FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**MM/LON/OOAS/OC9/2O23/OI34**
Property	**:**	**27 Berkeley Close, Ruislip, Middlesex HA4 6LE**
Applicant landlord	**:**	**Brickfield Properties Limited**
Representative		**Wallace LLP, Solicitors, London W1**
Respondent lessee	**:**	**Kylie Jane Bower and Michael Thomas Groves**
Representative	**:**	**Freeths LLP, Solicitors, Birmingham**
Type of application	**:**	**Section 91(2)(d) of the Leasehold Reform, Housing and Urban Development Act 1993 (Costs)**
Tribunal members	**:**	**Mr Charles Norman FRICS Valuer Chairman**
Date of decision	**:**	**30 January 2024**

DECISION

Decision

1. The Tribunal determines that the section 60 statutory costs payable by the lessee of 27 Berkeley Close, Ruislip, Middlesex HA4 6LE are as follows:

   (i) applicant landlords' legal costs: **£2,511.50** plus disbursements of **£69.58**;

   (ii) applicant landlords' valuation costs: **£825**.

   VAT is to be added to the above sums where applicable.

2. The respondents' cost application under rule 13 is dismissed.

Reasons

Background

3. This is an application under section 91(2)(d) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") 27 Berkeley Close, Ruislip, Middlesex HA4 6LE ("the Flat"). The address relates to a first floor maisonette in an inter war building in an outer suburban location.

4. The application is for the determination of the reasonable costs payable by the tenant under section 60(1) of the Act following service of a Notice of Claim dated 5 August 2022 under section 42 of the Act to acquire a new lease of the Flat.

5. The notice was sent to Daejan Investments Limited the freeholders. However, on 24 February 2015, Daejan created a headlease for 999 years to Brickfield Properties Limited. Brickfield was therefore the competent landlord. Brickfield is an associate company of Daejan with the same address.

6. The applicant responded via its solicitors disputing the validity of the notice and serving a counter notice on a without prejudice basis in which it disputed the acquisition terms and set out its proposals. The counter notice appended a draft lease. Subsequently, the lessees did not pursue the notice or make an application to the FTT with the result that the notice was deemed withdraw.

7. The applicants sought the following costs inclusive of VAT:

	Landlords Claim
Legal fees s60(1)(a)	£3300.00
Land registry fees	£25.20
Courier fees	£58.30
Valuers' fees s60(1)(b)	£1500.00
Total	**£4,883.50**

The statutory provisions

8. Section 60 of the Act provides:

> 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—
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> (a) any investigation reasonably undertaken of the tenant's right to a new lease;
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> (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;
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> (c) the grant of a new lease under that section;
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> 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.
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> (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.
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> (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.
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> (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.

Directions

9. The tribunal issued its standard costs directions on 6 November 2023, providing for determination on the papers unless any party requested a hearing, which none did. The landlords were directed to send the tenant by 20 November 2023 schedules of costs and supporting documentation to stand as the landlords' case. The directions stated that the schedule should identify and explain any unusual or complex features of the case. The tenant was directed by 11 December 2023 to provide a written statement. The landlord was permitted to send a statement in response by 25 December 2023.

10. The applicant landlord and tenant responded to the directions.

Applicants' case

Legal Costs

11. The applicant put its case as follows:

> *"2. It is not accepted that the Respondent did not serve a Notice of Claim, because it was invalid. A Notice of Claim must be considered to be valid and of effect until such time as it is accepted or determined that the Notice of Claim is invalid and of no effect. The Respondent is estopped from stating that no costs are payable because an invalid Notice had been served. The Property Chamber is referred to paragraph 32-26 of Hague on Enfranchisement, 7th Edition.*
>
> *4. It is submitted that if the validity of the Notice of Claim is disputed, the contention as to invalidity can be included in the Counter-Notice provided that it is clear that the Counter-Notice is served without prejudice to the Notice of Claim being invalid. It is regarded as being preferable to make the contention as to invalidity within the body of the covering letter serving the Counter-Notice. The Property Chamber is referred to paragraph 30-22 of Hague on Enfranchisement, 7th Edition.*
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> *5. The Property Chamber is to note that the Applicant wrote to the Respondent, prior to service of the Counter-Notice on 13 September*

2022, advising that the Notice of Claim was invalid and invited the Respondent to accept that contention. A copy of the letter is attached at page 1 of exhibit "SJB1". It is unfortunate, that the heading of the above letter was incorrect, as it contained a different address. However, upon receiving the letter, the Respondent's solicitors would be aware that the letter referred to the flat in question. The letter was (a) addressed to the Respondent's solicitors (being the address set out in the Notice of Claim) (b) the correct reference for the solicitor dealing with the claim was recited and (c) the date of the Notice of Claim was correct. It is submitted that the letter will have come to the attention of the Respondent's solicitors. No query or response was given to that letter. On 21 September 2022, the Applicant's solicitors sent an email seeking a response to the letter of 13 September 2022. A copy of the email is attached as page 2 of exhibit "SJB1". No response was forthcoming to that email.

