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**HM COURTS AND TRIBUNAL SERVICE**

**LEASEHOLD VALUATION TRIBUNAL**

**Application for a determination as to liability to pay and reasonableness of a variable administration charge or for the variation of a fixed administration charge under Schedule 11 of the Commonhold and Leasehold Reform Act 2002.**

<b>Case number</b>	<b>BIR/00CW/LAC/2012/0010</b>
<b>Property</b>	<b>Flats 58, 100, and 113 St Cecelia's, Okement Drive, Wolverhampton</b>
<b>Applicant</b>	<b>Elizabeth Anne Hacking</b>
<b>Respondent</b>	<b>Michael Ryan</b>
<b>Tribunal</b>	<b>Mr C J Goodall, LLB, MBA Chairman Mr S Berg FRICS</b>
<b>Date decision issued</b>	<b>30 OCT 2012</b>

## **Background**

1. Mrs Hacking ("the Applicant") owns the leasehold interest in three flats at St Cecelia's, Okement Drive, Wolverhampton, which are the flats numbered 58, 100, and 113. Mr Ryan ("the Respondent") is the freehold owner of the building in which these flats, and some 116 other flats are contained ("the Flats").
2. In 2009, the Respondent issued a regulation to the Applicant (and to all the other owners of the leasehold interests in the Flats) ("the Regulation") under which he sought to impose the following obligation upon the Applicant and the other lessees:

### **"Rules and Regulations**

Whilst Lessees cannot abrogate their primary responsibility for observing and performing the covenants in their leases and are responsible for the misdemeanours of their sub-tenants, it has become essential for myself as Landlord and the Managing Agents to know full details of those persons who are occupying under such a sub-tenancy and for us to receive a copy of such sub-tenancy for which a charge will be made to cover the administration expenses etc.

Under the provisions of paragraph (4) of the Fifth Schedule of your lease the Landlord is entitled from time to time to make, add or amend regulations for the general convenience of the occupiers of the building.

Please note therefore that with effect from May 1<sup>st</sup> 2009 all and any lessees who wish to sub-let their premises shall be required to give notice to the Landlord giving details of the occupier and to supply a copy of the Tenancy Agreement and pay a fee for registration which will cover general administration of the same of £150 per annum."

3. The Regulation therefore seeks to make a charge ("the Charge") when a tenant of any of the Flats sub-lets any flat. The Applicant challenges the Charge and has brought these proceedings to obtain a ruling on whether there is provision in the lease for it and if so to challenge the need or justification for it.
4. The Tribunal did not consider an inspection was necessary, and neither party requested an oral hearing. Accordingly the Tribunal has considered the application on the basis of the documentation submitted by the parties, being the Application Form and supporting documents, Mr Ryan's statement dated 13 September 2012 with exhibits, Mrs Hacking's statement in reply dated 26 September 2012 with exhibits, a supplementary statement of Mr Ryan dated 4 October 2012, Mrs Hacking's supplementary statement in reply dated 5 October 2012, and a copy letter dated 9 October 2012 from Mr Cattell of the St Cecelia's Residents Association. The Tribunal has however not taken into account the Applicant's further statement dated 19 October 2012 as this was received after the Tribunal members had met to deliberate.

## **Issues**

5. The Tribunal has firstly to analyse the legal status of the Regulation, to consider whether it is enforceable and whether the Charge is payable by the Applicant under the authority of the leases of the Applicant's flats. If there is no power in the leases for the Respondent to claim the Charge, it is merely a unilateral demand for a payment which has no legally enforceable basis.
6. If the Tribunal considers that the Charge is due under the leases, it then has to consider whether it is an administration charge under schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the Act"), and if so whether under these statutory provisions any order should be made limiting the amount that can be claimed under the Regulation.

### **Issue 1 - Do the leases allow the Regulation to be created and the Charge to be levied**

7. The Tribunal has been provided with a copy of the lease for flat 113 and has been informed that all other leases follow the same pattern.
8. The Regulation and the Charge are not found within the lease at all. The only way in which they can be legally enforceable under the lease is if the lease allows the Respondent to impose them as a result of a clause in the lease allowing him to add obligations not contained in the lease.
9. The first provisions in the lease to consider are paras 30 and 31 of the Fifth Schedule, which are the covenants against alienation (assigning, sub-letting etc), where any restriction upon sub-letting, and obligation to pay fees for consents, would normally be found. Para 30 allows sub-letting of the whole of the flat without restriction. Para 31 requires that notice should be given to the Landlord of any sub-letting, with a copy of the sub-lease to be provided, but this obligation only applies to sub-leases if they are for a term exceeding 21 years. If any of the sub-leases which concern the Respondent are for more than 21 years, the lease already obliges a tenant to give notice, for which a landlord may charge a reasonable fee. But the Respondent here is principally concerned about short term lets at a rack rent, and the lease contains no covenants obliging the Applicant to notify the Respondent of any sub-letting, or for the payment of a fee for the registration of the creation of such an interest.
10. The second set of provisions which the Tribunal has considered are the Service Charge provisions. In summary, the Respondent insures and maintains the building and the amenities at the Flats, and he may charge for the costs of managing and administering St Cecelia's. Each lessee pays a defined proportion of the costs of such management, the figure in the lease for flat 113 being 0.84%.
11. The Respondent's case is that he is able to impose the Regulation and Charge under the authority of clause (4) of the Fifth Schedule, which provides:

**"The right for the Lessor from time to time to make add to or amend regulations for the preservation of the general amenities of the Development or any part thereof for the general convenience of the occupiers of the Building"**

