First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CAM/00KA/OLR/2019/0007**
Property	**:**	**129 Brook Street, Luton, LU3 1DZ**
Applicant	**:**	**Ronald Douglas Liebner**
Respondent	**:**	**Luton Borough Council**
Date of Application	**:**	**14th January 2019**
Type of Application	**:**	**To determine the terms of acquisition and costs of the lease extension of the property**
Tribunal	**:**	**Bruce Edgington (lawyer chair) Mary Hardman IRRV (Hons) FRICS**

DECISION

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1. The Respondent's proposed addition to paragraph (17) of the Third Schedule to the original lease dated 9th October 1995 as set out in the counter-notice for incorporation into the new Deed of Surrender and New Lease is refused.

2. The various applications for costs pursuant to rule 13 of the **Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013** ("the rules") are refused save that the Respondent is ordered to pay to the Applicant the sum of £100 being the fee paid to the Tribunal by the Applicant within 28 days of the date of this determination.

3. As all other matters within the lease extension have been agreed, the Tribunal has no further jurisdiction.

Reasons

4. This is an application for the Tribunal to determine the terms of the lease extension for the property. The Tribunal issued its usual directions order on the 16th January 2019 timetabling the case to a final determination. As the

premium had been agreed and the Tribunal therefore did not need to inspect the property, the Tribunal said that it would deal with the determination of any further outstanding issue on the papers on or after 8th March 2019. Both parties were told that if they wanted an oral hearing, one would be arranged. No request for such a hearing has been submitted and a bundle of documents has been filed.

5. The application was made because in the counter-notice served by the Respondent, it said that the original lease terms should be preserved save for "*The addition of the words 'and to pay to the Council a registration fee of not less than £75.00 plus VAT' to the end of Clause (17) of the Third Schedule of the existing lease*".

6. Clause (17) of the Third Schedule reads:

> "*The Lessee shall within twenty one days of the date of every assignment underlease grant of probate or administration assent transfer mortgage charge discharge Order of Court or other event or document relating to the term hereby granted give notice thereof in writing to the Council and in the case of a document produce it to the Council for registration with the notice*"

7. In the bundle produced, there is correspondence by letter and e-mail between the parties, much of which may have been intended to be 'without prejudice' because it sets out the negotiations. On the 13th February 2019 i.e. after the date of this application, the Legal Services division of the Respondent wrote a letter which is not marked 'without prejudice' and which says that "*Having considered the matter further, however, the Council is prepared to agree to the removal of the requirement to pay a notice fee contained within the new lease and to proceed with the lease extension on the terms which have been agreed*".

8. The Applicant then made it a condition that he be recompensed for having to make this application and the Respondent would not agree to this. In fact both parties have made an application for costs under the rules referred to in the decision above.

9. Whether the terms of the Deed of Surrender and New Lease have actually been agreed is a mute point. On the face of it they have, but the Respondent's statement of case dated 21st February 2019, i.e. after the date of the purported agreement, states "*The Respondent seeks to amend a provision within the new lease to clarify that the payment of a registration fee, is required on the basis that this was omitted from the original lease and the Respondent seeks to rely on the provisions of section 57 of the* (1993 Act) *for such inclusion. The original lease is an old lease which did not include a registration fee and therefore the Respondent seeks to rely on this provision to bring the new lease in line with its standard Right to Buy lease*".

10. All the Tribunal can do is assume either that the letter of the 13th February was intended to have been written 'without prejudice' or that the offer set out therein has now been withdrawn. Whichever it is, the Tribunal has decided

that it must assume that the proposed new term in the counter-notice is still to be determined together with the applications for costs.

The Law

11. Section 57 of the **Leasehold Reform, Housing and Urban Development Act 1993** ("the 1993 Act") says when a new lease is granted under the provisions of the 1993 Act, it "*shall be a lease on the same terms as those of the existing lease, as they apply on the relevant date, but with such modifications as may be required or appropriate….*".

12. In the particular circumstances of this case the only permitted modification which is relevant provides, in subsection 57(6), that "*any term of the existing lease shall be excluded or modified in so far as….it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of the 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*".

13. Section 38(9) of the 1993 Act defines the relevant date as being the date of the Initial Notice of claim which, in this case, is the 22nd June 2018. The date of commencement of term in the existing lease is the 19th August 1988, which is almost 7 years before the date of the lease but is still relatively recent.

14. As far as costs are concerned, rule 13 of the rules is in 2 parts. Under rule 13(1), the Tribunal can order one party to pay the costs of another if "*a person has acted unreasonably in bringing, defending or conducting proceedings*".

15. The Upper Tribunal case of **Willow Court Management Co. Ltd. v Alexander plus 2 other cases** [2016] UKUT 0290 (LC) binds this Tribunal. It confirmed that the definition of unreasonable conduct is still, in essence, that set out by the then Master of the Rolls in **Ridehalgh v Horsefield** [1994] Ch 205. At pages 232 and 233 in that judgment, 'unreasonable' is said to be "*conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But cannot be described as unreasonable simply because it leads in the event to an unsuccessful result*".

16. On the other hand, rule 13(2) says that a Tribunal may make an order requiring a party to reimburse any fee paid to the Tribunal of its own initiative and without any determination of unreasonable conduct as defined above.

The Applicant's position

17. The Applicant has been unrepresented within these proceedings but he has referred to the 2007 Upper Tribunal case of **Gordon v Church Commissioners for England** LRA/110/2006 in which His Honour Judge Huskinson said, in paragraph 41, that "*In my judgment there is no power under section 57(6) for a party to require that there is added into the new lease a new provision which is not to be found in the old lease. There is nothing illogical or unfair in this because, apart from the grant of the new lease, the parties would have continued to be bound by the terms of the old lease for the next X years where X may be a substantial period (over 50*

years in the present case)". The judge in that case said, in terms, that the provisions in subsection 57(6) should be strictly interpreted.

The Respondent's position

18. As has already been said, the Respondent's position is that their suggested addition to paragraph (17) in the Third Schedule to the lease is to bring this new lease into line with their usual Right to Buy terms – paragraph 4 of their statement of case. They also say that the payment of a fee is standard conveyancing practice. They go on to refer to the Mortgage Lenders' Handbook, at paragraph 9 of their statement of case, which requires notice of a mortgage to be given to a landlord and "*it is common conveyancing practice that a fee accompanies each notice*".

Discussion

19. The existing lease has over 90 years remaining which means that without the extension agreed, there would be at least another 90 years when no fee would be payable under paragraph (17) of the Third Schedule. The clause is modern in its language and it seems clear that it was the intention of both parties at the commencement of the lease that no fee would be paid when any of the notices referred to in the paragraph were given. It perhaps reflects a more philanthropic attitude displayed by local authorities at the time under the right to buy process.

20. In these circumstances, it seems clear to this Tribunal that the suggested addition to paragraph (17) is a new provision. The Mortgage Lenders' Handbook is often quoted as a reason for a lease amendment, and rightly so because unless a lease complies with its requirements, the chances are that no mortgage funds would be released to a prospective buyer. However, in this case, the lease does comply with the Handbook because it does insist on notice of the mortgage being given to the landlord. The Handbook does not require a fee to be paid.

Conclusion

21. As the suggested addition is a new provision and is not covered by subsection 57(6), the Tribunal confirms that it is not to be included in the new lease.

Costs and fees

22. It seems to this Tribunal that the Respondent knew or ought to have known that trying to insist on a new provision going into the lease just to bring it in line with new Right to Buy leases was not compliant with section 57 of the 1993 Act. At the time when this application was made there was an *impasse* and, in the Tribunal's view, the Applicant was justified in making this application. The suggestion in the Respondent's statement of case at paragraph 11 that there should have been some sort of alternative dispute resolution without saying what that would or could have been is disingenuous.

23. The Applicant did not fall into the trap of trying to introduce any other items of dispute. He expressly limited the issue to the proposed addition to paragraph (17) of the Third Schedule. In all these circumstances he should be reimbursed the fee paid to this Tribunal when the application was issued.

24. Both parties have, in effect, alleged unreasonable conduct as defined in **Ridehalgh**. The Respondent, in paragraph 12 of its statement of case

expressly alleges conduct which 'is vexatious and designed to harass the Respondent' without setting out what that conduct was. Indeed the wording used by the Respondent is that it seeks "*a wasted costs order in accordance with Rule 13 of the Land Tribunal Rules*". It should know that a wasted costs order is not what is being sought and there are no 'Land Tribunal Rules'. A wasted costs order is an order against a professional representative.

25. As was made clear in **Willow Court**, a party who applies to this Tribunal or responds to such an application will generally expect to pay for his or her own costs. It is only unreasonable conduct which carries the possible sanction of a costs order under rule 13(1). The merits of the case are largely irrelevant and as far as this application is concerned, the Tribunal cannot see that either party has been guilty of the sort of unreasonable conduct anticipated by rule 13(1) as interpreted by **Willow Court**. No order is made under rule 13(1) in favour of either party.

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Bruce Edgington
Regional Judge
8th March 2019

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.