UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – costs – valuation fee – freeholder agrees to pay a fee within a fixed range for initial valuation and similar fee for subsequent negotiations – whether agreed fee reasonable for valuation or whether it should be based on hourly rate – Leasehold Reform, Housing and Urban Development Act 1993, s60(1)

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

by

MICHAEL FREDERICK CLIVE FITZGERALD

Re: Flat 3
49-51 Cheval Place
London
SW7 1EW

Before: N J Rose FRICS

Sitting at Residential Property Tribunals Service, 10 Alfred Place, London, WC1E 7 LR on 4 February 2010

Mr Peter Beckett FRICS for the Appellant with permission of the Tribunal

The following case is referred to in this decision:

Blendcrown Ltd v The Church Commissioners for England [2004] 1 EGLR 143

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DECISION

Introduction

1. This is an appeal by the freeholder, Mr Michael Frederick Clive Fitzgerald, against a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (the LVT) as to the proper valuation fee recoverable in connection with an abortive lease extension claim in respect of flat 3, 49-51 Cheval Place, London, SW7 1EW under the provisions of section 60(1) of the Leasehold Reform Housing and Urban Development Act 1993 as amended (the Act). Notice under section 42 of the Act was served on 3 June 2008 by the tenant, Safflane Limited (Safflane). The LVT decided that valuation and legal fees of £1,725 and £1,388 plus VAT respectively should be paid to the appellant. The appellant applied for permission to appeal on the issue of valuation costs. On 20 October 2009 I granted permission to appeal, limited to that one issue, on the grounds that the issue raised was of potentially wide implication. Safflane did not respond to the appeal.

2. At the hearing before me Mr Peter Beckett FRICS, a member of Beckett and Kay LLP, appeared for the appellant with permission of the Tribunal and gave evidence. He submitted that a valuation fee of £4,000 plus VAT should be awarded, being the amount actually paid by the appellant to his firm.

Facts

3. In the light of the evidence I find the following facts. The appeal property is situated in Knightsbridge, in a street parallel with Brompton Road accessed from Montpelier Street, which itself is roughly opposite Harrods. The building comprises a ground floor shop/showroom and basement, with three upper floors. There are two flats on the first floor. The appeal property occupies the whole of the rest of the building. The original arrangement of the flat was three bedrooms, three bathrooms, a dressing room and a study on the second floor; and a large open living/dining room and kitchen area on the third floor, with a roof terrace. At the valuation date, 3 June 2008, the appeal property was held under a lease with 77.5 years unexpired at a ground rent of £100 per annum, rising to £200 in November 2019 and £400 in November 2052.

4. Mr Beckett first wrote to the appellant, at the request of the appellant's managing agents, Harrison Goaté, on 4 July 2008. He referred to the implications of the tenant's proposal to alter the flat, both within the demise and expanding the demise upwards, and with the effect of a lease extension on future development potential. He continued

> "To turn now to our part in the lease extension claim: dealing with a 90-year lease extension under the Act is essentially a two-, but sometimes three-stage process.
>
> Stage 1 is the stage before service of your counternotice. This will include inspection of the flat, perusal of the lease, guiding you on the likely range of price payable,

advising on the considerations which will determine the final level of price, and providing a figure to put in the counternotice.

Stage 2 is the negotiation stage. This is where we would attempt to agree all the various factors which go into the calculation of the price with the tenant's valuer. In most cases we are able to reach agreement at an acceptable price.

Stage 3, which is to be avoided if at all possible, is reference to the Leasehold Valuation Tribunal ('LVT'). If agreement cannot be reached between the parties, it is open to either the tenant or the landlord to apply to the LVT for a hearing. Both sides present their cases, and the LVT makes a determination. Because of the time involved, this is an expensive stage.

Our standard fees for each stage are as follows:

Stage 1: £3,000 to £5,000 per flat, depending on scale and complexity. Without seeing the property, I can't be sure, but I think your case is likely to lie in the middle of the range.

Stage 2: £3,000 to £5,000 per flat, depending on scale and complexity.

Stage 3: £325 per hour for Peter Beckett (£300 per hour for Richard Kay; £100 per hour for an unqualified professional assistant). There is a 20% uplift for time spent on the hearing.

All fees are subject to the addition of disbursements and VAT.

If you would kindly let me know that you are prepared to proceed on this basis, we will proceed with pleasure."

