UPPER TRIBUNAL (LANDS CHAMBER)

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LRX/76/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2011

LANDLORD AND TENANT – Administration charge – charge made by landlord for entering into a deed granting retrospective consent to alterations to a flat – whether administration charge had been agreed or admitted by tenant – Commonhold and Leasehold Reform Act 2002 Schedule 11 paragraph 5

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER) (RESIDENTIAL PROPERTY)

Between:

Avon Freeholds Limited

Appellant

and

Alexander Garnier

Respondent

Re: 43 Gore House
Drummond Way
London N1 1NR

Before: His Honour Judge Hodge QC

Sitting at Royal Courts of Justice, Strand, London WC2A 2LL
On 28th October 2016

The appeal was determined under the Tribunal's written representations procedure.

Written representations were received from **Mr Justin Bates** instructed by Scott Cohen, Henley-on-Thames on behalf of the Appellant and from the Respondent in person

DECISION

Introduction

1. This is an appeal by the freehold owner of 43 Gore House, Drummond Way, London N1 1NR, Avon Freeholds Limited, from a decision dated 6th April 2016 of the First-tier Tribunal (Property Chamber) effectively reducing the sum payable by the former leaseholder, Mr Alexander Garnier, by way of an administration charge for retrospective consent to alterations to his flat by £5,000 to £1,800 (inclusive of £300 VAT). The appellant seeks to review the FTT's decision on the grounds that it wrongly interpreted or applied the relevant law. Permission to appeal was given by the F-TT on 16th May 2016. By a procedural order dated 21st July 2016 the Deputy President (Mr Martin Rodger QC) directed that the appeal should be determined under the Upper Tribunal's written representations procedure. He also gave the respondent permission to cross-appeal the FTT's decision that the sum of £1,500 (plus VAT) was payable by way of an administration charge. The respondent contends that the appellant had provided no justification for any part of that charge.

2. Before the FTT the appellant had contended that the charges were not administration charges within the meaning of paragraph 1(1) of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 but the FTT rejected this argument and the appellant has not sought to challenge this part of the FTT's decision by way of appeal. The sole issue on this appeal is whether the FTT correctly rejected the appellant's alternative argument that the respondent had agreed to pay the total sum demanded (including VAT) of £6,800 with the consequence that the FTT's jurisdiction to determine the amount of the administration charge was ousted by paragraph 5(4) of Schedule 11 to the 2002 Act, which excludes the FTT's jurisdiction "in respect of a matter which (a) has been agreed or admitted by the tenant…" The FTT correctly noted that by paragraph 5(5) "the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment".

3. The appellant is represented by Mr Justin Bates (of counsel), instructed by Scott Cohen Solicitors of Henley-on-Thames. The respondent has no legal representation. In determining this appeal and the cross-appeal I have had regard to the FTT's decision, the appellant's notice, statement of case and accompanying documents, the respondent's notice and statement of case, the appellant's reply, and the respondent's response thereto, together with the additional documents at Divider F of the appeal bundle. I am grateful to both Mr Bates and the respondent for their submissions.

Background

4. The background to the application to the FTT is as follows: During the summer of 2015 the respondent carried out works to his flat involving the installation of a shower cloakroom and associated new plumbing. The respondent had taken the view

that the appellant's consent to this work was not required under his lease of the flat but at the end of November and in December 2015 he sought to regularise the position by seeking the appellant's retrospective consent to the alterations in order to secure the sale of his flat. The appellant took the view that the works involved a breach of the absolute covenant against cutting, maiming, or injuring, or making any breach in any part of the structure of the flat, alternatively a breach of the qualified covenant against making any alterations to the flat without the landlord's consent (which was not to be unreasonably withheld or delayed) under paragraph 22 of Part 1 of the 8th Schedule to the lease of the flat. By email of 3rd December 2015 Mr Richard Simmons, the Head of Developments for the appellant's group of companies, informed the respondent that there would be a non-refundable consultation fee of £500 plus VAT, which would include a representative of the appellant visiting the property, reporting to the appellant, and responding to the respondent with the appellant's decision and/or requirements for instruction of a surveyor and/or solicitor. The respondent was warned that that fee was solely for inspection and initial work to assess the scope of the work, and whether the landlord's surveyor and solicitor would be required to take the matter further. It was made clear that payment of the fee did not guarantee consent. The respondent replied by email confirming that "That is fine, thank you." The sum of £600 was duly paid, and the inspection duly took place on Monday 7th December 2015. Following the inspection, a meeting between Mr Simmons and the appellant was scheduled to take place but this was later cancelled and ultimately was re-arranged for Thursday 17th December 2015. In the meantime, on 11th December 2015, the respondent had sent an email to Mr Simmons stating that the consent was the only item they were waiting on before exchange of contracts and asking if there was any way to expedite the process. Having heard nothing further from Mr Simmons or the appellant, on 17th, 18th, and 21st December 2015 the respondent sent Mr Simmons an increasingly anxious series of emails "hassling" him for an update on progress, and emphasising that the outstanding consent was the only matter holding up exchange and completion and was putting the sale of the flat in jeopardy. The email of 21st December (timed at 9.35 am) reported that the purchasers of the flat had informed the respondent over the weekend that they would pull out of the purchase if the respondent did not hear back from Mr Simmons that day, and inquiring whether anything could be done to get them a response that morning.

