

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/00XH/LAC/2009/0006

DECISION AND REASONS

Application : Schedule 11 of the Commonhold and Leasehold Reform Act 2002 as amended (“the 2002 Act”) and section 20C of the Landlord and Tenant Act 1985 (“the 1985 Act”)

Applicant/Leaseholder : Mr Henning Madsen

Respondent/Landlord : Peverel Freeholds No 5 Limited

Premises : 22 Britten Road, Abbey Manor, Swindon, SN25 2HQ

Date of Application : 13 July 2009

Date of Directions : 16 July 2009

Hearing : determined on the papers without a hearing

Members of the Tribunal : Mr P R Boardman JP MA LLB (Chairman), and Mr A J Mellery-Pratt FRICS

Date of Tribunal’s Decision and Reasons : 7 December 2009

Introduction

1. The Applicant/Leaseholder stated in his application that the grounds of his application were :
 - a. the consent fee to sublet his flat was unreasonable
 - b. it was unreasonable that he had to pay £75 for each new tenant or when a tenancy expired
 - c. he wished to make an application under section 20C of the 1985 Act

The Applicant/Leaseholder’s lease

2. The material parts of the lease dated the 28 September 2007 were as follows :

Eighth Schedule [Tenant’s covenants] :

25 Not at any time during the term

25.2 underlet the.....Premises without the prior written consent of the Manager or its agents (such consent not to be unreasonably withheld or delayed) provided always that such underletting shall be by means of either an assured shorthold tenancy agreement or any other form of agreement which does not create any rights of tenancy for the tenant after the term of any such agreement shall have expired and also to pay.....to the Manager such reasonable fee at the same time as the granting of every such consent

25.3 grant any underlease of the.....Premises without the prior written consent of the Manager or its agents (such consent not to be unreasonably withheld or delayed) and also to pay.....to the Manager such reasonable fee at the same time as the granting of every such consent

26in every underlease which may be granted to insert a covenant by the.....underlessee.....directly with the manager to observe and perform the covenants conditions and obligations on the part of the lessee.....in this lease other than the payment of the reserved rents in the case of an underletting or underlease.....

27 To give written notice.....to the Manager.....of any assignment transfer mortgage charge grant of probate letters of administration order of the court or other matter disposing of or affecting the.....Premises or devolution of or transfer of title to the same.....and also to pay.....at the same time to the Manager such reasonable fee appropriate at the time of registration in respect of any such dealing

Letter from Peverel OM 19 June 2008

3. Peverel OM stated to the Applicant/Leaseholder that the lease contained a covenant that consent had to be obtained if the lessee wished to underlet the Premises. In order to obtain that consent the lessee had to give notice of that subletting and pay a fee for its registration. The present fee was £100 plus VAT (£115). Peverel OM would normally grant consent without further enquiries in relation to any subletting of the Premises on a company tenancy or an assured shorthold tenancy of not less than six months and no more than three years. Consent to sublet together with the fee for registration of such consent was due on each renewal/reletting of an assured shorthold tenancy and on an annual basis in the case of a company tenancy
4. It had come to the attention of Peverel OM that the Premises might have been sublet. If so Peverel OM requested the Applicant/Leaseholder to complete an application form and return it with a cheque for the registration fee

Subsequent letters from Peverel OM

5. Peverel OM wrote to the Applicant/Leaseholder in similar terms on the 21 July 2008, 21 August 2008, 23 September 2008, 23 October 2008, 21 November 2008, and 30 December 2008

Letter from Estates & Management Limited 19 June 2009

6. Estates & Management Limited stated to the Applicant/Leaseholder that it had been brought to their attention that the Premises might be being sublet. The terms of the lease required consent from the Respondent/Landlord in order to sublet. Estates & Management Limited's fee for dealing with consent was £180. That's related to the period of the shorthold tenancy agreement only (maximum 12 months for a rolling tenancy). A further fee of £75 would be payable each time the tenancy agreement expired or a new tenant took occupation. Alternatively Estates & Management Limited was able to grant a global licence for which the fee would be £370. That would last for the duration of the Applicant/Leaseholder's ownership of the Premises. A further fee of £75 would only be

required for each new tenant. Where an existing tenant renewed their tenancy agreement no further fee would be payable

