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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/00AJ/OLR/2015/0351
Property	:	33 Cromwell Close, London W9 6BN
Applicant	:	Jasbinder Kaur Sidhu
Representative	:	IBB Solicitors
Respondent	:	Grays Inn Estates Limited
Representative	:	Stevensons Solicitors
Type of Application	:	Enfranchisement
Tribunal Members	:	Judge Robert Latham Ian Holdsworth, FRICS
Date and venue of Hearing	:	9 April 2015 10 Alfred Place, London WC1E 7LR
Appearance for Applicant	:	Nicholas Trompeper (Counsel)
Appearance for Respondent	:	Peter Hosking (Solicitor)
Date of Decision	:	16 April 2015

DECISION

The Tribunal determines that we have no residual jurisdiction in this matter, all the relevant terms having been agreed by the parties. We therefore strike out this application pursuant to Rule 9(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Introduction

1. On 12 February 2015, the Applicant tenant issued this application made pursuant to Section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") for a determination of the premium to be paid and the terms for a new lease. In Section 8, the Applicant asks the Tribunal to determine both the premium payable and the provisions (other than the premium) to be contained in the new lease. It is asserted that the Applicant has proposed a premium of £25,700; whilst the landlord has proposed on of £48,250. The Applicant failed to complete Section 9 which invited her to identify the terms in dispute and the proposed provisions to be contained in the new lease.

2. The Respondent responded to the application by asserting that the Tribunal had no jurisdiction to determine the application as all of the terms of the acquisition had been agreed prior to the issue of the application.

3. On 27 February, the Tribunal gave Directions for the jurisdiction issue to be determined as a preliminary issue. The Tribunal proposed determining the matter on the papers. However, either party was invited to request an oral hearing. The Applicant requested such a hearing.

The Hearing

4. The hearing of the application took place on 9 April. The Applicant was represented by Mr Nicholas Trompeper, Counsel. The Respondent was represented by Mr Peter Hosking, Solicitor. Neither party adduced any evidence. We were rather required to determine the issue on the basis of the correspondence passing between the parties and their respective advisors. Both advocates filed Skeleton Arguments. The landlord also filed a Statement of Case, dated 10 March 2015.

5. Mr Hosking criticised the Applicant for failing to file a Statement of Case. Strictly, this was not required by the Directions. He also complained about Mr Trompeper relying on a Skeleton Argument and legal authorities which he had only seen on the morning of the hearing. The Tribunal was assisted by the Skeleton Arguments filed by both parties. Mr Hosking addressed us fully on the legal authorities upon which the Applicant sought to rely.

6. The Applicant had failed to file two bundles of documents as required by the Directions. The Tribunal therefore granted a short adjournment to enable the parties to prepare two copies of a paginated bundle.

7. The sole issue for the Tribunal to determine on this preliminary issue is whether, when the proceedings were issued, there was outstanding issue

to be determined relating to the terms of the new lease or the premium payable.

8. Mr Hosking suggested that correspondence between the parties' surveyors was privileged as being "without prejudice" negotiations. The public policy behind this rule is to encourage parties to settle their differences, rather than litigate. "Without prejudice" material will be admissible if the issue in dispute is whether or not negotiations resulted in an agreed settlement (see *Walker v Wilsher* (1889) 23 QBD 335, which was more recently approved by Dackworth LJ in *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378 at p.1382-3). The Tribunal indicated to the parties that it was minded to consider all relevant material. In so far as we should conclude that any was privileged, it would be excluded from our consideration as to whether there was an agreed settlement.

The Law

9. Section 48 of the Act permits either the tenant or the landlord to make an application to the Tribunal where any of the "terms of the acquisition remain in dispute at the end of the period of two months beginning with the date when the counter-notice or further counter-notice was so given" (s.48(1)). The phrase "the terms of acquisition" is defined by s.48(7) (emphasis added) as "the terms on which the tenant is to acquire a new lease of his flat, whether they relate to the terms to be contained in the lease or to the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of the lease, or otherwise". Once all the terms have been agreed or determined by a Tribunal, the Leasehold Reform (Collective Enfranchisement and Renewal) Regulations 1993 ("the Regulations"), provide for a lease to be prepared and the Act provides a default procedure.

The Facts

10. The Tenant's Claim to a New Lease is dated 12 June 2014. Paragraph 7 states that IBB Solicitors ("IBB") have been appointed to act for the tenant in connection with the claim. We refer to the solicitor who had conduct of the case as "RA". The tenant proposed a premium of £25,700 and that the terms contained in the new lease should be the same as in her existing lease.

11. The Landlord's Counter-Notice admitting the claim is dated 13 August 2014. The landlord proposed a premium of £48,250 and a number of amendments to the existing lease. The Counter-Notice stated that Stevensons were acting on behalf of the landlord.

