FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	LON/00BH/ORL/2019/1061
Property	**:**	Flat 12, Grosvenor Court, Brewster Road, London E10 6RH
Applicant	**:**	Rafela Begum
Representative	**:**	DKLM LLP, Solicitors
Respondent	**:**	Better Properties Limited
Representative	**:**	Rice-Jones and Smith, Solicitors
Type of Application	**:**	Enfranchisement
Tribunal Members	**:**	Robert Latham Luis Jarero BSc FRICS
Date and venue of Hearing	**:**	12 November 2019 at 10 Alfred Place, London WC1E 7LR
Date of Decision	**:**	18 November 2019

DECISION

The Tribunal determines the preliminary issue against the landlord. The Tribunal will now give directions to determine the application in respect of both the premium and the terms of the new lease.

The Preliminary Issue

1. This is an application made pursuant to Section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") for a determination of the premium to be paid and the terms for a new lease.

2. On 24 January 2019, the tenant served her Notice of Claim proposing a premium of £33,500 and addressed the terms of the new lease as follows:

> "I propose that the terms of the new lease to be granted under Section 56 of LRHUDA 1993 is to be a lease on the same terms as

> those of the existing lease as they apply at the date of this Notice as modified in the case of the terms of years and the rent by that Section and such other terms as may be required by the LRHUDA 1993".

3. On 1 April, the landlord served its Counter-Notice proposing a premium of £81,1000. In respect of the terms of the new lease, the landlord stated:

> "The Landlord accepts the following proposals in the applicants notice: a new Lease to be granted under Section 56 of the Act, such lease to be on the same terms as those of the existing lease as they apply at the date of this notice as modified in the case of the terms of years and the rent by that Section and such other terms as may be required by the Act".

4. On 23 September, the tenant issued her application to this Tribunal, for the determination of the premium or other terms of acquisition which remain in dispute. Nationwide Building Society, the tenant's mortgagee, is named as an interested party. In Section 8 of the application form, the tenant records the difference between the parties on the premium. In Section 9, the tenant asserts that a number of proposed provisions to be added to the new lease, remain in dispute. These include:

(i) The addition of new clauses 4(4), 4(5) and 4(6), requiring the lessor to give advance notice to the lessee's "chargee" (mortgagee) of any breach of covenant by the lessee, before exercising any right of re-entry and giving the chargee the opportunity to remedy the breach.

(ii) To amend Clause 5(3) of the existing lease which is the lessor's covenant to insure the building. The amendment requires the lessor to insure the building to "the full reinstatement value" and to make up any shortfall from its own moneys if the building needs to be reinstated and the insurance moneys are inadequate.

(iii) To insert a new Clause 5(6) giving the lessee the right to terminate the lease if the building is not reinstated within two years of any damage or destruction.

The tenant states that no comments have been received from the landlord in respect of the proposed provision.

5. On 27 September, the landlord wrote to the tenant expressing surprise that she was trying to introduce new amendments to the lease at this stage. Its position is that the terms of the new lease have been agreed. An offer was made by the tenant in her Notice of Claim which was accepted by the landlord when it served its Counter-Notice. The only outstanding issue for the Tribunal to determine is the premium.

6. On 2 October, the landlord wrote to the tribunal to ask us to determine as a preliminary issue as to whether we have jurisdiction to determine the terms of the new lease given this apparent agreement. They state that, prior to the application, the tenant had not raised the proposed provisions.

7. On 15 October, the Tribunal requested the tenant to respond to the landlord's letter by 18 October. The Tribunal stated that it would deal with the issue as a preliminary issue on the papers unless either party requested an oral hear. Pursuant to these directions:

(i) On 17 October, the tenant made written representations.

(ii) On 18 October, the landlord made written representations.

(iii) On 18 October, the tenant made further representations.

