

4365



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

Case Reference : **LON/00BG/OC6/2016/0002**

Property : **73 & 51 (and garage for 73)
Lockesfield Place, London E14 3AJ**

Applicant : **Lockes Field Management
Company Limited**

Representative : **Mr Jaque and Mr McPherson of
DWFm Beckman Solicitors**

Respondent : **Mr Rakesh Patel**

Representative : **Mr Fain of Counsel instructed by
Brethertons Solicitors**

Type of Application : **Assessment of costs under section
33 of the Leasehold Reform
Housing and Urban Development
Act 1993**

Tribunal members : **Mrs Sonya O'Sullivan
Mrs Helen Bowers MRICS**

Date of Decision : **24 November 2016**

DECISION

The background

1. This is an application by the nominee purchaser of 51 & 73 Lockesfield Place, London E14 3AJ (“Lockesfield Place”) to determine the amount of the landlord’s reasonable costs under section 33 of the Leasehold Reform Housing and Urban Development Act 1993 (the “1993 Act”) in connection with a claim by the participating tenants to exercise a right of collective enfranchisement.
2. The initial notice of claim was given under the Leasehold Reform Act 1967 on 12 June 2014 and was subsequently withdrawn. A notice was subsequently served dated 25 July 2014 under the Leasehold Reform, Housing and Urban Development Act (the “1993 Act”). An application was subsequently made to the tribunal under section 24 of the 1993 Act for a determination of the terms of the enfranchisement on 15 January 2015. The parties agreed the terms of the transfer before the hearing took place and a consideration of £100 was agreed. The proceedings were withdrawn on 24 February 2016.

The present application

3. The tribunal now before it an application for an assessment of its costs under section 33 of the 1993 Act.
4. Both parties have lodged comprehensive points of dispute.
5. The application was considered at an oral hearing on 21 September 2016. The Applicant was represented by Mr Jaque and Mr McPherson of DWF Solicitors. The Respondent was represented by Mr Fain of Counsel.
6. The costs before the tribunal total £40,115 inclusive of Vat.
7. At the commencement of the hearing the Applicant landlord applied for an order that the Respondent be barred from taking part in the proceedings on the basis that there had been non compliance with the directions in relation to the service of the points of dispute. The tribunal heard that the Respondent’s points of dispute had been due to be served by 22 August 2016 but had been served a day late. The tribunal declined to make a debaring order. The points of dispute were served only one day late and the Applicant’s professional representatives were not prejudiced by such a slight delay.

The Legal costs

8. Mr Jaque for the Applicant set out the history to this matter. He confirmed that the Applicant had not disputed the right to enfranchise once served with the correct notice under the 1993 Act and a nominal consideration of £100 was quickly agreed. The dispute between the parties had however related to the terms of the transfer; the Applicant's stance had been that all lessee covenants relating to the service charge had to be contained in the transfer and the Respondent's position had been that he would not agree to the inclusion of the service charge covenants and would not pay service charge. The dispute was settled between the parties shortly before the tribunal hearing was due to be heard with the parties agreeing that the service charge provisions would be included and that the Respondent could insure. The Applicant accepted that the costs of the tribunal proceedings could not be recovered under section 33. The bulk of the costs claimed are in respect of work carried out in relation to the transfer under section 33(1) as costs "*of and incidental to*".
9. In response Mr Fain submitted that the Applicant had a fundamental misunderstanding of section 33(1). He submitted that this was a simple enfranchisement claim. He relied on various case law most notably the Upper Tribunal in *Plunkett-Ernle-Erle-Drax v Lawn Court Freehold Limited [2010] UKUT 81 (LC)* to say that the test of proportionality applied in that the landlord should be "*no worse (or better off) after the acquisition than before*". As far as the costs of the conveyancing are concerned Mr Fain submitted that these should not extend to any costs where there is a dispute between the parties and should include only the costs of drafting the transfer and considering the first response received. He also suggested that as the application was made to the tribunal on 15 January 2015 no costs after that date should be recoverable. He asked the tribunal to stand back and consider whether a landlord would himself spend in the region of £50,000 on legal costs when the consideration he was receiving was only £100. He suggested that this approach must be correct or a landlord could prolong negotiations and in effect prevent enfranchisement by making the process too expensive. As a ballpark he considered that the reasonable costs under section 33 were in the region of £5,000 plus Vat.
10. The charge out rates applied were £350 per hour for Mr Jaque and £275 per hour rising to £325 per hour (March 2014 onwards) and £350 per hour (March 2015 onwards) for a partner with greater than 8 years experience.
11. The tribunal went through the bill of costs in some detail with the parties and does not intend to repeat all of the submissions made but would comment on the following;

