RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Residential Property TRIBUNAL SERVICE

Re: Lee Cliff Park Dawlish Devon EX7 0NE (the Property)

In the matter of an Application under section 84(3) of the Commonhold and Leasehold Reform Act 2002

(Right to Manage Application)

DECISION AND REASONS

Case Number:	CHI/18UH/LRM/2009/0001
Applicant::	Lee Cliff Park RTM Company Limited
Respondent::	Mrs Pamela Parmigiani
Appearances:	Mark Sefton (Barrister) and Simon McLoughlin Pupil Barrister for the Applicant
	Justin Bates (Barrister) for the Respondent
In Attendance:	Eileen O'Connor
	George Palmer Ford Simey Solicitors for the Applicant
	Martin Murray
	John Aspinwall
	Pamela Parmigiani - Respondent
Tribunal Members:	Cindy A. Rai LLB Solicitor (Chairman)
	Timothy Shobrook BSc FRICS; Chartered Surveyor (Valuer Member)
	Peter G. Groves Lay Member
Hearing Date:	22nd October 2009
Decision Date:	24th November 2009

Decision

The Tribunal determines that the Applicant has the right to manage Lee Cliff Park Warren Road Dawlish Warren Devon EX7 0NE together with the appurtenant property (as defined in Section 112(1) of the 2002 Act) being the property shown edged in red and edged in green on the Plan supplied by the Applicant to the Tribunal office with the letter from Eileen O'Connor dated 27th July 2009 (and a copy of which is annexed hereto).

Background

1. The Applicant served four claim notices each dated 9th April 2009, in accordance with Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 ("CLRA") to acquire the right to manage:-

    a. Lee Cliff Park Warren Road Dawlish Warren Devon EX7 0NE together with the appurtenant property (and defined in Section 112(1) of the 2002 Act) but excluding other property owned by the said Pamela Parmigiani

    b. Block A Lee Cliff Park Warren Road Dawlish Warren Devon EX7 0NE together with the appurtenant property (and defined in Section 112(1) of the 2002 Act) but excluding Blocks B and C and other property owned by the said Pamela Parmigiani

    c. Block B Lee Cliff Park Warren Road Dawlish Warren Devon EX7 0NE together with the appurtenant property (and defined in Section 112(1) of the 2002 Act) but excluding Blocks A and C and other property owned by the said Pamela Parmigiani

    d. Block C Lee Cliff Park Warren Road Dawlish Warren Devon EX7 0NE together with the appurtenant property (and defined in Section 112(1) of the 2002 Act) but excluding Blocks A and B and other property owned by the said Pamela Parmigiani

2. The Respondent's objections to the Applicant's claim are set out in four Counter Notices all dated 13th May 2009. It alleges that by reason of:-

    a. Section 72(1)(b) and section 112 of CLRA the building does not contain two or more *flats* held by qualifying tenants

    b. Section 72(1)(c) of CLRA the qualifying tenants do not hold at least two thirds of the number of *flats* in the building

    c. Schedule 6 paragraph 1 of CLRA that the premises are non-residential as they are not occupied, or intended to be occupied for residential premises

    on the 9th April 2009 the Applicant was not entitled to acquire the right to manage the premises specified in each of the four claim notices.

3. On the 3rd June 2009 the Applicant submitted an application to the Leasehold Valuation Tribunal ("LVT") to determine whether the Applicant is entitled to the Right to Manage.

4. Directions were issued by John Tarling on the 7th July 2009 ("the Directions") following which the parties having complied broadly with the directions a hearing took place on the 22nd October 2009, at Exeter Racecourse Kennford Exeter.

Hearing

5. At the hearing both parties were represented by barristers with Mark Sefton presenting the Applicant's case and Justin Bates the Respondent's case.

6. Mr Sefton outlined the background to the application to the LVT and stated that notwithstanding that four claim notices had been served it was accepted that it was only necessary to consider the principal notice which referred to Blocks A B and C and the communal grounds. In fact the extent of the premises was clarified following the issue of the Directions following which the Applicant acting through Mrs O'Connor, sent a letter dated 22nd July 2009 to the Tribunal office, attached to which was a plan ("the Plan"), showing the extent of the premises to which the application relates. No objection to this course was made by the Respondent and therefore in its decision the Tribunal considers only the principal notice and the Respondent's counter notice to that principal notice, both parties having agreed that the other three notices and counter notices are not relevant to the determination. Furthermore, and in response to questions from the Tribunal, Mr Bates confirmed that the Respondents accept that the Plan shows the extent of the premises to which any order made by the Tribunal would relate.

7. Mr Sefton explained that he considered that sub-paragraphs (a) and (b) of the counter notice were essentially the same but that paragraph (c) was different. The qualifying rules for an Applicant to serve a notice are set out in section 72 of CLRA. It is not disputed that all the lessees are "long lessees". The Respondent's first objection is that the lessees are not qualifying tenants of flats. The second is that even if the Applicants are qualifying tenants they do not hold at least two thirds of the number of flats in the building. He referred the Tribunal to Sections 72 and 112 of CLRA which are set out below.

8. In section 112 "flat" and "dwelling" are defined:-

"flat" means a separate set of premises (whether or not on the same floor)—

(a) which forms part of a building,

(b) which is constructed or adapted for use for the purposes of a dwelling, and

(c) either the whole or a material part of which lies above or below some other part of the building,

"dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling,

Section 72 sets out the "qualifying rules" which have to be satisfied in relation to an application under Chapter 1 "Right to Manage" of CLRA

S72 Premises to which Chapter applies

(1) This Chapter applies to premises if—

(a) they consist of a self-contained building or part of a building, with or without appurtenant property,

(b) they contain two or more flats held by qualifying tenants, and

(c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.

(2) A building is a self-contained building if it is structurally detached.

(3) A part of a building is a self-contained part of the building if—

(a) it constitutes a vertical division of the building,

(b) the structure of the building is such that it could be redeveloped independently of the rest of the building, and

(c) subsection (4) applies in relation to it.

(4) This subsection applies in relation to a part of a building if the relevant services provided for occupiers of it—

(a) are provided independently of the relevant services provided for occupiers of the rest of the building, or

(b) could be so provided without involving the carrying out of works likely to result in a significant interruption in the provision of any relevant services for occupiers of the rest of the building.

(5) Relevant services are services provided by means of pipes, cables or other fixed installations.

(6) Schedule 6 (premises excepted from this Chapter) has effect.

9. Mr Sefton's case is that the Applicants do not believe that it can be disputed that the premises, comprising the flats owned and occupied by the members of the Applicant, are premises to which this chapter of CLRA applies, so that thus the Applicants are "qualifying tenants". Mr Sefton suggested that the Respondent's objection is that the units are not dwellings. He however submits on the basis of section 112, that all flats are dwellings. He accepts that the interpretation of the two clauses (72 and 112), of CLRA results in a circularity of arguments.

10. The Tribunal accept that Mr Sefton's interpretation of the legislation is consistent with the Rent Assessment Committees understanding and counsel for the respondents submission in the Glendorgal case which is referred to later.

11. Mr Sefton believes that the Respondent's counter notices alleges that the 33 flats which comprise the Property are not "occupied" as dwellings. This is because "holiday flats are not dwellings. He said that, If the individual 33 units are not "flats" it does not work. If the 33 units are not "dwellings" it does not fall within the section 72 definition. Both parties accept that for a unit to be a "flat" it must also be a "dwelling". Therefore if a unit is not a dwelling it cannot be a flat. Mr Bates relies upon the decision in the case of King v. Udlaw. This was an appeal to the Lands Tribunal from a decision of the LVT on an application under section 27A of the Landlord and Tenant Act 1985 ("LTA 1985") to determine the applicants liability to pay service charges. The LVT determined that it had no jurisdiction to determine the application because the service charges being "questioned" were not payable by the tenant of a "dwelling" within the meaning in section 18(1) of the LTA 1985 Act

definition because the restriction requiring the property to be used for holiday lets prevented an interpretation that the bungalows were used as dwellings for the purpose of the LTA 1985. Paragraph 9 of the decision states that.....

"the model leases (of the relevant premises in that case) provided that the premises should not be used 'for any purpose other than that of a holiday bungalow' and the Planning Consent which was produced to us dated 5 May 1999 issued by the Borough of Restormel provided that the development permitted should be 'used for holiday purposes and shall not be used for permanent residential accommodation' "

In those circumstances the Leasehold Valuation Tribunal found, in that case, that the premises did not constitute dwellings under section 18 of the LTA 1985 and therefore it had no jurisdiction. The appellant's counsel, in that case, relied principally on planning cases; i.e. cases which were about the interpretation in planning law terms, of the use of a dwelling to support his arguments. He discussed the interpretation of these cases in which the courts had hitherto given weight to evidence of both:-

(a) Actual occupation - whether the building in question afforded the facilities required for a private day to day domestic existence and
(b) whether the building in question, in that case a bungalow had the facilities necessary for "day-to-day private domestic existence" to those who used it.

The respondents counsel (in that case), relied upon cases which suggested that an interpretation of dwelling implied the place where "one lives and makes one's home" and notions of centrality and settled occupancy which where "antithetical" to the concept of holiday accommodation. Interestingly, in his argument, he placed no weight upon the "planning cases" . The Lands Tribunal accepted the arguments of the respondents, and upheld the preceding LVT decision. George Bartlett QC president of the Lands Tribunal said:-

"There is no reason to give the word "dwelling", as it applies to sections 18 to 30, a meaning other than one it ordinarily bears in legislation giving protection to tenants. It imports a requirement that the dwelling should be occupied as a home and it therefore excludes from the operation of sections 18 to 30 these holiday bungalows because their use is restricted to providing holiday accommodation."

12. Mr Bates suggested to the Tribunal that there is no basis either in law or fact for distinguishing his arguments in this case from the decision in King v. Udlaw.

13. Just prior to the lunch adjournment the Tribunal provided each party with a copy of the Rent Assessment Committee decision in Glendorgal. Neither party had apparently previously seen this decision, or intended to consider or refer to it. Mr Bates said the he had been unable to find a case in which the King v. Udlaw decision had been subsequently considered. The Tribunal asked each party to consider the implications of the decision and advised that both counsel would have the opportunity to make further comment. It explained that it would particularly wish the Glendorgal decision to be considered since one of its members had been a member of the committee who had made the decision, and it was likely to take it into account so

must therefore offer the opportunity to the parties to consider it too. It was accepted that the decision was not easy to obtain except by making direct request to the Tribunal office.

The Glendorgal decision dated 4th July 2008 was a decision made by the Southern Rent Assessment Committee in the matter of a application for the recognition a Tenants Association under section 29 of the LTA 1985 made by the Glendorgal Tenants Association. It's relevance to this application is on account of the fact that the decision refers to the consideration of the definition of "dwelling" in section 38 of the LTA 1985. The Rent Assessment Committee made it clear that it was not obliged to follow the decision in King v. Udlaw. It accepted that King v. Udlaw may not have been correctly decided as another case albeit, a county court case, but a case which considered section 20 (LTA 1985) consultation requirements had not been considered. It concluded that it was not essential for a dwelling to be occupied as a home to bring it within the definition to which section 18 of the LTA 1985 would apply. In its decision it stated that:- "the Committee took the view that a distinction must be made between the legislation that is intended to give a tenant security of tenure under the Rent Acts and the Housing Act, from the entirely separate issue of the service charge regime established by the 1985 Act. In other words one must look at the context that is used in interpreting the word."

14. The third objection to the claim notices which the Respondent made was that the notice is defective as the premises are excluded because under schedule 6, paragraph 1 of CLRA they are not occupied or intended to be occupied for residential purposes.

15. Schedule 6 of CLRA was originally designed to exclude the legislation applying to buildings with commercial elements. That is why that section does not refer to dwellings. The schedule is set out below.

SCHEDULE 6

PREMISES EXCLUDED FROM RIGHT TO MANAGE

Buildings with substantial non-residential parts

Para 1

(1) This Chapter does not apply to premises falling within section 72(1) if the internal floor area—

(a) of any non-residential part, or

(b) (where there is more than one such part) of those parts (taken together),

exceeds 25 per cent. of the internal floor area of the premises (taken as a whole).

(2) A part of premises is a non-residential part if it is neither—

(a) occupied, or intended to be occupied, for residential purposes, nor

(b) comprised in any common parts of the premises.

(3) Where in the case of any such premises any part of the premises (such as, for example, a garage, parking space or storage area) is used, or intended for use, in conjunction with a particular dwelling contained in the premises (and accordingly is not comprised in any common parts of the premises), it shall be taken to be occupied, or intended to be occupied, for residential purposes.

(4) For the purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part shall be taken to extend (without interruption) throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part shall be disregarded.

16. Mr Sefton suggested that the for the Respondents to seek to relay upon a grounds suggesting that more than 25% of the floor area of the whole of the premises which collectively made up the 33 units demonstrates a misunderstanding of the meaning of "residential" in the context of CLRA.

17. The Tribunal is inclined to agree with Mr Sefton's arguments. It believes that this part of the act was intended to cover mixed use buildings where a mixture of uses might exclude applications under this part of CLRA. In any event, even if the Respondent had believed that it might properly rely upon Schedule 6, it had not sought to provide any evidence as to the extent, (in terms of area), of those parts of the premises which were not residential. Whilst counsel each argued it was the responsibility of the other party to have provided this evidence, it seemed to the Tribunal that this grounds was not substantiated, not least, on account of the fact that if the Tribunal accepted that a dwelling did not have to be occupied or intended to be occupied permanently and that all the flats within the premises might be interpreted as dwellings, the Respondent was not likely to be able to demonstrate that the premises could be excluded under schedule 6.

18. Given the acceptance by Mr Bates that no factual issues were materially disputed by either party with the consequence that witness statements had not been produced, it was agreed that it was unnecessary for Mrs O'Connor to confirm to the Tribunal her evidence as to the use of the 33 flats comprising the premises.

The Lease

19. Both parties referred in their arguments to an example lease. It is not disputed that the lease which appears at PP2 of the Respondents bundle is similar to all the other leases of the 33 units. The lease enables the use of the unit as a dwelling. Factually the majority of units are used as residences but some are used solely for holiday letting. The Tribunal were asked on several occasions to consider the wording in

paragraphs 11, 13 and 15.2 of the Fifth Schedule in relation to the "permitted use" and these paragraphs are set out below.

Extracts from Fifth Schedule of "example lease"

11. *The Lessee shall not do or permit or suffer to be done any act manner or thing in or in respect of the Demised Premises which contravenes the provisions of the Town and Country Planning Act 1971 (as amended) or any enactment amending or replacing it and shall keep the Lessor indemnified against all claims demands and liabilities in respect thereof*

13. *The Lessee shall not use or permit the Demised Premises or any part thereof to be used for any illegal or immoral purpose nor permit any trade or business to be carried on there nor any boarders or lodgers to be taken in but the Lessee shall use the Demised Premises for the purposes only of either holiday accommodation or for the Lessee's own occupation as a single private residence*

15.2 *The Lessee shall not underlet the Demised Premises for any purpose other than as holiday accommodation and no person other than the Lessee shall occupy the Demised Premises for any period or periods in aggregate of more than one month in any twelve month period*

Planning

20. Both parties put forward different arguments with regard to planning use. The facts are not disputed. The use of the flats within the premises was originally authorised in 1971 by means of a planning consent a copy of which was produced to the Tribunal at PP6 of the Respondents bundle, and which granted planning consent for "holiday flat units", with a condition that these should be occupied only for six months of the year. A later planning consent dated 21st October 1989 varied the occupation period but still referred the units as "flats for holiday purposes". That consent was granted subject to conditions and the reasons for the conditions is set out in the consent. Mr Sefton suggested, and was persuasive in his arguments, that under section 171(b) of the Town and Country Planning Act 1980 (the "TCPA"), if it can be successfully demonstrated that the units have been used continuously for four years as private residences the use is authorised. Whilst a certificate of lawful use can be applied for, that is all it is. The use is established upon expiry of the qualification period at which point it is legally *authorised.* The certificate merely confirms the actual authorised use.

21. In his response, Mr Bates contended that such arguments were not relevant to this application. It did not matter to him what the authorised planning use is now. That could not alter the fact that the restrictions in the lease remained binding on the Lessees. He did not accept Mr Sefton's arguments that the rules of construction could be used to interpret paragraphs 11 and 13 of the Fifth Schedule to the Lease, as enabling and indeed authorising permanent residential use of a unit by the owner, and or use for holiday letting, and that both were within the law in the case of those flats (the majority), which had qualified for certification as "lawfully used" for permanent residential purposes.

22. Mr Sefton asked that the tribunal to consider the following further questions when making its decision.

- What is a dwelling?
- Should the Tribunal follow the guidance set out in the Glendorgal case or not?
- Section 112 of CLRA contains the definition of dwelling that applies in relation to section 72 of the act. Does the Property comprise units intended to be occupied as separate dwellings?
- If the Tribunal accept that it does would it make a difference to its decision if the provisions of the leases permitted this?

He suggested that the user clause in paragraph 13 of the Fifth Schedule to the Lease enables the units to be used **either** for holiday letting **or** to be occupied by the owner. The units are always used for one of the two uses and therefore the flats must be within the definition of "dwelling" in CLRA. He asked the Tribunal to consider whether occupation would influence its decision. The Udlaw case does not suggest that occupation is relevant. He believes that this is because the Appellants could not rely upon that argument on account of the lease restriction in that case. In other words the facts were distinguishable. In this case the premises are occupied, and on the basis of the undisputed facts for the most part as permanent residences. Glendorgal, however, suggests that premises, such as these premises are "flats". Even if Glendorgal is wrong he considers that paragraph 13 of the Fifth Schedule to the Lease offers two options:-

Are the premises:-

- Intended to be occupied as permanent homes? or
- Actually occupied as permanent homes?

23. Mr Sefton suggested that the Tribunal should consider whose "intention" they needed to consider. It has been argued that notwithstanding that the Lease permits occupation as a residence, paragraph 11 of the Fifth Schedule requires compliance by the lessee with the planning legislation and therefore compliance with the requirements of planning legislation (including those imposed by the local planning authority pursuant to such legislation, effectively acts as a fetter on use. He does not accept that the acceptance of the usage by the local planning authority could effectively overrule an agreement between Landlord and Tenant.

24. The Tribunal is not persuaded that the planning status of the units is or could be helpful in enabling it to determine this application. It seems entirely contrary to the purpose of this chapter of CLRA that the ability of an applicant to make a successful application to it, should in any way be dependent upon the authorised planning use of a unit, particularly in the light of the argument from both parties, albeit with different emphasis, that the interpretation of the Lease was of paramount importance in influencing the Tribunal's determination of this application.

25. Following careful consideration the Tribunal agreed that the influence of the planning legislation, coupled with the actual legal position (from a planning perspective), as to what the "lawful use" of the units might be, was not relevant to its determination as to whether or not the units within the Property were flats and/or dwellings for the purpose of considering the application before it and the jurisdictional issues. To the extent that this was relevant to its reaching its decision, it agrees with Mr Bates that the factual use of the premises is not disputed by the Respondent and cannot be

influential in persuading it that any reliance could, or indeed should, be placed upon the legal use of premises for planning purposes. It seems entirely contradictory to the underlying purpose behind this chapter of CLRA that an application to the LVT should succeed or fail, based upon either planning policy and planning decisions taken and implemented by the local planning authority relying upon the interpretation of the legislation contained in the Town and Country Planning Act 1990 to determine whether or not the flats making up the premises were dwellings.

26. Mr Sefton suggested that the Tribunal could choose with regard to whether the premises were within CLRA and its jurisdiction by choosing between Glendorgal and Udlaw. He said that his client would still succeed and "win" its application. He asked the Tribunal to consider and determine three subsidiary matters.

The Consent Order

27. Mr Sefton explained that this order which was referred to in the Directions had wrongly been referred to as a Tomlin Order. He explained that the purpose of a Tomlin Order was to record an agreement between parties which enabled a settlement of the proceedings on the basis of a "stay" on terms which would always be set out in a schedule attached to the order and which the court does not have power to order. The order referred to in the Directions was an order made by the Torquay and Newton Abbot County Court dated 28th September 2007 by District Judge Arnold (the "Consent Order") which simply recorded a "declaration" in favour of Lee Cliff Management Company Limited that the participating tenants were entitled to exercise the right to collective enfranchisement and that the Notice dated 29th April 2006 is valid and deemed to be effective and is deemed to be reserved at the date of "this order". That court had power to make an order that the application for enfranchisement was valid and it did this by way of the declaration. The qualification requirements for collective enfranchisement under the Leasehold Reform and Urban Development Act 1993 (LRUDA) are identical to the requirements set out in section 72 of CLRA for this application. The definitions in section 101 of LRUDA are quite similar. He suggested that the Consent Order evidences that the County Court accepted that the Tenants are tenants of "dwellings". He appeared to request that the Tribunal accept that a declaration of the County Court would be binding upon it notwithstanding that this application is made under different legislative provisions.

28. Later in the Hearing Mr Bates argued that he did not accept the "estoppel" argument put forward by the Applicant that the Consent Order meant that the Tribunal had to find that the application would succeed. Nor would he accept that the doctrine of "res judicata" applied so that the Consent Order meant that the Respondent had to accept the application was beyond challenge on the basis of her having consented to the earlier enfranchisement application. He suggested that the jurisdiction of the Tribunal could not be "ousted" by the Consent Order.

29. In response, Mr Sefton explained that he had never suggested that the Consent Order restricted or "ousted" the jurisdiction of the Tribunal. Such an argument has never been his case. Confusion had arisen on account of a statement made in the Applicant's statement of case submitted to the Tribunal by Mrs O'Connor and which, it was later suggested, resulted from a misunderstanding by the Applicant at a time when it was acting "in person".

30. However Mr Sefton stated that the Respondent cannot now say that the premises are not dwellings. He submitted that she had already conceded that the premises are dwellings and that this concession is embodied in the Consent Order. For the Respondent to now backtrack on "an acceptance" of which there is clear evidence would potentially be an abuse of process.

31. However the Tribunal does not accept that the Consent Order has any relevance to its decision. It is simply an order made with the consent of both parties in different proceedings. It was probably drafted by or on behalf of one or other party and then signed by the District Judge. Such an order would not have been further scrutinised or even examined by anyone else. Neither party has been successful, in the arguments each put forward, in persuading the Tribunal that the Consent Order could, or should, influence its determination of this application. The Consent Order was not made in contemplation of these proceedings. Given the controversy its existence has provoked it seems likely that it would not have been consented to, had the parties had any premonition that other proceedings, such as this application might follow.

32. The Tribunal therefore determines the existence of the Consent Order is not relevant in any way to its determination and that therefore the arguments put forward on behalf of the parties have been afforded no relevance at all, in it reaching its decision.

33. Mr Bates had submitted that only 20 of the 33 flats can lawfully comprise residential accommodation. This is ground (c) of the counter notice which Mr Bates submitted would enable the Respondent to resist the application on the grounds that the non-residential parts of the Property comprise more than 25% of the internal floor area. Mr Sefton was unimpressed by the reliance of the Respondent upon such a ground when it had offered no evidence as to areas since no survey had been prepared to demonstrate or support the argument. He said that any party seeking to rely upon this ground must itself produce the evidence to support its contention and that the Respondent has failed to do this. He quoted two cases (each reported in the Estates Gazette), as authority but was unable to provide the Tribunal with copies. The cases are Indiana Investments 2003 and Marine Court v. Hastings v. Rotherham District Investments 2008. The Tribunal has not considered either case for the reasons given later in its decision.

34. In any event since the ability to rely upon paragraph 1 of Schedule 6 of CLRA taking the premises out of the section 72 criteria would depend on establishing that part of the property was "non-residential". Mr Sefton argued persuasively that this could not be established simply on the contention of the Mr Bates that those flats or units that were not occupied as dwellings but regularly used for holiday letting were "non-residential".

35. Mr Bates had argued that his case in reliance on ground (c) of the counter notice was supported by the decision in the case of Thorn v. Madden. He said it was an argument "by analogy". 11 of the 33 flats are let to others for holiday use. He maintains that all of the properties could be let for use as holiday accommodation. Thus he suggests that the actual use and the potential use removes at least 11 of the flats from the jurisdiction of CLRA, as these flats are neither occupied nor intended to

be occupied for residential use. In reliance upon Thorn v. Madden he argues that by analogy with the decision in that case as 11 flats are used for commercial letting and that as all the flats potentially could be so used, this use or potential use "removes" the flats from the ambit of CLRA since the decision in Thorn v. Madden was that commercial use could not be a residential use and if this is established the units could not be dwellings.

36. Mr Sefton in response, suggested that Mr Bates legal arguments demonstrated a shift in emphasis in that he has referred the Tribunal to cases about commercial occupation. He does not accept Mr Bates' interpretation of the case of Thorn v. Madden . This was a 1924 case, in which a covenant in a sub-lease preventing the dwelling house and premises being used for the purpose of "a trade or business" was considered and in which it was held that the defendant had breached the covenant because she had taken in paying guests and lodgers "in order to meet rent rates and outgoings ...". He said that it was a very specific case which primarily related to a covenant preventing the property being used as a private residence and which is about breach of covenant. The determination was not about the right to residential use, but whether the defendant had ceased to use the property exclusively for residential use. On that basis he is not persuaded by Mr Bates transposition of the decision to be analogous to a change of use of premises from residential to commercial to enable the premises to "escape" from being caught under section 72 of CLRA.

37. The Tribunal was not persuaded that Thorn v. Madden has any relevance to its decision in this application. It considers that the primary reason for Schedule 6 is to enable a Landlord of a building, which partly comprises commercial premises, such as a shop or an office to resist a section 72 application if (and only if **it can demonstrate** successfully the criteria set out in paragraph 1(1) (a) or (b). This has not been done by the Respondent in this case. It is therefore not necessary for the Tribunal to comment upon the arguments exchanged between Mr Sefton and Mr Bates as to which party should have prepared the evidence demonstrating which areas of the building were used for non-residential use and that the internal floor areas exceeded the 25% test, or indeed to go on to consider the two cases referred to by Mr Sefton (and by name in paragraph 22 of this decision).

Costs

38. Mr Bates has, in his skeleton argument, referred to two costs schedules which were supplied to the Tribunal office late on the preceding day. As a consequence only the Chairman has had sight of these prior to the hearing. Costs are claimed under section 88 of CLRA In response the Applicant suggests that any costs recoverable by the Respondent must fall within section 88 of CLRA and that beyond that that the jurisdiction of the Tribunal with regard to costs is primarily limited by paragraph 10 of Schedule 12 and in particular sub paragraph (3). He does not deny that section 88 will assist the Respondent in recovery of some costs section 88(3) he suggested was a limitation on which costs might be recovered and clearly this would depend upon the outcome of the application. He said that the parties should first attempt to agree the relevant costs secure in the knowledge that they could as a "fall back" to rely on subsection 88(4) to seek determination from a Leasehold Valuation Tribunal if the

costs cannot be agreed. He argued that In any event it is not a matter for determination under the umbrella of this application nor can it be determined on the basis of a letter submitted by the Respondent's solicitors late on the preceding day. Mr Bates indicated agreement to the proposed course of action and the Tribunal therefore confirmed that it agreed with the parties that they should deal with the costs in the way that they both agreed was appropriate. If the costs could not be agreed an application could be made under section 83(4). Such applications are usually determined by a paper determination without a hearing. Section 88 and paragraph 10 of schedule 12 are not set out as the legislation was not considered by the Tribunal as the parties had agreed how they would deal with the question of costs.

Summing up

39. In his final submission Mr Bates said that the Tribunal should follow the arguments in the Udlaw case and determine that the application failed because section 72 did not apply to the Property. At the Lands Tribunal hearing which preceded the decision both parties had been represented and the case was fully argued on both sides. Whilst the Tribunal accept that this was so, it has not been able to investigate or consider the grounds of the appeal in that case, which it suspects was that the Leasehold Valuation Tribunal was wrong in law. If that is the case the Lands Tribunal would not have had before it the same evidence as would have originally been submitted to the Leasehold Valuation Tribunal who made the original decision. It does not however accept Mr Bates suggestion that the lack of sight of the headnote (which had apparently not been published at the time of the Glendorgal decision) would have resulted in a different interpretation of Udlaw the Rent Assessment Committee which determined Glendorgal. As a matter of fact both parties at the hearing which preceded that decision were also represented.

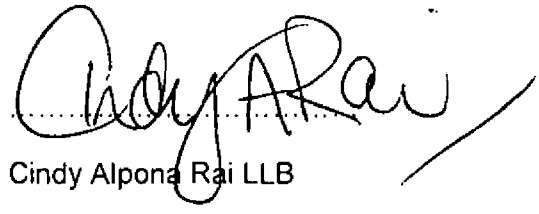
40. Following the completion of the submissions of both parties the Tribunal sought clarification as to the extent of the Property with regard to which the Application was made. Whilst this had not been absolutely clear on the face of the Notice or notices the Plan subsequently submitted to the Tribunal clearly shows the extent of the premises and both parties confirmed that the plan was agreed and that the extent of the premises was not disputed. The counter notice does not take any issue with what is and what is not appurtenant property within the definition contained in section 112 of CLRA.

Decision

41. In reaching its decision the Tribunal has carefully considered all of the arguments presented to it by each party. The fact that the Respondent's case, by Mr Bates admission, relied solely upon legal argument is perhaps central to the consideration of the differences between the Applicants case and the Respondents case since the Applicants arguments do in part rely upon primarily factual issues. However in reaching its decision the Tribunal has given equal weight to the consideration of the factual and legal issues. For the reasons set out in the decision the Tribunal has not been influenced either by the de facto planning use of the Premises or by the existence of the Consent Order. Its decision has been made on the basis of the interpretation of "dwelling" and "flat" within the context of the legislation, in particular CLRA but also the LTA 1985. It accepts that in this case the premises do comprise

flats which are dwellings. It accepts that it is a fact that some are apparently used only for holiday purposes but that is not relevant. What is relevant is that others are used as dwellings in the context of "dwelling" meaning a permanent home. Whilst perhaps this use might not have been what was originally intended when the leases were granted, the leases do not prevent the Tribunal concluding that the premises are dwellings and flats within the context of both CLRA and the LTA 1985. None of the three grounds set out in the counter notice have been established. The notices are therefore valid.

42. The Tribunal determines that the Applicant has the right to manage Lee Cliff Park Warren Road Dawlish Warren Devon EX7 0NE together with the appurtenant property (as defined in Section 112(1) of the 2002 Act) being the property shown edged in red and edged in green on the Plan supplied by the Applicant to the Tribunal office with the letter from Eileen O'Connor dated 27th July 2009 (and a copy of which is annexed hereto)



Cindy Alpona Rai LLB

Chairman

A member of the Panel appointed by the Lord Chancellor

Dated November 2009

Cases referred to

King and others v. Udlaw Limited - Lands Tribunal 20th March 2008

Glendorgal - Rent Assessment Committee Decision dated 4th July 2008

Thorn v. Madden [1925] 1 Ch 847

Statutes referred to

LTA 1985	Landlord and Tenant Act 1985
TCPA	Town and Country Planning Act 1990
CLRA	Commonhold and Leasehold Reform Act 2002
TCPA	Town and Country Planning Act 1990

TITLE NUMBER

DN206744

DEVON : TEIGNBRIDGE

N

ORDNANCE SURVEY MAP REFERENCE: SX9778SE

SCALE 1:1250 Enlarged from 1/2500

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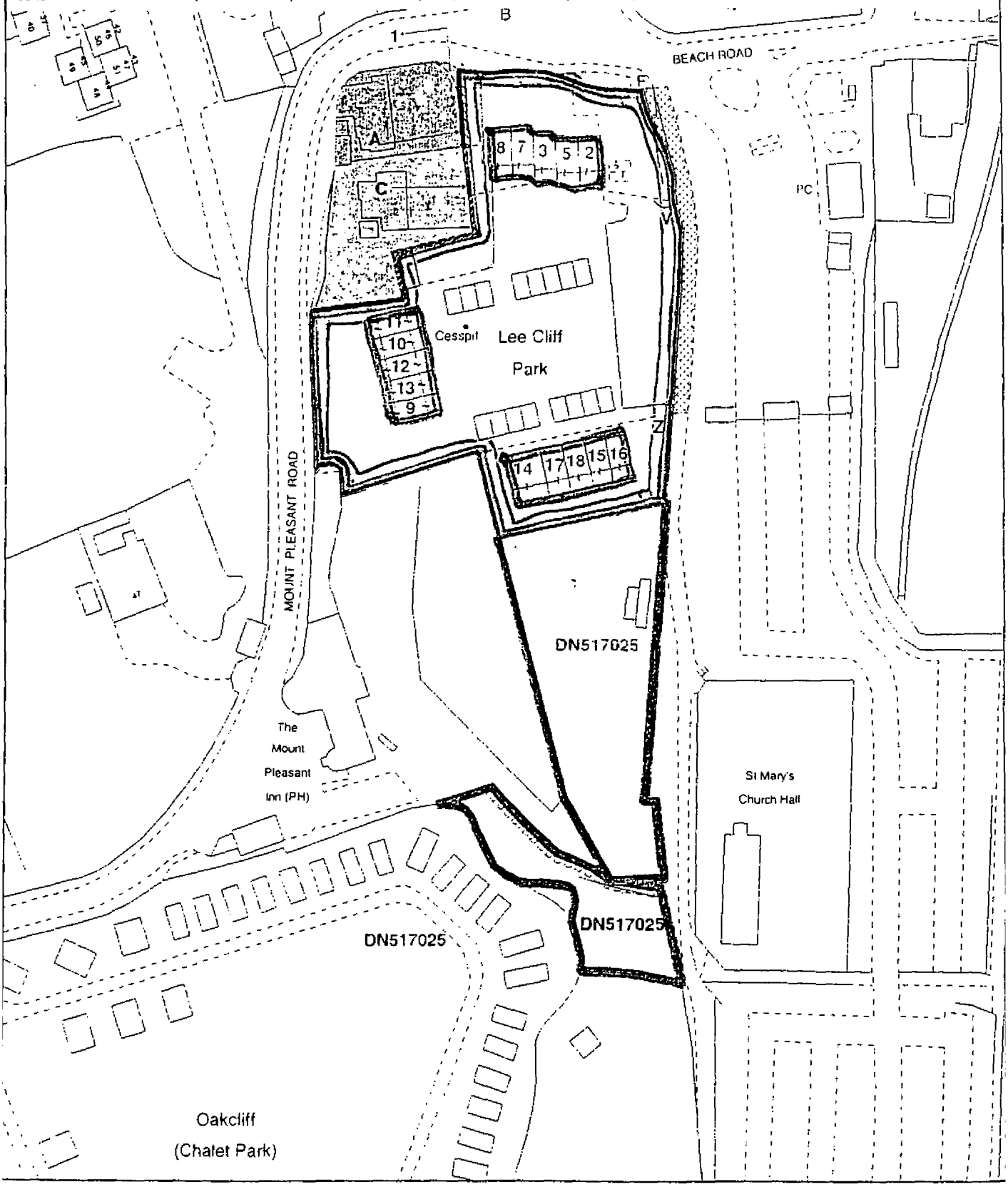

This title plan shows the general position of the boundaries: it does not show the exact line of the boundaries. Measurements scaled from this plan may not match measurements between the same points on the ground. For more information see Land Registry Public Guide 7 - *Title Plans*.

This official copy shows the state of the title plan on **3 January 2006** at **11:28:05**. It may be subject to distortions in scale. Under s.67 of the Land Registration Act 2002, this copy is admissible in evidence to the same extent as the original.

Issued on 3 January 2006.

This title is dealt with by the **Plymouth District Land Registry**.

H.M. LAND REGISTRY MH 08/2004