FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/29UN/OC9 /2019/0003
Property:	17F Arlington House, All Saints, Margate, Kent CT91XS
Applicant:	Metropolitan Property Realizations Limited
Representative:	Wallace LLP
Respondent:	Flora Katinka Herbert
Representative:	Armstrong and Co
Type of Application:	Section 60 Leasehold Reform Housing and Urban Development Act 1993 Application for an Award of Costs in relation to a Right to Acquire a New Lease Claim
Tribunal Members:	Judge A Cresswell (Chairman)
Date of Decision:	3 May 2019

DECISION

The Application

1. On 30 June 2018, the Respondent served on the Applicant a Claim Notice to exercise the right to acquire a new lease of the property under Section 42 Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act") with a proposed premium of £6,000.
2. The Applicants apply for costs incurred in consequence of the Claim Notice under Section 60 of the 1993 Act.

Summary Decision

3. The Tribunal has determined that costs in the sum of £2,007 + VAT for legal costs + £30 Land Registry fees + £450 + VAT for a Valuer's fee were reasonably and properly incurred and are payable by the Respondent to the Applicant.

Directions

4. Directions were issued on 22 January 2019. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
5. The parties did not request an oral hearing.
6. This determination is made in the light of the documentation submitted in response to the directions.

The Law

7. The relevant law the Tribunal took account of in reaching its decision is set out in the Appendix below.
8. There is guidance in the following cases:

Dashwood Properties Limited v Beril Prema Chrisostom-Gooch 2012 UKUT 215 (LC):

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…." .

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.

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.

Sinclair Gardens Investments (Kensington) Ltd v Wisbey **[2016] UKUT 203 (LC) The Upper Tribunal (HHJ Huskinson sitting with the Registrar as an assessor) held as follows:**
In *Realisations Limited v Moss* [2013] UKUT 0415 (LC) at paragraphs 9-11 the Tribunal summarises the purpose of the cost charging provisions in section 60:
"9. These provisions are straightforward and their purpose is readily understandable. Part I of the 1993 Act is expropriatory, in that it confers valuable rights on tenants of leasehold flats to compel their landlords to grant new interests in those premises whether they are willing to do so or not. It is a matter of basic fairness, necessary to avoid the statute from becoming penal, that the tenant exercising those statutory rights should reimburse the costs necessarily incurred by any person in receipt of such a claim in satisfying themselves that the claim is properly made, in obtaining advice on the sum payable by the tenant in consideration for the new interest and in completing the formal steps necessary to create it.
10. On the other hand, the statute is not intended to provide an opportunity for the professional advisers of landlords to charge excessive fees, nor are tenants expected to pay landlords' costs of resolving disputes over the terms of acquisition of new leases. Thus the sums payable by a tenant under section 60 are restricted to those incurred by the landlord within the three categories identified in section 60(1) and are further restricted by the requirement that only reasonable costs are payable. Section 60(2) provides a ceiling by reference to the reasonable expectations of a person paying the costs from their own pocket; the costs of work which would not have been incurred, or which would have been carried out more cheaply, if the landlord was personally liable to meet them are not reasonable costs which the tenant is required to pay.
11. Section 60 therefore provides protection for both landlords and tenants: for landlords against being out of pocket when compelled to grant new interests under the Act, and for tenants against being required to pay more than is reasonable."

"The 1993 Act specifically provides in section 45 for the service by a landlord of a counter-notice. This is a crucial step in the procedure. Failure by a landlord to serve a proper counter-notice can have serious adverse effects upon the landlord's position. I consider it to be reasonable for a landlord to instruct a solicitor, experienced in this specialised area of law, to consider a tenant's claim to a new lease under section 42 and to advise upon the terms of a counter-notice.

