BIR/OOCN/LVA/2004/0001
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Decision of the Leasehold Valuation Tribunal in respect of applications for:

(i) 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

119 Berryfield Road, Sheldon, Birmingham B26 3UN

Mrs M Bennett (Applicant)

and

Martinvale Developments Ltd (Respondents)

Background:

On the 2nd February 2004, the agent acting on behalf of the tenant of the subject property, Mrs M Bennett ("the Applicant") 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 agent acting on behalf of the landlords, Martinvale Developments Ltd ("the Respondents"), it was agreed that the matter would be dealt with by means of written submissions.

By Directions issued on 19th April 2004, both parties were, inter alia, (i) invited to submit their principal case to the Tribunal by 7th May 2004, and following exchange of those documents, their reply to the other party's principal case by not later than 11th June 2004, and (ii) advised that the principal case and reply of each party would be regarded as that party's complete case. Consequently, any correspondence or submission after that date is inadmissible.

Evidence for the Applicants:

In summary, the case submitted by the agent for the Applicant, Paul Rocky FRICS (supported by appropriate documentation and copy correspondence) is: -

(i) The lessee holds the property by virtue of a lease dated 17th February 1950, for a term of 99 years from 25th December 1949 at a current (fixed) ground rent of £6.50 per annum.

(ii) The Applicant acquired the property with her late husband in May 1954, at which time the property already had a small lean-to conservatory at the rear, erected by the previous owner (believed to be the original lessee).

(iii) Although unable to produce specific evidence that the freeholder's consent had been obtained for these works due to the fact that they were carried out between 46 and 54 years ago, the Applicant believes that: (i) consent had already been obtained for the construction of the conservatory prior to the purchase of the property in May 1954, and (ii) her husband had obtained consent from the then freeholder (not the Respondents) for the formation of the opening between the two living rooms in 1958.

(iv) Since May 1954, the Applicant believes there has been a change in the ownership of the freehold on two or three occasions; the present owners having acquired it around 1982. This reinforces the possibility that records of consent could have been mislaid by successive freeholders. Nevertheless, the present freeholders acquired their interest in the property many years after the works had been carried out, and therefore must be deemed to have acquired it with the alterations and extensions in place. As such they should not be entitled to seek a fee ("administration charge") for retrospective consent, when there is considerable uncertainty as to whether such consent had already been given around fifty years ago. By acceptance of the transfer of the freehold interest they were deemed to have given implied consent for the works – whether or not there was any previous and specific consent for them. Most reasonable landlords who were second or third owners of the freehold would give the benefit of the doubt to a tenant under the circumstances of this case, given that:

- not only has there been no damage to the security, but in fact there has been a modest enhancement, and

- there is uncertainty as to whether consent was obtained for the works and doubt about its availability due to the passage of time, change of landlord, and the death of Mr Bennett.

(v) Even if it was certain that no consent had been obtained for the works, a fee of £50 would be more than adequate given that the inspection which gave rise to the administration charge was intended to be for the purposes of providing a valuation of the freehold which the applicant had expressed an interest in acquiring. As such, the same inspection could have been used for both purposes and merely one letter would have been necessary to remedy the alleged breach of covenant (the freeholder being entitled – if a Notice of Claim had been served

subsequently – to receive a valuation fee of the order of £250 - £275 under the provisions of the Leasehold Reform Act 1967).

(vi) By charging £250 for rectification of the alleged breach of covenant and potentially another £250 - £275 for the valuation of the freehold, the Respondents would effectively be in a position of charging total fees of around £500 resulting from one short inspection at the property. This was considered excessive and unreasonable.

(vii) The Respondents did not inform the Applicant of her rights under Schedule 11 4 (1) of the Commonhold and Leasehold Reform Act 2002, and in particular, that she was entitled to challenge the amount demanded by way of administration charge if she considered it excessive.

(viii) The demand for the administration charge was sent by the freeholder's agent, Mr D W S Fell of The Dennis Fell Companies on 6th November 2003. As part of that demand, it was indicated that once the payment of £250 had been made, then a figure for the freehold could be quoted (the original purpose of the approach by the Applicant). Following a reminder on 18th November 2003, a cheque for £250 was then forwarded by the Applicant's solicitors, Messrs Prior Cumberlidge & Pugh on 26th November with a covering letter enquiring, amongst other things, as to the terms on which the freeholders might be prepared to negotiate the sale of their interest to the Applicant, outside the terms of the Leasehold Reform Act 1967. This prompted a response granting retrospective consent regarding the conservatory and the enlargement of the lounge and dining room into one room. The letter of 26th November did not say that they had advised their client to pay the sum demanded; it said that "our client has instructed us to forward"(the cheque). Consequently, it was not accepted that the Applicant or her solicitors had actually agreed the fee asked for by the freeholder.

(ix) On 16th December, the Respondents' agent wrote to Prior Cumberlidge & Pugh asking for a remittance on account of the formal valuation of £125, to which the solicitors responded on 18th December indicating that they had no further instructions in the matter and were no longer instructed.

