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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION IN RELATION TO AN APPLICATION FOR A LEASE EXTENSION UNDER THE LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993

Case Reference:	LON/00AM/OLR/2012/0332
Premises:	Lower Flat, 16A Beatty Road, London N16 8EB

Applicants:	Jonathan Cheifetz and Gesine Garz
First Respondent:	Demetrous Kleopa
Second Respondent:	John Baron
Leasehold Valuation Tribunal:	Mr P. Korn
Date of decision:	6th August 2012

BACKGROUND

1. The Applicants as tenants seek a new lease of the Premises pursuant to the relevant provisions of the Leasehold Reform, Housing and Urban Development Act 1993 ("**the 1993 Act**").

2. The Applicants served an initial notice on the Respondents under section 42 of the 1993 Act but no counter-notice was served on them by the Respondents. The Applicants later discovered that, whilst the First Respondent could be traced, the Second Respondent could not and therefore appeared to be a landlord who "cannot be found" for the purposes of section 50 of the 1993 Act. The Applicants therefore applied to the West London County Court on 10th January 2012 for a vesting order.

3. On being, and expressing itself, satisfied that all relevant notices had been served the West London County Court transferred the matter to the Leasehold Valuation Tribunal for a determination of the terms of the new lease including the premium payable by an order of Deputy District Judge Walder dated 20th March 2012. The Court added that the premium deemed payable and any costs shall be appointed 50% to the first defendant (i.e. the First Respondent) and 50% payable into court.

4. The Tribunal issued Directions on 12th April 2012, which included directions allowing the First Respondent the option of calling evidence in relation to the valuation issues. Ringley Legal on behalf of the Applicants wrote to the Tribunal on 17th April 2012 submitting that the First Respondent should not be entitled to influence the valuation. The Tribunal decided to list this issue for a preliminary determination (with no oral hearing) and invited the parties to make written submissions on this issue.

5. In their written submissions on behalf of the Applicants, as well as addressing the question of whether the First Respondent should be entitled to influence the valuation Ringley Legal also submitted that the First Respondent should not be entitled to recover any costs incurred in connection with the new lease under section 60 of the 1993 Act.

6. At the preliminary determination the Tribunal determined that the First Respondent was not entitled to influence the valuation. In relation to the separate issue of the First Respondent's costs, the Tribunal considered that the First Respondent was entitled to more notice of this particular challenge and therefore the Tribunal issued further directions inviting the parties to make written submissions on this specific point.

7. Since the date of that preliminary determination the Applicants and the First Respondent have made written submissions on the issue of the First Respondent's costs and they have also settled the terms of the new lease between them. In addition, the Applicants have submitted a Valuation Report from Ringley Chartered Surveyors in relation to the premium considered to be payable.

8. The Applicants have included with the joint bundle of submissions a sheet headed "Brief Summary of Issues In Dispute" and it contains three bullet points. The first bullet point refers to the issue of whether the Applicants should be liable for the First Respondent's costs under section 60 of the 1993 Act. The second bullet point states that the First Respondent has failed to provide written submissions, which may have been true at one point but is no longer the case and in any event is not an "issue in dispute" for the Tribunal to determine. The third bullet point states that no counter-notice was submitted in response to the Applicants' section 42 notice, which whilst true is not disputed and therefore again is not "an issue in dispute".

9. It would therefore seem that the only issue in dispute is the issue of the First Respondent's costs, although some brief comments will be made below regarding the "terms of the new lease, including the premium payable", these being matters referred to the Tribunal by the County Court for a determination.

PREMIUM PAYABLE

10. The Tribunal has already made a preliminary determination that the First Respondent is not entitled to submit valuation evidence. The Applicants have submitted valuation evidence in the form of a Valuation Report dated 23rd July 2012 prepared by Ringleys Chartered Surveyors. The Report is stated to have been carried out in accordance with the Practice Statements in the RICS Appraisal and Valuation Manual and the author of the Report confirms that he is independent of the interested parties. It is disappointing that he has failed to sign the Report, but the Tribunal considers that it would be disproportionate to disallow or ignore the Report on this basis.

11. Section 49 of the 1993 Act envisages a degree of discretion on the part of a court or a tribunal in relation to applications made by a tenant in circumstances where the landlord has failed to give a counter-notice. However, the Valuation Report has been properly compiled by a registered valuer with appropriate qualifications acting as an independent expert and the Tribunal does not consider it has any proper basis to question either his independence or his expertise. Therefore, the Tribunal confirms the premium at £13,577.

LEASE TERMS

12. The lease terms have been agreed between the Applicants and the First Respondent. Whilst the terms have not been agreed by the Second Respondent this is because he is a missing landlord. Although it might therefore be argued that the lease terms are not irrevocably agreed between the parties and that therefore the Tribunal has jurisdiction to interfere with the lease terms if it considers it appropriate to do, the Tribunal does not consider that it has any proper basis to do so and therefore the lease terms as agreed between the Applicants and the First Respondent are confirmed. This is without

prejudice to any continuing application of the provisions of section 50 of the 1993 Act to the missing landlord.

FIRST RESPONDENT'S SUBMISSIONS ON COSTS ISSUE

13. The First Respondent's solicitors, in written submissions, note the terms of the County Court's Order dated 20th March 2012 (this being the date in the top right corner of the Order, there being two separate dates). Paragraph 2 of the Order states that *"The premium deemed payable and any costs shall be appointed 50% to the [First Respondent] and 50% payable into court"*, and in their submission this constitutes an order to the Applicants to pay the First Respondent's costs.

14. The First Respondent's solicitors also argue that the First Respondent has incurred costs which would not have been incurred if the Applicants had not served a section 42 notice and that therefore the First Respondent will be severely prejudiced if he cannot recover his costs, particularly as the First Respondent has acted helpfully throughout. They further argue that to disallow his costs is equivalent to stating that he should have simply ignored the section 42 notice and subsequent proceedings. In addition, he has been required to comply with directions, and so again it would be unfair then to disallow his costs of doing so.

15. Furthermore, the First Respondent's solicitors submit (albeit without detailed argument) that the definition of "relevant person" in sub-section 60(6) of the1993 Act is wide enough to allow the First Respondent to be categorised as a relevant person for these purposes, and section 60 does not state that costs are only payable if a counter-notice is served.

APPLICANTS' SUBMISSIONS ON COSTS ISSUE

16. The Applicants' solicitors submit that as one of the freeholders is missing and no counter-notice was served and a vesting order has been made, the standard missing landlord approach should be taken.

17. Specifically as regards the definition of "relevant person", this cross-refers to the definition of "landlord" in sub-section 40. Sub-section 40(1) states that *" 'the landlord' ... means the person who is the owner of that interest in the flat which for the time being ... is either a freehold or a leasehold interest whose duration is such as to enable that person to grant a new lease ..."*. In their submission, the First Respondent is not "the owner of that interest" and nor is he able "to grant a new lease" because he is not the sole freeholder and cannot therefore grant the lease by himself.

18. The Applicants' solicitors further submit that, in any event, the First Respondent's costs are unreasonable in the circumstances. The relevant parts of sub-section 60(1) provide as follows:-

"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 the fixing of the premium or any other amount payable by virtue of Schedule 13 ...;

(c) *the grant of a new lease ...".*

19. Based on the wording of sub-section 60(1) quoted above, their argument is that the First Respondent's solicitors knew that they did not represent both Respondents and therefore that the First Respondent was unable to influence the claim. In the absence of a counter-notice the default process is such that the claim is based only on the Applicants' notice. Therefore, as the First Respondent was not in a position to contest the validity of the notice it was not reasonable for him to incur any costs.

TRIBUNAL'S ANALYSIS ON COSTS ISSUE

20. Regarding the wording of the Court Order, the Tribunal does not accept that the words *"The premium deemed payable and any costs shall be appointed 50% to the [First Respondent] and 50% payable into court"* constitute an Order for the Applicants to pay the First Respondent's costs. The phrase "any costs" must allow for the possibility of there not being any, and in the Tribunal's view a more reasonable interpretation of this phrase is that it means that costs will be split in the same way as the premium **to the extent (if at all) that costs are found to be payable.**

21. As regards the argument that the First Respondent would suffer prejudice if not awarded costs, whilst this is self-evidently true it does not in principle seem to the Tribunal to be a sufficient ground by itself for the Tribunal to award costs which would not otherwise legally be payable. Although there might exist cases in which the degree of prejudice could test this principle, the First Respondent has failed to demonstrate that this is such a case, and even if he were to do so the decision to award costs in such a case might only be available to a higher court.

