



**FIRST-TIER TRIBUNAL
FLAT CHAMBER (RESIDENTIAL
FLAT)**

Case reference : **LON/00AC/OLR/2023/0229**

Flat : **Flat 1, Riverside House, 87 Holden Road, London N12 7DP**

Applicant : **Mr. Shiraz Tarmohamed**

Representative : **Mr. S Gallagher - Counsel**

Respondent : **WX Investments Limited**

Representative : **Altermans Solicitors Limited**

Type of application : **Section 48 of the Leasehold Reform, Housing and Urban Development Act 1993**

Tribunal members : **Judge Dutton
Mr. D I Jagger MRICS**

Date of determination and venue : **19 September 2023 by video conferencing**

Date of decision : **19 September 2023**

DECISION

Summary of the tribunal's decision

- (1) The tribunal finds that the terms of the new lease should be as set out in paragraph 16 hereof.

Background

1. This is an application made by the applicant leaseholder pursuant to section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 (“the Act”) for a determination of the premium to be paid for the grant of a new lease of Ground floor flat, 1, Riverside House, 87 Holden Road, London N12 7DP (the “Flat”). The original lease is dated 11 November 1997 between South Eastern Recovery III PLC (1) and the Applicant (2) for a term of 99 years from 1 September 1996 (the Lease). We shall refer to the relevant terms in due course.
2. The application also sought a determination on the terms of the new lease. It is this matter that came before us for hearing on 19 September 2023. The premium had been agreed and there remained one term of the lease relating to parking arrangements, that could not be agreed.
3. Prior to the hearing we were provided with two bundles to consider. The first running to 132 pages contained the application, directions, copies of the Leases and the lease to flat 3 at the development, with supporting Land Registry papers, the original notice and counter-notice and sundry documents including a parking plan annexed to a letter from Flats & General the then managing agents dated 18 September 2007.
4. The second bundle produced the day before the hearing contained the submissions of Mr Gallagher, which we had seen previously, a statement by the Applicant Mr Tarmohamed, the proposed wording for the new lease, a copy of flat 8’s lease and extracts from textbooks, Hague, and Gale on Easements. The Upper Tribunal case of Park v Morgan[2019]UKUT 20 (LC) was also provided.
5. Of interest was an email to the tribunal from the solicitors acting for the Respondent, explaining their non-participation in the hearing and the lead up thereto. At this point the only issue related to the wording concerning the Applicants right to park at the property. The proposed wording was as follows:

“The exclusive right to park one private motor car in the parking area within the landlord’s Property as shown coloured blue on the attached plan 1 together with the right to park a private car in the visitors car parking spaces on a first come first served basis the said visitors parking spaces are shown marked “V” on the accompanying plan.”
6. The email from the Respondent’s solicitors said this *“The respondent is unable to agree the last point as were they to do they would potential be exposing themselves to claims by others who may claim the right to use the parking space over which the claimant asserts to have an exclusive right to park.*

If the tribunal on having heard the evidence is satisfied that the claimant should have the exclusive right to park on the subject parking space and thus the new lease is to be granted on those terms, its determination will serve as a defence to the claims (if any) of others that by granting that right the respondent has or is interfering with their rights”.

7. At the hearing on 19 September 2023 Mr Gallagher represented the applicant, who attended and gave some evidence in addition to his witness statement. We noted the contents of the statement. This was to the effect that he had owned the Flat since 1997, indeed was the original lessee. Throughout his period of ownership, whether he occupied the Flat or members of his family, or tenants did, they had parked their car in the area designated on the plan annexed to the Lease and edged in red.
8. He said that when he purchased the Flat the sales particulars spoke of communal gardens and separately of parking. He was told on at least three times by the managing agents that he had the right to park in the space outside his flat which was said to be exclusively for his use. In 2007 a plan of the parking was produced by the then managing agents (see para3 above) which marked out the parking space used by the Applicant as being ‘allocated’ to him, with a request that these marked spaces were used by occupiers as it had been brought to their attention that some of the spaces allocated for each flat were not being used as prescribed within the terms of the lease.
9. The Lease at the Second Schedule under ‘Rights granted with let Flat’ at paragraph 6 says this *“The right to park one private car in the parking area shown on the attached plan 1 within the landlord’s property on a first come first served basis”.*
10. This contrasted to the wording contained in the only two other long leases, for flats 3 and 8, the remaining flats being held by the landlord for short term lettings, which granted this right, *“The exclusive right to park one private car in the parking area within the landlord’s property in the space shown edged in red on plan 1 together with the right to park a private car in the visitors car parking spaces on a first come first served basis”*
11. The other term of the Lease to which our attention was drawn was Clause 2 under the heading “LETTING SCHEME” which stated as follows *“The landlord’s Property is divided into eleven flats, parking area and grounds, and the landlord intends to let the flats on terms similar to this lease so that each tenant can enforce the restrictions against the other”.*

Hearing

12. Mr Gallagher had provided a helpful submission dated 18 September 2023 running to some 8 pages. We have carefully noted the contents.

Paragraphs 1 to 7 address the position of the Respondent and why it may not be able to consent to the proposed changes put forward on behalf of the Applicant. It is really from paragraph 8 onwards that the argument for allowing change is made. Reference is made to s57 of the Leasehold Reform, Housing and Urban Development Act 1993 (the Act), the wording of which is set out at the foot of this decision.

13. Mr Gallagher's submission set out the elements he considered of relevance, first under s57(6)(b), which he put as "a backup and common-sense argument". Essentially having used the parking space exclusively since 1997, without challenge, the Applicant has acquired a legal easement by prescription. In this regard he relied on the legal text book Gale on Easements, an extract of which was attached, which we have noted and also by virtue of s62 of The Law of Property Act 1925. It would be unreasonable for the wording in the new lease not to be modified to record the rights that have been exercised for over 24 years.
14. As to the provisions of s57(6)(a) he submitted that the failure to include the same wording in the Applicants lease as was contained in the other two leases, was a defect that would be corrected by the proposed amendment. Reference was made to authorities including the UT case of Gordon v Church Commissioners and a later UT authority of Park v Morgan. The Letting Scheme referred to above was relied upon and we were reminded that there were only three long leases and two had the wording for which the Applicant now contended should be included in the new lease. He accepted that the lease could be rectified but that was not within our jurisdiction. However, there was a defect, which we could correct under the Act, as the original lease should have included the exclusive right to park a car in the allocated space.
15. Having considered the evidence before us in the written statement from the Applicant and the parking plan prepared in 2007, the marketing papers, the fact that a figure 1 is marked in the space used by the Applicant, the submissions made as set out in paragraph 13 above and the lack of contrary argument from the Respondent all showed, in his contention, that the lease was defective. It should have included the now sought for wording for the parking and should therefore be carried forward into the new lease so that the defect was cured.

The tribunal's determination

16. The tribunal determines that the new lease should contain the following wording relating to the parking arrangements:

"The exclusive right to park one private car in the parking area within the landlord's property in the space shown edged in red on the plan dated 24.10.93 annexed to the Lease together with the right to park a

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.

(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.

(3) Subject to subsection (4), provision shall be made by the terms of the new lease or by an agreement collateral thereto for the continuance, with any suitable adaptations, of any agreement collateral to the existing lease.

(4) For the purposes of subsections (1) and (3) there shall be excluded from the new lease any term of the existing lease or of any agreement collateral thereto in so far as that term—

(a) provides for or relates to the renewal of the lease,

(b) confers any option to purchase or right of pre-emption in relation to the flat demised by the existing lease, or

(c) provides for the termination of the existing lease before its term date otherwise than in the event of a breach of its terms;

and there shall be made in the terms of the new lease or any agreement collateral thereto such modifications as may be required or appropriate to take account of the exclusion of any such term.

(5) Where the new lease is granted after the term date of the existing lease, then on the grant of the new lease there shall be payable by the tenant to the landlord, as an addition to the rent payable under the existing lease, any amount by which, for the period since the term date or the relevant date (whichever is the later), the sums payable to the landlord in respect of the flat (after making any necessary apportionment) for the matters referred to in subsection (2) fall short in total of the sums that would have been payable for such matters under the new lease if it had been granted on that date; and section 56(3)(a) shall apply accordingly.

(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.

(7) The terms of the new lease shall—

(a) make provision in accordance with section 59(3); and

(b) reserve to the person who is for the time being the tenant's immediate landlord the right to obtain possession of the flat in question in accordance with section 61.

(8) In granting the new lease the landlord shall not be bound to enter into any covenant for title beyond—

(a) those implied from the grant, and

(b) those implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994 in a case where a disposition is expressed to be made with limited title guarantee, but not including (in the case of an underlease) the covenant in section 4(1)(b) of that Act (compliance with terms of lease); and in the absence of agreement to the contrary the landlord shall be entitled to be indemnified by the tenant in respect of any costs incurred by him in complying with the covenant implied by virtue of section 2(1)(b) of that Act (covenant for further assurance).

(8A) A person entering into any covenant required of him as landlord (under subsection (8) or otherwise) shall be entitled to limit his personal liability to breaches of that covenant for which he is responsible.

(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).

(11) The new lease shall contain a statement that it is a lease granted under section 56; and any such statement shall comply with such requirements as may be prescribed by land registration rules under the Land Registration Act 2002.

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Flat 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 Flat 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).