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Case Reference	:	**MAN/00FF/OC9/2013/0003**
Property	:	**Marlborough Wharf, Marlborough Grove, York YO10 4AX**
Applicant	:	**Marlborough Wharf Limited**
Representative	:	**N/A**
Respondent	:	**Boston Holdings Limited**
Representative	:	**N/A**
Type of Application	:	**Leasehold Reform, Housing and Urban Development Act 1993 – s91**
Tribunal Members	:	**Judge J Holbrook (chairman) Judge L Bennett**
Date and venue of Hearing	:	**Determined on the papers**
Date of Decision	:	**4 November 2013**

DECISION

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DECISION

For the purposes of section 33(1) of the Leasehold Reform, Housing and Urban Development Act 1993, the amount of costs payable to the Respondent (in consequence of a notice having been served in respect of the Property under section 13 of the Act on 19 December 2012) is £5,090.97 inclusive of VAT.

REASONS

Background

1. On 19 December 2012, a tenants' initial notice claiming collective enfranchisement was served under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act"). The notice related to premises known as Marlborough Wharf, Marlborough Grove, York ("the Property") and it was served on the freehold owner of the Property, Boston Holdings Limited ("the Respondent"). The notice was served by a number of tenants of the Property, and claimed to exercise the right to acquire the freehold of the Property together with additional freehold and leasehold property specified in the notice. The notice identified Marlborough Wharf Limited ("the Applicant") as the nominee purchaser for the purposes of the Act.

2. By counter-notice dated 21 February 2013, the Respondent admitted that the participating tenants were entitled to exercise the right to collective enfranchisement in relation to the Property. However, the Respondent did not accept that the Applicant was entitled to acquire all of the land specified in the tenants' notice; nor for the purchase price originally specified. The counter-notice set out a number of counter-proposals in respect of these matters.

3. In the event, the proposed acquisition by the Applicant did not proceed and, on 15 March 2013, the Respondent wrote to the Applicant demanding payment of the costs incurred by the Respondent in connection with service of the counter-notice. These costs were demanded under section 33 of the Act, in the sum of £14,434.21. However, it is noted that, in its subsequent submission to the Tribunal, the Respondent asserts that the costs it has incurred amount to £15,004.81.

4. On 17 July 2013, the Applicant applied to the Tribunal under section 91(2)(d) of the Act for a determination of the amount of the costs payable under section 33. The Tribunal gave directions for the conduct of the proceedings on 16 August 2013. It informed the parties that it considered this matter suitable for a determination without an oral hearing unless either party notified the Tribunal that it wished a hearing to be listed. As no such notification was received, the Tribunal proceeded to determine the matter on the basis of the evidence

provided in the application and in written submissions provided by the parties in response to directions. The Tribunal did not inspect the Property.

Law

5. Section 33(1) of the Act provides that:

   Where a notice is given under section 13, then (subject to the provisions of this section ...) the nominee purchaser shall be liable, to the extent that they have been incurred in pursuance of the notice by the reversioner or any other relevant landlord, for the reasonable costs of and incidental to any of the following matters, namely–
   (a) any investigation reasonably undertaken–
      (i) of the question whether any interest in the specified premises or other property is liable to acquisition in pursuance of the initial notice, or
      (ii) of any other question arising out of that notice;
   (b) deducing, evidencing and verifying the title to any such interest;
   (c) making out and furnishing such abstracts and copies as the nominee purchaser may require;
   (d) any valuation of any interest in the specified premises or other property;
   (e) any conveyance of any such interest;
   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.

6. Section 33(2) provides the following additional safeguard for nominee purchasers:

   For the purposes of subsection (1) any costs incurred by the reversioner or any other relevant landlord 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.

7. It is made clear by section 33(5) that a nominee purchaser is not liable under the section for any costs which a party to any proceedings before the Tribunal incurs in connection with those proceedings.

8. The Act also makes provision for persons other than a nominee purchaser to be liable for the costs described in section 33(1) in circumstances where the tenants' initial notice is withdrawn or is deemed to be withdrawn. However, the focus of the application before the Tribunal is solely upon whether the costs demanded by the Respondent are reasonable in amount.

9. The purpose and effect of the Act's provisions on the reimbursement of costs was considered in a recent Upper Tribunal judgment in the case of *Metropolitan Property Realizations Limited v Moss* [2013] UKUT 0415 (LC). That case actually concerned the operation of section 60 of the Act (which deals with payment of the reversioner's costs on the grant of a new lease under the Act). However, the provisions of sections 33 and 60 are materially similar and there can be little doubt that the same principles apply in respect of both sections. At paragraphs 9 – 11 of his judgment in that case, Judge Martin Rodger QC described the statutory provisions in the following terms:

> "These provisions are straightforward and their purpose is readily understandable. Part I of the 1993 Act is expropriatory, in that it confers valuable rights on tenants of leasehold flats to compel their landlords to grant new interests in those premises whether they are willing to do so or not. It is a matter of basic fairness, necessary to avoid the statute from becoming penal, that the tenant exercising those statutory rights should reimburse the costs necessarily incurred by any person in receipt of such a claim in satisfying themselves that the claim is properly made, in obtaining advice on the sum payable by the tenant in consideration for the new interest and in completing the formal steps necessary to create it.
>
> 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 landlords' costs of resolving disputes over the 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.
>
> Section 60 therefore provides protection for both landlords and tenants: for landlords against being out of pocket when compelled to grant new interests under the Act, and for tenants against being required to pay more than is reasonable."

The disputed costs

10. The costs which the Respondent seeks to recover comprise a mixture of legal costs and consultants' fees incurred by the Respondent following receipt of the tenants' initial notice. The various heads of cost comprised within the total sum which the Respondent seeks are itemised in column A of the Table annexed to this Decision. It is

necessary to consider the reasonableness of the various heads of cost in turn.

11. Before doing so, however, we pause to note that, whilst the Applicant initially challenged the reasonableness of the inclusion of VAT in some of the costs the Respondent seeks to recover, upon confirmation from the Respondent that it is not registered for VAT, the Applicant has accepted that, to the extent that costs incurred by the Respondent are reasonable, any VAT charged on those costs is also recoverable under section 33 of the Act.

Legal fees

12. The Respondent seeks to recover the fees and disbursements paid to two firms of solicitors: Walker Morris and Schulmans. When the Respondent initially wrote to the Applicant with a demand for costs on 15 March 2013, the legal fees demanded comprised the fees and disbursements covered by a single invoice from Walker Morris for £7,618.96. However, by the time of the Tribunal's determination, the Respondent also sought to recover the fees covered by a second invoice from Walker Morris for £282.00 plus those covered by an invoice from Schulmans for £288.60.

13. We shall deal first of all with the fees and disbursements of Walker Morris. The Respondent says that, upon receipt of the tenants' initial notice, it was Walker Morris to which it turned to first for advice. The Respondent submits that the service of the tenants' notice gave rise to a complex legal problem which justified it incurring substantial legal costs.

14. By way of additional background, the Respondent explained that the Property comprises a development of 21 apartments and associated car parking/garages and amenity areas. The apartments are comprised within three self-contained blocks of seven apartments (Blocks A, B and C). The Respondent owns the freehold, but also owns long leasehold interests in six of the apartments in Block C. The leaseholder of the seventh apartment in Block C is Mr Spencer (who is one of the Respondent's two shareholders). There is additional accommodation beneath the Property: whilst the parties disagree as to its exact nature, it is clear that this is some kind of storage area and is used by the Respondent for business purposes.

15. The Respondent was concerned to understand the implications of the tenants' initial notice for its interests in Block C and the storage area. Walker Morris advised that a surveyor be appointed to value the freehold interest and the storage area; that plans be drawn up to enable the various elements of the development to be identified; that title be investigated; that consideration be given to the Respondent seeking a long lease of the storage area from the Applicant on enfranchisement (and that a draft lease be prepared); and that insurance and tax advice be sought in addition to considering the implications for current

management arrangements. Walker Morris apparently also advised that an opinion be sought from counsel.

16. Walker Morris prepared and served a detailed counter-notice which set out counter-proposals for the acquisition of certain parts of the development and for the grant of rights over other parts. The counter-notice was accompanied by a letter from the firm dated 22 February 2013. That letter stated that, upon completion of the collective enfranchisement process, the Respondent intended to make a separate claim to collectively enfranchise Block C.

17. The Applicant accepts that it was reasonable for the Respondent to seek advice from Walker Morris following service of the tenants' initial notice – and this is clearly right. However, it complains that many of the costs referred to in Walker Morris' first invoice relate to the preparation of the letter of 22 February and to the matter of whether Block C could be the subject of a separate enfranchisement claim at some later date. The Applicant says that such costs are not recoverable under section 33 of the Act. It also argues that section 33 does not cover the cost of drafting and serving a counter-notice and that the legal costs to the Respondent should not exceed the Applicant's own legal costs of £750 for preparing and serving the tenants' initial notice. The Applicant objects, in particular, to the reasonableness of costs incurred in obtaining an opinion from counsel, Anthony Radevsky of Falcon Chambers in London.

18. We do not accept that there is any necessary correlation between the costs incurred in preparing the tenants' initial notice and the reasonable costs of the reversioner in responding to it. Nor do we accept that section 33 of the Act is insufficiently broad to permit recovery of the costs of preparing and serving a counter-notice. The work involved in doing so must be incidental to that described in subsection (1)(a), and payment of reasonable costs so incurred is necessary to avoid the Act having the "penal" effect described by Judge Rodger in *Metropolitan Property v Moss*. However, we do agree with the Applicant's argument that the cost of legal work undertaken in anticipation of what might happen *after* enfranchisement has taken place is not recoverable under section 33.

19. We also share the Applicant's concern about whether it is reasonable for the Respondent to seek to recover the cost of obtaining counsel's opinion. The Respondent offered minimal evidence as to the particular issue or issues on which counsel was asked to advise. Although it seems that he advised on the terms of the counter-notice, it is not known whether his advice also extended to the prospective claim in relation to Block C. Even if counsel was asked to confine his advice to the current enfranchisement claim, however, the Respondent has not satisfied us that it was reasonable to seek his opinion. Although the enfranchisement claim clearly gave rise to a degree of complexity, no explanation has been offered as to why counsel's advice was required,

particularly in view of the fact that the Respondent already had the benefit of advice from Walker Morris, a leading law firm in Leeds.

20. Counsel's fees of £2,700.00 (inclusive of VAT) were included in Walker Morris' invoice, and we find that these fees are not reasonable costs for the purposes of section 33. It follows that the fees and disbursements charged by Walker Morris in connection with instructing counsel and then attending a conference with him are not recoverable under section 33 either. It is apparent from the detailed breakdown of Walker Morris' costs provided to the Tribunal that these costs include £108 for researching counsel and specialist firms; £504 for drafting instructions to counsel; £378 for writing-up a note of the conference; and three sets of train fares to London on 12 February 2013 amounting to £487.50. When VAT is added to these items, it follows that the amount which is irrecoverable under section 33 is £1,773.00.

21. The effect of stripping out from Walker Morris' fees the costs of, and associated with, instructing counsel is to reduce those fees from £7,900.96 to £3,427.96. However, it then becomes necessary to consider whether a proportion of these remaining fees is also irrecoverable because it concerns advice given in respect of the possible future enfranchisement of Block C. We consider that this must indeed follow from the fact that such advice was clearly given – and was presumably charged for. The breakdown of charges provided to the Tribunal does not enable an accurate assessment of the cost of the advice provided to the Respondent in this regard. It appears to us, however, that the questions relating to the current enfranchisement claim (concerning matters such as the extent of the land to be acquired and the nature of rights to be granted) were more complex than those relating to the possible future enfranchisement of Block C. It seems reasonable to suppose that the majority of the work carried out by Walker Morris related to the former and a minority to the latter. With this in mind, we find that 75% of Walker Morris' remaining costs are reasonable costs for the purposes of section 33, but that 25% (or £856.99) are irrecoverable under that section. The reasonable costs of Walker Morris for the purposes of section 33 of the Act are accordingly £2,570.97.

22. A further (albeit significantly smaller) invoice for legal services was received from Schulmans, and the Respondent also seeks to recover these costs under section 33 of the Act, on the basis that it consulted the specialist debt-recovery department of this firm for advice in relation to the recovery of its costs arising from the tenants' initial notice. However, as the Applicant rightly points out, the breakdown of Walker Morris' charges shows that researching section 33 and the time for requesting costs was an item included within that firm's charges. Given that this is so, we agree with the Applicant's argument that it would be unreasonable to also seek recovery of the costs of a second firm of solicitors for advising on the same issues. We find that none of Schulmans fees are reasonable costs for the purposes of section 33.

Consultancy fees

23. The Respondent says that, given it has two directors and a company secretary but no other employees, and given the demands on the management time of its directors, it decided to employ a consultant to assist in the project management of the work arising out of the tenants' initial notice. The consultant it engaged was Mr Paul Walker of PLW Consultants Limited who the Respondent describes as having legal and commercial experience in such matters.

