

Y TRIBIWNLYS EIDDO PRESWYL
RESIDENTIAL PROPERTY TRIBUNAL (WALES)
LEASEHOLD VALUATION TRIBUNAL (WALES)

Reference: LVT/0046/11/19

In the Matter of: 95-97 Cathedral Road, Cardiff, CF11 9PG

Applicant: Brynley Gwynne Llewellyn Morgan

Respondents: Philip Darcy Mackenzie, Alexendra Clare Robinson, Dean Miles Fletcher, Alan Marshall Kettle, Catherine Anne Kettle, Amanda Fairclough, Gavin James Fairclough, Cheryl Linda Keety, Gadpack (Cardiff) Ltd

In the Matter of: An Application under the Leasehold Reform Housing and Urban Development Act 1993, Section 91(2)(d) relating to the determination of reasonable costs payable under Section 33(1) of the Leasehold Reform Housing and Urban Development Act 1993

Tribunal: Trefor Lloyd (Legal Chair)

ORDER

The amount of reasonable costs payable by the Respondents in respect of the cost of an application in relation to 95-97 Cathedral Road, Cardiff, CF11 9PG in accordance with Section 33(1) and 91(2) of the Leasehold Reform Housing and Urban Development Act 1993 is **£3,600 (three thousand six hundred pounds)** inclusive of VAT and disbursements. The shortfall between this sum and the sum already paid to be payable by the Respondents within 21 days of the date of this Decision.

REASONS

BACKGROUND

1. By way of a Notice under Section 13 of the Leasehold Reform Housing and Urban Development Act 1993 ("the Act") the Respondents on the 20th April 2018 gave the Applicant notice of their desire to exercise their right of collective enfranchisement in respect of 95-97 Cathedral Road, Cardiff. The Applicant served a Section 21 Counter Notice on the 28th June 2018 (referred to as paragraph 5 of the Witness Statement of Rhodri Lewis of Darwin Gray LLP on behalf of the Respondents). The Counter Notice was served on the basis that

the premises did not reach the required 75% under Section 4(1) of the Act and accordingly were excluded from the right to collectively enfranchise.

2. Amended directions were made on the 9th December 2019. Those directions at paragraph 1 required the Applicant/Applicant's representatives to provide:
 - (a) Full details of the Applicant's costs claimed.
 - (b) Details of the grade of fee earner, hourly rates charged, the work undertaken, supported by timesheets, a narrative explanation of the work and any submissions in support of the costs claimed.
3. The same amended directions required written representation and submissions by the Respondents upon the question of the Applicant's costs and the factors taken into account together with any submissions upon the cost figure the Respondents considers to be appropriate.
4. With the Applicant and Respondents' agreement the matter was then to be determined on the papers without an oral hearing. Both the Applicant and Respondents have filed Witness Statements. On behalf of the Applicant there is a Statement dated the 12th December 2019 from Hedydd Davis of L G Williams & Pritchard Solicitors together with what is referred to as a Schedule of Costs. On behalf of the Respondents a Witness Statement from Rhodri Lewis of Darwin Gray LLP dated the 6th January 2020 together with a precedent Form H relating to Court proceedings between the Applicant and Respondents and also a copy of a receipt/VAT invoice from Mr Ewan Paton Counsel from Guildhall Chambers dated 23rd July 2019. Mr Paton is known to me as he is a fee paid member of this Tribunal however this has not played any part in my assessment of the merits of this Application.
5. Consideration of the respective Statements reveal the following background information:
 - (1) In January 2016 the Respondents instructed a surveyor to carry out a measured survey with a view to exercising collective enfranchisement under the Act.
 - (2) The Applicant who is also the owner of two apartments in the building upon becoming aware of the survey granted Leases of the loft space, and the whole basement area to his sons for the purposes of storage of car parts.
 - (3) The consequence of granting the two Leases was to increase the percentage of commercial space in the premises to the extent that there was potentially a shortfall below the required 75% qualification under Section 4(1) of the Act.
6. The Respondents despite the grant of the two Leases aforesaid served a Section 13 Notice on the 20th April 2018.

7. The Applicant served a Section 21 Counter Notice on the 28th June 2018. The objection being based upon an assertion that the premises had not reached the required 75% as per Section 4(1) of the Act and accordingly were excluded from the right to collectively enfranchise.
8. As a result the Respondents issued a County Court claim on 24th August 2018, that claim was served on the 12th December 2018 with some correspondence between the date of issue and service between the parties. A Single Joint Expert Surveyor was instructed (although not clear from the paperwork I have seen, presumably as part of a Court Order in the proceedings). As a result of the Single Joint Expert's findings the Respondents accepted the premises could not be collectively enfranchised and discontinued their claim with the costs of the County Court action being settled between the parties.