6. Considering the above, it is submitted that it was reasonable for the Applicant to prepare and serve a Counter-Notice, admitting entitlement, but without prejudice to the contention that the Notice of Claim was invalid and of no effect.

7. The draconian nature of the Act would put a landlord in a perilous position had it not served a Counter-Notice, notwithstanding the points raised as to invalidity. A Landlord would not put itself to such a vulnerable position that it would allow a Court to determine that a new lease can be granted upon the terms of the Notice of Claim. The Tribunal is to note that the sum offered in the Notice of Claim was £9,900 and the sum counter-proposed £22,500.

8. A Landlord would have considered that a Tenant could raise several arguments to counter the contention that the Notice of Claim was invalid. The Tenant was able to submit that the Notice of Claim had been given "to the Landlord" because it was served at the correct address and that the Competent Landlord was an associated company of the company upon which the Notice of Claim was served. A tenant could argue that it would be apparent that the Notice of Claim would come to the attention of the Competent Landlord

The Applicant also believes that the Respondent could rely on an argument that it was clear that the Respondent had understood the provisions of Section 42(2)(f) and (5) of the Act. The Notice of Claim was served under cover of a letter dated 5 August 2022 and gave a response date by 5 October 2022. The Notice of Claim was served by registered post and therefore did not comply by only one day. Accordingly, a reasonable recipient may accept that the Notice had been sufficiently served.

It is submitted therefore that the Applicant believed it appropriate to serve a Counter-Notice due to the draconian nature of the legislation

and, due to any potential unrecoverable costs with regard to an application to the County Court, seeking a declaration as to the validity of the Notice of Claim.

In the above circumstances, the Applicant submits that a Notice of Claim was served and the Applicant is entitled to seek its reasonable costs, pursuant to Section 60 of the Act. "

12. As to quantum, the applicant's case was that the work was carried out by a partner and assistant solicitor who were both grade A fee earners, with respective charge our rates of £520 and £425 per hour. The applicant referred to FTT authorities *Daejan Investments Limited v Parkside 78 Limited, Daejan Properties Limited v Steven Kenneth Twin,* and *Andrew v Allan Properties Limited.*

13. The applicant submitted that preparation of the counter notice was crucial as the consequences of failing to do so are draconian and the time spent was reasonable.

The Respondents' Case

14. This was set out as follows:

13. The Tenants position is that there is no basis for the Landlord's claim for costs under Section 60(1). Such a position is submitted pursuant to Section 60(1) and (2).

14. Under Section 60(1) in order for the Tenants liability for costs to arise the Notice must be served. The Notice in this case was not served on the Landlord, it was sent to the freeholder, Daejan. This position is acknowledged by the Landlord in its correspondence.

15. There was therefore no reason for the Landlord to embark on incurring costs in circumstances where the Notice had not been served on it.

16. The Landlord's decision is also contrary to the provisions of Section 60(2) in that in pursuing a claim for its costs the Landlord is only permitted to claim costs which are to be only 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."

17. The Landlord ought to have been aware and/or received advice from its representatives after becoming aware of the Notice (despite it not being served on it) that there was no requirement for it to do anything in response to it. In such circumstances there is no sense in the

Landlord incurring cost, it would not have done so had it been advised that it would be personally liable for such costs. There is no justification for the Landlord to later seek recovery of those costs from the Tenants.

18. The Tenants are aware that under paragraph 1, Schedule 11 of LRHUDA 1993 a notice can be deemed served on the competent landlord if served on "other landlords". This provision however does not apply in this case as "other landlords" constitute intermediate interests between the Landlord and the Tenants. There are no such interests in this case.

19. The Tenants therefore submit that the entitlement to costs under Section 60(1) does not arise and the Landlord's application should be dismissed.

As to quantum, the hourly rates are excessive much higher than those of the lessees' solicitors, the tenants and the counter notice costs for the counter notice of £1324.50 are grossly excessive.

Findings

15. As to liability, the Tribunal accepts in full the landlord's submissions. In particular, the tribunal agrees that the respondent is estopped from denying the validity of the claim form in the current application. It also agrees that the status of the notice was arguable, having regard to the close connection between the freeholder and head leaseholder. The tribunal also finds that the applicant acted reasonably in serving a counter notice and draft lease on a without prejudice basis. It considers that any competent solicitor in these circumstances would do likewise and that the costs therefore fall with section 60. The tribunal finds that all the claimed time expenditure was reasonable.

16. In *Peak Holdings Limited v City & Country Properties Ltd and another* (LON/00AJ/OC9/2021/0176) dated 28 April 2022 this tribunal considered the fees of Wallace LLP and stated:

17. "The Tribunal accepts that the statement of costs accurately reflects work carried out. However, it does not accept the intermediate landlords' submissions in relation to the charge out rate adopted, except that the rate has been accepted in other cases. It is not clear whether other decisions were subsequent to the 2021 Guide to the Summary Assessment of Costs. In any event, FTT decisions are non-binding. The Tribunal finds that the Guide, very recently published after a gap of ten years, is an important new factor to which the Tribunal should have full regard and give considerable weight. Paragraph 10 states "The court should not be seen to be endorsing disproportionate or unreasonable costs."

