12554

First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UJ/LVT/2017/0001**
Properties	:	**19-54 Aylets Field,** **Southern Way,** **Harlow,** **CM18 7LW**
Applicant **Represented by**	:	**Moat Homes Ltd** **Dean Robson, solicitor advocate** **(Clarke Willmott)**
Respondents **Represented by**	:	**the long leaseholders of the 36 long leases set out in the Application** **(some were self representing – see below)**
Date of Application	:	**20th June 2017**
Type of Application	:	**Application to vary leases (Part IV Landlord and Tenant Act 1987 as Amended ("the 1987 Act"))**
The Tribunal	:	**Judge Reeder** **Judge Edgington**
Date and venue of hearing	:	**7th November 2017, The Court House, Harlow, Essex CM20 1HH**

DECISION

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1. The Applicant to vary the leases is refused.

REASONS

Introduction

2. This is an application to vary all the leases for 34 flats and 2 maisonettes (numbers 31 and 32) on this estate of residential properties. It became clear during the hearing that Nos 1-18 Aylets Field are described as houses with a mixture of outright freehold and shared ownership tenure. No application is made in relation to those properties and the applicant was unable to confirm the 'estate' service charge provisions relevant to those properties. The application is made in relation to the leases of the properties in the three blocks 19-32, 33-50 and 51-54 Aylets Field. It became clear during the hearing that Nos 31 and 32 (in the block 19-32) are maisonettes with their own individual entrances and no communal parts. The other relevant properties are all flats.

3. The difficulties concern the ability of the Applicant to recover all the service charges incurred and the administrative problems caused by the fact that the end of the accounting year is not the same as other developments owned by the Applicant.

4. In relation to the 'end of the accounting year' issue the Tribunal raised the issue of jurisdiction. The Applicant sought a variation pursuant to section 35(2)(e)of the *Landlord & Tenant Act 1987*. The statutory power was analysed during the hearing and the Applicant conceded that the Tribunal had no jurisdiction to grant the variation sought to change the account year end in these leases to be the same as other developments owned by the Applicant.

5. The main problem was in respect of the service charges. The regime in the leases is for the leaseholders to pay a percentage of the cost of repair, maintenance and upkeep of the estate including the building in which their flat/maisonette is situated. The problem is that when the leases were originally drafted, the definition of 'the building' in some leases was wrong and the percentage of the estate costs was also wrong in many of the leases i.e. divided by 34.

6. The variations sought were (a) to redefine the definition of 'the building' in the leases for all the properties to correctly describe the blocks in which they are situated and (b) to vary the estate costs proportion to 'a fair and reasonable proportion'.

7. A directions order was issued on the 20th July 2017 timetabling the case to a final determination. It indicated that the case could be determined on a consideration of the papers and any written submissions and it intended to do so on or after the 15th September 2017 unless anyone asked for an oral hearing. Four of the leaseholders did ask for an oral hearing, as was their right. A hearing bundle of some 381 pages was lodged.

The Inspection

8. The members of the Tribunal decided that as the variations sought were rather

technical ones relating the wording of the leases rather than any practical matter concerning the estate itself, they would not have a pre-hearing inspection. If an inspection had been thought necessary, it could have been undertaken after the hearing. In the event it was not necessary.

The Leases

9. The Tribunal was shown copies of relevant sample leases exemplifying the problems. Such leases are shared ownership leases all for terms of 125 years from the 29th September 1991. There are the usual covenants on the part of the landlord to maintain the grounds of the estate and the common parts and then to maintain the structure of the various buildings and to insure them and it was clearly intended that the long leaseholders would pay a proportion of all these costs so that 100% of them were recovered.

10. The statement of Karen Embleton from the Applicant, supporting the application, exemplifies the problems. At page 219 in the bundle she gives the example of flat 26 which defines 'the building' as numbers 26-30 on one page and then "*correctly defines it as 19 to 32 on another page of the particulars*". A request is then made to redefine 'the building' as 19 to 32. Reference is then made to flat 27 which has the same problem.

