4036

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**OT/LON/OOBH/OC9/2015/0211**
Property	:	**38 - 40 Perth Road, London E10 7PB**
Applicants	:	**Stealth Developments Limited and Mr A. Kalugendo (nominee purchasers)**
Representative	:	**Verbatim Property Lawyers**
Respondents	:	**Daejan Estates Limited (other landlord) and Leslie Fink Limited (reversioner)**
Representative	:	**Wallace LLP, solicitors**
Type of Application	:	**Application under section 91(2)(d) of the Leasehold Reform, Housing and Urban Development Act 1993 ('the Act') to determine the costs payable under section 33(1) of the Act**
Tribunal Members	:	**Professor James Driscoll (Judge)**
Date and venue of Hearing	:	**The tribunal considered the application on the basis of the papers filed without an oral hearing on 8 July, 2015. In August 2015 each of the solicitors involved sent the tribunal additional written comments.**

Date of Decision : 24 August 2015

DECISION

Summary of the decision

1. The applicants are to pay the sum of £6761 (exclusive of disbursements and VAT) in respect of the respondent's legal costs in accordance with section 33(1) of the Act.

Introduction

2. The applicants are the leaseholders of the two flats in a building situated at 38-40 Perth Road, London E10. They gave notice under section 13 of the Act seeking to acquire the freehold. As to the respondents, they are the reversioner which owns the freehold and another landlord which has two intermediate leasehold interests. As indicated above, each of the parties is represented by solicitors and they have also received specialist advice on valuation. As the first claim notice proved to be defective a second notice was given.

3. It appears that the parties reached agreement on the price to be paid for the freehold (and the other terms of the transfer) but that they could not agree on how much the landlord's solicitors were entitled to claim in respect of their legal costs in accordance with section 33 of the Act. (The tribunal notes that the solicitors agreed on the payment of the landlord's valuation fee - see letter from the landlord's solicitors dated 12 May 2015). Accordingly an application was made by the applicant's solicitors for a determination of the legal fees payable to the landlords under section 33 of the Act. This application is made under section 91(2)(d) of the Act. In short, the respondent's solicitors fees (and disbursements) amount to the sum of £8,100. According to the applicants, only £3,000 is a reasonable sum to pay. (Both of these figures are exclusive of VAT).

4. The applicant's solicitors is a firm called Verbatim Lawyers ('Verbatim') and the landlords are represented by the firm of Wallace LLP ('Wallace LLP')

5. In the letter to the tribunal which accompanied the application dated 7 May 2015, Verbatim stated that only the legal fees were in dispute. They added that they have completed the freehold purchase and have paid in full the costs and fees but the disputed fees are being held to their order pending the determination by the tribunal. They also stated that they wished to apply for the costs of this application.

6. Directions were given on 12 May 2015. In accordance with regulation 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 the directions included a statement that the tribunal considered that the matter was suitable for a determination without an oral hearing. However, the parties were invited to seek a hearing if they wanted one. Neither party did so. The parties were directed to exchange statements and the applicant was required to prepare a bundle of documents.

Consideration of the application

7. On 24 June 2015 the tribunal received two copies of a bundle of documents prepared by Verbatim. This bundle, which runs to some 200 pages includes letters to the tribunal and comments on the costs claimed (which sets out the applicant's objections to the legal costs claimed) and a very detailed submission (24 pages in length with several exhibits including copies of previous decisions of this tribunal) prepared by Wallace LLP with several exhibits. Those advising the applicants did not prepare and serve a detailed statement. As a result the tribunal has a brief statement prepared by Verbatim with additional comments made by them in correspondence, a detailed schedule of costs and a very detailed commentary prepared by Wallace LLP. The applicant's position is contained in a document marked 'THREE' in the bundle. They agree that seven of the items of work undertaken by Wallace LLP are recoverable under section 33 of the Act and they agree on the hourly rates claimed.

8. They complain of duplication of work as the first notice given '..was easily discoverable by the Respondents solicitors to be defective..'. They also complain that Wallace LLP contended that the second notice was also defective (when in their view it was not) and that as they are not party to their file they are unable to see which items of work are justified. In short, they suggest that a fee of £3000 is payable under section 33 of the Act (exclusive of VAT)

9. The tribunal does not consider that the complaint by Verbatim that Wallace LLP failed to include a column for their detailed comments in their schedule of costs is a legitimate one. This was not a step required by the directions (see direction numbered 2 in the directions). Further Verbatim could have prepared a more detailed set of challenges to the fees claimed.