18. The Tribunal does not accept that the wording of section 60 provides a full indemnity for costs. The provision does not make reference to indemnity and, to the contrary, limits cost recovery to those specific matters in section 1(a) (b) and (c), subject to the further qualification under s.60(2).

19. Paragraph 27 states "guideline figures for solicitors' charges are published in appendix 2 to this guide which also contain some explanatory notes. The guideline rates are not scale figures: they are broad approximations only." Paragraph 28 states "the guideline figures are intended to provide a starting point for those faced with summary assessment. They may also be helpful starting point on detailed assessment." Paragraph 29 states "in substantial and complex litigation, an hourly rate in excess of the guideline figures may be appropriate for grade A, B and C fee earners where other factors, for example the value of litigation, the level of complexity, the urgency or importance of the matter, as well as any international element, would justify a significantly higher rate. It is important to note (a) that these are only examples and (b) they are not restricted to high-level commercial work that may apply for example to large and complex personal injury work. Further, London 1 is defined in Appendix 2 as "very heavy commercial and corporate work by centrally based London firms"…

20. The Tribunal does not find, in the present case, that the work can be described as "very heavy commercial and corporate work" bringing it within the scope of the London band 1 category.

21. It finds that the appropriate category is City & Central London Other Work, bringing it within London band 2. The guideline rate for this band is £373 per hour for a grade A fee earner and £244 for a grade C fee earner. For the reasons stated above, namely the somewhat specialised nature of the work, it finds that a modest uplift on those rates may be justified. Accordingly, it finds that the maximum reasonable charge out rates in this case are £400 and £250 for grade A and C fee earners respectively."

22. That decision is non-binding but the tribunal places weight on it. Since that decision a period of high inflation has ensued which the tribunal should reflect in its determination. Having regard to that it finds that a 10% uplift is appropriate, with the result that the maximum rate for a grade A fee earner in London Band 2 is £440 per hour. On the particular facts of this case, which involve some difficult points, it finds that it was reasonable for grade A fee earners to be used.

23. This equates to 3.1 hours at £440 and 2.7 hours at £425, giving a total of £2,511.50. The Land Registry and courier costs are approved. VAT is to be added where applicable.

Valuation Costs

24. The Tribunal accepts the evidence that a valuation was carried out by Chestertons. However, the Tribunal finds that a valuation fee of £1500 for an outer suburban maisonette is too high. The work could have been carried out by a surveyor of less seniority. The Tribunal finds that the maximum reasonable fee was £825 plus VAT, and this is allowed.

Rule 13 Application

25. The respondent seeks a costs order under Rule 13(1)(b), based on the applicant's unreasonable conduct. It does not seek an order for wasted costs under Rule 13(1)(a).

26. Rule 13(1)(b) is engaged where a party has acted "…unreasonably in bringing, defending or conducting proceedings…". The Tribunal's power to award costs is derived from section 29(1) of the Tribunals, Courts and Enforcement Act 2007, which provides:

> "*(1) The costs of and incidental to –*
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> *(a) all proceedings in the First-tier Tribunal, and*
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> *(b) all proceedings in the Upper Tribunal,*
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> *shall be in the discretion of the Tribunal in which the proceedings take place."*

27. It follows that any Rule 13(1)(b) order must be limited to the costs of and incidental to the proceedings before this Tribunal, namely the Section 42 Application.

28. The Upper Tribunal's decision *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC), outlined a three-stage test for deciding Rule 13 costs applications. The Tribunal must first decide if there has been unreasonable conduct. If this is made out, it must then decide whether to exercise its discretion and make an order for costs in the light of that conduct. The third and final stage is to decide the terms of the order.

29. At paragraph 24 of *Willow Court* the UT said "We see no reason to depart from the guidance in *Ridehalgh v Horsefield* at 232E, despite the slightly different context. "Unreasonable" conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person have conducted themselves in the manner

complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?" At paragraph 43, the UT emphasised that Rule 13(1)(b) applications "…should not be regarded as routine…" and "…should not be allowed to become major disputes in their own right."

The Tribunal's decision

30. The Tribunal first considered whether the applicant had acted unreasonably in defending the Section 42 Application.

31. No evidence was produced of any unreasonable behaviour by the applicant in the conduct of the case. On the contrary, the evidence showed that the applicant acted entirely properly in the conduct of the application, and in particular by setting out clear reasons for alleged invalidity of the notice and inviting the respondent to withdraw it.

32. The respondent has not established any unreasonable conduct of the proceedings on the part of the applicant and has not satisfied the first stage of the *Willow Court* test. This meant it was unnecessary for the Tribunal to go on and consider the second and third stages. However, in the circumstances of this case, the Tribunal would in any event have exercised its discretion against the respondent.

Name: Mr Charles Norman FRICS **Date:** 30 January 2024

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.