FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CAM/00KF /OLR/2022/0091
Property	:	20 Beresford Road, Southend-on-Sea, Essex, SS1 2TW & Garden Ground
Applicant	:	Sarah Penelope Hardy
Representative	:	Morr & Co LLP
Respondent	:	Nigel Richard Prevost
Representative	:	Tolhurst Fisher
Type of Application	:	For determination of the terms for a new lease-Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act")
Tribunal Members	:	Judge Professor Robert M. Abbey
Date of determination	:	14 November 2022
Date of Decision	:	14 November 2022

DECISION

DECISION

The Tribunal approves the form of draft lease but with the exclusion of the disputed clauses inserted by the respondent. Therefore, the Tribunal

determines that the new lease is to be as approved but not with the respondent's amendments as set out below as they are to be deleted from the draft lease.

Introduction

1. This is an application made by the Applicant under section 50 of the Leasehold Reform, Housing and Urban Development Act 1993 (as amended) ("the 1993 Act") for a determination of the terms and price for the granting of an extended new lease of the property known as 20 Beresford Road, Southend- on-Sea, Essex, SS1 2TW & Garden Ground. (" the property").

2. The applicant is the leaseholder of the property that is registered at HM Land Registry with title absolute under title number EX322838. The applicant holds the property under a registered lease dated 9 December 1985 for a term of 99 years from 24 September 1985, (the existing lease). There are two flats at 20 Beresford Road, the subject property and a ground floor flat and garden. The respondent is the freeholder of the building in which the property is located and the freehold of 30 Beresford Road is registered at HM Land Registry under title number EX174962 with title absolute.

4 The applicant exercised her statutory right to claim a lease extension by way of a notice of claim dated 6 December 2021 and this was admitted by the respondent by way of a counter-notice dated 19 January 2022.The premium due under the statutory provisions in that regard has been agreed by the parties at £21,000 but subject to the terms of the new lease being agreed. It is the detail of the lease content that has required the tribunal to consider the lease renewal application. An application was made to the Tribunal dated 18 July 2022. The Tribunal then issued Directions for the progress of the matter on 5 September 2022. The Tribunal decided that a paper-based decision was appropriate and proportionate given the nature of the dispute. No objections thereto were received from either party.

The issue

5 The applicant says that the premium has been agreed but the form of the lease is yet to be agreed. The applicant maintains that the following clauses from Schedule 1 of the proposed draft lease should be removed as they are excluded under s57(6) of the 1993 Act. It is important to note that under the terms of the 1993 Act the new lease is normally on the same terms and conditions as the old lease, apart from it being at a peppercorn rent and for an additional 90 years. The 1993 Act specifies the situations in which the new lease may be varied, (see s.57 of the 1993 Act and *(1) Jones (2) Seymour v Roundlistic Limited* [2018] EWCA Civ 2284), including circumstances where:

- the new lease is in respect of a property that has been altered, or is an amalgamation of more than one existing lease
- the landlord agrees to provide additional services such as repairing or insurance (the lease will be varied as is just to make

corresponding provision for the leaseholder to pay for them through service charges)

- there has been a change of circumstance, to the extent that this is reasonable
- the old lease was 'defective'. The term 'defect' is interpreted strictly. In one case the Upper Tribunal held that where a term of the original lease enabled the landlord to collect far more in service charges than it was actually spending, this was a defective term, see *Rossman v Crown Estate Commissioners* [2015] UKUT 288 (LC).

The burden is on the party who would like the change to show why the change is needed, and that the proposed modification would cure, not simply reduce the problem complained of.

<u>The Additional New Sub Clauses imported in to the new lease by the respondent: -</u>

The following shall be added to the Previous Lease as new sub-clauses to clause 2 of the Previous Lease:

(xxxi) To keep the Lessor indemnified against all expenses, costs, claims, damages and loss (including any diminution in the value of the Lessor interest in the demised premises and loss of amenity of the demised premises) arising from any breach of the lessee covenants in this Lease, or any act or omission of the Lessee, any under lessee or their respective
workers, contractors or agents or any other person on the demised premises with the actual or implied authority of any of them

(xxxii) If any rents or any other money payable under this Lease have not been paid by the date it is due, whether it has been formally demanded or not, the Lessee shall pay the Lessor interest at the rate of 4% per annum above the base rate of Lloyds Bank Plc, or if that base lending rate stops being used or published then at a comparable rate reasonably determined by the Lessor, on that amount for the period from the due date to and including the date of payment

(xxxiii) To pay all costs and expenses of the Lessor by way of legal costs and/or surveyors fees or otherwise in relation to all applications made by the Lessee or made on behalf of the Lessee to the Lessor and arising out of the terms of this Lease whether or not the Lessor shall approve such application

(xxxiv) To pay to the Lessor all costs and disbursements reasonably and properly incurred or reasonably estimated by the Lessor to be incurred of any managing agent or other person retained by the Lessor to act on the Lessor's behalf in connection with the building.

