FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AH/OLR/2014/0688**
Property	:	**Flat 1, 6 Moreton Road, South Croydon, Surrey CR2 7DL ("the flat").**
Applicant	:	**Jacquelyn Helen Nasrat ("the tenant")**
Representative	:	**Pro-Leagle, a European Law Firm**
Respondents	:	**Foxglade Properties Limited ("the landlord")**
Type of application	:	**A new lease claim**
Date and Venue of hearing:	:	**4 June 2014** **10 Alfred Place, London WC1E 7LR**
Tribunal member	:	**Angus Andrew**
Date of decision	:	**7 July 2014**

DECISION

Decision

1. The terms of acquisition were agreed by the parties within the meaning of section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") on 10 December 2013 and this tribunal had no jurisdiction to accept the tenant's application made on 1 May 2014.

2. I decline to order the landlord to pay the tenant's costs pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

Hearing

3. At the preliminary hearing on 4 June 2014 both parties were represented by counsel: the tenant by Mr T Davis and the landlord by Ms C Waterworth.

Background

4. The tenant holds a lease that was granted on 15 March 1985 for a term of 99 years from 24 June 1984. On 11 November 2013 the tenant gave notice to the landlord of her right to acquire a new extended lease of the flat. The initial notice proposed that the new lease should be at a premium of £11,000. Paragraph 7 of the claim notice reads:

   "The terms which I propose should be contained in the new lease are: A new clause extending the term of the lease by a further statutory ninety years at a peppercorn ground rent with no changes to the demise or to the Lease in general".

5. The landlord served its counter-notice on 29 November 2013. The landlord admitted the claim and proposed a premium of £14,900. Paragraph 2 of the counter-notice reads:

   "The reversioner accepts the proposals contained in paragraph (7) of the initial notice relating to the terms to be contained in the new Lease".

6. On 10 December 2013 the tenant wrote to the landlord in these terms:

   "We are instructed by our Client to accept the premium of £14,900 contained in the Counter-Notice.

   Kindly let us have draft New Lease and Section 60 Legal and Surveyors costs for our consideration and approval".

7. A draft lease was not forthcoming and the tenant's representative sent two reminders on 15 January 2014 and 10 February 2014. On 31 January 2014 the landlord finally sent a draft new lease to the tenant although on the

basis of the date stamp the letter and draft new lease were not received by the tenant's representative until 14 February 2014.

8. The tenant amended the draft lease by deleting three clauses that were not agreed and returned the travelling draft lease to the landlord on 17 February 2014. The first disputed clause was a tenant's covenant to pay all arrears of service charges due under the existing lease. The second negated the provisions of the Contracts (Rights of Third Party) Act 1999. The third was a tenant's covenant to apply for registration of the new lease within four weeks of completion.

9. By letter of 18 February 2014 the landlord explained why these three disputed clauses had been included and persisted with the first two clauses whilst conceding the third clause. By letter of 11 March 2014 the tenant persisted in her objection to the first two disputed clauses pointing out that they were *"of a non-statutory nature"*.

10. On 13 March 2014 the landlord sent an engrossment of the new draft lease to the tenant for execution although it was not received until 21 March 2014. Although the covering letter did not refer to the disputed clauses none of them were included in the engrossment.

11. On 31 March 2014 the tenant returned the engrossment with some further amendments. The first amendment was to the prescribed clause LR11: Easements. Both parties conceded that the amendment was one of style rather than substance. The other amendments however were made to reflect a deed of 17 June 2006 that had varied the terms of the existing lease and in particular the extent of its demise. It would seem that until that time both parties had overlooked the 2006 deed of variation. As Ms Waterworth conceded the amendments reflecting the deed of variation were necessary.

12. By a letter dated 2 April 2014 the landlord provided a further engrossment of the new lease. The covering letter states that the engrossment incorporates the tenant's amendments. In reality the engrossment did not incorporate the amendment to the prescribed clause LR11: Easements although it did incorporate all the amendments to reflect the 2006 deed of variation.

13. By letter of 15 April 2014 the tenant requested a further engrossment including the proposed amendments to the prescribed clause LR11: Easement and requested a completion statement as at 16 May 2014.

14. By letter of 17 April 2014 the landlord asserted that the tenant was deemed to have withdrawn her claim pursuant to section 53(1) of the Act and demanded its statutory costs of £1,758 less a deposit of £1,100 already paid.

15. On 1 May 2014 the tenant applied to the tribunal for a determination of the terms of acquisition remaining in dispute pursuant to section 48(1) of the 1993 Act. Following letters from the landlord disputing the tribunal's jurisdiction the application was listed for a preliminary hearing on 4 June 2014 to determine the extent if any of the tribunal's jurisdiction.

16. On 16 May 2014 the landlord issued proceedings in the Watford County Court for a declaration that there had been a deemed withdrawal of the tenants claim for a new lease. At the hearing I was told that the tenant has applied to strike out those proceedings as an abuse of process.

