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FIRST - TIER TRIBUNAL

PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00HN/OC9/2013/0006**
Property	:	**38 Milton Road, Bournemouth, Dorset, BH8 8LP**
Applicant	:	**Long Term Reversions Ltd**
Representative	:	**Tolhurst Fisher LLP**
Respondent	:	**Milton Court RTM Ltd**
Representative	:	**Harold G Walker Solicitors**
Type of Application	:	**Section 91 Leasehold Reform, Housing & Urban Development Act 1993**
Tribunal Members	:	**Judge N Jutton**
Date	:	**16 July 2013**
Date of Decision	:	**16 July 2013**

DECISION

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1 This is an application by the Applicant Lessor, Long Term Reversions Ltd, for the determination of costs payable by the Respondent, Milton Court RTM Ltd, pursuant to section 91 of the Leasehold Reform, Housing & Urban Development Act 1993 (the Act).

2 **Background**

3 On 13 March 2013, directions were made by the Tribunal and notice was given by the Tribunal to the parties that the Tribunal intended to determine the application on the basis only of written representations without an oral hearing. Neither party has objected, or requested that the matter be dealt with by way of a formal hearing.

4 The Applicant has filed and served the following documents:

a. A bundle of documents containing a Statement of case providing details of the legal costs sought by the Applicant together with supporting documents.

b. A form of Statement of case providing a breakdown of valuation fees incurred with a company called Morgan Sloane Ltd t/a Morgan Sloane Property Valuations.

c. A letter to the Tribunal dated 3 July 2013 stating that the terms of acquisition agreed between the parties were agreed on 7 February 2012.

5 The Respondent notwithstanding the directions made by the Tribunal has not filed a Statement of case/Points of dispute. The Respondent's Solicitors Harold G Walker have sent a letter to the Tribunal dated 27 June 2013 stating that they are not instructed to make representations on behalf of the Respondent and that they are content that the matter be dealt with by the Tribunal. Harold G Walker have sent a further email to the Tribunal dated 4 July 2013 stating that the terms of acquisition would appear to have been agreed on or about 7 February 2012.

6 On 19 May 2011 the Respondent served on the Applicant a Notice pursuant to section 13 of the Act seeking to exercise a right to collective enfranchisement of the Property.

7 On 21 July 2011 the Applicant served a Counter Notice pursuant to section 21 of the Act admitting the right to collective enfranchisement but disputing the terms proposed.

8 On 7 February 2012, the terms of acquisition between the parties were agreed.

9 The parties failed however to enter into a binding contract incorporating the terms agreed.

10 Section 29(2)(b) of the Act provides that in a case where the terms of acquisition are agreed between the parties (or have been determined by a Tribunal), but no application for an order is made pursuant to section 24(4) within the period specified in section 24(5), then the Initial Notice served pursuant to section 13 of the Act is deemed to have been withdrawn. It is deemed to be withdrawn at the end of the period specified in section 24(5).

11 Section 24(5) provides that an application to the Court under sub section 4 of that section must be made no later than the end of a period of 2 months beginning immediately after the end of the appropriate period specified in sub section 6 of that section.

12 Section 24(6) provides that the appropriate period is a period of 2 months beginning with the date when the terms of acquisition were agreed (section 24(6)(a)).

13 Accordingly the total period of time within which the parties must either enter into a binding contract or make an application to the Court pursuant to section 24(4) is 4 months; 4 months from the date that the terms of acquisition are agreed. In default, the Initial Notice served pursuant to section 13 is deemed to be withdrawn. That is the case here.

14 Section 33(3) of the Act provides:

"Where by virtue of any provision of this Chapter the initial notice ceases to have effect at any time, then (subject to sub section (4)) the nominee purchaser's liability under this section for costs incurred by any person shall be a liability for costs incurred by him down to that time".

15 Section 33(1) of the Act provides as follows:

"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 section 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".

16 Section 33(2) addresses what is meant by *"reasonable"* for the purposes of section 33(1). It provides:

"For the purposes of sub section (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".

