4274

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

1st Case Reference	:	**BIR/00CR/0C9/2016/0010**
2nd Case Reference	:	**BIR/00CR/0C9/2016/0011**
3rd Case Reference	:	**BIR/00CR/0C9/2016/0012**
1st Property	:	**6 Netherend Lane & garage, Homer Hill, Halesowen, West Midlands B63 2PU**
2nd Property	:	**169 Apperley Way & garage, Homer Hill, Halesowen, West Midlands B63 2XS**
3rd Property	:	**85 Apperley Way & car parking space, Homer Hill, Halesowen, West Midlands B63 2PY**
Applicant	:	**Mr M P P Kenna**
Representative	:	**Lawrence & Wightman Chartered Surveyors Mrs S Abel MRICS**
Respondent	:	**Sinclair Gardens Investments (Kensington) Limited**
Representative	:	**W.H. Matthews & Co. Solicitors Mr R Lawrence Solicitor**
Type of Application	:	**Application under Section 91(2) (d) of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal Members	:	**Judge T N Jackson Mr N Wint FRICS**
Date and venue of Determination	:	**Paper determination 12th July 2016 at Birmingham**
Date of Decision	:	**10th August 2016**

DECISION

The Tribunal determines that the reasonable legal costs of the Respondent in the first case, 6 Netherend Lane, in dealing with the matters in section 60 of the Act are **£512 plus disbursements and VAT (if applicable).**

The Tribunal determines that the reasonable legal costs of the Respondent in the second case, 169 Apperley Way, in dealing with the matters in section 60 of the Act are **£512 plus disbursements and VAT (if applicable)**.

The Tribunal determines that the reasonable legal costs of the Respondent in the third case, 85 Apperley Way, in dealing with the matters in section 60 of the Act are **£512 plus disbursements and VAT (if applicable)**.

Reasons for Decision

Introduction

1. This is a matter that deals with three separate applications under section 91(2) (d) of the Leasehold Reform, Housing and Urban Development Act 1993, ("the Act"), for the determination of the freeholder's reasonable legal costs.

2. The Tribunal received separate Applications in respect of 6 Netherend Lane Homer Hill Halesowen B63 2PU, 169 Apperley Way Homer Hill Halesowen B63 2XS, and 85 Apperley Way Homer Hill Halesowen B63 2PY, all dated 29th March 2016.

3. Directions were issued by the Tribunal in relation to all three matters on 7th April 2016. All matters were listed to be heard on the same day and, due to the fact that the properties are located in the same area, the parties and their representatives are the same and the issues in dispute are the same, the cases have been considered and determined together.

4. Submissions and counter submissions were received from both parties.

5. The Tribunal understands that the terms of the acquisition and the valuer's costs have been agreed but that the legal costs are in dispute.

6. The parties are agreed that the Tribunal may determine the matters in issue on the papers submitted without the need for an oral hearing.

The Law

7. The relevant law is set out below:

Leasehold Reform, Housing and Urban Development Act 1993
Section 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).....

(4) .....

(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".

Applicant's Submissions

8. A Statement together with supporting evidence was forwarded to the Tribunal by Ms Abel, a partner with Lawrence & Wightman Chartered Surveyors.

9. Ms Abel confirmed that both parties agreed that the leaseholder was responsible for the freeholder's reasonable costs under section 60 of the Act and that the main points in dispute were as to whether the items charged to the leaseholder were items that could be charged under section 60, the amount of time spent on the items charged and the

hourly rate charged and whether these were reasonable in the context of the particular cases.

10. She refers to the case of *Drax v Lawn Court Freehold Limited [2010] UKUT 81(LC)* which stated that costs should be reasonable and be incurred in pursuance of the Section 13 Notice. She submitted that Section 33 could easily be translated to Section 60 and lease extensions.

11. Ms Abel states that the Respondent was the proprietor of the freehold reversion of over 200 registered leasehold interests on the Estate in which the three properties were situated. Since becoming the freeholder in 1988, the Respondent had granted 30 lease extensions, 21 of which had been under the 1993 Act. Ms Abel forwarded a copy of the freehold title detailing the same. She submits that the Respondent's legal representatives are the retained solicitors for the freeholder and had dealt with many hundreds of cases on their behalf.

12. She states that Mr Lawrence, the solicitor with conduct of these cases, had confirmed in his submission that he had acted on behalf of the Respondent with over 270 enfranchisements or lease extensions since 2013. She submits that the legal firm and Mr Lawrence himself should be considered as experts in this area and therefore this type of work should be considered as routine. She argues that Mr Lawrence would likely have a standard form of instructions and standard letters when dealing with a 1993 Act Notice.

