UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 241 (LC)
UTLC Case Number: LRX/170/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – administration charges – charge for consent to subletting – reasonableness – Landlord and Tenant Act 1927 s.19(1)(a) – appeal allowed

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

BETWEEN **FREEHOLD MANAGERS (NOMINEES) LTD** **Appellant**

and

MARTINA PIATTI **Respondents**
POLO PIATTI

Re: 40 Wetherden Street
London E17 8EJ

Determination on the basis of written representation

The following cases are referred to in this decision:

Holding and Management (Solitaire) Ltd v Norton [2012] UKUT 1 (LC), LRX/33/2011
Bradmoss Limited v Stubbs [2012] UKUT 3 (LC), LRX/128/2011

DECISION

Introduction

1. This is an appeal from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") whereby the LVT gave a decision in relation to an administration charge under Schedule 11 to the Commonhold and Leasehold Reform Act 2002. The substance of the LVT's decision, which is challenged, was that the Appellant (as landlord) was not entitled to charge a fee for the grant of any licence to sublet to the Respondents (who were the tenants) – see paragraph 19 of the LVT's decision.

2. The Appellant is the freehold owner of the building containing 40 Wetherden Street ("the Property"). The Appellant's predecessor in title demised the Property to the Respondents' predecessor in title by a lease dated 21 November 1973 for a term of 99 years from 24 June 1973 at the yearly rent of £10. The lease contained covenants by the lessee which included covenants in the following form in clauses 2(17) and (18):

> "(17) Not to transfer assign underlet or part with possession of the demised premises or any part thereof without the written consent of the lessor such consent however not to be unreasonably withheld in the case of a respectable and responsible person.
>
> (18) That the lessee will within three calendar months next after any absolute transfer assignment charge or devolution or his interest under this present lease in the demised premises or any part thereof give notice in writing of such transfer assignment charge or devolution to the lessor or its Solicitor and produce to him the instrument of such transfer assignment charge or devolution and pay to him the fee of three pounds fifteen pence for the registration of such notice.

In about 2000 the Respondents took an assignment of the residue of the term of this lease of the Property. At some time in or about 2008 the Appellant acquired the freehold reversion.

3. It appears that the Respondents had purchased the Property with a view to it being a buy-to-let investment. The Respondents have never occupied the Property but have always let it out. The Respondents were initially advised by their solicitor that, under the terms of the lease, they would need to get one consent for the first subletting but that once the landlord had given this one consent this would be sufficient for all future sublettings. The LVT concluded that that advice was plainly wrong – and I agree. It appears that, anyhow so far as concerns such years as are relevant to the present case, the Property had been the subject of a succession of assured shorthold tenancies granted to the same tenant, with each tenancy running for one year. In 2008 the Appellant contacted the Respondents as to the state of occupation of the Property and whether the Respondents had obtained the appropriate consent to any subletting. There was

apparently some exchange of correspondence at that time, but then (so I gather from the statement of case of the Respondents given to the LVT) matters went quiet. In 2011 the Appellant's agents wrote to the Respondents referring to the fact that, from their records, it appeared that the Respondents may be subletting the Property without the prior consent of the freeholder and without serving notice/registration of letting on the freeholder. It was pointed out that this may constitute a breach of the terms of the lease. The Respondents were told that if they were subletting the Property they must notify the freeholder and obtain permission in accordance with the covenants contained in the lease. The Appellant's agents enclosed what they described as "subletting guidelines" and they also enclosed an application form for making an application for the relevant consent. The Respondents were told that this application for consent to the subletting would need to be accompanied with "payment for the licence you wish to obtain".

4. The Appellant's document entitled "Sublet Guidelines" reminded the Respondents that the freeholder's consent to subletting was required and stated:

> "Our fees for subletting cover reviewing tenancy agreements to ensure that they comply with the terms of the lease and that tenants are suitable, issuing consent documentation, receipting notices, updating our database, storing copies and making changes to correspondence addresses.
>
> At present, we offer two packages in relation to consent to sub-let issued on behalf of our client:
>
> Standard Licence - £260 (including notice of registration fee) Annual Licence granted for subletting. Annual renewals will be reduced to £130 (including notice of Registration fee).
>
> Global Licence - £400 (including notice of registration fee): Licence granted for subletting for a maximum period of five years. The benefit of obtaining a Global Licence is that renewal fees are only applicable whenever a tenant changes and not upon expiry of each Tenancy Agreement. Upon a tenancy change, our registration fee below must be paid. A reduction of 50% will be offered from the current registration fee should you have a global licence in place.
>
> Registration fee - £95: When landlords consent is not required under the terms of the lease, or every time a tenant changes or when the tenancy term expires or becomes rolling, a registration fee will be applicable.
>
> Please note all our fees include VAT."

