4499

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HY/OLR/2016/0223
Property	:	72 Sarum Close, Salisbury, Wiltshire SP2 7LF
Type of Application	:	Lease renewal: terms of acquisition: Section 48 Leasehold Reform, Housing and Urban Development Act 1993.
Applicant	:	Ms Nicola Stumpf
Represented by	:	Stillwells Solicitors
Respondent	:	Sinclair Gardens Investments (Kensington) Limited
Represented by	:	W H Matthews and Co. Solicitors
Tribunal Members	:	Judge M Davey Mr M Ayres FRICS
Date of decision	:	03 August 2017
Reasons amended	:	25 September 2017

Decision with reasons amended (as shown at paragraphs 34, 35 and 51 below) following a review under Rule 55 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Decision

Section 48 Leasehold Reform Housing and Urban Development Act 1993 application

The Tribunal determines that it be a term of acquisition, that Coleridge Management Company Limited, whose registered office is at Equity Court, 73-75 Millbrook Road East, Southampton, Hampshire SO15 1RJ, shall be a party to (and therefore execute) the new lease claimed by the Applicant under Part I, Chapter II of the Leasehold Reform, Housing and Urban Development Act 1993 Act.

Reasons for decision

The property and the leases

1. Sarum Close is a leasehold flat development in Salisbury, Wiltshire. It was developed as such around 1987, by the then freeholder, McLean Homes Southern Limited, who sold the flats on 99 year leases in 1988. The lease of flat 72 (formerly plot 45) was entered into on 11 December 1987 for a term of 99 years from 24 March 1986 ("The Lease"). The Lease reserved a yearly ground rent payable to the Lessor of £25 for the first 33 years, £50 for the next 33 years and £75 for the remainder of the lease. The parties to the Lease were the Lessor (McLean Homes Limited), a management company (Coleridge Management Company Limited) ("the Company") and the Lessees, Russell Charles Cole and Tracy Kim Cole. The function of the Company was to maintain the structure and common parts of the Building and Estate and provide services to the flats contained therein, in accordance with the relevant covenants in the Lease. In return the Lessees covenanted to pay to the Company a service charge in respect of the costs thereof.

2. On 21 October 1993, by which time the Lease had been transferred to John Christopher Godfrey and Anita Kim Moore, the Lease was forfeited by Sinclair Garden Investments (Kensington) Limited, which was by now the freeholder and had brought the forfeiture proceedings against the leaseholders. On 14 April 1994 the High Court made the Yorkshire Building Society ("the Society") a party to those proceedings and by Order vested in the Society a lease from

that date expiring on 24 March 2086 on the terms and conditions and covenants of the forfeited lease. The parties to the lease created by the vesting order ("the Order") were the freeholder and the Society, but not the Company.

The claim to a new lease

3. The lease vested in the Society ("the existing lease") was subsequently acquired by Katie Serena Margaret Outhwaite, who, by a notice dated 25 February 2016, and given in accordance with section 42 of the Leasehold Reform Housing and Urban Development Act 1993 "(the 1993 Act"), claimed the right to acquire a new lease of the Flat, under Part 1, Chapter II of that Act ("the new lease"). On 30 March 2016 Katie Outhwaite contracted to sell the existing lease to Nicola Louise Stumpf and on the same date she assigned the benefit of the section 42 notice to Nicola Stumpf, conditional on the Transfer of the lease being completed. That Transfer was completed and Nicola Stumpf was registered as the proprietor of the existing lease on 12 April 2016.

4. On 5 May 2016, W.H. Matthews and Co., ("Matthews") the solicitors for the Landlord, served a counter notice on the leaseholder, Nicola Stumpf, under section 45 of the 1993 Act.

5. The notice of claim proposed a premium for the new lease of £4,400 and that in addition to the terms required by sections 56, 57(7) and 57(11) of the Act the terms contained in the new lease should be the same as the existing lease, save that the ground rent should be a peppercorn rent and the turn of the new lease should be 90 years in addition to the unexpired term of the existing lease.

6. The counter notice admitted the Applicant's right to a new lease, accepted that the ground rent should be a peppercorn and that the term of the new lease should be 90 years in addition to the unexpired term of the current lease. However, the counter notice proposed an alternative premium of £8,040. That notice otherwise agreed that the terms to be included in the new lease should be the same as in the existing lease save for a number of proposed revisions. They were (1) the demise in Clause 2 should be varied to a limited title guarantee of the property to which the claim extends and that the right of re-entry be extended to include breaches of covenants in the new lease in accordance with section 57(6) of the Act (2) Any clauses prescribed pursuant to the Land Registration (Amendment No 2 Rules 2005 that may be required are included therein (3) The terms set out in section 57(8) and (8A) of the

Leasehold Reform Housing and Urban Development Act 1993 are included in the new lease.

