5137

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE**

**LEASEHOLD VALUATION TRIBUNAL**

**Case number : CAM/26UJ/LAC/2010/0001**

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| **Property** | : | **Flat 40, The Quadrant, Rickmansworth, Herts WD3 1GA** |
| **Applications** | 1 | For determination of liability to pay certain administration charges, viz on arrears of ground rent and for registration of notice of an underletting [CLRA 2002, s.158 & Schedule 11, para 5] |
| | 2 | For determination of the manner in which any such administration charges are payable [CLRA 2002, s.158 & Schedule 11, para 5] |
| | 3 | Limitation of landlord's costs [LTA 1985, s.20C] |
| **Applicant** | : | Paul Christopher Broome, Buzon 3253, Sebastian Gomez 18, 03730 Javea, Alicante, Spain |
| **Respondent** | : | Freehold Properties GR Ltd [landlord] and<br>Simarc Property Management Ltd [managing agent]<br>c/o Stevensons Solicitors, Gorgate Chambers, Gorgate Drive, Hoe, Dereham, Norfolk NR20 4HB |

**DECISION**

**following a paper determination**

Handed down 1st July 2010

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| **Tribunal** | : | G K Sinclair (chairman), B Collins BSc FRICS & C Gowman BSc MCIEH MCMI |



**Summary**

1. The Applicant is the original long leaseholder of a brand new flat under a lease dated 14th September 2006. It was acquired as a "buy to let" property, with his tenants occupying under assured shorthold tenancies. Whether they remit their rent payments direct to the Applicant, now resident in Spain, or to a local agent is unclear. The presence of a local agent would resolve most if not all of the difficulties besetting the Applicant, and which form the substance of this application.

2. The Respondent managing agent has sought payment of ground rent and also a fee for each occasion on which the leaseholder is required to notify the freeholder that he has entered into a new letting agreement, and the identity of his new tenant. The Respondent has done so by writing to the Applicant either at the property or at the Applicant's last known address in England and Wales. Despite repeated requests it has refused to write to the Applicant at his permanent address in Spain, to communicate with him by fax or e-mail, or to supply details of the freeholder's bank sort code and account number so that he might remit payments to it by direct bank to bank transfer. Because it refuses to do so, and because the Applicant claims that he has no means of writing a sterling cheque from his Euro-denominated account in Spain, no payment of ground rent has been made and charges have been imposed. The Respondent's solicitors at quite a late stage in the proceedings abandoned any claim that the ground rent was in arrears, and therefore that any arrears charges were recoverable. The Applicant invites the tribunal to determine whether the registration fees for changes in tenancy details (being much higher than those mentioned in the lease as a minimum fee) are reasonable and also to decide the means of payment.

3. As this application has been brought before the tribunal under paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 then, for the reasons set out below, the tribunal determines :
   a. That, upon the point being conceded by the Respondent, no arrears charges are due and payable by the Applicant for non-payment of ground rent
   b. That the fee levied for registration of details of any new sub-tenancy, etc is not an administration charge within the statutory definition and the tribunal has no jurisdiction under Schedule 11 to determine the reasonableness or otherwise of the amount sought to be levied
   c. That while the parties may contract to accept payment in any particular manner, or extra-contractually may waive any such requirement, neither the tribunal nor any court may compel one party to pay and another to accept payment by any method which they have not agreed between themselves
   d. As the Respondent concedes that the provisions in the lease do not entitle the freeholder to recover the Respondent's costs in connection with this application the tribunal makes no order under section 20C of the Landlord and Tenant Act 1985.

**Jurisdiction & statutory provisions**

4. By paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 an application may be made to a leasehold valuation tribunal for a determination whether an administration charge is payable and, if it is, as to –
   a. the person by whom it is payable,
   b. the person to whom it is payable,
   c. the amount which is payable,
   d. the date at or by which it is payable, and
   e. the manner in which it is payable.

   This applied whether or not payment has already been made.

5. Paragraph 1(1) of the same Schedule, which is critical to the Respondent's submissions, provides :

(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) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease

6. Paragraph 1(3) explains that 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 specified in his lease.

7. Paragraph 2 provides that a variable administration charge is payable only to the extent that the amount of the charge is reasonable.

8. Paragraph 4 further provides as follows :

(1) A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.

(2) The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.

(4) Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it.

9. On 1st October 2007 the Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007[1] came into force. These provide that the summary of rights and obligations which must accompany a demand for the payment of an administration charge must be legible in a typewritten or printed form of at least 10 point, and must contain the title "Administration Charges-Summary of tenants' rights and obligations" and a prescribed statement comprising eight numbered paragraphs.

