



**FIRST - TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

<b>Case Reference</b>	:	LON/00AQ/OLR/2014/1927 LON/00AQ/OLR/2014/1942
<b>Property</b>	:	Flats 15A and 19B Vancouver Mansions, Vancouver Road, Edgware, Middlesex, HA8 5DB
<b>Applicants</b>	:	Marina Nazzarena Mobed (Flat 15A) Mohammed Yuqub & Mohammed Yousef (Flat 19B)
<b>Representative</b>	:	Moerans Solicitors
<b>Respondent</b>	:	Brickfield Properties Limited Halliard Property Co Limited (Freeholder)
<b>Representative</b>	:	Wallace LLP
<b>Type of Application</b>	:	Enfranchisement
<b>Tribunal Members</b>	:	Robert Latham Neil Martindale FRICS
<b>Date and venue of Hearing</b>	:	21 April 2015 10 Alfred Place, London WC1E 7LR
<b>Appearance for Applicant</b>	:	Alexander Bastin (Counsel)
<b>Appearance for Respondent</b>	:	Piers Harrison (Counsel)
<b>Date of Decision</b>	:	18 May 2015

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**DECISION**

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The Tribunal is asked to determine various terms of the new lease. Our determinations are set out at paragraphs 16 to 34.

## **Introduction**

1. These two applications are 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 new leases. The premiums are now determined. The sole issue that we are asked to determine are the terms of the new lease. The parties have provided us with a Scott Schedule setting out the terms that we are asked to determine and the respective positions of the parties.
2. The Applicant tenants have been represented by Mr Alexander Bastin of Counsel. He has provided us with a Skeleton Argument. The Respondent landlord has been represented by Mr Piers Harrison of Counsel. No evidence has been adduced.
3. The Tribunal annexes the relevant provisions of the Act to this decision.

## **Background**

4. Vancouver Court was constructed c.1900 and consists of four blocks with three flats on the ground, first and second floors. Flat 15A is on the ground floor and Flat 19B on the first floor. The leases are dated 4 December 1970 and 6 April 1970 respectively.
5. The Tribunal have been provided with separate bundles relating to each flat. We are treating Flat 15A as the lead case, but the parties are agreed that the two leases raise identical issues. Any page references are to the Bundle for Flat 15A. The lease for Flat 15A is at p.55-66 of the Bundle. The layout of Vancouver Mansions is illustrated in the Land Registry plan at p.54. We were also shown photos (at p.104-107) which suggest that the blocks are in a poor state of repair and decoration.
6. The parties are agreed that the leases as originally drafted did not make satisfactory provision for the repair and maintenance of the block. The landlord was not under the normal obligation to keep in repair the structure and exterior of the buildings. This is rather the obligation of the tenant. Thus by Clause 2(8), the tenant of Flat 15A not only covenants to keep in repair, and where necessary rebuild, the demised premises but also the foundations of the building in which the flat is situated. We were informed that the repairing obligation on the top floor flat extends to keeping in repair, and where necessary rebuild, the roof of the block. The tenants of the first floor flats are in a more favourable position with no liability for either the foundations or the roof of their block.
7. However, the lease is more complicated than this. The tenants covenant to pay a service charge which is to be apportioned on the basis of the rateable values of the flats. This extends to the landlord's costs of maintaining and repairing the structure (excluding the roof and

foundations) of the building including the main drains and electrical cables and redecorating the exterior. Thus the landlord may carry out these works, but is under no obligation to do so.

8. Thus both parties are agreed that the extended lease should be on new terms. Vancouver Court is a block of flats which should be managed and maintained as such. The existing leases are rather maisonette leases more appropriate to four separate converted houses. The new leases impose an obligation on the landlord to keep in repair the structure of the four buildings including the main drains, roofs, and foundations. Each tenant is to contribute one-twelfth of the service charge.

