UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 1 (LC)
LT Case Numbers: LRX/33/2011
LRX/34/2011
LRX/76/2011
LRX/102/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – administration charges – charge for consent to underletting – whether precluded by statute – held that it was not – whether precluded if no provision for it in lease – held that it was not – reasonableness – Landlord and Tenant Act 1927 s 19(1)(a) and(b) – appeals allowed

IN THE MATTER OF APPEALS AGAINST DECISIONS OF LEASEHOLD VALUATION TRIBUNALS FOR THE EASTERN RENT ASSESSMENT PANEL

BETWEEN HOLDING AND MANAGEMENT (SOLITAIRE) LIMITED Appellant

and

CHERRY LILIAN NORTON Respondent

Re: 9 Mortimer Way
Witham
Essex CM8 1SZ

BETWEEN SAMNAS LIMITED Appellant

and

JESSICA RUDNAY Respondent

Re: 20 Marshall Road
Banbury
Oxon OX16 4QR

© CROWN COPYRIGHT 2012

BETWEEN **FLAMBAYOR LIMITED** **Appellant**

and

ANDREW HILL **Respondent**

Re: 17 Boroughbridge
Oakhill
Milton Keynes MK5 6FY

BETWEEN **HOLDING AND MANAGEMENT (SOLITAIRE) LIMITED** **Appellant**

and

JAMES KNIGHT **Respondent**

Re: 3 Shelley Court
46 London Road
Reading RG1 5DG

Determinations on written representations

No cases referred to

DECISION

1. These four appeals arise from decisions given in almost identical terms on applications under paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 in relation to administration charges made by landlords. The LVT panel was the same in each case. The issue in each case is whether the landlord has the right to charge the tenant a fee for consenting to the underletting of the property. There are two particular questions, raised because of the basis on which the LVT determined the applications: the first, which arises in all four cases, concerns the construction and application of section 19(1)(b) of the Landlord and Tenant Act 1927; and the second, which arises in two of the cases, concerns the construction and application of section 19(1)(a).

2. The short facts relating to each of the appeals are these (I will refer to them for short as *"Norton", "Samnas", "Flambayor"* and *"Knight"*):

(a) In *Norton* the respondent holds the subject property for a term of 155 years from 1 December 2004 as successor in title under a lease dated 25 February 2005 made between Barratt Homes Limited ("the Developer"), Jason John Watson ("the Lessee") and the appellant ("the Company"), under which the Developer demised to the Lessee a newly-built flat. The consideration was stated to be the payment of "the Premium", which was specified as £123,295. The Lessee's covenants were made with the Company, and they included a covenant not to underlet the property without the consent of the Company, such consent not to be unreasonably withheld (paragraph 9(c) of the Third Schedule), and a covenant "To pay all reasonable costs and expenses of the Company (including all solicitor's and surveyor's costs and fees) incurred in granting any consent under this Lease" (paragraph 16 of the Third Schedule). The respondent, wishing to underlet the property, sought the consent of the appellant, who sought to charge her a fee of £105 for this (as well as £75 for the preparation of a deed of covenant and £75 for registration of the underletting).

(b) In *Samnas* the respondent holds the subject property for a term of 125 years from 1 January 2006 under a lease dated 30 March 2007 from Barteak Developments Limited. The appellant is the successor in title of Barteak Developments Limited. The property was newly built. The demise was stated to be in consideration of the Premium, which was specified as the sum of £122,000, and the rents and covenants reserved by the lease. There is a covenant with the landlord, clause 4.3.2, not to underlet without the landlord's written consent, such consent not to be unreasonably withheld. Under clause 4.4 the tenant is required within four weeks after any underletting to give notice in writing and deliver to the landlord or its solicitors a certified copy of any instrument of underletting and to pay to the landlord's solicitors a reasonable fee, not being less than £40, for the registration of any such notice. The respondent, wishing to underlet the property, sought the consent of the appellant, who sought to charge her a fee of £105 for this (as well as £75 for registration of the underletting).

(c) In *Flambayor* the respondent holds the subject property for a term of 125 years from 1 July 2005 under a lease dated 3 May 2007 from Fairclough Homes Limited. The property was newly built. The demise was stated to be in consideration of the Premium, which was defined as the sum of £166,000, and the rent reserved by the lease. Also a party to the lease was Oakhill View Management Company Limited. There is a covenant, enforceable by the lessor and the management company (paragraph 25.2), not to underlet the demised premises without the prior written consent of the lessor and the management company, such consent not to be unreasonably withheld or delayed. The respondent, wishing to underlet the property, sought the consent of the appellant, who sought to charge her a fee of £135 for this (as well as £75 for registration of the underletting).

(d) In *Knight* the respondent holds the subject property for a term of 125 years from 1 April 1998 under a lease dated 18 December 1998 from Barratt Homes Limited. The respondent is successor in title to the tenant under the lease. The property was newly built. The demise was stated to be in consideration of the Premium, which was defined as the sum of £104,995. The appellant was also a party to the lease. Under paragraph 8.2 of Schedule 4 Part II of the lease the tenant covenants with the landlord, the management company and the other tenants or owners of the 39 flats forming part of the estate being developed by the landlord not to underlet the demised premises without the consent in writing of the management company, such consent not to be unreasonably withheld. Under paragraph 8.3 there are notification and other requirements where there is an underletting other than one at a rack rent without charging a premium and for a period not exceeding seven years. The respondent let the property under an assured shorthold tenancy agreement from 28 January 2010 at a rent of £750 per month, and the appellant sought from him a fee of £135 for consent to an underletting and a notice fee of £75.

3. In each case the LVT held that the landlord was not entitled to charge a fee in respect of its consent to the underletting. (In *Norton* it also held that £75 for the deed of covenant was unreasonable and that £75 for registration was unreasonable but that £50 would be reasonable; in *Samnas* it held that £75 for registration was unreasonable, but that £40 would be reasonable; and in *Flambayor* it held that £75 for the registration of a shorthold tenancy was unreasonable and not payable; and in *Knight* it held that, since the property was let at a rack rent for less than 7 years, the lease itself excluded the registration process. Nothing arises in relation to these parts of the decision.) In *Norton* the LVT concluded that, despite the covenant in the lease for payment of the reasonable costs of granting consent, the landlord was precluded from charging for such consent by the provisions of section 19(1)(b) of the 1927 Act. It applied this reasoning in the other three cases also, but in addition in *Samnas* and *Flambayor* it held that, in any event, neither lease contained any provision entitling the landlord to charge for consent to underletting; and it concluded that section 19(1)(a) had no application in the absence of such a provision in the lease. In each case the tribunal granted permission to appeal against its decision on the entitlement of the landlord to charge a fee for consent to underletting.

4. Section 19(1) 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; and

(b) (if the lease is for more than forty years, and is made in consideration wholly or partially of the erection, or the substantial improvement, addition or alteration of buildings, and the lessor is not a Government department or local or public authority, or a statutory or public utility company) to a proviso to the effect that in the case of any assignment, under-letting, charging or parting with the possession (whether by the holders of the lease or any under-tenant whether immediate or not) effected more than seven years before the end of the term no consent or licence shall be required, if notice in writing of the transaction is given to the lessor within six months after the transaction is effected.

5. The first matter that arises (the one that is common to all three appeals) is the construction and application of section 19(1)(b). In *Norton* the LVT in its conclusions said this:

> "22. The provisions contained in the 1927 Act are there because Parliament clearly felt that it was unreasonable for someone to pay a large capital sum for a long lease of part of a new or substantially adapted building and then for the freeholder to put obstacles in the way of that person being able to sublet what he or she had paid for. There is virtually no risk to a freeholder in the event of a subletting. The lessee remains liable to comply with the terms of the lease including not allowing a nuisance and the payment of ground rent and service charges.
>
> 23. It may be suggested that there is no mention in the lease itself that part of the consideration for the lease was the erection of a building. However, this property is referred to by plot number and the landlord is still Barratt Homes from which it can be inferred that the building was new because not all the flats had been let. If they had the freehold title would have been transferred to the respondent.
>
> 24. In this Tribunal's experience, the fact that the premium and rent were being paid for the new building and lease of part thereof would have been set out in the contract for sale. These circumstances lead the Tribunal to decide, on the balance of probabilities, that part of the consideration was for the new building and Section 19 of the 1927 Act is therefore engaged.
>
> 25. It is interesting to note that the Respondent's statement to the Tribunal and its correspondence in the bundle acknowledges that the 1927 is relevant but fails to deal with the point put to it clearly by the Applicant that Section 19(1)(b) applies. There is

> certainly no suggestion that part of the consideration for the lease was not for the erection of the building.
>
> 26. Thus, despite what is in the lease, the provisions as to the obtaining of the freeholder's consent are expressly excluded by the 1927 Act and no fee can therefore be charged for this."

6. In the other three decisions these paragraphs were reproduced, although they were numbered differently and paragraphs 23 and 25 were modified, paragraph 23 so that it referred to the fact that the lease provided that no service charges were payable until the lease had been completed rather than to Barratt Homes and the letting of other flats. In *Flambayor* paragraph 25 was expressed in the following way:

> "It is interesting to note that the Respondent's statement to the Tribunal acknowledges that Section 19 of the 1927 is relevant in that it allows a lessor to charge for a consent to sub-let but it asserts that Sub Section 19(1)(b) does not apply because, amongst other things, *"this lease is not what is known as a 'building lease' which imposes an obligation on the tenant to build'.* With respect to the Respondent, the Sub Section makes no mention of the tenant having an obligation to build. The Respondent may think that this is what was intended, but this is not what it says."

7. The LVT was in my judgment in error in these paragraphs. Under section 19(1)(b) the question in each case is whether the lease was "made in consideration wholly or partially of the erection, or the substantial improvement, addition or alteration of buildings". The consideration in respect of which the lease was made was the consideration moving from the tenant to the landlord for the grant of the lease. As expressed in the demise, what the tenant gave in *Norton* and *Knight* was the premium, in Samnas the premium and the covenants under the lease, and in Flambayor the premium and the rent. What the tenant in each case received for this consideration was the lease, a 125 year term (in *Norton* a 155-year term) in a building newly erected by the landlord. The fact that the building was newly erected is of no relevance to the application of section 19(1)(b) in these circumstances. What that provision is concerned with, as the written submissions on the part of the appellant point out, is the situation where the *tenant* is required as the whole or part of the consideration for the lease to erect or substantially improve or add to or alter a building. It would typically be a building lease (defined, it may be noted, in section 205(1)(iii) of the Law of Property Act 1925 as a lease for the purposes of erecting or improving or adding to or repairing a building). The rationale for the provision is that the lessee under the building lease, having carried out the work that formed all or part of the consideration of the lease, should not be inhibited in assigning the lease or creating an underlease. Having created the new or improved building as required by the lease, he should be allowed to assign or underlet without restriction. There would be no reason at all for conferring on a tenant who was not required as part the consideration for the lease to carry out building works carte blanche to underlet simply because the lease was a lease of a new or improved or altered building.

8. In *Norton* there is a specific covenant that requires the lessee to pay "all reasonable costs and expenses of the Company (including all solicitor's and surveyor's costs and fees) incurred

in granting any consent" under the lease. Since section 19(1)(b), for the reasons that I have just given, does not operate so as to prevent the enforcement of this covenant, the appellant is thus able to make a charge for the reasonable costs and expenses it incurs in granting consent to the underletting. In none of the other cases does the lease make specific provision for a charge for consent to underletting. In *Samnas* and *Flambayor* the LVT considered whether there were any general provisions in those leases that had the effect of entitling the landlord to make such a charge, and it concluded that there were not. I do not disagree with this. That, however, is not an end of the matter. Each lease entitles the landlord to withhold his consent to an underletting, provided that he does not do so unreasonably. Consequently, if it is not unreasonable for the landlord to seek a payment for the costs that it incurs in consenting to such an underletting, it will not be unreasonable for it to withhold consent if such payment is not made. The question is whether the charge that is sought to be made is reasonable.

