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**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **CAM/OOME/LVT/2013/0004**

Property : **Flats 1-5, South Lodge, London Road,
Ascot, Berkshire, SL5 7EG**

Applicants : **South Lodge Management
Company (Ascot) Limited
("the Company")
(Flat 1) Mr and Mrs. G. Jenkins
(Flat 2) Mr. S. Renfrew
(Flat 4) Mr. & Mrs. J. Lane
(Flat 5) Mr. G. Boyle & Ms. A. Nolan**

Respondents : **(Flat 3) Mr. & Mrs. M. Cowley**

Date of Application : **22nd August 2013**

Type of Application : **Application to vary the terms of the
leases, pursuant to section 37 of the
Landlord and Tenant Act 1987 ("the
1987 Act")**

**Date of (Paper)
Hearing** : **29th November 2013**

Tribunal : **Judge J. Oxlade
J. Sims**

DECISION

For the following reasons, the Tribunal¹:

- (i) varies the leases of flats 1-5, South Lodge, London Road, Ascot, Berkshire, by deleting the words "During the last seven years of the term" in clauses 5.7 of the leases,
- (ii) directs that the Applicants do notify the Land Registry, in order to annex the decision to the freehold and leasehold titles.

¹ The Decision recorded in this document was made by the First-tier Tribunal (Property Chamber) rather than the leasehold valuation tribunal, to whom the application had been made, because by virtue of The Transfer of Tribunals Function Order (2013 No1036) ('the Transfer Order') the functions of leasehold valuation tribunals were, on 1st July 2013, transferred to the First-tier Tribunal (Property Chamber). In this decision the expression 'the Tribunal' means the First-tier Tribunal (Property Chamber).

REASONS

Background

1. The Applicants are (i) the freehold company, established to acquire the freehold and manage the premises, and (ii) four out of the five lessees. The premises consist of a block of five flats, constructed in 2008/2009, which are subject to long leases of more than 900 years.
2. The leases provide that (i) during the last 7 years there shall be no assignment, under-letting or parting with possession of the property without the consent in writing of the landlord, such covenant not to be unreasonably withheld, and (ii) throughout the term there shall be no assignment, under-letting or parting with possession of part of the property.
3. The Applicants are concerned that the existing covenants do not adequately protect their rights enjoyment of the premises, prompted by the letting of flat 3.
4. Since 2011 flat 3 has been let through an agency, repeatedly on a short-term basis, with multiple occupants who rotate during the period of the tenancy, and which has given rise to problems relating to noise, raised security concerns, rubbish and parking problems, there has been a lack of co-operation, increased maintenance costs and general wear and tear. The problems are exacerbated by noise transmission in the building, which is poor for a newly built dwelling. Though this can be mitigated by co-operative use of the building, as the tenants are short-term, they have little understanding of the problems or desire to co-operate.
4. The Applicant lessees have all agreed to a variation of all five leases, with opposition from the lessee of flat 3. Accordingly, 4/5ths of the lessees are in agreement.
5. The proposed variations would be the insertion of the following clauses:

“5.8A In the case of an under-letting of the Property

5.8A.1 Not to underlet the Property for a term of less than six months.

5.8A.2 That the property shall be occupied as a single household as defined by section 258 of the Housing Act 2004 and the sections 3 and 4 of the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006 and clause 2.10 of this lease shall not apply to this clause 5.8A.2.

5.8A.3 In the case of an underletting to a company corporation or other non-natural person that the underlease shall specify the name of the

natural person or persons who may occupy the Property (“the occupier”) and for the duration of the underletting only the Occupier may occupy the Property and for the avoidance of doubt clauses 5.8A.1 and 5.8A.2 hereof shall apply to such undertaking”.

6. An applicant was made to the Tribunal for variation, pursuant to section 37 of the Landlord and Tenant Act 1987, which application is opposed by the lessee of flat 3.
7. In accordance with Directions made on 23rd September 2013 the parties have filed a bundle of documents in time for the determination on the papers by the Tribunal on 29th November 2013, which we have read and carefully considered. The bundle includes a copy of a sample lease, witness statements from the lessees of each flat, and a copy of case law relied on by the Applicants.

Relevant Law

8. The material parts of sections 37 and 38 of the 1987 Act, provide as follows:

Section 37

“s37(1) Subject to the following provisions of this section, an application may be made to a leasehold valuation tribunal 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, not 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 consent to it; ...

Section 38

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

(6) A Tribunal shall not make an Order under this section effecting any variation in 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 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.

(10) Where a Tribunal makes an order under this section varying a lease the Tribunal 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 Tribunal considers he is likely to suffer as a result of the variation”.

9. Section 258 of the Housing Act 2004 (“the 2004 Act”) provides that:

“(1) This section sets out when persons are to be regarded as not forming a single household for the purposes of section 254.

(2) Persons are to be regarded as not forming a single household unless –

(a) they are all members of the same family, or

(b) their circumstances are circumstances of a description specified for the purpose of this section in regulations made by the appropriate national authority.

(3) For the purposes of section (2)(a) a person is a member of the same family as another person if –

(a) those persons are married to each other or live together as husband and wife (or in an equivalent relationship in the case of persons of the same sex)

(b) one of them is the relative of another; or

(c) one of them is, or is a relative of, one member of a couple and the other is a relative of the other member of the couple.

10. Paragraphs 3 and 4 of the Licensing and Management of Houses in Multiple occupation and other houses (Miscellaneous Provisions) (England) Regulations 2006 make provision for persons employed as domestic workers and carers, to be regarded as members of a single household for the purposes of section 254 of the 2004 Act.

The Applicants’ case

Flat 1

11. The Applicants rely on various witness statements made by the lessees.

12. Lindsey and Gareth Jenkins of flat 1, bought their ground floor flat as an investment, and have since 2009 let it continuously on tenancies

within a minimum term of 6-months. Their tenants have, since late 2012 had cause to complain on two occasions about noise and disturbance from tenants at flat 3, which is located directly above on the first floor. Their opinion is that letting to individuals and families, leads to more respectful and less boisterous tenants than where flats are let on a flat-sharing basis.

Flat 2

13. Scott Renfrew of flat 2, owner and occupant of a ground floor flat said that he supported the application in the hope of a return to the peace and quiet which existed prior to the middle of 2012.

Flat 4

14. Elaine and Joseph Lane of flat 4, occupy their flat part-time for 3-4 nights out of 10. They said that since late 2011 flat 3 has been let by Finchlea Estates who, according to their literature, provide "properties with minimum rental periods of 7 nights as an alternative to hotel accommodation". Since being let by Finchlea Estates there has been a regular turnover of short term tenants occupying flat 3. Matters came to a head in the summer of 2012 when a group of security guards employed in the Olympics were in occupation. The men rotated frequently, came and went at all hours, were noisy, took other residents' parking bays, left rubbish for other residents to deal with, and generally had no concern for others. They had tried to deal with these problems by approaching the lessees of flat 3, without success. Their position is that the type of user on a short term and high cost basis does not expect to and does not take into account the community around them.
15. However, prior to an AGM called to vote on the subject of minimum lettings of 6 months, agreement was reached as to a variation of the leases, and so the AGM was cancelled and Solicitors were instructed to prepare the necessary variations. The lessees of flat 3, who live in Australia, did not return the leases and so an EGM was called. The motion was passed with 4 votes, the lessees of flat 3 not having voted in time; their proxy in favour was received too late to count. However, the lessees of flat 3 then became concerned about the terms of it, and negotiations took place; eventually unanimous agreement was reached that the minimum let would be 6 months, and if let to companies then there was to be no rotation of employees. Again Solicitors were instructed, but the wording raised questions by the lessees of flat 3, as to flat-sharers. These prevarications cost time and money. So a final decision was taken and an application made.
16. The lessees of flat 4 did not accept that the estimated income of company lets verses assured shorthold tenancies would greatly differ – as asserted by the lessees of flat 3 - once all costs and void periods were factored in. Neither did they accept that the availability or otherwise of

the flat for the use of lessees of flat 3 was a material consideration, as they had not used it in the past year.

Flat 5

17. The lessees of flat 5 Gerald Boyle and Anne Nolan are owner occupiers, and live on the top floor, half of which is located over flat 3. They particularise their experiences with occupants from 16th October 2011 onwards. These can be characterised as short visits of usually 5-10 days, some with a rotation of occupants during the period of occupation, and with noise problems: tv and music on loud and late, doors banging early, overhearing sexual activity, loud screaming and shouting.
18. The lessees acknowledge that the sound insulation is not that good in the building, and with long-term occupants, a conversation can be had and accommodation reached. With short term tenants who expect to treat the place like an Hotel, they are unlikely to have as high a regard for the others in the community; there is no time to build a rapport, inform, and achieve an understanding.
19. The occupants think that the flat will be serviced, and so do not always put out the rubbish, leading on one occasion to the flat smelling when food was left in bins during a hot period.
20. The lessees of flat 5 consider that their quality of life is affected, as well as incurring additional costs in the development due to inconsiderate behaviour.

The Respondents' Case

21. Mr and Mrs. Coley the lessees of flat 3 lived in the flat until re-locating to Australia in 2011. They now let it on a short-term basis through Finchela Estates, who are well-respected agents. They charge high rents which mean that good quality and respectable tenants occupy them. The flat is ideally located for this type of arrangement, and in an area where this is not uncommon. The lessees like to have the flexibility of short-term lets in the event that they may wish to use the flat as a base on visits to the UK.
22. They consider that the application is made without being suitably supported by facts to show the nature, gravity or frequency of these incidents. Whilst there is an acknowledgment that there have been a few problems, these have been minor and infrequent.
23. The flat has been let on 8 occasions in the past 48 months, 6 to corporate clients, three to the same corporate client. There was a small amount of email traffic about noise, which on one occasion was caused when their 18 year old daughter was having a party. The costs of increased maintenance and wear and tear is unsubstantiated, and illogical if it is occupied for so little time and empty the rest.

24. The lessees of flat 3 consider that the factual background or need for a variation has not been made out, and that to do so would cause substantial prejudice, as follows:
- (i) the lessees have invested several thousand pounds in equipping the flats to the high standards required by those who are paying high rents of just under £1000 per week,
 - (ii) the letting arrangements are common in the area, and a change may affect the sale value and would affect the income levels, as well as affecting the flexibility of part-time investment/part-time user by the lessees of 4-6 weeks per year,
 - (iii) the leases were recently drawn, and all bought with the benefit of legal advice, and subject to mortgages, whose interests could be adversely affected by additional terms,
 - (iv) the lessees had instructed their agents, who have a good reputation, to pay particular attention to the terms of letting; this is a more appropriate way of resolution than the imposition of new terms,
 - (v) the type of letting is not inherently bad, and does not inevitably lead to problems; the flat is empty at least 50% of the year and so the matter is balanced out over time,
 - (vi) all problems which have been brought to their attention have been attended to expeditiously and professionally,
 - (vii) a prohibition against flat-sharing would be unattractive to future buyers of the flat.
25. The lessees of flat 3 have now instructed their agents (i) not to let the flat for a minimum term of less than 6 months, (ii) not to allow rotations i.e. use of the flat by multiple tenants under one tenancy and (iii) not to allow flat sharing, save to named tenants.

