



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/45UH/OLR/2016/0221

Property : Flat 26 Seaview Court, Bath Road,
Worthing, West Sussex, BN11 3PE.

Applicant : Mr KC Stevenson & Mrs BN Stevenson

Representative : Biscoes Law Limited

Respondent : Brinor Investments Limited

Representative : Bishop & Sewell LLP

Type of Application : Determination of terms of acquisition
remaining in dispute. Section 48,
Leasehold Reform, Housing and Urban
Development Act 1993 (the Act)

Tribunal Member(s) : Judge RTA Wilson

Date of Decision : 11 May 2017

DECISION

Decision

The registration fee in the new lease shall remain at two pounds ten pence for the duration of the new term and accordingly the landlord's submission that Clause 11 of the Fourth Schedule of the lease be modified is rejected.

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 disputed terms of an extended lease of Flat 26 Seaview Court, Rowlands Road, Worthing, West Sussex, BN11 3LF ("the Property").
2. By a Notice of Claim dated 7 March 2016 served pursuant to Section 42 of the Act, the Applicant exercised the right to the grant of a new lease of the Property.
3. By a counter notice dated 19 May 2016 served pursuant to Section 45 of the Act, the Respondent admitted the Applicant's right to acquire a new lease of the Property.
4. The premium to be paid for the new lease has been agreed but the terms of the new lease remain in dispute as a result of which the Applicants have issued this application for the tribunal to decide on the disputed terms.
5. By consent of the parties the application has been determined on the papers without a hearing

Matters agreed

6. The premium of £24,500 and the valuation fee of £525 plus VAT have been agreed.

Matters not agreed

7. The Freeholder wants to change Clause 11 of the Fourth Schedule of the existing lease, which currently provides for the payment by an assignee of the lease of a registration fee of £2.10. The Freeholder considers that this clause should be updated by replacing £2.10 with £50 or such greater fee as shall be reasonable from time to time together with VAT at the appropriate rate. The Leaseholder does not agree with this proposal and they contend that such a change to the terms of the existing lease is not justified.

The Law

8. The relevant law is to be found in Section 57 of the Act the provisions of which are set out at the end of this decision.

Submissions

9. It is Respondent's contention that the existing registration fee of £2.10 is inadequate given the passage of time and effects of inflation since the original grant of the lease in 1971. They say that the £2.10 does not reflect the cost of work involved consequent upon the service of a notice of assignment. For example receipting and returning a copy of the notice, advising managing agents of the change in ownership, obtaining the deeds and placing the notice with them.
10. They further contend that the proposed revised fee of £50 plus VAT is in line with what is paid by other Leaseholders in the Property, consistent with the fee paid across the Respondent's property portfolio and consistent with two decisions on properties with similar facts determined by the London Leasehold Valuation Tribunal in 2007 and 2015.
11. Finally it pleads that the additional wording that it seeks to impose in the new lease namely *or such greater fee as shall be reasonable plus Vat* is also important because the new lease will run for another 144 years so that the registration fee will have to be adjusted as inflation and circumstances demand.
12. The Applicants' case centres on the existing wording of the registration clause which reads as follows: *within one month after every assignment of the demised premises or any part thereof to give written notice to the landlord of the assignment and the name and address of the assignee or assignees and on demand to produce to the landlord the instrument of assignment or proper documentary evidence of assignment by operation of law and to pay a fee of Two pounds ten new pence to the Landlord for registration thereof.* It is their submission that the clause does not require the Respondent to take any action when served with the notice of assignment. As no service is provided they say that subsection 2 of S.57 of the Act primarily relied upon by the Respondent is not engaged.
13. The Applicants' further contend that S.57 (6) of the Act which allows modifications to address changes occurring since the grant of the existing lease, which affects the suitability of the clause in the new lease, does not assist the Respondent. This is because it has been decided by another tribunal that the fact that in real terms the value of a fee payable has diminished is not a change in circumstances which in itself would justify modification of an existing term. In support of their arguments they cite two London Tribunal cases decided in 2013 and

2015 where in both cases attempts to increase the registration fee was rejected.

Discussion and determination

14. I start with my general approach to this issue. Under S.56 of the Act a leaseholder may claim a new lease which is granted in substitution for the existing lease at a nominal rent for a term expiring 90 years after the term date of the existing lease.
15. The next point to turn is S.57, which deals with the terms on which the new lease is to be granted. S.57 (1) provides that except for the rent and the term, the terms of the new lease shall be those of the existing lease. However under that section modifications may be required or appropriate to take account of (a) omission of property in the new lease, (b) alterations to the property since the existing lease was granted.
16. S.57 (2) of the Act applies where the landlord will under the new lease be under an obligation to provide services. In such cases the new lease may include provisions under which the leaseholder makes payments for the costs incurred by the landlord. Where the existing lease does not have such provisions requiring leaseholder payments (or where they do, they only allow for a fixed payment) the new lease may have terms, which allow the landlord to recover the costs incurred from time to time.
17. S.57 (6) allows for the exclusion of a term or its modification to either remedy a defect or where it would be unreasonable to include it or modify it in view of changes that have occurred since the existing lease was granted.
18. I now address the rival submissions and the authorities relied upon. As far as the authorities are concerned both parties have cited a number of decisions of the London Leasehold Valuation Tribunal the forerunner to this tribunal. However these are all first instance non-binding decisions without detail as to the precise wording of the relevant covenants. As such whilst I have regard to them they offer only limited assistance.
19. A Supreme Court case is also cited namely the De Walden case decided in 2008. This decision is of course binding upon me but its facts are quite different and it is therefore also only of limited assistance. Furthermore as a general rule most cases are fact-specific, in the sense that what must be looked at is the particular clause in the particular lease of the particular property, and conclusions arrived at by previous courts or tribunals in relation to other clauses in other leases of other property are unlikely to be of much assistance.

20. I have approached this determination by reviewing each subsection of clause 57 to see whether the facts of this application can be said to apply to that subsection such as to allow the proposed revision.
21. The scope of subsection 1 of Section 57 clearly has no relevance to an increase in a registration fee. It is designed to deal with physical changes to a property.
22. Subsection 2 is designed to deal with leases, which oblige the landlord to provide services. However I agree with the leaseholder that in this case existing clause 11 of the Fourth Schedule does not contain any express or implied obligation on the part of the freeholder to provide a service and because no service is supplied I have concluded that Subsection 2 has no application.
23. Subsections 3 to 5 and 7 to 11 inclusive do not appear to be relied upon by either party so no comment is required other than to record that I am satisfied that they have no application.
24. That leaves Subsection 6. This clause is designed to allow for exclusion or modification in so far as is necessary to remedy a defect or where it would be "unreasonable to include without modification, the term in question in view of changes occurring since the date of the existing lease which affect the suitability of the provisions of that lease."
25. Whilst it is not expressly argued that the existing registration clause is defective it is at least arguable that it is no longer suitable in its current form on account of the effect of inflation and it appears that this is the argument put forward by the Freeholder and it relies upon subsection 6 for the modification.
26. I reject such an argument. It is pleaded by the Leaseholders and I agree with them that the registration clause simply provides for the Leaseholder to serve a notice of assignment on the Freeholder. It is a tenants covenant not a landlords one. There is no obligation on the part of the Freeholder to carry out any work upon receipt of such a notice and this is likely to be one reason why the registration fee was set at the low level of £2.10 in 1971. In my experience a low figure such as £2 was not uncommon for a clause of this kind in the 1970's, because the intention of the clause was not to secure reimbursement of the landlords costs so much as to provide a record (by the cashing of the cheque) that the notice had been received. There is no defect.
27. Further it is no surprise that the fee was set at a nominal low figure bearing in mind the lack of obligation on the part of the landlord. This lack of obligation means that any argument for an uplift based on the cost of the landlord's professional fees is not sustainable. In arriving at my decision I have also borne in mind that there is no presumption of, or a right of, indemnity in respect of the Freeholder's costs of administration and the service of a notice of assignment can be said to be of benefit to both parties.

