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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/OLR/2011/1214**
Property	:	**Flat 124A, 4 Whitehall Court, London, SW1A 2EP**
Applicants	:	**Mr M Rossman**
Representatives	:	**In person**
Respondent	:	**The Crown Estate**
Representative	:	**Mr A Sheftel of Counsel**
Type of Application	:	**SECTION 48 OF THE LEASEHOLD REFORM, HOUSING & URBAN DEVELOPMENT ACT 1993**
Tribunal Members	:	**Judge I Mohabir** **Mr I Holdsworth**
Date and venue of Hearing	:	**2 July 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**23 September 2013**

DECISION

Introduction

1. This is an application made by the Applicant under section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 (as amended) ("the Act") for a determination of the premium to be paid for an extended lease of Flat 124A, 4 Whitehall Court, London, SW1A 2EP ("the property").

2. The property is a residential flat that forms part of a development known as 3 & 4 Whitehall Court, London, SW1, which is laid out over basement, ground, upper ground and 1st to 7th floors and Tower accommodation above, part of which has been adapted and sometimes referred to as the 9th and 10th floors.

3. Over time the building has been redeveloped and the aggregate of the service charge contributions now exceed 100%. It is thought that there are approximately 115 residential flats and that the aggregate of the service charge contributions are approximately 130%.

4. The freehold interest in Whitehall Court is held by the Respondent. A headlease of 3 & 4 Whitehall Court dated 12 May 1987 was grated to Whitehall Court (Holdings) Ltd ("WCHL") for a term of years from 5 January 2981 to 4 April 2086 and is subject to the residential underleases.

5. By a Notice of Claim dated 25 March 2011 served pursuant to section 42 of the Act, the Applicant exercised the right to the grant of a new lease of the property. The proposed premium was £16,350, apportioned at £9,319.50 and £7,030.50, as between the Respondent and WCHL respectively.

6. By a counter notice dated 16 May 2011 served pursuant to section 45 of the Act, the Respondent, as the competent landlord, admitted the

Applicants' right to acquire a new lease and counter proposed a premium of £68,228 and £2,947 in respect of WCHL.

Matters Not Agreed

7. The Tribunal was told that the premium and terms of the new lease had been agreed save for clause 2.21. This relates to the service charge contribution payable by the lessee. The Respondent's proposed variation stipulates a contractual rate of 0.8%. This is not agreed by the Applicant on the basis that the aggregate of the total service charge contributions exceed 100% of expenditure. The Applicant proposed that a square footage proportion be applied, which would result in a service charge contribution of 0.287230%.

The Relevant Law

8. Essentially, section 57(1) of the Act requires that a new lease shall be granted on the same terms as the existing lease, subject to the provisons set out in sub-sections (1) to (11). In paticular sub-section (6) provides:

> *"Subsections (1) to (5) shall have effect to any agreement between the landlord and tenant as to the terms of the new lease or any agreement collateral thereto; and either of them may that for the purposes of the new lease any term of the existing lease shall be excluded or modified in so far as-*
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> *(a) it is necessary to do so to remedy a defect in the existing law; or*
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> *(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."*

Hearing and Decision

9. The hearing in this matter took place on 2 July 2013. The Applicant appeared in person. The Respondent was represented by Mr Sheftel of Counsel. WCHL did not attend and were not represented.

10. In a very detailed and extensive opening statement, the Applicant had, helpfully, set out his arguments in relation to the unsatisfactory nature of the service charge provisions in his lease. As will become apparent, it is not necessary to set out here the details of his arguments. However, in broad terms, the Applicant argued that clause 2.21 of the new lease should be varied by the Tribunal under section 57(6) of the Act for three main reasons. These are:

(a) that it would comply with the Unfair Contract Terms Regulations 1999.

(b) that the service charge provisions operated extra contractually, that is, the landlord has an absolute discretion in relation to the lessees' service charge liability.

(c) that the existing service charge terms breached the guidelines issued by the RICS.

11. In the present case, the Tribunal had the benefit of an extensive, clear and detailed earlier decision made by another Tribunal dated 11 February 2013 ("the earlier decision"). That decision concerned an application that had been made by the Applicant, together with a number of joined lessees, under section 35 of the Landlord and Tenant Act 1987 seeking to vary the terms of their leases to address, they argued, the shortcomings of the service charge regime in operation.

12. On that occasion, the Applicant had proposed the same service charge variation he seeks in these proceedings and as part of his case had advanced the same argument set out at point (b) above. The reasons given by the Tribunal in dismissing are to be found at paragraphs 122 to 141. Essentially, the Tribunal held that, whilst the present regime was not perfect, it did not amount to defect that warranted the terms of the leases being varied. As part of the earlier decision, the Tribunal also considered the extra contractual arrangements that formed part of the

service charge regime. In addition the Tribunal was satisfied that the Applicant's proposed variation was not workable and an improvement on the current scheme operated by WCHL.

13. Whilst the earlier decision is not strictly binding on this Tribunal, it is nevertheless highly persuasive, as Mr Sheftel correctly submitted. Indeed, this Tribunal repeats and relies on the same reasoning set out in the earlier decision to find that the existing service charge terms in the Applicant's lease do not amount to a sufficiently serious defect within the meaning of section 57(6)(a) of the Act. In addition, the Applicant had not referred to any physical or legal changes since the grant of the lease as a result of which it would be unreasonable to include in the Respondent's proposed clause without modification in accordance with section 57(6)(b).

14. The Tribunal then turned to consider the arguments made by the Applicant in relation to the Unfair Contract Terms Regulations 1999 ("the Regulations") and, specifically, whether existing service charge terms infringed one or more the Regulations and could be regarded as a "defect". This was not an argument that the Applicant had specifically advanced in the previous proceedings.

15. The Tribunal concluded that the service charge terms did not breach any of the Regulations and could not, therefore, be regarded as a defect within the meaning of section 57(6)(a) of the Act. Paragraph 1 of Schedule 2 of the Regulations sets out a non-exhaustive list of contractual terms that could amount to an unfair term. The Tribunal concluded that the service charge provisions in the Applicant's lease did not breach any of the terms set out in paragraph 1 of Schedule 2 of the Regulations. Mr Sheftel correctly submitted that the service charge provisions are not ambiguous or unfair to the tenant. They do not allow the landlord to unilaterally vary the tenant's liability, for example, in breach of paragraph 1(k) of Schedule 2 of the Regulations and the terms are absolute.

16. The Applicant's service charge liability was not affected by the extra contractual arrangements in place and do not, in any event, form part of the terms of the Applicant's lease. They are, therefore, not caught by the Regulations. Indeed, at paragraph 130 of the earlier decision, the Tribunal stated that the lessees in fact paid less than the contractual contribution stipulated in their leases as a consequence of this arrangement. They could not, therefore, either be regarded as being an unfair term within the meaning of the Regulations or a "defect" requiring remedying under section 57(6)(a) or being unreasonable and thereby requiring modification under section 57(6)(b) of the Act.

17. As to whether the service charge terms breached one or more of the RICS Management Code, the Tribunal had little difficulty in concluding that the provisions of the Code cannot form the basis on which the contractual terms of a lease can be varied. The RICS describe the Management Code as "guidance on best practice to practitioners" with none of the provisions mandatory. They are intended to be no more than a guide in the practice of good management and no more.

18. Accordingly, the Tribunal was satisfied that none of the exceptions set out in section 57, and in particular subsection (6), of the Act had been met by the Applicant and it determined that the service charge provisions of new lease should be granted on the same terms as the Applicant's existing lease unless the parties agree on different terms.

Judge I Mohabir
23 September 2013