10. Nor does the tribunal consider the claim for the costs of this application to be borne by the landlords is a sound one. This is a 'costs free' tribunal. The tribunal has the power to make an order for costs under rule 35 of the 2013 Rules in cases where a party has behave unreasonably.Verbatim have not made out a case that the landlords have behaved unreasonably.

11. I will turn next to the applicant's objections to the legal charges taking them in the same order as they appear in be bundle of documents. First, in a

letter sent to the tribunal dated 22 June 2015 they make three points. They complain that that the schedule of costs prepared by the respondent's solicitors did not contain a column for their comments. They then complain that there is much duplication of work and finally that they were wrong to claim that the second claim notice was invalid.

12. Second, they prepare a schedule (marked 'THREE' in their bundle) in which they agree seven items in the respondent's costs schedule which come to a total of £2,122.50 (exclusive of VAT). Three points are added: that unnecessary legal work was done on the first claim notice which was defective; that their work claiming that the second claim notice was invalid was unreasonable (as the notice was in fact valid) and that they propose a 'final fees figure' of £3000 exclusive of VAT.

13. I turn to Wallace LLP's response. First, they submit that as there were three superior interests involved, a defective claim notice, that the case was unusually complicated and required expert specialist advice. Second, they note that those advising the applicants had agreed some of the costs claimed so by implication they agreed both the hourly rate and use of fee earners. They then summarise the history of the claims and comment on why the first claim notice was invalid and they confirm that the acquisition of the freehold has been completed. As a result the only issue for the tribunal is the determination of legal costs and disbursements payable by the leaseholders to the landlords.

14. Wallace LLP have acted for the landlords for several years and they are their solicitors of choice. In support of their defence to the challenge to their fees, Wallace LLP cite decisions of this tribunal dealing with costs which they submit support their position.

15. The claims of duplication of work is also rejected by Wallace LLP who make very detailed comments on why they took certain steps set out in paragraphs 43 to 59 of their statement (occupying some 11 pages). With these points in mind I also considered the detailed bill of costs which has a column explaining why this step was taken.

16. I must also note that each of the firms of solicitors involved sent additional communications to the tribunal after I first considered the papers relating to the application (which I did on 8 July 2015). This correspondence included a letter written by Wallace LLP and received by the tribunal (copied to Verbatim on 4 August 2015); the reply by Verbatim received by the tribunal on 6 August 2015. As this exchange of correspondence did not, in my view, add anything to the statements and submissions contained in the bundle, and it has formed no part of this decision. In other words, I considered the decision on the basis of the bundle of documents prepared by Verbatim as directed by direction 5 of the tribunal's directions made on 12

May 2015. In reaching my conclusions I have relied also on my professional experience in dealing with enfranchisement and new lease claims.

The decision

17. It is common ground that under section 33 of the Act (a copy is in the appendix to this decision) the claimant leaseholders are required to pay certain professional costs incurred by the landlord in dealing with the claim. Section 91 provides that if the parties do not agree on what should be paid application must be made to this tribunal for the disputed costs to be determined.

18. Section 33(2) of the Act states that *'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.'*

19. Commenting on this provision the editors of Hague on Leasehold Enfranchisement (6th edition, 2014)) suggest that '..this sensible measure is designed to prevent the landlord from inflating his costs merely because the tenants are paying them' (28-32). Wallace LLP state that their fees have already been agreed with the landlords and paid in full. However, this is far from conclusive and it does not absolve the tribunal from its duty to consider the reasonableness of the costs claimed under the Act the proviso in section 33(2).

20. Dealing with the general issues involved, Wallace LLP are correct to state that enfranchisement and new lease law is a complicated area of law and practice. This complexity is such that it has prompted much litigation in the courts and in the tribunals.

21. Second, I accept as a general proposition that a party to such claims is entitled to appoint solicitors of their choice and they are not required to see if cheaper advice can be obtained elsewhere. It follows that a landlord is perfectly entitled to appoint solicitors of their choice who are expert in this field.

22. Third, just as a landlord is entitled (or well-advised) to seek specialist advice, a specialist advisor might reasonably be expected to undertake the work with less time that a non-specialist advisor.

