9385.

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AH/LVT/2013/0003**
Property	:	**74 Auckland Road, Crystal Palace, London SE19 2DH**
Applicant	:	**74 Auckland Road Ltd**
Representative	:	**Mr Thorin Redwin**
Respondent	:	**(1) Jorge Garcia Rodriguez (Basement flat)** **(2) Stephen Brown & Rachel Rose Mylrea Brown (Flat 1b)**
Type of Application	:	**Lease Variation**
Tribunal Members	:	**Angus Andrew** **Mr N Martindale FRICS**
Date and venue of hearing	:	**23 October 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**5 November 2013**

DECISION

Decision

(1) We decline to vary the respondents' leases of their respective flats.

The application

(2) The applicant sought an order pursuant to section 37 of the Landlord and Tenant Act 1987 ("the Act") varying each of the respondents leases by increasing the Service Charge Proportion (as defined in the leases) from 10% to 16.67% or 1/6th.

(3) The relevant statutory provisions are set out in the appendix to this decision.

The background

(4) The property was originally a double fronted detached house that was converted into five flats: two on the ground floor, two on the first floor and one on the second floor. A previous freeholder sold four of the five flats. One of the first floor flats was sold in 1967. A ground floor flat was sold in 1986. The remaining first floor flat and the second floor flat were sold in 1988. It seems likely that leases were granted for terms of either 99 or 125 years although nothing hangs on that. Each lease required the lessee to pay by way of service charge 1/5th of all costs incurred by the lessor in maintaining and insuring the property. It was clearly the intention that each flat owner would bear an equal share of the cost.

(3) In 2005 Jorge Garcia Rodriguez and his son Jorge Lorenzo Rodriguez purchased the freehold reversion in the property. In this decision we refer to them as Garcia Rodriguez and Lorenzo Rodriguez, to avoid confusion. They acquired vacant possession of the undeveloped basement and flat 1B on the ground floor that had not previously been sold. They sold flat 1B on the open market in February 2006 to Ms L J Matthews. That flat is now owned by Mr & Mrs Brown.

(4) They then developed the basement to form a separate self contained flat and in July 2006 they granted a lease of the basement flat to Garcia Rodriquez, who remains the lessee of that flat. Both leases were granted for terms of 125 years and each required the lessee to pay a Service Charge Proportion of 10%. Thus the total Service Charges Proportions equalled 100% so that the lessor would obtain a complete recovery of its costs.

(5) Having granted leases of the two vacant flats Lorenzo Rodriquez and Garcia Rodriquez sold the freehold reversion to what they described as a *"freehold company"*. In due course that company sold the freehold reversion to 74 Auckland Road Ltd that is under the control of the other four lessees. Ms S E Williams and Mr A G Williams are the lessees of

flat 1a on the ground floor: Ms J H O'Neil is the lessee of flat 2 on the first floor: Ms T Leignel is the lessee of flat 3 of the first floor and Mr T R Redwin is the lessee of flat 4 on the second floor. Having acquired the freehold reversion through 74 Auckland Road Ltd these four lessees then varied the terms of their existing lessees. In so far as relevant to this case they varied their lessees by extending the terms to 999 years and by reducing the Service Charge Proportion in each lease from 1/5th to 1/6th or 16.67%.

(6) Having varied their leases the four lessees, through 74 Auckland Road Ltd, then sought to persuade the respondents to vary their leases by increasing the Service Charge Proportions from 10% to 16.67% or 1/6th. They then demanded service charges based on a Service Charge Proportion of 16.67% although the respondents' leases had not been varied. At the hearing Lorenzo Rodriquez and Garcia Rodriquez told us that the other lessees informed them that they were legally obliged to pay the increased service charges although there was clearly no basis for that assertion.

(7) Having apparently failed to persuade the respondents to voluntarily increase their Service Charge Proportions the other four lessees through 74 Auckland Road Ltd made their application to the tribunal under section 37 of the Act.

(8) On 22 August 2013 the tribunal issued directions with concluded by listing the application for hearing at 1.30pm on 23 October 2013. The applicant and Mr & Mrs Brown neither appeared at the hearing nor were they represented. However Garcia Rodriguez did appear and he was assisted by his son Lorenzo Rodriguez.

Reasons for the tribunal's decision

(9) The applicant's statement of case included in the hearing bundle was brief. It requested us to increase the respondents' Service Charge Proportions *"so that each flat-owner becomes responsible for paying an equal share of these charges"*. It also requested us to *"make a ruling on which parties are liable for the cost of amending each lease to reflect the new service charge percentage of just over 16% (or 1/6th)"*.

(10) The applicant having failed to attend the hearing we would have been entitled to strike out its case. Nevertheless we deal with the application on its merits.

