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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAC/OLR/2015/0788**
Property	:	**Flat 11, Kennyland Court, Hendon Way, London NW4 3LU**
Applicant	:	**Hyun Don Choi**
Representative	:	**Mr G Willis of C L Clemo and Co Solicitors**
Respondent	:	**Daejan Investments Limited**
Representative	:	**Miss K Gray, Counsel instructed by Wallace LLP**
Type of Application	:	**Consideration of lease terms under the Leasehold Reform, Housing & Urban Development Act 1993**
Tribunal Members	:	**Tribunal Judge Dutton** **Mrs H C Bowers MRICS**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR on 4th August 2015**
Date of Decision	:	**1st September 2015**

DECISION

DECISION

The Tribunal determines the terms of the lease as set out in findings section below.

BACKGROUND

1. The Respondent is the freehold owner of Kennyland Court and the Applicant the lessee of Flat 11. It appears that in November 2014 a notice under Section 42 of the Leasehold Reform, Housing and Urban Development Act 1983 (the Act) claiming a new lease was served. The premium payable was agreed in June of this year but there remain issues relating to the terms of the new lease.

2. Prior to the hearing we were provided with a bundle of documents which contained copies of the application, directions, claim notice and counter notice as well as the freehold and leasehold titles. The existing lease was also included with the new draft lease, a summary of issues in dispute and other documentation including the authority relied upon of Gordon v the Church Commissioners reference LRA/110/2006. We also received skeleton arguments on behalf of the Applicant, filed by Mr Willis her advocate, and on behalf of the Respondents filed by Miss Gray of Counsel. In addition Mr Willis provided us with a table of decisions from the LVT/First Tier Tribunal with copies some of those decisions.

3. Mr Willis indicated that in his view the jurisdiction under Section 57 (1) and (2) were not relevant and that this matter rested within the provisions of Section 57 (6) (b), which was agreed by Miss Gray.

4. The three issues in dispute were, firstly at Clause 1 of the proposed draft lease the wording should proceed as follows:- "*yielding and paying to the landlord firstly a rent of one peppercorn per annum (if demanded) and secondly on demand by way of further rent such sums as are payable under Clause 2 (2) of the previous lease (as amended herein) and thirdly on demand all of the sums payable by the tenant hereunder*".

5. A further modification was requested by the Respondents to the schedule at clause 2 to read as follows "*and if the lessee shall fail to repair and make good such defects and wants of repair then it shall be lawful for the lessor to enter the flat and carry out such works itself and the cost of such works shall be paid by the lessee to the lessor on demand and shall at the option of the lessor be recoverable as a debt or as a rent in arrear*" these words to be added to the end of clause 2 (10) of the tenants covenants in the previous lease.

6. The final alteration was a desire to amend the registration fee at clause 2(16) (iv) to provide as follows "*the registration fee payable at clause 2 (16) (iv) of the tenant's covenants in the previous lease shall be £50 together with VAT thereon or such greater registration fee as the landlord reasonably requires.*"

7. The arguments for the Applicants were that the first change relating to the wording including reservation as to rent was unnecessary. The second the change to the repairing obligations and the right for the landlord to recover the costs as a debt was unreasonable. This was referred to as the Jervis v Harris clause arising from a Court of Appeal case bearing that name under reference CH 1991 J No 416.

8. It was said by Mr Willis that this merely added another string to the Respondent's bow and were for the landlord's convenience only. There were disadvantages that he could see, such as disputes concerning access and costs, but the main plank of the argument was that the existing lease gave the landlord perfectly adequate remedy and that there were no change in circumstances which lead to the need for this alteration to be made. It was not, he said, a defect in the lease the existing provisions being fully workable in practice.

9. Finally on the question of registration fee, the Applicant relied upon the arguments put forward in relation to the repairing obligations but also on two LVT decisions one from the Eastern panel and the other from London where the LVT had refused to modify the registration fee having regard to the Gordon case referred to above.

10. For the Respondents Miss Gray accepted that the change in respect of the reservation of service charge as rent was not a modification of the existing terms. It was said that this was in the interests of both parties as it removed any potential confusion and the term was reasonable and logical. She did, however, confirm on discussions with us that the wording which we suggested might deal with this matter would not be objected to. We had suggested that the clause might read as follows *"yielding and paying to the landlord in lieu of the yearly rent contained in the previous lease at clause 1, a rent of one peppercorn per annum if demanded"* omitting the remainder of that clause and at clause 2 of the proposed new lease, under the heading "Terms" inserting therein the following wording after *"previous lease except as to"* the following wording " *the yearly rent now as reserved as a peppercorn.*" This seemed to be agreeable to both parties.

11. On the question of the enforceability covenant with regard to repairs, she argued that this was a modification and not an entirely new clause. It was suggested, perhaps somewhat surprisingly, that this was a benefit to both the landlord and to the tenant. Her view was that this clause would only operate if the Applicant behaved badly and therefore there was no prejudice by including it. In this regard she relied upon the extract of Woodfall, the Jervis v Harris case and De Walden v Aggio the Supreme Court case where certain obiter comments were made by Lord Neuberger.

12. Finally, on the question of the registration fee, it was put to her that schedule 11 of the Commonhold and Leasehold Reform Act 2002 may provide assistance. The Respondent's position was that this was a change in circumstances given the change in the value of money and that the fee provided for in the original lease of only £12 without any uplift was unreasonable given the passage of time. The introduction of the new figure was not she said of prejudice to the Applicant and relied on the Leasehold Valuation Tribunal case of Bellmont Hall issued by the Tribunal under LON/OOAZ/OLR/2013/1382 and 1474 in April of last year. When asked of Mr Willis of whether the £50 was an unreasonable fee, the best he could say was that he would not argue against it. There were not costs applications.

THE LAW

13. The law applicable to this matter is to be found at Section 57 and is set out below.

FINDINGS

14. There are three matters that we need to consider. We will deal with those in turn. The first is the proposed wording to be found at clause 1 of the new lease. We have already set out above wording that we suggested to the parties and which they found acceptable. In those circumstances we find that that wording as set out in clause 4 above should be substituted into the new lease for the wording which presently exists.

15. We turn then to the repairing obligation and the changes required. We do not accept Miss Gray's arguments in this regard. It seems to us that the original lease was perfectly adequate giving the landlord the rights of pursuing any breaches by way of potential forfeiture if the terms of the lease are not adhered to. There are rights of inspection that can be utilised and it does not seem to us necessary or indeed within the provisions of Section 57 (6) (a) or (b) to include a further clause which expands the lessee's liabilities. It is not, with all respect to Miss Gray, a modification. It is an addition of a liability that did not exist in the existing lease and we cannot see that there are any changes of circumstances or a defect in the original lease that warrants this additional clause. We therefore strike out clause 2 in the schedule of the proposed new lease.

16. We have more sympathy with the Respondent's position in respect of clause 4 of the schedule to the new lease relating to the registration fee. We have considered the decisions but find that the Bellmont Hall case is one that we are comfortable with. It does seem to us that with the passage of time a fee of £12 that could exist far into the future, is insufficient for this purpose. It is in the interest of the Applicant, as well as the Respondent, to ensure that registration of transactions are dealt with, for good housekeeping purposes if nothing else. A solicitor is unlikely to want to undertake works of this nature for such a paltry reward. Accordingly an increase to £50 or such other reasonable sum seems to us to be perfectly fair. The Applicant of course has the protection of Schedule 11 of the 2002 Act to challenge any fee if it departs greatly from the £50 plus VAT provided for in the new lease.

17. That concludes matters. There were no applications for costs.

Judge: *Andrew Dutton*

A A Dutton

Date: 1st September 2015

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).