LEASEHOLD VALUATION TRIBUNAL

LEASEHOLD REFORM, HOUSING AND URBAN DEVELOPMENT ACT 1993 SECTIONS 48, 56 AND 57

Ref: LON/NL/5416 and LON/NL/5643

Properties:	Flats 6A and 9, 61 Cadogan Square, London SW1X 0HZ
Landlord:	(1) The Right Honourable Charles Gerald John, Earl Cadogan (2) Cadogan Estates Limited
Tenants:	(1) William Worsley and Marie Noelle Worsley (Flat 6A) (2) Ian Jeremy Gaunt and Iryna Marciuk (Flat 9)
Appearances:	Mr C.R. Semken (Counsel) Ms K. Simpson (Pemberton Greenish, Solicitors) Mr David John Ramsell FRICS (Cadogan Estates Limited) <u>For the Landlord</u> Mr Thomas Jefferies (Counsel) Mr C.A. Levontine (Winward Fearon, Solicitors) <u>For the Tenants</u>
Date of Hearing:	13th February 2007
Date of Decision:	26th February 2007
Members of Tribunal:	Miss J. Dowell BA (Hons) Mr L. Jarero BSc FRICS

The Application

1. These are two applications under section 48 the Leasehold Reform, Housing and Urban Development Act 1993 ("the Act") where the terms of acquisition in respect of the new leases of 6A, 61 Cadogan Square and 9, 61 Cadogan Square remain in dispute. The Application was made to the Leasehold Valuation Tribunal on 26th July 2006 in respect of Flat 6A and on 15th September 2006 in respect of Flat 9. The dispute relates to the terms of two clauses in the new leases. The terms in dispute are:

   (a) the assignment clause;
   (b) service charges in relation to the caretaker's flat.

Summary of Statutory Provisions

2. The Respondents have exercised their right to a lease extension pursuant to the Act. On completion of the prescribed procedure under the Act a qualifying tenant will be granted, in place of an existing lease, a new lease of the flat for a premium and a peppercorn rent for a term expiring 90 years after the termination date of his existing lease (section 56(1)). Subject to these provisions about rent and duration (which are not in dispute) the new lease "*shall be a lease on the same terms as those of the existing lease*" subject only to modifications agreed between the parties or provided for by the Act (section 57(1)).

3. Section 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) .....
(4) .....
(5) .....

(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.

4. Procedure where competent landlord is not tenant's immediate landlord - Schedule 11 of the Act

Deemed surrender and re-grant of leases of other landlords

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

Notices

5. The tenant of Flat 6A served a notice under section 42 of the Act on 8th May 2006 and the tenant of Flat 9 served a notice on 7th May 2006. The landlord's counter notices under section 45(2)(a) of the Act were served in respect of Flat 9 on 24th May 2006 and in respect of Flat 6A on 14th July 2006. The application to the Tribunal was made on 26th July 2006 in respect of Flat 6A and on 15th September 2006 in respect of Flat 9.

6. Section 57 requires that the new lease will be granted on the same terms as those of the existing lease, as the terms apply on the relevant date i.e. the date on which the notice of claim under section 42 was given (subject to modifications agreed between the parties or permitted by the Act).

Structure of leases

7. The freehold of 61 Cadogan Square is owned by the Applicant. A head lease was made between The Honourable Charles Gerald John Cadogan (1), Cadogan Estates Limited (2) and THM Developments Limited (3) on 24th June 1968. The Tribunal was not provided with a copy of this head lease and it is not relevant to these proceedings, as it has expired.

8. On 31st January 1969 an under lease in respect of Flat 9 was made between THM Developments Limited (1) and 61 Cadogan Square Tenants Limited (2) and Lady Phyllis Kathleen Maxwell (3). On 15th July 1970 an under lease in respect of Flat 6A was made between THM Developments Limited (1) and 61 Cadogan Square Tenants Limited (2) and Diana Pilcher (3).

9. These two under leases provide that 61 Cadogan Square Tenants Limited was formed for the purpose of maintaining and managing the building and that the lessees were members of this company.

10. On 31st August 1984 a head lease was made between The Honourable Charles Gerald John Cadogan (1) Cadogan Estates Limited (2) and Copefringe Limited (3) for a term of 65 years from 25th March 1984 expiring on 25th March 2049.

