FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/OLR/2023/0303, LON/00BK/OLR/2023/0292, LON/00BK/OLR/2023/0295,**
Property	**:**	**Flats 17, 23, 35, 40, 46 and 51 Basildon Court, Devonshire Street, London W1G 6PR**
Applicant	**:**	**Howard De Walden Estates Limited**
Representative	**:**	**Mr Mark Loveday - Counsel instructed by Charles Russell Speechlys LLP**
Respondent	**:**	**Zulfikar Remtulla Jetha Shelina Zulfikar Jetha**
Representative	**:**	**Ms Ellodie Gibbons - Counsel instructed by Edwin Coe LLP**
Type of application	**:**	**Section 48 of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal members	**:**	**Judge Dutton Mr I Holdsworth FRICS**
Date of hearing and venue	**:**	**14 November 2023 by video**
Date of decision	**:**	**21 November 2023**

DECISION

Summary of the tribunal's decision

(1) The terms of the lease shall be as set out below.

Background

1. This is an application made by the applicant leaseholder pursuant to section 48 of the Leasehold Reform, Housing and Urban Development

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Act 1993 ("the Act") for a determination of the terms to be included in the new leases of the subject properties at flats 17, 23, 35, 40, 46 and 51 Basildon Court, Devonshire Street, London W1 (the "Flats").

2. The premiums for the lease extensions have been agreed as have the terms of the extended lease save for one clause. The leases, at the relevant dates had less than three years to run.

3. The existing clause in the leases is as follows: By clause 5(16) of the existing leases, the Lessee covenants with the Lessor –

"*During the final seven years of the said term hereby granted not to assign sub-let or part with the possession of the demised premises without the consent of the Lessor in writing first being obtained such consent not to be unreasonably withheld in the case of a respectable and responsible person not being an incorporated body*"

4. The Applicant seeks to amend this clause by the removal of the words "*during the final 7 years of the term hereby granted*", which would mean that landlord's consent to sub-let would be required throughout the term.

5. The Respondents agree to the amendment of this covenant in the new leases in respect of assignment only. However, they do not agree to the covenant being amended to the extent sought by the Applicant and want the restriction on sub-letting to be limited to the last 7 years of the term, as it is in the existing leases.

6. The matter came before us for determination on 14 November 2023. The Applicant was represented by Mr Loveday of Counsel and the Respondent by Ms Gibbons, also of Counsel. Both had very helpfully supplied us with either a submission or skeleton argument, the title did not matter. We are grateful to them for their assistance in this regard.

The hearing

7. Mr Loveday told us in opening that there was no authority on the point we were being asked to consider. As background he told us of the problems the Applicant had previously had with the Respondents and their family. It appears that they are the owner of some 11 flats in a block of circa 55 flats. We noted all that was said.

8. At this point it is appropriate to set out the relevant terms of the Leasehold Reform Housing and Urban Development Act 1993 (the Act) as they relate to this application. They are:

57 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.

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.

9. Put simply, without in any way wishing to demean Mr Loveday's arguments, the proposition was that the basis for considering the new lease was that it should include the wording that applied at the relevant date and the fact that the existing lease contains the wording at paragraph 3 above means that the new lease should, for the whole of the 90 years, have this clause embedded within it.

10. He submitted that this is what was meant by the phrase *"as they apply on the relevant date"*. If Parliament had meant differently that could have been achieved by simply omitting the "relevant date" wording. He put forward various scenarios which showed, in this submission that the overall purpose of s57(1) was to look at the circumstances on the "relevant date" and not some earlier period. This he said was consistent with the provisions at 57(1) (b) and (c). It was he said absurd to remove the restriction retrospectively, it having applied for the last 2 – 3 years.

11. This could have been avoided he opined if the Respondents had served their s42 notice earlier. He pointed out that for three other flats in the block, apparently owned either by other members of the family (Flat 15 owned by Irfahn Zulfikar Jetha, Flat 21 owned by Aly Zulfkar Jetha and Flat 54 in fact owned by the Respondents) had accepted the wording proposed by the Applicant.

12. He went to argue that if we were against him on this point then he could rely on s57(6) and in particular 57(6)(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*.

13. In support of this proposition, he referred to the Housing Act 1988 and the expanded market for short term lettings and the wish for the Applicant to assume a "gatekeeper" role, which this clause would allow. It should be noted that the Respondents and their family seem to be running a commercial exercise in subletting the flats owned by them. Reference was made to The Renter Reform Bill, which is not law, the fact that other leases in the block contained this provisions (see para 11 above) and the Respondents' poor record in respect of service charge payments.

14. He was asked by Mr Holdsworth what he thought the purpose of the original covenant could be and gave a somewhat discursive response. He also confirmed that there was no evidence of difficulties involving any subletting's by the Respondents or their family. He also confirmed that if the s42 Notice had been served say 8 years before the expiry of the lease the arguments he was putting forward would not apply. He could throw no light on why other members of the family (see para 11 above) had agreed the changed wording.

15. We then heard from Ms Gibbons. In her skeleton argument she had referred to the LVT (now FTT) case of Huff but Mr Loveday did not, in truth utilise this case, we think for good reasons as it related to assignments and the questions of subletting was not considered. The Respondent has conceded the point on assignments.

16. We were told that the onus to prove the case fell at the Applicant's feet and cited authorities supporting her proposition that our jurisdiction was narrow.

17. In her verbal submission she was somewhat dismissive of the merits of the application. The term in dispute was included to prevent security of tenure issues for the landlord as the lease expired. The term was only relevant in the last 7 years.

18. As to the alternative argument put forward by Mr Loveday under s57(6) there was no defect and the 'changes' suggested by Mr Loveday and the authorities mentioned did not apply in this case.

19. The fact that other leases had been granted with the wording sought by the Applicant in this case did not mean there had to be uniformity. We did not know the basis upon which the wording had been agreed by others, even family member, who may have had different needs for the flat in mind. Further the alleged failings of the Respondents have no bearing on the issue before us. We have limited jurisdiction rooted in the existing lease.

20. Mr Loveday responded briefly to Ms Gibbons' submissions. He suggested that she had not really engaged with his primary case on the "relevant date" point. We were reminded that there was no case law on this point.

Findings

21. The Argument put forward by Mr Loveday is novel. In reaching our decision we have reviewed the authorities cited by counsel. For the Respondent the LVT decision is not binding authority and predates the Upper Tribunal cases put to us, in particular Gordon v Church Commissioners case. We have noted what was said about the Rossman case and its relevance, it being primarily, it would seem, relating to s57(6)(a). It was no wholly clear what principles we are take from the Howard De Walden case as it was not referred to by Mr Loveday other than in his written submission and then to indicate that s57(6) was intended to give us "relatively wide powers". We have already dealt with the Huff case.

22. Ms Gibbons did not engage to any great degree on the "relevant date" point other than to suggest the case was without merit.

23. We do not accept Mr Loveday's submission. We find that reference to the "relevant date" means the terms of the lease when viewed at the date of the intended extension, which in this case is a lease which in the last seven years (our emphasis) imposes a restriction on subletting. It cannot be right in our finding that the fact there is but a few years left on the lease, and the disputed term happens to be relevant for this short period, means that we must approve a new lease with this restriction running for the whole of the extended period. That cannot be what was intended when the lease was first drafted. The intention was clearly to protect the Landlord at the closing of the lease from a tenant obtaining some security of tenure when the original lease expired.

24. Further, it does not sit well with Mr Loveday's concession that if the s42 Notice had been served a few months before the 7 years he would not have been able to run this argument.

25. The Respondents are known to be utilising the flats as a business letting for short terms under the Housing Act 1988. There is no love lost between the parties, as a result of the apparent failings on the part of the Respondents to pay their service charges on time. We wonder whether this was a force which led to this application. Certainly, a requirement to obtain consent for each subletting throughout the term would have a detrimental impact on the Respondents' use of the Flats in delaying the ability to 'turn round' the flats at the conclusion of any let.

26. It appears to be accepted that this is not a point for which we can find any judicial assistance. We suspect because the issue has never exercised legal minds. The facts of this case are rare. Extensions of leases with only these few years left do not arise on a frequent basis in practice. That being said we conclude that any party seeking a lease extension would not expect to find that something which applied for a limited period of time, and which happened to exist at the date of the s42 Notice being given, would bind the parties for the full extent of the new, extended lease.

27. We find therefore that the terms of the lease should read

    5.16.2. not to: assign; *or during the final 7 years of the term hereby granted* sublet or part with possession of the whole Demised Premises without the previous written consent of the Landlord.......

Name: Judge Dutton **Date:** 21 November 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).

CASE REFERENCE LON/00AC/OLR/2014/0106

First-tier Tribunal
Property Chamber (Residential Property)

Valuation under Schedule 13 of the Leasehold Reform Housing and Urban Development Act 1993

Premium payable for an extended leasehold Interest in [Property]

Valuation date: [Date]