

4212



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

Case reference : LON/00AJ/OLR/2016/0347

Property : 107a Mill Hill Road, London W3
8JF

Applicant : Mr Maroun Rizk (leaseholder)

Representative : McMillan Williams Solicitors

Respondent : Mr Ajay Kumar Anand (freeholder)

Representative : Mr Kamlesh Kumar, Cheal Assets
Management Ltd, t/a KLPA & Co

Type of application : Section 48 of the Leasehold
Reform, Housing and Urban
Development Act 1993

Tribunal Judge : Judge Timothy Powell
Mr Ian Holdsworth FRICS

**Date of determination
and venue** : 21 June 2016
10 Alfred Place, London WC1E 7LR

Date of decision : 11 July 2016

DECISION

Introduction

1. This is an application made by the applicant leaseholder, pursuant to section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 (“the Act”) for a determination of the terms of a new lease to be granted in respect of Flat 107A, Mill Hill Road, London W3 8JF (the “property”), the premium for the new lease having been agreed between the parties.

Background

2. The building at 107 Mill Hill Road is a typical three-storey, end-of-terrace house, which contains four converted flats, all of which have been sold on long 99-year leases, granted between August and November 1984, and in each case the terms run from 25 March 1984.
3. By a notice of claim dated 2 July 2015, served pursuant to section 42 of the Act, the applicant's predecessors in title exercised the right for the grant of a new lease in respect of the subject property. At the time of serving the notice of claim, the applicant's predecessors in title held the existing lease to the property, which was granted on 17 August 1984 for a term of 99 years from 25 March 1984 at an annual ground rent of £75, and rising. The applicant's predecessors in title proposed to pay a premium of £14,500 for the new lease.
4. The benefit of that notice of claim was assigned to the applicant, Mr Rizk, on 8 July 2015, being the same date as the transfer of the property to him (as confirmed by the official copies of the leasehold title).
5. On 15 September 2015, the respondent freeholder, through his agent, Cheal Asset Management Ltd ("Cheal"), served a counter-notice, without prejudice to the validity of the notice of claim, but otherwise admitting that the applicant was entitled to exercise the right to extend his lease, and with a counter-proposal of a premium of £25,600 for the grant of a new lease.
6. On 25 February 2016, the applicant applied to the tribunal for a determination of the terms of acquisition and the premium to be paid (the latter now having been agreed).

The hearing

7. The hearing took place on 21 June 2016. The applicant was represented by Mr John Pursley of McMillan Williams Solicitors, and the respondent by Mr Kamlesh Kumar of Cheal Asset Management Ltd, also trading as KLPA & Co ("KLPA"). As only the terms of the new lease were in dispute, no inspection was necessary.
8. The tribunal had before it a comprehensive hearing bundle prepared by the applicant's solicitors, which contained all the key documents. The tribunal had some two and half hours prior to the hearing to read this in detail. This was due to a last-minute change of the applicant's legal representative, his original solicitor being called away urgently to hospital on a family matter, shortly before the hearing. In addition, the tribunal had a skeleton argument on behalf of the respondent.

Challenge to the tribunal's jurisdiction

9. During the hearing, Mr Kumar questioned the tribunal's jurisdiction to determine the terms of the new lease, but his challenge was rejected.
10. The tribunal's jurisdiction stems from sections 91(1), 91(2)(a)(ii) and 91(12)(a) of the Leasehold Reform, Housing and Urban Development Act 1993, as amended by paragraph 119 of Schedule 1 to the Transfer of Tribunal Functions Order 2013, which together state:

"91 Jurisdiction of leasehold valuation tribunals

(1) ... any question arising in relation to any of the matters specified in subsection (2) shall, in default of agreement, be determined by the appropriate tribunal.

(2) Those matters are—

(a) the terms of acquisition relating to ...

(ii) any new lease which is to be granted to a tenant in pursuance of Chapter II ...

(12) For the purposes of this section, "appropriate tribunal" means—

(a) in relation to property in England, the First-tier Tribunal ..."

