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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/00AC/OC9/2014/0119
Property	:	27 Hendon Hall Court, Parson Street, Hendon, London NW4 1QY
Applicant	:	Calabar Estates Limited
Representative	:	Wallace LLP
First Respondent	:	Benjamin Hakham
Representative	:	Koster Hanan Herskovic
Second Respondent	:	Alex Barnett and Spencer Leslie
Representative	:	None
Type of Application	:	Enfranchisement
Tribunal Members	:	Mr Robert Latham Mrs Helen Bowers MRICS
Date and venue of Hearing	:	29 October 2014 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	26 November 2014

DECISION

The Tribunal finds that the following costs are payable by the Fist Respondent:

To the Applicant

(i) Legal Costs of £1,500.50 + VAT of £300.10; (ii) Land Registry Fee of £128.00; (iii) Courier Fees of £10.61; and (iv) Valuer's Fees of £215.74 (inc VAT).

To the Second Respondent

(i) Legal Costs of £1,100; (ii) Valuer's Fees of £825 + VAT of £165.

Introduction

1. This is an application under section 91 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act"). The current application by the freeholder is for the determination of the costs payable by the tenants under section 60(1) of the Act.

2. On 1 September 2014, the freeholder issued this application. The freeholder sought an oral hearing, albeit that this Tribunal would normally have dealt with such applications on the papers. The freeholder claims the following:

(i) Legal Costs incurred by Wallace LLP ("Wallace") of £2,400 + VAT;

(ii) Disbursements of £138.61, namely Land Registry fees of £128 and one courier at £12.73 (both inc VAT); and

(iii) Valuer's Fees of £850 + VAT.

3. The tenant's responds that the following sums would be reasonable:

(i) Legal Costs of £1,000;

(ii) The Disbursements should be disallowed;

(iii) Valuer's Fees of £215.74 should be allowed as this was the sum paid by the freeholder.

4. The freeholder further seeks a determination of the fees payable to the intermediate landlord, Alex Barnett and Spencer Leslie, the Second Respondent. The following sums are claimed:

(i) legal costs of £950 + VAT; and

(ii) Valuer's Fees of £1,100 + VAT.

5. The tenant responds that the following sums would be reasonable:

(i) Legal Costs of £75;

(iii) Valuer's Fees of £600.

6. Hendon Hall Courts Resident Ltd ("Hendon") is the head leaseholder of Hendon Hill Court ("the Premises"). They had claimed £795. These have been agreed at £250 + VAT.

7. On 3 September, the Tribunal gave Directions. As the Applicant had requested an oral hearing, the matter was set down for an oral hearing on 29 October 2014.

8. By 17 September, the freeholder was directed to serve a Schedule of Costs sufficient for a summary assessment, and copies of any invoices and documents upon which the freeholder seeks to rely. The freeholder's schedule and invoices are at Tab 5 of the Bundle.

9. The Second Respondent has also filed a Schedule of Costs, dated 15 September, which is at Tab 6.

10. The tenant was directed to file their Statement of Case and copies of any documents upon which he seeks to rely. His statement of case and submissions are at Tab 7.

11. The freeholder was permitted to file a Statement in Response. Its Submissions in Reply, dated 8 October, are at Tab 8 and extend to 130 pages. This includes a Scott Schedule, at p.179-195.

12. The freeholder has filed a Bundle of Documents which totals 240 pages.

The Hearing

13. This matter was listed before us for hearing on 29 October. The Applicant freeholder did not appear. The First Respondent tenant, was represented by Mr David Herskovic, a partner of Koster Hanan Herskovic ("KHH"), Solicitors.

14. We were given no explanation as to why the Applicant failed to attend. As stated, the Tribunal would normally have dealt with such an application on the papers. This is the proportionate manner to determine such an application. It is always open to a party to request an oral hearing, if satisfied that this is the only fair means of determining an application. What is not acceptable is for a party to insist on an oral hearing and then fail to attend without providing any explanation for their absence.

15. Mr Herskovic stated that he would have been content for the matter to be dealt with on the papers. We agree that this was the proportionate manner in which to determine this dispute.

16. We asked Mr Herskovic whether he wished to make an application for his costs in attending today under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. He initially indicated that he was minded to make such an application. However, he changed his mind when we informed him that we would be obliged to give the Applicant the opportunity to make representations.

The Background

17. On 10 June 2013 (at p.1-3), the First Respondent served his Section 42 Notice applying for a new lease of Flat 27 Hendon Hall Court ("the Flat"). The application was not entirely straight forward:

(i) The First Respondent, tenant, holds a 99 year leasehold interest in the Flat, dated 28 February 1964, running from 29 September 1963 (p.15-24). His extended 90 year lease would expire on 28 September 2152.

(ii) The Second Respondents are the immediate leaseholder of the Flat pursuant to a lease dated 1 May 1998 for a term of 125 years, less three days, from 29 September 1982. This interest expires on 26 September 2107.

(iii) Hendon is the head leaseholder of the Premises pursuant to a lease dated 25 January 2010 for a term of 125 years from 29 September 1982. This interest expires on 28 September 2107.

(iv) The Applicant is the freehold owner of the Premises.

18. The First Respondent suggested that the following premiums would be payable:

(i) The Second Respondent, immediate leaseholder: £34,165.00.

(ii) Hendon, the head leaseholder of the Premises: £0.00.

(iv) The Applicant, freeholder: £6,446.

19. On 12 August 2013, the Applicant freeholder, as "competent landlord" for the purposes of Section 40, served a Counter Notice (at p.5) admitting the tenants' entitlement to a new lease. The counter-proposal for a premium was £52,322, together with £1 payable to Hendon pursuant to Schedule 13 of the Act. The Counter Notice was also given on behalf of the Second Respondent.

20. On 17 October 2013, the Second Respondent served a Notice to Act Independently (p.137).

21. On 4 February 2014, the First Respondent made an application to the Tribunal pursuant to Section 48 to determine the terms of acquisition of the new lease. These terms were agreed on 27 May (p.57). The grant of the new lease was completed on 8 August (p.60).

22. The following sums were agreed to be payable:

(i) The Second Respondent, immediate leaseholder: £47,808 (tenant's offer: £34,165).

(ii) Hendon, the head leaseholder of the Premises: £1.00 (£0.00).

(iv) The Applicant, freeholder: £7,191 (£6,446).

23. On 6 June 2014 (at p.231), the Applicant, freeholder, submitted their claim for costs, together with that for the intermediate landlords. On 19 June (p.232), Wallace provided a breakdown of their costs which totalled £2,410. This included two items of anticipated costs. The Schedule of costs which the

Tribunal is asked to consider (at p.35) includes these additional items and now totals £2,569. The Tribunal is satisfied that we should assess costs on the basis of this most recent statement.

24. No agreement as to the statutory costs payable has been reached and the freeholder has therefore made its current application to the Tribunal.

The Statutory Provisions

25. Section 60 provides, insofar as relevant for the purposes of this decision:

> "(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;
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> 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.
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> (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.
>
> .....
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> (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... or any third party to the tenant's lease."

The Principles

26. *Drax v Lawn Court Freehold Limited* [2010] UKUT 81 (LC) dealt with costs under section 33 of the 1993 Act, rather than section 60, but the principles established in *Drax* have a direct bearing on costs under section 60. In summary, costs must be reasonable and have been incurred in pursuance of the section 42 notice in connection with the purposes listed in sub-paragraphs 60(1)(a) to (c). The nominee purchaser is also protected by section 60(2), which limits recoverable costs to those that the lessor would be prepared to pay if he were using his own money rather than being paid by the nominee purchaser.

27. This does, in effect, introduce 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 lessor should only receive his costs where it has explained and substantiated them.

