

SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00HN/OLR/2008/0008-0009-0010

BETWEEN:

Ms L J Bingham (Flat 2)
Ms M Ridley and Mr P Sheldon (Flat 4)
The Salvation Army Trustee Co. (Flat 6)

Applicants

- and -

Mr R G Gates
Mr Stone and Mr Davies
Cheriton Management (Bournemouth) Limited

Respondents

PREMISES: Flats 2, 4 and 6
Cheriton
47 West Cliff Road
Bournemouth
Dorset
BH4 8AZ ("the Premises")

HEARING: 3rd July 2008

TRIBUNAL: Mr D Agnew LLB, LLM (Chairman)
Mr K M Lyons FRICS

DETERMINATION AND REASONS

1. The Applications
- 1.1 This case concerns three separate applications by each of the Applicants to acquire new leases in respect of their flats.
- 1.2 The terms for the new leases, including the premiums payable, were agreed between the parties
- 1.3 All that remained for the Tribunal to determine was:-

- a) the amount of the Third Respondent's legal costs payable by each Applicant under Section 60 of the Leasehold Reform Housing and Urban Development Act 1993 and
 - b) the amount of the First and Second Respondents' valuer's fees.
- 1.4 It should be explained that the First Respondent was the freeholder and the Second Respondents were intermediate landlords. The management company Cheriton Management (Bournemouth) Ltd also held an intermediate leasehold interest and on 13th March 2008, approximately seven weeks after the applications were submitted to the Tribunal, the Third Respondent served notice that it intended to be separately represented by solicitors.
- 1.5 Messrs Coles Miller were solicitors for all three applicants. Messrs Preston & Redman acted on behalf of the First Respondent and Messrs Insley & Partners acted on behalf of the Third Respondent.
- 1.6 In accordance with Directions issued by the Tribunal the matter concerning the First Respondent's legal costs was dealt with on the basis of written submissions to the Tribunal. In respect of the disputed valuer's fees, there was an oral hearing at The Royal Bath Hotel, Bournemouth on 3rd July 2008. Mr G Bevens FRICS MCI Arb C dip AF FEWI who was the First Respondent's valuer appeared before the Tribunal. Messrs Coles Miller on behalf of the Applicants did not appear but submitted written points of dispute.

2. The Inspection

- 2.1 The Tribunal inspected the property, Cheriton, immediately preceding the hearing but as the inspection did not impact upon the matters in dispute in this case or upon the respective arguments of the parties it is unnecessary to give a description of the property in these Reasons.

3. The Hearing

- 3.1 Mr Bevan's evidence was that he had agreed with his clients a fixed fee of £650 plus VAT per flat for the valuation of the freehold and the intermediate interest of the Second

Respondents in this case. He had not yet produced an invoice because he did not want to have to pay the VAT element of the bill to Customs and Excise if it was going to be some time before he would be paid, but that was the agreed fee.

- 3.2 Mr Bevans stated that £650 plus VAT was his "standard fee" for this work, that since January 2006 he had charged this fee in all but a very few cases and that the tenants' solicitors would have been well aware that that was likely to be the fee he would charge. It did not matter whether he acted for landlord or tenant: that was his usual fee. He charged a standard fee because that is what clients like: they have certainty as to what the cost is going to be and he did not have to keep time sheets or spend time working out what the precise bill would be in each case. There was an element of "gaining on the swings and losing on the roundabouts" in charging a fixed fee as some valuations would be more straightforward and some more complicated than the norm.
- 3.3 Mr Bevans acknowledged that he was probably the most expensive valuer carrying out enfranchisement and new lease valuations in Bournemouth but his clients were prepared to pay the extra cost to gain the benefit of his expertise. If he were to charge at an hourly rate, when these valuations were carried out it would have been at £180 per hour but as he had quoted a fixed price he did not have time sheets to back up his figure of £650.
- 3.4 Mr Bevans said that in this case he visited the block on two occasions as he was unable to gain access to the third flat on the same day as the other two. Having visited and seen the accommodation he then had to carry out research as to the current open market value by looking at comparable evidence available from local agents on their websites and by looking at Land Registry information. He then carried out his calculations and reported to his clients. In this instance he was instructed to value the freehold and one intermediate leasehold interest.
- 3.5 Mr Bevans told the Tribunal that he had been involved in other disputed costs arising from valuations in 2004. In the first, his fees were agreed at the hearing in the sum of £550 and in the other his fixed fee (which at that time was £600) was reduced by the Tribunal to £550.

