FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	CHI/43UB/MNR/2021/0004
Tenants	:	Stephen Henderson and Julie Wendy Henderson
Tenants' Representative	:	Mundays LLP M Green of Counsel
Landlords	:	Richard Fayter and Marie Kvetoslava Fayter
Property	:	19 Clive Road, Esher, Surrey, KT10 8PS
Type of Application	:	Housing Act 1988 – Section 13 Appeal of Notice of Rent increase
Tribunal Members	:	W H Gater FRICS MCIArb Chairman Judge A Cresswell N Robinson FRICS
Date of Hearing	:	8 April 2021 by Video
Date of Decision	:	14 May 2021

DECISION

Background

1. The Landlords served a notice under Section 13(2) of the Housing Act 1988 (the Act) which proposed a new rent of £10,000 per month, in place of the existing rent of £7,250 per month to take effect from 9 January 2021.

2. On 5 January 2021, the London Tribunal received an application from the Tenants under Section 13(4)(a) of the Act. This was subsequently transferred to the Southern Tribunal which deals with properties in Esher.

3. Representations were made by both parties regarding the validity of the Landlords' Notice.

4. On 28 January 2021, the Tribunal made directions for the conduct of the case, indicating that the matter would be determined on paper.

5. Further directions were issued on 22 February 2021 in response to an application to extend time limits for compliance.

6. The Landlords made an application on 16 March seeking permission to respond to the Tenants' submissions. The Tribunal directed on 29 March 2021 that the matter would be set down for Hearing on 8 April 2021. This was with a view to giving both parties an opportunity to present their case and cross-examine each other in the interests of justice.

7. Due to the Covid-19 restrictions the property was not inspected. The Tribunal relied on the evidence provided in the bundle and orally at the Hearing.

The Hearing

8. The Hearing was held by videoconference nominally from Havant Justice Centre.

9. The Tenants were represented by Ms Mattie Green of Counsel. She was accompanied by Mr Nick Martyn and Ms Amelia Alston of Mundays Solicitors.

10. The Landlords were represented by Mr R Fayter .

11. As a preliminary issue the Tribunal considered the delivery of a skeleton argument by Ms Green for the Tenants and a response in the form of copy legislation by the Landlords received some hours before the Hearing.

12. The Tribunal commented that this was contrary to directions not to submit material piecemeal. The Tribunal nevertheless determined that it would admit this late material in the interests of justice.

13. The Tribunal identified three issues to be resolved, namely:

    a. Whether the Tribunal should exercise discretion to determine the rent in the light of the service of a notice to quit: Section 14 (8) of the Act,
    b. The validity of the Landlords' notice of rent increase,
    c. The rental value of the property in accordance with the Act.

14. The Tribunal sets out the summing up submitted by the parties at the hearing and will then deal with each issue in turn.

15. In summing up Mr Fayter said that the notice of rent increase served was valid and the rental evidence supported his assertion of a rental value of £10,000 pcm.

16. Summing up for the Tenants, Ms Green said that the validity of the rent increase notice was brought into question in that the signed document had no guidance notes and the copy with guidance notes was unsigned.

17. With regard to the rent, whilst it was regretted that the surveyor was not present to give evidence, he was an expert who submitted the most comparable properties, and this is significant in the determination of rental value.

18. The Tribunal thanked the parties for their comprehensive submissions.

Whether the Tribunal should exercise discretion to determine the rent in the light of the service of a notice to quit: Section 14 (8) of the Act

19. For the Tenants, Ms Green invited the Tribunal to exercise its discretion under the Act stating that the service of a notice to quit on 8 March 2021 meant that the tenancy ends on 8 April 2021, the date of the hearing. The grounds for discretion were that it would not be proportionate to continue as any determination would relate to only three months of the tenancy.

20. Questioned by the Tribunal, Ms Green agreed that, in law, the tenancy ends on 8 April at midnight so that at the date of the hearing the tenancy had not come to an end.

21. Mr Fayter referred the Tribunal to the notice to quit and considered that the wording gave options to extend and therefore was not definitive as ending on this date.

The Tribunal's Findings

22. Section 14 of the Act deals with determination of rent by the Tribunal. Section 8 states:-

> *(8) Nothing in this section requires [the appropriate tribunal] to continue with their determination of a rent for a dwelling-house if the landlord and tenant give notice in writing that they no longer require such a determination or if the tenancy has come to an end.*

23. In this case the Tenants are inviting the Tribunal to exercise its discretion on the grounds that the tenancy has come to an end.

24. The result of the Tribunal declining to determine the case would be that the Tenants would be liable for the rent payable from the date of increase to the date of cessation of the tenancy. This would be a sum of £2,750 per month. This is a large fraction of the annual rent, and it is not de minimis. The parties have prepared extensively and to decline to complete the determination would not be in the interests of justice.

25. Further, at the date of the determination by the Tribunal, 8 April 2021, the tenancy was still extant. Accordingly, section 14 (8) is not engaged.

26. For these reasons, the Tribunal will go on to determine the remaining issues.

The validity of the Landlords' notice of rent increase

27. The Landlords' uncontroverted evidence was that they served notice of rent increase on 7 December 2020 by the service of two notices.

28. Ms Green for the Tenants made representations regarding the validity of the notice.

29. The first document, a signed notice, did not include the guidance notes at the end of the statutory form and was, she said, therefore, invalid.

30. Further, the Landlords should not have entered 7 December 2020 in Section 3 because the First exception in note 17 applies, and there was no requirement to add the words *(Notification Date for Rent Increase)* to section 3 and (Reference the Tenancy Agreement dated 24 October 2018 pages 2, 3, 14 and 15 are appended to this notice) to section 7. In addition, the notification date was not the date of service but, in law the notice was deemed delivered on the next working day.

31. The second notice contained the same errors referred to above and was not signed or dated. For these reasons Ms Green submitted that notice was invalid.

32. Mr Fayter considered that the prescribed form needs to be read as a whole. The notice is not invalidated by the insertion of unnecessary/otiose wording. The Tenants have not been misled to any degree.

33. Mr Fayter said that the male Tenant is a developer constructing two houses and buying another. He had foregone eight months of potential rent increases as

he believed their departure was imminent due to their pending purchase. When he heard in November 2020 of their intention to stay until July 2021, he served notice to increase the rent.

34. Questioned by the Tribunal, Mr Fayter could not be certain that he had included the guidance notes.

35. The Tribunal pointed out that the Tenants' advisers had assembled the bundle which included the guidance notes. On reflection Mr Martyn for the Tenants agreed that the notes must have been included. It was apparent that the signed copy lacked the notes, but the unsigned copy was complete.

36. In answer to a question from the Tribunal, has the tenancy ended at this point, Mr Martyn for the Tenants confirmed that the notice to end the tenancy served by the Tenants is a valid one.

The Tribunal's findings

37. The Tribunal has considered these submissions. It finds as a fact that two notices were served, as described, and agreed or admitted by the parties. The question before the Tribunal is, therefore, were these two notices, jointly or separately, sufficient to satisfy the requirements of the Act?

38. In **Pease v Carter** (2020) EWCA, the Court of Appeal reviewed the law on interpretation of statutory notices, including **Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd** [1997] AC 747 and **Ravenseft Properties Ltd v Hall** [2001] EWCA Civ 2034, and advised as follows.

39. The conclusions which the Tribunal draws from this survey of the authorities are as follows:

    a. A statutory notice is to be interpreted in accordance with Mannai v Eagle, that is to say, as it would be understood by a reasonable recipient reading it in context.
    b. If a reasonable recipient would appreciate that the notice contained an error, for example as to date, and would appreciate what meaning the notice was intended to convey, then that is how the notice is to be interpreted.
    c. It remains necessary to consider whether, so interpreted, the notice complies with the relevant statutory requirements. This involves considering the purpose of those requirements.
    d. Even if a notice, properly interpreted, does not precisely comply with the statutory requirements, it may be possible to conclude that it is "substantially to the same effect" as a prescribed form if it nevertheless fulfils the statutory purpose. This is so even if the error relates to information inserted into or omitted from the form, and not to wording used instead of the prescribed language.