12. On 13 October 2014 (at p.63 of the Bundle), IBB wrote to Stevensons in these terms (emphasis added):

"Further in this matter we understand that our clients' respective Surveyors have been in negotiation with regard to the proposed lease extension.

The terms of the new Lease as per your Notice of 13th August have been agreed and we accordingly look forward to receiving draft lease for approval.

Should you require any further information or documentation from ourselves we should be grateful if you could let us know by return.

We look forward to hearing from you."

It is an open letter. It is not marked "subject to contract".

13. On 22 October (p.65), Stevensons responded:

"Thank you for your letter dated 13 October 2014.

We note what you say and enclose draft lease in triplicate for approval by yourselves and the management company."

The terms of the draft lease are at p.87-95. At LR7, a premium of £48,250 is specified. The other terms largely reflect those proposed by the landlord in its Counter-Notice. Mr Trompeper highlighted some differences. However, these were not controversial.

14. On 14 November (p.66A), IBB wrote to the management company:

"We write to advise that we act on behalf of Jasbinder Kaur Sidhu in respect of the proposed extension to her current lease.

We enclose a copy of the proposed raft (sic) new lease for your approval and look forward to hearing from you as soon as you are able.

Please advise as to whether you require any further information or documentation.

We attach a copy of our client's registered title to assist"

15. On 10 December (p.67), IBB wrote to Stevensons:

"Further to you letter of 22nd October we have finally received confirmation from the Management Company that they approve the Lease.

In view of the time constraints (the matter needs to be concluded by 22nd December) they are signing the copy that we have forwarded to them.

We should be grateful if you could please forward engrossment copy to us by return for signature by our client together with completion statement."

Mr Trompeper was unable to assist us with what the time constraints were. The deadline for any application to the Tribunal would have been 13 February 2015. There may have been a desire to complete the lease extension before Christmas. The Tribunal notes that IBB made no suggestion that the issue of the premium payable had yet to be agreed.

16. On 12 December (p.96A), Stevensons replied:

> "Thank you for your letter dated 10 December 2014.
>
> We enclose proposed counterpart lease together with completion statement as requested which we have calculated to 22 December 2014.
>
> Please let us have the proposed lease executed by the management company whereupon we will forward this to our client for execution. It is however unlikely now that we will have this back executed by our client by 22 December 2014."

The Completion Statement is at p.97. It specifies the premium of £48,250. The total sum required to complete, less the statutory deposit, is stated to be £48,006.23.

17. On 16 December (p.69), IBB responded to Stevensons:

> "Further to your letter of 12th December we now enclose herewith Lease signed by the Management Company.
>
> We have forwarded Counterpart Lease to our client for signature.
>
> We note that all concerned are trying to complete this matter for 22nd December next and will endeavour to achieve this. We also note your comments in the last paragraph of your letter".

18. On 17 December (p.70), IBB responded changing the tone of the correspondence (emphasis added):

> "I write further to your letter dated 12 December 2014.
>
> Despite our recent correspondence suggesting that the terms of the new lease have been agreed, our client informed us that the premium of £48,250 has not been agreed. In the circumstances, completion cannot take place until the premium has been agreed.
>
> I understand that the parties' surveyors are still negotiating the premium and your client's surveyor has suggested that a premium of £38,500 is payable for the new lease.
>
> In the circumstances, the two month period pursuant to section 48(5) of the 1993 Act does not apply to this matter as all the terms of acquisition have not been agreed.

> I would therefore be grateful if you can confirm your client's position as soon as possible."

The Tribunal notes that this letter was written a day after IBB had forwarded the Counterpart Lease to their client which specified the premium of £48,250. RA did not write this letter; WK had now assumed conduct on the matter on behalf of the tenant. It is apparent that he had spoken to his Surveyor before writing this letter.

19. Thereafter, there was further correspondence between the Solicitors. However, this largely rehearsed the arguments which we have been required to consider:

(i) On 22 December (p.71), Stevensons asserted that the terms of acquisition had been agreed. Reference was made to the Regulations which sets out the procedure to be followed when the terms of acquisition have been agreed.

(ii) On 7 January 2015 (p.72), IBB asserted that whilst the letter of 13 October 2014 had stated that the terms of the new lease had been agreed, it did not state that the premium had been agreed.

(iii) On 12 January (p.73), Stevensons responded asserting that the premium payable is not merely a term of a lease, it as a fundamental term.

(iv) On 15 January (p.74), IBB asserted that the landlord was construing the letter of 13 October 2014 in an unduly narrow manner. The letter should be read in its entirety. Reference was also made to *Pledreams Properties Ltd v 5 Felix Avenue London Ltd* [2010] EWHC 3024 (Ch); [2011] L&TR 20 ("*Pledream Properties*") in support of the proposition that there needs to be a positive, rather than an implicit agreement, before one can say that agreement has been reached on the terms of a lease.

(vi) On 26 January (p.76), Stevensons made 5 points in support of their averment that all the terms of the lease were agreed on "13 October 2014 onwards".

(vii) IB responded by a letter wrongly dated 15 January (at p.74)

20. On 11 February, IBB made the current application to the Tribunal on behalf of the tenant suggesting that both the premium and the terms of the extended lease were in dispute.

21. Mr Trompeper referred us to the state of negotiations between the surveyors appointed by the parties to negotiate the premium. We set this

out briefly as we are satisfied that does not assist us in determining what, if any, agreement had been reached between the Solicitors. Mr Hosking conceded that he had not informed his Surveyor that agreement had been reached.

22. On 15 September 2014, the Surveyors made contact. Richard Sumner ("RS") acted on behalf of the tenant and Andrew Balcombe (AB) on behalf of the landlord. We were referred to a number of e-mail exchanges. We note that these exchanges are marked "without prejudice":

(i) On 17 October (p.84), AB explained the basis of the premium of £48,000 which the landlord had specified in the Counter-Notice;

(ii) On 20 November (p.83), RS stated that he would be willing to recommend £30,000 to the tenant.

(iii) On 28 November (p.82), RS chased up a response from AB.

(iv) AB responded later that day (p.81). He was not willing to accept £30,000, but would recommend a figure of £37,500 to the landlord, if this were agreed by the tenant.

(v) On 15 December (p.79), RS questioned how the figure of £37,500 could be justified.

(vi) AB did not respond. On 19 January 2015 (p.79), RS telephoned him. On the same day, AB e-mailed explaining his reason for not responding: "this was because I was informed that the terms were agreed by your client's solicitor and therefore there was nothing to discuss".

(vii) On 26 January (p.78), RS responded asserting that the premium had not been agreed "according to my client's solicitors and my client".

The Submissions of the Parties

23. Mr Hosking submitted that the landlord's Counter-Notice set out the terms, including the premium, upon which the landlord was willing to agree to an extension of the tenant's existing lease. In contractual terms, this was "an offer". IBB's letter of 13 October 2014, was an "acceptance" of that offer. The phrase: "the terms of the new Lease as per your Notice of 13th August have been agreed" is unambiguous. It is a matter of construction as to what the tenant was agreeing. There was nothing in the letter suggesting that this agreement excluded premium specified in the Counter-Notice. Indeed, the premium is a fundamental term of any new lease. In so far as is necessary, he would rely upon the subsequent correspondence up to, and including, 16 December 2014, it support of his

averment that there was no uncertainty between the parties as to the scope of what had been agreed.

24. Mr Trompeper argued that the issue for the Tribunal was a narrow one: "Is it clear that negotiations between the Tenant and the Landlord have been completed and final agreement has been reached in relation to the terms of the acquisition of the new lease of the flat"? By reference to the documents before the Tribunal, he averred that the question must be answered in the negative. He referred us to the decision of Lewison J in *Pledream Properties* and highlighted three passages:

> (i) "whether a term has been agreed is, in my judgement, a question of fact. The Act does not deem a term to have been agreed when in fact it has not" (at [18]).
>
> (ii) "Such indications as there are in case law suggest that what one is looking for is positive agreement rather than silence" (*at 20]);
>
> (iii) Lewison J approved a the following "workable test" proposed by HHJ Robinson in *City of Westminster v CH (2006) Ltd* [2009] UK Upper Tribunal 174 LC:
>
> > 'It must be clear that negotiations have been completed and final agreement has been reached either orally or in writing on a specific term or terms that is not in any way contingent on agreement or determination of some other term or terms.'

The Tribunal's Determination

25. The Tribunal is satisfied that when these proceedings were issued, there was no outstanding issue to be determined relating either to the terms of the new lease or the premium payable. The Tribunal is further satisfied that agreement was reached on these issues on 13 October 2014.

26. Our decision turns on our construction of the tenant's letter of 13 October 2014. We agree with Mr Hosking that the phrase: "the terms of the new Lease as per your Notice of 13th August have been agreed" is unambiguous. The landlord's Counter-Notice, dated 13 August 2014, set out the terms, including the premium, upon which the landlord was willing to agree to an extension of the tenant's existing lease. By IBB's letter of 13 October 2014, the tenant accepted those terms. We agree with Mr Trompeper that whether agreement had been reached is a question of fact. In this case, IBB's letter is the clearest evidence of a "positive agreement", the tenant's Solicitor expressly stating in writing that the terms of the new lease "have been agreed. There can no doubt about the meaning of this phrase.

