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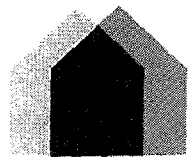

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL
LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993

LON/00AC/OLR/2007/1439

Premises:	Flat 2 St Edwards Court, 708 Finchley Road, Golders Green, London NW11 7NB
Applicants:	(1) Rafael Halahmy (2)Miriam Ruth Halahmy
Represented by:	Mr Dyar - Solicitor Black Graf & Co
Respondent:	The Westminster Roman Catholic Diocese Trust
Represented by:	Ms Ellodie Gibbons
Intermediate Lessee	Acestar Consultants Ltd
Represented by	Mr Berlinger- Managing Agent
Tribunal:	Ms M W Daley (LLB Hons) Mr D Edge FRICS
Date of Hearing:	07/05/08
Date of Decision:	02/06/08

The Application

1. This Application is for a determination pursuant to section 48(1) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act").
2. The Applicants are the leasehold owners of Flat 2, St Edwards Court, 708 Finchley Road, and Golders Green London NW11 7NB, pursuant to a lease dated 20/2/62. The Respondents are the freehold owner of the property, The Westminster Roman Catholic Diocese Trustee (the Landlord), and Acestar Consultants Limited ('Acestar') (the intermediate landlord).
3. By letter dated 2 May 2008 the intermediate landlord served notice pursuant to paragraph 7(1) of part II of Schedule 11 to the Act of its intention to be separately represented.
4. The summary of issues at page 15 of the bundle identified two issues to be determined by the Tribunal, these being (i) the sum payable to the intermediate landlord and (ii) a clause of the new lease which remained in dispute.
5. It was agreed between the Applicant and the Respondent landlord that the amount payable to the Respondent, calculated in accordance with paragraph 2 of Schedule 13 of the Act, was £41,554.

The Law

Section 48 -(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),

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, a leasehold valuation tribunal may, on the application of either the tenant or the landlord, determine the matters in dispute.

Section 57(6) b

(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

The Hearing

6. At the hearing the Tribunal were referred to the Report of Jennifer Ellis at pages 74-105 of the bundle. The Tribunal were also referred to the Schedules of agreed valuation matters between the valuers at page 14, which confirmed that the only matter at issue was the sum payable to Acestar.

7. The background to the dispute with the intermediate landlord was that the Applicant served a notice of claim dated 29th May 2007. In this notice a premium of £20,000 was offered to the freeholder and a sum of £5000 was offered to the intermediate landlord. The sum offered of £5000 for the intermediate interest was accepted in the counter-notice (dated 2 August 2007), however the amount proposed to the landlord of £20,000 for the grant of a new lease was rejected, and the landlord counter-proposed the sum of £44,160.

8. In his submission at point 1.3 (sent undercover of a letter dated 6 May 2008),

Mr Dyar (solicitor to the Applicant) stated "*...the Tribunal is being asked to determine whether the parties are bound by the figures set out in an initial notice and accepted by a landlord in its counter-notice.*"

9. Mr Dyar stated that the initial figure of £5000 had been set out in the notice as a result of certain advice that had been given by the Applicant's surveyor which had been based on certain assumptions. This figure was no longer considered to be realistic as a result of the negotiations between the Applicant and competent landlord's surveyors.

10. In support of his submission Mr Dyar stated that the Applicant must, by virtue of section 42, specify the premium the Tenant proposes to pay. In Mr Dyar's submission the wording 'propose' and the language of the legislation did not adopt the language of contract and that "*the respective Notices are not such as set the final position of the parties and do not create a contract or a statutory contract between the parties.*"

11. Mr Dyar referred the Tribunal to the case of '***9 Cornwall Crescent, London Limited – v-The Royal Borough of Kensington & Chelsea 2005' [2005] EWCA Civ 324***. The Tribunal were provided with a copy of this decision.

12. Mr Dyar submitted that this case confirmed the position that the only requirement for the proposal figure was that it should be made in good faith, that it could be an opening shot in negotiations, and that it did not have to be justified by valuation evidence.

13. The Tribunal were referred to paragraph 6 of the leading judgement of AULD LJ in '***9 Cornwall Crescent, London Limited.***' "*One of the critical matters for resolution in the exercise of such a statutory right is the price to be paid for the freehold of the premises in which the Tenants live. The Act provides a mechanism for resolution of that matter and satisfaction of other requirements of exercise of the right, consisting broadly of two stages. The first is that of an exchange of Notices between the tenants, or their nominee, and the landlord, which serves to identify at an early stage whether and broadly what issue or issues there are between them..... It does not serve, as the Judge appears to have considered at para 25 of his judgement, as a means of securing a final definition of, or a constraint on, the issue or issues for determination by court or a leasehold valuation tribunal if the matter goes that far.. Rather, it serves as a useful negotiating stage during which any issues may be resolved so as to avoid, if*

possible, recourse to the second stage, namely application to the court to determine the tenants' entitlement to enfranchisement and/or, as the case may be, to a leasehold valuation tribunal to determine the price and/or other terms". Mr Dyar submitted that the proposed figure in the Notice of Claim was an opening shot. Mr Dyar also referred the Tribunal to the case of Cadogan -v- Morris [1998] ECWA Civ 1671 which concerned the validity of a tenant's notice served under the provisions of the 1993 Act. (which is referred to below)

14. Mr Dyar invited the Tribunal to consider the Landlord's Surveyor's Report. He stated that whilst Ms Ellis had erred in her conclusions at paragraph 2.1.8, she was correct in paragraph 2.1.7 of her report that stated "*Part 111 of Schedule 13 deals with the Amounts payable to Owners of Intermediate Leasehold Interests". The amount is defined as the aggregate of (a) the diminution in the value of the intermediate landlord's interest (b) any compensation payable to the intermediate landlord.*

15. *2.1.8 Those two elements are covered by the sum of £5000 offered and accepted and are not, therefore, within the jurisdiction of the LVT"*

16. Mr Dyar stated that having regard to the figures the intermediate landlord could be entitled to; the Tribunal was invited to confirm the intermediate Landlord's entitlement to £1,048. [sic £1,084] (£563 in respect of diminution in value and £485 in respect of the share of the marriage value).

17. The Tribunal asked Mr Dyar to confirm when the intermediate landlord was notified that their share of the premium was no longer agreed. Mr Berlinger (who acted on behalf of the intermediate landlord) confirmed on the intermediate landlord's behalf that they had been notified on 2 May 2008 (the Friday before the hearing).

The submissions of the Intermediate Landlord

18. Mr Berlinger referred the Tribunal to Ms Ellis' report at paragraph 3.15 which stated that Acestar's share of the marriage value is £488, Ms Ellis then states" which I say is payable to them from the premium by the Diocese in addition to the agreed "other amount" of £5000.

19. In Mr Berlinger's view this amount was payable to the intermediate landlord, as well as the £5,000. Mr Berlinger stated that the offer was analogous to an offer to purchase

the freehold which could be considered a legally binding agreement. Mr Dyar had referred to a property at Flat 1 St Edwards Court Finchley, (which involved the same Respondents), and was in the same block of flats. In this case the value of the intermediate landlord's premium was determined at £1394. Mr Berlinger stated that the intermediate landlord had been granted leave to appeal to the Lands Tribunal and therefore did not accept that the case referred to demonstrated that the intermediate landlord's premium had been over valued.

20. Mr Berlinger, in closing, stated that intermediate landlord had been notified by the 'summary of issues' received on the Friday before the hearing, and that as a result he had spent 4 hours going through the file and had also spent 2 hours at the Tribunal. He was asking the Tribunal to make an order for cost against the Applicants on the grounds that their conduct had been frivolous and vexatious. Mr Berlinger was asked by the Tribunal to confirm his charge-out rate, (which he confirmed by letter in one particular instance as being £100 per hour). Mr Dyar submitted in answer to the application, that the Applicant had not acted frivolously and vexatiously.

The Application for a variation of the wording of Clause 5b of the Lease

21. With regard to the second issue concerning the terms of the Lease, Mr Dyar stated that the Landlord's insurance obligations were set out in Clause 5b of the existing Lease (page 38 of bundle) and these are mirrored (bar one word) in Clause 8.2 of the draft Lease (page 65 of bundle) and provides that the Landlord is:-

"*.... to insure and keep insured (unless such insurance shall be vitiated by any act or default of the Lessee or the owner Lessee or occupiers of the any Flat comprised in the Building....*"

22. He stated in his written submission that "*The Tenant considers that the circumstances in which the insurance can be vitiated being by way of an act by an owner Lessee or occupier in any Flat of the Building or such that the insurance provisions in the Lease are defective.* And that as such section 57(6) of the 1993 Act.

