4376

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/OC9/2019/0330**
Property	:	**Flat 4, 146 Great Portland Street, London W1W 6QB**
Applicant	:	**Mr Benjamin Hart**
Representative	:	**Mr Andrew Hart (Solicitor)**
Respondent	:	**Mount Eden Land Limited**
Representative	:	**Ms Harriet Holmes (Counsel) instructed by Stephenson Harwood LLP**
Type of Application	:	**Application under section 91(2) of the Leasehold Reform, Housing and Urban Development Act 1993 to determine section 60 costs**
Tribunal Members	:	**Mr Jeremy Donegan – Tribunal Judge** **Mr Luis Jarero BSc FRICS – Valuer Member**
Date and venue of Hearing	:	**19 October 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**29 November 2016**

DECISION

Decisions of the tribunal

The tribunal has no jurisdiction to determine the costs application made under section 91(2) of the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act') and the application is dismissed.

The background

1. The Applicant is the leaseholder of Flat 4, 146 Great Portland Street, London W1W 6QB ('the Flat'). The Applicant's immediate landlord is Fairhome Properties Limited, which holds a lease of 144-146 Great Portland Street ('the Building'). The Respondent is the freeholder of the Building.

2. On 20 February 2015 the Applicant served a notice of claim on the Respondent, pursuant to section 42 of 1993 Act, seeking a new lease of the Flat.

3. On 23 June 2015 the Respondent served a counter-notice in which it admitted the claim but sought a higher premium, pursuant to section 45 of the 1993 Act.

4. The parties subsequently agreed the premium but were unable to agree the terms of the new lease and the Applicant submitted an application to the tribunal under section 48 of the 1993 Act ('the original application'). That application was determined in a decision dated 04 April 2016, which was issued following a hearing on 22 March 2016.

The costs application

5. The parties subsequently corresponded regarding the costs payable under section 60 of the 1993 Act and it is this issue which prompted the costs application.

6. The application was received by the tribunal on 28 July 2016 and directions were issued on 29 July. In a detailed letter dated 05 August 2016, the Respondent's solicitors submitted that the section 60 costs had been agreed and the tribunal had no jurisdiction to determine these costs. This submission was contested in an email from the Applicant's solicitor; Mr Andrew Hart ('Mr Hart') dated 08 August. The costs application was listed for a preliminary issue hearing, to decide whether the tribunal has jurisdiction.

The hearing

7. The jurisdiction hearing took place on 19 October 2016. The Applicant attended and was represented by Mr Hart. The Respondent was represented by Ms Holmes.

8. The tribunal members were supplied with a statement of case from each party together with a helpful skeleton argument from Mr Hart. The tribunal also heard oral submissions from both representatives.

9. On questioning from the tribunal, the representatives advised that the original application did not include any application to determine the section 60 costs. The sole issue to be determined by the tribunal is whether these costs have been agreed in correspondence. If they have then the tribunal has no jurisdiction to determine the costs application. The relevant correspondence is referred to below.

10. The relevant legal provisions are set out in the Appendix to this decision.

Relevant correspondence

11. The Respondent's solicitors first provided Mr Hart with details of the section 60 costs in an email dated 08 March 2016. The gross sums claimed were £2,671.50 (including VAT) for valuation fees and an estimated figure of £5,050 (including VAT and disbursements) for "*conveyancing costs*". The net sums were £2,226 and £4,100, respectively.

12. The figure for conveyancing costs was an estimate, as the new lease had not been completed and further work was required. The email included the following paragraph:

    "You will of course be aware that my client is not required to complete the lease until these sums have been paid or, where the sums are unascertained (as will be the case with our client's conveyancing cost), reasonable security is provided"

13. In an email dated 27 May 2016, Mr Hart proposed lower figures of £2,226 for valuation fees and £3,000 for legal fees and stated "*No sums can be tendered until I am sure we have reached agreement on the terms of the new lease including its two plans*". Attached to the email was a draft undertaking to pay disputed service charge arrears for the Flat, if the arrears were determined to be payable.

14. The reply email from the Respondent's solicitors, dated 31 May included the following paragraph:

"My client is not required to complete the lease until the costs recoverable under section 60 of the LRHUDA 1993 have been tendered, which your client has not yet done"

15. On 31 May, Mr Hart sent a further email to the Respondent's solicitors, asking *"..please can you now deal with this one conventionally too, by providing me with what is outstanding"*. This evoked the following response on 01 June:

"The only matter outstanding is for your client to tender my client's costs recoverable under section 60 of the LRHUDA 1993.