The Application and subsequent developments

7. On 24 October 2016 the First-tier Tribunal (Property Chamber) ("the Tribunal") received an application from Nicola Stumpf under section 48 of the 1993 Act for a determination of the premium to be paid and those terms of acquisition, which had not been agreed. The Application stated that the terms still in dispute were (a) the premium to be paid and (b) the terms of the new lease to be on the same terms as the existing lease. The Tribunal issued Directions on 28 November 2016, although the Respondent says that it never received them.

8. On 23 November 2016 the parties agreed a premium of £7,536 for the new lease and the Respondent's solicitors (Matthews) sent a draft lease to the Applicant's solicitors ("Stillwells") for approval. The covering letter stated the draft was submitted for discussion purposes "to ascertain the terms of acquisition [as put in issue in the Counter notice] in dispute (if any)." The letter also asked for copies of any correspondence with the Management Company in connection with the new lease. On 7 December 2016 Stillwells wrote to Matthews stating that "The draft lease is approved as drawn and we look forward to hearing from you with engrossments for signature". On 12 December 2016 Matthews replied stating "We confirm that the terms of the lease had been agreed between us and the premium has been agreed between the parties' Valuers and consequently all the terms of acquisition are agreed. We enclose engrossment of the lease for execution by your clients and the Management Company."

9. On 15 December 2016 Matthews wrote to Stillwells asking if the lease had been sent to the Management Company for their execution. Stillwells replied on 20 December 2016 saying that because the Company was not a party to the existing lease their client's notice was "validly served upon a correct party." By a letter to Matthews of the same date Stillwells suggested that if their client's lease was inconsistent with other leases in the block that the new lease rectify this using section 56 of the 1993 Act. (This seems to be a mistaken reference to section 57). Matthews replied on 16 January 2017 agreeing that Stillwells' letter of 20 December 2016 sets out "the correct position" and said that "The agreed lease therefore needs amendment as the Company is not a party to the Existing Lease....If this is agreed we will draft amendments for consideration." By a

letter dated 17 January 2017 Stillwells agreed. On 2 February 2017 Matthews wrote to Stillwells stating that "We have taken our client's instructions in respect of the proposed variations to the lease and they agree that it should be varied to exclude the Third Party because it was not a Party to the Existing Lease."

10. On 8 February 2017 Stillwells wrote to Matthews stating that they had no adverse comments on the draft lease enclosed with their letter of 2 February but asked if the latter had a copy of the lease of 14 April 1994 pointing out that whereas the draft lease referred to the lease of that date having been made between Sinclair Gardens Investments Limited and the Yorkshire Building Society their client's register of title referred to it being made between (1) McLean Homes Limited and (2) Russell Charles Cole and Tracy Kim Cole." On the same date Stillwells wrote to the Land Registry and asked if they would accept a lease between their client and the Respondent. Matthews replied by letter dated 13 February 2017 enclosing a copy of the Vesting Order of 13 April 1994. (The order was actually sent 2 days later).

11. On 20 February Matthews wrote to Stillwells stating that the terms of acquisition had been agreed by the latter's letter of 8 February 2017. On 24 February 2017 Stillwells replied refuting that assertion. On 24 February they wrote to Matthews proposing that the Company be a party to the new lease. That proposal was reiterated in a letter to Matthews dated 8 March 2017. On 9 March 2017 Matthews wrote to Stillwells enclosing a First-tier Tribunal decision (LON/OOAM/OLR/2015/0212 – 10 Georgian Court, Skipworth Road London E9 7TW, *Jellicoe v Sinclair Gardens Investments (Kensington) Limited)* ("*Jellicoe*") stating that the Tribunal will have to decide whether it has "jurisdiction to determine the terms of the lease consequent upon any agreement reached between the parties, and if so, the terms thereof."

12. On 28 March 2017 Stillwells wrote to the Management Company explaining the problem and asked if they would be content to be a party to the new lease. On 30 March 2017 Stillwells wrote to Matthews and asked if in the alternative they would be willing to consent to an application to the Tribunal under the Landlord and Tenant Act 1987 for variation of the existing lease. Matthews replied first that the existing lease was created by an order of the High Court and only the High Court would have power to vary that Order and second that they did not believe that a variation such as that proposed would be covered by the 1987 Act. On 4 April 2017 Stillwells wrote to Matthews informing them that the Company was willing to be joined as a party to the Tribunal proceedings and to be a party to the new lease. Matthews replied on 4 April 2017 stating that the Act did not provide for a third party to be joined in an application to the Tribunal. It then summarized its opposition to the Application before the Tribunal on the grounds, which it later advances more fully in its statement of case.

13. On 10 April 2017, the parties, through their solicitors, presented the Tribunal with an agreed statement of issues. The agreed statement explained that by that time the premium to be paid and "most (but not all) of the terms of acquisition" have been agreed. The parties require the tribunal's assistance with the two remaining issues that have not been agreed." The matters that remained in dispute concerned (a) the form and wording of the new lease; specifically whether the new lease should correct an omission in the existing lease by virtue of which there is no management function in respect of the Property whereas the leases of all other flats in the block include a third party which is not a party to the existing lease and (b) the inclusion of a party that is not a party to the existing lease.

14. On 19 April 2017 the Tribunal issued Directions stating that it would decide these issues after the expiry of 21 days. On 31 May 2017, the Applicant submitted a statement of case drafted by counsel. On 2 June 2017 the Respondent submitted its statement of case prepared by its solicitors, W.H. Matthews and Co. On 7 June, the Applicant made additional written submissions to which the Respondent replied by way of further submissions, dated 12 June 2017. The Tribunal then met on 27 June to make a determination. During the period from 10 April to 12 June the issues in dispute were modified by the parties from the position as set out in the agreed statement of 10 April 2017.

The Applicant's statement of case

15. In her initial written submissions the Applicant submitted that, following the agreed facts and disputed issues statement of 10 April 2017, there was one issue, in two parts, that remained in dispute: viz; (1) whether the new lease should contain a provision that Coleridge Management Company Limited ("the Company") shall undertake a management function with associated covenants as per the original forfeited lease; (2) whether the Tribunal has jurisdiction to add the Company to the lease given that, at present, it is not on the face of the vesting order a named party.

16. The Applicant referred to the fact that the existing lease was created by a vesting order in forfeiture proceedings, which failed to make the Company a party to the lease. Nevertheless, despite this omission the Company still manages the Building and provides services and the Applicant (and her predecessors in title) pay and have paid service charges demanded of them.

17. The Applicant referred to paragraph 5 of the Vesting Order whereby the Court ordered that the benefit of the Order should not be assigned without the assignee entering into a deed of covenant with the plaintiff in those proceedings (the Respondent in the present proceedings) "to perform during the continuation of this Vesting Order all those covenants, agreements and conditions that

were to be performed by the Lessee under and contained in the Forfeited Lease."

18. The Applicant says that these obligations include payment of the service charge levied by the Company. She says that it would be illogical for the Lessee to be under an obligation to pay for repairs etc. if there is no mechanism for the Company to do them. The Applicant submits that the Vesting Order should be subject to an implied term that it includes all the covenants in the forfeited lease and as such the Company is an implied party to the Lease. The Applicant relies on the test for implying a term set out in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another* [2015] UKSC 72); that is to say that term is so obvious that it goes without saying or that it is necessary to give business efficacy to the lease.

19. The Applicant submits that the failure of the existing lease to make provision to that effect is a 'defect' in the existing lease for the purposes of section 57 of the 1993 Act. The Applicant says that the defect is a shortcoming below an objectively measured satisfactory standard (as to which see *Gordon v Church Commissioners for England* LRA/110/UKUT 1454 ("*Gordon*")). The Applicant further submits that the Tribunal has power under section 57 of the 1993 Act to rectify that defect by modifying the terms of the existing lease so that the new lease reflects the terms of the forfeited lease with regards to repairs and services and the parties to that lease (specifically the Company). In the alternative it asks that the Tribunal modify the existing lease to impose on the Landlord the management covenants in the forfeited lease to maintain the property and provide services.

The Respondent's submission

20. The Respondent included in its submission two versions of the draft lease with amendments proposed by the Applicant and said that the difference between the parties was whether the Tribunal has jurisdiction under the Act to include the Company. If the Tribunal determined that it had jurisdiction to add the Company then version 1 (which included the Company as a party) was agreed. With regard to version 2 (no Company) the Respondent proposed deletion of the clause which would make the Landlord liable for the covenants on the part of the Company set out in the forfeited lease and inclusion of a clause making it clear that the Company was not a party to the new lease and that all covenants between the Company and other parties in the forfeited lease were not included in the new lease.

