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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : LON/00AW/LOR/2017/1179

Property : Flat 3, 99 Earls Court Road,
London W8 6QN

Applicant : John O’Sullivan

Representative : Ms Ayesha Omar -Counsel

Respondent : Chardonnay Holdings Limited

Representative : Mr A Redpath-Stevens - Counsel

Type of application : Section 48 of the Leasehold
Reform, Housing and Urban
Development Act 1993

Tribunal members : Tribunal Judge Dutton
Mr W R Shaw FRICS

**Date of determination
and venue** : On 22nd May 2018 at 10 Alfred
Place, London WC1E 7LR

Date of decision : 29 May 2018

DECISION

Summary of the tribunal’s decision

- (1) The Tribunal determines that it will not make the alterations to the New Lease as requested by either party for the reasons set out below.

Background

- 1. This was an application made by the applicant leaseholder pursuant to section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 (“the Act”) for a determination of the premium to be paid for

the grant of a new lease of Flat 3 99 Earls Court Road, London W8 6QH (the "Property") and the lease terms.

2. By a notice of a claim dated 5th January 2017, served pursuant to section 42 of the Act, the applicant exercised the right for the grant of a new lease in respect of the Property. At the time, the applicant held the existing lease granted on 19th March 1985 for a term of 99 years from 24th June 1980 at an annual ground rent of £75 and rising as provided. The applicant proposed to pay a premium of £62,353 for the new lease and sought an amendment to include the fourth floor of the building, which has been used as a roof deck by the Applicant, it would seem, since around 2001.
3. On 15th March 2017, the respondent freeholder served a counter-notice admitting the validity of the claim and counter-proposed a premium of £115,000 for the grant of a new lease and objected to any alteration in the extent of the demise of the Property.
4. The parties agreed the premium at £87,002. However they had not been able to agree two clauses of the proposed new lease. The first was a modification sought by the Applicant to the existing insurance clause of the lease (Clause 3(3)(i)). The second was a request by the Respondent to include a new clause seeking to exclude the impact of section 62 of the Law of Property Act 1925.

The hearing

5. The hearing in this matter took place on 22nd May 2018. The Applicant was represented by Ms Omar, and the Respondent by Mr Redpath-Stevens.
6. Prior to the hearing we had the opportunity of considering a bundle of papers containing the Applicant's summary of issues, the Application, the notices served, title documents, the existing and proposed new lease and a copy of a report by Mr Corble, the valuer appointed by the Applicant. In addition to these papers we were provided with copies of un-sworn statutory declarations by the Applicant and Mr Khodayecki, the previous freeholder. During the course of the hearing the Applicant was able to produce a sworn copy of his declaration and it would seem a sworn copy of a declaration made by Mr Khodayecki, which was not the same as the one included in the bundle before us. We noted the contents of these various documents
7. There were letters dated respectively 6th November 2015, 18th November 2015 and 15th December 2015 passing between solicitors instructed for the Applicant and Respondent. We noted the contents.

Insurance provisions

8. The Applicant, in a skeleton argument prepared by Ms Omar and received on the morning of the hearing sought to amend the lease under the provisions of section 57 (6)(b) arguing that changes to the Council of Mortgage Lenders (CML) requirements on insurance, which changed in November 2015, meant that there should be an amendment to the existing lease. We were provided with the wording of clause 6.14.1 of the CML Handbook. It was said that the proposed change to the new lease would ensure that the insurance cover met the CML's requirements, there having been a change in 'conveyancing' practice.
9. The Respondent's position was that there was no defect in the lease (s57(6)(a)) and that there were no changes under s57(6)(b). Further it was suggested that the CML's requirements appeared to indicate that it could request the Borrower to insure, which would be unacceptable. The wording is as follows

Insurance

6.14.1 You must make reasonable enquiries to satisfy yourself that buildings insurance has been arranged for the property from no later than completion.

You should remind the borrower that they:

- Must have buildings insurance in accordance with the requirements of the mortgage contract no later than completion, and
- Must maintain such buildings insurance throughout the mortgage term.

