

**SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL**

Case No: CHI/00HP/OLR/2010/0002

**In the matter of Section 48 of the Leasehold Reform Housing and Urban
Development Act 1993 ("the Act").**

Between:

Mrs S J Simester (Applicant/Lessee)

and

Stour Developments Limited (Respondent/Landlord)

Premises: Flat 21 The Conifers 1 The Avenue Poole Dorset BH13 6BA
("the Premises")

Date of Hearing: 15 April 2010

Tribunal: Mr D Agnew BA LLB LLM Chairman
Mr A J Mellery Pratt FRICS
Miss C D Barton BSc MRICS

DETERMINATION

The Tribunal does not agree that the Landlord should be able to insert into the lease a new clause 9 in the terms sought but that the wording of clause 9 of the existing lease shall be incorporated as clause 9 of the new lease.

REASONS:

1. Background
 - 1.1 On 29 December 2009 the Applicant applied to the Tribunal under Section 48 of the Act for the Tribunal to determine the term of the new lease to be acquired under the Act.
 - 1.2 All the terms of the new lease, including the premium, were agreed prior to the hearing leaving only clause 9 as proposed by the Respondent in issue. This was therefore the only matter that the Tribunal was required to determine.
2. The Inspection

The Tribunal inspected the premises immediately preceding the hearing on 15 April 2010. The Conifers comprises four interconnecting

blocks of flats constructed in the late 1960s occupying a pleasant corner site at the top of The Avenue in Poole close to local shops and the beach. The 21 flats are on three floors with no lifts. The grounds are pleasantly laid out but are not extensive. Flat 21, owned by the Applicant, is on the first floor and looks out onto a very pleasant and well-maintained garden. In the grounds there is limited parking space. There are 19 garages situated on the southern and north-eastern boundaries of the plot. This plot is described in the current lease as "the Estate".

3. The Existing Clause 9

Clause 9 of the existing lease dated 14 May 1970 provides as follows:-
"IT IS HEREBY AGREED AND DECLARED that the lessee shall not be or become entitled to any right of light or air or other easement which will in any manner restrict or interfere with the free and unrestricted user for building purposes or otherwise of any land or premises of the landlords or their predecessors in title or their respective successors in title adjoining or near to the Estate."

4. The Proposed New Clause 9

The Landlord wants to substitute the following for the existing clause 9:-

"IT IS HEREBY AGREED AND DECLARED that the lessee shall not be or become entitled to any rights or easements which will in any manner restrict or interfere with the right of the landlord to rebuild redevelop alter use extend add to or deal with the Estate and the blocks of flats and garages erected thereon and land buildings and premises adjoining above or near the demised premises in any manner it thinks fit and to enter on the demised premises with or without plant and materials to carry out any works to any such buildings or premises adjoining above or near the demised premises even if the access of light or air to the demised premises or any other easement right or advantage belonging to the lessee may as a result be diminished or interfered with PROVIDED THAT the landlord must not thereby materially inhibit or otherwise affect the access to or use enjoyment and occupation of the demised premises by the lessee or any other lawful occupiers in accordance with this lease."

5. The Law

- 5.1 By Section 57(1) of the Act it is provided that the new lease "shall be a lease on the same terms as those of the existing lease ... 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 ... from more than one separate leases, of their combined effect and of the differences (if any) in their terms.

- 5.2 By Section 57(6) of the Act it is stated that subsections (1), (2) and (5) shall have effect subject to any agreement between the landlord and tenant as to the terms of the new lease or an 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 insofar 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 the commencement of the existing lease which affect the suitability on the relevant date on the provisions of that lease.

6. The Hearing

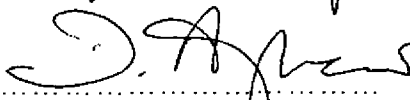
- 6.1 Mrs Simester appeared in person but her solicitors had provided a skeleton argument. In that skeleton argument the Applicant's solicitors had denied that the facts of this case came within Section 57(6) of the Act and therefore the Landlord was not entitled to require the new clause 9 to be inserted into the lease in substitution for the existing clause 9.
- 6.2 The Respondent was represented by a solicitor, Mr Miller. He maintained that Section 57(6)(b) did apply in this case. He accepted that Section 57(6)(a) was not relevant to this case. As far as sub clause (b) was concerned, however, his argument was as follows. He said that there had been a change of circumstances since the existing lease was granted in 1970 because seven other flats had been granted new leases all of which contained the same clause 9 as the Landlord wishes to insert in the new lease of flat 21. He also maintained that the proposed clause 9 was nothing more than a modernisation of the existing clause which was drafted forty years ago. Although he had no evidence to support his assertion Mr Miller said that it was his experience that a clause in the form proposed was being inserted into modern leases instead of the clause in the terms of clause 9 of the existing Lease.
- 6.3 Mrs Simester explained to the Tribunal what the Landlord was proposing to do. It had obtained planning permission to construct five one-bedroom flats and two two-bedroom flats onto the roof of the existing building. It was not proposed that any lifts would be provided. Additional parking would be provided and this may result in some of the garden onto which she looks being converted into car parking spaces. She felt that the whole proposed new development would adversely affect the value of her property. She had been trying to acquire the new lease for a number of years but she was continually running into

the problem of being advised by her solicitors that the proposed clause 9 was unacceptable and could not be imposed upon her under the terms of the legislation. She said that the delay and the need to resort to solicitors had cost her a great deal of money not only in the increase in the amount she would have to pay for the new lease itself but also in the legal fees that she incurred. She just wanted the Tribunal to determine the issue.

7. The Consideration

- 7.1 The Tribunal did not consider that the Landlord's proposed new lease was permissible within the terms of Section 57 of the Act. The Tribunal did not consider that this was a modification of the existing clause 9. The proposed new lease went beyond being a modification. It was a quite different provision. The existing clause 9 deals with a situation where there may be development on land adjoining or near to the Estate whereas the proposed new clause 9 affects the rights of the lessee in circumstances where the lessor may carry out development works on the Estate itself. If that is what the lessor intended when the lease was granted in 1970 then it would have said so but it did not.
- 7.2 Secondly, the Tribunal did not accept that the new clause 9 was just a modernising of the old clause 9. Again, this was a new provision not simply the updating of an existing provision. The Respondent's solicitor produced no evidence that the proposed clause 9 was simply a modern form of the existing clause 9 and the Tribunal did not accept that a completely new provision could be regarded as simply a modernising exercise.
- 7.3 Consequently, the Tribunal rejected the Respondent's submissions and saw no reason to find that the wording of the existing clause 9 was in any way unsatisfactory or unsuitable and consequently it is the wording of the existing clause 9 that will be imported into the proposed new lease.

Dated this 21st day of April 2010


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D. Agnew BA LLB LLM
Chairman