23. Mr Dyar made the following submissions: - he stated that in reliance on guidance from the council of mortgage lenders, set out at page 11 of his skeleton argument, *"The Title to the Property must be good and marketable, free of any restrictions covenants easements, charges or encumbrances which at the time of completion might reasonably be expected to materially adversely affect the value of the property or its future marketability (but excluding any matters covered by Indemnity Insurance) and which may be accepted by us for Mortgage purposes".*

24. This in his view meant that a Conveyancing Solicitor would not be able to give a clear Certificate of Title if the Lease contains a provision such as clause 8.2 of the draft Lease.

25. Mr Dyar considered that the defect could be cured by a re-wording of the clause to state "unless such insurance shall be vitiated by any act or default of the Lessee". He further stated that " In Butterworth's Encyclopaedia of forms and Precedents (Volume 23 (2) (2002 Issue) the only circumstances which can affect the insurance cover of flat are set out as "Tenant's activities:

26. Mr Dyar also referred the Tribunal to the 'guidance on unfair contract terms in tenancy agreements', at Para 2.7.1 and 2.7.2

"A term which could allow the Landlord to refuse to carry out his side of the Contract or any important obligations under it at his discretion and without liability can potentially distort the balance of the Contract to the Tenant's disadvantage. This also applies to terms which permits the Landlord to? suspend provision of any significant benefit under the Contract. The intention behind such terms may be acceptable, for example to protect the Landlord from the effects or circumstances outside his control or to protect the interests of other Tenants. Although the intention may be reasonable, the potential effects have to be taken in to account in assessing fairness. If exclusion goes further than is strictly necessary

to achieve a legitimate purpose, it could give scope for abuse and thus set the balance of the Contract to the determent of the Tenant"

"The Tenant must not do or omit to do or permit anyone under his control to do or omit to do anything that could result in any insurance on or in relation to the [Building] becoming wholly or partially void or voidable or increase the rate of premium (unless he has previously notified the Landlord and has agreed to pay the increased premium.)

27. In response, Ms Gibbons (Counsel for the landlord) criticised Mr Dyar's submissions insofar as they concerned opinion evidence which he had purported to give as an expert conveyencer.

28. Ms Gibbons referred the Tribunal to section 57 of the Act, in particular section 57(6) which dealt with the amendment of the lease being necessary in order to remedy a defect. Counsel submitted that the word 'necessary' had been strictly construed *"The word "necessary" has been construed strictly and is not equivalent to "convenient": Waitt v. Morris [1994] 2 E.G.L.R. 224 at 226C."*

29. Counsel submitted further in paragraph 10 of her submissions that "The meaning of the word "defect" was considered by H.H. Judge Huskinson in ***Gordon v. Church Commissioners for England*** **(unreported, 25/5/07, Lands Tribunal) at paragraph 47**

"There is no definition in the statute of the word "defect" which is an everyday English word. The Shorter Oxford English Dictionary gives as a meaning: shortcoming, fault, flaw, imperfection. I consider it proper to adopt this fairly broad meaning of defect but subject to the following qualification. I conclude that a lease can only properly be described as containing a defect (in the sense of shortcoming, fault, flaw or, perhaps even, imperfection) if it can objectively be said to contain such a defect when reasonably viewed from the standpoint of both a reasonable landlord and a reasonable tenant.... This mandatory language indicates that the concept of a defect

is a shortcoming below an objectively measured satisfactory standard. It is not sufficient for a provision to be a defect only when viewed from the standpoint of one or other party."

30. Ms Gibbons submitted that there was no defect in the lease in this case and that accordingly it was not necessary to amend the lease. In answer to the issues raised by Mr Dyar, counsel submitted that there was no evidence that the wording of the lease had affected the marketability of the property or indeed the ability of the Applicants to obtain a mortgage or give good title.

