BIR/47UB/LVA/2006/0001

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE MIDLAND LEASEHOLD VALUATION TRIBUNAL AS TO ITS JURISDICTION TO MAKE A DECISION UNDER SCHEDULE 11 TO THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Property: **Flat 41, Housman Park, Bromsgrove, Worcestershire B60 1AZ**

Applicant: Mr M G Lammas (tenant)

Respondent: Somerset Redstone Trust (landlord)

Date of preliminary hearing: 23 March 2006

Appearance: Mr M G Lammas

No appearance by the landlord

Members of the leasehold valuation tribunal:

Lady Wilson
Mr T F Cooper BSc FRICS FCIArb
Mr W H Hatcher

Date of the tribunal's decision: 23 March 2006

Background

1. This is an application by Mr Lammas, who was formerly the leaseholder of Flat 41 Housman Park, School Drive, Bromsgrove, ("the flat"), under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the Act").

2. Housman Park is a complex of 57 retirement flats, built in the 1980s, and Mr Lammas lived in the flat for three years until he sold it in November 2004. The original lease of the flat, dated 10 August 1988 for a term of 99 years from 25 September 1987, was granted by William Weaver Limited and John Richardson (Holdings) Limited as freeholders of the land and buildings, Richardson Managements Limited, essentially the management company being also a party, to a Mr and Mrs Weaver. The term was subsequently assigned on three occasions, and so Mr Lammas was the fourth person to hold the lease. The respondent is now the owner of the freehold interest, and an associated company is the management company.

3. The lease contains the following leaseholder's covenant with Richardson Managements Limited at clause 3(b):

> *Not to assign or transfer nor offer to assign or transfer the Flat or otherwise part with possession of the same without first notifying Richardson Managements Limited and then to pay them a selling service fee of 5% of the enhanced value of the Flat at that time being the difference between the consideration recited in this Lease and the gross sale price or open market value such price or value to be determined by Richardson Managements Limited's Surveyor in default of agreement.*

4. Mr Lammas by his application asks the tribunal to determine:

i. that it is unreasonable for the "selling service fee" to be payable not only by the original leaseholders but also by subsequent leaseholders, and that the fee of £3950 which he reluctantly paid on the sale of his flat should be reimbursed to him; and

ii. in the alternative, that the fee is an administration charge within the meaning of Schedule 11, and is unreasonable and thus not payable.

5. In the statement supporting the application, Mr Lammas said that the management company neither offers nor carries out any kind of sales service to leaseholders other than registering a transfer, for which a separate a fee is payable under the lease. [A fee of £10 plus VAT is payable to each of the solicitors to the lessor and to the management company a month after assignment under clause 2(q) of the lease.] He said that during the period of his residence at Housman Park he had served for a year as Chairman of the Residents' Association, and had thereby had access to some of the appropriate statutory instruments and also to the Code of Practice of the Association of Retirement Housing Managers. He said that he understood that clause 3(b) was inserted in the lease in order to recover some of the profit lost by the developer when it set the original selling price of the flats at an artificially low level in order to encourage quick sales, which he considered to be legitimate in the case of the original purchaser of the lease because he had had the benefit of a discounted price. However, he said, the Code of Practice specifically stated that managers should not make any charge or require any payment on re-sales except where stated or implied in the lease. He considered that it should not be assumed that clause 3(b) of the lease meant that a "selling service fee" was payable on subsequent sales, and the fact that such a fee had been charged on each re-sale meant that the landlord and/or the management company was receiving a large and unmerited profit due entirely to escalating property values or to improvements carried out by successive leaseholders.

6. Part 1 of Schedule 11 to the Act provides, at 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) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is a party to his lease otherwise than as a 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 a party to his lease otherwise than as a landlord or tenant, or

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

7. By paragraph 1(3), a "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.*

8. By paragraph 2, a "variable administration charge" *is payable only to the extent that the amount of the charge is reasonable*". By paragraph 5, the tribunal is given power to determine whether an administration charge is payable. By paragraph 3, any party to a lease may apply to the tribunal for an order varying the lease on the grounds that -

(a) any administration charge specified in the lease is unreasonable, or

(b) any formula specified in the lease in accordance with which any administration charge is calculated is unreasonable.