### **The Tribunal's Jurisdiction to Modify the terms of the Lease**

9. Section 39 of the Act confers the right on qualifying tenants to acquire a new lease in accordance with Chapter II. The rent and term of the new lease are fixed by the Act. Section 57 provides for the terms on which the new lease is to be granted. Prima facie, all the other terms are to be the same as those in the existing lease as they apply on the date when the notice of claim under section 42 was given. This is subject to any terms that the parties may agree (Section 57(6)).

10. As the Editors of Hague on Leasehold Enfranchisement (6<sup>th</sup> Edition) note (at 32-06):

“A claim for a new lease under the 1993 Act presents a golden opportunity to substitute a wholly new lease for an out-of-date or unsatisfactory one. Some large landlords try to obtain the lessee's agreement to taking a new lease in their modern standard form, in order to ease the administration of their estate. Equally some tenants wish to upgrade old fashioned leases to make them more mortgageable.”

11. In the absence of such agreement, the scope for this Tribunal to modifying the terms of the existing lease is limited. The parties are agreed that there are three circumstances in which changes to the existing lease can be made:

(i) Modifications relating to the three factors specified in Section 957(1)(a) to (c). It is agreed that none apply in the current case.

(ii) Modifications for the recovery of service charges where the landlord is obliged to provide services, repairs, maintenance or insurance (Section 57(2)).

(iii) A terms can be excluded or modified pursuant to Section 57(6) 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.”

12. Hague (at [32.10]) discusses the scope of any exclusion or modification under Section 57(2):

(a) The word “necessary” has been construed strictly and is not equivalent to “convenient”. The word “defect” is not defined, but given the use of the word “necessary”, a strict or narrow interpretation seems the proper one. Accordingly, the use of this provision to attempt to modernise the terms generally in the face of opposition from the other party would not be permissible.

(b) The word “changes” is not defined and would appear to include, for example, physical changes in the property used by the tenant, as well as changes in acceptable conveyancing practice. It has been held that the enactment of the Landlord and Tenant (Covenants) Act 1995 is a change falling within s.57(6)(b). Accordingly, a qualified covenant against assignment in the last seven years of the term of the existing lease was reproduced in the new lease without the restriction relating to the last seven years. The landlord would thus be able to seek an authorised guarantee agreement on an assignment during the whole of the term. The onus is on the person proposing the change to show that there are grounds for deleting or modifying the term in question.

13. Mr Bastin referred us to *Gordon v Church Commissioners for England* LRA/110/2006 and the judgment of HHJ Huskinson at [41]:

“In contrast to the approach where subparagraphs (a) to (c) of section 57(1) apply, the words in section 57(6) contemplate the parties having open on the table before them the terms of the existing lease and identifying one or more of those terms as being a term which, by reason of the matters in paragraphs (a) or (b), should either be excluded from the new lease or should be modified in the new lease. 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 (over 50 years in the present case). It is one thing to exclude or modify a term or terms of the

existing lease where a good reason (i.e. 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.”

14. We were also referred to [47]:

“There is no definition in the statute of the word “defect” which is an everyday English word. The Shorter Oxford English Dictionary gives as a meaning: shortcoming, fault, flaw, imperfection. I consider it proper to adopt this fairly broad meaning of defect but subject to the following qualification. I conclude that a lease can only properly be described as containing a defect (in the sense of shortcoming, fault, flaw or, perhaps even, imperfection) if it can objectively be said to contain such a defect when reasonably viewed from the standpoint of both a reasonable landlord and a reasonable tenant. It may be noted that once a defect is shown to exist in the existing lease then a party 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 it is necessary to do so in order to remedy the defect. This mandatory language indicates that the concept of a defect is a shortcoming below an objectively measured satisfactory standard. It is not sufficient for a provision to be a defect only when viewed from the standpoint of one or other party.”

### **The Tribunal’s Determination**

15. We turn to the issues which we are asked to determine. The parties have set out their respective positions in the Scott Schedule. Both parties are agreed to the structure of the new lease that is proposed. However, the Applicant tenants, dispute some of the terms sought by the landlord.

#### **(i) Clause 2(2)(a)(i)**

16. Clause 2(2)(a) relates to the works to which tenants must contribute through the service charge. The parties are now agreed that the reference to lifts and boilers is to be removed from sub-paragraph (i).

#### **(ii) Clause 2(2)(iii)**

17. The tenants object to the addition of the words “and the repair and/or replacement before such redecorating of all window frames and the entrance doors of flats which have not been duly repaired and/or replaced by individual Tenants”. The effect of this would be to permit the landlord to recover through the service charge the cost of works that it might carry out because the tenant has not done it. The landlord

contends that this falls within the scope of Section 57(2)(a). We disagree. It is not necessary to remedy a defect in the original lease. We rather agree that the original Clause 2(11) should be reinstated. If a tenant fails to carry out any works, the landlord may carry out the works in default and charge the tenant in default for the cost of the same.

(iii) Clause 2(2)(a)(iv)

18. The tenant objects to the inclusion of this sub-paragraph, the effect of which would be to permit the landlord to recover through the service charge the cost of works that it might carry out because the tenant has not done it. For the same reasons, we are satisfied that it is not necessary to remedy a defect in the original lease and that this should rather be covered by re-instating the original Clause 2(11).

(iv) Clause 2(2)(a)(v)

19. The landlord wishes to add this provision to expressly permit it to employ maintenance staff, cleaners, gardeners etc.. The tenant objects that there is no similar clause in the current lease. The landlord argues that the existing lease provisions lack any such facility and that the estate is falling into disrepair and losing appeal. This is necessary to give effect to the agreed structure for the new leases. The proposed service would benefit all the residents and so it follows that the landlord should be entitled to recover the cost under the service charge. The landlord relies upon either Section 57(2)(a) and 57(6)(b) of the Act. We agree that both these provisions would permit this change and allow this modification.

(v) Clause 2(2)(a)(vi)

20. The landlord wishes to add this provision to permit it to charge for the cost of any accommodation and associated costs provided for such staff. Mr Harrison relies on Section 57(6)(b). The tenant contends that there is no such provision in the existing lease, so there is nothing to modify. Further, the change would not be reasonable because it would expose the tenants to a potential liability that is not necessary given the character and location of the blocks. We agree and disallow this term.

(vi) Clause 2(2)(a)(xi)

21. The landlord wishes to add a provision permitting it to recover the cost of any other service or facility which it might in its absolute discretion provide for the comfort or convenience of occupiers on the buildings or for the proper maintenance, safety, amenity and administration of the same. The landlord argues that there is no prejudice to the tenants because it would be to the benefit of all leaseholders and appropriate to include some discretion to allow further services or amenity in improving

the condition amenity and appeal of the estate. The tenants contend that there is no statutory basis for the inclusion of this clause. There is no such provision in the current lease. If this provision were to be included, the landlord would gain a very wide discretion which might come at considerable cost to the tenants. We agree with the tenants and disallow this additional provision.

(vii) Clause 2(2)(b)(v)

22. This provision would permit the landlord to collect an advance service charge and establish a reserve fund. The tenants contend that the landlord is currently unable to demand these charges and that there is therefore no statutory basis for this inclusion. We disagree. We are satisfied that this addition is covered by Section 57(2) and that it is just to add this provision having regard to the structure that is proposed for the new leases.

(viii) Clause 2(16)

23. There is no general alienation provision in the current lease save when within the last 7 years of the lease (see Clause 2(20) at p.62). The landlord now proposes that there be an extensive clause. The landlord agrees that the phrase "not to be" must be added to sub-paragraph (a). The parties are agreed that sub-paragraphs (c) to (e) should be deleted.
24. The landlord argues that Vancouver Mansions are a development of flats in high demand for the local area and the Landlord needs to modify the alienation provisions in view of changes since the date of the existing lease and would fall within Section 57(6)(b) of the Act. 1993 Act. Mr Harrison highlighted three factors:
- (i) any licence must not be unreasonably withheld;
  - (ii) the tenants must not sublet at less than the reserved rent;
  - (iii) any sub-tenant should not have any statutory right to a new lease.
25. Mr Harrison reminds us that by virtue of Section 57(7) the new lease shall make provision in accordance with Section 59(3), namely that "no long lease created immediately or derivatively by way of sub-demise under the lease shall confer on the sub-tenant, as against the tenant's landlord, any right under this Chapter to acquire a new lease".
26. Mr Harrison also reminded us that the original lease was made prior to the Landlord and Tenant (Covenants) Act 1995 and that this was an enactment which fell within the scope of Section 57(6)(b). The changes

