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THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 60 OF THE LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993

Reference: LON/OOAG/OLR/2007/0948

Premises: Ground Floor Flat
21 Inglewood Road
London NW6 1QT

Applicant: Mr M.A. Hellen (Tenant)
Represented by: Pro-legal Limited

Respondent: Norstown Properties Limited (Landlord)
Represented by: Mr J. Fattal, Director

Appearances:
For the Applicant: Ms N. Matthews of Counsel instructed by Pro-legal Limited.
For the Respondent: Mr J. Fattal, Director of Norstown Properties Limited.
Also present: Mr M. Hellen, Applicant and Ms H. Abrahane, part-time secretary to Mr Fattal.

Date of Application: 21st August 2007
Date of Hearing: 22nd April 2009
Leasehold Valuation Tribunal:
Miss S.J. Dowell BA (Hons)
Mr N. Martindale FRICS

Date of Decision: 21st May 2009

The application

1. This is an application under section 60 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") for a determination of the landlord's costs payable by the tenant pursuant to a notice of claim under section 42 of the Act dated 1st January 2007. The tenant's application to the tribunal is dated 21st August 2007 which was to determine the premium payable for the grant of a new lease and to determine section 60 costs. The Application before the tribunal is purely to determine section 60 costs the sums claimed being (i) legal costs of £250 plus VAT, (ii) surveyor's costs of £600 plus VAT, and (iii) legal costs "for approving lease under statutory leasehold extension" £500 plus VAT.

Issues

2. (1) The Applicant seeks a determination as to whether the Respondent is entitled to section 60 costs as claimed or at all.

   (2) The Applicant seeks an order under paragraph 10 Schedule 12 Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent should pay costs up to a maximum of £500 on the grounds that he has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

The statutory framework

3. 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) 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 a leasehold valuation 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.

Background

4. On 1st February 2007 the Applicant served a notice under section 42 of the Act claiming an extension of the lease for the property known as Flat 1, 21 Inglewood Road, London NW6 1QT. The date for service of the counter notice was 10th April 2007. On 24th April 2007 solicitors acting for the Respondent acknowledged the Applicant's right to have the lease extended on the terms set out in the notice.

5. On 15th May 2007 solicitors for the Respondent claimed that a counter notice was served by Mr J. Fattal a director of the Respondent company by hand on 1st March 2007.

6. On 21st August 2007 the Applicant applied to the leasehold valuation tribunal to have the premium and section 60 costs determined. Between December 2007 and August 2008 proceedings took place in the county court to determine a dispute as to whether the counter notice referred to in paragraph 5 above was served.

7. On 14th August 2008 Her Honour Judge Hazel Marshall QC found that the section 48 notice under the 1993 Act was not validly served by the Respondent. The county court proceedings continued regarding the validity of the notice of claim and completion of the leasehold extension. On 12th December 2008 a consent order was entered into by the parties fixing the premium at £8,800 and the Applicant agree to pay the reasonably incurred costs on the grant of the new lease under section 60(1)(c) of the Act. The order of 12th December 2008 in Central London County Court (claim no. CHY08123) between Mark Andrew Hellen and Norstown Properties Limited records that the claimant agreed to pay the defendant's reasonably incurred section 60 costs in respect of the grant of a new lease and that any dispute over the defendant's section 60 costs should be referred to the leasehold valuation tribunal for a determination.

8. On 11th February 2009 the Applicant's solicitor agreed with the Respondent's solicitor, Marshall Levine, to pay their section 60(1)(c) costs in the sum of £500 plus VAT i.e. the costs of the grant of the new lease.

9. On 24th February 2009 the Applicant wrote to the leasehold valuation tribunal to ask that the application for a determination in respect of section 60 costs be restored.

10. On 21st February 2009 the leasehold valuation tribunal gave directions for the application.

11. On 12th December 2008 the parties had agreed to complete the extension of the lease by 28th February 2009 but by that date the extension had not been completed and the Respondent refused to complete on the basis that the section 60 costs had not been settled.

12. On 9th March 2009 the Respondent wrote to the leasehold valuation tribunal requesting a full hearing.

13. By a letter dated 10th March 2009 the parties were notified by the leasehold valuation tribunal that the hearing would take place on Monday 22nd April 2009.

14. By a letter dated 13th March 2009 the Respondent notified the Applicant's solicitors that the section 60 costs which were being claimed were:

    (a) Any investigation reasonably undertaken to a tenant's right to a new lease - Howard Kennedy, solicitors fees £287.50 (section 60(1)(a) of the Act).

    (b) A 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 – invoice from RD and D Associates, £600 plus VAT (section 60(1)(b) of the Act).

    (c) The grant of a new lease – invoice from Marshall F. Levine Associates, £575 (section 60(1)(c) of the Act).

Total £1,567.50.