My client is not required to complete the lease until your client does so. No completion statement can (or will) be provided until then. You have been notified of my client's recoverable costs which comprise £4,100 plus VAT and valuation fees of £2,226 plus VAT.

Once you confirm that these sums are agreed you will then be provided with a completion statement and lease plans for checking. Until then completion of the lease cannot progress.

....."

16. There were three emails on 17 June. The first was from Mr Hart and timed at 07.50, in which he wrote:

"The completion statement you provide now to me with the engrossment needs to reflect all sums demanded less what has been paid on account. I will be happy to transfer the sums referred to on the completion statement to your firm's client account to be held to my order pending completion. As you know, at completion either all the sum deposited will then be released to your client or, if we are not then agreed about the costs, your firm will hold as security the part referable to costs, pending a determination of the payable costs by the FTT."

17. The reply from the Respondent's solicitors, timed at 07.59, included the following paragraphs:

"As you are well aware, the only matter outstanding is for your client to tender my client's costs recoverable under section 60 of the LRHUDA 1993. My client is not required to complete the Lease until your client does so. No completion statement can (or will) be provided until then. You have previously been notified of my client's recoverable conveyancing costs and valuation fees.

Once you confirm that these sums are agreed you will then be provided with a completion statement and Lease plans for checking. Until then, completion of the Lease cannot and will not progress."

18. Mr Hart's response, timed at 14.43, included the following passage:

"The sums here tendered are:

The competent landlord's costs, as claimed by your firm in correspondence prior to today: £6,326 plus VAT

The agreed premium due to the competent landlord: £25,108 (less £1,550 paid on account 14 May 2015)

The agreed sum due to the intermediate landlord: £2,714

Please now provide the completion statement and engrossment of the counterpart."

19. There was then a slight lull until 22 June 2016, when the Respondent's solicitors sent an email in the following terms:

"On the basis that you have now tendered the relevant costs, we can move to completion

Stephen will be in touch regarding the draft lease and completion statement"

20. The completion statement and lease plans were sent to Mr Hart by email, on 30 June 2016.

Submissions

21. Mr Hart submitted that no binding agreement has been reached on the section 60 costs. To the contrary he had always made it clear that the sums claimed were disputed. He had tendered the full amount of the costs pursuant to section 56(3), so the new lease could be completed. In fact completion has not taken place and a separate application has been made to the County Court; presumably under section 48(3) of the 1993 Act.

22. Mr Hart suggested there had been duress on the part of the Respondent's solicitors. He referred to two conditions imposed in their email of 17 June 2016, which they could not insist on. They were unwilling to provide lease plans or a completion statement until the costs had been agreed and tendered. Mr Hart was unable to progress the conveyancing without these documents.

23. Mr Hart made the point that section 60 costs are not one of the terms of acquisition of the new lease. It follows the new lease can be completed before the costs have been agreed or determined, but only if the costs are tendered under section 56(3).

24. Mr Hart tendered the costs in his second email of 17 June 2016. He submitted the email had no contractual force. It was neither an agreement, nor an offer, to pay these costs. There was no indication in the email that Mr Hart agreed the costs and no acceptance that agreement was required to complete the new lease. He argued that his use of the words "*tendered*" and "*as claimed by your firm*" clearly indicated the costs were not admitted or agreed.

25. Mr Hart relied on the Upper Tribunal's decision in ***Friends Life Limited and The Halliard Property Company Limited v Jones [2014] UKUT 0422 (LC).*** In that case the leaseholder's surveyor had submitted a section 92(3) application, to determine section 60 costs costs, on 14 February 2013. Directions were issued on 13 March 2013 and the leaseholder's conveyancing solicitors transferred the completion funds, including the full sum claimed for section 60 costs, to the freeholder's solicitors on 22 March 2013. The parties completed the new lease on or shortly before 30 April 2013. The First-tier Tribunal determined that the payment of the section 60 costs did not amount a binding agreement that excluded its jurisdiction to determine these cost and this decision was upheld by the Upper Tribunal.

26. Mr Hart also referred to the email dated 22 June 2016, from the Respondent's solicitors. In his words, "*...this email did not use the language of agreement either, but rather acknowledged that the costs had been tendered, and so the landlord was bound to move to complete the grant of the lease*". He also suggested there was nothing in the subsequent correspondence to suggest a binding agreement had been reached.

27. Ms Holmes' contended that the section 60 costs had clearly been agreed and the tribunal has no jurisdiction to determine these costs. Mr Hart tendered the costs in his second email of 17 June 2016. The language in that email must be viewed objectively and the tribunal should disregard what Mr Hart felt, subjectively. The word tender means an offer to pay, or an offer of money as payment. By tendering payment, Mr Hart was offering to pay the costs in full. Applying ordinary contractual principles, this was an offer. Mr Hart did not impose any conditions on this offer. Nor did he reserve the Applicant's right to challenge the costs.

28. Ms Holmes submitted the offer was accepted in the email from the Respondent's solicitors dated 22 June 2016. Alternatively it was accepted by the sending of the completion statement and lease plans on

30 June 2016. Ms Holmes' 'fall-back' argument was that the Respondent's solicitors' email of 17 June was an offer and Mr Hart accepted that offer in his second email of 17 June.

29. Ms Holmes also took the tribunal through some of the later correspondence passing between the parties but accepted this was not directly to the formation of any contract.

30. Ms Holmes submitted that the ***Friends Life*** decision was of little assistance, as the facts were very different. However she did refer to paragraph 20 where HHJ Gerald said:

"The test of whether or not the parties reached agreement is objective. For purposes there is no doubt that the Appellant's statement of their conveyancing fees as stated in their original completion statement dated 21 February 2013 as revised on 1 March 2013 constituted an offer in respect of those costs which could have been accepted and so making a binding contract. The question is whether or not there has been acceptance of that offer. In law the party is only to be treated as having accepted an offer if there is a final and unqualified expression of an assent to what has been offered. The offer may of course be accepted by conduct. However conduct will only amount to an acceptance if it is clear that the act of alleged acceptance was with the intention, ascertained objectively, of accepting the offer."

31. Viewed objectively, there had been offer and acceptance in this case and the section 60 costs had been agreed. Further there was no justification for the suggestion of duress on the part of the Respondent's solicitors, who had acted quite properly.

32. In response, Mr Hart reiterated that the Respondent's solicitors were making two demands in their email of 17 June 2016. Firstly they wanted him to agree the costs and secondly they wanted him to tender these costs. He tendered the costs in his response of the same day but did not agree them. Mr Hart submitted the tender should be viewed in the context of the earlier correspondence, from which it was clear the costs were disputed.

33. Mr Hart also reiterated that he tendered the costs pursuant to section 56(3) of the 1993 Act, to enable the transaction to proceed. The Respondent's solicitors could not insist on him agreeing the costs, as a precondition to producing the documents and he was not obliged to spell this out. He had not agreed the costs. Ms Holmes described the 'two demands' argument as sophistry and pointed out that Mr Hart was not obliged to tender the costs. He could have offered reasonable security for the costs pursuant to section 56(3). He was aware of this, as evidenced by his first email of 17 June.

The tribunal's decision

34. The tribunal determines the section 60 costs were agreed on 22 June 2016 and it has no jurisdiction to determine these costs, by virtue of section 91(1) of the 1993 Act. The costs application is dismissed.

Reasons for the tribunal's decision

35. The Respondent's solicitors were not entitled to insist on Mr Hart agreeing and tendering the costs, as a pre-condition of producing the completion statement and lease plans. Section 56(3) makes it clear that a landlord is not obliged to *"execute"* a lease unless ascertained costs are tendered. In this case the conveyancing costs had not been ascertained, as stated in the Respondent's solicitors' email of 08 March 2013. Further the Respondent's solicitors were linking the tender to the production of documents, rather than execution of the lease.

36. Faced by the stance taken by the Respondent's solicitors, Mr Hart had various options. He could have pointed out the pre-conditions were unenforceable and/or offered security under section 56(3) and/or offered to pay the costs but reserve the Applicant's right to challenge the costs and/or make an application to the tribunal to determine the costs. He did none of these things. Rather he tendered the costs, without condition, in his second email of 17 June 2016. The tribunal accepts this amounted to an offer, for the reasons advanced by Ms Holmes. The tribunal does not accept that Mr Hart's use of the words "*tendered*" and "*as claimed by your firm*" revealed a continuing intention to dispute the costs.

