FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/OOAN/OLR/2018/0316**
Property	**:**	**Flat 23 Kings Court Mansions 737 Fulham Road London SW6 5PB**
Applicant	**:**	**Rupert Adam Hobart Kenlock**
Representative	**:**	**Streathers Solicitors LLP (non-attendance)**
Respondent	**:**	**Oakfern Properties Limited**
Type of Application	**:**	**Mr Carl Fain of Counsel (TWM Solicitors)**
Tribunal Members	**:**	**Judge Prof Robert Abbey** **Neil Martindale (FRICS)**
Date and venue of determination	**:**	**15 January 2019 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**17 January 2019**

DECISION

Introduction

1. This is an application made by the Applicant under section 50 of the Leasehold Reform, Housing and Urban Development Act 1993 (as amended) ("the 1993 Act") for a determination of the terms and price for the granting of an extended new lease of the property known as **Flat 23 Kings Court Mansions 737 Fulham Road London SW6 5PB**. (" the property").

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2. The applicant is the leaseholder of the property. The applicant holds the property under a lease dated 21 June 1996 for a term of 99 years (less 3 days) from 29 September 1977, (the existing lease). The respondent is the freeholder of the building in which the property is located.

3. There are 24 residential flats in the building held on a headlease (the headlease) dated 14 June 1979 for a term of 99 years from 29 September 1977. The registered proprietor of the headlease is Publicshield Property Management Limited (Publicshield). Each residential leaseholder including the applicant holds a three-way lease between the lessor, the lessee and a management company, Fulham Road Management Company Limited (Fulham Road).

4 The applicant exercised his statutory right to claim a lease extension by way of a notice of claim dated 5 July 2017 and this was admitted by the respondent by way of a counter-notice dated 6 September 2017.The premium due under the statutory provisions in that regard has been agreed by the parties at £98,000 but subject to the terms of the new lease being agreed. It is the detail of the lease content that has required the tribunal to consider the application.

The issue

5 The existing lease does not contain direct covenants between the tenant and the landlord to repair, maintain and insure the building. The respondent's obligations within the headlease cover these issues so that the respondent must repair maintain and insure the building. The existing lease at clause 5(5) contains a covenant for Publicshield to enforce the covenants and other obligations of the respondent that are contained in the headlease. This therefore means that the existing lease covers adequately these aspects of the running of the building.

6 The problem that the applicant has identified is that once the headlease expires (and there is no new headlease in place) then the whole system breaks down. The applicant says, "At the point the headlease ceases to exist, the covenant by Publicshield to enforce the respondent's covenants in the headlease become obsolete, leaving no covenants for repair, maintenance and insurance of the building". The respondent then crucially asserts that the absence of such provisions constitutes a defect and results in the lease being unacceptable to lenders as it would be in breach of their standard requirements, (see *Gordon v Church Commissioners* LRA/110/2006, a decision of Judge Huskinson in the Lands Tribunal regarding the meaning of defects.) Consequently, the applicant wants to include in the new lease that on the expiry of the headlease that the respondent will take over the responsibility for the services previously undertaken in the manner set out above. The respondent seeks to resist these changes.

7 The respondent does not agree to the inclusion of the new terms in the new lease and seeks the new lease on terms that are materially the same as the previous 18 other renewals that have already been granted to other tenants in the building.

The effect of statute

8 Section 57 of the Leasehold Reform, Housing and Urban Development Act 1993 provides that: -

> ***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*

9 Section 57(6) of the 1993 Act provides that: -

> *(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.*

Accordingly, in order for a party to require the terms of the existing lease to be modified the party must satisfy the tribunal that either of the grounds in 57 (6) (a) or (b) are made out.

The Tribunal's decision

10 The tribunal carefully considered submission from both parties even though only Counsel for the respondent appeared at the oral hearing. Indeed, Counsel was most helpful to the tribunal by trying to put both sides of the disagreement on the lease terms to the tribunal.

