FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CW/OLR/2020/0019**
HMCTS	**:**	**P: PAPERREMOTE**
Property	**:**	**6 Smallshire Close, Wednesfield, Wolverhampton, WV11 3SL**
Applicants	**:**	**Mr F A Barnes and Mrs C Barnes**
Representative	**:**	**Fraser Wood (Midlands) Limited**
Respondent	**:**	**Wallace Partnership Reversionary Group Holdings Limited**
Representative	**:**	**Stevensons Solicitors**
Type of Application	**:**	**An application under section 48 of the Leasehold Reform Housing & Urban Development Act 1993 for a determination of the terms of the acquisition which remain in dispute**
Tribunal Members	**:**	**Judge M K Gandham** **Mr N Wint FRICS**
Date of Decision	**:**	**19 October 2020**

DECISION

Introduction

1. By an Application received by the Tribunal on 27th April 2020, Mr Frederick Arthur Barnes and Mrs Christine Barnes ('the Applicants') applied, under section 48(1) of the Leasehold Reform, Housing and Urban Development Act 1993 ('the Act'), for the determination of the terms of acquisition which remained in dispute in respect of a new lease of the Property known as 6 Smallshire Close, Wednesfield, Wolverhampton, Wv11 3SL ('the Property').

2. The Property is held by the Applicants under a lease dated 10th June 2003 made between (1) George Wimpey Midland Limited (2) The Applicants and (3) Hamilton Court (Wednesfield) Management Company for a term of 99 years from 31st March 2002 ('the Existing Lease'). The Applicants' leasehold title is registered at the Land Registry under Title Number WM803521. Wallace Partnership Reversionary Group Holdings Limited ('the Respondent') own the freehold interest, which is registered at the Land Registry under Title Number WM910822.

3. The Tribunal issued Directions on 28th April 2020 and received a copy of a draft lease ('the Draft Lease') from Stevenson's Solicitors ('the Respondent's Representative') and a statement of case from both parties. On 21st July 2020, the Tribunal issued further directions relating specifically to the car parking space and maintenance charge and two further submissions were received from each of the parties. As neither party requested an oral hearing, the Tribunal made its determination on the basis of the written submissions received.

The Law

4. Section 48 of the Act deals with applications where the terms of a new lease are in dispute or where there is a failure to enter into a new lease.

5. Section 48(1) confirms that if, following a counter-notice or further counter-notice served by a landlord on a tenant, 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 given: "*the appropriate tribunal may, on the application of either the tenant or the landlord, determine the matters in dispute.*"

6. Section 48(7) confirms that "*the terms of acquisition*", in relation to a claim by a tenant include "*the terms to be contained in the lease*".

7. Section 56(1) of the Act confirms that a qualifying tenant has the right to obtain a new lease for a term expiring 90 years after the term date of the existing lease at a peppercorn rent. Subject to those provisions, and some exceptions detailed in section 57, section 57(1) confirms 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, as they apply on the relevant date…".*

8. Under section 3 of the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993/2407 ('*the Regulations*'), in a transaction for a new lease which has been undertaken to give effect to a tenant's notice, the parties must, unless they agree otherwise, be bound by Schedule 2 of the Regulations. Paragraph 7 of Schedule 2 to the Regulations states as follows:

> *"7.— Preparation of lease*
>
> *(1) The landlord shall prepare a draft lease and give it to the tenant within the period of fourteen days beginning with the date the terms of acquisition are agreed or determined by the appropriate tribunal (as defined in section 38).*
>
> *(2) The tenant shall give to the landlord a statement of any proposals for amending the draft lease within the period of fourteen days beginning with the date the draft lease is given.*
>
> *(3) If no statement is given by the tenant within the time specified in sub-paragraph (2), he shall be deemed to have approved the draft lease."*

The Property

9. No physical inspection was carried out by the Tribunal. The information from the statements of cases provided by both parties, along with online street view information, showed that the Property was a two-bedroom flat, located on the first floor of a building ('the Building'), off Smallshire Close. A garage and store belonging to the Property were located on the ground floor, underneath the living accommodation. The Applicants confirmed that the Property was self-contained and shared no internal common areas with any of the other flats in the Building.

10. The Building is of an unusual design, in that the flats are built in an octagonal shape around a central area which encompasses several private gardens, an access way and a parking area. The parking area was accessed via a driveway from Smallshire Close, which led through an entranceway, over which part of the Building (including a small section of the living accommodation on the first floor of the Property) oversails.

