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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAM/OLR/2015/0212**
Property	:	**10 Georgian Court, Skipworth Road, London E9 7TW**
Applicant	:	**Daisy Jellicoe**
Representative	:	**Mr R Cherry, of Counsel instructed by Darlingtons Solicitors LLP**
Respondent	:	**Sinclair Gardens Investments (Kensington) Limited**
Representative	:	**Mr T Boncey, of Counsel instructed by W H Matthews & Co Solicitors**
Type of Application	:	**Consideration of lease terms under the Leasehold Reform, Housing & Urban Development Act 1993**
Tribunal Members	:	**Tribunal Judge Dutton** **Mrs H C Bowers MRICS**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR on 4th August 2015**
Date of Decision	:	**1st September 2015**

DECISION

DECISION

The Tribunal determines that the form of the new lease shall be in version C as contained in the bundles of papers behind tab 10 subject to the following amendments. Clause 6.4 of the lease should read "This lease is granted under Section 56 of the Act in substitution for the existing lease." In addition the reference to the company in the recital (3) should be deleted. Finally, clause 4.2 of the lease should be deleted in its entirety.

The Tribunal declines to make an order under Rule 13 of the Tribunal Rules (First Tier Tribunal) (Property Chamber) Rules 2013 (Rules) for the reasons set out below.

BACKGROUND

1. This was an application by Daisy Jellicoe, the Applicant, to determine the lease terms for the property at 10 Georgian Court, Skipworth Road, London E9 7TW (the property) under the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 (the Act).

2. The premium payable for the extension of the lease has been agreed at £22,792 in November 2014. Later that month it appears that the Applicant purchased the leasehold interest in the property from the former lessee and at the same time was assigned the right to the new lease.

3. Correspondence flowed between the parties from December 2014 through to May 2015 when at which point three draft leases were prepared by the solicitors for the Respondents for consideration. Matters could not be agreed and the case came before us for hearing on 4th August 2015.

4. The lease acquired by the Applicant was dated 19th August 1983 for a term of 99 years from 29th September 1982. The original parties to the lease were Smardene Properties Limited (1), the original lessee (2) and Skipworth Road Management Company Limited (3) (the old company).

5. The old company was a party to the lease with the object of providing certain services to and for the lessees in the flats and for essentially managing the property on behalf of the freeholder. The lease contains the usual provisions for the payment of service charges and includes at paragraph 6(2) the right for the lessor to undertake the performance of the obligations on the part of the old company if it fails to do so.

6. It appears that the old company was dissolved in 1991 and a new company, Skipworth Road Management Company (1992) Limited (new co) was incorporated. This was in September 1992 and since that time new co has been taking on the obligations of the old company on an ad hoc basis. It does not appear that this issue was spotted by previous assignees or indeed those acting on behalf of the Applicant in this case. Nor is it clear when the Respondent first discovered this problem but certainly no steps were taken by any party to resolve the issue. It does appear that new co has been successfully managing the property for a number of years, presumably recovering service charges from the lessees and it may well be therefore, that some form of contract has been established with the

present lessees. It is said, however, that no such contract exists between the Respondent and new co.

7. In Mr Cherry's skeleton argument he sets out in some detail the correspondence that passed between the Applicant solicitors and the Respondent solicitors. It was accepted by Mr Boncey, on behalf of the Respondent, that his instructing solicitors had misunderstood the provisions of Section 57 and adopted a position which was incorrect. That, however, was corrected when he was instructed but it is this failing on the part of the Respondent solicitors which gives rise to the application for costs under the Rules. We will deal with that matter as a separate heading.

8. Briefly put, it is the Applicant's case that Section 57 (6) of the Act empowers the Tribunal to modify the lease by substituting new co for the old company. In the alternative, if we are not persuaded that the addition of a new party falls with the provisions of Section 57 (6), then the new lease should either be in the terms of the original, insofar as it retains the clauses referring to maintenance and service charges. It was said by Mr Cherry in his skeleton argument that the Respondent's continuing refusal to agree any of the above was wholly unreasonable. For the Respondent Mr Boncey contends that the existing lease contains no defect, that it would not be unreasonable to include the terms of the existing lease without modification but that to make the modification proposed by the Applicant, that is to insert a new party, would be unreasonable.

9. The starting point from the Respondent's point of view was that the new lease to be granted under Section 57 (6) should be on the same terms as the existing one subject to the provisions of Section 57 (1) which it is we believe commonly agreed does not apply in this case. One therefore has to consider the provisions of Section 57 (6) and in particular sub-sections (a) and (b). For the Applicant Mr Cherry contended the lease was defective, applying the wording from the Lands Tribunal case of Gordan v Church Commissioners in that the lack of effective provisions for maintenance repair and insurance of the block constitutes a defect. Further, the absence of management provisions is contrary to the Council of Mortgage Lenders requirements. It is suggested that the modification of the terms by substituting new co for the old company would remedy the defect.

10. It is said by Mr Cherry that Section 57 (6)(b) is also satisfied as the dissolution of the old company results in an absence of maintenance and insurance provisions.

11. The skeleton argument by Mr Cherry also dealt with the conduct of the landlord giving rise to the claim for costs.

12. For the Respondent Mr Boncey's position was that Section 57 (6) was not intended to add an entirely new provision, in this case a new party to the lease. Again by reference to the Gordon case and also Burchell v Raj Properties Ltd, an Upper Tribunal case, sub-section (6) it was said, does not permit the addition of a wholly new party as this would amount to re-writing the lease, which is not permitted. Under Section 57 (6)(a) the submission by the Respondent was that there was no defect in the existing lease, but that if there was, the proposed modification was not necessary to remedy it. The submission made, both in the skeleton argument and before us, was that there was no defect in the existing lease because at the time the lease was originally granted the inclusion of terms imposing rights and

obligations on the management company was not a mistake. Plainly all the original parties to the existing lease intended those covenants to be included. The submission went on to contend that if the lease had run its full term, there would be no provision for the company's obligation to be performed by any other party unless the Respondent exercised its powers under clause 6.2 of the lease. The proper course was for the tenants to make application under the Landlord and Tenant Act 1987 for all leases in the building to be amended.

13. It was said further that new co would have no contractual entitlement to the remuneration for performance of its obligations from the other tenants, save where it could be argued that some form of contract had been entered into and of course there was no contractual relationship with the lessor under the original lease. The proposal put forward by the Respondents was that version C of the lease should be approved but just prior to the hearing it was suggested that there should be some minor amendments to clause 4.2 of the lease in the form of italic wording set out in Mr Boncey's skeleton argument.

14. In addition to their skeleton arguments both Counsel discussed with us the appropriate way forward. It is accepted we believe by both sides that the present provisions are not ideal but it remains the Respondent's position that the provisions of the lease cover sufficiently the maintenance provisions and that this was the bargain struck when the lease was entered into and was not considered to be a problem at that time. The Respondent's position is that a term could not include the addition of a party and in this regard we were referred to sub-section 9 of Section 57 where it refers to a party to an agreement collateral to the lease which was not applicable in this case.

15. There was also discussion as to whether new co had been fully advised as to their obligations should they become a party to this lease. It appears that another lease extension had taken place some time ago when new co were indeed added as a party to the lease. The present solicitors to the Respondent acted at that time but it was said by Mr Boncey that this was a mistake and that no new leases extended under the Act would be granted on those terms. Further, we were reminded that new co was not a party to this application.

16. The Applicant's position was that a substitution of the party was allowed as it was a term within the meaning of the Act. It is accepted, however, that there appears to be no specific authority as to what can and cannot be done with regard to the substitution of a party.

17. Mr Cherry was concerned that even just before the Hearing there had been further amendments made to draft C which he thought unreasonable. He did indicate, however, that he could "live with draft C" provided that the further wording suggested by Mr Boncey was not included.

18. Mr Boncey in discussions indicated that he would have no objections to that additional wording being removed or indeed the totality of the clause 4.2 from the draft C.

THE LAW

19. The provisions of Section 57 are set out below and we have applied those as well as considering the authorities given to us by Counsel.

FINDINGS

20. This was an interesting case, well-argued by both Counsel. There is clearly a problem. However, we were attracted to Mr Boncey's view that to create an obligation on the part of the landlord when none existed in the original lease, and would not have existed until the lease expired, is not appropriate under the provisions of the Act. Furthermore, we are not persuaded that the addition of a new party falls within the provisions of Section 57. We do not consider the addition of a party is a term of the lease. Furthermore we have no information available as to the constitution of the new company, its memorandum and articles of association or its membership structure. We should record that we received correspondence from Darlingtons Solicitors LLP dated 4th August 2015, which arrived after we had reached our decision, although not committed to writing. The correspondence does not cause us to alter our findings. The letter purportedly agreeing to take on the role of management by the new co comes from managing agents and we have no information on their contract with new co and it does not answer our concerns as to the status of new co, putting aside our view that the insertion of a new party does not come within the ambit of section 57.

