Neutral Citation Number: [2024] UKUT 2 (LC)

Case No: LC-2023-533

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT Ref: MAN/00EQ/OC9/2022/0001

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – COSTS – liability of assignee tenant to pay costs under section 60 of the Leasehold Reform, Housing and Urban Development Act 1993

BETWEEN:

GRAY'S INN INVESTMENTS LIMITED

Appellant

-and-

SALLY CLAIRE JOLLEYS

Respondent

168 Caldy Road,
Handforth
Wimslow,
Cheshire, SK9 3BS

Upper Tribunal Judge Elizabeth Cooke
Determination on written representations

Decision date: 3 January 2024

Stevensons Solicitors for the appellant

Introduction

1. This appeal raises a short point about the liability of a tenant for reasonable costs incurred by the landlord after a notice has been given under section 42 of the Leasehold Reform, Housing and Urban Development Act 1993.

2. The appeal has been determined under the Tribunal's written representations procedure. Grounds of appeal were prepared for the appellant landlord, Grays Inn Investments Limited, by Stevensons Solicitors. The lessee, Ms Sara Jolleys, provided written representations in response to the appellant's application for permission to appeal, but has chosen not to participate in the appeal as respondent.

The factual and legal background

3. Chapter 2 of Part 1 of the 1993 Act gives certain qualifying tenants holding a long lease of a flat the right to acquire an extended lease. The process of acquisition is initiated by the lessee serving on the landlord a notice under section 42 of the 1993 Act.

4. On 18 June 2018 Mr Ian Warburton gave such a notice in respect of 168, Caldy Road, Handforth, Wilmslow SK93BS to the appellant. Mr Warburton did so as the executor of Mr K Warburton, who had been the tenant of 168 Caldy Road (a flat) under a 99-year lease dated 7 October 1965. The appellant gave a counter-notice on 28 August 2018; if I have understood correctly, only the premium payable was in dispute.

5. On 14 December 2018 Mr Ian Warburton sold 16B Caldy Road to Ms Jolleys. The 1993 Act makes express provision for the situation where the flat is sold or otherwise disposed of after a section 42 notice has been given. Section 43 provides as follows:

> "(1) Where a notice has been given under section 42 with respect to any flat, the rights and obligations of the landlord and the tenant arising from the notice shall enure for the benefit of and be enforceable against them, their personal representatives and assigns to the like extent (but no further) as rights and obligations arising under a contract for leasing freely entered into between the landlord and the tenant.
> (2) Accordingly, in relation to matters arising out of any such notice, references in this Chapter to the landlord and the tenant shall, in so far as the context permits, include their respective personal representatives and assigns.
> (3) Notwithstanding anything in subsection (1), the rights and obligations of the tenant shall be assignable with, but shall not be capable of subsisting apart from, the lease of the entire flat; and, if the tenant's lease is assigned without the benefit of the notice, the notice shall accordingly be deemed to have been withdrawn by the tenant as at the date of the assignment.
> (4) In the event of any default by the landlord or the tenant in carrying out the obligations arising from the tenant's notice, the other of them shall have the like rights and remedies as in the case of a contract freely entered into."

6. On the same date as he transferred the flat to Ms Jolleys, 14 December 2018, Mr Ian Warburton assigned to her the benefit of the section 42 notice. Clause 2 of the deed of assignment said:

> "The Buyer covenants with the Seller to reimburse to the Seller any statutory deposit paid to the Landlord and to perform and discharge all of the obligations arising from the Notice of Claim and to keep the Seller fully and effectually indemnified against all actions, proceedings, damages, costs, claims and expenses arising out of the giving of the Notice of Claim."

7. Ms Jolleys then made an application to the First-tier Tribunal for it to determine the terms of acquisition of the proposed lease extension to her, and by a decision dated 24 May 2019 the FTT determined that the premium payable by was £25,700. However, the new lease was not completed and the application was deemed to have been withdrawn pursuant to section 53 of the 1993 Act.

8. On 11 February 2022 the appellant applied to the First-tier Tribunal ("the FTT") for an order that Ms Jolleys pay its costs pursuant to section 60 of the 1993 Act. Section 60 reads, so far as relevant, as follows:

> "(1) Where a notice is given under section 42, then (subject to the provisions of this section) the tenant by whom it is given shall be liable, to the extent that they have been incurred by any relevant person in pursuance of the notice, for the reasonable costs of and incidental to any of the following matters, namely—
>
> (a) any investigation reasonably undertaken of the tenant's right to a new lease;
>
> (b) any valuation of the tenant's flat obtained for the purpose of fixing the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of a new lease under section 56;
>
> (c) the grant of a new lease under that section;
>
> but this subsection shall not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void.
>
> …
>
> (3) Where by virtue of any provision of this Chapter the tenant's notice ceases to have effect, or is deemed to have been withdrawn, at any time, then … the tenant's liability under this section for costs incurred by any person shall be a liability for costs incurred by him down to that time.
>
> …
>
> (5) A tenant shall not be liable under this section for any costs which a party to any proceedings under this Chapter before [the FTT] incurs in connection with the proceedings.
>
> (6) In this section *"relevant person"* , in relation to a claim by a tenant under this Chapter, means the landlord for the purposes of this Chapter, any other landlord (as defined by section 40(4)) or any third party to the tenant's lease."

9. Accordingly, the tenant who has served a section 42 notice has to reimburse the landlord for any costs incurred as a result of the notice, but not for any costs incurred in the FTT. In the present case the section 42 notice was deemed withdrawn because Ms Jolleys did not continue with the procedure. It was the appellant's case that she had stepped into the shoes of Mr Ian Warburton when the lease was assigned to her, in accordance with section 43, and that therefore she took on the liability, under section 60, of the tenant who gave the notice to pay the landlord's costs up until the date when the notice was deemed withdrawn, excluding costs incurred in the FTT proceedings.

10. The FTT refused the application. In its decision of 26 September 2022 it set out the background and said:

> "10. … The Tribunal is satisfied that, as the Respondent is not "the tenant by whom [the Notice" is given, the Respondent is not liable to the Applicant for any costs under s6o of the Act.
>
> 11. There is no evidence before the Tribunal of a stipulation (as envisaged by s6o (1) of the Act) entered into by the Respondent on the sale of the Property that imposed an obligation on her to the Applicant to meet its costs. …
>
> 12. Further, the Tribunal notes that clause 2 of the Assignment contains an indemnity from the Respondent in favour of Mr. Ian Warburton as Seller " ... against all .... costs ... arising out of the giving of the [N]otice".
>
> 13. The Tribunal considers that the effect of the Assignment is to entitle the Seller to seek reimbursement by way of indemnity from the Respondent for costs for which the Seller is liable to the Applicant under s6o of the Act."

11. The appellant appeals with permission from this Tribunal.

The appeal

12. As the appellant says, the FTT misconstrued section 60 of the 1993 Act. The effect of the section is, as the FTT said, that the "the tenant by whom the notice is given" is liable for the landlord's costs. But the effect of section 43(1) is that when Ms Jolleys took the benefit of the section 42 notice she also took on the liabilities that went with it. Therefore section 43(2) provides that "references in this Chapter to … the tenant shall, in so far as the context permits, include their assigns", and that means that the reference to the tenant in section 60(1) includes the tenant's assignee.

13. The FTT was led astray by the closing words of section 60(1), which it appears to have thought meant that the assignee would take on this liability only if there was an express stipulation to that effect in the transfer of the flat to Ms Jolleys. That is not what it means; it is an exception to the provision that precedes it, and its effect is to except certain costs from the tenant's liability. What those costs are is a bit obscure, but footnote 220 to paragraph 28-32 of *Hague on Leasehold Enfranchisement* expresses the view (about the same provision in the context of collective enfranchisement in section 33 of the 1993 Act) that the reference is to certain unusual costs which s.48 of the Law of Property Act 1925 provides that a purchaser cannot be required to pay to a vendor, for example the cost of a vesting deed under the Settled Land Act 1925. What the closing words clearly do not mean is that the section 60(1) liability arises, for an assignee, only where the transfer of the flat expressly requires it.

14. The provision in the deed of assignment, quoted at paragraph 6 above, is not relevant to the issue in the appeal since, as the FTT correctly observed, it created only a liability to Mr Warburton. Ms Jolley's liability to the appellant is created by the combination of sections 60 and 43. As I said above she has chosen not to participate in the appeal; in the FTT she argued that she had not been informed that she would be liable for any costs, but that is not relevant (and in any event as the FTT observed she was informed of her liability by the terms of the deed of assignment).

Conclusion

15. For that reason the appeal is allowed and the FTT's decision is set aside, and the Tribunal substitutes its own decision that Ms Jolleys is liable to pay the appellant's costs under section 60 of the 1993 Act. The appellant has not provided details of its costs to the Tribunal and so the Tribunal cannot assess them, and the matter is remitted to the FTT for the costs claimed by the appellant to be assessed.

Upper Tribunal Judge Elizabeth Cooke

3 January 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.