

1511

Reference: LON/00BK/OC9/2007/0026

LEASEHOLD VALUATION TRIBUNAL

**LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT
1993: SECTIONS 60 and 91**

Applicant: Daejan Properties Limited

Represented by: Ms Samantha Bone, Wallace LLP

Respondent: Mr Steven Kenneth Twin

Represented by: Mr Duncan Henderson of Counsel, Instructed by Bayham
Solicitors LLP

Premises: 44 Park West, Edgware Road, London W2

Also in Attendance: Ms Ayesha Kirpalani of Wallace LLP

Date of Hearing: 19 September 2007

Tribunal: S E Carrott LLB
J C Avery BSc FRICS

1. **Background**

This is an application under section 60 of the Leasehold Reform, Housing and Urban Development Act 1993 for the determination of the landlord's reasonable costs.

2. The Applicant is Daejan Properties Limited and the Respondent is Mr Steven Kenneth Twin. The subject property is 44 Park West, Edgware Road, London W2.
3. At the hearing of this application, the Applicant was represented by Ms Samantha Bone of Wallace LLP and the Respondent was represented by Mr Duncan Henderson of Counsel.
4. The Application for costs arises out of a notice of claim served by the Respondent on the Applicant pursuant to section 42 of the 1993 Act and dated 16 November 2005. The Respondent served a counter notice on 20 January 2006.
5. Following the service of the counter notice, the parties agreed on the premium and there followed negotiations as to the terms of the new lease. No application had been made either to the Tribunal or indeed the County Court because it looked as though save for the inclusion of clause in the new lease by which on full indemnification, the Respondent could require the Applicant to enforce the lessee covenants of other tenants in Park West without an increase in the premium payable by the Respondent, the parties were in agreement.
6. On 23 March 2007 the Applicant's Solicitors wrote to the Respondent notifying them that because the Respondent had failed to make an application to the Leasehold Valuation Tribunal within the time limit prescribed by section 48 of the Act, or application to the County Court, the Notice of Claim was deemed to be withdrawn.

7. There is now no dispute between the parties that in accordance with section 53 of the Act, the application is deemed to have been withdrawn as from 21 July 2006.
8. Against that background, the Applicant seeks legal costs of £1,787.00 plus VAT (the legal costs being assessed down to 23 March 2007), disbursements of £32 (Land Registry Fees) and Valuer's Fees of £1,250 plus VAT making a total of £3600.48 (including VAT).
9. **The Respondent's Submissions**

In making his submissions, Mr Henderson relied by way of background upon the witness statement of Ms Carole Wall who is a legal executive employed by the Respondent's Solicitors. The witness statement is dated 1 September 2007 and sets out the chronology of events and reasons for opposing the Applicant's application for costs.
10. Mr Henderson first sought to challenge the valuers costs. He argued that given the contents of the report which had been prepared by the Applicant's valuer, it was difficult to see how the total sum of £1,468.75 could have reasonably been incurred having regard either to the length of time said to have been taken to prepare the report (which the Applicant said was charged either on the basis of £250 per hour) or even if based upon the value of the property. He submitted that this was not a high value property and neither was the valuation of any particular complexity.
11. He criticised the Applicant for not being clear as to the basis upon which the valuer was charging, whether it was on an hourly rate or indeed whether it was based upon the value of the property. He argued that it was incumbent upon the Applicant to have either some evidence or some material before the Tribunal as to the basis of the charging rate and indeed the time taken to prepare the report. Here there was no such evidence before the Tribunal or indeed material upon which it

could be said that the valuation costs were reasonable or indeed at that rate reasonably incurred.

12. As to the legal costs, Mr Henderson drew the Tribunal's attention to section 60(3) of the 1993 Act. He submitted that the effect of section 60(3) was that tenant's liability to pay costs in the present case was down to the date of deemed withdrawal and that in accordance with section 53 of the Act that date (as the Applicant agreed) was 21 July 2006.
13. In the present case, he argued, since the Applicant's Solicitors had calculated their costs down to 23 March 2007, the costs schedule required adjustment in order to ascertain the correct figure. He drew the Tribunal's attention to the Schedule of Costs which showed that no work was carried out between 20 January 2006 and 19 September 2006 and that accordingly the Respondent's liability for costs (if any) ceased as at 20 January 2006. On his calculation that meant that the maximum amount the Applicant was entitled to in respect of legal costs was £1432.01 (including VAT and disbursements).
14. He further argued that the charging rate of £250 to £275 was too high and that the Tribunal should adopt as a guide the Court Service's Guideline Figures for the Summary Assessment of Costs. The Applicant's Solicitors were not a City Firm. He considered that this was appropriate because in the course of such applications the Tribunal was carrying out a summary assessment based upon a broad-brush approach, rather than a detailed assessment as would be carried out by a costs Judge.
15. In addition to charging rate Mr Henderson also challenged the fact that some of the work was carried out by a Grade A Fee Earner and that some of the work itself could have been carried out by assistant as is the practice in most firms.

16. Finally he argued that since the Tribunal was concerned with reasonableness, then the Tribunal should in this case take into account the conduct of the Applicant. In short it was contention that the Applicant had in effect reneged on its agreement as to the premium which had been agreed.

17. **The Applicant's Submissions**

Ms Bone for the Applicant, relied upon her two witness statements as setting out the factual background to the application. She argued that so far as the valuation costs were concerned that the valuer's standard costs in the present case were charged at £250 per hour. When it was pointed out by the Tribunal that it was difficult to see how a report which was less than one and half pages, citing one comparable and with a short valuation attached could take 5 hours, Ms Bone pointed out that there was also an inspection and that the valuer may have charged on a higher basis because this was a high value property. Ms Bone was unable to produce any further material that would assist the Tribunal as to the basis of the valuer's costs.

18. On the issue of section 60(3), Ms Bone reminded the Tribunal that under section 60 the landlord was entitled to the costs reasonably incurred and that the costs up and until 23 March 2007 were so reasonably incurred because until that point all of the parties were proceeding on the basis that there would indeed be the grant of a new lease.

19. With regard to the charging rate she relied upon the decision of this Tribunal in LON/ENF/1005/03 and the emphasis made on that decision upon the reasonable expectation test set out in paragraphs 8 and 9 of the decision. She argued that there was no basis for reducing either the charging rate or the time taken to do the work in this case and that so far as the use of an assistant was concerned, that in this case when it proved possible she did in fact use an assistant. With regard to the use of a Grade A fee earner, she advised the Tribunal that once the

premium had been agreed the matter was transferred to a conveyancer in her firm and owing to the dispute surrounding the mutual enforceability covenant a Grade A fee earner was required. In her second witness statement, Ms Bone exhibited a decision of this Tribunal in LON/NI/1588-1604/02 to illustrate just how contentious such covenants were and she advised the Tribunal that there were a number of different decisions by the Tribunal on the issue where differently constituted Tribunals had come to different conclusions on the issue.

20. Whilst agreeing the reasonable expectation test set out in LON/ENF/1005/03, Ms Bone stated that where a an application was made to the Tribunal for a determination as to the landlord's reasonable costs, the Tribunals function was to carry out a detailed assessment in much the same way as a costs Judge of the County Court and to resolve the costs items in dispute.

21. **Determination**

Section 60 of the Leasehold Reform, Housing and Urban Development Act 1993 in so far as is material to this decision states as follows -

(1) Where a Notice is given under section 42, then (subject to the provisions of this section) the tenant by whom it is given shall be liable, to the extent that they have been incurred by any relevant person in pursuance of the notice, for the reasonable costs and incidental to any other following matters, namely:

- (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;

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 purpose of subsection (1) any costs incurred by a relevant person in respect of professional services rendered by any person shall only be regarded as reasonable if and to the extent that the costs in respect of such services might reasonably be expected to have been incurred by him in circumstances had been such that he was personally liable for all such costs.
- (3) Where by virtue of any provision of this Chapter the tenant's notice ceases to have effect, or is deemed to have been withdrawn, at any time, then (subject to subsection (4)) the tenant's liability under this section for costs incurred by any person shall be a liability for costs incurred by him down to that time.