Events after the tribunal application

11. The tribunal received the application on 25 February 2016 and issued directions to the parties on 4 March. When Cheal complained to the tribunal about the validity of the notice of claim, the tribunal replied to say that this was the matter for the county court, not the tribunal; that unless and until a party confirmed that proceedings had been issued in the county court relating to the validity of the notice of claim, the tribunal would continue to deal with the tenant's application; and that the parties should continue to comply with the tribunal's directions.
12. Direction no.2 stated that the landlord must by Monday, 28 March 2016 submit a draft lease to the tenant for approval. By direction no.3, the tenant must by Monday, 11 April 2016 return the draft lease to the landlord with any amendments shown in red. By direction no.4, the landlord must by Monday, 18 April 2016 provide the tenant with list of the terms of the draft lease that remain in dispute. Provision was then made for listing and hearing, in the period 6 June to 8 July 2016.
13. In purported compliance with direction no.2, the respondent, through Cheal/KLPA, submitted no fewer than four draft leases to the tenant's solicitors, McMillan Williams, for approval: on 22 March, 19 April, 28 April and 8 June 2016.
14. The first of those drafts was a document some 32 pages long, starting with the usual prescribed lease clauses and continuing with a substantial re-write of the existing lease. The clause numbering of the first draft lease was entirely different, the order of the clauses varied

considerably, the wording of the clauses was often changed, new clauses had been inserted, there was a lack of consistency in terminology and several clauses (in particular those relating to the landlord's repairing obligations) were repeated a number of times, but often in varying terms.

15. McMillan Williams' response, on 7 April 2016, was to send Cheal a draft lease in a more conventional format, that is to say a prescribed clauses lease, incorporating the terms of the existing lease, with such standard statutory modifications as are required by the 1993 Act, but otherwise leaving the existing lease unaltered. McMillan Williams commended this standard-form lease extension to the respondent, saying that it "works well since it is "clean" and it is by reference to the Existing Lease and therefore easy to follow."
16. Cheal was unwilling to accept the tenant's lease and submitted a second draft, dated 19 April 2016. This draft was 33 pages long and it repeated many of the problems of the first draft. McMillan Williams wrote to Cheal on 26 April stating "even in its amended form, the lease is considered unworkable and unclear and we will therefore be seeking to proceed on the basis of a lease extension in our form suggested precedent submitted by our cover letter of 7 April. This is a straight-forward precedent, which is in a recognised format in the legal profession and which leaves no ambiguity."
17. The letter goes on to say that: "Further, it is imperative that we ensure that our client's lease is in similar form as those leases that have already been granted in respect of other flats in the building not least because of Council of Mortgage Lenders requirements. In particular, we must have absolute clarity in respect of the demise, the exceptions and reservations, the definition of the reserved property, the landlord and tenant obligations, service charge and insurance provisions to name but a few. There is no need to depart from what is already set out in the original lease. We do hope that your client can reconsider his position since if we cannot agree matters, the form of lease shall have to be determined by the First-tier Tribunal."
18. Cheal/KLPA replied by letter dated 28 April 2016 enclosing the third draft lease, some 30 pages long, but still in a different numerical format to the existing lease. When that did not find favour with the tenant's solicitors, Cheal served a fourth draft, dated 8 June 2016. This was some 30 pages long and, like the other drafts, it was intended to have annexed to it a copy of the existing lease.
19. By this stage, a tribunal hearing date had been fixed for 21-22 June 2016 and, since the premium had been agreed by then, the sole purpose of that hearing was to determine the terms of the new lease.

20. McMillan Williams wrote to the tribunal on 3 June 2016 (with a copy to KLPA) stating that: "In the interests of saving costs and in the economic interests of the public, we respectfully request that the hearing take place by way of written submissions." However, by letter dated 7 June 2016, Cheal wrote on behalf of the respondent that he was not in agreement to a paper hearing. As a result, McMillan Williams prepared a 227-page hearing bundle and arranged for a solicitor to attend the oral hearing on behalf of the applicant leaseholder.
21. Having heard submissions from the parties' representatives, the tribunal gave an oral decision in relation to the terms of the new lease. The tribunal confirmed to the parties that written reasons would follow and that any appeal rights would run from the date of those reasons (i.e. from the date of this document).

Decision of the tribunal

22. We approve the applicant's draft of new lease, to be found at pages 172-182 of the hearing bundle, once the agreed premium and the correct rent payment day have been inserted.

