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

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| **Case Reference** | : | **DD/LON/OOBD/OLR/2014/1729** |
| **Property** | : | **Flat 3, 48 Cedars Road, Hampton Wick, KT1 4BE and car park space number 3** |
| **Applicant** | : | **Simon Jeremy Davies** |
| **Representative** | : | **Mr Sissons of Counsel** |
| **Respondent** | : | **Estates Finance Limited** |
| **Representative** | : | **Dr Virnik** |
| **Type of Application** | : | **For the determination of other terms of the new lease pursuant to section 48** |
| **Tribunal Members** | : | **Mrs S O'Sullivan - solicitor**<br>**Mrs E Flint –valuer** |
| **Date and venue of Hearing** | : | **3 March 2015 at 10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | : | **13 April 2015** |

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**DECISION**

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## Decisions of the tribunal

The tribunal makes the determinations as set out under the various headings in this Decision

## The application

1. The Applicant seeks a determination pursuant to s.48 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act")] as to the other terms of the new lease of Flat 3, 48 Cedars Road, Hampton Wick, KT1 4BE and car park space number 3 (the "Flat").

2. Mr Davies gave notice to his landlord under section 42 of the 1993 Act on or around 8 April 2014. On or about 17 June 2012 the Respondent served a counter notice admitting the right to acquire a new lease of the Property but putting forward alternative proposals for the terms of the new lease. As not all matters were agreed an application was made to the tribunal.

## The hearing

3. The Applicant attended the hearing and was represented by Mr Sissons of Counsel. The Applicant is represented by Carter Bell solicitors. The Respondent was represented by Dr Virnik, a director.

4. At the commencement of the hearing the tribunal clarified the documents which the parties wished the tribunal to consider. The Applicant had lodged a bundle of documents in advance of the hearing and Counsel provided the tribunal with a skeleton argument and supporting authorities at the commencement of the hearing. Dr Virnik for the Respondent confirmed that he had sent a bundle to the tribunal. As only one copy of this bundle was available the tribunal took a short adjournment to allow it to be copied and to give Counsel for the Applicant an opportunity to read it through. Counsel raised no objection to the admission of these documents. The Respondent's representative, Dr Virnik, was based in Austria. Dr Virnik informed the tribunal that he had only received the Applicant's bundle some 2 days before the hearing although he accepted that it had been delivered to the Respondent's address in Esher a week ago.

## Application for an adjournment

5. Dr Virnik applied for an adjournment of the hearing on the basis that he needed more time to familiarise himself with the Applicant's bundle. At first he said that he had not had time to read the bundle at all. After having been referred to his statement of costs in which he claimed 2.5 hours for reading the bundle, he told the tribunal that although he had

read it on Sunday he had forgotten almost all of the contents. After taking a short break to consider the application for the adjournment the tribunal determined that it should be refused on the following grounds;

i. Correspondence from the Respondent at page 88 of the bundle had given the address in Esher as the address for service of legal documents in the UK. It was accepted by Dr Virnik that the bundle had been received by the Esher office a week ago;

ii. Dr Virnik had completed a schedule of costs in which he had claimed 2.5 hours for reading the bundle and he accepted on questioning that this was the case; and

iii. In any event the bundle was modest containing only 91 pages in total (which included the lease) and, having gone through each document contained in the bundle, it was confirmed by Dr Virnik that he had seen all the documents previously.

6. Taking the above grounds into account the tribunal was satisfied that Dr Virnik had been provided with ample time in which to consider the bundle and that the Respondent would not be prejudiced by the refusal of an adjournment of the hearing.

7. The tribunal went on to consider the substantive application.

**The Applicant's case**

8. Counsel for the Applicant informed the tribunal that the parties had agreed the premium to be paid by the Applicant and all of the terms of the new lease save in relation to one issue which was now before the tribunal. The tribunal was referred to a statement of agreed facts at page 65 of the Applicant's bundle. The sole issue before the tribunal was whether the Respondent was entitled to insist upon the inclusion in the new lease of a new term which would entitle the Respondent to relocate the Applicant's car parking space in the event that the Respondent developed its adjacent property.

9. Put simply the Applicant maintained that the term proposed by the Respondent should not be included as it amounted to a variation of the terms of the existing lease and that variation was not justified under section 57(6) of the 1993 Act which sets out the only basis upon which any variation should be allowed. The new clause proposed is as follows;

*"PROVIDED THAT upon giving reasonable notice to the Tenant the Landlord is at liberty to provide an alternative car parking space together with rights of access thereto and where such alternative car parking space does not reduce or impede the Tenant's right to park under the terms of this clause."*

10. By clause 2 of the existing lease the Flat is demised to the Applicant together with the rights set out in Part II of the First Schedule. By paragraph 5 of Part II of the First Schedule those rights include:

*"The exclusive right to park one motor car on the Car Park Space together with the right of access with the motor car thereto."*

11. The term Car Park Space is defined to mean *"the space numbered 3 on the Plan 1"*. The plan shows the parking space numbered 3.

12. It is submitted for the Applicant that he has an exclusive easement of parking over a defined, fixed space. The Respondent has no entitlement to relocate the car parking space and any development by which the Respondent obstructs the car parking space or even made it difficult to access would amount to a substantial interference with the Applicant's rights.

13. It is acknowledged by the Applicant that the lease contains a reservation in favour of the Respondent of the right to build or develop alter or deal with the Building provided that the amenity of the Flat or access of light or air to it is not diminished. However the Applicant submits that this very general reservation cannot displace or override the specific grant of a fixed easement over the Car Park Space not least because it falls to be construed strictly against the landlord. In this regard Counsel relies on *Paragon Finance Plc v City of London Real Property Co Ltd [2002] EGLR 97*. It is further submitted that the Respondent appears to accept this given that it would be unnecessary to include the clause if the Respondent already has the right to re-locate the space pursuant to the general reservation at paragraph 3 of Part III of the First Schedule.

14. As far as the statutory grounds for modification are concerned the Applicant referred the tribunal to section 57(6) of the 1993 Act which sets out the limited grounds upon which either party may require any term of the existing lease shall be modified or excluded. This provides that a party may seek a variation where (a) it is necessary to remedy a defect in the existing lease or (b) it would be unreasonable in the circumstances to include or include the term without modification in view of changes occurring since the date of commencement which affect the suitability on the relevant date of the provisions of that lease.

15. Counsel for the Applicant submitted that in relation to (a) above the lease was not defective. The landlord could have reserved the right to relocate the parking space and the fact that the terms of the lease could have been made more convenient from the point of view of the current landlord does not amount to a defect. Further Counsel relied on the authority of *Waitt v Morris [1994] 2. EGLR 224* in which it was held that the work "*necessary*" in section 57(6) should be strictly construed and is not equivalent to "*convenient*". Reliance was also placed on

*Gordon v Church Commissioners for England LRA/110/2006* (a case cited with approval by the President of the Upper Tribunal in *Burchell v Raj Properties Ltd [2013] UKUT 443*, in particular *"it is not sufficient for a provision to be a defect only when viewed from the standpoint of one or other party"*.

16. The Applicant submitted that the Respondent's case did not come close to satisfying that test and the absence of a right to relocate the car parking space can only be considered a disadvantage to the landlord and not to the Applicant.

17. In relation to (b) *Unreasonable in view of changes since the commencement of the lease* Counsel for the Applicant submitted that the authorities establish that the onus is on the person proposing the change under section 57(6) (b) to show that there are grounds for deleting or modifying the term in question (*Hague, Leasehold Enfranchisement 6th Ed 32-10).* The Applicant suggested that the Respondent had failed to identify any change in circumstance which would affect the *"suitability on the relevant date of the provisions of that lease"* and thus render it unreasonable to grant a new lease without the relevant modification.

18. Counsel submitted that the only possible change is that it is more likely that the adjacent land will be redeveloped. However the tribunal was asked to consider that there was no evidence to that effect; even if there were this could not be relevant change and it cannot be reasonable to deprive the Applicant of his car parking space simply because the landlord wishes to redevelop.

**The Respondent's case**

19. Dr Virnik disputed that all terms were agreed save for the proposed clause. The tribunal referred him to the statement of agreed facts at page 65 of the bundle which was a document signed by himself dated 7 January 2015. This clearly stated under "Disputed Issues" that clause 5.2 be deleted. No other issues were stated to be in dispute. This was clearly agreed by the parties and the tribunal did not consider it now had jurisdiction to consider any other issues.

20. Dr Virnik felt that he was not in a position to comment on the authorities relied on by Counsel although he accepted that he had received an index of the authorities at the same time as the bundle.

21. Dr Virnik explained that planning permission had been granted for the site previously but that this had lapsed. There was no current application although Dr Virnik explained it was "*ready to go*". As far as the Company was concerned it was necessary to relocate the car parking space as once the adjacent site was built on the Applicant

would have to move his car each time a neighbouring tenant wanted to access his car parking space. He submitted that the relocation of the car parking space would have no effect on the value of his property at all.

22. He submitted that the Applicant would be in breach of his lease if he objected to a planning application. He considered that the issue of the car parking needed to be resolved and that there was no disadvantage to the leaseholder in relocating his space. He suggested that the tenant had a financial motive and is seeking compensation for the relocation of the space.

23. In his witness statement dated 9 February 2015 Dr Virnik also stated that if the Respondent obtained planning permission the building would be erected on freehold land. He went on to say that there is no provision in the lease for the tenant to pass over this land and that the Respondent would be entitled to fence off this land with the result that the Applicant would not be able to access his space and would have to negotiate with the other tenants for access.

24. The tribunal invited Dr Virnik to comment on the statutory grounds contained in section 57(6) but he declined to do so.

## The tribunal's decision

25. The starting point in relation to the terms of any new lease to be granted by virtue of section 57(1) of the 1993 Act is that the new lease shall be a lease on the same terms as those of the existing lease.

26. Section 57(6) then goes on to provide that the parties may, by agreement, vary the terms of the existing lease on an extension and that either party:

*"..may require that for the purposes of any 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 that lease."*

27. The tribunal considered whether the inclusion of clause 5.2 could be said to be "*necessary to remedy a defect*" under section 57 (6) (a). In this regard it considered the authorities relied on by Counsel. In

particular it had regard to the case of Gordon v Church Commissioners (see above) in which HHJ Huskinson said that *"a lease can only properly be described as containing a defect (in the sense of shortcoming, fault, flaw, or perhaps even imperfection) if it can objectively be said to contain such a defect when reasonably viewed from the stand point of both a reasonable landlord and a reasonable tenant."* Although we fully appreciate that the landlord's inability to relocate the car parking space is clearly not ideal from the landlord's point of view we did not consider that the lease in its current form could be considered objectively defective.

28. We went on to consider whether the proposed clause could fall within clause 57(6)(b), that is, whether it is unreasonable in view of changes since the commencement of the lease. We considered the provisions of Hague which confirms that the word *"changes"* is not defined but would appear to include physical changes in the property as well as changes to acceptable conveyancing practice. We did not consider that the Respondent had identified any change in circumstance since the existing lease was granted in 1988 which would affect the *"suitability on the relevant date of the provisions of that lease"*. The possibility of developing adjacent land was present when the lease was granted in 1988. No planning permission is currently in force and there is no live application for planning permission. Even if the landlord obtains planning permission it is our view that any rights to develop must be subject to the Applicant's fixed easement.

29. The tribunal therefore concluded that pursuant to clause 57(6) the new lease to be granted shall not contain the proposed clause 5.2.

## Rule 13 - costs

30. The Respondent had made an application under Rule 13 (1)(b) of the Tribunal Procedure (First tier Tribunal) Property Chamber Rules 2013. The Applicant also reserved the right to apply for costs. The tribunal was not in a position to consider the application under Rule 13 at the hearing as the Applicant was not in a position to respond to the costs application and breakdown provided. However should either party wish to pursue an application for costs under Rule 13 after the issue of this decision they should write to the tribunal within 14 days of the date of this decision and directions will be issued.

**Name:** Sonya O'Sullivan **Date:** 13 April 2015