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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/OLR/2015/2008**
Property	:	**Flat 4, 146 Great Portland Street, London, W1W 6QB**
Applicants	:	**Mr Benjamin Hart**
Representative	:	**Mr A Hart**
Respondents	:	**Mount Eden Land Limited**
Representative	:	**Miss H Holmes of Counsel instructed by Stephenson Harwood LLP**
Type of application	:	**For the determination of the terms of acquisition remaining in dispute for the grant of a new lease**
Tribunal members	:	**Judge N Hawkes** **Mr P M J Casey MRICS**
Date and venue of Hearing	:	**22nd March 2016 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**4th April 2016**

DECISION

Decision of the Tribunal

The Tribunal determines that the new lease shall be in the terms proposed by the respondent and that the applicant's proposed lease plan shall not be incorporated into the new lease.

Background

1. This is an application under section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") for the Tribunal to determine the terms of acquisition of a new lease of the property.

2. By a notice dated 20th April 2015 pursuant to section 42 of the 1993 Act, the applicant claims to exercise the right to acquire a new lease. The respondent has served a counter notice under section 45 of the 1993 Act dated 23rd June 2015.

3. The parties have agreed the premium. The terms of the lease are also agreed save for the description of the demise and, consequently, the plans to be appended to the new lease.

The issues in dispute

4. The applicant contends:

   (i) that a balcony at the property is included in the demise; and

   (ii) that the words "including the staircase and landing used exclusively for access thereto" should be replaced in the new lease with the words "including the landing and staircase used exclusively for access thereto"; that is that the order of the words "staircase" and "landing" should be reversed.

The hearing and inspection

5. The applicant was represented by Mr A Hart, solicitor, at the hearing and the respondent was represented by Miss H Holmes of Counsel.

6. At the request of Mr A Hart ("Mr Hart"), the Tribunal carried out an inspection of the property following the hearing. The property is situated a short distance from the Tribunal building. Mr Hart, the applicant and both Counsel and Solicitor for the respondent were present at the inspection.

7. Both parties have provided detailed skeleton arguments and the Tribunal carefully considered the parties' skeleton arguments and the

documents which were referred to during the course of the hearing before reaching its decision.

The law

8. Subsection 56(1) of the 1993 Act provides:

(1) Where a qualifying tenant of a flat has under this Chapter a right to acquire a new lease of the flat and gives notice of his claim in accordance with section 42, then except as provided by this Chapter the landlord shall be bound to grant to the tenant, and the tenant shall be bound to accept—
(a) in substitution for the existing lease, and
(b) on payment of the premium payable under Schedule 13 in respect of the grant,
a new lease of the flat at a peppercorn rent for a term expiring 90 years after the term date of the existing lease.

9. Subsection 57(1) of the 1993 Act provides:

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.

10. Subsection 57(6) of the 1993 Act provides:

(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.

11. The applicant has referred the Tribunal to Stanhope v Caplan LON/00AG/OLR/2007/0209 and to Hatfield v Moss [1988] WL624017. The respondent has referred the Tribunal to Gordon v Church Commissioners for England LRA/110/2006.

The conveyancing background

12. The conveyancing background is not in dispute. In summary, the respondent is the freehold owner of the building known as and situate at 144-146 Great Portland Street and is the "competent landlord" within the meaning of section 40 of the 1993 Act.

13. The applicant's immediate landlord is Fairholme Properties Limited ("Fairholme"); the head-lessee of 144-146 Great Portland Street. Fairholme holds a lease of 144-146 Great Portland Street for a term of 110 years from 24th June 1985.

14. By a lease dated 5th January 1987, the fourth floor of the premises was demised for a term of 110 years (less 10 days) from 24th June 1985 ("the original lease"). In respect of the demised premises, the original lease provides:

DEMISED PREMISES All that 4th floor flat situate at the property as the same is more particularly described in the First Schedule hereto and known as Flat 4 146 Great Portland Street, London W1

The First Schedule then states:

ALL THAT flat forming part of the Property and known as Flat 4 for the purposes of identification only edged red on the Plan annexed hereto and situate on the fourth floor of the Property including the ceilings and floors of the said flat and joists and beams on which the floors are laid but not the joists or beams to which the ceilings are attached and the windows and the internal walls of the said flat including the interior surfaces of the external walls thereof including the staircase and landing used exclusively for access thereto Excepting from the demise the main structural parts of the Property including the roof foundations external walls and external parts thereof.