The Statutory Provisions

8. A claim by a tenant to exercise their statutory right to acquire a new lease is commenced by the tenant serving "the tenant's notice" pursuant to Section 42 of the Act. Section 42(3) provides for the matters which "must" be included in the tenant's notice. This must:

> "(d) specify the terms which the tenant proposes should be contained in any such lease".

9. The landlord must respond to the tenant's notice by the date specified in the notice. The matters to be included in the landlord's counter-notice are specified in Section 45. By Section 45(3), the counter-notice must:

> "(a) state which (if any) of the proposals contained in the tenant's notice are accepted by the landlord and which (if any) of those proposals are not so accepted; and
>
> (b) specify, in relation to each proposal which is not accepted, the landlord's counter-proposal."

10. Section 57 provides for the terms upon which the new lease is to be granted. Section 57(6) provides (emphasis added):

> (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."

11. Section 48 makes provision for either party to apply to this tribunal where the terms of acquisition remain in dispute:

"(1) Where the landlord has given the tenant:

(a) a counter-notice under section 45 which complies with the requirement set out in subsection (2)(a) of that section, or

(b) a further counter-notice required by or by virtue of section 46(4) or section 47(4) or (5),

but any of **the terms of acquisition** remain in dispute at the end of the period of two months beginning with the date when the counter-notice or further counter-notice was so given, the appropriate tribunal may, on the application of either the tenant or the landlord, determine the matters in dispute."

12. On the other hand, Section 48(2) provides that where all **the terms of acquisition** have been either agreed between those persons or determined by a tribunal, but a new lease has not been entered into in pursuance of the tenant's notice by the end of the appropriate period, the county court may, on the application of either party make such order as it thinks fit with respect to the performance or discharge of any obligations arising out of that notice.

13. Section 48(7) defines "terms of acquisition":

"In this Chapter "the terms of acquisition" , in relation to a claim by a tenant under this Chapter, means 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."

The Submissions of the Parties

14. The tenant argues that the proposed provisions are required for the following reasons:

(i) Forfeiture Provision: The lease was granted in 1987. This change is required to make the lease "CML Compliant". Without this clause, the lease would be unmortgageable.

(ii) Insurance Provision: The changes are again required to make the lease CML Compliant.

15. The tenant contends that these provisions are "required by the Act". The proposed provisions therefore come within the scope what was contemplated in the Notice of Claim:

(i) The exiting lease is outdated and is no longer CML compliant. It would therefore be unreasonable in the circumstances to include the existing terms without modification in view of changes occurring since the date of commencement of the existing lease (Section 57(6)(b));

(ii) Alternatively, the proposed provisions are necessary in order to remedy a defect in the existing lease (Section 57(6)(a)).

16. The landlord responds that Section 42(3) requires the tenant to specify the terms which the tenant proposes to be contained in the new lease. The terms proposed in the Tenant's Notice are quite clear and these were unambiguously accepted by the landlord in its Counter-Notice. Section 48 only gives the tribunal the jurisdiction "where the terms of the acquisition remain in dispute". In the current case, there was no dispute as to the terms of the new lease as the tenant had not yet raised the terms that she now wishes to add.

17. In its letter of 18 October, the landlord raises a new issue, namely that the Tenant's Notice could be construed as being invalid as it did not contain the tenant's requirements and was therefore not capable of acceptance. This is disputed by the tenant who refers us to *Bolton v Godwin-Austen* [2014] EWCA Civ 27; [2014] HLR 15.

18. Both parties have reserved their rights in respect of the costs of this application.

The Tribunal's Determination

19. The first issue for the Tribunal to determine is whether the tenant's Notice of Claim is valid. The landlord suggests that it did not contain the

tenant's requirements and therefore was incapable of acceptance. The answer to this question is provided by the Court of Appeal in *Bolton v Godwin-Austen* [2014] EWCA Civ 27; [2014] HLR 15. In that case, the landlord's counter-notice was drafted in these terms:

> "The new leases(sic) terms should contain such modifications and amendments as the Landlord is entitled to under and/or as may be necessary to give effect to the requirements of Chapter II of Part I of the Act and without prejudice to the generality of the above such further reasonable modifications to be agreed."

