4570

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/26UK/OLR/2017/0120**
Property	:	24A London Road, Apsley, Hemel Hempstead HP3 9SB
Applicants	:	Kevin Alan Lane & Georgina Louise Lane
Representative	:	S A Law LLP
Respondents	:	John Jeremy Harrison & Janina Danuta Harrison
Representative	:	Taylor Walton LLP
Type of Application	**1**	For determination of premium and other terms of acquisition of new lease [LRHUDA 1993, s.48(1)]
	2	For determination of landlord's reasonable costs [LRHUDA 1993, s.60(1)]
Tribunal Members	:	G K Sinclair, G F Smith MRICS FAAV REV
Date of determination	:	Tuesday 12th September 2017
Date of decision	:	13th November 2017

DECISION FOLLOWING A PAPER DETERMINATION

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1. For the reasons which follow the tribunal determines :
   a. That none of the modifications to the lease sought by the applicant lessee upon which no agreement with the lessor has been reached are necessary, and/or
   b. That no changes have occurred since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease so as to make it unreasonable in the circumstances to include, or include without modification, the terms in question.

within the meaning of section 57(6) of the Leasehold Reform, Housing and Urban Development Act 1993.

2. The tribunal further determines that the amount of the lessor's costs payable by the applicant lessee pursuant to section 60 is limited to the sum of £1691.00 plus such VAT as is due thereon, as explained in the Schedule to this decision.

Introduction

3. In this case the applicant lessee has applied for the grant of a new lease of a flat, on the first and second floors above a shop, known as 24a London Road, Apsley, Hemel Hempstead HP3 9SB, pursuant to Chapter II of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993. The only issues that have not been agreed between the parties and require determination by the tribunal are the terms of the new lease (i.e. whether some terms in the current lease be modified) and quantum of the lessor's costs payable by the applicant lessee.

4. By agreement with the parties the case was dealt with by the tribunal on the basis of written submissions, with those on behalf of the applicants prepared by Stan Gallagher of counsel and those for the respondents by their solicitor. While there was a clear schedule setting out the respective parties' views on costs the same could not be said about the proposed deletions or modifications to the terms to be included in the new lease. Further directions were therefore issued on 20th September 2017 seeking clarification about which terms were now agreed and which remained in dispute.

5. By the existing lease dated 15th December 2000 the present respondents granted the first-named applicant a lease of the above-mentioned upstairs flat for a term of 99 years commencing on 1st December 2000, at an initial rent of £50 per year for the first 33 years, rising to £100 for the next 33 years and then to £150. As Mr Gallagher points out in his submissions, some of the provisions of the lease seem more designed for use with a block of flats than a single flat. In addition, the fact that the building comprises a single flat above a commercial unit retained by the lessor deprives the residential lessee of the use of many statutory remedies for poor management that would be available were the building to contain two or more flats. Despite this, the tribunal is bound to apply the statutory provisions of the 1993 Act when considering the merits of this application.

Applicable law

6. On the subject of exclusion or modification of lease terms section 57 of the Leasehold Reform, Housing and Urban Development Act 1993 provides :
   (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)–(5) *[not material]*

(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 an 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. Concerning the applicant lessee's liability to pay some of the respondent lessor's costs, section 60 provides :

(1) Where a notice is given under section 42, then (subject to the provisions of this section) the tenant by whom it is given shall be liable, to the extent that they have been incurred by any relevant person in pursuance of the notice, for the reasonable costs of and incidental to any of the following matters, namely –

(a) any investigation reasonably undertaken of the tenant's right to a new lease;

(b) any valuation of the tenant's flat obtained for the purpose of fixing the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of a new lease under section 56;

(c) the grant of a new lease under that section;

but this subsection shall not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void.

(2) For the purposes of subsection (1) any costs incurred by a relevant person in respect of professional services rendered by any person shall only be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3)–(4) *[not material]*

(5) A tenant shall not be liable under this section for any costs which a party to any proceedings under this Chapter before [the appropriate tribunal] incurs in connection with the proceedings.

