UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2010] UKUT 81 (LC)
LT Case Number: LRA/58/2009

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Leasehold enfranchisement – costs – initial notices – basis of assessment – costs of proceedings – unreasonable conduct – appeal allowed in part – section 33 Leasehold Reform, Housing and Urban Development Act 1993 – paragraph 10 Schedule 12 Commonhold and Leasehold Reform Act 2002

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE SOUTHERN RENT ASSESSMENT PANEL

BETWEEN JEREMY RYTON PLUNKETT-ERNLE-ERLE-DRAX Appellant

and

LAWN COURT FREEHOLD LIMITED Respondent

Re: Lawn Court,
9 Surrey Road,
Bournemouth,
BH2 6BP

Determination on the basis of written representations under Rule 27 of the Lands Tribunal Rules (as amended)

by

A J Trott FRICS

The following cases are referred to in this decision:

Re Cressingham Properties Limited [1999] 2 EGLR 117
London County Council v Tobin [1959] All ER 649

DECISION

Introduction

1. This is an appeal by the freeholder of Lawn Court, 9 Surrey Road, Bournemouth BH2 6BP, Mr Jeremy Ryton Plunkett-Ernle-Erle-Drax (Mr Drax or the appellant), against a decision of the Leasehold Valuation Tribunal for the Southern Rent Assessment Panel dated 21 March 2009. The decision of the LVT concerned an application made by the nominee purchaser, Lawn Court Freehold Limited, under section 91 of the Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act) for the determination of the amount of Mr Drax's costs payable by the nominee purchaser under section 33 of the 1993 Act arising from a claim for the collective enfranchisement of Lawn Court (the enfranchisement price having been settled by agreement).

2. Lawn Court is a five storey purpose built block of nine flats. There are two flats on each of four floors with a penthouse occupying the whole of the top floor.

3. The LVT considered three issues:

(i) The determination of the costs payable in respect of an initial notice under section 13 of the 1993 Act that was purported to have been served by the nominee purchaser on Mr Drax on or about 5 September 2007. The amount claimed by Mr Drax was £1,423 for legal fees and £270 for valuation fees.

(ii) The determination of the costs payable in respect of a second initial notice served by the nominee purchaser on Mr Drax on 12 October 2007. The amount claimed by Mr Drax was £7,804 for legal fees (excluding the legal fees on the first initial notice).

(iii) The determination of an application by Mr Drax that the nominee purchaser should pay his costs of the proceedings in accordance with paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act) due to its unreasonable conduct in making an application to the LVT to determine costs rather than making a worthwhile offer to him.

(All costs are exclusive of VAT.)

4. The LVT found in favour of Mr Drax on the first issue and this part of its decision is not subject to appeal. On the second issue the LVT awarded costs in the sum of £2,500. On the third issue the LVT refused to make an order for costs upon Mr Drax's application under paragraph 10 of Schedule 12 of the 2002 Act.

5. Mr Drax sought leave to appeal the LVT's decision on the second and third issues but this was refused by the LVT on 27 April 2009. He then applied to this Tribunal for permission to appeal on 11 May 2009. His Honour Judge Reid QC granted permission to appeal by way of written representations on 13 October 2009.

The LVT's decision

6. In respect of the second issue, dealing with the costs of the second initial notice, the LVT said:

> "24. We invited the respondent [Mr Drax] to explain why the costs were so high, indicating that in our experience we would expect them to be in the region of £2,000-£3,000. The answer that we have from Mr Drax and Miss Foye [a senior assistant solicitor with Preston Redman, Mr Drax's solicitors] is that a very substantial amount of work had to be done because of service charge matters raised by CM [Coles Miller, solicitors to the nominee purchaser]
>
> …
>
> 27. That raises two issues:
>
> (a) What proportion of the second notice costs relate to service charge matters?
>
> (b) Are those costs relating to service charges recoverable under section 33?"