Submissions

Applicants' submissions

11. The Applicants stated that they had notified the Respondent's solicitors that they required a statutory lease extension on exactly the same terms as their original lease. They submitted that the Draft Lease was fundamentally different to the Existing Lease, so they had applied to the tribunal to enforce their right under the Act to have a statutory lease extension on the same terms as the Existing Lease.

12. In relation to the negotiations leading to the application to the tribunal, the Applicants stated that they had received the Respondent's Counter-Notice, which had proposed a premium of £4,050 and additional clauses and amendments to

the terms of a new lease. They stated that the proposed amendments were not agreed as they contained substantial changes to the terms and conditions in the Existing Lease. They stated that, by way of a letter sent to the Respondent's Representative on 3rd March 2020 (a copy which was supplied to the Tribunal), they accepted the premium proposed of £4,050 strictly on the basis of the grant of a new 90-year statutory lease subject to the same terms and conditions as the Existing Lease. They submitted that the Draft Lease, which was received by them on 10th March 2020, completely ignored this proviso. The Applicants stated that, shortly thereafter, their solicitor's office had to close, due to the Covid-19 lockdown, and that they were severely hindered in their ability to respond to the draft that had been supplied.

13. The Applicants stated that the Property was a 'coach house', of which there were three in the Building. They submitted that the three coach houses had different leases and obligations to those of the remainder of the flats in the Building. They stated that any alterations would mean that their lease was different to the leases for the other two coach houses, leading to complications for the management of the development.

14. In relation to the terms of the Draft Lease in dispute, they stated that the Draft Lease included Hamilton Court (Wednesfield) Management Company as a party to the lease. They submitted that a Leasehold Valuation Tribunal, in February 2013, had determined that the management company were not a party to the existing lease. They stated that they were not members of the management company and had no desire to become members of the same.

15. The Applicants submitted that the Respondent was attempting to remove their right to a car parking space. They stated that clause 1.6 of the Existing Lease referred to a car parking space but that this was omitted from the definition of the Property in the Draft Lease.

16. Although any parking space had not been included in the area edged in red on the plan to the Existing Lease, the Applicants stated that the plan did have a number '20' marked on it, just in front of the garage to the Property. The Applicants stated that their parking space was located immediately in front of their garage and had been used by them ever since they purchased the Property in 2003, without any objections from either the Respondent or the management company. They further stated that they would not have purchased the Property if they had not had the ability to park two vehicles.

17. The Applicants provided a copy of the freehold title to the parking area which confirmed that the land was still under the ownership of George Wimpey Midlands Limited, the previous lessor.

18. The Applicants objected to the Draft Lease imposing an obligation on the lessee to pay a registration fee to the lessor's solicitors for dealings with the Property. They stated that the Existing Lease contained no such obligation and that, although they understood that any new lease could contain provisions for updating the Existing Lease, they did not believe that this allowed for totally new obligations to be included in the same.

19. In relation to the maintenance charge, the Applicants stated that, in accordance with clause 2.9 of the Existing Lease, the only claim that could be made against them was a one sixty seventh part of the total amount spent by the management company in the maintenance of the 'open space'. The 'open space' was defined in the Existing Lease as the areas coloured in yellow on the plan to the lease. The Applicants stated that this open space had, historically, never been subject to an itemised invoice and that they believed that the management company had failed to comply with their lease obligations in this regard. The Applicants submitted that clauses 5.7 onwards of the Draft Lease, were attempting to include obligations or covenants to pay the management company and Respondent maintenance charges, which were not contained within the Existing Lease.

20. In addition, they stated that clause 5.10 of the Draft Lease, which stated as follows:

> "*Without prejudice to the generality of the foregoing the Lessee hereby covenants with the Lessor and the Management Company not withstanding* [sic] *the surrender of the 2003 Lease effected by this lease to pay the Maintenance Charge to the Management Company in accordance with clauses 4.2 and 6 of the Sixth Schedule in the 2003 Lease including any such amount that relates to any period prior to the date of this lease."*

was unreasonable, in that it was attempting to make them responsible for payments that may be owed under the Sixth Schedule of the Existing Lease after such lease had been determined.

21. Finally, the Applicants noted that they had not received the Respondent's submissions in respect of the further information requested by the Tribunal, by 3rd August 2020 as directed.

