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HM Courts & Tribunals Service

Leasehold Valuation Tribunal

case no. CAM/26UK/OLR/2012/0056

Property	:	**76 Southwold Road** **Watford** **WD24 7FH**
Applicant	:	**Kerri-Lynne Sherrard**
Respondent	:	**Peter John Cutler, Anne Nellie Cutler and Barnett Waddingham Trustees Ltd (as trustees of the SGIK Directors Pension Scheme)** **The Treasury Solicitor (in respect of the Crown's interest in Southwold Road (Block C) Management Company Ltd – dissolved)**
Date of Application	:	**25th May 2012**
Date of Hearing	:	**12th September 2012**
Type of Application	:	**To determine the terms of acquisition and costs of the lease extension of the property**
Tribunal	:	**Francis Davey (chair)** **Dallas Banfield FRICS**
Representation	:	**Craig Sherard, solicitor, of Brecher Solicitors for the Applicant** **Robert Strang of counsel, instructed by P. Chevalier & Co for the Respondent** **The Treasury Solicitor did not appear.**

DECISION

1. The tribunal finds that, in so far as the terms have not agreed between the landlord and tenant, the lease shall be modified pursuant to section 56(6)(b)

of the Leasehold Reform, Housing and Urban Development Act 1993 in accordance with the draft amendments submitted by the tenant at pages 36 to 58 of the trial bundle subject to the amendments set out in the schedule to this agreement.

Reasons

Introduction

2. On 8th June 2012, the panel president made a case management order which included, at paragraph 10, a requirement that there be an agreed bundle filed at the tribunal's offices at least 10 days before the hearing.

3. In breach of this order, the Respondent's solicitors P. Chevalier & Co, sent two additional bundles which arrived at the tribunal's offices on 7th September 2012. Both were therefore 5 days too late. Both were unindexed and did not have numbered pages. Time was needlessly wasted before and during the hearing trying to navigate them.

4. Mr Strang had no instructions as to the reason for these failures to comply with case management directions. On his own evidence P. Chevalier is an experienced solicitor, well aware of the processes of the tribunal, and aware of the importance of complying with the tribunal's directions.

5. In the light of his failure to carry out one of the most elementary tasks imposed on the parties, we thought it appropriate to record our disapproval. In future we expect that P. Chevalier & Co will comply with directions and, if unable to do so, will promptly explain to the tribunal the reasons for the failure.

6. This was an application pursuant to section 48(1) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"). There was no dispute of fact between the parties. The parties told us at the start of the hearing that costs had been agreed. The only point remaining in dispute was the terms of the new lease.

7. The property is a ground floor flat in a purpose-built block of flats. The parties were not able to tell us how many other flats were contained in the block, but it was agreed there were a number of other flats leased on what were assumed to be identical leases, none of which have been extended pursuant to the 1993 act, though one may have been extended by a deed of variation to the term.

8. The lease was in tripartite form being made between the original Lessor, the original Lessee and Southwold Road (Block C) Management Company Limited, referred to in the lease as "the Company".

9. Under the lease, the obligations such as repair and management that would, in a traditional lease, have been imposed on the landlord, were imposed on the Company. The only substantive obligation of the Lessor is found in Clause 4(2) of the Lease:

"*(2) That the Lessor will require every person to whom it shall hereafter grant a Lease of any part of the Block to covenant to perform and observe such several covenants conditions and agreements as aforesaid and if so required by the Lessee will take all reasonable steps to enforce the same and the covenants on the Company's part contained in Clauses 7 and 8 hereof PROVIDED that the Lessee shall indemnify the Lessor against all costs charges and expenses incurred or to be incurred in respect of such enforcement AND the Lessor may require the Lessee to lodge reasonable security against such costs charges and expenses prior to enforcing such covenants*"

10. Clause 6(3) gave the Lessor the right to carry out the Company's obligations itself if the Company defaulted, as follows:

"*(3) If during the term hereby granted the Company shall fail or neglect to perform and observe its obligations or any of them hereunder or shall go into liquidation the Lessor shall be entitled to undertake (or by action or otherwise compel the Company to undertake) the obligations or any of them hereby agreed to be undertaken by the Company and shall be entitled to recover from the Lessee a due proportion of all monies costs charges and expenses incurred by the Lessor in connection therewith*"

11. The correlative duty imposed on the Lessee to pay a due proportion of the costs is reiterated in clause 2(b).

12. The Company was dissolved on 10th October 2000, accordingly its interest under the lease passed to the Crown as bona vacantia. By a letter, dated 18th June 2012, the Treasury Solicitor wrote to the Residential Property Tribunal Service, indicating that he had disclaimed that interest on 29 May 2012 and that the Crown therefore had no further interest in this application.

13. From 2000 to 2011 the then lessors exercised their right under clause 6(3) to carry out the Company's duties. Since 2011 a right to manage company has been in place.

14. The issue between the parties is how the new lease should be drafted in the light of the Company's dissolution.

The Law

15. Section 57(6) of the 1993 Act, provides:

"*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.

16. The parties' representatives were very helpful in narrowing the issue between them. It was common ground that s57(6)(b) applied, in the sense that it would clearly be unreasonable to include in the new lease, without modification, terms in the existing lease granting rights to, or imposing duties on, a company that has long ceased to exist. We agree with that conclusion.

17. They were also agreed that the question for us to decide was what that modification should be.

The Applicant's claim

18. Mr Sherard's case was that if the Company were to be excised from the lease, there would be no party remaining to undertake the duties of repair, management and so on. One purpose of section 57(6) was to avoid placing landlord and tenant in an unreasonable position after renewal of the lease. It would be unreasonable – in the sense of section 57(6) – for the lease to make no provision for the carrying out of the former Company's duties.

19. Mr Sherard told us that if no-one were responsible for insurance and repair of the building, the Council of Mortgage Lenders' Handbook suggested that it might be very difficult for the tenant to sell the flat. Although the Handbook was included in the trial bundle, neither party drew attention to any relevant provision in it.

20. He pointed out that the landlord could be compelled by clause 4(3) of the lease to carrying out the Company's duties, so that imposing those duties directly was no great hardship on the landlord.

21. Mr Sherard suggested that a further factor in favour of imposing the Company's duty on the landlord was the fact that there was a Right To Manage (RTM) company responsible for management of the block in existence which meant that any duty imposed on the landlord would be unlikely to materialise. If it was our view that there were competing factors in deciding what was most reasonable, this would work in the tenant's favour.

The Respondent's position

22. Mr Strang proposed instead that the new lease should simply impose no duty on the Company – the Company's former duties not being transferred to any other party.

23. He referred us to the unreported Lands Tribunal case of *Gordon v Church Commissioners for England* (LRA/110/2006), in which His Honour Judge Huskinson said:

> "*In my judgment there is no power under section 57(6) for a party to require that there is added into the new lease a new provision which is not to be found in the old lease. There is nothing illogical or unfair in this because, apart from the grant of the new lease, the parties would have continued to be bound by the terms of the old lease for the next X years where X may be a substantial period ... It is one thing to exclude or modify a term or terms of the existing lease where a good reason (ie a reason within paragraph (a) or (b) of section 57(6) can be shown. It is another thing to permit a party to seek a rewriting of the lease by the introduction of new provisions.*"

24. Mr Strang submitted that the essence of a "term" of an agreement was the parties who were bound by it. A term imposing duties on a different person was a different term, not merely a modification of an existing term.

25. The modifications proposed by Mr Sherard would transfer duties from the Company to the landlord. Although, in principle, that could be achieved by changing the text of terms in the old lease, and could be understood as a "modification" of those terms, in reality Mr Sherard wished to introduce entirely new terms in the agreement. According to *Gordon* this could not be done.

26. Mr Strang pointed out that a change to the terms of the instant lease would mean that the leases of the block were out of step. The landlord would owe duties of management only to the Applicant and no-one else.

27. Mr Strang pointed out that the Applicant could avoid the unsatisfactory situation created by the Company's demise by making an application for variation of her lease under s35 of the Landlord and Tenant Act 1985. An advantage of that process would be that the Respondent would be able to use s36 of that Act to bring the other leases of the block before the tribunal and so avoid any inconsistency.

28. The existence of the Right To Manage company ought, he suggested, be a point in favour of the Respondent. At present there were adequate measures in place to ensure the proper management of the block and so any prejudice to the tenant that might exist as a result of having a lease which imposed no management duties on any person would be avoided.

Conclusions

29. In our view it was a matter of common sense that a flat, the lease of which lacked any provision for insurance, repair or management of the block, would be harder to sell.

30. We did not think the existence of the Right To Manage company was relevant to our decision. The new lease will last for a considerable period. There is absolutely no guarantee that the Right To Manage company, or even the concept of a Right To Manage company, will continue to exist in that period.

31. We took the view that any consideration of unreasonableness inherent in section 57 would have to refer to the whole period of the new lease and should not be significantly influenced by what might be temporary arrangements.

32. Although we found it difficult to decide between the parties, in the end we preferred the Respondent's case.

33. In our view Mr Strang's submission that section 57(6) cannot be used to transfer a duty from one person to another probably goes too far. We would not like to be seen to be ruling out such a possibility.

34. Nevertheless, His Honour Judge Huskinson's dictum in *Gordon*, drawn to our attention by Mr Strang, provides useful guidance. It makes it clear that there is nothing illogical or unfair in allowing an unsatisfactory situation that prevailed under the old lease to continue into the new lease.

35. Even if the change proposed by the Applicant does not amount to the writing of new provisions into the lease – a course of action forbidden by *Gordon* – we would be using section 57(6) to rectify a situation that has, on the evidence before us, existed for nearly 12 years.

36. Two further factors persuaded us that the Respondent had the better case: first that the Applicant may, at any time, apply for a variation of her lease pursuant to the 1987 Act; and second that the old lease itself contemplates that the Company may go into liquidation, without making any provision for the Company's duties to be transferred to any other person.

37. If the existing lease contemplated a situation where no-one would be obliged to perform those duties, we do not think it appropriate for us to exercise our powers under section 57(6) to improve on that original drafting.

38. At our invitation, the parties' representatives helpfully agreed on two forms of words for the new lease that would apply depending on whether we preferred the Applicant or the Respondent's case.

39. Since we have decided for the Respondent, we attach as a schedule to this decision, the amendments to be made to the draft lease submitted by the Applicant at pages 36 to 58 of the hearing bundle.

40. A copy of this judgment was circulated to the parties in order for their representatives who were present at the hearing to check that we had correctly recorded what was then agreed in the form of the schedule.

41. The only written response was a letter, received by the tribunal on 17 October 2012 which suggested that the lease be varied in ways different from those discussed at the hearing.

42. Having heard the case and come to a decision on the basis of the evidence and arguments put before us, we do not think it would be sensible for us to re-open a matter agreed by the parties. For that reason we do not accede to the Respondent's request for further variations.

43. We would like to indicate our gratitude to Mr Strang and Mr Sherard for the helpful and clear way they put their cases.

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Francis Davey

Chair

21 September 2012

Schedule

Page numbers refer to the hearing bundle supplied by the Applicant

Page 43	
New clause 4(5)(a)	
Line 1	Delete to line 5 and line 6 up to and including "PROVIDED ALWAYS that".
Lines 6 – 11	Restore deleted material
Line 7	after "any of the obligations", replace "of" with "that would have been imposed on"
Clause 4(5)(b)	delete whole clause
Clause 4(6)	delete whole clause
Page 46	
Clause 6(1) Line 9	Delete from "except in .." to the end of line10.
Deleted clause 6(3)	Modify whole clause to "The Lessor shall be entitled to undertake the obligations that would have been imposed on the Company as set out in Part IV of the Schedule hereto and shall be entitled to recover from the Lessee a due proportion of all monies costs charges and expenses incurred by the Lessor in connection therewith."
Clause 7	Delete whole clause
Page 47	
Delete clause 8	
Page 49	
Paragraph (2), line 4	Delete from "subject to" to the end of line 5.
Paragraph (8), line 1	After "container" insert "previously". Restore "Company" and delete "Lessor".
Page 51	
Paragraph (8), line 3	Delete from "or to which" to the end of

	the line.
Paragraph (11), line 1	Replace "unless the Lessor shall provide" with "unless the Company has provided".
Page 52	
Part IV, first paragraph	Replace the whole paragraph beginning "Subject to the due …" with "The obligations that would have been imposed on the Company are as follows."
For the remainder of Part IV (pages 52 – 54), in every case where the word "Company" has been replaced by "Lessor" restore the word "Company" and delete the word "Lessor", subject to any further change below.	
Page 54	
Part IV, paragraph (12)	Delete the whole paragraph
Part V, paragraph (b)	After the end of paragraph (b) insert new paragraph (c) "The Company was Southwold Road Management Company Limited (now removed from the register) whose registered office was at 50 Lancaster Road Enfield Middlesex EN2 0BY"