22. In LON/ENF/1005/03, Professor Farrand stated -

'8. As a matter of principle, in 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 the inevitable incidental expenditure incurred in obtaining the professional services of valuers and lawyers for a transaction and proceedings forced upon them

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 he was personally liable for all such costs".

23. Although the above statement was in relation to a claim for costs under section 33(1) of the 1993 Act, there is no material distinction for the purposes of section 60(1). The principle stated by Professor Farrand in

the above case although not binding, has been recognised in subsequent decisions of this Tribunal as being a correct statement of the law.

24. Moreover in accordance with the above principle, the function of the Tribunal on an application for the determination of the landlord's reasonable costs (whether under section 33(1) or section 60(1)), is to carry out a summary assessment. This involves a broad-brush approach in resolving the items in dispute between the parties. It is not the function of the Tribunal to carry out a detailed assessment of the landlord's costs. The function of the Tribunal in such cases is simply to determine the landlord's reasonable costs that have been incurred in accordance with the section. Where there is a dispute between the parties, such dispute can readily be resolved summarily by the Tribunal.
25. With regard to the valuers costs the Tribunal formed the view that the work which was undertaken by the valuer should not have reasonably taken more than between more than three to four hours. Moreover, this was not in the experience of the Tribunal a high cost case, and indeed if it was regarded by the valuer as being a high cost case which demanded greater care and attention than usual, it was surprising that the valuer produced a report of such brevity.
26. The Tribunal determined that in the circumstances the valuer's reasonable fee was £875 plus VAT on the basis that the charging rate was £250 and that the enquiries, report and inspection took between three and four hours.
27. With regard to the application of section 60(3) of the Act to the legal costs, the Tribunal determined that Mr Henderson's argument was unassailable. It would be a surprising result that the Applicant on the one hand could insist that the notice was deemed to be withdrawn on 21 July 2006 yet continue to claim costs until 23 March 2007.

28. With regard to the charging rate, the Tribunal was not persuaded that it should accept Court Service's Guideline Figures for the Summary Assessment of Costs as dictating what the landlord might reasonably be expected to have incurred by way of legal expenses. A landlord was not obliged in this specialist area to shop around for the cheapest Solicitors and indeed so far as the fees of Ms Bone were concerned and that of the Grade A fee earner, these rates were not beyond what in the experience of the Tribunal competent Solicitors in this complex area of law were charging in the market. Neither as a matter of practicalities was the Tribunal persuaded that an assistant could have carried out more of this work.
29. With regard to the issue of the conduct of the Applicant it was difficult to see, following the operation of section 53 and section 60(3) what effect conduct could have on the reasonableness of the legal fees. In accordance with section 60(3) the cut off date was 21 July 2006, being the date of deemed withdrawal of the tenant's notice. For practical purposes it was 20 January 2006, that being the last work carried out by the Applicant's Solicitors. There was no complaint about the Applicant's conduct prior to the date of the deemed withdrawal.
30. Although in determining the reasonableness of costs the Tribunal could take into account all relevant circumstances, it was difficult to see how the purported bad behaviour or conduct of the Applicant could affect the costs position when purported bad behaviour or conduct took place after the date of deemed withdrawal of the notice. As Ms Bone made clear in her submissions to the Tribunal, it was for the Respondent to safeguard his own position by making an application to the Tribunal before the date of deemed withdrawal if there had not been any firm agreement or if it looked as though matters were not progressing speedily enough.

31. Accordingly, limiting the costs to the work done up until the date of the deemed withdrawal, the Tribunal determined that the Applicant's reasonable legal costs were £1432.01 being inclusive of VAT and disbursements (and being a figure agreed by both parties if section 60(3) was applied).

32. **Decision**

- (1) The Applicant's reasonable valuation costs are £875 plus VAT.
- (2) The Applicant's reasonable legal costs are £1432.01 inclusive of VAT and disbursements.

Chairman SECAMOTT

Date 19/10/07