28. It does not follow that this is an assessment of costs on the standard basis. That is not what section 60 says, nor is *Drax* an authority for that proposition. Section 60 is self-contained.

The Tribunal's Determination

<u>The Total Costs of £6,500.73 (inc VAT)</u>

29. The tenant seeks to argue that the overall costs that he is obliged to pay are "unreasonable, excessive and disproportionate". The Tribunal does not accept this argument. Three superior interests were involved. In *Dashwood Properties Ltd v Beril Prema Chrisostom-Gooch("Dashwood")* [2012] UKUT 215 (LC), HHJ Walden-Smith held that it is not unreasonable for an intermediate landlord to carry out an independent investigation of the tenant's right to a new lease. She set out her reasons for reaching this decision:

> "23. As is pointed out by the appellant, it may well be that there are issues of conflict between the intermediate and competent landlord, if different, and it cannot be incumbent upon the intermediate landlord to need to rely upon the investigations carried out by the competent landlord.
>
> 24. The caveat contained in section 60(2) of the 1993 Act is there to ensure that the relevant person does not simply incur costs, knowing that those costs will be paid by the lessee, without there being any necessity to do so. An intermediate landlord will wish to ensure that the tenant does have a right to a new lease, regardless of whether a different competent landlord, who may not have the same degree of interest or concern as the intermediate landlord, has already determined that the tenant does have such a right."

30. We are satisfied that we should therefore consider the individual sums that are claimed.

Freeholder's Legal Costs of £2,400 + VAT (Tenant's proposal: £1,000)

31. The tenant disputes the hourly rates which Wallace have charged, namely £375-£400 for a partner and £285-£300 for an assistant solicitor. The tenant suggests rates of £250 and £150 respectively.

32. We have been referred to a number of first instance decisions. We rather have regard to *Wraith v Sheffield Forgemasters Ltd; Truscott v Truscott* [1998] 1 WLR 132, in which the Court of Appeal gave guidance on the factors to take into account in determining whether it is reasonable for a party to instruct a particular firm of solicitors. We have had regard to the judgment of Kennedy LJ at p.141C-E. Each case turns on its own facts. The essential point is that a party has a right to choose their own legal representative, but not to demand reimbursement of the extra costs from a "luxury choice".

33. In the current case, we have regard to the following. Calabar Estates Limited, the freeholder, has been instructing Wallace for many years. The freeholder is based in Shaftesbury Avenue, WC2. Leasehold enfranchisement is a specialist area. The choice of a Central London firm is therefore justified. We note where a partner is engaged, we would expect the solicitor to be experienced in this area of work and to take less time than a more junior member of the firm. We therefore accept that the charge out rates are reasonable for a Central London firm.

34. The tenant objects to Wallace using different partners for different work and suggests that this has led to duplication. The freeholder responds that it is appropriate to rely on the expertise of any particular fee earner for specific areas of work. We are satisfied that the real issue is the fee charged for any particular item of work.

35. The Tribunal turns to the time charged for the individual items. A detailed schedule has been provided of the work involved (at p.35). The bill totals £2,569. Wallace has reduced their claim to £2,400. The tenant disputes the following work:

(i) Item 1 - Considering the Notice of Claim: £225 is claimed (0.6 hrs or 36 mins) at £375ph). The tenant suggests that no more than 0.3 hrs or 18 mins) is reasonable. We do not consider that 36 minutes can be said to be unreasonable.

(ii) Item 6 - Obtaining Office Copy Entries and Lease: £30 is claimed (0.2hrs at £150ph). The tenant asserts that this is a secretarial task and relies on [18] of the decision of Professor Driscoll in 50 & 60 *Wellesley Court* (LON/00BK/OLR/2008/0770). The freeholder suggests that study of the title structure is more complex. We consider that £30 is not unreasonable for this modest task.

