Y TRIBIWNLYS EIDDO PRESWYL
LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0052/12/16

In the Matter of 42 Esplanade House, The Esplanade, Porthcawl, Bridgend CF36 3YE

In the matter of an Application under the Leasehold Reform, Housing and Urban Development Act 1993, ("the Act") section 91 (2)(d)).

APPLICANT Esplanade Porthcawl Ltd

RESPONDENTS Clive James Down and Sheenagh Jane Down

ORDER

The application is dismissed.

REASONS

1. By an application to the tribunal dated 19th of December 2016, Walter Coughlin, Director of the Applicant firm sought an order for costs under section 91 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act").This relates to the earlier case between the parties with case number LVT/0013/06/16, which was Mr and Mrs Down's application for a lease extension. The tribunal determined, in a written decision dated 29th of September 2016 (following an oral hearing on 31st August 2016), that the premium for the new lease should be £3,345.

2. The Applicant seeks reimbursement of the costs of £1008 for their expert surveyor. However the invoice for those costs stated that they were for time spent preparing for and attending at the tribunal hearing on 31st of August 2016 and therefore by virtue of section 60 (5) of the Act, the tenant is not liable for them. In addition, or in the alternative the Applicant argues that £500 of those costs should be paid by the Respondents under paragraph 10 (2) (a) of Schedule 12 of the Commonhold and Leasehold Reform Act 2002. This states as follows;

   "10. (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub – paragraph (2).

   (2) The circumstances are where –
   (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) the amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed –
(a) £500, or

(b) such other amount as may be specified in procedure regulations."

3. The Applicant, in a letter dated 19th December 2016 accompanying the application, set out various negotiations and discussions that had taken place before the hearing. In essence, the Applicant had offered to settle the matter by e mail of 18th February 2016 for £3200 and states that the Respondents' surveyor would not move from his valuation of £2000. The Applicant points out that the tribunal's decision was that the premium should be £3345 which was close to the valuation that the Applicant in this case had suggested at the outset. The Applicant states that there was no response to his initial offer to settle for £3200 and that when the discussions took place between the surveyors but did not bear fruit, the Respondents in this case referred the matter to the tribunal. The Applicant contends that the offer of £3200 deserved a response and that the refusal to respond was unreasonable.

4. By letter to the tribunal of 30th December 2016 the Respondent's solicitors, Rees Wood Terry, denied that their clients had acted "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings" and pointed out that they had served a counter notice upon the freeholder on 6th April 2016 proposing a premium of £4500. They state that their clients' surveyor had sought to negotiate the premium with the freeholder surveyor but no progress was made and therefore their client submitted an application to the tribunal on 17th June 2016 for determination as to the premium. Rees Wood Terry further point out that the freeholder did not make any attempt to settle the matter between April and August 2016 and that pursuing the matter through the tribunal was reasonable.

5. The tribunal gave further directions in this matter seeking any further representations and evidence upon this application by 20th of January 2017. By letter dated 18th of January 2017 further representations and documentation was supplied by Rees Wood Terry on behalf of the Respondents. No further information has been forthcoming from the Applicant. The directions also made it clear that the matter would be determined without an oral hearing on 10th February 2017, but made both parties aware of their right to request an oral hearing at any time before 11 AM on 10th February 2017. No such request was made and this determination has therefore been made upon the papers.

6. The Respondents' solicitors' letter of 18th of January 2017 pointed out that the original lease extension claim notice was sent to the Applicant on 2nd February 2016 and on 18th February the Applicant sent an email to the Respondents' solicitors suggesting that they may be willing to proceed with the premium of £3200. That email did not conform to the Act's requirements in relation to the contents of a counter notice and was higher than the figure advised by the Respondents' surveyor. Further on 6th April 2016 the Applicant's solicitors served a counter-notice seeking a premium of £4500 which was double the amount that the Respondents had originally proposed. Discussions between the parties respective surveyors did not result in any progress and the Respondents submitted an application to the tribunal. Rees Wood Terry point out that the parties' surveyors met on 4th July 2016 to discuss their calculations but again no progress was made and they point out that the Applicant has not filed any evidence of attempts made to settle this matter before the hearing.