21. The Respondent submitted that on an application under section 48(1) of the 1993 Act, the Tribunal's jurisdiction is limited to proposed terms of acquisition contained in the notice or counter notice that remain in dispute (*Greenpine Investment Holding Limited v Howard de Walden Estate Limited* [2016] EWHC 1923 (Ch)

("*Greenpine*")). The Respondent's case was that it had been agreed between the parties that the terms of acquisition of the new lease shall be the same as the existing lease as proposed in paragraph 4 of the notice of claim save as to the additional clauses proposed by the Respondent in the counter notice which were now all agreed by the Applicant. It followed that the Tribunal's jurisdiction did not extend to the amendment proposed by the Applicant, which did not feature in the notice or counter notice. The Respondent says that there is a distinction between agreeing the terms of acquisition and settling the final form of the lease and that the Tribunal's jurisdiction is limited to the former.

22. Alternatively, section 57(6) of the Act does not permit the Tribunal to modify the existing lease by adding a new party to the lease. The amendment proposed is not an 'exclusion' or 'modification' which are the only changes permitted by section 57 (as to which see *Burchell v Raj Properties Limited* [2013] UKUT 0443 (LC). The absence of a party is not a provision capable of exclusion or modification, because it amounts to a rewriting of the lease (See *Gordon*).

23. The Respondent submits that the general presumption in section 57(1) is that the new lease will be granted on the same terms as the existing lease as they apply at the relevant date (see *Rossman v Crown Estate Commissioners* [2015] UKUT 288 (LC) ("*Rossman*"). The starting point is therefore the terms of the existing lease (*Gordon*) and the burden of establishing a departure from those terms by way of exclusion or modification is on the Applicant (see *Rossman* and *Jellicoe*). Since the Company was not a party to the existing lease the terms of the forfeited lease dealing with the company's rights and obligations do not apply. Thus the starting point is that they are not to be included in the new lease save in so far as they detail the historical obligations of the Company under the forfeited lease which the landlord would take over in the event that it exercised its right to do so pursuant to clause 5(4) of the forfeited lease.

24. The Respondent submits that section 57(6) is not of assistance to the Applicant because the omission of the Company is not a 'defect' in the existing lease. To amount to a defect a provision must be such if it can objectively, from the viewpoint of landlord and tenant, be seen to be a defect. That is to say a mistake which neither party intended. In the present case the Landlord's perspective is that it was plain that the Company was not intended to be a party to the existing lease and therefore there is no defect because its obligations under clause 5(4) of the forfeited lease only arose if it elected to perform those obligations.

25. Alternatively, the Respondent submits that the parties to a lease are not a "term" of that lease and therefore are not capable of amendment under section 57. The parties are the persons who are

subject to the terms of the lease. They are not themselves one of those terms.

26. Finally, the Respondent contends that the Applicant's alternative proposal, which would create an obligation on the Landlord, where none existed before, is also not permitted by the 1993 Act. It says (a) that it is an entirely new provision and consequently does not modify or exclude provisions in the existing lease and/or (b) the leases of the flats in the Buildings would no longer be in common form and/or (c) it is not reasonable that the Landlord should take on an onerous and prejudicial responsibility and/or (d) it was not proposed as a term of acquisition in the notice of claim.

The Applicant's response

27. In a response dated 6 June 2017, the Applicant says that the Respondent's statement of case is the first time since 10 April 2017 that the Respondent has suggested that the terms have been agreed and that the Tribunal therefore has no jurisdiction. The Applicant denies that the terms of acquisition have been agreed. Indeed she says that Version 2 of the draft lease appended to the Respondent's submission is a new version and is clear evidence that the terms of the new lease are still not agreed.

The Respondent's response

28. In a response dated 12 June 2017, the Respondent submitted that both parties' positions had developed since 10 April 2017. The Applicant for example argues for an implied term in the existing lease, which had not been raised before. The Respondent reiterates that there is a distinction between the terms of acquisition, which are restricted to the differences between the proposals identified in the claim notice and counter notice, and the final form of the lease, which incorporates the terms of acquisition agreed or determined. The Respondent therefore maintains its submission that the terms of acquisition have been agreed and that any details of the final form of the lease are a separate matter.

