RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

S.48 Leasehold Reform Housing & Urban Development Act 1993 ("the Act")

DECISION

Case Number:	CHI/00ML/OCE/2005/0084
Property:	Flat 6, 14 Meads Street Eastbourne BN20 7QT
Applicant:	Gillian Seymour and Simon Naish
Respondent:	Graham Engley and Peter Daniel Taylor
Date of Hearing:	22nd November 2006
Date of Decision:	8th December 2006
Appearances:	Mr Donegan of Messrs Osler Donegan Taylor solicitors for the Applicant and Mr Stone of Messrs Mayo & Perkins solicitors for the Respondent
Tribunal Members:	Mr R T A Wilson LLB (Chairman) Mr B H R Simms FRICS MCIArb Mr R Athow FRICS MIRPM

INTRODUCTION

1. Following the Tenants' notice of Claim to exercise right under Section 42 of the Act, directions were issued on the 27th September 2006 for an oral hearing to determine outstanding issues between the parties.

2. The parties have agreed the premium payable and the costs payable. However, one of the terms of the new lease has not been agreed namely the landlords insurance covenant. This is the one remaining issue that the Tribunal is asked to determine.

3. At clause 5 (e) of the current lease the landlord covenants,

   "that the landlord will at all times during the said term insure and keep insured the building in the joint names of the landlord and the tenant against loss or damage by fire and such other risks (if any) as the landlord thinks fit with such a reputable insurance office as maybe decided by the landlord in at least such amount as in the sole opinion of the landlord shall represent the full reinstatement value thereof for the time being……."

4. The Applicant asks for the following clause to be added to the new lease:-

   "the landlord and tenant agree that clause 5(e) of the old lease shall be amended so that the words 'under a comprehensive policy' *shall be inserted after the words,* 'keep insured the building', *and the word,* 'sole' *shall be replaced by the word,* 'reasonable' ".

THE APPLICANTS' CASE

5. Mr Donegan opened his case by reminding the Tribunal that Section 48(1) of the Act gave it the power to determine matters in dispute at the end of the two month period as stated in section 48. The section refers to any of the "terms of acquisition" which include the content of the new lease by virtue of section 48(7). Mr Donegan stated that the draft lease had been submitted by the Respondent s solicitors relatively recently on or around the 13th October 2006. At the date of the application there was no issue because his client had not seen the document. Now that the draft had been received there was an issue and it was appropriate for the Tribunal to determine the matter.

6. The issue related to the nature of the insurance covenant which would now be regarded as defective by the majority of lending institutions because the existing wording provided only for guaranteed fire cover whereas lending institutions required a much wider range of insured risks. The range of required insured risks was as set out in the Council of Mortgage Lenders (CML) Handbook which requires fire, lightning, aircraft, explosion, earthquake, storms, flood, escape of water or oil, riot, malicious damage and a number of other risks. As the existing lease did not require the landlord to provide cover against all these risks the lease could be regarded as defective as it would be unacceptable security to many lenders.

7. Mr Donegan referred the Tribunal to section 57(6) of the Act which gave the Tribunal the power to vary or modify a term in the new lease insofar 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.

8. In Mr Donegan's view the existing insurance covenant was defective and by virtue of clause 57(6)(a) the Tribunal had the power, and should order the proposed variation.

9. In the alternative, Mr Donegan argued that there had been changes occurring since the date of the existing lease which did affect the suitability of the existing lease insofar as it related to the insurance covenant and that it would be unreasonable to include the covenant in its existing format bearing in mind the CML Handbook referred to above. Therefore by virtue of clause 57(6)(b) the Tribunal should order the proposed variation.

10. In summary the existing insurance covenant was both defective and unreasonable and that the Tribunal had the power to alter it and should exercise its discretion in this case.

THE RESPONDENTS CASE.

11. Mr Stone opening the case for his clients maintained that the Tribunal did not have the jurisdiction to sanction the proposed change and even if it did then he did not accept that there was any defect or change in circumstances which entitled the Applicant to the variation.

12. Whilst he accepted that the Tribunal had the power to vary the terms of the new lease from those in the existing lease under section 57(6) of the Act, that power only arose if a request for variation was made in the originating application. In this case no such request had been made and therefore the Tribunal had no power to vary under section 57.

