**First-tier Tribunal**
**Property Chamber**
**(Residential Property)**

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| **Case reference** | **:** | **CHI/00ML/OLR/2020/0095** |
| **Property** | **:** | **Flat 3 Wolseley Court,**<br>**50 Wolseley Road,**<br>**Portslade,**<br>**East Sussex BN41 1ST** |
| **Applicant**<br>**Represented by** | **:** | **James Kim Dalberg**<br>**Bate & Albon, solicitors** |
| **Respondent**<br>**Represented by** | **:** | **Van-Dare Properties Ltd.**<br>**Commonhold & Leasehold Experts Ltd.** |
| **Date of Application** | **:** | **26th May 2020** |
| **Type of Application** | **:** | **To determine the terms of acquisition of a lease extension for the property** |
| **Tribunal** | **:** | **Bruce Edgington (lawyer chair)**<br>**Brandon Simms FRICS** |

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## DECISION

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1. The 5 proposed and disputed amendments to the form of Deed of Surrender and New Lease provided for the Tribunal are determined as follows:-

   (a) The new service charge provisions proposed for clause 2(iv) do not amount to a permitted amendment under section 57(6) and this change is not allowed.

   (b) The new service charge definition proposed for clause 3(b) does not amount to a permitted amendment under section 57(6) and this change is not allowed.

   (c) The propose obligations in the amendment to clause 3(c)(iii)(a) and (c) of the existing lease to give notice of any matters an insurer or underwriter might treat as material or which might affect any insurance policy are too vague and are not allowed.

   (d) The new proposed clause 10 of the Schedule to the new lease requiring the leaseholder to pay the landlord's costs in certain circumstances is a new provision which does not remedy a defect and is not allowed.

(e) The new proposed clause 12 of the Schedule to the new lease requiring the leaseholder to pay for a managing agent is a new provision which does not remedy a defect and is not allowed.

2. The premium and the remaining terms are said to have been agreed.

## Reasons

3. This is an application for the Tribunal to determine the terms of the lease extension for the property. The Tribunal issued its usual directions order timetabling the case and ordering that this determination would be made upon a consideration of the papers and written submissions of the parties unless either party objected. No such objection has been received.

4. As the premium has been agreed, the Tribunal did not need to inspect the property and notice was given to the parties that the determination would be made on or after the 17th November 2020, upon a consideration of the bundle submitted to include the representations of the parties, which the Applicant was ordered to file.

5. When the bundle was so submitted, the Applicant's solicitors said that the premium and many of the disputed lease terms set out in the Scott Schedule had been agreed leaving the 5 matters set out in the decision above to be determined.

6. One complication which has been mentioned is that Flat 1 Wolseley Court's lease was fairly recently extended and the limited company leaseholder in that case did accept some of the clauses in dispute in this case. As far as is known, the lease to the other flat has not been extended. It is indeed unfortunate that the leases of the 3 flats in this building may, in the event, have different clauses but the Tribunal was not involved in Flat 1 and this determination must be made in the light of the law as it stands.

7. A further complication has been raised on behalf of the Applicant. It is said that none of the proposed amendments to the original lease were mentioned in the counter-notice following service of the notice requesting a lease extension. This is correct. However, the Respondent has rightly mentioned the High Court Chancery case of **Greenpine Investment Holding Ltd. v Howard de Walden Estates Ltd.** [2016] EWHC 1923 (Ch) which does seem to establish that it is the statutory context which is relevant. The Tribunal is not persuaded that the Respondent is prevented from raising these further matters even though they are not in the counter-notice.

### The Law

8. Section 57 of the **Leasehold Reform, Housing and Urban Development Act 1993** ("section 57") determines the terms of a new lease to be granted by obligation under the provisions of section 56 of the same Act. In essence, the new lease is to be in the same terms as the old one save for the term, ground rent and specific matters referred to in section 57. Certain new terms are proposed by the Respondent. Some have not been accepted by the Applicant

and those which are still being pursued by the Respondent form the basis for this determination.

9. Part of section 57 which is often referred to, by landlords in particular, is subsection (6) which says that a term of the existing lease can be excluded or modified in so far as "*it is necessary to do so in order to remedy a defect in the existing lease or 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*".

10. The Respondent has referred the Tribunal to the case of **Gordon v Church Commissioners for England** LRA/110/2006. This is a decision of His Honour Judge Huskinson in the Upper Tribunal which discusses whether an alteration to the original lease can be ordered enabling the tenants, in essence, to require the landlord to enforce covenants against other tenants in the building.

11. In the latter part of paragraph 41 of his decision, Judge Huskinson says:-

> "*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 (ie 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*"

12. It will be noted in the present case that the original term was 99 years from the 24th March 1999 i.e. is over 50 years unexpired as in the **Gordon** case. The Judge decided that the proposed clause could not go into the new lease because it was simply a new term, even though there were persuasive arguments put forward by the long leaseholder as to why the clause would be in everyone's best interests. He clearly considered that it would not be reasonable to include the new clause as there had been no changes since the lease commenced.

13. In the case now being dealt with by this Tribunal, the original lease commenced just over 20 years ago with the same landlord i.e. the Respondent. Any argument that there have been 'changes' within that time has not been pursued save for the enforcement provisions in the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") which are mentioned below.

14. In **Gordon**, the Judge went on to make *obiter* comments. He discussed the proposed amendment as if he had been wrong in his decision, and the proposed clause had been within section 57(6) as being 'usual or desirable'.

The purpose was obviously to give guidance to landlords and tenants in the future in case his basic decision was overturned on appeal – which it was not.