5. Mr Simmons does not appear to have responded until 2.25 pm that day when he emailed the respondent to say that the appellant was willing to deal with the retrospective consent on terms that the respondent agreed to pay (1) the appellant's legal department's fee in drawing up the consent order [sic] of £1,000 plus VAT and (2) the appellant £5,000 for retrospective consent. Mr Simmons asked the respondent to let him know whether he wished to proceed whereupon Mr Simmons would get the documentation actioned. At 2.25 pm the respondent inquired by email whether it would be possible to get the documentation in place that day. At 2.25 pm Mr Simmons responded that the documents could be drafted that day but that he would need confirmation from the respondent straight away as it was getting late. At 3.11 pm the respondent replied by email thanking Mr Simmons for dealing with the matter. The email continued (correcting obvious typographical errors):

"On the fees:

I have just spoken to my solicitor, and I understand the clear legal position is that any administration fees which are reasonably and properly incurred, and fully documented, are allowed, but anything additional would be against legislation and the terms of the lease. My solicitor has therefore advised me that there is no basis for an additional £1,000 + VAT for a simple consent document, plus £5,000 (in fact he believes the £500 + VAT already paid had no basis under the law)

- However, given the urgency, I am happy to compromise by paying an additional £1,000 + VAT (on top of the £500 + VAT already paid) – making the payments to the freeholder £1,500 + VAT in total

Please could you confirm this would be acceptable? If so, I can transfer the additional £1,000 + VAT straight away so that the document can be drafted this afternoon.

Thank you again for your help."

6. At 3.45 pm Mr Simmons responded by email stating that he had spoken to the appellant and that they wanted to seek legal advice from their solicitors regarding the claims in the respondent's email. However the firm was closed until the first week in the New Year so Mr Simmons would make sure that the matter was chased up that week and he had noted it on his calendar. At 3.49 pm the respondent replied stating:

"This really does need to be done today (I will lose the sale if we wait until new year), so I will make the £6200 payment now, that's fine.
If I send this now via faster payment, can the documentation be started and sent today?
Thank you"

At 4.02 pm Mr Simmons responded stating that he had asked "for the consent to be drawn up in good faith that payment is being made to make sure it is done in good time today." By an email timed at 4.11 pm the respondent thanked Mr Simmons and stated that the payment should be him with him shortly if not already. The deed giving retrospective consent for the alterations was duly executed on the same day (21st December 2015) and was expressed to be made in consideration of £5,000 paid by the respondent to the appellant.

FTT Decision

7. Having rejected the argument that the £6,800 demanded was not an administration charge, the FTT stated that it was more concerned with the argument that, by entering into an agreement to pay the sum demanded, the respondent had ousted the jurisdiction of the Tribunal. The FTT referred to paragraph 5(4) of Schedule 11 to the 2002 Act and correctly recognised that the mere fact of payment did not constitute agreement. The FTT proceeded to set out the evidence on the issue of whether the respondent had entered into an agreement to pay the charge, starting with the email from Mr Simmons timed at 2.25pm on 21st December 2015 (recited at

paragraph 5 above). It is not clear whether the earlier email exchanges were before the FTT, but they were included within Divider F of the appeal bundle and I have therefore thought it right to have regard to them in order to put the later emails into their proper context. At paragraph 42 of its decision the FTT stated –in my judgment correctly - that the question for it was whether the statement "I will make the £6,200 payment now, that's fine" equalled an agreement to pay. The FTT noted (at paragraph 43) – and again correctly - that the usual evidence of agreement in these circumstances was payment but that the statute excluded the fact of payment from evidence of agreement. The FTT's conclusions are expressed at paragraphs 44-47 of its decision:

> 44. In the very particular circumstances of this case, when the Applicant was under pressure to compete the sale of the property immediately, the tribunal concludes that no genuine agreement about the appropriate administration charge for retrospective consent was reached.
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> 45. The tribunal notes that the Applicant had sought legal advice in connection with the matter showing his dissatisfaction. In addition he made an application to the tribunal very soon after completing the transaction. Although the copy of the application form provided in the bundle is undated, the fact that the directions were issued on 8th January 2016 supports this.
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> 46. This indicates that the Applicant never accepted the validity of the payment, but paid the monies requested under duress.
>
> 47. Therefore the tribunal considers it has jurisdiction to determine the application."

8. Having determined that it had the necessary jurisdiction to do so, the FTT proceeded to consider the reasonableness of the administration charge for retrospective consent. The FTT noted the respondent's contention that he should pay nothing in connection with the retrospective consent and that the appellant had provided "no justification for the charges demanded". The FTT determined that the amount payable was £1,500 plus VAT. At paragraphs 51 to 52 of its decision, the FTT said that it was clear that the appellant was entitled to make some charge for the retrospective consent. In the absence of any argument in connection with what a reasonable amount should be, the FTT relied on the offer made by the respondent during the course of negotiations to pay a total of £1,500 plus VAT. Although the FTT recognised that it could be argued that even that figure was proposed under duress, it seemed to the FTT that that was a reasonable offer given the speed with which the matter had to be concluded.

Submissions

9. The appellant contends that the FTT was wrong to find that there was any duress applied by the appellant. The Upper Tribunal is therefore invited to allow the appeal

and to substitute an order dismissing the application, with the result that the respondent (and his successor in title) has the benefit of the consent previously negotiated and the appellant retains the money previously paid.

10. The appellant points out that, there having been no threat to any person or property, any duress was economic duress. It is said that in all cases duress involves some "wrongful or illegitimate threat or other form of pressure" by one party which leaves the other "with no practical alternative" (citing *Chitty on Contracts*, 32nd edn., para 8-001. There is said to have been nothing "wrongful" or "illegitimate" here. The appellant had proposed a fee which the respondent had disputed. When the appellant had replied that it would need to take legal advice on the matter, the respondent had made the choice to pay. Moreover, there had been no threat or any illegitimate pressure. Any "pressure" had been self-inflicted by the respondent, who had been anxious to ensure that nothing jeopardised the sale of his flat. He had decided that securing the sale was of such importance to him that he was prepared to make a payment which was higher than he might otherwise have wished to make (or even than he thought that he should make). That had been his decision and it had been reached freely. The economic duress cases discussed in *Chitty* (at paras 8-015 and 8-016) are said to demonstrate just how serious any threat or pressure has to be (and just how far away the present case is). Quite simply, it is said that there was no operative duress. There was, however, an agreement. It followed that the FTT had been wrong to find that it had jurisdiction to hear the underlying application.

11. Alternatively, it is said by the appellant that if the respondent (and the FTT) are correct and the agreement was tainted with duress, then the underlying application must be treated as the respondent's election to avoid the contract. If it was avoided, there can be no agreement. The FTT did not consider this issue, or the consequences of the agreement being avoided. It is said by the appellant that if the agreement is avoided, then (1) there is no consent for the alterations, and the present leaseholder holds a flat that is liable to forfeiture; and (2) there was nothing for the FTT to rule upon, i.e. no consent existed and no administration charge in connection with the same could be challenged. If that is correct, then it is said that the underlying application should have been dismissed.

12. The respondent begins by inviting the Upper Tribunal to dismiss the appeal on procedural grounds in the light of what are said to be procedural omissions and misrepresentations in the presentation of the appeal. I reject this preliminary invitation. Even if there is any substance in the respondent's criticisms of the appellant's presentation of the documents and the facts, I am entirely satisfied that any omissions or misrepresentations in the presentation of the documents and the facts have now been rectified, that the Upper Tribunal is now in a position to deal with the appeal fairly and justly, and that it would be wholly disproportionate, and contrary to the overriding objective, to dismiss the appeal on procedural grounds, and without any consideration of its merits.

13. On the substantive issues, the respondent contends that the grounds of appeal are completely irrelevant to the FTT's decision. The FTT had agreed with the respondent that, on the evidence, he had only paid the moneys under duress; but that was only

one strand of its reasoning, and the real basis of the FTT's decision had been that, on the evidence, there had been no genuine agreement to pay the sum of £6,800 demanded and the respondent had never admitted the validity of the amounts demanded and paid; in fact, he had made it clear that he disputed them. The appellant had applied wrongful and illegitimate pressure to the respondent to make the payment in that (1) consent, which the appellant was obliged to provide under the terms of the lease, was withheld, and (2) the respondent was held ransom to the payment of sums of £1,200 and £5,000 without any valid legitimacy or rationale for them, and against the background of the respondent having made the appellant aware, a number of times over a number of weeks, that should consent not be provided within a reasonable timescale, the sale of the flat might fall through and the respondent would forego hundreds of thousands of pounds and have a collapsed property chain going into the Christmas period. It is submitted that for the appellant now to say that there was any practical alternative to making the payment demanded, or that the decision to do so was reached free from any pressure, is "irrelevant, bizarre, and wrong".

14. As for the appellant's alternative ground of appeal, this is said to have forgotten the crux of the FTT's decision, which was that the £6,800 demanded and paid was, on the facts, an administration charge in connection with the grant of an approval under the lease, and that it was not a charge paid or payable under a separate agreement. In summary, the appellant is said to appear to fail to understand that it is a party to an agreement (the lease) whereunder it had agreed to provide consent (not to be unreasonably withheld, and subject only to the payment of any reasonable, proper and justified surveyors' or lawyers' fees) and it therefore did not have the discretion to go about demanding from vulnerable lessees thousands of pounds by attempting to concoct a separate "contract".

15. The respondent cross-appeals on the question of the appellant's entitlement to the payment of any moneys whatsoever (including the initial £500 plus VAT). In summary, it is argued by the respondent that by paragraph 23 of Part 1 of the 8th Schedule to the lease of the flat the appellant is only entitled to the payment of "reasonable and proper legal and surveyors fees". None of the payments are said to have been legal or surveyors' fees because no lawyer or surveyor was involved at any stage of the application process. All of the other fees (such as the site visit, correspondence, etc) are said to be already covered by other elements of the service charge schedule, and the appellant should not be allowed to abuse its position by charging twice for the same service. The Upper Tribunal is invited to note that the appellant has continued to refuse to provide any detail whatsoever of the charges being sought. There has been no disclosure of (1) the work undertaken, (2) the time spent, (3) the grade of fee earner or hourly rates, (4) the terms of engagement, or (5) any supporting invoices.

16. By way of reply, the appellant submits that the FTT plainly did resolve the case on the basis of the existence of duress, as any reading of its decision shows; and that if the appellant had misunderstood the basis of its decision, then the FTT would have made that clear when considering the application for permission to appeal (and would have been likely to have refused such permission). The cross-appeal is said to miss the point. The FTT is said to have found that there was an agreement to pay the

charges (which was held to have been avoided by reason of duress) but that the payments related back to the alterations covenant in paragraph 22 of Part 1 of the 8th Schedule to the lease of the flat. The works which the respondent had carried out were (so the appellant contended) in breach of that covenant. The respondent appeared to have accepted that the covenant had (at least arguably) been breached and so he had sought retrospective consent. The appellant had had no obligation to grant **retrospective** consent under the clause and there was nothing objectionable in identifying the terms on which consent might be granted.

17. In his response, the respondent submits that the FTT had not found that there had been any agreement to pay the charges demanded by the appellant outside of the lease. In any event, the charges were patently an administration charge in connection with an approval granted under the lease (as evidenced by recital (C) to the deed of consent drafted by the appellant, and as found by the FTT). The respondent had never accepted that there had ever been any breach of the alterations covenant in the lease; he had merely sought consent under that clause out of caution, and in order to have the fullest set of documentation for the sale of his flat. The respondent reiterated that no additional fees could be chargeable in this instance, for the reasons previously stated.

18. Those were the parties' submissions, to which I have paid due regard.

Discussion and conclusions

19. The statute makes it clear that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment. Something more is required. The FTT correctly identified the real question raised by the application to it as being whether the respondent's statement (in his email of 21st December 2015 timed at 3.49 pm) that "I will make the £6200 payment now, that's fine", when read against the background facts and the earlier emails described at paragraphs 4 to 6 of this decision, amounted to an agreement or admission in respect of that payment within the meaning, and for the purposes, of paragraph 5(4) of Schedule 11 to the 2002 Act so as to oust the jurisdiction of the FTT to determine the reasonableness of the amount of that charge under that Schedule.