THE APPLICANT'S CASE

9. The Applicant claims the sum of £6,603.84 broken down as follows:
 - (i) Solicitor's costs of £3,703.20
 - (ii) Counsel's advice of £900
 - (iii) Surveyor's costs of £900
 - (iv) Total net being: £5503.20 plus VAT at 20% being £1,100.64

Total being: £6,603.84

10. A continuation sheet to box 9 on the application form states as follows:

"There was a dispute as to whether the interest was liable to acquisition and as such the time recorded increased and Counsel's advice was obtained...."
11. In accordance with the Amended Directions as referred to above the Tribunal has received a Witness Statement from Hedydd Davis of LG Williams & Pritchard Solicitors on behalf of the Applicant. At paragraph 6 of that Statement the following is set out:
12. *"This particular matter has been a relatively unusual one and very time consuming, given that the Applicant and Respondents disagreed as to whether the building would qualify for collective enfranchisement on the basis that more than 25% of the building was used for non-residential purposes. As such, most of the costs incurred were in relation to ascertaining (whether any interest in the specified premises or other properties is liable to acquisition) Under Section 33(1)(a)(i)"*
13. The Statement goes on to confirm that a surveyor was instructed not only to provide a valuation but to determine the extent of the residential and

commercial areas of the premises and it was necessary to obtain Counsel's advice as to whether certain areas would be considered residential or non-residential. The matter was dealt with on behalf of the Applicant by Hedydd Davis at a rate of £161 per hour and Philip Evans at a rate of £217 per hour which on behalf of the Applicant is submitted to be extremely reasonable rates given the specialist nature of the work.

14. The surveyor's costs were £900 plus VAT and Counsel's fees were £900 plus VAT.

15. Despite the reference at paragraph 6 of the Witness Statement to costs under 33(1)(a)(i), at paragraph 11 the following is set out:

"The Applicant has not made any claim for costs unless it was for costs he is entitled to under sub-sections (a) to (e) of Section 33(1) of the Act".

16. Appended to the Witness Statement is what is referred to as a Schedule of Costs which seems to be a Fee Earner Activity Log in chronological order which provides a brief narrative in relation to each entry.

RESPONDENTS' CASE

17. The Respondents accept the principle that they are liable for the Applicant's reasonable costs, but contend that the sum of £3,300 inclusive of VAT which has already been offered and paid is in the circumstances reasonable and proportionate.

18. At paragraph 8 of the Witness Statement the Applicant refers to paragraph 1 of the Amended Directions dated the 9th December 2019 (as set out at paragraph 2 above of this Decision) and submits that the witness statement and accompanying documents "*fall some way short of complying with this Direction*".

19. As a result it is submitted on behalf of the Respondents that they and this Tribunal will have difficulty in assessing the reasonableness of the costs claimed as against the relevant sub-sections to Section 33 of the Act.

20. On behalf of the Respondents the point is also made that it is for the Applicant to satisfy this Tribunal that the costs claimed are:

(1) Incurred in pursuance of the original Section 13 Notice.

(2) Reasonable in amount.

(3) Are costs of and incidental to the Section 33 criteria

21. In this regard the Respondents also refer to Woodfall: Landlord and Tenant Volume 4 at 29.100 in relation to the burden placed upon the Applicant.

22. The Respondents further contend that there is an absence of explanation of the work undertaken or a narrative of the same and therefore it is impossible to ascertain what work is claimed against the sub-section (a) to (e) of Section 33(1) of the Act and also make the point that it appears the Applicant accepts that the only work done related to Section 33(1)(a) and no other sub-section of Section 33(1).

Surveyor's Costs

23. In relation to the surveyor's fee the Respondents make the point that they have never seen an invoice or proof of payment and as such are unaware as to:
- (1) What the surveyor was instructed to undertake.
 - (2) When the work was undertaken as it can only be recovered in relation to the Section 13 Notice and not before.
 - (3) Whether the surveyor's fee was claimed and settled in the County Court costs claim. In this regard reference is made to the costs precedent H form appended to the Witness Statement where it is set out (supported by a Statement of Truth) that costs of £1,750 had been incurred on expert's reports by the 25th June 2019. Broken down according to paragraph 12 of the Witness Statement filed on behalf of the Respondents as to £1,200 for the surveyor and £550 for Counsel's fees both net of VAT.
24. As a result the Respondents submit that the Applicant cannot demonstrate what the surveyor did and also when the same was undertaken, and whether they relate to the Section 33(1) categories, also whether or not the surveyor has been paid or the same cost claimed in the Court action.