- 12. The Respondent says that he needs to know the identity of a sub-tenant in order to take more control of the sub-letting to assist in preserving the amenities for the general convenience of the occupiers of the Building. He says he needs control firstly because there have been complaints about anti-social behaviour, secondly because people are parking in spaces they have no right to park in, and thirdly because insurance companies need to know the proportions of sub-let properties to quote insurance premiums.**
- 13. So far as the first and second reasons are concerned, the Tribunal does not consider that being informed of the names of sub-lessees and the terms of the sub-leases assists in the management of the Flats or the "preservation of the amenities of the Building". The Respondent has no direct relationship with any sub-tenants, and if their behaviour is sufficiently serious, the Respondent's remedy is to enforce any relevant lease covenants against the lessee, not the sub-tenants. The Tribunal notes that the leases contain a number of covenants about lessees behaviour in the Sixth Schedule, for instance covenants against causing a nuisance annoyance or disturbance (para 16), noise (para 18) unsightly washing (para 19) and unattractive curtains (para 20).**
- 14. In relation to the third reason identified, the Tribunal does consider that it is reasonable for the Respondent to obtain information about sub-letting to assist in the obtaining of competitive insurance quotes. This would normally be information that a manager of flats would seek on an informal basis, but the Tribunal does take the view that clause (4) of the Fifth Schedule is sufficiently wide to allow the Respondent to impose an obligation upon the lessees of the Flats to inform him when they sub-let.**
- 15. However, the Tribunal is also of the view that there is no right for the Respondent to impose the Charge under the authority of clause (4) of the Fifth Schedule for the following reasons:**
  - a. A clause in a lease is generally construed restrictively against a landlord where its meaning or effect is ambiguous or uncertain. Here, the clause allows the imposition of a regulation, defined in the Shorter Oxford English Dictionary as "a rule prescribed for the management of some matter, or the regulating of conduct; a governing precept or direction; a standing rule." The essence of a regulation is that it prescribes behaviour or conduct, and it is normally negative in nature. It stretches the meaning of the word too far to consider that it embraces the right to impose charges or fees.**
  - b. The Tribunal considers that the Charge (as opposed to a regulation requiring a lessee to inform the Respondent of a sub-letting) will have no value in preserving the amenities of the Development for the general convenience of the occupiers of the Building. The only purpose of the Charge might be to cover the costs of obtaining information about sub-letting for the purposes of assisting in the obtaining of insurance quotes. The Tribunal considers that the obtaining of this information is part of the general duties of management.**

- c. The general law allows the owner of an interest in land to deal with that interest (e.g by assigning, sub-letting or mortgaging) without any restriction or payment, unless there is a restriction in the lease. In the absence of any such restriction in paras 30 and 31 of the Fifth Schedule, the general law cannot or should not be circumvented by the alternative route suggested by the Respondent.

16. The Tribunal is therefore of the view that the leases do not authorise the Respondent to impose the Charge. The Tribunal should add that in its view the administrative task of receiving notification of sub-letting only justifies a nominal charge and so the actual sum charged of £150 for a notification is excessive in any event. Also, the Tribunal cannot see how an annually repeating charge can be justified in any circumstances for what would be a single notification.

**Issue 2 – Is the Charge an administration charge and what order should the Tribunal make?**

17. The Applicant has applied for a determination of the liability to pay a variable administration charge, or the variation of a fixed administration charge.
18. In the opinion of the Tribunal, bearing in mind that we have determined there is no basis for imposing the Charge under the leases of the Applicant's flats, the Charge cannot legally be enforced. It is not due from the Applicant to the Respondent and that is effectively the end of the matter. But the way we express our decision depends to an extent on whether the Charge can be an administration charge, so some consideration of this issue is required.
19. An administration charge is defined in para 1 of Schedule 11 of the Act as "an amount payable by a tenant of a dwelling". As we have decided that there is no legal basis for the Charge, it cannot be a sum "payable by the tenant of a dwelling", and so is not an administration charge. Even if it were, there are four further requirements of para 1, namely that the sum payable has to be for an approval, or for the provision of documents, or because the tenant has failed to make a payment due to the landlord, or that the payment is due in connection with a breach of the lease, and none of those apply to the Charge.
20. As the sum claimed by the Respondent is not an administration charge, the order that the Tribunal has to make is that there is no jurisdiction to determine the payability or reasonableness of an administration charge in this case. In the view of the Tribunal, the legal effect of this determination is that the Applicant has no liability to pay the Charge to the Respondent because there is no basis for it being charged under the lease.
21. In her application, the Applicant proposes an alternative form of Regulation. The reason she submitted this alternative is that if the Charge were an administration charge, the Tribunal has authority under the Act to vary a fixed administration charge, and the applicant is asked, on the application form, to propose a form of variation that would be acceptable if the Tribunal did decide it should vary the administration charge. For the reasons already given, the

Tribunal is of the view that as the Charge has been determined not to be an administration charge at all, the Tribunal has no power to vary it.

### **Costs**

22. The Applicant has applied for an order under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") that none of the costs incurred by the Respondent in opposing this application should be recoverable under the service charge provisions of the leases from the Applicant or any of the other tenants of the Flats. Except in very limited circumstances, the Tribunal has no power to award costs against a party to proceedings before it. None of those circumstances apply to this application, so there is no direct costs order made by the Tribunal. The purpose of section 20C is to give the Tribunal the power to prevent a landlord actually recovering its costs via the service charge.
23. The discretion given to the Tribunal is to make such order as it considers just and equitable.
24. As the Tribunal has in effect found for the Applicant in these proceedings, the Tribunal considers that it would not be just or equitable for the Respondent's costs of this application to be passed on to the Applicant or any of the other lessees of the Flats and makes an order under section 20C of the 1985 Act that none of the costs of this application are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant or any of the other lessees of the Flats.

Dated

*C. Goodall*

Signed

**30 OCT 2012**