

3008



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

Case Reference : **PJ/LON/OOBB/OLR/2014/1458**

Property : **Upper Maisonette, 56 Kildare Road,
London E16 4AJ**

Applicant : **Haveli Limited (leaseholder)**

Representative : **Mr. A. Arora, solicitor**

Respondent : **Campion House Estates Limited
(freeholder)**

Representative : **Mr G. Bond, solicitor of Slater Bradley &
Co**

Type of Application : **Correction certificate (Regulation 50 The
Tribunal Procedure (First-tier Tribunal)
(Property Chamber) Rules 2013.**

Tribunal Members : **Professor James Driscoll (Judge) and
Duncan Jagger MRICS (Valuer Member)**

**Date and venue of
Hearing** : **10 Alfred Place, London WC1E 7LR**

Date of Certificate : **23 April, 2015**

DECISION

As Chairman of the Tribunal, which decided the above-mentioned case, I hereby correct the errors and clarify the decision dated 10 March 2015 as follows: Paragraph 2 of the decision should be replaced by the following 'This application is made by the leaseholder of the subject premises which consists of a flat in a purpose built block of two flats. The respondent to the application is the owner of the freehold and the landlord under the leaseholder's lease.'

James Driscoll, 23 April 2015

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

Case Reference	:	PJ/LON/OOBB/OLR/2014/1458
Property	:	Upper Maisonette, 59 Kildare Road, London E16 4AJ
Applicant	:	Haveli Limited (leaseholder)
Representative	:	Mr A. Arora, solicitor
Respondent	:	Campion House Estates Limited (freeholder)
Representative	:	Mr G. Bond, solicitor of Slater Bradley & Co
Type of Application	:	Under section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 ('the Act') seeking a determination of the disputed terms of the new lease.
Tribunal Members	:	Professor James Driscoll (Judge) and Duncan Jagger MRICS (Valuer member)
Date and venue of Hearing	:	The application was heard at 10 Alfred Place, London on 10 February, 2015
Date of Decision	:	10 March, 2015

DECISION

Summary of the decision

1. The landlord's submission that the terms of the new lease should include a modified version of clause 3 of the existing is rejected. Other than the term of the new lease and its nominal ground rent, the terms of the new lease shall be those in the existing lease without any modification.

Introduction

2. This application is made by the leaseholder of the subject premises which consists of a converted upper floor flat forming part of two former terrace town houses comprising basement, ground and five upper floors, which includes a caretaker's flat in the basement, plus 12 flats served by lift. The respondent to the application is the owner of the freehold and the landlord under the leaseholder's lease.
3. A notice seeking the grant of a new lease was given by the leaseholder's predecessor in title to the freeholder on or about 24 January 2014. The benefit of this notice was assigned to current leaseholder by a deed of assignment dated 31 January 2014. A counter-notice dated 25 March 2014 was given by the freeholder admitting the claim but proposing a higher premium than the one proposed by the leaseholder.
4. As the parties could not agree on the terms of the new lease, or on the costs payable by the leaseholder to the freeholder, application was made to this tribunal on 23 September 2014. Directions were given on 13 October 2014.

The hearing

5. A hearing was held on 10 February 2015 when the leaseholder and the freeholder were each represented by their respective solicitors. They told us that there was just one, but an important issue, that they could not agree on. The premium and the costs payable were agreed as were most of the terms of the new lease.
6. However, the freeholder wants to change clause 3 of the existing lease which currently provides that provides for the payment by an assignee of the lease of a registration fee of £5. The freeholder considers that

this should, in effect, be updated to replace the words 'Five Pounds' in clause 8 by the words "£50.00 or such higher sum as from time to time shall represent a reasonable fee for that...". The leaseholder does not agree with this proposal and it contends that such a change to the terms of the existing lease is not justified under Part I of the Act.

7. Mr Arora addressed us first. He reminds us that under section 57 the starting point is that the terms of the new lease should be those of the existing lease except in very specific cases set out in that section none of which in his opinion applied to this case.

8. He relies on a number of authorities including *Gordon v Church Commissioners* [2006]. Mr Arora submits that this authority for the proposition that tribunals should use the power conferred by that section restrictively.

9. For the freeholder, Mr Bond told us that he relies primarily on the wording of section 57 itself and on points made by Lord Neuberger in *De Walden Estate v Aggio* ([2009] 1 AC 39) at paragraph 72. His main point is that clearly the effects of inflation since the grant of the existing lease has eroded the value of the payment so a new formula for determining the payment is justified. .

Reasons for our decision

10. We start with our general approach to this important issue. Under section 56 of the Act a leaseholder may claim a new lease which is granted in substitution for the existing lease a new lease at a nominal rent for a term expiring 90 years after the term date of the existing lease.

11. The next point to turn to is section 57 which deals with the terms on which the new lease is to be granted. Section 57(1) (a copy of which is appended to this decision) provides that except for the rent and the term, the terms of the new lease shall be those of the existing lease. However, under that subsection modifications may be required or appropriate to take account of (a) omission of property in the new lease, (b) alterations to the property since the existing lease was granted and (c) one required where the existing lease was derived from more than one separate leases.

12. Section 57(2) of the Act applies where the landlord will under the new lease be under an obligation to provide services, repairs, maintenance or insurance. In such cases the new lease may include provisions under which the leaseholder makes payments for the costs incurred by the landlord. Where the existing lease does not have such provisions requiring leaseholder payments (or where they do they

only allow for a fixed payment) the new lease may have terms that allow the landlord to recover the costs incurred from time to time. Section 57(6) is also relied on by Mr Bond as it allows for the exclusion of any term or its modification to either remedy a defect in the existing lease or where it would be unreasonable to include it or modify it in view of changes that have occurred since the existing lease was granted.

13. We now consider the rival submissions. As noted above, Mr Arora relies on the *Gordon* decision. In that decision the UT decided that a restrictive approach should be adopted and the UT decided that in the absence of agreement it would not impose a covenant in the new lease requiring the landlord to enforce covenants against other leaseholders in the block.

14. However, Mr Bond was correct to remind us that the House of Lords in the *de Walden* decision Lord Neuberger stated that the tribunal has under section 57(6) 'relatively wide powers, often involving sophisticated judgement' (at paragraph 49 of the decision). So, on balance, and though we were only briefly addressed on the issue, we consider that Mr Bond is correct in submitting that post-*De Walden* a less restrictive approach should be taken.

15. However, we do not consider that a new term is warranted under section 57(6) as the existing provision on fee can hardly be described as a defect in the existing lease (section 57(6)(a)). Nor do we consider that the proposed new term is justified under section 57(6)(b) of the Act. This is because the fact that in real terms the value of the fee payable has diminished is not a 'change in circumstances' which would justify a modification of the existing term. It was section 57(6) that Mr Bond relied on. But we also consider that none of the justifications for a new term set out in section 57(1) or (2) apply to this case. None of the circumstances in section 57(1) or (2) apply to this case.

16. Moreover, as we suggested to the representatives of the parties at the hearing, if the existing charge is an 'administration charge' as it is defined in Schedule 11 of the Commonhold and Leasehold Reform Act 2002 either party can apply to this tribunal for a determination that the charge specified in the lease is unreasonable.

17. To summarise the terms of the new lease shall be those in the existing lease and the landlord's submission that clause 3 should be modified is rejected.

James Driscoll and Duncan Jagger

Dated: 10 March, 2015

APPENDIX

Leasehold Reform, Housing and Urban Development Act 1993

Section 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).