5. This fee structure was accepted by the appellant in a letter dated 8 July 2008. On 10 July Mr Beckett inspected the property, accompanied by his assistant and Ms Max from the appellant's solicitors. The next day he received from Ms Max copies of her report on the claim and the draft lease.

6. Ms Max was present at the inspection, in part, because of a number of unusual circumstances. The flat was a vacant shell, completely stripped back to brick or blockwork walls and concrete floor. There were no services. The flat had been stripped out because of a fire. There was a dispute between the appellant and Safflane as to the method of handling the insurance recoveries that followed. The flat had been sold several times since it was constructed, and different levels of improvement had been effected by the lessee on each occasion. Safflane had approached the appellant with a view to remodelling the flat completely and had asked for the demise to be extended. After some discussion it was concluded that the Act did cover the premises as they then stood.

7. Mr Beckett did not provide a formal valuation report. He did, however, report to the appellant informally, following which the appellant served a counternotice on 29 July 2008,

proposing a premium of £150,000. Mr Beckett then exchanged valuations and opened discussions with Safflane's surveyor, Mr French. On 3 September 2008 he met the appellant and his wife, the appellant's managing agent and his solicitor to discuss the lease extension claim and the request for a licence for alterations. Mr Beckett was asked about alterations subsequently, but that issue sank into the background from that point onwards, apart from one discussion on 22 September 2008, when Mr Beckett outlined his approach to the price to be paid for an addition to the demise.

8. On 30 September 2008 the appellant applied to the LVT to determine the terms of the lease extension . On 29 October 2008 Mr Beckett met Mr French. The discussion was mainly about the lease extension, but they also touched on the question of the proposed addition to the demise. In the absence of agreement the appellant instructed Mr Beckett on 23 January 2009 to give expert evidence at the LVT hearing on 3 and 4 February 2009. Safflane withdrew its statutory claim on 30 January 2009.

9. On 10 October 2008 Beckett and Kay submitted an invoice (no.693) for £4,700 including VAT. The invoice described the work carried out as follows:

> "Receiving your instructions to advise following the service of a notice by your lessee under s42 of the Leasehold Reform Housing and Urban Development Act 1993 as amended to consider values and to provide a price for your counternotice.
>
> Inspecting the Flat; perusing the documentation provided by your solicitors; reviewing comparable evidence; preparing statutory valuations; providing a price for the counternotice; the counternotice being duly served by your solicitors on 29 July 2008.
>
> Attending a meeting at your solicitor's office on 3 September to discuss the exchange of notices and tactics in relation to a proposal by the lessee to expand his demise and make other alterations.
>
> Our fee as agreed."

10. Beckett and Kay submitted a further bill for £4,657.50 including VAT on 11 May 2009. On this occasion the work was described in these terms:

> "Further to our account no.693, receiving your further instructions to negotiate following an exchange of notices between the parties to assess the price payable pursuant to the Leasehold Reform Housing and Urban Development Act 1993 as amended.
>
> Negotiations with the surveyors acting for the lessee, including further research and collation of comparable evidence; meeting you and your solicitors at their offices to discuss progress; keeping abreast of procedural matters in relation to the Leasehold Valuation Tribunal; preparing a sequence of statutory worked valuations; meeting the lessee's surveyor; reporting on progress; reaching agreement or near-agreement on most matters; hearing that the Leasehold Valuation Tribunal had set a hearing date of

3/4 February 2009; hearing that the lessee had withdrawn his claim shortly before the Tribunal hearing.

Our fee, as agreed (second stage: negotiation)"

The first account was paid on 16 October 2008 and the second on 20 May 2009.

Statutory provisions

11. Section 60 of the Act provides as follows:

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…

(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 …

(5) A tenant shall not be liable under this section for any costs which a party to any proceedings under this Chapter before a leasehold valuation tribunal incurs in connection with the proceedings."

Case for the appellant

12. Mr Beckett said that his firm had a standard policy in relation to leasehold enfranchisement instructions. In the PCL area, as a general rule, they received instructions to act on behalf of tenants. This was because most of the landlords in the area were the great London estates, who instructed larger firms of surveyors to represent them. Beckett and Kay had produced some standard text which it sent to enquirers. This quoted a fee of £3,000 to

£5,000 per flat for each of stages 1 and 2. They considered stage 1 to be the stage up to the service of the section 42 notice, the counternotice, or the section 13 notice, as the case may be. Stage 2 consisted of negotiations. This standard policy had been applied in the case of the appeal property. Mr Beckett explained that, in general, his firm departed from the standard policy only where there were special considerations.

13. The first of these was where they acted for lessees in the context of a collective enfranchisement, where many of the flats and many of the leases were identical. In such cases they would certainly negotiate a reduction in the standard tariff, particularly where there was a prospect of frequent repeated instructions, the values were low and the flats or maisonettes were uniform. In such cases the work was usually done by a professional assistant overseen by a partner. The inspection was undertaken by the assistant, as was comparable research and the first draft worked valuation.

14. Mr Beckett said that in his experience clients tended to prefer fixed fees to time-related fees. There were some kinds of work carried out by his firm where it would be unsafe to agree a fixed fee. This was particularly the case with valuations for dilapidations claims, which had a habit of expanding dramatically compared with the client's original expectations. In the early stages of the dilapidations claim, therefore, he invariably worked on an hourly basis, but he encountered resistance from clients, which usually took some effort to overcome.

15. In the case of leasehold enfranchisement work, in general his firm was able to predict more accurately what work would be involved in stages 1 and 2. A problem of prediction arose at stage 3 (tribunal work), however, where his firm invariably worked on an hourly rate basis. Mr Beckett said that the essential feature of a fixed fee arrangement was that the risk passed from the client to the valuer. Obviously, the fixed fee must reflect this transfer of risk, so that his firm could be reasonably sure that the average instruction at a fixed fee worked out at least as well as, and preferably at somewhat better than, it would have done on an hourly basis.

16. The provisions of section 60 of the Act were considered by the Tribunal (P H Clarke FRICS) in *Blendcrown Ltd v The Church Commissioners for England* [2004] 1 EGLR 143. In that case the LVT considered that the charges proposed by the landlord's surveyors, based on 0.125% of the freehold vacant possession value and amounting to £57,887.89 plus VAT, were not reasonable.

17. Mr Beckett referred to the Tribunal's conclusions in *Blendcrown* as to the proper approach to be adopted to the assessment of valuation fees. Those conclusions were as follows:

> "98… I agree with Mr Maunder Taylor that the LVT were wrong to say that valuation fees are invariably charged as a percentage of value. This was the position in the past but in these days of competitive fees an owner seeking a valuation following the service of an initial notice would, in my judgment, look for a fixed fee, where the

amount of his liability is certain at the outset. He would not agree to a fee dependent on the size of the valuation and therefore uncertain as to amount and wholly dependent upon the opinion of value put forward by the valuer. A fixed fee would necessarily reflect the work involved and, to some extent, the size and complexity of the valuation, although it does not necessarily follow that a valuation of a large amount should be proportionately greater than a valuation of a lesser amount, as would be the case with a fee calculated as a percentage of value. I therefore reject the approach of the LVT in assessing the reasonable valuation costs as a percentage of value. In my view this does not produce a reasonable fee but an excessive fee.

> 99. In my judgment, the reasonable fee payable by Blendcrown should be a fixed fee based on a reasonable amount of valuation work costed at a reasonable hourly rate. Mr Ford said that his rate is £200 an hour. I accept this as reasonable. I was not given any breakdown of this figure but, in my opinion, it is sufficient to cover cost, profit and an allowance for risk in the sense that any valuation has the potential to give rise to a negligence claim. I should add, however, that I do not give this latter point the importance given to it by Mr Ford. Although the valuations in this appeal are high, all professional work is potentially the source of negligence proceedings and I do not find there to be any unusual or special risks in this case."

Conclusions

18. Mr Beckett's case, in short, is that the appellant agreed to pay a fixed fee for stage 1, that the work carried out at stage 1 was a valuation of the appeal property obtained for the purpose of fixing the premium, and that the agreed fee represents the reasonable costs of such valuation. In support of this contention Mr Beckett relies on the decision of this Tribunal in *Blendcrown*.

19. Mr Beckett recognises that, in *Blendcrown*, the Tribunal in fact based its assessment of a reasonable fixed fee on a reasonable amount of valuation work costed at a reasonable rate. But, he says,

> "the essence of the Tribunal's decision was reference to a reasonable landlord, seeking valuation advice, in accordance with section 60(1). He would do so by looking for a fixed fee, as did the freeholder in the present case… As I read it, the Lands Tribunal only turned to hours spent for lack of any other benchmark for the fixed fee the Member envisaged. In the present case, by contrast, the fee was always conceived as a fixed fee."

