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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
EASTERN REGIONAL OFFICE

Case Reference	:	CAM/11UE/OLR/2017/0221
Property	:	79 St Davids Close, Iver, Bucks SL0 0RS
Applicant (leaseholder)	:	Keith Russell Tippins Represented by Turbervilles Solicitors (Uxbridge)
Respondent (landlord)	:	Rightscope Limited Represented by Colman Coyle Solicitors (Islington)
Date of Application	:	30th November 2017
Type of Application	:	Sections 42 & 60 Leasehold Reform Housing & Urban Development Act 1993 Determination of terms of acquisition, premium and costs of lease extension
Tribunal	:	Tribunal Judge G M Jones Mr R Thomas MRICS
Date and venue of Hearing	:	Cambridge County Court 20th April 2018

DECISION

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ORDER

1. The Applcant's application for determination of issues under section 48 of the Leasehold Reform Housing & Urban Development Act 1993 was made out of time and is accordingly dismissed, the Tribunal having no jurisdiction to make any such determination.

2. The Respondent has permission to make application for a wasted costs order, provided such application is made within 28 days from the date of this Order. Any such application must be accompanied by full written submissions.

3. In the event such application is made the Tribunal Clerk shall as soon as is reasonably practicable serve the application on the Respondent who has permission within 14 days from the date of service to file written submissions in reply.

4. Unless either party asks for a hearing, such application will be determined on the basis of such written submissions as have been made in accordance with the terms of this Order.

Judge G M Jones
Chairman
21st May 2018

REASONS

0. BACKGROUND

The Property

0.1 The subject property is first and second floor apartment in what appears to be a development of 52 apartments on three floors. Further details of the premises are irrelevant for present purposes.

The Lease

0.2 The lease dated 14th September 1962 is for a term of 99 years from 29th September 1961 at a rent of £11.50 per annum. On the face of it, the lease falls within the provisions of Part I Chapter 2 of the Leasehold Reform Housing & Urban Development Act 1993 so that the tenant is entitled to serve notice under section 42 of the Act to acquire an extended lease and, in case of dispute, apply to the Tribunal for determination of disputed issues under section 48 of the Act.

1. THE DISPUTE

1.1 The Applicant tenant served notice under section 42 on 5th April 2017. The Respondent freeholder served a counter-notice by hand on 30th May 2017 admitting the tenant's right to an extended lease but disputing the amount of the premium to be paid. The amount of the premium remains in dispute. On 30th November 2017 the Applicant's solicitors delivered to the Tribunal Office at 6.30 pm an application for determination of issues.

2. THE ISSUES

2.1 The principal issue before the Tribunal is whether the Applicant's application was made in time. Subsidiary issues are whether, if the application was out of time, the Tribunal has jurisdiction to extend time, and, if so, whether it should exercise its discretion so to do.

3. THE EVIDENCE

3.1 The facts are not in dispute. The Applicant's solicitors say they attempted to file the application by fax during the afternoon of 30th November 2017 (before 5.00 pm) but this failed because the fax machine in the Tribunal Office (which is also the County Court Office) was malfunctioning. None of this is disputed by the Respondent, whose case is that the application was out of time and that the Tribunal has no power to extend time. It is not suggested that the Respondent suffered any prejudice or even inconvenience by reason of the fact that the application was slightly late.

3.2 Solicitors for each party submitted written representations on the issues to be determined and agreed that those issues should be decided on the basis of those written representations i.e. without a hearing. In those circumstances, the Tribunal met in private to determine the issues.

4. THE LAW

Claim for an Extended Lease

4.1 Under section 42 of the Leasehold Reform Housing & Urban Development Act 1993 a qualifying tenant of a flat may serve notice of his desire to acquire an extended lease of the flat. He must pay a premium in accordance with the provisions of Schedule 13 and the landlord's reasonable costs under section 60. This premium takes into account the loss of any ground rent payable under the lease; the diminution in the value of the landlord's interest; and the enhanced value of the new lease. In case of dispute either may apply to the First-Tier Tribunal under section 48.

The Tribunal is required to assess the premium on the artificial assumption that the lease does not have the benefit of the 1993 Act rights (a "No Act lease").