The Applicant's case

15. The Applicant submitted that the sum demanded for legal costs from Howard Kennedy Solicitors of £287.50 was not due from the Applicant under section 60(1)(a). The reasoning was because the counter notice purportedly served by the Respondent was not validly served. It was therefore submitted that these costs were not incurred "in pursuance of the notice" as defined by section 60(1) of the Act. Counsel relied on Mr Fattal's evidence under oath on 14th August 2008 in the county court proceedings that Howard Kennedy had been instructed after the time for service of the counter notice had expired. In addition it was submitted that the Respondent was investigating title itself and had demanded and was paid a sum of £117.50 in this respect. The final submission was that the invoice from Howard Kennedy as amended on 17th April 2009 did not provide the details of the work undertaken, the grade of fee earner and was insufficient to justify the claimed expenditure.

16. With regard to the surveyor's costs claimed under section 60(1)(b) it was submitted that these were also not in pursuance of the section 42 notice. It was further submitted that the survey was not obtained for the purpose of "fixing the premium" as the survey had been carried out on 8th May 2007, nearly a month after the date service of the counter notice expired. Further it was submitted that the invoice did not give sufficient detail of the work undertaken, the hourly rate and it was disputed that the expenditure of £600 plus VAT was justified.

17. Marshall Levine's costs of £500 plus VAT were claimed under section 60(1)(c) of the Act. Although it was accepted that it had been agreed between solicitors that this sum would be paid when agreement had been reached on 12th December 2008, it was submitted at the hearing that the grant of the new lease still had not been completed. Further it was submitted that on the basis of the telephone conversation between solicitors on 6th April 2009 that Marshall Levine no longer acted for the Respondent in any capacity and this rendered any agreement which had been made null and void. The Applicant submitted that in any event these costs had not been incurred in the

grant of the leasehold extension because the Respondent continued to refuse to complete.

18. The Applicant's Counsel relied on a leasehold valuation tribunal decision 89C *Castelnau* (LON/NL4250/05). This was relied on to support the argument that the work was carried out after the date for service of the counter notice and therefore could not come within section 60(1)(b) of the Act.

The Respondent's case

19. Mr Fattal acknowledged that when the section 42 notice was served that his company asked for a fee of £100 plus VAT but this was purely to cover administration costs and was not in respect of the costs set out in section 60(1)(a) of the Act.

20. The invoice from Howard Kennedy showed work carried by Rolfe Roseman who is a partner at Howard Kennedy. His hourly rate is £350 per hour and the work was carried out at the beginning of 2007. In fact Norstown Properties Limited had received an invoice for a sum in excess of £3,000 plus vat from Howard Kennedy for the work. Mr Fattal had enquired of Howard Kennedy how much of the work came within section 60 and asked for an amended invoice for this part of the work carried out by Howard Kennedy.

21. Mr Fattal submitted that the work carried out and payable under section 60 was not limited by the time limit for serving a counter notice. He submitted that this work did not have to be done before the counter notice was served. He submitted that in any event the value of the extension had to be determined in order to ascertain the value of the lease. He relied on the case of *The Earl of Cadogan and Others -v- 26 Cadogan Square Limited* to support his claim that the valuation in the notice of claim was unrealistic and therefore the notice itself was not valid.

22. With regard to the surveyor's fees, Mr Fattal said that the surveyor gave him an indication of the premium which Mr Fattal then entered on the counter notice (albeit that the counter notice was subsequently deemed to be invalid). Mr Fattal said that the

surveyor had difficulty in obtaining access. Again Mr Fattal submitted that his understanding of section 60(1)(b) was that this covered "any valuation of the tenant's flat obtained for the purpose of fixing a premium" and was not confined to work carried out prior to service of the counter notice.

23. Mr Fattal produced a copy of the surveyor's report and a copy of the invoice for £600 plus VAT. In addition he produced a copy of a letter of 20th April 2009 from Rudy Fattal MRICS of RD and D Associates who had carried out the inspection and produced the survey report. Mr Rudy Fattal confirmed in this letter that no part of his negotiation fee was included in the valuation fee of £600 plus VAT. Mr Fattal confirmed that he had spoken to Mr Rudy Fattal prior to serving the counter notice and had been given some oral advice before subsequently receiving the written report. Mr Fattal submitted that the charges of Mr Rudy Fattal were reasonable and accurate.

24. With regard to Marshall Levine's fees of £500 plus VAT, Mr Fattal submitted that that these had been agreed between solicitors on 11th February 2009 and that this agreement was binding. Marshall Levine's costs had been reduced from £1,200 plus VAT to £500 plus VAT and this is what had been agreed to be paid.

Decision – section 60 costs

25. The landlord is entitled to his reasonable costs of any investigation reasonably undertaken to a tenant's right to a new lease. This includes the cost of establishing the tenant's title. The Respondent has stated that he intended to appeal the decision of Her Honour Judge Marshall QC that the counter notice was not validly served. However no such appeal was pursued and all parties at this tribunal are therefore bound by the decision of Her Honour Judge Marshall QC. However in our opinion this does not negate the Respondent's right to costs under section 60(1)(a) being the sum claimed by Howard Kennedy of £250 plus VAT, although no breakdown is given, is a reasonable sum taking into account the test contained in section 60(2).

