FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AC/OC9/2018/0339**
Property	**:**	**156a East End Road, London N2 0RY**
Applicant	**:**	**Fraser Thomas Kelsall**
Representative	**:**	**Winckworth Sherwood LLP**
Respondent	**:**	**Metropolitan Property Realizations Ltd**
Representative	**:**	**Wallace LLP**
Type of Application	**:**	**Costs on extension of lease**
Tribunal	**:**	**Judge Nicol** **Mr WR Shaw FRICS**
Date of Decision	**:**	**13th May 2019**

DECISION

The Tribunal has determined that the amount payable by the Applicant shall be the following:-

(1) For the Respondent's legal costs, £2,768.75 plus VAT of £553.75 and disbursements totalling £20.40.

(2) For the Respondent's valuer's fee, £925 plus VAT of £185.

Reasons for Decision

1. The Applicant has applied following his request for a new lease for a determination as to the costs recoverable by the Respondent in accordance with

section 60 of the Leasehold Reform, Housing and Urban Development Act 1993 which is set out in the Appendix to this decision.

2. On 22nd March 2019 the Tribunal issued directions for the costs application to be dealt with on the papers, without a hearing. The directions specified that there should be a single bundle containing material sufficient for a summary assessment. The Tribunal has instead received two bundles and a Scott Schedule analysing in detail each item of the Respondent's solicitors' costs breakdown. This is not appropriate and, if the costs of these items were in dispute, the Tribunal would be minded not to allow them.

3. The Respondent's solicitors' schedule of costs provides a breakdown of work carried out by them for a total of £2,768.75 (plus VAT of £553.75), disbursements of £20.40 (inc VAT) and a valuer's fee of £925 (plus VAT of £185). The Applicant's solicitors made a number of submissions in response and each is dealt with in turn below.

4. In relation to the latter two items, only the recoverability of the VAT is in dispute. In *Metropolitan Property Realizations Ltd v Moss* [2013] UKUT 415 (LC), Martin Rodger QC stated in his judgment:

> 32. The reasonable costs which a tenant is liable to pay under section 60 of the 1993 Act necessarily include an indemnity for any VAT payable on professional fees by the landlord which it is unable to reclaim as input tax. That principle was not disputed by the respondent.
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> 33. In his points of dispute the respondent referred to determinations by other leasehold valuation tribunals to the effect that where a landlord is registered for VAT, any VAT payable by the landlord on professional fees is not recoverable from the tenant under section 60 because the landlord to whom the services have been provided will be able to recoup the VAT as an input when accounting for its own VAT liability.
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> 36. As is well-known, VAT is charged on any supply of goods or services made in the United Kingdom where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him (VAT Act 1994 section 4(1)) ("the 1994 Act"). Anything which is not a supply of goods, but which is done for a consideration, is a supply of services for this purpose (section 5(2)(b)) ("the 1994 Act"). However the grant, assignment or surrender of a major interest in land (which means the fee simple or a tenancy for a term certain exceeding 21 years) is designated a supply of goods (1994 Act section 96(1) and schedule 4, paragraph 4).
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> 37. For VAT purposes supplies of goods or services are divided into three categories: exempt supplies, zero-rated supplies and standard-rated supplies. The grant of any interest in or right over land or of any licence to occupy land is an exempt supply unless it falls within a list of exceptions (see Group 1 of schedule 9 to the 1994 Act). The general rule is therefore that the grant of an interest in or right over land is an exempt supply. None of the exceptions to that general rule includes the grant of an interest in or right over a dwelling or a number of dwellings used

> solely for residential purposes. In particular, the right to waive the exemption from VAT on the grant of interests in land (commonly called the option to tax) does not apply in relation to a building or part of a building designed or adapted and intended for use as a dwelling or a number of dwellings (1994 Act schedule 10, paragraph 6). A supply relating to the grant of an interest in a residential building is accordingly an exempt supply.
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> 38. VAT on purchases which relate to exempt supplies is known as "exempt input tax". As explained in HMRC's VAT Notice 700, generally a business registered for VAT is not entitled to reclaim exempt input tax unless the amount of the exempt input tax is below a certain threshold. That threshold is determined annually. A business which can show that it has paid only a relatively small amount of input tax on its purchases which relate to exempt supplies is able to reclaim all of that input tax if two conditions are satisfied, namely that the average exempt input tax it has paid is not more than £625 per month and that the amount is not more than half of the businesses total input tax reclaimed.
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> 39. The position is, therefore, not as simple as was assumed by the LVT. Where professional fees have been incurred in connection with the grant of a lease of residential premises in a residential building it cannot be assumed that the landlord who incurred those fees will be able to recover the VAT as input tax. Where on a determination of the costs payable under section 60 of the 1993 Act the paying party puts the indemnity for VAT in issue, it will be for the receiving party to satisfy the tribunal that it cannot recover the VAT it has incurred on professional fees as input tax.
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> 40. The evidence before me is in the form of an email from Mr Stuart Nicholls, the Finance Director of the Freshwater Group of companies, dated 20 March 2013 (which was not before the LVT). Mr Nicholls explains that the appellant is a member of a group VAT registration within the Freshwater Group of companies. VAT is only charged on rents for, and recovered on expenditure in relation to, the group's commercial property on which the exemption from VAT has been waived. Arlington House is a residential property in relation to which the option to tax may not be exercised. Costs incurred by the appellant in relation to Arlington House must therefore be borne by the appellant gross of VAT and it is not in a position to recover VAT as input tax.

5. The Respondent has asserted that it equally cannot recover input VAT on expenditure relating to the subject property. On the basis of the Upper Tribunal's reasoning set out above, the Tribunal accepts that the Respondent may recover VAT for the purposes of this application.

6. The Respondent's solicitors charged their work at the following hourly rates:

- Samantha Bone, partner: £475, increasing to £495 in August 2018

- Sharmin Kashem: £385
- Fleur Neale: £385
- Jennifer Nyame, paralegal: £200

7. The Applicant asserted that it was unreasonable for the transaction to have been conducted by two Grade A fee earners with over 15 years' experience for such a straightforward lease extension claim compared to the SCCO Guideline Rate of £317 per hour for a Grade A fee earner.

8. The Respondent pointed to the reasoning of the Tribunal in previous cases. In *Daejan Investments Freehold Ltd v Parkside 78 Ltd* (2004) LON/ENF/1005/03 the Tribunal stated:

> 8. As a matter of principle, in the 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 their inevitable incidental expenditure incurred in obtaining the professional services of valuers and lawyers for a transaction and proceedings forced upon them. Parliament has indeed provided that this expenditure is recoverable, in effect, from tenant-purchasers subject only to the requirement of reasonableness …
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> 9. As to what is "reasonable" in this context, it is merely provided that "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 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. In *Daejan Properties Ltd v Twin* (2007) LON/00BK/OC9/2007/0026 the Tribunal quoted the above passage and stated:

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

10. In *Allen v Daejan Properties Ltd* (2010) LON/00AH/OLR/2009/0343, a similar submission was made that the work was of a routine nature and could have been carried out by someone working at a lower hourly rate. The Tribunal rejected this submission, stating:

> 11. … It is possible (and perhaps would have been desirable) that some of this work could have been discharged or carried out by an assistant solicitor, but the Tribunal notes that … the saving, had an assistant been engaged … would have been modest. For future reference it is perhaps to be desired that greater use of an assistant for routine work should be encouraged, but the Tribunal is unable to say for present purposes that, looking at the matter in the round, the failure to do so pushes the sum claimed beyond the threshold of that which is reasonable in cases of this kind.

11. In *Brickfield Properties Ltd v Hayek* (2018) LON/00AC/OC9/2017/ 0307 the Tribunal stated,

> 6. The FTT rejects the Respondent's argument that the Applicant should have used a "cheaper" suburban solicitor, or chosen a less experienced solicitor in its chosen firm that charges a lower hourly rate. The FTT accepts the Applicant's arguments that it is entitled to use the firm of its choice, in this case a longstanding choice of solicitor located in Central London. Of necessity, therefore, the FYI accepts that these solicitors charge Central London rates of which £450 per hour (plus VAT) is not regarded as "excessive". …

12. Although not binding, the Tribunal agrees with and adopts the reasoning of its predecessors.

13. It appears that the Applicant's request for an extension to his lease was relatively straightforward. The parties reached settlement on both price and the terms of the new lease and the Respondent's schedule of costs does not show substantial amounts of time being spent on the material elements of the procedure. However, the straightforward nature of any case is only revealed in hindsight. This is a complex area of the law, requiring knowledge and experience from a party's representative, and it cannot be objectionable that a senior solicitor participates, at least in the initial stages (see *Rubin v Faroncell Ltd* (2016) LON/00AM/OC9/2016/0072 at para 17).

14. The Respondent is entitled to choose their lawyer and has done so in this case based on a relationship which has existed since at least 1996. The guideline rates are exactly that, guidelines, not maxima. The Applicant objected to the increase in Ms Bones's rates but that was simply part of the uprating notified to the Respondent by their solicitors annually.

15. The Respondent's costs are considered on an indemnity basis, not on the standard basis used for most cases in the courts, limited only by what they would have paid themselves. In this regard, the Applicant pointed to an interim bill for £1,000 whereas the Respondent's schedule of costs claims that the costs

incurred to the same date had been £1,500. This is perhaps a surprising submission as most lawyers would know that interim bills are commonly not for the full amount but for a payment on account, to be adjusted when the final bill becomes known. The Respondent's solicitors were not suggesting that their interim bill represented all the costs incurred to that point and it does not imply a breach of the indemnity principle.

16. The Applicant has suggested that the use of more than one fee earner has resulted in duplication of work. Although that can be a risk when a case is passed from one caseworker to another, there is no evidence that duplication has occurred here. The Respondent has asserted that the individuals involved were carrying out different work for which they were specialised so that there was no duplication. The Tribunal has no basis on which to gainsay the Respondent's assertion.

17. The Applicant asserted that "the costs breakdown submitted by the Respondent is not in the correct format as prescribed by the Tribunal." There is no prescribed format. As was stated about the same solicitors in *Hayek v Brickfield Properties Ltd* (2016) LON/00AC/OC9/2016/ 0319,

> 27. I consider that there is no merit in the suggestion that the breakdown of costs supplied by Wallace LLP was inadequate. It complies with the tribunal's directions and provides sufficient information to allow assessment of those costs. Full time sheets are not required.

18. The Tribunal looked at the Respondent's solicitors' schedule of costs and could not identify any item which was unnecessary or took a disproportionate amount of time to carry out. In the circumstances, the Tribunal is satisfied that the entire amount claimed is payable.

Name: NK Nicol **Date:** 13th May 2019

Appendix

Leasehold Reform, Housing and Urban Development Act 1993

Section 60 Costs incurred in connection with new lease to be paid by tenant.

(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 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 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 purposes 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 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.

(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.

(4) A tenant shall not be liable for any costs under this section if the tenant's notice ceases to have effect by virtue of section 47(1) or 55(2).

(5) A tenant shall not be liable under this section for any costs which a party to any proceedings under this Chapter before a leasehold valuation tribunal incurs in connection with the proceedings.

(6) In this section "relevant person", in relation to a claim by a tenant under this Chapter, means the landlord for the purposes of this Chapter, any other landlord (as defined by section 40(4)) or any third party to the tenant's lease.