IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 0157 (LC)
Case No: LRA/114/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – costs – whether purchasing tenants liable to pay freeholder's valuation fee incurred after application to Ft-T had been submitted – whether cost incurred in pursuance of tenant's notice of claim – s.9(4)(e) Leasehold Reform Act 1967

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

HELEN CHUNG and GORDON WONG **Appellants**

- and -

MARTIN JAMES TOWEY **Respondent**

Re: 128 Victor Road
Solihull
West Midlands
B92 9DJ

Decision on Written Representations

Peter D McCrea FRICS

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The following cases are referred to in this Decision:

Covent Garden Group Ltd v Naiva [1995] 1 EGLR 243
Goldstein v Conley LRA/49/2001

DECISION

Introduction

1. This short decision concerns the liability of a purchasing tenant to pay the reasonable costs of the freeholder in obtaining a valuation of the relevant property under s.9(4)(e) of the Leasehold Reform Act 1967 ("the 1967 Act"), in circumstances where the valuation was commissioned after an application had been made to the First-tier Tribunal.

2. The appeal is by the freeholders of a bungalow at 128 Victor Road, Solihull, West Midlands, B92 9DJ ("the appeal property"), Helen Chung and Gordon Wong ("the appellants") against a decision of the First-tier Tribunal ("the Ft-T") dated 13 July 2016, in which the Ft-T held that the purchasing tenant, Mr Martin James Towey, ("the respondent") was not liable to pay the valuation fee incurred by the appellants, because the valuation was commissioned after there had been an application to the Ft-T for determination of the premium to be paid, and accordingly the costs had not been "incurred in pursuance of the notice [of claim]".

3. Following a refusal of permission to appeal by the Ft-T, the appellants appealed to the Tribunal against various aspects of the Ft-T's decision, including the premium payable, but by an Order dated 3 November 2016, the Deputy President (Martin Rodger QC) granted permission to appeal only on the issue of the valuation fee, and directed that the appeal would be dealt with as a review of the Ft-T's decision, to be conducted under the Tribunal's written representation procedure.

4. The Deputy President commented: "having stated in paragraph 36 that the applicants' valuation report was prepared for them rather than for the [Ft-T] it is not clear on what basis [it] regarded the cost as irrecoverable. The implicit suggestion that no cost is recoverable in respect of a valuation undertaken after the application to the first-tier tribunal (whether or not is was prepared with a view to being presented in evidence) raises a point of principle which, although of low value, is of potentially wide application and is fit for consideration by the Tribunal".

The Ft-T's decision

5. The Ft-T was faced with two competing valuations. It is necessary to outline them, very briefly and without commenting on them or the Ft-T's decision, to put into context the Ft-T's findings as to the valuation fee. The respondent's valuer, Mr Keith Chew FRICS, appeared at the Ft-T, and gave evidence as to his valuation under s.9(1) of the 1967 Act. He considered the appropriate premium should be £6,680. The appellants' representative, Mr Shaw, referred to a valuation undertaken by Mr Robert Kaye MRICS of Leasehold Assist Ltd (who did not appear at the Ft-T), under s.9(1)(A) of the 1967 Act, at £29,125, although Mr Shaw contended for

£29,848. The Ft-T was persuaded that a valuation under s.9(1) was appropriate and calculated that the premium payable should be £6,737.

6. As regards the valuation fee, the Ft-T summed up the evidence (in paragraphs 34 and 35) as follows:

> "Mr Chew stated that, in his opinion, the [appellants] did not obtain valuation advice as to the appropriate value of the freehold interest following service of the Notice of Claim and prior to the application to the [Ft-T] for a determination of the price to be paid. He had not been contacted by an agent or valuer acting on behalf of the [appellants]. Accordingly, he did not consider that it was appropriate for a valuation fee to be paid.
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> "Mr Shaw submitted that a valuation fee of £400.00 was payable. An invoice for this amount pursuant to 'valuing and calculating the premium payable for the purchase of the freehold' had been submitted by Leasehold Assist Ltd. He acknowledged that it was common for the amount of such fees to be settled between the parties, but, in this case, there had been no negotiations. The [appellants] had taken valuation advice prior to these proceedings. [They] were not professionals and it would be severe to deny the payment of the valuation costs incurred."

7. It went on (at 36):

> "The Tribunal considered the oral and written evidence that had been presented and submitted……most notably a section 9(1)(A) valuation of the price payable for the freehold interest which…was…prepared for the Respondents rather than the Tribunal"

8. The F-tT placed limited reliance on Mr Kaye's valuation, since it was marked "subject to contract and without prejudice" and did not include a statement of truth from him. It decided (at 44):

> "Section 9(4) of the [1967] Act makes provision for the payment by the [respondent] of the reasonable costs incurred in connection with any valuation of the property to the extent that those costs are 'incurred in pursuance of the notice [of claim]'. The evidence shows that a valuation of the property dated 9th February 2016 was undertaken on behalf of the [appellants] by Leasehold Assist Ltd and followed the application to this Tribunal dated 5th January 2016. <u>In this circumstance</u>, the tribunal accepts Mr Chew's submission that it would not be appropriate to make an order for the payment of the valuation fee incurred by the respondents."
>
> (my emphasis)

9. There is no mention in that paragraph of the valuation being under s.9(1)(A), rather than the Ft-T's preferred s.9(1), nor of Mr Chew's submissions on the point, and it can be inferred that the Ft-T's rejection of the appellant's claim for the valuation fee was solely on the grounds of timing.

