9071

FIRST- TIER
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/22UL/LVT/2013/0002**
Property	:	**Lucam Lodge, The Garners, Rochford, Essex SS4 1DS**
Applicant	:	**Genesis Housing Association Limited (represented by Osbornes Solicitors LLP)**
Respondents	:	**The Leaseholders as set out in the details of Respondents annexed to the Application**
Type of Application	:	**An Application to vary Leases under Section 37 of the Landlord and Tenant Act 1987**
Tribunal	:	**Judge D. Robertson** **Regional Judge B. Edgington**
Date and venue of Hearing	:	**22nd October 2013 at Unit C4, Quern House, Mill Court, Great Shelford, Cambridge CB22 5DL**
Date of the Decision	:	**30th October 2013**

DECISION

The Tribunal dismisses the application made under Section 37 of the Landlord and Tenant 1987 ("The Act") and it makes no order under Section 38 of the Act varying the Leases because the variations requested are likely to substantially prejudice one or more of the Respondents to the application and generally it would not be reasonable in the circumstances of this case for the variations as proposed to be effected.

REASONS FOR THIS DECISION

The Application

1. The Application was made on the 24th June 2013 under Section 37 of the Act requesting the variation of 40 Leases (This was subsequently amended to 41 Leases) to cover the fact that there are no resident wardens of the flats at Lucam Lodge and this facility has not been offered since approximately September of 2007. It is now proposed to sell off the two warden flats which are empty. This will have the effect of reducing the leaseholders service charge.

2. The Applicant says these objects cannot be achieved unless all the Leases are varied to the same effect because for the purposes of good estate management the provisions of all leases on the estate need to be in a common form to achieve a fair and efficient position.

The Law in summary

3. Section 37 of the Act allows for variation by the majority where an application is made in respect of two or more leases and the landlord is the same person. The ground for making application must be that the object to be achieved by the variations cannot be satisfactorily achieved unless all the leases are varied to the same effect. In order for an application to be made the following condition must be satisfied for the purposes of this case namely that it is not opposed for any reason by more than ten percent of the total number of parties concerned and at least seventy five percent of that total number consent to it. This condition has been satisfied in this case as there is only one tenant who opposes and over seventy five percent of the parties consent.

4. Section 38 of the Act also deals with orders varying leases. Section 38(6) reads as follows:-

(6) A Tribunal shall not make an order under this section effecting any variation of the lease if it appears to the Tribunal

(a) That the variation would be likely substantially to prejudice
(i) Any respondent to the application, or
(ii) Any person who is not a party to the application,
and that an award under sub-section (10) would not afford him adequate compensation or
(b) That for any other reason it would not be reasonable in the circumstances for the variation to be effected.

Issues considered by the Tribunal

5. Osbornes initially stated that the Property comprised a block of 40 flats. This was later amended to refer to a total of 43 flats. 41 of these are the subject of this application and there are in addition two vacant flats which were occupied by wardens. Osbornes have now with their letter of the 9th October 2013 produced a revised schedule of service charge percentages for Lucam Lodge whereby they purport that there are now 44 flats to consider. The Tribunal does not consider that it is reasonable that there should be this inconsistency.

6. This revised schedule shows proposed service charges totalling 102.3% to correspond with the initial application. The Applicants have now revised all of the service charge percentages and make a final suggestion of 44 flats paying in total 100.012%.

7. The Tribunal has relied previously on representations that flat 13 does not exist. If in the proposed column one deducts 2.29 from 102.3 you reach a figure of 100.01. In the final suggested column if one deducts 2.238 from 100.012 you reach a figure of 97.774.

8. Whichever way you look at the figures prepared by the Applicant they do not total 100%. There do not appear to be any exceptional reasons in this case why the service charge for this estate should not total 100% and therefore it is not reasonable for the variation to be effected on the basis proposed in the revised schedule with the said letter of 9th October.

9. The Tribunal then turned to page 21 of the bundle which refers to relevant terms for flats 5, 8, 22, 23 and 24. The Tribunal decided to consider in detail the Lease for flat 5 as this was the first one listed for consideration. This Lease is dated the 23rd May 1989 and is made between Springboard Chelmer Housing Association Limited of the first part and David John Gibbs and Phyliss May Gibbs of the second part ("the Lease")

10. There are a number of mistakes in the relevant terms set out on page 21 of the bundle . What is important is the actual proposed variations of the Lease referred to in Schedule 10 set out on pages 45 and 46 of the bundle which we will refer to later in this statement of reasons.

11. The Tribunal then considered the provisions at the bottom of page 2 of the Lease which require the tenant to pay by way of additional rent one 26th part of the amount that the Landlord may expend in effecting or maintaining the insurance of the flats in the building. One needs to compare this with Clause 3(2) where before completion of the Lease the words "one 26th part" appear to have been deleted and the words "2.41 per centum" substituted for the further additional rent being paid by way of service charge. There does appear to be a manifest error as the fraction one 26th cannot be equated in any way to the other figures as referred to in the proposed variations. The Tribunal believes that the Landlord collects the insurance premium as part of or at the same time as the service charge. The Tribunal has looked at other leases on the estate and it would appear that they all require further and additional rent to

be paid for the insurance of the flats but none of the percentages or fractions equate to the new service charge proposed or the Applicant's final suggestion of percentages.

12. The Tribunal appreciates that this insurance rent is not part of the application for variation but it should not be ignored because this incorrect fraction is likely to substantially prejudice the Respondents.

13. The Tribunal then considered Schedule 10 on pages 45 and 46 of the bundle. Ignoring the amount of the proposed new service charge every one of the proposed amendments has a mistake in it. These are as follows:-

    (a) In clause 2 of the recitals it should be Warden's flat not Wardens' flats.
    (b) Clause 3(2) should refer throughout to the Association and not Springboard Two. The existing per centum is 2.41 in words not 3.10 percent in figures. The words "including the Wardens flat" should be added and then shown as deleted.
    (c) Clause 6(1)(A)(iii) it is Warden's flat not wardens' flats.
    (d) The heading relating to clause 6(B) is wrong. It should be 6(1)(b).
    (e) Clause 6(5) the words "the main part of" should not be there.
    (f) Paragraph 3 of the Second Schedule is wrong and needs to repeat the wording in the Lease.

14. There are additional points noted by the Tribunal that have not been covered by the proposed variations. In Clause 3(7)(e) the words "and Warden accommodation" should be deleted. In Clause 9 the words "the Warden or others" should be deleted and the word "any" should be inserted in their place.

15. The Tribunal does not consider it to be reasonable in the circumstances for the variations to be effected with so many mistakes.

16. The Tribunal also considered the representations made by Mr J.A. Pearson. His main concern is that the service charge for each flat should be based on its size. He makes reference to calculations being done on a square footage or potential occupancy basis. The tribunal thinks these are not the only factors that might be considered when calculating service charge percentages. The Tribunal does not accept the percentages for service charges recommended by him as they do not accord with the wishes of the majority.

17. The Tribunal does not normally wish to reject applications where the majority of parties are in agreement but it does on this occasion as the variations would be likely substantially to prejudice one or more of the Respondents and for the reasons given it would not be reasonable in the circumstances for the proposed variations to be approved.

Judge D.T. ROBERTSON
Chair