17 By reason of the failure, having agreed the terms of acquisition, to enter into a binding contract or to make an application to the Court pursuant to section 24(4), in this case the Initial Notice served by the Respondent is deemed to have been withdrawn on 7 June 2012 and the Respondent is liable for the Applicant's costs pursuant to section 33 down to that time.

18 **The Applicant's Case**

19 In the application form submitted to the Tribunal by the Applicant dated 1 March 2013, the Applicant refers to legal costs including disbursements of £1720.78 and valuation fees of £3900.

20 However, in its Schedule of costs/Statement of case filed pursuant to the directions made by the Tribunal, the Applicant seeks to recover legal costs including VAT and disbursements of £1650.38. Further, in the Schedule of costs/Statement of case filed in respect of Valuer's fees, the Applicant seeks to recover valuation costs of £2520.

21 The Solicitors having the conduct of the matter on behalf of the Applicant were Robert Plant a partner in Tolhurst Fisher LLP Solicitors and Louise Cornell who was at the relevant time an Assistance Solicitor in the same firm. Mr Plant's charge out rate is £200 per hour and Miss Cornell's £180 per hour.

22 Reference is made in the Schedule of costs/Statement of case prepared by the Applicant's Solicitors and by or on behalf of the Applicant's Valuer to other decisions made by this Tribunal, (the Tribunal is not bound by those decisions although it may have regard to them).

23 The Applicant makes reference to section 33(2) of the Act, that costs for the purposes of section 33 may only be regarded as reasonable to the extent that they might reasonably have been expected to have been incurred if the Applicant were to be personally liable for such costs.

24 The Applicant says at paragraph 2.6 of its Schedule of costs/Statement of case that pursuant to the Solicitors' Code of Conduct 2007 a letter was sent by the Applicant's Solicitors to the Applicant setting out the hourly rates to be charged by the Applicant's Solicitors which the Applicant says therefore satisfies the test in section 33(2).

25 In a letter from the Applicant's Solicitors to the Tribunal dated 3 July 2013, in response to a request from the Tribunal to produce any client care letter/terms of retainer, the Applicant's Solicitors said *"There are no client care letters as this firm acted on behalf of the Applicant on an established long term relationship, acting on hundreds of cases of this nature in each year"*.

26 The Applicant's Solicitors confirm at paragraph 2.7 of their Schedule of costs/Statement of case that the costs claimed by the Applicant do not exceed the amount which the *"Respondent reversioner"* (no doubt a reference to the Applicant) is liable to pay.

27 The Applicant contends that the costs payable by the Respondent are costs on an indemnity basis in accordance with part 48.8 of the Civil Procedure Rules 1998. That pursuant thereto, costs are presumed to be reasonably incurred and reasonable in amount if incurred with the approval of the client. That approval, the Applicant says, has been obtained.

28 Further the Applicant says that the costs that it is entitled to recover are those which the Applicant is contractually liable to pay pursuant to the terms of the retainer with its Solicitors and Valuer to the extent that those costs cannot be recovered from the Respondent. The Applicant says such costs must be assessed on an indemnity basis by reference to the Decision of the Court of Appeal in **Gomba Holdings Ltd v Minories Finance Ltd & Others** (No.2) (1992) 4 All ER. That in circumstances where there is a contractual right to recover costs, all actual costs incurred are recoverable so far as they are reasonable and have been reasonably incurred. That the burden of proof to establish that costs are not reasonable rests with the Respondent and by reference to Part 44.4(3) of the Civil Procedure Rules where costs are assessed on an indemnity basis, any doubt as to whether or not costs are reasonable or reasonably incurred should be resolved in favour of the receiving party, the Applicant.

29 The Respondent, the Applicant says, has failed to provide any evidence to dispute or challenge the Applicant's costs and that accordingly the Applicant says the Tribunal should allow the Applicant's costs in full.