10. By section 166 of the Commonhold and Leasehold Reform Act 2002 a tenant under a long lease of a dwelling is not liable to make a payment of rent under the lease unless the landlord has given him a notice relating to the payment; and the date on which he is liable to make the payment is that specified in the notice. The contents of such notice must comply with the wording of the Schedule to the Landlord and Tenant (Notice of Rent)

[1] SI 2007/1258

(England) Regulations 2004.[2]

11. Also pertinent is section 167 of the 2002 Act, sub-sections (1) to (3) of which provide :

(1) A landlord under a long lease of a dwelling may not exercise a right of re-entry or forfeiture for failure by a tenant to pay an amount consisting of rent, service charges or administration charges (or a combination of them) ("the unpaid amount") unless the unpaid amount-

(a) exceeds the prescribed sum, or

(b) consists of or includes an amount which has been payable for more than a prescribed period.

(2) The sum prescribed under subsection (1)(a) must not exceed £500.[3]

(3) If the unpaid amount includes a default charge, it is to be treated for the purposes of subsection (1)(a) as reduced by the amount of the charge; and for this purpose "default charge" means an administration charge payable in respect of the tenant's failure to pay any part of the unpaid amount.

12. Finally, of particular relevance to an issue where the Respondent's attitude has caused considerable frustration for the Applicant is section 196 of the Law of Property Act 1925, sub-sections (3) and (4) of which read :

(3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned [by the postal operator (within the meaning of the Postal Services Act 2000) concerned] undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

**Relevant lease provisions**

13. The lease in question is dated 14th September 2006, the original parties being Country & Metropolitan Homes Ltd (as landlord), The Quadrant Management Company (Rickmansworth) Ltd (management company) and Paul Christopher Broome (tenant). The term granted is 125 years from 1st June 2005, with an initial annual ground rent of £250 and stepped increases by the same amount every 25 years.

14. Amongst the tenant's covenants in clause 3 and the Fourth Schedule are :

1. To pay the yearly rent on the days and in the manner stipulated herein and in the

2 SI 2004/3096

3 The amount has been set at £350 and the period as no more than three years by the Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (England) Regulations 2004 [SI 2004/3086]

event of the tenant delaying in making any such payments as aforesaid on the dates specified to pay interest thereon...

20. Upon every underletting of the demised premises and upon every assignment transfer or charge thereof and upon the grant of probate of letters of administration affecting the term and upon the devolution of the term under any assent or other instrument or otherwise howsoever or by any order of the court within one month thereafter to give to the landlord and management company or to their respective solicitors for the time being notice in writing of such underletting assignment transfer charge grant assent or order with full particulars thereof and to produce to the landlord and the management company or their respective solicitors every such document as aforesaid and to pay to the landlord a reasonable fee (not being less than £40) plus any Value Added Tax or similar tax payable thereon at the rate for the time being in force and to deliver to the management company each deed of covenant referred to in paragraph 8.2(c) of this Schedule duly stamped.

15. This final clause in paragraph 20 is a mystery, as there is no such paragraph 8.2(c) in the Schedule, and nor does it accord with the numbering style in the lease.

16. Of particular relevance to this case is clause 6.3, which provides that :

> Without prejudice to the operation of section 196 of the Law of Property Act 1925 any demand notice or request to be made on or given to the tenant for any of the purposes hereof shall be sufficiently served if made or given in writing addressed to the tenant and sent by pre-paid recorded delivery post to the tenant at the demised premises or if affixed to or left for the tenant upon the demised premises and any demand notice or request sent by post as aforesaid shall be deemed to have been delivered in the usual course of post.

**Submissions and evidence considered**

17. The points on which the Applicant seeks the tribunal's determination are :
    a. Administration fees arising from non-payment of ground rent [now conceded by the Respondent]
    b. The reasonableness and payability of a fee for registering a notice of underletting, a sum of £99.88 inclusive of VAT being demanded by Simarc by letter dated 5th July 2007 [bundle page 97]
    c. Whether Simarc, as the freeholder's managing agent, can insist on serving notices on the Applicant at the demised premises or at his last known UK address instead of at his Spanish address and refuse to provide bank details, thus preventing the Applicant from making direct payments of ground rent from his Spanish bank to the freeholder's account.

