FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference **HMCTS Code**	**:**	**CAM/00MD/LSC/2020/0039** **P:PAPERREMOTE**
Property	**:**	**11-15 Rockall Court, Langley, Slough SL3 8EZ**
Applicants	**:**	**Imtiaz Mehdi Mohamed and Nasim Mohamed**
Representatives	**:**	**Pro-Leagle LLP**
Respondents:	**:**	**Freehold Managers (Nominees) Limited**
Representatives	**:**	**Bolt Burdon LLP**
Type of application	**:**	**A determination of reasonable costs under Section 33(1) of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal	**:**	**Judge Wayte**
Date of Decision	**:**	**16 February 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because all issues could be determined from the bundle in accordance with the usual practice for a determination of costs. The documents that I was referred to are in a bundle of 228 pages, the contents of which I have noted, subject to paragraph 3 below.

Decision

Pursuant to section 33(1) of the Leasehold Reform, Housing and Urban Development Act 1993 statutory costs of £6,823.20 are payable by the applicants.

The application

1. By its application dated 17 September 2020 the applicants sought a determination under section 33(1) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") of their former landlords' statutory costs incurred in respect of their purchase of the freehold in respect of 11-15 Rockall Court ("the property"). The costs of the enfranchisement report had been agreed at £1,600, although VAT liability was disputed.

2. Directions were given on 9 November 2020, following a case management conference, which identified the dispute as to the amount of the legal costs and whether VAT was payable on them and the valuation costs on the basis that the respondent was likely to be registered for VAT and therefore able to reclaim any input tax themselves. The respondent was ordered to provide their schedule of costs and arguments as to the VAT position by 30 November 2020, the applicants to present their case by 21 December 2020, any response from the respondent by 11 January 2021 and the bundle to be provided to the tribunal by 18 January 2021.

3. Following receipt of the bundle, the respondent's solicitors objected to pages 167-215 on the basis that this late evidence was not permitted under the directions. The applicant's solicitor replied that they had only received full arguments as to the costs and VAT on the 11 and 12 January and had responded immediately on 13 January 2021 with their reply. I do not consider that this justifies what appear to be new arguments as to VAT and other items, which could and should have been raised at a much earlier stage in accordance with the directions. I also consider that further argument is disproportionate to the issues. In the circumstances, I have excluded reference to pages 167-215.

Background

4. The initial notice pursuant to section 13 of the 1993 Act was dated 20 August 2018, proposing a premium of £24,750 and £250 for the relevant parking spaces. The applicants were the leaseholders of flats 14 and 15.

5. The counter-notice dated 24 October 2018 admitted the right to collective enfranchisement but proposed a premium of £50,126 and £140,000 for the appurtenant property.

6. Proceedings were issued in the FTT on 15 April 2019 to preserve the applicants' claim as the parties were still in dispute about the premium and terms.

7. The transfer of the relevant part of the respondent's title eventually completed on 25 October 2019 at an agreed premium of £43,600. A payment of £9,120

was made in respect of costs including VAT to be held to the applicants' order pending the outcome of this application.

Statutory framework

8. The Tenant's liability for payment of the Landlords' costs is governed by section 33 of the 1993 Act. The relevant provisions are as follows:

> **33. – Cost of enfranchisement**
>
> (1) *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 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 may require;*
>
> *(d) any valuation of any interest in the specified premises or other property;*
>
> *(e) any conveyance of any such interest;*
>
> *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 purpose of subsection (1) any costs incurred by the reversioner or any other relevant landlord 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.*

The amount of the legal costs

9. The respondent provided a costs schedule on 30 November 2020, which has been replicated in tabular form as an annex to this decision, using the numbering applied by the applicants' solicitor in the Scott Schedule. Before considering the costs claimed, I will deal with the arguments made as to the meaning of "reasonable costs" in accordance with section 33.