Consideration and decision

29. The facts of this case are unusual and it is this unusual feature that has given rise to the present Application. The original lease of flat 72 Sarum Close was granted on 11 December 1987. The lease was a tripartite lease, the parties being McLean Homes Southern Limited (the developer landlord), Coleridge Management Company (a management company which provided services to the block of flats in which the flat was located and levied a service charge in respect thereof) and the lessees Russell Charles Cole and Tracy Kim Cole. The lease was subsequently assigned to John Christopher Godfrey and Anita Kim Moore and mortgaged to the Yorkshire Building Society. The freehold was sold to Sinclair Gardens Investments

(Kensington) Limited who subsequently brought forfeiture proceedings against the lessees. On 14 April 1994 the High Court made the Yorkshire Building Society, a party to the proceedings and then ordered that there be vested in the Society a Lease of the flat "on the terms and conditions and covenants .....of the forfeited lease." The Management Company, which as noted above had been a party to the forfeited lease, was not made a party to the forfeiture proceedings nor did the Vesting Order state that it was to be a party to the lease created by the Vesting Order.

30. Despite this omission it is clear that everybody concerned carried on as if the position under the lease created by the Vesting Order was the same as under the forfeited lease. Thus the Management Company continued to provide services to flat 72, as it did to all the other flats in the block, and the leaseholders of flat 72 (the lease of which changed hands more than once) continued to pay a service charge to the Management Company.

31. On 26 February 2016 the then leaseholder of flat 72 served a claim notice on the Respondent Landlord claiming a new lease under Chapter II of the 1993 Act. The leaseholder assigned the benefit of that notice together with the lease to the Applicant on 30 March 2016. The Applicant became the registered proprietor of the lease on 12 April 2016. The property register of the leasehold title is inaccurate in so far as it shows the lease under which the property is held as having been created on 14 April 1994 between McLean Homes Southern Limited and Russell Charles Cole and Tracy Kim Cole. Note 1 says that "the land is held under a lease originally vested in Yorkshire Building Society for a term of years created by order of the Queens Bench Division of the High Court dated 14 April 1994, a lease dated 11 December 1987 made between (1) McLean Holmes Southern Ltd and (2) Russell Charles Cole and Tracy Kim Cole having determined on forfeiture, and subject to the covenants and conditions contained in such determined lease and the provisions of the Order." Note 3 states that "no copy of the lease dated 14th of April 1994 is held by Land Registry". It can be seen that no mention is made of the Company having been a party to the forfeited lease.

32. The dispute between the parties to the present application to the Tribunal is simply as to whether the Company should be a party to the new lease to be acquired under the 1993 Act. The position of the parties on this matter has shifted over time. It is tolerably clear that at no stage before 12 December 2016 had anybody mentioned the role of the Management Company. It was not raised in the claim notice of 25 February 2016, or the counter notice of 5 May 2016, accepting the right and agreeing some terms but not others, or the Application to the Tribunal of 24 October 2016, under section 42 of the 1993 Act asking for a determination as to the disputed terms.

33. The matter was raised for the first time on 12 December 2016. On that date the Landlord's solicitors wrote to the Applicant's solicitors confirming that the premium and all the terms of acquisition had been agreed and enclosed engrossment of the lease "for execution by your clients and the Management Company." At this stage therefore the Landlord's solicitors clearly assumed that the Management Company would be a party to the new lease.

34. This clearly concerned the Applicant's solicitors, because if the Management Company was a party to the existing lease the Claim notice would not have been served on them as required by section 42 of the Act. Correspondence between the two parties' solicitors between 12 December 2016 and 17 January 2017 appeared to show agreement that the draft lease should be amended to exclude the Management Company as a party.

35. On 2 February 2017 Matthews wrote to Stillwells stating that "We have taken our client's instructions in respect of the proposed variations to the lease and they agree that it should be varied to exclude the Third Party because it was not a Party to the Existing Lease." On 15 February 2017 Matthews sent Stillwell's (at the latter's request) a copy of the Vesting Order. In a letter to Matthews dated 24 February 2017 Stillwell's sought agreement that the Company should be a party to the new lease. It was at this point therefore that the Applicant reopened the matter of whether, and if so how, the Management Company should be made a party to the new lease. On 4 April 2017 Matthews refused and set out why they did not accept that proposal. Nevertheless on 10 April 2017 both Stillwells and Matthews presented the Tribunal with an agreed statement of issues. The agreed statement explained that by that time the premium to be paid and "most (but not all) of the terms of acquisition" have been agreed. The parties require the tribunal's assistance with the two remaining issues that have not been agreed." The matters that remained in dispute concerned (a) the form and wording of the new lease; specifically whether the new lease should correct an omission in the existing lease by virtue of which there is no management function in respect of the Property whereas the leases of all other flats in the block include a third party which is not a party to the existing lease and (b) the inclusion of a party that is not a party to the existing lease.