On the first point the LVT noted that there was little documentary evidence to assist in determining how much of the costs incurred related to service charges. They said:

> "28. …Miss Foye did not seem to demur from our suggestion of at least 40% of the costs arising from service charge issues… On the available evidence, we therefore found that a very substantial part of the high level of costs related to service charge matters. Bearing in mind that the Respondent was in control of service charge accounting it was unnecessary and inappropriate for PR [Preston Redman] to be significantly involved in those issues and we found therefore that their costs on that aspect were not reasonably incurred."

On the second point the LVT found that the provisions of section 33(1) of the 1993 Act, dealing with the costs of enfranchisement, were:

> "29. …very specific and do not, in themselves, include dealing with service charges."

However the section provided that costs that were incidental to the listed matters were liable to be paid by the nominee purchaser. The LVT said:

> "30. …We took the view that incidental work, to fall within the Section, is to be construed tightly… While we accept that service charge issues arose as a result of the initial notice, we found that those issues did not fall within the meaning of 'incidental' in Section 33(1) and that they should be disallowed accordingly."

The LVT noted that Mr Drax was a chartered surveyor and that he was "very fully involved" in the transaction which "has had a significant effect on the level of costs recorded by PR." The LVT said that the specific items referred to in section 33(1) did not necessitate a significant input from Mr Drax and that:

> "31. …There would be nothing particularly unusual about the necessary involvement of the freeholder in this case as against that of the freeholder in other similar cases."

The case was not materially different from the enfranchisement of any other small block of flats. The LVT concluded that as it did not have sufficient evidence to enable them to undertake a detailed analysis of the costs it could:

> "32. …only take a broad brush approach and determine what we believe, taking into account other cases and using our own knowledge and experience, a case such as this would reasonably justify as regards costs payable under section 33."

They noted three LVT cases to which they had been referred under section 33 and others in relation to section 60 of the 1993 Act (grant of a new lease). The LVT concluded:

> "35. Taking all the above into consideration we believe that the circumstances of this matter in relation to the second notice and the limited amount of work provided for under section 33, that a reasonable sum for the Respondent's legal costs does not exceed £2,500."

7. In respect of the third issue, the application for costs under paragraph 10 of Schedule 12 of the 2002 Act, the LVT said that the nominee purchaser's suggestion that Mr Drax's section 33 costs should be limited to some £240:

> "38. …was not a helpful attitude and unless there were other considerations, we might have found a costs order to be appropriate. However, this is a case where we have found that the Respondent's claim for Section 33 costs has been very significantly overstated to the extent that we do not feel any reasonable offer (measured in terms of our determinations) from the Applicant would have achieved settlement. For that reason we decided we would not, in this instance, make such an Order."

In its reasons for refusing leave to appeal the LVT said that:

> "To put it another way, had the [appellant's] costs claim been limited to Section 33 costs, there would have been more likelihood, in our view, of a sensible offer being made. So we considered the [appellant's] claim was unreasonable and should also be taken into account in deciding this issue."

The LVT went on to say that it considered the nominee purchaser's attitude in its points of dispute to have been unreasonable and of no assistance but it had considered that behaviour in the context of the appellant's overstated claim. The LVT did not find the nominee purchaser's case in respect of the first initial notice to have been misconceived; it was a matter of interpretation where there was no law directly on the point. The appellant said that the nominee purchaser's conduct in respect of the first notice had been unreasonable. The LVT said:

> "We do not consider the point made [about the respondent's conduct], which we accept, is relevant to the issue of the 2002 Act costs. Paragraph 10 of Schedule 12 of that Act deals with costs in 'connection with the proceedings', not costs in connection with the notice. The [nominee purchaser] conceded, albeit very late, that the first notice was not valid, but the proceedings themselves were founded only on the second notice."

Consequently the LVT made no order as to costs under paragraph 10 of Schedule 12 of the 2002 Act.

Review or rehearing

8. The notice of application to this Tribunal for permission to appeal specified that the applicant (Mr Drax) wanted the appeal to be heard as a rehearing. The Tribunal's permission to appeal did not impose any conditions which sought to reduce the ambit of the appeal other than that it should be heard by way of written representations. In the absence of the imposition of such conditions, an appeal to the Lands Tribunal is not restricted to a review but is an unrestricted appeal (a rehearing) under section 175 of the 2002 Act.