17. Copies of the relevant statutory provisions are annexed to this decision.

Issues

18. In correspondence prior to the hearing the landlord requested that the tribunal proceedings be stayed on the grounds that the County Court was the correct forum to determine if there had been a deemed withdrawal of the tenant's claim to a new lease. That request was refused by another tribunal judge. At the start of the hearing Ms Waterworth agreed that I was entitled to determine the extent of this tribunal's jurisdiction and she did not seek a stay of these proceedings.

19. Mr Davies on behalf of the tenant argued in effect that the detailed terms of the new lease were one of *"the terms of the acquisition"* within the meaning of section 48 of the Act. He asserted that the detailed terms of the new lease had never been agreed between the parties and that consequently one of *"the terms of acquisition"* remained in dispute. Thus section 48(2) of the Act is engaged and any application to the tribunal *"must be made not later then end of the period of six months beginning with the date on which the counter-notice ... was given to the tenant"*. The counter-notice having been given on 29 November 2013 and the application to this tribunal having been received on 1 May 2014, it retained jurisdiction to determine the disputed new lease terms.

20. In support of his submissions Mr Davies relied of the decision of Lewison J in Pledram Properties Ltd v 5 Felix Avenue London Ltd [2010] EWHC 3048 (Ch). I refer to that decision in more detail below.

21. Ms Waterworth on behalf of the landlord asserted that *"the terms of acquisition"* were agreed on 10 December 2013 when the tenant accepted the premium proposed by the landlord in its counter-notice. This assertion rested on the proposition that the terms of the new lease were agreed on 29 November 2013 when the landlord in its counter-notice accepted the tenant's proposal for the new lease set out in her initial notice. Consequently on 10 December 2013 this tribunal was deprived of any jurisdiction and sections 48(3)-(6) are engaged. The tenant should have applied to the County Court between 10 February 2014 and 10 April 2014

for an order requiring the landlord to grant the new lease on the terms set out in the initial notice. No such application having been made by the tenant her claim is deemed to have been to have withdrawn pursuant to a section 53 of the Act.

22. Shortly after the hearing I read the relatively recent decision of the Court of Appeal in Bolton v Godwin-Austin [2014] EWCA Civ 27 that related to a similar issue in respect of three new lease claims. As my attention had not been drawn to the Bolton case I sent a copy of the decision to each of the parties and requested them to submit representations by 20 June 2014. I have since received those representations and they are taken into account in this decision. In his submissions Mr Davis placed further reliance on the decision of the President of what is now the Lands Chamber in Ellis v Olga [LRA/3/2000] and again I refer to this case in more detail below.

23. Essentially the issue is whether any of the terms of acquisition remained in dispute within the meaning of section 48(1) of the Act after the tenant wrote to the landlord on 10 December 2013 accepting the premium proposed in the landlord's counter-notice.

24. Finally Mr Davis on behalf of the tenant applied for costs pursuant to rule 13 of the 2013 Rules on the grounds that in pursuing its jurisdiction objection and applying to the County Court the landlord had acted unreasonably.

Reasons for my decision

25. Both Pledream and Ellis are distinguishable from this case. Pledream related to a collective enfranchisement claim. Section 13 of the Act does not require the lessees to specify the transfer terms in the initial notice on a collective enfranchisement claim. In contrast section 42 of the Act requires the lessee to specify the terms of the proposed new lease in the initial notice and those terms are clearly capable of being accepted. In Pledream Lewison J found that the terms of the proposed transfer had never been agreed between the parties and thus remained in dispute.

26. Although Ellis did relate to a new lease claim it is equally distinguishable for two reasons. Firstly because the decision turns on a definition of the valuation date in paragraph 1 of schedule 13 to the Act that has since been repealed. Secondly because again there was never any suggestion that the premiums had been agreed between the parties: indeed it was at large and the outstanding task for the tribunal was to determine the premiums.

27. The nature of the agreement envisaged by sections 48(3)(2) and 48(6)(a) is explained by Lord Justice McCombe in Bolton v Godwin-Austin at paragraph 9 where he says:-

"Broadly, the "terms of acquisition" are what are known commercially as "heads of terms" and the form of lease is then drafted to give effect to the terms of acquisition, as either agreed between the parties or determined by the tribunal."

28. The point is emphasised by the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 2003. Schedule 1 deals with collective enfranchisements whilst schedule 2 deals with lease renewals. Paragraph 7 (1) of schedule 2 provides that:-

"The landlord shall prepare a draft lease and give it to the tenant within the period of fourteen days beginning with the date the terms of acquisition are agreed or determined by the appropriate tribunal".

29. In this case the tenant's proposals for the new lease were simple and unambiguous. She proposed that the new lease would be in the same form as her existing lease save that it was to be at a peppercorn rent and for a further ninety years. In proposing those new terms she was simply giving effect to the provisions of section 56 (1) of the Act. The landlord in its counter-notice could have proposed different terms in particular relying on section 57 of the Act. It is very common for landlords in new lease claims to attempt to substitute a modern form of lease for the existing lease usually by appending a draft of the proposed new lease to their counter-notice. That did not happen here. The landlord unambiguously accepted the tenant's proposal.

