UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – Leasehold Reform, Housing and Urban Development Act 1993 s 60 – costs of intermediate landlord – reasonableness of costs – matters to be taken into account

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN:

DASHWOOD PROPERTIES LIMITED **Appellant**

and

BERIL PREMA CHRISOSTOM-GOOCH **Respondent**

Re: 11 Newlands Court
Footscray Road
Eltham
SE9 2SS

Determination on the basis of written representations

The following cases are referred to in this decision:
Daejan Properties Ltd v Parkside 78 Ltd LON ENF 1005/03
Daejan Properties Ltd v Twin LON/00BK/0C9/2007/0026
Daejan Properties Limited v Allen LON/00AH/OLR/2009/0343

DECISION

Introduction

1. This is an appeal brought by the appellant, Dashwood Properties Limited, against the decision of the Leasehold Valuation Tribunal promulgated on 13 June 2011 with respect to costs awarded pursuant to the provisions of section 60 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act").

2. Permission to appeal was sought on three grounds, and permission was granted by the LVT on all three grounds on 7 July 2011. The Chairman of the LVT in granting permission to appeal indicated that he considered it would be helpful to have some guidance with respect to the costs incurred by intermediate landlords in enfranchisement claims.

3. The respondent, Beril Prima Chrisostom-Gooch, objects to all three grounds of appeal and seeks an order dismissing the appeal and upholding the decision of the LVT.

The grounds of appeal

4. The appellant appeals the decision of the LVT on the following grounds:

   (i) that the Tribunal erred procedurally in granting to the respondent further time for lodging its submissions and then relying on those submissions without first giving the appellant an opportunity to consider and respond to those submissions;

   (ii) that the Tribunal erred in determining that the costs of an intermediate landlord should take account of the price of the lease extension claim;

   (iii) that the Tribunal erred in determining that the costs of an intermediate landlord are a duplication of the work carried out by a competent landlord.

The factual background

5. By an application dated 13 April 2011, Dashwood Properties Limited applied to the LVT pursuant to the provisions of section 60 of the 1993 Act for an assessment of the costs which the tenant is liable to pay in respect to an application for a lease extension of the property at 11 Footscray Road, London SE9 2SS. The freehold owner is the Crown Estate Commissioners. The intermediate landlord is Dashwood Properties Limited, the appellant. The lessee is Beril Prima Chrisostom-Gooch, the respondent to this appeal.

6. The lessee held a lease for a term of 98 years from 5 July 1962. The appellant holds a headlease for a term of 98 years from 14 November 1964. The lessee applied for the grant of a new lease by way of section 42 notice of claim on 5 August 2009 and a counter-notice admitting the lessee's entitlement to a new lease was served by the Crown Estate Commissioners on 13 October 2009. On 16 October 2009 the appellant served a notice, pursuant to the provisions of section 40 and Schedule 11 to the 1993Act, to act independently of the Crown Estate Commissioners.

7. On 13 June 2011, the LVT assessed the appellant's costs. The costs claimed were £1046 plus VAT (a total of £1216.86) with respect to the legal costs involved in the checking of the notices and the respondent's entitlement to the new lease; £500 plus VAT (a total of £600) with respect to the conveyancing costs; and £500 plus VAT (a total of £600) with respect to valuation.

8. The LVT determined, adopting a broad brush approach, that the appropriate figures to be awarded to the appellant were as follows, adopting a broad brush approach: that the valuers fee of £500 plus VAT should be permitted; but that the legal costs incurred by the intermediate landlord should not exceed £650 plus VAT, and that those costs should be split one-third/two-thirds between the solicitors checking eligibility and the conveyancing solicitors.

The Appeal

Late Submissions by the respondent

9. The LVT recorded that while the respondent to this appeal had challenged the costs of the appellant as being excessive, there was no written submission on the part of the respondent. The LVT decided that it should approach the respondent in order to ascertain whether the respondent did wish to make any submissions and, upon discovering that the respondent did wish to do so, gave further time for that purpose.

10. Written submissions were provided by the respondent and taken into account by the LVT when coming to its final determination on costs. The appellant complains that it was not shown a copy of those submissions and was given no opportunity to present a response to those submissions. The appellant contends that this failure to give the appellant the opportunity to respond to the submissions made by the respondent is a procedural irregularity that gave rise to prejudice against the appellant. The appellant states that had it seen the submissions from the respondent it would have wished either to respond to them and would have sought further directions from the LVT to do so or, more likely, have sought an oral hearing in accordance with the provisions of paragraph 13(3)(a) of the Leasehold Valuation Tribunal's (Procedure)(England) Regulations 2003 ("the 2003 Regulations"). The appellant relies upon the provisions of paragraph 16 of the 2003 Regulations contending that paragraph 16 applies generally and not just to oral hearings.

11. In the reasons given when granting permission to appeal the LVT sets out that it was minded to give the respondent further time to make submissions as it had been made clear by the respondent that it wished to make submissions and it was a plain oversight by their solicitors that there had not been any submissions made. The LVT accepts that it ought properly to have informed the appellant of those submissions and that it would have considered any reply provided by the appellant, but that it does not consider that it would have made any material difference to the outcome.

12. The LVT cannot be criticised for giving the respondent an opportunity to provide written submissions with respect to the issue of costs. It was plain from the papers before the LVT that the respondent wished to make submissions and that there had been an oversight. That oversight was properly corrected by giving the respondent the opportunity to make submissions but, as a matter of procedure and natural justice, the appellant ought properly to have been given an opportunity to respond to those submissions. The LVT have acknowledged that in the decision to give permission to appeal.