9. Section 19(1)(a) provides that the statutory proviso that consent is not to be unreasonably withheld does not preclude the landlord from charging a reasonable sum for his consent. The appellants in each case relied on this provision in seeking permission from the LVT to appeal. The LVT paraphrased section 19(1)(a) as saying that permission to underlet "shall not be unreasonably withheld and that the landlord can charge any legal or other expenses for the granting of such permission." It said that the provision had no application because in each case section 19(1)(b) applied so as to prevent the making of any such charge. It is not right in my view to say that section 19(1)(a) confers on the landlord the right to make a charge. What it says is that the proviso (that consent is not to be unreasonably withheld) 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 consent. There is an argument, which appears to have found favour in other LVT cases, that the effect of this provision is simply to preserve any right conferred by the lease to make a charge. While it clearly does have this effect (and thus recognises, for instance, that the *Norton* covenant to pay a charge for consent is effective) it is not in my judgment restricted in this way. For the reasons given in the previous paragraph the withholding of consent would not be unreasonable if the lessee refused to pay a reasonable charge for it, and section 19(1)(a) makes clear that such a charge is not precluded.

10. Under paragraph 1(1) of Schedule 11 to the 2002 Act "administration charge" for the purposes of the Schedule is defined as an amount payable by a tenant as part of or in addition to the rent which is payable, directly or indirectly, (inter alia) for or in connection with the grant of approvals under his lease. The charge for consent to the underletting is thus an administration charge, provided that is it reasonable. If it is not reasonable, it would be unreasonable to withhold consent if the charge was not paid; and the charge would not be payable. Under paragraph 1(3) 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 in the lease. If the charge for consent to the underletting is an administration charge it is thus a variable administration charge for the purposes of the Schedule. Paragraph 2 provides that a variable administration charge is payable only to the extent that the amount of the charge is reasonable. My conclusion, for the reason that I have given, is that the LVT was wrong to conclude in each case that the appellant was not entitled to make a charge for the costs incurred in consenting to underletting. The issue that remains to be determined is that of reasonableness: whether the payment sought in each case (£105 in *Norton* and *Samnas*, £135 in *Flambayor* and *Knight)*) is reasonable; and, if it is not, what lesser amount if any would be

reasonable. The parties are now invited to make further submissions on this issue. Such submissions must be sent to the Tribunal and to the other party in each case within 21 days of the date of this decision.

Dated 5 January 2012

George Bartlett QC, President

Further Decision

11. I have now received submissions on the reasonableness of the administration charge sought for consent to the underlettings. Submissions have been made on behalf of the landlords in each case and by or on behalf of the respondents Mrs Norton, Dr Rudnay and Mr Hill.

12. It is pointed out that the £105 sought in *Norton* and *Samnas* was for advance consent and the £135 sought in *Flambayor* and *Knight* was for consent where no application had been made by the lessee with consent being granted retrospectively. It is said that in each case an application for consent is processed by the appellant's agents. The procedure adopted is claimed to be extensive: the agents will undertake a perusal of a copy of the under-lease to ensure that the appropriate covenants are contained within it. Once completed, the full details of the under-lease will be entered by the agents in their records and will pas the appropriate information to the property managers, who need a complete current record of the occupants of all the flats.

13. In each case, it is said, the work comprises: (i) seeking legal advice from in-house lawyers in connection with the drafting of all documents; (ii) perusing each lease and determining the requirements for consent under it; (iii) requesting the proposed tenancy documents, examining them, and ascertaining appropriate requirements; (iv) engaging in correspondence, email communications and dealing with telephone queries; (v) the execution of documents, such as the recording of all information, utilisation of IT infrastructure and lease storage and retrieval.. After the grant of consent all documents are scanned onto the appellants' database. In each case the work involved is undertaken by trained administrators under the supervision of qualified legal staff. It is not possible, when so many applications have to be processed, to set either an hourly rate or a charge out rate. It is estimated, however, that an administrator will spend approximately two hours dealing with the application and the legal department about one hour.