11. She then states that the 'Specified Proportion' in some of the leases is 1/34, in some it is 1/36 and in some the figure has been omitted. She asks that the Specified Proportion be redefined as "*a fair and reasonable proportion*" so that the Applicant can then ask the leaseholders to pay a proportion of the costs of the building in which they are plus a proportion of the estate costs.

The Law

12. Section 35 of the *Landlord and Tenant Act 1987* ("the 1987 Act") permits any party to a long lease of a flat to apply to this Tribunal for an order varying such lease if it "*fails to make satisfactory provision with regard to one or more of the following matters*". There then follows a list of matters such as repair or maintenance of the building, insurance, repair or maintenance of 'installations' or services and the ability to recover all the service charges from the tenants. In particular section 35(4) says that where the aggregate amount of service charge recoverable by a landlord would be more or less than the whole of such expenditure, the Tribunal could rectify this.

The Hearing

13. The applicant was represented by Dean Robson, solicitor. He had the assistance of Ms Embleton, neighbourhood operations manager for Moat Homes. Moat Homes are a registered social housing provider and the free hold owners of 19-51 Aylets Field.

14. The applicant's argument was that the 'discrepancies' (accepted to be mistakes on the part of the landlord) in the leases meant that the lessee service charge contributions due under the leases as presently drafted did not and could not

meet the actual costs incurred in complying with the landlord covenants.

15. The hearing was attended by Holly Ryder (lessee of No 47) and her Father and McKenzie friend, Jane Rance (lessee of No 45), the parents of Gary Howard (lessee of No 44) and Robin Williams (lessee of No 31).

16. The leaseholders responses distilled down to two arguments. The first and most forcefully put being that if there had been a mistake in the preparation of the leases, that was the landlord's fault. It was argued that this is large scale landlord who can and should meet any shortfall themselves. It was argued that the proposed variation would substantially increase the service charge contribution which some leaseholders had to pay, and that they had not planned or budgeted for an increase and could not afford it. Put simply, it was said to be simply unfair and inequitable to expect the lessees to pay increased contributions when their respective leases expressly set out the service charges due from them.

17. The second argument was that the proposed variation took no account of the fact that Nos 31 and 32 are maisonettes with their own entrances and no access to the common parts of the building of which they form part.

18. During the hearing the respondents also argued that the proportion of estate costs is unfairly divided between the houses and flats because the flats pay a higher proportion.

19. The tribunal was provided with a 381 page hearing bundle. This included a witness statement from Ms Embleton for the Applicant, examples of the relevant leases, letters from some respondents detailing their objections to the proposed variation, and letters from some respondents' lenders in relation to administration fees they may propose to charge in the event of any lease variation.

20. The statement by Ms. Embleton describes the present position as "*some leaseholders are escaping from paying their fair share of service charge because of the errors in their leases*". This is an unfortunate analysis of the situation. At present the leaseholders are not 'escaping' from any such liability. They have a contract with the Applicant which they are not disputing. It is the Applicant who caused this problem by the drafting of the 1991 leases, and has perpetuated this problem given that no application was made to this Tribunal until June 2017. The Applicant's description of the present problem is hardly designed to help find a solution.

Discussion

21. The most significant wording in section 35 of the 1987 Act is that there is a requirement that the lease "*fails to make satisfactory provision*". The question for determination therefore appears to this Tribunal to start with a consideration of the position in 1991 when the leases started which prevails to date.

22. The present position is that the leases of the relevant properties differ in defining the relevant contribution due. Some specify 1/34th, some 1/26th and some leave

a blank space. We are told that individual service charge demands between 1991 and 2008 were levied based on the number of properties in the lessee's individual block. We are told that some lessees challenged this apportionment in or about 2008 and that the Applicant is in the process of making retrospective repayments to reflect the actual lease terms.

23. Despite the assertions made on behalf of some leaseholders, this Tribunal considers that the service charge regime clearly fails to make satisfactory provision. The provisions of section 35 of the 1987 Act are there to enable just this sort of error to be rectified.

