



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

Case Reference : CAM/11UE/OLR/2018/0041

Property : 13 & 17 Old Fives Court, Burnham,
SL1 7ET (and parking spaces)

Applicant : Carole Anne Dodd

Represented by Mr. N. Grundy QC
(instructed by Stillwells LLP)

Respondent : Wallace Partnership Reversionary
Group Holdings Limited

(Stevensons Solicitors LLP)

Date of Application : 19th February 2018

Type of Application : To determine the terms of acquisition
of the lease extension of the property
pursuant to the Leasehold Reform,
Housing, and Urban Development Act
1993 ("the 1993 Act")

Tribunal : Judge J. Oxlade
D. Barnden MRICS
N. Martindale FRICS

**Date and venue of
Hearing** : 20th June 2018
Slough County Court

DECISION

For the following reasons the Tribunal finds that:

The terms of the leases shall be as found in the lease offered by the lessee at pages 99 to 108 of the bundle.

REASONS FOR THE DECISION

Issues for determination

1. The issues for determination by the Tribunal are the form and wording of the new leases.

Background

2. Carole Anne Dodd ("the lessee") is the lessee of two flats within the same development (Flats 13 and 17 Old Fives Court). They are let on identical terms by the Wallace Partnership Reversionary Group Holdings Limited ("the freeholder"). They are tri-partite leases; the management of the building is performed by Beeches Way Management Company Limited ("the Company").
3. The lessee sought lease extensions, and absent of an agreement on all of the terms of acquisition, she made applications to the Tribunal for determination of the terms of the new lease, pursuant to section 48 of the 1993 Act.

Agreed terms

4. By the time of filing the trial bundle, the parties had agreed a statement of issues ("statement of issues"). The following terms were agreed:
 - The term of 90 years, plus the unexpired term,
 - Peppercorn rent,
 - Premiums of £16,190 (flat 13) and £16,510 (flat 17), payable to the freeholder,
 - Total Freeholder's legal costs of £3645.70 (incl VAT), and valuer's fees of £1380 (incl VAT), payable by the lessee to the Freeholder.

Issues in dispute

5. At the time of filing of the bundle on 8th June 2018, the remaining issues were identified as to the form and wording of the new lease.
6. The parties had entered into correspondence, shown at pages 126 to 155, which set out their respective positions, and there was a travelling

draft lease, on which one party's comment had been overtaken by the other party's comment; some concessions were made by the parties.

7. On receipt of the bundle, the parties' final positions were set out at in their letters dated 11th May (lessee) and 21st May (freeholder), both were accompanied with their preferred drafts at pages 99 to 108 (lessee) and pages 116 to 125 (freeholder).
8. The application was listed for hearing on 20th June 2018.
9. On 18th June the freeholder's Solicitors wrote to the Tribunal, indicating that as they had set out their position fully in correspondence, they did not intend to attend the hearing, as there was nothing further to add to their case - save to take issue with point 10.1 of the agreed facts - which set out that the Applicant contentions for the form of a draft which they said was industry standard; however, the freeholder's point was that there was no evidence to support the assertion that it was in fact industry standard.
10. The lessee filed a detailed skeleton argument first thing on the morning of 19th June, on receipt of which the freeholder's Solicitors said that they now conceded two points in contention (as to 5.4 the complete covenant, and 5.5 as to part of the wording of that covenant) . They were at pains to point out that they had not previously understood why the lessee had taken issue with these points; had this been spelt out earlier, substantial costs would have been saved.

Hearing

11. The application was heard by the Tribunal on 20th June 2018.
12. In light of the issues as they appeared on the papers, the Tribunal dispensed with the need for an inspection of the premises, against which decision neither party took issue; so the application proceeded by way of submissions.

Lessee

13. The lessee was represented by Mr. Grundy QC. As referred to above he had filed the skeleton argument, together with extracts from Hague on Leasehold Enfranchisement and Woodfall, a copy of a model lease from Lexis Nexis, and case law referred to in paragraph 34 of his skeleton argument as to the limited powers of the Tribunal under section 57 of the 1993 Act to alter the existing terms of the lease.

14. In light of the freeholder's concessions made by letter of 19th June 2018, the Tribunal asked Counsel to identify that which appeared to be in dispute, and he identified the relevant dispute as to form and substance; in reality, if the arguments over form were decided for the lessee, then the arguments over substance would fall away.

Submissions

15. Mr. Grundy made oral submissions, firstly on the question of the form of the lease, and secondly on the substance of it.

Form

16. The lessee's case was that the lease proposed by her was in a form that was the industry norm; it is what a conveyancing solicitor would expect to see. He provided a download of a template document from the precedent service of Lexis Nexis headed "flat lease - individual enfranchisement"; it follows the form of a supplemental lease, incorporating the old lease by reference.
17. As the scheme of the legislation was to require the new lease to be in identical terms - save where agreement was otherwise reached, or in the limited circumstances permitted for terms to be altered - the old lease should be used, and simply attached to the new lease, the new lease itself providing the barest information necessary, but reflecting the new length of lease, and the peppercorn ground rent. He provided an extract from Hague (Sixth edition), which though not categorical support for an argument as to the lease being the bare minimum, was suggestive of this as the correct approach.
18. In contrast, the form proposed by the freeholder (p122 , clause 5.1) was a surrender and re-grant of the lease - which is not what the legislation provides. Further, it was a hybrid document, which necessarily attached the old lease (and referred to incorporated terms, some but not all from the old lease), but then repeated many of the terms; this was not only unnecessary, but excessive, and require the reader to pick through the documents working out what applies and what does not. Examples of this were that 5.4 and 5.5 of the old lease, which the freeholder had wanted to change; it would extend the time taken in reading it (at best) and lead to confusion at worst. The freeholder had not explained in correspondence why it had chosen this form of new lease.

Substance

19. As to the terms of the lease, he made the point that there was no argument ever advanced by the Freeholder in correspondence - and no concession by the Applicant - that the existing leases were defective or lacking in any way. Accordingly, being that there was no alteration to the demise or the property subject to the lease then the lessee did not consider that the Tribunal's statutory powers arose to make any alteration; section 57(1)(a) to (c) or s57(6) of the 1993 Act applied.
20. As the Tribunal has no jurisdiction to alter the terms - absent of the partys agreement, which was not forthcoming - the terms should remain unchanged.
21. In light of the concessions made on 18th June 2018 by the freeholder, the lessee's position was that there was no argument now as to the substance of the terms, it was solely form.
22. However, for the purposes of (i) illustrating the problem with the form proposed by the freeholder and (ii) an argument on costs, which the lessee wished to make, Mr Grundy wanted to point out that changing terms as to 5.4. and 5.5 interfered with the quiet enjoyment provision - making it subject to payment of new rent and compliance with terms - which hitherto had not been the case. Further, it imposed on the lessee obligations to inform the freeholder of assignments, transfers etc. It appeared that the freeholder had not understood that these were tripartite leases, that the Company undertook all administrative functions, and that this provision was a dramatic departure from the original lease, and totally out of step with the other leases in the development. It smacked of the freeholder wanting to improve its financial position, and to involve obligations over those owed by other lessees. Materially, the freeholder had never explained why they had wanted such clauses, or the legal justification.

Freeholder

23. The Freeholder's position is set out in the letter of 21st May 2018.
24. It set out its position, being that the Solicitor had been involved in litigation to resolve problems with leases (for clients who they had not represented at the drafting stage) arising from clauses being inadvertently included in new lease extensions; hence their anxiety to exercise due diligence in this case. The device of using the "incorporated terms" clause at 2.7 explained the provisions from the old lease which were to remain unchanged; that which was not

mentioned there - but did not require amendment - was inserted in a more natural and convenient place.

25. As to the clauses in issue at that time (5.4, 5.5 and 8.1 and 8.2) the freeholder said that it simply could not understand the objection; in favour of it, it was intelligent drafting.
26. We have observed above that the freeholder said that it had nothing to further to add, by letter of 18th June; on 19th June concessions were made as to 5.4. and 5.5, on the basis that the lessee had only now explained its logic. Further, the freeholder observed that the lessee had filed no evidence to support 10.1 of the points in issue document.

