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HM Courts & Tribunals Service

Leasehold Valuation Tribunal

Case number:	:	**CAM/26UB/LBC/2012/0012**
Property	:	**Flat 7 Maple Leaf Court Cross Road Waltham Cross Herts. EN8 7HU**
Applicant	:	**Stephen Lewis Pariser**
Respondent	:	**Selvinaz Ulger**
Date of Application	:	**18 September 2012**
Type of Application	:	**For a determination that the Respondent is in breach of covenant pursuant to Commonhold and Leasehold Reform Act 2002, s168(4).**

Members of the Tribunal

Francis Davey (chair)
Miss Marina Krisko BSc (Est. Man.) FRICS
Mrs Lorraine Hart

Appearances

Applicant

Martin Paine (surveyor)

Respondent

Hassan Sal (solicitor)

DECISION

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1. The Tribunal was not minded to dismiss the application in response to the Respondent's application pursuant to paragraph 7 of schedule 12 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act).

2. The Tribunal finds that the Respondent was in breach of covenant in that she failed to give notice to the Applicant within the time required by clause 5(vii) of the lease that there had been an assignment to her of the leasehold estate.

3. The Tribunal refuses the Applicant's application for costs pursuant to paragraph 10 of the 2002 Act.

4. The Tribunal orders, pursuant to s20C of the Landlord and Tenant Act 1985, that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant.

Reasons

Introduction

1. Ms Ulger is the tenant under a long lease of Flat 7, Mapleleaf Court, Cross Road, Waltham Cross ("the Property") and was represented at the hearing by Mr Sal, a solicitor.

2. Mr Pariser is the freeholder under the lease and was represented at the hearing by Mr Paine, a surveyor.

3. The factual background to support the s.168 application was found in the trial bundle filed on Mr Pariser's behalf. None of that factual background was in dispute.

4. Each party's representative made additional assertions, primarily as to motivation, in support of their respective applications. Although in each case those assertions were not challenged by the other party, the Tribunal was cautious as to accepting them at face value. The Tribunal's conclusions do not require that the Tribunal make any findings of fact as to the truth of those assertions. In this summary of facts, assertions not founded in contemporaneous documentation are set out by way of illustration of each party's position and not as facts found by the Tribunal.

5. On 23 February 2012, the leasehold was transferred to Ms Ulger. Clause 5(vii) of the lease requires that the tenant gives the landlord notice within 21 days of a transfer.

6. Sal & Co served a notice, dated 26th March 2012, on Circle, informing them of the transfer. Mr Paine's undisputed evidence was that the notice was received on 28th March 2012.

7. By a letter, dated 16 May 2012, Sal & Co wrote to Circle saying "We refer to our letter to you dated 26th March and our telephone conversation of this afternoon and enclose herewith a cheque in the sum of £264.00 in respect of the notice of transfer and charge as requested...."

8. Circle wrote a letter, dated 23 May 2012, thanking them for the cheque but saying "We are unable to receipt the notices due the outstanding amount on the account, a copy statement is enclosed".

9. The enclosed statement shows a debit entry of £264 for 18 May 2012, described as "Notice of Transfer and Charge" and a credit entry for the same date, described as "Payment Received – Thank You Sal & Co".

10. By a letter, dated 29 June 2012, Sal & Co wrote to Circle querying (by reference to the lease) Circle's refusal to "receipt notice of transfer" and purporting to deem that the notice had been served correctly. Circle made no response to that query.

11. Next, Circle wrote a letter to Ms Ulger directly, rather than to Sal & Co, dated 30 July 2012. The letter said:

    "The Tenant has failed to serve a Notice of Assignment within the time period specified within the lease granted on the property

    We understand that the above has occurred. In our opinion this constitutes a breach of the terms of your lease and we are minded to issue a Notice Pursuant to s146 of the Law of Property Act 1925"

12. The letter, was accompanied by a pro forma stating "I admit the above breach has occurred" accompanied by a space for signature and date.

13. The letter invited the tenant to return the pro forma, signed within 7 days of the date of the letter (not the date of receipt). The invitation was backed up by a threat to make an application to the Tribunal for a determination of the alleged breach. An application which, it was said, would cost £250 + VAT and that sum would be charged to the tenant's account.

14. Mr Sal told us that Ms Ulger passed the letter to his firm, being received by them on 7th August 2012. Sal & Co certainly wrote back on the same day complaining that there had been no response to their letter of 29th June.

