3 WINDSOR COURT, DOVER ROAD, DEAL

1. **The Application**

This is an application by Mr P Regan, the tenant of Flat 3, Windsor Court, under Section 13(4) Housing Act 1988 ("the Act"), referring to us a new rent proposed by the Landlords, Hanover Housing Association (Hanover) of £279.29 per month (inclusive of a service charge and new support charge of £64.20 per month) to take effect from 1 April 2003. The current rent was £266.16 per month (inclusive of a service charge of £64.20 per month).

2. **Background to the Application**

When Mr Regan's application reached the office of the Southern Rent Assessment Panel it was initially rejected by the Panel office on the grounds that the Southern Rent Assessment Committee would not have jurisdiction to entertain the application. The reasons given for that were that, while the requirements of Section 13(1)(b) were satisfied in that the tenancy was a periodic tenancy which did not contain a binding provision on the tenant for a possible increase in the rent in the future, Hanover had not served on Mr Regan a notice in the prescribed form proposing the new rent. The Association indicated that this provisional view of the Panel office was erroneous in their view and accordingly a hearing was arranged to determine whether or not the Rent Assessment Committee does have power to entertain Mr Regan's application under Section 13(4) of the Act.

3. **The Hearing**

At the hearing which took place at Deal Town Hall on 25 April 2003, Hanover was represented by Mr Peter Hubbard, solicitor and partner in the firm of Anthony Collins of Birmingham. Mr Regan was present in person. We invited Mr Hubbard to make his submissions first and explain to Mr Regan that he would have an opportunity of putting his case afterwards.

4. Mr Hubbard had already helpfully submitted his written submissions and he proceeded to take us through these submissions, amplifying them where necessary and dealing with questions from the Tribunal. The main points he made were as follows:-

(a) Hanover was a registered social landlord with about 14,000 properties in management across the country. The majority of the Association's residents occupied their properties on tenancy terms similar to Mr Regan's and therefore our decision in interpreting the tenancy agreement was of national importance to Hanover. If we were to uphold the view originally expressed by the Panel office then it would mean that, if we were correct in so doing, the whole round of recent rent increases was invalid.

(b) Section 13(1) of the Act stated:-

"This section applies to:-

(a) a statutory periodic tenancy other than one which, by virtue of paragraph 11 or paragraph 12 in Part 1 of Schedule 1 to this Act, cannot for the time being be an assured tenancy; and

(b) *any other periodic tenancy which is an assured tenancy, other than one in relation to which there is a provision, for the time being binding on the tenant, under which the rent for a particular period of the tenancy will or may be greater than the rent for an earlier period".*

Mr Hubbard said that in this case the tenancy fell within the exemption provided in sub section (1)(b). There was in the agreement a provision which was binding on the tenant under which the rent for a particular period of the tenancy would or might be greater than the rent for an earlier period. That being the case, the remaining provisions of section 13 did not apply. Hanover as landlords did not have to serve a notice satisfying the terms of section 13(2) of the Act and Mr Regan as tenant could not then refer such a notice to the Rent Assessment Committee.

(c) Mr Hubbard contended that there was indeed a clause in the tenancy agreement which was binding on Mr Regan as tenant, under which the rent was capable of being increased. He referred us to clauses 1.2 and 1.9 of the tenancy agreement, which stated as follows:-

> *1.2 The net rent will be reviewed at least once but not more than twice a year and normally on the first day of April. Hanover will give the tenant at least one calendar month's written notice of any increase or decrease in the net rent. The reviewed net rent ("reviewed net rent") will be set out in the notice and will become payable on the date set out in the notice. However Hanover will take into account when reviewing the net rent:*
>
> *(a) Hanover's rent policy as amended from time to time*
>
> (b) *Hanover's rules*
>
> (c) *The financial needs (both present and reasonably anticipated) of Hanover and specifically its ability to pay debts as they fall due.*
>
> (d) *Hanover's financial commitments.*
>
> *1.9 If the tenant does not want to continue the tenancy:*
>
> *(a) at any reviewed net rent; or*
>
> *(b) with any new services; or*
>
> *(c) at any reviewed service charge; or*
>
> *(d) on the new terms ("the varied terms of tenancy")*
>
> *the tenant has the right to end the tenancy by writing to Hanover before the varied terms of tenancy take effect stating:*
>
> *(i) the tenant wishes to end the tenancy on or before the varied terms of tenancy take effect; and*
>
> *(ii) the date of which the tenancy is to end".*

Mr Hubbard submitted that that was a valid, binding rent review clause and the further provisions of section 13 of the Act were therefore excluded.

(d) Mr Hubbard then considered in more detail the validity of Clause 1.2 of the tenancy agreement. He accepted that rent review clauses normally operate by way of a formula or machinery for calculating a new rent (for example by reference to the retail prices index or by reference to arbitration by a chartered surveyor in the event of disagreement). In this case the provision in the tenancy agreement did not provide a formula as such. He then referred to a number of cases decided in respect of business rent review clauses intended by the parties to have legal effect, before turning to the case of GLC –v- Connelly decided in 1970. That was a case involving a residential tenancy and the clause in the GLC's rent book stated:- *"The rent is liable to be increased or decreased on notice being given"*. This rent review clause had been upheld by the Court of Appeal, despite the fact that the timing and amount of the increase was dependent on the landlord's discretion. Mr Hubbard submitted that in the light of these decided cases, it was necessary, in order to show that a clause was void for uncertainty, that the rent review clause should, for example, be devoid of meaning or impossible to perform or difficult to determine the true intent of the parties involved. Hanover's rent review clause, however, specified the factors that Hanover would take into account when setting the new rent, specified the time period for notice to be given and restricted rent increases in their timing. He submitted that the clause was therefore valid and certain under the case law which he had outlined.

(e) Mr Hubbard then considered whether the provisions in the tenancy agreement fell foul of the Unfair Terms in Consumer Contract's Regulations 1999 ("the Regulations"). It had already been decided that the Regulations did apply to residential tenancy agreements between social landlords and individuals. Paragraph 1(j) of Schedule 2 to the regulations stated that a clause enabling the seller or supplier to alter the terms of the

contract unilaterally without a valid reason which is specified in the contract would usually be unfair. However paragraph 2 of Schedule 2 provided an important exception, namely – *"Paragraph 1(j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract".* Mr Hubbard also referred to paragraph 1.1 of Schedule 2 which stated that unfair clauses included – *"allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded".* Mr Hubbard said that the clause in the tenancy agreement providing for the increase in rent satisfied both of these provisions. The tenancy agreement was a contract of indeterminate duration (the landlords having no right to terminate it except for wrongful conduct on the part of the tenant) but the tenant was free, under clause 1.9, to terminate the tenancy agreement before the proposed increased rent would come into effect.

(f) Mr Hubbard considered the guidance given by the Office of Fair Trading ("OFT") on Unfair Terms in Tenancy Agreements. Paragraph 10.5 of that guidance stated:-

"Variation clauses may therefore be open to objection in fixed term tenancies. The OFT's concerns focus on any right to introduce changes to the terms of a tenancy agreement that could have a significant effect on tenants while they remain bound and cannot end their tenancy before the terms of the agreement are changed. This also applies to continuing "periodic tenancies", where a period of notice must be given before the agreement can come to an end."

Paragraph 12.2 of the guidance stated, specifically in relation to rent increases:-

"The concerns of the OFT arise where terms allow rent to be increase arbitrarily by the landlord without reference to clear and objective criteria or an independent valuer".

Mr Hubbard maintained that Hanover had drafted a rent review clause which contained clear and objective criteria to decide the level of future rents and gave tenants the additional right to terminate their tenancy if they did not want to accept the higher rent. Questioned by the Tribunal as to the fairness of a review clause which required the tenant to pay an increased rent fixed alone by the landlord without reference to a precise formula and then required the tenant to give up his tenancy as the only means of avoiding the increase, Mr Hubbard accepted that such a clause might be unfair as between a tenant and a private sector landlord. However he drew our attention to regulation 6(1) of the Unfair Terms in Consumer Contract Regulations which provided as follows:-

".....the unfairness of a contractual term shall be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract to all the circumstances attending the conclusion of the contract....."

He maintained that, as a social landlord, Hanover was constrained by the requirements of the Housing Corporation, the fact that it was a registered charity and the further consideration that its beneficiaries lived in its properties. Those circumstances made the situation very different from a letting by a private landlord, who had no such constraints and where the landlord obviously sought to make a profit.

Questioned further by the Tribunal, as to whether the review clause provided "clear and objective criteria" for determining the increase, Mr Hubbard referred to the terms of Clause 1.2 of the tenancy agreement which provided that Hanover would take into account when reviewing the net rent:-

(a) Hanover's rent policy as amended from time to time

(b) Hanover's rules

(c) The financial needs (both present and reasonably anticipated) of Hanover and specifically its ability to pay debts as they fall due

(d) Hanover's financial commitments.