- i) In Part 1 some 3 hours 54 minutes and 5 hours 42 minutes of time is claimed the two fee earners respectively. The Respondent challenged all of CJ's time as it was submitted there was no need for his involvement. The time was said to be unreasonable and not recoverable at all if no notice had been "given" for the purposes of the 1967 Act.
 - ii) In Part 2 there are numerous fees claimed for Counsel; advice on 17/07/14 charged at £600 plus VAT, advice on 12 and 13/02/15 charged at £700 plus VAT, on 5/03/15 an opinion charges at £1,400 plus VAT, 19/6/15 advice charged at £800 plus VAT, advice on 4/09/15 charged at £1,000 plus VAT, and advice on 16/01/16 charged at £400 plus VAT. It was said by Mr Fain that there was an over reliance on Counsel and in fact that there had been no need to seek advice from Counsel at all given the complexity of the matter. If it were allowable at all then his secondary point was that there had been no need to go to a leading expert as this was not proportionate. Mr Jaque said that the Respondent should not "*belittle the importance of this matter to the company*" and that the documents would speak for themselves. He informed the tribunal that negotiations had been "*torturous*" and that the arguments had been advanced by a specialist firm.
 - iii) Mr Fain submitted that much of the work contained in Part 2 had been in connection with the proceedings and as such was not recoverable. Also any discussions with experts and such like did not fall within the ambit of section 33. The Applicant said the tribunal should rely on the documents in this regard.
 - iv) Mr Fain submitted that it was entirely wrong to claim costs in relation to the valuation evidence as this was clearly in connection with the proceedings, this is highlighted by the fact that the litigator spent some 5.4 hours instructing the valuer. The Applicant maintained it was entitled to seek advice on valuation and this was not unreasonable on the context.
12. The tribunal asked Mr Jaque to deal with the issue of whether the landlord would have incurred all of these costs had it been personally liable under section 33(2). He submitted that the dispute had been run by the Respondent and that it was the Respondent who was raising the questions. He accepted that the Applicant could have chosen to cease negotiations and leave the matter to the tribunal but the Applicant had felt obliged to continue when there had been offers of meetings in an attempt to agree matters.

The Tribunal's decision – legal fees

13. By section 33(1) of the 1993 Act where a notice under section 13 is given the nominee purchaser is liable, to the extent they have been incurred in pursuance of the initial notice, for the reasonable costs of and incidental to the following;

(a) Any investigation reasonably undertaken –

- i. *of the question whether any interest in the specified premises or any other property is liable to acquisition in pursuance of the notice, or*
- ii. *of any other question arising out of that notice;*

(b) *Deducing, evidencing and verifying the title to 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;*

Any conveyance of such interest.

14. The parties took contrasting approaches to the recoverability of costs under section 33(1). Mr Fain's approach was that the provisions of section 33(1) should be strictly construed. He submitted that this meant the costs of Mr Jaque, the litigator were not recoverable nor were the costs associated in connection with the tribunal proceedings. He submitted the costs should be limited to sending out the transfer and receipt of the amended transfer.

15. The landlord submitted that the approach to be adopted was that section 33(1) allowed the words "*of and incidental to*" should be understood as including negotiations which would include negotiations on the terms of the transfer. The landlord also says that the level of the costs was exacerbated by the tenant's conduct.

16. We consider that the costs of conveyancing and those "*of and incidental to*" must as a matter of commonsense include some aspect of negotiation. Such negotiations arise as a matter of standard practice in conveyancing but are rarely protracted as in this case. However the extent of these costs would be limited to the costs which a landlord would be prepared to bear himself if he were so liable pursuant to section 33(2). In this case extensive ongoing discussions as to the terms of the transfer took place. For the landlord, given this was the first property on its estate to be the subject of an enfranchisement

claim, the issue was highly important and understandably care was taken to safeguard the interests of the other leaseholders in relation to such matters as service charge obligations. Discussions for the landlord therefore involved both the conveyancer and the litigator. We can well understand the importance to the freeholder of this issue given it was the first enfranchisement on the estate. However we do not consider it reasonable for the tenant to bear the costs of the landlord's vigilance and do not consider that many of the costs are recoverable within section 33(1). It is our view that in incurring this level of costs the landlord has failed to have regard to the issue of proportionality. In reaching this decision we had regard to the fact that the right to enfranchise had not been opposed, that a consideration of only £100 was agreed at the outset, that the only matters in dispute were the terms of the transfer as to insurance and service charge and the fact that this matter was not particularly complex. Also there has to be some element of commerciality in the consideration of how to proceed. If matters could not easily be resolved by the usual course of negotiations, then the Applicant could have availed themselves of the services of the tribunal to consider the substantial issues.

17. The costs allowed are set out below by reference to the bill of costs.

18. The disbursements are not challenged and are allowed in full.

Part 1

19. Part 1 costs relate to the initial invalid notice served under the 1967 Act. We considered that these were recoverable in principle. Total costs claimed total £2932.50. We consider that the type of solicitor instructed, whether it be a conveyancer or a litigator, is largely irrelevant. What is important is that the solicitor is a specialist with knowledge of this complicated area of the law. We see no reason for the involvement of more than one fee earner in relation to these initial notices and therefore allow the fees of one fee earner only. The costs allowed are the review of the title, the claim notice and the consideration of its validity and the drafting of the counter notice. We consider 2 hours of time to be wholly sufficient given that it should have been quickly clear to a specialist solicitor that this notice was invalid and therefore allow a total of 2 hours in the sum of £550 plus VAT of £82.50 (totalling £632.50)

20. We would mention that the majority of Mr Jaque's costs in this part appear to relate to other issues in respect of this client and do not concern the validity of the notices. The only fees which appear to relate to this matter is the opening of the file on 31 October 2013.

Part 2

21. Part 2 costs relate to time incurred in connection with the valid notices served under the 1993 Act. There are various attendances with Counsel and Counsel's fees total £4,900. Mr Fain submitted that there had been an over reliance on Counsel and that no reference to Counsel had been necessary. We considered that the telephone advice in the sum of £600 plus VAT given on 17 July 2014 should be allowed. This considered the draft counter notice and transfer and Counsel approved the drafts in this attendance. However we agree that there was much over reliance on Counsel. A specialist solicitor was already engaged and charged out at £350 per hour, it appeared that Counsel's advice added very little to the advice already given and that reliance on a specialist solicitor at the charge out rate should have been sufficient. The matter was not in our view particularly complex.
22. There were extensive negotiations as to the terms of the transfer. We were not satisfied that the experts appointed were appointed as part of those negotiations but rather appeared to us to be appointed in connection with the tribunal proceedings. We therefore disallowed any costs associated with those experts.
23. Overall we considered the costs claimed to be wholly excessive.
24. We considered that the following costs were recoverable. We allowed a rate of £350 per hour to reflect an experienced solicitor with knowledge of this complex area of the law.
25. We allowed 2 hours for checking the title and a further 2 hours for drafting the counter notice. We allowed a further 3 hours for consideration of the issues and advising the client throughout making a total of 7 hours allowed at a total cost of £2,450 plus VAT.
26. We considered that 3 hours should be allowed in relation to the drafting of the transfer. We acknowledge that the terms of the transfer were important and that there was a change in the Respondent's position from his initial stance to the terms eventually agreed. We therefore allowed 5 hours in relation to the discussions between the parties as to the terms of the transfer making a total of £2,200 plus VAT.
27. We allow a further 2 hours for completion at £275 per hour, amounting to £550 plus VAT..
28. Total costs allowed are therefore as follows exclusive of VAT;

Part 1

Profit costs	£550
Disbursements	£14

Part 2	
Profit costs	£2200
	£2450
Counsel's fees	£600
Disbursements	£1542
Completion costs	£550
Total	£7,906 plus Vat

Valuation costs

29. There are no valuation costs before the tribunal.

Costs

30. The bill of costs included a claim for costs. The tribunal explained the provisions of Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and indicated that they should consider whether to make an application under Rule 13 after receipt of the decision. They were referred to the recent decision in the Upper Tribunal decision in *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander* [2016] UKUT (LC), with particular reference to the three stages that the tribunal will need to go through, before making an order under rule 13.

Name: Sonya O'Sullivan

Date: 24 November 2016

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).