13. I do not consider, given the issues involved, that the LVT would have entertained the notion of ordering a hearing in these circumstances. It is important that the LVT deals with matters in a proportionate way, and a hearing arguing about costs totalling less than £3,000 would not have been proportionate.

14. In my judgment the LVT were correct to give the respondent an opportunity to make submissions. The appellant ought to have been able to provide a reply to those submissions. The LVT states that it does not consider that it would have made any material difference to their decision and that no prejudice was therefore suffered.

15. I do not consider it appropriate to go behind the LVT's conclusion on that point. However, even if there were some prejudice, that prejudice is being remedied by this appeal in which the appellant is giving a fulsome response as to why the LVT should not have accepted the submissions of the respondent and should not have reduced the costs claim.

16. This ground of appeal is dismissed. The LVT was entitled to decide that the respondent should be given the opportunity to make written submissions. No prejudice has been suffered by the appellant in the circumstances of this matter.

Price of the Lease Extension

17. The appellant's second ground of appeal is that the LVT ought not to have taken into account the price of the lease extension as a ground for determining whether the costs incurred were reasonable in accordance with the provisions of section 60 of the 1993 Act.

18. Section 60 of 1993 Act provides, inter alia, that:

> (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 the notice, for the reasonable costs of and incidental to any of the following matters, namely –
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> (a) any investigation reasonably undertaken of the tenant's right to a new lease;
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> (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;
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> (c) the grant of a new lease under that section; 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 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.

19. The appellant is a "relevant person" for the purposes of the 1993 Act and is therefore entitled to the reasonable costs of investigation of the tenant's right to a new lease, reasonably undertaken. The limitation on costs contained in section 60(2) contains a method by which the landlord is curtailed from expending monies on advice that it would not incur if it were obliged to pay for those costs personally.

20. The value of a dispute and the amount to be gained, or lost, by a party, is always a matter that a party will bear in mind when considering whether to incur costs and the level of those costs.

21. While the issues involved in enfranchisement claims can undoubtedly be complex and LVT decisions in *Daejan Properties Ltd v Parkside 78 Ltd* LON ENF 1005/03, followed in *Daejan Properties Ltd v Twin* LON/00BK/0C9/2007/0026 and *Daejan Properties Limited v Allen* LON/00AH/OLR/2009/0343 establish that the LVT accepted that a landlord is entitled to instruct the solicitors of its choice and is not obliged to instruct the cheapest or most local solicitors, the LVT were perfectly entitled to take into account the actual sum in dispute in determining whether the costs of professional services in investigating the tenant's right to a new lease were reasonable and that the investigation was reasonably undertaken.

22. The LVT were entitled to determine that costs far in excess of the amounts involved were not costs that "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" and the appeal on this ground therefore fails.

Duplication of Costs

23. An independent investigation of the tenant's right to the lease is, as a matter of principal, a reasonable investigation to undertake. As is pointed out by the appellant, it may well be that there are issues of conflict between the intermediate and competent landlord, if different, and it cannot be incumbent upon the intermediate landlord to need to rely upon the investigations carried out by the competent landlord.

24. The caveat contained in section 60(2) of the 1993 Act is there to ensure that the relevant person does not simply incur costs, knowing that those costs will be paid by the lessee, without there being any necessity to do so. An intermediate landlord will wish to ensure that the tenant does have a right to a new lease, regardless of whether a different competent landlord, who may not have the same degree of interest or concern as the intermediate landlord, has already determined that the tenant does have such a right.

25. In the circumstances, I do not consider that the LVT were correct to determine that there should be a reduction of the intermediate landlord's costs by reason of there being duplication with the work of the head landlord. To this extent, this ground of the appeal is allowed.

26. I do consider that there was duplication in the instructing of two firms of solicitors with respect to the investigation of the tenant's right to a new lease (section 60(1)(i)) and the conveyancing costs (section 60(1)(iii)). In my judgment, such costs do not satisfy the proviso set out in section 60(2) of the 1993 Act.

27. The costs of instructing separate conveyancing solicitors to the solicitors advising on the tenant's right to a new lease, with the inevitable duplication that will incur, do not fall within the approach adopted in the three LVT cases referred to above. Those duplicated costs are not something that "might reasonably be expected to have been incurred by him if the circumstances had been such that [the landlord] was personally liable for all such costs." In my judgment the LVT were correct to come to the conclusion that such duplicated costs should not be recoverable.

28. This ground of appeal therefore succeeds to a limited extent.

Conclusion

29. For the reasons set out above, grounds 1 and 2 of the appeal do not succeed. The appellant succeeds to an extent with respect to the duplication of costs between the competent and intermediate landlords.

30. Using the "broad brush" approach adopted by the LVT, the valuation costs of £500 plus VAT (£600 in total) stand. With respect to the solicitor's costs of investigation and

conveyancing, I consider the reduction was too great in that I have found the intermediate landlord was entitled to undertake his own independent investigation of title, but that the amount potentially at stake is a matter which is properly taken into account and that there was duplication in costs of the conveyancing solicitor and the solicitor investigating title. I will allow £675 plus VAT for the investigation of title (£810) and £350 plus VAT for the conveyancing costs (£420). A total costs of £1230 for the solicitors costs (inclusive of VAT). If the landlord is VAT registered then the costs recoverable should not include VAT so that that the valuation costs are £500 and the solicitor's costs are £1025.

Dated 26 June 2012

Her Honour Judge Karen Walden-Smith