RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL
& LEASEHOLD VALUATION TRIBUNAL

Case No.	**CHI/29UN/OC9/2009/0010** **CHI/29UN/OC9/2009/0009**
Property:	**11B and 18G Arlington House** **All Saints Avenue** **Margate** **Kent** **CT9 1XR**
Applicant:	**Metropolitan Property Realizations Ltd**
Respondents:	**Mr. J.K.Moss and** **Mr. R.P.Greene**
Members of the Tribunal:	**Mr. R. Norman** **Mr. J.B. Tarling MCMI**

RE: 11B AND 18G ARLINGTON HOUSE, ALL SAINTS AVENUE, MARGATE, KENT CT9 1XR

Decision

1. Mr. Moss is to pay the costs incurred by the Applicant in connection with his application for a new lease in the sum of £1,732.05 made up as follows:

	£
Costs	1,067.28
VAT @17.5%	186.77
Valuer's fees	450.00
Land Registry fees	28.00
	1,732.05

From that sum must be deducted the retained deposit of £320 leaving £1,412.05 to pay.

2. Mr. Greene is to pay the costs incurred by the Applicant in connection with his application for a new lease in the sum of £1,732.05 made up as follows:

	£
Costs	1,067.28
VAT @17.5%	186.77
Valuer's fees	450.00
Land Registry fees	28.00
	1,732.05

Background

3. Applications have been made by Metropolitan Property Realizations Ltd ("the Applicant") under Section 60 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") for determination of costs payable by Mr. J.K. Moss and Mr. R.P. Greene ("the Respondents") in connection with applications made by the Respondents for new leases under the 1993 Act.

4. Both applications are being heard together.

5. Before the hearing each of the Respondents had supplied documents setting out their points of dispute and Wallace LLP the Solicitors representing the Applicant had supplied a bundle of documents including a witness statement of Samantha Jane Bone dated 24th February 2010.

6. The application had been set down for a hearing but shortly before the date of the hearing Wallace LLP by letter suggested that the case should proceed by way of a paper determination. They stated that it was the Applicant's intention to rely on detailed written submissions (in the form of the witness statement of Samantha Jane Bone dated 24th February 2010) and that they did not intend to attend the hearing. They explained that no disrespect was intended to the Tribunal and that was accepted. However, as the Respondents wanted a hearing the Tribunal decided that the hearing should proceed and Wallace LLP were informed of this. It was therefore a matter for them and the Applicant whether or not they attended.

The Law

7. Unless otherwise stated, references to Sections and Schedules are references to Sections of and Schedules to the 1993 Act.

8. Section 41 gives a qualifying tenant the right to obtain information about superior interests etc. For example a qualifying tenant may serve a notice on his immediate landlord or on any person receiving rent on behalf of his immediate landlord in order to find out the identity and address of the competent landlord.

9. Section 42 (1) and (2) provides that the tenant's notice of claim is made by giving notice to the landlord (i.e. the competent landlord) and to any third party to the tenant's lease. However by paragraph 1of Schedule 11, the notice of claim is regarded as given to the competent landlord if it is given to any other landlords instead.

10. Paragraph 9(1) of Schedule 12 provides that the tenant's notice shall not be invalidated by any inaccuracy in any of the particulars required by Section 42(3). Those particulars are listed in Section 42(3)(b). The specification of the date by which the landlord must respond to the notice by giving a counter-notice under Section 45 is a requirement of Section 42(3) but it is not a particular. Consequently,

specifying a date less than 2 months hence for service of a counter-notice is not an inaccuracy in any of the particulars and is not saved by this paragraph from being invalid. If the notice is considered to be invalid the landlord could ignore it or respond by serving a counter-notice without prejudice to his contention of invalidity. The Tribunal considers that the latter course of action is preferable in view of the risk that the notice is held to have been valid. This can be done either in the counter-notice itself, or by a separate covering letter. It would then be for the validity of the claim notice to be decided by the County Court (Section 90(2)). If in response to a valid notice of claim the landlord fails to serve a counter-notice the tenant may apply for an order determining the terms of acquisition in accordance with the proposals contained in the tenant's notice (Section 49(1)).

11. Paragraph 8 of Schedule 11 requires any landlord other than the competent landlord to "give the competent landlord all such information and assistance as he may reasonably require". The reason for this is that until the competent landlord has all the information to complete the counter- notice, he is unable to prepare it.

12. Paragraph 7(1) of Schedule 11 provides for the giving of a notice to be separately represented but it does not mean that the intermediate landlord can do nothing until that time.

