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

Case Reference : **MAN/00BY/OC9/2015/0003**

Property : **27 Hawarden Avenue
Liverpool
L17 2AJ**

Applicant : **Peter David Rooney**

Representative : **Orme Associates**

Respondent : **Elmdon Real Estate LLP**

Representative : **Michael Simkins LLP**

Type of Application : **Leasehold Reform, Housing and Urban
Development Act 1993, section 91(2)(d)**

Tribunal Members : **Judge J Holbrook
Judge L Bennett**

**Date and venue of
Hearing** : **Determined without a hearing**

Date of Decision : **18 August 2016**

DECISION

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DECISION

- A. For the purposes of section 33(1) of the Leasehold Reform, Housing and Urban Development Act 1993, the amount of costs payable to the Respondent (in consequence of a notice having been served in respect of the Property under section 13 of the Act on 21 April 2015) is £2,010.40 plus VAT.
- B. The application for a wasted costs order is refused.

REASONS

Background

1. On 21 April 2015, Peter David Rooney (“the Applicant”) served a tenants’ initial notice in relation to the collective enfranchisement of premises known as 27 Hawarden Avenue, Liverpool L17 AJ (“the Property”). The notice was served on the freehold owner of the Property, Elmdon Real Estate LLP (“the Respondent”) under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 (“the Act”). The Applicant is the leasehold owner of the two flats comprising the Property and the notice identified him as the nominee purchaser for the purposes of the Act.
2. By counter-notice dated 19 June 2015, the Respondent admitted that the Applicant was entitled to exercise the right to collective enfranchisement in relation to the Property. However, the Respondent did not accept the proposed purchase price and the counter-notice set out an alternative proposal in this regard.
3. On 27 August 2015, the Tribunal received an application under section 24(1) of the Act for a determination of the amount payable under the Act as the purchase price for the Property (“the purchase price application”). However, on 30 September 2015, Orme Associates, the Applicant’s representative, asked to withdraw this application. The Tribunal gave consent to the withdrawal of the purchase price application on 7 October 2015 and subsequent requests to reinstate the application were refused by the Tribunal as they were made out of time.
4. In the meantime, on 25 November 2015, the Tribunal received a separate application made on behalf of the Applicant under section 91(2)(d) of the Act for a determination of the amount of the costs payable under section 33 (“the reasonable costs application”). In fact, the reasonable costs application was erroneously made under section 21 of the Leasehold Reform Act 1967 but the Tribunal subsequently permitted the application to be amended in order for it to be considered under the appropriate statutory provisions.

5. The Tribunal gave directions for the conduct of the reasonable costs application on 10 December 2015. It informed the parties that it considered this matter suitable for a determination without an oral hearing unless either party notified the Tribunal that it wished a hearing to be listed. As no such notification was received, the Tribunal proceeded to determine the matter on the basis of the evidence provided in the application and in written submissions provided by the parties in response to directions. The Tribunal did not inspect the Property.
6. During the course of the proceedings the Respondent made an application under rule 13 of the Tribunal's procedural rules for a wasted costs order against Orme Associates ("the wasted costs application").

Law

7. Section 33(1) of the Act provides that:

Where a notice is given under section 13, then (subject to the provisions of this section ...) the nominee purchaser shall be liable, to the extent that they have been incurred in pursuance of the notice by the reversioner or 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.*

8. Section 33(2) provides the following additional safeguard for nominee purchasers:

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.