7. Further Rees Wood Terry point out that a completion statement was received from the Applicant's solicitors on 18th November 2016 which included surveyor's costs for £1692 including VAT. Rees Wood Terry sent a letter to the Applicant's solicitors on 18 November 2016 seeking a breakdown of the surveyor costs as these were felt to be too high but no substantive response was received to that. The Respondent solicitors suggested that the parties complete the lease extension and seek to reach agreement as to costs at a later date but the Applicant was not prepared to agree this. No progress had been made upon the issue of costs and then the Respondents' solicitors received notification of the current application. Rees Wood Terry point out that this was filed by the Applicant on 19th December 2016 rather than the Applicant's solicitors. They submit that the Respondents have acted reasonably throughout the process and that in fact the Applicant has acted unreasonably by causing repeated delays. There was also a letter from the Respondents themselves dated 11th January 2017 setting out the chronology of matters and the anxiety and frustration caused to them by the repeated delays and the stance of the Applicant freehold company.

DECISION

8. The tribunal has carefully considered all of the evidence and representations and dismisses the application. Accompanying the application had been an email enquiry that Walter Coughlin had sent to the clerk to the tribunal on 24th November 2016. This had again set out the matters referred to in paragraph 3 above and also stated "*I have now been informed that, as things stand at present, the company is liable to pay the costs of its surveyor in relation to the tribunal hearing. I submit please that, in the special circumstances of this particular case,that would not be fair or just."* In my judgement this is a telling sentence. In fact the legal position was that the Applicant company was always liable to pay the costs of the surveyor in relation to the tribunal hearing in accordance with section 60 (5) of the Act. This is something that the Applicant company should have been advised at the outset by its surveyor and solicitor, and certainly before instructing the surveyor to attend at the hearing. It is not possible to determine from the information before me whether or not the Applicant was given that advice earlier or whether his use of the phrase *"I have now been informed…"* indicates that he had only received such advice as to the legal position on tribunal costs on or around 24 November 2016.

9. Upon the narrative provided by Mr Coughlin, (let alone that provided by Rees Wood Terry) there is no evidence whatsoever to even begin to suggest that the Respondents in this case or their solicitors have acted "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings." The circumstances of this case, namely that an initial offer was not accepted, that there were other counter offers, but subsequent negotiations did not successfully resolve the matter meaning that an application was made to the tribunal, are commonplace and routine. Mr Coughlin's suggestion that there are "special circumstances" in this particular case is rejected.

10. In any event Mr Coughlin's initial offer was apparently only 'on the table' for a limited time, namely from 18th February 2016 to the 6th April 2016 when the Applicant's solicitors served a counter- notice proposing a premium of £4,500. Mr Coughlin's e mail and letters to the tribunal are silent on that counter-notice and the subsequent negotiations described by Rees Wood Terry. There is nothing untoward or unreasonable about the way that the Respondents/ their solicitors have conducted themselves in relation to the lease extension and they were entirely within their rights to apply to the tribunal. The Applicant is also reminded that the tribunal's determination of 29th September 2016 was both higher than Mr Coughlin's offer and significantly lower than the £4500 proposed in the counter-notice served by the Applicant's solicitors. The counter-notice, as an official document that is part of the lease extension process, would carry more weight as evidence of the Applicant's valuation, than the contents of an e mail.

11. This application is entirely misplaced and was doomed to failure under section 60(5) of the Act, and yet the Applicant seeks a 'second bite at the cherry' by making wholly unwarranted allegations of unreasonable behaviour. It may be that the Applicant Company cannot easily afford to pay the costs of its surveyor's representation before the tribunal as Mr Coughlin's email of 24th of November 2016 states. However the instruction of surveyors was entirely a matter for Mr Coughlin and the Applicant Company to take into account and to seek advice upon at the outset and at the negotiation stage. If the Applicant had either not been advised about the effect of section 60 (5) of the Act until a late stage, or had failed to appreciate such effect then that does not make the Respondent's behaviour unreasonable. Nor does the claimed impecuniosity of the Applicant Company. The application is dismissed. The Respondents are not responsible for payment of the Applicant's surveyor's fees of £1008 (including VAT) which are to be met by the Applicant Company.

DATED this 16th day of February 2017.

Richard Payne
CHAIRMAN