15. Sal & Co also said:

    "You now require our client to sign your letter of the 30th July to admit that she has failed to serve a Notice of Assignment within the time period specified in the lease.

    We do not believe that our client's signature is necessary to this effect. We have sent you the notice which you still hold. If you believe such breach took place, you will be able to ascertain the breach from the date of the notice. There is no need for our client to sign a separate document for this. Would you please also confirm with us the reason you require our client's signature for the alleged breach as we would be interested to know."

16. No further correspondence took place. Mr Pariser then made his application to the Tribunal, asking for a finding that clause 5(vii) of the lease had been breached.

17. The chair of the Tribunal made an order ("the September Order"), dated 23rd September 2012, that the parties submit statements of case.

18. Mr Pariser's statement of case included an application that the Tribunal make an order for costs in Mr Pariser's favour in accordance

with paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

19. Ms Ulger's statement of case consisted of a witness statement of a Filiz Er of Sal & Co. After setting out much of the background in the preceding paragraphs, she made an application on Ms Ulger's behalf that the application be struck out pursuant to paragraph 7 of Schedule 12 and a consequential order for costs be made. She also made an application pursuant to s20c of the Landlord and Tenant Act 1985.

The hearing

20. At the hearing the parties accepted that the Tribunal faced 4 separate matters, which seemed to the Tribunal most logically to fall in the following order:

    a) the application to strike out by Ms Ulger

    b) the substantive application pursuant to s168

    c) Mr Pariser's application for costs pursuant to paragraph 10

    d) Ms Ulger's s20C application

Striking out

21. Paragraph 7 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 states:

    Procedure regulations may include provision empowering leasehold valuation tribunals to dismiss applications or transferred proceedings, in whole or in part, on the ground that they are—

    (a) frivolous or vexatious, or

    (b) otherwise an abuse of process.

22. The power of this tribunal to strike out is governed by rule 11 of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003, which provide that:

    11.—(1) Subject to paragraph (2), where—

        (a) it appears to a tribunal that an application is frivolous or vexatious or otherwise an abuse of process of the tribunal; or

        (b) the respondent to an application makes a request to the tribunal to dismiss an application as frivolous or vexatious or otherwise an abuse of the process of the tribunal,

    the tribunal may dismiss the application, in whole or in part.

    (2) Before dismissing an application under paragraph (1) the tribunal shall give notice to the applicant in accordance with paragraph (3).

        (3) Any notice under paragraph (2) shall state—

(a) that the tribunal is minded to dismiss the application;

(b) the grounds on which it is minded to dismiss the application;

(c) the date (being not less than 21 days after the date that the notice was sent) before which the applicant may request to appear before and be heard by the tribunal on the question whether the application should be dismissed.

(4) An application may not be dismissed unless—

(a) the applicant makes no request to the tribunal before the date mentioned in paragraph (3)(c); or

(b) where the applicant makes such a request, the tribunal has heard the applicant and the respondent, or such of them as attend the hearing, on the question of the dismissal of the application.

23. As Mr Paine pointed out to the Tribunal, it would not have been possible for us to exercise the power pursuant to rule 11(1) without first having given notice of at least 21 days pursuant to rules 11(2) and 11(3)(c). No such notice had been given. Both parties accepted that this was the case.

24. Nevertheless, the Tribunal thought that the application of rule 11 is a two-stage process. The application of rule 11 is clearly always discretionary as indicated by the use of the phrase "may dismiss" in rule 11(1). Hence, the Tribunal must already have decided that it might dismiss the application before giving notice pursuant to rule 11(2).

25. If the Tribunal is not minded to dismiss the application, then there need be no second stage. Only if the Tribunal were satisfied that it might exercise the rule 11 jurisdiction does it need to give notice and then hear the applicant if the applicant so requests pursuant to rule 11(4)(a).

26. The Tribunal therefore invited Mr Sal to address it on the application of rule 11. Mr Paine declined to make any submissions on behalf of the applicant as, in view of the Tribunal's analysis, was his right.

27. Mr Sal said that the description in rule 11 he relied on was that the application was "frivolous".

28. In his submissions Mr Sal not only admitted that there was a breach of covenant, but submitted that the breach was self-evident, requiring merely a calculation of dates. Mr Sal's submission was that, although the applicant was therefore entitled to a finding pursuant to s168 of a breach of covenant, there could be no good reason for the applicant pursuing the case.

