

## Enfranchisement Nuts and Bolts: an Introduction to Lease Extensions

### The Terms of the New Lease

#### Preliminary considerations

- The rent and term of the new lease are fixed by the 1993 Act (s.56(1)): rent is a peppercorn and term is 90 years from the expiry of the existing lease.
- Subject in particular to that consideration, the broad principle is that “*the new lease ... shall be a lease on the same terms as those of the existing lease*”, as they apply on the date that the s42 Notice is given to the landlord (s.57(1)).
  - ***Gordon v Church Commissioners*** (LRA/110/2006): "the starting point is firmly based in the terms of the existing lease" (at [34]).
- However: the effect of s57(6) is that (other than in respect of rent and term) the landlord and the tenant may agree the terms of the new lease
  - Note s.93(3): where the terms have not been determined by the FTT, the court has power to reopen the agreement on the application of the tenant, if it considers that the tenant is not adequately recompensed under the agreement
- Points to consider during discussions and if agreement is not achieved:
  - (Where acting for the tenant): will the term affect the premium – can the tenant afford it?
  - Where agreement has been reached other than in respect of certain proposed terms: will litigating cost the parties the agreement?
  - What in monetary terms is the term actually worth? The FTT is essentially a no costs jurisdiction – is litigation worth the cost?
  - The FTT’s jurisdiction is only in relation to matters remaining in dispute so before the hearing, be clear about the extent to which agreement has been reached.

**Scope for modification to the terms of the existing lease if agreement is not reached:  
s.57(1) and s.57(6)**

- Unless agreement is reached, there is only limited scope to insist that the terms of the existing lease be modified in the new lease. It is not simply a question of establishing that the proposed new term would be “reasonable”.
  - So (for example) the 1993 Act does not entitle the landlord to modify the terms of the existing lease so as to ensure that all new leases in relation to a particular building are uniform (for ease of estate management). The landlord must show that the proposed modification falls within one of the statutory grounds (*Flat 5, 70-72 Cadogan Square* LON/NL/3188/04).
  
- S.57(1) provides that:
 

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.
  
- S.57(6) provides that:
 

“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”.
  
- **Gordon:** there is a “notably wider” power to alter the existing terms under s.57(1) than under 57(6).

### S.57(1)

- S.57(1)(a): this provision is perhaps most likely to be relevant where a head lessee seeks a lease extension in relation to e.g. one or two flats
  - **Howard de Walden Estates v Aggio** [2008] UKHL 44: Lord Neuberger: whilst "the terms of the lease" would ordinarily refer to the covenants and conditions of the lease and not to the extent of the premises comprised in the lease, in the context of s.57(1) the expression is "perfectly well able to cover the precise identification of the premises to be comprised in the new lease" (at [44]).
  - Argument that the exercise of identifying the precise boundaries of the flat to be comprised in the new lease is difficult (and could not have been envisaged by the legislature) is rejected. The House of Lords accepts that covenants and other terms of an existing lease of a flat (or even of several flats but e.g. no common parts) would normally be relatively easy to transfer without substantial alterations into the new lease and that "more considerable alterations would be likely to be needed on translating the terms of a lease of a block of flats into a new lease" ([47]); however:
 

"...I do not accept the argument that such alterations would be outside the normal meaning of "modification", either because they would involve additions or because they could be fairly radical. Nor do I accept that it would represent an extraordinary task for LVT members, who are frequently faced with ticklish conveyancing and valuation problems, as perusal of their decisions since January 2003 (available on their website) demonstrates. In many cases, indeed I expect most cases, the premises demised by such head leases will include flats subject to qualifying underleases whose terms will provide very good guidance to the LVT as to the terms to be included in the new lease of a flat to be granted to the head lessee. In cases where no such guidance is available, I have no doubt that members of the LVT will be able to rely on their own expertise and experience, as well as the assistance afforded to them by the parties" ([48]).
  - For guidance on what is to be expected when a head lessee is granted a new lease of a flat: **26 Cadogan Square** (LON/00AW/OLR/2008/0940)
- S.57(1)(b):
  - It is advisable to inspect the flat (or use plans) to compare the property as demised with the property as it stands at the time of the claim. A land registry compliant plan should show the current configuration of the flat.
  - If the tenant has encroached (e.g. on common parts, on part of another flat), investigate. It is possible that the "encroached upon" part will have become part of the tenancy through adverse possession: e.g. **London Borough of Tower Hamlets v**