14. Mrs Norton said that she had never contested the fee for the preparation of a deed of covenant and had reached agreement with the appellant prior to the LVT hearing that the fee for registration should be limited to £30 plus VAT. She took issue with the charge for consent, however. All that was necessary to ensure compliance with the covenants in the lease was for the underlessee to enter into a deed of covenant, as required by paragraph 9(d) of the Third Schedule to the lease to observe and perform the covenants and conditions in the lease. The lease specifically precluded the insertion of covenants other than this where the underletting was a shorthold tenancy. There was thus no need for the lease to be perused, nor was there any need for the appellant even to see a copy of the tenancy agreement, since it was sufficient that the deed of covenant had been entered into. For the same reason there was no need for a review of the documentation by the legal department. Mrs Norton suggested that the consent aspect of the process, consisting of reviewing the deed of covenant and issuing a consent letter should take between ten and twenty minutes. In its statement of case to the LVT the appellant had suggested a fee of £150 for three hours work. At the same rate the fee for ten or twenty minutes' work would be £8.33 or £16.67, and even if it was held necessary to review the tenancy agreement, an additional 55 minutes at the appellant's suggested rate would add £45.83 to the fee..

15. Dr Rudnay said that under her lease the only obligation was to give notice within four weeks of the underletting. It could not be seriously suggested that the landlord would obtain his own references on a tenant already in occupation under a shorthold tenancy agreement. Her letting agents, Stepping Stones of Banbury were an experienced firm of repute and integrity, who introduced the tenant, obtained references and managed the necessary finances. The landlord had no advance knowledge of the tenant's identity or the agreed terms. There could be no purpose, nor any benefit to the landlord, in carrying out an expert's scrutiny of a familiar standard form assured tenancy agreement drafted by lawyers for a reputable agent. In the circumstances of her lease her estimate of the justifiable administration costs for such a tenancy was just over £50 excluding VAT.

16. Mr Hill said that in his original correspondence with Flambayor he made an offer of £40 for the granting of consent, but this was declined. The way in which payment was sought for the granting of consent was inequitable. The lease, whilst stating that consent must be obtained, set out no criteria for the type of tenant that would be acceptable, and the consent was a mere formality.

17. The appellants seek to justify the consent fee in terms that apply to all consents, and they do so by setting out (see paragraph 13 above) a list of work that, it is claimed, their agents do. It looks to me to be a list of all the things that could conceivably be done in connection with the grant of consent rather than the things that would need to be done in a typical case or that were in fact done in the cases under consideration. I agree with Mrs Norton that in relation to her shorthold tenancy agreement there was no need for the lease to be perused and that, in view of the covenant, there was no need for the tenancy agreement to be examined or for the documentation to be reviewed by the legal department. I am wholly unpersuaded by the appellant's assertion that it would have been necessary for an administrator to spend approximately two hours dealing with the application and the legal department about one hour. In the absence of any information on the part of the appellant as to what was actually done, by

whom and how long it took, I am not satisfied that a fee of £105 for the grant of consent in addition to fees for the covenant was justified or that consent could reasonably have been refused in the event that Mrs Norton had refused to pay it. The same goes in relation to Dr Rudnay. Doing the best I can on what is before me, I conclude that a fee greater than £40 plus VAT could not be justified, and I determine that this amount is payable. In relation to the other two cases a fee of £135 was sought – higher than the £105 because, it was said, the consent was a retrospective one. The appellants have done nothing to show that in these two cases extra costs were incurred. I therefore determine that the amount payable in each case is £40 plus VAT.

Dated 15 February 2012

George Bartlett QC, President