FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	LON/OOAW/OLR/2021/0149
Property	:	Flat 3,8 Nevern Square, Kensington, London SW5 9NW
Applicant	:	Navin Ram
Representative	:	Mr Castle
Respondent	:	Rollhelp Limited
Representative	:	Mr Blakeney
Type of Application	:	**Determination of remaining terms**
Tribunal Members	:	Judge Shepherd Mark Taylor (MRICS)
Date of Determination	:	3rd August 2022

Determination

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1. In this case the Applicant, Navin Ram ("The Applicant") of Flat 3, 8 Nevern Square, London SW5 9NHW (" The premises") is seeking a determination of terms of acquisition which remain in dispute pursuant to section 48 (1) of the Leasehold Reform, Housing and Urban Development Act 1993 ("The Act").

The Respondents to the application are Rollhelp Limited ("The Respondents") the application was dated the 15th of February 2021. The Applicant is the leaseholder of the premises and the Respondent the freeholder.

2. Pursuant to Section 42 of the Act the Applicant served a notice of claim to exercise right relating to the grant of a new lease on the 3rd of September 2020. The respondents served a counter notice pursuant to section 45 of the act thereafter.

3. After negotiations between the parties they helpfully narrowed issues between them. They agreed that the premium to be paid for the extended lease was £180,000. The issues that remained between the parties at the date of the hearing were the reinstatement clause proposed by the Respondent for the new lease and the question of the lease plan. The Applicant was seeking to attach a revised lease plan to the new lease.

4. The proposed reinstatement clause stated the following:

4 (10) (a) - The lessee covenants with the landlord to reinstate the premises to its original layout in accordance with plan B within three months from the date of the lease. The reinstatement must be done at the lessee's cost and to the reasonable satisfaction of the landlord and shall not be made without the prior written consent of the landlord, such consent not to be unreasonably withheld or delayed. The lessee must pay on demand any further reasonable costs and disbursements of the landlord, it's solicitors and surveyors incurred in connection with the reinstatement of the premises or in making good any damage to any land or building, plant or machinery (other than the premises) which is caused by the reinstatement of the premises.("The reinstatement clause").

5. The background to these two issues is that it is alleged by the Respondents that the layout of the premises has been changed in contravention of the lease. They therefore seek the above clause to be included requiring the Applicant to

reinstate the premises on the presumption that he is in breach of the lease. Similarly, the Applicant wants the new lease plan to reflect the situation on the ground rather than the situation at the outset of the original lease. Whilst to some degree this reflects an acceptance by the Applicant that the layout of the premises has been changed there was no concession by the Applicant that he was in breach of the lease. Pausing here it is worth noting that no application had been made pursuant to section 168 of the Commonhold and Leasehold Reform Act 2002 seeking a determination from the tribunal that the Applicant was in breach of his lease. The question of breach was not therefore before the Tribunal.

6. The Applicant became the registered proprietor of the premises on the 28th of October 2003. His lease contains an absolute prohibition against alterations at clause 4 (10):

   That the lessee will not make or suffer to be made any alteration in the plan or elevation of the flat or any part thereof or in any party or other wall or cut or otherwise injure such walls or main Timbers or floors or have any wires or cables too or on the front elevation of the building or alter or interfere with the existing wiring or other services (save for renewing or repairing the same) or install any additional electric current gas or water consuming or heating apparatus in the flat or any part thereof other than the installation of electric fires and except where provision is made therefor by existing cocks sockets points and terminals for the installation thereof and the lessee will not remove any of the existing grates chimneys etc

7. During negotiations between the parties the Respondents discovered that the layout of the premises differed from the original layout as stated in plan B attached to the lease. This was the reason for their inclusion of an additional clause requiring reinstatement.

Analysis

8. Section 42 (3) (d) brackets of the Act requires a lessee to specify the terms which the tenant proposes should be contained in any such lease. Hague on leasehold enfranchisement, 7th edition states at paragraph 30-08:

> *The initial notice must specify the terms which the tenant proposes should be contained in the new lease. This will usually be done by reference to the existing lease. If any particular alterations are required they should be included in the notice.*

9. Mr Blakeney for the Respondents submitted that the Applicant did not include the new lease plan in their notice neither did they make express reference to it therefore they should not be allowed to rely on it now. He says that the Applicant did refer *to such other amendments as may be necessary or desirable in accordance with the provisions of section 57 of the Act* but this general provision should not and cannot be used to slip in through the back door what should have been express. Another more fundamental problem with the inclusion of the lease plan became clear during the hearing. The Tribunal had not been invited to inspect the premises and therefore they were unable to verify whether the proposed plan was accurate or not. Indeed, the Respondents had not been allowed to inspect prior to the hearing in order to verify the plan or indeed to determine what changes had been made to the premises. The Tribunal was therefore not in a position to determine whether or not the proposed lease plan should be included at all. In relation to that issue at least the position was straight forward, the new lease plan should not be included in the new lease.

10. A more thorny issue was the reinstatement clause. Mr Blakeney said that all the Respondents were seeking to do by introducing the the clause was to ensure the breach of the lease was remedied and to ensure that the lease and lease-plan accorded with one another. This presupposes that there was a breach of the lease. Whilst it was common ground that some changes had been made it was not possible to say exactly what they were.

11. Mr Blakeney said that section 57 (1) (d) of the 1993 act was designed precisely for these. The problem with that proposition is that it ignores the fact that the reinstatement clause is founded on the basis that the Applicant himself was in breach of the lease and was required to reinstate the premises to their original condition. As already indicated the Tribunal was not dealing with the question of breach. Mr Blakeney said if the reinstatement clause was not added in the lease this would result in forfeiture being waived (by virtue of the new lease) although not through a positive act on the part of the Respondent but by *compulsion from the tribunal*. The Tribunal rejects that argument. In the present circumstances the Tribunal is dealing with a lease extension and the terms of the new lease. To suggest that the Tribunal is thereby responsible for waiving forfeiture is disingenuous and relies again on the supposition that the Applicant is in breach when the tribunal were not dealing with the issue of breach. It's not clear why the Respondents did not seek to make an application pursuant to section 168. Indeed, they could have asked the Tribunal to stay the current issue pending such a determination. They did not do this and in effect as suggested by Mr Castle they are seeking via the back door to deal with the breach by virtue of the reinstatement clause.

12. Mr Castle's argument was that section 57 (1) (d) was being used by the Respondents in an attempt to deal with an unproven and not admitted breach of covenant. The Tribunal agree. Mr Castle is right to say that no breach has been proven in this case. The Applicant did not become the registered owner of the premises until the 28th of October 2003 and he did not admit that he'd altered the premises in the last 19 years.

13. The starting point in relation to section 57 (1)(d) of the Act is a general presumption that the new lease to be granted will be in the same terms as those of the existing lease. In *Howard de Walden Estates Ltd v Agio* [2009] 1AC39 it was stated that leases may be rewritten under section 57 (1) in a manner that could be fairly radical.

14. The inclusion of the reinstatement clause is not just radical it's based on an entirely unproven assumption of breach This is not the appropriate means of

obtaining such enforcement. If the Respondents wanted to enforce the lease terms they should have brought an application under Section 168. This was not done and it is not for the Tribunal to assist the Respondents to deal with their own failure to take action. Indeed, the suggestion at this stage that the Tribunal is in some way complicit in the Respondents' inability to forfeit the lease is as already indicated entirely disingenuous and wrong. In any event the Tribunal accepts Mr Castle's argument that the Respondents still have a remedy by virtue of injunction. It is not unusual that the granting of a new lease will waive any right to previous forfeiture. This is one of the consequences of giving leaseholders the right to obtain new leases. It would be wrong for the Tribunal to be swayed by allegations of breach when no proper enforcement action has been started. Pausing here there was some lack of clarity about when the respondents became aware of the breach but an application under section 168 could have been raised even at the 11th hour and it was not done so.

15. In summary the tribunal were not impressed by either the lease plan argument or the reinstatement clause argument. It was unfair for the Applicant to seek to impose a lease plan that had not been verified by the Respondent or the Tribunal and it was unfair for the Respondent to seek to foist a reinstatement clause of the Applicant when proper enforcement action had not been taken.

16. Hopefully this determination is sufficient to end the matter as all other issues between the parties including the valuation of the new lease have been resolved.

Judge Shepherd 3rd August 2022

ANNEX - RIGHTS OF APPEAL Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
3. 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.
4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers
5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.