**Barrett** [2005] EWCA Civ 923 at [26] to [30] and [101]. Any dispute on the point will have to be resolved by the FTT as part of the terms of acquisition.

- The new lease should include any accretion to the tenancy. Otherwise the tenant will lose it: e.g. **13 Parsifal Road**, (LON/00AG/OLR/2007/0209) (the only issue before the LVT was whether or not an attic room was included in the demise).

### S.57(6)

- There is no power under s.57(6) for either the landlord or the tenant to require that a new provision which is not found in the existing lease be added into the new lease: **Gordon** ([41]).
  - Suggestion that **Gordon** may perhaps be too restrictive: **Aggio** [48]-[49]; also **Flat 17, 50 Sloane Street** (PJ/LON/00AW/OLR/2010/1297).

- S.57(6)(a): definition of “defect”: **Gordon** ([47])

"There is no definition in the statute of the word “defect” which is an everyday English word. The Shorter Oxford English Dictionary gives as a meaning: shortcoming, fault, flaw, imperfection. I consider it proper to adopt this fairly broad meaning of defect but subject to the following qualification. I conclude that a lease can only properly be described as containing a defect (in the sense of shortcoming, fault, flaw or, perhaps even, imperfection) if it can objectively be said to contain such a defect when reasonably viewed from the standpoint of both a reasonable landlord and a reasonable tenant. It may be noted that once a defect is shown to exist in the existing lease then a party 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 it is necessary to do so in order to remedy the defect. This mandatory language indicates that the concept of a defect is a shortcoming below an objectively measured satisfactory standard. It is not sufficient for a provision to be a defect only when viewed from the standpoint of one or other party”.

- Example: lease fails to comply with requirements of Council of Mortgage Lenders e.g. lease without adequate repairing / insurance obligations.
- S.57(6)(b): “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”
  - Common examples of changes that are capable of satisfying the requirement:
    - Changes in the value of money: can be proved by reference to the RPI;
    - Changes in conveyancing practice (accepted in **Gordon** at [49]);
      - Can be proved by producing precedents from a publication such as the Encyclopaedia of Forms and Precedents - from the edition

which was current when the existing lease was granted, and from the edition current at the time of claim;

- New legislation.
- Satisfying the “change” criterion is a necessary but not sufficient step: it must also be shown that it would be unreasonable to include / include without modification, the relevant existing term:
  - So a change in legislation will not in and of itself provide the landlord with *carte blanche* in seeking more onerous covenants than those in the existing lease. E.g. LON/NL/4214/06 and LON/NL/5416/06: LVT acknowledges that the advent of the Landlord and Tenant (Covenants) Act 1995 is a change in circumstances but that is not sufficient.
  - A more onerous test than simply whether proposed term is reasonable.

### Service charges

- S.57(2) provides that:
 

“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 [re-entry or otherwise (subject to section 85 of the Tribunals, Courts and Enforcement Act 2007) in like manner as if it were a liability for payment of rent”.
- **Gordon**: again, s.57(2) (like s.57(1)) gives a “notably wider power” than s.57(6)
- The landlord must be under an obligation:
  - A power which does not amount to an obligation will not suffice: so s.57(2) would not justify e.g. a covenant requiring the tenant to pay the costs of legal proceedings which the landlord is not obliged to pursue
  - Nor is s.57(2) engaged where a management company has to provide services.

