



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

<b>Case reference</b>	:	<b>CAM/22UE/OLR/2019/0196</b>
<b>Property</b>	:	<b>19 Broadlands, Thundersley, Benfleet, Essex SS7 3BD</b>
<b>Applicant</b>	:	<b>Susan Nella Clarke</b>
<b>Representative</b>	:	<b>Nairnsey Fisher and Lewis</b>
<b>Respondent</b>	:	<b>Mandy Ann Leach and Caroline Susan Tompsett</b>
<b>Representative</b>	:	<b>Tolhurst Fisher LLP</b>
<b>Type of application</b>	:	<b>Determination of the terms of a new lease and costs to be paid under the Leasehold Reform Housing and Urban Development Act 1993 (“the Act”)</b>
<b>Tribunal member(s)</b>	:	<b>Judge Wayte</b>
<b>Date of decision</b>	:	<b>17 April 2020</b>

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**DECISION**

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**The tribunal determines that:**

1. The terms of the new lease shall be as offered by the applicant on 28 November 2019.
2. The section 60 costs payable by the applicant to the respondent are £2,325 inclusive of VAT and disbursements.

## **Background**

1. This is an application for a determination of the terms of the new lease under section 57 of the Act and the respondent's costs under section 91(2)(d) of the Act.
2. The Applicant is the leasehold owner of the flat known as 19 Broadlands, Thundersley, Benfleet, Essex SS7 3BD registered at HM Land Registry under title number EX 187021 ("the Flat"). The Applicant instructed Nairnsey Fisher and Lewis Solicitors to act on her behalf.
3. The Respondent is the freehold owner of land which includes the Flat.
4. On 23 April 2019 the Applicant served on the Respondent a notice of claim to exercise the right to acquire a new lease of the Flat pursuant to section 42 of the Act.
5. On 18 June 2019 the Respondent's solicitor Tolhurst Fisher LLP served a counter notice, admitting that the Applicant had the right to acquire a new lease but disputing the premium offered and proposing various additional terms for the new lease.
6. The premium was subsequently agreed between the respective parties' surveyors but in the absence of any wider agreement on 29 November 2019 the Applicant applied to the First Tier Tribunal Property Chamber (Residential Property) for determination of the terms of the new lease pursuant to section 57 of the Act and the landlord's reasonable costs pursuant to section 60 of the Act.
7. The tribunal issued directions on 6 January 2020 providing for the service of a draft deed of surrender and new lease (if not already provided) and a statement of costs by the landlord by 20 January 2020. The draft lease had already been the subject of discussion between the respective solicitors but the applicant's solicitors complained that the costs schedule was only provided on 21 February 2020. No formal response was made to that schedule, other than the generalised objection that the fees were "exaggerated for the work undertaken". Both parties agreed to a paper determination on the basis of the applicant's bundle.

## **The terms of the new lease**

8. As set out in the summary of the issues in dispute, the starting point under section 57(1) of the Act is for the new lease to be granted on the same terms as those of the existing lease. In addition, section 57(6) provides that 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 terms 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.

In addition, it is obviously open to the parties to agree the terms of the new lease.

- 9. The lease produced by the respondent's solicitor on 1 November 2019 contained several additions. The applicant's case is that those additions do not fall within section 57(6) of the Act as they are not necessary to remedy a defect in the existing lease. They accepted two of the modifications on the basis that they were in keeping with the other flat leases where lease extensions had already been granted. The draft lease is at pages 77-81 of the bundle, with the modifications set out in a schedule. The modifications agreed by the applicant were to add a new paragraph (w) to the Fourth Schedule stating that "no long lease created immediately or derivatively by way of sub demise under this Lease shall confer on the sub tenant as against the Lessor any right under Chapter II of Part I of the Act to acquire a new Lease"; and to replace the words "ten pounds" with "forty pounds" in paragraph (s) of the Fourth Schedule, dealing with notice of assignment etc.
- 10. The bundle included emails between the parties' solicitors dealing with the draft lease. In particular, the applicant's solicitor returned the draft on 28 November 2019 stating it had been amended to ensure it was in line with the other lease extensions agreed by the freeholder. The respondent's solicitors replied on 3 January 2020 stating that none of the amendments were agreed. When pushed for reasons they wrote on 21 February 2020 referring to two authorities which they stated supported their original amendments. The first case was the *Respective Lessees of the Property v Brickfield Properties Limited* [2013] UKUT 0133. That is in fact a lease variation case and therefore of questionable reference to this dispute. From the email, the respondent seeks to rely on the First-tier decision in that case. That is of course not binding on this tribunal and given it affects a different property, of no relevance to this dispute at all.
- 11. The second decision quoted by the respondent's solicitor was *Howard de Walden Estates Limited v Assio and Others* [2008] UKHL 44. This authoritative decision concerns the definition of qualifying tenants for the purposes of Chapter II of the Act. Lord Neuberger considered the statutory language in some detail and it is correct to say that in paragraph 49 he observes that "*Section 57(6) also indicates that the*

*LVT was intended to have relatively wide powers, often involving sophisticated judgement.*” The respondent relies on this observation to support the modifications, although has not made any argument explaining the basis on which they satisfy section 57(6) of the Act or any other relevant provision.

### **The tribunal’s decision**

12. It seems to me that the key word in Lord Neuberger’s judgment is “relatively” and that depends upon the modifications falling within section 57(6) of the Act (or other relevant provision). The respondent has made no arguments in that regard and I agree with the applicant that the amendments sought do not appear to remedy any defect or fall within section 57(6)(b). In the circumstances, I determine that the new lease should be in the form agreed by the applicant’s solicitors on 28 November 2019, with the amendments to the existing lease limited to those set out in paragraph 9 above.