36. Notwithstanding this statement the Respondent's position is now that the terms of acquisition to be determined by the Tribunal are those raised in the notice and counter notice which had not been agreed 2 months after the counter notice and in respect of which an application had been made thereafter to the Tribunal. It says that all those terms had been agreed by 8 February 2017 at the latest and therefore there are no disputed terms for the Tribunal to determine. It says that the application to the Tribunal remains extant only in so far as it concerns the final form of the lease incorporating the agreed terms of acquisition.

37. The Respondent Landlord's primary argument is that because a notice and counter notice were given and any terms identified in those notices that remained in dispute have since been agreed, there is nothing for the Tribunal to determine as far as the terms of acquisition are concerned. The Landlord relies on the wording of section 48 and the decision of the High Court in *Greenpine*.

38. Section 48(1) provides that where the landlord has given the tenant a counter notice "but any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date when the counter notice .....was given" the Tribunal may, on the application of the landlord or tenant, "determine the matters in dispute." Section 48(7) provides that "In this Chapter 'the terms of acquisition' .....means 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."

In *Greenpine* the judge (Timothy Fancourt QC) stated

"the Court of Appeal in *Bolton v Godwin-Austen* [[2014] EWCA Civ 27] held that the terms of acquisition were a different concept from the final form of the lease. Reading section 48 as a whole and in the context of the statutory scheme my conclusion would be that the terms of acquisition to be agreed or determined by the tribunal are the terms set out in the respective notices that remain in dispute at the relevant time."

39. However, what the Respondent Landlord in the present case does not refer to is a later passage in the judgment in *Greenpine*, which states:

> "It is not however necessary for me to decide this case on the basis that the requirement for the FLO was made too late to be a term of acquisition within the meaning of section 48. Given that, as I understand it, the practice of many lawyers and surveyors who specialise in this field is not entirely aligned with my interpretation of the Act, I should leave that decision to be made in a case where it is essential to the outcome of the case."

40. The judge therefore went on to decide the case on the assumption that a term of acquisition can be raised as such after the date of the counter notice but before all the terms of acquisition have been agreed or determined. In the present case the question of whether the Company should be a party to the new lease with all the concomitant provisions as to the provision of services by the Company and obligation to pay a service charge by the Applicant had clearly been raised and not agreed by the time of the position

statement of 10 April 2017. The Tribunal considers that, despite the views expressed *obiter* in *Greenpine,* it has jurisdiction to determine a term that is still in dispute before the Tribunal, notwithstanding that it was raised after the service of the counter notice but before the Tribunal determines the matter of the terms of acquisition. Section 48 does not expressly limit the Tribunal's jurisdiction. It gives the Tribunal power to determine "the matters in dispute".

41. The next issue is whether the Tribunal has power to add a party to the lease. Section 57(1) of the 1993 Act establishes the starting point that the new lease is to be "on the same terms as those of the existing lease, as they apply on the relevant date."

Section 57(6) provides that "Subsections (1) to (5) shall have effect subject to any agreement between the landlord and tenant as 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 insofar 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."

42. In *Gordon* Judge Huskinson held that section 57(6) did not permit the addition of an entirely new provision as opposed to the modification or exclusion of an existing provision. He then said that a lease could only be said to contain a defect "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 is not sufficient for a provision to be a defect only when viewed from the standpoint of one or other party."

43. In *Jellicoe* a London First-tier Tribunal refused to add a new Management Company to the new lease where the original Company that was a party to the existing lease had been dissolved. However, that was a case where, had the application succeeded the lease in question would be the only one in the block with a new management Company as a party. The Tribunal indicated in that case that the proper solution was an application for variation of all the leases under the Landlord and Tenant Act 1987.

44. The issue therefore is whether the omission of the Company as a specified party to the existing lease created by the Vesting Order can be said to be such a defect. Paragraph 2 of the Order referred to the forfeited lease "being made on 11 December 1987 between McLean

Homes Southern Limited of the one part and Russell Charles Cole and Tracey Kim Cole ("the Lessee") of the other party (sic)." This was clearly wrong because it failed to mention the Management Company being a party to the forfeited lease. The Order then stated that the lease created by the Order ("the existing lease") was granted on the same terms conditions and covenants as the forfeited lease. The forfeited lease contained obligations on the part of the Management Company to provide services and on the part of the tenant to pay the service charge. The lease created by the Vesting Order was therefore clearly defective in failing to specify that the Management Company should be a party to the new lease.

45. Is this a defect when viewed objectively by a reasonable landlord and tenant? The Tribunal considers that it is. The scheme of the lease, as one of a series of leases in the block, was that the tenant should receive services for which he or she should pay a service charge. That scheme will only work if the Company is a party to the lease. This would be obvious to any reasonable landlord and tenant. The failure of the existing lease to include the Company as a party is clearly a defect.

46. The rectification of that defect is not writing a new term into the lease but modifying the particulars of the lease (which includes the parties to the lease) to give effect to that scheme. The terms of the lease with regard to the provision of services and charges for the same will not work unless somebody is obliged to provide those services and the lessee is obliged to pay for them. Indeed, the Company will still provide the services for the block as a whole and it is absurd if it cannot recover the share of those costs attributable to flat 72. The Respondent's case is that because the Company is not a party to the existing lease none of the obligations as to services in the forfeited lease apply as between the Company and the lessee of flat 72. But this is not what the existing lease provides. It is "on the terms and conditions and covenants...of the forfeited lease."

47. The Respondent also argues that a party to the lease is not a 'term' of the lease. However, section 48(7) provides that "……terms of acquisition" means 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." Thus the terms on which the tenant is to acquire a new lease of his flat may be the terms to be contained in the lease...or otherwise." This last word is apt to include a modification of the existing lease to make it clear that the Management Company is an integral element of the scheme of the lease. With all due respect to the *Jellicoe* tribunal the Tribunal does not agree that adding a party cannot be said to be within section 57(6). Furthermore, unlike *Jellicoe*, in the present case the Company is still solvent and actively managing the property.

48. Ordinarily the terms of the lease refers to the covenants and conditions of the lease (*Cadogan v McGirk* [1996] 4 All ER 643, 647 per Millett LJ). However, in *Howard de Walden Estates Ltd v Aggio and Others* [2008] UKHL 44 the House of Lords held that it was apt to cover the extent of the demised premises to be comprised in the lease. It is a small step to say that it also includes the parties to the lease. Indeed the parties are included as one of the terms of the draft lease submitted by the Respondent. The Tribunal therefore determines that the identity of the parties is a term of the lease.

49. It should be noted that the Tribunal did not accept the Applicant' submission that it was an implied term of the *existing* lease that the Management Company is a party to that lease. The existing lease was a lease created not by act of the parties to that lease but by the Court, by means of a Vesting Order following forfeiture of the original lease. Furthermore, if that argument were correct the claim notice would have been invalid, not having been served on the Company. On the contrary the Tribunal finds that the omission of the Company as a party was the defect that needed to be removed.

50. The Tribunal agrees with the Respondent that the Applicant's alternative proposal, which would create an obligation on the Landlord, where none existed before, is not permitted by the 1993 Act in that it would place on the landlord an onerous responsibility that was never in the forfeited lease or the existing lease. However, in view of the Tribunal's finding above it is not necessary to consider this proposal any further.

51. In its submission the Respondent stated in one line that because the existing lease was created by a Vesting Order of the High Court, which did not include the Management Company as a party to that lease, that Order can only be varied by the High Court. The Tribunal finds that this is irrelevant because it is being asked to determine the terms of the new lease, which are based on the terms of the existing lease, as modified if necessary. The Tribunal is not varying the Vesting Order.

52. The Tribunal accordingly determines that it be a term of acquisition, that Coleridge Management Company Limited, whose registered office is at Equity Court, 73-75 Millbrook Road East, Southampton, Hampshire SO15 1RJ, shall be a party to (and therefore execute) the new lease claimed by the Applicant under Part 1, Chapter II of the Leasehold Reform, Housing and Urban Development Act 1993 Act.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional Office, which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, that person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Martin Davey
Chairman

3 August 2017

The Law

Leasehold Reform Housing and Urban Development Act 1993

Section 42 Notice by qualifying tenant of claim to exercise right.

(1) A claim by a qualifying tenant of a flat to exercise the right to acquire a new lease of the flat is made by the giving of notice of the claim under this section.