Closing

27. During the course of the hearing, having been aware from the skeleton argument that the lessee wished to seek wasted costs in accordance with Rules 13 of the Tribunal Procedure (First-tier)(Property Chamber) Rules 2013, on account of the freeholder's unreasonable conduct, we indicated that the freeholder must have notice of the application prior to any decision being made, and so an opportunity to be heard. Therefore we would not take submissions on that. Also, it would be premature to do so as the substantive application was to be heard.
28. We indicated that we would in this decision - if appropriate - give directions for disposal of the costs issue.
29. At the end of the hearing we reserved our decision.

Relevant Law

30. The new lease shall, by section 57(1) of the 1993 Act, be on the same terms as the existing lease, with modifications as set out in paragraphs 57(1)(a) to 57(11).

Findings

Form

31. The purpose of this legislation is to provide lessees with the right to extend a lease, subject to suitable monetary compensation paid to the freeholder. It clearly says in section 57(1) that it shall be "on the same terms as those in the existing lease" and does not countenance alteration or variation of the lease as a right, save in the limited circumstances envisaged in sections 57(1)(a)-(c) and 57(6), or by agreement. The process of drafting the new lease should be simple, and

relatively low cost. The legislation does not provide for a surrender and re-grant, which is what the freeholder's draft seeks to achieve.

32. As the legislation provides for the grant of a new lease it inevitably has to take on a different form from the original, as one cannot simply re-date the existing lease. Unsurprisingly in view of the vast range of different types of lease and need, the legislation does not (by way of schedule to the Act or Statutory Instrument) provide a template of the correct or preferred form that should be used on the grant of a new lease. For the same reason, the Tribunal sees an infinite variety of draft leases in lease extension cases, and so in this case we do not say (subject to the surrender and re-grant point above) that either form proposed by either party is wrong. It is a question of preference.
33. In considering the correspondence filed and submissions made as to form, we observe that each seeks to incorporate a portion of the existing lease, under the heading "incorporated terms"; in essence the lessee's draft incorporates the whole lease, which makes it simple to read, and is unambiguous. By contrast, the freeholder's new lease incorporates large portions of the old lease, but not all. It requires the reader to pick their way through the new and the old, working out what is still in force and what is not. As originally proposed the new lease provides for new rights and responsibilities (5.4. and 5.5) which were a significant departure from the past – as the old lease made no direct covenants between the lessee and the freeholder.
34. Whilst the lessee argues for a form which is said to be industry standard, and we agree that the form proposed by the lessee is widely used, though not standard, and our decision is not based on this. Rather, we find that the lessee's draft is easier to read, easier to apply, and less likely to lead to ambiguity. We therefore adopt as the approved draft that which was provided by the lessee.

Substance

35. The freeholder has conceded the points as to substance at clauses 5.4 and 5.5. The other remaining points as to substance fall away in view of our decision that we prefer the lessee's draft lease.
36. We should say that we consider that it was misconceived for the freeholder to argue for insertion of 5.4 and 5.5; these were a departure from the existing lease, and the legislation clearly did not provide for new terms which did not fit within sections 57(1)(a)-(c) and 57(6), or by agreement. It was unhelpful to argue for inclusion on the basis that

“we cannot see why your client objects”. These points will no doubt be fully ventilated on the question of wasted costs, about which we express no view.

Decision

37. In conclusion, we make it clear that we prefer the lessee’s draft leases at pages 99 to 108 of the bundle filed for the hearing on 20th June 2018, and approve that draft.
38. Further, as to the costs application, if the Applicant seeks costs in accordance with rule 13, she shall indicate this to Applicant by no later than 4th August 2018 together with the statement of costs filed at the hearing, for the purpose of attempting to seek agreement on the sum sought and payable. Absent of agreement on costs, the lessee shall contact the Tribunal by no later than 15th August 2018, to specify whether or not an oral hearing is required – in which case directions will be made. We raise as an issue now the point made in the skeleton argument, that the lessee wishes to set off against the premium any costs order secured; the lessee will need to file authority for that point.

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Joanne Oxlade
Judge of the First tier Tribunal, Property Chamber

19th July 2018