UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 321 (LC)
UTLC Case Number: LRX/174/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – administration charges – charges for consent to underletting – whether precluded if no provision for it in lease – held that it was not – reasonableness – jurisdiction to determine issues not raised by the application – held there was none – Landlord and Tenant Act 1925 s144 - Landlord and Tenant Act 1927 s19(1)(a) - paragraphs 1 and 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 - Landlord and Tenant Act 1988 s1(5) - appeal allowed

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

BETWEEN:

CROSSPITE LIMITED **Appellant**

and

(1) MAHESH SACHDEV
(2) SEEMA SACHDEV
(3) KAMLESH SACHDEV

Respondents

Re: 5 Foxtail House
Taylor Close
Hounslow
TW3 4BZ

His Honour Judge Gerald

Determination on written representations

The following case is referred to in this decision:

Holding and Management (Solitaire) Limited v Norton and others [2012] UKUT 1 (LC); LRX/33/2011
Country Trade Limited v Noakes [2011] UKUT 407 (LC), LRX/118/2010
Birmingham City Council v Keddie LRX/54/2011

The following case was referred to in written submissions:
Gorjifar v Peverel Properties Limited BIR/00CN/LAC/2012/0003

DECISION

1. This is an appeal by the Appellant landlord against the decision of the Leasehold Valuation Tribunal ("the LVT") that it was not entitled to make a charge for the costs incurred in consenting to underletting the demised premises and the finding that £135 not the £165 sought by the Appellant would be the reasonable costs therefore.

2. The Appellant discovered that the Respondent tenants had underlet the whole of the demised premises in breach of lease dated 8th September 1995 ("the Lease") so required an application for retrospective consent to underlet in respect of which the Appellant required payment of their standard £165 charge to cover their costs of consenting to underlet. By clause 2(8)(b) of the Lease the lessee covenants with the lessor "not to underlet the whole of the Premises without first obtaining the written consent of the Lessor such consent not to be unreasonably withheld".

3. On 1st July 2011 the Respondents applied to the LVT ("the Application") seeking *inter alia* a determination that the £165 charge was unreasonable under paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). In their pre-issuance email dated 9th June 2011, the Respondents had stated that they were "not averse to paying an administration charge" but did not agree to the amount of the £165 charge sought for the initial grant of permission or the £130 to be sought upon annual renewal which, in their 28th July 2011 letter, they suggested warranted a one off administration charge of £50 to £100.

4. The relevant parts of paragraphs 1 and 2 of Schedule 11 to the 2002 Act provide:

> "*Meaning of 'administration charge'*
>
> "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 application for such approvals…
>
> "1(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"
>
> "2 A variable administration charge is payable only to the extent that the amount of the charge is reasonable."

5. In its 16th August 2011 Statement of Case, sought to justify the initial £165 standard charge as being reasonable on the basis that

> "The procedure adopted by the [Appellant's] agents when an application is received to sub let a property is extensive as a subletting affects all lessees in a block and so the agents will undertake a perusal of a copy of the assured shorthold tenancy to ensure the appropriate covenants are contained within that tenancy and, once completed, registering full details of the tenancy in their records and passing the appropriate information to the Property Managers as a full record of occupants of all flats will be needed by those manager especially in the event of an emergency. The documents will be reviewed by the agent's legal department and once they are satisfied a consent document will be issued. The charge for this work is … £165 and it is estimated that an administrator would spend approximately two hours in dealing with the application [for permission to underlet] including input of information and the legal department approximately one hour".

It went on to state:

> "As fees are quoted in advance which is for the benefit of the [Respondent] and [Appellant] it is submitted that this is a fair and reasonable method of dealing with such an application. If every application was dealt with purely on time spent together with extra charges for letter, telephone calls and emails no figure could be quoted until a transaction had been concluded, this would not assist an applicant. In this case this charge would certainly have been higher as the [Respondent] had underlet the property in breach of covenant and without correspondence from the [Appellant] may have remained in breach."

The Appellant's Administration Charges Sublet Guidelines was also adduced into evidence which explains that the charge was to:

> "…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."

