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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL
Case no. CAM/00KF/OLR/2012/0080

Property	:	**135a Leighton Avenue, Leigh-on-Sea, Essex SS9 1PZ**
Applicant	:	**Michael William Stapleton**
Respondent	:	**Sarum Properties Ltd. Represented by Mr. Aaron Walder of counsel (Bonallack & Bishop)**
Date of Application	:	**12th September 2012**
Type of Application	:	**To determine the terms of a lease extension and costs**
Tribunal	:	**Bruce Edgington (lawyer chair) Stephen Moll FRICS Roland Thomas MRICS**
Date and venue of Hearing	:	**12th December 2012 at Southend Magistrates Court, 80 Victoria Avenue, Southend-on-Sea, Essex SS2 6EU**

DECISION

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1. The terms of the lease are in accordance with the draft submitted as amended by the Respondent save for clause 4. The words "*or are set out in the Schedule and*" are deleted and the following words are added:-

   "*SAVE THAT the first 5 lines of clause 4(1) shall read 'To keep the building of which demised premises form part comprehensively insured with an insurance company of repute for such sum and for such risks as the Lessor shall reasonably require with the Lessee contributing one half of the premium paid and to produce...'*"

2. The Respondents application for costs in accordance with paragraph 10 of Schedule 12 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") succeeds but the amount awarded is £250 only. The Applicant shall pay this sum to the Respondent on or before 31st January 2013.

Reasons

Introduction

3. This is a very straightforward lease extension case where the premium and the costs have been agreed and the only matter for determination is the terms of the deed of surrender and new lease.

4. Such terms are agreed save as to the terms of a Schedule which seeks to provide different provisions with regard to insurance.

The existing lease

5. The Lease in question ("the old lease") is dated 19th October 1984 and was made between Michael John Rose (1) and Stephen Derek Bird (2) wherein the property was demised for a period of 99 years from the 25th June 1984.

6. The insurance provisions are contained in various parts of the old lease. At the end of clause 1 it states that the term is as described above and is subject to two things namely the payment of ground rent and then payment:-

> "*on demand a sum equal to the amount which the Lessor shall expend in insuring the demised premises in accordance with his covenant in that behalf hereinafter contained*"

7. The covenant to insure is in clause 4(1) which says that the Lessor covenants with the Lessee:-

> "*To keep the demised premises comprehensively insured in the joint names of the Lessor and the Lessee for such sum as the Lessee shall from time to time request or such greater sum as the Lessor shall reasonably require...*"

8. Clause 4(2) provides that the Lessor shall use all insurance money received in making good damage or reinstating the building.

9. The Fourth Schedule contains the lessee's covenants which includes a covenant not to do or permit anything to be done which would either render the insurance void or voidable or would increase the premium.

10. Finally, there are the usual covenants on the part of the Lessor to repair and maintain the structure etc. on condition that the lessee reimburses one half of the cost. Obviously, this would include the reimbursement of any insurance excess.

The new terms proposed by the Respondent

11. Clause 4 of the proposed Deed of Surrender and New Lease ("the new lease") is in standard terms in the sense that it says that "*The Landlord and the Tenant mutually covenant that they will respectively perform and observe the several covenants provisos and stipulations contained*

in the Old Lease as if they were repeated in full in this lease...". It then goes on to say that this will be subject to the terms of the Schedule.

12. The Schedule then sets out an addition to the lessees covenants to provide for the lessee to pay one half of the insurance premium, to pay any insurance excess and to pay anything that the insurance company shall deduct from the insurance benefits because of any act or omission of the lessee.

13. Clause 4(1) is then deleted. In its place is a lengthy covenant on the part of the lessor to provide insurance "*with reputable insurers on fair and reasonable terms for an amount not less than the reinstatement value*" for risks covering some 10 lines.

14. Clause 4(2) is also deleted and provisions are substituted to say that the Lessor will make a prompt claim if the building is damaged or destroyed; notify the lessee if the insurers say that the reinstatement value will not be recovered; pursue any lessee if the insurers refuse to pay because of any act or omission of any lessee; obtain any planning permission needed for any repair or rebuilding work and rebuild the property to an equivalent size, layout and quality to that which exists.

The Law

15. Section 57 of the **Leasehold Reform, Housing and Urban Development Act 1993** ("the 1993 Act") says that any lease extension shall be in the same terms as the old lease save that such terms may 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 the 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*"

16. Section 48 of the 1993 Act says that this Tribunal determines any dispute relating to this issue.

17. For the purpose of this case, the relevant part of the 2002 Act is the paragraph and Schedule referred to in the decision. It is often referred to as the 'wasted costs' provision for obvious reasons. To make an order under this provision, the Tribunal has to come to the conclusion, in this case, that the Applicant has behaved unreasonably in connection with these proceedings and that this has caused unnecessary expense to the Respondent.

The Inspection

18. As the dispute was only in respect of the limited insurance terms as set out above, the Tribunal decided that an inspection was not necessary.

The Hearing

19. Those attending the hearing were the Applicant, Mr. Mike Stapleton FRICS, and Mr. Aaron Walder, counsel for the Respondent. The Tribunal chair firstly asked Mr. Stapleton why he was suggesting in his written submissions that there was no provision on the old lease for recovery of the insurance premium. He responded that there was no such provision.