Reasons

23. By the date of the hearing, the tribunal was presented with two competing draft leases, one from the landlord and one from the tenant.
24. The landlord's draft lease was his fourth draft, dated 8 June 2016. Mr Kumar said that the content of this draft was identical to the existing lease, save that it was in a different format. He said that the landlord cannot agree to the tenant's version of the new lease, the draft dated 7 April 2016.
25. The tenant opposed the landlord's lease on two grounds:
 - (i) The first was that, contrary to the requirement of section 45 of the 1993 Act, the landlord's counter-notice nowhere sought to reserve the right to impose new terms or a new lease. By section 45(3) the landlord must make a counter-proposal as to terms, and has not done so. Accordingly, that precludes the landlord from putting forward a new lease at this stage; and
 - (ii) The second ground was that the changes proposed by the landlord must fall within sections 56 and 57 of the 1993 Act. These allow changes in very limited circumstances, but none are required in the present case.
26. With regard to the first ground, we disagree with the tenant. Section 45(3) of the 1993 Act says that a counter-notice must 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 specify, in relation to each proposal which is not accepted, the landlord's counter-proposal.

27. This does not require the landlord to spell out any modifications that he wishes to see to the terms of the lease (though he may do so). See, for example, the decision of the Court of Appeal in *Bolton & others v Godwin-Austen & others* [2014] EWCA Civ 27, where it was held possible to have arguments about the form of a draft lease, notwithstanding that terms of acquisition are agreed.
28. Rather, the tribunal prefers to concentrate on second ground, relating to the meaning and effect of sections 56 and 57 of the 1993 Act.
29. Section 56 sets out the landlord's obligations to grant a new lease and the only mandated changes are that the rent should be reduced to a peppercorn and the term should expire 90 years after the term date of the existing lease.
30. Section 57 sets out the terms on which the new lease is to be granted. The starting point, in section 57(1), is that "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..." (*emphasis added*). Section 57 then goes on to specify very limited grounds to modify the terms of the existing lease. The only relevant grounds are those set out in section 57(6), which states (*again, with emphasis added*):

"57 Terms on which new lease is to be granted

(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."

31. It was established at the hearing that Mr Kumar was not asking the tribunal to exclude or modify any term of the existing lease. Indeed, he said that the terms of his fourth draft were identical to the existing lease, and it was only the format and numbering of his draft lease that were different.
32. He also confirmed to the tribunal that he could not identify any defect in the existing lease, but that he sought a change of format and numbering for his own administrative purposes, to make it easier for

him to administer numerous different properties. Neither party said that the premises had physically changed since the date of the existing lease.

33. Our view is that the changes that Mr Kumar seeks do not fall within section 57(6), as there is no term to be excluded or modified, there is no defect in the existing lease and there have been no changes since date of the existing lease.
34. Even if Mr Kumar's proposed formatting changes fell within section 57(6), we found very strong reasons not make any of the modifications that he wanted and not to adopt his draft lease.
35. First, we were not convinced the draft terms proposed by Mr Kumar were identical to those in the existing lease. During the hearing, we pointed out variations in wording between clauses in his draft and the existing lease; and we did not consider it acceptable for Mr Kumar simply to say that if the tribunal found any discrepancies he would be happy to delete them.
36. Secondly, we consider the outcome sought by Mr Kumar was entirely unworkable. If his draft lease were to be adopted, there would be a completely re-drafted lease, with new formatting, clause numbering and, sometimes, different wording compared to the existing lease, but then the draft proposed to annex the existing lease. Such an outcome would make it impossible task for anyone to understand the new lease terms, as it would require a forensic cross-referencing between two dissimilar documents, trying to locate the wording of one in a different place from the wording of another, and then to determine which of the two versions prevailed.
37. Thirdly, the resulting new lease would then be different to at least two, and probably all three, of the other existing leases of the four flats in the building. Not only would this would be contrary to recital (C) on page 4 of the existing lease, by which the landlord expressed his intention to demise each of the flats at the property "upon terms and conditions substantially similar in all respects to the covenants restrictions and conditions hereafter appearing", but it would then disturb a settled scheme of management of the building framed by the existing leases.
38. Lastly, Mr Kumar's proposal achieves nothing but confusion. Any changes would only be for the benefit of the freeholder (though, frankly, even that is doubtful), but certainly to the detriment of everyone else in the building.
39. The tenant's proposed new lease, dated 7 April 2016, on the contrary, has a lot to commend it: it complies with standard leasehold

enfranchisement practice and is completely unexceptional and clear. We are reinforced in our view by the fact that the tenant's draft is in a very similar format to the one that Mr Kumar presented to the tribunal during the hearing, apparently prepared at great expense by Hill Dickinson solicitors in May 2014 in relation to a different property, which he commended to the tribunal as representing the very best practice in the drafting of new leases extended under the 1993 Act. Notably, the Hill Dickinson draft did not follow the format of Mr Kumar's proposed new lease in relation to this property, but, like the tenant's draft, it incorporated and annexed the existing lease terms as those which prevailed in the new lease, subject to statutory modifications (and, in addition, to specific minor changes to two clauses).

40. Mr Kumar raised a peripheral issue relating to the date on the initial notice and the deed of an assignment, alleging fraud on the part of the tenant's solicitors. In short, this had to do with the original notice of claim being dated the 26 June 2015 but being re-dated 2 July 2015, and a deed of assignment being dated the 8 July 2015, which, from the official copies of the leasehold title, also appears to have been the date of the transfer of the leasehold interest. Mr Kumar complained that an earlier version of the deed of assignment had been certified as a true copy by the solicitors, and yet had had blank spaces instead of crucial dates, which then had been added later.
41. The tribunal is very doubtful that an allegation of fraud or professional misconduct can be sustained on these facts but, in any event, it does not consider that this is the proper forum to investigate such allegations. Although the counter-notice had been served in September 2015 without prejudice to the validity of the notice of claim, the tribunal noted that there was no evidence that the landlord had issued county court proceedings to challenge the validity of that notice. The fact that the landlord had made a complaint to the Solicitors Regulation Authority (which was apparently under investigation), was not relevant to the task the tribunal had to carry out in determining the terms of the new lease.
42. It follows from all of the above that we approve the applicant's draft of new lease, to be found at pages 172-182 of the hearing bundle, once the agreed premium and the correct rent payment day have been inserted.

Landlord's statutory costs

43. As the part of the enfranchisement process, the landlord will be entitled to his statutory costs under section 60 of the 1993 Act; and if they are not agreed between the parties, the tribunal has jurisdiction to determine the amount of any costs payable, pursuant to section 91(2)(d) of the Act.

44. Section 60 sets out the extent of the costs that may be recovered by a landlord and these include the costs of granting a new lease. While the tribunal would naturally expect there to be an exchange of views and negotiations in relation to the terms of the new lease, it would not expect to see a landlord providing four versions of a draft lease, none of which was suitable to the task in hand. It follows from this that the tribunal would not expect to see any costs relating to the drafting of those four leases to be included in the landlord's claim for statutory costs.

Application for rule 13 costs

45. As part of his skeleton argument, Mr Kumar asked for an order for costs against the tenant under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the allegation being that the tenant had acted unreasonably in bringing or conducting the proceedings, for not having complied with directions.
46. The tribunal's view is that the tenant has complied with, or substantially complied, with the tribunal's directions by engaging with the negotiations of the terms of the new lease, in good faith. However, the tenant was faced with an impossible task, having to grapple with the landlord's draft leases which were, frankly, not fit for purpose. Direction no.3 required the tenant to return the landlord's (first) draft lease to the landlord with any amendments in red by Monday, 11 April 2016. In order to comply with that direction, on 7 April 2016, the tenant's solicitors understandably and justifiably rejected the landlord's first draft lease and provided a simple, standard-form new lease, by reference to the existing lease, which the tribunal has now approved.
47. Although, under pressure from the landlord, a copy of the landlord's first draft lease with amendments in red was provided on 18 April 2016, in no way can that be said to constitute non-compliance with the tribunal's directions. If anything, it was the landlord who was in breach of direction no.4, which required him by 18 April 2016 to provide the tenant with the list terms of the draft lease that remained in dispute, something which, so far as we can see, never occurred.
48. Be that as it may, there are no grounds whatsoever to conclude that the tenant or his solicitors acted unreasonably in any way in conducting the proceedings. It follows, therefore, that we have no hesitation in refusing the landlord's application for rule 13 costs.
49. On the contrary, the tribunal has very serious concerns that the landlord, through Mr Kumar, has conducted the proceedings unreasonably. He has supplied four wholly inadequate draft leases and, despite there being no realistic prospect whatsoever that his drafts would be accepted by the tribunal, he forced a hearing to take place when it was patently unnecessary.

50. At the hearing, we indicated that if the tenant wished to make his own rule 13 costs application against the landlord he may do so, within 28 of the receipt of this written decision, at the same time sending a copy of any such application to Mr Kumar at Cheal Assets Management Ltd. However, since then, the Upper Tribunal has issued an important decision on the question of rule 13 costs, namely *Willow Court Management Company Limited v Alexander* [2016] UKUT 0290 (LC), LRX/90/2015, LRX/99/2015 & LRX/88/2015. Any future application must take into account the guidance given by the Upper Tribunal and address the tests and relevant factors in that decision.

Name: Judge Timothy Powell **Date:** 11 July 2016