20. Mr Beckett concedes that, if the valuation fee payable pursuant to section 60(1) is to be assessed purely by reference to the amount of work done by his firm to enable the appellant to fix the premium to be quoted in the counternotice, the figure of £1,725 plus VAT determined by the LVT is right. That figure was based on the standard hourly rates quoted by Beckett and Kay for stage 3 work. Mr Beckett argues, however, that clients tend to prefer fixed fees to time-related fees; that the appellant agreed to pay a fixed fee; and that that fixed fee represents the reasonable costs of obtaining the necessary valuation.

21. I accept Mr Beckett's evidence that clients tend to prefer fixed fees to time-related fees. The question, however, is whether he has shown that the fee of £4,000 plus VAT, which the appellant paid his firm on 16 October 2008, was a reasonable one within the meaning of section 60(1)(b). I am not satisfied that it was a reasonable fee, for these reasons. Firstly, Mr Beckett accepted that, in every case where he had prepared a valuation to enable a landlord to quote a premium for a lease extension, he had subsequently been instructed to negotiate the amount of the premium with the tenant or his surveyor. It is understandable that Mr Beckett's firm would wish to apportion its charges between the work done at stage 1 and stage 2. Such an apportionment enables it, perfectly reasonably, to submit an account after service of the counternotice, rather than waiting to be paid until negotiations have been concluded. But the appellant accepted Mr Beckett's fee basis in anticipation that he would be advised by Mr Beckett throughout. The reality, therefore, is that the appellant did not agree to pay a fee of £4,000 plus VAT for the valuation. What he agreed was a range of charges, for stages 1 and 2 combined, of between £6,000 and £10,000 plus VAT. The attribution by Mr Beckett's firm of the same range of fees to both stages was, in my view, entirely arbitrary. Mr Beckett explained that the case proved to be much simpler at stage 1 than had been reasonably anticipated and became more complex in subsequent stages. Thus, on the assumption that the fee of £8,000 plus VAT that was paid for stages 1 and 2 combined was reasonable, the amount reasonably attributable to the first stage would be considerably less than £4,000.

22. The second reason for my conclusion that a fee of £4,000 for stage 1 was not reasonable is that Mr Beckett quoted a fee in the £3-5,000 range.

> "depending on scale and complexity."

Since the stage 1 work proved to be simpler than originally expected, the fee of £4,000 (which Mr Beckett originally anticipated would be appropriate) now appears to be excessive. (By the same token a fee of more than £4,000 for stage 2 might well have been justified).

23. Thirdly, it is clear from Mr Beckett's initial account dated 10 October 2008 that the fee of £4,000 included a discussion of

> "tactics in relation to a proposal by the lessee to expand his demise and make other alterations."

In my judgment such discussion does not fall within the ambit of section 60(1)(b).

24. The appellant has therefore failed to prove that a fee higher than that determined by the LVT was reasonable. Mr Beckett suggested that I might provide guidance on the approach to valuation fees which should be adopted in other cases. Given the conclusion I have reached on this appeal, I would not wish to depart significantly from the guidance contained in paragraph 99 of *Blendcrown*. I should, however, comment upon Mr Beckett's suggestion that some of the work carried out by his firm at stage 2, after service of the counternotice, is properly to be described as valuation for the purposes of section 60(1)(b). Mr Beckett explained that, after the counternotice had been served, he took steps to refine his valuation. He attended a meeting on 3 September 2008 with the appellant, his managing agent and his solicitor, at which he investigated the question of tenant's improvements more carefully, and he obtained and

analysed details of four previous sales of the subject premises. On 29 October 2008 he met the tenant's surveyor to negotiate the terms of the lease extension. He suggested that it

> "was perhaps with that meeting that any activity which might be headed 'valuation' came to an end."

25. Mr Beckett is no doubt right to say that valuation work takes place after service of the counternotice. I do not agree, however, that such work comes to an end with the commencement of negotiations. Valuation forms the very subject-matter of such negotiations. It is to be expected that one or both valuers will refine his or her valuation on one or more occasions before negotiations are completed. But Mr Beckett rightly accepts that section 60(1)(b) does not apply to valuations prepared in the course of negotiations. There is, in my judgment, no logical distinction to be drawn between such valuations and work of a valuation nature which is done, after the stage 1 valuation has been provided to the client and the counter notice served, in order that the valuer is fully prepared by the time negotiations commence.

26. The appeal is dismissed.

Dated 10 February 2010

N J Rose FRICS