While he could see how such criteria might be classed as subjective in nature, he again said that the clause in the tenancy agreement had to be construed against the background of Hanover's status as a registered social landlord and again he prayed in aid regulation 6(1) and the constraints under which Hanover operated. He had not brought with him to the Tribunal Hanover's rent policy and Hanover's rules. However details of the rent policy were provided to tenants and Mr Regan was able to submit the latest newsletter he had received, which referred to the Government's plans to bring in a uniform rent setting policy for all tenants of council and housing association properties. Hanover had adopted this Government's sponsored rent setting policy and, applying the criteria laid down in that policy, the Association had devised a mechanism under which in any one year the rent could be increased by taking the current rent and then adding to it the current rate of inflation plus ½% plus £2 per week. Mr Hubbard explained that, in order to achieve convergence between rents in this sector over a 10 year period, some landlords might have to increase the current rent by more than £2 per week over and above the rate of inflation and ½% but the £2 per week was a maximum figure imposed simply because the Government considered that tenants might not be able to afford more than £2 per week on top of the rate of inflation and ½%. He mentioned this last point because Mr Regan had intervened to say that nobody had ever explained to him what this extra £2 per week was about.

5. Mr Regan's Submission

Mr Regan said that he would have to leave it to the Tribunal to determine the point of law involved on the issue of jurisdiction. His main objection had been to the way in which the increase had been dealt with. He had tried to seek information from the management at Windsor Court but his questions had been answered by statements to the effect – *"Well, if you are not happy, why don't you leave?"* It was this attitude which had upset him. Mr Hubbard offered to discuss the matter with Mr Regan after the conclusion of the hearing and said that he would make an appropriate report back to the management.

6. Consideration

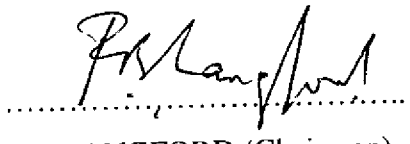
We accepted that on the correct interpretation of Section 13 of the Act, there was no need for us to make a determination as to whether Hanover had or had not given a valid notice under Section 13 (2) of the Act if, by the terms of Section 13(1) of the Act the remaining provisions of Section 13 did not apply. The question we had to decide was therefore whether under Section 13(1) we were dealing with a periodic assured tenancy in which there was a provision for the time being binding on the tenant, under which the rent for a particular period of the tenancy would or might be greater than the rent for an earlier period. Hanover claimed that that Clause 1.2 was such a clause. Clearly that clause provided for the possibility of the rent becoming "greater than the rent for an earlier period". It lacked a precise formula e.g., one related to the retail prices index for fixing an increased rent but we accepted Mr Hubbard's contention that, on the basis of the decided cases he had referred to, it would be necessary to show that the rent review clause was devoid of meaning or impossible to perform or was such that it was not possible to determine the true intent of the parties. The clause was accordingly valid, unless it was "unfair", i.e., it was in breach of the Unfair Terms in Consumer Contracts Regulations 1999. We were indeed concerned about the fairness of the clause and that is why we questioned Mr Hubbard closely at the hearing. The service of providing housing accommodation was so fundamental that if the fairness of a review clause depended upon the ability of a tenant to give up his housing accommodation before the new rent came into operation, it could hardly be said to be "fair". In such a situation there was "a significant imbalance in the party's rights and obligations under the (tenancy), to the detriment of the (tenant)". Equally the criteria set out in Clause 1.2 of the tenancy agreement were subjective criteria revolving around the landlord's financial situation, and although the Landlord in this case, Hanover, publicised their rent policies, it was Hanover alone which interpreted them in fixing the proposed new rent. In the context of a private sector tenancy, we would certainly have held that the rent review clause was unfair, as being in breach of the 1999 regulations. However we were persuaded by Mr Hubbard's argument that we must have regard to regulation 6(1) and the fact that this particular landlord, Hanover, was a social landlord bound by the constraints of the Housing Corporation and by its position as a charity where the beneficiaries of the charity lived in its own property. We were well aware from our own experience and knowledge that these

constraints meant in practice that rents fixed by social landlords were invariably lower than open market rents. Thus we concluded that the rent review clause was fair and valid and that under the terms of Section 13(1) we had no jurisdiction to consider the rent under Section 13(4).

7. What Mr Regan had said in his statement about the reaction of the management to his bona fide requests for information regarding the increase in the rent was, if true (and we had no reason to doubt the truth), a matter for concern. We are sure that Mr Hubbard will bring this matter to the attention of the senior management of Hanover. It cannot however affect our decision in this case.

8. **Decision**

For the reasons given, this application is dismissed, as we have no jurisdiction to consider it.



P B LANGFORD (Chairman)