21. We do accept, however, it is an unsatisfactory position. It seems to us the matter can be resolved by applications under the Landlord and Tenant Act 1987. If one tenant were to apply to amend under Section 35 it seems to us that the landlord could make a cross-application under Section 36 it being clear that the amendment of one lease would not be sensible and that all leases should be amended. The alternative would be for a majority of the lessees to make a joint application under Section 37. It does seem to us that it is in the interests of the existing lessees to have this matter resolved. Not to do so could well cause problems with regard to any further sale and as we expressed above, we are surprised it has not caused problems before now.

22. Doing the best we can, therefore, it seems to us that with the limits on the changes that can be made bearing in mind the authorities and the provisions of Section 57 (6), we need to proceed on the basis that version C is the appropriate one. That, however, needs to be slightly amended to remove the reference to the company and the recital (3), remove the wording at clause 4.2 as it adds nothing but in fact obfuscates matters and also include provisions under 6.4 that this is the lease granted under Section 56 of the Act, wording which is agreed between the parties.

23. We then turn to the question of the costs under the Rules. It is right to say that on 3rd December 2014 the solicitors for the Applicant wrote in a letter as *"Our client does not wish to incur further costs in this matter and is satisfied to complete the new lease with reference to the existing lease on the basis that the lease term and the ground rent provisions are varied if the new Management Company are not willing to enter into the new lease."* It is not wholly clear what steps were taken to pursue the involvement of the new management company. The response, however, was by W H Matthews & Co that the old company should be restored. In response to that by a letter dated 11th December 2014 the Applicant said *"we accept that the new lease would technically be defective if there are no*

enforceable covenants on the part of the freehold or a management company to maintain and repair the building. However, our client is willing to accept the position as it currently stands and would like to complete the matter as soon as possible now that the premium has been agreed. Whilst we agree that the position needs to be regularised, this is a matter for your client and the current management company to resolve in due course. This should not delay completion of our client's new lease."

24. Correspondence then passed between the parties and here the confusion on the part of the solicitors for the Respondents vests itself. An email was received from Blue Property Group, apparently the managing agents of new co, indicating that they had signed the previous lease extension on behalf of new co and were happy to do so for this property. However, if gave no clear indication as to their ability to do so and their rights. On went the correspondence. On 23rd February 2015 a draft lease was sent on a without prejudice basis for discussion basis, which was returned approved subject to amendment. It appears that as a result of further instructions being received, that lease was not proceeded with and in May of this year, three forms of leases were sent, the first providing for the restoration of the old company to the register, the second providing for new co to be inserted and the third form C proceeding with no third party. It is said by the Applicants that the Respondents were unreasonable in their conduct of this matter by taking so long to produce draft leases when it was clear last year that the Applicant would enter into some form of lease which merely reflected the existing position leaving the Respondent to resolve the matter. The question, therefore, we are asked to consider in respect of the costs is whether this conduct was so unreasonable as to require the Respondents to pay the Applicant's costs of the work associated with the consideration of the new lease. A statement of costs was produced, we assume for the Applicant, although it did not specifically say so, in which fees of £7,882.80 were sought which includes all solicitors' fees and Counsel's fees. Together with the letter of 14th August 2015 referred to above we also received a further copy of the summary of costs which did contain a certificate to the effect that these are the totality of the costs incurred by the Applicant and was signed by a partner of the firm.

25. It is a draconian step to require a party to the proceedings before us to be responsible under the Rules for the costs of another. It is our view that the level of unreasonableness remains as it was under the 2002 Act. That is to say that unreasonableness should be read in conjunction with the frivolous, vexatious and abusive elements previously to be found in the 2002 Act. There can be no suggestion that the "defending" of the application is unreasonable and the issue must, therefore, be confined to conduct. It seems to us that the misunderstanding of the provisions of Section 57 (1) had no real impact on the conduct of the case. The issue centred around the provisions of Section 57 (6) which has resulted in a three hour hearing before us by experienced Counsel with differing views. It does not seem to us, therefore, that the actions of the Respondent could be considered unreasonable in those circumstances. We have borne in mind the somewhat strange stance struck by the Respondent's solicitors indicating that they were not willing to discuss the matter by telephone, but they did produce three proposed drafts to cover each eventuality and the position adopted by the Applicant in respect of the inclusion of new co in draft B had as much impact on the matter

coming before us as any action of the Respondent. We find that the provisions of Rules 13 have not been met and we make no order for costs.

26. We should perhaps just add as a matter of comment, that if the costs under Section 60 have yet to be considered, we trust that the Respondent's solicitors will bear in mind the complaints raised by the Applicant before us as to the manner in which the draft lease has been prepared and reflect this appropriately in such sums as they may seek to recover for the "conveyancing" aspect which is payable under the provisions of Section 60.

Judge: *Andrew Dutton*

A A Dutton

Date: 1st September 2015

57 Terms on which new lease is to be granted.

(1)Subject to the provisions of this Chapter (and in particular to the provisions as to rent and duration contained in section 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 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 (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 of payments related to the cost from time to time to 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 payment of rent.

(3)Subject to subsection (4), provision shall be made by the terms of the new lease or by an agreement collateral thereto for the continuance, with any suitable adaptations, of any agreement collateral to the existing lease.

(4)For the purposes of subsections (1) and (3) there shall be excluded from the new lease any term of the existing lease or of any agreement collateral thereto in so far as that term—

(a)provides for or relates to the renewal of the lease,

(b)confers any option to purchase or right of pre-emption in relation to the flat demised by the existing lease, or

(c)provides for the termination of the existing lease before its term date otherwise than in the event of a breach of its terms;

and there shall be made in the terms of the new lease or any agreement collateral thereto such modifications as may be required or appropriate to take account of the exclusion of any such term.

(5)Where the new lease is granted after the term date of the existing lease, then on the grant of the new lease there shall be payable by the tenant to the landlord, as an addition to the rent payable under the existing lease, any amount by which, for the period since the term date or the relevant date (whichever is the later), the sums payable to the landlord in respect of the flat (after making any necessary apportionment) for the matters referred to in subsection (2) fall short in total of the sums that would have been payable for such matters under the new lease if it had been granted on that date; and section 56(3)(a) shall apply accordingly.

(6)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.

(7)The terms of the new lease shall—

(a)make provision in accordance with section 59(3); and

(b)reserve to the person who is for the time being the tenant's immediate landlord the right to obtain possession of the flat in question in accordance with section 61.

(8)In granting the new lease the landlord shall not be bound to enter into any covenant for title beyond—

(a)those implied from the grant, and

(b)those implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994 in a case where a disposition is expressed to be made with limited title guarantee, but not including (in the case of an underlease) the covenant in section 4(1)(b) of that Act (compliance with terms of lease);

and in the absence of agreement to the contrary the landlord shall be entitled to be indemnified by the tenant in respect of any costs incurred by him in complying with the covenant implied by virtue of section 2(1)(b) of that Act (covenant for further assurance).

(8A)A person entering into any covenant required of him as landlord (under subsection (8) or otherwise) shall be entitled to limit his personal liability to breaches of that covenant for which he is responsible.]

(9)Where any person—

(a)is a third party to the existing lease, or

(b)(not being the landlord or tenant) is a party to any agreement collateral thereto,

then (subject to any agreement between him and the landlord and the tenant) he shall be made a party to the new lease or (as the case may be) to an agreement collateral thereto, and shall accordingly join in its execution; but nothing in this section has effect so as to require the new lease or (as the case may be) any such collateral agreement to provide for him to discharge any function at any time after the term date of the existing lease.

(10)Where—

(a)any such person ("the third party") is in accordance with subsection (9) to discharge any function down to the term date of the existing lease, but

(b)it is necessary or expedient in connection with the proper enjoyment by the tenant of the property demised by the new lease for provision to be made for the continued discharge of that function after that date,

the new lease or an agreement collateral thereto shall make provision for that function to be discharged after that date (whether by the third party or by some other person).

(11)The new lease shall contain a statement that it is a lease granted under section 56; and any such statement shall comply with such requirements as may be prescribed by rules made in pursuance of section 144 of the Land Registration Act 1925 (power to make general rules).