(11) Where as in this case there are less then nine leases an application can only be made to the tribunal if *"all but one of the parties concerned consent to it"*. Thus the application cannot succeed unless either Mr & Mrs Brown or Garcia Rodriquez consent to it. It is for the applicant to demonstrate that consent has been given.

(12) Mr & Mrs Brown did not attend the hearing and their written consent to the application was not included in the hearing bundle submitted by the applicant. Garcia Rodriquez who did attend declined to give his consent to the application. Consequently the application must fail because two of the parties have not expressly consented to it.

(13) Even had the consent of one of the respondents been forthcoming we would still not have varied the lessees in the face of an objection from the other and in the absence of an offer of compensation from the applicant.

(14) Both respondents had taken leases that obliged them to pay 10% of the service charge costs and Mr & Mrs Brown in particular had paid the market price for their flat. The obligation to pay a substantially increased service charge would of itself prejudice the respondents and might reduce the market value of their flats. Certainly it would be unreasonable to impose that increased obligation without a monetary payment to compensate the respondents for the increased service charges and no proposals for compensation were put before us.

(15) Equally we are not satisfied that it would be reasonable in the circumstances of this case to vary the respondents' leases as requested. The applicant had unilaterally varied the leases of its own members and then sought to impose a similar variation on the respondents. Not only that but it had stipulated that the respondents should pay the cost incurred in varying their own leases to their detriment. The applicant had in short had acted oppressively. As Garcia Rodriquez explained at the hearing he was not opposed in principle to the proposed variation but he considered that it should be achieved by a process of negotiation with a minimum requirement that the applicant should pay his costs and possibly agree to an extension of the term of his lease. That was not an unreasonable bargaining position and contrasted sharply with the behaviour of the applicant.

(16) Consequently and for each and all of the above reasons we decline to order the variation sought by the applicant.

(17) We appreciate that the applicant cannot now obtain a complete recovery of its costs. However by unilaterally varying the leases of its own members it is responsible for the position in which it finds itself. It has the option of either recovering any shortfall from its members or of obtaining the respondents' agreement to the proposed variation.

(18) The applicant's failure to attend the hearing might well justify an adverse cost order. Nevertheless Garcia Rodriquez said that his costs to date had been small and he did not seek an order for costs.

Name: Angus Andrew **Date:** 5 November 2013

Sections 37 & 38 of the Landlord and Tenant Act 1987

37 Application by majority of parties for variation of leases.

(1) Subject to the following provisions of this section, an application may be made to the court in respect of two or more leases for an order varying each of those leases in such manner as is specified in the application.

(2) Those leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats which are in the same building, nor leases which are drafted in identical terms.

(3) The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.

(4) An application under this section in respect of any leases may be made by the landlord or any of the tenants under the leases.

(5) Any such application shall only be made if—

(a) in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; or

(b) in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent. of the total number of the parties concerned and at least 75 per cent. of that number consent to it.

(6) For the purposes of subsection (5)—

(a) in the case of each lease in respect of which the application is made, the tenant under the lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of the parties concerned); and

(b) the landlord shall also constitute one of the parties concerned.

38 Orders by the court varying leases.

(1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the court, the court may (subject to subsections (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order.

(2) If—

(a) an application under section 36 was made in connection with that application, and

(b) the grounds set out in subsection (3) of that section are established to the satisfaction of the court with respect to the leases specified in the application under section 36,

the court may (subject to subsections (6) and (7)) also make an order varying each of those leases in such manner as is specified in the order.

(3) If, on an application under section 37, the grounds set out in subsection (3) of that section are established to the satisfaction of the court with respect to the leases specified in the application, the court may (subject to subsections (6) and (7)) make an order varying each of those leases in such manner as is specified in the order.

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the court thinks fit.

(5) If the grounds referred to in subsection (2) or (3) (as the case may be) are established to the satisfaction of the court with respect to some but not all of the leases specified in the application, the power to make an order under that subsection shall extend to those leases only.

(6) The court shall not make an order under this section effecting any variation of a lease if it appears to the court—

(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 subsection (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.

(7) The court shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease—

(a) which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or

(b) which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or

(c) which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.

(8) The court may, instead of making an order varying a lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified; and accordingly any reference in this Part (however expressed) to an order which effects any variation of a lease or to any variation effected by an order shall include a reference to an order which directs the parties to a lease to effect a variation of it or (as the case may be) a reference to any variation effected in pursuance of such an order.

(9) The court may by order direct that a memorandum of any variation of a lease effected by an order under this section shall be endorsed on such documents as are specified in the order.

(10) Where the court makes an order under this section varying a lease the court may, if it thinks fit, make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the court considers he is likely to suffer as a result of the variation.