Findings

26. There is no issue but that the Applicants have satisfied the threshold condition, set out in section 37(5)(a) of the 1987, namely that there are less than 9 leases, and all but one of the parties concerned consent to a variation.
27. Accordingly, the Tribunal has jurisdiction to consider exercising its discretion to make an Order for the variation sought, or to make an Order in different terms.
28. The Tribunal finds as a fact that there have been problems arising from short-term letting of flat 3 and the rotation of occupants. These problems have principally been noise-related, and which have been exacerbated by the fairly poor sound insulation in the building which is a small development, with flats in close proximity. The lessees of flat 3 are, by virtue of being in Australia, not on hand to see the problems or deal with them; they depend on Agents, who have not filed evidence in the case to respond to the points which have been particularised in the

witness statement of flat 5. The Tribunal finds that the witness statement made by the lessees of flat 5 is accurate and reliable. It provides sufficient detail for the Tribunal to be satisfied that there are genuine problems which have arisen. It is an obvious point, but tenants who have occupied the premises on the basis that it is equivalent to a Hotel will expect to have all the facilities that a Hotel offers, not expect that their user will give rise to significant noise problems, nor expect to invest in the relationships within the community there. It is a fair point made by the lessees of flat 5 that if there are longer term occupants, then there is time to inform, educate, negotiate, and try to achieve harmonious living conditions.

29. Accordingly, there are problems, and the question is what to do about them.
30. The lessees of flat 3 refer to substantial prejudice if the lease terms were varied, as asked. However, there is no evidence that they have approached their mortgage company for an opinion on the proposed changes, and there is no evidence filed by a mortgage broker on the point. The letter from Barclays at page 58 of the bundle is the best evidence of the mortgage markets view of the change. Further, the Tribunal notes that the lessees of flat 3 have now instructed their agents not to let the flat for a minimum term of less than 6 months. That undermines the point about suffering prejudice by not being able to be both investor and part-time occupant, as by letting on this basis, they would not have the flexibility which they have hitherto enjoyed. Finally, there is no accurate evidence from the letting agents as to the achievable rental income being significantly reduced by the letting as currently instructed as opposed to the basis of previous letting. This disposes of the points of substance made by the lessees as to prejudice but the Tribunal is not satisfied that the lessees of flat 3 have established the substantial prejudice of which they complain.
31. However, the Tribunal does have misgivings about the proposed variations. We bear in mind that any variation has to be made on the basis that it will subsist for the remaining term of the leases, which is over 900 years. The balance of owner/occupier to owner/investor has changed since 2009 and is likely to change again. The current occupants will come and go, and the type of user will ebb and flow over time as societal needs change. With that in mind the Tribunal considers that the proposed new terms of the lease, are too prescriptive and too limiting to be the subject of a variation for all time. For example, the Tribunal notes that the terms proposed at 5.8.A.3 would preclude the sharing of a flat by (say) two school friends in their 60's, who are widows and want to live together and who had been friends all their lives. They are likely to be good users of space. This variation would preclude that. We bear in mind that any variation which is too strict may affect the ability to sell the leases in future.

32. The more usual term of the lease which we consider meets the need for flexibility, is to Order a variation against sub-letting in general terms: to prohibit letting of the premises, save with the consent of the lessor, which consent is not to be unreasonably withheld. The terms of consent may vary over time, depending on the balance of owner occupation, and as the type of user changes over time. The type of concessions made by the lessees of flat 3 can be recorded as part of the consent; if the lessee is unable to offer suitable terms which are acceptable to the lessor, then the parties can make an application to the County Court for determination of the matter and the lessee will need to establish that the consent has been unreasonably withheld. A covenant in these terms is not unusual and should not have an adverse effect on sale of the leases.
33. This variation can be effected by deleting from the existing clause 5.7 of the leases the words "During the last seven years of the Term" so leaving the term of the lease, as follows:
- "Not to assign underlet or part with possession of the Property or any part of the Property without the consent in writing of the landlord such consent not to be unreasonably withheld".
34. The Tribunal has not been invited to consider making a compensation Order to meet loss or disadvantage arising from the proposed amendment, and in light of the above the Tribunal has not identified any basis on which to do so.

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J. Oxlade Judge of the First-tier Tribunal (Property Chamber)

9th December 2013