The tribunal's determination and findings

10. The tribunal determines that the proposed changes to the wording do not meet the requirements of s57(6). The existing insurance clause in the lease is extensive and applies to all flats in the building. We do not consider it is necessary to include the proposed additional wording set out in the Third Schedule to the proposed new lease. There was no evidence that there had been problems in selling leases within the building as a result in the changes to the CML requirements. Further the Applicant openly accepted that an abortive sale in 2015 had nothing to do with the insurance provisions in the exiting lease. We have borne in mind the judgment of HH Judge Huskinson in the case of Gordon v Church Commissioners LRA/110/2006. The CML requirements are matters for the legal advisors for the borrower to satisfy. We have no evidence that the existing wording would not meet the CML's needs.

Exclusion of s62 Law of Property Act 1925

11. For the Respondent it was argued that the existing lease did not provide for the use of the roof deck. It was said that the Applicant was attempting, by the 'back door' to extend the demise to include these areas. Although the Applicant sought to include the roof deck in the Initial Notice it was accepted by him that he had no right to do so. The eventual price was settled without any value being given to the roof spaces. Indeed the valuer for the Applicant, Mr Corble, confirmed that the eaves storage and roof terrace were not within the demise and that the lease had not been varied to include those areas. Accordingly he had disregarded these areas when calculating the premium.
12. The statutory declarations refer to an 'informal licence' granting permission to erect and maintain a roof deck and use of the roof space. Mr Khodayecki understood that the "informal licence would continue after my period of ownership". The freehold was transferred to the Respondent in 2005.
13. The Applicants statutory declaration confirms that no documentation was put in place to formalise the issue of the roof spaces. It does indicate that the Respondent was fully aware of the use. The declaration as paragraph 14 says "*Therefore I confirm the roof deck was constructed with the freeholder's consent and the agreement to execute a deed of variation to include it in my demise as and when required*". However, as we have indicated above this was not a stance he adopted in the lease extension process, agreeing a value which excluded this area.
14. Mr Redpath-Stevens referred us to Woodfall, Landlord and Tenant Volume 1 at para 1.003 which says as follows "*A revocable licence is determined by the death of the licensor or the licensee, or by assignment of the land over which, or of the subject –matter in respect of which, the licence is to be enjoyed. Since a licence does not create an interest in land it is not binding on a successor in title or the original grantor, even if he purchases with notice of the licence, unless the circumstances are such that his conscience is affected, in which case he may be made to give effect to the licence through the mechanism of a constructive trust*"
15. No such argument as to a trust was put to us by the Applicant.
16. The Applicant asserted that the Respondent sought to introduce a wholly new term without consent. Again the judgement of HH Judge Huskinson was referred to. It was initially asserted by Ms Omar that the roof area was not appurtenant to the Property but she seemed to slightly resile from this position after there was a short adjournment. She did, however, accept that it was unlikely to be appurtenant.

17. Mr Redpath-Stevens argued that we were required to make a finding that either the lease was defective and the exclusion of s62 of the 1925 Act should be included so as to prevent the Applicant from acquiring a right to use the roof areas, or make a finding that the Applicant had no such right.

The tribunal's determination and findings

18. It appears to be common ground that the right that the Applicant has to use the roof spaces is under a personal, informal licence, which is not in writing. Further, it is common ground that the roof areas did not require a value to be attributed to them for assessing the premium for the lease extension for the Property.
19. There is a paucity of evidence available to us. The Respondent provided no evidence at all, other than a couple of letters from its solicitors, one dated 6th November 2015 which was relevant. This said in the final paragraph *"Accordingly, unless you are able to advance any reasons as to why your client is entitled to these areas, our client's instructions are that it is not prepared to transfer the same to your client and that it requires your client to cease his use of the same and to restore the said areas to their previous condition"*.
20. The Applicant's evidence was to be found in the two declarations, one of which may or may not have been sworn (Mr Khodayecki). There is no evidence from the Respondent as to its knowledge of the usage.
21. The existing lease makes no reference to the roof area. It grants no easements over same. The valuation excluded the areas.
22. It is our finding therefore that there is no defect in the lease. The demise and the rights are clear. Further we find that the provisions of s57(6)(b) do not apply. This proposed change is not a term of the existing lease but the introduction of a new term, without the agreement of the Applicant.
23. We would add that it would seem inappropriate for the Applicant to seek to establish an easement or right to the roof area for no value. The entitlement to the roof spaces may be a matter for another jurisdiction. We are not prepared to make findings within the limited ambit of s57 on the history of the use and what may have been known by the Respondent nor what impact such knowledge may or may not have on the position.
24. We therefore find that neither proposed amendment is allowed by us.

Name: Tribunal Judge Dutton **Date:** 29 May 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Relevant Law

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.

(2) Where during the continuance of the new lease the landlord will be under any obligation for the provision of services, or for repairs, maintenance or insurance—

(a) the new lease may require payments to be made by the tenant (whether as rent or otherwise) in consideration of those matters or in respect of the cost thereof to the landlord; and

(b) (if the terms of the existing lease do not include any provision for the making of any such payments by the tenant or include provision only for the payment of a fixed amount) the terms of the new lease shall make, as from the term date of the existing lease, such provision as may be just—

(i) for the making by the tenant of payments related to the cost from time to time to the landlord, and

(ii) for the tenant's liability to make those payments to be enforceable by distress, re-entry or otherwise in like manner as if it were a liability for payment of rent.

(3) Subject to subsection (4), provision shall be made by the terms of the new lease or by an agreement collateral thereto for the continuance, with any suitable adaptations, of any agreement collateral to the existing lease.

(4) For the purposes of subsections (1) and (3) there shall be excluded from the new lease any term of the existing lease or of any agreement collateral thereto in so far as that term—

(a) provides for or relates to the renewal of the lease,

(b) confers any option to purchase or right of pre-emption in relation to the flat demised by the existing lease, or

(c) provides for the termination of the existing lease before its term date otherwise than in the event of a breach of its terms;

and there shall be made in the terms of the new lease or any agreement collateral thereto such modifications as may be required or appropriate to take account of the exclusion of any such term.

(5) Where the new lease is granted after the term date of the existing lease, then on the grant of the new lease there shall be payable by the tenant to the landlord, as an addition to the rent payable under the existing lease, any amount by which, for the period since the term date or the relevant date (whichever is the later), the sums payable to the landlord in respect of the flat (after making any necessary apportionment) for the matters referred to in subsection (2) fall short in total of the sums that would have been payable for such matters under the new lease if it had been granted on that date; and section 56(3)(a) shall apply accordingly.

(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.

(7) The terms of the new lease shall—

(a) make provision in accordance with section 59(3); and

(b) reserve to the person who is for the time being the tenant's immediate landlord the right to obtain possession of the flat in question in accordance with section 61.

(8) In granting the new lease the landlord shall not be bound to enter into any covenant for title beyond—

(a)those implied from the grant, and

(b)those implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994 in a case where a disposition is expressed to be made with limited title guarantee, but not including (in the case of an underlease) the covenant in section 4(1)(b) of that Act (compliance with terms of lease);

and in the absence of agreement to the contrary the landlord shall be entitled to be indemnified by the tenant in respect of any costs incurred by him in complying with the covenant implied by virtue of section 2(1)(b) of that Act (covenant for further assurance).

(8A)A person entering into any covenant required of him as landlord (under subsection (8) or otherwise) shall be entitled to limit his personal liability to breaches of that covenant for which he is responsible.

(9)Where any person—

(a)is a third party to the existing lease, or

(b)(not being the landlord or tenant) is a party to any agreement collateral thereto,

then (subject to any agreement between him and the landlord and the tenant) he shall be made a party to the new lease or (as the case may be) to an agreement collateral thereto, and shall accordingly join in its execution; but nothing in this section has effect so as to require the new lease or (as the case may be) any such collateral agreement to provide for him to discharge any function at any time after the term date of the existing lease.

(10)Where—

(a)any such person ("the third party") is in accordance with subsection (9) to discharge any function down to the term date of the existing lease, but

(b)it is necessary or expedient in connection with the proper enjoyment by the tenant of the property demised by the new lease for provision to be made for the continued discharge of that function after that date,

the new lease or an agreement collateral thereto shall make provision for that function to be discharged after that date (whether by the third party or by some other person).

(11)The new lease shall contain a statement that it is a lease granted under section 56; and any such statement shall comply with such requirements as may be prescribed by rules made in pursuance of section 144 of the Land Registration Act 1925 (power to make general rules).