18. The Applicant's case appears in his initial application form and attachments [pages 31–47] and his later submission and statement of case [pages 81–112]. The latter includes copies of correspondence with and from Simarc, plus letters from Simarc to Bank of Scotland plc [page 104] and also Clydesdale Bank [page 107] seeking payment in the first case of a subletting fee of £165 plus VAT and in the second ground rent arrears and various fees and charges totalling £832.23. Upon receipt of the Respondent's Statement of Case the

Applicant filed a further submission dated 20th May 2010 [pages 150–153, to which was attached a copy of an earlier LVT decision dated 10th March 2008.

19. The Respondent's submission and statement of case [pages 113–148] includes copies of five previous LVT decisions dealing with the registration fee point (viz that it is not an "administration charge" within the meaning of the Act) and, on the ground rent charges, concedes that it is in no position to prove that ground rent demands were served which complied with current legal requirements. It also makes the point that the Respondent's costs of these proceedings are not recoverable by the freeholder under the lease, so an application by the tenant under section 20C is otiose. In reply to the Applicant's further submissions the Respondent also filed a short submission dated 4th June 2010, arguing that the tribunal has no jurisdiction to amend clause 6.3 of the lease (concerning service), and challenging the relevance of the 2008 LVT decision relied upon by the Applicant.

**Discussion**

20. *Registration fee for notice to underlet.* By letter dated 5th July 2007 Simarc wrote to the Applicant in the following terms :

> We thank you for your recent correspondence to this office regarding the subletting of the above-mentioned property.
>
> We are writing to inform you that it is a requirement of the lease that Notice of Underletting is served upon the landlord within a stated time after its commencement and it would appear from our files that we have not received the appropriate notice.
>
> To rectify this matter, we enclose herewith a Notice to Underlet form to enable us to draw up the relevant Notice of Underletting which must be completed and returned to this office within 21 days of the date of this letter together with the requisite fee of £99.88 inclusive of VAT.
>
> We further wish to point out that whilst this matter is outstanding you are in breach of your lease.

21. Accompanying such letter was a form headed "Notice to Underlet" which requires from the lessee the most basic of information, but including the date of commencement of any subletting and its duration (as per the tenancy agreement). It goes on to state :

> Once completed the form needs to be returned to the address at the top together with the following :
> 1 – A copy of the tenancy agreement and administration fee
> 2 – Payment [etc]

22. If by :

a. suggesting that the lessee must complete and submit to Simarc a Notice to Underlet in the form provided so that it may in turn draw up a Notice of Underletting
b. requiring the form to be returned, with the required fee[4] within 21 days, and
c. insisting in the form that the lessee must supply a copy of the tenancy agreement

[4] The Notice to Underlet describes this as an "administration fee"

(presumably for review),

the intention is to create the impression that the landlord's approval for such underletting is somehow required then this is misleading, as it implies that the lessee could have problems if he does not do as the managing agent requests.

23. All the lease requires is that when the lessee assigns, charges, transfers, underlets, etc the premises he must give notice in writing to the landlord and to the management company, for which he must pay a reasonable fee of not less than £40 plus VAT. The time limit is one month, not the claimed 21 days. No form is required : a letter will do.

24. Upon a proper interpretation of the lease this fee is NOT an administration charge within the meaning of the paragraph 1(1)(a) of the Schedule to the Act. Why this particular type of charge is not included within the list, when fees for notifying landlords of transactions affecting the property are commonly imposed in lease covenants, is a complete mystery; but that is the current state of the law. The tribunal therefore has no jurisdiction under Schedule 11 to deal with this charge.

25. That would appear to mean that if a lessee is prepared to tender only what he regards as a reasonable fee (being not less than £40 plus VAT) when giving proper notice under paragraph 20 of the Fourth Schedule then the freeholder's options would be :

a. accept
b. issue County Court proceedings (on the small claims track, where legal costs are usually irrecoverable) and seek to persuade the District Judge that the fee is reasonable
c. apply to the Leasehold Valuation Tribunal for a determination under section 168 of the Act that the lessee is in breach of covenant, prior to service of a section 146 notice. Under that jurisdiction the tribunal can then determine whether the failure to pay a substantially higher fee than that mentioned in the lease is a breach if a proper, or "reasonable", amount has been tendered.

26. *Service of notice, etc.* A major element in the dispute between managing agent and tenant has been the Respondent's insistence on writing to the Applicant only at an address in England, even though fax is simpler and quicker, and e-mail is cheaper and quicker. A further factor causing annoyance is the Respondent's refusal to provide the Applicant with details of the freeholder's bank account so that he can ensure prompt payment of the annual ground rent. To the Applicant this attitude seems wilful and spiteful, as in other circumstances the Respondent has been willing to provide such details; although preferably for payment by direct debit – so that it retains control.