5. The Respondents did complete the application form for consent and sent that to the Appellant's agents together with a copy of the then current assured shorthold tenancy and also together with a cheque for £3.15 (as opposed to the much more substantial fees sought by the Appellant), this sum of £3.15 being the sum for a registration referred in clause 2(18) of the lease.

6. The Appellant made clear that it was not prepared to grant consent on this basis. The Respondents considered they were not obliged, having regards to the terms of their lease, to make payment of any more substantial sum. In due course the Respondents made an application to the LVT under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 for the LVT to decide whether they were obliged the pay these sums sought by the Appellant.

7. The LVT noted the terms of the lease; it noted that these terms did not include any covenant by the tenant to pay any fee to the landlord in return for considering/granting a licence to sublet; the LVT noted the provisions of section 19(1) of the Landlord and Tenant Act 1927; the LVT concluded that section 19(1) did not create a right to charge a fee where one did not exist in the lease; and the LVT decided that where no right to charge a fee was provided for in the lease then:

> "It could not have been the intention of Parliament for Section 19(1)(a) to be used to create an obligation in the Landlord's favour where none exists in the Lease. The Lease as drafted contains no right for the Respondents to charge a fee for the grant of any licence to sublet and the Respondent must accept the position."

In paragraph 21 the LVT stated:

> " If the assured shorthold tenant is the same person for whom consent was obtained in 2000 when the Applicants purchased the Property, no further consent is required. If there was a change of assured shorthold tenant, then the Applicants would have been in breach of the terms of the Lease, as the grant of a new assured shorthold tenancy agreement to an new sub-tenant would have required a new consent. However, this consent must not be unreasonably withheld and must be given without payment of any fee to the Respondents as there is no provision for payment contained in the Lease and no such obligation can be imposed by Section 19(1)(a) of the 1927 Act."

8. Accordingly the LVT did not reach any conclusion as to whether the fee proposed by the Appellant for the granting of consent was reasonable or not. Instead the LVT concluded that any consent to underletting must be given without payment of any fee, unless such consent was reasonably withheld for some other reason (i.e. other than the non payment of a fee).

Statutory provisions

9. Section 19(1)(a) of the Landlord and Tenant Act 1925 provides as follows:

> "(1) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, under-letting, charging or parting with possession of demised premises or any part thereof without licence or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject –

(a) to a proviso to the effect that such licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent."

10. Section 158 of the Commonhold and Leasehold Reform Act 2002 provides that Schedule 11 (which makes provision about administration charges payable by tenants of dwellings) is to have effect. Schedule 11 defines the expression "administration charge" in paragraph 1:

> "(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly –
>
> (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
>
> (b) ….
>
> (c) ….
>
> (d) ….
>
> (2) ….
>
> (3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither –
>
> (a) specified in his lease, nor
>
> (b) calculated in accordance with a formula specified in his lease.
>
> (4) …."

11. Paragraph 2 of Schedule 11 provides that a variable administration charge is payable only to the extent that the amount of the charge is reasonable. Paragraph 5 makes provision (in wording very similar to that in relation to service charges in section 27A of the Landlord and Tenant Act 1985 as amended) enabling an application to be made to a leasehold valuation tribunal for a determination whether an administration charge is payable and, if it is, as to the person by whom it is payable, the person to whom it is payable, the amount that is payable, the date at or by which it is payable and the manner in which it is payable.

The parties' submissions

12. Both parties have agreed the present case shall be decided by this Tribunal upon written representations and without a hearing.

13. The Appellant's statement of case contends that the LVT was wrong in its conclusion that the Appellant has no right to charge any fee for the grant of a licence to

sublet. The Appellant refers to the provisions of section 19 of the 1927 Act as interpreted in two decisions of this Tribunal (both decisions of George Bartlett, QC President) in *Holding and Management (Solitaire) Limited v Norton* [2012] UKUT 1 (LC) and in *Bradmoss Limited v Stubbs* [2012] UKUT 3 (LC). The Appellant contends that the charge sought by the Appellant in return for granting consent to sublet is a variable administration charge within Schedule 11 of the 2002 Act. The Appellant submits that it was reasonable for the Appellant to seek a payment for the costs that it incurs in consenting to an underletting. It also submits that the charge that it sought was reasonable. There is not included within the papers before me any evidence submitted in support of the contention that the amount sought to be charged was reasonable. The papers at present seem to concentrate upon the question of whether any charge can be made at all.