Statutory provisions

9. Section 33 of the 1993 Act states, so far as is relevant:

> "(1) Where a notice is given under section 13, then…the nominee purchaser shall be liable, to the extent that they have been incurred in pursuance of the notice by the reversioner…, 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) deciding, 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 purposes of subsection (1) any costs incurred by the reversioner … 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 have been 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 initial notice ceases to have effect at any time, then … the nominee purchaser's liability under this section for costs incurred by any person shall be a liability for costs incurred by him down to that time."

10. Paragraph 10 of Schedule 12 to the 2002 Act states:

"(1) A leasehold valuation tribunal may determine that a party to the proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2)

(2) The circumstances are where –

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings,

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed –

(a) £500, or

(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph."

The costs of the second initial notice

Evidence and submissions

11. The appellant argued that leasehold enfranchisement was a species of compulsory purchase and that, as such, the landlord should not be out of pocket in incurring costs to dispose of his interest. While costs were limited by section 33 of the 1993 Act the appellant said that he should, in general terms, be indemnified by the respondent for dealing with the claim to enfranchise Lawn Court. The landlord's costs should be assessed on the indemnity basis with any doubt about whether the costs were reasonably incurred or reasonable in amount being determined in his favour. The appellant said the situation was analogous to the assessment regime under Part 44.4 of the CPR.

12. The LVT's decision to award £2,500 was wrong because it gave no, or insufficient, weight to the appellant's need to respond to the numerous requests for information made by the respondent's solicitors. The LVT had a full analysis of the appellant's costs, including time records and a substantial extract from his solicitor's file, to enable it to reach an informed view about whether or not the costs were incurred as a direct result of the steps taken by the respondent's solicitors. However it chose instead to base its award on a consideration of other cases and gave no substantive or considered reasons for disallowing costs. The LVT's approach meant that the appellant had to justify his costs above the LVT's estimate of £2,000 - £3,000 which meant that no doubts were resolved in his favour. The LVT had also erred in finding that the appellant's involvement in instructing his solicitor had increased the costs under circumstances where the respondent had raised matters requiring both the appellant and his solicitor to respond. The appellant was entitled to instruct a solicitor to deal with the conveyancing on his behalf rather than to answer any questions himself.

13. The LVT's construction of section 33 was too narrow and had the effect of excluding the cost to the appellant of answering the respondent's queries about service charges. But the appellant could not reasonably decline to answer such queries since the nominee purchaser had an interest in understanding the service charge accounts. Section 33 should not be interpreted so as to suppress the appellant's legal costs artificially and unfairly.

14. The respondent did not accept that the principle of indemnity costs applied in this appeal. It said that the majority of LVT decisions took a contrary view. The respondent's experience was consistent with that of the LVT with respect to the expected costs of transfer. It gave the example of Dorset House, a block of nine flats in Bournemouth, where on enfranchisement the costs of Preston Redman for the freeholder were £2,600 excluding VAT and disbursements.

15. The LVT noted that no reason had been given for the high costs in this appeal other than in relation to service charges. The amount of time spent on this subject was due to a considerable extent to the appellant's failure to maintain service charge information and provide it to the tenants. The service charge issues were continuing irrespective of the enfranchisement. The tenants had not received service charge accounts for the year ending 29

September 2006 and the maintenance of Lawn Court "had ground to a halt". In fact the appellant's managing agents had misappropriated the service charge monies and had ceased trading. There had not been a proper handover to the appellant's new managing agents. It was not a question of the appellant reacting to requests from the respondent about service charges so much as the respondent making requests arising from the appellant's breach of covenant in failing to maintain and provide adequate service charge information.

16. While the tenants were entitled to certain information regarding service charges under section 21 of the Landlord and Tenant Act 1985 they had no right to such information under the 1993 Act. So there was no duty on the appellant to respond to such service charge queries if it considered that any costs that it incurred would not be recoverable. That the appellant thought that this might be so was apparent from an attendance note of a phone call from Mr Drax to his solicitors saying that he would answer the respondent directly about the service charge issues "because he does not wish to incur further costs in relation to this matter."