30. The service of the counter-notice put the terms of the new lease beyond doubt. The only other issue in dispute apart from statutory costs (that are not a term of acquisition) was the premium. That was agreed when the tenant by her letter of 10 December 2013 accepted the sum proposed by the landlord in its counter-notice. The two notices and the letter of 10 December 2013 constituted the heads of terms envisaged by Lord Justice McCombe in Bolton v Godwin-Austin much as in that case the tenants' letter accepting the landlord's proposals in the counter-notices was held to constitute an agreement for the purpose of section 48.

31. The landlord should have submitted a draft lease by 24 December 2013. Its failure to do so is regrettable. However the tenant's remedy was to apply to the court pursuant to section 48(3) of the 1993 Act and not to sit on her hands and send chasing letters. That would have been an inconvenience but the tenant would have been entitled to her costs. As Lord Justice McCombe put it at paragraph 47 of the judgement in Bolton v Godwin-Austin:-

"In fact, proposals were made and accepted in writing. The only question that might have arisen, if matters had got that far, would have been what the accepted proposals truly meant. That would have been a matter for the Court on an application under section 48"

32. In this case there could have been no doubt about the nature of the agreement reached between the parties. On a practical level there was nothing left that required the determination of an expert tribunal. The landlord was not entitled to the additional clauses that it initially contended for as it ultimately recognised. The tenant was entitled to a new lease on the same terms as the old lease as varied by the 2006 of variation because that deed pre-dated her claim. The omission of any reference to the 2006 deed was a clear mistake: the court would have ordered its inclusion in the unlikely event of the landlord taking the point. Equally the prescribed clause LR11: Easements is a statutory requirement.

33. Consequently and for each and all of these reasons I am satisfied that all the terms of acquisition were agreed on 10 December 2013 and that after that date none of them remained in dispute within the meaning of section 48(1) of the Act. Consequently as from 10 December 2013 this tribunal was deprived of jurisdiction.

34. I now turn to the tenant's cost application. As she has lost there is no basis for making a cost order in her favour. However even is she had been successful I would not have made a cost order. Rule 13 is not intended to give this tribunal full cost shifting powers. It can only make a cost order "*if a person has acted unreasonably in bringing, defending or conducting proceedings*". The point raised in this case has been the subject of confliction tribunal decisions. There was an arguable point and both sides were entitled to take it. Clearly different considerations will apply in the proceedings before the Watford County Court.

Name: Angus Andrew **Date: 7 July 2014**

APPENDIX OF RELEVANT LEGISLATION

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

(2) Any application under subsection (1) must be made not later than the end of the period of six months beginning with the date on which the counter-notice or further counter-notice was given to the tenant.

(3) Where—

(a) the landlord has given the tenant such a counter-notice or further counter-notice as is mentioned in subsection (1)(a) or (b), and

(b) all the terms of acquisition have been either agreed between those persons or determined by the appropriate tribunal under subsection (1),

but a new lease has not been entered into in pursuance of the tenant's notice by the end of the appropriate period specified in subsection (6), the court may, on the application of either the tenant or the landlord, make such order as it thinks fit with respect to the performance or discharge of any obligations arising out of that notice.

(4) Any such order may provide for the tenant's notice to be deemed to have been withdrawn at the end of the appropriate period specified in subsection (6).

(5) Any application for an order under subsection (3) must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period specified in subsection (6).

(6) For the purposes of this section the appropriate period is—

(a) where all of the terms of acquisition have been agreed between the tenant and the landlord, the period of two months beginning with the date when those terms were finally so agreed; or

(b) where all or any of those terms have been determined by the appropriate tribunal under subsection (1)—

(i) the period of two months beginning with the date when the decision of the tribunal under subsection (1) becomes final, or

(ii) such other period as may have been fixed by the tribunal when making its determination.

(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.

53.- Deemed withdrawal of tenant's notice.

(1) Where—

(a) in a case to which subsection (1) of section 48 applies, no application under that subsection is made within the period specified in subsection (2) of that section, or

(b) in a case to which subsection (3) of that section applies, no application for an order under that subsection is made within the period specified in subsection (5) of that section,

the tenant's notice shall be deemed to have been withdrawn at the end of the period referred to in paragraph (a) or (b) above (as the case may be).

56. - Obligation to grant new lease.

(1) Where a qualifying tenant of a flat has under this Chapter a right to acquire a new lease of the flat and gives notice of his claim in accordance with section 42, then except as provided by this Chapter the landlord shall be bound to grant to the tenant, and the tenant shall be bound to accept—

(a) in substitution for the existing lease, and

(b) on payment of the premium payable under Schedule 13 in respect of the grant,

a new lease of the flat at a peppercorn rent for a term expiring 90 years after the term date of the existing lease.

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.