13. Mr Stone referred the Tribunal to section 42 of the Act which set out the information to be included in the tenant's Notice of Claim. At clause 42 (3)(d) the notice must specify the terms which the tenant proposes should be contained in any such lease. Mr Stone referred the Tribunal to the Notice in this case which contained no application to amend the terms of the existing lease. Mr Stone then referred the Tribunal to Hague's commentary on the contents of a section 42 notice. In relation to subsection (d) Hague states that, "*the notice should specify the terms which the tenant proposes should be contained in the new lease. This will usually be done by reference to the existing lease. If any particular alterations are required, they should be included in the notice,*"

14. Mr Stone's contention was that the wording of section 42 was mandatory in terms of the contents of a section 42 notice. Therefore as the Applicant had failed to include an application to vary in his Notice, the Tribunal did not have the jurisdiction to make an amendment pursuant to section 57 of the Act.

15. In the alternative, if the Tribunal considered that it did have the jurisdiction to vary, he maintained that the existing insurance clause was perfectly workable and therefore could not properly be regarded as a defect. The Applicant wanted to vary the clause simply because of an external third party, namely lending institutions imposing their own requirements. The fact that lending institutions had their own requirements did not in itself make the insurance provisions defective. The clause and the extent of the landlord's obligations were unambiguous and had worked in practice over many years and were not defective.

16. Mr Stone accepted that there may be a 'change in circumstances' over insurance with the advent of the CML Handbook. However in his opinion there were other means to deal with the situation. For example insurance policies dealing with defective insurance clauses were now readily available in the market, and would cover a situation like this one. In addition there were a number of other ways in which to deal with the issue. In his opinion it was not unreasonable for the insurance clause in the new lease to remain as drawn.

17. In summary, Mr Stone maintained that neither of the two grounds in Section 57(6) had been made out by the Applicant.

THE TRIBUNALS' DELIBERATIONS

18. The Tribunal carefully considered both arguments put forward to it regarding jurisdiction. The Tribunal preferred the approach and construction of the legislation put forward by Mr Stone. The Tribunal is of the view that its powers to order a variation of the terms of the old lease when considering the terms in the new lease pursuant to section 57(6) do only arise if the leaseholders initial notice contains an application to amend the terms of the existing lease as set out by Section 42(3)(d). This clause is not couched in discretionary terms i.e. setting out what material should be included but directs in mandatory terms namely stating that the tenant notice **must** specify the terms which the tenant proposes should be contained in any such lease. We have scrutinised the notice of claim in this case which is dated the 7th March 2006 and the terms of the new lease as proposed by the tenant reads as follows:-

The new lease should expire on 23rd June 2171

The new ground should be £50 per annum doubling on the 24th June 2015 and thereafter every 33 years of the term.

19. In short no request to vary is contained in the Applicant's Notice. The Applicant's argument that the proposed terms were not known until the draft was submitted is rejected as it is clear from the statute that the terms of the new lease will be the same as the existing lease other than those relating to lease length and rent.

20. We believe that the intention of parliament in including section 42(3)(d) is to bring to the Respondent landlords attention at an early stage any variations in the new lease required by the leaseholder. The comments contained in Hague, a well known and respected authority, also confirm the mandatory nature of this section. In the circumstances we conclude that a precondition of being able to request an amendment pursuant to section 57 is compliance with section 42(3)(d), which in this case has not happened. Having regard to the above the Tribunal considers that it has no jurisdiction to order the amendments requested by the Applicant.

21. However, even if the Tribunal is wrong in its interpretation of the legislation above then we still consider that the Applicant has failed to establish the grounds to enable the Tribunal to grant the amendments proposed. In our view the existing insurance covenant is not defective. The clause itself is clear and unambiguous and sets out the scope of the landlords covenant to insure. The lease was granted as long ago as 1983 and appears to have worked adequately up until now. Furthermore the existing Applicant purchased the property some four years ago with a mortgage which is an indication that the insurance arrangements have been accepted relatively recently by a mortgage lender. We therefore do not accept that the insurance covenant as drawn constitutes a defect.

22. We do accept that the advent of the CML Handbook has brought about a change in conveyancers perceptions of what amounts to a defect. We further accept that the CML Handbook requires a greater range of risks than is currently guaranteed under the existing lease. However, we agree with Mr Stone that the perceived mischief can be dealt with in a number of different ways not least of all by obtaining an insurance policy covering the operation of the insurance covenant. In short whilst the issue of insurance might arise on a future sale of this property, we consider that there are a number of ways that the issue could be dealt with at the time. Therefore whilst there may have been a change in circumstances we do not consider that it would be unreasonable for the existing insurance covenant to remain unaltered in the new lease.

DECISION IN SUMMARY

23. For the reasons set out above the Applicant's request for the insurance clause to be modified in the new lease is dismissed.

Dated this 8th day of December 2006

Robert Wilson LLB
Chairman