3.6 In the latter case, that concerning 2 Barrington Court, Bournemouth, decided on 20th July 2005, the Tribunal had said:-

"The Tribunal recognises that Mr Gates (and indeed other landlords) may be prepared to pay a premium for Mr Bevans' services, whether or not they will be personally liable for his fee, because of his experience in the field, and to accept that he can charge in accordance with a scale that the market will accept". Mr Bevans suggested that this was the test as to the level of fees that a tenant should be required to pay in respect of Landlords' valuation costs.

3.7 Mr Bevans referred to the lessees' solicitors points of dispute which suggested that the fee of £175 plus VAT which the lessees' valuer had charged was the "going rate" for such valuations in the market, that the lessee's valuer, Mr Wetherall, was an experienced valuer in this field and that that was a reasonable sum for the lessees to be required to pay by way of Landlords' valuer's fee. In response Mr Bevans said in his witness statement served on each of the Applicants and their solicitors, on or about 24th April 2008, well before the hearing, that he had spoken to Mr Wetherall about his fees. He had been told that he had carried out a lease extension valuation in the block the previous year and had also carried out a valuation of the block for enfranchisement purposes; that his charge was for initial advice only and that he updated that advice prior to service of the Applicants' claims; and that when acting for freeholders his base charge is £450 plus VAT per flat.

3.8 Mr Bevans raised two interesting and interconnected arguments as to what Section 60 of the Act permits to be recovered from a tenant. The Act refers to the cost of any valuation being obtained by the landlord. The use of the word "any" in the legislation suggests, Mr Bevans argued, that there may be more than one valuation for which a fee may be recovered by a landlord from a tenant, otherwise the expression "a valuation" or "one valuation" would have been used. Secondly, he regarded discussion with the tenants' valuer after he had formed his own view as to valuation and reported to his client as being more in the nature of a substantiation of this valuation rather than in the nature of "negotiations". The other valuer may bring matters to his attention which might cause him

to revise his valuation or he may be confirmed in his view of the correctness of his valuation. Mr Bevans contended that a certain amount of discussions with the other valuer in this case was concerned with confirming the valuation rather than negotiations. He regarded half an hour's discussion as being appropriately recoverable from the tenant and his fixed fee contained an element for such discussion.

4.

4.1 The Applicant's Points of Dispute with regard to the valuation, in summary, were:-

- a) that the landlord is not entitled to recover his surveyor's costs of negotiations with a view to seeking to agree a premium
- b) that there is a competitive market for this sort of work amongst experienced and competent surveyors
- c) That a landlord may be tempted to agree a higher fee than he would otherwise in the knowledge that he would not have to pay that fee
- d) there is a temptation for a landlord's surveyor to include an element of negotiation within the valuation fee and that Mr Bevans had admitted that there was an element for "negotiating" in his fee.
- e) the tenants' surveyor who is competent in this field was prepared to charge £175 plus VAT for his valuation
- f) no "updating" work was necessary in this case
- g) a valuer should not be entitled to a fee for revising his valuation on being presented with counter-arguments

5. The law

5.1 Section 60 of the Act states:-

(1) "Where notice is given under section 42 then..... 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 of and incidental to any of the 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 Section 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 purposes of subsection (1) any costs incurred by the relevant person 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.

