LRA/110/2006

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – acquisition by tenant of new lease – Leasehold Reform, Housing and Urban Development Act 1993 Part 1 Chapter II – terms of new lease – provision in existing lease excluding any obligation on landlord to enforce covenants against other lessees in the building – whether power under section 57(6) to introduce into new lease a covenant by landlord to enforce such covenants – whether absence of such a clause a defect in existing lease – whether unreasonable not to include such a clause in view of changes occurring since commencement of existing lease.

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **DONALD CAMERON GORDON** **Appellant**

and

CHURCH COMMISSIONERS FOR ENGLAND **Respondents**

Re: Flat 27,
1 Hyde Park Square
London W2 2JZ

Before: His Honour Judge Huskinson

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 26 April 2007

Mr Donald Gordon appeared in person
Edwin Johnson QC, instructed by Charles Russell LLP, for the Respondents

The following cases are referred to in this decision:

Earl Cadogan v Stylianou LON/NL/3228/04
Brander LON/NI/1588-1604/02
Cadogan v Molyneux LON/NL/1637/02
Garner LON/NL/2141-2144 and 2167/03
19 Cheshire Garden LON/NL/4393/05
Cadogan v Whittome LON/NL/2973/04
Sportelli v Cadogan LON/NL/2788/04

DECISION

Introduction

1. This is an appeal from the Leasehold Valuation Tribunal for the London Rent Assessment Panel who, by a decision dated 8 June 2006, decided on an application under section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 as amended that a proposed provision, as contended for by the Appellant, should not be included in the new lease to be granted to the Appellant by the Respondents in accordance with Part I Chapter II of the 1993 Act.

2. The only aspect of the LVT's decision which is the subject of this appeal is its conclusion that the new lease to be granted to the Appellant as qualifying tenant should not include a clause as suggested by the Appellant and contained at P64 of the bundle, being a clause in the following terms requiring the Respondents (on an indemnity for costs and subject to counsel's opinion) to enforce against the lessees of other flats the covenants binding those other lessees under the terms of their leases:

> "That if so required by the Lessee the Lessor will at the cost of the Lessee enforce against the Lessee of any other Flat on the Estate such covenants similar to those herein contained entered into or to be entered into by the Lessee of such other Flat (the Lessee indemnifying the Lessor against all costs and expenses of such enforcement and supplying such sum as the Lessor shall reasonably require as a security for any such costs and expenses) and PROVIDED ALWAYS the Lessor may in its absolute discretion before taking any action under this clause require the Lessee or the person or persons requesting such action at his or their own expense to obtain for the Lessor from Counsel to be nominated by the Lessor advice in writing as to the merits of any contemplated action in respect of the allegations made and in that event the Lessor shall not be bound to take action unless Counsel advises that action should be taken and is likely to succeed."

For convenience this clause is hereafter called "the Proposed Clause".

3. This case raises the question of whether, having regard to the terms of the Appellant's existing lease and the provisions of the 1993 Act, especially section 57(6):

(1) the LVT (and now the Lands Tribunal on appeal) has power to order that the Proposed Clause should be included in the new lease; and

(2) if so, whether on the merits the Tribunal should reverse the decision of the LVT and order the inclusion of the Proposed Clause.

The facts

4. The Respondents are substantial landowners including in relation to land in Hyde Park forming their Hyde Park Estate, which extends to about 85 acres and comprises about 1738 units which are predominantly residential. Part of this estate comprises the building at 1 Hyde Park Square which includes about 30 separate residential flats, each flat being let on a long lease.

5. So far as concerns the Appellant's flat, namely flat 27, he holds this flat under a lease dated 5 May 1964 between the Respondents as landlord and himself as tenant whereby the flat was demised to him for a term of 97 years from 25 December 1961.

6. Clause 2 of the lease provides that the lessee (ie the Appellant) covenants with the lessors (ie the Respondents) in the manner set out in the first and second schedules. Clause 3 and the third schedule provides for covenants by the lessors in favour of the lessee and for certain further covenants by the lessee in favour of the lessors. Clause 4 of the lease is of significance and provides as follows:

> "AND IT IS HEREBY AGREED AND DECLARED that nothing in these presents shall be construed as entitling the Lessee to require that any such covenants or provisions as are contained herein shall be imposed upon or enforced in respect of any adjoining or neighbouring premises or any other property for the time being in the ownership of the Lessors."

Also it may be noted that in paragraph 14 of the third schedule it is provided:

> "Nothing in this Schedule shall raise the implication of any covenant by the Lessors with the Lessee not expressly set out herein".

7. Accordingly under the existing lease the Respondents cannot be required by the Appellant, on the basis of any covenant given by the Respondents to the Appellant, to seek to enforce against other lessees in the building any covenant given by such other lessees. It is left to the judgment of the Respondents as to whether in any particular circumstances to seek to enforce, through legal proceedings or otherwise, any such covenant. So far as concerns the ability of the Appellant, or any other lessee holding under a lease in terms similar to the Appellant's existing lease, to enforce directly any negative covenant in another such lessee's lease, Mr Johnson did not seek to argue that the present lease creates any form of letting scheme. I therefore proceed on the basis that, while the Appellant would enjoy any common law rights of action such as in nuisance against another lessee in the building, the Appellant does not enjoy any right directly to enforce covenants against such other lessee, nor does the Appellant enjoy the right to require the Respondents to enforce such covenants against such other lessee.