15. He discussed whether the lack of the proposed clause constituted a 'defect' in the existing lease which he defined by using the Shorter Oxford English Dictionary as a "*shortcoming, fault, flaw or, perhaps even, imperfection*".

16. He then noted that once a defect has been shown "*then a party may 'require' that for the purposes of the new lease any term of the existing lease 'shall' be excluded or modified….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*".

17. He concluded that even taking into account his *obiter* comments, he still came to the same view i.e. that the proposed provision did not come within section 57 even though there may have been benefits to its inclusion.

**Discussion**

18. Clause 2(iv) of the existing lease
The existing clause provides that the leaseholder shall pay one third of the expense incurred by the landlord in keeping the building in reasonable condition. The change proposed by the Respondent is to (i) create a service charge arrangement whereby a 'reasonable proportion determined by the lessor' of such costs is to be paid which will include a premium to be charged for certain acts or omissions on the part of, or on behalf of, the leaseholder, (ii) a payment on account must be made to be determined by the landlord's agent whose decision is to be final (iii) at the end of each year of the term any amount payable in addition to the amount paid on account shall be paid by the leaseholder (but no re-payment will be made for an overpayment) and (iv) there shall be an auditor's certificate which will be final and binding on the parties. It is now conceded by the Respondent that the 'reasonable proportion' should be one third.

19. These changes will enable the landlord to ask for payments on account of service charges which will be a considerable change as the leaseholder will undoubtedly be required to pay about double the amount of service charges in one year i.e. the past year's charges plus an amount on account for the following year. The change will also allow the landlord to charge more or less than a third because of the undefined 'premium' to be paid without any explanation as to why this change is to correct a defect.

20. The final part will, it is presumed, open the door to the landlord charging the leaseholder for an auditor. The RICS guidance for what is to be included in a managing agent's fee states that such a fee includes the provision of service charge accounts. For a building of this age and size, a service charge account will not be complicated and an auditor's fee will therefore be both new and unreasonable in the normal course of events.

21. The existing arrangements in the lease are workable and enable the landlord to recover all reasonable expenses as part of a service charge.

22. Clause 3(b)
The existing lease provides a comprehensive description of the works and services for which the landlord can collect a service charge. For the purpose of this proposed amendment and the previous one, it is worth setting out the existing service charge provisions. The leaseholder covenants:-

> "*At all times during the said term to bear and pay a One third proportion towards the expense of supporting rebuilding cleansing and repairing all passageways pathways sewers drains pipes watercourses water pipes gutters party walls party structures chimney stacks aerials and roofs foundations fences easements and appurtenances belonging to used or capable of being used by the Lessee in common with the Lessor and the Lessees or occupiers of the building of which the demised premises form part*"

The proposed provisions make the description much more complicated but it has not been argued that the new definition corrects a defect. It is simply argued that the new provisions provide 'clarity' to the parties. This is a new provision and is not allowed.

23. Clause 3(c)(iii)(a) and (c)
These are new provisions requiring the leaseholder to give notice to the landlord of any matters that an insurer or underwriter 'might' treat as material in deciding whether to or upon what terms to insure or which 'may' affect any insurance policy. Apart from the obvious fact that this is a new provision, it cannot be the leaseholder's duty to provide information in a situation where such leaseholder does not know what the insurer or underwriter wants. Indeed, the suggested clause could well be defined as being void for uncertainty.

24. Clauses 10 and 12 of the Schedule to the new lease
These provisions can be taken together. They enable the landlord to recover contractual legal costs in certain circumstances and a management fee. Both are new provisions. One of the arguments put forward by the Respondent is that there are new requirements on landlords for fire safety measures and new enforcement provisions imposed by the 2002 Act which require a landlord to obtain a determination from this Tribunal as to whether there has been a breach of a lease term before a Section 146 (**Law of Property Act 1925**) forfeiture notice can be served. On the latter point, it is said that section 57(2)(a) is engaged.

25. The plain fact of the matter is that the existing lease is just over 20 years old and the landlord is the same. The existing lease was drawn up by the Respondent or its lawyers at the time and there is no suggestion on the Respondent's part that there was an error. It is said that there are a number of steps a landlord can take and costs will be incurred. That is exactly the position as it was in 1999. The landlord or its advisors may have made the mistake of not setting out these provisions in detail in the existing lease. Judge Huskinson's comments on the **Gordon** case need to be considered by the Respondent.

26. The existing service charge provisions enable the landlord to claim costs and a management fee if it can satisfy either the leaseholder or this Tribunal or the court (in respect of civil litigation costs) that they have been reasonably incurred in providing the services to the property that clause 2(iv) in the existing lease sets out. The fire safety measures referred to would be included in this. If the Respondent is seeking to recover more, then that is a change. These 2 provisions are not allowed.

27. As to whether section 57(2)(a) is engaged in respect of legal costs, the Respondent is reminded that section 57(2) is engaged if, under the new lease, a landlord "*will be under any obligation for the provision of services, or for repairs, maintenance of insurance*". Paying for the landlord's legal costs of enforcement does not come within that definition.

**Conclusions**

28. Whilst it may be true that the disputed proposed new clauses or something similar are sometimes seen in other long residential leases, the fact of the matter is that these proposed clauses are clearly designed to make the terms more in favour of the landlord. As Judge Huskinson said in **Gordon,** "*it is not sufficient for a provision to be a defect only when viewed from the standpoint of one or other party*".

29. It is the decision of the Tribunal that all 5 of the disputed amendments to the new lease are disallowed.

**.....**
**Judge Edgington**
**17th November 2020**

## ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.