22. However, there are other points to consider as well, including the meaning of "relevant person". The Applicants argue that the First Respondent is not a "relevant person" for the purposes of section 60 of the 1993 Act, but having considered their arguments on this point the Tribunal is not convinced by them, for the simple reason that in the

Tribunal's view the Applicants are asking themselves the wrong question. It is true that the First Respondent is not by himself the landlord as defined in sub-section 40(1) in that he is not by himself "the person who is the owner of that interest ... whose duration is such as to enable that person to grant a new lease". However, this seems to the Tribunal to be an artificial way of looking at the issue.

23. It is arguable that when the relevant parliamentary draughtsmen drafted this section of the 1993 Act they did not have foremost in their minds the case of joint landlords, one of whom was missing and one of whom was not. However, the intention of section 60, in the light of the definition of "landlord" in section 40, seems to the Tribunal to be that the reversioners are entitled to recover their costs to the extent that they relate to the tasks set out in paragraphs (a) to (c) of sub-section 60(1) and to the extent that the costs are reasonable.

24. It seems to the Tribunal that the costs of the "landlord" for these purposes are the costs of the First Respondent plus the costs of the Second Respondent. Obviously, as the Second Respondent is a missing landlord (or part landlord) his costs are zero. If the First and Second Respondents were both traceable then the Applicants would expect to pay both of their costs, albeit that it is highly likely that it would just be one set of costs unless they could justify instructing separate legal advisers. Indeed, if for whatever reason the Second Respondent obtained separate pro bono advice, the Applicants would be very hard-pressed to argue that they should not pay the First Respondent's costs simply on the basis that the First Respondent was not by himself the landlord.

25. As regards the details of paragraphs (a) to (c) of sub-section 60(1), the Tribunal considers that here the Applicants are on slightly stronger ground. It has been established that the First Respondent is not entitled to influence the valuation and therefore the Tribunal agrees that the First Respondent is not entitled to recover its costs to the extent that they relate to valuation issues. However, as regards investigation of the Applicants' right to a new lease, to the extent that this investigation was reasonably undertaken the Tribunal fails to see why the reasonable cost should not be recoverable. As the First Respondent points out, section 60 does not state that costs are only recoverable if a counter-notice has been served.

26. As regards the grant of the new lease itself (referred to as a possible cost item in paragraph (c) of sub-section 60(1)), the Applicants have not argued – or at least have not argued expressly – that the First Respondent is not entitled to be involved in the process of agreeing and completing the lease. It therefore seems to the Tribunal that the First Respondent is entitled to recover his reasonable costs associated with this as well.

27. It is noted that the Tribunal does not seem to have been provided with either a figure for the total costs being sought by the First Respondent

under section 60 or a breakdown of those costs. In the circumstances, and in the interests of proportionality, the parties are strongly urged to try to agree a figure between them, on the basis that the amount recoverable is determined by the Tribunal to be the First Respondent's reasonable costs of and incidental to the matters set out in paragraphs (a) and (c) of sub-section 60(1) of the 1993 Act. If the parties are unable to agree a figure between themselves then each will need to make further written submissions to the Tribunal on quantum.

DECISION

28. The premium payable is £13,577. The terms of the lease have been agreed between the Applicants and the First Respondent and the Tribunal does not seek to disturb that agreement.

29. The First Respondent's reasonable costs of and incidental to the matters set out in paragraphs (a) and (c) of sub-section 60(1) of the 1993 Act are payable by the Applicants.

30. The Applicants and the First Respondent shall endeavour to agree the quantum of the First Respondent's costs between them and the Applicants shall by no later than **27th August 2012** notify the Tribunal either (a) of the details of that which has been agreed or (b) of the fact that an agreement has not been reached.

31. If no agreement on quantum has been reached by 27th August 2012 the First Respondent shall by **10th September 2012** send to the Applicants – with two copies to the Tribunal – a detailed breakdown of its costs and its written submissions as to how much is recoverable from the Applicants and on what basis. The Applicants shall then by **24th September 2012** send to the First Respondent – with two copies to the Tribunal – its written submissions in response.

32. The Tribunal shall – if no agreement has been reached on quantum – make a 'paper' determination on the issue of quantum (without an oral hearing) during the week beginning **8th October 2012**.

Name:  **Date:** 6th August 2012

P. Korn