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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00CN/OC6/2013/0003**
Property	:	**16 Ferndown Close, Yardley, Birmingham, West Midlands, B26 2BT**
Applicant	:	**Colin John Corkindale**
Representative	:	**Hadgkiss Hughes & Beale, Solicitors**
Respondent	:	**City and County Properties (Midlands) Limited**
Representative	:	**Wallace LLP, Solicitors**
Type of Application	:	**Application under section 21(1)(ba) of the Leasehold Reform Act 1967 for the determination of the reasonable costs payable under section 9(4) of that Act**
Tribunal Members	:	**Judge C J Goodall LLB MBA (Chair)** **D J Satchwell FRICS** **P Hawksworth**
Date of Decision	:	6 SEP 2013

DECISION

Background

1. On 20 October 2012, Mr Corkindale ("the Applicant") served a notice ("the Notice") under the Leasehold Reform Act 1967 ("the Act") seeking to compulsorily acquire the freehold of the house and premises known as 16 Ferndown Close, Birmingham ("the Property") under the Act.

2. The Tribunal has been informed that all issues relating to the Notice have been resolved between the parties save for the amount of solicitors costs that the Applicant should pay. To resolve that issue, on 20 March 2013, the Applicant's representative applied to this Tribunal for a determination of those costs.

3. Neither the parties nor the Tribunal considered that an inspection of the Property was necessary. Neither party requested a hearing. This decision has therefore been made on the basis of the written representations of the parties comprised in a statement with appendices from Mr Anthony John Jones, a consultant with the Applicant's representatives dated 10 July 2013, and a statement of submissions in reply by the Respondent's representative dated 1 August 2013.

The Law

4. Sections 9(4) and 9(4A) of the Act provide:

"9(4) Where a person gives notice of his desire to have the freehold of a house and premises under this Part of this Act, then unless the notice lapses under any provision of this Act excluding his liability, there shall be borne by him (so far as they are incurred in pursuance of the notice) the reasonable costs of or incidental to any of the following matters:—

(a) any investigation by the landlord of that person's right to acquire the freehold;

(b) any conveyance or assurance of the house and premises or any part thereof or of any outstanding estate or interest therein;

(c) deducing, evidencing and verifying the title to the house and premises or any estate or interest therein;

(d) making out and furnishing such abstracts and copies as the person giving the notice may require;

(e) any valuation of the house and premises;

but so that 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.
9(4A) Subsection (4) above does not require a person to bear the costs of another person in connection with an application to [the appropriate tribunal]"

5. There is a helpful paragraph in Hague on Leasehold Enfranchisement, 5th Edition on this subject, at para 6-39 of Chapter 6, which says:

"The costs for which the tenant is liable are:

(a) The landlord's valuation costs. [not in issue in this case]

(b) The landlord's ordinary conveyancing costs.

(c) The costs of, or incidental to, "any investigation by the landlord of that person's right to acquire the freehold". This item includes the landlord's costs of investigating the claimant's title to the leasehold, and (where relevant) whether the tenant has been in occupation as his only or main residence for the relevant two-year period; but not the landlord's costs of preparing and serving a Notice in Reply, serving copies on other persons interested, and taking general advice as to his rights under the Act.

In order to be recoverable under section 9(4), the costs must be reasonable, they must be incurred in pursuance of the notice (i.e. the Notice of Tenant's Claim) and they must be in respect of or incidental to the matters set out above. The person seeking to recover costs must therefore show what costs have actually been incurred...."

The Applicant's case

6. Mr Jones, who qualified as a solicitor in 1973, and has been a specialist in leasehold enfranchisement cases for the last 20 years or thereabouts, says that when analysed carefully, the landlord's solicitors work for which the tenant has to pay under section 9(4) does not amount to a great deal. He accepts that the following work is required:

   a. Investigation of whether the premises comprise a house;

   b. Investigation of the tenant's ownership of the house, which will generally nowadays comprise inspection of official copies of the tenant's title;

   c. Drafting of the transfer document (where landlords solicitors wish to do this because their clients own other properties that may be affected by the sale);

   d. Deduction of the landlords title to the tenant's solicitors, which will generally be by production of official copies, which are likely to have been obtained already by the tenant's solicitor; and

   e. Providing any further abstracts or copies as may be necessary if these have not already been dealt with.