6. The determination of the issue of valuer's fees

- 6.1 The Tribunal considered that the Act lays down a two-stage process in determining the professional fees incurred by the landlord which are recoverable from the tenant under Section 60. First, the fees have to be reasonable. Thus, they have to have been reasonably incurred and be of a reasonable amount for the work done. Secondly, the fees must not exceed what a landlord might reasonably expect to have to pay if he were paying those fees out of his own pocket and not be able to recover them from the tenant. In practice, it is difficult to see how this second requirement adds to the requirement that the amount recoverable be reasonable. If the landlord has agreed to pay a higher fee than he would if he were paying it all himself, that would not be a reasonable fee for the tenant to pay. It does emphasise, however, that the legislation is concerned to protect the paying tenant from paying more than what it is reasonable for him or her to pay in the circumstances of the case. The Tribunal therefore rejected Mr Bevans' contention that the

only test as to what was recoverable was the amount that the landlord would be prepared to pay if he were paying the costs himself and was not able to recover anything from the tenant. The overall requirement is one of reasonableness so that even if a landlord was prepared to pay an unreasonable amount for his valuer's services he will not be able to recover the full amount from the tenant.

6.2 Secondly, the Tribunal is not concerned with determining the amount payable by the tenant in terms of the landlord's surveyor's fixed fees. Just because the surveyor always or almost always charges a set amount is of no moment as far as the Tribunal is concerned. It has to look at each case and determine what, in its view, is a reasonable amount for the tenant to pay for the work done and the expertise employed in the particular case. Fixed fees undoubtedly have their advantages to both a landlord and his surveyor but if the landlord is to have the benefit of a fixed fee agreement, he must be made aware that the disadvantage is that he will not necessarily recover the full amount of his liability for his valuer's fees from the tenant. The Tribunal will not necessarily accept that the fixed fee is a reasonable fee for the tenant to pay in the circumstances of a particular case. Equally, however, although the amount that the tenant has paid for his or her valuation is a factor for the Tribunal to take into account, it is not determinative of what is reasonable or the market rate. There may be many factors influencing the amount paid by the tenant for the valuation and, again, the Tribunal needs to decide what is a reasonable fee for the work done by the landlord's valuer in this particular case. The Tribunal accepted Mr Bevan's evidence as to his discussion with Mr Wetherall as to the latter's fees in the absence of any appearance from the tenants or their solicitor to challenge that evidence save for their comments in the written Points of Dispute.

6.3 The Tribunal bore in mind that these were three separate applications in this instance and that a reasonable fee was payable in respect of each valuation. However, a certain amount of work was done which would have been common to all three valuations. On the other hand the Tribunal took into account that Mr Bevan's valuation was for the freeholder and also for an intermediate leaseholder and that a duty of care was owed to both clients.

- 6.4 The Tribunal did not demur from the quotation from the decision of the Tribunal in the case of 2 Barrington Court referred to in paragraph 3.6 above but the Tribunal considered that this was concerned with Section 60(2) of the Act and did not constitute the complete test for recoverability of costs from the tenant.
- 6.5 If hourly rates were to be applied, the amount of the hourly rate had to be reasonable bearing in mind the experience and expertise of the person charging. One would normally expect less time to be spent on a matter by someone on a higher charging rate than by someone of less experience on a lower charging rate. In this case, however, the fee being sought to be recovered had not been based on an hourly rate supported by work sheets showing time spent and so the Tribunal had to do the best it could based on its own experience of such matters and the work involved, the complexity of the matter and the importance of the work done.
- 6.6 The Tribunal did not consider that there was any great significance in the word "any" before the word "valuation" in Section 60(1)(b) of the Act. The Tribunal considered that the landlord was in most cases entitled to recover the reasonable costs of the valuer up to the point where the valuer submits his valuation report to his client. Thereafter, any "discussions" with the tenant's valuer are likely to be in the nature of negotiation either towards a settlement or at least to narrow the issues. If the tenant's valuer's representations lead the landlord's valuer to change his mind about his valuation this would be an indication that his initial valuation was deficient in the first place and the tenant should not be expected to pay for this. However, each case has to be looked at by the Tribunal on its own facts and it would be wrong for this Tribunal to seek to lay down any hard and fast rules in this regard, which are not, in any event, binding on other Tribunals. There may be good reason for the landlord's surveyor having to carry out more than one valuation: for example, if there is a change in the law or there are circumstances coming to light that the valuer could not reasonably have known about at the time of his first valuation.

6.7 Taking all the above matters into account the Tribunal decided that the valuer's fee recoverable from each of the Applicants in this case would be £600 plus VAT.

