2767

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/OLR/2013/0595**
Property	:	**Flat 1, Storeroom 1 & Garage 11 at 12-18 (even) Hill Street, W1J 5NH**
Applicant	:	**Ms Nitu Bhojwani**
Representative	:	**Forsters solicitors** **Mr M Buckpit (Counsel)**
Respondent	:	**12-18 Hill Street Investments Limited**
Representative	:	**Teacher Stern solicitors** **Mr S Gallagher (Counsel)**
Type of Application	:	**New Lease (s. 48 Leasehold Reform, Housing and Urban Development Act 1993)**
Tribunal Members	:	**Mr M Martynski (Tribunal Judge)** **Mr D Banfield FRICS**
Date and venue of Hearing	:	**9 October 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**28 October 2013**

DECISION

Decision summary

1. The Tribunal decides that none of the lease terms argued for by the parties should be included in the new lease to be granted to the Applicant.

Background

2. The Applicant's flat ('the Flat') is one of twelve flats at 12-18 Hill Street ('the Building'). Of those twelve flats, eleven are held on long leases, one is occupied by a caretaker/porter.

3. The Applicant also has a separate lease of a garage.

4. The freehold interest in the Building is owned by the Respondent Company. Of the eleven long leaseholders in the Building, nine have (we were told unequal) shares in the Respondent Company.

5. Upon the Respondent acquiring the freehold interest in the Building, it granted its nine shareholders new 999-year leases of their flats. A ninth leaseholder has since been granted a 999-year lease of his/her flat in the Building leaving the Applicant as the only leaseholder without such an extended lease.

6. The Applicant's existing lease of the Flat ('the Lease') is dated 4 November 1980 and is for a term of 70 years from 29 September 1980. A management company, which has since ceased to exist was a party to the lease. By a deed of variation dated 24 September 1999 the landlord covenanted to fulfil the management company's obligations under the lease.

7. The new 999-year leases granted to other leaseholders all have as a party to them, a new management company. The Tribunal was told that the Respondent Company is the sole shareholder in this new management company.

8. There has been an unfortunate history of animosity and litigation between the parties to this application.

9. In an application to what was then a Leasehold Valuation Tribunal, the Applicant challenged the reasonableness and payability of various Service Charges. The Applicant, following a decision dated 2 February 2012, was mostly successful in that application. In respect of some parts of the application where she was not successful, she appealed to the Upper Tribunal and was successful in that appeal. The exact monetary value of this litigation is not clear. It can however be said that the result of the decisions in this litigation is that the Applicant is left with a claim[1] for the re-payment of Service Charges amounting to a considerable sum[2].

10. The Applicant's Notice of Claim for the new lease is dated 2 November 2012. The Respondent's Counter-Notice is dated 10

[1] The Respondent asserts that any such claim would be defended

[2] The Applicant says that this over £100,000

January 2013. The current application was made to the Tribunal on 7 May 2013.

11. By the time that the Applicant's current application came to be heard by this Tribunal, the valuation of the premium for the new lease had been agreed in principle between the parties. This left a number of the terms of the new lease in dispute between the parties. Following further negotiations on the day of the hearing, and subject to agreement over the fine drafting, there remained just three unagreed issues between the parties. Each of the issues related to the terms of the new lease.

The issues and the Tribunal's decisions

Applicant's proposed term as to accounting

12. The Applicant required a rather curious term to be inserted into the new lease as follows:-

> The sums of £.....and £.....[3] plus interest accrued stands to the credit of the Tenant's service charge account which the Landlord is entitled to draw upon in respect of the Tenant's obligations herein contained and until such time as such sum has been expended the tenant shall have no obligation to pay any sums in respect of its service charge liabilities to the Landlord

13. The Applicant's desire for this clause comes directly from the Service Charge litigation referred to above. Her concern is that she considers that, as a result of the decisions in the Service Charge litigation, she has considerably overpaid in respect of her Service Charges. She is worried that she will not be able to recover those overpaid charges and so seeks to use the new lease as a method of securing, what she sees, as the debt owed to her out of the Service Charge Litigation.

14. The Applicant was concerned that if the new lease completed without the clause argued for, her ability to set-off her debt would be prejudiced.

15. Mr Buckpit for the Applicant argued that the ground on which the proposed clause should be included in the new lease was that such a provision was required to cure a defect in the Lease. This was reasoned as follows; there is a provision in the Lease to credit the tenant by an amount by which the tenant's contributions to the Service Charge during a 12-month period have exceeded the actual amount expended by the Landlord on Service Charge items during that period. However, there is a defect in the lease in that there is no provision in the Lease which allows the Tenant to be in credit in the circumstances that have arisen out of the decisions made by the

[3] It was proposed that in the default of agreement between the parties of the actual amounts, a further application would be made to the Tribunal for determination of the amounts

20. The Respondent argued that, because the Lease terms as they apply to costs do not refer specifically to lawyers and legal cases, the provisions in the Lease, so far as the recovery of such costs is concerned are, apart from the standard forfeiture clause, unlikely to allow the recovery of such costs.

21. The Respondent went on to argue that the provision in the Lease for recovery of costs in any event worked less well than they did when the Lease was granted in 1980. This was due to the creep of statutory regulation which essentially gave tenants under a long lease considerably increased rights and protection. In particular for example, when the Lease was originally granted. There were no restrictions on the service of a section 146 notice other than were contained in the lease itself and further, in the case of rent or charges reserved as rent, there was no need for a section 146 notice in the first place, the landlord could simply forfeit the lease leaving the tenant in the position of having to apply for forfeiture. Taking either route in the case of recovery of Service Charges would usually ensure that the tenant would have an obligation to pay the landlord's costs.

