



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

Case Reference : **CAM/26UF/OLR/2020/0111**

HMCTS : **Paper**

Properties : **35 Constantine Place, Baldock, Hertfordshire
SG7 6ST**

Applicant : **Rebecca Jane Hashem**
Representative : **HRJ Foreman Laws**

Respondent : **Proxima GR Properties Limited**
Representative : **Estates & Management Limited**

Date of Application : **31st July 2020**

Type of Application : **To determine the terms of acquisition of the
lease extensions of the Property**

Tribunal : **Judge JR Morris**

Date of Decision : **2nd December 2020**

DECISION

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This determination on the papers has been consented to by the parties. A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the case is to be determined wholly on the papers because it is not reasonably practicable for a hearing, or to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Decision

1. The Tribunal decides that the Developer is not required to be a party to the proposed lease and determines the terms of acquisition are to be amended as set out in Appendix 1 of this Decision.

Reasons

Application

2. The Tenant served a Notice of Claim pursuant to section 42 of the Leasehold Reform and Urban Development Act 1993 ("the 1993 Act") dated 18th December 2019 for a new lease.
3. The Landlord served a Counter Notice pursuant to section 45 of the 1993 Act dated 18th February 2020.
4. The Applicant applied to the Tribunal on 31st July 2020 for a determination, initially, in respect of the premium and terms of acquisition for a new lease under section 48(1) of the 1993 Act.
5. Directions were issued on 11th August 2020.
6. The parties subsequently agreed the premium for the new lease and the terms of acquisition except with regard to the parties to the new lease under section 57 of the 1993 Act. The parties therefore seek a determination on this specific issue.
7. Copies of the Notices and the following documents were provided:
 - a) A copy of the original Lease for the Property dated 29th May 21986 between Hertfordshire County Council (the Lessor) (1), Barratt Luton Limited (the

- Developer) (2) and Graham Leonard Beardmore (the Lessee) (3) for a term of 120 years from 1st January 1986 (“the Original Lease”).
- b) A copy of the Leasehold Title Absolute Number HD209327 showing the Applicant Tenant as the Leasehold Proprietor as of 11th December 2014.
 - c) A copy of the Freehold Title Absolute Number HD209311 showing the Respondent Landlord as the Freehold Proprietor as of 18th February 2008
 - d) A draft copy of the new lease more particularly described as the Deed of Surrender and Lease and includes the Land Registry Prescribed Clauses (referred to hereafter as “the Draft Deed”).
 - g) A Summary of Issues.

Issues

- 8. The only unresolved issue between the parties is whether the Developer should be a party to the acquisition process for a new Lease and to the new Lease itself.

The Law

- 9. The relevant law is contained in section 57 of the 1993 Act as set out in Appendix 2.

Submissions

- 10. The Applicant submitted that in accordance with Section 57(9) of the 1993 Act a party to an existing lease shall be a party to a new lease and join in the execution. In Section 62(1) of the Act a third party is defined as a party to an original lease save for the landlord and the tenant. As such, the Developer, as defined at LR3 of the Draft Lease (copy provided) should be a party to the new lease.
- 11. The Applicant therefore sent correspondence to the Developer to seek its approval of the Draft Lease but without response.
- 12. The Respondent submitted that the Developer is not a third party on the following grounds:
 - 1. The Developer does not covenant to observe or perform anything in the Original Lease.
 - 2. The Developer does not have an interest in the Property.
 - 3. Section 57(9) of the 1993 Act requires third parties to the Original Lease to be a party to the new lease, in order that the third party covenants continue until the termination date of the original lease (unless otherwise agreed between the landlord and the tenant). There are no third party covenants in the Original Lease.

4. The Notice of Claim has to be served on a third party, and the third party has to be a party to the new lease, if that third party continues to have an involvement in the Property (*Wellcome Trust v Bellhurst* [2002] EWCA Civ 790 – copy provided) which is not the case in these proceedings (the Respondent referred the Tribunal to LJ Walker’s comments at paragraph 12 of the Judgement and at 19 to 27).
13. Consequently, the Respondent did not agree the terms of the proposed new lease and submitted that recital F of the Draft Lease is incomplete and 6.3 is incorrect as there are not covenants and conditions on the part of the Developer in the Original Lease.

Decision

14. The Tribunal examined the Original Lease and the Draft Lease and found the Developer was a party to the Original Lease.
15. The question for the Tribunal is whether the Developer is a “third party” for the purposes of the 1993 Act and so should be served with a Notice of Claim under section 42 of the 1993 Act and subsequently be made a party to the new lease.
16. The Parties have not said whether the Developer was served with a Notice of Claim under section 42 of the 1993 Act. Whether or not service was required will be answered by this decision.
17. The Tribunal appreciates that on looking at the requirements of section 57(9) and the definitions in section 62 of the 1993 Act it would appear that if the Developer is not a landlord or a tenant then it must be a “third party” to which the provisions of the 1993 Act apply.
18. From considering subsections (9) and (10) of section 57 and the Court of Appeal decision in *Wellcome Trust Limited v Bellhurst Limited* [2002] EWCA Civ 790 (*Wellcome Trust*) which approves of a purposive approach to the interpretation of sections 42, 57 and 62, the Tribunal finds that a “third party” is a party to a lease or to a collateral agreement to a lease who has a “function” in respect of that lease or some interest in the property.
19. In *Wellcome Trust* the Wellcome Trust Limited was the freehold owner of 27 Lennox Gardens. It granted a lease to a Mr Pitt-Roche who subsequently assigned it to Charlgrove Securities Limited. Before doing so Mr Pitt-Roche entered a contract for an underlease to a Mr Edgson. Mr Edgson assigned the benefit of his contract to Countess Giaconda Cicogna and accordingly Mr Pitt-Roche granted Countess Giaconda Cicogna an underlease. Countess Giaconda Cicogna was the tenant, Mr Pitt Roche was the landlord and Mr Edgson was a party to the underlease by virtue of his having assigned the benefit of his contract to Countess Giaconda Cicogna. She later assigned the underlease to Bellhurst Limited on trust for her sons.

20. Bellhurst Limited served a Notice of Claim for a new lease under section 42 of the 1993 Act on Wellcome Trust Limited who in this case was the competent landlord and Charlgrove Securities Limited was under the 1993 Act an “other landlord”. Of the two issues dealt with in the case the one relevant to these proceedings is that Wellcome Trust Limited claimed that the Notice under section 42 was invalid because it had not been served on Mr Edgson who it claimed to be a “third party” having been a party to the original underlease.
21. Walker LJ noted at paragraph [23] that the judge at first instance:
“... concluded that Mr Edgson was not a third party within the meaning of the 1993 Act because there was no practical purpose to be achieved by giving notice to him:
“...it would be entirely futile for any document or notice to be served upon him because there is nothing that he could do about it; no obligation would be imposed on him on the service of notice, and no right would arise in his favour on the service of a notice. Service of a notice upon him would be a complete waste of time and, in short, he would simply have no interest in being served with a notice.”
22. The Court of Appeal was referred to the case of *John Lyon Grammar School v Secchi & Anor* [1999] 3 EGLR 49 which concerned the service of a section 42 Notice for new leases. A management company called 94 Carlton Hill Limited was a party to the original leases of the flats and undertook obligations for their repair and insurance. That company had not been given notice until a late stage.
23. At paragraph 24 of *Wellcome* Walker LJ referred to page 51 where Aldous LJ identified the statutory purpose of giving notice to a third party:
“It is not right that a third party does not have an interest in the tenant's notice. In this case the third party has covenanted with the landlord and with the tenant to repair and insure the premises. It will, subject to making an agreement to the contrary with both the landlord and tenant, be a party to and have obligations under the new lease if one were to be granted.”
24. Walker LJ taking account of the purpose of giving notice at paragraph [25] compared the position of 94 Carlton Hill Limited which had obligations under the original lease and that of Mr Edgson, “who by contrast, had dropped out of the picture as soon as he had executed the underlease” having no further interest in the property and concluding at paragraph [26]:
“In my judgment, the judge was right in his approach. Mr Edgson was undoubtedly a party to the underlease, viewed as a deed executed on (or in any event dated) 29 June 1977. He was made a party to the deed and he signed and sealed it. He did so only for the purpose of giving effect to his subsale, if that is the appropriate expression for passing on the benefit of a contract for the grant of a new lease which has not yet been granted. Once the lease had been granted and was in existence as an interest in property rather than as a document, Mr Edgson had no involvement or interest in it

at all. The purpose of requiring notice to a third party is, as Aldous LJ indicated in the *John Lyon* case, because of the rights and obligations which that person is going to have under section 57(9) in relation to the early years of any new lease.”

25. At paragraph [27] added:

“This view is supported by considering the use of the word "lease" in these statutory provisions. Occasionally the word naturally refers to the document granting the lease. I note that the different expression "leasehold interest" is used in section 40(1) and section 41(2) in relation to the interest of an immediate landlord. Nevertheless, throughout the chapter as a whole, the word "lease" seems to be generally used to describe an interest in land, not a document.”
26. The Tribunal read the Original Lease and the Draft Lease. It found that apart from the Developer’s name appearing in the Parties Clause and its execution of the Deed in the Testimonium there was no mention of the Developer in the Original Lease. The Tribunal found that there was neither obligation nor right appertaining to the Developer in either document.
27. The Tribunal further found from the Leasehold Title that the Developer had no interest in the Leasehold Property.
28. The Tribunal was of the opinion that the reason for the Developer being made a party to the Original Lease was due to the reference to the Transfer of the Freehold estate in the land, dated 19th June 1986 made between (1) Hertfordshire County Council (Council) (2) Barratt Luton Limited (Company) (3) O M Limited (Transferee), which is recited in the Charges Register of the Leasehold Title. Once the Original Lease had been executed all the rights and obligations contained in it were those of the Landlord and the Tenant not the Developer. The restrictive covenant referred to in the Leasehold Title is only applicable to the Freehold estate.
29. As the Developer has no rights or obligations under the Original Lease or Draft Lease and no interest in the Property, the Tribunal finds it is not a “third party” within the meaning of the 1993 Act.
30. The Tribunal decides that the Developer is not required to be a party to the proposed lease and determines the terms of acquisition in the Draft Lease are to be amended as set out in Appendix 1 of this Decision.

Judge JR Morris

APPENDIX 1 – TERMS OF ACQUISITION

1. The Tribunal determines the terms of acquisition as set out in the Draft Lease are to be amended as follows:
2. The reference to Parties in LR3 is to the parties to the new lease not the Original Lease, therefore in respect of Other Parties in LR3 of the Land Registry Prescribed Clauses the following is to be deleted:

“Developer

Barratt York Limited (Company Registration No 0783323) of Barratt House, Cartwright Way, Forest Business Park, Bardon hill, Coalville, Leicestershire LE57 1UF

BDW Trading Limited (Company Registration no 03018173) of Barratt House, Cartwright Way, Forest Business Park, Bardon hill, Coalville, Leicestershire LE57 1UF”

3. The following is to be deleted from the front sheet of the Draft Lease:

“Barratt York Limited and BDW Trading Limited (3)”

4. The following is to be deleted from the Parties Clause of the Premises section of the Draft Lease:

Barratt York Limited incorporated and registered in England and Wales with company number 0783323 whose registered office is at Barratt House, Cartwright Way, Forest Business Park, Bardon hill, Coalville, Leicestershire LE57 1UF and BDW Trading Limited incorporated and registered in England and Wales with company number no 03018173) whose registered office is at Barratt House, Cartwright Way, Forest Business Park, Bardon hill, Coalville, Leicestershire LE57 1UF (“Developer”)

5. The following is to be deleted from the Recitals section of the Draft Lease:

F The Developer was made a party to the Lease to []

G On 30 April 1991 Barratt Luton Limited changed its name by way of special resolution to Barratt Eastern Counties Limited. On 10 February 1992 Barratt Eastern Counties Limited changed their name by special resolution to Barratt York Limited. On 30 June 1995 pursuant to the terms of a Business Asset Transfer Agreement the assets and rights (subject to all liabilities) of Barratt York Limited were transferred from Barrett York limited which on 30th November 2007 changed it name by way of special resolution to BDW Trading Limited.

6. The following is to be deleted from the Covenants section of the Draft Lease:

6.3 The Landlord and the Tenant hereby release the Developer absolutely from all the covenants and conditions on the part of the Developer as contained in the Previous Lease and as modified above contained in the Lease and from all liability for any subsisting breach of any of them.

7. The following is to be deleted from the Testimonium section of the Draft Lease:

EXECUTED as a DEED by
BARRATT YORK LIMITED
Acting by director and director or secretary:

EXECUTED as a DEED by
BDW TRADING LIMITED
Acting by two directors or by a director and its secretary:

APPENDIX 2 - RIGHTS OF APPEAL

1. If a party wishes to appeal the 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.

APPENDIX 3 – THE LAW

The Law

The relevant law is contained in the Leasehold Reform and Urban Development Act 1993

42 Notice by qualifying tenant of claim to exercise right.

- (1) A claim by a qualifying tenant of a flat to exercise the right to acquire a new lease of the flat is made by the giving of notice of the claim under this section.
- (2) A notice given by a tenant under this section (“the tenant’s notice”) must be given—
 - (a) to the landlord, and
 - (b) to any third party to the tenant’s lease.

57 Terms on which new lease is to be granted.

- (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).

62 Interpretation of Chapter II.

- (1) In this Chapter—

“third party”, in relation to a lease, means any person who is a party to the lease apart from the tenant under the lease and his immediate landlord.

