FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**DD/LON/OOAU/OC9/2013/0075**
Property	:	**Imperial Hall, 104-122 City Road, London EC1V 2NR**
Applicant	:	**Columbia House Properties (No 3) Ltd.**
Representative	:	**Brethertons LLP, Solicitors**
Expert	:	**None**
Respondent	:	**Imperial Hall Freehold Ltd.**
Representative	:	**Maxwell Winward LLP, Solicitors**
Expert	:	**None**
Type of application	:	**Leasehold Reform Housing and Urban Development Act 1993 – Section 48**
Tribunal members	:	**Judge Goulden** **Mr A M Vance** **Mr R A Potter FRICS**
Date and venue of hearing	:	**22 January 2014** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**6 March 2014**

DECISION

Determinations

1. The Tribunal determines that the sum of £12,366 (£10,305 plus VAT of £2,061) being the fees of Sterling Estate Management (SEM) is not payable by the Respondent Company to the Applicant company.

Background

2. An application to the Tribunal dated 22 November 2013, and received by the Tribunal on 25 November 2013, had been made under S91(2)(d) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") as amended for a determination of reasonable costs payable under S33(1) of the Act.

3. The Applicant was the registered proprietor of Imperial Hall, 104-122, City Road, London EC1V 2NR ("the property") under Land Registry Title Number NGL655333. On 20 January 2012, the Respondent company had served an Initial Notice on the Applicant pursuant to S13 of the Act claiming the right to collectively acquire the freehold of the property. By a Counter Notice dated 22 March 2012, the Applicant's right was admitted.

4. In the Applicant's statement of case, it was stated *"in or around January 2012, the Applicant instructed Sterling Estates Management Ltd...to act on their behalf in respect of the claim"*.

5. The issue relates to the fees of SEM, the Applicant's managing agents, in the sum of £10,305 plus VAT.

6. Directions of the Tribunal were issued to the parties on 27 November 2013.

7. The Directions stated that the Tribunal was of the view that the matter could be determined by way of a paper determination. However, Direction 8 provided for an oral hearing if either party requested the same.

8. On 28 November 2013, the Respondent's solicitors requested an oral hearing, and as set out in the Directions, this was listed for 22 January 2014.

The hearing

9. The hearing took place on 22 January 2014.

10. The Applicant, Columbia House Properties (No 3) Ltd., was represented by Ms S Smith of Counsel, instructed by Brethertons LLP, Solicitors. Ms Smith provided a skeleton argument. Evidence on behalf of the Applicant

was provided by Mr P Sherrard of Sterling Estates Management ("SEM"), the Applicant's managing agents.

11. The Respondent, Imperial Hall Freehold Ltd., was represented by Ms K Helmore of Counsel, instructed by Maxwell Winward LLP, Solicitors. Two of the three Directors of the Respondent company, namely Mr S McCabe and Mr P Burditt, appeared. No oral evidence was provided on behalf of the Respondent.

The Applicant's case

12. The parties had entered into a contract for the sale of the property by the Applicant to the Respondent in the sum of £406,623, a copy of which was supplied to the Tribunal. The contract was dated 13 February 2013 and the completion date was 25 March 2013.

13. From the copy the completion statement supplied, and, in respect of the S33 costs, Brethertons' legal costs of £10,461 (£8,718 plus VAT) and the Chesterton Humberts' valuation fees of £7,800 (£6,500 plus VAT) have been paid by the Respondents to the Applicant. The agent's fees in the completion statement was stated to be £6,000 (£5,000 plus VAT). A note in bold type next to this figure stated *"not agreed. Buyer's solicitor to retain this sum pending resolution in accordance with Contract of Sale".*

14. Under Special Condition 15 of the contract, it was stated:

> *"15.1 The Buyer shall on completion and in addition to the balance of the purchase price and all other amounts due under this Agreement pay to the Seller it's* (sic) *recoverable costs under section 33 of the 1993 Act legal costs, the amount of such costs to be agreed between the parties or in default to be determined by the Leasehold Valuation Tribunal.*
>
> *15.2 In the event that at Completion the amount of such costs has not been agreed or determined aforesaid then on completion the Buyer shall deposit with their solicitor a sum equal to the amount of the unagreed costs to be held by those solicitors until 6 months from Completion or the determination of the Seller's application to the Leasehold Valuation Tribunal whichever is the later".*

15. The sum of £5,000 plus VAT inserted in the contract was a compromise sum, which had been refused by the Respondent (see paragraph 23 below) The Respondent's solicitors continue to hold the sum of £5,000 plus VAT under Special Condition 15(2) of the contract pending a determination of the Tribunal.

16. On 20 March 2013, SEM sent an invoice to the Respondent in the sum of £10,305 plus VAT. These fees have not been paid and are contested in their entirety.

17. The Applicant contended that the costs of SEM as its agent were *"reasonable costs of and incidental to"* those matters listed in S33(a) to (e) of the Act. It was stated *"an analogous regime exists in the Commonhold and Leasehold Reform Act 2002, s88 where a landlord is entitled to the recovery of reasonable costs incurred "in consequence of" service of a notice to exercise the right to manage".*

18. The Tribunal was provided with a schedule/breakdown of costs incurred by SEM and it was stated *"the fact that the Applicant has been invoiced for this work under the description "Timesheet for work undertaken in relation to Collective Enfranchisement Claim...for the Property further to Invoice No 2215..demonstrates that such work was all done in connection with that claim"* . SEM's costs had been paid by the Applicant in full.

19. Ms Smith cited a Court of Appeal decision in **Freeholders of 69 Marina, St Leonards on Sea v Oram & Ghoonum [2012] HLR 12** that the words "incidental to" bear a broad meaning. Further authorities were cited, copies of which were sent to the Tribunal on 21 January 2013.

20. It was denied that there had been any duplication of work and *"far from duplicating the solicitors' and/or valuer's work, SEM have assumed the role of the Applicant. Had they not done so, it is averred, the costs incurred by the solicitor/valuer would have increased as, with a development of this nature, they would have been required to carry out additional and unnecessary investigative work without recourse to the very entity which possessed the information (ie SEM, which has managed Imperial Hall for a number of years). Moreover, the lack of availability of company directors from time to time, the need to take expeditious instructions owing to the statutorily imposed time-frames involved in investigating and responding to the initial notice and the commercial sense in retaining a managing agent rather than having employees of the company spend significant time and resources in dealing with the claim all lean in favour of permitting managing agents fees to be generally recoverable".* Ms Smith said that S33 of the Act covered a significant area of work in an enfranchisement claim and the purpose was to remunerate a freeholder deprived of its proprietory interest and to compensate a freeholder for costs involved in that purpose.

21. A witness statement was provided from Mr R Hardwick, Head of Enfranchisement at Brethertons LLP dated 16 January 2014, although he did not appear before the Tribunal to be questioned thereon. At paragraph 9 of the witness statement he stated *"...SEM's involvement included assisting (eg in describing the premises) and providing instructions (on the Applicant's behalf), in connection with my investigations concerning the Respondent's right to acquire the freehold of the Building; questions*

relating to the extent of the interest proposed to be acquired by the Respondent; the conveyance of those interests, and the terms of the conveyance (and contract); the Applicant's right to a discretionary leaseback (and the terms of that leaseback); my own instructions to Eric Shapiro of Chesterton Humberts (the Applicant's valuer). All of those matters are, in my view, "incidental" to the items listed in Section 33 (1) of the 1993 Act".

22. In respect of the figure of £5,000 plus VAT in the completion statement, at paragraph 13 of his witness statement, Mr Hardwick said, *"It is true that the Completion Statement specified a figure of £6,000 (inc. VAT). As I explained in my email of 26 March 2013...this was no more than an attempt at compromise. There is a history of litigation between the Applicant and SEM on the one hand, and the Respondent on the other, including a dispute over costs incurred in connection with a right to manage claim (which has recently been heard by the Upper Tribunal (Lands Chamber)). It was considered that the Respondent would be much more likely to agree £6,000 than the actual value of their time, avoiding the need for yet further proceedings before the Tribunal, although (regrettably) this proved not to be the case."*

23. Mr P Sherrard AIRPM of SEM gave oral evidence, although he had not provided a witness statement, He said that he was the head of property and systems at SEM and had worked in that company for some 8 years. His role was to assist the Directors of the company in day to day management and its internal systems when necessary.

24. Mr Sherrard said that he had first been instructed by the Applicant, who were long existing clients, on this matter on 20 January 2012. He said that SEM managed the Applicant's property portfolio of some 1200 units, most of which were in London and residential units, also some properties were in Bristol, Kent and Yorkshire. SEM had been managing since 2006. He said that the claim notice had been forwarded to SEM since *"we had the most practical knowledge of the property on site"*. Mr Sherrard said that he not advised the Applicant since it had lawyers and surveyors, but supplied information in respect of the subject property and this was *"to increase the value of the advice"*.

25. Mr Sherrard had carried out a site inspection. No one from the Applicant had attended, but he, with a colleague, had escorted the surveyor around the property. In his view *"a surveyor wouldn't have been able to pick up in depth knowledge"*.

26. Mr Sherrard was taken through certain items on his costs schedule, although not the entire schedule, since this would have taken a disproportionate amount of time. He confirmed that he had acted as an intermediary between the Applicant and its solicitors. He denied that there had been any duplication and said that he had acted in the best interests of his client in obtaining as high a return as possible. He said *"the matter*

would have proceeded but would have taken longer. We provided ground rent schedules and service charge schedules and plans of the property".

