4140

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AH/OC9/2016/0024**
Property	:	**130 Connell Crescent, London, W5 3BP**
Applicants	:	**Brickfield Properties Limited**
Representative	:	**Wallace LLP, solicitors**
Respondents	:	**(1) Simon Charles Peter East** **(2) Ashley Rolfe**
Representative	:	**Attwells, solicitors**
Type of application	:	**Section 91(2)(d) of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal members	:	**Judge Amran Vance**
Date of determination and venue	:	**17 March 2016 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**17 March 2016**

DECISION

Summary of the tribunal's decisions

1. The tribunal determines that the section 60 statutory costs payable by the Respondents is **£3,816.80.**

Background

2. This is an application under section 91(2)(d) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") in respect of 130 Connell Crescent, London, W5 3BP ("the Property").

3. The application is made by Brickfield Properties Limited ("Brickfield") and is for the determination of the reasonable costs payable by the Respondents under section 60(1) of the Act following service of various Notices of Claim to acquire a new lease.

4. The background has some complexity. Brickfield is the long leasehold owner of 130-136 (even) Connell Crescent in which the Property is situated. Brickfield's lease is dated 4 February 2013 and was granted by Daejan Properties Limited for a term of 999 years from 4 February 2013. It is registered at HM Land Registry under title AGL282766 **[115-118]** and is subject to four leases, including a lease of the Property.

5. The Respondents lease is dated 17 November 1969 and was granted for a term of 90 years less three days from 22 September 1950. It is registered at HM Land Registry under title AGL116756. It appears that this lease was entered into between (1) Daejan Properties Limited and (2) Anna Schalck.

6. On 19 February 2014 Niina Ezewuzie, the Respondents predecessor in title, assigned her leasehold interest in the Property to the Respondents **[121-123]** together with the benefit of a Notice of Claim (also dated 19 February 2014) sent by her solicitors to Daejan Properties Limited in which she made a claim to acquire a new lease of the Property ("the First Notice") **[119-120].** The First Notice was served by BH solicitors ("BH") on behalf of Niina Ezewuzie.

7. On 11 April 2014 Wallace LLP, on behalf of Brickfield, served a Counter-Notice **[125]** admitting entitlement to the grant of a new lease but without prejudice to the contention that the First Notice was invalid and of no effect because it had not been given to the Competent Landlord in accordance with the provisions of s.42(2)(a) of the Act and because it did not comply with ss.42(3)(f) and (5) in that it did not give less than two months for the landlord to respond by giving a Counter-Notice. In a covering letter Wallace LLP requested confirmation that it was accepted that the notice of claim was invalid and of no effect.

8. On about 25 April 2014 a second Notice of Claim ("the Second Notice") **[144-145]** was served by BH on Brickfield, again, on behalf of Niina Ezewuzie.

9. The Respondents became the registered proprietors of the Property on 7 May 2014.

10. On 28 April 2014 Wallace wrote to BH pointing out, amongst other matters, that the Second Notice provided a date for the landlord to respond, by way of a Counter Notice, by 25 April 2014, such date having already passed.

11. On about 25 June 2014 Wallace served a further Counter-Notice ("the Second Counter-Notice") **[151]** on the Respondents' solicitors, Attwells. The covering letter **[149]** refers to a lack of response to the letter sent to BH on 28 April and states that pending clarification on the points raised in that letter that Brickfield reserved the right to contend that the Second Notice was invalid and of no effect and/or deemed withdrawn.

12. On 2 July 2014 BH purported to serve a further Notice of Claim ("the Third Notice") on Brickfield **[193-4].** The Third Notice was in the same form as the First Notice, this time addressed to Brickfield. However, it was dated the same date as the First Notice, 19 February 2014 and gave a date for the Landlord to respond by way of a Counter-Notice of 19 April 2014, such date having already passed. Once again, it was expressed as being served on behalf of Niina Ezewuzie.

13. Wallace wrote to BH on 3 July 2014 **[195]** asking them to confirm if the letter of 2 July 2014 should be disregarded. Further correspondence to BH resulted in a letter from BH to Wallace dated 14 August 2014 in which they refuted that the First Notice was invalid and of no effect **[201-2].** That contention was rejected by Wallace in a letter dated 19 August 2014 **[203-4].**

14. On 28 August 2014 Wallace wrote to Attwells, solicitors for the Respondents setting out the chronology and what they considered to be the position regarding the claim to acquire a new lease of the Property **[205]**

15. On 5 March 2015 Wallace wrote to Attwells stating that the Second Notice was deemed to be withdrawn as no application had been made to the Property Chamber pursuant to s.48 of the Act. That letter also sought costs under s.60 of the Act.

16. On 14 January 2016 Wallace made an application to the Property Chamber seeking a determination of the costs payable by the Respondents under s.60 of the Act. It seeks the following costs:

Legal fees	£3,000 plus VAT (although the actual costs amounted to £3,133).
Valuation Fees	£600 plus VAT
Courier Fees	£61.50 plus VAT
Land Registry Fees	£65

The statutory provisions

17. Section 60 of the Act provides:

> **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 the appropriate 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.

Directions and the schedules of costs

18. The tribunal issued its standard costs directions on 15 January 2016, providing for the landlords to send the leaseholders a detailed schedule of costs for summary assessment by 29 January 2016, for the leaseholders to provide a statement of case in relation to those costs by 12 February and for the landlords to send any statement in response by 19 February. It was the Applicants' responsibility to file hearing bundles by 26 February. The tribunal directed that it was content to determine the matter on the papers unless either party requested an oral hearing, in which case the matter would be dealt with at a hearing

on 9 March 2015. No party requested a hearing and the application was determined on the papers on 17 March 2016.

The tenants' case

19. The Respondents accept that the First Notice was defective in that it was addressed to Daejan Properties Limited and not Brickfield who, it agrees was the Competent Landlord for the purposes of the Act. Their position is that the Second Notice was sent by BH without the consent, authority or knowledge of the Respondents or Attwells. They accept that both the Second Notice and Third Notices were defective being served after Niina Ezewuzie assigned her leasehold interest in the Property to the Respondents and because the stated time for service of the landlord's Counter-Notice had expired.

20. However, The Respondents contend that s.60 costs are not payable to Brickfield as it is not the 'relevant person' as defined under s.60(6) of the Act. They appear to contend that the 'relevant person' was Daejan Properties Limited.

21. They contend that the costs sought are unnecessary, excessive and unreasonable and not costs recoverable under s.60 as it was Wallace who deemed the First Notice to be "void" or "invalid". Further, the error in the First Notice should have been immediately apparent as Daejan Properties Limited was not Wallace's client and was not the Competent Landlord. Similarly, the error in the Second Notice would have been easily identifiable given that the Notice of Assignment was dated 19 February 2014. The defect with the Third Notice was, they say, clear and should be regarded as an attempt at rectification as opposed to a fresh Notice.

22. The Respondents argue that the costs of the First Counter-Notice are excessive and that there was no need to serve a Second Counter-Notice given that the defect in the Second Notice was readily apparent.

23. They also argue that the Respondents are not liable for costs incurred by Wallace in respect of the Second and Third Notices as these were issued by BH solicitors *"outside of their client's ownership"* and that the costs should be sought from BH Solicitors who took it upon themselves to serve further Notices.

24. As to the costs of preparation of the draft lease and the costs incurred by the valuer, the Respondents contend that these costs should not have been incurred whilst the validity of the Notices was being challenged.

25. They also argue that the valuer should not have considered any of the Notices given that Wallace had disputed their validity and query the dates of the valuation report and if these costs are payable as s.60 costs.

26. The Respondents consider the use of a courier to serve the Counter-Notices to be unreasonable and that recorded or next day delivery would have sufficed.

27. They also contend that the costs of obtaining and considering land registry entries have been duplicated.

The landlords' case

28. Wallace made detailed submissions on costs. They dispute that the First notice was deemed "void". Instead, the First Counter-Notice admitted the claim to a new lease but was served without prejudice to the contention that the First Notice was invalid and of no effect. The costs incurred, in doing so are, it says, properly recoverable as s.60 costs.

29. They reject the suggestion that costs incurred in respect of the Second and Third Notices are not capable of being recovered by the Competent Landlord and that once a Notice is served it is necessary for a landlord to respond and to serve a Counter-Notice.