11. On the same date the two under leases of Flat 6A and 9 were extended for a term of 65 years from 25th March 1984 less three days. The parties to the lease for Flat 6A were Copefringe Limited (1) Louis Joseph Portman (2) and 61 Cadogan Square Tenants Limited (3). The parties to the lease for Flat 9 were Copefringe Limited (1) Jacqueline Millicent Colvin (2) and 61 Cadogan Square Tenants Limited (3). Both leases were made subject to the superior lease dated 31st August 1984 referred to above. Except for the term of years granted and the rent reserved the demise was made on the same

terms and subject to the same covenants on the part of the lessor and the company and the lessee as the existing leases.

Intermediate landlord

12. The Tribunal was told by Mr Semken, Counsel for the Applicant, that the intermediate landlord, Copefringe Limited is a company owned by the tenants of the building. We were not provided with any documentation in relation to this company. However we were told that all the lease negotiations had been conducted between the Applicant and Respondents and that the intermediate landlord had played no active part in the negotiations and that it had not sought separate representation in these proceedings.

Terms of new lease

13. Section 57(1) requires that the new lease to be granted to a tenant shall be a lease on the same terms as those of the existing lease as they are found on the relevant date subject to certain modifications. It was common ground that none of the circumstances set out in clause 57(1) applied to these new leases. In this case the existing leases referred to in paragraph 57(1) are both under leases dated 31st August 1984. These under leases are subject to the head lease also dated 31st August 1984. The two under leases which are the subject of this application are drawn in exactly the same form and the parties asked us to consider only the existing lease of Flat 6A and the draft of the new lease of Flat 6A on the basis that the existing lease and the new lease of Flat 9 were the same.

Assignment provisions

14. The current assignment provisions are found in clause 3(13)(A), (B) and (C) and are as follows:

3(13) (A) Not to assign any interest in the premises:

(i) other than the whole of the residue of the term in the whole of the premises;

(ii) otherwise than to a person who at the same time acquires the Lessee's share in the Company;

(iii) without at the same time assigning to that person the benefit of the covenants set out in this Lease Provided that a mortgagee assigning the premises in exercise of a power of sale shall be deemed to have complied with part (ii) of this covenant if immediately after the completion of the assignment the assignee applies to the Company for a share to be issued to him

(B) not to create any sub-tenancy or other occupancy of the premises of any part.

PROVIDED THAT the whole of the premises may be let for a period not exceeding 2 years in any period of 3 years;

AND PROVIDED ALSO that the Lessee may create a sub-demise by way of mortgage or charge

(C) not during the last 7 years of the said term to assign or transfer this Lease or any interest in the premises without the consent in writing of the Lessor and the Superior Lessor

15. The Applicants' proposed assignment clause in the extended lease is as follows:

3.17 3.17.1 Not to assign transfer underlet or part with possession of any interest whether legal or equitable in part only of the Demised Premises

3.17.2 Not without the prior consent in writing of the Company such consent not to be unreasonably withheld or delayed to assign transfer underlet or part with possession of any interest whether legal or equitable in the Demised Premises as a whole (except by way of mortgage or charge)

PROVIDED however that should the Lessee desire to assign the Demised Premises either (i) to a limited company or (ii) to a corporate body domiciled outside England Scotland or Wales or (iii) to an individual domiciled outside England Scotland or Wales (hereinafter in this Clause respectively called "the Assignee") the Lessee shall before such assignment (if required to do so by the Company and whether or not previously required) procure that two persons domiciled in England Scotland or Wales and first approved by the Company as guarantors for the Assignee enter into a joint and several covenant with the Lessor and separately with the Company (in a deed to be prepared by the Company's solicitors at the cost of the Lessee) that so long as the term hereby granted is vested in the Assignee and during any subsequent period that the Assignee may be liable under the terms of this Lease or any deed supplemental to it they will pay and make good to the Lessor and the Company all losses costs and expenses sustained by the Lessor or the Company through the default of the Assignee to pay the rents hereby reserved or the failure of the Assignee to observe and perform the Lessee's covenants and conditions herein contained or contained in such supplemental deed

16. Negotiations between the parties in respect of the assignment clause have broken down thus necessitating the need for an adjudication by the Tribunal. The tenants' current position is that they oppose any change to the existing covenant relating to assignment on the basis that they are entitled to a new lease on the same terms as the existing lease and that neither of the requirements set out in paragraph 57(6) apply. It is the Applicant's case that it would be unreasonable in the circumstances to include without modification the assignment clause in view of changes occurring since the commencement of the existing lease (i.e. 31st August 1984) which affects the suitability on the relevant date i.e. 7th/8th May 2006 of this provision of the lease.

