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**RESIDENTIAL PROPERTY TRIBUNAL**

**LEASEHOLD VALUATION TRIBUNAL**

Reference: LVT/0052/03/13

TRIBUNAL D J Evans LLB LLM
C Trotman Jones MRICS

In the matter of an Application under the Leasehold Reform, Housing and Urban Development Act 1993 dated the 2nd October 2012

PROPERTY Flat 12 and garage, Clos Hendre, Rhiwbina, Cardiff, CF14 6PN

APPLICANT Mrs Verena Ruth Jenkins

RESPONDENT Coffin Developments Ltd

DECISION

## 1 INTRODUCTION

On the 9th day of January 2013, we considered an application by Mrs Verena Ruth Jenkins (the Applicant) to determine the premium payable by her to Coffin Developments Ltd (the Respondent) for a statutory extension to her lease of 12 Clos Hendre, Rhiwbina, Cardiff (the Property) under the terms of the Leasehold Reform, Housing and Urban Development Act 1993 (the Act). Our Decision was issued on the 31st January 2013. Following that Decision, there was some doubt as to whether the Applicant wished to proceed with the extended lease. However, on the 7th March 2013, the Applicant's surveyor (Mr Morrell) informed the Respondent's Solicitor (Mr N John of Hopkin John) that the Applicant was "minded to proceed" with the statutory extension.

## 2 THE ISSUE

In the letter of the 7th March 2013, Mr Morrell asked Mr John to confirm his costs at the same time drawing his attention to the terms of section 60(1) of the Act which in effect limits the Respondent's Solicitor's and Surveyor's fees to:

- The Solicitor's costs of verifying the Applicant's claim
- The Surveyor's costs of valuing the Property
- The Solicitor's costs of granting the statutory lease extension.

Mr John notified Mr Morrell by letter dated the 11th March 2013 that his fees were:

- £200 for verifying the Applicant's claim, and
- £500 for the grant of the extension to the lease.

On the 22nd March 2013, Mr Morrell e-mailed the Tribunal requesting the Tribunal to determine the costs payable under the Act. By an e-mail dated the 22nd April 2013 to the Tribunal Mr Morrell indicated that there was no issue with regard to the fees of the Respondent's Surveyor (Mr Kenneth Cooper of The William Ricketts Partnership) of £575 plus VAT. The only issues therefore related to Mr John's costs.

## 3 THE HEARING

The application was heard at the Tribunal Offices on Wednesday the 24th April 2013. The Applicant did not attend. Neither did her Solicitor (Ms Emma Penn of James Morgan & Co) nor Mr Morrell. The Tribunal had, however, received an e-mail from Mr Morrell indicating that he would not be attending as it was not convenient for him to attend and explaining that the Applicant was anxious not to incur further costs. The Respondent was represented by Mr Peter Fletcher, Solicitor, and Mr Cooper whose fees were no longer in issue, but who attended in case there was need to refer to his file. The Respondent had prepared a bundle of documents to which reference was made during the hearing. In this Decision, we shall refer to a document which is included at, for example, page 38 in the bundle as being the document at R38.

## 4 THE APPLICANT'S CASE

The Applicant's case is essentially that set out in Mr Morrell's e-mail to the Tribunal dated the 22nd April 2013. His arguments are as follows:

(a) Mr John's fee of £200 for investigating the Applicant's right to an extended lease is too high because her right could be established from the Land Registry at minimal cost;
(b) He would have expected Mr John's fee for the grant of an extended lease to be similar to that charged by Ms Penn on behalf of the Applicant, namely £350 plus VAT. He attached a copy of Ms Penn's client care letter in support of this contention.

## 5 THE RESPONDENT'S CASE

Mr Fletcher put forward the following arguments:

(a) When Mr John informed Mr Morrell of the amount of his costs, he did not challenge them directly. Ms Penn has never commented upon them. Even when e-mailing her own client (a copy of an e-mail from Ms Penn was disclosed by the Applicant) and incorrectly overstating the costs at £800 instead of £700, in each case plus VAT, she made no adverse comment on the amount
(b) Although Mr Morrell states in an e-mail from himself to his client and to the Tribunal that the Applicant had attempted to resolve the issue of costs, he had not in fact made any effort to do so. Mr Morrell has made the application prematurely and has not bothered to attend to justify his claim.
(c) The costs are reasonable. Mr John's charge out rate is £200 per hour which is a reasonable rate for work of this nature. He estimated that the work would take 2½ hours to complete. Mr John has set out the work done to date in the preface to the bundle. Mr John is an experienced sole practitioner and his charge out rate compares reasonably with the rates allowed in the Cardiff County Court for litigation.
(d) The application is premature as the extended lease has not been completed. Mr Fletcher did not suggest that the Tribunal had no authority to deal with the costs at this stage and when asked, he indicated that he accepted that it did. He also agreed that it would not be sensible to postpone consideration until after completion as this would only add to the costs.

Mr Cooper referred us to the comments he made at the conclusion of the original hearing, namely that his costs were £575 plus VAT and that legal costs were £600 plus VAT. After conferring with our notes of the previous hearing, we were able to confirm Mr Cooper's recollection on this point and the fact that Mr Morrell made no comment.

## 6 THE TRIBUNAL'S COMMENTS

As an expert Tribunal we are entitled to rely upon our knowledge and experience, but in fairness to the Respondent we raised a number of issues with Mr Fletcher for his observations:

(a) He was unable to offer any explanation as to why it had taken from the 11th March, when Mr John had received Mr Morrell's letter of the 7th March informing him that the Applicant was proceeding with the statutory extended lease, until the 3rd April before Mr John had begun to draft the lease.

(b) He did not know why it had taken Mr John an hour spread over 2 days to draft what we suggested was a straightforward standard lease requiring the current details to be inserted in the appropriate places (R59). The draft had been based on an earlier precedent although he could not say whether that was a statutory extension or a new 80 year lease of the type frequently offered by his client.

(c) He would not be drawn as to whether the additional costs incurred in connection with a variation of the original lease in order to update it should be borne by each party as each would benefit (R63).

(d) He accepted that a more senior Solicitor charging a higher rate than a Solicitor of less qualification would be expected in some circumstances to carry out a task more quickly than someone with less experience. A client would not expect to pay for his/her Solicitor's learning time.

(e) In response to the Tribunal's comment that in its experience a fee of £350 to £400 plus VAT for the extended lease was more usual, he submitted that the question for the Tribunal was whether Mr John's fee was reasonable, not whether someone else would do the work for less. In Mr Fletcher's view, 2½ hours @ £200 was a reasonable estimate. He also considered that a lessee's Solicitor's costs would be less than those of the lessor's Solicitor, a suggestion in respect of which we expressed some doubts, but Mr Fletcher did not develop his argument.

## 7 THE LAW

Section 91 of the Act gives the Tribunal jurisdiction to determine the amount of costs payable by the Applicant under section 60(1) of the Act. Those costs are the "reasonable costs of and incidental to...

(a) any investigation reasonably undertaken of the[Applicant's] right to a new lease;

(c) the grant of a new lease under [section 56 of the Act]."

The new lease is required under section 57 to be on the same terms as those of the existing lease (except as to rent and term and certain specified modifications). However, either party "may require that for the purposes of the new lease any term of the existing lease shall be …modified in so far as (a) it is necessary to do so in order to remedy a defect in the existing lease" (section 57(6)). The amount of any costs incurred by Mr John must not be more than he would have expected the Respondent to pay (see section 60((2) of the Act).

