LRX/59/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – variation of leases – Landlord and Tenant Act 1987 sections 35 and 38 – breach of natural justice (omission by LVT to take into consideration lessees' submissions) – variation made taking into account attitudes of the parties in the light of impending enfranchisement (section 38(6)(b) applied)

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **MRS RACHEL MAWHOOD** **Appellants**
MISS RACHEL DOBSON

and

SINCLAIR GARDENS INVESTMENTS (KENSINGTON) LIMITED **Respondent**

Re: 32 and 32A Fairthorn Road,
Charlton,
London
SE7 7RL

Before: His Honour Judge Huskinson

Sitting at: Procession House, 110 New Bridge Street, London, EC4Y 6JL
on 30 June 2008

The Appellants appeared in person.
The Respondent did not appear and was not represented.

DECISION

1. The Appellants appeal to the Lands Tribunal from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") dated 18 December 2006, whereby the LVT gave its decision upon an application by the present Respondent for the variation of two long leases, being one in respect of 32 Fairthorn Road and the other in respect of 32A Fairthorn Road. The Respondent's application to the LVT had been made under Section 35 of the Landlord and Tenant Act 1987 as amended.

2. The Respondent was, and as at the date of the hearing before me still is, the freehold owner of the property comprising 32 and 32A Fairthorn Road. Mrs Mawhood holds the long lease of No. 32A. Miss Laura Fernie was the former long lessee of No. 32 with the result that the original parties to the application to the LVT were the present Respondent (as applicant) and Mrs Mawhood and Miss Fernie (as respondents). However Miss Fernie has subsequently assigned her lease to Miss Rachel Dobson with the result that Miss Fernie no longer has any interest in the premises, or in the present appeal, whereas Miss Dobson has become directly concerned as one of the two long lessees in the building. This matter had been raised by the Respondents in correspondence with the Lands Tribunal prior to the hearing. At the hearing I gave permission for Miss Dobson to be substituted as an Appellant in place of Miss Fernie.

3. The premises with which this case is concerned comprise a building with garden. The building is divided into two flats, No. 32 and 32A. The two long leases were each granted in 1975 by a predecessor in title of the present Respondent to predecessors in title of the present Appellants. The term of each lease is 99 years from 23 January 1975. It is clear that drafting errors were made in the leases. It was common ground between the parties before the LVT that something had gone wrong with the drafting and it has never been the case on behalf of the present Appellants that no variation should be made to the leases. It is not necessary to set out the terms of the leases in any detail. In summary however the problems are as follows. Taking first the lease of No. 32A, this document includes a covenant by the lessor in clause 5(1) that the lessor will (inter alia) repair etc the exterior of the building and the main walls and roof, but this covenant is made

> "subject to the Lessee paying his proper proportion of the costs thereof (which proportion shall be determined by the Lessor's Surveyor whose decision shall be final and binding on the Lessee)".

However there is no provision in the lease whereby the lessee is made liable, either by way of additional rent or through any covenant to pay, for this "proper proportion of the costs thereof". Puzzlingly there is within the lease a First Schedule which has all the appearance of being a schedule which it was intended to refer to in the body of the lease as being a schedule containing the items which the lessee was to pay for. However within the body of the lease there is no reference to the First Schedule and no obligation on the lessee to pay the items referred to in the First Schedule. The First Schedule is in the following terms:

> "1. The costs charges and expenses incurred by the Lessor in carrying out its obligations under Clauses 5(1) and 6(2) hereof.

2. The expenses of management and of the services provided by the Lessor for the benefit of the Lessee and the Lessees and occupiers of the other flats in the building and all other expenses reasonably incurred in relation to the Lessor's covenants and obligations hereunder in connection with or in relation to the building, property or the demised premises whether such expenses be incurred by the Lessor or its Managing Agents or Surveyors".

4. So far as concerns the lease of No. 32 the lessor's repairing covenant in clause 5(1) was in similar (although not identical) terms to that contained within the lease of No. 32A. However in the case of No. 32 not merely was there no obligation within the body of the lease to make the payments referred to in some schedule, but there was not even any schedule equating to the First Schedule within the lease of No. 32A.

5. The Respondent, as lessor upon these two leases, applied to the LVT under section 35 of the Landlord and Tenant Act 1987 for an appropriate variation in the leases to cure abovementioned problems. The Respondent put forward a draft of the proposed amendments. The Appellants were entitled to respond to these proposals and did so by representations made by their then solicitors which were sent under cover of a letter of 16 November 2006 which was received by the LVT on 17 November 2006. It appears that the Respondent submitted a Reply to these representations.

6. The matter proceeded before the LVT by way of written representations. Paragraph 8 of the LVT's decision reads as follows:

> "The parties were in agreement that the Leases as drawn fell short of providing satisfactory provisions for the repair and maintenance of the Building. The Applicant had produced a form of Deed of Variation and there have been no comments from the Respondents on the form or content. It is unfortunate that the parties were unable to agree to complete the Deed of Variation without the need for an Order to be made by the Tribunal but the Tribunal was asked to issue an Order varying the Lease in accordance with the agreed draft".

The LVT's decision, consistent with this statement that there had been no comments made by the Appellants (i.e. the then respondents), gave no consideration to any of the points which had been raised by way of submission in the Appellants' solicitors' representations.

7. By its Order dated 18 December 2006 the LVT ordered under Section 38 of the 1987 Act that the leases should be varied in certain specified ways. These variations not merely cured the gap in the existing leases regarding the ability of the lessor to recover the costs incurred under the lessor's repairing obligations, but also included provisions:

(1) requiring the payment of interest on late payments by the lessees;

(2) obliging the lessees to obtain a direct covenant from any new lessee following any assignment or disposition of the lease;

(3) requiring the making of on account payments towards a service charge and making provisions for the setting up of a sinking fund; and

(4) requiring the payment of reasonable expenses of the lessor in employing managing agents, accountants or surveyors in relation to the lessor's covenants and obligations in maintaining the building.

8. The Appellants raised with the LVT the contents of paragraph 8 of its decision and the fact that the LVT had apparently omitted to take into consideration the Appellants' representations. The LVT by a letter dated 14 March 2007 (not before me but referred to in various places in the papers before me including in the Respondent's letter to the Lands Tribunal of 3 July 2007) stated:

> "However I can confirm that the responses made by yourselves and your solicitors Thackray Williams, to the submissions made by Sinclair Gardens Investments (Kensington) Limited were received and made available to the Tribunal prior to its decision on 18 December 2006. The statement at paragraph 8 of the Tribunal's Decision that "there have been no comments from the Respondents" is incorrect. However the Tribunal's conclusions remain as set out in paragraphs 9 to 15 of the Decision."

9. On the strength of this letter of 14 March 2007 the Respondent has submitted to the Lands Tribunal in, inter alia, its Statement of Case that the Appellants have received a fair hearing and that this Tribunal should proceed on the basis that the Appellants' representations were taken into consideration and that in any event the representations would not have altered the LVT's Decision.

10. As will be seen below, matters have moved on in the sense that there is now an enfranchisement proceeding under the Leasehold Reform, Housing and Urban Development Act 1993, whereby the Appellants, through a nominee purchaser, are acquiring the freehold of the premises from the Respondent. The Respondent has written to the Tribunal by letter dated 25 June 2008 stating:

> "The Appeal is taking place at the same time as the impending enfranchisement of the Property and the variations to the Lease will be irrelevant to the Respondent following completion."

The Respondent appears to agree in principle the proposed variations in the leases as set out in paragraphs 6.2, 6.3 and 6.4 of the Appellants' Statement of Facts and Issues. The Respondent continues by stating that it does not propose to attend the hearing of the appeal:

> "…and will leave the Lands Tribunal to determine whether any **other** clauses should remain in the Deed of Variation approved by the Leasehold Valuation Tribunal."
>
> (emphasis not added)

The Respondent explained in its letter that, while intending no disrespect, it would not be represented before the Tribunal at this appeal.