(2) A notice given by a tenant under this section ("the tenant's notice") must be given

(a) to the landlord, and

(b) to any third party to the tenant's lease

(3) The tenant's notice must—

(a) state the full name of the tenant and the address of the flat in respect of which he claims a new lease under this Chapter;

(b) contain the following particulars, namely—

(i) sufficient particulars of that flat to identify the property to which the claim extends,

(ii) such particulars of the tenant's lease as are sufficient to identify it, including the date on which the lease was entered into, the term for which it was granted and the date of the commencement of the term,

(c) specify the premium which the tenant proposes to pay in respect of the grant of a new lease under this Chapter and, where any other amount will be payable by him in accordance with any provision of Schedule 13, the amount which he proposes to pay in accordance with that provision;

(d) specify the terms which the tenant proposes should be contained in any such lease;
(e) state the name of the person (if any) appointed by the tenant to act for him in connection with his claim, and an address in England and Wales at which notices may be given to any such person under this Chapter; and
(f) specify the date by which the landlord must respond to the notice by giving a counter-notice under section

Section 45 **Landlord's counter-notice.**

(1) The landlord shall give a counter-notice under this section to the tenant by the date specified in the tenant's notice in pursuance of section 42(3)(f).

(2) The counter-notice must comply with one of the following requirements—

(a) state that the landlord admits that the tenant had on the relevant date the right to acquire a new lease of his flat;
(b) state that, for such reasons as are specified in the counter-notice, the landlord does not admit that the tenant had such a right on that date;
(c) contain such a statement as is mentioned in paragraph (a) or (b) above but state that the landlord intends to make an application for an order under section 47(1) on the grounds that he intends to redevelop any premises in which the flat is contained.

(3) If the counter-notice complies with the requirement set out in subsection (2)(a), it must in addition—

(a) state which (if any) of the proposals contained in the tenant's notice are accepted by the landlord and which (if any) of those proposals are not so accepted; and
(b) specify, in relation to each proposal which is not accepted, the landlord's counter-proposal.

(4) The counter-notice must specify an address in England and Wales at which notices may be given to the landlord under this Chapter.

(5) Where the counter-notice admits the tenant's right to acquire a new lease of his flat, the admission shall be binding on the landlord as to the matters mentioned in section 39(2)(a) unless the landlord shows that he was induced to make the admission by misrepresentation or the concealment of material facts; but the admission shall not conclude any question whether the particulars of the flat stated in the tenant's notice in pursuance of section 42(3)(b)(i) are correct.

Section 43 **Applications where terms in dispute or failure to enter into new lease.**

(1) Where the landlord has given the tenant—

(a) a counter-notice under section 45 which complies with the requirement set out in subsection (2)(a) of that section, or

(b) a further counter-notice required by or by virtue of section 46(4) or section 47(4) or (5),

but any of the terms of 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, [the First-Tier Tribunal] may, on the application of either the tenant or the landlord, determine the matters in dispute.

(2) Any application under subsection (1) must be made not later than the end of the period of six months beginning with the date on which the counter-notice or further counter-notice was given to the tenant.

(3) Where—

(a) the landlord has given the tenant such a counter-notice or further counter-notice as is mentioned in subsection (1)(a) or (b), and

(b) all the terms of acquisition have been either agreed between those persons or determined by a leasehold valuation tribunal under subsection (1),

but a new lease has not been entered into in pursuance of the tenant's notice by the end of the appropriate period specified in subsection (6), the court may, on the application of either the tenant or the landlord, make such order as it thinks fit with respect to the performance or discharge of any obligations arising out of that notice.

(4) Any such order may provide for the tenant's notice to be deemed to have been withdrawn at the end of the appropriate period specified in subsection (6).

(5) Any application for an order under subsection (3) must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period specified in subsection (6).

(6) For the purposes of this section the appropriate period is—

(a) where all of the terms of acquisition have been agreed between the tenant and the landlord, the period of two months beginning with the date when those terms were finally so agreed; or

(b) where all or any of those terms have been determined by a leasehold valuation tribunal under subsection (1)—

(i) the period of two months beginning with the date when the decision of the tribunal under subsection (1) becomes final, or

(ii) such other period as may have been fixed by the tribunal when making its determination.

(7) In this Chapter "the terms of acquisition", in relation to a claim by a tenant under this Chapter, means 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.

Section 56 Obligation to grant new lease.

(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.

Section 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).