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RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL FOR THE EASTERN RENT ASSESSMENT PANEL

CASE NUMBER CAM/26UE/OLR/2010/0027

IN THE MATTER OF FLATS 1,4,7,10,17,20,25 & 33 Watling Court, High Street, Boreham Wood, Hertfordshire WD6 3ES

PARTIES; D.G.& D.E.ALCOCK; B.J.OAKES; S.E.BERNES; A.E.OATLEY; J.T. MITCHELL; C.R.BOWLER; H.R.ETIENNE & B.KIMM

Applicants

T.E.W.NOAD

Respondent

DATE OF APPLICATION; 11th May 2010

DATE OF DETERMINATION; 15th August 2010

TRIBUNAL MEMBERS: Mr A.A. Dutton - Chair

Miss M Krisko BSc (Est Man) FRICS

Mrs S Redmond BSc (Econ), MRICS

DATE OF DECISION; 24 August 2010

DECISION

The Tribunal finds that the clause proposed by the Respondent is not allowed for the reasons set out below.

A. REASONS

1. The Application before the tribunal was made by Mr Clive Richard Bowler of 20 Watling Court on behalf of the other lessees who were parties to applications for lease extensions of properties at Watling Court, Elstree. The only issue before the tribunal was the request for us to determine the terms of the new lease under section 57 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act")
2. The clause the Respondent sought to include was set out in the draft surrender and lease and is as follows:-

   "6 (ix) The Landlord will be entitled to recover from the Tenant in connection with its obligations under this Schedule (including clause 6) and under the Lease:-

   (a) The cost of employing or engaging solicitors, counsel and other professional persons in connection with the management of the Building and the administration and collection of the service charge payable by the Tenant and other tenants at the Building

   (b) The cost of enforcing or attempting to enforce against the Tenant the covenants and restrictions imposed against the Tenant by this Lease and the cost of enforcing or attempting to enforce against other tenants or occupiers at (the sic) Building similar covenants and restrictions imposed on them but only in so far as such costs shall not be recovered from the person against whom such enforcement is made or attempted or from the person requesting such enforcement"
3. Messrs Bishop & Sewell, solicitors for the Respondent had provided written submissions on behalf of the Respondent. Our attention was drawn to section 57(6)(a) and (b) of the Act. It was submitted that the proposed clause was a benefit to the remainder of the flat owners on the basis that the provisions would allow the recovery of costs from the non paying party. It was said that protection could be found for the tenant in section 20(c) presumably of the Landlord and Tenant Act 1985 as amended. It was averred that because the relevant service charge legislation was introduced after the grant of the original lease (1965) the Respondent's position had altered to his detriment. It was also suggested that the clause was necessary as not only did it rectify a defect in the existing lease but that it would be unreasonable to proceed without including the clause in the light of changes occurring since the date of the grant of the

original lease. We were told that the clause had been included in other leases extended under the Act and a copy of the lease for flat 9 was included with the submission.

4. For the Applicant Messrs Lawrence Stephens submitted a response. It was said that the proposed clause did not remedy a defect as the existing lease, whilst potentially being disadvantageous to the Respondent, was not defective. The word "necessary" in section 57(6)(a) should be construed strictly and the provisions of section 20C of the 1985 Act were not relevant. In so far as the suggestion that legislative changes had occurred which required the Lease to be altered the Applicant argued that only one change had occurred, which was not relevant. The suggestion that the inclusion of the clause would benefit the remainder of the lessees was rejected with the submission that the clause was disadvantageous to the tenants. Although it appeared that two other renewed leases had the offending clause included it was not clear as to the background of such inclusion. It was said that the inclusion of the clause would result in a significant disadvantage to the tenant and that we should exclude the clause.

B. THE LAW

5. The law applicable to this matter is contained at Section 57 of the Act which states as follows:-

"57(1) Subject to the provisions of this Chapter (and in particular to the provisions as to rent and duration contained in Sections 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 modification as maybe 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 to payments related to the cost from time to time of the landlord, and

(ii) for the tenant's liability to make those payments to be enforceable by distress, re-entry or otherwise in like manner as if it were a liability for the payment of rent

We do not need to consider sub-sections (3) to (5) inclusive. Sub-section (6) reads as follows:-

(6) Sub-sections (1) to (5) shall have effect subject to any agreement between the landlord and the 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

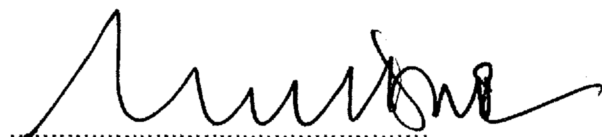
(b) it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease

C. FINDINGS

6. The 1993 Act provides at Section 57(1) that the new lease is to be on the same terms as those of the existing lease. The existing lease of course still had a substantial amount of time left to run and had there not been the renewal, the landlord and tenant would have been bound to observe the existing terms. The modifications provided for at Section 57(1)(a)(b)(c) do not apply in this case. The only basis upon which any alterations to the lease can be entertained has to be confined to those set out at Sections 57(6)(a) or (b). In this case, clearly there has been no agreement as to different terms. Our finding is that the provisions set out at Section 57(6) limit the tribunal's powers to exclude or modify terms in the <u>existing</u> lease. The proposal on behalf of the Respondent is to do neither. It is to insert a fresh term altogether. In those circumstances it does not seem to us that we have the power to make the alteration that the Respondent seeks. In those circumstances we dismiss the application. If we are wrong in that finding, it does not, in any event, seem to us that

the clause which is proposed remedies any defect in the existing lease. It seems to us that the lease contains provisions for the recovery of fees and expenses incurred by the landlord in dealing with matters under the terms of the lease, see for example clauses 6(v)(c) and (d). Further, we cannot see that there have been any changes occurring since the date of the commencement of the lease which effect the suitability of same. We bear in mind the term remaining on the existing lease and the fact that the parties would have been bound by same for many years to come. The fact that other lessees, who may or may not have had legal advice, have agreed the terms within their lease is in our view an irrelevancy. We do not consider that the ability for the landlord to seek to recover costs against other lessees for the defaulting actions of other tenants in the block is a matter that falls within any of the provisions of Section 57, either Sections 57(1) or (2) and most certainly not under Section 57(6). In those circumstances, we dismiss the application made by the Respondent.

7. In the bundle of papers before us was correspondence passing between the parties in August of this year on the question of costs. It is not clear to us whether costs are still an issue. If they are, then the parties are welcome to submit written representation to us within the next 28 days so that we may consider the matter further. Representation should on the part of the Respondent set out clearly the work that has been done, the status of the fee earner and the hourly rates applied so that we can assess whether the costs sought are reasonable or not. If the parties are able to agree costs then so be it, but would they please notify the Tribunal accordingly. The file will be closed 28 days from the date of this decision.



ANDREW A DUTTON

Dated 24 August 2010