37. The Respondent's solicitors accepted the offer by their conduct. It was clear from their email of 22 June 2016 that the offer was accepted. They stated "*On the basis that you have now tendered the relevant costs, we can now move to completion*". There can be no doubt this statement was made with the intention of accepting the offer, as is clear from the subsequent production of the completion statement and lease plans on 30 June 2016.

38. The tribunal agrees with Ms Holmes that ***Friends Life*** can be distinguished on the facts. In that case it was clear the costs were disputed, as there was an outstanding application to determine the disputed costs that needed to be resolved. Further the payment was made by the leaseholder's conveyancing solicitor whereas the costs application was issued by his solicitor. In this case, Mr Hart was dealing with the conveyancing and the costs. His second email of 17 June 2016 gave no indication the costs were still disputed. Rather he tendered the costs unconditionally. This offer was accepted on 22 June 2016 and a binding contract was agreed.

39. Mr Hart has not established any duress on the part of the Respondent's solicitors. Their preconditions for the production of the documents were unenforceable but that does not amount to duress. Mr Hart is an experienced solicitor, who is clearly familiar with the workings of the 1993 Act. There was nothing in the correspondence to suggest he was coerced to tender the costs.

Name: Tribunal Judge Donegan **Date:** 29 November 2016

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of relevant legislation

Leasehold Reform, Housing and Urban Development Act 1993 (as amended)

Section 48

(1) Where the landlord has given the tenant –

(a) a counter-notice under section 45 which complies with the requirement set out in subsection (2)(a) of that section, or

(b) a further counter-notice required by or by virtue of section 46(4) or section 47(4) or (5),

but any of the terms of acquisition remain in dispute at the end of the period beginning with the date when the counter-notice or further counter-notice was so give, the appropriate tribunal may, on the application of either the tenant or the landlord, determine the matters in dispute.

.....

(7) In this Chapter "*the terms of acquisition*", in relation to a claim by a tenant under this Chapter, means the terms on which the tenant is to acquire a new lease of his flat, whether they relate to the terms to be contained in the lease or to the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of the lease, or otherwise.

Section 56

(1) Where a qualifying tenant of a flat has under this Chapter a right to acquire a new lease of the flat and gives notice of his claim in accordance with section 42, then except as provided by this Chapter the landlord shall be bound to grant to the tenant, and the tenant shall be bound to accept –

(a) in substitution for the existing lease; and

(b) on payment of the premium payable under Schedule 13 in respect of the grant,

a new lease of the flat at a peppercorn rent for a term expiring 90 years after the term date of the existing lease

(2) In addition to any such premium there shall be payable by the tenant in connection with grant of any such new lease such amounts to the owners of any intermediate leasehold interests (within the meaning of Schedule 13) as are so payable by virtue of that Schedule.

(3) A tenant shall not be entitled to require the execution of any such new lease otherwise than on tendering to the landlord, in addition to the amount of any such premium and any other amounts payable by virtue of Schedule 13, the amount so far as ascertained -

(a) of any sums payable by him by way of rent or recoverable from him as rent in respect of the flat up to the date of tender;

(b) of any sums for which at that date the tenant is liable under section 60 in respect of costs incurred by any relevant person (within the meaning of that section); and

(c) of any other sums due and payable by him to any such person under or in respect of the existing lease;

and, if the amount of any such sums is not or may not be fully ascertained, on offering reasonable security for the payment of such amount as may afterwards be found to be payable in respect of them.

.....

Section 60

(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 this 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 section 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 notices 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 an 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, or any other landlord (as defined by section 40(4) or any third party to the tenant's lease.

Section 91

(1) Any question arising in relation to any of the matters specified in subsection (2) shall, in default of agreement, be determined by the appropriate tribunal.

(2) Those matters are –

.....

(d) The amount of any costs payable by any person or persons by virtue of provision of Chapter I or II and, in the case of costs to which section 33(1) or 60(1) applies, the liability of any person or persons by virtue of any such provision to pay any such costs; and

(e) the apportionment between two or more persons of any amount (whether of costs or otherwise) payable by virtue of any such provision.

.....