30 The Applicant sets out details of work carried out by its Solicitors in section 4 of the Schedule of costs/Statement of case submitted by its Solicitors. There is then a breakdown of those legal costs in section 5 of that document. Similarly, the Schedule of costs/Statement of case submitted on behalf of the Applicant's Valuers Morgan Sloane includes a breakdown of the valuation fees claimed. There is with that Statement a form of invoice from Morgan Sloane addressed to the Applicant dated 4 June 2013 for £2520

inclusive of VAT. The Schedule of costs/Statement of case produced by or on behalf of Morgan Sloane contains arguments which mirror those set out in the Schedule of costs/Statement of case produced by the Applicant's Solicitors in respect of legal costs (albeit wrongly throughout making reference to section 60 of the Act). The hourly rate charged by the Applicant's Valuer Mr Holford is £200 plus VAT. Mr Holford is described as a Valuer of *"14 years post MRICS qualified experience and 9 years property valuation experience"*. The Schedule of costs/Statement of case submitted on behalf of Morgan Sloane confirms that the valuation fees claimed do not exceed the amount which the Applicant is liable to pay.

31 **The Respondent's Case**

32 The Respondent has not submitted its Statement of case or Points or dispute. The Respondent says it is content simply to rely upon the decision of the Tribunal.

33 **The Tribunal's Decision**

34 **Legal Costs**

35 Details of costs claimed have been provided to the Tribunal pursuant to directions made by the Tribunal. They are set out in the Schedule of costs/Statements of case submitted by the Applicant in respect of both legal costs and Valuer's fees. Those total including VAT and disbursements £1650.38 and £2520 respectively. It is those fees which the Tribunal understands and accepts form the basis of this application. Those are the fees which the Applicant seeks to recover.

36 In the Tribunal's view, the hourly rates charged by the Applicant's Solicitors, £200 per hour for work carried out by Mr Plant and £180 per hour for work carried out by Ms Cornell, are reasonable. A landlord is entitled to instruct Solicitors of his choice and is not required to shop around for the cheapest Solicitors or even those practising nearest to the property in question. The Tribunal's approach is to take a 'broad brush'.

37 The costs which the Applicant is entitled to recover are limited to those which are set out in section 33(1) of the Act. The wording of that sub section is very specific.

38 The test as to reasonableness to be applied by the Tribunal in relation to such costs is the test set out in section 33(2). That costs shall only be regarded as reasonable if and to the extent that they might reasonably be expected to have been incurred if in the circumstances the receiving party was personally liable for such costs.

39 The Tribunal is not assisted by the Applicant's reference to part 48.8 of the Civil Procedure Rules. Rule 48.8 applies to the assessment of a Solicitor's bill to his client. Such costs are to be assessed on an indemnity basis. The Tribunal does not accept the Applicant's argument that because of the application of the test of reasonableness set out in section 33(2) of the Act

that costs should be assessed in effect on a Solicitor and own client basis by reference to CPR Part 48.8. In considering the issue of whether the costs claimed are reasonable, the test to be applied by the Tribunal is that set out in section 33(2) of the Act, no more and no less. It is not necessary for the Tribunal to look any further.

40 Further, the Applicant argues that by reference to **Gomba Holdings Ltd v Minories Finance Ltd** that where a contractual right arises to recover costs, such costs are recoverable on an indemnity basis.

41 Gomba was concerned with contractual rights arising between a mortgagee and a mortgagor. The right of a mortgagee to recover costs pursuant to the terms of a contract between the mortgagee and mortgagor. The Court in Gomba held that on a true construction of the contractual documents entered into between the parties, the mortgagee was entitled to recover costs from the mortgagor on an indemnity basis. That such an entitlement to costs corresponded to the indemnity basis of assessment.

42 The relationship between the Applicant and the Respondent is not a contractual relationship. The Applicant's entitlement to recover costs from the Respondent arises not out of contract but out of statute. It is a statutory right to recover costs being those costs set out in section 33 of the Act. Accordingly the Tribunal is not assisted by the decision in Gomba.

43 The Tribunal has considered the breakdown of costs set out in the Applicant's Solicitor's Schedule of costs/Statement of case.

1. Work carried out prior to the terms of acquisition being agreed. That is prior to 7 February 2012. The Applicant claims a total of £294 in respect of correspondence and £690 for works of preparation, reviewing papers and drafting, including the drafting of the Counter Notice, Contract and Transfer document TR1.