9. It is made clear by section 33(5) that a nominee purchaser is not liable under the section for any costs which a party to any proceedings before the Tribunal incurs in connection with those proceedings.
10. The purpose and effect of the Act's provisions on the reimbursement of costs was considered by the Upper Tribunal (Lands Chamber) in the case of *Metropolitan Property Realizations Limited v Moss* [2013] UKUT 0415 (LC). That case actually concerned the operation of section 60 of the Act (which deals with payment of the reversioner's costs on the grant of a new lease under the Act). However, the provisions of sections 33 and 60 are materially similar and there can be little doubt that the same principles apply in respect of both sections. At paragraphs 9 – 11 of his judgment in that case, Judge Martin Rodger QC described the statutory provisions in the following terms:

“These provisions are straightforward and their purpose is readily understandable. Part I of the 1993 Act is expropriatory, in that it confers valuable rights on tenants of leasehold flats to compel their landlords to grant new interests in those premises whether they are willing to do so or not. It is a matter of basic fairness, necessary to avoid the statute from becoming penal, that the tenant exercising those statutory rights should reimburse the costs necessarily incurred by any person in receipt of such a claim in satisfying themselves that the claim is properly made, in obtaining advice on the sum payable by the tenant in consideration for the new interest and in completing the formal steps necessary to create it.

On the other hand, the statute is not intended to provide an opportunity for the professional advisers of landlords to charge excessive fees, nor are tenants expected to pay landlords' costs of resolving disputes over the terms of acquisition of new leases. Thus the sums payable by a tenant under section 60 are restricted to those incurred by the landlord within the three categories identified in section 60(1) and are further restricted by the requirement that only reasonable costs are payable. Section 60(2) provides a ceiling by reference to the reasonable expectations of a person paying the costs from their own pocket; the costs of work which would not have been incurred, or which would have been carried out more cheaply, if the landlord was personally liable to meet them are not reasonable costs which the tenant is required to pay.

Section 60 therefore provides protection for both landlords and tenants: for landlords against being out of pocket when compelled to grant new interests under the Act, and for tenants against being required to pay more than is reasonable.”

The reasonable costs application

11. The Respondent asserts that its reasonable costs comprise its solicitors' costs of £1,416 plus a valuation fee of £750 (exclusive of VAT in each case). A summary breakdown of the solicitors' costs was provided from which it can be seen that a total of 7.1 hours' work is said to have been carried out. Of this, 2.7 hours' work was carried out by a fee earner charging £280 per hour. The rest of the work was carried out by fee earners charging £150 per hour. The firm of solicitors concerned is based in central London.
12. On behalf of the Applicant, Orme Associates object to the proposed solicitors' costs on the following grounds:
 - that they exceed the figure of £1,260.40 (including minor disbursements) detailed in a summary of costs dated 9 November 2015 which the Respondent's solicitors had provided to the Applicant for the purposes of a completion statement;
 - that they include costs which are irrecoverable under section 33 of the Act; and
 - that they are unreasonable in amount when compared with legal costs which have been determined on other applications to the First-tier Tribunal.
13. In addition, however, Orme Associates argue that, by reason of the Respondent's failure to comply with the Tribunal's case management directions in a timely fashion, either no costs should be permitted under section 33, or else those costs should be further limited in some way.
14. In effect, the Applicant proposes that the Tribunal should disregard the Respondent's statement of case. We do not consider that it is necessary to penalise the Respondent for its late compliance in order to deal with the present application fairly and justly. However, although we consider it appropriate to take all of the evidence into account in order to make a fair and proper determination of the costs payable under section 33, we note that, when it finally was received, the Respondent's explanation of the costs sought was brief to the point of being perfunctory: it merely stated that the summary provided to the Applicant on 9 November was "by no means a final determination of the Respondent's costs and, accordingly, we have set out further details of our client's costs in the schedule enclosed". That schedule provided very brief details of the nature and extent of the work described at paragraph 11 above. No attempt was made to explain why the amount of time being claimed had increased from 6.5 hours in November 2015 to 7.1 hours now. As such, we consider it appropriate to disregard the claim for the excess time and to proceed on the basis of the earlier costs

summary – which had been accompanied by a fuller and more helpful description of the work undertaken anyway.

15. It is clear from the costs summary that the work undertaken by the Respondent's solicitors includes, among other things, drafting and serving a counter-notice; general consideration of the file and correspondence with the Applicant and with the Respondent. Orme Associates argue that the costs of such work are not within the scope of section 33 of the Act. However, we do not agree that the provision is insufficiently broad to permit recovery of such costs. The work involved in preparing and serving a counter-notice and in corresponding about the proposed transaction must be incidental to the matters described in subsection (1), and payment of reasonable costs so incurred is necessary to avoid the Act having the "penal" effect described by Judge Rodger in *Metropolitan Property v Moss*.
16. Nor do we agree that it is appropriate to determine the costs payable in this case by reference to other first instance Tribunal decisions the facts of which are unrelated to this application. No evidence has been produced which persuades us that it was unreasonable for the Respondent's solicitors to spend 6.5 hours working on the file (only 2.1 hours of which was billed at the higher of the charging rates mentioned in paragraph 11 above) and, whilst the Respondent opted to appoint relatively expensive London solicitors to act in this matter, it is entitled to recover the proper costs of doing so provided that the proviso in section 33(2) of the Act is not breached – and we have been shown nothing to suggest that the Respondent would have appointed less expensive solicitors if it had expected to bear its own costs. It also appears that the work was shared appropriately between fee earners of differing seniority.
17. As far as valuation costs are concerned, Orme Associates note that the Respondent's valuer did not make a site inspection. They argue that a fee of £600 plus VAT would be more in line with reasonable expectations. However, it is not clear what this assertion is based on and, whilst we consider the valuation fee of £750 to be at the upper end of a range of reasonable charges, we do not consider it to be outside of that range.
18. Accordingly, we find that the reasonable costs payable under section 33 of the Act comprise solicitors' costs (including minor disbursements) of £1,260.40 plus valuation costs of £750, making the total payable £2,010.40 plus VAT.

The wasted costs application

19. The Respondent seeks an order for wasted costs against Orme Associates Property Advisers (the trading name of 27ST Limited) who have represented the Applicant throughout these proceedings. As noted at paragraph 3 above, following withdrawal of the purchase price application, Orme Associates applied (several months later) for that

application to be reinstated. The application for reinstatement was refused by the Tribunal. The Respondent now contends that, by seeking reinstatement of the purchase price application, Orme Associates acted unreasonably and that, as a result, additional legal costs have been incurred by the Respondent which could have been avoided. The Respondent also argues that Orme Associates have acted unreasonably by failing to engage in discussions to reach a settlement of the dispute concerning the amount of costs payable under section 33. The Respondent now seeks wasted costs of £1,878 plus VAT.

20. Rule 13(1)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 empowers the Tribunal to make an order in respect of costs under section 29(4) of the Tribunals, Courts and Enforcement Act 2007. The Tribunal may thus order a legal or other representative to meet all or part of any “wasted costs”. These include costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of the representative or any employee of the representative.
21. It does not follow just from the fact that an application in proceedings before the Tribunal turns out to be unsuccessful that it was unreasonable to make the application in the first place. In this case, we do not consider that Orme Associates acted improperly or unreasonably in seeking to reinstate the purchase price application. Whilst the passage of time between the withdrawal of the purchase price application and the reinstatement application was such that the application was unlikely to succeed, the Applicant (acting by his representative) was nevertheless entitled to make it. The Respondent has failed to demonstrate that Orme Associates acted unreasonably in this regard. It has also failed to demonstrate how the alleged unreasonable behaviour could have resulted in the Respondent incurring wasted costs of the amount claimed (or anything approaching it). Nor do we accept that the Respondent has shown that there was such a failure to engage in settlement discussions as to justify the making a wasted costs order. The Respondent has produced a copy of a single email (dated 12 May 2016) in which it offered to settle the section 33 costs issue. A failure to respond to that email is not, in our view, sufficient grounds for making a wasted costs order.
22. Accordingly, the wasted costs application is refused.