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**HM Courts
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Service**

LEASEHOLD VALUATION TRIBUNAL

Leasehold Reform Act 1967

Housing Act 1980

DECISION OF LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER S21 OF THE LEASEHOLD REFORM ACT 1967 (the Act)

Case Numbers: (1) BIR/00CR/OAF/2012/0025
(2) BIR/00CR/OAF/2012/0064c

Applicants: Leslie Alan Cash and Valerie Jane Cash

Respondents: David Edward Acton and Christine Acton

Property: 28 Abingdon Road, Netherton, Dudley, DY2 9RN

Dates of Applications: (1) 21st March 2012
(2) 10th September 2012

Representation: Applicants – Mr K Chew FRICS
Respondents – Mr D Acton

Tribunal: W J Martin (Chairman)
S Berg FRICS

DETERMINATION:

- (1) That the price payable to the Respondent by the Applicant under Section 9 (1) of the Leasehold Reform Act 1967 ('the Act') in respect of Application (1) is £ 3131.00 and in respect of Application (2) is £ 3191.00
- (2) That the section 9 (4) valuation costs are £375 plus VAT and the section 9 (4) legal costs are £620 plus £34 in respect of disbursements

REASONS FOR THE TRIBUNAL'S DECISION

BACKGROUND

- 1 On 19th January 2012 Leslie Alan Cash and Valerie Jane Cash ('the Applicants') acting by their Agent, Lawrence and Wightman, served a Notice of Tenant's Claim ('the First Claim Notice') under the Leasehold Reform Act 1967 ('the Act') of their desire to have the freehold of the house and premises situate at 28 Abingdon Road, Netherton, Dudley, DY2 9RN ('the Property') on David Edward Acton and Christine Acton ('the Respondents').
- 2 On 21st March 2012 the Applicants made an application ('the First Application') to the Tribunal for a determination of (a) the price to be paid for the freehold and (b) the Respondents costs under section 9 (4) of the Act.
- 3 The validity of the First Claim Notice was challenged by the Respondents. However, on 9th August 2012 the Tribunal determined, for the purpose of whether to proceed to determine the First Application that the First Claim Notice was valid
- 4 On 2nd July 2012 the Applicants served a further Notice of Tenant's Claim ('the Second Claim Notice') on the Respondents without prejudice to the validity of the First Claim Notice, and on 10th September 2012 applied to the Tribunal for a determination of the price to be paid, based on the date of the service of the Second Claim Notice.
- 5 By serving the Second Claim Notice without prejudice to the validity of the First Claim Notice, the Applicants are able to rely upon either Notice in the alternative. The Tribunal decided that both Applications should be heard simultaneously and issued Directions appropriate to the case.

INSPECTION

- 6 The Tribunal inspected the Property on 28th November 2012 in the presence of Mrs Cash. It comprises a two storey semi-detached house of traditional construction but in the modern style. The frontage is 7.90metres and the average depth of the plot is 30.63 metres giving an overall site area of 242 square metres. The Property is in very good condition benefiting from hardwood replacement double glazed windows throughout. There is a tarmacadam forecourt and a rear brick garage and also gardens to front and rear.
- 7 The accommodation comprises three bedrooms plus a bathroom on the first floor and a hall, living room, dining room and kitchen on the ground floor. The dining room has been extended to the rear.
- 8 The Tribunal found that the Property is modernised, is in good condition and that the site is fully developed.

AGREED MATTERS BETWEEN THE PARTIES

- 9 Both parties submitted valuations from their respective valuers. In the case of the Applicants, this was via Mr Chew of Lawrence and Wightman and on behalf of the Respondents Mr Herbert of Pennycuik Collins submitted a valuation. Both valuers agreed on the following:
- A. The unexpired term at the dates of Valuation

January 19 th 2012 Notice	53.18 yrs unexpired
July 2 nd 2012 Notice	52.73 yrs unexpired
 - B. Valuation Method

Term and reversion to a section 15 Modern Ground Rent for fifty years with a second reversion to a reduced Capital Value following the *Clarisse Properties* case.
 - C. The Capitalisation Yield

The appropriate yield for the capitalisation is agreed at 6.5%
 - D. The Deferment Yield

The appropriate yield for deferment is agreed at 5.5%
 - E. The site percentage to arrive at the section 15 rent

This is agreed at 33 1/3 percent

ISSUES NOT AGREED

- 10 The following matters were not agreed
- A. The Freehold Entirety Value
 - B. The section 9 valuation costs
 - C. The section 9 legal costs
 - D. Schedule 12 costs Commonhold and Leasehold Reform Act 2002

The Applicants request an order against the Respondents for the maximum costs of £500, as the Applicants allege that the Respondents have acted vexatiously and unreasonably in respect of the Notices in Reply.