6. On 27th September 2011, the LVT issued its decision (the "Decision"), made on a paper hearing, in which it held *inter alia* that the Appellant was not entitled to charge for its costs of consenting to underletting and in any event £165 was unreasonable. Its reasons are contained in the following paragraphs:

> "12. In its statement of case the [Appellant] does not identify the provision in the lease upon which it relies as imposing an obligation on the lessee to pay fees or charges to the landlord in connection with a request for a written consent pursuant to clause 2(8)(b) of the lease.
>
> "13. It is trite law that service charges and administration charges are only payable by lessees of residential leases to the extent that the lease imposes a clear and unambiguous obligation on them to do so.
>
> "14. The [Appellant] has not identified in the lease the obligation to pay a charge for a consent and we can find none.
>
> "15. The [Appellant] is under the statutory duty imposed by section 1 of the Landlord and Tenant act 1988 [("the 1988 Act")] to give consent to a request for an underletting of the

whole of the demised premises unless it is reasonable not to give consent and the landlord has a duty to give written notice of his decision within a reasonable time. Those statutory duties are not in any way qualified or made subject to a precondition that the tenant is obliged to pay the landlord's costs of considering an application.

"16. In these circumstances we find that the lease does not oblige the tenant to pay costs or charges to the landlord for or in connection with a request made for written consent to underlet.

"17. However, in case it be held that we are wrong in our principle finding we have considered the rival arguments of the parties as to whether a fee of £165 is a reasonable charge for the landlord to impose if it were entitled to recover a costs (*sic*) or to make a charge.

"18. In its statement of case the [Appellant] sets out the tasks involved, or which might be involved, in considering and processing a request to underlet. In principle we accept those submissions although we do find that the estimated time incurred on them is rather overstated. Drawing on the accumulated expertise and experience of members of the Tribunal in these matters we find that a charge in the region of £135 is within the bracket that can be considered reasonable, albeit that it is at the top end of the bracket."

7. On 10th October 2011 the Appellant applied to the LVT for permission to appeal the Decision on the grounds that the it had no jurisdiction to determine whether the Appellant was entitled to require payment of the costs incurred in consenting to underletting as that did not form part of the Application and had been agreed by the Respondents and in any event the LVT was wrong as the Appellant is entitled to require payment of the costs incurred in consenting to underletting as is implicitly recognised by section 19 of the Landlord and Tenant Act 1927 ("the 1927 Act").

8. Section 19 of the 1927 Act 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".

9. On 7th November 2011, the LVT refused permission to appeal because the Appellant could have but did not address the question of its right to require payment of the costs of consenting to the underletting in its Statement of Case and in any event section 19(1) of the 1927 Act does not permit

such a charge to be levied, there being no such provision in the Lease. In respect of the jurisdictional point, the LVT said:

> "5. The issue for the Tribunal related to sums claimed by the Respondent which, if payable, might amount to administration charges with the meaning of the (*sic*) Schedule 11 to the Act. In considering this issue it is open, indeed, incumbent, upon the Tribunal to consider whether the charge claimed is payable within the terms of the lease and if so, whether the sum claimed is reasonable in amount. If a charge is not payable under the terms of the lease it cannot by definition be reasonable in amount."

10. On 16th November 2011, the Appellant renewed its application for permission to appeal to the Upper Tribunal (Lands Chamber) but also sought permission to appeal the finding that £165 was unreasonable.

11. On 5th January 2012, the President of the Upper Tribunal (Lands Chamber) granted permission to appeal because "there is a realistic prospect of success on the grounds advanced" and that the appeal will be by way of review. By necessary implication, permission was granted to appeal both issues. This was the same day upon which the President allowed the appeal in *Holding and Management (Solitaire) Limited v Norton and others* [2012] UKUT 1 (LC); LRX/33/2011 which considered the same issue with which, as will become clear, I respectfully agree.

12. On 26th January 2012, the Appellant, as directed by this Tribunal on 17th January 2012, set out their Statement of Case in terms broadly similar to that set out in their 16th November 2011 Grounds of Appeal save that it was also submitted that the LVT wrongly concluded that £165 was unreasonable.

13. On 23rd February 2012, the Respondents, as directed by this Tribunal on 17th January 2012, set out their position in their Statement of Case. They did not challenge the entitlement of the Appellant to require payment of the costs incurred in consenting to the underletting but maintained their challenge to its reasonableness. They stated:

> "We consider the initial and ongoing fees to be excessive especially on the basis of the fact that if the same tenant remains in the property no further work is undertaken on an ongoing basis yet a fee of £130 per annum is still levied."

The only point to note here is that the LVT made no finding in respect of the £130 renewal fee no doubt because such had not been claimed by the Appellant as there had been no application to renew. The Decision was confined to the reasonableness of the initial charge of £165, not the renewal charge of £130.