11. Insofar as the opposition in principle to the present appeal is still persisted in by the Respondent I cannot accept such opposition. Assuming that the LVT's letter of 14 March

2007 is correct and that the Appellants' submissions, made by their solicitors, were indeed received and made available to the LVT prior to its decision of 18 December 2006, I am driven to the conclusion that these submissions, although made available to the LVT, did not in fact come to the attention of the actual members of the LVT who decided the present case. I am driven to this conclusion having regard (a) to the express statement in their decision in paragraph 8 that "there have been no comments from the Respondents", (b) to the complete absence from their decision of any analysis of or conclusion upon any of the points of objection raised by the Appellants' solicitors and (c) to the curious reference in paragraph 8 to "the agreed draft". If the Appellants' submissions had come to the attention of the LVT, and if the LVT had concluded that it should dismiss all of the objections and should approve a variation precisely as contended for by the Respondent, the LVT would of course have been required to give clear and sufficient reasons for its decision on this point. It did not do so.

12. In summary therefore I conclude that there has been a breach of the rules of natural justice and a substantial procedural irregularity, in that the LVT has reached its present decision without taking into consideration the representations of the Appellants. The LVT's decision cannot stand.

13. The question therefore arises as to what variations should be made to the leases. The terms in which permission to appeal to the Lands Tribunal was granted made it clear that the parties would be expected at the appeal to deal with whether the decision of the LVT should be allowed to stand and, if not, what the terms of any variation to the leases should be.

14. As already mentioned above, matters have moved on. I was told by the Appellants that they are proceeding with an enfranchisement under the 1993 Act, the price to be paid has been determined by a separate decision of an LVT, and a vesting order is now being sought by the Appellants, or more precisely by their nominee purchaser being 32 Fairthorn Road Management Limited, a company in which the Appellants are the only shareholders and directors. It is not suggested by either the Appellants or the Respondent that the outcome of the present appeal, being a determination as to the terms of variation of the leases, is in any way relevant to the enfranchisement or to the price payable thereunder, see in particular the Respondent's solicitors letter of 22 May 2008 to Mrs Mawhood.

15. I shall in due course revert to the proposed amendments as described in paragraphs 6.2, 6.3 and 6.4 of the Appellants' Statement of Facts and Issues, as apparently accepted by the Respondent in its letter of 25 June 2008. However as regards the question of whether any other variations should be made beyond variations to deal with the matters covered in these paragraphs 6.2, 6.3 and 6.4, the following point should be noted. Section 38(6)(b) of the 1987 Act provides that a tribunal shall not make an order under section 38 effecting any variation of a lease if it appears to the tribunal:

> "(b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected."

I must consider the situation as at the date of the hearing before the Lands Tribunal. Bearing in mind the ongoing enfranchisement and the express statement, made to me by the Appellants at the hearing, that they did not wish there to be any variations in the leases beyond those dealt

with in their paragraphs 6.2, 6.3 and 6.4 of their Statement of Facts and Issues, I conclude that it would not be reasonable in the circumstances for more far ranging variations to be made. This is not to be taken as any kind of decision as to the merits of clauses as proposed by the Respondent (and adopted by the LVT) in other cases where there will be a continuing arms length relationship between the lessor and the lessees. In the present case however the present lessor, namely the Respondent, has expressly stated in its most recent letter to the Tribunal that the variations to the leases will be irrelevant to the Respondent following completion of the impending enfranchisement. Also it is stated to me by the Appellants on their own behalves (as lessees) and on behalf of the nominee purchaser (as impending lessor) that they do not want any variations more far reaching than those contemplated in their paragraphs 6.2, 6.3 and 6.4. Accordingly I conclude that there should not be any such more far reaching amendments and that therefore the following provisions proposed by the LVT, namely the new clauses 4(18) and 4(19) and the new paragraphs 3 and 4 of the First Schedule, should not be introduced into the leases.

16. Turning to paragraph 6.2 of the Statement of Facts and Issues the Appellants propose a new clause 1(ii) which would follow clause 1(i) (which is a reservation of additional rent in respect of insurance) in the following terms:

> "(ii) a sum or sums of money equal to one half of the amount which the Lessor has reasonably incurred in fulfilling its obligations within the First Schedule".