11 The core of the dispute is about what the amendments sought by the applicant are trying to do, are they seeking to modify clause 5 of the existing

lease to safeguard the provisions for insurance and repair or are they a wholly new insertion, by new clauses, to achieve the same aim?

12 The tribunal determines that what the applicant seeks to insert in the new lease is entirely new and is not a modification of an existing covenant. There is no such covenant to modify because the arrangement is dealt with elsewhere. The proposed clauses are entirely new to the lease and as such cannot be construed as a modification of an existing covenant. The tribunal has no jurisdiction pursuant to section 57(6) of the 1993 Act to require a new term in the format of the proposed insertions proposed by the applicant. In the case of *Gordon v Church Commissioners* LRA/110/2006 it was made clear that wholly new terms cannot be inserted in the new lease under the terms of section 57(6) of the 1993 Act. The decision makes it plain that in the absence of agreement between the parties statute will not include new terms under this section. Paragraph 41 of that decision confirms this clear interpretation of the section where Judge Huskinson writes "*In my judgment there is no power under section57(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"*. The tribunal noted that the case of *Gordon* was applied by the Leasehold Valuation Tribunal in *Cadogan v Chelsea Properties Limited (No 2)* (Unreported 2008).

13 The current lease is, by common consent, not defective in the way it operates or in the way it has been drafted. The management company is required to carry out the functions in the sixth schedule and the immediate landlord covenants to procure the performance and observance of the superior landlord of its obligations contained in the headlease. What the applicant is seeking to do by the proposed lease amendments is to address a future error. This future error would arise if the headlease was allowed to expire by the effluxion of time with the new lease remaining in existence. At that point the repairing and insuring mechanism currently in place would fail but this is something that might or might not occur decades in the future, (circa September 2076). The legislation contemplates the correction of existing defects, statute talks about remedying a defect in the existing lease. However, there is no such existing defect in the existing lease, it might only occur decades into the future, namely 57 years into the future.

14 The applicant also seeks to call into play section 57 (6) (b) asserting that it would be unreasonable in the circumstances to include, or include without modification, the lease insertions in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date. However, the tribunal cannot accept this argument. This is because there has been no pertinent change of circumstances since the date of commencement of the existing lease which affect the suitability of the existing lease on the relevant date namely when the notice was served. The extension lease cannot be such a change of circumstances.

15 The applicant also referred to the tribunal the case of *Howard de Walden Estates Limited v Les Aggio* [2008] UKHL 44 where Lord Neuberger observed that "*Section 57(6) also indicates that the LVT was intended to have relatively wide powers, often involving sophisticated judgment*." However,

this was a comment made in a case that differed from the one before the tribunal, (being a consideration of section 57(1) of the 1993 Act). It is accepted that there are wide powers available to a tribunal within the relevant statutory provision but not so wide as to permit the insertion of an entirely new or fresh clause in a lease extension deed.

16 The applicant also rightly raised the question of another clause in the proposed lease, this time inserted by the respondent. Initially the respondent sought to insert a provision in the lease to exclude the effect of section 62 of the Law of Property Act 1925. At the hearing Counsel for the respondent confirmed that the respondent was not persisting with this suggested insertion and is therefore prepared to concede the removal of this alteration to the draft new lease.

Conclusion

17. Accordingly, the Tribunal approves the form of draft lease with the exclusion of the disputed clauses inserted by the applicant and also with the exclusion of the proposed clause regarding section 62 of the Law of Property Act 1925 inserted by the respondent. However, the tribunal wishes to place on record the suggestion that this whole dispute could be resolved by the simple solution of extending the term of the headlease so as to extend the term to just beyond the expiry date of the renewed lease (and indeed the other 18 leases already extended for other tenants in the building). By making this simple change the problem will be resolved for all the tenants in the building and will be a sensible and reasonable method of solving/addressing the obvious concerns about possible future lease defects. There will be other solutions to this problem but given the circumstances the tribunal considers this course of action to be a potential way forward.

18 The annex to this decision sets out rights of appeal available to the parties

Prof Robert M. Abbey

Tribunal Judge

17 January 2019

Annex

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber)