4259

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BB/OLR/2015/1360**
Property	:	**40A Ernald Avenue, London E6 3AL**
Applicant	:	**Mr Dennis Christopher Johnson**
Representative	:	**Mr Ian Mitchell – Anthony Gold Solicitors**
Respondent	:	**Raj Properties Limited**
Representative	:	**Mr Ajay Arora - In-house solicitor**
Type of Application	:	**Section 48(1) Leasehold Reform, Housing and Urban Development Act 1993 – to determine those terms of acquisition in dispute**
Tribunal Members	:	**Judge John Hewitt** **Mr Neil Martindale FRICS**
Date and venue of Hearing	:	**8 December 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**24 December 2015**

DECISION

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Decisions of the tribunal

1. The tribunal determines that:

    1.1 Box LR13 Prescribed Clauses to be lodges at Land Registry with the new lease to be granted by the respondent to the applicant shall not contain the standard form of restriction in the form contended for by respondent or any form of restriction at all; and

    1.2 Clause 3.2 of the draft lease contended for by the respondent, which seeks to amend clause 2(7) of the lease originally granted shall be deleted, and there shall be the consequent re-numbering of clauses 3.3 – 3.5.

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. 40 Ernald Avenue, London E6 3AL was originally constructed as house and subsequently it has been adapted to contain two self-contained flats. In 1977 both flats were sold off on long leases for terms of 99 years from 24 June 1977 [22].

4. The freehold interest is vested in the respondent [21].

5. On 8 February 2012 the applicant was registered at Land Registry as the proprietor of the lease of 40A which is described as the first floor maisonette [24].

6. By a notice of claim dated 3 February 2015 [15] given pursuant to section 42 Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act) the applicant claimed a new lease of the flat and set out his proposals for the grant of that new lease.

7. By a counter-notice dated 24 April 2015 [20] the respondent admitted that on the relevant date the applicant had the right to acquire a new lease of the flat. The respondent did not accept all of the proposals set out by the applicant and set out its counter-proposals.

8. Evidently the parties were not able to reach agreement on all of the terms of acquisition and by an application form dated 13 August 2015 [10] the applicant made an application to the tribunal for the terms in dispute to be determined.

9. Directions were given on 4 September 2015 [13].

10. The application came on for hearing before us on 8 December 2015.

The hearing

11. At the hearing the applicant was represented by Mr Ian Mitchell a partner with Anthony Gold Solicitors.

    The respondent was represented by Mr Ajay Arora an in-house solicitor.

12. Mr Mitchell had filed and served a witness statement. At the hearing Mr Mitchell gave oral evidence and was cross-examined by Mr Arora and he answered questions put to him by members of the tribunal. Towards the end of the hearing Mr Mitchell made closing submissions.

13. The respondent had not filed any witness statements during the course of the hearing. Mr Arora said that generally he proposed to rely upon legal submissions and authorities.

    Mr Arora indicated that he was willing to give oral evidence but as he had not filed a witness statement in advance we did not consider it fair or just that he be allowed to do so. In any event it became apparent that the nature of the evidence he might give was limited to his view of what good conveyancing practice might amount to. Such evidence, if admissible at all, was touching on expert evidence and none of the provisions of rule 19 had been complied with. We were not prepared to admit such evidence at such a late stage from Mr Arora.

    Mr Arora did however make full submissions to us and he took a full part in the general discussion which took place concerning the two issues before us.

14. We were told that premium, costs and most of the new lease terms had been agreed but there were two lease terms in issue.

    Those two terms were:

    14.1 Alienation. Clause 2(7) of the original lease, a covenant on the part of the tenant, was in the following terms:

    "Not during the last seven years of the term hereby granted without the previous consent in writing of the Lessor (such consent not to be unreasonably withheld) assign underlet or part with possession of the demised premises"

    The respondent contended that that provision should be carried over into the new lease but with the words *"Not during the last seven years of"* deleted and replaced by the words *"Not at any time during…"*.

    14.2 Prescribed clauses. Since 1 October 2009 it has been a requirement of Land Registry that leases presented for registration must contain at the beginning of the lease a standard set of prescribed clauses duly completed. From the

information provided in those clauses Land Registry will prepare the register entries to complete the registration. In broad terms the completion of the prescribed clauses boxes will enable Land Registry staff to readily and clearly identify those lease clauses which are material to matters to be recorded in registers. Thus this avoids Land Registry staff having to trawl through each lease presented for registration to identify all of the clauses which are material to registration.

The respondent wished to include an entry in Prescribed Clause Box LR13. The clause contended for is at [47] as originally proposed. At the commencement of the hearing Mr Arora said that the respondent wished to modify its position and the clause now contended for was in the following terms:

"No disposition of the registered estate by the proprietor of the registered estate, or by the proprietor of any registered charge, not being a charge registered before the entry of the restriction, is to be registered without the written consent signed by the proprietor for the time being of the estate registered under title number EGL66007 or their conveyancer that the provision of clause 2(7) disposition of the Lease as modified subsisting of the registered estate has been complied with."

