

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

**SOUTHERN RENT ASSESSMENT PANEL
& LEASEHOLD VALUATION TRIBUNAL**

**THE LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT
ACT 1993**

Case No. CHI/00HN/OLR/2010/0020

**Property: Flat 6 and Garage
Pennington House
8 Grosvenor Road
Bournemouth
Dorset
BH4 8BL**

Applicant: Mr. D. Webb

First Respondent: Mr. R.G. Gates

Second Respondent: Mr. R.C. Mellery-Pratt

Date of Consideration: 6th October 2010

**Members of the Tribunal: Mr. R. Norman
Mr. R. Athow FRICS MIRPM**

Date Decision Issued: 29th October 2010

**FLAT 6 AND GARAGE, PENNINGTON HOUSE, 8 GROSVENOR ROAD,
BOURNEMOUTH, DORSET BH4 8BL**

Background

1. Mr. D. Webb ("the Applicant") is the lessee of Flat 6 and Garage, Pennington House, 8 Grosvenor Road, Bournemouth, Dorset BH4 8BL ("the subject property"). Mr. R.G. Gates ("the First Respondent") and Mr. R. Mellery-Pratt ("the Second Respondent") are the freeholder and intermediate landlord respectively of the subject property. The Applicant is represented by Coles Miller Solicitors LLP, the First Respondent is represented by Preston Redman Solicitors LLP and the Second Respondent is represented by Lacey's Solicitors.

2. The Applicant applied for a new lease and as a result of Notices served under Section 42 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") and negotiations the premium payable has been agreed but it has not been possible to agree the terms of the new lease. An application has therefore been made to the Leasehold Valuation Tribunal under Sections 48 and 91 of the Act to determine the terms of the new lease.

3. The following are the terms which are not agreed and upon which a determination by the Leasehold Valuation Tribunal has been sought:

(a) Paragraph 7 of the 6th Schedule to the draft lease

(b) Paragraph 2 of the 7th Schedule to the draft lease

4. On 29th July 2010 directions were issued and with those directions the Tribunal gave notice to the parties under Regulation 13 of the Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003 that the Tribunal intended to proceed to determine the matter on the basis only of written representations and without an oral hearing. The parties were given the opportunity to object to that procedure by writing to the Tribunal no later than 28 days from the 29th July 2010. No written objection has been received and the matter is being dealt with on the basis only of written representations and without an oral hearing.

5. Solicitors representing the First Respondent have referred us to Section 57(6) of the Act which provides that either the landlord or the tenant:

"...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."

Submissions

6. On behalf of the First Respondent submissions have included that:

(a) The leases of two other Flats at Pennington House have been extended and that their new leases incorporated the wording suggested by the First and Second Respondents.

(b) The amendments sought are both necessary to remedy a defect in the drafting of the existing lease and also that it would be unreasonable not to incorporate the amendments in view of changes in the drafting practice of residential long leases since the grant of the existing lease in 1962.

(c) In respect of the proposed amendment to paragraph 2 of the 7th Schedule, while it is accepted there is no like provision in the existing lease it is submitted that it would be unreasonable not to allow the modification and that the absence of such a provision is a defect in the existing lease.

7. On behalf of the Second Respondent submissions have included that:

(a) In relation to paragraph 7 of Schedule 6, the obligation to do the repairs is in the existing lease and the sensible amendment proposed merely provides a means for the landlord to carry out those repairs in good time to avoid more serious damage to the building. The cost can then be pursued through the courts. The situation of having to

go to court to enforce the tenant's covenants to repair causes delay and possibly further resultant damage to the building. All modern leases are in the terms proposed and this is very sensible and reasonable updating.

(b) In relation to paragraph 2 of Schedule 7, the tenant cannot expect to breach the lease (by causing a nuisance) and for there to be no repercussions. Any nuisance is entirely in the control of the tenant and it is therefore in his power to avoid any costs being charged. This again is the basis for all modern leases and is sensible and reasonable updating.

8. On behalf of the Applicant submissions have included that:

(a) Whilst the statutory scheme allows for the remedy of a defect if it is necessary, the words necessary and defect should be construed strictly (*LVT: Waitt v Morris 1994*) and thus it should not be sufficient to attempt to modernise the terms to allow for the recovery of the landlord's costs where it was previously not provided for.

(b) The statutory scheme does not provide for the insertion of new provisions to the terms simply because the First Respondent feels that term in the existing lease should have been drafted to include the provisions the First Respondent now requires.

(c) The statutory scheme does not provide for a variation to the existing lease so that the new lease is in modern form.

(d) Section 57(6) of the Act does not allow the addition of wholly new terms/provisions in the absence of consent. There is at present no tenant's covenant in the existing lease to pay the landlord any costs including costs incidental to the preparation of a section 146 Law of Property Act 1925 Notice as a result of either the Applicant failing to carry out works or abating a nuisance. The Respondents are therefore seeking the inclusion of wholly new provisions.