THE HEARING ,THE SUBMISSIONS OF THE PARTIES AND THE TRIBUNAL'S DETERMINATIONS

- 11 A hearing was held at the Tribunal's offices on 28th November 2012. Mr Acton of Acton and Co appeared for the Respondents. Mr Chew represented the Applicants. The submissions of the parties on the contentious issues are set out below. Mr Acton is of course one of the Respondents.
- 12 The Freehold Entirety Value

Mr Acton made no submissions on the valuation issues, relying upon the written submissions of Mr Herbert. Mr Chew made oral submissions in addition to those contained in his written report.
- 13 Mr Chew considered that the freehold value is £123,000. In support of this figure he put forward three comparables as follows:

- **12 Abingdon Road** is the most recent sale in the road which was completed in October 2010. This is an almost identical property apart from the fact that the rear extension is full width and the garage is attached to the side elevation. The sale price was £122,000. Mr Chew did not think there had been any movement in prices since 2010.
- **21 Matlock Close** was sold in October 2011 at £128,000. It too is almost identical to the subject property, it has a triangular plot and a full width rear extension.
- **7 Matlock Close** was marketed at £139,950 but eventually sold in February 2012 at £128,000.

14 Mr Chew considered that Abingdon Road is slightly less attractive than Matlock Close because during the rush hours Abingdon Road is used as a cut through avoiding a busy road junction. Accordingly he considers that £123,000 is the freehold value at both of the valuation dates.

15 Mr Herbert put forward the two properties in Matlock Close as comparables and also provided sales particulars for two other properties sold 'subject to contract':

- A house in **Fladbury Close** which was sold at £140,000. This appears similar in all material respects to the Property and is situated in an adjacent road.
- Another similar house in **Tewkesbury Drive** which has sold subject to contract at £135,000.

Mr Herbert contends that there has been little change in values over the period of the comparable sales and considers that the freehold value at both valuation dates of the Property is £135,000.

The Tribunal's Determination of the Entirety Value

16 The Tribunal considered that evidence of sales 'subject to contract' should be used with caution and preferred to base its determination on the actual sales of almost identical properties which are nearest in time to the valuation dates. These are the two properties in Matlock Close. The Tribunal does not agree that there should be any deduction to allow for the alleged 'rat run'. The road was very quiet at the time of the inspection and any disadvantage caused by the extra traffic at rush hours is offset by more convenient access from the main roads. The Tribunal accordingly determines that the entirety value is £128,000.

17 The Tribunal's valuations, based on the above are contained in the Schedule to this Decision.

The Section 9 valuation costs

18 By virtue of section 9 (4) (e) of the Act the Respondents are entitled to the 'reasonable costs' of and incidental to 'any valuation of the house and premises'. Mr Herbert in his submissions claims a valuation fee of £450 plus VAT. Because two Notices were served he is claiming the costs of the two separate valuations. An internal and external inspection was undertaken by a 'referencer' employed by Pennycuik Collins. The referencer is not a Chartered Surveyor but is employed by Pennycuik Collins and has considerable experience in this sort of work. Mr Herbert has perused the lease details, amassed the comparables from a desktop study and prepared the valuations.

19 Mr Chew considers that a proper fee is £350 plus VAT. Had a Chartered Surveyor conducted the valuation, he would have agreed the higher figure. The use of a referencer and a computer programme to prepare the valuations greatly reduces the professional time a Chartered Surveyor is employed, and this should be reflected in the fee.

The Tribunal's Determination of the Valuation Fee

- 20 The Tribunal agrees with Mr Chew that the fee of £450 claimed is too high, given that there was no personal inspection by Mr Herbert. A fee of £350 plus VAT would be appropriate with only one Notice and something additional should be allowed for the additional work of the second valuation. However, the Tribunal concludes that this additional work is minimal and determines that the valuation fee under section 9 (4) (e) in respect of both Notices is £375 plus VAT

The Section 9 Legal costs

- 21 Mr Chew said that he had considerable experience of dealing with section 9 enfranchisements and that the range of fees agreed or determined by the LVT is typically in the region of £400 to £600 plus VAT. The three most recent were:

(i) A property on the Calthorpe Estate in respect of which Shakespeares acted for Calthorpe. The transfer was prepared by Shakespears as the Estate Regulations have to be incorporated. The fee agreed was £550 plus VAT

(ii) A case where the Freeholder was Freehold Properties Limited who use Maxwell Winwood of Ludgate Hill, in London. The fee agreed was £600 plus VAT

(iii) A case in which Mr Chew was, unusually, acting for the freeholder, where the fees were agreed at £375 plus VAT

- 22 Mr Chew said that the current case is, from a conveyancing point of view, straightforward. Mr Acton is a solicitor of many years standing who owns a considerable portfolio of freeholds and is therefore very familiar with the work. Mr Acton appears to work from home and therefore has less overheads. Mr Chew contends that a reasonable hourly rate would be £125 and that no more than three hours should have been spent, producing a figure of £375 plus VAT.

- 23 Mr Acton said the case is far from straightforward. He had done a quick 'head count' and found that on his file were 54 letters in (12 from Lawrence and Wightman), 44 letters out (12 to Lawrence and Wightman) and six hours of attendances. As a grade A solicitor he would expect to be paid at the rate of £208 per hour, this being the current hourly charge rate allowed by Birmingham County Court, plus £20.80 each for untimed letters in and out. He calculated the letters in and out amounted to £1,999 in total. The six hours at £208 amounts to £1,248, coming to a total in excess of £3,200. He suggested that £2,500 plus disbursements of £34 would be appropriate.

The Tribunal's determination of the section 9 (4) legal costs

- 24 It emerged during the Hearing that the costs claimed by Mr Acton included correspondence with the Tribunal, preparation for the Tribunal hearing and also costs involved on the preparation of the Notice in Reply. Section 9 (4A) of the Act provides:

"Subsection (4) above does not require a person to bear the costs of another person in connection with an application to a leasehold valuation tribunal"

Similarly, *Hague on Leasehold Enfranchisement* 5th Edition at paragraph 6 – 39 states that the costs of and incidental to “any investigation by the landlord of that person’s right to acquire the freehold” (section 9 (4) (a)) includes:

“the landlord’s costs of investigating the claimant’s title to the leasehold but not the landlord’s costs of preparing and serving the Notice in Reply, serving copies on other persons interested, and taking general advice as to his rights under the Act”.

- 25 It is true that *Hague* does not provide authority for the above statement. However, the Tribunal finds that in the absence of any contrary authority provided by the Respondent, that it is persuasive. Accordingly, the overall costs figure claimed by Mr Acton clearly includes a considerable amount of matters which are not recoverable and that therefore the ‘head count’ provided by Mr Acton must be treated with caution as a basis for assessing the costs to be allowed.
- 26 Mr Chew had agreed that 3 hours was a reasonable time for the Respondent’s solicitor to spend upon the matter and that the rate allowable should be £125 per hour. The Tribunal agrees with Mr Acton that there was, in this case, additional allowable time spent upon a perusal of the second claim Notice, but considers that no more than a further half hour should be allowed for this. Accordingly the Tribunal finds that a total of 3 ½ hours is allowable. It is not prepared to consider payment for any ‘untimed’ letters in or out, however.
- 27 The Tribunal considered the arguments put forward that, as Mr Acton works from home, there is a cost saving, analogous to that where the solicitor is ‘in house’ and that therefore the rate should be less than normal. The Tribunal rejects this approach. Mr Acton pointed out that he has to pay his indemnity premiums and purchase his practising certificate. Accordingly the Tribunal determines that the rate payable should not be reduced because of the interrelationship between the Respondent and their solicitor.
- 28 The Tribunal does not agree, however, that Grade A rates are applicable. The Tribunal accepts that Mr Acton is a grade A solicitor, but the work involved in a section 9 (1) enfranchisement case is relatively straightforward and should therefore be allowed at a Grade B fee earner’s rate. The Tribunal does not find that there are any especially complex issues in this particular case justifying a higher grade.
- 29 Further the hourly rate should be that applicable to the geographical location of Mr Acton’s office, i.e. Dorridge, rather than the higher rate which would be allowed for a central Birmingham solicitor. Taking these factors into consideration, the Tribunal determines that an appropriate Grade B solicitor rate in the present case is £177 per hour. The Tribunal adopts this rate, which produces a figure of £619.50, rounded to £620 plus VAT.
- 30 The Tribunal therefore determines that the Landlord’s section 9 (4) legal costs are £620 plus VAT and disbursements of £34.

The Applicants’ cost application

- 31 Mr Chew has asked the Tribunal to make a costs order against the Respondents on the basis that they have acted vexatiously and unreasonably, particularly with reference to the Second Notice. In his written submissions he referred to the responses to both Notices, but at the Hearing referred specifically to the Second Notice. In particular Mr Chew says the Notice in Reply in respect of the second Notice included claims that the Applicants did not use ‘magic words’ when these alleged words were simply a commentary in *Hague* as to the effect of serving a Second Notice of Claim without prejudice to the First Notice. Additionally the Notice in Reply was served outside of the two-month period allowed by the Act. Mr Chew

says that Mr Acton's behaviour has caused unnecessary worry and stress to the Applicants, who have now, reluctantly, decided to apply to the County Court for a determination of the validity of the Claim Notices.

32 Mr Chew also complained at the Hearing of personal comments made by Mr Acton in his written submissions to the Tribunal. The submissions included the words 'unprofessional and impertinent' and 'rude and impertinent', which Mr Chew finds unacceptable from one professional commenting upon another professional's submissions.

33 Mr Acton said that there was nothing unreasonable about challenging one or both notices, and that this should not be the subject of a punitive costs award. In any case, why should the lay client, i.e. Mrs Acton be bound by anything said by Mr Acton as solicitor for both Respondents?

34 Mr Chew then said that the Tribunal might want to defer its decision on this point until the outcome of the County Court proceedings was known. Mr Acton did not agree with this. He said the costs application has been made and should be determined by the Tribunal without delay.

The Tribunal's determination of the costs Application

35 The Tribunal's powers to award costs are contained in Schedule 12 to the Commonhold and Leasehold Reform Act 2002, paragraph 10:

"(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where:

(a)

(b) he has in, the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a leasehold valuation tribunal shall not exceed:-

(a) £500..."

36 The Tribunal agrees with Mr Acton that it would be inappropriate to defer its decision on the costs application until the outcome of the County Court proceedings are known. The Tribunal also understands, and has sympathy with, the worries and stress that the Applicants are put to because of the legal challenges to their enfranchisement claim which have been made by the Respondents. However, the Tribunal does not find that these challenges amount to vexatious or unreasonable behaviour within the terms of paragraph 10. The Tribunal does not have the jurisdiction to determine conclusively whether either of the Notices of Claim are valid, and therefore ought not have the jurisdiction to award costs in connection with an allegedly vexatious or unreasonable challenge to their validity. These are matters reserved for the County Court.

37 Mr Chew complained about the language used by Mr Acton in his submissions, but did not claim that such language was abusive, within the terms of paragraph 10. For completeness, the Tribunal records that, whilst such language is regrettable, it does not amount to acting 'frivolously, vexatiously, abusively, disruptively or otherwise unreasonably', and the Tribunal would not have awarded any Schedule 12 costs in connection with the specific words used by Mr Acton in this case.

38 The Tribunal therefore refuses the costs application made by the Applicants.

Conclusion

39 In making its determinations the Tribunal considered the submissions of the parties, its inspection and the relevant law. It also used its general knowledge and experience as an expert tribunal but not any secret or special knowledge.

Signed:

W.J. Martin – Chairman

17th December 2012

The Schedule – The Tribunal’s determinations as to the Price

VALUATION DATE 19th JANUARY 2012

VALUATION NO 1

Term:

Ground Rent		£28.00 per annum
YP 53.17 years @ 6.5%	<u>14.8438</u>	£ 415.63

First Reversion

Entirety Value	£128,000.00	
Site @ 33 1/3%	£ 42,667.00	
Modern Ground Rent @ 5.5%	£ 2,346.69	
YP 50 years @ 5.5%	16.9315	
	£ 39,732.98	
PV of £ in 53.17 years @ 5.5%	0.05805	£ 2,306.50

Second Reversion

Reversion to 80% Capital Value £102,400		
PV of £ in 103.17 years @ 5.5%	0.00399	<u>£ 408.58</u>

£3,130.71

Say £3,131.00