14. The <u>first submission</u> of the Appellant is that the LVT had no jurisdiction to determine the entitlement of the Appellant to require payment of the costs incurred consenting to underletting because it had not been raised by the Respondents and had been agreed. The Appellant relied upon paragraph 5 of Schedule 11 to the 2002 Act, which mirrors the wording of section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"), the material parts of which are as follows:

"(1) 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

"(4) No application under sub-paragraph (1) may be made in respect of a matter which-

"(a) has been agreed or admitted by the tenant…

"(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment."

15. In my judgment, the LVT had no jurisdiction to determine the issue of the Appellant's entitlement to require payment of its costs of consenting to underletting. There are two reasons. First, because it was not an issue raised in the Application so that the LVT did not have jurisdiction to consider it. In this respect, I repeat the observations I made in respect of the mirror provisions of section 27A of the 1985 Act in *Birmingham City Council v Keddie* LRX/54/2011 which are of equal applicability to paragraph 5 of Schedule 11 to the 2002 Act. It follows that the Appellant can not properly be criticised for failing to identify the legal basis of its entitlement to charge the costs of consenting to underletting as it was not challenged by the Respondents.

16. Secondly, the Respondents had by their 9th June 2011 email made it clear that they accepted that the Appellant was entitled to require such payment but merely challenged the reasonableness of the sum demanded, so that they could not have challenged the Appellant's ability to demand payment as such had been "agreed or admitted by the tenant" within paragraph 5(4) of Schedule 11 to the 2002 Act. No particular form or formality as to how agreement or admissions are made is prescribed by the Act. Logically, they must pre-date the making of the application otherwise there would be no ousting of right to make an application under paragraph 5(1). In principle, there is no reason why such can not be made informally.

17. Whilst not expressed as an agreement or admission, it was implicit within the phrase "not averse to paying an administration charge" contained in the 9th June 2011 email that the Respondents admitted that the Appellant was able to demand payment for its costs of consenting to underletting. They of course have subsequently reiterated that position in their 17th January 2012 Statement of Case where they again make it clear that the only matter in issue is the reasonableness of the costs not the Appellant's entitlement to require payment. The agreement or acceptance implicit within the email sufficed for the purposes of paragraph 5(4) of Schedule 11 to the 2002 Act.

18. The second submission of the Appellant is that the LVT was in any event wrong in law to find that the Appellant was not entitled to require payment of the costs incurred in consenting to underletting. I agree. The law is as follows. Clause 2(8)(b) of the Lease entitles the landlord to withhold its consent to underletting provided it does not do so unreasonably. It is axiomatic that the landlord may impose terms or conditions upon the granting of consent provided they are reasonable. If they are not reasonable, the tenant may ignore them. If they are reasonable, the tenant must comply with them otherwise risk forfeiture.

19. One such term or condition commonly imposed is to require the tenant to pay a reasonable sum in respect of any legal or other expenses incurred by the landlord in connection with consenting to underletting. If the amount charged is reasonable, the withholding of consent would not be unreasonable if the lessee refuses to pay, so the lessee must pay the charge if he is to get consent. If it is not reasonable, the withholding of consent would be unreasonable and if the lessee refuses to pay the sum would not be payable.

20. The ability to require such payment is therefore a function of or permitted by clause 2(8)(b) of the Lease, not section 19(1)(a) of the 1927 Act albeit that that provision makes clear that such a charge is not precluded provided it is reasonable as indeed does section 144 of the Law of Property Act 1925 which prohibits the levying of fines but expressly preserves the right to require payment of reasonable costs upon the granting of consent (italics supplied):

> "144 In all leases containing a covenant, condition or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; *but this proviso does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to such licence or consent.*"

21. By contrast, the 1988 Act is concerned not with the terms or conditions upon which consent may be granted or withheld but with the timeous granting or withholding of consent within a reasonable time and the giving of reasons failing which the landlord may attract liability for breach of statutory duty. The LVT rightly observed in paragraph 15 of its Decision that those statutory duties are not in any way qualified or made subject to a precondition that the tenant is obliged to pay the landlord's costs of considering an application, but wrongly concluded that that was because landlords are not entitled to require such payments: the 1988 Act did not seek to and did not circumscribe the way in which the landlord might exercise its right to impose terms and conditions when deciding whether or not to grant consent, including the long-recognised right to demand such costs as part and parcel of the granting of consent and of course the long-established conveyancing practice that the tenant pays the reasonable costs of the landlord on an application for consent to assign or underlet.

