between the various types of flats in the building.

11. Thereafter, despite what is said on behalf of MPR, the succeeding cases, of which these are two, would be more straightforward. A commercial client paying these costs out of its own pocket would insist on there being some economy of scale. The terms of each Notice served under section 42 of the Act would have to be considered, each title would have to be looked at for each case and a review of the local comparables would have to be made on a desktop basis. However, with a good basic knowledge of the leases, the titles and the property, the task of the lawyer and the valuer is bound to be simpler and less time consuming in successive cases.

12. These costs assessments have always been undertaken on the basis of a summary assessment. In view of the implications for what seem likely to be many successive cases, this Tribunal has decided that it is essential that the basic principles of a summary assessment be adopted so that parties in future cases will have some guidelines to follow which will hopefully stop this sort of litigation arising again.

13. For those who are not familiar with the difference between a summary assessment and a detailed assessment, it is, in essence, a difference between a broad brush assessment of costs reasonably incurred (summary assessment) as opposed to a detailed analysis of each and every item of claim (detailed assessment).

14. The Tribunal has had regard to the Schedules and bundles prepared by the parties in respect of the applications which the Tribunal found very helpful in determining these matters. The Tribunal had read all of these documents prior to the hearing and considered carefully the documents contained therein.

The Law

15. It is accepted by the parties that Notices under section 42 of the Act were served and therefore section 60 of the Act is engaged. The long leaseholders therefore have to pay both Thanet's and MPR's reasonable costs of and incidental to:-

    (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 Schedule 13 in connection with the grant of a new lease under section 56

    (c) the grant of a new lease under that section;
    (section 60(1) of the 1993 Act)

16. What is sometimes known as the 'indemnity principle' applies i.e. the landlords are not able to recover any more than they would have to pay their own solicitors and valuers in circumstances where there was no liability on anyone else to pay (section 60(2)). Any dispute is to be decided in the receiving party's favour provided the overall test of reasonableness is satisfied.

The Hearing

17. The Tribunal had originally indicated that it would deal with these assessments on a consideration of the relevant documents and written submissions. An oral hearing was requested and arranged. It was decided to hear both cases at the same time.

18. MPR was represented by Mr. Simon Serota, a partner in the well known firm of Wallace LLP who practice in London. That firm is highly specialised and deals with this sort of case on a regular basis. Thanet was unrepresented at the hearing but claimed its costs incurred by local solicitors Boys & Maughan and surveyors Pearson Gore i.e. £1,150.10 plus VAT and £420 including VAT respectively in respect of flat 14H, with slightly reduced amounts and a different valuer (Caxtons) for 18H.

19. All 4 long leaseholders attended as did Mr. John Moss who had been asked to represent Mr. and Mrs. Kirschner because of his involvement in a previous lease extension case and his knowledge of the building. He had provided assistance in the formulating of the objections and the Tribunal considered that his contribution would assist. In the absence of any objection from Mr. Serota, he was permitted to represent Mr. and Mrs. Kirschner.

20. Mr. Serota did provide a more up to date schedule of objections with helpful concessions on many items including hourly rates. This did reduce the areas of conflict. Mr. Moss, for example, accepted the hourly rate of £285 offered for the first part of the work although he still pursued his contention that £217 per hour was more appropriate for the later work connected with the completion of the lease.

21. Thereafter, Mr. Moss, Mr. Spencer and Ms. Castelino were invited to make their representations, which they did in a calm and helpful way. Mr Serota then did the same. None of the parties really added to the matters which had already been committed to writing.

22. In broad terms, the complaints were (a) why did Thanet need to instruct its own legal and valuation team when it not done so before (b) the hourly rates of Wallace LLP and (c) the allegedly excessive times being claimed by Wallace LLP. If the Tribunal had agreed that Thanet was able to instruct its own lawyers and valuer then consideration was to be given to their respective claims, because there were also arguments about the time they had spent.

Discussion

23. In his address to the Tribunal, Mr. Serota quoted from the Tribunal chaired by Professor Julian Farrand in the well known case of **Daejan v Parkside 78 Ltd.** LON/ENF/1005/03 when it was said that "*As a matter of principle, in the view of the Tribunal, leasehold enfranchisement under the 1993 Act may understandably be regarded as a form of compulsory purchase by tenants from an unwilling seller and at a price below market value. Accordingly, it would be surprising if freeholders were expected to be further out of pocket in respect of their inevitable incidental expenditure incurred in obtaining the professional services of valuers and lawyers for a transaction and proceedings forced upon them*".

24. The first point to make, of course, is that such decision is not binding on this Tribunal. The second point to make is that the matter being considered by that Tribunal was a collective enfranchisement i.e the purchase of the freehold and thirdly, the comment is self evidently incorrect because a landlord is not able to recover all its expenditure for the 'transaction and proceedings' if it decides to instruct its lawyer to handle everything including negotiations etc.

25. A landlord is able to recover more of its costs in a collective enfranchisement case because section 33 of the Act which deals with what that Tribunal was talking about is written in much wider terms than section 60. In section 33 cases, the landlord is able to recover any cost reasonably incurred in respect of "*any other question arising out of*" the service of an Initial Notice which is certainly not the case with a lease extension. This may sound like semantics but it is not.

26. Mr. Serota suggested that as his firm always attaches a draft deed of surrender and new lease to the counter-notice, such expenditure could be included within the definition of the "*grant of a new lease*".

27. Turning to the question of the **costs incurred by Thanet**, the Tribunal was told that although Thanet relied upon Wallace LLP and MRP's valuers in previous cases, they had apparently been criticised for instructing London advisors with London rates. They had therefore decided to instruct their own local professional advisors throughout. If this was intended to reduce cost, the Tribunal found it to be a somewhat bizarre decision because it was bound to result in substantial additional cost. The Tribunal is unaware what the ultimate premium agreement was in respect of 14H Arlington House, but in respect of 18H, the settlement was in line with earlier cases and the split of premium was £5,935 to MRP and £65 to Thanet.

28. The Tribunal therefore considered, objectively, what an ordinary commercially minded client would do in these circumstances bearing in mind the relatively small amount involved. He or she would clearly want their interests protected. Thanet had previously been prepared to rely on MRP's lawyers and valuers to advise them. Any lawyer or chartered surveyor would be bound to advise their clients to go elsewhere if it was seen that there was an obvious conflict of interests between 2 clients they were representing in the same case. That self evidently did not happen in the earlier cases.

29. Bearing in mind that a potential benefit, i.e. premium, of less than £100 was involved for each case, the Tribunal can only conclude that any reasonable client who wanted to ensure that they had proper legal and valuation advice would either ask MRP's lawyers and valuers to act for them again or instruct their own but without duplicating everything that MRP's lawyers and valuers were doing. The Tribunal also concludes that the lawyers involvement in checking the Notice under section 42 and arranging for the new lease to be checked and executed would be less than an hour and a reasonable sum would be £200 plus VAT.

30. For the valuer, the Tribunal noted an e-mail from Boys & Maughan in the bundle dated 9th May 2013 wherein it is said "*Mike Baker has confirmed his valuation of the Council's interest in the extension at a figure of a few pounds...*". Mike Baker is the valuer employed by Thanet and the property involved was 14H Arlington House. Any responsible surveyor would have contacted the client as soon as this was known to avoid further cost. Any reasonable client would have stopped instructing the valuer at that point. To reach that stage after a desktop valuation, the Tribunal considers that the valuer's reasonable fee would be £150 plus VAT.

31. In essence, the decision of the Tribunal is that whether Thanet used Wallace LLP and their valuer, or their own independent advisors, there would have been an extra cost to pay. Obviously in these 2 cases, the costs of Wallace LLP and Chesterton Humberts did not include advising Thanet.

32. Turning now to the **hourly charging rate** of Wallace LLP, any argument on that has largely been taken away because of the concession made by Mr. Moss and the fact that Mr. Spencer and Ms.

Castelino are not actively pursuing the point. The Upper Tribunal has criticised enough LVTs and First-tier Tribunals recently for raising matters which are not contested in an adversarial system. This Tribunal follows that guidance.

33. The Tribunal does agree with Mr. Moss that a commercially minded client would demand that the fee earner dealing with the conveyancing work should charge less than the person dealing with the main lease extension decision. The reason is that the Act is very clear about how the new lease is to be worded and any policy matter relating to any limited additional or altered wording permitted by the Act would have already been taken in earlier cases.

34. Finally, the Tribunal turns to the detailed analysis of the time actually spent in each matter. In general, it accepts that some of the time charged would appear to be excessive. An initial consideration of the Notice under section 42, for example, will be somewhat cursory until such time as copy title documents were available. How much time is attributable to the conveyancing rather than other matters is always a thorny problem and it is very difficult to be pedantic because some items of work will cover both.

35. The Tribunal is also conscious of the open position of Mr. and Mrs. Kirschner at page 3(14) in the bundle i.e. that they would pay £1,102.60 (presumably excluding VAT although it does not say so) for legal costs. The latest concession by Wallace LLP is that they would accept £1,411.50 plus VAT and disbursements which is a substantial concession on earlier claims.

36. Mr Spencer and Ms Castellino had filed a detailed submission contained within their bundle. They referred to having offered a total contribution towards the costs of £1500 when the premium was agreed but seemed to be now suggesting that a lesser amount should be awarded. They relied on the fact that the premium which they had to pay was only £6,000 and suggested that the costs were therefore unreasonably high.

37. Broadly, the Tribunal accepts the time concessions made by Wallace LLP but considers that the cost and time taken in preparing and completing the lease should have been less bearing in mind (a) the previously completed lease extensions in this building where the terms would have been more or less the same except for the names and addresses of the leaseholders and the premium and (b) the fact that this work should have been undertaken by a fee earner with a much reduced rate.

38. The Tribunal considers that £1,250.00 plus VAT and disbursements in each case is the figure to take these factors into account and what any reasonable commercially minded client would agree to pay for advice on the section 42 notice and the preparation and completion of the new lease.

39. Mr Spencer and Ms Castellino requested that MPR and Thanet should pay the costs of preparing the bundles for the hearing.

40. As to any costs and expenses claimed, the Tribunal regrets that it is not making any order. This is a 'no costs' regime which means that awards for costs and expenses are rare and generally only made where a party has behaved unreasonably during the course of any Tribunal proceedings which has not been the case in this determination.

The Future

41. This Tribunal was extremely concerned about the wasted time and professional fees spent on arguing about costs in the lease extension cases relating to Arlington House. It is disproportionate to the relatively modest sums involved. The Tribunal's overriding objective dictates that parties must behave proportionately and they must help the Tribunal further that objective. It is sincerely hoped by the Tribunal that this decision will be used constructively to guide parties in future cases.

42. Having said that, the Tribunal is conscious of a comment made by Mr. Spencer at the end of the hearing when he said that it was unreasonable that the costs involved were so high compared with the price being paid for the least extension. Unfortunately, the fact is that lease extensions are not simple transactions and there are certain minimum costs which are going to be incurred. With 2 landlords, those costs are going to be higher. Statute says that most, but not all, of those costs have to be met by the long leaseholders. In a case such as this where the premium is not great, those costs are bound to appear as quite a high proportion of the premium.

Judge David Whitney

24th September 2014