17. In reply the appellant said that there was no discernible pattern in LVT cases which favoured either indemnity or standard costs. Reliance on the transaction of Dorset House was misplaced because there was a head leasehold interest in the property which vested in the flat owners and which meant that the freeholder had no involvement in the management of the property. In the present appeal the greatest part of the costs were incurred by the appellant in responding to the respondent's questions about service charge matters. These were made at an unreasonable level of detail. Unless the appellant could recover its costs of dealing with such service charge enquiries the respondent's solicitor would be free to involve the appellant in detailed questions about service charge matters secure in the knowledge that his clients would never have to pay for the professional time spent in attending to such questions.

18. The respondent's solicitor had raised all his queries about service charges as part of the enfranchisement process and the appellant had only claimed for the costs of dealing with those matters in that context. The costs of answering reasonable enquiries to establish the state of the service charge account, current and planned works would be properly covered by section 33(a) (sic). Had the appellant refused to answer such questions then the respondent would almost certainly have applied to the LVT to have service charge matters considered as part of the terms of the acquisition. Mr Drax denied that he accepted that costs relating to service charges would not be recoverable under section 33.

Conclusions

19. Both parties cited LVT cases in support of their argument for (the appellant) and against (the respondent) costs under section 33 being assessed on the indemnity basis. Those cases are inconclusive and are not binding on this Tribunal but they do highlight the confusion that appears to exist about how section 33 should be interpreted. The LVT in this appeal did not address this question directly, although in accepting all of the appellant's claimed costs in respect of the first notice it appears that it may have proceeded on the indemnity basis (where any doubt as to the reasonableness of the costs is to be resolved in favour of the receiving party, namely the appellant). The LVT's consideration of the costs on the second notice was

undertaken differently. It took a global view of the total costs (£7,804) and determined that, in its experience and based upon the evidence of the sale of similar properties, this amount was disproportionately high. The only explanation given by the appellant was the amount of work required to deal with the service charge issues and, even allowing for that at 40%, the costs were well above what the LVT expected for this type of work. The LVT's award of £2,500 was made on the basis that the costs payable by the nominee purchaser should be no more than would have been payable had the work done by the appellant been conducted in a proportionate manner.

20. This Tribunal has recognised that enfranchisement under the 1993 Act is analogous to compulsory purchase. Thus in *Re Cressingham Properties Limited* [1999] 2 EGLR 117 the Member, Mr P H Clarke FRICS, said at 119D:

> "It must be borne in mind that leasehold enfranchisement is a form of compulsory purchase. Parliament has given the tenant the right to purchase his landlord's interest at a price that is statutorily defined and has allowed the landlord to recover his costs in effecting the transaction."

21. The underlying principle of compulsory purchase is that of equivalence; the person from whom property is acquired should be no worse (or better) off after the acquisition than before. This is reflected in the approach to the assessment of *Tobin* costs (legal and accountancy costs incurred as a result of the service of a notice to treat; see *London County Council v Tobin* [1959] All ER 649) which are, in effect, assessed on an indemnity basis; it is for the acquiring authority to show that such costs were unreasonably incurred or were unreasonable in amount. But a direct analogy with the position regarding *Tobin* costs under compulsory purchase is not appropriate given the specific provisions of section 33 of the 1993 Act.

22. To qualify for payment by the nominee purchaser such costs must be reasonable and have been incurred in pursuance of the section 13 notice in connection with the purposes listed in sub-paragraphs 33(1)(a) to (e). The nominee purchaser is also protected by section 33(2) which limits the costs to those that the reversioner would be prepared to pay if he were using his own money rather than being paid by the nominee purchaser. This, in effect, introduces a (limited) test of proportionality of a kind associated with the assessment of costs on the standard basis.