8. The Appellant and the Respondents have, subject to the outstanding point regarding the Proposed Clause, been able to agree the other terms of the proposed new lease to be granted to

the Appellant including the amount of the premium payable. A draft of this proposed new lease is at tab 5 in the bundle provided to the Tribunal at the hearing. If the Appellant succeeds in his argument before the Tribunal then the terms of the new lease will of course have to be amended so as to include a covenant by the Respondents in the form of the Proposed Clause and there would need to be an appropriate amendment made to the terms of the draft new lease including in particular paragraph 1 of the Fourth Schedule. However, the parties have agreed that if the Appellant's argument in favour of the Proposed Clause fails, then rather than go back to the precise provisions of the existing lease there should instead be included the provisions as contained within recital (5) of the draft new lease:

> "It is intended that every person becoming the owner of a long lease of a flat in the Building shall enter into a covenant with the Lessors to observe and perform in relation to that flat covenants in similar terms to those entered into by the Lessee hereunder to the intent that the owner of any flat held on a ninety-nine year lease may enforce the observance and performance by the owner of any flat held on a long lease of the said covenants."

Thus while paragraph 1 of the Fourth Schedule of the new lease contains provision similar to that in the existing clause 4, it is contemplated that under the new lease there should be a provision seeking expressly to set up a letting scheme and providing for the mutual enforceability between lessees holding under similar leases of any restrictive covenants contained in their leases.

9. So far as concerns the procedure followed under the 1993 Act, the position in summary is as follows:

(1) By a notice sent under cover of a letter dated 15 June 2004 the Appellant made his claim to exercise his right to acquire a new lease of the flat. The notice made a proposal regarding the premium to be paid and proposed that the new lease should be for a term expiring on 25 December 2148 at a peppercorn rent

> "....and otherwise on the same terms as the Lease subject to such modifications as are required or desirable in accordance with section 57 of the Act".

The Appellant's notice did not include anything more specific regarding the Proposed Clause than merely the text set out above. No argument has been raised by the Respondents to the effect that the section 42 notice failed to comply with the provisions of section 42(3)(d) which require that the tenant's notice must "specify the terms which the tenant proposes should be contained in any such lease". The Respondents have throughout proceeded on the basis that the Appellant has adequately and validly given notice of his requirement for the Proposed Clause and I shall proceed on that basis.

(2) By a counter notice dated 19 July 2004 the Respondents admitted the Appellant's right to acquire a new lease but gave notice that they did not accept the proposed premium or the proposal regarding the terms of the new lease and they made a counter proposal regarding the premium and also proposed that the

new lease should be in the Respondents' standard form for flats in converted blocks subject to such modifications as are required or desirable in accordance with section 57 of the Act.

(3) Within the relevant time limit the Appellant applied to the LVT under section 48(2) of the Act for the LVT to decide upon the terms of the new lease, the premium being agreed.

10. At the hearing before the LVT evidence was called by the Appellant, namely evidence from Mrs Gordon in accordance with her witness statement, and evidence was called by the Respondents from Mr Nicholas Baynes, a Chartered Surveyor and Partner in Cluttons. At the hearing before the LVT (as at the hearing before the Lands Tribunal) the Appellant represented himself and the Respondents were represented by Mr Johnson of counsel. It should however in this connection be noted that at the hearing before the Lands Tribunal (and doubtless also before the LVT) the Appellant presented his case with all the skill and courtesy which would naturally be expected from a practising barrister of many years experience. There was thus no inequality of arms, and I was grateful to the Appellant for his having helpfully set out his case in written submissions, which he added to as appropriate in response to points made by Mr Johnson and in response to questions from me.

11. The LVT's decision on the question of Proposed Clause is contained in paragraph 14 and 15 of its determination in the following terms:

> "14. The Tribunal decided in essence to prefer Mr Johnson's view of Section 57(6)a, although not necessarily for the reasons he advanced. In the existing lease the Tenant was debarred from enforcing covenants in other leases. Nevertheless the Tribunal implied from the evidence given by Mrs Gordon and Mr Gordon's submissions relating to the increase in absentee leaseholders, and its own knowledge of the Hyde Park Square Estate that there was a ready market for long leases in the existing form. No evidence was produced to us suggesting that the properties on the estate were unsaleable or selling at significantly less than the market value of similar properties. The new Preamble 5 and Clause 3 as drafted would allow Tenants to enforce covenants against other lessees of long leases on the estate which were granted in the new form, as it would create a letting or building scheme. This constituted an improvement, although the Tribunal noted that this improvement might only take effect gradually as more leases in the new form were granted. Mr Gordon's preferred clause might well spawn considerable litigation and disagreement in a large development, into which the Landlord would inevitably be drawn. While it had protection on costs, it seemed unnecessary in all the circumstances. The Tribunal considered that there was no defect which would engage Section 57(6)a.
>
> 15. After reviewing the case law the Tribunal decided to accept the narrower view advanced by Hague. The Tribunal generally preferred Mr Johnson's view of Section 57(6)b, although it did not agree with him that changes in conveyancing practice were not included in the interpretation of the word 'changes'. The Tribunal considered that the statement in Hague seemed the better view. Mr Gordon's interpretation that

> 'changes' could refer to the character of the lessees in the block seemed rather too vague, and might well open the door to more argument. While current conveyancing practice as to what was desirable had moved on, that alone seemed insufficient in this case, when old style leases were readily saleable. Also the Tribunal did not consider the wording offered by the Landlord as being unusual."

12. In granting permission to appeal to the Lands Tribunal the President recognised that the point was of some significance and stated

> "conflicting decisions on it have been given by LVTs and it is appropriate, therefore, for the Lands Tribunal to resolve the point".

The Statutory Provisions

13. Section 39 the 1993 Act as amended confers on a tenant of a flat, provided he has been a qualifying tenant of the flat for the last two years, the right exercisable in accordance with Chapter II to acquire a new lease of the flat. The Appellant is indeed a qualifying tenant because he is the tenant of his flat under a long lease, ie a lease for a term of years certain exceeding 21 years, see sections 5 and 7. The Act provides for the exercise of the right to a new lease by the service of a tenant's notice (section 42) and it provides for the giving by the landlord of a counter notice (section 45). Section 48 provides that in circumstances which arose in the present case (where the landlord has admitted the right to a new lease but where any of the terms of acquisition remain in dispute by a certain date) an application can be made to the LVT to "determine the matters in dispute".

14. Section 56(1) provides that where a qualifying tenant of a flat has a right to acquire a new lease of the flat and gives notice of his claim then, except as otherwise provided, the landlord is bound to grant to the tenant and the tenant is bound to accept, in substitution for the existing lease and on payment of a premium (as provided for in schedule 13) a new lease of the flat at a peppercorn rent for a term expiring 90 years after the term date of the existing lease.

15. Section 57 of the Act is central to the present case and makes provision regarding the terms on which a new lease is to be granted. Section 57(1), (2) and (6) are in the following terms:

> "(1) Subject to the provisions of this Chapter (and in particular to the provisions as to rent and duration contained in section 56(1)), the new lease to be granted to a tenant under section 56 shall be a lease on the same terms as those of the existing lease, as they apply on the relevant date, but with such modifications as may be required or appropriate to take account –
>
> (a) of the omission from the new lease of property included in the existing lease but not comprised in the flat;
>
> (b) of alterations made to the property demised since the grant of the existing lease; or

(c) in a case where the existing lease derives (in accordance with section 7(6) as it applies in accordance with section 39(3)) from more than one separate leases, of their combined effect and of the differences (if any) in their terms.

(2) Where during the continuance of the new lease the landlord will be under any obligation for the provision of services, or for repairs, maintenance or insurance –

(a) the new lease may require payments to be made by the tenant (whether as rent or otherwise) in consideration of those matters or in respect of the cost thereof to the landlord; and

(b) (if the terms of the existing lease do not include any provision for the making of any such payments by the tenant or include provision only for the payment of a fixed amount) the terms of the new lease shall make, as from the term date of the existing lease, such provision as may be just –

(i) for the making by the tenant of payments related to the cost from time to time to the landlord, and

(ii) for the tenant's liability to make those payments to be enforceable by distress, re-entry or otherwise in like manner as if it were a liability for payment of rent.

(3) ....

(4) ....

(5) ....

(6) Subsections (1) to (5) shall have effect subject to any agreement between the landlord and tenant as to the terms of the new lease or an agreement collateral thereto; and either of them may require that for the purposes of the new lease any term of the existing lease shall be excluded or modified in so far as –

(a) it is necessary to do so in order to remedy a defect in the existing lease; or

(b) it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease.

(7) to (11) ....."

16. It is not necessary for present purposes to examine the details of schedule 13, dealing with the amount of the premium payable, but it may be noted that part of the premium is made up of a marriage value which is calculated by taking into consideration, among other matters, the value of the interest to be held by the tenant under the new lease (Schedule 13 para 4(2)(b)). Thus in a case where there may be some marriage value it may well be that a

landlord, in its own interest, may be disinclined to seek to insist on new terms which substantially depress the marketability of a new lease, because that would depress the marriage value.

Evidence before the Lands Tribunal

17. There were before the Lands Tribunal two witness statements, namely the witness statement from Mrs Gordon as laid before the LVT and a witness statement from Mr Baynes dated 28 March 2007. Mr Johnson indicated that he did not require Mrs Gordon to be tendered for cross examination and was content for the Tribunal to receive Mrs Gordon's evidence in the form of her witness statement. So far as concerns Mr Baynes, Mr Gordon was asked whether he wished Mr Baynes to be tendered for cross examination. He answered in the affirmative and accordingly Mr Baynes confirmed the truth of the matters in his witness statement and was then briefly cross-examined as to whether he knew any details regarding a recent sale of flat 25 in the building. However he did not know such details and accordingly the cross-examination did not assist the Tribunal. Mr Gordon did not cross-examine Mr Baynes on the general content of his statement and his evidence therefore remains as contained in that statement.

18. As regards Mrs Gordon's evidence she has lived in the flat since July 1964. She stated that she has noticed a change in the nature of the occupants of the various flats in the building over the years and that the present occupants are inclined to be more transient than in earlier years. She stated that she is the director of an enfranchisement company which has purchased the freehold reversion of a block of flats in Bournemouth containing 133 flats and being the largest block in that town. She described how in 1991 it was reported to the leasehold association (on which she served for 17 years) that there was a difficulty over the leases when buying or selling the flats in that solicitors involved and in particular mortgage companies were unhappy about the terms of the old lease because it did not contained a clause requiring the head lessor to take action to enforce the covenants. A solution was found in that the head lessor was approached and was prepared, subject to costs being paid, to enter into a deed of variation to cure this gap. Prior to enfranchisement such a deed was used on 25 occasions. Mrs Gordon stated that when the freehold was purchased in 2005 new leases were granted and this new lease included a clause of mutual enforceability by the landlord company on the request of the lessees under the new lease. Mr Gordon also gave certain specific instances of problems that had occurred for her and the Appellant caused apparently by the occupant of the flat above theirs. She stated that she has many years experience and that she had learned that strict enforcement of covenants in a lease is an imperative and to follow that course of action leads to a stable and peaceful residence and one in which the value of the flats is protected.