40. Notices served under Section 13(2) Housing Act 1988 provide for the landlord to serve on the tenant a notice in the prescribed form proposing a new rent to take effect at the beginning of a new period of the tenancy specified in the notice, being a period beginning not earlier than the minimum period after the date of the service of the notice; and except in the case of a statutory periodic tenancy—

    (i) in the case of an assured agricultural occupancy, the first anniversary of the date on which the first period of the tenancy began;
    (ii) in any other case, on the date that falls 52 weeks after the date on which the first period of the tenancy began.

41. The Tenants do not dispute that the basis of the form used by the Landlords was the prescribed form and nor do they dispute that the date for the start of the new rent is correctly detailed within that form, as is the amount of proposed new rent.

42. The Tribunal has examined the notice documentation in the light of the guidance in Pease v Carter.

43. What the Tenants do say is that the form is rendered invalid because the signed copy of the form did not contain the accompanying guidance notes, whereas an unsigned and undated copy of the form did contain those notes. The Tribunal finds that this objection is without merit because an extra unsigned and undated copy of the form was also served at the same time as the signed form as part of the same transaction both by hand and by email, such that the Landlords did serve the signed prescribed form and did serve the guidance notes at the same time.

44. The Tenants also says that the form is rendered invalid because the signed copy of the form is completed in respect of paragraph 3, whereas note 17 does not require such completion; that paragraph 3 includes excess words (“Notification date for rent increase”); that paragraph 3 records the incorrect date (i.e. it records the date the form is signed rather than the date of deemed delivery). The Tribunal finds these to be unmeritorious objections. It is abundantly clear to the Tribunal that the form would be understood by a reasonable recipient reading it in context. Adding extra words, which in no way detract from the essential message of a proposed increase in a certain amount on a certain date, does not in any way prevent the form from fulfilling the statutory purpose detailed in Section 13(2) above.

45. Similarly, the addition of a paragraph 7: "Reference the Tenancy Agreement dated 24 October 2018 pages 2, 3, 14 and 15 are appended to this notice" can be regarded as mere surplusage, which in no way detracts from the form being understood by a reasonable recipient reading it in context or prevents the form from fulfilling the statutory purpose detailed in Section 13(2) above.

46. Accordingly, the Tribunal finds that the requirements of Section 13 of the Act were satisfied by the service of the documents described and for the reasons set out above. The Tribunal will go on to determine the rental value of the property in accordance with the Act.

The rental value of the property in accordance with the Act

The Law.

47. S14 Determination of Rent by First-tier Tribunal

48. (1) Where, under subsection (4) (a) of section 13 above, a tenant refers to a First-tier Tribunal a notice under subsection (2) of that section, the Tribunal shall determine the rent at which, subject to subsections (2) and (4) below, the Tribunal consider that the dwelling-house concerned might reasonably be expected to be let in the open market by a willing landlord under an assured tenancy-

(a) which is a periodic tenancy having the same periods as those of the tenancy to which the notice relates;
(b) which begins at the beginning of the new period specified in the notice;
(c) the terms of which (other than relating to the amount of the rent) are the same as those of the tenancy to which the notice relates; and
(d) in respect of which the same notices, if any, have been given under any of Grounds 1 to 5 of Schedule 2 to this Act, as have been given (or have effect as if given) in relation to the tenancy to which the notice relates.

49. (2) In making a determination under this section, there shall be disregarded-

(a) any effect on the rent attributable to the granting of a tenancy to a sitting tenant;
(b) any increase in the value of the dwelling-house attributable to a relevant improvement carried out by a person who at the time it was carried out was the tenant, if the improvement-
was carried out otherwise than in pursuance of an obligation to his immediate landlord, or was carried out pursuant to an obligation to his immediate landlord being an obligation which did not relate to the specific improvement concerned but arose by reference to consent given to the carrying out of that improvement; and
(c) any reduction in the value of the dwelling-house attributable to a failure by the tenant to comply with any terms of the tenancy.

