BIR/47UB/LAC/2003/0001
BIR/47UB/NLC/2003/0008

Decision

of

The Leasehold Valuation Tribunal

in respect of applications for:

(i) the determination of the liability to pay or for the variation of an administration charge under Schedule 11 of the Commonhold & Leasehold Reform Act 2002, and

(ii) the limitation of costs under Section 20C of the Landlord & Tenant Act 1985

in connection with

15 Willow Road, Sidemoor, Bromsgrove, Worcestershire B61 8PL

Mr & Mrs P Ward (Applicants)

and

A H Field (Developers) Ltd (Respondents)

Background:

On the 13th November 2003, the solicitors acting on behalf of the tenants of the subject property, Mr and Mrs P Ward ("the Applicants") submitted the above applications to the Leasehold Valuation Tribunal under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 and Section 20C of the Landlord and Tenant Act 1985 respectively.

Following consultation with the solicitors acting on behalf of the landlords, A H Field (Developers) Ltd ("the Respondents"), it was agreed that the matter would be dealt with by means of written submissions.

By Directions issued on 2nd December 2003, both parties were invited to submit their principal case to the Tribunal by 16th December 2003, and following exchange of those documents, their reply to the other party's principal case by not later than 16th January 2004.

Evidence for the Applicants:

In summary, the case submitted by the solicitors for the Applicants, Messrs Holt and Sellars (supported by appropriate documentation and copy correspondence) is: -

(i) The applicants bought the subject property on or about 24th August 2001 for investment purposes.

(ii) The property is held by virtue of two leases - the more recent one dated 4th May 2001 ("the 2001 lease") effectively extends the earlier lease and is for a term of 99 years from 4th May 2001 at an initial ground rent of £100 per annum rising at the end of the 33rd year to £200 per annum and at the end of the 66th year to £400 per annum. In all other respects, the earlier lease dated 5th July 1960 ("1960 lease"), takes effect.

(iii) The 1960 lease contains the relevant provisions regarding the obligation to pay the ground rent, while the 2001 lease specifies the timing and amount of the payment.

(iv) At the time the Applicants bought the property, the Respondents were advised of the Applicants' home address.

(v) The Respondents' agents, by whom the ground rent is collected, are A H Field (Properties) Ltd ("the Agents").

(vi) In respect of the ground rent due on 24th June 2002, the Agents incorrectly addressed the invoice and it was not received by the Applicants. A copy of the invoice was however sent to the subject property and was handed to the Applicants by the then tenant. As a result of this, the Applicants contacted the Agents and (i) were sent a copy of the invoice showing the incorrect address, and (ii) advised the Agents of their correct home address. Consequently, the Applicants understood the Agents then to have their correct address and that future ground rent would be paid upon receipt of an invoice for the amount due.

(vii) No invoice or any form of communication regarding payment of the rent due on 24th June 2003 was received by the Applicants until two identical letters with accompanying Section 146 Notices dated 7th October 2003 were received from the Respondents' solicitors, Messrs Bowling and Co. It was unclear why two identical letters and notices had been received although as one was marked "Copy", it could well be that this was intended to be sent to the subject property. However neither the Applicants nor the tenant of the property were aware of any correspondence about the matter being sent to 15 Willow Road.

(viii) The Applicants paid the ground rent of £100 "by return" upon receipt of the Section 146 Notice, and in response to that, received a letter from Bowling and Co dated 14th October 2003 seeking payment of both the Agents' and their own costs of £176.25 and £431.00 respectively.

(ix) The Applicants then instructed Holt and Sellars to represent them in the matter.

Holt and Sellars contend:-

1) The costs sought by the Respondents are variable administration charges within the meaning of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

2) The Applicants do not believe the costs should be payable by them on the grounds that the Agents failed to send a demand/invoice for the ground rent due on 24th June 2003 to the Applicant's correct address.

3) In relation to Bowling and Co's fees, the 2002 Act restricts the commencement of forfeiture proceedings for breaches of covenant or conditions of a lease to only those instances where the tenant agrees with the charges (which the Applicants do not) or a Court or the Leasehold Valuation Tribunal has decided that the charges are reasonable and due. In this instance, the preparation and service of a Section 146 Notice was premature, and the costs incurred in so doing should not therefore be payable by the Applicants.