The LVT had proposed a new clause 1(ii) in the following terms:

> "a sum or sums of money equal to one half of the amount which the Lessor may expend in fulfilling its obligations under the First Schedule".

In the circumstances I consider it reasonable and appropriate for the phraseology proposed by the Appellants to be adopted which has the expression "has reasonably incurred" in place of "may expend".

17. As regards the new clause 4(17), as dealt with in paragraph 6.3 of the Statement of Facts and Issues, I consider that in the circumstances of the present case it would be reasonable and appropriate for the clause proposed by the Appellants to be adopted (but with the deletion of the words "or this Deed" which are unnecessary) in place of the clause as proposed by the LVT. In my judgment it is reasonable for this substantial rate of interest only to become payable from a date thirty days from the date of service of a demand for payment rather than thirty days from the due date. This will avoid the possibility of a late demand, made long after the due date, being a demand which contains within it a substantial claim for interest.

18. As regards the proposed provision in paragraph 6.4 of the Statement of Facts and Issues, this proposes the introduction of a First Schedule into the lease of No. 32 (which at present does not contain any First Schedule at all), but the proposed First Schedule does not match that contained in the existing lease of No. 32A. I have already set out the existing First Schedule in the lease of No. 32A in paragraph 3 above. The proposed First Schedule for No. 32 is in the following terms:

"(1) The costs, charges and expenses reasonably incurred by the Lessor or its agents in carrying out its obligations under Clauses 5(1) and 5(2) hereof".

In my judgment the First Schedule to the lease of No. 32A should remain as it stands (save that the typographical error whereby the reference is to clause 6(2) should be changed to 5(2)) and a First Schedule should be introduced into the lease of No. 32 in the same terms as are in the First Schedule to the lease of No.32A (subject to the abovementioned small typographical alteration). I do not consider that the word "reasonably" needs to be introduced again into the First Schedule, bearing in mind first that the word reasonably is already included in the new clause 1(ii) and also bearing in mind the terms of sections 18 and 19 of the Landlord and Tenant Act 1985.

19. In the result therefore I allow the Appellants' appeal. I order, pursuant to sections 35 and 38 of the Landlord and Tenant Act 1987 as amended, that the lease of No. 32 Fairthorn Road and the lease of No. 32A Fairthorn Road shall be, and by virtue of this order are, varied as follows:

(1) By adding a new clause 1(ii) which is to follow clause 1(i) of the existing leases in the following terms:

"**(ii) a sum or sums of money equal to one half of the amount which the Lessor has reasonably incurred in fulfilling its obligations within the First Schedule."**

(2) By adding a new Clause 4(17) to each of the two leases:

"(17) To pay interest at the rate of 4% above the National Westminster Bank Plc base lending rate on any monies due and payable under this Lease should the same remain unpaid for 30 days from the date of service of a demand for payment upon the Lessee such interest to be calculated daily from the date of service of the demand for payment to the date on which payment is actually made."

(3) By amending the First Schedule in the lease of No. 32A by correcting in paragraph 1 thereof "6(2)" to "5(2)".

(4) By adding a new First Schedule to the lease of No. 32 such First Schedule to be in precisely the same terms as the First Schedule to the lease of No. 32A (subject to the amendment made in subparagraph (3) above).

(5) By re-naming the existing schedule in the Lease of No.32 so as to be named "The Second Schedule above referred to – Lessee's Regulations", such schedule to follow the new First Schedule referred to in subparagraph (4) above.

20. At the hearing the Appellants recognised that the fact that the existing leases were defective was the fault of neither the Appellants nor the Respondent. Further the fact that the LVT failed to take account of the Appellants' representations was the fault of neither the Appellants nor the Respondent – it was this failure which made the present appeal necessary. The Appellants made no application for costs. In case the Respondent's documentation before the Lands Tribunal is to be taken as some application for costs, I conclude that the Appellants

have not “acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings”, and accordingly I make no order for costs, see Commonhold and Leasehold Reform Act 2002 Section 175(6).

Dated 9 July 2008

His Honour Judge Huskinson