UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2015] UKUT 0045 (LC)
LT Case Number: LRX/51/2014

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – costs – whether freeholder can recover costs of managing agent in addition to those of solicitors and valuers in dealing with an enfranchisement notice – appeal allowed – First Tier Tribunal wrongly disallowed managing agents costs on the grounds the work could have been done by the freeholder without considering reasonableness – no reasons given for rejecting the costs as involving duplication or falling outside the statute – s.33 Leasehold Reform, Housing and Urban Development Act 1993

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

COLUMBIA HOUSE PROPERTIES (No.3) LIMITED **Appellant**

and

IMPERIAL HALL FREEHOLD LIMITED **Respondent**

Re: Imperial Hall,
104-122 City Road,
London WC1V 2NR

Determination by written representations

The following cases were referred to in this decision:

Re Cressingham Properties Limited [1999] 2 EGLR 117, LT
London Borough of Havering v MacDonald [2012] UKUT 154 (LC)

DECISION

Introduction

1. This is an appeal against a decision of the First Tier Tribunal Property Chamber (Residential Property) ("F-tT") dated 6 March 2014 in which it refused to make an order for costs pursuant to s.33 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act").

2. Columbia House Properties (No.3) Limited ("the appellant") was the freehold owner of Imperial Hall, 104-122 City Road, London EC1V 2NR ("the Property"). On 20 January 2012 Imperial Hall Freehold Limited ("the respondent") served a notice on the appellant pursuant to s.13 of the 1993 Act claiming the right collectively to acquire the freehold of the Property. By a counter-notice dated 22 March 2012 that right was admitted. In due course a contract for the sale of the Property was entered into and the sale completed.

3. The respondent paid the appellant's legal and valuation costs in the sum of £10,461 and £7,800 respectively. However, the appellant also claimed to be entitled to the costs of its managing agents Sterling Estates Management Limited ("SEM") in the sum of £12,366 which the respondent refused to pay. Accordingly the appellant made an application to the F-tT pursuant to s.91(2)(d) of the 1993 Act for the payment of those costs. It its decision the F-tT refused to order that any of SEM's costs be paid.

4. On 12 June 2014 the Tribunal (Martin Rodger QC Deputy President) granted permission to appeal as a review with a view to a rehearing. At the appellant's request the case is to be dealt with by written representations. The respondent has taken no part in the appeal.

First Tier Tribunal

5. Section 33 of the 1993 Act provides so far as relevant as follows:

> "(1) Where a notice is given under section 13, then… the nominee purchaser 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;
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 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….

(5) The nominee purchaser 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…"

6. The appellant produced an invoice from SEM enclosing a timesheet which the appellant stated it had paid. For the purposes of the F-tT hearing the timesheet was set out in more detail in a costs schedule. It relied on a witness statement from its solicitor Roger Hardwick of Brethertons LLP and oral evidence from Philip Sherrard of SEM.

7. The respondent's case was that SEM's costs were not payable for a number of reasons. First, it was not clear that the matters referred to in the timesheet fell within s.33(1)(a) to (e). Second, the work was merely duplication of work done by the solicitors and valuers which had already been paid for. Third, some of the work was inconsistent with the costs schedule of the appellant's solicitors, for example SEM's timesheet referred to emails that were not mentioned by the solicitors. Fourth, in any event the costs should be limited to those specified in the completion statement namely £6,000.

8. The F-tT's reasons for rejecting the appellant's claim are set out in paragraphs 33 to 38 of its decision:

"33. Whilst the Tribunal understands that the Applicant would like its managing agents to carry out work on its behalf, the Tribunal must consider whether it is reasonable for the Respondent to pay for this. The charge out rate was not challenged. The principle was.

34. Mr Hardwick had not explained why the matters referred to in paragraph 9 in his witness statement (see paragraph 21 above) could not have been dealt with by the Applicant and/or by the Applicant's Solicitors and/or by the Applicant's valuer.

35. In paragraph 11 of Mr Hardwick's witness statement he had said "*the role of agent is that of an intermediary. That is the role that SEM fulfilled in this instance (and it is a role for which they were entitled to be paid). They were not holding themselves out to be solicitors or surveyors. Rather, they interacted with us on the*

Applicant's behalf." SEM may well be an intermediary for the Applicant, and it may well be that SEM was entitled to be paid by the Applicant. However, the Tribunal must consider whether the Applicant is entitled to be reimbursed for the cost of SEM, which is an entirely different proposition.

36. The Applicant is a property developer with a large portfolio in London and elsewhere. SEM are its managing agents. The Applicant had employed experienced lawyers and valuers to deal with the enfranchisement claim. Whether or not the Applicant would have had to use in house employees in addition is immaterial.

37. The Tribunal is of the view that there may well have been duplication of work carried out and/or the work carried out by SEM is not covered by the statute and is therefore otiose. It also may well be the case that SEM's fees have been paid in full by the Applicant, but that is a matter between the Applicant and its managing agents.

38. The information supplied by its managing agents may be useful to the Applicant but there is no reason why the Applicant could not or should not have been in a position to supply the information to its lawyers and/or surveyors itself. The Tribunal has not been persuaded that the need to instruct SEM was justified or incidental to those matters listed in S33 (a) to (e) of the Act".

9. In the event it was not necessary for the F-tT to express a view on the respondent's fourth argument relating to the completion statement.

10. The appellant criticizes the decision on the grounds that the F-tT misconstrued s.33 and failed to give adequate reasons. First, contrary to paragraph 34 of the decision, there is no requirement in s.33 that work be done by the party itself rather than agents. The only issues are whether the costs are "of and incidental" to the matters listed in subsection (1)(a) to (e) and whether they meet the 'paying party' test in s.33(2). Second, the F-tT took into account a number of matters that are not relevant in paragraph 36 of the decision namely that the appellant is a property developer with a large portfolio. Third, when stating in paragraph 37 that "there may well have been duplication of work and/or the work is not covered by statute" the F-tT have given inadequate reasons.

Decision

11. In my judgment the appellant's criticisms of the F-tT decision are well founded. There is no reason in principle why costs incurred under s.33 should not include the costs of a professional agent, be they managing agent, valuer or solicitor. Indeed, subsection (2) envisages that this will be the case by referring specifically to costs incurred in respect of professional services. It goes on to prohibit the freeholder from recovering more than might reasonably be expected to have been incurred if he had been personally liable for the costs (the 'paying party' test). If a freeholder chooses to use agents to carry out work then it may recover those costs provided they relate to the

matters set out in subsection (1)(a) to (e) and are reasonable which includes that they are such as might reasonably be expected to be incurred by him if he had been personally liable for them.

12. I do not consider that paragraphs 34 to 36 of the decision can reasonably be explained on the basis that they relate to the requirement of reasonableness or the test in s.33(2). There is no mention of reasonableness, that subsection or its wording. On the contrary, the F-tT appears to criticise the claim for costs on the grounds that the appellant had not shown they could not have been incurred by someone else. I note that the F-tT does not appear to be saying that the work was not done as a matter of fact. Of course, if a freeholder seeks to recover the costs incurred by several agents, then it may expect the claim to be closely scrutinized to ensure the work genuinely falls within subsections (1)(a) to (e) and that the costs are reasonable. Even if there is no duplication of work, it may be that some work could have been done by one agent only and would have cost less than by that work being split between two agents.

13. Duplication is dealt with by the F-tT in paragraph 37, see below. The F-tT does not say in paragraphs 34 to 36 that the costs are unreasonable because they have been increased as a result of work being split between two agents rather than being carried out by one agent. Indeed, by concentrating on SEM's role as intermediary the F-tT has failed to address the specific work which SEM undertook some of which is described in paragraph 11 of Mr Hardwick's witness statement. If it considered that this work could and should have been dealt with at lower cost by the lawyers and/or valuers then no reasons for that conclusion have been given.