19. So far as concerned Mr Baynes he is a partner in Cluttons (having joined that firm in 1987) and effectively all of his professional work has been in relation to residential properties, especially for central London landlords. He oversees others at Cluttons regarding the management of the building containing the Appellant's flat and he has dealt with this property since becoming involved with the estate in 1996. He described the substantial extent of the Respondents' Hyde Park Estate. He stated that around 25 to 30 leases in some of the modern

blocks of flats on the Respondents' Hyde Park Estate contained a provision similar to the Proposed Clause, save that the provision expressly states that the obligation to enforce covenants against other lessees is not to apply whilst the Respondents are the lessor. The introduction of such a clause is a compromise which the Respondents have been prepared to accept by negotiation when pressed. They have not however agreed to a clause in the term of the Proposed Clause (ie which would also bind the Respondents) as sought by the Appellant. As regards the Proposed Clause Mr Baynes stated that in his view such a clause could put the Respondents (or any other landlord bound by such a clause in respect of a substantial building) in a very difficult position as regards their relationship with the tenants of the building in that the Respondents could be called on by two different tenants to take action against the other tenant. He stated that very often in such situations neither tenant involved in the dispute was entirely blame free and that it would be very difficult for the Respondents, in such a situation, to have to take action against opposing tenants in the same dispute. Mr Baynes stated that a landlord should exercise its own judgment as to what action is required against any particular tenant whose activities may be causing problems in a building. He stated that this was good management and that it was not good management if the landlord could be forced into taking action against one tenant by another tenant or if the landlord could be forced into taking action against each of two warring tenants. He stated that in his experience it was not a good idea for a landlord of a block of flats to be seen to take the side of one tenant against the other and that it was better if the landlord was seen to take action on its own initiative against any tenants thought to be in breach of covenant. He stated that the Respondents' view, which reflected his own belief, is that clauses such as the Proposed Clause are not conducive to good estate management. He stated that a lease which does not contain a clause such as the Proposed Clause remains a lease which is acceptable security to a mortgage lender and reference was made to the Council of Mortgage Lenders' handbook which does not require a provision such as the Proposed Clause to be incorporated within leases. He stated that in over 19 years of experience in dealing with residential property management, including for landlords other than the Respondents, he had only occasionally come across leases containing a clause such as the Proposed Clause.

The Appellant's submissions

20. The Appellant noted the wording in section 57(6) to the effect that:

> ".... and either of them may require that for the purposes of the new lease any term of the existing lease shall be excluded or modified in so far as ...."

The Appellant argued that the wording of section 57(6) was sufficiently wide to allow new provisions, not in the existing lease, to be introduced and he drew attention to paragraphs 3 and 18 of the Leasehold Valuation Tribunal decision in *Cadogan v Stylianou* LON/NL/3228/04 decided on 9 June 2006. The relevant part of that decision concerned a proposal to introduce restrictions on alienation into the new lease and the Tribunal observed:

> "There are in fact arguably no alienation provisions in the existing lease, but it was not suggested that the words 'any terms of the existing lease shall be excluded or modified' in section 57(6) would prevent the introduction of a new term, and we agree".

In this respect he therefore disagreed with the footnotes in Hague on Leasehold Enfranchisement fourth edition at paragraph 32-04 where it is stated that section 57(6) does not include the power to add wholly new terms, this footnote being based on the Leasehold Valuation Tribunal decision in *Brander* LON/NI/1588-1604/02.

21. Even if the foregoing were wrong the Appellant argued that in any event what he was proposing constituted a blue pencil exercise upon the provisions of the existing lease and could properly be described as a modification of the terms of the existing lease rather than the introduction of some wholly new provision. The existing clauses which are being modified are those in Clause 2 of the existing lease (lessee's covenants) and in Clause 4 (the exclusion of mutual enforceability). Accordingly, the Appellant argued that the LVT and the Lands Tribunal both have the power to order the inclusion of the Proposed Clause. The Appellant then went on to examine the provisions of subparagraphs (a) and (b) of section 57(6) and argued that the present case fell within both (or at least one or other) of those provisions such that the proposed clause could and should be included.

22. So far as concerns section 57(6)(a) the Appellant argued that the word "defect" was not defined but was a common everyday word which should be given its ordinary meaning. He submitted that the question of whether a defect existed should be examined as at the date when the terms of the existing lease fall to be examined, rather than as at the date of the existing lease. He further argued that the word defect was not limited to patent defects (eg something which had obviously gone wrong on the face of the lease) and could extend to a defect such as in the present case, namely a lease which prevents mutual enforceability as provided for by existing Clause 4. He submitted that a modern lease should provide mutual enforceability and that a tenant should be entitled in an appropriate case to require the landlord to undertake enforcement procedures against other tenants in the block (provided of course adequate safeguards were given to the landlord by way of an indemnity for costs and the obtaining of counsel's opinion). So far as concerns paragraph (a) of section 57(6) the Appellant argued that the proper approach was to consider whether there was a defect and, if the answer is yes, then to examine what is necessary in order to cure that defect. He argued that the word 'necessary' should not be read as qualifying the defect – in other words paragraph (a) should not be read as requiring consideration of whether, if a defect has been identified, such defect can be said to be a substantial defect (which it is necessary to remedy) as opposed to being an insubstantial defect (which it is not necessary to remedy). Instead once a defect has been identified then whatever exclusion or modification is necessary to remedy the defect must be introduced into the lease.