introduced by this Act in respect of privity of contract entitled the landlord to require a more onerous alienation clause.

27. Mr Bastin disputes that Vancouver Mansions in 'high demand' and refer us to the photographs which illustrate the current state of the blocks. They note that there is no general alienation provision in the current lease and contends that the landlord cannot rely upon Section 57(6)(b). The tenants contend that it would unreasonable to include anything more than the limited alienation provision in the current lease. The onus is on the landlord to establish to the contrary.
28. The Tribunal accepts that by virtue of Section 57(7) the new lease shall make provision in accordance with Section 59(3) of the Act. However, the Tribunal is not willing to approve any modification which goes further than this statutory provision and the limited alienation clause which is to be found in Clause 2(20) of the existing lease. The landlord has not satisfied us that the wider alienation clause that is sought is justified by the enactment of the 1995 Act.

(ix) Clause 3(i)

29. The landlord proposes to introduce this new provision in view of the lack of the same in the existing maisonette leases that do not deal with the position on the ground concerning the normal right for the landlord to use, develop or make alterations to the estate. The landlord contends that this does not prejudice the tenants nor affect their use, access or enjoyment of their flats. This modification therefore places no further onerous burden on the Tenant and is a facility that allows the landlord to manage and maintain the estate in the interests of good estate management.
30. The tenants contend that there is statutory basis for the inclusion of this clause and there is no such provision in the current lease. Although the landlord suggests that there will be no prejudice to the tenants as this will not interfere with their access, use and enjoyment of their flats, in reality experience suggests that such development work does so interfere. The proposed clause would give the landlord extensive rights beyond what is in the current lease and would cause some prejudice to the tenants given the requirement that they would need to obtain consent or pay compensation.
31. The Tribunal agrees that this provision goes beyond what is permitted by the Act.

(x) Clause 5(5)(a)

32. This is now agreed between the parties.



(xi) First Schedule – Paragraph 5

33. The landlord seeks a provision that all the easements specified in Schedule 1 should be subject to and conditional upon the tenant contributing and paying the contribution provided under Clause 2(2). The landlord contends that in a modern lease where rights are granted, it is normal for a precedent lease to contain a proviso where exercise of the rights are subject to payment towards the service charge expenses that provide the amenity and access for which the rights are granted. The tenants contend that there is no such provision in the current lease and that there is no statutory basis for including it. The Tribunal agrees.

(xii) Third Schedule – Paragraphs 5,6,7,9,13 and 16

34. The landlord seeks to include a number of regulations that are common in a modern lease and which are included to ensure the efficient management of the estate. The tenants contend that none of these regulations are included in the current lease and that there is no statutory basis for including them. The Tribunal agrees. In the absence of agreement between the parties, these are not regulations which this Tribunal can impose.

Robert Latham  
Tribunal Judge  
18 May 2015

## Appendix of Relevant Legislation

### Leasehold Reform, Housing and Urban Development Act 1993

#### 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 [re-entry or otherwise (subject to section 85 of the Tribunals, Courts and Enforcement Act 2007)]<sup>1</sup> 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.

.....

59. Further renewal, but no security of tenure, after grant of new lease

...

(3) Where a lease has been granted under section 56, no long lease created immediately or derivatively by way of sub-demise under the lease shall confer on the sub-tenant, as against the tenant's landlord, any right under this Chapter to acquire a new lease (and for this purpose "long lease" shall be construed in accordance with section 7).