



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

Case reference : DD/LON/00AU/OC9/2013/0075

Property : Imperial Hall, 104-122 City Road,
London EC1V 2NR

Applicant : Columbia House Properties
Investment (No. 3) Limited (“the
landlord”)

Representative : Sterling Estates Management Ltd
 (“the managing agent”)

Respondent : Imperial Hall Freehold Limited
 (“the nominee purchaser”)

Representatives : Maxwell Winward LLP, Solicitors

Type of application : For a determination of the
statutory costs under section 33 of
the Leasehold Reform, Housing
and Urban Development Act 1993

Tribunal members : Angus Andrew
P M J Casey MRICS

Date of decision : 4 September 2015

DECISION

Decision

1. Pursuant to section 33(1) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") statutory costs of £3,000 plus VAT are payable by the nominee purchaser to the landlord in respect of the work undertaken by the managing agent.

The application and hearing

2. On 22 November 2013 the landlord applied for a determination of the nominee purchaser's liability to pay costs under section 33(1) of the Act in respect of the managing agent's costs of £10,305 plus VAT.
3. The application was first considered by a differently constituted tribunal at a hearing on 22 January 2014. By a decision dated 6 March 2014 the tribunal concluded that none of the managing agent's costs were payable by the nominee purchaser. The landlord appealed that decision and the appeal was considered by Her Honour Judge Alice Robinson who issued a decision on 3 February 2015. Judge Robinson allowed the appeal and remitted the case to this tribunal for rehearing. Directions were issued on 12 June 2015 and the case was listed for hearing on 25 August 2015.
4. By letter dated 20 August 2015 the managing agent informed the tribunal that the applicant would neither attend nor be represented at the hearing because it was "*unable to financially afford the further unnecessary cost of Counsel and our firm for representations on the day of the Hearing, 25 August 2015*".
5. We heard the case on 25 August 2015. As at the first hearing the tenants were represented by Ms K Helmore, a barrister. The landlord did not appear and was not represented.

Background

6. We were told by Ms Helmore that the tenants (or at least a majority of them) acquired the right to manage the property on 4 April 2011. By an initial notice dated 20 January 2012 the participating qualifying tenants claimed the right to acquire the freehold reversionary interest in the property. The initial notice proposed a total purchase price of £303,658. The landlord's counter-notice is dated 22 March 2012. The landlord admitted the tenants claim but proposed a total purchase price of £605,526. The counter-notice also made a number of lengthy proposals relating to lease backs and the inclusion in the transfer of various reservations and restrictive covenants.
7. It seems that the terms of acquisition were finally agreed between the parties. On 13 February 2013 they entered into a contract with a

completion date of 25 March 2013. At special condition 15 the contract provided for the payment by the nominee purchaser to the landlord of the landlord's "recoverable costs under section 33 of the 1993 Act". The landlord is entitled to those costs in any event.

8. Prior to the contractual completion date the landlord's solicitor submitted a completion statement. A copy of that statement was not included in the hearing bundle although it seems to have been included in the bundle that was considered by the tribunal at the hearing on 22 January 2014. However that bundle was not available to us and two members of the tribunal that heard the case in January 2014 have since have retired. It is however apparent from their decision that the landlord sought the following section 33 costs from the nominee purchaser:-
 - a. Its solicitors costs of £8,718 plus VAT: £10,461 in total
 - b. Its valuers costs as £6,500 plus VAT: £7,800 in total
 - c. The managing agent's costs of £5,000 plus VAT: £6,000 in total

A note in bold type next to the managing agent's costs stated "*not agreed. Buyer's solicitor to retain this sum pending resolution in accordance with Contract of Sale*".

9. It seems that the landlord's legal and valuation cost were agreed and were paid on completion, which we assume occurred on 25 March 2013.
10. However, it transpired that the managing agents costs of £5,000 plus VAT included in the completion statement was less than half the managing agent's actual costs said to be incurred pursuant to section 33. Unfortunately a copy of the managing agents invoice was not included in the hearing bundle. It is not clear when a copy of that invoice was first given to the nominee purchaser but Ms Helmore informed us that it was after contracts were exchanged.
11. The discrepancy between the managing agent's actual costs and those claimed through the completion statement is explained in a witness statement of Roger Hardwick of 16 January 2014. Mr Hardwick is the solicitor who dealt with the matter on behalf of the landlord and whose costs were agreed. In that statement Mr Hardwick explains that the figure of £5,000 plus VAT was included in the completion statement as an "*attempt at compromise*". He goes on to explain that there is a long history of litigation between the parties including that relating to the right to manage claim and that in consequence the landlord considered that the nominee purchaser would be "*much more likely to agree £6,000 than the actual value of their time, avoiding the need for yet further proceedings before the Tribunal*".

The statutory framework

12. The relevant sections of section 33 of the Act provide:-

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.

The claimed costs

13. Four people at the managing agent dealt with the matter. Mr Shalim Ahmed and Mr Antonio Ahmed are both directors and their time was costed at £180 per hour plus VAT. Mr Philip Sherreard and Ms Christine Lambertucci are both senior managers and their time was costed at £120 per hour plus VAT. Shalim Ahmed spent 22.25 hours, Antonio Ahmed 8 hours, Philip Sherreard 38.50 hours and Christine Lambertucci 5 hours. The nature of the work undertaken is set out in a timesheet at pages 183 to 186 of the bundle and this is largely replicated in a statement of costs at pages 140-143 of the bundle. Both Shalim Ahmed and Philip Sherreard provided witness statements in preparation for the hearing on 22 January 2014. Copies of those statements were included in the hearing bundle although as indicated above none of the landlords witnesses attended for cross examination.