Counsel's Fees

25. As regards Counsel's fees, £900 plus VAT is claimed and this is supported by a receipted invoice. In this regard the Respondents make the following points:
- (1) As can be seen from the receipted fee note the advice was dated the 10th October 2018 two months after the date of the Section 21 Notice. The explanation given is that the fee relates to advice as to whether certain areas have been considered residential or non-residential.
 - (2) The Respondents submit that it is difficult to see how it would be reasonable to obtain Counsel's advice once the Applicant already responded to the Notice by way of the Counter Notice.
 - (3) Two and a half years earlier Leases of commercial parts had been granted to the Applicant's sons and this the Respondents say suggests the Applicant would already have had advice on the issue long before having to respond to the Section 13 Notice.

- (4) The only real issue is whether the commercial Leases granted in January 2016 would be viewed by this Tribunal as genuine. That being the case it would not be reasonable for the Applicant to ask the Respondents to pay for advice on the validity of Leases granted nearly three years earlier in an attempt to thwart collective enfranchisement.

Applicant's Solicitors costs

26. As aforesaid the Respondents criticise the Applicant for the lack of narrative explanation. Further in relation to the sums claimed the Respondents contend as follows:

- (1) £1,305.50 of the costs postdate the service of the Section 21 Counter Notice and should therefore be unrecoverable as the Applicant had already set out his opposition.
- (2) Although only one example is given, certain sums claimed prior to service of the Counter Notice are administrative in nature and irrecoverable. The example given being £205.10 for drafting a client care letter.
- (3) There is no record of a number of emails and letters claimed inter partes and therefore impossible to place a figure on them without seeing the inter partes correspondence.
- (4) Following on from the above there were some inter partes correspondence relating to outstanding repair issues which would not be recoverable under Section 33. However, given the nature and information it is impossible to distinguish one from the other.
- (5) A considerable amount of time has been claimed for liaising with the surveyor without any narrative of the nature of the correspondence.
- (6) Bearing in mind the indication is that costs are solely claimed under Section 33(1)(a) the Respondents submit that the solicitor's costs are excessive and it is impossible to determine their reasonableness given the absence of a detailed narrative or explanation.

27. The Respondents' submissions conclude by making the point that they consider the sum of £3,300 already offered and paid to be reasonable, and proportionate in the circumstances.

THE LAW

28. Section 33(1) of the Act states as follows:

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 *nominee purchaser* [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 [RTE Company] may require.
- (d) any valuation of any interest in the specified premises or other property.
- (e) any conveyance of any such interest".

29. Section 91 of the Act states as follows:

- (1) ...Any question arising in relation to any of the matters specified in sub-section 2 (shall in default of agreement, be determined by [In Wales the Residential Property Tribunal, Leasehold Valuation Tribunal].

30. In relation to this matter the relevant sub-section of Section 91(2) is as follows:

- (2)(a) The terms of acquisition relating to -
 - (i) any interest which is to be acquired by a nominee purchaser [RTE Company] in pursuance of Chapter 1.

DECISION

31. Having considered the matter carefully I have to say that there is some force in the point made on behalf of the Respondents as to the absence of information provided by the Applicant to support his costs application. The Amended Directions were abundantly clear as to the information required. Against that background all that has been provided is a short Witness Statement with only in essence paragraphs 6 to 9 providing further information over and above what was contained within the application form. Attached to the Witness Statement is what is referred to as a Schedule of Costs which lists in chronological order time spent on the matter. The Schedule recounts matters under the following headings:

"Fee Earner Activity" - which is extremely brief and relates to, for example, letters in or out, perusal, phone calls in or out etc.

"Description" - which provides some further information as to, for example, to or from whom, emails or letters etc had been sent/received.