10. The respondent claims legal costs of £6,585 plus VAT. The applicants argue that this total sum is neither reasonable nor proportionate. They point out that the solicitors' costs alone represent almost 20% of the premium paid for the freehold and submit that the respondent would not have agreed to pay that amount if they had been personally liable for them (see section 33(2) and *Dashwood Properties Ltd v Beril Prema Christostom-Gooch* [2012] UKUT 215 (LC)). They assert that the fact that there is no evidence that the respondent has paid the bill also supports that argument. They also argue that "reasonable costs" should be interpreted in line with the High Court case of *Kazakhstan Kagazy plc v Zhunus* [2015] EWHC 404, a commercial decision referring to proportionality under the Civil Procedure Rules (CPR), which they describe as an expansion of the reasonableness test set out in the earlier Lands Chamber case of *Drax v Lawn Court Freehold Limited* [2010] UKUT 81. Alternatively, they argue that the respondent would have sought a deduction of some 20% to reflect the fact that Bolt Burdon were likely to have repeat business in respect of the estate of which the property forms part, following the case of *Sinclair Gardens Investments (Kensington) Limited v Wisbey* [2016] UKUT 0203.

11. Counsel for the respondent replied to these arguments by submissions dated 6 January 2020. The first argument is that "proportionality" as required by the CPR does not directly apply to statutory costs under section 33 and that the *Kazakhstan* case is also irrelevant. Both *Dashwood* and the *Wisbey* case were very much on their own facts: *Dashwood* related to the costs of an intermediate landlord whose lease was just over 2 years longer than the lease which was to be extended and in *Wisbey* the tribunal was aware of another 21 lease extensions in relation to the same development.

12. I agree with the respondent that the relevant decision here is *Drax*, rather than the other cases cited by the applicants. I also reject the need for the respondent to show that the bills have been paid by their client pending this determination. An assessment of costs under section 33 of the 1993 Act does not involve an assessment of costs on either the standard basis or the indemnity basis, nor does "proportionality" apply as set out in the CPR, although I accept that *Drax* described the reasonableness test in section 33 as "*a (limited) test of proportionality of a kind associated with the assessment of costs on the standard basis*". Although the costs claimed are on the high side for a collective enfranchisement of modest property, they are not obviously excessive by reference to the premium or the fact that the respondent may have repeat business for their representatives. I will therefore consider the costs on the basis of the hourly rates sought and the work undertaken, together with the other arguments raised by the applicants as to whether the work properly falls within section 33.

13. The work was primarily undertaken by Joyce Cooper, a Senior Solicitor at an hourly rate of £360. The file was opened by Stacy Dawes, a trainee solicitor, and 12 minutes was claimed for her work at £39. The applicants challenged the rates on the basis that the respondent should have instructed a firm in Slough, rather than Islington, or that the work should have been undertaken by the respondent's own legal department at a fixed fee of £750. If an hourly rate was thought to be appropriate, the applicants suggested the hourly rate in the

SCCO guide of £210 and £110. The applicants also suggested that more work should have been undertaken by a more junior solicitor or paralegal.

14. The respondent relies on the well-established principle that enfranchisement is a specialised area of work and landlords are entitled to instruct an experienced practitioner. They cite the case of *John Lyon's Charity v Terrace Freehold LLP* [2018] UKUT 0247 (LC) as the latest confirmation of that principle, together with the fact that it described an hourly rate of £350 for work undertaken in 2016/17 as "*relatively low*". The reference to the respondent's in-house legal department is thought to be to that of NatWest Bank, whose Trustee and Depositary Services company are the depositary of the beneficial owner ARC TIME:Funds. It is pointed out that NatWest Bank are not experts in enfranchisement.

15. There is nothing in the applicants' arguments on the hourly rates in this case. Leaving aside the point that their representative holds herself out as an expert in enfranchisement and is based in London, £360 is well within the reasonable range of hourly rates commonly allowed for this work. The SCCO rates date back to 2010 and the argument as to NatWest's legal department is, frankly, bizarre. In any event, *Sidewall Properties Ltd v Tewin* [2015] UKUT 0122 is authority that the hourly rates of any in-house solicitors should be assessed in the same manner as private practice. That said, having allowed an hourly rate of £360, I expect reciprocity from the respondent in terms of efficiency.