13. Section 60 so far as it is relevant to this application provides that:
"(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.....
(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....."

14. Paragraph 2(1) of Schedule 2 to The Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993 allows a landlord to demand payment of a deposit of 10% of the Premium (paragraph 2(2)) at any time that the tenant's notice continues in force. There is no provision for the return of the deposit until the tenant's notice is withdrawn, deemed to have been withdrawn or otherwise ceased to have effect (paragraph 3(1)) but the landlord may deduct any amount due to him for costs (paragraph 3(3)).

The Hearing

15. The hearing was attended by the Respondents and there was no appearance by anybody on behalf of the Applicant.

16. At the hearing the Respondents produced copies of the following:
(a) letters dated 4th, 10th, 18th September 2008 and 3rd October 2008 between Wallace LLP and Askews, the Solicitors who were representing the Respondents and Mr. McAllan, the lessee of Flat 6F, in their applications for new leases.
(b) a letter from Thomson Snell and Passmore dated 24th October 2008 (a copy was at pp37 and 38 of the Applicant's bundle)
(c) the landlord's counter notices addressed to Mr. McAllan (in respect of flat 6F), and to the Respondents.
(d) a letter dated 13th November 2008 from Thomson, Snell and Passmore to Askews.

17. The Respondents gave evidence and made submissions.

Reasons for the Tribunal's decision

18. The Tribunal considered all the evidence and submissions made by or on behalf of the parties in writing and at the hearing.

19. It must be made clear that the Tribunal does not have jurisdiction to make a determination as to the validity of the notices of claim. The Tribunal has to consider what the parties did and whether the Respondents are responsible for the costs incurred by the Applicant.

20. It is worth noting that the Respondents' criticisms of the intermediate landlord and the problems encountered could have been avoided had use been made of the power to make preliminary enquiries.

21. Many of the Respondents' submissions are based on their understanding that the Applicant was not in a position to do anything because the Applicant was not the competent landlord, that a valuer should not have been instructed to make a valuation, that Wallace LLP could not charge for their work because they were not representing the competent landlord, that the Applicant could do nothing until after the counter-notices had been served and the Applicant could then serve a notice of intention to be separately represented and it would be only after the service of such a notice that the Respondents would be liable for costs and that the obtaining or retaining of a deposit had some bearing on the time from which costs could be claimed.

22. It will be seen that the Tribunal's interpretation of the law does not agree with those submissions.

23. The Applicant could have accepted service of a notice which Wallace LLP

considered to be defective without prejudice to the defects even though it was not served on the competent landlord.

24. The Applicant was entitled on receipt of each notice of claim to consider it and having come to the conclusion that the notices of claim were invalid could have ignored them but that would not have been advisable as the Applicant would run the risk of the notices being declared valid by the County Court with serious consequences for the Applicant. In this case Thomson, Snell and Passmore in their letter of 24th October 2008 to Askews stated that Askews may wish to consider with their clients withdrawing the notices of claim. They were not withdrawn. The Respondents could have withdrawn their notices at that stage (and terminated their liability to costs), or taken proceedings in the County Court to establish the validity of their notices. They also could have made an application to the Leasehold Valuation Tribunal to preserve their right to a new lease, which they also failed to do. The Tribunal's practice is to accept such applications (within 6 months from the date of the counter-notice – section 48(2) of the 1993 Act) to preserve the claim and adjourn the Tribunal proceedings while the County Court makes the determination. Similarly, at a later date Wallace LLP sent a letter to the Respondents saying that Wallace LLP considered the notices of claim to be invalid and the Respondents stated at the hearing that they had not replied to that letter.

25. Wallace LLP considered that for a number of reasons the notices of claim were invalid but the Applicant could have decided to waive any invalidity and proceed under the terms of the 1993 Act, perhaps disputing just the sums to be paid, or could have decided to negotiate new leases and it could be reasonable for Wallace LLP to take time to consider whether or not the Applicant should be advised to challenge the validity of the notices of claim.

26. The Applicant also had an obligation to provide information and assistance to the competent landlord so that the counter notices could be prepared. Such "information and assistance" would surely include a valuation of the intermediate interest and all the other matters that are relevant to what has to go in the counter-notice. That might be an investigation of title, and raising the "questionnaire" that the Tribunal was shown. Hence when the Respondents argue that the intermediate landlord should do no work at all until the counter-notice is served this cannot be right as the intermediate landlords are obliged by law to communicate with the competent landlord and supply the information that is required for the counter-notice.

