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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Property	: Flat 1, Angus House, 13 Granville Road, Eastbourne, East Sussex BN20 7HE
Case Reference	: CHI/21UC/LAC/2017/0003
Applicant	: Terence Eric Varnfield
Respondent	: Angus House (Eastbourne) Company Limited
Type of Application	: Determination of administration charges
Tribunal Member(s)	: Judge A Johns QC
Date of Decision	: 26 May 2017

DECISION WITHOUT A HEARING

Introduction

1. Mr Varnfield asks the Tribunal to determine that 2 sums paid by him as lessee (with his wife) of Flat 1, Angus House, 13 Granville Road, Eastbourne ("the Flat") for the grant of a licence to alter the Flat were unreasonable and so not payable. Those sums are (a) £2500 charged as a fee by the respondent landlord Angus House (Eastbourne) Company Limited ("the Company"), and (b) £262.80 representing the costs of Mayo Wynne Baxter, the Company's solicitors ("MWB").

Factual background

2. Mr Varnfield completed his purchase of the Flat by way of a new lease on 26 March 2015. At around the same time, the freehold of Angus House was changing hands. A transfer to the Company which had been incorporated on 9 February 2015 for the purpose completed on 9 June 2015 following an auction on 11 May 2015.
3. Mr Varnfield wished to make changes to the Flat. He applied for the landlord's consent to alterations by a letter to Stredder Pearce dated 11 May 2015 enclosing his supporting documents. Stredder Pearce are the surveyors who have acted for the landlord at all material times, both the Company and its predecessor.
4. On 5 June 2015 Stredder Pearce wrote to Mr Varnfield indicating that "*I see no reason why consent may not be given and to this end have forwarded your request and the proposed plan to the freeholder for approval*".
5. Despite that indication and despite chasing, Mr Varnfield did not receive a consent from Stredder Pearce or the Company and on 10 February 2016 he renewed his request for permission by writing direct to the Company as, it appears, he had now been told by Stredder Pearce to do.
6. There was another letter of this date. It was from Mr Varnfield's solicitors, Crosby & Woods, to MWB as solicitors for the Company. It seems Crosby & Woods had been unable to register the new lease and sought the assistance of the Company's solicitors in remedying the problem. The view was then taken at some point that the answer was to grant a new lease.
7. On 22 March 2016, the Company's solicitors wrote to Crosby & Wood on the topic of the requested licence for alterations. They asked for the information about the works "*so that I may assist my client in considering your client's*

request". That information was sent to MWB by Mr Varnfield on the same day by way of email with attachments.

8. But still no licence to alter was forthcoming. Mr Varnfield chased MWB for both the new lease and the licence for alterations. MWB's response, by emails of 4 and 28 April 2016, was that they could not get instructions.

9. There were still no instructions on the new lease or the licence for alterations by the end of May. MWB wrote to Crosby & Wood on 24 May 2016 as follows: "*I am still awaiting formal, unequivocal, instructions in relation to the licence to alter and the grant of the new lease – but I do not think that my formal instruction in this regard will remain outstanding for much longer*". It did however. MWB wrote again on 11 June 2016 and on 4 July 2016 that they were still without instructions.

10. MWB never did get the awaited instructions. Instead, on 26 July 2016 they wrote to Crosby & Wood to the effect that they were passing the matter on to Stredder Pearce to deal with: "*when I was originally approached to deal with the licence, I wasn't aware that Stredder Pearce had already begun dealing with the matter and had been in direct contact with Mr Varnfield ...*".

11. Stredder Pearce wrote to Mr Varnfield on 26 August 2016 indicating that they had been instructed "*following some confusion with the company solicitors*". They indicated that their fee for dealing with the licence to alter would be £250 plus VAT. And that the Company would be charging what they called "*a premium fee*" of £2500. They invited agreement in these terms: "*With the above in mind we would ask that you sign the attached copy of this letter demonstrating that you are in agreement with those fees charged as advised above*". They finished by informing Mr Varnfield that they will proceed with the process of issuing the retrospective licence once they had received his agreement; "retrospective" because it seems the works were carried out from around August 2015. The letter had a second page which was a form on which Mr Varnfield could indicate his agreement.

12. On or about 7 September 2016, MWB sought its costs of £262.80 including VAT from Mr Varnfield.

13. Mention must also be made of an email from Mr Varnfield to his own solicitors, Crosby & Wood, of that date. It referred to both sums which are the subject of this application to the Tribunal. As to MWB's costs, Mr Varnfield

wrote "*My thoughts are we need to get the lease sorted and registered asap so we will, extremely reluctantly, agree to pay her schedule of costs relating to the licence to alter ...*". As to the premium of £2500, Mr Varnfield described this in his email as "*extortionate and wholly unacceptable*" and told his solicitor that "*I am hoping to negotiate with them on this*". But it seems there was no negotiation.

