FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BB/OLR/2018/0206 & 0207**
Properties	**:**	**(1) Sixth Floor Flat, 27 Albion House, Church Street, London, E16 2ND and Pram Shed** **(2) GFF, 51 Durban Road, London, E15 3BW**
Applicants	**:**	**(1) Raj Properties Ltd** **(2) East Estate Properties LLP**
Representative	**:**	**Mr Arora, In-House Solicitor**
Respondent	**:**	**London Borough of Newham**
Representative	**:**	**Miss Polimac of Counsel**
Type of application	**:**	**Section 48 of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal members	**:**	**Judge I Mohabir** **Mrs Gyselynck MRICS**
Date of determination and venue	**:**	**21 August 2018 at** **10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**24 August 2018**

DECISION

Background

1. This is an application made by the Applicant leaseholders pursuant to section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") for a determination of the terms and the premium to be paid for the grant of new leases of the Sixth Floor Flat, 27 Albion House, Church Street, London, E16 2ND and Pram Shed and GFF, 51 Durban Road, London, E15 3BW (the "properties").

2. By a notices of a claim dated , served pursuant to section 42 of the Act, the Applicants exercised the right for the grant of new leases in respect of the subject properties.

3. The Respondent freeholder served counter-notices admitting the validity of the claim.

4. On 5 February 2018, the Applicants applied to the Tribunal for a determination of the premium and the terms of the new leases.

The issues

5. The issues set out below are identical in relation to both of the subject properties and for this reason the applications can conveniently be considered together in this decision.

6. The Tribunal was told that the premiums agreed in respect of the subject properties are £1,785 and £2,984 respectively. In addition, the terms of the new leases had been agreed save for the following:

   (a) Clause LR8 in the new lease and the deletion of clause 5(15) in the original leases.

   (b) The deletion of clauses 1, 3 and 4 in the original leases.

   (c) The deletion of clauses 4.4 to 10 in the new leases.

7. Each of these issues is considered in turn below.

Relevant Law

8. Section 57(1) of the Act provides that the terms of a new lease are, prima facie, to be the same as the existing lease as they apply on the date when the notice of claim under section 42 was given.

9. The parties are free to agree the terms of the new lease. In the absence of agreement, there is only limited scope to modify the terms of the existing lease. Under section 57(6) of the Act, any existing term may be excluded or modified on two grounds:

   (a) If it is necessary to do so in order to remedy a defect in the existing lease. Although neither "necessary" nor "defect" is defined in the Act, it seems they have been construed strictly and

given a narrow interpretation. Therefore, the use of this provision to attempt to modernise the terms generally, if opposed, is not permitted.

(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 the lease.

Decision

10. The hearing in this matter took place on 21 August 2018. The Applicants were represented by Mr Arora, an in-house Solicitor. The respondent by Miss Polimac of Counsel.

Clause LR8 in the new lease and the deletion of Clause 5(15) in the original leases

11. Both of these clauses can be considered together as they turn on the same point.

12. Clause 5(15) in the existing leases provides that the lessee shall:

> *"Not assign or underlet the demised premises without first obtaining from the intended Assignee or Underlessee the execution of a direct covenant with the Corporation to observe and perform all the covenants by the Lessee in this lease…".*

13. Mr Arora submitted that it was unreasonable under section 57(6)(b) of the Act to allow clause 5(15) to continue in the new leases nd, therefore, the requirement in clause to include clause LR8 stating that the new leases contain a provision that prohibits or restricts dispositions, for two reasons.

14. Firstly, clause 5(15) does not prohibit a disposition of the lease. He referred the Tribunal to the Upper Tribunal decision in ***Burchell v Raj Properties Ltd*** [2013] UKUT 0443 (LC) where a similar clause was decided on appeal in favour of the First Applicant. However, the Tribunal did not accept this submission as being correct because it is clear that ***Burchell*** was concerned with a user clause whereas in the present case clause 5(15) related to the assignment of the lease.

15. Secondly, that the new leases are now subject to section 3 of the Landlord and Tenant (Covenants) Act 1995 ("the 1995 Act") and the requirement in clause 5(15) for an assignee or underlessee to enter into a direct covenant with the freeholder was no longer required and was void in any event under section 25 of the 1995 Act.

16. Miss Polimac submitted that clause 5(15) was required to cover the situation where the lessee had sub-let the property under an assured shorthold tenancy and it was necessary for the Respondent to be able to enforce the lessee's covenants against the sub-tenant. In addition, it was a term in the existing leases and the Act required it to be continued in the new leases.

17. The Tribunal did not accept Miss Polimac's submission that clause 5(15) applied to sub-tenancies granted by way of an assured shorthold tenancy. It was satisfied that clause 5(15) was a qualified non alienation clause that only applied to the leasehold interest, which did not concern an assured shorthold tenancy. In any event, on the Respondent's own case, as a matter of routine practice it enters into a collateral agreement directly with any sub-tenant of a lessee who occupies a property under an assured shorthold tenancy.

18. The Tribunal found that the implementation of the 1995 Act is a "change" within the meaning of section 57(6)(b) of the Act. Indeed in ***Huff v Trustees of the Sloane Stanley Estate (No.2)*** (Unreported, 1997, LVT) it was held to be so. Clause 5(15) in only concerned with the enforceability of the lessee's covenants against any subsequent assignee or underlessee. As the existing leases were granted before the 1995 Act, it is clear that such a clause was a necessary requirement. However, section 3 of the 1995 Act now entitles a freeholder to be able to enforce leasehold covenants against any subsequent assignee or underlessee and the requirement for clause 5(15) in the existing leases is now irrelevant and unreasonable for it to continue in the new leases.

19. Therefore, the Tribunal concluded that clause 5(15) in the existing leases should be deleted and clause LR8 should record that the leases do not contain any prohibition or restriction against dispositions. It follows that it was not necessary for the Tribunal to go on to decide if clause 5(15) is void under the 1995 Act.

Deletion of clauses 1, 3 and 4 in the original leases.

20. These clauses all relate to the Right to Buy provisions under which the existing leases were granted including any claw back on the discount afforded to the original right to buy tenant. It was common ground that they no longer had any application to the existing leases and that the new leases are being granted under the Act.

21. The Tribunal found for the reasons set out above amounted to relevant "changes" within the meaning of section 57(6)(b) of the Act and that there was unreasonable for clauses 1, 3 and 4 to be repeated in the new leases. Therefore, clause 1 in the existing leases is to be amended as proposed in clause 2.2 in the new leases and clauses 3 and 4 are to be deleted altogether.

Deletion of clauses 4.4 to 10 in the new leases

22. The Tribunal accepted the submission made by Mr Arora that these clauses are in fact entirely new clauses and are not permitted under the Act. It did not accept the submission made by Miss Polimac that, specifically, the new clause 4.4 is permitted under section 57(8)(a) of the Act. The Tribunal was satisfied that this section of the Act only applies to covenant as to title and the scope of clause 4.4 appears to relate to the covenants generally in the new leases.

23. As these clauses are entirely new terms, the Tribunal adopted the same reasoning in ***Gordon v Church Commissioners for England*** (LRA/110/2006) and approved at paragraph 41 in ***Burchell*** and concluded that the scope of section 57(6) of the Act does not grant the Tribunal power to *"add an entirely new provision which is not to be found in the original lease"*. The power conferred by the statute to limited to excluding or modifying a term in the existing lease only.

24. Accordingly, clauses 4.4 to 10 in the new leases are to be deleted.

Name: Judge I Mohabir **Date:** 24 August 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).