31. Ms Gibbons also referred to the unfair contract terms in tenancy agreement provisions referred to by Mr Dyar. Counsel stated that even on the passage relied upon it could be shown that the term would not be unfair because "*The intention behind such terms may be acceptable, for example to protect the Landlord from the effects or circumstances outside his control or to protect the interests of other Tenants.*" and that this was the effect of this term, Counsel stated that the clause should also not be considered defective simply because it was unusual or not common. Counsel invited the Tribunal to consider the wording of *Section* 57(6) a, of the Act, and find that the lease did not contain a defect and that it should not be amended.

The decision of the Tribunal

32. The Tribunal determined that the amount to be paid to the intermediate landlord is £5000 and that this sum was for both compensation and for their share of the marriage value in accordance with section 13.

33. The Tribunal accepted that the amount proposed in the notice was not on its own a binding offer. and that it was "*an opening shot in negotiations.*" However on a careful analysis the case law referred to by Mr Dyar in l***9 Cornwall Crescent, London Limited –v-The Royal Borough of Kensington & Chelsea 2005' [2005] EWCA Civ 324 and Cadogan –v- Morris 19999 1EGLR.***

34. At paragraph 17 ***Cadogan –v- Morris, Lord Justice Stuart- Smith stated*** *"I do not consider it is necessary to read any words into s42 (3) c the tenant is required to specify the premium that he proposes to pay . He did not do so: he deliberately specified a figure which he did not propose to pay. I do not think the tenant is required to offer his final figure which he may be prepared to go to, but he should in my view offer a realistic figure".*

35. In ***The Royal Borough of Kensington & Chelsea 2005'*** *this wording is considered at paragraph 43 the starting point was on the facts of the case whether there was a genuine offer in the sense of the figure that the tenant proposed to pay that is a bona fide offer whatever its amount."* Both cases confirm that the offer should be made in good faith. In the Tribunal's view, an offer made in good faith should be a figure that the Applicant is prepared to pay, if the offer is accepted.

36. The Landlord's counter-notice was served on 2 August 2007. In that notice the intermediate landlord accepted the offer. At no stage in the subsequent negotiations with the competent landlord did the Applicant indicate to the Intermediate landlord that the offer had been withdrawn or was subject to the overall outcome of the on-going negotiations with the competent landlord. This remained the case until the position was clarified by the summary of issues drafted on Friday 2 May 2008.

37. The Tribunal on the evidence before it, from the notices and from the comments made by Ms Ellis in her report consider that up until that point the Intermediate landlord and the competent landlord were proceeding on the basis that the compensation to be paid to the intermediate landlord had been agreed.

    In her report at Para 2.1.7, referred to at paragraph 15, Ms Ellis confirmed this.

38. However the Tribunal have not solely placed reliance on the report of Ms Ellis (in setting out the position between the Intermediate landlord and the Applicant concerning the proposed compensation). The Tribunal have considered whether any information was given to the intermediate landlord to put them on notice that the matter was no longer agreed. On the evidence before the Tribunal no information was presented to the Tribunal that this offer had been formally withdrawn, and no such withdrawal was communicated to the Intermediate landlord, neither was any evidence presented to show that a genuine mistake had arisen in this offer being made. In the

absence of any information to the contrary, the Tribunal are of the view that the Intermediate Landlord ought to be entitled to rely upon an offer made in good faith.

39. Accordingly the Tribunal find that the sum of £5000 is payable to the intermediate landlord.

The Application for the Amendment of Clause 5b of the Lease

40. The Tribunal on careful consideration of the construction of clause 5(b) of the Lease and Section 57 (6) b of the Act, find that the clause was not defective, and that although the strict application of the clause could have a detrimental effect on the Applicant, the wording of the clause was not such as be a defect within the meaning of section 57(6) b of the act. The Tribunal considered that the wording of section 57(6) a, was not applicable in this case, and accordingly the Application for an amendment of the lease was refused.

Application for costs by the Intermediate Landlord

41. The Tribunal find that the Applicant has not acted frivolously or vexatiously. Further, although Mr Berlinger stated that he had spent over 4 hours in preparation, there was little evidence (such as correspondence or skeleton arguments) to show how this time was spent. Accordingly the application for costs made by the intermediate landlord is refused.

Signed.....

Dated.....

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Dated..3-6-08.....