14. It is unclear what the F-tT considered to be the relevance of the reference in paragraph 36 to the appellant being a property developer with a large portfolio. Of more importance in my view is the statement at the end of that paragraph that "Whether or not the Applicant would have had to use in house employees in addition [to lawyers and valuers] is immaterial." The F-tT appears to be saying that, if there was additional work to be done, it could have been done in house, see also paragraph 38 of the decision. If there was work which needed to be done in response to the enfranchisement claim that fell within s.33(1)(a) to (e) over and above that which could be done by lawyers and valuers then the appellant is entitled to claim the reasonable cost of that work, whether done in house or by managing agents. If costs are incurred in house then in principle they may be the subject of a claim, see *Re Cressingham Properties Limited* [1999] 2 EGLR 117, LT. Such costs may also be recovered if they are carried out by an agent, provided they are reasonable and the 'paying party' test is met.

15. If a freeholder chooses to use a managing agent to carry out work that it could do itself then it may recover those costs provided they relate to the matters set out in subsection (1)(a) to (e) and are reasonable including that they are such as might reasonably be expected to be incurred by him if he had been personally liable for them. Insofar as the F-tT disallowed the costs simply because it considered that they could have been dealt with by the appellant, without reference to whether they were as a matter of fact reasonable, then in my judgment it fell into error and took into account an irrelevant consideration. Insofar as the F-tT considered that the costs were unreasonable because e.g. the work could have been undertaken more cheaply in house, no reasons for that conclusion have been given. For example, the F-tT does not deal with the

appellant's argument set out in paragraph 20 of the decision that the costs would have increased if SEM had not been used.

16. Turning to paragraph 37 of the F-tT decision, no reasons have been given as to why SEM's work "may well have" involved duplication or be outside the matters set out in subsections (1)(a) to (e). The standard of reasons required is encapsulated in the first principle set out in paragraph 31 of the recent decision in *London Borough of Havering v MacDonald* [2012] UKUT 154 (LC):

> "proper and adequate reasons must be given, so that they are intelligible and deal with the substantial points that have been raised, and the reasons should deal, in short form, with the substantial issues raised in order that the parties can understand why the decision has been reached."

17. Whether there had been duplication and whether the work fell within subsections (1)(a) to (e) were two key issues raised by the respondent which reproduced the appellant's schedule of costs with detailed annotations against each item. A frequent comment is that SEM claimed the cost of sending an email to the solicitors the cost of which did not appear on the solicitors costs schedule. Paragraph 12 of Mr Hardwick's witness statement specifically addresses this issue. He says he had SEM's timesheet in front of him when he prepared his costs schedule and he left out references to emails where to claim costs would have involved duplication with that timesheet. It is wholly unclear whether the F-tT had regard to that evidence (which is not mentioned in its summary of the appellant's case) or, if it did, why it rejected it because no reasons are given.

18. The evidence showed that work undertaken by SEM included providing schedules of ground rent and service charges and providing plans of the Property (see paragraph 26 of the decision which summarises some of Mr Sherrard's evidence). This would appear to be a cost of and incidental to any valuation of the Property for the purposes of s.33(1)(d) of the 1993 Act. The F-tT gives no reasons why that work falls outside the statute or has been duplicated by another agent. It is precisely the sort of information that you would expect a managing agent to provide. Paragraph 11 of Mr Hardwick's witness statement refers to SEM being involved in determining the number of car parking spaces for which Land Registry searches proved unreliable. This would appear to be necessary in order to value the Property, was not information available from legal documents which the solicitors could have dealt with and again is the sort of information a managing agent could be expected to provide. The F-tT gives no reasons why that work falls outside the statute or has been duplicated by another agent.

19. These are simply two examples which illustrate the failure to give reasons for the F-tT's decision. There is nothing wrong with giving reasons compendiously by reference to broad points, e.g. the claim for emails, without the need to deal with individual cost items. However, that it not the case here as no reasons have been given, merely a conclusion stated in paragraph 37.

20. The appeal is therefore allowed. The case will be remitted to the F-tT for rehearing in accordance with this decision.

21. This decision is final on all matters other than costs. A letter inviting submissions on costs will be sent to the parties.

Dated: 3 February 2015

Her Honour Judge Alice Robinson