FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BD/OLR/2020/1145**
Property	**:**	**Flat 1, 50 Denton Road, TW1 2HQ**
Applicant	**:**	**Ava Jamooji Mehta**
Representative	**:**	**Mr Will Beetson (counsel)**
Respondent	**:**	**Edward Cameron Hunt and Rachel Josephine Hunt**
Representative	**:**	**Mr Brynmor Adams (counsel)**
Type of Application	**:**	**93 Act New Lease of Flat**
Date of Decision	**:**	**2 July 2021**

DECISION

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The parties have provided a Bundle of Documents for the hearing. The order made is described at the end of these reasons.

Background

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

2. The hearing of this application took place on 15 June 2021. The Applicant, tenant, was represented by Mr Beetson (counsel). The Respondent, landlords, were represented by Mr Adams (counsel).

3. The application relates to Flat 1, 50 Denton Road TW1 2HQ (the "Property"). 50 Denton Road is a semi-detached period property converted into three individual flats subject to long leases. The Property comprises a 2-bedroom flat which has direct access to its own rear garden, and a single car garage.

4. On 20 March 2020, the Applicant served a Section 42 Notice of Claim proposing a premium for a lease extension of £49,817. On 20 May 2020, the Respondents served a Counter-Notice proposing a premium of £118,920.

5. As at the date of the hearing, the parties had agreed the premium payable for the new lease of £92,000. Accordingly, the only issue outstanding related to proposed modifications to the terms of the lease.

6. Prior to the hearing, both sides had sought various proposed modifications. For example, the Applicant had proposed amendments to the terms of the existing lease, in essence: (i) removing the requirement that the property be occupied as by a single family; and (ii) changing the absolute covenants against keeping pets into a qualified one. However, by the time of the hearing the Applicant was no longer pursuing these changes and the matters in issue between the parties had been reduced to a single disputed clause proposed by the Respondents.

7. The Respondents' proposed modifications related to the contention that in the summer of 2020 the Applicant carried out works to the flat without first obtaining the Landlord's consent. The tribunal was informed that the parties have been negotiating retrospective consent to the alterations but had not reached an agreement as at the date of the hearing.

8. The Respondents proposed the addition of two clauses, the purpose of which was said to be to preserve the position between the parties in relation to the Applicant's alterations.

9. The proposed new clauses were as follows:

"6. Repair and reinstatement

6.1 Any covenants given by the Tenant to repair, decorate and yield up the property are to be construed as if they had been given at the date of the Previous Lease.

6.2 All provisions relating to alterations in the Previous Lease (including any obligations to reinstate), will apply to this lease as if any obligations

to reinstate any alterations carried out during the term of the Original Lease will apply at the end or sooner determination off the term.

7. Preservation of claims

7.1 During the period of the Tenant's ownership of the Property (such period of ownership commencing on 23 March 2020) various unauthorised works are suspected to have been carried out at the Property by the Tenant and the Tenant failed to seek or obtain the Landlord's prior consent to any works pursuant to clause 2(8) of the Previous Lease. The Landlord has not consented to the Tenant's works to the Property nor has it waived the Tenant's breach of clause 2(8) of the Previous Lease in relation to such works.

7.2 The Tenant has until recently refused the Landlord's request to inspect the Property and any works carried out to the Property pursuant to the Landlord's right of entry contained in clause 2(5) of the Previous Lease.

7.3 The Property is currently occupied by a party other than the Tenant and the Tenant has failed to provide notice of such occupier to the Landlord as is required by clause 2(12) of the Previous Lease.

7.4 The parties acknowledge that the grant of this lease shall act to surrender the Previous Lease. Accordingly the grants of this lease shall be without prejudice to the liability of the Tenant for the breaches of the Previous Lease to include but not limited to those as outlined in clauses 7.1-7.3 inclusive of this lease and the Landlord's rights and remedies in respect of all such breaches shall be preserved notwithstanding the surrender of the Previous Lease."

10. During the course of the hearing, Mr Beetson advised that the Applicant accepted the addition of the new clause 6. Accordingly, the only area of dispute between the parties related to clause 7.

The law

11. Section 57(1) of the 1993 Act provides that:

"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:

…

(b) of alterations made to the property demised since the grant of the existing lease; or

… ."

12. Further, pursuant to section 57(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."

Discussion and decision

13. On behalf of the Respondents it was submitted that section 57(6)(b) of the 1993 Act was engaged, i.e. it would be unreasonable not to include the modification (the proposed clause 7) in view of the physical changes to the Property as a result of the alterations.

14. It was submitted that the Applicant wished to retain the ability to impose reasonable conditions (e.g. relating to the standard of works) on the grant of any retrospective licence. Moreover, the Applicant submitted that if the new lease were to be granted without modification, it might be contended by the Respondents that (i) any alterations made prior to the grant of the new lease do not amount to a breach of covenant against alterations in the new lease; and/or (ii) the Respondents would be precluded from exercising some or all of their remedies in respect of unauthorised alterations occur before the grant of the new lease because the grant the new lease amounts to a waiver or some other bar to enforcing the covenants in the existing lease.

15. The difficulty with the above submission was that the Respondents could not point to any authority that such arguments would succeed as a matter of law. Indeed, reference was made to a passage in Woodfall (¶17.040) which indicated the contrary:

"*A surrender … operates to release the tenant from liability on covenants taking effect after the date of the surrender, while leaving him liable for past breaches, e.g. on repairing covenants. However, the transaction affecting the surrender may amount to a release from liability for past breaches of covenant by accord and satisfaction*."

No authority or principle was cited to suggest that there is anything inherent in a claim for a new lease under the 1993 Act that would result in any outcome other than that a tenant would remain liable for past breaches.

16. Further, in the tribunal's view, the fact that the Applicant agreed to the proposed clause 6 goes a significant way to allaying the Applicant's concerns.

17. On behalf of the Applicant, Mr Beetson opposed the insertion of clause 7 on a number of grounds. In particular, he submitted:

    (1) The proposed clauses 7.1-7.3 would require the tribunal to make findings of fact on issues on which no evidence had been heard and were outside the scope of a determination of the terms of acquisition of a new lease under the 1993 Act;

    (2) The clause seeks to preserve the position on waiver. However, this is a question of law and cannot be done contractually.

18. In response, it was suggested that the first objection could be overcome by just including clause 7.4 as an alternative to the entire clause 7. It was also suggested that the wording of clause 7.4 only sought to preserve such rights and remedies as the Respondents may have – it does not seek to create rights that the Respondents did not have. However, in the Applicant's submission, whether or not clause 7.4 were to be included, the Respondents would still have the remedies that they have at law and so not including 7.4 does not remove any rights.

19. In the tribunal's determination, it is important to have regard to the test set out in section 57(6) of the 1993 Act. In our view, it cannot be said that it would be unreasonable not to include the clause 7, or alternatively clause 7.4 alone, in view of the physical changes to the flat. This is for the reasons that: (i) it could not be submitted that as a matter of law that the granting of a new lease under the 1993 Act would mean that a tenant would cease to be liable for past breaches – at its highest it was merely suggested that it was an argument that might be made; and (ii) in light of the Applicant's agreement to the addition of clause 6 as set out above.

20. **In the circumstances, the tribunal determines that the terms of acquisition should not include the proposed clause 7**. As noted above, the tribunal was informed that the other terms of acquisition have been agreed.

Name: Judge Sheftel **Date:** 2 July 2021

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).