22. Given the statutory protection and hurdles for the landlord to negotiate before a section 146 notice can be served or forfeiture proceedings taken, it is nowadays far from certain as to whether (without a comprehensive costs clause) a landlord will recover any costs of taking action in respect of unpaid Service Charges.

23. The modern form of lease will now usually contain a clause by which the tenant is made directly responsible for the payment of the landlord's costs incurred due to any default or non-payment by the tenant. Such clause operates as an Administration Charge.

24. The modern lease will also contain a widely drafted clause for the recovery by way of Service Charge of all types of landlord's expenditure and will specifically include legal costs.

25. Mr Gallagher, for the Respondent, argued for a three-stage approach to the issue as follows.

26. First, one establishes whether changes have occurred since the Lease was granted which affect the suitability on the relevant date of the provisions of the Lease. The changes here, argues Mr Gallagher, are the legislative changes referred to above.

27. Second, consideration is given to how the Lease is working in the light of those changes – in this case according to Mr Gallagher, the lease works less well than it once did in relation to the recovery of landlord's costs as described above.

28. Third, consideration has to be given as to whether or not it would be *unreasonable* in the circumstances to include, or include

without modification, the terms relating to costs in view of the changes.

29. Mr Gallagher urged the Tribunal to take a wide and purposeful view of the reference in section 57(6) of the Leasehold Reform, Housing and Urban Development Act 1993 ('the Act') to 'term'. 'Term' he argued should not be taken literally to mean the individual terms as set out word for word in the Lease. 'Term' should be considered in a general sense. In the context of this application, 'terms' should be considered to be the terms in the Lease, taken together, that relate to the recovery of landlord's costs.

30. In response to these points, Mr Buckpit for the Applicant relied on a number of submissions which we summarise as follows:-

(a) effectively the Respondent was trying to 'roll back' the years of statutory protection that have been introduced over the years since the Lease was granted
(b) the Respondent was attempting to protect its costs position under the Lease in all circumstances but made no suggestion that there should be a similar change to protect the Applicant's costs position in the Lease; the Respondent was effectively saying that it should never be out of pocket – contrast with the situation in the recent litigation between the parties over Service Charges where due to the 'no cost' nature of the Chamber, the Applicant has been left substantially out of pocket
(c) had not the Applicant exercised her right to demand a new lease, the existing provisions in the Lease would have remained for the remainder of the term, until 2050, with no prospect of a variation in the costs provisions
(d) in respect of the proposed Administration Charge clause, the statutory protection afforded to the Applicant in respect of the reasonableness of such charges was not as extensive as the protection that tenants have in respect of Service Charges
(e) the Act's reference to 'term' meant that there had to be reference to some term in particular that it was necessary to exclude or modify, it was not sufficient to rely on a general lack of provision or unsatisfactory position in the Lease; it was not permissible to introduce what amounts to an entirely new clause/s
(f) in any event, it could not be argued that in the circumstances of this application, it would be unreasonable for these clauses not to be inserted into the new lease

31. Specifically (and presumably additionally, where appropriate) in the case of the proposed Service Charge clause, Mr Buckpit argued that;
(a) there is no need for such clauses given that all bar one of the 999 year lessees in the building are both effectively landlord and tenant

(b) If all the leases have a direct costs covenant (that is the Administration Charge), there is no need for an additional provision for recovery by way of Service Charge

(c) The new clauses are predicated on the basis that the landlord should be entitled to a 100% recovery of costs, there is no justification for this and nor should there be any legitimate expectation by a landlord investment company of such indemnity

(d) If a tenant has adequate protection from these clauses by virtue of the various provisions of the Landlord and Tenant Act 1985 (i.e. Sections 19, 20C and 27A) then, without prejudice to the other objections relied upon, the new clauses should not come into effect until the expiry of the current term of the Lease

The Tribunal's decisions

32. We consider that our jurisdiction under section 57(6) is narrow.

33. We were referred to *Gordon v Church Commissioners for England* LRA/110/2006 and *Howard de Walden Estates Ltd v Aggio and others* [2009] 1 AC. We consider ourselves bound to follow the very specific guidance in *Gordon* set out in paragraph 41 of that tribunal's decision, the relevant part of which says as follows:-

> In my judgement there is no power under section 57(6) for a party to require that there is added into the new lease a new provision which is not to be found in the old lease. There is nothing illogical or unfair in this because, apart from the grant of the new lease, the parties would have continued to be bound by the terms of the old lease for the next X years where X may be a substantial period (over 50 years in the present case). It is one thing to exclude or modify a term or terms of the existing lease where a good reason (i.e. within paragraph (a) or (b) of section 57(6) can be shown. It is another thing to permit a party to seek a rewriting of the lease by the introduction of new provisions.

34. We consider that the proposed Administration Charge and Service Charge costs terms go far beyond the modification of the existing terms and that they amount to new terms; as such therefore, section 57(6) does not allow their admission into the new lease.

35. We further consider that, given the fact that the Respondent landlord is in a similar position to many other landlords with similar leases that may be problematic from their point of view in the light of the legislative protections that have been introduced over recent years; and given that, had it not been for the Applicant's claim for a new lease, the Respondent would, in all likelihood, have been stuck with the Lease for the remainder of the Lease term, it would not be unreasonable not to include these lease terms (even if they were allowable as 'modifications') in the new lease.

Mark Marynski, Tribunal Judge
28 October 2013