(iii) Item 10 - Preparing Draft Lease: £280 is claimed (0.7hrs at £400ph). The tenant suggests that the draft lease is no more than a template with nothing unduly complicated. The draft lease is at p.7-13. The modifications are at p.13. A more junior member of staff may have taken

more than 42 minutes. We do not consider the sum claimed to be unreasonable. However, we note two factors. First, the draft lease included a number of new clauses which Wallace subsequently agreed to remove. We agree with the tenant that the default position is the lease as currently drafted (Section 57(1)). Negotiating new terms falls outside the scope of Section 60(1). Secondly, we note that the work included "reconciling service charges and ground rents" which would be outside the scope of what is permitted by Section 60(1). We therefore reduce the sum claimed by 50% to £190. We make a reduction of £190.

(iv) Item 12 - Letter to Intermediate Landlord's Solicitor: £39.50 is claimed (0.1 hrs at £395ph). The tenant contends that the cost of communications between the solicitors of the freeholder and intermediate landlord are not within the scope of Section 60(1). The freeholder reminds us of the duties imposed on the "competent landlord" by Schedule 11. The tenant does not challenge the first notification which the freeholder sent to the intermediate landlord on 14 June. The freeholder has not explained the basis upon which this further letter falls within the scope of any of the sub-paragraphs in Section 60(1). We therefore disallow this. We make a reduction of £39.50.

(v) Item 17 - Perusing Counter Notice: £395 is claimed (0.7 hrs at £395ph). It is agreed that there is an arithmetical error and that the correct sum is £276.50. We make a reduction of £118.5.

(vi) Items 21-23 & 28 - Amendments to Lease: A total of £342 is claimed (4 x 0.3hrs at £285ph). The tenant contends that the freeholder is not entitled to the costs of "arguing or negotiating the claim"; only "the costs of and incidental to the drafting and execution of the new lease". These observations are to be found at [32-24] of Hague. The tenant also states that the terms of the agreement were reached on 27 May. Item 28 is dated 9 June. The freeholder asserts that the proposed amendments fall within Section 57. Any concessions were only to facilitate settlement and avoid costs. Even after the terms were agreed, further work was required before the new lease could be granted. The proposed modifications are at p.13. We are not satisfied that these modifications fall within the scope of Section 57, the terms of which are restrictive. We therefore disallow these costs which relate to the amendment of the lease. We make a reduction of £342.

(vii) Item 25 - Preparing lease engrossments: £85.50 is claimed (0.3 hrs at £285ph). The tenant contends that engrossment is a clerical matter which should not be carried out be a fee earner. Reference is made to the decision of Andrew Dutton in *23 Camelford Court* (LON/00AY/OC9/2012/0073). The freeholder responds that the involvement of an assistant solicitor is justified. We disagree. We allow £25 for this clerical task. We make a reduction of £60.50.

(viii) Items 27 & 29 - Letters from partner (30 May and 9 June): £79 is claimed (2 x 0.1 hrs at £385). The tenant contends that no letters were received at this time. The freeholder conceded that the second letter

should be disallowed. We allow the first letter which enclosed the engrossment counterpart lease. We make a reduction of £39.50.

(ix) Items 30 to 38 - £338.50 is claimed for work carried out between 25 June and 8 August 2014. The tenant contends that as the terms were agreed on 27 May, all this work falls outside the scope of Section 60(1). The freeholder contends that all this work is incidental to the grant of the new lease and therefore falls within Section 60(1)(c)). The Tribunal note that the new lease was granted on 8 August. We are satisfied that most of these sums fall outside the scope of Section 60. We allow £60 for the costs of granting the new lease. We make a reduction of £278.50

36. The total reductions which we make are £1,068.50. This reduces the total sum claimed from £2,569 to £1,500.50.

37. The freeholder claims VAT at 20%. Calabar, the freeholder, is registered for VAT, but has not elected to charge VAT on rents at the Property. It is not in a position to make such an election as this is residential accommodation. Calabar is therefore not making taxable supplies on the property. The freeholder relies on the decision of Martin Rodger QC in *11B Arlington House* [2013] UKUT 0415 (LC). At [32] to [41] of his decision, the Deputy President analysed the statutory provisions relating to the recovery of VAT. The basic principle is that 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.

