

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL



In the matter of an application under S.48 of the
Leasehold Reform Housing & Urban Development Act 1993
(Application to determine disputed terms)

DECISION & REASONS

Case Number:	CHI/21UL/0LR/2010/0065
Property:	20 Arlington House Upperton Road Eastbourne BN21 1LR
Applicant:	Mrs E Aspel
Represented by:	Mayo Wynne Baxter LLP
Respondent:	Wynsel Properties Ltd
Represented by:	SLP Solicitors
Tribunal Members:	Mr B H R Simms FRICS MCI Arb (Chairman) Ms J Morris (Lay Member)
Date of Consideration:	29 September 2010
Date of This Decision:	08th October 2010

DECISION

The Tribunal does not have jurisdiction to decide the validity of the Counter Notice under S.48.

There shall be no further variations of the lease originally granted in addition to those matters agreed between the parties.

REASONS

BACKGROUND

1. By an application received on 4 August 2010 the Applicant requests the Tribunal to consider whether or not terms proposed to be contained in the new lease defined in the Notice of Claim and in a draft Deed of Variation should be allowed.
2. In addition, in the Statement of Case submitted in support of the application, the Applicant wishes the Tribunal to consider the validity of the Counter Notice.
3. Directions for the conduct of the case were issued dated 12 August 2010.
4. Formal notice was given to the parties that the matter would be dealt with as a paper determination without an oral Hearing and no objection was received.
5. The Applicant submitted a detailed Statement of Case with exhibits in accordance with the Directions.
6. On the day prior to the date set for the Determination SLP Solicitors, for the Respondent, submitted a Statement of Case for their client. In mitigation of the late arrival SLP indicated that they had not received a copy of the Directions and their client had not received them at its registered office address. The Tribunal office only has the address for the Landlord in Old Marylebone Road, London, as stated in the application, and had not been advised that SLP Solicitors were acting on behalf of the Respondent Landlord.
7. The Respondent's statement has been taken into account when making this Determination.

MATTERS AGREED

8. Prior to the application under consideration, the price to be paid and other general matters have been agreed between the parties.

9. By exchange of Statements of Case and other correspondence various matters relating to the variations of the lease have been agreed, namely:

1. an addition at the end of Clause 2(ix):

“PROVIDED THAT no long lease created immediately or derivatively by way of sub demise under this Lease shall confer on the sub-lessee as against the Landlord a right under Chapter II of Part 1 of the Leasehold Reform Housing and Urban Development Act 1993 to acquire a new lease”

and

2. a declaration to be inserted in the lease:

“It is hereby further agreed and declared that the Lessor may (a) at any time during the period of 12 months ending on 24 March 2063; and (b) any time during the period of 5 years ending on 24 March 2153 apply to the Court under Section 61 of the Leasehold Reform Housing and Urban Development Act 1993 (“the Act”) for an order for possession of the Flat on the ground that for the purpose of redevelopment it intends to demolish or reconstruct or carry out substantial works of construction on the whole or a substantial part of any premises in which the Flat is contained and that it cannot reasonably do so without obtaining possession of the Demised Premises and the provisions of that Section and of Schedule 14 to the Act shall apply accordingly under the provisions of that Section”

10. Other variations requiring new clauses relating to: mutual enforceability, reimbursement of Landlord's costs in forfeiture, payment of VAT and interest, and the payment of Landlord's costs for licences, have been deleted and are no longer before the Tribunal.

MATTERS IN DISPUTE

11. From the original list of eight matters, two variations now remain for consideration by the Tribunal as follows:

1 Insurance

Clause 3(2) and 3(3) from existing Lease shall be amended to read as follows:-

“That the Lessor will keep the building and the Landlord’s fixtures and fittings therein insured against loss or damage by such risks as may normally be covered by a policy of comprehensive insurance for a building situated where the building is situated and against such other risks including public liability for accident and injury to third parties as the Landlord shall reasonably think fit (having reasonable regard to the requirements of the CML Handbook or such other similar requirements published by the major lending institutions) to the full reinstatement value thereof and all architects, surveyors and other fees necessary in connection with the performance of this covenant in some insurance office of repute and the Landlord will produce to the Tenant or the Tenant’s agent on request the said policy and the receipt for the current premium and will forthwith utilise the proceeds received of any such policy, so far as the same will extend to the rebuilding or reinstatement of the building.”

2. Fee for Registration of Transfer

The words “Three Guineas” in clause 2(ix) shall be replaced with the words “fifty pounds (£50.00)”.

THE LAW

12. S.57 of the Act governs the terms on which the new lease is to be granted. The overriding principle is that “...*the new lease to be granted to a tenant ...shall be a lease on the same terms of those of the existing lease...but with such modifications as may be required or appropriate*”

13. Sub section (6) states:

“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 purpose 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.”*

14. The proposals before the Tribunal fall within this Subsection.

EVIDENCE

Insurance

15. The Applicant asserts that it would be unreasonable to include, without modification, the existing clauses 3(2) and 3(3) of the lease considering the changes in acceptable conveyancing practice since the inception of the lease in 1964. In support of this proposition reference is made to Hague and the case of **Donald Cameron Gordon –v- Church Commissioners for England**.
16. Reference is also made to the Council of Mortgage Lender's (CML) Handbook and guidance given therein which relates to adequate covenants and arrangements in respect of buildings insurance. In the Applicant's view the current wording does not satisfy a CML requirement. This the Applicant believes is "standard conveyancing practice" cited in **Gordon**. The Applicant believes that if she had been required to have a mortgage when acquiring the property she would have had to seek a variation in the lease at that time.
17. The Respondent does not consider that the Applicant has demonstrated that it would be unreasonable to include the original insurance clause without modification. The valuation has been agreed between the valuers which in the Respondent's view is an indication that the valuers did not regard the

wording of the insurance clause as relevant to their valuations. No evidence is adduced to support her contention that the flat would be unmortgageable without the variation.

18. The CML Handbook simply requires the lender to be notified of the position regarding insurance. There is no automatic disqualification.
19. The Respondent would suffer inconvenience if the clause were redrafted as the building is insured under a block policy and it would mean that one flat would have to be separately insured from others in the block. The Applicant has not satisfied the burden of proof required by S.57(6).

Increase in Fee for Registration of Transfer

20. This is a variation proposed by the Respondent. It argues that it is required to bring a reasonable modernisation of the lease term and that it would be unreasonable to include the existing term without modification. The purpose of the payment of a registration fee of three guineas was to represent the administration costs to the Landlord in 1964 whereas the substitution of a fee of £50.00 represents the modern equivalent. This is a change in conveyancing practice which should be permitted under S.57(6)(b).
21. The Applicant does not consider that this change is required as the existing clause makes perfectly adequate provision for the payment of a notice fee. The imposition of a £50.00 fee is extortionate and would have the effect of imposing upon the Applicant and any subsequent owner of the property a substantially increased cost and burden. On the issue of the notice in respect of the actual acquisition of the property the managing agents were happy to accept a fee of £3.15.

THE TRIBUNAL'S CONSIDERATION

Insurance

22. The Tribunal starts from the position that the lease should not be varied unless good cause can be shown - S.57.

23. The existing insurance clauses at 3(2) and 3(3) are perfectly adequate and workable as stated by the Respondent.
24. The Applicant cites the CML Handbook but this applies only where the purchaser would require a mortgage.
25. A variation of this individual lease would cause considerable difficulties with the insurance of the block as a whole which would be usual practice. There is nothing to prevent an application for the variation of all the leases but the route for that is not a variation under S.57(6).
26. His Honour Judge Huskinson in **Gordon** does state that changes in conveyancing practice are capable of amounting to changes within paragraph (b) of S.57(6) but he goes on to state that he is "*...unable to conclude that there have occurred any changes in conveyancing practice which effect the suitability of the terms of the old lease*" in that case.
27. The Tribunal believes that the same situation exists here and no variation is required.

Fee for the Registration of A Notice of Transfer

28. Inevitably any specific fee mentioned in a lease would only be relevant to the date of the lease or close to that date. Although the insertion of £50.00 currently might be appropriate it will equally be out of date in a few years time and if the Respondent's proposal is accepted another lease variation will be required then.
29. As the Applicant says the fee at three guineas is quite workable and has proved to be so, so no case for a variation has been made.

Dated 08 October 2010

[signed Brandon H R Simms]

Brandon H R Simms FRICS MCI Arb
Chairman