30. Wallace submit that the costs claimed are reasonable and recoverable under s.60.

31. Wallace LLP contended that the time spent by their fee earners was appropriate given the complexities of the provisions of the Act and the facts of this claim.

The principles

32. The proper basis of assessment of costs in enfranchisement cases under the 1993 Act, whether concerned with the purchase of a freehold or the extension of a lease, was set out in the Upper Tribunal decision of *Drax v Lawn Court Freehold Ltd* [2010] UKUT 81 (LC), LRA/58/2009. That decision (which related to the purchase of a freehold and, therefore, costs under section 33 of the Act, but which is equally applicable to a lease extension and costs under section 60) established that costs must be reasonable and have been incurred in pursuance of the initial notice and in connection with the purposes listed in sub-sections [60(1)(a) to (c)]. The applicant tenant is also protected by section 60(2) which limits recoverable costs to those that the respondent landlord would be prepared to pay if it were using its own money rather than being paid by the tenant.

33. In effect, this introduces 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 landlord should only receive its costs where it has explained and substantiated them.

34. It does not follow that this is an assessment of costs on the standard basis (let alone on the indemnity basis). This is not what section 60 says, nor is *Drax* an authority for that proposition. Section 60 is self-contained.

35. Wallace LLP rely upon comments of numerous previous tribunal judges in support of its claim for costs. While none of those previous decisions is binding on this tribunal, some of the findings are of persuasive authority. In particular, the tribunal has had regard to the comments of Professor Farrand QC in the decision relied upon by the Applicant in *Daejan Investments Freehold Ltd v Parkside 78 Ltd* (LON/ENF/1005/03), in which, at paragraph 8, he stated:

> "As a matter of principle, in the view of the Tribunal, leasehold enfranchisement 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 reversioners 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..."

The tribunal's determination and reasons

36. The tribunal rejects the suggestion that no s.60 costs are payable to Brickfield because it was not the 'relevant person' for the purposes of s.60(6) of the Act. It is clear that Brickfield, as holders of the superior leasehold interest in the Property were at all times the Competent Landlord and therefore the relevant person.

37. The tribunal notes that whilst the Respondents argue that the costs sought are "unnecessary, excessive and unreasonable" no specific challenge has been made to the grade of fee earners who carried out the work itemised in the schedule of costs provided by Wallace **[62-63]** nor their hourly rates. The schedule of costs indicates that work has been carried out: by a partner at an hourly rate of £395 rising to £425 by August 2014; by an assistant solicitor at the rate of £285 per hour; and by a paralegal at £150 per hour rising to £180 per hour by February 2015.

38. In the tribunal's view the hourly rates sought are at the upper end of what can be considered reasonable. The guideline rates issued by the Senior Courts Costs Office currently suggest a figure of £409 for a Grade A solicitor and £296 for a Grade B solicitor. However, the tribunal is conscious that those rates have not changed since 2010. The tribunal accepts that enfranchisement this work is of sufficient complexity and importance in work to justify the hourly rates sought and the involvement of a partner at least in the initial stages following service of a notice of claim. The tribunal accepts that it was reasonable for a partner to carry out the work identified in the schedules.

39. The suggestion that costs are not payable because Wallace deemed the First Notice to be "void" or "invalid" is an erroneous one. Wallace acted entirely appropriately by admitting the claim to a new lease and serving a Counter Notice without prejudice to the contention that the First Notice was invalid. These steps are, in the tribunal's view, appropriate for a landlord to take given the serious consequences that would flow from failing to serve a Counter Notice, namely a claim by a tenant that it was entitled to a new lease on the terms proposed in the notice of claim.

40. However, we consider the time spent considering the First Notice (0.8 hours) was somewhat excessive given that that the work was carried out by a partner in a firm that specialises in leasehold enfranchisement work. The tribunal consider 0.6 hours is reasonable. The tribunal considers this work to have been appropriate regardless of the fact that Daejan Properties Limited was not the Competent Landlord. The claim still had to be investigated and considered by Wallace and the time spent is not unreasonable.