15. A plan of the fourth floor is incorporated into the original lease.

16. By a deed of surrender and regrant dated 5th May 2000, the original lease was surrendered and there was a regrant of the premises demised under the original lease and a grant of the fifth floor. Clause 2 of the 2000 deed provides:

The Landlord hereby demises to the Tenant the original premises together with the premises on the fifth floor including the roof of 146 Great Portland Street London W1 shown edged red on the plans annexed hereto hereinafter collectively called "the extended premises" for a term of 110 years (less 10 days) from the 24th June 1985.

17. The respondent drew attention to differences between the plan of the fourth floor in the original lease and the plan of the fourth floor annexed to this deed of surrender and regrant. The terms of the original lease were incorporated by reference.

18. By a subsequent deed of surrender and regrant dated 8th November 2010 ("the existing lease"), the demise under the May 2000 deed was surrendered and then regranted for a term of 110 years (less 10 days) from 24th June 1985 together with a small additional area on the fifth floor. Clause 2 of the deed provides (emphasis added):

The Landlord hereby demises to the Tenant the extended premises together with the additional premises on the fifth floor including the roof of 146 Great Portland Street London W1 ***as shown edged red on the plans annexed hereto*** *hereinafter collectively referred to as "the substituted premises" for a term of 110 years (less 10 days) from 24th June 1985.*

19. The respondent drew attention to differences between the plan of the fourth floor in the original lease; the plan of the fourth floor in the 2000 deed; and the plan of the fourth floor which is annexed to the existing lease. The terms of the original lease were again incorporated by reference.

The submissions

20. The applicant states that the main issue is whether the recessed balcony located in and on the fourth floor of the property is included within the demise under the existing lease.

21. In his skeleton argument, the applicant advances five grounds for contending that the balcony is included in the demise under the existing lease, namely:

"1. The parcels of the original lease of 5 January 1987 in part I of the First Schedule make clear that the demised premises are all the 4th floor flat. That means the entirety of the flat on the 4th Floor.
2. There are no words in the parcels excluding the balcony from the parcels defining the demised premises. The deeds of surrender and restatement of the lease of the flat have made no change to the parcels in their inclusion of the entirety of the 4th floor of the flat, including its balcony.
3. The terms of the lease are to be construed against the physical state of the premises at the date on which the lease was granted.
4. The red line on the 4th floor plan attached to the 1987 lease for the purposes of identification only apparently does not exclude the recessed balcony – as I have pointed out in the 22 January email to Mr Laud. That is the same plan attached to the deeds of surrender and restatement of the lease of the flat in 2000 and 2010.

5. The person to whom the lease of the flat was granted in 1987 has confirmed by signed statement that the balcony was used exclusively by him as part of his flat; and three subsequent assignees of the flat and its lease have provided similar written signed statements."

22. The applicant describes the second issue, which concerns the order of the words "staircase" and "landing" in Part 1 of the First Schedule to the lease, as a "very subsidiary issue for the Tribunal to determine". The applicant states in his skeleton argument:

"You reach the landing at the top of the communal stairs before you can go through the flat 4 entrance door and onto the internal staircase, I suggest that it is a defect to refer to landing before the internal staircase in describing access to the flat."

23. In oral argument, Mr Hart relied upon subsection 57(6)(a) of the 1993 Act and submitted that the relevant words of the existing lease are poorly drafted such that this constitutes a defect. He also submitted words have been omitted from the existing lease and that this too constitutes a defect.

24. The respondent submits that the rent and term of the new lease are fixed by the 1993 Act. All other terms are, prima facie, to be the same as those in the existing lease – ie "the starting point is firmly based in the terms of the existing lease", Gordon v Church Commissioners for England at [39]. Unless agreement is reached, there is only limited scope to insist that the terms of the existing lease be modified in the new lease. It is not simply a question of establishing that the proposed term would be "reasonable", nor do the provisions in effect permit the rewriting of leases. Counsel for the respondent made brief reference to Hague on Leasehold Enfranchisement and gave Mr Hart the opportunity to consider the relevant sections of Hague.