22. The charge for consent to underletting is an "administration charge" within paragraph 1(1) of Schedule 11 to the 2002 Act because it is "an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly … for or in connection with the grant of

approval under" the Lease, and is a "variable administration charge" because it is neither "specified in his lease" nor "calculated in accordance with a formula specified in his lease". The LVT therefore had, as the parties agreed, jurisdiction to determine the issue of reasonableness.

23. The third submission of the Appellant is that the LVT failed to give any or any adequate reasons for concluding that the £165 charge was unreasonable and that £135 was at the top end of a bracket that could be considered reasonable and was in the circumstances wrong.

24. Unlike in the usual service charge case where the tenant must adduce sufficient evidence to show that the question of reasonableness is arguable, in cases concerning the reasonableness of terms or conditions imposed upon consenting to underletting it is for the landlord to justify the reasonableness of the condition. That in my judgment flows from section 1(6)(b) of the 1988 Act which provides that if the question whether the reasonableness of a condition arises it is for the landlord to show that it was reasonable. In this case, the Appellant bears the burden of proving that the £165 was reasonable.

25. In that respect, there was no evidence from the Respondents to counter that adduced by the Appellant, merely an assertion that £50 to £100 was reasonable to cover both the initial grant and renewal of consent. The LVT was therefore faced with the not untypical situation of evidence adduced by only one side. In the slightly different context of a service charge dispute in *Country Trade Limited v Noakes* [2011] UKUT 407 (LC), LRX/118/2010, I made the following observations:

> "16. The difficulty comes where the LVT accepts that "some" work has been done but does not accept that the "rates" or "charges" claimed as reasonable are credible or justified but there is no other comparative or market evidence (in the form of estimates, or quotes or such like) of what those rates or charges might be. The LVT will not be able to reject the sum claimed because it has accepted that some work has been done to justify a charge, but will have concluded that the amount claimed is too high.
>
> "17. In those circumstances, the LVT is entitled to apply a robust, common sense approach and make appropriate deductions based on the available evidence (such as it is) from the amounts claimed always bearing in mind that it must explain its reasons for doing so. The circumstances in which it may do so will depend on the nature of the issues raised and service charge items in dispute, and will always be a question of fact and degree. In some instances, such as insurance premiums, it will be very difficult for the LVT to disallow the landlord's claim in the absence of any comparative or market evidence to the contrary. In other cases, such as gardening, cleaning or such like, the position might be different where the nature and complexity of the work is fairly straightforward. It is only where the issue is finely balanced that resort need be had to the burden of proof."

26. In my judgment, in paragraph 18 of its Decision the LVT conflated two different things. On the one hand, it accepted the scope of work required but thought that it would not take as long as the Appellant said it would to do the work – *i.e.* they thought it would take less than three hours. On the

other hand, they referred to a bracket of charges for such work without stating what the lower end of the bracket was or giving any information as to the source of that bracket. The flaw in this approach is that the LVT is imposing some sort of standard charging bracket upon the subject transaction without evaluating or explaining what it is and how and why it is applicable to the subject transaction. In this case, the consenting to underletting was somewhat more complex than usual involving as it did a retrospective application for consent.

27. Whilst the LVT was entitled to apply its own robust common sense to whether the work really would take as long as was alleged, they were not entitled to impose some sort of charging bracket especially on a transaction which was outside the norm and failed to take account of the fact that this was not a straight-forward consent to underletting. The LVT erred in finding that £165 was unreasonable. On the basis of the evidence before the LVT, in my judgment the only reasonable conclusion the LVT could properly and reasonably have reached was that the Appellant had discharged its burden of showing that the £165 was reasonable in the circumstances of this case.

28. I therefore allow the appeal.

29. It should be noted that this is the fourth recent appeal (cf *Fairhold Mercury Limited v Merryfield RTM company Limited* 2012] UKUT, LRX/134/2011; *Beitov Properties Limited v Martin* [2012] UKUT 133 (LC); LRX/59/2011; and *Birmingham City Council v Keddie* LRX/54/2011) of an LVT of its own motion taking a point or issue not raised by the parties and deciding the case on that basis. In *Fairhold* and, probably, *Beitov* the points were within the broad scope of the application. In *Keddie* and the instant case the issues were outside the broad scope of the application and involve issues which were in effect against not just one but both parties. In all four cases considerable costs have been run up in appealing the LVT. It is hoped that the LVT will hesitate before raising novel points, and if it feels compelled to do so will take care to invite comment on them from all parties before deciding whether it is indeed appropriate or necessary to so and, if so, before deciding the point or issue.

Dated 25 September 2012

His Honour Judge Gerald