13. The original leases drafted on the Estate are of a standard format and Ms Abel submits that the Respondent and its solicitors will have a standard form of draft lease extension, given that a number of lease extensions have already been drafted.

14. Ms Abel submits that a new lease extension should be extremely straight forward for an experienced solicitor and that the work could largely be carried out by an assistant or trainee particularly if it is repetitive work dealing with several cases at a time. In this case, each of the three claims was being made by the same leaseholder who had instructed one solicitor to deal with all three matters. Ms Abel states that 85 and 169 Apperley Way completed simultaneously, whereas 6 Netherend Lane completed shortly thereafter due to a delay in receiving consent from the lender , but that this required no additional work in respect of the Respondent's solicitor's costs.

15. Ms Abel submits quotes from two solicitors firms, one based in Coventry and one based in Kidderminster, in support of her argument that the amount of time spent in each case was not reasonable. The costs for lease extensions under the Act, once terms were agreed, were quoted as £587.50 (26 units of 6 minutes) by the former firm and 2 hours at a partner hourly charge out rate of between £200 and £235 or a paralegal hourly rate of £150 by the latter firm.

16. In relation to charging rates, Ms Abel submits that all the work should have been carried out by a Grade B solicitor at a charging rate of £192

per hour. Ms Abel provided a breakdown of what she considered to be a reasonable time in units and reasonable costs in relation to each case.

17. Ms Abel submits that the scope of the legislation does not support the Respondent's solicitor instructing a valuer or reviewing the valuation as that is for the client to do. She also submits that the legislation does not allow any costs to be claimed in connection with drafting and issuing a Counter Notice. She submits that the freeholder's solicitor does not need to look up the leaseholder's title as it is produced to him.

18. Ms Abel refers to a number of cases from this Tribunal, one of which related to properties on the same Estate where the same arguments had been submitted by herself and the Respondent's representative. This was 198 Apperley Way Homer Hill (BIR/00CR/OC9/2013/0010; 29 Wiltshire Drive Homer Hill (BIR/00CR/OC9/2014/0001).

19. She refers to further determinations of this Tribunal involving different Respondents which, she says, give examples of the number of units charged, the reasonableness of costs and the issue of the use of partner time as opposed to Assistant's time.

20. Ms Abel contends that the reasonable legal costs under section 60 of the Act in relation to each property should be £480 (plus VAT if applicable and disbursements), based on each matter taking 27 units of time (each unit of time equating to 6 minutes) and based on a Grade B hourly rate of £192.

Respondent's Submissions

21. The Respondent, through Mr Lawrence, submitted a Statement with supporting evidence. The Statement included a schedule, detailing the time spent in relation to investigating the title and the grant of a new lease.

22. Mr Lawrence refers to several First Tier Tribunal decisions some of which involve the Respondent. He also refers to several decisions of the Upper Tribunal some of which also involve the Respondent.

23. The Respondent is the owner of a very significant number of freehold reversions. Mr Lawrence states that it is the Respondent's core business. Mr Lawrence asserts that the charging rate of £250 per hour is reasonable as, under the Act, the Respondent was not required to find the cheapest or cheaper solicitor but only to give instructions as it would ordinarily give if it was going to bear the cost itself.

24. Mr Lawrence refers to the decision in 1-30 Hampden Court London LON/ENF/785/02 where Professor Farrand QC had stated at paragraph 27, that expenditure by the landlord is recoverable from the nominee purchaser subject only to the requirement of reasonableness. Mr Lawrence asserts that the **only** test in section 60 as to the reasonableness of the landlord's indemnity costs is whether the landlord would have paid the costs if it was paying them personally.

25. Mr Lawrence submitted a letter on letter headed paper from the Respondent, dated 15th April 2016, which appears to confirm the Respondent's agreement to costs of at least £1380 including VAT and an hourly charge out rate of £250. Mr Lawrence says that costs of £1500 plus VAT have been considered reasonable in some previous decisions of the Leasehold Valuation Tribunal.

26. Mr Lawrence argues that, in the absence of any proof to confirm that the Respondent would not pay their costs, the costs should be regarded as reasonably incurred and contends that the costs come within a band of reasonableness of costs for such matters.

27. Mr Lawrence submits that cases of this nature are complex and refers to a Zurich pamphlet in which the professional indemnity insurers describe the process as "an extremely complex task with numerous procedural requirements and time limits to get to grips with".

28. Mr Lawrence gives a very detailed account of the services provided in dealing with this type of matter. In relation to the valuation report, Mr Lawrence states that the valuer has to be fully instructed and that they work in tandem. Mr Lawrence states that his client would expect its solicitor to read the expert's report and offer his observations. Mr Lawrence also refers to the Civil Procedure Rules Part 35 (Assessors and Experts) which were appended to his statement.