Reasons for our decision

14. It is apparent from the narrative in the statement of costs that the managing agent undertook the work that would normally be undertaken by an “intelligent client”. Most practitioners would be surprised to find that a property developer with a large portfolio in London and elsewhere could recover the costs of such work under section 33. The Upper Tribunal decision opens the door to landlords subcontracting work, that has previously been absorbed as an in house cost, to managing agents and then recovering the cost from tenants under the Act at a commercial rate. It has the potential to significantly increase the costs recovered from tenants exercising the right to collective enfranchisement or to extend their leases.
15. Nevertheless as Judge Robinson points out an element of the work undertaken by the managing agent has reduced the time that would normally be spent by the solicitor and valuer in a claim such as this. The difficulty is in identifying that saving from the barebones of a timesheet. Our task is made more difficult by the landlord’s failure to appear.
16. As the landlord’s witnesses failed to attend for cross-examination we can give only a limited weight to their statements. There are aspects of the landlord’s case that we find troubling. The managing agent’s costs account for 68% of the total claimed costs. The costs claimed for doing the work of an intelligent client is completely disproportionate when compared with the solicitor’s costs that were charged at a significantly higher hourly rate. The time is recorded in 25 minute units rather than the 6 minute units used by solicitors. That could result in three relatively straightforward tasks being costed on the basis of more than hour’s time.
17. We are also concerned that much of the work undertaken by the managing agent appears to add very little value. To a large extent they acted simply as a conduit to pass or filter information between the client and the professional team. Much of the work does no more than replicate work properly undertaken by the professional team. For example the first entry in the timesheet is 4 hours spent in reviewing the claim notice and sending a copy to the client with recommendations and advice regarding its implications. However no self-respecting solicitor would rely on the recommendations and advice given by the client’s managing agent in a specialist field of law and from the solicitor’s costs schedule it is apparent that he claimed costs for providing essentially the same service.
18. At paragraph 6 of his witness statement Mr Sherreard frankly admits that this was the first enfranchisement claim that he had been involved with. With respect to Mr Sherreard it is apparent that the case was very much a learning curve and it is not reasonable to expect the nominee purchaser to pay the increased cost.
19. We have approached our task by identifying the work in the managing agent’s timesheet that relates to the matter set out in sub-sections 33(1)(a)

to (e) and then assessing the costs that might reasonably have been incurred in performing those tasks.

20. The proper basis of assessing those costs under the 1993 Act was set out in the Upper Tribunal decision of *Drax v Lawn Court Freehold Ltd* [2010] UKUT 81 (LC), LRA/58/2009. That decision established that costs must be reasonable and have been incurred in pursuance of the initial notice and in connection with the purposes listed in sub-sections 33(1)(a) to (e). The nominee purchaser is also protected by section 33 (2) which limits recoverable costs to those that the landlord would be prepared to pay if it were using its own money rather than being paid by the nominee purchaser.
21. In effect, this introduces what was described in *Drax* as a “(limited) test of proportionality of a kind associated with the assessment of costs on the standard basis”. It is also the case, as confirmed by *Drax*, that the landlord should only receive its costs where it has explained and substantiated them.
22. It does not follow that this is an assessment of costs on the standard basis (let alone on the indemnity basis). This is not what section 33 says, nor is *Drax* an authority for that proposition. Section 33 is self-contained.
23. In her decision Judge Robinson helpfully identifies two tasks performed by the managing agent that fall within section 33(1). The first is the provision of schedules of ground rent and service charges and providing plans although it has to be said that as a right to manage company had taken over responsibility for the management of the property it is not entirely clear why service charge schedules were required from the managing agent. The second is their involvement in determining the number of car parking spaces for which the Land Registry searches proved unreliable although again an email from the nominee purchaser’s solicitor to the landlord’s solicitor in the hearing bundle rather indicates that it was the nominee purchaser who resolved this issue.
24. We are nevertheless mindful of the guidance given by the Upper Tribunal and doing the best that we can in the absence of the landlord or its witnesses we have identified further tasks undertaken by the managing agents that fall within section 33(1). They obtained estimates from a number of solicitors and valuers and having selected the professional team they then gave instructions on behalf of the landlord although it is again surprising that a property developer with a large portfolio in London and elsewhere did not have a professional team in place. They attended the valuer on a site inspection although we would only allow the attendance of one member of staff rather than the two claimed. Finally it is apparent that they acted as a filter between the landlord and the professional team with the result that the professional team were not burdened with unnecessary and perhaps even irrelevant communications from the

landlord, thereby reducing the costs of the professional team and adding value.

25. It is extremely difficult to assess from the timesheet the correct amount of time that should be allowed for these tasks. Ms Helmore suggested 4 to 5 hours. That in our view is an underestimate. Standing back and having regard to each and all of the factors identified above we are satisfied that it is reasonable to allow 20 hours for the tasks undertaken by the managing agent that fell within section 33(1). To that time we apply a blended rate of £150 per hour. Consequently we allow costs of £3,000 plus VAT: £3,600 in total.

Name: Angus Andrew

Date 4 September 2015