FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case References	**:**	**LON/00AC/OC9/2021/0006**
HMCTS Code (paper, video, audio)	**:**	**P - Paper**
Property	**:**	**Queensborough Court, North Circular Road, London N3 3JP**
Applicants	**:**	**Aorangi Properties Ltd.**
Representative	**:**	**Taylor Rose MW**
Respondent	**:**	**Queensborough Court (Freehold) Ltd.**
Representative	**:**	**Child and Child**
Type of Applications	**:**	**For the determination of the costs payable by the Respondent pursuant to section 33(1) of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal Members	**:**	**Tribunal Judge S. J.Walker**
Date of Decision	**:**	**12 July 2021**

DECISION

Pursuant to section 33(1) of the Leasehold Reform, Housing and Urban Development Act 1993, statutory costs totalling £18,618 including VAT are payable by the Respondent to the Applicant.

Reasons

Background

1. This is an application made by the Applicant under section 91 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") for a determination of the statutory costs payable to them under section 33 of the Act arising out of the application by the Respondent to acquire the freehold of the property.

2. The property comprises 37 self-contained flats together with 17 on-site garages and some amenity land. Three of the flats are subject to overriding leases granted to an intermediate landlord, Hurstway Investment Company Ltd., but no application is made in respect of their costs.

3. The Applicant's entitlement to its costs under section 33(1) of the Act arises as follows. On 8 June 2018 the Respondent, the nominee purchaser, served an initial notice on the Applicant under section 13 of the Act (pages 2 to 9). A counter-notice was served on 20 August 2018 which admitted that the participating tenants had the right to collective enfranchisement under the Act but denied the right to acquire specified additional freeholds and did not accept the proposed purchase price. Counter-proposals were put forward (pages 49 to 53).

4. The Respondent then served a further section 13 notice on 1 November 2018 which was largely the same as the first notice save that the additional freeholds referred to were garages 2,3,4 6 and 7 rather than 1,2,3,6 and 7, further details were given of one other leasehold interests, and the number of flats was changed from 37 to 36 (pages 58 to 65). A further counter-notice was served on 9 January 2019 which again accepted the right to collective enfranchisement but which denied the right to acquire the specified additional freeholds and did not accept the proposed purchase price. Counter-proposals were again put forward which were broadly the same as previously (pages 103 to 108).

5. The valuation figure proposed by the Applicant was £3.56m whereas that proposed by the Respondent was £391,000. The principal reason for this difference was that the Applicant claimed that the roof could be developed. In due course this became the only issue in dispute between the parties. A two-day hearing then took place before the Tribunal on 13 and 14 August 2019 to determine the question of the value of any roof development. In a written decision issued on 30 October 2019 the Tribunal determined that the estimated cost of the proposed development exceeded its gross development value and that only a nominal £10,000 was payable in respect of the roof space (pages 318 to 330).

6. On 22 November 2019 the Respondent made an application for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules"). However, in response to this the Tribunal issued standard directions for the assessment of statutory costs under section 33(1) of the Act on 18 January 2021. Following those directions this application was made on 5 February 2021. The Applicant seeks total costs of £31,353 including VAT made up of legal costs of £9,153 and £22,200 valuation fees.

7. The directions required the Applicant to prepare a costs schedule sufficient for a summary assessment and for the Respondent to prepare a statement of case identifying what costs are agreed and those that are disputed, with reasons. The directions allowed for the Applicant to provide a statement in response to the Respondent's statement of case.

8. Further directions were issued by Judge Vance on 17 June 2021 when it was directed that the Applicant should provide a single paginated bundle. It was also directed that the application would be determined on the papers in the week beginning 12 July 2021.

9. Judge Vance also had regard to the fact that there had been an application under rule 13 of the Rules but directed that the application was to proceed as an application for statutory costs and that, if it were intended to pursue a rule 13 application then such an application could be renewed with further directions being issued. No such renewed application is currently before this Tribunal.

10. The Tribunal had before it a bundle comprising 353 pages. Page references throughout this decision are to that bundle. This bundle included the Applicant's application together with a schedule and supporting documents and the Respondent's statement of case and supporting documents. There was no statement from the Applicant in response to the Respondent's statement of case.

11. No request for a hearing has been made by either party. The Tribunal considered rules 3 and 31 of the Rules and was satisfied that it was appropriate to determine the application without a hearing.

The Law

12. The liability of the Respondent to pay the Applicant's costs is governed by section 33 of the Act, which provides, so far as relevant, as follows;

> "*(1) Where a notice is given under section 13, then (subject to the provisions of this section and sections 28(6), 29(7) and 31(5)) the RTE company shall be liable, to the extent that they have been incurred in pursuance of the notice by the reversioner or by 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 ….

(2) For the purpose 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 such costs….

(5) The RTE company 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.

13. Costs are, therefore, not to be assessed under either the standard basis or the indemnity basis. Nevertheless, costs must be reasonable. The case of Drax -v- Lawn Court Freehold Ltd. [2010] UKUT 81 (LC) makes it clear that the landlord should only receive its costs where it has explained and substantiated them.

The Application

14. According to the Applicant's schedule (pages 175 to 177) the Applicant seeks legal costs as follows, £3,825 – representing 15.3 hours work at £250 per hour - plus VAT together with disbursements of £450 in respect of investigating entitlement and serving a counter notice to the first notice together with legal costs of £2,800 – representing 11.3 hours at £250 per hour – plus VAT together with disbursements of £153 in respect of investigating entitlement and serving a counter notice to the second notice together with £500 – representing 2 hours at £250 per hour – plus VAT for completing the transfer, making total legal costs £9,153. These figures are also set out in a letter from the Applicant's solicitors at page 346. Further detail is provided in invoices at pages 348 and 350.

15. In addition, the Applicant's schedule shows that they are seeking valuation costs of £18,500 plus VAT which they argue equates to £500 per flat. They state that the valuation was undertaken by Richard Sumner MRICS and Daniel Grove AssocRICS of Arnold & Baldwin. Details of the fee rationale adopted by Arnold & Baldwin are set out at page 178 which states that their normal valuation rate is £750 plus VAT per flat, for which some discount has been given for quantum on the basis of representative inspections. They state that their typical hourly rate is £180 per hour plus VAT, which equates to roughly 100 hours which were recorded on file. The time recorded on file is set out at page 179. At page 181 the valuers set out the valuations which were required, these included the freehold interest in the specified premises, the marriage value for flat 27, the freehold interest in the additional freehold, the leasehold interests in flats 10 and 27, and the additional interests to be acquired in respect of the freehold flat 37, the freehold garages 1, 4 and 5, the intermediate leasehold interest in flat 37 and the intermediate leasehold interests in garages 1 and 5. The invoice is at page 182.

The Respondent's Submissions

16. The Respondent's case is set out in detail at pages 184 to 188. They raise a number of objections to the costs sought. With regard to the legal costs they argue as follows;
    (a) a total of 26.5 hours chargeable work undertaken by the Applicant's solicitors in respect of checking a series of 36 nearly identical forms of lease, 36 official copies of title and preparation of a section 21 counter-notice which would be based largely on figures provided by the valuer is excessive. Particular complaint is made of the failure to break down what time was spent undertaking what work as only total hours are provided. They rely on an express request for a breakdown of the hours worked in an e-mail to the Applicant's solicitors dated 10 December 2019 (page 343) to which the only reply was a repetition of the gross hours spent (page 352);
    (b) no information has been provided as to the grade of fee earner being employed and that it would not be necessary for a fee earner charging £250 per hour to do the entirety of the case;
    (c) time was spent reviewing the same documents twice and that there is an element of duplication of work;
    (d) an appropriate charge would be 16 hours at £250 per hour, making a total of £4,000 plus VAT for checking title and the notices and the preparation of counter notices;
    (d) not all disbursements are justified – in particular £450 is charged for office copy entries (page 346) which would equate to 150 copies at £3 each, and a charge of £45 for storage of the files does not fall within the scope of the costs which can be recovered;
    (e) no challenge was made to the charge of £500 plus VAT for completing the transfer.

    The Respondent argues that the Applicant has failed to discharge the burden of establishing that their costs are reasonable.

17. With regard to the valuation costs, the Respondent argues as follows;
    (a) there is a huge disparity between their own valuation costs - £1,500 plus VAT – and those of the Applicant;
    (b) it was not appropriate to appoint two valuers to undertake the valuation exercise;
    (c) the 100 hours spent on the report is excessive;
    (d) time spent on the issues directly associated with the roof development claim should be reduced or disallowed to reflect the overwhelming defeat of that claim at trial as this point should never have been raised in the first place;
    (e) the Tribunal found the Respondent's report of greater value in assisting the Tribunal to determine the issues;
    (f) the Applicant is put to strict proof as to what fees, if any, were separately invoiced by Arnold & Baldwin in respect of their preparation of their substantive report in connection with the Tribunal proceedings and the valuer's attendance at the trial as such costs would not be recoverable by virtue of section 33(5)
    (g) a reasonable figure would be £3,600 plus VAT, representing a total of 20 hours work at £180 per hour

18. Finally the Respondent argues that VAT would not be recoverable if the Applicant is VAT registered.

The Applicant's Reply

19. No statement in reply to the Respondent's submissions has been received by the Tribunal.

The Tribunal's Conclusion

20. The Tribunal notes that the Applicant has failed to respond to any of the arguments and criticisms made by the Respondent. In regard to the legal fees, no breakdown has been provided of the amount of time spent on particular activities nor has any explanation been given as to why the charges appear to be based on the entirety of the work being done by a fee earner charging £250 per hour. The Tribunal does, though, also recognise that this is a highly technical area of law which is mainly conducted by firms with requisite knowledge and experience and that use of a senior associate charging an overall hourly rate of £250 plus VAT would be reasonable for the majority of the work undertaken. However, simple work, such as obtaining office copy entries in respect of the titles involved, should not require a fee-earner at such a level.