29. Mr Lawrence submits that Ms Abel has not followed the case of *Drax* correctly and that the hourly rate in that case was significantly in excess of the hourly rate proposed by the Applicant.

30. Mr Lawrence disputes the amounts charged by the solicitors referred to in Ms Abel's statement and notes that the firms give no detailed analysis of the services provided to allow a comparison to be made.

31. To take account of the costs of contemporaneous Notices of Claim, Mr Lawrence states that the legal costs claimed are based on the average of £1500 for a stand-alone Notice of Claim (having deducted out some letters) and £975 , (a discount of over 23%), for each subsequent Notice of Claim, which equates to £1,150 per Notice of Claim. He provides a breakdown of the services provided on a contemporaneous Notice, which totals 39 units.

32. Mr Lawrence submits that the legal costs of £1,150 (plus VAT and disbursements) for each case are reasonable legal costs under section 60 of the Act.

The Tribunal's Deliberations

33. Previous decisions of other First Tier Tribunals are not binding on this Tribunal. The Tribunal considers that each decision turns on the facts of the particular lease extension.

34. The Tribunal has had regard to the Upper Tribunal decisions referred to in the parties submissions namely:-

Drax v Lawn Court Freehold Limited [2010] UKUT 81(LC)
Metropolitan Property v Moss [2013] UKUT 0415 (LC)
Appeal from a decision of the London Rent Assessment Panel LVT by Arora [2013] UKUT 0362 (LC)
Sinclair Garden Investments (Kensington) Limited v Wisbey [2016] UKUT 0201 (LC)
Sidewalk Properties Limited v Twinn [2015] UKUT 0122 (LC)
Appeal from a decision of Midland Rent Assessment Panel LVT by Sinclair Garden Investments (Kensington) Limited [2014] UKUT 0079 (LC)

Interpretation of section 60(2)

35. The Tribunal considered the wording in section 60 (2) of the Act which clearly states that '*...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 such costs*'.

36. The Tribunal considers that this phrase does not, as Mr Lawrence asserts, state that the Applicant should be responsible for **any** costs that a landlord's solicitor should charge so long as evidence is produced that the landlord would pay those costs. The Tribunal does not agree with Mr Lawrence's interpretation of paragraph 10 of *Metropolitan Property v Moss [2013] UKUT 0415 (LC).*

Deputy President Rodger QC said:-

"*On the other hand, the statute is not intended to provide an opportunity for the professional advisers of landlords to charge excessive fees, nor are tenants expected to pay landlord's costs of resolving disputes over terms of acquisition of new leases. Thus the sums payable by a tenant under section 60 are restricted to those incurred by the landlord within the three categories identified in section 60(1) and are further restricted by the requirement that only reasonable costs are payable. Section 60(2) provides a ceiling by reference to the reasonable expectations of a person paying the costs from their own pocket; the costs of work which would not have been incurred, or which would have been carried out more cheaply, if the landlord was personally liable to meet them are not reasonable costs which the tenant is required to pay*" (paragraph 10).

37. The use of the word "ceiling" is telling. The inclusion by Parliament of the words '*only*' sets this as a ceiling as to the amount of costs that would be payable. In addition, the repetition of the reasonable element in relation to '*costs in respect of such services*' again requires the Tribunal not to simply accept the Respondent's agreement to pay, but

requires the Tribunal to consider whether such costs, (even if agreed), were reasonable. If this were not the case, the provisions in respect of the Tribunal's jurisdiction under section 91 of the Act to determine the costs would not have been required.

38. Further, even if the Tribunal had accepted Mr Lawrence's interpretation, which it does not, the Tribunal considers that the letter submitted by Mr Lawrence from the Respondent agreeing to their Representative's costs is of little evidential value as it does not detail by whom it has been signed and the signature is illegible.

39. Therefore, whilst accepting that the Respondent does not have to make use of the cheapest solicitors, the costs incurred, (even if agreed by the Respondent) have to be reasonable in all the circumstances of the case.

40. The Tribunal has considered all the written evidence submitted by the parties and has made its determination by firstly considering which services would be recoverable under Section 60, secondly by considering the time that should reasonably be taken to deal with those matters and finally the reasonable charge - out rate for the work carried out.

Items recoverable under Section 60

41. Section 60 of the Act is quite clear in its wording as to the services. It includes '*any investigation reasonably undertaken of the tenant's right to a new lease*' and '*the grant of a new lease*' together with reasonable costs which may be '*of and incidental to*' to these matters.

Counter Notice

42. The Tribunal has had regard to the Upper Tribunal decisions of *Drax v Lawn Court Freehold Limited [2010] UKUT 81(LC)* (paragraph 28) and *Sinclair Garden Investments (Kensington) Limited v Wisbey [2016] UKUT 0201 (LC)* (paragraph 24). The Tribunal does not see any reason to depart from the decisions above and determines that the costs of the Counter-Notice are recoverable under section 60 (1) provided they are reasonable.

Valuer

43. The question of instructing a valuer, considering the valuation and discussing the same with the client and the valuer has been considered in the cases of *Sidewalk properties Ltd v Twinn [2015] UKUT 0122 (LC)* and *Sinclair Gardens Investments (Kensington) Limited [2016] UKUT 0203 (LC)*. It was determined in *Sidewalk Properties* and agreed by the Upper Tribunal in *Sinclair Gardens Investments* that the instructing of the valuer (as opposed to the later consideration of the valuer's report) was an administrative rather than a professional task for which no separate time charge could reasonably be made.

44. Both cases held that considering the valuation report is a non-administrative task incidental to the valuation and, therefore the costs are properly recoverable providing that they are reasonable. The Tribunal agrees with that view and determines that the costs of considering the valuer's report falls within section 60 (1).

45. Paragraph 38 of *Sidewalk Properties* comments that the work involved in considering and advising on a report provided by an experienced surveyor of a very modest property should not be too time consuming. In that case, 12 minutes to advise on a single report and to take instructions was said to be reasonable.

"However, what does not seem reasonable is that the same time should have been spent considering and advising on each of the seven reports. There is no reason to doubt that the reports were very similar indeed, as the flats were very similar and the valuation was identical in each case. All that was required, having read the first report, was for the solicitor to satisfy himself that that was the case, which could be done almost at a glance. A generous allowance for reading and considering all seven reports would therefore be 20 minutes" (paragraph 38).

This point is relevant to consideration of time taken in these cases which is considered in paragraph 56 below.

Office Copy Entries

46. Whilst the Tribunal accepts that a request for deduction of title is sent and would be provided by the leaseholder's solicitor, the Respondent's solicitor would still be required to consider the same. The Tribunal considers that the costs are of the investigation reasonably undertaken of the tenant's right to a new lease and are therefore recoverable under section 60.

Attend to completion

47. The Tribunal considers that the task of completing the transaction of the lease extension are a necessary part of the grant of a new lease and are costs "of the grant of a new lease" and are recoverable under section 60 if they are reasonable.

Time taken

48. Ms Abel sets out, in Paragraph 4.19 of her submission (p10), a breakdown as to what she considers to be a reasonable amount of time to be taken on each of these cases namely 27 units which, at her suggested hourly rate of £192 equates to £480 per case. However, there is a mathematical error as the units in the breakdown total 25 rather than 27.

49. Mr Lawrence sets out, in paragraph 8.2 of Appendix H of his submission (p72), a breakdown of the time taken on each subsequent

contemporaneous Notice of Claim which totals 39 units which, at his suggested hourly rate of £250 equates to £975. The cost of the first Notice of claim is based on an average of £1500 for a stand-alone Notice.

50. A lease extension under the Act is now a common transaction. Whilst issues of principle requiring highly specialist knowledge sometimes arise, unless there is an unusual aspect to any particular transaction, lease extensions should be regarded as repetitive routine transactions. The Tribunal for its part, as an expert Tribunal, is fully aware of the steps that need to be taken and with this knowledge, it considers that, in the absence of any unusual or specific complexities, the legal work in respect of a stand-alone Notice of Claim is largely repetitive in each case and could reasonably be completed between 3 and 4 hours by an experienced practitioner.

51. In order to assess the reasonableness of the time taken, the Tribunal needs to understand the issues at large in the particular transaction.

52. In these three cases, it is the same leaseholder and he is using the same solicitor for all three cases. All three Notices of Claim are identical regarding the premium, the proposed terms of the new lease and all have the same date for a response by Counter Notice. All three Notices were issued on the same date. The lease the subject of the extension in each case is in the same format in each case.

53. The three Counter Notices issued by the Respondent are identical in terms other than the addresses and the premiums to be paid, (although two are dated 23rd November 2015 and one 25th November 2015). All three Counter Notices propose one variation to the terms of the demise in Clause 1 of the Lease and the wording of the variation is identical in all three cases. Two of the cases completed simultaneously whilst the third completed shortly thereafter.