8. In his written submissions Mr Gallagher, for the applicants, drew to the tribunal's attention the decision by the President of the Upper Tribunal (Lands Chamber) in *Rossman v The Crown Estate Commissioners*[1] on the issue whether a lease can be said to be defective. The respondents' solicitor relied instead on a passage from the current (6th) edition of *Hague on Leasehold Enfranchisement* at 32–10 on the scope of modifying the terms of the existing lease, and on the decision of HHJ Huskinson in *Sinclair Gardens Investments (Kensington) Ltd v Wisbey*[2] on costs in relation to the service of the counter-notice and on instructing a valuer.

Discussion and findings

9. The tribunal considers it important to note at the outset that as recently as 2000 the terms of this lease were agreed by the first-named applicant with the present respondents. If dissatisfied with the terms proposed for the existing lease then that was the time to challenge them. While the parties are free to agree between themselves alterations of any nature whatever the tribunal, if required to decide what modifications to impose, must abide by the criteria prescribed by section 57.

10. Those in section 57(1)–(5) are not relevant in this case, so the focus of enquiry is placed on section 57(6). First, are the deletions or modifications proposed by the applicants necessary because the lease is defective? If not, then is it unreasonable to include, or include without modification, a term in the lease in view of changes since the date of the lease that affect its suitability? If that test is not met then no such modification can be imposed on an unwilling party. One such change might be an unwillingness by CML lenders to accept certain terms such as stepped increases in ground rent and/or service charges so that the amount due quickly escalates beyond normal market conditions or actual service charge expenditure. In this case, although mentioned, no evidence has been produced of any specific alterations in CML lending criteria that are relevant to the applicants' proposals.

11. The parties have produced a Schedule setting out their rival contentions about the deletions or modifications proposed by the applicant lessees. The tribunal shall briefly address each in turn.

12. *4th Schedule, Part 1 – Variation of proportions.* The lease currently provides for recovery of 100% of any service charge costs, so it is not defective. No changes have been alleged to have taken place since December 2000. This provision is typical where a landlord may wish to extend the estate either by erecting a further building or by adding another floor to a block. Should the lessor in this case wish to extend the ground floor commercial premises then one might expect that the proportion attributable to the flat would decrease, not increase. This amendment is rejected.

13. *Clause 7 – Company's [lessor's] power of investment.* The deletion of this clause has been agreed by the lessor and therefore does not require determination.

14. *3rd Schedule, par 3 – underletting.* This proposal is rejected. Paragraph 11 covers the case of assured shorthold tenancies, whereby no such covenant is

[1] [2015] UKUT 288 (LC) (Sir Keith Lindblom, President)

[2] [2016] UKUT 203 (LC); [2016] L&TR 29

required for a letting at a rack rent with no premium for less than 7 years.

15. *5th Schedule, para 3 – to employ staff.* This term does not meet the statutory criteria justifying exclusion or modification of the existing term. However, while the lease appears better suited to the management of a large block where the landlord may legitimately wish to employ on-site staff such as a caretaker, the employment of any dedicated staff in a building such as this would certainly fail the "reasonableness" test for recovery of service charges under section 27A of the Landlord and Tenant Act 1985.

16. *5th Schedule, para 5 – TV aerials, etc.* The lease provides at Schedule 3, para 22 that the lessee is not to erect any television aerial, etc. There is no mention of seeking the lessor's consent. By clause 4.1 the lessor covenants to provide the services specified in the 5th Schedule, so a "communal" aerial must be provided by the lessor for the benefit of the applicants.

17. *5th Schedule, para 7 – Third Party insurance.* This amendment is accepted by the lessor.

18. *5th Schedule, para 11 – Other services and expenses.* There is no statutory reason why this provision should be deleted, but again the necessity for such deletion is not established, whether by CML lending criteria or otherwise. However, the withdrawal of particular services (or the addition of services of questionable benefit) has not been proven to be of any value. Yet again a former member of the security services is mentioned, but long service and experience is seemingly not recognised as being of any value.

19. *3rd Schedule, para 9.2 – Not to underlet without the consent of the lessor.* There is no reason to impose a 3 year minimum period for underletting. A landlord (and arguably the buildings insurer) is entitled to know the identity of who is in actual occupation of the demised premises. Such a 3 year period is not, in the tribunal's experience, a normal lease provision and it would open up the possibility of the demised premises being used for an AirBnB type of operation that could very easily cause a nuisance to the lessor or any future lessee of the ground floor commercial premises. Statutory provisions already provide the remedy sought concerning the unreasonable withholding of any landlord's consent, but (the tribunal asks rhetorically) is it not better if the state of the law is actually reflected in the wording of the lease itself?

20. *1st Schedule, proposed new para 5 – to permit lessee to enter other premises for purpose of laying mains water supply pipe.* This proposal, with the intention of separating the water supply to the flat from that to the ground floor premises, is accepted by the lessor.

21. Turning now to the issue of recoverable costs, the tribunal wishes to make a few general points. Ordinarily, the process of checking whether a tenant is entitled to exercise the right to acquire a new lease is relatively straightforward. So too is preparation of a counter-notice after obtaining valuation advice. Instructing a valuer is regarded by tribunals both at First-tier level and in the Upper Tribunal as essentially an administrative task requiring no legal skill. The same is not the case for considering the valuer's report and advising the client upon it.

22. The tribunal also considers that if a Grade A solicitor is instructed to handle the transaction then there is no need for a partner to be involved as well. Secondly, a transaction such as this deserves the attention of the property department, not the services of a solicitor from the litigation department (especially if the hourly rate of the latter is higher).

23. In this case the lessee's notice was more complex than usual due to the many proposed changes to the lease terms. This in turn required some more thought in the preparation of the counter-notice. While the receiving party may not think so, the tribunal has therefore been more generous in the time that it has allowed for consideration of the notice and responding with a counter-notice.

24. Applying these criteria to the costs schedule produced by the lessor's solicitors the tribunal considers that the amount demanded is excessive. Having considered the schedule containing both parties' submissions (and the lessor's concessions on a number of points) the tribunal determines that the amount payable by the lessee to the lessor on completion of the new lease is £1 691.00 plus such VAT as may be recoverable thereon. A stage by stage explanation appears in the Schedule annexed to this decision.

Dated 13th November 2017

Graham Sinclair

Graham Sinclair
Tribunal Judge

SCHEDULE – ALLOWABLE SECTION 60 COSTS

Point #	*Item*	*Amount claimed*	*Tribunal comments*	*Decision*
1 GP	Involvement of partner		Grade A solicitor should not need such supervision, but property department rates should apply	
2 GP	Hours spent	£3 467.60	Too much time claimed	
3	Investigating claim and title	£192.00	Allow 1 hr @ £170	£170.00
3	Preparing counter-notice	£319.00	As above	£170.00
3	Correspondence with lessor client	£481.00	As above. Two solicitors not required	£170.00

4	Correspondence with surveyor	£180.00	Issue of instructions is an admin task only. Tribunal notes that premium was agreed despite terms still remaining in dispute. No negotiation costs recoverable	£0.00
5	Correspondence with SA Law	£196.00	30 mins @ £170	£85.00
	Disbursements ¶	£606.00	Search fee and valuation report not challenged	£606.00
6	Drafting new lease	£365.00	Template lease by reference to existing one. Disallow cost of partner, and allow 1 hr @ £140	£140.00
7	Correspondence with lessor client	£70.00	Negotiation costs not recoverable. Not proven to refer to grant	£0.00
7	Correspondence with SA Law	£70.00	Allowed	£70.00
8	Projected costs	£365.00	Disallow partner rate. Agree 2 hrs @ £140	£280.00
	Sought (exc VAT)	*£2,844.00*	**Allowed (exc VAT) ¶**	**£1,691.00**

Notes :

\# Numbering taken from applicants' schedule setting out points in dispute

¶ The tribunal's award is net of any VAT calculated as payable. In relation to the VAT treatment of disbursements, and in particular search fees paid to a third party, the receiving party is referred to the decision of the First-tier Tribunal (Tax Chamber) in *Brabners LLP v Commissioners of HMRC* [2017] UKFTT 666 (TC)