50. (3) For the purposes of subsection (2)(b) above, in relation to a notice which is referred by a tenant as mentioned in subsection (1) above, an improvement

is a relevant improvement if either it was carried out during the tenancy to which the notice relates, or the following conditions are satisfied, namely-

> (a) that it was carried out not more than twenty-one years before the date of service of the notice; and
> (b) that, at all times during the period beginning when the improvement was carried out and ending on the date of service of the notice, the dwelling-house has been let under an assured tenancy; and
> (c) that, on the coming to an end of an assured tenancy at any time during that period, the tenant (or, in the case of joint tenants, at least one of them) did not quit.

51. (4) In this section "rent" does not include any service charge, within the meaning of section 18 of the Landlord and Tenant Act 1985, but, subject to that, includes any sums payable by the tenant to the landlord on account of the use of furniture, in respect of council tax or for any of the matters referred to in subsection (1) (a) of that section, whether or not those sums are separate from the sums payable for the occupation.

52. The Tribunal is required to determine the rent at which the subject property might reasonably be expected to be let in the open market by a willing Landlord under an assured tenancy. The personal circumstances of the Tenants are not relevant to this issue.

53. The property was originally let to the tenants under an Assured Shorthold Tenancy agreement dated 24 October 2018 for a term of two years from 9 November 2018.The rent was £7,250 per calendar month (pcm). Advance rent of £130,500 was payable under the agreement on 9 November 2018.

54. The Tenants say: “As to section 14(1)(c) of the Act, paragraph 2 of 'The Main Terms of the Tenancy' imposes on the Tenant an obligation to pay 18 months of the rent due under the Tenancy, in advance. That provision will likely restrict the pool of prospective buyers available to take a tenancy of the Premises and by implication, depress the level of rent likely to be secured in respect of it.”

55. The Tribunal regards this as a self-defeating argument because the obligation in the agreement referred to is one “relating to the amount of rent”, the rent having been reduced for advance payment directly as a consequence of the clause in question. If the legislator had meant to restrict the ambit to one setting out the amount of rent, it would have said so. The relevant clause in the agreement [6] is headed “The Rent”, which might suggest to the reasonable reader that what follows is “relating to the amount of rent”. Consequently, the Tribunal is required by Section 14(2)(c) to disregard that difference.

56. The Tenants also point out that the tenancy agreement at Schedule 5, 1.1 and 1.2 gives notice that possession may be sought under grounds 1 and 2 of Part 1 of Schedule 2 of the Act. Under Section s 14(1)(d) of the Act the assessment of

rent must have regard to any notices which have been served. The Tenant says that this has the effect of limiting the tenant's security and might lead to the fixing of a lower rent.

57. Does the existence of this clause in the agreement adversely affect rental value under the Act?

58. The agreement was for a term expiring on 8 November 2020. At the date of valuation, 9 November 2020, the tenancy had expired and therefore the tenancy was a statutory periodic tenancy.

59. At that date no notices had been served seeking possession of the property.

60. Mr Scrivener, in his evidence, notes the requirements of Section 14(1)(d) but at no point makes mention or adjustment in rental calculation to reflect this.

61. No evidence of any allowance or reflection on this issue has been offered in relation to comparables referred to.

62. Given the nature of the properties built for owner occupation in the first instance it is likely that the inclusion of these clauses is to be expected.

63. In the absence of evidence of any rent differentiation the Tribunal finds that no allowance in rental valuation should be made for the inclusion of these clauses.

The property.

64. The Tribunal had regard to the extensive evidence provided by both parties in the bundle including photographs of the property and comparables. It will not recite all the evidence but in making its determination has had due regard to all submissions. It thanked the parties for their assistance given the current inability to carry out inspections.

65. The Tribunal having examined the descriptive evidence finds the following:-

66. 19 Clive Road is a large, six bedroom detached house standing in a plot of approximately one quarter of an acre. It was built in about 1986 and in recent years has undergone extension and modernisation. It has a floor area of approximately 5,800 square feet. The tenancy agreement notes that the Landlord had installed multi room /multi zone audio equipment throughout the house.

67. Clive Road is a gated development and the locality is characterised by individual houses built to a high specification. It forms part of a Conservation Area.

68. Originally built for owner occupation, some houses on the development have been let to corporate tenants on relocation and assignment.