14. There was then an important letter dated 12 November 2016 from Mr Varnfield to Stredder Pearce expressed to be by way of reply to the 26 August letter which had, as has been seen, invited agreement. Mr Varnfield's letter included the following in relation to the fees:
"*I agree to pay the Stredder Pearce fee of £250.00 + VAT once invoiced for issuing the licence to alter.*
I agree to paying the premium of £2500.00 charged by the freehold company and as we have recently accepted an offer on the property would prefer to pay this premium upon completion of the sale"
He added "*For further clarity we have also completed your form agreeing to the fee charges as advised.*"

15. An email from Mr Varnfield to his solicitor of 16 November 2016 refers to that letter. "*As you will see in my letter to them, I have agreed to pay both charges*".

16. That payment of the Company's fee for the licence to alter was required before the lease would be granted was made clear by an email dated 18 November 2016 from Stredder Pearce to Mr Varnfield.

17. Both the charges referred to in the 12 November 2016 letter were paid by Mr Varnfield on about 21 November 2016. It seems MWB's costs of £262.50 had been paid by Mr Varnfield before this time. The licence to alter was granted by a letter dated 6 December 2016 from Stredder Pearce which began as follows: "*Thank you for returning our signed duplicate letter of the 26 August 2016 and also forwarding payment as requested* ". The new lease is also dated 6 December 2016.

18. That new lease is said to be in like terms to that previously granted to Mr Varnfield. The covenant against alterations appears in paragraph 11 of the Sixth Schedule to the lease and is a qualified covenant in that it does not

restrict alterations absolutely but only those made "*without the licence in writing of the lessor*".

Law and procedure

19. By Schedule 11 to the Commonhold and Leasehold Reform Act 2002 at paragraph 2, variable administration charges are payable only to the extent that they are reasonable. Paragraph 5 provides that an application may be made to the Tribunal for a determination whether an administration charge is payable and as to the amount payable.

20. But by virtue of sub-paragraph 5(4), no such application may be made "*in respect of a matter which (a) has been agreed or admitted by the tenant ...*"; though "*the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment*" – sub-paragraph 5(5).

21. By virtue of directions given by the Tribunal on 21 February 2017 and in the absence of any objection, Mr Varnfield's application is to be determined without a hearing. In addition to the directed statements of case, some late further material was submitted by both sides. I have had regard to all the papers submitted in arriving at my decision.

Parties' cases

22. On the larger of the 2 amounts in issue, being the Company's fee of £2500, Mr Varnfield contends that this is totally unreasonable, being without any justification particularly in view of the delay in providing the licence to alter.

23. In response, the Company does not seek to justify the reasonableness of the fee. Rather, it points out that the licence was retrospective and that the fee of £2500 was agreed. It relies on the case of *Avon Freeholds Ltd v Garnier* [2016] UKUT 477 (LC) in arguing that, in those circumstances, the Tribunal does not have jurisdiction to the determine the questions of reasonableness and payability.

24. Mr Varnfield denies agreement. He says that his attitude to the fee is to be found in his email dated 7 September 2016 (referred to in para. 12 above) and that his payment of the fee was made under duress; he having been made aware that the new lease would not be granted without such payment. He points in particular to the email of 18 November 2016 referred to at paragraph 16 above.

25. As to the costs of MWB, Mr Varnfield says that those solicitors achieved nothing through no fault of his.

26. MWB say that £262.80 is reasonable for the work carried out.

Discussion

(i) £2500

27. Starting with the Company's fee of £2500, the key issues for the Tribunal given the parties' cases are:

27.1 Was the fee agreed on the correspondence between the parties?

27.2 If so, can Mr Varnfield nevertheless avoid that agreement on the ground of economic duress?

28. The case of *Avon Freeholds Ltd v Garnier* [2016] UKUT 477 (LC) is relevant to both issues. The Upper Tribunal in that case was also concerned with retrospective consent to alterations. The landlord was prepared to give such consent for a fee of £5000 plus legal fees of £1000 plus VAT. As the tenant was in the course of selling his flat, he ended up paying the sum requested; emailing as follows: "*I will make the £6200 payment now, that's fine*". Such was regarded as an agreement and one ousting the jurisdiction of the Tribunal as (the Upper Tribunal allowing the appeal on this basis) the agreement was not the result of illegitimate pressure.

29. HHJ Hodge QC's reasoning (at para.20) included this:

"... the respondent had the choice of either: (1) simply making the payment, which (by para.5(5) of Sch.11) would not have been taken as constituting any agreement or admission in respect of the payment; or (2) making the payment expressly under protest and/or expressly reserving the right to invoke the jurisdiction of the FTT under Sch.11 to the 2002 Act; or (3) agreeing to make the payment. Had the respondent adopted either of alternatives (1) or (2), the appellant would have been able to take a view on whether to prepare and enter into the deed retrospectively consenting to the alterations in the knowledge that the respondent would be entitled to invoke the machinery under Sch.11 to the 2002 Act to challenge the amount of the payment. Instead, the respondent said that the payment was "fine", thereby agreeing to it. As a result, the appellant issued the retrospective consent under a false understanding as to the acceptability to the respondent of the £6,200 payment. In finding that the respondent "never accepted the validity

of the payment, but paid the monies requested under duress", in my judgment the FTT wrongly applied the relevant law. As a matter of law, there was no wrongful or illegitimate threat or other form of pressure applied to the respondent, and he was left with practical alternatives to agreeing the £6,200 payment. He is bound by his agreement—"that's fine"—to accept the amount of the payment."