23. I do not think that Verbatim really took issue with these simple propositions and they were correct, in my view, not to do so. That said there remain some issues that this tribunal must consider. These are, did a partner have to undertake most of the work or could an assistant solicitor

have been used for much of most of the work? Second, just how complicated was this claim? Was such a large bill representing some twenty hours of a specialist solicitors time justified?

24. In addition to these issues are the submissions made by Verbatim namely that there is considerable duplication in the work involved in dealing with two claim notices and that overall the size of the bill is too high. It will be recalled that the first claim notice was invalid and whilst the validity of the second notice was questioned by Wallace LLP the parties eventually reached agreement on the terms of the transfer of the freehold and the premium to be paid.

25. I turn now to the costs claimed for the first notice of claim which was invalid. The submission that the defects in the notice were 'easily discoverable' is a strange one for Verbatim to make as they prepared it. Besides, they could have given a fresh notice once they accepted the invalidity of the first one and they could have done this without having to withdraw the first one (which was dated 19 September 2013 but not given until 5 February 2014). However, they did not take this step until 13 May 2014. By this date the landlords had to take steps to prepare and to give a counter-notice which they did on 9 April 2014 and to take the other necessary steps in relation to the enfranchisement claim. If Verbatim had given a second and a valid notice sooner the tribunal considers that they might have saved about one-half of the professional costs incurred on behalf of the landlords.

26. Equally, the landlords were bound to respond to the second notice and they were entitled to raise an issue as to its validity. In the event they gave a counter-notice and the parties eventually reached agreement as I described above.

27. Given the history of this matter, I do not accept that Wallace LLP duplicated work. They were bound to investigate the validity of the second claim and to take the steps necessary to protect the position of their clients until a second notice was given.

28. As Wallace LLP have provided the tribunal with a very detailed statement and schedule of the work undertaken for both notices and in the absence of a detailed challenge to their schedule of costs the tribunal is required to determine whether the costs were reasonably incurred. The tribunal does not accept that Verbatim were in anyway hampered by not having access to the file held by Wallace LLP as they could judge from their own emails and other exchanges how much work was involved.

29. As to their justification for the work is concerned, the tribunal accepts that the landlords were entitled to instruct specialist solicitors and that it was appropriate for a partner to take the lead in dealing with with the claim.

Even though it is on the face of it an uncomplicated claim, with just two leaseholders seeking to acquire the freehold of the building, the claim was complicated by the fact that there was not just a freeholder but another landlord with two leasehold interests in the premises involved. All three of the superior interests had to be considered including the preparation and the giving of a counter-notice, division of the premium to be paid and on the terms of the transfer.

30. The tribunal notes that Verbatim did not challenge the hourly rates claimed. Although this does not prevent the tribunal from considering this issue the rates charged (£395 per hour for a partner rising to £420 for work after August 2014 and £285 for an assistant rising to £300 per hour after August 2014) and even though these hourly rates seem on the high side, the tribunal does not consider that they are unreasonable.

31. The decision by the landlords to instruct a partner was, for the reasons set out above, perfectly reasonable. But the tribunal questions whether it was necessary for the partner concerned to be so closely involved when more of the work could have been carried out by an assistant under the supervision of the partner concerned. This is particularly so with much of the work that was undertaken on the second notice of claim. By then the landlord's solicitors had already had occasion to examine title and valuation issues. Clearly, the partner concerned and those instructing her were justified in using her to examine the validity of the second notice and the drafting of the second counter-notice. But thereafter with supervision the assistant could have taken the responsibility for the steps that led up to the completion of the transfer of title from the landlords to the nominee purchaser. The tribunal has also noted that the sums of money involved were relatively modest.

32. Considering the period after the giving of the second notice (May 2014 to April 2015), and allowing also for the increase in the relevant hourly rates from August 2014 the tribunal considers that one and one-half hours of the work could have been undertaken by the assistant solicitor instead of a partner (that is to say 1.5 hours at £300 as opposed to £420). (The tribunal notes that almost all of the work undertaken in 2015 was dealt with by the assistant solicitor). The tribunal also questions the use of a paralegal to obtain copies of the leases and Land Registry fees and this element of the costs claim (£60) is also rejected. In all this amounts to a total of £240 to be deducted from the fees claim which is the sum of £6761. These figures are exclusive of VAT.

James Driscoll, 24 August 2015

Appendix

Section 33
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.