(e) The Second Respondent is seeking to use the Applicant's exercise of a statutory right to a new lease to put the Second Respondent in a better position than he is now and that by the Second Respondent's own admission he would, under the terms of the existing lease, have to sue the Applicant to ensure that any works are carried out and bear the costs of that action himself.

(f) The provisions in issue which the Respondents are seeking to introduce are prejudicial to the Applicant and relevant to value and would be taken into consideration by a purchaser. The acquisition of an extended term of the lease can never have been intended by Parliament to put the tenant in a less advantageous position than when he purchased the flat.

(g) The Second Respondent was aware of the provisions of the lease when he took an assignment of it.

Reasons

9. The skeleton argument of the Second Respondent is dated 27th September 2010, the same date as a letter from the Applicant's Solicitors withdrawing the Applicant's objection to some of the proposed additional words in paragraph 7 of Schedule 6; the result of which is that if the Applicant does not proceed diligently with the repairs the Respondents may enter upon the premises and execute the same. This goes some way to dealing with the Second Respondent's concerns.

10. The decision of the LVT in *Waitt v Morris [1994]* supports the submission that the word "necessary" in Section 57(6)(a) should be construed strictly and in *Hague on Leasehold Enfranchisement* it is suggested that "necessary" is not

equivalent to “convenient”. Also that the word “defect” is not defined, but given the use of the word “necessary”, a strict or narrow interpretation seems the proper one and that accordingly the use of this provision to attempt to modernise the terms generally in the face of opposition from the other party would not be permissible. As to Section 57(6)(b) the word “changes” is not defined and Hague suggests that it would appear to include, for example, physical changes in the property used by the tenant as well as changes in acceptable conveyancing practice. The onus is on the person proposing the change to show that there are grounds for deleting or modifying the term in question.

11. We were not persuaded that, because the leases of two other Flats at Pennington House had been extended and that their new leases incorporated the wording suggested by the First and Second Respondents, this justifies the amendments proposed under the provisions of Section 57(6)(a) or (b) in this case.

12. On considering the submission made, while the proposed disputed amendments may well be convenient from the Respondents’ point of view, we were not satisfied that there was a defect in the existing lease which it was necessary to remedy by the inclusion of those amendments so that their inclusion could be justified under Section 57(6)(a). It was submitted on behalf of the Second Respondent that all modern leases are in the terms proposed and that this is very sensible and reasonable updating. However, we agree with the suggestion in Hague, that the use of this provision to attempt to modify the terms generally in the face of opposition from the other party would not be permissible.

13. It was submitted on behalf of the First Respondent that as well as being necessary to remedy a defect in the existing lease it would also be unreasonable not to incorporate the amendments in view of changes in the drafting practice of residential long leases since the grant of the existing lease in 1962. It was submitted that the proposed amendments were modifications of clauses in the existing lease. We were not satisfied that the proposed amendments were in fact modifications. Whether a term is a new term or a modification of an existing term is a matter of fact and degree. We found that the amendments imposed new liabilities for costs, charges and expenses which were not expressly included in the existing lease and as a result we found them to be new provisions and therefore not able to be included under the provisions of Section 57(6). However, if the amendments were to be considered to be modifications of existing terms, we were not satisfied that it would be unreasonable to incorporate without modification the existing terms in view of changes occurring since the date of commencement of the existing lease, as those existing terms do not affect the suitability on the relevant date of the provisions of that lease. Consequently, on that basis also, we found that the proposed amendments could not be included under the provisions of Section 57(6).

Decision

14. Having considered the skeleton arguments and all the documents provided and for the reasons set out above having made findings on a balance of probabilities, the Tribunal have determined that the following terms shall be included in the new lease:

(a) Paragraph 7 of the 6th Schedule to the lease:

The Lessor or Mr. Mellery-Pratt may with or without workmen and others twice in every year at reasonable times in the daytime on reasonable written notice enter upon and examine or view the condition of Flat 6 and may thereupon serve upon the Lessee notice in writing specifying any repairs or works necessary to be done for which the Lessee is liable hereunder and require the Lessee forthwith to execute the same and if the Lessee does not within three months after the service of such notice proceed diligently with the execution of such repairs or works then the Lessor or Mr. Mellery-Pratt (as the case may be) may enter upon the premises and execute the same

(b) Paragraph 2 of the 7th Schedule to the lease:

The Lessee shall not do or permit or suffer to be done in or upon Flat 6 anything which may be or become a nuisance disturbance or annoyance or cause damage injury or inconvenience to the Lessor or the owner or occupier of any other Flat or any adjoining premises or the neighbourhood or whereby any insurance for the time being effected on Pennington House or any part thereof (including Flat 6) may be rendered void or voidable or whereby the rate of premium may be increased

Signed

R. Norman

Chairman