30. As to the first of the issues identified above, in my judgment there was agreement by Mr Varnfield to the fee of £2500 with the consequence that, subject to the question of duress, the Tribunal has no jurisdiction to determine the reasonableness or payability of such fee.

31. The Stredder Pearce letter of 26 August 2016 invited agreement to the fee of £2500. Mr Varnfield's letter of 12 November 2016 was expressly in reply to that letter and was unequivocal in giving such agreement. That agreement was given in the body of the letter, and the signed form further indicating such agreement was also returned.

32. The agreement in this case was therefore expressed more formally and comprehensively than in *Garnier* where "*that's fine*" was sufficient.

33. While Mr Varnfield pointed to his letter dated 7 September 2016, that was not a communication to Stredder Pearce or the Company but to his own solicitors and significantly earlier in time. In those circumstances, it does not cast any doubt on the true meaning of the letter of 12 November 2016 which, as I have said, clearly expresses agreement.

34. Turning to the second issue, being economic duress, an agreement will be voidable where it is the result of illegitimate threats or pressure.

35. That is not, in my judgment, the situation in this case for the following reasons.

36. First, withholding the grant of a new lease until payment had been made does not strike me as illegitimate. Mr Varnfield was not, it seems to me, entitled to a new lease. And so there was nothing wrong in withholding the grant of it. Certainly and in any event, there is nothing inherently unreasonable in concluding the grant of a new lease and the consent to alterations together, at least in the circumstances of this case where there was some doubt over Mr Varnfield's original lease and consent was to be given under a valid registrable lease.

37. Second, Mr Varnfield's case is that the new lease would not have been forthcoming without payment. But had he simply paid without more then he would have been able to challenge the fee. It is not the payment but his expression of agreement that causes the problem. As in *Garnier*, Mr Varnfield was not left without practical alternatives. One was simply to make payment. Another was to do so under protest and/or reserving the right to challenge the reasonableness of the fee. Further, by the time of the email of 18 November 2016 which Mr Varnfield places particular emphasis on, he had already agreed the fee.

38. It follows from the above that the Tribunal has no jurisdiction to determine the reasonableness or payability of the £2500 charge.

39. If the Tribunal had had such jurisdiction then I would have determined that the charge was not reasonable or payable in whole or in part. The Company did not seek to justify the charge. It was not related to any loss flowing from the alterations. It was in the nature of a premium. There was an application for consent before the works were carried out and a landlord is under a duty not to unreasonably refuse or withhold consent by reason of the proviso implied in qualified covenants against alterations by s.19(2) of the Landlord and Tenant Act 1927. That proviso is in terms that do not contemplate a premium: "*In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the making of improvements without a licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed.*"

40. But given the agreement reached between the parties, the Tribunal has no jurisdiction in relation to the fee of £2500.

(ii) £262.80

41. Mr Varnfield did not, however, agree MWB's costs of £262.80 by his letter of 12 November 2016. That sum had already been paid. The issue on this sum is whether it is reasonable and therefore payable.

42. I have reached the conclusion that these costs were not reasonable and so not payable.

43. First, the charge made by Stredder Pearce covered all that was necessary in connection with the licence to alter. The sum of £250 plus VAT in respect of their costs, to which Mr Varnfield did agree by his 12 November letter, was to "*include reviewing all relevant documentation, advising the client upon the documentation, receiving instruction and issuing the licence accordingly*" – see Stredder Pearce's letter dated 26 August 2016. On that basis, a charge made by MWB represents a duplication of cost.

44. Second, it does seem to me that nothing of value was done by MWB. In short, they received the same documentation as Stredder Pearce and were unable to take any instructions from their client.

45. Third, their involvement sprang from not appreciating that Stredder Pearce were acting in relation to the licence to alter. Their costs were therefore the result of a lack of communication between the landlord and its advisers. Mr Varnfield was certainly not responsible for this confusion. His email of 22 March 2016 to MWB spelled out Stredder Pearce's involvement. It is not reasonable that the confusion should increase the cost to Mr Varnfield.

Summary of decision

46. From the above, the Tribunal decides as follows on the 2 sums in issue on this application:

46.1 It has no jurisdiction to determine the reasonableness or payability of the sum of £2500 charged as a fee by the Company.

46.2 The sum of £262.80 representing the costs of solicitors MWB is not reasonable and is not payable by Mr Varnfield.

Appeal

47. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

48. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

49. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit. The Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

50. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Judge A Johns QC

Dated 26 May 2017