7. Mr Jones suggests that the correct approach to assessment of costs under section 9(4) is to review each item charged to see if it was reasonably

incurred, then to assess whether the sum claimed for that item is reasonable in amount, and to add up the reasonable cost of the charges reasonably incurred. That amount, he says, must then be considered against a test of proportionality to the consideration involved.

8. A proportionality test is appropriate, it is said, because this is suggested in the Jackson report on civil costs. Mr Jones quotes an extract from the New Law Journal dated 30 April 2013 where Jackson LJ's report is quoted as follows:

"Disproportionate costs do not become proportionate because they were necessary. If the level of costs incurred is out of all proportion to the circumstances of the case, they cannot become proportionate simply because they were 'necessary' in order to bring or defend the claim".

9. Mr Jones also asks the Tribunal to take into account the reality of the market place for legal costs. He says that market pressures mean that conveyancing charges are now lower than those that were being charged in the late 1990's. This is a time of austerity and a change of approach is needed. Charges based on time records reward inefficiency and the market has moved towards fixed costs. Mr Jones quotes Lord Neuberger in a speech to the Association of Costs Lawyers, where the learned judge is reported as having said:

"Hourly billing fails to reward the diligent, the efficient and the able: its focus on the cost of time, a truly moveable feast, simply does not reflect the value of work."

10. There is no dispute by Mr Jones that the work claimed to have been undertaken was actually undertaken. There is a dispute as to whether that work was necessary, or charged at the correct level.

11. Mr Jones invites the Tribunal to allow a reasonable fee. In the application to the Tribunal for this determination, the amount suggested for the Applicant as a reasonable fee for the Respondent's legal fees is £626.00. Mr Jones does not provide any explanation of how this figure is arrived at.

The Respondent's case

12. The submission from Wallace LLP contends that the actual fees incurred, on a time cost basis, are £1,642.50. A breakdown is provided, showing 37 separate charging points, itemised for letters and emails and perusal/preparation of documents. There is reference to consideration of the Notice, review of official copies, deduction of title, review of the valuation report, preparing Notice in Reply, drafting the transfer, preparing completion statement, preparing Notice to complete, and completion. The work is carried out by three grades of fee earner, being partner, assistant solicitor, and paralegal. Two partners were engaged on this matter – one who carried out initial work in considering the Notice (charged at £375 per hour) and one who drafted the Transfer (charged at

£350 per hour). The assistant solicitor charging rate is claimed at £275 per hour, and the paralegal rate is £150 per hour. A total time of 5 hours 36 minutes is said to have been spent on the matter, broken down as follows:

Partners (both Grade A fee earners)	1 hour 30 mins
Assistant solicitor (Grade B fee earner)	3 hours 54 mins
Paralegal	12 mins
Total	5 hours 36 mins

13. It is said by Wallace LLP in its submission that the Act is complex and accordingly it is necessary to use the level of fee earner used in this case. The work generally required is analysed in a little detail, and is said to be; consideration of entitlement to enfranchise and validity of the Notice, communication with the client, the applicant, and instruction of the valuer; carrying out of necessary searches, preparation of Notice in Reply, and drafting of the Transfer.

14. Wallace LLP say that any consideration of proportionality has no application to this dispute. That concept belongs to the Civil Procedure Rules, and has not been imported into disputes about costs under section 9(4) of the Act. Furthermore, they point out that section 9(4) costs are not costs as they arise in a transaction between a willing seller and a willing buyer. There is an element of compulsion upon the landlord, and in consequence it is suggested that calculation of costs on a time cost basis is the correct approach. A suggestion that the costs should reflect the value of the transaction is rejected as the time spent on a matter may be the same irrespective of the consideration payable.

15. The point is also made by Wallace LLP that the Respondent should be entitled to use the fee earner of its choice who has the relevant experience to conduct the matter.

16. The Respondent's rely upon the Leasehold Valuation Tribunal case, determined in 2004, of *Daejan Investments Freehold Ltd v Parkside 78 Ltd (LON/ENF/1005/03)* ("Parkside"). This was a case relating to costs of a collective enfranchisement by a group of tenants of a block of flats under section 13 of the Leasehold Reform and Urban Development Act 1993. As such the statutory provisions are not identical to those under the Act. Professor Farrand, who chaired that Tribunal, said in paras 8 – 10 of that decision:

"8. 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 out of pocket in respect of their inevitable incidental expenditure in obtaining the professional services of valuers and lawyers for a transaction and proceedings forced upon them. Parliament has indeed provided that this expenditure is recoverable, in

effect, from tenant-purchasers subject only to the requirement of reasonableness (see s33(1) of the 1993 Act).

9. As to what is "reasonable" in this context, it is merely provided that "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 was personally liable for all such costs" (s33(2) of the 1993 Act). The Tribunal considers that this reasonable expectation test is satisfied here.

10. The statutory test does not turn upon what tenant-purchasers may reasonably expect to be their liability. Thus the reversioner was not required to find the cheapest nor even cheaper solicitors or valuers but only, in effect, to give such instructions as it would ordinarily give if it were itself going to be bearing the cost of paying the solicitors and valuers for acting, as it will be contractually obliged to in so far as recovery cannot be obtained from the Nominee Purchaser. No suggestion was made to the Tribunal that the Reversioner would not have employed the same firms of solicitors and valuers concerned on the same terms on its own behalf or would not have accepted liability for dealing with a complicated matter properly."

The Tribunals' deliberations

17. Clearly, the focus of the decision the Tribunal has to make is firstly the meaning, and application in the context of this case, of the phrase "reasonable costs". Secondly, the Tribunal has to consider the scope of the work for which costs are recoverable. The Tribunal makes the following observations in considering these points:

    a. The Tribunal accepts the point made in Parkside to the effect that on a compulsory acquisition from a reluctant landlord, the landlord should not be out of pocket on costs, as long as they are reasonable. It should be entitled to use the solicitors firm of its choice, without being expected to select on the basis of whether those solicitors are cheap, or cheaper than others in the market. To that extent, what other solicitors will charge in the market becomes an irrelevant consideration. Nevertheless, there are constraints on the amount a landlord's solicitor may charge as the charges are subject to the test of reasonableness.

    b. The basis for assessing costs has historically been on a time cost basis. The Tribunal sees no reason to depart from that approach, at least as a starting point. The Applicant has suggested that this is not an efficient way of considering costs under section 9(4), but has not adduced any evidence of any regularly accepted or established fixed cost scale. The Tribunal considers that without that evidence it cannot use any fixed scale to determine the landlord's costs.

c. The suggestion by the Applicant that costs be proportionate is superficially attractive, as disproportionate costs seem unlikely to be reasonably incurred. There is a possibility though, in enfranchisement cases, that costs may seem disproportionate but they will still be reasonable. Processes have to be followed through in a statutory enfranchisement whatever the value of the transaction. It may well be that the enfranchisement price for a modest property enfranchised early in the life of the lease will be low, but the professional time required to carry out the statutory processes carries a cost that is a large proportion of that enfranchisement price. Those costs will still have been reasonably incurred.

d. So the Tribunal accepts that assessing costs by using time costing is the correct approach. The time costing approach is to multiply the amount of time spent on a case by the hourly rate charged. If there is any control over the amount of costs as a result of the requirement that they be reasonable, that control must be that the amount of time and the hourly rates themselves must both be reasonable, as these are the two key elements of costs.

e. The role of the Tribunal is therefore to assess whether the amount of time claimed on a transaction and the hourly rate charged are "reasonable". To carry out this task, the Tribunal really needs information on not just how much time was involved, but also on how that time was spent. Were there any issues of a technical nature requiring research? Were either of the titles of the landlord or the tenant complicated or unregistered? Was there retained land requiring the imposition of covenants or easements? Were there mortgages or other charges that required investigation and resolution? Did the tenant's solicitors raise non-meritorious points which increased the costs at no fault of the landlords solicitors? Was the correspondence a series of short routine letters or a substantive exchange on key issues? The Tribunal needs to understand the issues at large in the transaction. It may be that the most helpful way of solicitors explaining the issues on an application for costs would be to provide a copy of the file – or at least the key documents involved.

f. An enfranchisement of a house under the Act is now a common transaction. Whilst issues of principle requiring highly specialist legal knowledge do sometimes arise (for instance the definition of a "house" where a building has a different or new use), unless there is an unusual aspect to any particular transaction, enfranchisements under the Act should be regarded as repetitive volume transactions which can be carried out using standard policies and procedures, rather than individual bespoke transactions.

18. In the light of the considerations listed above, the Tribunal considered carefully the costs claim submitted in this case. It is necessary for the landlord's solicitors to carry out three substantive processes; investigation of the applicant's right to enfranchise, drafting of the transfer, and deduction of the landlord's title. Each of these will have consequent administrative procedures, including establishing instructions from the client, liaison with valuers, and the preparation of a completion statement and the process of completion.

19. Using its expert knowledge, the Tribunal considers that the time spent by the Respondent's solicitors in this case of five hours and 36 minutes was excessively long for these processes, and therefore unreasonable, in the absence of evidence of good reason for that time being spent. Most transactions do not involve complexity about whether the Property is a house, or (upon production of official copies of the Applicant's interest) whether the Applicant qualified for enfranchisement. The Tribunal has not been told of any particular difficulties over drafting of the transfer (which is likely to follow a standard precedent), and deduction of the landlord's title will usually be easily accomplished simply by providing official copies. The Respondent's solicitor has also clearly included the time spent in drafting the Notice in Reply, which the Tribunal does not consider is an item it is entitled to charge for under the Act (see the quotation from Hague at paragraph 5 above).

20. Bearing in mind these points, the Tribunal considers that a reasonable amount of time for the Respondent's solicitors to deal with the elements chargeable to the Applicant for this enfranchisement transaction under the Act, in the absence of any evidence of any unusual or specifically complex features, is between two and three hours.

21. So far as the hourly rate is concerned, the Respondent's solicitors have used a mix of Grade A and Grade B fee earners. The Grade B fee earner rate claimed is £275 per hour. The Tribunal considers that the vast majority of enfranchisement cases require a fee earner at Grade B level for most of the work necessary. In addition, there will have been certain tasks (e.g carrying out of searches, completion statements, routine correspondence) which will justify use of a fee earner rather than an administrative clerk but at a lower level than Grade B. The Tribunal notes that the Respondent used a paralegal at £150 per hour for a certain amount of the work involved in this case. The Tribunal does not however consider that use of a Grade A fee earner for anything above a limited amount of supervision was necessary or appropriate. The Tribunal's views on the level of complexity of enfranchisement transactions under the Act are set out in paragraph 17(f) above.

22. In relation to this point, the Tribunal does not accept the argument of Wallace LLP summarised at paragraph 15 above. The argument is that the Respondent should be allowed to use the fee earner it chooses (as opposed to the solicitor's firm it chooses), even if the work carried out by that fee earner is work for which the fee earner is over qualified, and the cost of that work is therefore more than would have been the case had a

lower level, but still appropriately qualified, fee earner carried out the work. In the view of the Tribunal this is a luxury (which the Respondent is entitled to purchase if it wishes) rather than a reasonable cost for which the Applicant should pay.

23. It follows from paragraphs 19 - 22 above that the Tribunal considers that the Respondent's reasonable costs under section 9(4) for the enfranchisement of the Property are lower than the costs claimed. Doing the best it can on the evidence available, the Tribunal assesses the reasonable costs in this transaction as in the region of two and a half hours of Grade B fee earner time plus half an hour of Grade D fee earner time. The Tribunal rounds this amount to the sum of £750.00 plus VAT (if irrecoverable by the Respondent).

24. The Respondent's solicitors have also claimed disbursements being Land Registry fees of £26 and courier fees of £23.92. The Tribunal allows the Land Registry fees but does not allow the courier fee, for which there has been no explanation or justification, and which is opposed by the Applicant. The Tribunal is not aware of there being a requirement during an enfranchisement transaction that requires any documents to be sent by courier.

Decision

25. The Applicant must pay the Respondent's solicitors costs in the sum of £750.00 (plus VAT if irrecoverable by the Respondent) plus Land Registry fees of £26.00.

Appeal

26. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Date - 6 SEP 2013

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Judge C J Goodall
Chair
First Tier Tribunal (Property Chamber)