- S.57(2)(b): it is very rare that the existing lease will make no provision. Provision only for the payment of a fixed amount is also rare, but is found occasionally.
- One potentially very significant point in the context of terms relating to service charges is that the terms of any head-lease do have to be taken into account in applying s.57(2) (Schedule 11 to the 1993 Act, paragraph 10(2)). Other than in that specific context, the terms of the head-lease are irrelevant to the terms of the new lease.

#### **Exclusions: s.57(4)**

- The following terms must be excluded from the new lease:
  - (a) any term which provides for or relates to the renewal of the lease – this is unnecessary, because the right to a new lease pursuant to the 1993 Act applies to a lease granted under the Act (i.e. may be exercised *ad infinitum* – s.59(1));
  - (b) any term which confers an option to purchase or right of pre-emption in relation to the flat
  - (c) any term which provides for the termination of the existing lease before its term date, other than for breach of the terms of the existing lease. A proviso for re-entry on the ground of the tenant’s bankruptcy will be treated as a term providing for termination for breach, so will not be excluded: ***Cadogan Estates Ltd v McMahon*** [2001] 1 AC 378.

#### **Miscellaneous**

- S.57(7): the terms of the new lease shall
  - (a) “make provision in accordance with section 59(3)” i.e. provide that no long lease granted as a sub-tenancy shall confer on the sub-tenant (as against the tenant’s landlord) any right to acquire a new lease under the 1993 Act;
  - (b) reserve to the tenant’s immediate landlord the right to obtain possession of the flat in accordance with s.61 (right to terminate new lease on grounds of redevelopment). But even if the new lease fails to include the requisite reservation, that omission will not be of any relevance or effect as regards reliance upon s.61 by the freeholder: ***Kutchukian v John Lyon Free Grammar School*** [2013] EWCA Civ 90 [2013] 1 WLR 2842.

- The new lease must contain the following statement: “This lease is granted under section 56 of the Leasehold Reform, Housing and Urban Development Act 1993” (s.57(11))

**Heather Sargent**

**Landmark Chambers**

**9<sup>th</sup> October 2014**

## Annex

### Relevant provisions of the 1993 Act

#### Section 56

(1) Where a qualifying tenant of a flat has under this Chapter a right to acquire a new lease of the flat and gives notice of his claim in accordance with section 42, then except as provided by this Chapter the landlord shall be bound to grant to the tenant, and the tenant shall be bound to accept—

(a) in substitution for the existing lease, and

(b) on payment of the premium payable under Schedule 13 in respect of the grant,

a new lease of the flat at a peppercorn rent for a term expiring 90 years after the term date of the existing lease.

#### Section 57

(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 land registration rules under the Land Registration Act 2002.

### **Schedule 11 paragraph 10**

(1) Where a lease is executed under section 56 or 93(4) or in pursuance of any order made under this Chapter, then (subject to sub-paragraph (3)) that instrument shall have effect for the creation of the tenant's new lease of his flat, and for the operation of the rights and obligations conferred and imposed by it, as if there had been a surrender and re-grant of any subsisting lease intermediate between the interest of the competent landlord and the existing lease; and the covenants and other provisions of that instrument shall be framed and take effect accordingly.

(2) Section 57(2) shall apply to the new lease on the basis that account is to be taken of obligations imposed on any of the other landlords by virtue of that or any superior lease; and section 59(3) shall apply on the basis that the reference there to the tenant's landlord includes the immediate landlord from whom the new lease will be held and all superior landlords, including any superior to the competent landlord.

(3) Where a lease of the tenant's flat superior to the existing lease is vested in the tenant or a trustee for him, the new lease shall include an actual surrender of that superior lease without a re-

grant, and it shall accordingly be disregarded for the purposes of the preceding provisions of this paragraph.

*This seminar paper is made available for educational purposes only. The views expressed in it are those of the author. The contents of this paper do not constitute legal advice and should not be relied on as such advice. The author and Landmark Chambers accept no responsibility for the continuing accuracy of the contents.*