FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/ORL/2023/0055**
HMCTS Code	**:**	**V: CVPREMOTE**
Property	**:**	**54 Basildon Court, 28 Devonshire Street, London, W1G 6PR**
Applicant	**:**	**Zulfikar Remtulla Jetha and Shelina Zulfikar Jetha**
Representative	**:**	**Miriam Seitler (Counsel) instructed by Edwin Coe LLP**
Respondent	**:**	**Howard De Walden Estates Limited**
Representative	**:**	**Michael Pryor (Counsel) instructed by Charles Russell Speechlys LLP**
Type of application	**:**	**Enfranchisement**
Tribunal member	**:**	**Judge Robert Latham** **Charles Norman FRICS**
Date and Venue of Hearing		**21 June 2023 at 10 Alfred Place, WC1E 7LR**
Date of decision	**:**	**17 July 2023**

DECISION

Decision

Schedule 6 of the new lease should include the provision for payment of interest on late arrears as proposed by the Respondent.

© CROWN COPYRIGHT

Covid-19 pandemic: description of Hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: SKYPEREMOTE. A remote hearing was requested by the parties.

The parties have provided a Bundle of Documents (263 pages) to which reference will be made in this decision. Both Counsel provided Skeleton Arguments and Bundles of Authorities.

The Application

1. On 10 May 2022 (at p.91), the Applicants served a Notice of Claim pursuant to section 42 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") seeking a new 90 year lease of their flat at 54 Basildon Court, 28 Devonshire Street, London, W1G 6PR ("the Flat"). The Applicants proposed a premium of £436,516 and that the terms of the new lease should be on the terms of the existing Underlease terms with modifications consistent with section 57 of the Act.

2. On 20 July 2022 (p.94), the Respondent served its Counter-Notice pursuant to section 45 of the 1993 Act proposing £526,900 as the premium and enclosing a proposed draft lease (at p.95-123).

3. On 25 August 2022, the parties agreed a premium, but were unable to reach agreement on the terms of the new lease. On 13 January 2023 (at p.124), the Applicants applied to this Tribunal pursuant to section 48 for determination of the remaining terms of the new lease. The Applicants had been content for the Tribunal to determine the application on the papers. This was opposed by the Respondent. On 18 May, Judge N Carr set this down for a virtual hearing.

4. There is a single issue in dispute, namely whether the following clause should be included in Schedule 6 of the new lease:

> "If the Service Charge or the Insurance Charge shall be due and unpaid for 14 days to pay on demand to the Landlord interest at the rate of 4 per centum above the base lending rate from time to time of The Royal Bank of Scotland plc (or if the same shall have been abolished at a fair and reasonable rate of interest as the Landlord may notify to the Tenant from time to time in writing) on such money from the due date until the date of actual payment whether before or after judgment and such interest shall be treated for all purposes as rent in arrear and shall be recoverable by distress or other process of law." ("the Disputed Clause")

The Hearing

5. Ms Miriam Seitler (Counsel) appeared for the Applicants. She was accompanied by Ms Katherine Simpson from her instruction solicitor, Edwin Coe LLP.

6. Mr Michael Pryor (Counsel) appeared for the Respondent. He was accompanied by Ms Lauren Spark from his instructing solicitor, Charles Russell Speechlys.

7. Both Counsel provided Skeleton Arguments. We are grateful for the assistance that they provided.

8. Section 57 of the Act provides for the terms of the new lease. The Respondent relies primarily on section 57(2) (Option 1). Mr Pryor's fallback position is to rely on section 57(6) (Option 2).

The Background

9. The Respondent is the freehold owner of Basildon Court ("the Building") which is a mixed development with 56 residential flats with commercial units on the ground floor. It has been managed by Basildon Court Residents Company Limited ("the Service Company"). The Service Company is controlled by the lessees.

10. There are three relevant legal documents:

(i) The Applicants hold an underlease of the Flat, dated 9 December 1976 ("the Underlease"). They acquired their interest on 13 April 2011. The underlease (at p.43-60), between Linnett Property Company Limited ("the Lessor") to Percy Alden Gascoin ("the Lessee") granted a term of 57 years from 25 March 1967 There is an annual rent of £30. The service charge is not reserved as rent. By Clause 2(1) and Schedule, the Lessee covenants with the Lessor to keep the Service Company indemnified form and against 1.6% of all costs incurred by Service Company in carrying out its obligation under a lease dated 2 April 1968.