26. The surveyor's costs are payable of any valuation of the tenant's flat obtained for the purpose of fixing the premium. Section 60(1)(b) does not state that these costs cannot

be payable for costs incurred after service of the counter notice. The decision referred in the case of *Castelnau* whilst of interest turns on its own facts and is not binding on this tribunal.

27. Mr Rudy Fattal has confirmed that his fees of £600 do not include any sum for negotiations. A fee of £600 would be regarded as reasonable for an inspection and written report.

28. However as the counter notice was deemed invalid then the premium is fixed at the amount contained in the notice of claim and therefore the Respondent cannot claim for the cost of the valuation of the tenant's flat obtained for the purpose of fixing the premium.

29. The tribunal is aware that negotiations did take place and that an agreement was reached in December 2008 thereby the premium was fixed at £8,800 but this was a matter of negotiation.

30. With regard to the costs of Marshall Levine, Solicitors, in the sum of £500 plus VAT which are claimed under section 60(1)(c), these costs were agreed between solicitors on 11th February 2009. This is recorded in the skeleton argument for the Applicant at paragraph 26 and confirmed by the Respondent. The Applicant takes the view that this agreement has been nullified. However it is clear that there was an agreement which means that this tribunal has no jurisdiction to determine the costs as an agreement has been reached.

Applicant's application for costs under paragraph 10 Schedule 12 of the 2002 Act

31. Counsel for the Applicant referred to a letter from Norstown Properties Limited dated 20th April 2009 to the tribunal in which Mr Fattal stated "We have just received from the other side the Applicant's supplementary bundle under letter to the leasehold valuation tribunal dated 17th April 2009". Miss Matthews submitted that this could not be correct as Mr Fattal had responded on 9th April 2009.

32. Counsel stated that Mr Fattal had flouted the rules and not complied with the tribunal's directions. He had served documents on the 21st April 2009 after 4.30 pm knowing her instructing solicitor did not accept service by fax.

33. There had been no compliance with the tribunal's directions whereby a detailed statement of costs should have been supplied. Further Mr Fattal had attended the hearing with documents and had even produced documents after the lunch break. The directions were clear and Mr Fattal had acted unreasonably. Further he had attempted to deceive the tribunal and had lied in relation to his statement about the non-receipt of the Applicant's bundle. Counsel submitted that Mr Fattal intended to manipulate the court process and per se this is an abuse of the process.

34. In those circumstances an order for costs should be made against the Norstown Properties Limited under the provisions of paragraphs 10(1), (2)(b) and (3) of Schedule 12 of the 2002 Act.

The Respondent's case

35. Mr Fattal told the tribunal that he had sent his original bundle on 9th April 2009. Then a second set of documentation was received on Friday 17th April 2009. He did not see this until 3pm on Monday 20th April and then the letter of 20th April 2009 from Norstown Properties Limited was sent on 21st April 2009. He denied that he had lied and confirmed that the letter of 9th April 2009 was sent by fax to the other side.

36. Mr Fattal explained that he did not get the Applicant's bundle until 21st April 2009. His submitted that his behaviour was entirely reasonable. He accepted that he had not fully complied with the tribunal's directions but pointed out that the Applicant had also been in default.

Decision – application for costs under the 2002 Act

37. There has been a long and unfortunate history to this application for a leasehold extension which has resulted in considerable litigation in the county court and a hearing before this tribunal in respect of section 60 costs.

38. Counsel for the Applicant made an unfounded allegation against the Respondent in that it was alleged that the Respondent had lied in his letter to the tribunal dated 20th April 2009 when he said that he had just received the Applicant's supplemental bundle. In fact the Respondent was able to prove to the tribunal that this was correct and Counsel for the Applicant was forced to retract her allegation and issue an apology to the Respondent.

39. In our opinion both parties have behaved in an unsatisfactory manner in the relation to the preparation of this case. Both parties were in breach of the directions and in our opinion it is most unfortunate that agreement could not have been reached without the need for a contested hearing.

40. We determine that in our opinion the Respondent has not acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings and the application for costs is dismissed.

Summary

41. Costs determined to be payable under section 60(1) of the Act:

- Section 60(1)(a) - £250 plus VAT.
- Section 60(1)(b) - no sum payable.
- Section 60(1)(c) - the tribunal has no jurisdiction to make a determination as the Applicant through his solicitors agreed to pay the sum of £500 plus VAT for costs on or about 11th February 2009.

Application for costs under paragraph 10 Schedule 12 of the 2002 Act

42. The tribunal determines this application be dismissed.

Jane Dowell

Chairman

Dated this 21st day of May 2009