Evidence of the Applicant

17. The Applicant relied on a witness statement of David John Ramsell FRICS (Estate Surveyor to the Cadogan Estate) dated 12th February 2007. Mr Ramsell also gave

oral evidence. Mr Ramsell dealt only with the assignment clause. In paragraph 8 of his witness statement he explained that the reasons for the changes between the proposed clauses and the existing ones could be summarised as follows:

> *"Firstly, the nature of the Cadogan Estate and its reputation as one of the great central London estates and, secondly, the Estate's concern that the buildings within which the subject apartments are situated and others in the locale can be managed properly and in the best interests of all parties involved."*

He stated that following the enactment of the 1993 Act the Cadogan Estate undertook a review of the best ways of dealing with claims for lease extensions and that it was decided to adopt a standard form of extension lease that could be issued to tenants making claims under the Act at the time the counter notice is served. He said the estate had not granted a lease not based on the standard form although he accepted there were situations where modifications to the standard form were desirable and necessary. He also accepted that the proposed provision in respect of assignment was more comprehensive than the assignment provisions in the existing leases. He explained that the clause was designed to enable the new leases to exist alongside the remaining original leases in each building and also to be compatible with leases in nearby buildings. He referred to the effect of the Landlord and Tenant (Covenants) Act 1995 ("the 1995 Act") and the restriction on the landlord's ability to enforce covenants against original lessees. He gave an example of where an offshore corporate lessee had service charge arrears of almost £15,000 and the difficulty the Applicant had experienced in obtaining payment. It was his evidence that "forfeiture is now effectively no longer an option". He emphasised that the Applicant would require personal guarantees in every case on an assignment.

18. On cross-examination it was put to Mr Ramsell that the Applicant had agreed an extension under the Act in respect of Flat 4, 28-29 Ormond Gate without the form of assignment clause demanded in this case. Mr Ramsell's explanation for this was this matter must have been dealt with by another surveyor not familiar with the Applicant's policies and procedures and that the usual surveyor must have been ill. He said he could not give an explanation as he had not been personally dealing with this case. It was put to Mr Ramsell that in fact he was creating inconsistencies with the leases of the building by demanding this clause in respect of assignment when none of the other leases in the building contained it. Mr Ramsell said that he was trying to make sure that the building was protected against difficulties in managing the leases. Mr Ramsell said that he assumed that the head lessee would require these clauses as he had expected the head lessee to be represented at the hearing if they did not want these clauses. Without the clause the landlord had no choice and would not be able to obtain guarantees.

Submissions of the Applicant

19. It was common ground that the new leases would be new tenancies within the meaning of the Landlord and Tenant (Covenants) Act 1995, being tenancies granted after the 1st of January 1996. Counsel for the Applicant relied on clause 57(6)(b) of the Act and argued that it would be unreasonable in the circumstances to include without modification the assignment clause in the current lease in view of changes

occurring since the date of commencement of the existing lease (i.e. 31st August 1984) which affected the suitability on the relevant date i.e. 7th/8th May 2006 of the provisions of that lease. The change upon which he relied was the enactment of the Landlord and Tenant (Covenants) Act 1995 and the great increase in the number of overseas investors in prime London residential properties since the date of grant of the existing leases. Counsel submitted that the inability of the lessor to enforce covenants against the original lessee following assignment made the financial status, reliability and place of residence of the tenants more important. This was particularly so in relation to obligations to pay service charges which may be substantial. Prompt payment was essential if the building was to be kept in proper repair for the benefit not only of the Applicant but all the lessees. The proviso was drafted so as to address the potential difficulties in the event of (1) an assignment to a limited company – such company might be a shell with little or no assets (2) a foreign corporate body - such company may be a shell with little or no assets and further may be difficult and expensive to sue and enforce against if it has no place of business in the United Kingdom and (3) a foreign individual might similarly be difficult to pursue and to enforce against.

20. Counsel for the Applicant relied on a Leasehold Valuation Tribunal decision *Earl Cadogan -v- Whittone and Harper*, 7th October 2005 (basement and ground floor flats, 67 Cadogan Square, London SW1) in which the Tribunal had accepted that the change in the law, the 1995 Act, justified permitting the landlord to substitute in the new lease the same assignment clause as was proposed in this case.

21. He emphasised that what had been lost to the landlord was the right to look to the original tenant throughout the term of the lease for enforcement of the covenants. He emphasised that the Applicant's approach was not outflanking the intention of parliament. He submitted that the case of *Wallis Fashion Group Limited -v- CGU Life Assurance Limited* (2000) 2EGLR49 relied on by the Respondents was not relevant because that case involved an argument about the terms of a new business tenancy under the Landlord and Tenant Act 1954. He argued that to construct the 1993 Act according to the dicta of the Landlord and Tenant Act 1954 was an improper form of construction of the Act. He emphasised that the absentee tenant was the problem for the Applicant under lease extensions. He submitted that the proposition that a guarantor could not be adequately secured was fanciful. If an assignee obtained a mortgage a mortgagee would require a third party which was the same as a guarantor. He submitted that a rent deposit was not a satisfactory form of security for the Applicant. He confirmed Mr Ramsell's evidence which was that the Estate had no interest in being unreasonable but that they had a great and large leasehold empire to manage and the Applicant wished to maintain quality on the estate and not to be in a position where covenants could not be enforced and a building could not be maintained. In answer to the submission that when the original leases were granted in 1994 the Applicant could have controlled the under leases, Counsel pointed out that the Applicant had no interest as these leases were timed to expire three days before the head lease fell in so there was no question of a freeholder having any direct relationship with the lessees. He submitted there was no reason to believe that Cadogan properties were disfavoured in the market where this proviso had been included in leases. Even if the Applicant did have a reputation for enforcing covenants in leases this was no reason for the Tribunal to disallow the proviso in dispute.

22. Lastly Counsel submitted that the case of *Huff Trustees -v- The Sloane Family Estate (No. 2)* an unreported 1997 case was not disapproved in "Hague on Leasehold Enfranchisement" fourth edition and that although Mr Huff had appeared in person Counsel for the landlord had a duty to the Tribunal and as long ago as 1997 the Tribunal had accepted that the 1995 Act was a change which affected the suitability of the provisions of the lease in that case.

Evidence of the Respondent

23. The Respondent relied on a witness statement of Clive Anthony Levontine, Partner and Head of the Property Department of Winward Fearon Solicitors, dated 1st February 2007. Mr Levontine also gave oral evidence. Mr Levontine told the Tribunal that he dealt with numerous lease extensions across London estates and that the Applicant was the only estate which sought to impose a requirement in the terms of, or similar to, the proviso in this case. He gave examples relating to the Grosvenor Estate and the Wellcome Trust. He said that in his experience flats on the Cadogan Estate were particularly attractive to overseas purchasers or individuals who wished to purchase through a corporate vehicle. In his view such purchasers often would not be able to provide two guarantors as required in the proviso. He stated that nothing had changed since the existing leases were granted in 1984 that justified a change in the existing clause under any of the provisions of section 56. He was able to give an example with supporting documentation of a lease extension in respect of Flat 4, 28-29 Ormond Gate where the Applicant had conceded the proviso which was being demanded in this case. His evidence was that he could not recall any of his clients on cases he had dealt with conceding the clauses which were being demanded in this case. He also said in answer to a question on cross-examination that he could not recall acting for a landlord seeking to enforce an obligation against an original tenant because the landlord always threatened forfeiture which was far more effective. His evidence was that he would never advise anyone to give a guarantee in the form being requested by the Applicant because of its potential liability. The proposed guarantee was not just to secure payment of the service charge but compliance with all of the lease terms. The landlord always had the option of asking for a service charge deposit deed as a condition of granting assignment. In the case of breach of the alterations or user clause the ultimate sanction was forfeiture. A guarantor would not in any event always be able to remedy such breaches. Forfeiture was a much more valuable and effective remedy for the landlord. On cross-examination Mr Levontine accepted that he could not produce any evidence to prove his argument that there was a reduction in value of Cadogan properties where the new clause in respect of assignment was included in the new lease.

Submissions of the Respondent

24. Counsel for the Respondent told the Tribunal that there had been a previous hearing in respect of a dispute about exactly the same assignment clause in a case relating to flat at 57 Cadogan Gardens in February 2006. The Tribunal found in favour of the lessees and the Applicant made no appeal to the Lands Tribunal. However they were continuing to seek to impose the assignment provision in new leases. It was submitted that the Applicant's failure to accept the Tribunal's ruling on this clause was "verging on an abuse of process". Because negotiations had collapsed, the tenants' offer to

accept a qualified covenant against assignment if the proviso were omitted had been withdrawn and the tenants' case at this hearing was that they opposed any change to the existing covenant relating to assignment. Counsel for the Respondent made a number of submissions as to why the requirements of clause 57(6)(b) were not made out.

(a) The head lease contained a provision in the terms of the proposed covenant but these were not reflected in the under leases. However the circumstances which made the Applicant include the proviso in the head lease must have pertained in 1984 and therefore cannot amount to a change of circumstances since the commencement of the under leases. Schedule 11, paragraph 10(1) of the Act provides for a notional surrender and re-grant of any existing intermediate lease where a new lease is executed by the freeholder as in this case. Schedule 11 does not require regard to be had to the terms of the head lease for the purpose of this section 57(1) or (6).

(b) The 1995 Act introduced a provision whereby tenants of leases granted after 1st January 1996 were released from their covenants when the lease was assigned (section 5 of the 1995 Act). The Act renders void any agreements seeking to exclude, modify or frustrate the intention of the Act (section 25 of the 1995 Act). The Act introduced the concept of an authorised guarantee agreement ("AGA") a guarantee by the tenant of the obligations of the assignee. An AGA can only be given if consent is required for assignment and the landlord lawfully requires an AGA as a condition of consent (section 16(3) of the 1995 Act).

(c) Counsel relied on *Wallis Fashion Group Limited -v- CGU Life Assurance*. In this case the landlord sought a clause requiring the tenant to give an AGA on every assignment whether reasonable or not. The court (Neuberger J.) refused to allow such a provision because (a) an AGA could only be required if it was reasonable to do so, (b) the court should not exercise its discretion so as to give the landlord the maximum permitted by the 1995 Act, (c) the court should not exercise its discretion so as to impose the requirement which would allow the landlord to act unreasonably. He cited with approval the following guidance from *Cairn Place Limited -v- CBL (Property Investments) Company Limited* (1984) 1WLR 696:

> "*Where parliament has enacted a later Act designed to relieve tenants of a specific obligation, it is not in our view a correct exercise of judicial discretion to use the wide power conferred upon court by the general words of section 35 of the Act of 1954 to deprive the tenants of protection conferred upon them by a later Act dealing specifically with this very obligation. It is perfectly correct to say that section 35 deals with the powers of the court and not with the agreement of a term by the parties. But it does not follow that the court when exercising discretion in determining other terms pursuant to section 35 can fail unreasonably deprive the tenants of a protection that parliament conferred upon him in 1958.*".

Counsel emphasised that the bargain made between the parties in this case in 1984 which the Applicant as freeholders had power to veto under clause 2(18)(b) of the head lease was that the leases were granted without restrictions on assignment save in the last seven years. There was no justification for introducing a covenant against assignment in terms which differed from the existing leases. This would give the landlord better protection than under the existing leases.

(d) Counsel also argued that the extensive requirements under this clause were contrary to section 19 of the Landlord and Tenant Act 1927 and section 1 of the Landlord and Tenant Act 1988. A landlord may not specify circumstances in which consent to assignment may be withheld, or conditions of such consent, in the case of a residential lease. Such a provision is also contrary to the duty imposed on a landlord by section 1 of the Landlord and Tenant Act 1988 to give consent, except where it is reasonable not to give consent.

(e) No evidence had been produced about an increase in foreign purchasers and therefore the only way in which the Applicant could meet the requirements of clause 57(6)(b) was to rely on the 1995 Act as a change occurring since the date of commencement of the existing lease. It is wrong to impose additional requirements in the new lease which are inconsistent with the intention of the 1995 Act. The starting point is the existing lease, and since that lease was granted the 1995 Act has deprived the landlord of his remedy against the original tenants. It is not for this Tribunal to introduce better protection for the landlord. These are the first extended leases in this block and the Respondents are entitled to argue that there should be no change to their leases. Counsel submitted that a landlord would be entitled to require a guarantor or other security on assignment if justified in a particular case or to refuse consent where no suitable security is offered (he relied on *Woodfall* at 11.143). The lessor would therefore be adequately protected by the provisions of the proposed lease.

(f) Counsel submitted that the Applicant wished to behave unreasonably and to be able to demand a guarantee where it was not reasonable to do so. The Applicant had chosen not to impose a requirement that the under lessee should provide guarantees in the original lease. Clause 2(18) of the head lease sets out the conditions for assignment but these provisions were not mirrored in the under leases and the Applicant included no requirement in the head lease for this.

(g) The landlord has the option of forfeiture. Capital values of these flats are substantial. An example of a company which is not domiciled in the United Kingdom is Microsoft. Clearly it would be inappropriate to demand two personal guarantees if Microsoft were to take an assignment of one of these leases. There is no justification for demanding two guarantors in every case. The landlord is under a statutory duty to act reasonably in giving consent. A guarantor has no statutory duty to anyone and the question is why should a landlord be able to pass all the risk to a guarantor.

(h) The decisions in the landlord's bundle should not be followed because in the case of *Huff*, Mr Huff was in person and it was not an equal contest and in the case of *Cadogan -v- Whittone* there was no discussion of the relevant arguments. Both these cases were referred in the case in respect of 57 Cadogan Gardens decided against the landlord, the decision being dated 15th March 2006.

Decision of the Tribunal in respect of the assignment clause

25. The question for the Tribunal to determine is whether the proposed assignment clause comes within the requirements of section 57(6)(b) of the Act. This means that we have to consider "changes occurring since the date of commencement of the existing lease" i.e. 31st August 1984.

26. The first change we were asked to consider was the increase in foreign investors in flats on the Cadogan Estate. We were provided with no evidence in this respect and we therefore reject this as a reason to determine that there should be a modification of the assignment clause in the original lease.

27. The second change relied on by the Applicant was the Landlord and Tenant (Covenants) Act 1995 which means that the original lessees would be released from liability under their covenants in these new leases. In his evidence Mr Ramsell was quite clear that the landlord's reasons for changes between the proposed clauses and the existing ones were for the benefit of the Cadogan Estate. His evidence was that the standard form of lease being put forward had been used by the Cadogan Estate in granting more than three hundred lease extensions and that this standard form of extension lease had been adopted following the enactment of the 1995 Act.

28. In those circumstances it is difficult to understand how the landlord can now be putting forward an argument that the form of this new lease is necessary because of the changes introduced by the 1995 Act which became effective on 1st January 1996.

29. In our view the only change that could make unreasonable the assignment clause in the original lease is the 1995 Act. No evidence was given by Mr Ramsell as to the landlord's practice in pursuing original tenants when assignees breached the lease. Mr Levontine's evidence was that he had never known this to happen although we accept he does not of course have knowledge of every lease on the Cadogan Estate.

30. Mr Ramsell's arguments about management of the estate and the landlord's desire to have consistency in leases is not supported by the requirements of the Act. In any event his arguments were not convincing in view of the evidence we heard about a case where this assignment clause had not been required and the fact that the original leases in this building alone had not been amended and therefore the current lessees were not subject to these stringent provisions now required. The example Mr Ramsell gave about a recent case where an offshore corporate lessee had service charges arrears of more than £15,000 has no bearing on the decision we are asked to make in respect of section 57(6)(b). We were not given details of the lease and the arguments about the effect on other lessees is of no relevance to our decision.

31. We accept that it has been held that the enactment of the 1995 Act is a change falling within section 57(6)(b) and we accept that *Huff* were not disapproved in Hague. However the modification requested by the landlord in the case of *Huff* is considerably less onerous than that which is requested in this case.

32. We do not accept that it would be unreasonable in the circumstances to include without modification the assignment clause in view of changes occurring since 31st August 1984. The only change which we deem to be relevant is the 1995 Act. In our view the effects of the 1995 Act do not justify the landlord being permitted to change the terms of the original lease to such an extent that it is effectively circumventing parliament's intention with the introduction of the 1995 Act. Section 25 of the 1995 Act renders void any agreement seeking to exclude, modify or frustrate the intention of the Act and it is certainly arguable that the clause proposed by the landlord does just this. The tenants are entitled to a lease "on the same terms as those of the existing lease as they apply on the relevant date". Modifications are permitted in only limited circumstances described by the Act. We do not find that any of these circumstances have been made out. We heard no evidence that the landlord had ever pursued an original tenant. We do not accept Mr Ramsell's evidence that "forfeiture is now effectively no longer an option". He did not explain his reason for this statement but forfeiture is certainly open to the landlord with considerable benefits if successful.

33. The head lease is an important document in this case and we have noted the stringent provisions against assignment contained in this lease. The landlord chose not to make it a requirement that the under leases should be subject to this requirement. It was suggested by Mr Ramsell that lessons had been learned from experience gained over the years since the original leases were granted. This in our view is not a change within the meaning of section 57(6)(b). Mr Ramsell stated that the landlord had adopted "a standard form of extension lease" which would be issued to tenants making claims under the Act to ensure that all parties knew from the outset what the lease would contain. In our view this is an incorrect approach. It is not for the landlord to impose new provisions on the tenant unless they are justified under the Act although of course agreement may be reached between the landlord and tenant as to any of the terms of the new lease.

34. Our final concern about the proviso is the requirements of section 19 of the Landlord and Tenant Act 1927 and section 1 of the Landlord and Tenant Act 1988. Even if we accepted that the landlord was entitled to a modification of the current assignment clause such a modification must take into account the statutory provisions which the proposed clause does not.

35. We have concluded the landlords are asking for more than the current lease permits. This is admitted by Mr Ramsell in paragraph 12 of his witness statement. There is no power under the Act to add a wholly new term or to give either party more than it had in the original lease unless it is agreed by the other party. Our interpretation of the Act is that we have very limited discretion to change the original leases and for the reasons set out above we are satisfied that the new assignment clause proposed by the landlord does not meet the requirements of section 57(6)(b) of the Act.

The service charges in respect of the caretaker's flat (Fourth Schedule)

36. By clause 5.2(iii) of the existing under lease Cadogan Square Tenants Limited covenants to provide the services set out at Schedule 4 of the under lease. Paragraph 3 of this schedule requires the provision of "*a porter or porters at the building on week days during such hours and at such other times as the Lessor or the Company may consider necessary or desirable to carry out such duties as are usual in a residential building or the Character of the Building as may be determined from time to time by the Lessor*".

37. By clause 8(3) of the existing leases the tenants covenant to pay a defined share of the cost of provision of the services, including the cost of providing a porter:

38. The head lease contains a covenant in clause 2(3) that the intermediate landlord must not use part of the basement of 61 Cadogan Square other than as a caretaker's flat. Clause 2(11)(c) of the intermediate lease contains a covenant on the part of the intermediate landlord "*to provide for the demised premises throughout the said term a full time caretaker (who shall not be the lessee, or a director or other officer of the lessee if a company) who shall reside in the caretaker's flat rent free as a licensee on a service basis and his duties shall include.....*".

39. Under clause 11(5) of the under lease the lessor agrees "*to indemnify the Lessee in respect of the rent and other sums payable under the Head Lease and the covenants and conditions on the part of the Lessee therein contained except insofar as the Lessee or the Company was liable therefor under the provisions of this Lease.*".

40. The services to be provided at the cost of the service charge are set out in the draft new lease at the Fourth Schedule Part 3. The porterage service is set out at paragraph 5 of the schedule and includes the rental cost of any accommodation provided to the porter, inside or outside the building provided that until 22nd March 2049 the sum equivalent to the market rent when such accommodation is provided within the building will not be payable.

41. The tenants have agreed to a clause in the following terms:

> "*Where accommodation is provided for the use occupation or residence of such person in the building (a) the cost of maintaining servicing overhauling repairing and where necessary rebuilding renewing and reinstating such premises furnishing and equipment and of providing all normal utilities and outgoing and services for such premises (b) from and including 25th March 2049 a sum equivalent to the market rent of such accommodation.*".

42. The dispute therefore is whether the tenant should be liable to pay the sum equivalent to the market rent for accommodation provided outside the building for a caretaker.

Evidence and submissions of the Applicant

43. Mr Ramsell's witness statement did not address this point.

44. Counsel submitted that the existing lease did not require the provision of a resident porter and neither does the draft new lease. The lessor is entitled to provide a resident or non-resident porter provided that the porterage services are provided in accordance with the lease. However if a resident porter is likely to be the most suitable to satisfy the obligations the cost of a non-resident porterage service (if greater) will not be recoverable. Counsel relied on the case of *Russell -v- Laimont Properties Limited* (1984) 1EGLR37. The Applicant was willing to concede a proviso that until 25th March 2049 (the contractual expiry date of the head lease) no sum equivalent to the market rent for porter's accommodation within the building would be chargeable to the lessees. The lessees contend that the restriction should apply whether such accommodation is provided within the building or elsewhere. Counsel for the Applicant submitted that this contention was misconceived because there is no obligation under the existing lease to provide a porter resident in the building at all. If porterage services were provided by way of a non-resident porter or a porter accommodated elsewhere the cost of such provision is recoverable under the existing lease and therefore is recoverable under the new lease.

45. In either case the lessor suffers the loss of the rental if he is unable to recover it under the service charge. Counsel relied on *Gilje -v- Chalgrove Securities Limited* (2002) 1ELGR41 where it was held that the question was what the reasonable tenant would expect he would have to pay on reading the lease.

46. Counsel accepted that under the head lease the tenant was restricted in his use of the porter's flat to the accommodation of a porter. However his submission was that it did not follow that after such restriction fell away in 2049 that the reversioner should be bound to provide a caretaker's flat without charge whether within or outside the building.

Evidence and submissions of the Respondent

47. Mr Levontine's witness statement dealt with the service charge provisions at paragraph 31 onwards. It was his case that the bargain between the freeholder and the intermediate landlord was that a flat in the basement of the building would be designated as a caretaker's accommodation on the terms set out in the head lease. The tenants of the flats then entered into an under lease which required the landlord to provide porterage. The tenants have paid through the service charge the salary of the porter and the upkeep on the porter's flat. However the existing leases make no provision for the tenant to pay a rent on the porter's flat.

48. Counsel submitted that the landlord could not recover the cost of providing accommodation for a caretaker outside the building as this was not justified by any of the provisions of the 1993 Act. He submitted it was also inconsistent with the structure of the leases as it would be a breach of the head lease to accommodate the caretaker in a different building and there should be no justification for charging for such accommodation. The tenants conceded that after the head lease expired they would be liable to pay a sum equivalent to the market rent of the caretaker's accommodation in the building.

Decision

49. Our starting point is section 57(6)(b) of the Act. There is no defect in the existing lease so section 57(6)(a) does not apply. The only reason to modify the term in the lease is if there are changes which have occurred since the date of commencement of the existing lease which affects the suitability in May 2006 of the provisions of that lease. We do not accept the submission that the existing leases do not require the provision of a resident porter. Our interpretation of the existing lease (i.e. the under lease) read in conjunction with the head lease is that the head lease requires the lessee to provide for the demised premises throughout the term a full-time caretaker who shall reside in the caretaker's flat rent free. The under lessee has the benefit of an indemnity from the intermediate landlord in respect of this covenant.

50. The tenants have conceded that some modification is necessary in that they will be liable to pay a service charge to cover the market rent of any accommodation provided in the building after the expiry of the head lease on 25th March 2049. We do not accept that any further modification is required as no changes have occurred since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of the lease in respect of this service charge. The tenant is entitled to a new lease on the same terms as those of the existing lease and our interpretation of the interaction of the head lease with the under lease is that the tenant is entitled to expect the services of a resident caretaker.

Tribunal
Miss J. Dowell BA (Hons)
Mr L. Jarero BSc FRICS

.....
Chairman

Dated this 26th day of February 2007