38. The tenant refers us to the decision of a LVT in *5, 7 & 16 Thornberry Court* (ARG/LON/00AT/OLR/2013/1188). This decision was premised on the finding that the landlord was able to reclaim VAT in that case. We are satisfied that the freeholder is not able to recover VAT in the current case and that VAT at 20% must therefore be added.

Freeholder's Claim for Disbursements of £138.61

39. Land Registry Fees: £128. Copies of the Land Registry invoices are at p.37-40. The fees relate obtaining office copy entries of the freehold, headleasehold, sub-headleasehold and leasehold interests together with a copy of the Head Lease, sub-headlease, and tenant's lease. The freeholder asserts that these were required to review the tenant's entitlement to the grant of a new lease and to inform the valuation report.

40. The tenant responds that the landlord may require the tenant to deduce its title pursuant to Schedule 2, paragraph 2. The office copy entries could have been obtained electronically at a lower cost.

41. We are satisfied that the freeholder was entitled to carry out its own inquiries into all the relevant interests and that the sum claimed is recoverable under Sections 60(1)(a) and (b).

42. Courier Fees: £12.73. The tenant contends that the Counter Notice could have been served by fax or recorded delivery. The tenant places reliance on the

LVT decision in *23 Camelford Court* (LON/00AY/OC9/2012/0073); whilst the freeholder relies on contrary decision by a LVT in *Daejan Properties v Gilligan* (LON/00AH/OLR/2012/0020). Given the draconian consequences of failing to serve a Counter Notice, we are satisfied that the modest courier fee is reasonable.

Freeholder's Valuation Fee of £850

43. The tenant contends that the valuation fees have been agreed at £179.78 + VAT and that Section 91(1) precludes us from reviewing this. The freeholder contends that there was "error in communication between the Valuer and Solicitor" which negates any such agreement.

44. On 17 July 2014 (at p.63), Wallace wrote to KHH in these terms: "We have clarified our client's valuer's fees and they are in fact to be £179.78 + VAT. We trust this will be acceptable". On 18 July (at p.64), KHH responded stating: "We note the substantial reduction of your client's valuer's fees and these are accepted". Wallace's Completion Statement, dated 8 August, (at p.60) records: "Section 60 Valuation Costs competent landlord (inc VAT) £215.74". This is £179.78 + VAT. This evidence is uncontradicted. We accept that the parties agreed the valuation fees in this sum. KHH had no reason to realise that Wallace had made a mistake. We note that on 11 August (at p.199), Wallace suggested that they had made an error. However, this was after the fee had been agreed.

45. The tenant disputes that VAT is chargeable. We accept that it is for the reasons set out in [37] above.

Intermediate Leaseholder's Legal Costs of £950 + VAT (Tenant: £75)

46. The intermediate leaseholders, Alexander Barnett and Spencer Leslie, rely on a statement from S Mattey, a Company Director of Ultratown Limited ("Ultratown") (at p.44). S Mattey describes how the Second Respondents are constituent members of the Alan Mattey Group. They use a service company, Ultratown. Legal services have been provided by Alison Sandler, a senior in-house solicitor. Mrs Sandler has been qualified for over 20 years and is the sole solicitor employed by Ultratown.

47. The intermediate leaseholder is claiming £950 which represents 3.5 hours work at £260ph. The work carried out is set out at p.45. The hourly rate is said to represent the rate attributable to a Grade A fee earner in Outer London. Ultratown do not seek to profit from the sums claimed which are intended to cover Mrs Sandler's salary together with a suitable sum to reflect her overheads.