28. The Respondent's contention that the fee be changed from a fixed fee to a variable one and with immediate effect increased by over 2000% cannot by any standards be regarded as reasonable and it bears the hall marks of the Freeholder seeking to improve upon the bargain that it agreed to when the lease was granted. The legislation is not designed for this purpose.
29. I agree with the decisions made by the tribunals in cases LON/00AZ/OLR/2013 and PJ/LON/00BB/OLR/2014/1458 that the fact that in real terms the value of the fee payable has diminished is not a "change in circumstances" which would in the context of this registration clause justify a modification of the existing term.
30. Having reviewed all of the Freeholders submissions I have concluded that none of the circumstances envisaged by Section 57 (1) or (2) apply to this case with the result that the Freeholders submission that clause 3 of the Fourth Schedule of the lease should be modified is rejected.
31. It is not clear from the papers if the parties have yet reached agreement on the level of Section 60 costs payable by the Applicants. If agreement cannot be reached an application to the tribunal should be made and the tribunal will give directions for the Section 60 costs to be determined.

Judge RTA Wilson
11 May 2017

Schedule of relevant law

Terms on which new lease is to be granted.

(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) Subject to subsection (4), provision shall be made by the terms of the new lease or by an agreement collateral thereto for the continuance, with any suitable adaptations, of any agreement collateral to the existing lease.

(4) For the purposes of subsections (1) and (3) there shall be excluded from the new lease any term of the existing lease or of any agreement collateral thereto in so far as that term—

(a) provides for or relates to the renewal of the lease,

(b) confers any option to purchase or right of pre-emption in relation to the flat demised by the existing lease, or

(c) provides for the termination of the existing lease before its term date otherwise than in the event of a breach of its terms; and there shall be made in the terms of the new lease or any agreement collateral thereto such modifications as may be required or appropriate to take account of the exclusion of any such term.

(5) Where the new lease is granted after the term date of the existing lease, then on the grant of the new lease there shall be payable by the tenant to the landlord, as an addition to the rent payable under the existing lease, any amount by which, for the period since the term date or the relevant date (whichever is the later), the sums payable to the landlord in respect of the flat (after making any necessary apportionment) for the matters referred to in subsection (2) fall short in total of the sums that would have been payable for such matters under the new lease if it had been granted on that date; and section 56(3)(a) shall apply accordingly.

(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 any 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) The terms of the new lease shall—

(a) make provision in accordance with section 59(3); and

(b) reserve to the person who is for the time being the tenant's immediate landlord the right to obtain possession of the flat in question in accordance with section 61.

(8) In granting the new lease the landlord shall not be bound to enter into any covenant for title beyond—

(a) those implied from the grant, and

(b) those implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994 in a case where a disposition is expressed to be made with limited title guarantee, but not including (in the case of an underlease) the covenant in section 4(1)(b) of that Act (compliance with terms of lease); and in the absence of agreement to the contrary the landlord shall be entitled to be indemnified by the tenant in respect of any costs incurred by him in complying with the covenant implied by virtue of section 2(1)(b) of that Act (covenant for further assurance).

(8A) A person entering into any covenant required of him as landlord (under subsection (8) or otherwise) shall be entitled to limit his personal liability to breaches of that covenant for which he is responsible.

(9) Where any person—

(a) is a third party to the existing lease, or

(b) (not being the landlord or tenant) is a party to any agreement collateral thereto, then (subject to any agreement between him and the landlord and the tenant) he shall be made a party to the new lease or (as the case may be) to an agreement collateral thereto, and shall accordingly join in its execution; but nothing in this section has effect so as to require the new lease or (as the case may be) any such collateral agreement to provide for him to discharge any function at any time after the term date of the existing lease.

(10) Where—

(a) any such person ("the third party") is in accordance with subsection (9) to discharge any function down to the term date of the existing lease, but

(b) it is necessary or expedient in connection with the proper enjoyment by the tenant of the property demised by the new lease for provision to be made for the continued discharge of that function after that date, the new lease or an agreement collateral thereto shall make provision for that function to be discharged after that date (whether by the third party or by some other person).

(11) The new lease shall contain a statement that it is a lease granted under section 56; and any such statement shall comply with such requirements as may be prescribed by rules made in pursuance of section 144 of the Land Registration Act 1925 .

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office, which has been dealing with the case. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
2. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
3. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking