FIRST TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/41UD/LVL/2018/0001**
Property	**:**	**Flats 1-33 Mercian Court, Maxwell Close, Lichfield, Staffordshire, WS13 6TZ**
Applicant's Representative	**:** **:**	**Clarion Housing Association Limited** **In house**
Respondent	**:**	**The Leaseholders of Mercian Court**
Type of Application	**:**	**An Application for a variation of the terms of a lease pursuant to Section 37 of the Landlord and Tenant Act 1987.**
Date of determination (Conducted without a hearing)	**:**	**14 March 2019**
Tribunal Members	**:**	**Judge A McNamara** **Mr C Gell FRICS**
Date of Decision	**:**	**22 May 2019.**

DECISION

Background

1. This is the decision of the First-tier Tribunal (Property Chamber) (Residential Property) in respect of an Application pursuant to Section 37 of the Landlord and Tenant Act 1987 (the Act) in respect of a proposed variation to two styles of leases which regulate the Landlord/Tenant relationship in this case.

2. The Applicant is the freeholder of the property. Although the Applicant's '*Grounds of Application*' identify the Respondents as '*The Leaseholders of Mercian Court*', the reality is that there is only one representative Respondent, as above, and even she is conditionally in favour of the proposed variation. Of the remaining 31 leaseholders the Tribunal has seen evidence of only one outright objection to the variation (from number 17); three did not reply (the residents/leaseholders of flats 1, 2 and 26); and the majority (26 including the Applicant but excluding the Respondent) were in favour of the proposed variation.

3. The Application suggests that:

   3.1. 26 leaseholders voted in favour of the variation
   3.2. 3 Leaseholders voted against the variation
   3.3. 3 Leaseholders did not respond to the consultation.

4. The Respondent is the Deputy and/or personal representative of the resident of Flat 3 and acts on her behalf pursuant to an enduring power of attorney.

5. The Applicants are represented by their in-house representatives and the Respondent acts in person.

6. The Application was dated 30 October 2018. According to §2 of the Applicant's Grounds, Mercian Court is a leasehold scheme for the elderly of 32 flats arranged in 5 blocks. A 33rd flat was provided for the exclusive use of a resident caretaker. It is the Applicant's case that, since the retirement of the last title holder in 2010, it has been unable to secure the services of a resident caretaker. Accordingly, it seeks this variation.

7. Historically, the Applicant previously sought, amongst other things, such a variation but, in a decision dated 11 May 2017, the Tribunal concluded that the Applicant had failed to acquire the necessary 75% positive response of those polled to the proposed variation for the purposes of section 37 of the Act. Accordingly, the proposed variation was not sanctioned and that part of the application was unsuccessful.

8. Subsequent to the application, and pursuant to the Directions of this Tribunal, the Applicant filed a four page statement from Bilal Hussain, dated 11 January 2019; and

the Respondent filed a document entitled submissions under cover of a letter dated 17 January 2019 which was accompanied by three annexures.

9. The Respondent is in favour of the principle of variation but takes issue with the detail.

Inspection

10. The Tribunal inspected the Property on 14 March 2019 where they met representatives of the Applicant and the Respondent in person.

11. The question for the Tribunal is whether the variation is permissible in accordance with the statutory provision.

Directions

12. Following the inspection on 14 March 2019, the Tribunal issued directions in the following terms:

    1. *By 4.00 p.m. on [21 days from the date of this Order], the parties shall serve and file further statements and/or evidence in response to the following matters:*
    2. *In the event that the material paragraphs were merely excised:*
        - *How does the Applicant propose to provide an equivalent service to that which is currently provided for in the lease in the absence of a resident caretaker?*
        - *How is it proposed that that service will be paid for in the absence of a mechanism to recover it under the lease (please provide evidence in relation to the costs of the current scheme)?*
        - *In the event that the material paragraphs are excised, how does the Applicant propose to recover the costs of Jo's (or equivalent) attendance at the Property in the event that they were not covered by the broad heading of 'management fees' for the purposes of any service charge?*
    3. *What is the Applicant's view in respect of the amended version of the material paragraphs as advanced by the Respondent in the submissions dated 16 January 2019?*

13. The Tribunal received two responses by way of email; one from residents and the other from the Applicant dealing with the issues raised above under §2:

    13.1. Mr and Mrs Lee, of 9 Mercian Court, in an email dated xx/xx/xx, reminded the Tribunal that '*...in excess of 75% of the residents of Mercian Court when surveyed voted to stand by the status quo of almost 10 years and not reinstate a warden/caretaker*'.

13.2. Mr and Mrs Lee also expressed anxieties regarding the cost of the resident service.

13.3. In response to the questions in §2 above, the Applicant's case was set out in submissions sent under cover of a letter dated 4 April 2019 and is as follows:

13.3.1. *The applicant proposes to offer an equivalent service to that provided for in the lease by a resident caretaker by utilisation of the existing emergency call system. This will provide residents with 24-hour coverage. Operators will take the most appropriate action including (but not limited to) calling emergency services or the leaseholders nominated representative. In the course of this consultation, a number of residents agreed to the variation not only due to the prohibitive costs of a caretaker service but also because they were not in sufficient need of such a service.*

The Applicant believes that should residents require an enhanced service then this service should be obtained independently in order to avoid other leaseholders in the scheme, in effect, subsidising this service. The advantage in this is that the service can be better tailored to the needs of the resident. An example of the cost of this service and what can be provided is enclosed at Appendix 1

13.3.2. *As stated above no service other than the emergency pull cords would be offered. The applicant realizes that under the proposed changed, its ability to recover costs of this service will be lost and welcomes parts of the amended version submitted by the respondent below to be included in the variation.*

Currently, the only costs charged to residents in relation to the call system relate to a service contract with Tunstalls to repair reported faults with the system. For 2019/20, the cost of the Tunstall contract is £931.99 + VAT. A copy of this invoice is enclosed at Appendix 2.

13.3.3. *The purpose of the regular visits by a neighbourhood officer (currently Jo Bedworth) is to undertake inspections to ensure compliance with statutory regulations (e.g. Fire safety regulations), check on contractor workmanship (e.g. communal cleaners, window cleaners, etc.) and to inspect and report on repairs to the communal areas. This is in keeping with the RICS code of practice on Service Charge Residential Management Code. The applicant belives, therefore, that he attendance of a Property manager is covered under the heading of "management fee".*

13.3.4. *The respondent…suggested the following variation to the lease:*

> *2.4 The right to enjoy the relevant services as defined in clause 5.6*
>
> *5.6 To provide or contract an appropriate service provider for the performance of the following duties (unless prevented by circumstances beyond its control):*

a) Responding to the call system fitted in the property
b) Maintaining contact with the Tenant looking for signs of need and summoning medical or other aid as and when necessary and in performing this obligation the service provider will respect the independence and privacy of the tenant so far as is reasonably practicable.
c) Liaising with doctors, social workers, external organisations and relatives of the Lessee as and when the Landlord and/or the service provider deems it necessary
Para 2 in the schedule
a) The cost of the service provider and all other costs in connection with the provision of the service

In order to continue to provide services via an emergency call system, the applicant suggests the following amendment, as reasoned above:

2.4 The right to enjoy the services as defined in clause 5.6

5.6 To provide or contract an appropriate service provider for the performance of the following duties (unless prevented by circumstances beyond its control):
a) Responding to the emergency call system fitted in the property and taking appropriate action where necessary including but not limited to:
i) Liaising with emergency services and/or nominated representatives of the Lessee as and when the Landlord and/or the service provider deem it necessary
Para 2 in the schedule
a) All costs incurred by the landlord in the provision of an emergency call system including repairing maintaining replacing and improving any equipment used for the emergency call system located within the estate.

The Law

14. The relevant section of the Act of 1987 provides:

37. Application by majority of parties for variation of leases.
(1) *Subject to the following provisions of this section, an application may be made 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.

The leases

12. The two styles of long lease provide as follows in respect of the provision of a resident Landlord (the Applicant's Annex 3 to the Application sets out the distribution of the two styles of lease. It is also annexed to this judgment in redacted form removing the names of all leaseholders save for the Respondent):

'Lease A'

5.6 To employ a resident caretaker for the performance of the following duties (unless prevented by circumstances beyond its control):
(a) responding to the caretaker call system link between the Property and the caretaker's residence
(b) maintaining contact with the Tenant looking for signs of need and summoning medical aid as and when the resident

caretaker deems it necessary and in performing this obligation the resident caretaker will respect the independence and privacy of the Tenant so far as is reasonably practicable

(c) Liaising with doctors social workers external organisations and relatives of the Tenant as and when the Landlord and/or the caretaker deems it necessary

'Lease B'

2…

(4) The right to enjoy the services of the resident caretaker

5…

(6) [as above at (a)-(c)]

The Tribunal's Deliberations

13. Following the site visit, the Tribunal met and considered the written evidence presented by the Parties. No formal hearing took place at which evidence or oral submissions were heard. This decision is based upon the written representations, the site visit and the deliberations of the Tribunal.

14. The language of the leases is clear in that they both provided for a resident caretaker. It is uncontroversial that the services of such a caretaker would, formerly, have formed part of the service charge (indeed Lease A makes express provision at §2(a) of the Schedule).

15. The Respondent's objection to the proposed course of action reflects that the Property is one which provides 'sheltered' accommodation. That is, there is an elevated level of service in the form of the caretaker in the form of observation of mature residents in order to reflect the increased needs of such a 'population'.

16. In the original written submissions before the Tribunal from the Respondent, an alternative form of words was proposed for §5.6 of the two styles of lease so that the term is not merely excised. In terms, the Respondent wished to see the utilisation of a contractor as a substitute for the resident caretaker in order to preserve a comparable level of service to the residents without the need for the provider to reside at the Property.

17. It is the Applicant's case that since the last holder of the post of resident caretaker retired in 2010 a '*standard leasehold service*' has been provided consisting of a '*property manager/neighbourhood officer*' inspecting '*the development every four to six weeks*'. The Tribunal has heard no evidence in respect of the matter but it

seems logical to conclude that that level of inspection could not be considered comparable to the activity of a resident caretaker.

18. In the light of the directions, the position of the Applicant has now shifted so that there is a difference of construction of any revised term between its position and that of Mrs. Wall on behalf of her Mother.

19. That is, the Applicant no longer pursues mere excision of the original term but seeks an amended term which offers 'equivalency' by reliance on an emergency call system; rather than, as Mrs. Wall would prefer, the replacement of the resident caretaker by a contractor capable of maintaining observations upon the residents.

The decision

20. Given that the required percentages of residents polled have been met (both for and against) for the purposes of section 37(5)(b) of the Act of 1987; and that it is common ground that a resident caretaker is no longer desirable or practicable, the Tribunal is bound to accede to the Application to remove from the lease any reference to a resident caretaker.

21. The question thereafter is the proposed variation. For the reasons set out in the submissions made on behalf of the Applicant (and in part supported by the written evidence from Mr and Mrs Lee), the Tribunal concludes that the revised version proposed by the Applicant should be preferred. Namely:

2.4 The right to enjoy the services as defined in clause 5.6

5.6 To provide or contract an appropriate service provider for the performance of the following duties (unless prevented by circumstances beyond its control):
a) Responding to the emergency call system fitted in the property and taking appropriate action where necessary including but not limited to:
i) Liaising with emergency services and/or nominated representatives of the Lessee as and when the Landlord and/or the service provider deem it necessary
Para 2 in the schedule
a) All costs incurred by the landlord in the provision of an emergency call system including repairing maintaining replacing and improving any equipment used for the emergency call system located within the estate.

22. Accordingly, the Tribunal grants the Application albeit subject to the revised terms of the lease as set out above.

Appeal

23. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after the date this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

Judge A McNamara
C Gell FRICS