(ii) There is a separate deed (at p.61-65), dated 1976, between the Lessee and the Service Company, whereby the Service Company covenants with the Lessee to manage the Building, namely to insure the Building, repair and maintain the structure and exterior of the Building and the installations therein, and to employ a caretaker to clean and maintain the common parts. The Lessee covenants to pay a service charge contribution of 1.6%.

(iii) There is a lease dated 2 April 1968, whereby the Lessor granted the Service Company a demise of the common parts of Basildon Court for a term of 57 years from 25 March 1967 ("the Common Parts Lease").

11. The Land Registry Official Copy of Register of Title, (at pp.3-37) records that on 20 June 2018, the Respondent acquired the freehold title to a number of properties in Marylebone in the triangle of Marylebone High Street, Beaumont Street and Weymouth Street. This records the freehold ownership of Basildon Court (item 9 at p.5) and the lease with the Service Company (item 19 at p.19).

12. The parties recognise that on 25 March 2024, upon the expiry of the lease held by the Service Company, the Respondent will face a choice. Will the Respondent extend the Common Parts Lease? If so, the Service Company will continue to manage Basildon Court. If not, the Respondent will assume this responsibility.

13. The new lease is at p.95-123. The Respondent is described as "the Landlord" and the Applicants as "the Tenant". The new lease is in a similar form to the current Underlease, albeit that there are significant variations required by the fact that the Service Company may not continue to manage Basildon Court after 24 March 2024. Therefore, provision is required to cater for the two alternative scenarios for the management of Basildon Court after that date. Mr Pryor highlighted the following clauses:

    (i) By Clause 2.1, the Tenant covenants to comply with the regulations and covenants in Schedule 2.

    (ii) By Clause 3, the Tenant covenants to enter into a deed of covenant with the Service Company in schedule 5, which obligations end on 24 March 2024.

    (iii) By Clause 5.21 and 5.22, the Tenant covenants to comply with the obligations in Schedule 6 from 25 March 2024, reflecting the possible change in the services regime.

    (iv) By Clause 7.3, the Tenant covenants that if the Service Company continue to provide services, the Lease will be read to reflect the fact that the Tenant's obligations to the Service Company in the deed of covenant in Schedule 5 continue beyond 25 March 2024, to whenever the Company's obligations and role expire.

14. The Disputed Clause appears at paragraph 2.5 in Schedule 6. The provision would only come into play were the management of Basildon Court to switch from the Service Company to the Respondent. This cannot have any effect during the currency of the existing lease (see Clause 7.3 of the new lease). The problem only arises because of the enfranchisement rights that the tenants have acquired under the 1993 Act. Whilst the Common Parts Lease held by the Service Company will come to an end on 24 March 2024, it is probable that the leases of all the 56 residential flats will be extended, by statute, beyond this date. Mr Spark stated that three leases had already been extended which had

included the Disputed Clause. He was not able to specify whether any other leases had been extended without this clause.

15. Mr Pryor argues that any modern lease whereby the landlord assumed the responsibility for providing services would include this clause. A landlord needs some leverage to encourage a defaulting service charge payer to meet their obligations. He further argues that this is equally in the interests of the other service charge payers who pay the sums demanded. Why should they be required to meet any loss arising in such circumstances?

16. Mr Pryor also asks the Tribunal to have regard to the problems which the Service Company have had to face with these Applicants and with members of their family. The Applicants and their wider family hold 11 of the 56 flats at Basildon Court. Proceedings in 2019, were compromised upon the Applicants agreeing to pay arrears of £150,000, interest of £9,558.06 and £10,000 towards the costs of the Service Company. In a witness statement, dated 10 January 2019 (at p.173), Mr Boyd who is a director of Service Company, describes the unhappiness of the other tenants about the Applicant's consistent non-payment and the effect that this has had on the management of Basildon Court. All leaseholders are members of the Service Company. The Applicants have been a minority who have defied the wishes of the majority.

17. Ms Seitler points out that were further arrears to arise, the landlord would have the right to claim interest pursuant to section 69 of the County Courts Act 1984 or the similar provisions in the High Court. Mr Pryor responds that interest could only be claimed when proceedings have been issued. The Disputed Clause would rather encourage a culture of compliance.

Option 1: Section 57(2) of the Act

18. Section 57(2) provides (emphasis added):

"(2) Where during the continuance of the new lease the landlord will be under any obligation for the provision of services, or for repairs, maintenance or insurance—

> (a) the new lease may require payments to be made by the tenant (whether as rent or otherwise) in consideration of those matters or in respect of the cost thereof to the landlord; and
>
> (b) (if the terms of the existing lease do not include any provision for the making of any such payments by the tenant or include provision only for the payment of a fixed amount) the terms of the new lease shall make, as from the term date of the existing lease, such provision as may be just—

(i) for the making by the tenant of payments related to the cost from time to time to the landlord, and

(ii) for the tenant's liability to make those payments to be enforceable by re-entry or otherwise (subject to section 85 of the Tribunals, Courts and Enforcement Act 2007) in like manner as if it were a liability for payment of rent."

19. The Respondent further relies upon the additional provisions of section 57:

"(9) Where any person—

(a) is a third party to the existing lease, or

(b) (not being the landlord or tenant) is a party to any agreement collateral thereto,

then (subject to any agreement between him and the landlord and the tenant) he shall be made a party to the new lease or (as the case may be) to an agreement collateral thereto, and shall accordingly join in its execution; but nothing in this section has effect so as to require the new lease or (as the case may be) any such collateral agreement to provide for him to discharge any function at any time after the term date of the existing lease.

(10) Where—

(a) any such person ("the third party") is in accordance with subsection (9) to discharge any function down to the term date of the existing lease, but

(b) it is necessary or expedient in connection with the proper enjoyment by the tenant of the property demised by the new lease for provision to be made for the continued discharge of that function after that date,

the new lease or an agreement collateral thereto shall make provision for that function to be discharged after that date (whether by the third party or by some other person)."

20. As the Editors of Hague "Leasehold Enfranchisement (7th Ed) note (at 32-07), the drafting of section 57(2) is not entirely happy. The first provision appears to give a general discretion to impose a service charge whenever the new lease imposes an obligation to provide services, or carry out repairs, etc. and regardless of the terms of the existing lease. If that is so, it is difficult to see the need for the second provision.

21. Mr Pryor argues that the Disputed Clause is required because the Respondent will be taking on a new responsibility should it, at any date after 25 March 2024, assume responsibility for insuring Basildon Court and providing the required services. He argues that the Respondent meets all three scenarios in section 57(2):

(i) the new lease may include the Disputed Clause "in consideration of those matters", namely the obligations which the landlord will be assuming for the provision of services, or for repairs, maintenance or insurance (section 57(2)(a)). The provision for the payment of contractual interest is "in consideration" of these matters.

(ii) the new lease may include the Disputed Clause "in respect of the cost therefor to the landlord", namely the cost of recovering the service charges in respect of the new obligations which the landlord will be assuming (section 57(2)(a)).

(iii) "the terms of the existing lease do not include any provision for the making of any such payments by the tenant" to the landlord for the services that it will be assuming. The new lease therefore shall make such provision "as may be just for the making by the tenant of payments related to the cost from time to time to the landlord" (section 57(2)(b)). Again, provision for the payment of contractual is "related to the cost" of providing the services.

22. Ms Seitler denies that the statutory conditions are met. She argues:

(1) payment of contractual interest is not a payment in "consideration of" or "in respect of the cost" of the Respondent providing services, repairs, maintenance or insurance. The purpose of interest is to compensate the landlord for late payment of money due, not to compensate the landlord for the actual cost of providing the relevant services.

(2) in any event, it is not 'just' within the meaning of s.57(2)(b) to introduce the Disputed Clause. The Existing Lease does not contain such a term. A historical service charge dispute does not justify it. The availability of statutory interest under s.69 of the County Courts Act 1984 is sufficient to account for any late payment that may occur. For the same reason, the discretion under section 57(2)(a) should not be exercised.

23. The Tribunal is satisfied that the Disputed Clause falls within all three limbs of the section. Further, we should exercise our discretion under section 57(2)(a) to include it and (to address the wording sub-paragraph (b)), it would be "just" to do so. We reach this decision for the following reasons:

(i) The fact that the existing lease does not make provision for contractual interest is not critical. The Respondent is potentially (and the situation may never arise) assuming a new obligation to provide the services and insure the building. We should therefore focus on what would be appropriate in a modern lease. We are satisfied that a modern lease would make provision for contractual interest.

(ii) In exercising our discretion, we are entitled to have regard to all relevant matters. The historic problems that have arisen are matters which we are entitled to take into account.

(iii) For the reasons stated by Mr Pryor, the right to claim statutory interest pursuant to section 69 of the County Court Act 1984, does not provide the landlord with the same protection as is provided by the right to claim contractual interest.

(iv) We are satisfied that the provision of a contractual right to interest will encourage a culture of prompt payment. This is not only good for the landlord. It is also good for the lessees who do pay their service charges promptly. It is also important to ensure that the landlord is put in funds so that the building can be maintained to a high standard.

Option 2: Section 57(6) of the Act

24. Section 57(6) provides (emphasis added):

> "(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."

25. The Editors of Hague (at [32.10) note that in the absence of agreement, the scope to modify the terms of the existing lease under this provision, is limited. There is a body of case law which Ms Seitler has summarised in her Skeleton Argument. Mr Pryor does not take issue with her summary of the law.

26. In *Gordon v Church Commissioners* (LRA/110/2006), HHJ Huskinson considered the scope of this provision:

> (1) 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;
>
> (2) as to what constitutes a "defect", a lease can only properly be described as containing a defect (in the sense of shortcoming, fault, flaw or, perhaps even, imperfection) if it can objectively be said to contain such a defect when reasonably viewed from the standpoint of both a reasonable landlord and a reasonable tenant… the concept of a defect is a shortcoming below an objectively measured satisfactory standard. It is not sufficient for a provision to be a defect only when viewed from the standpoint of one or other party.

27. *Gordon* was approved by Martin Rodger KC, the Deputy President in both *Burchell v Raj Properties Ltd* [2013] UKUT 443 at [41] and *Park v Morgan* [2019] UKUT 20.

28. In *Rossman v The Crown Estate Commissioners* [2015] UKUT 288, Sir Keith Lindblom, the then President, confirmed the following in respect of section 57(6):

> (1) the burden is on the party seeking to depart from the terms of the existing lease;
>
> (2) the party seeking change has to show that the exclusion or modification argued for would cure, and not merely ameliorate, the defect;
>
> (3) a strict or narrow interpretation of 'defect' is proper and therefore use of section 57(6)(a) to attempt to modernise the terms generally in the face of opposition from the other party would not be permissible. The concept of necessity here is a demanding one;
>
> (4) the distinction between convenience and necessity is important;
>
> (5) the crucial question is not whether it is necessary to remedy the defect in the existing lease, but whether, given that there is a defect which must be remedied, it is necessary to make the exclusion or modification to achieve that.

29. There is more limited case law on section 57(6)(b). It has been held by the LVT in *Huff v Trustees of the Sloane Stanley Estate (No.2)* (1997, Unreported) that the Landlord and Tenant (Covenants) Act 1995 is a change falling within s.57(6)(b). However, satisfying the "change"

criterion is a necessary but not a sufficient step. It must also be shown that it would be unreasonable to include (or include without modification) the relevant existing term. This decision is cited by Hague at [32.10].

30. Mr Pryor rather seeks to argue that since the Underlease was granted in 1976 the country has experienced periodic bouts of substantial inflationary pressure such that it is now clear that over the period of a long lease such as the New Lease, which will expire on 23 March 2114, it is almost certain that there will be periods of high inflation. He suggests that this was not immediately obvious in 1976.

31. The Tribunal is not persuaded by this argument. First, the Respondent has not produced any evidence on this issue. It was raised for the first time in Mr Pryor's Skeleton Argument. Secondly, were the Respondent to be seeking to modify the existing lease in the light of changed circumstances, the Tribunal would have expected the existing lease to be similarly modified to enable the Service Company to recover contractual interest. The Respondent does not go this far. Mr Pryor has not met the high threshold necessary to modify the lease under this provision. Further, we are not satisfied that the failure to include a provision for contractual interest in the original lease was a "defect in the lease".

32. Mr Pryor again refers to the recent history on non-payment of service charges to the Service Company. However, this does not reflect on the terms of the existing lease. It rather reflects on the personal characteristics of this lessee.

Conclusions

33. The Respondent is only seeking to include the Disputed Clause in the new lease to cover the situation should the Respondent not extend the Common Parts Lease. Should it decided at any time after 25 March 2024 not to do so, the Respondent would take over the management of Basildon Court. The new lease will expire in 90 years. Both parties are agreed that the new lease must make provision for this possibility.

34. Against this background, the Tribunal is satisfied that our starting point should be section 57(2), rather than section 57(6). We are satisfied that a modern lease would make provision for contractual interest and that the Respondent should be able to benefit from such a provision should it assume the management of Basildon Court. We are satisfied that section 57(2) permits this Tribunal to include the disputed Term in the new lease and that we should do so.

35. However, we are not satisfied that there is any defect in the existing lease or any change in circumstances that would justify the Tribunal to modify the existing lease under section 57(6).

Judge Robert Latham
17 July 2023

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).