24. The Tribunal's jurisdiction is to "vary the lease in such manner as is specified in the application". The application as issued and before the Tribunal seeks a variation such that the 'specified proportion' is varied from 1/34th, 1/36th or blank as relevant to "*a fair and reasonable proportion*" so that the Applicant can then ask the leaseholders to pay a proportion of the costs of the building in which they are resident plus a proportion of the estate costs to be determined by the Applicant.

25. On the evidence before the Tribunal that proposed variation is ill conceived. It's effect would be to resolve the Applicant's problems by putting every apportionment decision at the discretion of the Applicant. However, with the level of mistrust between the Applicant and some of the leaseholders, leaving the apportionment of service charges at the discretion of the Applicant is just going to create further mistrust and uncertainty, particularly as there are problems 'brewing' over the proportion of estate costs being charged to the flats.

26. This was acknowledged to a degree by the Applicant during the hearing who proposed that a more appropriate variation may be to 1/14th (in respect of Nos 19-32), 1/18th (in respect of Nos 33-50) and 1/4 (in respect of Nos 51-54). However, that is not the variation specified in the application. Further, given the issues raised, and the shortcomings in the available information identified, in the hearing it is far from clear that even this formulation would make satisfactory provision for recovering the service charge costs. In addition, as a matter of procedural and substantive fairness the lessees are entitled to know precisely the variation sought and the grounds relied upon for that formulation.

27. In formulating a proposed variation the Applicant may wish to consider the service charge regimes for the block of flats not included in this application and/or the remainder of the estate including the houses, what proportions are being paid by others, and why 1/36th is being used as an estate charge for these properties when there appear to be other properties contributing towards the total costs of the estate? Ms. Embleton's statement gave none of this information to this Tribunal. The Applicant may also wish to consider the effect of Nos 31 and 32 being maisonettes and not flats. Section 35 variations are limited to flats. Section 60(1) of the 1987 Act defines a flat as being "*divided horizontally from some other part of that building*". It was made clear at the hearing that 31 and 32 are only divided vertically from another part of a building.

28. In simple terms, one cannot replace unsatisfactory covenants with other unsatisfactory covenants.

Conclusions

29. The application to vary the leases is refused. The Tribunal has no jurisdiction to deal with Nos 31 and 32 as they are not flats. Section 35 does not enable a variation dealing with accounting periods and based on the evidence placed before the Tribunal, the other variations sought will not create a satisfactory regime for the collection of service charges.

The Future

30. Despite the assertions of the leaseholders who attended the hearing, this problem must be sorted out so that the landlord Applicant can be reimbursed the total cost of services provided. The protection for leaseholders in the *Landlord and Tenant Act 1985* which states that service charges must be reasonable and be reasonably incurred applies equally to landlords. If they cannot be paid for the services they supply, how is this 'reasonable'?

31. The Tribunal does not know how the service charge provisions in the other block of flats are set out. However, looking at these 3 blocks in isolation, one does wonder whether it is actually fair to separate the buildings. As a simple example, the cost of replacing a roof in one block may be much more expensive to each leaseholder than in another block. Many of these estates share all costs on an equal basis.

32. Nevertheless, if the proposed regime is preferred, then the amendments should show the actual and correct proportions for both the building costs and the estate costs.

33. The leaseholders would be well advised to agree terms and to all contribute to the cost of a solicitor to represent them. The Applicant should agree to pay any costs involved as this whole problem has been caused by the landlord's failure to draw the leases properly. At the hearing they did concede that they should pay any mortgagees' costs. Numbers 31 and 32 would also be well advised to sort this out as far as their leases are concerned.

34. What the leaseholders must understand is that if these problems are not resolved, they are more than likely to have problems when they come to sell their properties.

Delay in providing Decision

35. The Tribunal offers its apologies for the delay in providing this written Decision which has resulted from a period of illness including in-patient treatment suffered by Judge Reeder.

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Judge Reeder
15 December 2017

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person