IN THE LEASEHOLD VALUATION TRIBUNAL
LEASEHOLD REFORM HOUSING AND URBAN DEVELOPMENT ACT 1993 S33

Case Number	CHI/00ML/OCE/2008/0041
Property	45 Russell Square Brighton
Applicant	Nadav Ltd – Nominee Purchaser Mr Eversfield Ms C White Represented by Osler Donegan Taylor, Solicitors
Respondent	Sinclair Gardens Investments Co Ltd Represented by P Chevalier & Co, Solicitors
Tribunal members	Ms H Clarke (Barrister) (Chair) Mr A Mackay FRICS Mr N Cleverton FRICS
Date of consideration	13 November 2008
Date of decision	24 November 2008

1. **THE APPLICATION**
The original application asked the Tribunal to determine the purchase price payable for the freehold. On the day before the hearing the parties notified the Tribunal that they had agreed the purchase price at £22,500. The matters which remained to be determined by the Tribunal were the amount of the costs which the Respondent could recover from the Applicant under s33 Leasehold Reform Housing & Urban Development Act 1993 ('The Act'), and a dispute as to the terms of the conveyance, namely whether it should include a clause indemnifying the Respondent against past and future claims or alternatively against future claims. The parties also asked the Tribunal to determine the purchase price in the sum agreed.

2. **DECISION**

The Tribunal determined that the amount of costs which the Applicant must pay to the Respondent is £2925.75 inclusive of VAT.
The Tribunal decided that it did not have jurisdiction to direct that the conveyance shall include a term as to indemnity, whether in the fuller form proposed by the Respondent or a narrower form as to future breaches offered by the Applicant.
The Tribunal decided that it did not have jurisdiction to determine the purchase price in the sum agreed by the parties, because there was no dispute as to this matter by the time of the hearing.

3. **BACKGROUND**
The Applicant nominee company served a Notice to enfranchise under s13 of the Act. The Respondent admitted the right to enfranchise. Directions were given as to the preparation and filing of evidence by both parties including valuation reports and a joint statement of issues agreed /issues remaining in dispute.

4. **HEARING**
In accordance with the directions a hearing was arranged in Brighton. On the afternoon of the day before the hearing the parties notified the Tribunal that they had agreed the purchase price. No inspection therefore took place. The hearing was attended by Ms C Bown, of Osler Donegan Taylor, Solicitor for the Applicants. Mr D Aslen, Lessee of the Ground Floor Flat, also attended but made no representations. The Tribunal took into consideration the written submissions filed by both parties.

5. The parties also put a large number of earlier decisions of the LVT before the Tribunal. Whilst such decisions are not binding on the Tribunal it is desirable that there should be a consistency of approach and the Tribunal accordingly considered the decisions when making its determination.

6. **THE LAW**
The relevant part of the Act in relation to costs provides that the nominee purchaser shall be liable for the reversioner's reasonable costs of and incidental to matters incurred in pursuance of the notice (s33 Leasehold Reform Housing & Urban Development Act 1993). Costs for professional services shall only be regarded as reasonable to the extent that they might reasonably be expected to have been incurred by the reversioner if personally liable for them (s33(2)).

7. In relation to the indemnity clause, the relevant part of s34 of the Act provides:
"(9) Except to the extent that any departure is agreed to by the nominee purchaser and the person whose interest is to be conveyed, any conveyance executed for the purposes of this Chapter shall–
(a) as respects the conveyance of any freehold interest, conform with the provisions of Schedule 7"

8. Schedule 7 of the Act sets out a number of provisions which are required to appear in the conveyance including such provisions as the freeholder may require in respect of an indemnity for the freeholder against breaches of restrictive covenants other than those arising under the leases of the enfranchising tenants.

9. **SUBMISSIONS AND REASONS: COSTS**
The Respondent had submitted an estimate of costs in the total sum of £3305.40. This comprised £690 plus VAT for the valuer's fee, which was not disputed; £805 plus VAT for the conveyancing costs, and £1376.16 plus VAT for work said to be incidental to the notice.

10. The Applicants conceded that the Respondent was entitled to recover some costs pursuant to s33 but challenged the amount claimed. They submitted that the charging rate of the solicitor was too high at £230 per hour as it was outside the guideline rates applicable to assessment of costs under the Civil Procedure Rules. Some of the work could have been done by a lower-grade fee-earner, and if there was none in the firm (as the Respondent stated) then the time taken to do the work by a higher-grade earner ought to have been less than what was claimed. Some of the work fell outside the parameters of s33 (1). Some of it represented a duplication of other work. It was in any event difficult to calculate the figures because there had not been a consistent use of time units. In answer to the Tribunal's question the Applicant's solicitor said that the Applicant's costs were in the region of £1100 plus VAT for the 'notice' work and £600 plus VAT for the 'conveyancing' work, although of course the Applicant's solicitors had not had to do the same work as the Respondent's solicitor. The Applicant's solicitor's firm frequently acts for landlords in enfranchisement cases, and the costs usually came to around £900-£1,000 plus VAT.

11. The Respondent's case was that s33(2) denotes an 'indemnity costs' test and that in consequence any doubts ought to be resolved in favour of the receiving party. The Respondent's solicitor was a sole practitioner with considerable experience in this specialist field. The Respondent was not required to find the cheapest solicitor able to do the work.

12. The Tribunal rejected the Respondent's submission as to the proper interpretation of s33(2) and accepted the Applicant's counter-submission that as that section provides that 'costs shall only be regarded' as reasonable if they fulfill the test therein, the burden is on the Respondent to justify the costs which it claims.

13. However the Tribunal also took the view that leasehold enfranchisement under the 1993 Act may understandably be regarded as a form of compulsory purchase by tenants from an unwilling seller and at a price below market value. Accordingly, it would be surprising if freeholders were expected to be further out of pocket in respect of their inevitable incidental expenditure incurred in obtaining the professional services of valuers and lawyers for a transaction and proceedings forced upon them.

14. The Tribunal considered that it was to be reasonably expected that the Respondent would instruct a specialist and experienced firm of solicitors, and that it was not incumbent upon the Respondent to seek out other solicitors who might be prepared to do the work more cheaply. The guideline rates applicable to assessment of costs under the Civil Procedure Rules did not assist the Tribunal, because the principles applying to assessment of inter-partes costs in contested litigation did not apply to the determination of costs under s33. In any event the charging rates were not so far different from the guideline rates as to undermine the view that it was reasonably to be expected that the Respondent might incur them. The Tribunal therefore did not reject the charging rate of the Respondent's solicitor.

15. Whilst the summary of costs included some provision for items which as therein described did not at first glance fall within the scope of s33(1), the Respondent's

solicitor had provided a detailed description of the work undertaken and the Tribunal determined that the costs claimed fell within the scope of s33.

16. However on a close examination of the Schedule of Costs submitted by the Respondent the Tribunal observed that there appeared to be a certain amount of duplication in respect of attendances and advice given to the client, and instructions and letters written to the valuer. The Tribunal also considered that the estimated costs sought in relation to the conveyance included some items which the Applicant's solicitors might reasonably expect to bear, such as engrossment. The Tribunal therefore determined that the costs which the Respondent might reasonably have been expected to incur in relation to the 'notice' work would be £1200 plus VAT and in relation to the 'conveyancing' work would be £600 plus VAT. To these amounts must be added the valuer's fee of £690 plus VAT which was not disputed. The total amount in respect of the Respondent's costs was therefore determined at £2925.75.

17. **SUBMISSIONS AND REASONS: INDEMNITY COVENANT**
The Respondent sought an indemnity from the Applicant against both past and future breaches of covenant. It submitted that not to have such a covenant left it exposed to the possibility of action of which it has no present knowledge, but which would lie particularly within the knowledge of the current lessees and within the control of the Applicant; it asserted that it was a common practice to include such an indemnity, (whilst the Applicant asserted the contrary) and that no freeholder would willingly sell without one, and that therefore in an expropriatory situation, such a covenant ought to be included.

18. The Applicant submitted that the Tribunal had no jurisdiction to require an indemnity covenant to be included in the conveyance, whatever its scope. It relied on several LVT decisions (as did the Respondent), including Hampden Court Freehold Ltd v Danaglade Ltd LON/ENF/785/02. The Respondent in turn relied on this point on the Court of Appeal's decision in Penman v Upavon Enterprises [2002] L&TR 10 to submit that the Tribunal did have jurisdiction. In the alternative the Applicant proposed a covenant limited to future breaches.

19. The Tribunal took the view that the reasoning expressed in Hampden Court Freehold Ltd was to be preferred, as it accorded with the logical interpretation of the statute, and would respectfully adopt that reasoning:

"The terms of the transfer must be in accord with s.34 of the 1993 Act and otherwise "shall" conform with the provisions of Schedule 7 to the Act ""except. to the extent that any departure is agreed by the nominee purchaser and the reversioner" (s,34(9)). This is exclusive and mandatory wording. There is no statutory provision, in s.34 or Schedule 7 or elsewhere, providing for the inclusion of any indemnity covenant as sought by the Reversioner where, as here, not agreed by the Nominee Purchaser. It is accepted that the Tribunal has jurisdiction to determine any disputed "terms of acquisition" and that this expression includes "the provisions to be contained in any conveyance" (s.24(1)(8)). However, the Tribunal remains of the view that this does not confer an unrestricted jurisdiction to determine what would

be fair and/or reasonable provisions for inclusion but merely a jurisdiction to consider whether or not what is proposed accords or complies with the statutory provisions to be found in s.34 and Schedule 7 of the Act. The contrary view submitted by Mr Letman would, if correct, mean that it was open to a Tribunal to determine that an increased purchase price, not in accord with s.32 and Schedule 6 of the 1993 Act, was payable on enfranchisement on the basis that it would be a reasonable addition. This appears patently erroneous and illustrates the fallacy in the present submission".

20. The Tribunal further took the view that the point was left open by Penman v Upavon., which was concerned with the time at which an application for a vesting order may be made in the County Court. The Tribunal was particularly persuaded as to this by the remarks at para 26 of Penman , where it was said by Arden LJ that the court "cannot determine on this occasion" issues arising from the question of whether an indemnity covenant would have a bearing on valuation, and at para 36, to the effect that the appropriate course for either party in that case was to seek the determination of the LVT of all the issues placed before it, "or at least the decision of the tribunal as to whether it is prepared to entertain that issue".

21. The Tribunal accordingly decided that it had no jurisdiction to determine that an indemnity covenant should be included in the conveyance in the absence of agreement between the parties that such a covenant should be included.

Signed HMC
Dated 26.11.07
H M Clarke (Chair)