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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AZ/OLR/2015/1527**
Property	:	**115 Moremead Road, London, SE6 4LU**
Applicant	:	**Mr Paul James Stack**
Representative	:	**Miss Holmes of Counsel**
Respondent	:	**Ms Francis Bruton**
Representative	:	**Did not attend and was not represented**
Type of Application	:	**Section 48 of the Leasehold Reform, Housing & Urban Development Act 1993**
Tribunal Members	:	**Judge I Mohabir** **Mrs S Redmond MRICS**
Date and venue of Hearing	:	**19 January 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**15 February 2016**

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 terms of acquisiton on which the new lease of 115 Moremead Road, Catford, London, SE6 3LS ("the property") is to be granted.

2. The Applicant holds the property under a lease dated 24 April 1998 granted by the Respondent to (1) Bevan-Thomas and (2) Doris Lee for a term of 99 years from the same date ("the Existing Lease").

3. By a Notice of Claim dated 20 February 2015 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 £3,750.

4. By a counter notice dated 23 April 2015 served pursuant to section 45 of the Act, the Respondent admitted the Applicant's right to acquire a new lease and counter proposed a premium of £6,100.

5. The premium has been agreed in the sum of £5,500. However, the terms on which the new lease is to be granted remain in dispute for the following reasons.

6. In the claim notice, the Applicant proposed, *inter alia*, that the new lease be granted:

> *" In all other aspects on the same terms as those contained in the existing lease (and deed if applicable) save only for such modernisation as may be necessary to make the lease good and marketable security in line with the requirements of the Council of Mortgage Lenders Handbook together with such other amendments as may be necessary or desirable in accordance with section 57 of the 1993 Act."*

7. In the counter-notice, the Respondent rejected this proposal and counter proposed that the new lease be granted on the terms of the draft lease annexed to the notice.

8. Thereafter, unsuccessful extensive and protracted correspondence took place between the parties to attempt to agree the terms on which the new lease was to be granted. This resulted in three forms of draft lease being proffered by the respective parties. These are:

   (a) The Respondent's draft lease annexed to the counter-notice, which is materially different from the terms of the Existing Lease.
   (b) The Deed of Surrender and Lease by Reference to the Existing lease provided by the Applicant.
   (c) The Existing lease copied and amended by the Applicant in accordance with the 1993 Act.

8. In the absence of any agreement being reached, the Applicant made this application to the Tribunal for the terms of acquisition to be determined.

The Relevant Law

9. Given that both parties have had the benefit of professional representation and advice throughout this matter, it is sufficient to note that the Tribunal's determination takes place under section 48, by reference to section 57, of the Act and the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993 ("the Regulations").

Hearing and Decision

10. The hearing in this matter took place on 19 January 2016. The Applicant was represented by Miss Holmes of Counsel. The Respondent did not attend and was not represented. However, an e-mail from the Respondent's solicitor dated 18 January 2016 appears to contend as follows:

(a) that the Applicant's failure to comply with the 1993 Regulations means that the terms of the Respondent's draft lease are deemed to have been agreed and, as a consequence, the Tribunal does not have jurisdiction in this matter; and

(b) under the Act, the obligation is on the landlord to provide a more modern precedent draft new lease and the obligation is on the tenant to suggest proposals for amending the draft lease.

These issues are dealt with in turn below.

The Regulations

11. Paragraph 7 of Schedule 2 of the Regulations provides that:

> *"(1) The landlord shall prepare a draft lease and give it to the tenant within the period of fourteen days beginning with the date the terms of acquisition are agreed or determined (by the Tribunal).*
>
> *(2) The tenant shall give to the landlord a statement of any proposals for amending the draft lease within the period of fourteen days beginning with the date the draft lease is given.*
>
> *(3) If no statement is given by the tenant within the time specified in sub-paragraph (2), he shall be deemed to have approved the draft lease.*
>
> ..."

12. It is clear, therefore, that the provisions of paragraph 7 are only engaged once the terms of acquisition are agreed or have been the subject matter of a determination by the Tribunal.

13. Section 48(7) of the Act defines the "terms of acquisition" as meaning:

> *"...the terms on which the tenant is to acquire a new lease of his flat, whether they relate to the terms to be contained in the lease or to the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of the lease, or otherwise."*

14. It is also clear from section 48(7) that for the terms of acquisition to be regarded as having been agreed by a landlord and a tenant, there must

be agreement both in relation to the premium (and any other amounts payable) ***and*** (our emphasis) all of the terms of the new lease. In the absence of this, neither the time limits nor the deeming provisions in paragraph 7 of Schedule 2 of the Regulations are engaged.

15. It is beyond doubt from the *inter partes* correspondence before the Tribunal that, whilst the premium had been agreed by the parties, there had been no agreement on all of the terms of the new lease. Indeed, the extensive nature of the correspondence reveals the lengthy negotiations that took place between the parties and the level of disagreement on the new lease terms. Therefore, as correctly submitted by Counsel for the Applicant, the terms of acquisition had not been agreed and the terms of provisions in paragraph 7 of Schedule 2 of the Regulations were never engaged. Therefore, the terms of the Respondent's draft lease annexed to the counter notice were never capable of being deemed to have been agreed by the Applicant as was argued by her solicitor. It follows that the Tribunal still has jurisdiction to determine the terms of acquisition for the new lease.

Lease Terms

16. Unless the parties agree otherwise, the scope for modifying the terms of the existing lease is limited. Section 56(1) of the Act fixes the rent at a peppercorn and the term at 90 years from the expiry of the existing lease. Otherwise, section 57(1) of the Act provides that the terms of the new lease are to be the same as the existing lease unless modification which may be required or appropriate to take into account the matters set out in section 57(1)(a) to (c) are met. These are:

(a) The omission from the new lease of property included in the existing lease, but not comprised in the flat.

(b) Alterations made to the property demised since the grant of the existing lease.

(c) Where the existing lease derives from more than one lease, their combined effect and the differences (if any) in their terms.

17. Sections 57(1)(b) and (c) of the Act do not apply in this case. The issue is, therefore, is whether section 57(1(a) has been engaged.

18. The scope for modifying or excluding any existing term in a lease is limited to the two grounds set out in section 57(6) of the Act. These are:

(a) It is necessary to do so in order to remedy a defect in the existing lease.

(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.

19. The Act does not define what amounts to "necessary" and a "defect" under (a) or "changes" under (b). Both have been subject to judicial interpretation. The word "necessary" has been construed strictly and is not equivalent to "convenient"[1]. A similar narrow approach has been taken in relation a "defect" that it is necessary to remedy. The use of this provision to attempt to modernise the terms of a lease, as is the case here, in the face of opposition is not permissible[2].

20. In relation to section 57(6)(b) it has been held that this could include physical changes to the property used by the tenant, changed in acceptable conveyancing practice or changes in legislation such as the enactment of the Landlord and Tenant (Covenants) Act 1995[3].

21. It is clear that the burden is on the person proposing the change to demonstrate that there are grounds for deleting or modifying the term in question.

22. It is also clear that the rationale behind section 57(6) of the Act, in part at least, is to prevent the re-grant of partly defective leases and to

[1] see ***Waitt v Morris*** [1994] EGLR 224
[2] see ***Davies v Howard de Walden Estates Ltd*** unreported 1998 LVT
[3] see ***Waitt*** and ***Davies*** above

ensure at the time it is granted that it takes account of any relevant legislative changes that have occurred. It does not present an opportunity for either party to seek to redraft or modify a lease in any significant way in the absence of agreement to do so.

23. Examples of the proposed amendments by the Respondent to the existing lease have been, helpfully, set out at paragraph 31 to 36 of the skeleton argument provided by Counsel for the Applicant. It is not necessary to repeat these here, as they are self-evident.

24. Those amendments appear to result in a significantly different lease terms from the existing lease as was submitted by Counsel for the Applicant in her skeleton argument. The Tribunal, therefore, did not accept the assertion made by the Respondent that its draft lease was on substantially on the same terms as the existing lease. The justification on the part of the Respondent for seeking the make the proposed amendments is on the basis that "... *most landlords use a more modern precedent for the new lease...*". In the Tribunal's judgement, this does not discharge the burden of proving either ground in section 57(6) of the Act. It follows, therefore, that section 57(1)(a) is not engaged and the amendments proposed by the Respondent to the existing lease are not permitted.

25. As to the form of lease to be granted by the Respondent, the Tribunal determines that this should be the draft lease appearing at pages 80 to 102 in the hearing bundle, save for amending the lessees' names at page 80.

Judge I Mohabir