20. It was common ground that to constitute a valid counter-notice, the freeholders' proposals had to be sufficiently clear to indicate precisely what they were proposing as terms of acquisition. The Court of Appeal accepted that this wording provided a perfectly workable proposal by the freeholders, capable of acceptance by the tenant, and leaving it to the court to determine what the landlord was entitled to or the Act required. The Editors of Hague "Leasehold Enfranchisement" (6th Ed) at 30-07, consider that the same principles would be applied in construing a tenant's notice. We agree.

21. Under the Act, a critical issue is whether the "terms of acquisition" have been agreed:

(i) If they have been agreed, either party must apply to the County Court within two months beginning with the date when the terms were finally agreed.

(ii) If the terms remain in dispute, either party must apply to this tribunal to determine those matters in dispute. Such an application must be made no later than six months from the service of the Counter-Notice.

If an application is not made within the relevant "appropriate period", the Notice is deemed to be withdrawn.

22. The Tribunal is satisfied that the "terms of acquisition" are only agreed, when both the premium and the terms on which the tenant is to acquire a new lease are agreed. The reason for this is that the premium may depend upon the terms of the new lease. The tenant argues that the current terms of the lease are not CML compliant and that without modification, the lease would be unmortgageable. If this contention proves correct, then it would clearly have an impact on the value of the existing lease and the premium that would be payable.

23. Had the landlord in its Counter-Notice, accepted both the premium and the terms proposed by the tenant, this Tribunal would have no jurisdiction to determine the terms of acquisition. It would have been for

the County Court to determine "such other terms as may be required by the LRHUDA 1993". This was the situation in *Bolton v Godwin-Austen*.

24. It is rather this tribunal which must determine the "terms of acquisition". This includes both the premium and any terms that may be required by Section 57(6) of the Act. It is for either party to argue what may be "required" by the Act.

25. The Tribunal accepts that it is good practice for the tenant to identify any additional terms which the tenant wishes to include in the new lease when the Notice is served. This is the view of the editors of Hague (at [30.07], based on the dicta of Arden LJ in *Howard de Walden Estates v Aggion* [2008] 26 at [9]). A tenant has the choice as to when to serve its Notice of Claim and should have made an informed decision by that date as to the premium and other terms upon which it seeks to acquire a new lease. However, in the experience of this tribunal, this is not the practice of many lawyers and surveyors who practice in this field. The focus rather tends to be on the premium that is payable, rather than any modifications which may be required to the lese.

26. After the Tenant's Notice has been served, the conduct of the parties is often driven by the strict time limits laid down by the Act. However, even in these circumstances, the Tribunal would expect a tenant to raise any additional terms in correspondence prior to issuing their application to this tribunal. The Tribunal is surprised that the Applicant should have asserted that no comments had been received from the landlord, when the landlord had been given no opportunity to do so.

27. However, the Tribunal is satisfied that the Tenant's Notice in this case is valid. This leaves open the issue as to what amendments to the lease may be required by the Act. The scope permitted for such modifications by Section 57 of the Act is limited. However, we are satisfied that the tenant should not be prevented from arguing that the terms that she proposes fall within this limited scope.

28. In negotiating the terms of acquisition, it is always open to the parties to agree new terms, as is expressly recognised by Section 57(6). Indeed, the parties have a common interest in ensuring that the new lease is CML compliant as this will be relevant not only to the value of the Applicant's leasehold interest, but also to the premium payable for the lease extension.

29. Both parties have reserved their position on costs. The provisional view of this Tribunal is that the conduct of neither party comes close to meeting the high threshold for "unreasonable conduct" to justify an award of penal costs under Rule 13 of the Tribunal Rule (see *Willow Court Management Company* [2016] UKUT 290 (LC)).

Judge Robert Latham
18 November 2019

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.