4.2 The landlord is entitled to compensation for the diminution in value of his interest plus 50% of the "marriage value", i.e. the overall increase in the value of the freehold and leasehold interests created by the grant of the new lease. Tenants' improvements are to be disregarded. In case of dispute, the tenant can apply to the Tribunal under section 48. By section 56(1) the new lease will be for a term extending to 90 years from the term date of the existing lease at a peppercorn rent. The property comprised in the new lease will be the flat, together with any garage, gardens etc. as defined in section 62(2).

4.3 The terms will be the same as in the existing lease, save that under section 57 the Tribunal may order such modifications as may be required or appropriate to take account of the omission of property included in the existing lease but not comprised in the flat; of alterations made to the property demised since the grant of the existing lease; or in certain cases where the existing lease derives from more than one separate leases, of their combined effect and of the differences (if any) in their terms. 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, the lease may also require due contribution to be made by the tenant and may provide for enforcement of such contributions as though they were rent.

Costs under LRHUDA 1993

4.4 The landlord's reasonable costs of any investigation, reasonably undertaken, of the tenant's right to a new lease; any valuation of the tenant's flat for the purpose of fixing the premium or sums payable under Schedule 13; and conveyancing costs associated with the grant of a new lease; are payable by the nominee purchaser (in the case of collective enfranchisement) under section 33 or the tenant (in the case of a lease extension) under section 60. The nominee purchaser is not liable under section 33 nor the tenant under section 60 to pay costs incurred by the landlord in connection with the application to the Tribunal, save to the extent that costs relating to valuation evidence may have been reasonably incurred for the purpose of fixing the premium, as provided by the relevant subsection. Costs are to be regarded as reasonable only if and to the extent that such costs might reasonably be expected to have been incurred by the landlord if the circumstances had been such that he was personally liable for all such costs.

4.5 It is clearly established by a series of High Court and Lands Tribunal decisions that, where the landlord or his agent employs the services of an in-house solicitor, legal executive or licensed conveyancer, costs should be assessed in the same manner as if the practitioner were in private practice.

4.6 The Tribunal has no general power to award costs of the Application. Under section 29(4) of the Tribunals, Courts & Enforcement Act 2007 and Rule 13 of the Tribunal Procedure (First Tier Tribunal)(Property Chamber) Rules 2013 the Tribunal may award costs where, by reason of a party's conduct in relation to the application, costs have been wasted or in the event of unreasonable conduct by a party.

Proportionality and the Overriding Objective

4.7 The Civil Procedure Rules 1998 introduced into the civil courts in England and Wales a new concept; the Overriding Objective. This was designed to ensure that cases are dealt with justly and is stated in CPR Part 1. Rule 1.1(2) provides as follows:

> "Dealing with a case justly includes, so far as is practicable –
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense ...
> (c) dealing with the case in ways which are proportionate –
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

4.8 CPR Rule 1.2 provides that the court must seek to give effect to the overriding objective when it exercises any power given to it by the Rules; or interprets any rule. CPR Rule 1.3 requires the parties to help the court to further the overriding objective. Provisions of this sort are inevitable once it is recognised that the resources available to parties to access justice and to the courts to dispense justice are finite and must be controlled and allocated in a principled manner.

4.9 The Tribunal Service is not governed by the CPR; but the provisions of CPR Part 1 are echoed in the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 with a view to ensuring that the Tribunal is able to deal with cases fairly and justly (Rule 3(1)). Rule 3 further provides as follows:

> "(2) Dealing with a case justly includes, so far as is practicable –
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise in the Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it –
> (a) exercises any power under the Rules; or
> (b) interprets any rule or practice direction.
>
> (4) Parties must –
> (a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally."

Striking out a party's case – Rule 9

4.10 There are several situations in which a party's case may be struck out. The Tribunal must strike out a case where the Tribunal has no jurisdiction and does not exercise its power under rule 6(3)(n)(i) to transfer to another court or tribunal. One such situation is where the tenant's application is out of time. For example, section 48(2) of the Act of 1993 specifies that the application must be made not later than the end of the period of six months beginning with the date on which the counter-notice ... was given to the tenant. The question, whether the Tribunal has power to extend time and, if so, on what basis it should exercise its discretion in such cases, is discussed in detail in section 5 below.