24. A copy of the invoice from PLW Consultants was provided to the Tribunal, and this details the services provided by Mr Walker. These comprise a consideration of the issues arising from the tenants' initial notice, and its impact upon the Respondent's property interests in the development. The charges focus on various emails and meetings, including attendance at the conference with counsel and liaison with Walker Morris and Schulmans, as well as meetings with the Respondent's insurance broker and valuer. The charges also include "consideration of the relevant legislation, [the Respondent's] title, the terms of the tenants' initial notice and [the Respondent's] proposed response".

25. The Applicant argues that it was unreasonable for the Respondent to engage a property consultant, given that it had also engaged solicitors, counsel and valuers to advise it. We tend to agree (and would have taken the same view even if the Respondent had not sought advice from counsel). Whilst noting what the Respondent says about the pressures on its directors' time, the incurring of significant consultancy fees seems to us to run counter to the principle in section 33(2) of the Act that professional fees should only be regarded as reasonable to the extent that those costs might reasonably be expected to have been incurred if they were being paid out of the reversioner's own pocket. In this case, the Respondent appears to have engaged PLW Consultants to perform the functions which a reversioner would usually perform personally – a reasonable landlord would not pay to outsource its functions as "client" in relation to a proposed enfranchisement, and so the costs expended by the Respondent in doing so are not reasonable costs. In any event, we note that some of the work undertaken by Mr Walker appears to duplicate that which Walker Morris will no doubt have carried out in assessing and responding to the tenants' initial notice.

Valuation fees

26. The Respondent appointed Malcolm Stuart Property Consultants to give valuation advice in connection with the proposed enfranchisement. The charge for this advice amounted to £1,900.00 plus VAT and minor disbursements. The relevant invoice notes that the charge was calculated on a time spent basis and that the work undertaken included perusing documentation relating to the application, attending meetings with the Respondent and inspecting

the Property. The Applicant argues that the amount of the charges is unreasonably high and objects, in particular, to the need for the valuer to charge for attending meetings. The Applicant suggests that a charge of £1,500. would have been reasonable because it appears that the valuer undertook additional work which was unnecessary in order for the Respondent to deal with the tenants' notice

27. We are not persuaded by the Applicant's challenge to the amount of the valuation fees (which we find to be reasonable). The Property is a substantial development and the issues which arose as to which parts could or should be transferred and/or retained, with associated issues about rights to be granted and reserved, will doubtless have given rise to some complex valuation issues. It is not unreasonable for the Respondent to have met with the valuer to discuss such issues, particularly as there was a substantial divergence between the views of the parties as to the value of the Property and of its component parts.

Fee for preparing site plans

28. The Respondent paid £180.00 to have site plans professionally prepared. The plans were used in the counter-notice, and would no doubt have been suitable for use in a subsequent transfer document, had the matter progressed. Whilst we accept the Applicant's argument that it was unnecessary to go to the expense of having plans professionally prepared at that stage, we do not consider it unreasonable that the Respondent opted to do so. Having clear plans would certainly have assisted in the complex discussions which followed about which parts of the development were to be transferred, and would then also have been available for use in the transfer.

Fees for attending meetings

29. The Respondent seeks to recover £360.00 plus VAT invoiced by a company called Boston House Limited. The Respondent asserts that the charge concerns tax advice given in connection with the proposed enfranchisement by the Respondent's accountants. The Applicant objects on the ground that a Mr Johnson is both the company secretary of the Respondent and a director of Boston House Limited and, in the Applicant's view, was apparently charging via another company for attending meetings of the Respondent.

30. There is clearly a close corporate relationship between the Respondent and Boston House Limited. Of itself, this does not prevent costs incurred by the former in favour of the latter from being recoverable under section 33 of the Act. In this case, however, the Respondent has not produced evidence from which we can conclude that these costs were incurred for any of the purposes specified in section 33(1) or, indeed, that they satisfy the test of reasonableness set out in section 33(2).

Annex

Table of costs claimed and costs allowed

	Column A	Column B
Head of cost	**Amount claimed by Respondent**	**Amount found to be reasonable by the Tribunal**
Legal fees (Walker Morris)	£7,900.96	£2,570.97
Legal fees (Schulmans)	£288.60	NIL
Consultancy fees (PLW)	£3,863.25	NIL
Valuation fees (Malcolm Stuart)	£2,340.00	£2,340.00
Fee for preparing site plans (Blue Fish Draughting)	£180.00	£180.00
Fees for attending meetings (Boston House Limited)	£432.00	NIL
TOTAL	**£15,0004.81**	**£5,090.97**