54. The Tribunal does not consider, on the evidence presented, that any of the three cases is particularly complex and no evidence has been presented that there were any particular difficulties. Both parties acknowledge that a significant number of transactions had previously taken place on this Estate, which undoubtedly would have an effect on the time spent.

55. The Tribunal considers that some of the work carried out by Mr Lawrence in relation to the breakdown given for each case appears to be repetitious with, for example, units charged on more than one occasion for obtaining instructions. Whilst it is reasonable for a solicitor to keep their client informed about progress and to seek instructions as necessary, the Tribunal considers that, in the absence of any particular difficulties, an excessive amount of time has been charged. Further, on each case, 3 units are charged for considering the validity of the Notice and a further 4 units charged for researching questions regarding the tenant's right to a new lease. The Tribunal

consider this to involve some duplication and considers 7 units for the combined activity to be excessive and unreasonable.

56. Mr Lawrence's states that a discount has been given to reflect the contemporaneous Notices of Claim and yet the description in his breakdown of each element of the work explicitly states that each case is dealt with separately. There does not appear to be any recognition in the units allocated to the tasks of the fact that there may be duplication of tasks or that some tasks may take less time because they are contemporaneous Notices. For example, considering the valuer's report and discussing the same with the client is noted as 2 units for each case and yet there is little to distinguish the properties. Having read the first valuation report, the Tribunal considers that consideration of the reports for the remaining two Notices should have taken considerably less time, as referred to in paragraph 45 above, where it was suggested in that case that it would be reasonable to read seven valuation reports in 20 minutes. The Tribunal agrees with that principle in relation to these three cases. The same principle would apply to other tasks e.g. initial consideration of the Lease and drafting any proposed new terms, as the lease in all three cases is in a standard format

57. The Tribunal notes that, as expressly described in the breakdown, each contemporaneous Notice dealt with separately takes 39 units, and yet a stand- alone Notice is charged at £1500, which equates to 60 units. Mr Lawrence's submission does not adequately explain the reason for the significant difference between the two and he has not provided a breakdown of the costs of a stand -alone Notice. The Tribunal notes that £1500 has been allowed in other cases involving this firm of solicitors but those decisions appear to this Tribunal to be based on a broad brush approach rather than a detailed breakdown of the time spent.

58. The Tribunal considers that, in relation to all three matters and based on the evidence submitted in these particular cases and the factors described at paragraph 52 to 54 above, 80 units of time in total for the three cases is a reasonable amount of time. This splits into 30 units for the first case and 25 units for each of the subsequent Notices

Chargeable Rate

59. The Tribunal considered in detail the submissions by both parties as to the charge out rate.

60. The Tribunal would not normally regard the work involved in these cases as requiring a Grade A fee earner. Whilst the Tribunal agrees that the legislation involved can be considered to be complex, it should not be complex to a firm which has or a solicitor who has experience in this area of work. The fact that Mr Lawrence has himself been instructed in 270 enfranchisements or lease extensions since 2013 for this particular freeholder indicates the regularity with which this type of work is carried out for the Respondent and therefore the substantial experience and expertise available.

61. The Tribunal has not seen any evidence of any particularly complex issues that would justify the requirement to have a Grade A fee earner rather than a Grade B fee earner.

62. Whilst accepting that the Solicitors Guideline Hourly Rates was published in 2010 and relate to summary assessment of costs, the Tribunal consider them to be a useful starting point when considering hourly rates. The Tribunal notes that W.H Matthews & Co. Solicitors, appear to be located (based on their postcode) in Outer London for which the Solicitors' guideline hourly rates for a Grade B fee earner (London 3) range between £172 to £229. The Grade B hourly rate for solicitors outside London, in National Grade 1, is £192. £192 falls within the suggested range, and using its expert knowledge, the Tribunal determines that £192 is a reasonable hourly rate for the work required in these particular cases.

Decision

63. Taking all of this into account, the Tribunal considers that, in relation to all matters and based on the evidence submitted in these particular cases, 80 units of time in total for the three cases is a reasonable amount of time for the work referred to, and in dispute, under section 60 of the Act. The Tribunal considers that it would be reasonable for the work in all of these cases to have been carried out by a Grade B solicitor at a rate of £192 per hour. As the Respondent in its submission has averaged out the costs over the three cases, the Tribunal has adopted the same approach which results in costs of £512 per case (i.e.80 units of 6 minutes each divided by 60 minutes and multiplied by £192 then divided by the three cases).

64. If the Respondent is registered for VAT purposes, it will be able to recover the VAT on those fees because those services will have been supplied to the Respondent, not the Applicants. In such circumstances VAT will not be payable by the Applicants.

Appeal Provisions

65. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

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Judge T N Jackson