32. The Fee Earners are Hedydd Davis at a rate of £161 per hour and Philip Evans at a rate of £217 per hour.
33. No issue was taken with the hourly rate claimed and bearing in mind the HM Court and Tribunal Services document titled: "Solicitors Guidance Hourly Rates" ("the Guidance") in relation to a grade A Fee Earner in the Grade 1 category is £217 and the same has not been reviewed since 2010 I consider the respective rates claimed to be reasonable.
34. Bearing in mind the comment at paragraph 6 of the Witness Statement on behalf of the Applicant that most of the costs incurred were in relation to ascertaining whether any interest in the specified premises or other properties is liable to acquisition, ie the reference to 33(1)(a)(i), I accept the submissions on behalf of the Respondents that any legal costs incurred, ie solicitor's costs post service of the Notice should not be recoverable. It is clear in my view that by the time the Counter Notice had been hand delivered the Applicant had formed the view that it was appropriate to object. That view having been taken with it is clear from the Costs Schedule the benefit of input from the Surveyor and also Counsel. Although the Respondents put this figure at £1,305.50 by my calculations upon considering the fee schedule some £1,344 (net of Vat) had been incurred post-service of the Counter Notice. Due to the dearth of any particularity from the Applicant as to the nature of the expenditure despite clearly having had the opportunity to detail the same within the Witness Statement it is extremely difficult to assess costs other than to deal with the matter in the round. Upon the evidence presented it is impossible for me to form a view that the costs following that service of the Counter Notice fall into one or more of the sub-categories to Section 33(1). As set out on behalf of the Respondents it is clearly for the Applicant to prove his case before me. On the balance of probabilities I am of the view that he has not in relation to the costs incurred post-service of the Counter Notice, and as such I do not consider the sum of £1,344 plus vat to be recoverable.
35. In relation to legal costs pre-service of the Notice the Respondents take issue with the costs of drafting a client care letter said to be £205.10. The cost of the client care letter is an inevitable consequence of the Applicant having to seek advice following receipt of the Notice and as such it is in my view allowable. However as referred to above it is very difficult to assess exactly the activities that have been undertaken from the limited information given and in my opinion despite the potential dispute between the parties being rather unusual, legal costs of £3,703.20 plus vat does seem to me to be disproportionate especially given the fact that the Applicant would have taken advice and considered some of the same questions and issues when in 2016 he elected to grant his sons Leases of the basement and loft space. That being the case, and doing the best I can in relation to the legal costs up to the date of service of the Counter Notice, I would consider the sum of £2,250.00 to be proportionate and reasonable in all the circumstances and would allow this sum.

SURVEYOR'S COSTS

36. Whilst I take on board the Respondents' submissions and the reference to costs incurred in the County Court case the highlighted section of the Form H precedent refers to the sum of £1,750. There is no breakdown save as the Respondents at paragraph 12 of the Witness Statement maintain that £1,200 of the £1,750 related to surveyor and £550 to Counsel's fees. Again, the absence of any detail makes the Tribunal's role difficult. However, the Applicant's claim for costs including the surveyor's cost is supported by the Witness Statement and more crucially a Statement of Truth signed by Hedydd Davies with the final paragraph stating as follows:

"The Applicant has not made any claim for costs unless it was for costs he is entitled to under sub-sections (a) to (e) of Section 33(1) of the Act".

37. Also it is clear from the brief narrative on the Fee Schedule that a valuation was obtained. That valuation would not in my view have been required in relation to the Court proceedings themselves as those proceedings would not deal with valuation aspects that question being confined to this Tribunal. Accordingly, in the round and doing the best I can in the circumstances as there may be some potential for overlap and accepting the Respondents' submissions in part in my opinion a figure of £750 plus VAT is proportionate and reasonable in terms of the surveyor's costs.

COUNSEL'S COSTS

38. The sum of £900 plus VAT according to the receipt and VAT invoice was billed on the 10th October 2018. Although there is no evidence either way (unlike, for example, the advice by email which is likely to be contemporaneous or near enough contemporaneous with the date of issuing the Fee Note) The entry on the 10th October 2018 refers to written advice but does not state the date the written advice was completed. However, in my judgment upon the balance of probabilities it would be highly unlikely for the written Advice to have been prepared prior to the service of the Counter Notice on the 28th June 2019 and thereafter not billed until the 10th October 2018. Accordingly, I find that the written Advice post-dated the Counter Notice. I accept the submissions made by the Respondents that on any analysis Counsel was advising as to whether or not the Applicant had been successful by virtue of granting the Leases to his sons in respect of the loft and basement for storage of car parts to usurp any enfranchisement rights. For all those reasons in my view it would not be reasonable and proportionate to allow the Applicant to be able to claim Counsel's fees in this specific matter.

CONCLUSION

39. For all the reasons as aforesaid I determine the Applicant's reasonable Solicitor's costs in the sum of £2,250 plus VAT being in total £2,700, surveyor's costs of £750 plus VAT of £150, total £900 are reasonable. Accordingly, the grand total of costs and disbursements plus VAT is assessed at £3,600.00 with the shortfall between this sum and the sum already paid to be payable by the Respondents within 21 days of the date of this Decision.

Dated this 28th day of January 2020

A handwritten signature in black ink, appearing to read "W. J. ...". The signature is written in a cursive style with a horizontal line underneath the main part of the name.

Chairman