25. In respect of subsection 57(6)(a) of the 1993 Act, the respondent states:

"Under section 57(6)(a), the tribunal must ask (i) whether the absence or presence of the clause in question constitutes a defect and (ii) whether it is necessary to exclude or modify in order to remedy any such defect - 'necessary' is not equivalent to 'convenient' and is to be construed strictly. The word 'defect' is not defined but it is thought to mean a shortcoming or flaw "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" (Gordon at [47]".

26. The respondent submits that there is no "defect" within the meaning of section 57 of the 1993 Act which justifies the applicant's proposal. Plenty of leases raise questions of construction. It is not "defective" that the existing lease potentially (thought this is not accepted by the

respondent) leaves open a question of construction as to the scope of the demise.

27. The respondent states that the question of the extent of the applicant's existing lease is a mixed question of law and fact, which the Tribunal should not answer, not least because:
    (1) It is not for this Tribunal to effectively make a declaration as to the extent of the demise under the lease (existing or otherwise).
    (2) If indeed it is necessary to do so (which is not accepted), it is a mixed question of fact and law that ought to be determined by the court.
    (3) There are no directions for factual evidence in this case and it would not be appropriate for the applicant to adduce the same. This is a consequence of the manner in which the applicant initially put his case and to give further directions at this stage or to stay the application so that County Court proceedings can be brought would be disproportionate and would cause the respondent prejudice in the form of the loss of interest on the completion monies. By contrast, the applicant will not be prevented from bring proceedings for a County Court declaration as to the scope of the demise if he considers that he has an arguable case.

28. The respondent argues that, alternatively and in any event, even if the Tribunal were to seek to answer the question, the balcony is not demised or, at least, it is far from obvious that the balcony forms part of the demise because:
    (1) The existing lease plans clearly indicate that the balcony falls outside the demise.
    (2) The wording of the demise is consistent with the balcony falling outside the demise.
    (3) Further, the placing of an obligation to repair the balcony on the applicant's immediate landlord and the grant of access rights in relation to the same is consistent with the balcony falling outside the applicant's demise. This was also the case in respect of the roof before the flat was enlarged.
    (4) In the existing lease, the plans are not simply for identification purposes only but show the scope of the demise. The plan of the fourth floor shows, diagrammatically, an exterior point which projects from an aperture which can only be the balcony and this area is clearly excluded from the demise.
    (5) The physical state of the premises is not the determining factor.
    (6) The applicant's proposed lease plan would create ambiguity because it includes land which is clearly not included in the demise.

29. In reply, the applicant reiterated his case that the wording of the lease is defective; he stated that more was being made than necessary of thick and thin lines in the plans and that changes can be the result of copying; he was of the view that the physical state of the property was relevant but that it did not override the express provisions of the lease;

and he accepted that the exterior area which projects from an aperture shown on the existing lease plan diagrammatically represents the balcony.

The Tribunal's determination

30. Gordon v Church Commissioners for England LRA/110/2006 is binding on this Tribunal. At Paragraph 39 of the judgment, it is stated that the starting point is "firmly based" in the terms of the existing lease and that, "This is unsurprising bearing in mind that at the date when the new lease falls to be granted there may well be a substantial number of years ... still unexpired on the existing lease, such that apart from the renewal the landlord and tenant would continue to be bound by the existing terms for many years to come."

31. The Tribunal accepts that, other than with both parties' agreement, the scope for modifying the terms of the existing lease is limited.

32. It is stated at Paragraph 32-10 of Hague on Leasehold Enfranchisement that:

"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."

33. Applying a strict or narrow interpretation to the word "defect", the Tribunal finds that, whilst they fall short of perfection, the words of and the plan to the existing lease do not fall below an objectively measured satisfactory standard and that there is therefore no defect within the meaning of section 57(6)(a) of the 1993 Act.

34. Accordingly, the Tribunal determines that the terms of the new lease shall be in the terms proposed by the respondent and that the applicant's proposed lease plan shall not be incorporated into the new lease. The terms proposed by the respondent are those set out at page 115 of the hearing bundle save that (i) the red brackets are to be removed from the second paragraph and (ii) the words "including the staircase and landing used exclusively for access thereto" are to be added.

Judge N Hawkes

4th April 2016