14. The Respondents have submitted a statement of case. Paragraph 1 is introductory and refers over to their statement of case to the LVT (which I have considered). Paragraph 2 contends that the LVT was correct in noting there was no right to charge a fee for the grant of any licence to sublet and contends that the Appellant was in effect asking for the lease to be rewritten so as to allow a charging provision. Paragraph 3 contains material complaining about the manner in which the Appellant originally acquired the freehold reversion – these matters are not relevant to the present case. Paragraph 4 expresses concern that the Appellant appears to be contending that it can itself decide what is a reasonable amount as an administration fee. Paragraph 5 argues that a refusal by the Respondents to pay a fee for the granting by the Appellant of consent to a subletting should not be a justification for refusing consent of the subletting.

Conclusions

15. I respectfully agree with and adopt the reasoning of the learned President in *Holding and Management (Solitaire) Limited v Norton* where he said at paragraphs 9 and 10:

> 9. "…. "It is not right in my view to say that section 19(1)(a) confers on the landlord the right to make a charge. What it says is that the proviso (that consent is not to be unreasonably withheld) does not preclude the right of the landlord to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such consent. There is an argument, which appears to have found favour in other LVT cases, that the effect of this provision is simply to preserve any right conferred by the lease to make a charge. While it clearly does have this effect …. it is not in my judgment restricted in this way. For the reasons given in the previous paragraph the withholding of consent would not be unreasonable if the lessee refused to pay a reasonable charge for it, and section 19(1)(a) makes clear that such a charge is not precluded.
>
> 10. Under paragraph 1(1) of Schedule 11 to the 2002 Act "administration charge" for the purposes of the Schedule is defined as an amount payable by a tenant as part of or in addition to the rent which is payable, directly or indirectly, (inter alia) for or in connection with the grant of approvals under

> his lease. The charge for consent to the underletting is thus an administration charge, provided that it is reasonable. If it is not reasonable, it would be unreasonable to withhold consent if the charge was not paid; and the charge would not be payable. Under paragraph 1(3) a "variable administration charge" is an administration charge payable by a tenant which is neither specified in his lease nor calculated in accordance with a formula in the lease. If the charge for consent to the underletting is an administration charge it is thus a variable administration charge for the purposes of the Schedule. Paragraph 2 provides that a variable administration charge is payable only to the extent that the amount of the charge is reasonable. My conclusion, for the reason that I have given, is that the LVT was wrong to conclude in each case that the Appellant was not entitled to make a charge for the costs incurred in consenting to underletting."

16. Accordingly I conclude that the LVT was wrong in deciding that, under the terms of the present lease, the Appellant as landlord was required to grant consent to a subletting without payment (assuming there are no other grounds on which the consent could be reasonably withheld). I do not see any reason why a landlord under the terms of the present lease should not in effect say to the tenant: you are asking me to consider your application for consent to a subletting and I am happy to do so but I require you to agree to pay me a reasonable sum in respect of any legal or other expenses incurred by me in connection with such consent to a subletting. If the tenant on receiving such a communication replied that it would not pay a penny to the landlord for considering the application for permission to sublet, then it may well be the landlord would be entitled reasonably to say that in that case its consent would not be forthcoming because it would not be able to justify giving proper consideration to the application. However I do not understand that these are the facts which have arisen in the present case. Accordingly any final decision upon the point just mentioned can be reached in a case where the question actually arose. I proceed in the present case on the basis that the substance of the matter is as follows, namely that the Respondents are seeking consent to the subletting and are prepared to pay such reasonable charge (if any) as is properly payable.

17. The position which has been reached is therefore covered by the analysis in paragraph 10 of the decision in *Holding and Management (Solitaire) Ltd v Norton* (set out in paragraph 15 above) which is the analysis which was also applied in paragraph 6 of the President's decision in *Bradmoss v Stubbs*.

18. Accordingly I conclude that the LVT was wrong to find that nothing was payable by the Respondent in return for the Appellant granting consent to the subletting in respect of which consent was sought. The Appellant is entitled to charge a reasonable amount for the costs incurred by the Appellant in consenting to the subletting.