The Respondent's case

27. In the Respondent's statement of case in reply, it was contended that it was unclear from SEM's timesheet whether the amounts claimed fell within S33 of the Act and *"in particular in relation to numerous emails and other correspondence the detail provided is wholly inadequate...".*

28. It was also contended that the Respondent had already paid £10,461 including VAT in respect of the Applicant's solicitors' fees and £7,800 including VAT in respect of the Applicant's valuers' fees and *"it is simply not reasonable for the Applicant to use SEM to duplicate work already undertaken by the relevant professionals particularly when it is not clear in what capacity SEM were instructed as 'agents' nor that they have any relevant professional qualifications. Furthermore, it is striking that there was no communication or interaction at all between the Respondent or its solicitors and SEM throughout the life of the Claim, all communications were with Brethertons".* A spreadsheet was supplied which purported to highlight duplication.

29. It was maintained that the SEM timesheet was inconsistent with Bretherton's cost schedule, examples of which were referred to and *"it is to say the least unusual and concerning that these inconsistencies appear and must cast doubt on the accuracy and/or credibility of the SEM Timesheet.*

30. If the Tribunal found against the Respondent in this matter, it was submitted that, in any event, these could not exceed the sum of £5,000 plus VAT being the amount shown in the contract. SEM's fees were now *"more than doubled...to £10,305 plus VAT. Surprisingly this amount is nearly £2,000 more than the professional fees charged by the Applicant's solicitors".*

The Tribunal's Determination

31. The application before the Tribunal is under S 91(2) (d) of the Act which gives the Tribunal jurisdiction to determine **"the amount of any costs payable by any person or persons by virtue of any provision of Chapter I or II and, in the case of costs to which section 33(1) or 60(1) applies, the liability of any person or persons by virtue of any such provision to pay any such costs".**

32. S33 (1) and 2 (2) of the Act states:

" (1) Where a notice is given under section 13, then (subject to the provisions of this section and sections 28(6), 29(7) and 31 (5)) the

nominee purchaser shall be liable, to the extent that they hae been incurred in pursuance of the notice by the reversioner or by any other relevant landlord, for the reasonable costs of and incidental to any of the following matters, namely -

(a) any investigation reasonably undertaken -
i) of the question whether any interest in the specified premises or other property is liable to acquisition in pursuance of the initial notice, or
ii) of any other question arising out of that notice;

(b) deducing, evidencing and verifying the title to any such interest;

(c) making out and furnishing such abstracts and copies as the nominee purchaser may require;

(d) any valuation of any interest in the specified premises or other property;

(e) any conveyance of any such interest;

but this subsection shall not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void.

(2) For the purposes of subsection (1) any costs incurred by the reversioner or any other relevant landlord in respect of professional services rendered by any person shall only be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs."

33. Whilst the Tribunal understands that the Applicant would like its managing agents to carry out work on its behalf, the Tribunal must consider whether it is reasonable for the Respondent to pay for this. The charge out rate was not challenged. The principle was.

34. Mr Hardwick had not explained why the matters referred to in paragraph 9 in his witness statement (see paragraph 22 above) could not have been dealt with by the Applicant and/or by the Applicant's Solicitors and/or by the Applicant's valuer.

35. In paragraph 11 of Mr Hardwick's witness statement he had said *"the role of agent is that of an intermediary. That is the role that SEM fulfilled in this instance (and it is a role for which they were entitled to be paid). They were not holding themselves out to be solicitors or surveyors. Rather, they interacted with us on the Applicant's behalf"*. SEM may well be an intermediary for the Applicant, and it may well be that SEM was entitled to be paid by the Applicant. However, the Tribunal must consider

whether the Applicant is entitled to be reimbursed for the costs of SEM, which is an entirely different proposition.

36. The Applicant is a property developer with a large portfolio in London and elsewhere. SEM are its managing agents. The Applicant had employed experienced lawyers and valuers to deal with the enfranchisement claim. Whether or not the Applicant would have had to use in house employees in addition is immaterial.

37. The Tribunal is of the view that there may well have been duplication of work carried out and/or the work carried out by SEM is not covered by the statute and is therefore otiose. It also may well be the case that SEM's fees have been paid in full by the Applicant, but that is a matter between the Applicant and its managing agents.

38. The information supplied by its managing agents may be useful to the Applicant but there is no reason why the Applicant could not or should not have been in a position to supply the information to its lawyers and/or surveyors itself. The Tribunal has not been persuaded that the need to instruct SEM was justified or incidental to those matters listed in S33 (a) to (e) of the Act.

39. In the circumstances of this case, the Applicant's arguments are rejected.

40. The Tribunal determines that the fees of SEM of £10,305 plus VAT are not payable by the Respondent to the Applicant. For the avoidance of doubt, the Tribunal determines that no fees of SEM are payable by the Respondent to the Applicant.

Name: J Goulden **Date: 6 March 2014**