Submissions

10. In written submissions to me, Mr Chew submitted that the costs of the valuation must be incurred in pursuance of the tenant's notice. Freeholders had two months to respond to a notice, which gave them plenty of time to obtain valuation advice. He submitted copies of emails which indicated that the valuation was not commissioned until 21 January 2016 or thereabouts, and the valuation itself was dated 9 February 2016. The application to the Ft-T was made on 5 January 2016, more than two weeks before a valuation was commissioned and at a time when the appellants were aware of the application. His view was that the appellants only took valuation advice after they realised that the matter was to be referred to the Ft-T. No negotiations had taken place prior to the valuation, and even if they had, the appellants would not have been in possession of any valuation advice. He therefore considered that the valuation fee was not properly incurred in accordance with s.9(4) of the 1967 Act.

11. The appellants simply stated that the valuation fee was incurred in pursuance of the notice of the claim, and can be recovered from the respondent.

12. Neither party relied on any authorities, either it appears at the Ft-T, or before me.

Statutory provisions

13. Section 9 of the 1967 Act provides:

> **"Purchase price and costs of enfranchisement, and tenant's right to withdraw**
>
> 9. (1)….
>
> (4) Where a person gives notice of his desire to have the freehold of a house and premises under this Part of this Act, then unless the notice lapses under any provision of this Act excluding his liability, there shall be borne by him (so far as they are incurred in pursuance of the notice) the reasonable costs of or incidental to any of the following matters:—
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> (a) any investigation by the landlord of that person's right to acquire the freehold;
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> (b) any conveyance or assurance of the house and premises or any part thereof or of any outstanding estate or interest therein;

(c) deducing, evidencing and verifying the title to the house and premises or any estate or interest therein;

(d) making out and furnishing such abstracts and copies as the person giving the notice may require;

(e) any valuation of the house and premises;

(4A) Subsection (4) above does not require a person to bear the costs of another person in connection with an application to [the appropriate tribunal]."

Discussion and conclusions

14. In *Covent Garden Group Ltd v Naiva* [1995] 1 EGLR 243, the Court of Appeal held that the cost of work carried out by a landlord's surveyor in connection with a reference to the tribunal did not fall to be recovered under s.9(4)(e) of the 1967 Act. The Court relied partly upon Para 5 of Schedule 22 to the Housing Act 1980 (since repealed but which had similar language to s9.(4A) above) from which it considered clear by the plainest language that the cost of such work was not recoverable. But in that case, the work specifically carried out by the landlord's surveyor was to "set the matter down for a hearing immediately" and the Court found that no valuation had been carried out.

15. In *Goldstein v Conley* LRA/49/2001, the Lands Tribunal (Mr P H Clarke FRICS) differentiated between the cost of preparing a valuation, and costs incurred in support of a landlord's claim at the Leasehold Valuation Tribunal ("the LVT") and subsequently the Lands Tribunal. That was in the case of a lease extension of a flat, but again the language of s.60 of the Leasehold Reform, Housing and Urban Development Act 1993 is similar to s.9 of the 1967 Act, rendering the tenant liable for the reasonable costs, incurred by any relevant person incurred in pursuance of the notice … of any valuation of the tenant's flat obtained for the purpose of fixing the premium (s.60(1)(b)), but not liable for any costs incurred in connection with the proceedings [before the LVT] (s.60(5)).

16. In the doubtful circumstance that the wording of s.9 is insufficiently clear, it is plain from the authorities that there is a distinction between the cost of a valuation, and the cost of a valuer appearing at or conducting the proceedings.

17. The respondent's case is that the costs should be irrecoverable not because it can be shown that they specifically related to the subsequent hearing at the Ft-T, but because it was carried out after the application to the Ft-T had been made. It seems to me that there are the following difficulties with that approach.

18. First, section 9(4) of the 1967 Act does not differentiate between subsections (a) to (e), each of which concerns costs which must be incurred in pursuance of the notice of claim to be recoverable. But, for instance, the costs incurred in subsection (b) in the eventual conveyance

of the freehold interest will obviously be incurred after the application to the Ft-T, if a price can be negotiated. Accordingly, the objection to the costs of a valuation, simply because it was carried out after the application, has little merit.

19. The second difficulty is based upon the email exchange between the appellants and the valuer from Leasehold Assist Ltd which Mr Chew submitted to me. It is not clear whether this material was before the Ft-T, but giving Mr Chew the benefit of the doubt it does not help him. Nowhere in that email exchange is there a reference to Mr Kaye appearing at the Ft-T, and indeed he did not. There is reference to valuing the premium and, if needed, negotiating with Mr Chew. This cost of this work was plainly envisaged in the 1967 Act as being recoverable.

20. Thirdly, the Ft-T itself found that the valuation was prepared for the appellants rather than for the Ft-T.

21. Fourthly, the invoice in dispute stated that the work carried out was "valuing and calculating the premium payable for the purchase of the freehold". Again, no mention of the Ft-T proceedings.

22. In summary, I find myself facing the same difficulty as the Deputy President when granting permission to appeal on this point. It is not clear on what basis the Ft-T regarded the valuation fee as irrecoverable. If it was that no cost is recoverable in respect of a valuation undertaken after an application to the Ft-T, whether or not is was prepared with a view to being presented in evidence, for the above reasons that cannot be right.

Disposal

23. I find that the Ft-T was incorrect to disallow the recovery of the valuation fee by the appellants. The appeal is therefore allowed, and the respondent will be responsible for the appellants' cost in incurring the valuation by Leasehold Assist Ltd, which it is agreed is in the sum of £400.00.

Dated: 18 April 2017

Peter D McCrea FRICS