19. The Appellant and the Respondents are invited to make further submissions as to:

(a) what is the subletting in respect of which consent is sought;

(b) what is the amount sought by way of charge for the costs incurred by the Appellant in consenting to this subletting;

(c) whether (and why) the amount sought by way of charge is reasonable; and

(d) if it is not reasonable, what lesser amount (if any) would be reasonable.

Such submissions must be received within 28 days of this decision, which will not take effect until these issues have been determined.

Dated 17 July 2012

His Honour Judge Nicholas Huskinson

ADDENDUM

20. Further submissions have now been received from the parties in relation to the matters raised in paragraph 19 above.

21. The subletting in respect of which the Appellant's consent was sought is an assured shorthold tenancy for 12 months dated 14 December 2010 granted by the Respondents to Ms Michelle van Zyl and Ms Sonia Magnifico. As recorded in paragraph 3 above, it appears that the Property has been the subject of a succession of assured shorthold tenancies granted to the same tenant (or in fact tenants) with each tenancy running for one year. Accordingly the tenancy in respect of which the Appellant's consent was sought is a renewal tenancy, i.e. a tenancy granted to persons who were already in occupation under a previous subletting.

22. In a case where the Respondents have already obtained permission to sublet to X and where all that is being sought is permission to grant a further subtenancy on effectively the same terms to X, I consider that a reasonable administration charge for the grant of such a consent would in a normal case be much less than the £165, which is now the amended amount sought by the Appellant. It may be that a fee of £35 might be reasonable for such a consent to a renewal of the tenancy, i.e. the £130 mentioned within the Appellant's Sublet Guidelines document as the fee for annual renewals (including

notice of registration fee) with the registration fee element of £95 being deducted, on the basis that a fee of £3.15 will be payable separately under the lease for registration. However I can see scope for argument as to whether in such circumstances a fee of £35 would be a reasonable administration charge -- a lessee might seek to argue that a smaller amount should be payable whereas the lessor might seek to argue that there had been some particular matter that had had to be considered in relation to the proposed renewal (e.g. a history of complaints requiring consideration whether the existing subtenant remained a respectable and responsible person) such that a larger amount should be payable.

23. However in the present case, although the subletting for which consent was sought was in fact a renewal, the consent was being sought in circumstances where the Respondents had failed previously to obtain consent to the earlier sublettings to these subtenants, such that there was an irregular situation which needed investigating. Also it appears there was a complaint regarding a dog which had to be investigated. In the present case I consider that the Appellant has been put to a substantial amount of work for the purpose of considering the application to sublet.

24. Accordingly on the particular facts of the present case I conclude that the fee of £165 inclusive of VAT is a reasonable administration charge for the Respondents to pay for consent to the above-mentioned subletting. I understand the position of the parties to be that the Appellant has agreed to grant consent for this subletting on payment of a reasonable administration charge and that the Respondents have agreed to pay whatever is decided is the reasonable administration charge properly payable. I therefore find that £165 inclusive of VAT is payable as an administration charge by the Respondents to the Appellant.

25. I emphasise that this conclusion is reached upon the particular facts of the present case. This case has, with the consent of both parties, been decided upon written representations. Nothing in the present decision should be taken as confirming the reasonableness of the charges which the Appellant indicates it seeks to charge in its Sublet Guidelines document.

26. The Respondents have written to the Tribunal indicating that the Appellant's statement of case was served outside the time frame set for its service. The Respondents ask whether in consequence the entire appeal by the Appellant should have been dismissed. The answer is to be found in Rule 7 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 which provides that an irregularity resulting from a failure to comply with any requirement in the Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings. The Tribunal has power to waive any failure to comply with the rules. I have concluded that any lateness in the service of the statement of case did not prejudice the Respondents and that the Appellant's failure to serve its statement of case by the due date should be waived and that the appeal should be decided upon its merits.

27. I am not aware of any application having been made by the Respondents under section 20C of the Landlord and Tenant Act 1985 as amended for an order that the costs of these proceedings before the Upper Tribunal should not be included within the service charge. If the Respondents seek to make any such application they must do so within 28 days of the date of this decision. However this decision is to take effect forthwith, i.e. it is not to await the making (and, if made, the determination) of any such application under section 20C.

Dated 6 November 2012

His Honour Judge Nicholas Huskinson