4) In the alternative, if it is considered some monies are due (which is not accepted by the Applicants), then the sums claimed are unreasonable.

5) Bowling and Co did not forward with any of their correspondence in October 2003 a summary of the Applicants' rights and obligations in relation to administration charges.

6) The Applicants have incurred legal costs and disbursements in excess of £600 plus VAT and on the basis that the Tribunal has discretion to award costs, the Applicants seek to have such costs paid by the Respondents.

Evidence for the Respondents:-

In summary, the case submitted on behalf of the Respondents by Bowling and Co (supported by appropriate documentation and copy correspondence) is: -

(i) The Applicants failed to pay the annual rent of £100 due on 24th June 2003 in accordance with the covenant in Clause 4 of the 2001 lease, which incorporates the provisions of the 1960 lease. The ground rent is however payable whether demanded or not. The Applicants were therefore in breach of covenant to pay the rent.

(ii) An invoice for the rent was sent to the home address of the Applicants and a reminder was also sent there by the Agents on 29th August 2003. In the absence of any response, this was followed on 7th October 2003 by the service of a Section 146 Notice on the Applicants –again, at their home address.

(iii) As the Applicants were in breach of covenant and a Section 146 Notice had been served, then the Applicants were responsible for the Respondents' legal costs as well as those of the Agents. The amount of those costs was set out in Bowler and Co's letter to the Applicants of 14th October 2003, and repeated (with a detailed breakdown) in their letter to Holt and Sellars of 7th November 2003.

Bowling and Co therefore contend:-

1) That the costs claimed are reasonable and properly payable by the Applicants.

Decision:

SI 2003 No. 1986 (C.82) The Commonhold and Leasehold Reform Act 2002 (Commencement No. 2 and Savings) (England) Order 2003 made on 4th August 2003 brought into force a number of provisions in the 2002 Act - including (with effect from 30th September 2003) Section 158, which in turn gave effect to Schedule 11 to the Act. Part 1 of that Schedule is concerned with the reasonableness of administration charges and defines such a charge at Paragraph 1 (1) as:

> ..."an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly –
>
> .... (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"...

Paragraph 1 (3) defines a "variable administration charge" payable by a tenant as one which is neither specified in his lease nor calculated in accordance with a formula specified in his lease, and then goes on at Paragraph (2) to stipulate that a variable administration charge is payable only to the extent that the amount of the charge is reasonable. Paragraph (5) states that 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 (inter alia) the amount which is payable.

Given therefore the nature of the payment requested from the Applicants (which is a variable administration charge for the purposes of Schedule 11) and the timing of their applications (after 30th September 2003), the Tribunal is satisfied it has jurisdiction to hear the applications.

Accordingly:

i. The Tribunal accepts the **first contention** of Holt and Sellars that the costs sought by the Respondents are variable administration charges within the meaning of Schedule 11 to the 2002 Act.

ii. Currently, it is an accepted principle in law that (ground) rent is payable whether demanded or not. The tenant has a continuing contractual liability arising from his position as party to the lease and while many landlords adopt the convention of issuing invoices for rent due under a lease, it is not incumbent upon them to do so, nor is it a condition precedent to the liability of the tenant to pay the rent.

    Consequently, the dispute between the parties on this point is not considered pertinent to the issue and the Tribunal does not accept the **second contention** by Holt and Sellars that the applicant should be relieved of paying the Respondents' costs because of the (disputed) failure to send a demand for the rent due on 24th June 2003.

iii. In relation to the **third contention** by Holt and Sellars, that the 2002 Act restricts the commencement of forfeiture proceedings to only those instances where the circumstances specified in the Act applied, the relevant part of the 2002 Act (Section 168) is not yet in force. Consequently this point is not accepted by the Tribunal.

iv. The **fourth contention** by Holt and Sellars relates to the quantum of any costs payable by the Applicants and therefore arises only if a liability to pay an administration charge is established.

v. The **fifth contention** by Holt and Sellars, that Bowling and Co did not forward a summary of the Applicants' rights and obligations in relation to administration charges with any of their correspondence in October 2003 Act is accepted by the Tribunal. In this case, the event giving rise to the demand for payment of the administration charge (the service of the Section 146 Notice) was on 7th October 2003, and the demand for payment of that administration charge was in the letter from the Respondents solicitors to the Applicants dated 14th October 2003. Since 30th September 2003 Paragraph 4 (1) of Schedule 11 to the 2002 Act requires that:-

"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."

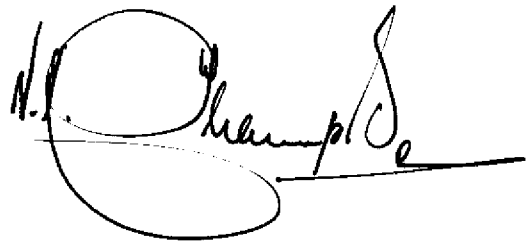
It will be noted that such a summary "must" accompany the demand, and in this case that clearly did not happen. Furthermore, Paragraph 4 (3) of Schedule 11 allows the Applicants to withhold payment of an administration charge which has been demanded if Paragraph 4 (1) has not been complied with in relation to the demand.

The Tribunal therefore finds that the Section 146 Notice served on 7th October 2003 by the Respondents' solicitors was invalid so far as the provisions of Schedule 11 are concerned, and that the Applicants are entitled to withhold payment of the costs arising from the preparation and service at that Notice - as more particularly detailed in (a) their letter to the Applicants dated 7th October 2003 and (b) their letter to the applicant's solicitors, Holt and Sellars, dated 14th November 2003.

Consideration of the fourth contention by Holt and Sellars (the quantum of any costs payable by the Applicants) does not therefore arise, as the Applicants are not liable to pay the administration charges sought by the Respondents.

vi. The Tribunal has no general power to award costs against either party, although under SI 2003 No.2098 The Leasehold Valuation Tribunal (Fees) (England) Regulations 2003 made on 7th August 2003, the Tribunal may require any party to proceedings in respect of which a fee is payable under the Regulations to reimburse to any other party to the proceedings the whole or any part the fees paid in respect to the proceedings. Before the Tribunal decides whether an order under the Regulations would be appropriate in this instance, the parties are invited to submit any written representations they may wish to make in relation to this aspect of the matter. Such representations should be lodged with the Tribunal by not later than 20th February 2004.

vii. In respect of the Applicants' application under Section 20C of the Landlord and Tenant Act 1985, the Tribunal orders that all of the costs incurred (or to be incurred) by the Respondents in connection with the current proceedings are not to be regarded as relevant costs (as defined by Section 18 of that Act) to be taken into account in determining the amount of any service charge (as also defined by Section 18 of that Act) payable by the Applicants.



N R Thompson
Chairman

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(iii) The 1960 lease contains the relevant provisions regarding the obligation to pay the ground rent, while the 2001 lease specifies the timing and amount of the payment.

(iv) At the time the Applicants bought the property, the Respondents were advised of the Applicants' home address.

(v) The Respondents' agents, by whom the ground rent is collected, are A H Field (Properties) Ltd ("the Agents").

(vi) In respect of the ground rent due on 24th June 2002, the Agents incorrectly addressed the invoice and it was not received by the Applicants. A copy of the invoice was however sent to the subject property and was handed to the Applicants by the then tenant. As a result of this, the Applicants contacted the Agents and (i) were sent a copy of the invoice showing the incorrect address, and (ii) advised the Agents of their correct home address. Consequently, the Applicants understood the Agents then to have their correct address and that future ground rent would be paid upon receipt of an invoice for the amount due.

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Holt and Sellars contend:-

1) The costs sought by the Respondents are variable administration charges within the meaning of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

2) The Applicants do not believe the costs should be payable by them on the grounds that the Agents failed to send a demand/invoice for the ground rent due on 24th June 2003 to the Applicant's correct address.

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4) In the alternative, if it is considered some monies are due (which is not accepted by the Applicants), then the sums claimed are unreasonable.

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vii. In respect of the Applicants' application under Section 20C of the Landlord and Tenant Act 1985, the Tribunal orders that all of the costs incurred (or to be incurred) by the Respondents in connection with the current proceedings are not to be regarded as relevant costs (as defined by Section 18 of that Act) to be taken into account in determining the amount of any service charge (as also defined by Section 18 of that Act) payable by the Applicants.

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Chairman

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