27. That Mr. Moss' deposit was not returned is not relevant as to the question of whether costs should be paid.

28. The Respondents would have liked to have asked Wallace LLP at what point in the process they realised that the counter-notices were invalid but, for the reasons set out above in the Tribunal's interpretation of the law, that would not reduce the costs.

29. It follows that the Applicant is entitled to claim from the Respondents the reasonable costs of the Applicant in dealing with these notices of claim.

30. The Tribunal then considered the individual items of costs being claimed and made findings of fact on a balance of probabilities. While many sums were found to be reasonable, others were reduced or removed because the Tribunal was not satisfied on the evidence presented by or on behalf of the parties that the sums claimed were reasonable. The Tribunal was mindful of Section 60(2) which provides that "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."

31. Unless otherwise stated, page numbers are references to pages in the Applicant's bundle of documents.

32. At pp14 and 15 Wallace LLP have set out their calculation of the costs the Applicant wishes to claim from Mr. Moss and Mr. Greene respectively.

33. The Respondents made a number of points as to the reasonableness or otherwise of the costs claimed. They are summarised below, together with the Tribunal's findings.

34. The Respondents submitted that Askews Solicitors had represented the Respondents and Mr. McAllan, also a lessee at Arlington House, and had submitted notices of claim for a lease extension on behalf of all three lessees. The first in time was that of Mr. McAllan which was submitted about two weeks before the others. At p65 Ms Bone in her statement states that the Applicant's Solicitors have been acting for the Applicant and other companies within the Freshwater Group of Companies for many years dealing with enfranchisement matters and that the Applicant's Solicitors are accordingly the Applicant's choice of solicitor and have the knowledge and capacity to deal with this work on their behalf. The Respondents therefore consider that Wallace LLP should have been able to spot very quickly if the notices of claim were invalid and that having come to the conclusion that Mr. McAllan's notice was invalid it would have been even easier for Wallace LLP to reach the same conclusion in respect of the Respondents' notices. The Respondents are not in a position to dispute the rate of £325 per hour for a partner in central London and £120 per hour for a trainee in central London but the knowledge and capacity of Wallace LLP to deal with enfranchisement should also mean that they would be able to decide what needed to be done and to do it more quickly and economically than solicitors less experienced in such work. Each notice was only two pages in length and the three notices were very similar. In all three claims Thanet District Council was the freeholder, the Applicant was the headlessee and the Respondents and Mr. McAllan were the underlessees. Wallace LLP know that the Applicant is the head lessee. They deal with this property regularly.

35. The Tribunal found this to be a valid point and as a result reduced from 1.2 hours to 0.75 hours the time taken to consider each notice of claim.

36. The Respondents submitted that Mr. McAllan had been asked to pay and had paid costs of £1,000 + VAT + £500 valuation + Land Registry fees £28. All three should be on the same basis. If anything Mr. McAllan's liability for costs should have been higher because Wallace LLP dealt with his notice first; making dealing with the others, when they were received, easier.

37. The Respondents understood that the fees of Thomson Snell and Passmore, Solicitors representing Thanet District Council, would be claimed because the landlord's counter notice states that Thomson Snell and Passmore are acting on behalf of the Applicant. In essence the Respondents have no objection to those costs. They should be shared equally among the three lessees (the Respondents and Mr. McAllan who has paid 1/3rd – about £1,200). The costs of Thomson, Snell and Passmore were less than those claimed by the Applicant yet it appeared to the Respondents that Thomson, Snell and Passmore had carried out more work

38. The Tribunal noted that in correspondence the costs element of the sums demanded by Wallace LLP were £1,750 + VAT from Mr. Moss and £1,500 + VAT from Mr. Greene. It is explained at p 71 that the letter to Mr. Moss contained a typographical error and that he should have been asked for £1,500 + VAT. No reason has been given for the Respondents being asked for larger sums than the sums demanded of Mr. McAllan but the Tribunal had no evidence of how Mr. McAllan's costs were calculated. Similarly, the Tribunal had no evidence of how much work had been done by Thomson, Snell and Passmore or how their costs had been calculated. The Tribunal made its determination on the evidence provided.

39. The Respondents pointed out that the copy counter notices at pp 5-12 are not dated or signed. The copies of the original counter notices received are dated 24th October 2008 and are signed. The copy counter notices produced by Wallace LLP at pp 5-12 are different in some respects to the counter-notices which were actually served. The Respondents' valuer had told them that there was a figure payable to the competent landlord but that nil was payable to the Applicant, the intermediate landlord. The Respondents submitted that any survey carried out on behalf of Thanet District Council would have determined any sums payable to both the Council and to the Applicant. Although the counter notices were served on 24th October 2008 there are charges for considering the counter notices on 27th October 2008 three days later.