69. The property stands a short distance from Esher High Street and about 1.5 miles from Esher mainline railway station.

70. The accommodation is arranged on three floors.

71. On the Ground Floor there is a Hall, Study, Reception Room, Kitchen, open to Conservatory, Cinema Room and Utility Room.

72. On the First Floor there are five en-suite bedrooms and a store room.

73. On the Second Floor there is a Bedroom, Office, Inner Hall, Kitchen, Bathroom and Media Room. Some of the rooms at this level have restricted headroom.

74. Outside there is a lawned front garden and driveway, and Integral Garage and enclosed Rear Garden.

The evidence.

75. Mr Fayter, for the Landlords, in highlighting his written evidence, said that location and other factors affected rental value. Esher is a thriving area with good facilities. This property is within 100m of Waitrose and yet in a quiet, gated cul-de-sac.

76. The property might not be to everyone's taste as some might consider that the footprint has been over-extended in a quarter acre site.

77. Originally built with a floor area of 2,100 sq ft, it is now 5,800 sq ft in area, including the conservatory.

78. The house is built to a very high, cutting edge specification and being larger than most comparables, commands a commensurately higher rent.

79. The property had been let to previous tenants at £9,866 from April 2017 to August 2018.

80. The current rent of £7,250 pcm paid by the Tenants reflected special circumstances, in particular the payment of 18 months rent in advance with no rebate on early departure and the assumption that they were to stay for a finite period whilst building a house. In the event the Tenants did not vacate the house as envisaged by Mr Fayter.

81. Savills estate agents had written pricing the house at a rent of £9,995 per month in January 2021 [149].

82. Referring to the tenants' surveyors' comparable evidence, he said that the EPC rating was variable. Waynflete Tower and Courtlands Avenue were E, the Lilys was B, Park Close was D. The subject property is rated C.

83. He questioned the accuracy of the surveyors' evidence for 11 Pelhams Walk. This shows an area of 3,129 sq ft with five bedrooms at a rent of £5,995 pcm

whereas later details [p253] and [p256] show the floor area to be 4,794 sq ft at a rent of £8,500 pcm.

84. He drew attention to three comparables in support of his case, all taken from the Tenants' surveyors' schedule.

85. 11 Pelhams Walk is about 400m from Clive Road, is on an infilling plot in a development of 300 houses. It has a wedge-shaped site and a small garden. It would be a good corporate let but is smaller than the subject property and the location is slightly inferior. On area alone the pro rata rent for the subject property would be £10,502 pcm. He indicated that the property is now sold subject to contract and the letting may not have proceeded.

86. The Lilys, West End Lane was built in 2018 and is situated a mile and a half from Clive Road. This is an inferior location as it is near a busy road. The rent was £10,500 for 5469 sq ft. Pro rata this would give a rent for Clive Road of £11,159.

87. 15 Esher Avenue is in a prestigious gated development and has six bedrooms. The road is used as a "rat run" and whilst the house is comparable, it is of an inferior specification to the subject property. Pro rata to the floor area of 4,865 sq ft the £12,500 per month rent would equate to £14,933 for Clive Road.

88. The average of the three pro rata rents would £12,198.

89. The Tribunal referred Mr Fayter to the "essential repairs" cited in the Tenants' submission [213]. These were dealt with in Mr Fayter's written responses,[291] but he amplified at the hearing to confirm that the underfloor heating had been fixed and he has been denied access to have an electrician's report carried out.

90. The Tenants had instructed Mr Scrivener who is a chartered surveyor with ten years' experience. His report referred to eleven comparables within one mile of the property with an average rent of £8,450 pcm. After a weighting exercise carried out by Mr Scrivener, this average adjusted to £8,125.

91. The Tribunal noted with regret that Mr Scrivener was not present to give evidence. Ms Green sought to explain the weighting method where the rent of a comparable was adjusted based on its similarity to the subject property. The higher the percentage adjustment the greater the similarity.

92. Through questioning from the Tribunal, it was established that this methodology is not entirely clear. The Tribunal recognised that Ms Green was the advocate and not the expert.

93. Ms Green considered that the previous letting at £9,866.45 pcm [112] did not assist the Tribunal as this took place in April 2017.

94. The CHK Mountford lettings at Wootton Place, Clive Road and Clare Hill referred to in the Landlord's evidence were also of no assistance as they pre-dated the valuation date.

95. The Tribunal asked where the evidence was that rents had changed in the intervening period. Ms Green answered that earlier lettings were not useful comparators and that lettings closer to the date were best evidence.

96. The Savills comparables referred to by the Landlord [148 et seq] were in the nature of an inducement to instruct the agent rather than useful comparisons.

97. The offer of £10,000 pcm from BP was provisional only and did not constitute transactional evidence whereas all eleven comparables in the Tenants' submissions were actually let.

98. Mr Fayter confirmed that the Pelham Walk property is under offer.

99. The subject property was described by Mr Scrivener as in fair condition whereas Mr Fayter maintains that it is "as new".

100. Mr Scriveners report lists 11 items which he describes as Essential repairs. They relate to a range of items such as the fridge freezer thermostat is broken and issues with the keys in the Utility and French doors .

101. In addition |Mr Scrivener refers to an Electrical Installation Condition Report [214] and [274].

102. He states that this was carried out on 9 March 2020 but the report states that the inspection was carried out on 9 March 2021. The Tribunal finds that the report date is the correct one.

103. That report concludes that the installation overall is unsatisfactory and lists a number of areas graded as "danger present" or "potentially dangerous".

104. Mr Fayter says that he awaits the electricians' programme for remedial actions and cites difficulty in gaining access. He is clear that safety is paramount.

Consideration and determination of rent.

105. The Tribunal has considered all the evidence of value. The property is of above average size in a prime location. It was, in recent years, extended and finished to a high specification.

106. The weighting exercise undertaken by Mr Scrivener relies on a number of assumptions and arithmetical calculation. The Tribunal considers that there is sufficient valuation evidence to enable a valuer to make a more robust assessment of rental value by refence to size, specification, number of bedrooms and locality.

107. The Tribunal has considered the condition of the property described by Mr Scrivener as "Fair", and by Mr Fayter as "as new". The photographic evidence shows the property to be well presented and clearly offering a high standard of accommodation.

108. The Tribunal must consider whether there are aspects of the condition of the property which affect rental value. The items listed by Mr Scrivener as essential repairs are such that they would ordinarily be dealt with by a prudent Landlord during handover and marketing as maintenance . The Tribunal finds that these items would not affect the market rental value.

109. The Electrical Installation Condition Report indicates that important works are required. However, in an apparent contradiction, at Part 3 it states that the General Condition of the installation is Good whilst the Overall assessment of the installation is Unsatisfactory.

110. Mr Scriveners valuation is said to be subject to the essential repairs but does not specify what adjustment, if any, was made to reflect the findings of this report. It is not clear from his weighted valuation if or how the other property rents are adjusted for condition.

111. The report was carried out at a time when new regulations affecting such matters for let properties came in to effect from 1 April 2021.The valuation date pre dates that, being 9 January 2021.

112. It is not clear whether any works required at the valuation date, could be carried out during marketing by a prudent landlord under the definition of market value, and consequently whether they would affect the market rental value.

113. The Tribunal finds that in the absence of direct evidence as to the cost and extent of works required and on the basis of its finding that it is more likely than not that any necessary works would be completed during handover, and that the report postdates the valuation date by 2 months, no allowance should be made at the valuation date to reflect the report of 9 March 2021.

114. In terms of the overall evidence the Tribunal finds that Mr Scrivener's valuation is less than the market rent the property would achieve. On balance the Tribunal prefers Mr Fayter's assessment of rental value.

115. Mr Fayter's evidence was clear and persuasive and it was supported by the letter from Savills. Mr Scrivener's evidence was open to challenge for the reasons detailed above, which include his use of an unexplained weighting method and some issues with the consistency of the information relating to his comparables.

116. Accordingly, the Tribunal finds the rental value of the property under the Act to be £10,000 per month at the valuation date.

PERMISSION TO APPEAL

1. A person wishing to appeal the decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.