(x) In support of his argument that the freeholders in this instance were being unreasonable, Mr Rocky referred to two other cases he had dealt with involving the same freeholder or associated companies where high and unreasonable fees had ben levied in very similar circumstances. The properties in question were 56 Westbrook Avenue, Aldridge and 5 Raven Close, Hednesford.

(xi) In the early part of this year, the Applicant consulted the Citizens Advice Bureau and Paul Rocky was asked to advise her in the matter.

Mr Rocky therefore contends:-

1) The charge for retrospective consent for the works was unreasonable and excessive.

2) The Respondents did not comply with the terms of the Commonhold and Leasehold Reform Act 2002 in relation to advising the Applicant of her rights.

3) It is quite possible that consent for the alteration and small conservatory had already been obtained but due to change of freehold ownership and the death of the original tenant, records had been mislaid. Consequently, when the Respondents acquired the freehold interest, the extension and alterations had taken place and therefore they accepted the freehold interest of the property in the state that it was then and is now. They should not therefore be entitled to demand a fee for retrospective consent as, by acceptance of the transfer of the freehold interest, implied consent was given whether or not there was previous consent for the work.

4) That the Tribunal should find that the fee paid by the Applicant to the Respondents should be reduced to nil and the amount already paid should be returned in full.

Evidence for the Respondents:-

In summary, the case submitted on behalf of the Respondents by Mr D W S Fell of The Dennis Fell Companies (supported by appropriate documentation and copy correspondence) is: -

(i) The application is not for the determination of the liability to pay the administration charge, but an application to vary the amount of that charge. As such, the liability to pay has been admitted but the amount of the fee is in question.

(ii) The relevant clause of the lease (Clause 2 [10]) stipulates,

> *"That the Lessee will not at any time during the said term without the licence in writing of the lessors first obtained erect or suffer to be erected any new buildings on the said premises or make or suffer to be made any alterations or additions whatsoever in or to the said premises or any buildings which may be erected on the said premises without such licence as aforesaid either externally or internally or make any alteration in any boundary".*

The covenants in the lease are for the benefit of both the lessor and the lessee and normally a formal application would be made to the freeholder for consent to carry out any appropriate works – as provided for by Clause 2 (10). In the current case, no formal application had been made and therefore, retrospective consent was required when the existence of the alterations came to light. The cost of inspection would be similar if it had been made at the time the works had been carried out and the formal consent given – there being no penalty applied for retrospective consent .

(iii) In this instance, the Applicant was advised and represented by her solicitors, and no doubt they would have advised her of her rights. Equally, they no doubt considered the fee for retrospective consent to be reasonable in their advice, given that it was paid via their office.

(iv) The Respondents receive a large number of requests for the price of the freehold of property they own each week. In order to carry out such valuations, inspections have to be undertaken in order to assess the relevant value and as only about 10 per cent of all inquiries actually lead to the sale of the freehold, a fee is required to cover the costs and expenses of visiting each individual property and carrying out the relevant valuation. In the event of the sale being completed, the fee which has been paid is credited to the valuation and sale price. In earlier years no initial fee was charged but when it became clear that many inquirers were simply attempting to obtain a quote without any real intention of proceeding, a fee of £50 was introduced, which had been increased over the past 30 years to the fee of £250 – £275 charged now. The suggestion by the Applicant's agent that £50 would be ample to carry out the inspection of the property under the terms of the lease is not reasonable in view of the time and expense taken to visit the property and report.

(v) There is no question of a total bill of £500 for dealing with this matter. The fee agreed and paid of £250 was purely for complying with the terms of the lease and the necessary work allied thereto.

(vi) Although the Applicant believed that as a solicitor had dealt with the original purchase on her and her husband's behalf, consent had no doubt been given for the construction of the conservatory, there is no evidence with the Applicant's deeds that any such consent was granted – nor is there any evidence of any plans or permission. No applications had been received and no previous grant of retrospective consent had ever been made for the works.

(vii) The costs and fees charged are commensurate with the appropriate breaches of covenant. The charges include visiting and surveying the property, travelling and correspondence and giving appropriate consent. As such, they are considered reasonable in all the circumstances, especially as if the lessee dealt with the leasehold covenants in the first place, such problems would not arise.

(viii) In connection with the two cases cited by Mr Rocky involving 56 Westbrook Avenue, Aldridge and 5 Raven Close, Hednesford, the applicants in both cases were advised by Mr Rocky and their respective solicitors. The fees were agreed following negotiation and Mr Rocky dealt subsequently with the formal Notices of Claim in each case to purchase the freehold under the Leasehold Reform Act 1967.

(ix) In Schedule 11 Part 2 Section 4 (a) of the Commonhold & Leasehold Reform Act 2002, it states that no application may be made in respect of a matter which has been agreed or admitted by the tenant. In the current case, evidence has been supplied that the tenant and her solicitors had agreed and admitted the claim and asked for retrospective consent – as evidenced by the letter from the Applicant's solicitors dated 26th November 2003. As a consequence, formal consent was given on behalf of the freeholders on 27th November 2003. In view of this, the application such be rejected.

Mr Fell therefore contends:

1. the costs claimed are reasonable and there should therefore be no alteration in the agreed fee already paid.

2. the applicant's solicitors were advising her of her rights in this matter.

3. there is no copy of any notice with the applicant's Deeds or the freehold deeds of any consent for the works which have been carried out.

4. no inspection of the property was made at the time of acquisition as this included a large number freehold purchases simultaneously.

5. The Applicant and her solicitors have agreed and admitted the claim.

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 –
>
> (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,.....
>
> (d) in connection with a breach or alleged breach of a covenant or condition in his lease."

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 in the present case, the application of this definition is reinforced by the use of the request by Mr Fell in his letter to Mrs Bennett of 18th November 2003 for *"a remittance for the outstanding breach of covenants..."*.

Paragraph 2 then goes on to stipulate that a variable administration charge is payable only to the extent that the amount of the charge is reasonable. Paragraph 5 (1) 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 Applicant (which is a variable administration charge for the purposes of Schedule 11) and the timing of the application (after 30th September 2003), the Tribunal is satisfied it has jurisdiction to hear the applications.

Accordingly:

i. The Tribunal finds that the costs sought by the Respondents are variable administration charges within the meaning of Schedule 11 to the 2002 Act.

ii. In relation to the contention by the Respondents' agent that the Applicant and her solicitor had agreed and admitted the matter and were therefore precluded from making an application to the Tribunal under Schedule 11 Part 1 Paragraph 5 (4) of the Commonhold & Leasehold Reform Act 2002, the Tribunal does not accept that view.

   The quoted sub-paragraph specifies that no application under sub-paragraph (1) may be made in respect of a matter that has been agreed or admitted by the tenant. This therefore poses the question as to whether the Applicant or her solicitors had actually agreed or admitted that retrospective consent was necessary for the works carried out at the property approximately fifty years ago. This has to be considered in the context of the other relevant provisions of Paragraph 5 – in particular sub-paragraph (2) which provides that the right to make an application *"applies whether or not any payment has been made"*, and also, sub paragraph (5) which makes it clear by qualifying the preceding sub

paragraph (4) - cited by Mr Fell – *"But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment".*

In the present case it is clear from the evidence presented that the Applicant paid the demanded fee of £250 in order to progress the possible purchase of the freehold, it having been made clear in correspondence from the freeholders' agent that the one was conditional on the other (see the final paragraph of the letter from Mr Fell to Mrs Bennett of 6th November 2003, *"In the circumstances can you please let us have a remittance in the sum of £250. Upon receipt of this we will then be in a position to quote you terms for the sale of the freehold interest."* In their covering letter of 26th November enclosing the requested cheque for £250 the Applicant's solicitors simply refer to the fact that their *"client has instructed us to forward the enclosed cheque for £250 to you and we should be pleased if you would let us have in return formal consent to the conservatory and the enlargement of the lounge and dining room into one room "*. (The letter then goes on to ask for terms to be quoted for the sale of the freehold to their client.) It will be noted that the wording of the letter does not agree or admit anything; it simply states that the solicitors have been instructed to send the requisite cheque and the following request again serves to reinforce the view that payment of the £250 was seen by the Applicant as a precondition to obtaining a quotation for the freehold.

There is no indication or statement in any of the evidence submitted to the Tribunal that the Applicant agreed or admitted the matter, and the Tribunal does not therefore accept the contention by Mr Fell that the Applicant is precluded from making the application(s).

iii. The contention by Mr Rocky that the charge made was unreasonable and excessive only arises if a liability to pay an administration charge is established.

iv. The submission by Mr Rocky, that a summary of the Applicant's rights and obligations in relation to administration charges was not forwarded to the Applicant with any of the correspondence in November 2003 is accepted by the Tribunal. In this case, the demand for payment of the administration charge was dated 6th November 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.

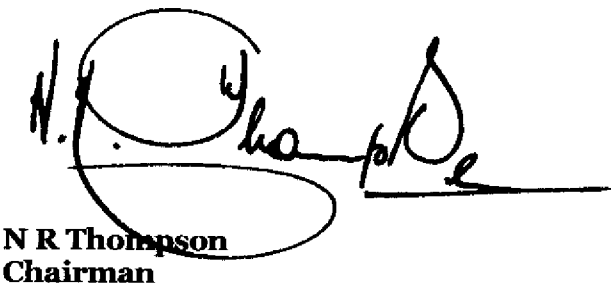
The Tribunal therefore finds that the demand for payment dated 6th November 2003 by the Respondents' agent was invalid so far as the provisions of Schedule 11 are concerned, and that the Applicant was

therefore entitled to withhold payment of the administration charge demanded.

Consideration of the questions of the reasonableness and quantum of any costs payable by the Applicant, as well as that of whether or not the freeholders' consent had been given (either expressly or by implication) for the works at the property, do not therefore arise, as the Applicant is not in any event liable to pay the administration charges sought by the Respondents. Consequently, as the application before the Tribunal is for the variation of the administration charge, it is ordered that the charge be reduced to nil.

v. 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 6th August 2004.

vi. In respect of the Applicant's 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 Applicant.



N R Thompson
Chairman

Date: 13th July 2004