### **The landlord’s costs**

13. Under section 60 a claimant leaseholder is required to pay the reasonable costs incurred by the landlord in connection with a claim for a new lease. Copies of the relevant statutory provisions are annexed to this decision.
14. The costs claimed are £2,625, inclusive of the surveyor’s fee of £750, disbursements of £45 and VAT. Robert Plant acted for the respondent, he is a partner of Tollhurst Fisher LLP and has 15 years post qualification experience. His hourly rate is £250 plus VAT and his time is charged to the client in 6 minute units. The costs schedule sets out the work carried out for the respondent in some detail, including 1.42 hours in respect of correspondence and 3.54 hours for drafting and preparation.
15. As stated above, the applicant’s solicitors complained about the late delivery of the schedule and the “exaggerated” nature of the costs but have not provided any detailed response, other than a request in their letter to the tribunal dated 24 February 2020 for sanctions against the respondent in terms of being barred from taking further part in the proceedings and a determination of costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) Property Chamber Rule 2013.

### **The tribunal’s decision**

16. The basis for assessing costs in enfranchisement cases was set out in the Upper Tribunal decision of *Drax v Lawn Court Freehold Ltd* [2010] UKUT 81 (LC). Costs must be reasonable, have been incurred in pursuance of the initial notice and in connection with the matters listed

in sub-sections 60(1)(a) to (c). Section 60(2) also limits recoverable costs to those that the respondent landlord would be prepared to pay. This was described in *Drax* as a limited test of proportionality. It is not an assessment on the standard or indemnity basis.

17. In the absence of a detailed objection by the applicant, I have considered the costs in the round as follows:
  - (i) The hourly rate is reasonable and in line with the SCCO Guidelines for National Grade 1 practices, bearing in mind they have not been updated since 2010.
  - (ii) I accept that enfranchisement is of sufficient complexity and importance to require the attention of a senior fee earner, particularly at the initial stage. That said, this should result in a more efficient service as a senior fee earner would be expected to require less time to deal with matters within their expertise.
  - (iii) With that in mind, I consider that the time claimed for drafting and preparation is excessive and reduce it by one hour, or £300 including VAT.
  - (iv) The surveyor's costs and the disbursements are reasonable.
18. In terms of the applicant's request for sanctions, by the time they wrote to the tribunal on 24 February 2020, the respondent had submitted their costs schedule and therefore there was nothing else for them to do in terms of preparation. As to the suggestion of an application for costs under Rule 13 (unreasonable behaviour), this is a high bar and failure to meet the date in the directions for the costs schedule is insufficiently unreasonable conduct in my view. That said, if the applicant considers she has a strong case she can apply for an order for costs within 28 days after this decision is sent out and I will give directions to determine that application at that stage.
19. In the circumstances the tribunal determines that the section 60 costs in respect of the original claim notice are £2,325 inclusive of VAT and disbursements.

**Name:** Judge Wayte

**Date:** 17 April 2020

## **Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

## **Annex**

## Leasehold Reform, Housing and Urban Development Act 1993

### **S60.— Costs incurred in connection with new lease to be paid by tenant.**

(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) Where by virtue of any provision of this Chapter the tenant's notice ceases to have effect, or is deemed to have been withdrawn, at any time, then (subject to subsection (4)) the tenant's liability under this section for costs incurred by any person shall be a liability for costs incurred by him down to that time.

(4) A tenant shall not be liable for any costs under this section if the tenant's notice ceases to have effect by virtue of section 47(1) or 55(2).

(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] <sup>1</sup> incurs in connection with the proceedings.

(6) In this section "*relevant person*", in relation to a claim by a tenant under this Chapter, means the landlord for the purposes of this Chapter, any other landlord (as defined by section 40(4)) or any third party to the tenant's lease.

### **S91.— Jurisdiction of tribunals.**

(1) [Any] question arising in relation to any of the matters specified in subsection (2) shall, in default of agreement, be determined by [the appropriate tribunal].

(2) Those matters are—

(a) the terms of acquisition relating to—

(i) any interest which is to be acquired by a nominee purchaser in pursuance of Chapter I, or

(ii) any new lease which is to be granted to a tenant in pursuance of Chapter II,

including in particular any matter which needs to be determined for the purposes of any provision of Schedule 6 or 13;

(b) the terms of any lease which is to be granted in accordance with section 36 and Schedule 9;

(c) the amount of any payment falling to be made by virtue of section 18(2);

- (ca) the amount of any compensation payable under section 37A;
  - (cb) the amount of any compensation payable under section 61A;
  - (d) the amount of any costs payable by any person or persons by virtue of any provision of Chapter I or II and, in the case of costs to which section 33(1) or 60(1) applies, the liability of any person or persons by virtue of any such provision to pay any such costs; and
  - (e) the apportionment between two or more persons of any amount (whether of costs or otherwise) payable by virtue of any such provision.
- (9) [The appropriate tribunal] may, when determining the property in which any interest is to be acquired in pursuance of a notice under section 13 or 42, specify in its determination property which is less extensive than that specified in that notice.
- (11) In this section—  
“*the nominee purchaser*” and “*the participating tenants*” have the same meaning as in Chapter I;  
“*the terms of acquisition*” shall be construed in accordance with section 24(8) or section 48(7), as appropriate
- (12) For the purposes of this section, “*appropriate tribunal*” means—  
(a) in relation to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and  
(b) in relation to property in Wales, a leasehold valuation tribunal.