2. The letters listed by the Applicant do no more than provide details of time spent, the date the letter was written, and the addressees. There is no evidence before the Tribunal to suggest that the letters were written otherwise than in respect of work carried out for the purposes of the matters set out in section 33(1)(a),(b),(c) and (e) of the Act. The Tribunal is not assisted by the failure of the Respondent to file any Points of dispute.

3. Two letters appear to have been written to the Applicant on 1 November 2011. Presumably the contents of those letters could have been included within 1 letter. The Tribunal disallows 1 letter in the sum of £18.

4. As to work carried out in reviewing Office Copy Entries, investigating the qualification of the tenants and considering the validity of the section 13 Notice, the Tribunal's view taking a broad brush approach is that the time claimed of 1 hour 30 minutes is excessive, the Tribunal allows 1 hour, a reduction of £90.

5. Costs incurred post agreement of the terms of acquisition post 7 February 2012.

6. The Applicant claims a total in respect of correspondence and telephone calls of £340 and in drafting Replies to Requisitions £20.

7. The Tribunal is not helped by the lack of any further detail as to the subject matters of the letters and phone calls claimed and by the failure of the Respondent to file Points of dispute.

8. The Applicant is entitled to recover its costs up to the date of the deemed withdraw of the initial Notice (section 33(3)) of the Act. That date is 7 June 2012. The costs claimed by the Applicant for work carried out after that date total £120, these are disallowed. The Tribunal allows the remainder of the Applicant's legal costs.

44 **Valuer's Costs**

45 The Tribunal considers the hourly rate charged by Mr Holford of Morgan Sloane of £200 per hour plus VAT to be reasonable. It was reasonable for the Applicant to instruct a Valuer of Mr Holford's expertise and experience.

46 The Tribunal has considered the breakdown of Valuer's fees set out in section 5 of the Valuer's Schedule of costs/Statement of case.

47 As with legal costs, the Tribunal is not assisted by the failure of the Respondent to file Points of dispute. There is no evidence adduced by the Respondent that the charges are unreasonable.

48 Mr Holford appears to have spent 3 hours travelling each way to and from the Property. That is a total of 6 hours travelling which he has charged at half his hourly rate, £300 each way. There is no explanation as to why the Applicant felt it necessary and reasonable to instruct a Valuer who was based some 3 hours from the Property. At the end of his Statement of case/Schedule of costs, Mr Holford gives two addresses. The first is described as *"address at point of inspection"* and is 9 Wimpole Street, London. The second which is described as *"current address"* is at Southfields Business Park, Laindon, Essex. The Property is in Bournemouth, Dorset. The Applicant's registered address is in Southend-on-Sea, Essex. The Applicant's Solicitors are also in Southend-on-Sea, Essex. Presumably it was convenient for the Applicant to instruct a local firm.

49 Whilst it is noted that the journey time claimed as far as it can be understood from the Statement of case/Schedule of costs produced by Mr Holford may be travelling time between London and Bournemouth, that time in view of the Tribunal is excessive. It is not unreasonable to have expected the Applicant to instruct a Valuer closer to the Property.

50 In the circumstances, The Tribunal considers that the travelling time totalling 6 hours, albeit at half rate, is excessive and allows half of this, a deduction of £300. The Tribunal allows the remainder of the Valuers fees.

51 **Summary of Tribunal's Decision**

52 **Legal Costs**

53 The Applicant seeks to recover legal costs of £1344 plus VAT and disbursements. The Tribunal reduces the legal costs by a total of £228 and thus determines that the amount of legal costs payable by the Respondent are:

Legal costs	1116.00
VAT	223.20
Disbursements	37.58
Total	**£1376.78**

54 **Valuer's Fees**

55 The Valuer's fees claimed are £2100 plus VAT. The Tribunal reduces these by £300.

56 The Tribunal determines that the amount of Valuer's fees payable by the Respondent are: 1800.00
VAT 360.00

Total **£2160.00**

Dated the 16th day of July 2013

Judge N. Jutton

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.