20. The chair then read out to him the provision in clause 1 as set out above which is a clear statement that the original term was granted on condition that the Lessee paid ground rent and for anything expended by the Lessor on insurance. He seemed to be genuinely taken aback by this which was surprising for a chartered surveyor who specialises in enfranchisement cases and must be used to looking at leases. It is even more surprising when he has been legally represented in the lease negotiations.

21. That having been established, the Tribunal chair pointed out to Mr. Stapleton that in the opinion of the Tribunal members, there was a defect in the old lease in the sense that it required the insurance to be in the joint names of the Lessor and the Lessee. When insuring a property such as this, i.e. a house consisting of two flats, it is important that the whole building is insured under one policy to ensure that the whole building is covered i.e. the flats, the common parts, the roof, the foundations etc. Trying to insure one flat is fraught with difficulties because of the scope for insurers to attempt to avoid a claim because, for example, damage to the building emanated from a part of the building not covered.

22. It is certainly usual practice to have one policy in which case, having such policy in the joint names of the Lessor and the Lessee of one flat only was unrealistic, particularly if the lease to the other flat is in the same terms. That is not a certain fact but it is likely that two leases created at the same time would be in the same terms.

23. In fairness to Mr. Stapleton, he saw the sense of that. The Tribunal chair therefore suggested that the only reasonable alteration to the new lease which came within the ambit of Section 57 of the 1993 Act i.e. to remedy that defect was as set out in the decision above the salient parts of which he read out.

24. Mr. Stapleton accepted that and Mr. Walder said that his instructions were that provided the Applicant accepted that there was a liability for him to contribute to the insurance, he would be able to agree this as well. Both said that they would like a determination from the Tribunal and Mr. Walder said that he wanted the decision to record, in a recital, that there had been agreement on the liability point.

25. Mr. Walder then said that he was instructed to ask for an order for wasted costs pursuant to the 2002 Act for the maximum sum of £500. He acknowledged that no notice had been given of this. His

submission was that this hearing was only necessary because of Mr. Stapleton's refusal to accept that he had any liability to contribute towards insurance. This is why the amendment was proposed. He quoted from Mr. Stapleton's written submissions to the Tribunal which said exactly that and it was self evident that Mr. Stapleton started the hearing on this basis.

26. Mr. Stapleton was asked for his submission. It should be said at the outset that he did not ask for an adjournment and he did not complain about the lateness of this application. This is in the context of Mr. Stapleton being an experienced advocate in enfranchisement cases. His submission was that there had been an agreement as to the wording of the new lease.

27. He referred to the fact that a draft lease had been submitted on the 9th October 2012. A letter written by his solicitor dated 2nd November approved that draft. Thus, there was an agreement as to the terms of the lease and this hearing should not have been necessary.

Conclusions

28. The contents of the new lease were agreed at the hearing. Mr. Walder said very clearly and specifically that his agreement was on the basis that there was a record of Mr. Stapleton's acceptance that there was a liability on him to pay towards insurance. He wanted a recital to the Tribunal's order. However, the Tribunal did not consider that a recital was appropriate when it was simply recording Mr. Stapleton's agreement to something he would have to accept in any event.

29. Nevertheless, and for the avoidance of doubt, Mr. Stapleton did specifically agree to the fact that he had under the old lease and will continue to have under the new lease, a liability to contribute his share of whatever the landlord spends on reasonable insurance.

30. Turning now to the costs issue, the Tribunal did carefully consider the correspondence between the solicitors. It was clear from Mr. Stapleton's written submissions at page 2 in the bundle that the original draft lease said specifically that the old lease was to be varied in accordance with a Schedule. That Schedule was not enclosed with the original draft of the lease and it was put to Mr. Stapleton, and accepted by him, that his solicitor was therefore accepting a draft lease which was subject to a Schedule which contained new terms of which he was completely unaware.

31. The Tribunal determines that this could not amount to a concluded agreement. Indeed it was entirely likely that such 'agreement' as existed would be void for uncertainty.

32. It is regretted that the stance taken by the respective solicitors has not been at all helpful. The Schedule should have been attached to the draft lease. When the Schedule did arrive, Mr. Stapleton's solicitors should have made his position clear. Neither solicitor appears to have identified in writing the specific issue over liability for insurance in the

old lease. If it had been, no doubt there would have been some reference to the provisions of clause 1 and the true defect i.e. as to the insurance being in joint names could have been identified.

33. Taking all of the facts and surrounding circumstances into account, the Tribunal concluded that if the solicitors had been straightforward with each other and had put their respective cases to each other clearly and in writing, this hearing could – or should – have been avoided.

34. The Tribunal has no doubt that the expense of the hearing to the Respondent was £500 or more bearing in mind that counsel had to be instructed to represent solicitors and the Respondent who both are in Wiltshire. However, the Respondent, through its solicitors, must take some responsibility for what has happened.

35. At the end of the day, the hearing appears to have happened because of a misunderstanding of the terms of the old lease on the part of Mr. Stapleton. The solicitors should have been able to resolve this. The Tribunal concludes, by way of a 'broad brush' approach that the fairest order to make is to order the Applicant to pay £250 towards the Applicant's costs but with a deferred payment date so that all financial matters can be concluded on completion of the new lease. There is a specific payment date in the order to cover the eventuality that completion does not actually take place.

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Bruce Edgington
Chair
13th December 2012