40. The Tribunal found that the freeholder and the Applicant could have different claims which should be valued separately, as indicated in two of the counter-notices where there are separate figures for a sum claimed under Schedule 13. As to the date of consideration of the counter-notices, the Tribunal noted at p 62 that Ms Bone stated that "On or about 24 October 2008, the Freeholder served a Counter-Notice....". The letter from Thomson, Snell and Passmore to Askews enclosing the counter-notices is dated 24th October 2008 and indicates that it was sent on that date by fax. Without an explanation for why there should be consideration of the counter-notices after they had been served, and no explanation has been provided by or on behalf of the Applicant, the Tribunal finds that this charge for 0.8 of an hour should be removed.

41. The Respondents drew attention to one of the copy letters produced at the hearing which is a letter dated 4th September 2008 from Wallace LLP to Mr. Moss care of Askews requesting office copy entries of his title and a copy of his lease and on 10th September 2008 Askews replied to Wallace LLP enclosing office copy entries and a copy lease yet on p 14 there are charges for obtaining their own office copy entries. Similarly a letter was written on 18th September 2008 to Mr. Greene care of Askews requesting office copy entries of his title and a copy of his lease and on 3rd October 2008 Askews replied to Wallace LLP enclosing leasehold office copy entries and a copy lease yet on 15th September 2008 there are charges for obtaining leasehold office copy entries and copy leases. Wallace LLP wasted time and money obtaining something they had asked the Respondents' Solicitors to provide.

42. The Tribunal found that it was not clear why there should have been this apparent duplication of work and therefore removed from the claim against Mr. Moss the sum of £36 for the trainee obtaining office copy entries. In respect of the claim against Mr. Greene the work of the trainee is described as obtaining freehold, headleasehold and leasehold office copy entries and copy leases. The Tribunal found that only part of this work was duplicated and therefore reduced the sum of £36 to £12.

43. The Respondents pointed out that charges have been made for a number of letters and e-mails to the valuer. On p14 it appears that the valuer was instructed on 4th September 2008. The Respondents queried why further letters were written to the valuer on 9th, 12th and 24th September and an e-mail on 6th October 2008. On p15 it appears that the valuer was instructed on 18th September 2008. The Respondents queried why e-mails had been written to the valuer on 6th October 2008. Had anybody attended to represent the Applicant then this is one of the questions which the Respondents would have asked.

44. The Tribunal appreciated that there could be a need to communicate with the valuer after the initial instruction but in the absence of evidence of the need to communicate further with the valuer, the claim against Mr. Moss for £32.50 on 12th September 2008 and the claim against Mr. Greene for £32.50 on 6th October 2008 should be removed.

45.. The Respondents dispute the valuer's fees because the valuations of the three flats were done on one day 19th September 2008 and there should be a discount for doing all three on the same day. The Respondents and Mr. McAllan obtained a discount by having the three valuations carried out on the same day. Their surveyor normally charged £450 +VAT but because all three were done on the same day charged £325 + VAT for each.

46. The Tribunal had very little evidence of the work carried out by the valuer and as a result had to use its knowledge and experience of such matters to arrive at a reasonable fee. In doing this the Tribunal bore in mind that the inspection of the three flats had been carried out on one day and that there would be many considerations

which would be the same or similar in respect of the three flats. As a result the Tribunal determined that a reasonable fee in respect of each of the Respondents' flats would be £450.

47. The Respondents pointed out that all three claims were treated individually but that some fees were individual and others were joint.

48. The Tribunal was not satisfied that the sum claimed from Mr. Moss on 6th October 2008 for preparing an e-mail to client was reasonable as on the same date there was a claim for £10.73 for preparing an e-mail to client.

49. At p14 the total legal fees claimed from Mr. Moss are stated to be £1,574.53. As a result of the Tribunal's findings deductions totalling £507.25 were made leaving £1,067.28 plus VAT of £186.77 making a total of £1,254.05.

50. At p15 the total legal fees claimed from Mr. Greene are stated to be £1,530.03. As a result of the Tribunal's findings deductions totalling £462.75 were made leaving £1,067.28 plus VAT of £186.77 making a total of £1,254.05.

R.Norman
Chairman
15th March 2010