## 8 THE HOURLY RATE

(a) Most Solicitors operate upon the basis of an hourly rate with tasks converted into units of 6 minutes or 1/10th of an hour. Mr John's rate is £200 per hour. It is a rate which reflects his seniority in the profession and his experience and expertise. It also takes into account the location of his offices and the staff and other overheads he incurs in servicing his clients. These overheads include computers with expensive, specialist software designed for accounts, time recording and word processing. In many cases it will include access to a bank of precedents. Standard length letters and general telephone calls would be charged out as

a unit - £20. We are aware from the papers that Ms Penn proposed to charge a fee of £350 plus VAT for acting on behalf of the Applicant, a cost which will have included the work involved in registering the new lease. However, we do not know her hourly rate. However, her offices are not in the town centre and presumably her overheads are less.

(b) Whilst Ms Penn's fee agreement with her client is of interest in that it is indicative of the level of fees which practices in Cardiff charge, we agree with Mr Fletcher that the overriding issue is not whether Ms Penn or anyone else would charge less, but whether Mr John's charges are reasonable.

(c) From our knowledge and experience, we are satisfied that the hourly rate of £200 is reasonable for a Solicitor of Mr John's seniority to charge. Established and important clients such as the Respondent will expect to have its affairs handled by someone of appropriate seniority. We accept Mr Fletcher's comment that the County Court rates allowed when litigation costs are assessed supports that view. We are satisfied that Mr John's hourly rate is reasonable.

## 9 INVESTIGATION INTO APPLICANT'S RIGHT TO NEW LEASE

The work of and incidental to this investigation will include the receipt and perusal of the notice, checking both the Respondent's title and that of the Applicant, checking the information against that held by the Applicant, acknowledging receipt of the notice, notifying the Respondent and instructing its Surveyor. There may be some follow up, telephone calls, advice and discussion with the Surveyor and the Respondent as to what issues are to be raised in the counter-notice. We have in the preamble to the Respondent's bundle a summary of the work done - 5 units for checking the title and preparing the counter-notice plus 5 letters and 2 telephone calls. This totals 12 units giving a charge of £240 which Mr John reduces to £200 (plus VAT). We consider 5 units for checking the notice and preparing the counter-notice is on the high side, but we can certainly see that each of these tasks would take more than a single unit of 6 minutes and would more likely be charged as 2 units each. Even allowing 2 units each plus 7 units for letters and telephone calls produces a figure of 11 units. It could be argued that all the letters were not necessary - copies to the client of correspondence passing between the Solicitors or with the Surveyor would be just as effective - but this is really reducing it to the basic minimum. The question is one of reasonableness and we are satisfied that overall a charge of £200 is within that band of reasonableness and we therefore determine accordingly.

## 10 MODIFICATIONS ON GRANT OF NEW LEASE

Section 60(1)(c) requires the Applicant to pay "the reasonable costs of and incidental to…the grant of a new lease under [section 56 of the Act]". As mentioned above, under section 57 of the Act, the extended lease is to be "on the same terms as those of the existing lease", subject to certain prescribed modifications and the right of either party to require the lease to be modified insofar as "it is necessary to do so in order to remedy a defect in the existing lease" (section 57(6)(a)). The existing lease does not appear to impose an obligation upon the Respondent to carry out the usual repair and maintenance of the common parts. The Applicant may well wish to have this rectified in the new lease. In our view, it was perfectly proper for Mr John to draw the attention of the Applicant's Solicitors to the deficiency in the existing lease and to offer amendments to rectify the problem. We cannot, of course, comment upon the sufficiency of those amendments as that is a matter for the Applicant's Solicitor. Nevertheless, this kind of modification is one which the Act clearly envisages and should therefore be taken into account when considering the Respondent's costs whether such modification is suggested by the lessor or required by the lessee. The costs are certainly "costs of and incidental to the grant" of the new lease. We are not suggesting that the costs of wholesale amendments or the substitution of a modern "estate" type lease would be

regarded as payable by a lessee, but modifications of this nature, necessary to ensure clarity and practical efficacy, are properly incurred by the Respondent and payable by the Applicant.