23. I have applied these principles to the assessment of the reversioner's legal costs in this appeal but before looking at the details of the claim I would make the preliminary observation that I found the respondent's points of dispute to the appellant's amended and supplemental analyses of costs to be unrealistic. In this I am in agreement with the LVT when it said:

> "23. We noted the points of dispute and final submissions of the [respondent]. Analysis of their objections to individual items of the [appellant's] costs breakdowns shows that they considered that almost every item should be disallowed and that the total value that they did not challenge amounted to a costs total of around £240. To take one example, the [respondent] considered that the cost of the [appellant]

preparing the draft transfer should be disallowed completely. We found that on any view, that attitude was unreasonable and of no assistance to our consideration."

24. I accept the rate of charge for Ms Foye at £215 per hour rising to £225 per hour in mid July 2008. However I do not think that it was appropriate for a partner (Mr Neville-Jones) to be involved in any of the work covered by section 33 and I have not allowed his higher charge out rate of £240 per hour rising to £255 per hour.

25. The appellant should only receive his costs where he has explained and substantiated them. In this appeal the appellant's solicitors, Preston Redman, have produced two analyses of costs supported by a comprehensive bundle of supporting information which I have found to be most helpful. Preston Redman reduced their costs by removing items associated with the application to the LVT. They were correct to do so but having examined the analyses and supporting documents I do not consider that they have deleted all such work and further deductions need to be made.

26. There are also a number of cost items for which there is either no, or inadequate, supporting information. This situation has not been helped by a lack of copies of most of the correspondence from the respondent's solicitors, Coles Miller. For instance in item 174 of the appellant's amended breakdown of costs the work undertaken on 12 August 2008 is said to be "Researching CM's point in 1st letter". There is no indication of what this letter refers to and I can find no copy of it in the trial bundle. In the absence of any (or adequate) details I have disallowed (or reduced) such items.

27. A significant number of items relate to emails and telephone calls between Ms Foye, Mr Drax and the appellant's valuer, Mr Bevans. While it is reasonable for a solicitor to keep her client informed about progress and to seek instructions as necessary, I think that there are an excessive number of such contacts in this appeal. Nor do I think that it is reasonable that the nominee purchaser should pay for items such as numbers 67 and 68 in the appellant's amended list which relate to sending Mr Bevans a further copy of the second initial notice because he apparently lost his original copy of it.

28. For the avoidance of doubt I have allowed costs associated with the preparation and service of a counter-notice. In my opinion this is a cost that was incurred "in pursuance of the notice". The word "pursuance" in this context seems to me to have a causative meaning, ie as a result of, or caused by, the notice. It is also a cost that is either directly or incidentally concerned with the matters contained in section 33(1) of the 1993 Act.

29. The decision of the LVT to reduce the amount of costs claimed was mainly based upon its view that "a very substantial part of the high level of costs related to service charge matters." It did not think that the appellant's solicitors should have been significantly involved in those issues and found that their costs on that aspect were not reasonably incurred. It also said that service charge issues did not come within the meaning of "incidental" for the purposes of section 33(1) of the 1993 Act.

30. The LVT was unable to determine how much of the legal work related to service charges because it did not have "sufficient evidence and submissions to form a view". It estimated that it was 40% of the total amount, a figure from which Ms Foye is said not to have demurred. In my opinion that estimate is too high. From an examination of the trial bundle and the appellant's amended and supplementary breakdown of costs I estimate that the time spent by the appellant's solicitors on dealing with service charge matters was no more than 17.5%.

31. In its response to the respondent's grounds of reply the appellant said:

> "During the course of the hearing the Appellant's solicitor was requested to indicate what percentage of her professional time was spent with service charge matters and it was the Chairman who suggested 40%. The solicitor explained that she would need to check her file and time recording in order to give a proper response. When pressed by the Chairman she said that she felt that the 40% might be a more accurate percentage than the higher figures which he had suggested to begin with."

32. The LVT said that:

> "There is not much reference in the costs breakdowns to service charge issues or in the documents which PR have produced to us, so we do not think we have as full a picture as we might."

33. That may be so, but from the evidence that was before the LVT, and which I have examined closely, I do not consider that it could have concluded reasonably that 40% of the legal costs were incurred in respect of service charges. I note that Ms Foye's response to the LVT was subject to the statement that she needed to check her records. These were available to the LVT and, had Ms Foye been given the opportunity to check them, I do not think that she would have accepted the figure of 40% that was put to her by the LVT.