Section 91
Jurisdiction of leasehold valuation tribunals.
(1)
Any jurisdiction expressed to be conferred on a leasehold valuation tribunal by the provisions of this Part (except section 75 or 88) shall be exercised by a rent assessment committee constituted for the purposes of this section; and any question arising in relation to any of the matters specified in subsection (2) shall, in default of agreement, be determined by such a rent assessment committee.
(2)
Those matters are—
(a)
the terms of acquisition relating to—
(i)
any interest which is to be acquired by a nominee purchaser in pursuance of Chapter I, or
(ii)
any new lease which is to be granted to a tenant in pursuance of Chapter II, including in particular any matter which needs to be determined for the purposes of any provision of Schedule 6 or 13;
(b)
the terms of any lease which is to be granted in accordance with section 36 and Schedule 9;
(c)
the amount of any payment falling to be made by virtue of section 18(2);
[F1(ca)
the amount of any compensation payable under section 37A;]
[F2(cb)
the amount of any compensation payable under section 61A;]
(d)
the amount of any costs payable by any person or persons by virtue of any provision of Chapter I or II and, in the case of costs to which section 33(1) or 60(1) applies, the liability of any person or persons by virtue of any such provision to pay any such costs; and
(e)
the apportionment between two or more persons of any amount (whether of costs or otherwise) payable by virtue of any such provision.
(3)
A rent assessment committee shall, when constituted for the purposes of this section, be known as a leasehold valuation tribunal; and in the following provisions of this section references to a leasehold valuation tribunal are (unless the context otherwise requires) references to such a committee.

(4)
Where in any proceedings before a court there falls for determination any question falling within the jurisdiction of a leasehold valuation tribunal by virtue of Chapter I or II or this section, the court—
(a)
shall by order transfer to such a tribunal so much of the proceedings as relate to the determination of that question; and
(b)
may then dispose of all or any remaining proceedings, or adjourn the disposal of all or any such proceedings pending the determination of that question by the tribunal, as it thinks fit;
and accordingly once that question has been so determined the court shall, if it is a question relating to any matter falling to be determined by the court, give effect to the determination in an order of the court.
(5)
Without prejudice to the generality of any other statutory provision—
(a)
the power to make regulations under section 74(1)(b) of the Rent Act 1977 (procedure of rent assessment committees) shall extend to prescribing the procedure to be followed consequent on a transfer under subsection (4) above; and
(b)
rules of court may prescribe the procedure to be followed in connection with such a transfer.
(6)
Any application made to a leasehold valuation tribunal under or by virtue of this Part must comply with such requirements (if any) as to the form of, or the particulars to be contained in, any such application as the Secretary of State may by regulations prescribe.
(7)
In any proceedings before a leasehold valuation tribunal which relate to any claim made under Chapter I, the interests of the participating tenants shall be represented by the nominee purchaser, and accordingly the parties to any such proceedings shall not include those tenants.
(8)
No costs which a party to any proceedings under or by virtue of this Part before a leasehold valuation tribunal incurs in connection with the proceedings shall be recoverable by order of any court (whether in consequence of a transfer under subsection (4) or otherwise).
(9)
A leasehold valuation tribunal may, when determining the property in which any interest is to be acquired in pursuance of a notice under section 13 or 42, specify in its determination property which is less extensive than that specified in that notice.
(10)
Paragraphs 1 to 3 and 7 of Schedule 22 to the Housing Act 1980 (provisions relating to leasehold valuation tribunals constituted for the purposes of Part I of the M3Leasehold Reform Act 1967) shall apply to a leasehold valuation tribunal constituted for the purposes of this section; but—
(a)
in relation to any proceedings which relate to a claim made under Chapter I of this Part of this Act, paragraph 7 of that Schedule shall apply as if the nominee purchaser

were included among the persons on whom a notice is authorised to be served under that paragraph; and

(b)

in relation to any proceedings on an application for a scheme to be approved by a tribunal under section 70, paragraph 2(a) of that Schedule shall apply as if any person appearing before the tribunal in accordance with subsection (6) of that section were a party to the proceedings.

(11)

In this section—

"the nominee purchaser" and "the participating tenants" have the same meaning as in Chapter I;

"the terms of acquisition" shall be construed in accordance with section 24(8) or section 48(7), as appropriate;

and the reference in subsection (10) to a leasehold valuation tribunal constituted for the purposes of Part I of the Leasehold Reform Act 1967 shall be construed in accordance with section 88(7) above.