4248

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**RC/LON/00BA/OLR/2015/1162**
Property	:	**96b High Street, Colliers Wood, London SW19 2BT**
Applicant	:	**Ms Katherine Elizabeth Chance**
Representative	:	**Mr Kasriel of Counsel**
Respondent	:	**Mr Anthony Peter Coopey**
Representative	:	**Mr Boncey of Counsel**
Type of application	:	**For the premium to be paid on the grant of a new lease under section 48(1)**
Tribunal members	:	**Mrs S O'Sullivan** **Ms M Krisko FRICS**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**3 February 2016**

DECISION

Decisions of the tribunal

(1) The tribunal determines that it has no jurisdiction in this matter.

(2) The tribunal declines to make any order for costs under Rule 13 of the Tribunal Procedure (First tier Tribunal) (Property Chamber) Rules 2013.

The application

1. This is an application under section 48(1) of the Leasehold Reform, Housing and Urban Development Act 1993 (the "1993 Act") seeking the determination of the grant of a new lease of the property known as 96b High Street, Colliers Woods, London SW19 2BT.

2. The Respondent submitted that the tribunal no longer had jurisdiction to consider the application and this was considered by the tribunal as a preliminary point.

3. The tribunal gave its decision to the parties orally at the end of the hearing but confirms its decision and reasons as set out below.

Jurisdiction

4. The claim notice served 11 November 2014 sought an *"Existing unexpired term plus 90 year extension at a peppercorn rent to comply with section 56 of the [1993 Act]. "*

5. The counter notice given by the landlord on 8 January 2015 stated that he "*accepts ...Existing lease to be surrendered and new lease granted for a term expiring on 24th March 2175 on terms set out in Initial Notice. Peppercorn ground rent*". The premium at that stage was disputed.

6. The new premium was subsequently agreed by email from the Applicant's solicitors dated 28 August 2015. It was stated in that email *"On the basis that the premium negotiations are now concluded we propose to proceed to the conveyancing of the Leasehold extension."* A draft lease was subsequently circulated.

7. It was not until 12 October 2015 that the Applicant's conveyancing solicitors raised two issues; firstly a typographical error required amendment (which is now agreed); and secondly in respect of a clause contained in the existing lease she wished to be omitted from the new lease. This clause provided for forfeiture of the lease in the case of the leaseholder's insolvency.

8. Counsel for the Respondent submitted that as at 12 October 2015 it was simply too late for points in relation to the substantive terms of the lease to be raised. The Applicant had not included any such term in the claim notice and the terms in dispute had been effectively agreed as at 28 August 2015 when the premium was agreed. As a result there was nothing left for the tribunal to determine.

9. Counsel for the Applicant argued that effectively there had been a waiver by silence by the Respondent given that the issues of jurisdiction now raised had not been previously mentioned. He relied on 2 letters between the solicitors which referred simply to the tribunal's jurisdiction rather then spelling out the grounds now relied upon. In addition he invited the tribunal to note that the Respondent had not filed a statement of agreed facts and disputes which would have flushed out the issue. Counsel also submitted, and did concede that this was a somewhat "*niggly*" point, that section 42(3)(d) required the tenant to state what the lease was to contain and did not require the tenant to state what was to be omitted.

Jurisdiction – the tribunal's decision

10. We found that we did not have jurisdiction to consider the application given that the only term in dispute as identified in the claim notice, namely the premium, was agreed as at 28 August 2015. Accordingly we had no jurisdiction to go on to consider the lease term now in dispute.

11. We were not satisfied that there had been any waiver in relation to the issue of jurisdiction. The proposed variations to the lease terms had not been raised until 12 October 2015. It was clear from the correspondence that the Respondent had disputed the tribunal's jurisdiction although the correspondence could have been more succinct. We considered that section 42(3)(d) is a mandatory provision which requires a tenant to state all the terms to be included in the lease. If any proposed omissions need not be included a landlord would be incapable of accepting the proposals contained in the notice. Lastly we noted that the Respondent had indeed filed its statement of agreed facts and disputes on 21 December 2015 which clearly stated that all terms in dispute and the premium had been agreed.

12. The Applicant asked the tribunal whether it would be willing to make a decision on whether in principle the omission of the clause in issue would be allowed under section 57(6) of the 1993 Act. Given that we had concluded that we had no jurisdiction we did not think it proper to do so.

Application for costs – rule 13

13. The Respondent then asked for a summary assessment of its costs pursuant to Rule 13 of the Tribunal Procedure (First tier Tribunal) (Property Chamber) Rules 2013. A statement of costs was produced to the tribunal.

14. The grounds for the application were that as soon as the premium had been agreed the Applicant should then have withdrawn her application given the issue in dispute had been agreed. From that date she could be said to have acted unreasonably. The issue of jurisdiction had been raised by the Respondent but the Applicant had chosen to continue even making an application to amend the application at the hearing.

15. Counsel for the Applicant stressed that this was essentially a no costs jurisdiction. He submitted that it could not be said that the Applicant had behaved unreasonably simply by bringing a case. Had the Respondent made its position clear, at an earlier date, the need for the hearing may well have been avoided. In relation to the costs themselves the hearing had taken less than half a day and he submitted that the fee appeared high for Counsel's call.

Application for costs – rule 13 – the tribunal's decision

16. We declined to make any order for costs pursuant to rule 13.

17. The tribunal's power to award costs is contained in Rule 13 (1)(b)(ii) of the Procedure Rules which states that;

"The Tribunal may make an order in respect of costs only-

(b) If a person has acted unreasonably in bringing, defending or conducting proceedings in-

(I) a residential property case ..."

18. The power to award costs pursuant to Rule 13 is discretionary and the wording of the provision makes it clear that the tribunal may only make such an order if a person's conduct of the proceedings is unreasonable rather than his behaviour generally.

19. The power to award costs pursuant to Rule 13 should only be made where a party has clearly acted unreasonably in bringing, defending or conducting the proceedings. This is because the tribunal is essentially a costs free jurisdiction where parties should not be deterred from bringing or defending proceedings for fear of having to pay substantial costs if unsuccessful. In addition there should be no expectation that a

party will recover its costs if successful. The award of costs should therefore in our view be made where on an objective assessment a party has behaved so unreasonably that it is fair that the other party is compensated to some extent by having some or all of their legal costs paid.

20. Having considered the facts of this case overall we do not consider that it is appropriate that an order is made under Rule 13 in respect of some of the Respondent's costs as we consider that the Applicant has not acted so unreasonably in conducting the proceedings that it is fair that the other party be compensated. Although the Respondent had indicated jurisdiction was an issue it had not clearly set out why this was the case until it had served its skeleton argument the day before the hearing. Had it done so the application may well have been withdrawn before the hearing.

Name: S O'Sullivan **Date:** 3 February 2016

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).