41. The tribunal also accepts that it was appropriate for Wallace to take the steps that it did in respect of the Second and Third Notices, including the preparation and service of the Second Counter-Notice. It was appropriate for Brickfield to protect their position given the potentially serious consequences for non-service of a Counter Notice. These costs all fall within the definition in s.60(1)(a) as *"costs of any investigation reasonably undertaken of the tenant's right to a new lease"*. However, we consider that the time that can be justified for consideration of those Notices and the preparation of the Second Counter-Notices is significantly less than for the First Notice and First Counter-Notice given that they are short and essentially in the same format as the First Notice. We make those adjustments in the table below.

42. The tribunal does not agree with the submission that the Respondents are not liable for costs incurred by Wallace in respect of the Second and Third Notices as these were issued by BH solicitors *"outside of their client's ownership"*. Given the evident confusion surrounding the service of multiple Notices of Claim Wallace were, in the tribunal's view, entitled to take the steps it did in response to each Notice of

Claim purportedly served upon it by BH. If BH had no authority to do so then this is a matter for the Respondents' to take up with BH. However, we consider that the spent in preparing the Second Counter-Notice to be excessive given that they are in essentially the same form as the First Counter-Notice and would have required little amendment. We make these adjustments in the table below.

43. Nor does the tribunal accept that it was inappropriate to incur the costs of preparation of the draft lease and the costs incurred by the valuer whilst the validity of the Notices was uncertain. These costs were properly incurred under s.60(1)(a) and (b) in preparation for the service of a Counter-Notice.

44. As to the valuers fees, the relevant invoice is dated 5 February 2016 **[95-6]** and states that the work undertaken was consideration of a Notice of Claim on 10 April 2015 and preparing and checking a report/valuation on 22 October 2014. The amount stated in the invoice is £780 plus VAT. It is unclear why this has been limited to £600 plus VAT in the Schedule of Costs. It is also unclear why work was carried out on these dates when the First Notice of Claim was served on 19 February 2014 and the Third on 2 July 2014. It seems likely that the 10 April 2015 date is a typographical error and that the actual date was 10 April 2014. This would accord with Wallace's statement in their submissions that the valuer inspected the Property and reported in advance of service of the First Counter-Notice on 11 April 2014.

45. We accept that the valuer carried out an inspection prior 11 April 2014 and that he provided a copy of that report prior to that date. However, we have no satisfactory explanation as to why costs were incurred in October 2014 in checking a report/valuation. Given this uncertainty we are not satisfied that the whole of the sum of £600 is payable under s.60(1). We recognise that the costs have been limited from the higher figure of £780 plus VAT but absent a clear explanation as to what work was carried out in October 2014 and why this is a recoverable cost we consider the sum of £500 plus VAT to be an appropriate sum for the Respondents' to pay.

46. We accept that the use of a courier was reasonable given the potentially draconian consequences of failing to serve a counter notice on time.

47. We also accept that it was reasonable to obtain up to date office copy entries from the land registry entries following service of a new Notice to confirm that there has been no assignment of the lease without notification to the landlord. The tribunal allows one unit of the paralegal's time to secure this and one unit of the partner's time to review these.

48. The tribunal therefore considers that all of the sums set out in the costs schedule are payable as statutory costs under s.60 costs except for the following:

Date	Item	Hours claimed	Hours allowed by tribunal
06.03.14	Considering First Notice of Claim	0.8	0.6
11.04.14	Preparing Draft Counter Notice	0.8	0.5
28.04.14	Considering Second Notice of Claim	0.6	0.3
17.06.14	Preparing Draft Counter Notice	0.4	0.2
19.06.14	Obtaining office copy entries and lease (paralegal)	0.2	0.1
19.06.04	Considering office copy entries and lease	0.2	0.1
02.07.14	Considering Third Notice of Claim	0.6	0.3

49. The above reductions amount to a reduction of 1.4 hours in respect of the partner's time and 0.1 of the paralegal's time which equates to reductions of £553 and £15 respectively (at hourly rates of £395 and £150).

50. The tribunal therefore determines that the statutory costs payable by the lessees under s.60 of the Act are:

Legal fees	£2,565 plus VAT of £51
Valuation Fees	£500 plus VAT of £100
Courier Fees	£61.50 plus VAT of £12.30
Land Registry Fees	£65.00
TOTAL	**£3,816.80**

Name: Judge Amran Vance **Date:** 17 March 2016

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.