34. I agree with the LVT, however, that the surprising absence of much of the correspondence from the respondent's solicitor from the trial bundle may mean that some of the legal time spent on service charge matters raised by the respondent has not been identified (Mr Drax described this in an email to Coles Miller as "a barrage of correspondence containing for the most part non-legal queries"). But I think that most of it will be reflected in the appellant's solicitor's time records by way of response and, in any event, I have made a small allowance for it in my figure of 17.5%.

35. In order for the nominee purchaser to be liable for the appellant's costs under section 33(1) of the 1993 Act those costs must:

(i) be incurred in pursuance of the section 13 (initial) notice, and

(ii) be reasonable (as qualified by section 33(2)), and

(iii) be the costs of and incidental to the matters set out in sub-sections (a) to (e).

There is no reason in principle why the costs of dealing with service charge matters cannot fall within these criteria. But they will not be covered by section 33 unless they are incurred in pursuance of the notice rather than in pursuance of disputes under the leases of the tenants. In the present appeal it seems to me that there was a continuing dispute between the tenants and the freeholder about service charge issues. This was exacerbated by the fact that the managing agent appointed by the appellant had apparently misappropriated the service charge monies. The legal costs arising out of this were not, in my opinion, incurred in pursuance of the notice nor incidental to the matters set out in subsections 33(1)(a) to (e). They were matters which would have had to be addressed regardless of the section 13 notice.

36. However, I think that it was necessary for some legal costs to be incurred in dealing with service charges when preparing the completion statement and I have allowed £450 for this, being two hours work at the hourly rate of £225. It follows that I disallow the balance of the 17.5% of the total costs that I estimate relate to service charge issues as falling outside the ambit of section 33. This amounts to approximately £915.

37. I have examined the breakdown of the remaining costs by reference to section 33 and the matters that I have described above. On this basis I calculate that the costs recoverable by the appellant in respect of the second section 13 notice amount to £3,925. To this I have added the £450 that I have allowed for service charge work to give a total of £4,375 (exclusive of VAT which is payable as appropriate) and I award this sum.

Costs under paragraph 10 of Schedule 12 to the 2002 Act

Evidence and submissions

38. The appellant said that the LVT erred by not exercising its discretion to award him the costs of the proceedings up to the statutory limit of £500. The respondent's conduct had been unreasonable. It had made no offer on the appellant's claim for costs despite having been provided with a breakdown of the costs on 26 September 2008, two weeks before the respondent made its application to the LVT on 10 October 2008.

39. In its points of dispute against the claim the respondent had offered a total of £240 compared with the appellant's claim of £9,227.50 (excluding VAT) and the LVT's total award of £4,193. Many of those points of dispute were wholly misconceived.

40. The LVT accepted the unchallenged evidence of Mr Barrie Lawrence, the owner of the penthouse at Lawn Court, that one of the participating tenants, Mr Hughes, had deliberately instructed Coles Miller to serve the first initial notice to the offices of the previous managing agents, DD Management Company Limited, hoping that by doing so it would be mislaid or not forwarded to Mr Drax, who would therefore miss the deadline for the service of a counter-notice. The respondent had never challenged Mr Lawrence's evidence and did not challenge the LVT's acceptance of it.

41. The respondent denied having acted unreasonably and said that the appellant's claim for costs under Schedule 12 of the 2002 Act was misconceived and frivolous. The appellant had criticised the respondent for not having made an offer on costs before it applied to the LVT but paragraph 10 of Schedule 12 related to costs incurred by another party in connection with the proceedings. No such costs could have been incurred before the proceedings commenced. There was no reason for the respondent to believe that the appellant's claim for costs of (at that time) over £10,000 was an opening stance in negotiations. It was not agreed and was not within striking distance of a negotiable figure. The respondent was entitled to apply to the LVT to determine the level of its liability.

42. The appellant had been unreasonable by inflating his claim for costs prior to the application to the LVT to determine them. The respondent had given cogent reasons in its points of dispute on all the disputed items. Those reasons were not misconceived. Although the LVT had found against the respondent on the costs of the initial notice it had not said the respondent was misconceived and had not found against it on the basis of any precedent authority.

43. The respondent had explained the reasons why it had served the first initial notice on the wrong address. It was served at the address furnished by the appellant on service charge and ground rent demands as the address for the service of notices. The first notice was served five days after the appellant had changed its managing agent but the director of the nominee purchaser from whom the respondent's solicitor took instructions was on holiday at the time and so neither he nor the solicitors were aware of the change of address at the time the notice was served. In any event the respondent's conduct in this respect was not conduct in connection with the LVT proceedings and was therefore not relevant to costs under paragraph 10 of Schedule 12 to the 2002 Act.

Conclusions

44. I have considered this issue by reference to the respondent's conduct in respect of each of the two initial notices. The LVT said the following about the appellant's argument that the nominee purchaser had deliberately served the first notice on the wrong address:

> "16. That is a remarkable allegation, but it is not contradicted by any subsequent submission or evidence on behalf of the [nominee purchaser]. The Tribunal found that it was consistent with CM's conduct in relation to the first Notice and accepts that it is true and at least goes some way to explaining their subsequent conduct."

Of that subsequent conduct the LVT said:

> "19. …The present case is wholly unusual and is a situation which the Tribunal found was initially created by deliberate mis-service which was then compounded by CM's subsequent total lack of co-operation. …The [respondent] and especially CM must have realised that their conduct would cause work to be done by PR. They had it in their hands to avoid that work being done but completely failed to take every opportunity given to them by PR."

45. Despite this strong indictment of the respondent's conduct the LVT felt unable to award costs against the respondent under Schedule 12 because such conduct had not been unreasonable "in connection with the proceedings". This conclusion assumes that the respondent's conduct prior to the initiation of the LVT proceedings cannot have been conduct in connection with those proceedings, even though the respondent's unreasonable conduct led to the appellant incurring costs which were then challenged by the respondent as not being payable under section 33 of the 1993. This challenge to the appellant's costs was, in my opinion, an attempt by the respondent to benefit from its unreasonable conduct in relation to the first notice. I do not accept the LVT's view that the proceedings were founded only on the second notice. The appellant's costs of dealing with the first notice, which the LVT accepted had been deliberately mis-served, were in issue before the LVT and formed part of the proceedings. I do not accept that the respondent's unreasonable conduct in relation to the first notice can be isolated from its consequences by adopting a temporal rather than a causative interpretation of the expression "in connection with the proceedings".

46. I have determined a figure in respect of the costs of the second notice which is 75% higher than the LVT's award, but which is still only 56% of the appellant's claim of £7,804. Under these circumstances I do not consider that the LVT were wrong to conclude that a sensible offer from the respondent would not have produced a negotiated settlement. In the trial bundle there is an email dated 5 September 2008 from Preston Redman to Mr Drax saying that they would be prepared to reduce their charges by £1,000 if this would bridge the gap and secure agreement with Coles Miller. I do not consider that such a reduction would have secured agreement even if Coles Miller had taken a responsible approach to the assessment of the costs. But in my opinion the respondent's assessment of the appellant's costs in the sum of £240, being a little more than one hour's work at the agreed charge out rates, was completely untenable and was not a serious approach to the issue. No reasonable person looking at the detailed costs breakdown provided by the appellant could have reached that conclusion. I distinguish the respondent's conduct from that of the appellant who properly sought to provide a detailed cost analysis upon which an informed judgment could be made.

47. In my opinion the respondent's conduct, when considered in connection with the proceedings in respect of both initial notices, was unreasonable. I therefore order the respondent to pay the appellant's costs of the proceedings in the maximum sum allowable of £500.

Determination

48. I allow the appeal in part and I award the following costs to the appellant:

(i) Costs of the first notice (as determined by the LVT)

(a)	Legal fees	£1,423.00
(b)	Valuation fees	£ 270.00

(ii)	Costs of the second notice	£4,375.00
(iii)	Costs of the proceedings	£ 500.00
	Total costs (excluding VAT)	£6,568.00

Dated 24 March 2010

A J Trott FRICS