7. The Third Respondent's legal costs

7.1 The Third Respondent's case was that it claimed £1,580.43 plus VAT total in respect of three flats. The Applicants maintained that this was excessive for the work done.

7.2 The Applicants' Points of Dispute were as follows:-

a) the work done by the Third Respondents' solicitors did not fall within Section 60(1)(a), that is costs of investigating whether the tenants were entitled to a new lease. They did not become involved until after the counter notice admitting the tenants' rights had been served.

b) much of the work for which the claim is made for costs was work in relation to proceedings before the Tribunal and is therefore expressly not claimable under Section 60.

c) much of the work may have been misguided. The Applicants point to two matters raised by the Third Respondents' solicitors erroneously, namely the date from which the peppercorn rent should apply and the inclusion of a statutory statement in the proposed draft lease.

d) the legal fees of the Second Respondents who were instructed on service of the initial notice were agreed at £460 plus VAT per flat.

7.3 The Third Respondent's written response was as follows:-

a) they have applied a charging rate of £195 plus VAT per hour. This is not challenged by the Applicants

b) they say they have been involved in

(i) 3 long and 8 letters sent

(ii) 2 Long and 2 short letters received

(iii) 6 untimed telephone attendances

(iv) 5 ¼ hours of consideration, perusals, drafting, personal and telephone attendances

but they do not break this down to indicate in respect of what work that time was recorded.

c) based on the above they claim their total costs to completion came to £1755 plus £307.13 VAT plus £24 Copy Land Registry Entries.

d) whilst there are three titles and "facts and matters in common" they have to be considered individually

e) this case was more complicated than some in that there was a freehold, head leasehold, intermediate leasehold and underleasehold interest to consider

f) they accept that Section 60(1)(a) limits the costs recoverable from the tenants to any investigation reasonably undertaken of the tenant's right to a new lease. They say they were required to review all the documentation generated in this matter prior to them being instructed and notice of separate representation being given on 13th March 2008

g) they accept that the costs of preparation of the Section 40 notice is not recoverable as they have reduced their claim from a total of £2,086.13 to £1,857 or £619 per flat.

8. Determination as to the Third Respondent's legal costs

8.1 The Tribunal decided that the basis of determining the amount of the Third Respondent's legal costs recoverable from the Applicants was the same as set out in paragraph 6.1 above in relation to valuers' fees.

8.2 The Tribunal also decided that it was not reasonable for the Third Respondent to seek to recover from the Applicants any legal fees incurred by its solicitor in investigating whether or not the Applicants were entitled to a new lease. This had already been carried out by the First Respondent's solicitors and a counter notice served admitting the claim by which the Third Respondent was bound. Thus any work carried out in repeating such work was otiose.

8.3 By 13th March 2008 the only work that the Third Respondent's solicitors were required to do and which would be recoverable under Section 60, was to amend if necessary and approve the new lease and attend to execution.

8.4 The Third Respondent's solicitors were furnished with one specimen lease to approve. They did make some amendments to the travelling draft. They also made some

suggestions with regard to the date on which the peppercorn rent should commence and the inclusion of a statement which is in fact a statutory requirement which were bad points to make.

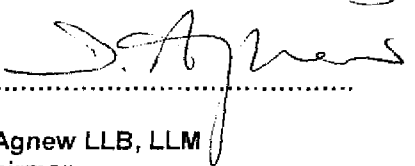
8.5 Although the amount agreed in respect of the Second Respondent's legal costs in the sum of £460 plus VAT was a matter for the Tribunal to take into account it is not determinative as to what is a reasonable sum for the Third Respondent's legal costs payable by the Applicants in this case.

8.6 In all the circumstances the Tribunal decided that the amount of Third Respondent's legal costs that the Applicants should each be required to pay is £150 plus VAT plus one-third of the disbursement of £24 making a figure of £158 for each of the three flats.

9. Summary and Conclusion

9.1 The amount that each of the three Applicants shall pay in respect of the landlord's valuer's fees shall be £705 inclusive of VAT and the amount that each of three applicants shall pay in respect of the Third Respondent's legal fees is £185.65 inclusive of VAT.

Dated this 14th day of July 2008


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D. Agnew LLB, LLM
Chairman