27. It has not been entirely clear whether the Applicant's position has been (i) that there was no agreement as all on 13 October, or (ii) that there was an agreement, but this was restricted to the terms of the lease and excluded the premium. Mr Trompeper seemed to adopt the later position.

28. The Tribunal is satisfied that the letter of 13 October can only be construed as agreement to the terms of the lease, including the premium:

> (i) The agreement expressly relates to "the terms of the new lease as per your Notice of 13th August 2014". The premium payable is a fundamental of the lease. In setting out their counterproposals in their Counter-Notice, the landlord highlighted the premium that is proposed before setting out the other proposed terms.
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> (ii) Had RA sought to signify the tenant's agreement to the terms of the lease, excluding the premium, she could have done so. She did not do so. The inference is therefore that all "the terms of the new Lease as per your Notice of 13th August" had been agreed.
>
> (iii) Paragraph 1 of the letter refers to the negotiations between the Surveyors. The Surveyor had been instructed to negotiate the premium. RA therefore clearly had the premium in mind.
>
> (iv) In paragraph 1, RA uses the past tense: "our clients' respective Surveyors have been in negotiation". This implies that those negotiations had resulted in a successful outcome. Any communication between RA and AB would have been privileged. The objective bystander construing this letter would not have known what advice, if any, had been proffered by AB.
>
> (v) The tenant requests a copy of the draft lease for approval. This draft lease would have included the agreed premium.

29. The Tribunal has regard to the subsequent sequence of events merely to ask ourselves whether there was any uncertainty as to what had been agreed on 13 October 2014 . The objective bystander would conclude that there was no uncertainty. That bystander would have regard to the landlord's letter of 22 October and the draft lease that was enclosed. The draft lease related to the terms of the lease including the premium. The landlord was the recipient of the tenant's letter of 13 October. The landlord understood that the tenant's acceptance extended to the premium. The objective bystander would conclude that the landlord had been entitled to reach this conclusion. IBB's letters dated 14 November, 10 December and 16 December all suggest that RA also understood the agreement to extend to the premium. IBB's desire to complete the lease extension by 22 December was only consistent with the premium that would be payable for that extension having been agreed.

30. On 17 December 2014, IBB's position changed. WK took over the conduct of the matter from RA. On the previous day, IBB had forward their client the Counterpart lease which referred to the premium of £48,250. The inference is clear. The tenant was taken by surprise that her Solicitor had agreed a premium of £48,250. The tenant may not have given their Solicitor authority to agree such a premium. However, IBB had ostensible authority to negotiate and conclude a settlement on behalf of their client. The issue is what, if anything, RA had agreed with her opponent.

31. The Tribunal have had regard to the e-mail exchange between the parties' Surveyors. We are satisfied that it is admissible evidence in so far as it assists to determining whether agreement was reached between the parties. However, the Tribunal is satisfied that this e-mail exchange does no more than indicate that the Surveyors were unaware of the negotiations which had been conducted by their client's Solicitors. It is always open to a Solicitor to reach agreement on a premium for a lease extension without reference to their Surveyor. It is the Solicitor who has authority to reach any settlement on behalf of their client. The Surveyor does no more than proffer informed advice as an independent expert. Any communication between Solicitor and their Surveyor is properly a matter of legal privilege.

32. In IBB's letter of 13 October, RA asserts that "our respective Surveyors have been in negotiation". This suggests that any negotiations have been completed. This was inaccurate in so far as the negotiations had not yet started. However, when reading that letter, the landlord would have had no knowledge of what advice, if any, had been tendered to the tenant by her expert.

Further Matters

33. In his closing submissions, Mr Trompeper indicated that were the Tribunal to find that the tenant was bound by the premium of £48,250, she would withdraw her notice and re-submit a further notice after the requisite period of time had elapsed. Whilst that might be one option, the tenant should seek independent legal advice on the options open to her.

34. In his Skeleton Argument, Mr Hosking sought an order for costs against the Applicant under Rule 13 of the Tribunal Rules. The Tribunal inquired whether he was making the application under Rule 13(1)(a) (a wasted costs order) or Rule 13(1)(b) (unreasonable conduct) and whether the order was sought against the Applicant or her Solicitor. He responded that he was pursuing all four options. The Tribunal reminded Mr Hosking that this Tribunal remains a non-cost shifting jurisdiction. A costs order under Rule 13 is only made in exceptional circumstances. A party seeking such an order must frame their case with precision so that the other party understands the case that it has to answer. In the light of

this observation, Mr Hosking withdrew his application, reserving the right to renew it within 28 days of our decision. Should Mr Hosking renew his application, it will be reserved to this Tribunal.

Robert Latham
Tribunal Judge

Date: 16 April 2015