<u>Additional Clauses imported in to the new lease by the respondent: -</u>

For the purposes of this Lease only, the provisions of the Previous Lease shall be varied providing the following additional clause to the Previous Lease as a new Clause 6:

> Except where notice is given in an emergency, any notice required to be given under this lease shall be in writing and shall be delivered personally, or sent by pre-paid first-class post or recorded delivery, to the other party at its address set out above or as otherwise specified by the relevant party by notice in writing to the other party.
>
> A correctly addressed notice sent by pre-paid first-class post or recorded delivery shall be deemed to have been duly received 48 hours after posting.
>
> A notice required to be given under this lease shall not be validly given if sent by fax or e-mail.

6 The applicant seeks to resist these changes. The respondent does not agree to the inclusion of the new terms in the new lease and seeks the new lease on terms that are materially the same as the previous lease

7 The trial bundle did not include any input or submissions on the issues from the respondent or the respondent's representatives.

The effect of statute

8 Section 57 of the Leasehold Reform, Housing and Urban Development Act 1993 provides that: -

> *Terms on which new lease is to be granted.*
>
> *(1) Subject to the provisions of this Chapter (and in particular to the provisions as to rent and duration contained in section 56(1)), 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, but with such modifications as may be required or appropriate to take account—*
> *(a)of the omission from the new lease of property included in the existing lease but not comprised in the flat;*
> *(b)of alterations made to the property demised since the grant of the existing lease; or*
> *(c)in a case where the existing lease derives (in accordance with section 7(6) as it applies in accordance with section 39(3)) from more than one separate leases, of their combined effect and of the differences (if any) in their terms*

9 Section 57(6) of the 1993 Act provides that: -

> *(6) Subsections (1) to (5) shall have effect subject to any agreement between the landlord and tenant as to the terms of the new lease or any agreement collateral thereto; and either of them 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.

Accordingly, in order for a party to require the terms of the existing lease to be modified the party must satisfy the tribunal that either of the grounds in 57 (6) (a) or (b) are made out.

The Tribunal's decision

10 The tribunal carefully considered all submissions in the trial bundle on the newly imported lease clauses.

11 The core of the dispute is about what the amendments sought by the respondent are trying to do, are they seeking to make wholly new insertions, by new clauses, to achieve their aims?

12 The tribunal determines that what the respondent seeks to insert in the new lease is entirely new and is not a modification of an existing covenant. The proposed clauses are entirely new to the lease and as such cannot be construed as a modification of an existing covenant. The tribunal has no jurisdiction pursuant to section 57(6) of the 1993 Act to require a new term in the format of the proposed insertions proposed by the applicant.

In the case of *Gordon v Church Commissioners* LRA/110/2006 it was made clear that wholly new terms cannot be inserted in the new lease under the terms of section 57(6) of the 1993 Act. The decision makes it plain that in the absence of agreement between the parties' statute will not include new terms under this section. Paragraph 41 of that decision confirms this clear interpretation of the section where Judge Huskinson writes "*In my judgment there is no power under section57(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".* The Tribunal noted that the case of *Gordon* was applied by the Leasehold Valuation Tribunal in *Cadogan v Chelsea Properties Limited (No 2)* (Unreported 2008).

13 The current lease is not defective in the way it operates or in the way it has been drafted. The legislation contemplates the correction of existing defects, statute talks about remedying a defect in the existing lease. However, there is no such existing defect in the existing lease. A modification of an existing lease is only available where it is "necessary to do so in order to remedy a defect". Case law has made it clear that it is not sufficient that the proposed variation may be convenient or consistent with current practice see the *Gordon* case. It must be a "shortcoming below and objectively measured

to satisfactory standard. It is not sufficient for a provision to be a defect only when viewed from the stand point of one or other party"

14 The tribunal referred to the case of *Howard de Walden Estates Limited v Les Aggio* [2008] UKHL 44 where Lord Neuberger observed that "*Section 57(6) also indicates that the LVT was intended to have relatively wide powers, often involving sophisticated judgment*." It is accepted that there are wide powers available to a tribunal within the relevant statutory provision but not so wide as to permit the insertion of an entirely new or fresh clause in a lease extension deed.

Conclusion and the determination

15. Accordingly, the Tribunal approves the form of draft lease with the exclusion of the disputed clauses inserted by the respondent. Therefore, the Tribunal determines that the new lease is to be as approved but not with the amendments inserted and set out above by the respondent as they are to be deleted from the draft.

16 The annex to this decision sets out rights of appeal available to the parties

Professor Robert M. Abbey

Tribunal Judge

14 November 2022

Annex

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber)