FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/OLR/2018/0266**
Property	**:**	**Flat 6, 35 Rosendale Road, London SE21 8DX**
Applicant	**:**	**Ms Gail Rowe**
Representative	**:**	**In person**
Respondent	**:**	**35 Rosendale Road Freehold Limited**
Representative	**:**	**Bennett Welch Solicitors**
Type of Application	**:**	**Application under section 48(1) of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal Members	**:**	**Mr Jeremy Donegan – Tribunal Judge** **Mr Kevin Ridgeway MRICS – Valuer Member**
Date and venue of Hearing	**:**	**03 July 2018** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**09 July 2018**

DECISION

Decisions of the Tribunal

The Tribunal's determination of the disputed lease term is set out at paragraph 15 of this decision.

The background

1. The applicant is the leaseholder of Flat 6, 35 Rosendale Road, London SE21 8DX ('the Flat'). This is on the first floor of 35 Rosendale Road ('the Building'), which contains 8 leasehold flats. The respondent company is the freeholder of the Building. The members of this company are some of the leaseholders at the Building. The applicant is not a member.

2. On 10 July 2017 the applicant gave a notice of claim to the respondent pursuant to section 42 of the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act'), seeking a new lease of the Flat. The notice proposed a premium of £10,660 with *"the terms to be contained in the new lease should be the same as in the Tenant's existing Lease subject to such reasonable modernisation and updating which shall be no more onerous to the Tenant than as per the existing Lease."*

3. On 18 August 2017 the respondent gave a counter-notice, admitting the applicant's right to a new lease but proposing a higher premium of £12,060. A draft new lease was attached, setting out the respondent's counter–proposals for the terms.

The application and procedural history

4. On 16 February 2018 the Tribunal received an application under section 48(1) of the 1993 Act, in which the applicant sought a determination of the premium and terms of the new lease. Directions were issued on 07 March 2018.

5. There has been no application to determine the respondent's costs under section 60 of the 1993 Act but paragraph 1 of the directions provided:

   "Any application to determine the landlord's recoverable costs is stayed. Any application to lift the stay must include confirmation that the recoverable costs are in dispute."

6. The respondent's solicitors wrote to the applicant on 06 April 2018, suggesting the section 42 notice was invalid and alleging it did not comply with section 42(3)(d) of the 1993 Act. This is somewhat surprising, given the letter was from the same solicitors that had served the counter-notice admitting the claim.

7. On 14 May 2018, the applicant sent an email to the Tribunal stating that "*the terms of the lease and the lease premium have now been agreed with the freeholder and their solicitors.*" In a letter dated 30 May, the respondent's solicitors informed the Tribunal *"the premium has been agreed, but the terms of the new lease have not been agreed."*

8. On 14 June 2018, the Tribunal wrote to the parties informing them that the hearing would take place at 10am on 03 and 04 July 2018.

9. The Tribunal received hearing bundles from the applicant, which included a summary of issues in dispute. This identified three proposed amendments to the existing lease and one proposed deletion to the draft new lease, as set out below:

<u>Existing Lease</u>

Third Schedule

Paragraph 1(a)	the insertion of the word "*landings*"
Paragraph 4	the insertion of the words "*and protection*"

Ninth Schedule

Regulation 12	the insertion of the words *"and/or other material with sound proofing qualities*"

<u>Draft Lease</u>

Deletion of clause 4.3, which reads "*The Landlord shall only be liable for breaches of covenant for which it is responsible*".

10. The relevant legal provisions are set out in the appendix to this decision.

<u>The hearing</u>

11. The applicant attended the hearing on 03 July, which commenced at approximately 10.30am. The Tribunal received a fax from the respondent's solicitors, earlier that day. This made various complaints

about the hearing bundles, repeated the allegation that the section 42 notice was invalid and stated they would not be attending the hearing. The Tribunal Judge relayed the contents of the fax to the applicant, who advised that the premium had been agreed (at £11,700) and the only remaining issue was her proposed amendments to the draft lease. The Judge informed her that the Tribunal would hear this issue, commencing at 11.30am. This information was also relayed to the respondent's solicitors by telephone, by the case officer.

12. The respondent's solicitors then sent a further fax to the Tribunal, stating that the there was insufficient time for them to attend the hearing but agreeing the applicant's proposed amendments to paragraphs 1(a) and 4 of the third schedule to the existing lease.

13. After the hearing resumed, the applicant withdrew her objection to clause 4.3 in the draft lease. This meant the only disputed term was her proposed amendment to regulation 12 of the ninth schedule of the existing lease, which obliges the Lessee:

"To cover the floors of the Demised Premises with carpets and suitable underlay (except in the kitchen and bathroom where linoleum or other flooring shall be acceptable)"

The applicant sought to insert the words "*and/or other material with sound proofing qualities*" after the word "*carpet*", to enable her (and her successors) to lay alternative flooring in the Flat.

14. The Judge referred the applicant to section 57(6) of the 1993 Act. She relied on section 57(6)(b) and asserted there had been changes since the existing lease was granted that justified her proposed amendment. In particular, the availability of alternative floor types (with adequate sound insulation) has increased and the use of alternative flooring has become more prevalent. This means the original wording of regulation 12, which only refers to carpets, is no longer appropriate. The applicant stated that most of the flats in the Building were not carpeted and specifically referred to wooden flooring in Flats 4 and 8.

The Tribunal's decision

15. The proposed amendment to regulation 12 of the ninth schedule to the existing lease is refused.

Reasons for the Tribunal's decision

16. The existing lease was granted 20 August 1999, approximately 19 years ago. The onus was on the applicant to establish changes occurring since that date, which affect the suitability of the regulation in question. She did not produce any independent evidence to support her assertion

there has been increased availability and use of alternative flooring during the last 19 years. The fact that other flats in the Building might have wooden flooring does not justify a change to her lease. The leaseholders concerned may have obtained consent for their alternative flooring or may be in breach of their leases.

17. The purpose of regulation 12 is to protect other occupants at the Building and that purpose remains. The Flat is on the first floor and changes to the flooring could have an impact on the flat/s below. It is not unreasonable for regulation 12 to remain in its current form, without modification. To the contrary, it is entirely reasonable for it to remain.

The next steps

18. The parties have agreed the new lease premium and all but one of the lease terms. The disputed term has been determined at paragraph 15 above, which means that all of the terms of acquisition have now been agreed or determined. The only remaining matter is the section 60 costs, which the parties should try and agree. In the absence of agreement, either party can submitted an application to the Tribunal under section 91(2)(d) of the 1993 Act. The Tribunal has no jurisdiction to determine the validity of the section 42 notice.

Name: Tribunal Judge Donegan **Date:** 09 July 2018

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.

Appendix of relevant legislation

Leasehold Reform, Housing and Urban Development Act 1993 (as amended)

42 Notice by qualifying tenant of claim to exercise right

(1) A claim by a qualifying tenant of a flat to exercise the right to acquire a new lease of the flat is made by the giving of notice of the claim under this section.

...

(3) The tenant's notice must -

...

(d) specify the terms which the tenant proposes should be contained in any such lease;

...

45 Landlord's counter-notice

(1) The landlord shall give a counter-notice under this section to the tenant by the date specified in the tenant's notice in pursuance of section 42(3)(f).

…

48 Application 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 beginning with the date when the counter-notice or further counter-notice was so give, the appropriate tribunal may, on the application of either the tenant or the landlord, determine the matters in dispute.

...

(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.

57 Terms on which new lease is to be granted

...

(6) Subsections (1) to (5) shall have effect subject to any agreement between the landlord and the 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.

...