FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference HMCTS Code	**:**	**CAM/42UF/OLR/2020/0071 – 73 V: CVPREMOTE**
Property	**:**	**Flats 24, 26 and 27 St Olaves Precinct, Bury St Edmunds, Suffolk IP32 6SP**
Applicant	**:**	**L & C Investments Limited**
Representative	**:**	**Higgs & Sons**
Respondent	**:**	**Remodifyz Trust**
Representative	**:**	**Bude Nathan Iwanier LLP**
Type of application	**:**	**Determination of the terms of a new lease under the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act")**
Tribunal member(s)	**:**	**Judge Wayte**
Date of decision	**:**	**17 December 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held due to the pandemic. The documents that I was referred to are in a bundle of some 254 pages, together with skeleton arguments and the latest travelling draft of the new lease. The decision made is described below.

The tribunal makes the following determinations in respect of the disputed terms:

(1) Clause 1.14 and the paragraph in respect of the Parking Area in the Second Schedule, paragraph 5 are deleted.

(2) Clause 1.19 and the paragraph in respect of the Refuse Area in the Second Schedule, paragraph 6 are deleted.

(3) Clause 9 in respect of the limitation of the landlord's liability is deleted.

(4) Clause 10 in respect of the waiver of the tenant's covenants is confirmed.

(5) The exclusion of any roof space or loft space from the definition of "the Premises" in the First Schedule, paragraph 9 is confirmed.

(6) The proviso in respect of redevelopment at the end of the Third Schedule (Reserved Rights), paragraph 2 is deleted.

(7) The addition in respect of the landlord's fixtures and fittings in paragraph 4 of the Fourth Schedule is deleted.

(8) The limitation of the qualified alienation clause during the last seven years only of the term in the Fourth Schedule, paragraph 9.2 is confirmed.

(9) The qualified covenant against non-structural alterations in paragraph 11 of the Fourth Schedule is deleted.

(10) The indemnity in respect of the costs of enforcement in Part 1, paragraph 2 of the Fifth Schedule is confirmed.

Background

1. This is an application for a determination of the terms of the new lease under section 57 of the 1993 Act.

2. The Applicant is the leasehold owner of the property known as Land at St Olaves Precinct, Hunter Road, Bury St Edmunds, registered at HM Land Registry under title number SK 156295 ("the Building"). The Building is mixed-use and comprises various shops and flats with a "service area" at the rear. This application relates to three of the flats contained within the Building, namely Flat 24, 26 and 27 ("the Flats"). The Applicant claims new individual leases in relation to each of the Flats, pursuant to Part 1, Chapter II of the 1993 Act.

3. The Respondent acquired its freehold interest of the Building in 2016.

4. On 5 December 2019 the Applicant served on the Respondent notices of claim to exercise the right to acquire a new lease in respect of the Flats pursuant to section 42 of the 1993 Act. The section 42 notices proposed a number of amendments to the existing lease, including those necessary to reflect the changes to the structure of the superior leasehold interest and to take account of the fact that each new lease will be a lease of part of the Building.

5. On 4 February 2020 the Respondent served counter notices, admitting that the Applicant had the right to acquire a new lease for each Flat but disputing the premium offered and the terms proposed by the Applicant. While it was agreed that appropriate provisions and amendments had to be made to deal with the conversion of the head lease of the Building to individual leases of the Flats, the Respondent disputed those offered by the Applicant and put forward its own.

6. On 6 May 2020 the Applicant issued three applications in relation to the Flats under section 48 of the 1993 Act for a determination of the premium and the other terms of acquisition which remained in dispute.

7. The tribunal issued directions on 30 June 2020, which were varied on 6 August 2020 to extend time for compliance for both parties. The premium was subsequently agreed but the parties were unable to agree all of the terms of the new leases.

8. The application was originally listed for hearing on 16 November 2020. Unfortunately, there was some confusion as to the format and time of the hearing which led to an adjournment to 10 December 2020. During that period the issues were further narrowed but some 12 provisions remained in dispute. The parties were represented by counsel at the hearings: Ms Caney for the Applicant and Mr Harrison for the Respondent. Due to connectivity issues Ms Caney attended the hearing by telephone; with the Applicant's solicitor, the Judge and the Respondent's representatives attending by video.

The law

9. The starting point under section 57(1) of the 1993 Act is for the new lease to be granted on the same terms as those of the existing lease. In addition, section 57(6) provides that 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.

10. As set out above, this application concerns three flats "carved out" of a headlease and therefore section 57 has to apply in that context, as set out by Lord Neuberger in *Howard de Walden Estates Limited v Aggio and Others* [2008] UKHL 44 ("*Aggio*"). Both parties relied on his observations in paragraph 49 that "*Section 57(6) also indicates that the LVT was intended to have relatively wide powers, often involving sophisticated judgement*" where their proposals involved new or modified terms. In addition to the *Aggio* decision, Ms Caney relied on *Rossman v Crown Estate Commissioners* [2015] UKUT 288 and the FTT decision in *Johnson v Raj Properties Limited* LON/00BB/OLR/2015/1360 to support her objection to some of the Respondent's modifications. Mr Harrison relied on *Greenpine Investment Holding Ltd v Howard de Walden Estates Ltd* [2016] EWHC 1923 (CH) and an extract from Hague on Leasehold Enfranchisement as set out below to support his client's position.

The disputed terms

11. Mr Harrison had produced a second skeleton argument on 9 December 2020 listing the disputed terms and both parties agreed to consider them in turn. This decision adopts that format, referencing the issues as numbered in that skeleton and the latest version of the travelling draft lease.

Issue 1 (and 6): Parking Area

12. The Applicant submitted that parking rights should be included in the new leases and proposed the following clause 1.14:

"*Parking Area" means such area (if any) within the Building as may be designated from time to time:*

(a) During the Headlease Duration, by the Tenant (as Headlessee); or

(b) Following the expiry of the Headlease, the Landlord,

for the non-exclusive parking of private motor vehicles by the owners and occupiers of the Flats and/or other occupiers of the Building."

13. That definition was then carried forward into the Second Schedule (The Granted Rights) into a new paragraph 5 providing for:

"*The non-exclusive right to park on a first-come-first-served basis one private motor car or private motor cycle belonging to the Tenant or its visitors in the Parking Area*."

14. The Applicant proposed that parking rights were a reasonable and appropriate modification of the headlease in accordance with *Aggio*, relying on paragraph 65 in particular, where Lord Neuberger discusses how the right over any car parking area can be modified from the head lease to an individual lease as follows:

"*If the person concerned is the lessee of a block of flats, then, where the parking area is used by the occupiers of flats in the block (as would usually be the case), it will be necessary to inquire what rights the particular flat enjoys in respect of that area. Sometimes, the area will be marked out so that each flat has its own particular allotted space, in which case the right to park in that space would no doubt, at least frequently, be granted with the new lease. In other cases, there may be a more informal arrangement such as a right for the occupier of each flat to park a vehicle within the area. In such case, the new lease would carry a right to park in the area (no doubt subject to appropriate limitations and qualifications as the LVT thought fit).*"

15. No parking area is set out in the headlease. No plan was provided to the tribunal (or the Respondent) to show where the Parking Area might be in the Flat leases and Ms Caney was unable to provide any clarification at the hearing. No evidence had been provided by the Applicant to explain what the current parking arrangements are or how they might change in respect of the new leases. The Respondent's objections were that in the absence of any clarity as to the actual area, the provision was unreasonable. Mr Harrison also submitted that the Applicant was required to give details of any parking space in the notice of claim. He relied on *Greenpine* as authority that the Applicant was unable to make such a claim now. A practical alternative was for the Respondent to grant whatever rights it thinks appropriate for the duration of its headlease, which expires in 2117 as a result of an extension granted in 1993.

16. Ms Caney disputed that *Greenpine* supported the Respondent's position and in any event asserted that the claim notices were drafted in broad terms to incorporate any parking rights. The Applicant's current proposals had moved from the demise of a car parking space to general use, reflecting the "*more informal arrangement*" mentioned by Lord Neuberger in *Aggio*.

The tribunal's decision

17. The headlease is silent as to any parking arrangements, other than a covenant on the part of the Applicant in clause 3(t) not to permit parking in the service area, which would appear to be the only area

where parking could be accommodated within the Building (there is a public car park in front of the precinct but that is outside the demise). Ms Caney submitted that the extent of the service area was unclear in the headlease but in the absence of any evidence at all as to the site or use of the current or proposed Parking Area from the Applicant, the tribunal agrees with the Respondent that the provision is unreasonable. As Mr Harrison submitted, there is an alternative open to the Applicant for the period of the headlease, assuming that there is somewhere to park within the Building which is not in breach of that lease. Although I accept that this is less satisfactory for the Applicant as it will involve an additional Deed, it avoids prejudice to both parties.

18. In the circumstances, I determine that Clause 1.14 and the paragraph in respect of parking rights in the Second Schedule, paragraph 5 should be deleted from the draft lease.

Issue 2 (and 7): Refuse Area

19. The Applicant proposed similar provisions in respect of the identification and use of a Refuse Area. Again, no plan or evidence was produced to show where that area was or would be and the arguments on both sides were the same as for the Parking Area.

The tribunal's decision

20. For the same reasons as set out above in respect of the Parking Area, I determine that Clause 1.19 and the paragraph in respect of the Refuse Area in the Second Schedule, paragraph 6 should be deleted from the draft lease.

Issue 3: Landlord's liability

21. The Respondent wished to include clause 9 limiting its liability as follows:

"*The Landlord shall not be liable or responsible for any damage suffered by the Tenant or any employee agent or invitee of the Tenant through any defect in under or upon the premises over which they have no control.*"

22. Mr Harrison relied upon section 57(8A) of the 1993 Act which states that: "*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.*"

23. Ms Caney submitted that the clause was a wide-ranging limitation of liability going far beyond s57(8A). She relied upon paragraph 35 of *Rossman* which emphasises that the starting point is firmly based on the terms of the existing lease. In order to introduce this new

provision, the Respondent had to show a good reason within section 57(6) (a) or (b), i.e. it is necessary to remedy a defect or unreasonable to exclude given changes since the headlease was granted. Section 57(8A) only applies in the context of a landlord's covenant as opposed to justifying a wide exclusion of liability generally.

The tribunal's decision

24. I agree with the Applicant that section 57(8A) of the 1993 Act applies in the context of a landlord's covenant. This provision is a free- standing limitation of liability generally and is therefore a much wider limitation than that contemplated by the 1993 Act. The Respondent did not contend that it falls within section 57(6) as above.

25. In the circumstances Clause 9 in respect of the limitation of the landlord's liability should be deleted from the draft lease.

Issue 4: waiver of tenant's covenants

26. This was also a Respondent's provision at Clause 10 stating that:

"*The Tenant's covenants shall remain in full force both at law and equity notwithstanding that the Landlord or Headlessee shall have waived or released temporarily or permanently revocably or irrevocably or otherwise a similar covenant affecting Neighbouring Property for the time being belonging to the Landlord or Headlessee*."

27. Mr Harrison submitted that the clause was a modification permitted under the "generous" ambit afforded by *Aggio*. In particular, moving from a single tenant in the headlease to multiple tenants with individual leases, made this provision a reasonable standard modification.

28. Ms Caney submitted that this was a new provision and should be considered under *Rossman* rather than *Aggio*. There was no justification for the provision and it should be deleted.

The tribunal's decision

29. I agree with the Respondent that this provision is a reasonable modification in line with *Aggio*, reflecting the move from one headlease to multiple tenants with individual leases, assuming the Applicant assign their Flat leases in due course. Although it is for the Respondent to justify their addition, no prejudice has been identified by the Applicant. Clause 10 (although it will have a different number given the other decisions) is therefore confirmed.

Issue 5: exclusion of roof or loft-space

30. Again, this was the Respondent's provision adding "*any roof or loft-space and*" to the exclusions from the definition of Premises in the First Schedule, paragraph 9.

31. Again, the Respondent pointed to *Aggio* (paragraph 63) as the authority for the need to carefully define the extent of the Flat to ensure that the new lease does not remove the repairing obligations of the Headlessee or Landlord in respect of the structure and exterior. Although the Applicant stated that there were no roof spaces there was no evidence to support that assertion. In any event, it was hard to understand the objection to the provision on that basis.

The tribunal's decision

32. I agree with the Respondent that without any evidence that the Flats lack roof space, the addition is sensible to clarify the extent of the demise of the Flat. Although it is for the Respondent to justify the provision, rather than the Applicant to object to it, if there is no roof space the provision will have no effect. I therefore confirm the addition of the words "*any roof or loft space and*" to the exclusions to the definition of the Premises in paragraph 9 of the First Schedule.

Issue 8: redevelopment

33. This is another provision argued for by the Respondent, adding "*PROVIDED THAT such obligations shall not prevent such works or redevelopment referred to above*" to the end of paragraph 2 of the Reserved Rights in the Third Schedule. This provision permits works or redevelopment on Neighbouring Property subject to the Landlord using reasonable endeavours to minimise disruption and, save as expressly permitted in the clause, not materially affect the Tenant's use and enjoyment of the Premises.

34. The Respondent argued that the addition made it clear that development would be permitted, which was the reason why the Applicant objected to it. Ms Caney submitted that the clause provided a reasonable balance between landlord and tenant without the disputed term.

The tribunal's decision

35. I agree with the Applicant that the clause provides a reasonable balance between the parties without the disputed term. In the circumstances the Respondent's proviso should be deleted from the draft lease.

Issue 9: Landlord's fixtures and fittings

36. The Respondent seeks to include in paragraph 4 of the Tenant's Covenants in the Fourth Schedule an obligation to "*renew and replace*

from time to time all Landlord's fixtures fittings and appurtenances in the Premises which may become or be beyond repair at any time during or at the expiration or sooner determination of the Term and to" in the tenant's covenant to keep the Premises in good and substantial repair.

37. Mr Harrison argued that the provision was a reasonable modification justified under the *Aggio* ambit. Given that the lease is some 200 years long, the Landlord's fixtures and fittings will require replacement at some point. The Applicant objected to the obligation on the basis that the covenant was sufficient without this additional obligation. The headlease made no mention of Landlord's fixtures and fittings and that addition did not fall within section 57(6).