Respondent's submissions

22. Firstly, the Respondent submitted that the tribunal had no jurisdiction to deal with the application. The Respondent stated that the premium had been agreed by the parties and the Draft Lease had been sent to the Applicant's solicitors on 9th March 2020. They stated that they had received no correspondence from the Applicant's solicitors commenting on the draft so, under paragraph 7(3) of the Second Schedule to the Regulations, the Applicants were deemed to have approved the Draft Lease. The Respondent stated that, under section 91 (1) of the Act, the Tribunal only had jurisdiction to determine any questions in default of agreement between the parties. As the draft lease was deemed to have been agreed, the Respondent submitted that the tribunal no had no jurisdiction to deal with the matter.

23. Without prejudice to that submission, in relation to the Applicants' submissions, the Respondent confirmed that they did not own the parking area and that George Wimpey Midland Limited were the registered proprietors of the same. They stated that, as they did not own the land in question, they had no title with which to be able to grant a lease of the same.

24. In relation to the maintenance charge, they stated that they were not sure whether the management company demanded or received a service charge from the Applicants but that the Applicants, under paragraph 4 of the Sixth Schedule to the Existing Lease had an obligation to pay such a charge. They stated that it was in the interests of all parties to ensure that the service charge obligations continued so that the relevant areas were maintained.

25. Finally, they stated that their further submissions had been sent to the Tribunal in time and provided a copy of an email, dated 3rd August 2020, as evidence of the same.

The Tribunal's Deliberations and Determination

26. The Tribunal considered all of the evidence submitted and briefly summarised above.

27. In relation to the matter of the tribunal's jurisdiction, the Tribunal notes that paragraph 7(1) of Schedule 2 to the Regulations refers to the landlord preparing the draft lease and supplying this to the tenant within a period of fourteen days beginning with the date on which "*the terms of acquisition are agreed*" or determined by a tribunal.

28. Paragraph 1 of schedule 2 confirms that "*terms of acquisition*" has the same meaning as in section 48(7) of the Act. Section 48(7) of the Act confirms that "*the terms of acquisition*", in relation to a claim by a tenant include "*the terms to be contained in the lease*".

29. It is clear from the wording in the Applicants' solicitor's letter, dated 3rd March 2020, that the terms to be contained in the lease had not been agreed. In response to the provisions detailed in the Counter-Notice, the letter stated that the Applicants were:

> *"…prepared to accept the premium proposed in respect of the grant of the new lease of £4,050.00 but no other changes to the Lease".*

It went on state that the Applicants were:

> "*…prepared to accept any legal requirements to enable registration at the Land Registry but that is all*".

30. As such, the Tribunal does not consider that the "*terms of acquisition*" were agreed and, accordingly, the Applicants could not be deemed to have approved the draft lease under paragraph 7(3). Consequently, the Tribunal does have jurisdiction to deal with the application.

31. In relation to whether the further evidence from the Respondent was received in time, the Tribunal accepts that it was.

32. Regarding the terms of any new lease, the Tribunal notes that section 57(1) of the Act gives a prima facie right for a tenant to be granted a new lease on the same terms as the existing lease.

33. In relation to the specific items in dispute, the Tribunal is satisfied that Hamilton Court (Wednesfield) Management Company are a party to the Existing Lease. They are clearly detailed as such in the Existing Lease which, at its commencement, states:

> "***THIS LEASE*** *made on the date shown in Clause 1 is* ***BETWEEN*** *(1) The Lessor (2) The Lessee and (3) The Management Company.*"

The Management Company is defined in clause 1.4 as "*Hamilton Court (Wednesfield) Management Company*".

34. Although the Tribunal is not, in any event, bound by its previous decisions, the decision of the Tribunal marked '8685' did not state that the management company was not a party to the Existing Lease. In addition, the Applicants do not need to be members of a management company for it to be a party to the lease.

35. In relation to the parking space, the Tribunal notes that the description of the premises in the Existing Lease is detailed in clause 1.6, which states as follows:

> "***THE Premises*** *are the dwelling on the first floor of the building* ***TOGETHER*** *with the garage thereunder and the car parking space forming part of the Development and Numbered Plot and shown edged red on the Plan*".

36. Neither the copy lease provided by the Applicants, nor the copy of the counterpart lease, provided by the Respondent, details any number after the words '*Numbered Plot*' in clause 1.6. In addition, neither the copy lease nor the counterpart, includes any parking space within the area marked in red on the plan, as being part of the property that was demised to the Applicants. Although the lease plan does detail a number '20' in the area behind the Property, this is not immediately outside the garage belonging to the Applicants but in the area by the entranceway to the parking area and the store belonging to the Property.

37. The Office Copy Entries to the Applicants' title (WM803521) describe the Property as including a '*ground floor garage and store*' but, again, no parking space is mentioned and no parking space is detailed on the Official Filed Plan.

38. The Official Copy Entries and Filed Plan of the Respondent's freehold title, (WM910822), does not include the area immediately behind the garages, which the Office Copies Entries and Filed Plan to Title Number WM631426 show belong to George Wimpey Midland Limited. Though the Respondent's title does include some parking spaces, these are located further away and an inspection of the Respondent's title shows that most of the properties within the Building have either a parking space or a garage but not both.

39. Although the Applicants have stated that they would not have purchased the Property without the provision for the parking of two vehicles, they did sign the Existing Lease, which forms the basis of their contract with the Respondent. In addition, based on the evidence before it, the Tribunal is not satisfied that the failure to include the parking space in the Existing Lease was a clear error. As

such, the Tribunal is satisfied that the description of the Property in clause LR4 of the Draft Lease is correct.

40. In relation to the proposed clause 5.4 in the Draft Lease, which obliges the lessee to pay a fee of not less than fifty pounds plus VAT to the lessor's solicitors for registering various dealings with the Property (including underleasing, mortgaging and charging), the Tribunal notes that paragraph 9 of the Third Schedule to the Existing Lease simply states that the lessee must: "*produce to the Lessors Solicitors within 21 days a notice of any change in the person liable for the payment of Rent*." There are no further obligations on the lessee or lessor in this respect. Accordingly, the Tribunal determines that the obligation to register other dealings and pay a registration fee, as referred to in the proposed clause, would be a new obligation for the Applicants and cannot be included in the terms of the new lease unless agreed by the parties.

41. In relation to the maintenance charge, clauses 5.7, 5.8 and 5.9 of the Draft Lease (with the correction in clause 5.9 of a typo on the third line stating '*his*' rather than '*this*') simply confirm provisions relating to the maintenance charge as per those contained within the Existing Lease.

42. The Applicants appreciated that they were responsible for the payment of the maintenance charge, as referred to in clause 2.9 of the Existing Lease, which was for a one sixty seventh part of the total amount spent by the management company in the maintenance of the open space (coloured in yellow on the lease plan). The terms in the Draft Lease in respect of the maintenance charge remain the same. The area coloured in yellow on the plan has not changed and clause 2.3 of the Draft Lease confirms that clauses 2.2 to 2.9 of the Existing Lease are incorporated into the draft. Accordingly, the Applicants are still only liable to pay, as their maintenance charge, one sixty seventh part of the total amount spent by the management company in the maintenance of the open space. Whether or not such maintenance charge is or is not currently, or historically, being collected in accordance with the lease provisions is not something which falls within the jurisdiction of the Tribunal in respect of this application, which simply relates to the terms of the new lease.

43. In relation to proposed clause 5.10, the Tribunal notes that this clause confirms that the Applicants will remain liable to pay any maintenance charge which they would have been liable to pay in accordance with the terms of the Existing Lease. This could include an interim sum, under paragraph 4.2 of the Sixth Schedule, or a balancing sum, under paragraph 6 of the Sixth Schedule (in relation to an interim charge that has already been paid). The Tribunal notes that, equally, there could be an excess due back to the Applicants, under paragraph 6, which the management company should be obliged to take into account when calculating the following year's estimated charge.

44. The Tribunal does not consider that the clause increases the obligations on the Applicants, it simply confirms that any sums due from the Applicants for service charge will not be extinguished and will remain due following the surrender of the Existing Lease, however, the Tribunal does consider that the proposed clause should be amended to state:

"*Without prejudice to the generality of the foregoing, the Management Company and the Lessee hereby covenant with each other and with the Lessor that, notwithstanding the surrender of the 2003 lease effected by this lease, to comply with the provisions of clauses 4.2 and 6 of the Sixth Schedule to the 2003 lease in relation to any amount of the Maintenance Charge which relates to the period prior to the date of this lease.*"

Determination

45. The Tribunal, therefore, determines that the terms of the new lease are to be as per the terms of the Draft Lease provided by the Respondent's Representative subject to:

- the deletion of clause 5.4; and
- clause 5.10 being amended to state the following:

"*Without prejudice to the generality of the foregoing, the Management Company and the Lessee hereby covenant with each other and with the Lessor that, notwithstanding the surrender of the 2003 lease effected by this lease, to comply with the provisions of clauses 4.2 and 6 of the Sixth Schedule to the 2003 lease in relation to any amount of the Maintenance Charge which relates to the period prior to the date of this lease.*"

Appeal

46. If the Applicants are dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M. K. GANDHAM
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Judge M. K. Gandham