"If a solicitor instructs a valuer to produce a valuation and then considers the valuation once it is provided, then the solicitor's costs are "incidental to" the valuation. If they are incidental to the valuation then they are properly recoverable providing they are reasonable having regard in particular to section 60(2). I observe a similar conclusion was reached by the Upper Tribunal (Martin Rodger QC, Deputy President) in ***Sidewalk Properties Ltd v Twinn*** *[2015] UKUT 0122 (LC), although I notice that in that case the Tribunal considered that the instructing of the valuer (as opposed to the later consideration of the valuer's report) was an administrative rather than a professional task for which no separate time charge could reasonably be made. I agree. "*

"The amount of the reasonable costs (excluding VAT) for a one-off transaction would have been £1650, being the sum of £1725 which was claimed by the appellant minus three units in respect of the costs of instructing a valuer at £25 per unit. "

It was reasonable for the landlord to use a Grade A fee earner for the conveyancing work. *"I consider that a rate of charge of £250 per hour (plus VAT) to be a reasonable rate of charge – the F-tT did not suggest that this was an excessive rate save in respect of the grant of the new lease."*

It would be reasonable to allow a discount of 20% to the fees to reflect the opportunity that the landlord had to negotiate a discount referable to the fact that there were several lease extension claims in the same building.

Metropolitan Property Realizations Ltd v Moss [2013] UKUT 415 (LC)
"….Wallace had rendered an interim invoice to their client. Unless that invoice was to be regarded as a sham, which was not a conclusion remotely open to the LVT on the evidence before it, it was wholly inconsistent with any notion that the solicitors were acting without the expectation of being paid by their own client albeit that their client would be entitled to be reimbursed for so much of their charges as fell within section 60 of the 1993 Act."

Consideration and Determination

The Applicant

9. The Applicant indicated that Thanet District Council ("Thanet") is the freehold owner and competent landlord and that Metropolitan Property Realisations Ltd ("Metropolitan") is the head leasehold owner, the latter receiving the bulk of any premium payable for the grant of a new lease.
10. Metropolitan received instructions to act on behalf of Thanet in respect of a new lease application relating to the property in relation to the Notice of Claim dated 30 June 2018, submitted with a letter dated 28 June 2018. An Assignment of the benefit of the Notice was not attached as stated and once received was dated 9 July 2018 (received on or about 2 August 2018 with the Transfer).
11. Immediately upon receipt of the Notice of Claim, Wallace LLP, solicitors instructed by Metropolitan, wrote to Thanet to ascertain whether it had

received the Notice of Claim and commenced necessary consequent procedures and asked whether Thanet also wished to instruct Wallace LLP.

12. The Notice of Claim indicated that Christopher Bushnell of EVC South East Ltd had been appointed to act for the tenant.
13. On 14 August 2018, the "Applicant" wrote to EVC South East Ltd advising that the Notice of Claim was invalid because it did not provide a date by which the landlord must respond by giving Counter Notice.
14. On 15 August 2018, EVC South East Ltd responded that they had not seen a copy of the Notice of Claim and were making enquiries of the conveyancing solicitors. Wallace LLP immediately provided EVC South East Ltd with a copy of the Notice of Claim.
15. On 17 August 2018, EVC South East Ltd advised that the Respondent had referred the matter to Armstrong & Co, solicitors, being the solicitors who served the Notice of Claim. That day, Wallace LLP received a communication from Armstrong & Co to the effect they were liaising with Girlings, solicitors, who apparently had served the Notice of Claim.
16. On 21 August 2018, Armstrong & Co sought agreement to an extension of time for service of the Counter Notice and on the same date, were advised by the "Applicant" that the provisions of the Act did not permit an extension.
17. On 22 August 2018, Wallace LLP received a fax to the effect that Armstrong & Co were awaiting instructions and that it was unlikely that they would revert that day, and would respond on 23 August 2018. Later that day, a further fax was received that the Respondent accepted the invalidity of the Notice of Claim.
18. Wallace LLP has provided a statement of costs in a schedule. The costs total £2056.50 + VAT for legal costs + £30 Land Registry fees + £450 + VAT for a Valuer's fee + Thanet fees of £500 +VAT.
19. The Schedule of Costs sets out the work undertaken and the fee earners responsible.
20. Wallace LLP have been Metropolitan's solicitors of choice over many years. The rates charged are consistent with rates for solicitors in central London. The Applicant relies upon previous Tribunal decisions.
21. The experienced fee earner deals with a range of considerations upon receipt of a Notice of Claim so as to cover the complex provisions of the Act, which includes preparing the Counter Notice and draft lease. The service of a Counter Notice is a requirement under the Act and is the only mechanism by which a landlord can respond to a Notice of Claim.
22. The costs claimed are costs incurred by Metropolitan in accordance with Section 60(2) of the Act, being costs that Metropolitan would incur had it been personally liable.
23. As well as the issue of dates, the Notice of Claim did not correctly set out the apportionment of the sums payable to the competent landlord and intermediate landlord. As there was a possible assignment, it was necessary to consider the title documentation.
24. It was important to ascertain whether the competent landlord had received the Notice of Claim and if such a copy had a date for a Counter Notice. It is not unusual for the original Notice to include a date but the copy sent to an intermediate landlord not to contain a date due to an administrative error. It can also be suggested by a tenant that a reasonable recipient would be able to calculate when a Counter Notice would be required.
25. It is not for the Applicant to provide legal advice to the tenant's representative and no response would be required other than a Counter Notice.