20. On the appellant's first ground of appeal, I accept the submissions of the appellant as summarised at paragraph 10 above. I hold that the appellant applied no wrongful or illegitimate threat or other form of pressure to the respondent; and I reject the respondent's submission that he was left with no practical alternative but to agree the £6,200 payment. Historically, the respondent could have chosen to apply for the appellant's consent to the relevant works before he embarked upon them. He apparently elected to proceed with the works on the advice of his "team" that consent for the work was not required: see his email of 30th November 2015 timed at 5.02 pm. Having completed the works, the respondent could have applied at that time for the appellant's retrospective consent thereto. Instead, he elected to wait until a time when he was in the course of selling his flat. Any degree of urgency in obtaining the

consent was therefore self-inflicted. The appellant was under no obligation to give its retrospective consent to the works under the terms of the lease. The qualified covenant in paragraph 22 of Part 1 of the 8th Schedule to the lease requires the landlord's "previous consent in writing" to non-structural works falling outside the scope of the absolute prohibition in the lease. The landlord was therefore entitled to impose a charge for such a retrospective consent; although, as an amount payable in connection with an alleged breach of a covenant in the lease, any such charge was an "administration charge" within the meaning of paragraph 1(1) of Schedule 11 to the 2002 Act, and thus payable only to the extent that the amount of the charge was reasonable. Following receipt of Mr Simmons's email of 21st December 2015 (timed at 3.45 pm) stating that the appellant wanted to seek legal advice on the respondent's assertion that there was no basis in law for the appellant to exact the additional sums demanded in Mr Simmons's email timed at 2.25 pm, the respondent had the choice of either (1) simply making the payment, which (by paragraph 5(5) of Schedule 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 Schedule 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 Schedule 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. I therefore find that the FTT had no jurisdiction to determine the application. The appeal is therefore allowed on ground 1.

21. Had it been necessary for me to consider the appellant's second ground of appeal, I would have rejected it. Even if there had been no valid agreement in respect of the £6,200 payment, because it was exacted by duress, the payment would still have constituted an administration charge because, as recital (C) to the deed recognised, the respondent had executed certain alterations to the demised premises for which the appellant's consent, as landlord under the lease, was required. Even if the £6,200 payment was never agreed, it falls to be characterised either as a payment "for or in connection with the grant of approvals under [the] lease, or applications for such approvals" (paragraph 1(1)(a) of Schedule 11) or "in connection with a breach (or alleged breach) of a covenant or condition in [the] lease" (paragraph 1(1)(d)). On either view, it was an "administration charge" and, as such, was amenable to the FTT's jurisdiction under Schedule 11 to the 2002 Act. Even if the retrospective consent were to fall away, the payment for it would still be amenable to challenge under Schedule 11 because the challenged payment was referable to that consent. The second ground of appeal must therefore fail.

22. Since I have held that the respondent had agreed to the £6,200 payment, the cross-appeal must fail because the jurisdiction of the FTT to order its repayment was excluded by the terms of paragraph 5(4) of Schedule 11 to the 2002 Act. Even if I had dismissed the appeal, however, I would still have rejected the cross-appeal. The respondent had clearly agreed to the payment of the initial £500 (plus VAT) by his email of 3 December 2015 timed at 4.59 pm: "That is fine, thank you." The respondent had clearly agreed to the payment of the further "1,000 (plus VAT) by his email of 21st December 2015 timed at 3.11 pm: "… given the urgency, I am happy to compromise by paying an additional £1,000 + VAT (on top of the £500 + VAT already paid) – making the payments to the freeholder £1,500 + VAT in total".

Decision

23. The freeholder's appeal is allowed. The Upper Tribunal determines that the FTT had no jurisdiction to determine that the sum of £1,500 plus VAT was payable by the respondent in respect of an administration charge for retrospective consent to works. The respondent had agreed to pay a total sum of £6,800 for the retrospective consent within the meaning, and for the purposes, of paragraph 5(4) of Schedule 11 to the 2002 Act. The former leaseholder's cross-appeal is dismissed.

Dated 28th October 2016

His Honour Judge Hodge QC