48. Mr Herskovic primary argument was that the Tribunal should only allow a handling fee of £75 should be allowed.

49. Mr Herskovic also disputes both the time claimed and the hourly rate. The tenant argues for an hourly rate of £80 based on an estimated pro rata salary of £30ph and overheads of £50ph. Reliance is placed on *123a High Street, Shoeburyness* (CAM/00KF/ORL/2013/0137), a LVT decision in which an hourly rate of £100ph was allowed.

50. The costs of in-house solicitors are normally assessed in the civil courts as if an independent solicitor had undertaken the work (see *In Re Eastwood* [1975] Ch 112). This approach has been applied in the Property Chamber in *Re Alka Aroro* [2013] UKUT 362 (LC). Martin Rodger QC held that the Tribunal had been wrong to reduce the hourly rate claimed from £250 to £200ph.

51. The Tribunal are satisfied that the intermediate leaseholder was entitled to instruct their own solicitor to protect their interest in ensuring that the tenant was entitled to apply for a new lease and that the appropriate premium is paid. We note that the intermediate landlord received the largest portion of the premium. The Tribunal is further satisfied that the hourly rate of £260 is reasonable and that the Solicitor was reasonably engaged for just over 3.5 hours. We therefore allow the sum claimed.

52. We turn to the issue of VAT. This is not an issue that S Massey has addressed (see p.44-45). The tenant has put the indemnity for VAT in issue. We are referred to the decision of the Deputy President in *11B Arlington House*. Where the paying party puts the indemnity for VAT in issue, it is for the receiving party to satisfy the Tribunal that a liability to pay VAT has arisen and that the VAT cannot be recovered (see [39]). The Second Respondent has adduced no evidence on this issue. The Tribunal cannot therefore be satisfied that the Section 60 costs that are recoverable should include an indemnity for any VAT that is payable.

Intermediate Leaseholder's Valuer's Fees: £1,100 + VAT (£600)

53. The tenant first raises the issue of duplication. He suggests that it was unnecessary for the intermediate leaseholder to obtain his own valuation report. It would have been sufficient for him to instruct a valuer merely to review the valuation report obtained by the freeholder. We are referred to the decision of HHJ Walden-Smith in *Dashwood* and remind ourselves of her observations on the issue of duplication:

> "27. The costs of instructing separate conveyancing solicitors to the solicitors advising on the tenant's right to a new lease, with the inevitable duplication that will incur, do not fall within the approach adopted in the three LVT cases referred to above. Those duplicated costs are not something that "might reasonably be expected to have been incurred by him if the circumstances had been such that [the landlord] was personally liable for all such costs." In my judgment the LVT were correct to come to the conclusion that such duplicated costs should not be recoverable.

54. The Tribunal are satisfied that the intermediate leaseholder was entitled to obtain their own valuation. This is a case where the larger part of the premium was payable to the intermediate leaseholder. This is an area where there was a potential conflict between the intermediate leaseholder and the competent landlord. We are satisfied that it cannot be incumbent upon the intermediate landlord to rely on the investigations carried out by the competent landlord.

55. The valuation fee is assessed on the basis of 5 hours work charged out by Laurence Nesbitt at £260ph. The tenant asserts that this is excessive, compared with the fees paid by both the tenant (£550) and the freeholder (£850).

56. The Tribunal is satisfied that the sum claimed is excessive. We reduce the hours claimed from 5 to 3.75 hours. We make the following adjustments (see p.46): (i) Studying Documents: reduced from 30 to 20 mins; (ii) Inspection – 1 hr is reasonable; (iii) Research – 1 hour is reasonable; (iv) Further studying Documents: reduced from 1.5 hours to 45 mins; and (v) Preparing Report – reduced from 1 hr to 40 mins. We therefore reduce the fee to £825, namely 3.75 hrs at £220ph. To this, we add VAT at 20%.

Robert Latham,
Tribunal Judge

26 November 2014