21. In addition to a failure to provide details of what has been charged for, the Tribunal notes that the Applicant seeks costs for 15.3 hours work in relation to the first notice and a further 11.2 hours in respect of the second (see page 346). This is despite there being only a relatively short period between the two

notices and there being only very minor difference between the two, as set out above.

22. Despite the question of duplication being raised, the Applicant has failed to explain why it required nearly 75% as much time to deal with the first notice as with the second when very much of the contents would already have been established in respect of the first notice.

23. Taking all things into consideration the Tribunal concludes that the Applicant has failed to discharge the burden of showing that the entirety of the legal costs sought were reasonable and it accepts the Respondent's argument that a reasonable figure would be £4,000 plus VAT for dealing with the two notices. There being no challenge to the costs sought for completing the transfer, the Tribunal is satisfied that the charge of £500 plus VAT for this is reasonable.

24. The Tribunal also concludes that the Applicant has failed properly to justify the charge of £450 for office copy entries and reduces this sum to £150, the equivalent of 50 titles. The Tribunal also concludes that there is no basis for the Applicant to recover £45 in respect of the storage of their files post-completion as sought in the invoice at page 350 as this does not fall within the scope of section 33(1).

25. There was no challenge to the other disbursements.

26. The Tribunal therefore concludes that the total legal costs which are recoverable are £4,500 plus VAT = £5,400, plus disbursements of £150 for the first notice and £108 in respect of the second notice = £258, making an overall total of £5,658.

27. With regard to the valuation costs, again the Applicant has failed to respond to the Respondent's criticisms. However, the Tribunal also notes that despite the fact that the Respondent was successful in the substantive trial, there is no suggestion in the decision of the Tribunal itself that it was unreasonable for the Applicant to pursue its argument that there was a development value in respect of the roof of the property and certainly no suggestion that such an argument was inevitably doomed to failure. In addition, the Tribunal considers that it would in any event be reasonable to spend at least some time, albeit possibly a short amount, exploring the possibility of such a development value where such a possibility arose even if after due consideration it was shown not to exist.

28. Also, the Tribunal did not consider that the relative weight attached to one valuation as opposed to another in its determination can, of itself, have any bearing on whether the costs of obtaining it were reasonable or not, nor can the disparity in the values obtained by the parties be an indication by itself of whether the costs were reasonably incurred or not.

29. The Tribunal considered that the appropriate way to assess the valuation costs would be by reference to chargeable hours at £180 per hour – a figure accepted by the Respondent – rather than a flat figure per unit. This is especially so given the issues relating to development value.

30. The Applicant has failed adequately to explain why two valuers were instructed instead of one and has failed to explain whether or not time recorded on the file represents time being spent simultaneously by two valuers performing effectively the same function. What is clear, though, is that both attended to inspect the property and both have charged 3 hours for that. There is no clear justification for this and so the number of chargeable hours should be reduced by 3.

31. In the absence of any conclusion by the original Tribunal that it was unreasonable to pursue the development value argument, this Tribunal accepts that it was reasonable to do so. That being the case, a total of 30 hours expended on what is a complex piece of work appears to the Tribunal to be reasonable. Implied criticism is made that costs relating to the trial itself have been included within the scope of the 30 hours. However, the assessment of the development value was put forward well before the trial and much of this work must necessarily have been done in advance of the counter-notice being served.

32. On the other hand, when one considers the complexity of the work involved in developing the rooftop development value proposal and the allocation of 30 hours to this complex piece of work, the allocation of 70 hours of work to the other, considerably more straight-forward elements of the case does appear to be excessive.

33. Taking all the factors into account the Tribunal considers that an overall figure of 60 hours of chargeable work would be reasonable. At an hourly rate of £180 this equates to £10,800 plus VAT, making a total of £12,960.

34. Of course, if the Respondent considers that it was unreasonable for the Applicant to have pursued the development value argument before the Tribunal it remains open to them to renew their application under rule 13 of the Rules.

35. This Tribunal is not a tax Tribunal and the issue of whether or not VAT should be charged to the Respondent is not one within its jurisdiction.

Total Costs

36. For the reasons set out above the Tribunal allows statutory costs of £18,618. These comprise legal costs of £4,500 plus VAT = £5,400, disbursements of £258, and valuation fees of £10,800 plus VAT = £12,960.

Name: Tribunal Judge S.J. Walker **Date:** 12 July 2021

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.

- 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.

- 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.

- 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.