4.11 A case may be struck out automatically if the party fails to comply with an order specifying that sanction in the event a direction is not complied with (usually made only after serial defaults). Under rule 9(3) the Tribunal may strike out the whole or part of proceedings or a case if –

> "(a) the applicant has failed to comply with a direction which stated that failure by the applicant could lead to the striking out of the proceedings or case or that part of it;
> (b) the applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly;
> (c) the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceeding or case which has been decided by the Tribunal;
> (d) the Tribunal considers the proceedings or case (or part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or
> (e) the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding."

4.12 The rule applies equally to a respondent, save that a reference to the striking out of proceedings or case or part thereof is to be read as a reference to the barring of the respondent from taking further part in the proceedings or such part of them.

4.13 These sanctions have serious consequences and must be applied with caution. The Tribunal must first give the affected party an opportunity to make representations in relation to the proposed striking out or debarring. If proceedings or a case or part of a case are struck out, or the respondent barred, rule 9(5) permits the affected party to apply for the proceedings etc to be reinstated or the bar lifted, as the case may be. Such an application must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out or debarring to that party.

5. DISCUSSION AND CONCLUSIONS

5.1 The Applicant's solicitors contend that the application was made on the last possible day. It is accepted that under Rule 15 of the Tribunal Rules the application ought to have been filed by 5.00 pm. This was an unwise concession.

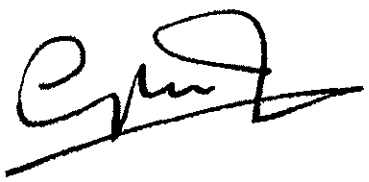
5.2 Rule 15 applies only to acts required by the Rules, a practice direction or a direction for doing that act. In this case, the act was required by section 42(8) to be done within 6 months, no time being specified. In the absence of any statutory provision, a day ends at midnight. In the judgment of this Tribunal, the application must be held to have been made on 30th November 2017.

5.3 The Respondent's solicitors have proceeded on the basis that, had service been effected by 5.00 pm, it would have been on time; but argue that, by reason of Rule 15, filing at 6.30 pm was too late. This stance was also unwise. Admittedly, as we have held, filing at 6.30 pm amounted to filing on 30th November 2017. However, 30th November 2017 was not the last day for service. Section 42(8) provides that the six-month period begins with the date when the counter-notice was given to the tenant. It is common ground that this was 30th May 2017. Accordingly, the last day for filing the application was 29th November 2017. In the judgment of the Tribunal, the application was clearly out of time.

5.4 The Applicant then asks the Tribunal to extend time in exercise its inherent jurisdiction, having regard to Rule 3 (the overriding objective) or by virtue of its jurisdiction under Rule 6 and 8. The Tribunal has no inherent jurisdiction; it has only its jurisdiction conferred by statute. Only the High Court has inherent jurisdiction (which may also be exercised by the Court of Appeal on appeal). Even the High Court does not extend time limits prescribed by statute using its inherent jurisdiction. Rules 6 and 8 apply only to time limits specified by the Rules, practice directions or judicial directions, not to time limits prescribed by statute.

5.5 Statutes sometimes make provision for extensions of time in certain circumstances (see e.g. the Limitation Act 1980). However, in this case a generous time limit was provided by statute and it is hardly surprising that no provision was made for the benefit of those who choose to leave things until the last minute. In the judgment of the Tribunal, there is no jurisdiction to extend time and the First-Tier Tribunal has no jurisdiction to determine the application.

5.6 This outcome is not disastrous to the Applicant, who may now serve a further section 42 notice. Of course, the lease is now somewhat shorter, so that the premium is likely to be higher; also there will have been wasted costs. But those are matters to be considered between the Applicant and his solicitors. In fairness to the Respondent, the Tribunal must give the Respondent permission (if so advised) to apply for a wasted costs order, to which there appears to be no defence, as the application for an extension of time was, on our findings, doomed to failure. Such an order could relate only to the costs of dealing with the Tribunal proceedings, so are likely to be of modest proportions.



Judge G M Jones
Chairman
21st May 2018