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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/OCE/2016/0029**
Property	:	**44 Leigham Court Drive, Leigh-on-Sea, SS9 1PU**
Applicant	:	**The estate of the late Alison Strauss & Christopher Mark Wilson**
Respondent	:	**Forcelux Ltd.**
Date of Application	:	**6th December 2016**
Type of Application	:	**To determine the costs payable on a proposed enfranchisement (Section 33 of the Leasehold Reform and Urban Development Act 1993 ("the 1993 Act"))**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **Roland Thomas MRICS**

DECISION

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1. The reasonable legal costs of the Respondent payable by the Applicant pursuant to Section 33 of the 1993 Act are £3,567.48 assuming that VAT is not recoverable as an input by the Respondent (see below).

2. The reasonable costs of valuation of the Respondent payable by the Applicant pursuant to Section 33 of the 1993 Act are £1,650.00.

Reasons

Introduction

3. This case was originally an application to determine the terms of the enfranchisement of the property which was listed for dismissal purposes at Cambridge on the 10th May 2017. Mr. Powell, from the Applicants' solicitors attended to confirm that the terms of the enfranchisement had been agreed. The matter of costs was ordered to be dealt with on paper with amended dates for service of documents and anticipated determination on the 20th June 2017.

4. Once again, there was a failure to deliver a bundle on the 10th June as ordered i.e. 10 days before the determination. A bundle arrived on the 16th June but there seems to be an argument between the solicitors about whether this bundle contains the correct documents. In order to make things absolutely clear, the Tribunal members do not have access to the office file. The documents they have before them are:-

   (a) The original directions order and the order of the 10th May 2017 (the directions said that these must be in the bundle but they are not)
   (b) An e-mail from Tolhurst Fisher LLP dated 23rd May 2017
   (c) The Respondent's Schedule of Costs dated 3rd February 2017 with attachments from pages 14-65 in the bundle
   (d) An e-mail from Birkett Long LLP dated 2nd June 2017 without attachment
   (e) A section with 3 copy fee notes from the Respondent's expert J.C. Gibb BSc (Econ) MRICS and the Respondent's Schedule of costs with some red annotations. Some of these are very difficult to read.
   (f) A letter from Birkett Long LLP dated 17th February with 4 numbered 'objections'
   (g) Replies to objections dated 13th March 2017 with comments from Mr. Gibb
   (h) Letters from Tolhurst Fisher LLP dated 1st March 2017 and 9th May 2017.
   (i) Letters from Birkett Long LLP dated 15th an 16th June 2017

5. Why there is no proper schedule of objections from the Applicants' solicitors in the form recommended by Part 47 PD (precedent G) of the Civil Procedure Rules so that the comments of the Respondents can be endorsed thereon is not known. This was specifically ordered by the Tribunal to make this exercise simpler. Birkett Long LLP need to be reminded about the overriding objective and, in particular, the requirement for solicitors to help the Tribunal. Disobeying directions orders is not being helpful.

The Law

6. It is accepted by the parties that 4 Initial Notices were served and therefore Section 33 of the 1993 Act is engaged. For the reasons set out below, the Applicant therefore has to pay the Respondent's reasonable costs of and incidental to:-

   (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 the 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;*

(Section 33(1) of the 1993 Act)

7. Despite what is said by the Applicants' solicitors, what is sometimes known as the 'indemnity principle' applies i.e. the Respondent is not able to recover any more than it would have to pay its own solicitors or valuer in circumstances where there was no liability on anyone else to pay (Section 33(2)). Another way of putting this is to say that any doubt is resolved in the receiving party's favour rather than the paying party.

8. Of relevance to one of the issues in this assessment is the case of **Sidewalk Properties Ltd. v Twinn** [2015] UKUT 0122 LC), where the Deputy President of the Upper Tribunal considered the question of whether costs recoverable pursuant to provisions of the 1993 Act could include work undertaken by the solicitor in respect of the valuation. He said:-

> *"36. I agree with the appellant that the task of instructing a surveyor is incidental to a valuation. Nevertheless in a case such as this it is an administrative rather than a professional task which no doubt relies on the use of standard instructions given to a surveyor who is very familiar with the requirements of statutory valuations under the 1993 Act. Where those administrative tasks are entrusted to a solicitor the client would not expect to be charged an additional fee, but would expect the expense to be subsumed instead in the fee payable to the solicitor for his or her own work.*
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> *37. I also accept that considering the valuation report of the surveyor is a task incidental to the valuation itself. Moreover, it is not an administrative task and it is legitimate, in my opinion, for the client to expect the solicitor who gave the instruction to consider the valuation and to be satisfied that it is in accordance with the basis of valuation required by the Act. I can see no reason why a client would not reasonably and willingly pay for the task to be undertaken, even where he is liable to meet the cost personally.*

9. In fact the Upper Tribunal was told that the solicitor took 12 minutes to advise on a single report which it held to be 'reasonable'. The case involved a consideration of 7 valuation reports and the Tribunal allowed a total of 20 minutes for the solicitor to consider and advise on all 7 reports.