27. The service of notices is governed by a combination of contract and statute. The lease sets out in clause 6.3 how and where the freeholder may serve notice on the tenant. To that is added section 196 of the Law of Property Act 1925. These all assume that the tenant should be served either at the demised premises or at some other address in England and Wales at which the tenant was last known to reside. Foreign service is not provided for. The freeholder and its managing agent are entitled to stick by the lease, but in these days of fax and e-mail where proof of sending or confirmation that an e-mail has been downloaded and read can be obtained the attitude adopted seems deliberately obstructive – intended to make life difficult for the Applicant so that "default" charges can

be claimed.

28. What of payment? The Applicant asks the tribunal to rule that the Respondent should provide relevant bank account details so that electronic payment can be arranged. That would put an end to non-payment of ground rent. Again, however, this is something not in the tribunal's gift. In pure theory it is the tenant's task to seek out his landlord and pay the rent in cash. Thus, as *Hill & Redman* explains[5] :

> ...where the rent is expressed in terms of money, generally a landlord may refuse to accept payment otherwise in coins which are legal tender for the amount of the rent, Treasury notes or Bank of England notes.[6] This right may be waived (though where there is a lease in writing, evidence of an antecedent oral agreement by the landlord to accept a bill was not admissible).[7] Likewise, the parties may agree that payment may be made in a particular way.

29. It is not unusual now for there to be agreement that payment of rent may be made by standing order to the landlord's bank. Further, it is possible for a landlord to waive his right to accept cash by directing the tenant to pay the rent into his bank account. Where this occurs, payment is made when the money is transferred to the landlord's account and not when the landlord's bank notifies the landlord that payment has been made.

30. However, where the tenant transfers money to the landlord's account, it will not be taken as having been accepted if it is returned to the tenant as quickly as possible[8] : thus, a landlord may avoid waiving a breach of covenant by returning the money promptly so that objectively considered the tenant would not suppose that the rent had been accepted.[9] However, if the landlord does not return the money, it will be inferred that the payment has been accepted.[10]

31. This may explain the freeholder's reluctance to accept payment controlled by the tenant, as opposed to payment by direct debit, where payment is called for by the payee. With a large landlord and many properties being managed on its behalf by a national managing agent there is the risk that a payment of rent by a tenant in breach of his lease may not be noticed and reacted to, resulting in a waiver. A partial answer to this can be found in section 167 of the Commonhold and Leasehold Reform Act 2002, which prevents the non-payment of small amounts for a short period, meaning non-payment of an amount not exceeding £350 (excluding any alleged arrears charge or other penalty) for a period of no more than three years,[11] from justifying forfeiture. In answer to this the freeholder would no doubt say that a fee for registration of the details of a new sub-tenancy, etc is

5 *Hill & Redman : Landlord & Tenant*, at A [1667]

6 *Beevers v Mason* (1978) 37 P&CR 452

7 *Henderson v Arthur* [1907] 1 KB 10

8 *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia* [1977] AC 850

9 *John Lewis Properties plc v Viscount Chelsea* [1993] 2 EGLR 77 at 85

10 *Antaios Compania SA v Salen Rederierna AB* [1983] 2 Lloyd's Rep 473

11 Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (England) Regulations 2004 [SI 2004/3086]

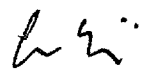
not by definition an "administration charge", nor is it rent or a service charge.

32. To some extent the Applicant has become the author of his own misfortune. He has chosen to purchase a buy-to-rent property and then absent himself from the country, leaving no-one on hand to deal with the day-to-day problems that arise when managing property. He has chosen not to maintain banking arrangements whereby he can pay by cheque, with an account only in Spain. Had he retained an agent in this country – either a solicitor or property professional – then it would have been relatively easy for him to transfer funds to the agent electronically, so that the agent could in turn send a cheque to the Respondent.

33. Save as outlined in paragraph 25 above the tribunal therefore cannot assist the Applicant on the question whether the fee for registering details of a new sub-tenancy, etc can be considered reasonable – especially where demands of the Applicant and his mortgagee seem to have referred to very different amounts, each much higher than that mentioned in the lease – as it simply lacks jurisdiction to do so. Similarly, it cannot interfere with the provisions in the lease (and statute) concerning service of notices, demands, etc and with the common law rules for payment of rent.

34. *Section 20C.* As conceded by the Respondent, if the lease does not entitle the freeholder to recover its or the Respondent's costs incurred in connection with these proceedings then there is no need for the tribunal to consider making any order under section 20C and it therefore declines to do so.

Dated 1st July 2010



Graham K Sinclair – Chairman
for the Leasehold Valuation Tribunal