16. Turning to the schedule, the first item refers to the file opening procedures, charged at 12 minutes of paralegal time or £39. This is objected to by the applicants on the basis that it falls outside section 33(1)(a) or (b). The response is that it is part of the conveyancing process and therefore falls under section 33(1)(e). I consider that these "own client services" naturally form part of the firm's overheads which I would expect to be absorbed in the approved hourly rate of £360 and therefore disallow this item.

17. The second item appears to be a dispute over 5 minutes for obtaining up to date office copy entries. I approve that item in dispute for the reasons given by the respondent and therefore the full 1 hour and 15 minutes claimed.

18. The third and fourth items have been agreed (18 and 11 minutes respectively).

19. The fifth item is disputed save for 12 minutes for responding to the client. This and other "consideration" type claims would have benefited from a date as the challenge is duplication. On balance, given the seniority of the fee earner responsible for the work, I approve 30 minutes for this item.

20. Items 6 and 7 have been agreed.

21. Item 8 is disputed, save for 18 minutes for advising the client on the draft transfer. Again, given that it is for the respondent to justify the time taken, a date would have assisted as given the time claimed for drafting the TP1, this

looks excessive and there is no response to the applicant's challenge. I allow 30 minutes for this item.

22. Item 9 is agreed.

23. The principal challenge to item 10 is duplication, although there is no mention of parking spaces earlier on in the schedule. Given the other deductions made I approve an hour for this item.

24. Item 11 is agreed.

25. I agree with the applicants that on the basis of the explanation given by the respondent, 24 minutes would appear sufficient for the work described in item 12.

26. The challenge to item 13, consideration of the allegation by the applicants' solicitor as to the validity of the counter-notice, is based on the assertion that it is not an allowable item under section 33(1)(a) or (b). Authority is against the applicants, *Wisbey* states that the costs of a counter-notice are costs of and incidental to section 33(1)(a-c) (see paragraph 24 of HHJ Huskinson's judgment). It is true that these are costs incurred after service of the counter notice but the applicants do not deny that they challenged its validity or that their challenge was withdrawn. In the circumstances I approve this item in full.

27. Item 14 – 5 minutes for exchanging valuer's details is objected to on the basis that the costs were incurred after the counter-notice. I do not agree that this is a valid objection but I do not consider this to be senior solicitor's work either, item disallowed.

28. Item 15, described as 15-22 in the Scott Schedule, relates to the finalisation of the transfer which is said to have taken 3 hours 36 minutes. The objection is that the work was undertaken after the applicants had made their application to the FTT. Again, there is clear authority that the issue is not the timing but the purpose of the work (*Chung & Wong v Towey* [2017] UKUT 0157). None of it relates to the proceedings, the description of the work clearly relates to costs of and incidental to the conveyance under section 33(1)(e). That said, on the information provided by the respondent and bearing in mind the seniority of the fee earner the time claimed appears excessive. 2 hours allowed.

29. Item 23 relates to consideration of the ground rents etc. The challenge is on various grounds but it is clear that such consideration can be justified as costs of and incidental to conveyancing. On balance I allow 1 hour

30. Item 24 relates to the argument in respect of VAT, considered below. Again, there is no date but it is clear from the bundle that there was some discussion before this application was issued. There appears to be a typo in paragraph 34 of the respondent's grounds but on balance I am not convinced that this item

does fall within costs of and incidental to the conveyancing, as opposed to costs incurred in relation to this application. Item disallowed.

31. Item 25 relates to completion of the transaction. 1 hour and 50 minutes has been claimed, with one hour conceded but at paralegal rates. I will allow 1 hour at the senior rate, for the reasons given in paragraph 15 above. Calculating the time allowed by the approved hourly rate of £360, this makes the legal costs £4,050, plus any VAT that may be payable.

32. Finally, the office copy entries. I accept the respondent's explanation that both copies were a year out of date and have already approved the time for requesting up to date copies. Disbursements of £36 approved, plus any VAT that may be payable.

Is VAT payable on Bolt Burdon's costs (and the agreed valuation fees)?

33. As stated above, the argument maintained at the Case Management Conference was based on the allegation that the respondent was registered for VAT and therefore could offset the VAT on their solicitors' costs against other liabilities. The respondent's statement of costs dated 30 November 2020 stated that "*Freehold Managers (Nominees) Limited hold the legal title to the property in their capacity as nominees only for and on behalf of NatWest Trustee and Depositary Services Limited ("NatWest TDS"). NatWest TDS are the depositary of ARC TIME:Funds. ARC TIME:Funds are the beneficial owner of the property and they are not registered for VAT and therefore cannot recover the VAT as an input tax.*" Copies of invoices from the solicitor and valuer addressed to the respondent for the costs, disbursements and the enfranchisement report were included, all showing VAT being charged at 20%.

34. The challenge in the applicants' statement of case dated 21 December 2020 was that the respondent should produce a CPR VAT certificate from HMRC or alternatively that if the beneficial owner was exempt from VAT, the transaction should also be exempt from VAT.

35. The respondent's reply relied on a letter of advice from its tax advisers, KPMG, dated 11 January 2021, accompanied by a statement signed by the nominees that they were also not registered for VAT and therefore unable to recover VAT incurred on costs. The KPMG letter also confirms that position.

36. The applicants object to that letter on the basis that it is unsigned, apparently for reasons to do with the problems of working at home in a pandemic. That seems a rather weak justification but given that the objection was in relation to input tax, I have no reason to doubt the fact that the respondent and the beneficial owner of the property is not registered for VAT, indeed that now seems to be accepted by the applicants. In the circumstances I consider VAT is payable by the applicants on the legal and valuation costs. Since the VAT argument was raised by the applicants, it was their responsibility to provide any evidence in support of their position with their statement of case. I have disallowed what appears to be further and different argument in their late

evidence as it was not permitted under the directions and there is no good reason for providing it at such a late stage in the application.

Name: Judge Wayte **Date: 16 January 2021**

Annex – Costs Schedule

Item	Description	Cost	Offer (time)	Determination
1	Opening the file etc – 12 mins by SD	£39	Nil	Nil
2	Receiving instructions etc – 1 hour 15 mins	£450	1hr 10 mins	£450
3	Liaising with valuer etc	£108	Agreed	£108
4	Deduction of title	£66	Agreed	£66
5	Further considering claim- 55 mins	£330	12 mins	£180 (30 mins)
6	Preparing counter-notice	£210	Agreed	£210
7	Preparing draft TP 1	£450	Agreed	£450
8	More work on transfer – 1 hr 28 mins	£528	18 mins	£180 (30 mins)
9	Discussing transfer with client	£66	Agreed	£66
10	Reviewing parking spaces – 1 hr	£360	Nil	£360
11	Further amending transfer	£150	Agreed	£150
12	Finalising counternotice etc – 1 hr 2 mins	£366	24 mins	£144 (24 mins)
13	Considering allegation re counternotice – 41 minutes	£246	Nil	£246
14	Exchanging valuer's details – 5 mins	£30	Nil	Nil
15-22	Various – 3 hrs 36 mins	£1,296	Nil	£720 (2 hours)
23	Ground rents etc– 1 hr 46 mins	£396	Nil	£360 (1 hour)

Item	Description	Cost	Offer (time)	Determination
24	Argument as to VAT – 2hrs 19 mins	£834	Nil	Nil
25	Amending completion statement etc – 1 hr 50 mins	£660	1 hour	£360 (1 hour)
			Total	£4,050
	Disbursements	£36	Nil	£36
	Valuation fee	£1,600	Agreed	£1,600
			Total costs	£5,686
	VAT at 20%		Nil	£1,137.20
Grand Total				£6,823.20

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).