4051

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AH/OLR/2014/0941**
Property	:	**First Floor Flat, 83 Oval Road, Croydon, Surrey CR0 6BQ ("the flat")**
Applicant	:	**Elsada Leonara Doyley ("the tenant")**
Representative	:	**McMillan Williams Solicitors**
Respondent	:	**Terence Angelo Bing & Maria Giovanna Coyne ("the landlords")**
Representative	:	**Pro-Leagle, a European law firm**
Type of application	:	**A new lease claim**
Tribunal members	:	**Angus Andrew**
Date of decision	:	**7 September 2015**

DECISIONS

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Decisions

1. The landlords are to pay the tenant's costs incurred in connection with the jurisdiction hearing on 27 August 2014 such costs to be assessed.

2. The terms of acquisition remain in dispute and the tribunal retains jurisdiction.

3. The new lease should not include a plan and to that extent the new lease should be in the form contended for by the tenant.

Application

4. On 18 June 2014 the tenant applied to the tribunal for a determination of the premium and other terms of acquisition. The application was made under section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act").

5. Copies of the relevant statutory provisions are annexed to this decision.

Background

6. Given the nature of issues now in dispute and the recent delay in dealing with this case for which the tribunal is largely responsible I set out the background facts chronologically and in some detail.

7. The lease under which the tenant holds the flat was granted on 18 December 1987 for a term of 99 years from 29 September 1987. The flat is identified by reference to a plan on which it is edged in red. The plan simply records the boundaries of the flat and does not show its internal layout. The plan was clearly sufficient to enable the Land Registry to register the leasehold title.

8. The tenant claim notice is dated 9 August 2013. In the claim notice the tenant proposed a premium of £4,700 and also proposed that the terms of the new lease *"should be the same as in the Tenants' existing lease"*. The tenant gave the landlords until 30 October 2014 to give their counter notice.

9. On 28 October 2013 and in response to a request from the landlords the tenant extended their time for service of the counter-notice to 31 December 2014.

10. On 22 December 2013 the landlords gave their counter-notice. The landlords proposed a premium of £11,500 and also proposed that the

existing lease be amended by the insertion of clauses that *"shall be in accordance with the provisions of the 1993 Act"*.

11. On 18 June 2014 the tenant made her application to this Tribunal.

12. On 10 July 2014 the landlords wrote to the tribunal claiming that it had no jurisdiction because their counter-notice was out of time: by implication they asserted that a tenant could not extend the time for service of a landlord's counter-notice. There was a jurisdiction hearing on 27 August 2014 and a decision was issued on 9 September 2014. A tribunal (of which I was the chairman) decided that a tenant can extend a landlord's time for service of a counter-notice and that consequentially this tribunal retained jurisdiction. In passing the tribunal commented that because the landlords themselves requested an extension of time within which to service their counter-notice their assertion that it was out of time was *"deeply unattractive"* and lacked any *"equitable compass"*.

13. There was no appeal against that decision and standard directions were issued on 15 September 2014. In compliance with those directions the landlords submitted a draft lease to the tenant on 29 September 2014. The draft lease did not include a plan, the flat being described by reference to the existing lease.

14. On 13 October 2014 the tenant agreed the draft new lease save for the reinstatement of the original registration fee and the inclusion of a new plan showing *"current layout"* of the flat. The tenant submitted a rudimentary plan with the travelling draft. That plan did show the internal layout of the flat but it did not comply with Land Registry's current requirements on an application to register a new lease.

15. On 16 October 2014 the tenant submitted an application under section 20C of the Landlord and Tenant Act 1985 in respect of her costs incurred in relation to the previous jurisdiction hearing. The application was clearly intended as an application for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 rules") and was accepted as such.

16. On 27 October 2014 the landlord proposed an amendment to the registration fee clause in the new lease and also requested a revised plan that complied with the requirements of Land Registry.

17. On 18 November 2014 the tenant wrote that a premium of £6,000 had been agreed by the parties' valuers. However she changed her position on the inclusion of a new plan. She asserted that *"the Land Registry do not require a new lease plan if there is no change to the demise as we can simply refer to the land demised under the original lease"*.

18. On 20 November 2014 the landlords responded by agreeing the £6,000 premium. However they now insisted that the new lease must include a Land Registry compliant plan. Their position is perhaps somewhat surprising given the terms of the draft originally submitted. This volte – face appears to have resulted from an assertion by the landlords that the tenant had previously carried out unauthorised alterations to the flat. It will therefore be seen that both parties reversed their initial positions on the need for a new plan.

19. There was then a substantial delay for which this tribunal must take responsibility and for which an apology has been offered. In essence it resulted from the tribunal file having fallen into "a black hole" following the departure of the case officer who was previously responsible for the case. The file came back to me in June 2015 and after writing to the parties to identify the outstanding issues I gave further directions on 25 June 2015 to determine both the outstanding rule 13 cost application and also whether the tribunal retained any jurisdiction in respect of the terms of acquisition.

20. On 26 June 2015 the tenant wrote to the tribunal effectively requesting it to decide the outstanding issues on the basis of past correspondence. In doing so she enclosed a copy of a cost schedule that was apparently sent to the tribunal on 15 October 2014 but which was not on the tribunal's file. The tenant's rule 13 costs were put at £5,347.20.

21. Following a warning from myself on 23 July 2015 that the parties might find their respective cases struck out if they did not comply with the directions of 25 June 2015 documents bundles were provided by both parties. Ultimately both parties confirmed in correspondence that they were content for me to decide the outstanding issues on the basis of the document bundles that I have received even though they have not been sent in strict compliance with my directions. Finally both parties in correspondence agreed that if I decide that the tribunal retains jurisdiction I should also decide whether the new lease should include a new Land Registry compliant plan.

Issues in dispute

22. Although possibly obvious from the above chronology it is nevertheless helpful to restate the issues. The first issue is the tenant's rule 13 cost application in respect of the jurisdiction hearing on 27 August 2014.

23. The second issue is whether the tribunal retains any jurisdiction other than in respect of costs. That issue raises two discrete supplemental issues. One is whether a plan can be said to be one of *"the terms on which the tenant is to acquire the new lease"* within the meaning of section 48(7) of the Act. The other is whether *"all the terms of acquisition"* were agreed by the parties within the meaning of section 48(3) the Act on 20 November 2014 when the landlords agreed the premium of £6,000.

24. The determination of the second issue is crucial to the tenant. If the tribunal lost jurisdiction on 20 November 2014 the tenant's time for applying to the court for an order enforcing the agreed terms under section 48(3) has expired and her claim is deemed to have been withdrawn pursuant to section 53(1) of the Act.

25. The third and final issue is dependent upon the second. If I decide that the tribunal retains jurisdiction I must then decide if a new Land Registry Compliant plan should be included in the new lease.

Reasons for my decision

Rule 13 cost application

26. The tenant claims costs of £5,347.20 said to have been incurred in connection with the jurisdiction hearing on 27 August 2014. The landlords make two objections. The first is procedural. Relying on rule 13(5) the landlords assert that the tenant's rule 13 application is out of time. The decision of 9 September 2014 was sent to the parties on 15 September 2014. The landlords say that any rule 13 cost application should have been within 28 days of that date: that is by 13 October 2014. The application was made on 15 October 2014 so that if the landlords are right it was two days late.

27. The landlords' second objection is that they did not act *"unreasonably in bringing, defending or conducting proceedings"*. They point out that the tribunal is essentially a no cost jurisdiction and that there was an arguable point that they were entitled to have determined.

28. I will deal firstly with the procedural point. Rule 13(5) provides that any cost application *"must be made within 28 days after the date on which the Tribunal sends ... a decision notice recording the decision which finally disposes of all issues in the proceedings"*. The decision of 9 September 2014 was not such a decision. It simply determined a preliminary issue. Consequently the 28 day time limit was not engaged and it will only be engaged once this decision is sent to the parties. Although not directly relevant I would also point out that rule 6(3)(a) permits me to extend any time limit including that contained in rule 13(5). I have not invited representations from the parties as to whether it would be appropriate to extend the 28 day time limit because, as previously indicated, I do not consider that the time limit is engaged.

29. Turning to the second objection I remind myself the rule 13 only permits me to award costs *"if a person acted unreasonably in bringing, defending or conducting proceedings"*.

30. In considering an application for penal costs under Rule 13(1)(b) it is helpful to have regard to the analysis of Sir Thomas Bingham MR (as he

then was) in Ridehalgh v Horsefield [1994] 3 All ER 848 as to the meaning of "unreasonable". In the context of a wasted cost order he said:

> *"'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simple because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."*

31. An order for costs should only be made under rule 13(1)(b) if on an objective assessment a party has behaved so unreasonably that it is only fair and reasonable that the other party is compensated by having their legal costs paid. This tribunal remains essentially a costs-free jurisdiction where a party should not be deterred from using the jurisdiction for fear of having to pay the other party's costs should they lose. It is also appropriate to have regard to the overriding objective in rule 3 to deal with cases fairly and justly.

32. The 1993 Act gives tenants a right either collectively to enfranchise or individually to extend their leases. The procedure set out in that 1993 Act was intended to facilitate that right: it was not intended to be an obstacle course. In this case, the landlords found themselves in difficulty because they could not serve their counter-notice by the due date. They asked the tenant for an extension of time within which to serve it. Had the tenant refused then it seems probably that she would have been entitled to extend her lease on the terms set out in her claim notice including a proposed premium of £4,700. Instead the tenant generously agreed to extend the landlords' time for the service of the counter-notice. The landlords did serve a counter-notice within the extended time but they then sat on their hands and waited until the tenant's time for applying to Court under section 49(3) had expired (which, if the landlords are right, it did on 30 April 2014). The landlords then repaid the tenant's generosity by asserting that their own counter-notice was out of time and that they had been a deemed withdrawal of the tenant's claim under section 53(2).

33. As the tribunal pointed out in its decision of 9 September 2014 the landlords' behaviour was *"deeply unattractive"* and lacked *"any equitable compass"*. Furthermore having raised the issue the landlords failed to attend the hearing on 27 August 2014 and relied only on written representations.

34. At the hearing the tenants' case was that she had been entitled to extend the date in her claim notice for the service of the landlords' counter-notice and the tribunal agreed with her. She could equally have put her case on the basis of the estoppel. Having specifically sought an extension of the

time from the tenant, the landlords were not in any position to deny her right to grant it.

35. In that context I am satisfied that the landlords' behaviour does not permit *"a reasonable explanation"*. The tenant is attempting to exercise a statutory right to extend the lease of her flat in Croydon. The premium is modest: the parties have agreed £6,000. I am satisfied that the landlords' behaviour in denying the validity of their own counter-notice was intended to harass the tenant. Indeed, it is behaviour that seems to be continuing.

36. Consequently and for each and all of the above reasons I am satisfied that it is appropriate to invoke rule 13 and to order the landlords to pay the tenant's cost incurred in connection with the jurisdiction hearing. That said I do have some reservations about the quantum of the claimed costs. So far the landlords have addressed only the issue of liability and it is appropriate to give them a further opportunity to address the quantum of the claimed costs. Accordingly in respect of those costs I issue the following directions:

    a. The landlords should by **23 September 2015** sent to both the tribunal and the tenant their observations on the quantum of the claimed costs.

    b. The tenant should by 7 **October 2015** sent to both the tribunal and the landlords a statement in response.

    c. I will after 7 **October 2015** consider the quantum of the claimed costs and issue a short supplemental decision.

Does the tribunal retain jurisdiction?

37. I deal firstly with the question of whether a plan is a term of a lease. Neither side really addressed this point in their written submissions. The description of the demised property contained in any lease must plainly be a term of the lease: it is fundamental to the grant. In most cases the extent of the demise is identified by reference to a plan. When the original lease was granted on 18 December 1987 the flat and the extent of the demise was identified by reference to a plan. Furthermore when leases are first registered the Land Registry insists upon a compliant plan. It is therefore logical that a plan must itself be a term of a lease.

38. Turing to the issue of whether the terms of acquisition were agreed the landlords rely on the Court of Appeal decision in Bolton v Godwin-Austen [2014] EWCA Civ 27 and in particular the judgment of Lord of Justice McCombe. I am not however persuaded that the decision assists the landlords. It is apparent from Lord Justice McCombe's judgment that the tenants in Bolton had unambiguously accepted the landlord's proposals contained in the counter notice. He thus concluded that the terms of acquisition had been agreed and that upon such agreement jurisdiction transferred to the County Court in the event of any subsequent dispute about the minutia of the new lease.

39. In this case however, there was no unambiguous acceptance of the terms proposed by the landlords' in their counter notice. The tenant disputed the registration fee clause and before a compromise was agreed the landlords themselves put the need for a Land Registry complaint plan into play.

40. Consequently and for each of the above reasons I am satisfied that a plan is a term of a lease within the meaning of section 48(7) and that on the facts of this case the terms of acquisition had not been agreed because the plan remained in dispute. Consequently the tribunal retains jurisdiction.

Should a new Land Registry compliant plan be included in the new lease?

41. Unfortunately neither party provided any conclusive evidence as to the Land Registry's requirements when a new lease (which takes effect as surrender and regrant) is granted under the Act. I did consult the Land Registry practice guide 27 on the Leasehold Reform legislation. The Land Registry practice guides are informative and are intended for practitioners. Practice guide 27 is however silent on the requirement for a plan when a new lease is granted under the Act and it is therefore of no assistance. I am to an extent thrown back upon my experience as a specialist practitioner in this area of law between 1993 and my retirement from private practice in 2002, albeit that that experience is now a little out date.

42. It is relevant that the landlords did not include reference to a lease plan in the draft lease that was sent to the tenant on 29 September 2014. The flat was simply defined as the "*First Floor Flat 83 Oval Road Croydon Surrey CR0 6BQ as more particularly described in the Existing Lease dated 18 December 1987*". It is reasonable to assume that at that time they did not think that a new plan was required. Furthermore the landlords' subsequent insistence on a lease plan appears to be motivated not by any desire to comply with the Land Registry's requirements but by a belief that the tenant had at some stage altered the flat without consent.

43. The Land Registry is not concerned with the internal layout of a flat. The important element of a lease plan is the red edging that identifies the extent of the demise. Occasionally the extent of the demise is altered on the grant of a new lease under the Act. In such circumstances a new Land Registry compliant plan will be required. However in the vast majority of cases, as in this case, the extent of the property demised by the new lease is identical to that demised by the old lease that is already registered at Land Registry and that extent of that demise is recorded on the Land Registry official plan. It is therefore usual for the new lease to identify the extent of the demise simply by reference to the old lease. Consequently and for each of the above reasons I am satisfied that a new Land Registry compliant plan is not required.

Name: Angus Andrew **Date: 7 September 2015**

APPENDIX OF RELEVANT LEGISLATION

The Leasehold Reform, Housing and Urban Development Act 1993

48. - Applications where terms in dispute or failure to enter into new lease.

(1) Where the landlord has given the tenant—

(a) a counter-notice under section 45 which complies with the requirement set out in subsection (2)(a) of that section, or

(b) a further counter-notice required by or by virtue of section 46(4) or section 47(4) or (5),

but any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date when the counter-notice or further counter-notice was so given, the appropriate tribunal may, on the application of either the tenant or the landlord, determine the matters in dispute.

(2) Any application under subsection (1) must be made not later than the end of the period of six months beginning with the date on which the counter-notice or further counter-notice was given to the tenant.

(3) Where—

(a) the landlord has given the tenant such a counter-notice or further counter-notice as is mentioned in subsection (1)(a) or (b), and

(b) all the terms of acquisition have been either agreed between those persons or determined by the appropriate tribunal under subsection (1),

but a new lease has not been entered into in pursuance of the tenant's notice by the end of the appropriate period specified in subsection (6), the court may, on the application of either the tenant or the landlord, make such order as it thinks fit with respect to the performance or discharge of any obligations arising out of that notice.

(4) Any such order may provide for the tenant's notice to be deemed to have been withdrawn at the end of the appropriate period specified in subsection (6).

(5) Any application for an order under subsection (3) must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period specified in subsection (6).

(6) For the purposes of this section the appropriate period is—

(a) where all of the terms of acquisition have been agreed between the tenant and the landlord, the period of two months beginning with the date when those terms were finally so agreed; or

(b) where all or any of those terms have been determined by the appropriate tribunal under subsection (1)—

(i) the period of two months beginning with the date when the decision of the tribunal under subsection (1) becomes final, or

(ii) such other period as may have been fixed by the tribunal when making its determination.

(7) In this Chapter "the terms of acquisition", in relation to a claim by a tenant under this Chapter, means the terms on which the tenant is to acquire a new lease of his flat, whether they relate to the terms to be contained in the lease or to the premium or any other amount payable by virtue of Schedule 13 in connection with the grant of the lease, or otherwise.

49 Applications where landlord fails to give counter-notice or further counter-notice

(1) Where the tenant's notice has been given in accordance with section 42 but—

(a) the landlord has failed to give the tenant a counter-notice in accordance with section 45(1), or

(b) if required to give a further counter-notice to the tenant by or by virtue of section 46(4) or section 47(4) or (5), the landlord has failed to comply with that requirement,

the court may, on the application of the tenant, make an order determining, in accordance with the proposals contained in the tenant's notice, the terms of acquisition.

(2) The court shall not make such an order on an application made by virtue of paragraph (a) of subsection (1) unless it is satisfied—

(a) that on the relevant date the tenant had the right to acquire a new lease of his flat; and

(b) if applicable, that the requirements of Part I of Schedule 11 were complied with as respects the giving of copies of the tenant's notice.

(3) Any application for an order under subsection (1) must be made not later than the end of the period of six months beginning with the date by which the counter-notice or further counter-notice referred to in that subsection was required to be given.

(4) Where—

(a) the terms of acquisition have been determined by an order of the court under this section, but

(b) a new lease has not been entered into in pursuance of the tenant's notice by the end of the appropriate period specified in subsection (7),

the court may, on the application of either the tenant or the landlord, make such order as it thinks fit with respect to the performance or discharge of any obligations arising out of that notice.

(5) Any such order may provide for the tenant's notice to be deemed to have been withdrawn at the end of the appropriate period specified in subsection (7).

(6) Any application for an order under subsection (4) must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period specified in subsection (7).

(7) For the purposes of this section the appropriate period is—
(a) the period of two months beginning with the date when the order of the court under subsection (1) becomes final, or
(b) such other period as may have been fixed by the court when making that order.

53 Deemed withdrawal of tenant's notice

(1) Where—
(a) in a case to which subsection (1) of section 48 applies, no application under that subsection is made within the period specified in subsection (2) of that section, or
(b) in a case to which subsection (3) of that section applies, no application for an order under that subsection is made within the period specified in subsection (5) of that section,

the tenant's notice shall be deemed to have been withdrawn at the end of the period referred to in paragraph (a) or (b) above (as the case may be).

(2) Where, in a case falling within paragraph (a) or (b) of subsection (1) of section 49, no application for an order under that subsection is made within the period specified in subsection (3) of that section, the tenant's notice shall be deemed to have been withdrawn at the end of that period.

(3) Where, in a case to which subsection (4) of section 49 applies, no application for an order under that subsection is made within the period specified in subsection (6) of that section, the tenant's notice shall be deemed to have been withdrawn at the end of that period.

(4) The following provisions, namely—
(a) section 43(3),
(b) section 48(4), and
(c) section 49(5),

also make provision for a notice under section 42 to be deemed to have been withdrawn at a particular time.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

13 Orders for costs, reimbursement of fees and interest on costs

(1) The Tribunal may make an order in respect of costs only—
(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

(i) an agricultural land and drainage case,
(ii) a residential property case, or
(iii) a leasehold case; or
(c) in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—
(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—
(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—
(a) summary assessment by the Tribunal;
(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");
(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.