26. Any confusion results from the acts of the three representatives of the Respondent.
27. Metropolitan's legal costs of £1500 + VAT were allowed by the Upper Tribunal in **Metropolitan Property Realisations Ltd v Moss** (2013) UKUT-415(LC).
28. In view of the time constraints under the Act, it is important to instruct the valuer immediate upon receipt of the Notice of Claim. The valuation is an important element. The fees claimed for valuation are proportionate. Valuer's fees for an individual lease extension in London usually range between £850 and £1500 +VAT. Here the sum is £450 + VAT. Tribunals have on numerous previous occasions stated that Mr Sharp's fees are reasonable. Mr Sharp is a Chartered Surveyor.

The Respondent

29. The Respondent states that the Applicant is represented by Wallace LLP and that the partner dealing with the matter is "*Samantha Bone who has vast experience in this field"*.
30. On receiving the Notice of Claim on 18 July 2018, Ms Bone should have immediately noticed that it was invalid due to the absence of a date for the Counter Notice. Being a short document, it would have taken no more than 10 minutes to discover this, so that 26 minutes of the period claimed was unnecessary.
31. The Applicant should immediately then have taken the step which it took on 14 August, which was to write to the Respondent's solicitors to ask whether they accepted that the Notice of Claim was invalid. In fact on that date, they wrote to someone else, but by 22 August 2018, the Notice was accepted as invalid, the Respondent's solicitors only being aware of the issue by an email of 21 August 2018.
32. The matter could have been resolved by 25 July 2018 had the Applicant acted with reasonable competence. The instruction of a valuer and the carrying out of multiple other steps were a complete waste of time in the circumstances. The only costs that should be allowable are for preliminary reading of the Notice of Claim and correspondence with the Respondent's solicitors asking them to withdraw it.

The Tribunal

33. The Tribunal has followed the guidance of the Upper Tribunal in the cases referred to above.
34. What is in issue in respect of the Applicant's application for costs is whether the costs claimed were reasonably incurred and are reasonable in sum and whether the costs are payable in accordance with the Act of 1993 and whether the Applicant should be required to pay those costs.
35. The Tribunal notes that there is no submission by the Respondent either that any of the costs incurred were not properly incurred in response to the service by it of the Claim Notice or that the costs are not reasonable in their amount for the specific works detailed. The Tribunal has, nevertheless, gone on to consider those issues.
36. The specific issues raised by the Respondent are that the initial assessment of the Notice of Claim was too long; that the Applicant should have immediately written to Armstrong and Co to point out the deficiency in the Notice of Claim and done no other work to progress a response to the Notice of Claim pending an acceptance by Armstrong and Co that the Notice of Claim was invalid.
37. Lease Extension claims are complicated issues. The Tribunal cannot criticise the Applicant for instructing a solicitor partner (a grade A fee earner), given

such complications. The solicitors involved have been accepted by the Upper Tribunal as being Metropolitan's solicitors of choice over a number of years. The Respondent makes no challenge to the charging rates of the various fee earners involved in the work following the receipt of the Notice of Claim.

38. The Tribunal has analysed the work conducted by the solicitors, which is helpfully detailed in the schedule, and finds that the work detailed was what the Tribunal would have expected to occur following receipt of a Notice of Claim where there is both a competent landlord and head leasehold owner and that the time recorded as expended is reasonable for the tasks detailed. Indeed the only time charge actually challenged by the Respondent is that for the initial consideration of the claim.

39. The Tribunal finds that Section 60(2) is also satisfied as it has noted that the Applicant has engaged the same solicitor in relation to many such Claim Notices and the solicitor had submitted an interim invoice for its fees (see **Metropolitan Property Realisations Ltd v Moss** above).

40. When in receipt of a Notice of Claim, it is entirely sensible and proper for a landlord to "get on with the job" until told by the person serving the Notice that it is not valid or a Tribunal reaches the same conclusion. Timescales are relatively tight and there is much to accomplish.

41. The Respondent seeks to throw blame at the door of the Applicant for not corresponding immediately with Armstrong and Co, but why would they do so when the Notice of Claim indicated that Christopher Bushnell of EVC South East Ltd had been appointed to act for the tenant and reference was then made by Armstrong and Co to Girlings solicitors as being responsible for the service of the Notice of Claim?

42. It is not for this Tribunal to speculate on causes of action open to a person if there is a negligent service by someone of an invalid Notice of Claim, which leads to financial loss for that person. The Tribunal reflects that if, as the solicitors for the Respondent suggest, it was so simple to conclude that the Notice of Claim was invalid within 10 minutes of looking at it, why did it take from around 17 to 22 August 2018 to admit that to be the case? Even if the solicitors actually acting for the Respondent became aware of the issue only on 21 August 2018, as their submissions argue, action by them that day or first thing next day would have saved the Respondent some £704 + VAT.

43. The costs of £2,007 + VAT for legal costs (i.e. £2,056.50 less £49.50, being the costs of instructing the Valuer – see **Sinclair Gardens Investments (Kensington) Ltd v Wisbey** above) + £30 Land Registry fees + £450 + VAT for a Valuer's fee claimed by the Applicant arose as a result of the service by the Respondent of a Claim Notice. Having found that the costs were reasonably incurred and that they are a reasonable sum, reflecting the work actually and properly conducted, the Tribunal concludes that they are payable by the Respondent to the Applicant.

44. The Thanet fees of £500 +VAT are disallowed. The Applicant's schedule said: "*Details to follow*", but no details did follow and there is no pleaded basis for these costs on the papers before the Tribunal.

Judge A Cresswell

APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

Leasehold Reform Housing and Urban Development Act 1993

60 Costs incurred in connection with new lease to be paid by tenant

(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—

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

(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;

(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.

(3) Where by virtue of any provision of this Chapter the tenant's notice ceases to have effect, or is deemed to have been withdrawn, at any time, then (subject to subsection (4)) the tenant's liability under this section for costs incurred by any person shall be a liability for costs incurred by him down to that time.

(4) A tenant shall not be liable for any costs under this section if the tenant's notice ceases to have effect by virtue of section 47(1) or 55(2).

(5) A tenant 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) In this section "relevant person", in relation to a claim by a tenant under this Chapter, means the landlord for the purposes of this Chapter, any other landlord (as defined by section 40(4)) or any third party to the tenant's lease.

91 Jurisdiction of . . . tribunals

(1) . . . Any question arising in relation to any of the matters specified in subsection (2) shall, in default of agreement, be determined by [the appropriate tribunal].

(2) Those matters are—

(d) the amount of any costs payable by any person or persons by virtue of any provision of Chapter I or II and, in the case of costs to which section 33(1) or 60(1) applies, the liability of any person or persons by virtue of any such provision to pay any such costs; and

(e) the apportionment between two or more persons of any amount (whether of costs or otherwise) payable by virtue of any such provision.

[(12) For the purposes of this section, "appropriate tribunal" means—

(a) in relation to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and