11 THE GRANT OF THE LEASE

(a) The grant has not yet been completed, although a fixed cost has been submitted to the Applicant. Mr Fletcher wisely accepted that it was not going to be cost efficient to adjourn the application until completion. He could not see that there was any reason why we could not consider the costs at this stage. The draft has been prepared together with some amendments. The matter should now proceed to completion in predictable fashion.
(b) In the preamble to the bundle Mr John suggests that his costs to date are £393. He has spent, in effect, just under 2 hours preparing the draft, with the schedule of modifications, as well as 7 letters and one telephone call.
(c) Mr Fletcher was unable to explain why it took Mr John, a Solicitor of considerable experience, an hour to prepare what is a standard, straightforward, 3 page lease. The draft lease appears to have been taken from a previous file (R59) and the modifications are recorded as having been "on computer", if we read Mr John's writing correctly (R63). We were given no justification to support the claim for an hour for the preparation and finalising of the draft plus another ten minutes for amending and adapting the standard modifications. We are of the view that a Solicitor of Mr John's seniority and experience should have been able to prepare and finalise a straightforward draft of such a short lease - including the obtaining of a standard set of modifications for consideration by Ms Penn - within half an hour.
(d) We have been provided with copies Mr John's correspondence. The six letters between R47 and R62 process the lease as well as dealing with the costs dispute. The later letters are really dealing with the Tribunal hearing. Even allowing the 7 letters claimed and the one telephone call (8 units) plus a reasonable amount of time for drafting the lease (with the suggested modifications) (5 units) the total amount of work to date amounts to 13 units @ £20 per unit, namely £260.
(e) It ought not realistically take more than 2 hours in total (including correspondence and telephone calls) to draft, negotiate and complete the lease and account to the client.
(f) On balance, we determine that the reasonable costs of and incidental to the grant of the extended lease are £400 plus VAT plus disbursements.
(g) We have noted Mr Fletcher's other arguments, but they are not matters which go directly to the amount of the costs. The reason why Mr Morrell did not attend was principally one of cost (see his e-mail of the 22nd April). The fact that he did not contact Mr John to challenge the amount immediately may not be good practice, but does not go to the issue of the amount. The application to the Tribunal was made on the 22nd March, not such a delay as to cast doubt on the genuineness of the application. Again, although Ms Penn makes no comment upon the costs in her e-mail to her client, we have not seen all the e-mails and correspondence passing between them - nor would we expect to see it. In our view this is not a valid argument. The premature nature of the application is referred to in paragraph 11(a) above.

12 COSTS

At the conclusion of the hearing, Mr Fletcher made an application for costs on the basis that the Applicant, through her Surveyor, had acted unreasonably in bringing this application. We indicated that as the Applicant was not present, and therefore was not aware that his application for costs was being made, it would not be in the interests of natural justice to come to a decision without the Applicant being given an opportunity to be heard. Mr Fletcher argued that an application for costs

would generally be made at the conclusion of the proceedings and that the Applicant had had the opportunity to attend and had not done so. We indicated that we would hear his application and if on determining the principal issue we considered that he had made out a prima facie case on the costs of this application, we would ask the Applicant to submit her response and refer that response to the Respondent for further comment.

13 THE RESPONDENT'S CASE FOR COSTS

Mr Fletcher acknowledged that our power to award costs was restricted by paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002 to circumstances where, in this case, the Applicant "has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings". Mr Fletcher did not accept that the words "otherwise unreasonably" had to be interpreted in a manner consistent with the preceding words. He put forward the following arguments in support:

(a) The application was premature;
(b) There was no attempt to agree different figures;
(c) The Applicant had given no prior warning of his intention to apply to the Tribunal and there had been no attempt at conciliation;
(d) The e-mail of the 23rd April 2013 stating that the Applicant had attempted negotiation was not true;
(e) The application was without merit;
(f) The costs had not been challenged;
(g) The Respondent had now incurred substantial costs relating to this application;
(h) There was a minor issue as to the inclusion of an incorrect figure of £800 in Ms Penn's e-mail and the fact that she had not criticised that figure;
(i) It was unreasonable on the part of Mr Morrell not to turn up.