The tribunal's decision

38. I agree with the Applicant. This is not an *Aggio* modification, that is dealt with by the definition of the Premises. The Respondent's provision in respect of the Landlord's fixtures and fittings should be deleted from the draft lease so that the covenant reflects the existing obligation in the headlease.

Issue 10: qualified covenant against assignment

39. The Headlease includes a qualified covenant against assignment during the last seven years of the term which has been replicated in the draft lease in paragraph 9.2 of the Fourth Schedule (Tenant's Covenants). In the Flat leases the Respondent wishes to delete "*during the last seven years of the Term*" so that the clause becomes a qualified covenant against assignment throughout the whole term of the lease.

40. Mr Harrison argued that the original provision was antiquated and *Aggio* operated to give the tribunal a wide discretion to vary the original terms where the new lease was for part of the premises. He also cited paragraph 32-10 of Hague as authority that the introduction of the Landlord and Tenants Covenant Act 1995 is a material change falling within section 57(6)(b). That paragraph makes reference to *Huff v Trustees of the Sloane Stanley Estate* (1998) where the LVT confirmed the deletion of a similar provision on that basis.

41. Ms Caney submitted that it was wholly inappropriate and impractical for the Landlord to insist on permission being sought for assignment of a 187 year lease. The *Huff* case is unreported and Ms Caney had been unable to find a copy of the decision; however she produced another first instance decision, *Johnson v Raj Properties Limited* (2015) where the FTT had considered *Huff* in some detail. In *Johnson* the tribunal refused to follow *Huff*, on the basis that the covenant sought was inappropriate in respect of modest residential property.

The tribunal's decision

42. I agree with the Applicant and the reasoning in the *Johnson* case that it would be unreasonable to require permission for assignment throughout the whole term of the lease. This is modest residential property with no ground rent payable. As Mr Harrison acknowledged, there are remedies for the Landlord (and Headlessee) in the event that any service charges remain unpaid. In the circumstances, I confirm paragraph 9.2 as drafted by the Applicant.

Issue 11: non-structural alterations

43. The Respondent argued in favour of paragraph 11 to the Tenant's Covenants in the Fourth Schedule as follows:

> "*Not without the Landlord's consent such consent not to be unreasonably withheld or delayed to make any non-structural alterations whatsoever to the Premises whether to the plan or elevation of the Premises or otherwise*."

44. Mr Harrison again cited *Aggio* as his main authority, together with Footnote 25 to paragraph 32-06 of Hague which refers to the LVT decision in *Cadogan v 26 Cadogan Square Ltd* (2009). He submitted that a qualified covenant against non-structural alterations was the norm in modern conveyancing.

45. Ms Caney objected to the provision on the basis that it was widely drawn and went far beyond the terms of the headlease, which were confined to structural alterations and replicated in the agreed clause 10. It was impractical for such a long lease to require permission for "*any…alterations whatsoever*". She submitted that a clause this wide would require very powerful evidence as to why it is necessary.

The tribunal's decision

46. Although I accept that alterations to the lease plan can cause problems within a block of flats or a converted house e.g. moving the location of the bathroom or kitchen, this development consists of a single storey of residential flats above commercial premises. In the circumstances the plan is less important and the proposed clause goes much wider than is reasonable. The agreed clause 10 in respect of structural alterations is widely drawn and reflects the existing provision in the headlease. I therefore determine that the proposed paragraph 11 in respect of non-structural alterations be deleted from the draft lease.

Issue 12: Landlord's indemnity

47. Finally, the Respondent wished to include in the Landlord's Covenants in Part I of the Fifth Schedule, paragraph 2 dealing with enforcement of tenant's covenants by the Landlord "*and upon being indemnified by the Tenant against the proper costs thereof and first being provided*

with appropriate security as to costs to", in addition to the provision that any enforcement would be at the "*cost of the Tenant*".

48. Mr Harrison pointed out that paragraph 2 was new and inserted at the request of the Applicant. The additional words ensured that the Landlord would be properly indemnified and were completely reasonable. Ms Caney opposed the addition on the basis that it was unnecessary and unreasonable.

The tribunal's decision

49. A Landlord's covenant to enforce is a standard mortgagee requirement in any residential lease. Such covenants usually provide for the Landlord to be indemnified by the tenant in respect of the costs of enforcement. In particular, I agree with the Respondent that an indemnity is required to protect the Landlord against third party costs, in addition to payment of their own costs by the Tenant. Although the addition is widely drawn it is not unreasonable. I therefore confirm the Respondent's addition to paragraph 2 of Part I of the Fifth Schedule to the draft lease.

Name: Judge Wayte **Date:** 17 December 2020

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).