29. First, the only reason offered by the applicant for the s168 application was that their intention, expressed in their letter of 30 July 2012, to serve a s146 notice. Such a notice could, Mr Sal said, serve no useful purpose. The breach had already been remedied since Ms Ulger had given notice, paid the fee requested by Circle who had accepted

payment of that fee – at least by noting it as "received with thanks" in its accounts.

30. There was therefore nothing further that Ms Ulger could do in respect of the breach. Mr Sal suggested that a s146 notice, followed by an application for possession would be doomed to fail. Ms Ulger would be able to obtain relief and that relief would be unlikely to be granted on terms favourable to the landlord.

31. Second, Circle had written its demand that the breach be admitted directly to Ms Ulger, rather than to Ms Ulger's solicitors who had been in correspondence with Circle for some time. The only inference Mr Sal could draw from that was that Circle were not behaving properly.

32. Circle had failed to respond to Sal & Co's request that they explain what their purpose was in asking Ms Ulger for an admission. No reason had been given up to and including the date of the hearing. Mr Sal submitted that Circle's failure to give any reasonable account of itself was evidence that its behaviour was "frivolous".

33. Mr Sal was pressed by the Tribunal to explain why, when asked to do so by Circle, no admission had been made. His response was that he thought that he had done all that was needed to make an admission. It was self-evident from the dates that a breach had taken place and so, he thought, pointing out to Circle that they could ascertain as easily as him that a breach had taken place amounted to an admission.

34. Under pressure from the Tribunal, Mr Sal accepted that, while in his eyes an admission had been made, it was possible to read correspondence from Sal & Co as refusing to make an admission. He re-iterated the fact that Sal & Co had asked for an explanation for the need for an admission and never received one. Had there been an explanation from Circle, Sal & Co might have clarified their position.

35. The Tribunal agreed with Mr Sal that, on the papers before it, there did not seem to be any good reason for Mr Pariser's application. The Tribunal took the view that a claim for possession based on the (now remedied) breach of covenant would be doomed to failure.

36. Circle had almost certainly waived the consequences of the breach (and therefore the right to forfeit), first because it had clearly agreed a fee for registration of Ms Ulger's notice and second because it had accepted payment of that fee. That waiver would almost certainly deny Circle the remedy of forfeiture and hence a right to possession.

37. Even if Circle had a right, it would be almost impossible to persuade a court to make an order for possession on so slender a ground as this.

38. The Tribunal thought that there was force in Mr Sal's criticism of Circle's conduct – although at this stage Circle had not had an opportunity to answer that criticism.

39. However, the s.168 jurisdiction of the Tribunal is a narrow one. The Tribunal's task is only to decide whether a breach of covenant has occurred. A Tribunal may not refuse a s.168 application on the basis,

for example, that a claim for possession founded on the Tribunal's decision would be refused.

40. In the Tribunal's view, to accede to Mr Sal's application would amount to the same thing. Parliament has given landlords a right to apply for a determination that a breach of covenant has occurred, and that right is not in any way qualified.

41. Therefore the Tribunal was not minded to dismiss the application.

Breach of covenant

42. The substantive application was straightforward. Ms Ulger admits the breach and so the Tribunal finds that a breach has occurred.

Costs

43. Mr Paine applies for an order for costs pursuant to paragraph 10 of schedule 12 to the 2002 Act, which states:

> 10(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
>
> (2) The circumstances are where—
>
> (a) ... or
>
> (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.'

44. Mr Paine submitted that Ms Ulger (in reality Sal & Co) could be characterised as having acted "otherwise unreasonably" on the simple basis that she had been invited to admit the breach of covenant, by Circle's letter of 30th July 2012, but she had failed to do so until today's hearing when Mr Sal made Ms Ulger's position clear.

45. When asked why it was that Mr Pariser had sought a s.168 declaration, he explained that there were on-going county court proceedings against Ms Ulger for alleged unpaid service charges.

46. Furthermore, he said that Ms Ulger's predecessor in title had not paid the ground rent due on 25th March 2012. The notice from Sal & Co that a transfer had taken place was not received until 28th March 2012. In that time costs had been incurred in connection with proceedings against the former tenant for unpaid ground rent.

47. Mr Paine was not clear as to whether these sums were for the issuing of proceedings or merely preparatory to issue. He did not know the date of issue. Nor was he sure when the demand for rent had been sent, except that he thought it was "in the middle of February".

48. Either way, he submitted, Mr Pariser's legal costs had been wasted. A finding by the tribunal that Ms Ulger was in breach of covenant would allow Mr Pariser to pursue a claim against Ms Ulger for those wasted costs on the basis that they were caused by her breach of covenant.

49. The Tribunal put it to Mr Paine that, in order to succeed in a claim against Ms Ulger for the wasted cost of litigation, Mr Pariser would need not merely to prove that she was in breach of covenant, but also causation. That, in turn, would require an examination of the date on which Mr Pariser (or Circle on his behalf) had notice.

50. This, the Tribunal suggested, was beyond the scope of a finding under s.168. In practice he would have to lead evidence covering the same factual matrix as had been presented before the Tribunal and the court would have to consider the same series of events. What, the Tribunal asked, did a finding under s.168 do to make such a claim easier.

51. Mr Paine's response was that it might "put pressure" on Ms Ulger, presumably to settle without further litigation.

52. The Tribunal asked Mr Paine to respond to the suggestion that in any county court claim, Mr Pariser would have difficulties on causation because a transfer could have taken place prior to the 25th March 2012 which would not have had to be notified to him, pursuant to clause 5, by 28th March. He was asked specifically whether he thought it was reasonable to issue court proceedings within 3 days of the due date.

53. Mr Paine was not able to give any satisfactory answer to the suggestion that he might have acted precipitously. Indeed the Tribunal found that he was evasive when pressed on any point of detail relating to the claim against Ms Ulger's predecessor in title.

54. The Tribunal's view is that this is a case where Ms Ulger's conduct – through her solicitors – was less than helpful. The Tribunal does not accept that the statement "If you believe such breach took place, you will be able to ascertain the breach from the date of the notice" was an admission. If Ms Ulger had made the admission, Mr Pariser would not have needed to make an application pursuant to s.168.

55. However, in the Tribunal's view, Mr Pariser's conduct was equally unhelpful. Circle ought not, after having corresponded with Sal & Co, to have written directly to Ms Ulger in the way they did. Furthermore, a deadline of seven days from the date on which a letter was written is, in the Tribunal's view, too short.

56. Circle's letter justified the request for an admission as a precursor to the service of a s.146 notice. Mr Paine admits that this was not Mr Pariser's purpose and was therefore untrue. Mr Paine gave no explanation for the misleading reference to s.146.

57. It seems to the Tribunal that Sal & Co's reaction was understandable in context. They had reason to be concerned about Circle's conduct in writing directly to Ms Ulger. They were suspicious of the reason put

forward by Circle for requiring an admission – as it turns out an entirely justifiable suspicion since Circle had no intention to pursue forfeiture as a remedy. Finally they had asked Circle to explain why an admission was needed – a question that was not answered by Circle until today's hearing.

58. Taken together it is the Tribunal's view that, although Ms Ulger's conduct may be criticised, her conduct is not so serious as to fall within the description of "unreasonable" in paragraph 10 of schedule 12 to the 2002 Act.

59. Mr Paine's application for costs is therefore refused.

S20C application

60. Mr Paine suggested that there was no need for the Tribunal to consider the s20C application since the lease did not allow the costs of the Tribunal hearing to be recovered from Ms Ulger.

61. In the Tribunal's view, the absence of any charging provision is not a bar to the making of a s20C order. Section 20C gives a tenant the statutory right to make an application to the Tribunal and a power to the Tribunal to make a consequential order. An order under S20C gives the tenant certainty as to the costs of proceedings before the Tribunal which has value to a tenant even if any costs recovery seems unlikely.

62. Furthermore, the Tribunal heard no detailed argument about costs recovery and so felt that it would, in any event, be better to consider the S20C application on its merits.

63. For reasons expressed above, and put to Mr Paine in the hearing, it is the Tribunal's view that the use of s.168 to obtain a finding that might prove a stepping stone to county court proceedings where there would, inevitably, be a rehearsal of the facts already aired in today's hearing, is not one for which a tenant should have to pay the costs.

64. Still less is the use of a s.168 application as a means to "put pressure" on a tenant a use for which it would be just to make the tenant pay.

65. For these reasons, the Tribunal makes the S20C order.

Francis Davey
Chair
7 January 2013