Mr Cooper observed that Mr Morrell knew the amount of the costs (albeit £600 plus VAT and not £700 plus VAT) in January 2013.

14 DECISION ON COSTS

(a) Mr Fletcher indicated during his submissions that if the Applicant was successful in reducing the amount of the Solicitor's fees, it was unlikely that his application would succeed. Whilst it does not necessarily follow, it is extremely rare, but not unknown, for an unsuccessful party to obtain an order for costs against a successful party.
(b) Apart from arguments 13(e)(h) and (i), we have some sympathy with the Respondent. We agree that it would probably have been better to await the conclusion of the lease before both parties started arguing the question of costs, but we have referred to that matter elsewhere. Certainly there had been no attempt at negotiation or conciliation or even a warning that this application was going to be made - despite Mr Morrell's assertion that they were seeking a settlement. Neither Mr Morrell nor Ms Penn made any direct challenge to Mr John over the costs when he notified them of the amounts.
(c) However, we do not accept that the application is without merit. We have determined that the Applicant is entitled to a reduction of £100 plus VAT in respect of the costs claimed. We have also made the point that we do not know what Ms Penn advised her client on the strength of the one e-mail. Further, it is not unknown for representatives to notify the Tribunal that they will not be attending a hearing on the grounds of cost.
(d) In our view, the words "otherwise unreasonably" must be construed in the context of paragraph 10. "Frivolously, vexatiously, abusively, disruptively" are all words which suggest that the party's conduct has had a serious effect upon the course of the application or caused major difficulties or expense for the other party. It is of course the conduct and not

its effect which is the issue, but conduct which is "otherwise unreasonable" whilst not necessarily frivolous, vexatious, abusive or disruptive must be of such a serious nature that it has similar consequences.

(e) We accept that there are elements in the way in which this application has been pursued which are unsatisfactory. It would have been appropriate to inform Mr John that the Applicant considered his fees to be too high when he notified them of the amounts. Mr Morrell could have put forward a counter proposal or negotiated or at least put forward reasons why the fees were considered too high. It is common courtesy to inform the opposite party that you are intending to refer the matter to the Tribunal if agreement cannot be reached and it is certainly not appropriate to inform the Tribunal that an attempt has been made to settle when that is not true.

(f) Whilst these aspects are unsatisfactory, we do not consider that they are of such gravity that individually or even cumulatively they amount to conduct which is "otherwise unreasonable" as intended by paragraph 10 of Schedule 12. Particularly, it must be borne in mind that the Applicant has succeeded in her application. Once the Respondent became aware that the application had been made, it was always open to the Respondent to consider its position and offer a reduction - possibly to the level mentioned by Mr Cooper at the Tribunal hearing. Mr John's letter of the 5th April 2013 makes it clear that he was not minded to compromise.

(g) In the circumstances, we do not consider it necessary to invite the Applicant to respond and we refuse the application for costs.

15 SUMMARY

We determine the issues as follows:

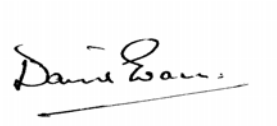
(a) The Respondent's Solicitor's fees for investigating the Applicant's right to a new lease are £200 plus VAT plus disbursements.

(b) The Respondent's Surveyor's fees for valuing the property are, as agreed, £575 plus VAT.

(c) The Respondent's Solicitor's fees of and incidental to the grant of the lease are £400 plus VAT plus disbursements.

The Respondent's application for costs is refused.

DATED this 22nd day of May 2013



CHAIRMAN