The statutory provisions

15. In general terms section 57(1) of the 1993 Act provides the new lease to be granted to a tenant shall be in the same terms as those of the existing lease.

Subsection 57(6) provides that:

(6) 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 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.

The gist of the case for the respondent

16. Mr Arora accepted that since it was the respondent which wished to modify the terms of the existing lease it was for him to make out case to do so.

17. Mr Arora relied upon section 57(6)(b) of the 1993 Act. He submitted that two changes had occurred since the existing lease had been granted that justified the modifications proposed.

18. As regards the modification of the alienation provision Mr Arora relied upon the enactment of the Landlord and Tenant (Covenants) 1995 (the 1995 Act). He said this introduced to a new regime and watered down the liability of the original tenant. Where a tenant is free to assign a lease to whomsoever he pleases without any control or input from the landlord there was a real risk that a landlord could end up in a position with an impecunious tenant and have limited recourse to prior tenants and that he may have be at risk in recovering service charges or other sums payable under the lease.

19. Mr Arora submitted that it was reasonable to modify the existing lease to give greater control over alienation and perhaps where appropriate to request an authorised guarantee be entered into by an outgoing tenant.

20. In support of his submission Mr Arora relied upon a 1997 decision of the Leasehold Valuation Tribunal Ref: LON/NL/283 *Dr W G Huff v The Trustees of the Sloane Stanley Estate (No.2).* This case concerned a very similar alienation clause. That tribunal accepted a persuasive argument that unless there was a covenant against alienation in the new lease then the landlord would lose its ability to enter into an authorised guarantee agreement. That tribunal also observed that it was recognised practice that landlord should not enter into new leases where authorised guarantee agreements are precluded. That tribunal this concluded it would be unreasonable in the circumstances to restrict the alienation provision to the last seven years of the term only. It held that there had been changes occurring since the date of the commencement of the lease which affect the suitability of the provisions of that lease, such that the new lease should be varied.

21. Mr Arora submitted that the *Huff* case had not been appealed or challenged since the decision was issued. He referred the tribunal to paragraph 32-10 *Hague – Leasehold Enfranchisement* 6th edition which cited *Huff* as authority for the proposition that the enactment of the 1995 Act was a change within the meaning of section 57(6)(b) of the 1993 Act.

21. As regards the prescribed clause LR13 Mr Arora argued that the Land Registration Act 2003, coupled with the new Land Registration Rules 2003 (as amended) introduced a new requirement for registrable leases to set out the beginning of the lease certain information in a standard set of prescribed clauses.

22. Mr Arora submitted that this was a major change since the existing lease was granted and the new lease had to include the prescribed clauses.

23. Mr Arora also submitted that inclusion of the restriction in LR13 was reasonable in the interests of good estate management.

The gist of the case for the applicant

24. Mr Mitchell gave oral evidence. He confirmed that his witness statement [69] was true when signed and was still true at the date of the hearing.

25. As regards the prescribed clauses point Mr Mitchell said that in his 12 years' experience of acting exclusively in leasehold enfranchisement he had never seen a landlord seek to enter a restriction on the title in the manner proposed by the respondent. Mr Mitchell said that the imposition of such a restriction would act an additional hoop for a lessee wishing to assign his lease to jump through and would be detrimental to the lessee's interests. If a landlord unreasonably failed to give to Land Registry the consent specified it may take several months for that issue to be resolved and would be costly. He said that what the respondent was seeking was exceptional.

26. As regards the alienation provision in clause 2(7) Mr Mitchell said authorised guarantee agreements are not used in the domestic residential sector – you just do not see them. He accepted that perhaps at the high end in prime central London where the tenant is an overseas person or corporate entity there is sometimes a provision for a UK based guarantor. However, the subject flat is not in prime central London, it is a modest flat in East Ham, London E6 with a value of circa £150,000. Again Mr Mitchell said that what the respondent proposed was exceptional and just not happen in domestic conveyancing.

27. In cross-examination on paragraph 18 of his witness statement Mr Mitchell accepted that clause 2(7) is qualified by the obligation of the landlord not to unreasonably withhold consent, but he maintained that the restriction if LR13 was not so qualified.

Final submissions

The applicant

28. In his final submissions Mr Mitchell argued that its counter-notice the landlord had raised the issue of the alienation clause 2(7) but had not raised the LR13 point. He submitted that it was too late for the respondent to raise now. Mr Mitchell did not have any authority to support that submission.

29. As regards LR13 Mr Mitchell submitted that this was not a change which had occurred which affected the suitability of the provisions of the existing lease within the meaning of section 57(6)(b) of the 1993 Act. He said it arose from a change in the registration of leases at Land Registry and the manner in which property rights may be protected and that LR13 is not a term of the lease itself.

30. Mr Mitchell repeated that the imposition of LR13 would introduce a second tier of procedure when a tenant wished to assign his lease or sublet the property. He also submitted that it would expose the tenant to further administration charges because the landlord would be able to impose a charge for giving his consent.

31. Mr Mitchell accepted that the enactment of the 1995 Act was a modification that fell with section 57(6)(b) of the 1993 Act but he argued that the modification sought as neither justified nor supported.

32. Mr Mitchell did not accept that the modifications sought by the respondent were reasonably required for the purposes of good estate management. He argued that here there would be no ground rent payable under the new lease and the landlord had a range of remedies available in the event that service charges were not paid. Mr Mitchell contrasted the position here where the lease was a valuable asset to that of leases of business premises let at a rack rent where the lease itself may have a limited value and thus where authorised guarantee agreements are more commonly to be found.

33. Mr Mitchell argued that taken together the two modifications proposed had the potential to impose great difficulties on a tenant wishing to assign his lease, would give rise to abortive sales and, to use his word, result in a nightmare.

34. As regards the *Huff* decision Mr Mitchell said that he had carried out research and had not been able to find any tribunal decision which had followed it. He submitted that the decision was made in 1997 relatively shortly after the introduction of the of the 1995 Act on 1 January 1996 and also the enactment of the Housing Act 1996 which imposed some restrictions on forfeiture of residential leases which provisions came into effect on 24 September 1996, and thus at a time when there may have been some uncertainty how the market would react to the changes and perhaps an overly cautious line was adopted. He argued that with the benefit of time and experience that market simply has not followed and embraced that decision.

The respondent

35. Mr Arora argued that the qualified covenant sought as regards clause 2(7) was in a form approved by the Council of Mortgage Lenders. He said that the imposition of the clause would enable the landlord to manage its estate effectively and section 57(6)(b) provided for modernisation in conveyancing practice. Mr Arora submitted that the section did not differentiate on the value of properties and that in any event East Ham was an up and coming area.

36. Mr Arora said that authorised guarantee agreements might not be taken regularly and the modification proposed would give the landlord the power to take such agreement or to impose conditions if it considered it appropriate to do so in the interests of good estate management. Mr Arora argued that if the mechanism allowed for the

possibility of authorised guarantee agreements and/or LR13 it is possible that any issues about breaches of covenant can be ironed out before a sale of the lease takes place – it provides for an easier mechanism for the landlord to pursue any breaches. Mr Arora argued that LR13 would not impose a bar on short sub-lettings because leases of less than seven years are not registrable at Land Registry.

37. On the counter-notice point Mr Arora submitted that one the *Poets Chase* cases was authority that points may taken at a hearing even if they were not expressly taken in the counter-notice.

Discussion and reasons

38. On the counter-notice point raised by Mr Mitchell neither party cited any authority to the tribunal. We have noted the discussion on the subject on paragraph 30-18 of *Hague* but it does not cover the point directly.

39. As will be seen below we were not persuaded that the imposition of LR13 falls within section 57(6)(b) of the 1993 Act, and if it did it would not be reasonable to make the modification.

40. In these circumstances we do not propose to make any determination on that submission.

41. In general terms we prefer the thrust of the submissions made on behalf of the applicant because they strike a chord with the experience of the members of the tribunal.

42. As regards clause 2(7) we consider the modification proposed to be unreasonable. We have given careful consideration to the decision in *Huff* and we respect the views expressed but we decline to follow it, largely for the reasons given by Mr Mitchell. Although there is no hard and fast rule, in our experience modern leases granted by the larger residential developers do not impose such an alienation clause and also, for that matter, do not seek to impose a restriction of the type contended for in LR13.

43. We find that in practice authorised guarantee agreements are rarely seen in domestic residential leases and we reject the submission that such are required for good estate management purposes.

44. Having decided the clause 2(7) point the LR13 point becomes of less significance because if it were to arise at all it would only arise in the last seven years of the term.

45. As for LR13 we find that the statutory requirement to include prescribed clauses at the beginning of leases is not a change which had occulted within the meaning of section 57(6)(b) of the 1993 Act. It is not a change that affects the landlord and tenant relationship. The clauses are imposed as an administrative tool to assist Land Registry with making proper entries on the register.

46. The Land Registration Act 2003 introduced a new regime for protecting certain property interests, namely notices and restrictions. Where a person has the benefit of a property interest that interest may be capable of protection by the entry of a restriction on the register which will preclude Land Registry from effecting a disposition of the property unless certain conditions are fulfilled.

47. Whilst a landlord has the benefit of covenants given by the tenant, including a covenant against alienation and whilst that might sometimes be capable of protection by the entry of a restriction on the title we find that in the circumstances of the present case it would be Draconian to do so. The benefit of such a restriction was not open to the landlord at the commencement of the existing lease. The fact that land registration protection has changed in the interim is not, of itself, reasonable cause to impose additional and unreasonable burdens on tenant.

48. For these reasons we find that the two modifications to the new lease sought by the respondent should not be included in the new lease.

Judge John Hewitt
24 December 2015

ANNEX - 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.