Letter from Estates & Management Limited 26 June 2009

7. The letter was in similar terms

Letter from the Applicant/Leaseholder 1 October 2009

8. The Applicant/Leaseholder stated that he had no further evidence to submit. He simply found the fees charged too high. All his tenants were checked by a professional letting agent to ensure that only high quality tenants lived at his property. For that he paid a professional fee. It was therefore unreasonable to have to pay a yearly fee to Peverel for having a tenant living in his property and a fee every time a new tenant moved out. The fees were in addition to the monthly management fee of £70 a month already paid to Peverel

Statement by Tabitha Sandles MSc ACMA 21 October 2009

9. Ms Sandles stated that Estates & Management Limited acted on behalf of the Respondent/Landlord and also on behalf of the Manager, Peverel OM
10. They had written to the Applicant/Leaseholder no fewer than eight times in relation to their breach of the terms of their lease in relation to underletting. There had been no response. The Respondent/Landlord had clear policies in place, principally to ensure that each lessee's rights were protected and to enable each lessee to continue to have quiet enjoyment in accordance with the terms of the leases
11. Legal advice from their in-house lawyers was sought in connection with drafting of all documentation including the licences that they offered, and the execution of such documentation incurred costs relating to staff time and additional resources required such as IT infrastructure and lease storage/retrieval. Where deeds and licenses required execution they had to be signed by two directors or a director and secretary (who were not all located at the same office). Where lessees failed to comply with the terms of their lease and obtain the necessary consents from the Respondent/Landlord and serve required notices that resulted in further administration time and related costs being incurred
12. Their fees fairly reflected the amount of time spent in dealing with the appropriate consents. In this case the fact that correspondence was totally ignored served to increase the costs. They have recently revised their fees in accordance with a recent precedent set by the Leasehold Valuation Tribunal decision dated the 24 October 2008 in connection with a similar Lease clause on subletting. Their fees were set out in their client's subletting policy
13. In the absence of any response from, or documentation being provided by, the Applicant/Leaseholder they had been unable to ascertain which of their services the Applicant/Leaseholder required and they had been unable to grant consent in relation to subletting the Premises because they could not determine whether the subletting did indeed conform with the terms of the lease. The Applicant/Leaseholder had refused until now even to confirm that he was subletting the Premises and was in breach of the terms of his lease

14. They required the following documentation from the Applicant/Leaseholder has previously requested in writing, namely a written request for consent to sublet, a completed application form, and a signed copy of the tenancy agreement
15. A standard licence was granted for individual subletting arrangements that met the requirements of the terms of the lease. These included reviewing all documentation, issuing all consent documentation, and receiving notice of transfer, together with preparing and executing relevant deeds. They believed that their fees as outlined were perfectly reasonable and indeed provided good value for lessees. Their combined renewal fees were below standard registration fees and fees for preparing and executing deeds. Registration fees were currently not less than £75 and their fee for preparing and executing a deed of covenant was currently £160
16. The Applicant/Leaseholder stated that he used a professional letting agent and paid a professional for those services. Whilst those services might be valuable to the Applicant/Leaseholder, they did not bear any relation to his compliance with the terms of his lease of which he was currently in breach. It was the Respondent/Landlord's duty to ensure that the tenancy complied with the terms of the lease and to prepare legal documentation as already clarified
17. The Applicant/Leaseholder had also stated that he believed that their fees were unreasonable because he paid a monthly management fee of £70 to his maintenance company. There was no connection between the fee he referred to, which would be payable to a maintenance company, and the fee which Estates & Management Limited would charge for lease compliance services on behalf of the Respondent/Landlord or management company. The fee referred to by the Applicant/Leaseholder would be payable to another party to carry out services to his block such as changing light bulbs, cutting grass, or arranging utility supplies to communal areas. Estates & Management Limited were not involved with such services
18. At the present time the Applicant/Leaseholder was in breach of the terms of his lease. The fees of Estates & Management Limited were perfectly reasonable and were due and payable under the terms of the lease prior to the grant of any consent to sublet
19. So far as the application under section 20C was concerned, it was not appropriate to make an order in the circumstances for the reasons already given. Also the Applicant/Leaseholder had not complied with the Tribunal's directions in that he had not supplied a formal statement of case

LVT decision relating to 25 Aura Court LON/00BE/LAC/2008/0009 21 October 2008

20. The applicant lessee in that case had granted a 12 month letting but did not appreciate that he was required by his lease to obtain consent. To do so he was required to pay £295 plus VAT for a "global" licence and a further £25 plus VAT for each letting. The lease required the lessee "to pay all reasonable costs and expenses of the [landlord] (including all solicitor's and surveyor's costs and fees) incurred in granting any consent under this lease"
21. The LVT found that legal advice would have been sought in connection with the drafting of the original licence, that the template would have been created which would require work to complete the details of the property, the lease, and the parties to the lease and that it would require execution by the landlord

22. The LVT found that the fees charged were not so high as to be unreasonable. The charge for the global licence appeared to be reasonable value for money as it afforded a licence to the applicant to sublet at any time during his ownership of the property and compared favourably with the normal option charge of £180. The fee of £25 plus VAT to record each letting did not appear unreasonable
23. The LVT made no order under section 20C

Other documents submitted on behalf of the Respondent/Landlord

24. Other documents were :
 - a. Estates & Management Limited's subletting policy, which stated that their fees included :
 - reviewing tenancy agreements to ensure that they complied with the terms of the lease and that tenants were suitable
 - issuing consent documentation
 - issuing deeds of covenant as appropriate
 - receipting notices
 - updating their database
 - storing copies
 - making changes to correspondence addresses
 - b. a form of application to sublet

The Tribunal's findings

25. The Tribunal, having considered all the evidence before the Tribunal in the round, and drawing on the Tribunal's collective knowledge and expertise in these matters, makes the following findings
26. The Respondent/Landlord can charge a fee for the granting of a licence to underlet only if the lease so provides
27. The relevant provisions in the lease are the following provisions in the eighth schedule to the lease, as referred to by Ms Sandles in her statement on behalf of the Respondent/Landlord :
 - a. paragraph 25.2, which :
 - prohibits the Applicant/Leaseholder from underletting without the prior written consent of the Respondent/Landlord or its agent
 - states that the consent is not to be unreasonably withheld
 - provides that the underletting is to be by way of assured shorthold tenancy or by way of any other form of agreement which does not create any rights of tenancy
 - permits the Respondent/Landlord to charge a reasonable fee on the granting of a consent to underlet
 - does not require the Respondent/Landlord's written consent to be by deed or to take any particular form
 - does not require the Applicant/Leaseholder or the undertenant to enter into a deed of covenant with the Respondent/Landlord or its agent
 - does not require the assured shorthold tenancy agreement to include a covenant by the undertenant to observe the terms of the lease

- does not require the Applicant/Leaseholder to give separate notice of the underletting after receiving consent
 - applies to an underletting by the Applicant/Leaseholder on an assured shorthold tenancy
- b. paragraph 25.3, which :
- prohibits the Applicant/Leaseholder from granting an underlease without consent
 - does not apply to an underletting by the Applicant/Leaseholder on an assured shorthold tenancy, in that :
 - if it had been intended that the word “underlease” should be synonymous with the word “underletting” there would have been no need for both paragraphs 25.2 and 25.3, and both words would not have appeared as alternatives in the penultimate line of paragraph 26
 - in any event, the words “grant any underlease” are, in the context of the lease as a whole, more appropriate for the granting of a long lease than for the letting to an assured shorthold tenant
- c. paragraph 26, which :
- requires the Applicant/Leaseholder to include in any “assignment or transfer of the.....Premises and in every underlease which may be granted” a covenant by the assignee, transferee, or underlessee to observe the terms of the lease except the payment of rent
 - does not apply to an underletting by the Applicant/Leaseholder on an assured shorthold tenancy, in that :
 - it would be very unusual, as the Tribunal finds, for an assured shorthold tenancy agreement to include a covenant by the undertenant to observe the terms of the lease, and clear words in the lease would be needed to impose such an obligation on the Applicant/Leaseholder
 - on the contrary, the words “assignment or transfer of the.....Premises and in every underlease which may be granted” are, in the context of the lease as a whole, and in the context of the Tribunal’s finding that the words “underlease” and “underletting” are not synonymous, more appropriate for dispositions of interests in the Premises than for the letting to an assured shorthold tenant, notwithstanding the reference to “underletting or underlease” in the exception to the requirement for the assignee, transferee, or underlessee to observe the terms of the lease
- d. paragraph 27, which :
- requires the Applicant/Leaseholder to give written notice of any “assignment transfer mortgage charge grant of letters of administration order of the court or other matter disposing of or affecting the.....Premises or devolution of or transfer of title”
 - does not apply to an underletting by the Applicant/Leaseholder on an assured shorthold tenancy, in that :
 - the list of matters requiring notice to be given is a long one, with, as the Tribunal finds, the consequent implication of being comprehensive
 - there is no express reference to underlettings in that list
 - in any event, the words “assignment transfer mortgage charge grant of letters of administration order of the court or other matter disposing of or affecting the.....Premises or devolution of or transfer of title” are, in the context of the lease as a whole, more appropriate for dispositions of interests in the Premises than

for the letting to an assured shorthold tenant, notwithstanding the reference to “other matter disposing of or affecting the.....Premises” [Tribunal’s emphasis]

28. On an application by the Applicant/Leaseholder for consent to underlet, the only relevant provisions in the lease are those in paragraph 25.2 of the eighth schedule to the lease
29. Under those provisions it is reasonable for the Respondent/Landlord or its agent to make a reasonable charge to the Applicant/Leaseholder for reasonable work actually carried out by the Respondent/Landlord or its agent in connection with that application
30. The only evidence before the Tribunal about the work actually proposed by the Respondent/Landlord or its agent in this case is in :
 - a. Ms Sandles’s statement, where she stated that the work would comprise :
 - seeking legal advice from their in-house lawyers in connection with drafting of all documentation including the licences that they offered
 - the execution of such documentation including staff time and additional resources required such as IT infrastructure and lease storage/retrieval.
 - where deeds and licenses required execution they had to be signed by two directors or a director and secretary (who were not all located at the same office)
 - where lessees failed to comply with the terms of their lease and obtain the necessary consents from the Respondent/Landlord and serve required notices that resulted in further administration time and related costs being incurred
 - b. Estates & Management Limited’s subletting policy, which stated that their fees included :
 - reviewing tenancy agreements to ensure that they complied with the terms of the lease and that tenants were suitable
 - issuing consent documentation
 - issuing deeds of covenant as appropriate
 - receipting notices
 - updating their database
 - storing copies
 - making changes to correspondence addresses
31. However, the Tribunal has found that the only requirements in the lease relating to the granting of consent to underletting are those contained in paragraph 25.2 of the eighth schedule to the lease, and that there is no requirement for the consent to be by deed, or for the tenancy agreement to contain a covenant with the Respondent/Landlord, or for the consent to be in any particular form
32. In the light of the Tribunal’s findings about the applicability and effect of paragraph 25.2 of the eighth schedule to the lease, on an application by the Applicant/Leaseholder for consent to underlet, it is :
 - a. unreasonable for the Respondent/Landlord or its agent to seek to charge the Applicant/Leaseholder for any costs incurred in connection with any alleged breach of covenant by the Applicant/Leaseholder, even an alleged breach of the Applicant/Leaseholder’s covenant in paragraph 25.2, in that :
 - costs incurred in connection with an alleged breach of covenant would be recoverable, if at all, only if the lease so provided or if a court so ordered

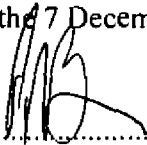
- in any event, such costs would not, by their very nature, be costs incurred in the granting of consent under paragraph 25.2, and would accordingly not be part of a “reasonable fee” for that purpose
- b. reasonable for the Respondent/Landlord to have charged to the Applicant/Leaseholder the following items of work, and for the following amounts of time in each case :
- advising the Applicant/Leaseholder of the Respondent/Landlord’s requirements and confirming the costs associated with the consent : 5 minutes
 - receiving and processing the payment of the consent fee : 5 minutes
 - perusing the draft tenancy agreement, checking that the underletting was to be by way of assured shorthold tenancy or by way of any other form of agreement which did not create any rights of tenancy, drafting written consent, and arranging for it to be signed by the Respondent/Landlord’s agent : 20 minutes
 - sending the original consent to the Applicant/Leaseholder : 5 minutes
 - lodging a copy of the consent with the counterpart lease : 5 minutes
 - total : 40 minutes
33. In relation to the charging rate, there is no evidence before the Tribunal about the hourly rate proposed to be charged by the Respondent/Landlord’s agent in connection with the granting of consent. However, drawing on the Tribunal’s collective knowledge and experience in these matters the Tribunal finds that a reasonable charging rate in all the circumstances would be £70 an hour
34. The Tribunal has found that it was reasonable for 40 minutes of time to have been charged to the Applicant/Leaseholder. 40 minutes at £70 an hour would amount to £46.66
35. However, having considered all the evidence in this case in the round, the Tribunal finds that a reasonable figure would be £50, and finds that the amount payable in respect of the consent to underlet would therefore be £50, plus VAT if appropriate
36. In making that finding the Tribunal has taken account of the findings of the LVT in the case of 25 Aura Court, but does not draw any assistance from those findings in the light, as the Tribunal finds, of the different terms of the lease in that case, and the different evidence presented
37. It has been suggested on behalf of the Respondent/Landlord that the Applicant/Leaseholder would be charged an additional fee for consent in relation to “subsequent renewals”. The Tribunal finds, in relation to underlettings on an assured shorthold tenancy in respect of which the Respondent/Landlord has already given consent, that :
- a. by virtue of the Housing Act 1988 the assured shorthold tenancy continues for so long as the tenant remains in occupation until brought to an end by an order of the court
 - b. the undertenant would accordingly continue as a periodic tenant at the end of any fixed term of the assured shorthold tenancy, and, in the absence of any other relevant factors, it would be unreasonable under paragraph 25.2 of the eighth schedule to the lease for the Respondent/Landlord to require the Applicant/Leaseholder to apply for a fresh consent to underlet to that tenant in those circumstances, or to seek to charge the Applicant/Leaseholder any extra fees for such a consent
 - c. in the event of a new fixed term assured shorthold tenancy being granted to the undertenant, that new fixed term would, on the face of it, be a new underletting requiring consent under paragraph 25.2 of the eighth schedule to the lease, but, if the terms of the new fixed term assured shorthold tenancy agreement were the same as those of the previous tenancy

agreement with that undertenant, it would not be reasonable for the Respondent/Landlord to charge any more than a nominal fee for that consent in the circumstances

- d. the amount of that nominal fee would depend on the facts of each case, but the Tribunal would be surprised if it were to exceed £25, plus VAT if appropriate

- 38. It has also been suggested that the Applicant/Leaseholder could choose to pay a “global” consent fee instead of a fee for consent to each individual underletting. That suggestion does not correspond with the provisions of paragraph 25.2 of the eighth schedule to the lease. However, it is of course open to the Applicant/Leaseholder to accept that suggestion, but, as the terms of any such agreement would be outside the terms of the lease, it would accordingly not be a matter within the jurisdiction of the Tribunal
- 39. In relation to the Applicant/Leaseholder’s application under section 20C of the 1985 Act, the Tribunal finds that :
 - a. there is no evidence before the Tribunal that any costs incurred by the Respondent/Landlord or its agent in these proceedings are costs which can be included in a future service charge
 - b. in any event, in the light of the Tribunal’s findings, it is inappropriate that any costs incurred by the Respondent/Landlord or its agent should be included in a future service charge
- 40. The Tribunal accordingly orders that none of the costs incurred by the Respondent/Landlord or its agent in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant/Leaseholder

Dated the 7 December 2009



.....
P R Boardman
(Chairman)

A Member of the Tribunal
appointed by the Lord Chancellor