In other words, if an administration charge is variable (as defined), it may be determined to be unreasonable; but if it is not variable, an application may be made to vary the lease.

9. As there appeared to be doubt as to whether the tribunal had jurisdiction to entertain this application, a preliminary hearing was directed in order to establish whether the tribunal had jurisdiction. The hearing took place in Birmingham on 23 March 2006 and was attended by Mr Lammas. The landlord and the management company were neither present nor represented.

The hearing

10. Mr Lammas explained the background and produced correspondence which had passed between the Charity Commissioners (the present landlord being a registered charity) and the landlord in relation to what was perceived to be a clause which was somewhat harsh to the leaseholders. Varying the leases had been discussed but had not happened. He felt strongly that the clause was unfair, but agreed that it was difficult to find anything in Schedule 11 which was apt to cover it. He said that while he was a leaseholder he and others had raised with the landlord what the leaseholders considered to be the unfairness of clause 3(b), and that although he and others had paid the fee, they had done so reluctantly.

Decision

11. We are satisfied that Mr Lammas's first argument, which is that the tribunal should order that the selling service fee of £3950 which he paid on the sale of his flat should be returned to him simply because at it is unreasonable for the fee to be payable not only by the original leaseholders but also by subsequent leaseholders, is not within the jurisdiction of the tribunal.

Our jurisdiction is limited to those matters conferred on it by statute, and we are not aware of any statute which gives us power to determine that it is unreasonable to pay such a fee, unless it is an administration charge, as to which see below. Nor do we have any power to order reimbursement if such a fee has been paid.

12. However it may perhaps be appropriate to mention that it seems to us at least arguable that the covenant in clause 3(b) of the lease is a positive covenant which, under principles of law well-established by a series of authorities including *Rhone v Stephens* [1994] 2 AC 310 and *Thamesmead Town Limited v Allotey* [1998] 3 EGLR 97, does not run with the land and therefore cannot be enforced against the covenantor's (in this instance the original leaseholder's) successors in title. The covenant does not appear on the face of it to be a reciprocal covenant such as may be an exception to the general rule and capable of binding the land according to the principles expressed in *Halsall v Brizell* [1957] Ch 169. These are not, however, matters for the tribunal to determine because we have not been given the jurisdiction to do so, and the applicant must take his own advice on this aspect of the case.

13. The question, then, is whether the selling service fee is an "administration charge" within the meaning of Part I of Schedule 11, because, if it is, and is variable, we have jurisdiction to determine the amount of it which is reasonable and therefore payable. And if it is an administration charge but is not variable, we would, if asked, have jurisdiction under paragraph 3 of Part I of the Schedule to vary the clause in the lease which gives the formula for calculating it.

14. With reluctance, but without any doubt, we have come to the conclusion that the "selling service fee" does not fall within any of the four categories in paragraph 1(1) of Part I of Schedule 11. In particular, the approval of Richardson Managements Ltd to the leaseholder's assignment is not required by the lease, (although clauses 2(n) and (o) impose restrictions on the persons to

whom the lease may be assigned and clause 2(p) requires notification of assignment to the lessor). So the fee cannot be categorised as being for or in connection with the grant of any such approval for the purpose of paragraph 1(1)(a). Nor can that the fee can be categorised as a payment, direct or indirect, in connection with a breach of covenant or condition in the lease for the purpose of paragraph 1(1)(d), because the fee is not referable to any breach. Clearly paragraphs 1(1)(b) and (c) do not apply.

15. We would add that, if the charge had been an administration charge, we are satisfied that it would not have been variable within the meaning of paragraph 2 of Part I of the Schedule, because it is calculable by reference to the formula in clause 3(b).

16. Accordingly we are satisfied that we do not have jurisdiction to determine this application.

17. Mr Lammas has asked for an order under section 20C of the Landlord and Tenant Act 1985 preventing the landlord from placing any costs incurred by the landlord in connection with these proceedings on any service charge. Although the application has been unsuccessful we are satisfied that Mr Lammas's point was worth making and we make the order sought, because we regard it as just and equitable to do, although it may well be that the landlord has not incurred any costs in connection with the proceedings.

18. Mr Lammas application fee will be returned to him by the appropriate authorities and therefore no question of an order for reimbursement against the landlord arises.

CHAIRMAN.....

DATE: 23 MARCH 2006

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