Legal fees

10. A costs schedule has been produced in accordance with the Tribunal's directions. The calculation of costs totals £3,233.30 for 14 hours 54 minutes' work plus VAT. There are a number of Tribunal decisions and the case of **Gomba Holdings UK Ltd. and others v Minories**

Finance Ltd and others (No 2) [1992] 4 AER p588 attached which are of little assistance.

11. The hourly rate charged by Tolhurst Fisher LLP is not challenged – quite rightly. 7 letters to the surveyor are objected to in the 'correspondence and telephone calls' section on the basis of the **Sidewalk Properties** decision. This is not commented upon in the replies, which presumably means that this is accepted.

12. Under preparation, it is clear that there have been 4 Initial Notices and the Respondent's solicitors charge for each. The objection is that the amount of time claimed is too much. 1 hour 30 minutes is claimed for the first and reduced times are then claimed for subsequent notices. This is clearly an important stage in the process and the solicitor must approach things with great care. However, given that all the necessary documentation is before the solicitor who would have arranged for office copy entries etc. to have been obtained by staff beforehand, it is difficult to see how this could take an experienced Grade A fee earner more than an hour.

13. For drafting the first counter-notice, 1 hour 6 minutes is claimed and the Applicants ask for this to be reduced to 30 minutes. Again this is an important stage and 1 hour 6 minutes is allowed because the counter notice seen by the Tribunal is not straightforward and obviously involved detailed instructions and work.

14. The times for the subsequent considerations and counter-notices have been reduced and are allowed as claimed. Just because they involved the same property and participating tenants does not mean that the solicitor is forced to cut corners and not do the job thoroughly when weeks or months separated the notices.

15. As far as anticipated costs are concerned, there are claimed reductions because the Applicants do not see why a contract is necessary and 36 minutes is deemed too long to draw the completion statement and invoice and review the reconciliation accounts. The Respondent points to paragraph 6 of the 1st Schedule to the **Leasehold Reform (Collective Enfranchisement etc.) Regulations 1993** which say how a draft contract is to be dealt with.

16. The main problem here is that section 24 of the 1993 Act anticipates either an agreement or a determination by this Tribunal. Sub-section 24(3) clearly anticipates a contract because it says that if a binding contract is not entered into following an agreement, as in this case, rather than a decision of the Tribunal, the Applicant can go to the court for enforcement.

17. Thus, the contract appears to this Tribunal to be incidental to the conveyance and recoverable under section 33. The times spent have not been challenged and 36 minutes to deal with all the financial paperwork on completion does not seem to be unreasonable.

18. Finally, there is objection to the claim for a telegraphic transfer fee, on the basis that the Fast Pay system (presumably a reference to the Faster Payment procedure) should have been used which would have incurred no charge. The Respondent relies upon a 6 year old case which is not binding on this Tribunal. There has been a change of practice over the last few years with the Faster Payment system being used more and more because transfer within 2 hours can be achieved with no dependant transactions. It seems to this Tribunal that any commercial client would be looking to balance the quickest method of transfer as against the cost. The more formal method would be by telegraphic transfer and if the transfer is sent early enough, same day delivery is assured. The cost, at £35 plus VAT is modest. There is doubt here and, on balance, the doubt is resolved in the receiving party's favour i.e. the fee is allowed, particularly as the Faster Payment system does attract a fee from most banks of either £10 or £5.

19. One of the main reasons for this decision is that neither solicitor has given any explanation as to the comparative merits of the 2 methods and it would be wrong of the Tribunal members to decide a case using their own knowledge and experience when there is no hearing. However, landlord's solicitors in general should be aware that Telegraphic Transfer fees will not necessarily be automatically allowed in the future.

20. Thus, the Tribunal reduces the claim by £151.90 (paragraph 11) and £108.50 (paragraph 12). This leaves a balance of £2,972.90. Assuming that the Respondent cannot recover VAT as an input, this means that the VAT is also payable at £594.58. If the Respondent can recover VAT as an input, the VAT element is not allowed.

Valuer's fee

21. The valuer's fees claimed are £1,800.00 consisting of 3 fee notes. The first one dated 11th March 2015 is in the sum of £850.00 and the word 'accepted' is written on it in red. This presumably means that the fee is agreed. The Tribunal would have agreed this in any event.

22. As to the other 2 fee notes, the words "*no hourly rate stated*" are written on each with reduced figures also written in red. In the Respondent's replies, the hourly rate is stated to be £150 which is reasonable for a person of Mr. Gibb's experience and qualifications.

23. The only query the Tribunal has about these 2 fee notes is the time spent and the need for another inspection. A reasonable commercial landlord would have just needed the valuer to research comparable evidence and then feed the results into his spreadsheet changing the valuation dates. The Tribunal considers that reasonable fees for these exercises would be £350.00 and £450.00 respectively, making a total figure of £1,650.00.

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Bruce Edgington
Regional Judge – 21st June 2017

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.