23. The Appellant submitted that the fact that the presence or absence of the Proposed Clause may not affect the saleability or the price obtainable for a lease of the flat is not a test of whether the clause is defective or unsuitable, because purchasers may not be advised about or may not be concerned with such a provision when deciding upon price.

24. The Appellant submitted, on the basis that the existing lease did indeed contain a defect, that the Respondents' proposed terms of the new lease did not remedy this defect. A letting scheme was proposed, but only a limited number of tenants had so far taken new leases and the

Appellant would be unable to enjoy any mutual enforceability of covenants against tenants under existing leases. Also a letting scheme would only extend to restrictive covenants. Also in future tenants seeking a new lease may seek to resist the Respondents' proposed new terms setting forth a letting scheme. In summary he argued that the gradual extension of the mutual enforceability of covenants (as contemplated by the LVT in paragraphs 7 and 14 of their decision) may never occur.

25. As regards section 57(6)(b) the Appellant submitted that the changes there referred to could include changes in conveyancing practice. He accepted that the absence of the Proposed Clause did not result in the lease being unacceptable to mortgagees having regard to the standard form instructions contained in the Council of Mortgage Lendors Handbook issued to solicitors acting for them when advancing money on mortgage of leasehold properties. However the Appellant drew attention to what he submitted was a wide recognition of the suitability and desirability of a clause such as the Proposed Clause as evidenced by the following matters:

1. A tenant who enjoys no more than a common law action in nuisance against a troublesome neighbour is in substantially less strong a position than a tenant who can, through the landlord, rely upon an express covenant going wider than a covenant merely against nuisance, eg a covenant against doing anything that is a 'nuisance damage, annoyance or disturbance' (see paragraph 12 of the First Schedule to the existing lease) or a specific covenant to keep covered with carpet or similar material the floors of the demised premises except any kitchen or bathroom (see paragraph 11 of the First Schedule to the existing lease).
2. The Appellant also drew attention to Mrs Gordon's evidence as to the desirability of a clause such as the Proposed Clause.
3. The Appellant referred to the fact that on one of London's leading estates, namely the Cadogan Estate, a clause similar to the Proposed Clause was included, see *Cadogan v Molyneux* LON/NL/1637/02 to which is attached a copy of the relevant provisions of the Cadogan Lease at pages 173 and 174 of the bundle.
4. The Appellant also drew attention to the recognition by the present Respondents (although he submitted the recognition did not go far enough) of the desirability of having some form of mutual enforceability of covenants between lessees, and that the Respondents in their new lease sought to set up a letting scheme and sought to depart from Clause 4 of the existing lease.
5. The Appellant also drew attention to the decisions in certain other LVT decisions, especially in the case of *Garner* LON/NL/2141-2144 and 2167/03 dated 23 March 2004 where the Leasehold Valuation Tribunal agreed with the submission that the leases were defective in so far as they contained no covenants to require the lessor to enforce covenants in the leases of other flats and where the LVT found from their knowledge and experience that the absence of a mutual enforceability covenant could severely affect the saleability of the lease and therefore should be included. He also referred to a recent decision in relation to *19 Cheshire Garden* LON/NL/4393/05 where the Leasehold Valuation Tribunal accepted the tenants' argument that on the facts of that case

a covenant by the landlord to enforce the covenants given by the other lessee in the building (there were only two units in that building) should be included.

26. Accordingly the Appellant submitted that even if, contrary to his first argument, the Proposed Clause could not be required under section 57(6)(a) for the purposes of remedying a defect in the existing lease, it could be required under section 57(6)(b) on the basis that it would be unreasonable in the circumstances to include the terms of old clause 4 in the new lease without modifying it as proposed by him in view of changes in conveyancing practice occurring since the grant of the existing lease, being changes which have affected the suitability of the provisions of the existing lease.

The Respondents' submissions

27. Mr Johnson had helpfully provided a detailed skeleton argument which he developed in oral submissions. He divided his submissions into four parts:

(1) A brief examination of other jurisdictions where the terms of leases can be altered.

(2) The statutory scheme of the 1993 Act.

(4) Whether, the LVT (and the Lands Tribunal on appeal) has power to determine that the Proposed Clause should be included in the new lease.

(5) Whether if such power exists, it is legitimate to exercise such power in the light of the qualifying criteria in section 57(6)(a) and (b).

28. So far as concerns other jurisdictions where leases can be altered, Mr Johnson referred specifically to two such jurisdictions, namely section 35 of the Landlord and Tenant Act 1954 and section 35 of the Landlord and Tenant Act 1987. As regards the former provision (dealing with the terms of a renewal tenancy granted to business tenants under Part II of the 1954 Act) Mr Johnson pointed out that the terms of such a renewal tenancy (other than the duration and rent) were to be such as may be agreed or, failing agreement, such as may be determined by the Court "and in determining those terms the Court shall have regard to the terms of the current tenancy and to all relevant circumstances". This provision has been the subject of substantial judicial consideration, but it is not necessary for present purposes to examine that in detail. What may be observed, submitted Mr Johnson, is that the Court is given a wide jurisdiction as to the terms of the new tenancy and the Court is merely told to "have regard to" the terms of the current tenancy and to all relevant circumstances. So far as concerns section 35 of the 1987 Act this makes provision for the application by a party to a lease to seek a variation of the lease insofar as the lease fails to make satisfactory provision with respect to one or more of certain specified matters. If the grounds for making an application for variation are made out then the tribunal may make an order varying the lease and this may be either the variation specified in the relevant application "or such other variation as the Tribunal thinks fit", see section 38. Thus this provision expressly contemplates the variation of the terms of leases and uses wide words as regards the powers of the Tribunal when choosing the varied terms. Mr Johnson submitted that both of the foregoing provisions conferred a much more open jurisdiction than

the jurisdiction, which he argued was a narrow one, conferred on a tribunal under section 57(6) of the 1993 Act.

29. So far as concerns the statutory scheme of the 1993 Act Mr Johnson drew attention to the different wording as between the powers of the tribunal where section 57(1) applies namely ".... but with such modification as may be required or appropriate to take account" of certain matters. As regards section 57(2), where this applies the terms of the new lease shall make "such provision as may be just" in respect of certain specified matters. Mr Johnson argued that the word "appropriate" in subsection (1) and the expression "as may be just" in subsection (2) were considerably wider than the provisions to be found in subsection (6). He submitted that under subsection (6) any change that can be required in the terms of the existing lease is limited to a change which involves an exclusion of an existing clause or a modification of an existing clause (and provided also that the matter falls within either paragraph (a) or (b)).

30. With the foregoing introduction regarding other jurisdictions and regarding the scheme of the 1993 Act Mr Johnson advanced his first substantive argument namely that the LVT had and the Lands Tribunal has no power to order the inclusion of the Proposed Clause. He submitted that for section 57(6) to be available the person seeking the exclusion or modification must be able to point to some clause in the existing lease which is to be excluded or modified. He submitted that if all that the Appellant sought was an exclusion of old Clause 4, then he could not argue there was no jurisdiction to exclude it. However, Mr Johnson pointed out that what was required by the Appellant was not a simple deletion of Clause 4 but was the introduction of a new covenant by the Respondents to enforce the covenants against other tenants coupled with an alteration to old Clause 4 which amounted in effect to its reversal through 180 degrees. Mr Johnson referred to the dictionary definition of "modify" which gives as one meaning:

> "make partial or minor changes to; alter without radical transformation".

(In reply the Appellant pointed out the dictionary went on to indicate that modify now frequently is used as referring to "alter so as to improve").

31. Mr Johnson accepted that if his submission on this point were correct then, in a case where the existing lease contained an obvious omission in the sense of a complete absence of a term which would normally be required in a lease, the problem could not be cured under section 57(6) in the absence of agreement between the parties. However, he pointed out that as a matter of practicality and self interest the parties would be likely to agree for the omission to be cured and, in the absence of this, there would be the possibility of an application under section 35 of the 1987 Act to cure the problem. In summary he argued that under section 57(6) it was only possible, having identified some term of the existing lease, either to exclude that term or to modify that term, but it was not possible to introduce new provisions.

32. If, contrary to his primary argument, the LVT had and the Lands Tribunal has power to order the introduction of the Proposed Clause, then he argued that neither of the qualifying circumstances in paragraph (a) or (b) of section 57(6) were present in the present case.

33. As regards section 57(6)(a) he submitted that for there to be a defect in the existing lease it was necessary that there was something actually wrong with the existing lease as a result of which the lease does not work, eg service charge provisions where the percentages are no longer capable of calculation or no longer add up to 100 per cent across the building. He submitted that where a lease contains provisions which do work but which could be put into a form which one or other or both of the parties might view as more desirable this was not a lease which contained a defect for the purposes of paragraph (a). He submitted that if the present Clause 4 involved something being wrong with the lease such that the lease did not work and was in consequence defective, then one would expect to see this defect reflected in the value of the lease. However, he drew attention to the fact that in the present case the premium was agreed between the parties without reference to whether or not the Proposed Clause would be included. He also drew attention to the fact that the presence or absence of the Proposed Clause is not something upon which the Council of Mortgage Lenders have any requirements. He referred to the *Cheshire Gardens* case where a clause such as sought by the Appellant was ordered to be included by the LVT, but he argued that the finding of a defect in the lease in that case was consistent with his argument that there was no defect in the lease in the present case. This was because in the *Cheshire Gardens* case the entire building only comprised two flats and the repairing obligation of major structural parts, such as the roof, was an obligation of one of the tenants. Accordingly the tenant of the lower part could not enforce the obligation to repair a crucial part of the structure unless that tenant was able to enforce the upper tenant's covenant by requiring the landlord to enforce it. In circumstances such as those, unlike the present case, the requirements of the Council of Mortgage Lenders would have been to require a covenant enforceable against the upper tenant (either directly or through the landlord) if the lease of the lower premises was to be mortgageable.

34. Mr Johnson further submitted that even if there is a defect in the existing lease, such that it is necessary to cure the defect, the clause proposed by the Appellant is not necessary because the letting scheme as proposed in the new lease would sufficiently cure the problem.

35. So far as concerns section 57(6)(b) Mr Johnson submitted that there was no sufficient evidence before the LVT or before the Lands Tribunal that there had been a change in conveyancing practice as between 1964 and 2004 (date of service of the section 42 notice) such as to justify a conclusion that is unreasonable in the circumstances for the new lease not to contain a provision such as the Proposed Clause. Mr Johnson noted that Hague accepts that a change in conveyancing practice can constitute a change within section 57(6)(b) but he submitted that this was incorrect and a mere change in conveyancing practice was insufficient. He submitted that it needed to be shown not merely that there had been a change in conveyancing practice but that there was a substantial reason for the change such that it would be unreasonable for the new lease to include the terms as it appeared in the original lease.

36. Mr Johnson drew attention to the evidence given by Mr Baynes which he submitted constituted reasoned evidence as to why the Proposed Clause could be undesirable and as to how such a clause was by no means universally included in leases of residential premises.

37. As regards other decisions by Leasehold Valuation Tribunals he accepted that these could only constitute assistance to the Lands Tribunal rather than any form of binding authority. He referred to two cases (both of which he stated were subject to appeal to the Lands Tribunal) in which the LVT had adopted a narrow construction to the jurisdiction under section 57(6), namely *Cadogan v Whittome* LON/NL/2973/04 and *Sportelli v Cadogan* LON/NL/2788/04. He accepted that the contents of paragraph 18 in *Cadogan v Stylianou* (see paragraph 20 above) were contrary to his submissions, but he submitted that this was of little weight bearing in mind no argument was advanced on the narrow wording of section 57(6). As regards the five LVT decisions in the Appellant's bundle he summarised these by pointing out that there were three cases in which the LVT refused to include a provision such as the Proposed Clause and one, namely *Garner*, where it was ordered to be included. He invited me not to follow the *Garner* decision and he pointed out that the LVT in that case appeared to have proceeded on the basis of their knowledge and experience which was contrary to the evidence before the Lands Tribunal in the present case. I have already recorded above his submissions on the *Cheshire Gardens* case.

Conclusions

38. I am unable to accept the Appellant's arguments. I conclude, in agreement with the LVT, that the Proposed Clause is not to be included in the new lease. My reasons for so concluding are substantially those advanced by Mr Johnson and can be expressed as follows.

39. The 1993 Act provides in section 57(1) that, subject to certain matters, the new lease to be granted to a tenant under section 56 "shall be a lease on the same terms as those of the existing lease, as they apply on the relevant date", subject to certain potential departures from these existing terms as provided for in section 57. Thus the starting point is firmly based in the terms of the existing lease. This is unsurprising bearing in mind that at the date when the new lease falls to be granted there may well be a substantial number of years (in the present case it happens to be just over 50 years) still unexpired on the existing lease, such that apart from the renewal the landlord and the tenant would continue to be bound by the existing terms for many years to come.

40. I accept Mr Johnson's argument that there is a notable difference between the wording of section 57(6) on the one hand and the wider provisions of certain other statutes such as section 35 of the 1954 Act and section 35 of the 1987 Act on the other hand. However of more significance than that is the distinction between the terms in section 57(6) on the one hand and the terms of other subsections within the same section on the other hand. Thus section 57(1), having provided for the starting point to be the terms of the existing lease, provides that the terms of existing lease are to be "with such modifications as may be required or appropriate to take account" of the matters in paragraphs (a) to (c) of that subsection. In contrast to section 57(6), which is dealing with the exclusion or modification of a particular term or terms, section 57(1) deals with the lease terms generally and provides that these terms can be the subject of modification. Also the modification can be such as may be required "or appropriate". Thus where subparagraph (a), (b) or (c) apply there is a notably wider power to alter the existing terms than under section 57(6). Similarly under section 57(2), where this applies, provisions

dealing with certain topics are to be included being such provisions "as may be just". Again this gives a notably wider power to the LVT and the Lands Tribunal to decide upon the new terms than under section 57(6).

41. Turning to section 57(6) the opening passage prior to the semi-colon gives the landlord and the tenant power to agree terms different from those which would otherwise emerge from the application of section 57(1) to (5). There then come the crucial words after the semi-colon namely that either of the parties "may require that for the purposes of the new lease any term of the existing lease shall be excluded or modified insofar as" either of paragraphs (a) or (b) apply. In contrast to the approach where subparagraphs (a) to (c) of section 57(1) apply, the words in section 57(6) contemplate the parties having open on the table before them the terms of the existing lease and identifying one or more of those terms as being a term which, by reason of the matters in paragraphs (a) or (b), should either be excluded from the new lease or should be modified in the new lease. In my judgment there is no power under section 57(6) for a party to require that there is added into the new lease a new provision which is not to be found in the old lease. There is nothing illogical or unfair in this because, apart from the grant of the new lease, the parties would have continued to be bound by the terms of the old lease for the next X years where X may be a substantial period (over 50 years in the present case). It is one thing to exclude or modify a term or terms of the existing lease where a good reason (ie within paragraph (a) or (b) of section 57(6)) can be shown. It is another thing to permit a party to seek a rewriting of the lease by the introduction of new provisions.

42. In the present case there is no clause such as the Proposed Clause. The closest the existing lease comes to the topic dealt with in the Proposed Clause is in Clause 4 of the existing lease which makes a provision contrary to that sought by the Proposed Clause.

43. In summary in my judgment the Appellant's proposal for the inclusion of the Proposed Clause and the blue pencilling of old Clause 4 does not constitute the exclusion of a term of the existing lease nor does it constitute a modification of a term of the existing lease. On the facts of the present case what is proposed is the introduction of a new provision. While I see the force of Mr Johnson's submission that "modified" in section 57(6) should be construed in accordance with the dictionary definition mentioned above as meaning "make partial or minor changes to; alter without radical transformation" I am unable to accept that as a matter of law a party can in no circumstances seek a reversal of a provision. Such circumstances will no doubt be rare, but if "modified" were strictly limited to the definition offered by Mr Johnson the following unsatisfactory circumstance, which cannot have been intended by Parliament, could arise. Suppose there is a clause in the existing lease which contains what would appear to be a misprint in that, by reason of the erroneous inclusion of the word "not" or some such mistake, the clause says the opposite of what the original parties to the lease must both have intended and as a result, if read literally, means there is a defect in the lease. Obviously such a mistake would in all probability be remedied with commonsense and by agreement between the parties. If however one party refused to agree to alter the clause I do not accept that the other would be powerless to require the reversal of the provision by the deletion of the offending word "not" under section 57(6) and would instead have to commence an action for rectification or make an application for variation under the 1987 Act. However in the present case what the Appellant

seeks is in substance the introduction of a new term rather than a modification of an existing term.

44. It follows that I accept Mr Johnson's submission that neither the LVT nor the Lands Tribunal has power in the present case, having regard to the terms of the existing lease, to order that the Proposed Clause is to be included in the new lease.

45. If the foregoing is wrong and there exists on the facts of the present case power for the LVT and the Lands Tribunal to order the inclusion of the Proposed Clause, I conclude that the LVT was correct on the merits of the case not to include the Proposed Clause. My reasons for this conclusion are as follows.

46. The furthest which the evidence before me goes regarding how usual or desirable the Proposed Clause is can be summarised as follows:

(1) Tenants may reasonably consider a clause such as the proposed clause to be desirable. A tenant would be more happily placed so far as concerns being able to ensure the enforcement of covenants against fellow tenants in a building if a clause such as the Proposed Clause is present in the lease.

(2) A clause such as the Proposed Clause is not uncommon and is used by various landlords. I note Mr Baynes' evidence that he has only occasionally come across leases containing a clause such as the Proposed Clause, but I am bound to find that the use of a clause such as the Proposed Clause is more widespread that this evidence suggests bearing in mind that it appears to be used in leases on the Cadogan Estate and having regard to Mrs Gordon's evidence and to observations in some of the LVT decisions before me.

(3) However the use of such a clause is not established on the evidence before me as being standard conveyancing. It is not established that the omission of such a clause would be a departure from such standard conveyancing. Also a lease omitting a clause such as the Proposed Clause and containing old Clause 4 would be acceptable to the Council of Mortgage Lenders and would not have any significant affect on the value of the lease. This is because under the terms of the existing lease (and the proposed new lease) the circumstances are not such that the responsibility for the insurance maintenance or repair of the common services is a responsibility of one or more of the tenants, and accordingly the provisions of paragraph 5.10.6 of the CML Handbook do not apply. A lease containing old Clause 4 (and not containing a clause such as the Proposed Clause) is therefore acceptable as security to a mortgagee. Also in the present case the Appellant and the Respondents agreed the premium to be paid for the new lease prior to the resolution of the present disagreement as to whether or not the Proposed Clause should be included. I also note the LVT's statement in paragraph 14 of its determination that:

> "No evidence was produced to us suggesting that the properties on the estate were unsaleable or selling at significantly less than the market value of similar properties."

(4) Landlords may reasonably take the view, which is the view taken by the present Respondents and shared by an experienced professional Mr Baynes, that a clause such as the Proposed Clause is undesirable and could give rise to estate management problems and a deterioration in the relationship between a landlord and its tenants.

47. In the light of the foregoing it is first necessary to consider section 57(6)(a) and to do so on the assumption (contrary to my first finding) that there is power under that provision to require the introduction into the new lease of the Proposed Clause. Under section 57(6)(a) the Appellant can require the old lease to be modified insofar as it is necessary to do so in order to remedy a defect in the existing lease. The question therefore arises as to whether the presence of old Clause 4 and the absence of a clause such as the Proposed Clause constitutes a defect in the existing lease. There is no definition in the statute of the word "defect" which is an everyday English word. The Shorter Oxford English Dictionary gives as a meaning: shortcoming, fault, flaw, imperfection. I consider it proper to adopt this fairly broad meaning of defect but subject to the following qualification. I conclude that a lease can only properly be described as containing a defect (in the sense of shortcoming, fault, flaw or, perhaps even, imperfection) if it can objectively be said to contain such a defect when reasonably viewed from the standpoint of both a reasonable landlord and a reasonable tenant. It may be noted that once a defect is shown to exist in the existing lease then a party may "require" that for the purposes of the new lease any term of the existing lease "shall" be excluded or modified in so far as it is necessary to do so in order to remedy the defect. This mandatory language indicates that the concept of a defect is a shortcoming below an objectively measured satisfactory standard. It is not sufficient for a provision to be a defect only when viewed from the standpoint of one or other party.

48. Applying the foregoing approach, I am unable to conclude, in the light of the matters recorded in paragraph 46 above, that the existing lease contains any defect as alleged by the Appellant.

49. Turning to section 57(6)(b) I accept that changes in conveyancing practice are capable of amounting to changes within paragraph (b) of section 57(6). However in the light of the matters in paragraph 46 above I am unable to conclude that there have occurred any changes in conveyancing practice which affect the suitability of the terms of the old lease (in particular old Clause 4) such as to make it unreasonable in the circumstances not to include the Proposed Clause in place of old Clause 4.

50. In the result therefore I dismiss the Appellant's appeal and conclude that the Proposed Clause is not to be included in the new lease.

51. Very properly, bearing in mind the limited costs jurisdiction in the present appeal, neither party sought to make any application for costs against the other party.

Dated 25 May 2007

His Honour Judge Huskinson