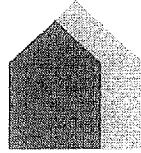


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**Residential
Property**
TRIBUNAL SERVICE

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
DIRECTIONS BY LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL**

Application pursuant to section 84 (3) Commonhold and Leasehold Reform Act 2002.

Ref LON/00BG/LRM/2010/0015 and 0016

Premises: 9 and 11 Byng Street, London E14 8GF
Applicant: Leaseholder of flats at 9 and 11 Byng Street
Respondent: Canary South (Ground Rents) Limited and Avonbraid Limited

**Date of paper
Determination:** 26 October 2010

Date of Decision 01 December 2010

Tribunal: Ms M Daley LLB (hons)
Mr M A Mathews FRICS

Background

1. The Tribunal received two applications under section 84(3) of the Commonhold and Leasehold Reform Act 2002 from 9 Byng Street RTM Limited and 11 Byng Street RTM Limited for a determination that they are entitled to acquire the right to manage the premises known as 9 Byng Street and 11 Byng Street RTM (the premises).

Directions for a hearing were made following a pre trial review on 10 September 2010.

2. At the Pre-trial review the Tribunal determined that there were two issues for determination-: *"...namely in the case of 9 Byng Street whether on the date on which the notices of claim were given, the applicants had given notice to each person who at the time the notice was given (A) is the qualifying tenant of a flat contained in the premises and (B) neither had or has agreed to become a member of the company and (ii) in both cases whether the premises consist of self contained buildings or part of a building with or without appurtenant property."*

3. The Directions also provided that the matter was suitable for determination without an oral hearing and that the application together with the enclosures should stand as the Applicant's case and that on or before the 5 October 2010 (as amended) the Respondent shall send a statement in reply. The Directions made provision for an inspection to be carried out on 26 October 2010.

4. The Inspection

The Tribunal inspected the premises on 26 October 2010. The Members of the Tribunal were met and shown around the property by Ms Diaz Riat from the Managing Agent, and Mr Tom Pank, the property handyman. (At the inspection, the Tribunal indicated that they wished to take photographs. Mr Tom Pank offered to take digital photographs and email them to the Tribunal) the two properties are part of a larger block of buildings fronting Byng Street, West Ferry Road and Manilla Street. The development includes a fire station fronting West Ferry Road and partly under no 9 and a restaurant on part of the ground and

first floor levels of no 9. The Tribunal inspected the outside of no 9 and noted the restaurant premises and the fire station. The Tribunal saw the outside of no 11 and noted the entrance to the underground garage and the entrance to the rear courtyard used by the fire station. The Tribunal saw the bin store and service lift. We entered no 11 and descended by lift to the underground plant rooms and car park area. We saw the inside of one of the plant rooms. From here The Tribunal went up into the reception area/concierge office and WC area in no 9. The Tribunal went to the 2nd and 6th floors to view the roof garden above the fire station. The Tribunal also saw the internal courtyard/garden to the development.

5.The Law

The Commonhold and Leasehold Reform Act 2002 sets out the procedural requirements that a right to manage company must follow before it can acquire the right to manage. The relevant sections for the purposes of this application are ss72 to 84.

Premises subject to the right to manage:

Section 72 defines the premises that may be subject to the right to manage. The relevant section states that a premise qualifies 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..."

Right to manage companies:

Section 73 provides that the right to manage can only be acquired and exercised by a RTM company and the company must be a private company limited by guarantee that includes the acquisition and

exercise of the right to manage as one of its objects. The company does not qualify if there is already a RTM company for the premises.

Membership of the company:

Section 74 75 and 76 provide that membership of the RTM company must consist of any qualifying tenant, defined as a residential tenant under a long lease of a flat in the premises, and that there can only be one qualifying tenant per flat, no less than half the qualifying tenants (subject to a minimum of two) must be members of the company on the date when the company serves the claim notice. From the time that the company acquires the right to manage the premises, any person who is a landlord under a lease of the whole or any part of the premises can be a member of the RTM company.

Notice of invitation to participate:

Section 78 - before making a claim to acquire the right to manage any premises, a RTM company must give notice to all qualifying tenants who are not members of the company inviting them to become members for the purposes of acquiring the right to manage.

Claim Notice:

Section 79 (1) – “A claim to acquire the right to manage any premises is made by giving notice of the claim and in this Chapter the relevant date in relation to any claim to acquire the right to manage means the date on which notice of the claim is given” and (6) “The claim notice must be served on each person who on the relevant date is

- (a) a landlord under a lease of the whole or any part of the premises,
- (b) a party to such a lease otherwise than as landlord or tenant or
- (c) appointed as manager of the premises under Part 2 of the Landlord and Tenant Act 1987.”

Counter Notice:

Section 84 "A person who is given a claim notice by a RTM company under section 79(6) may give a notice (referred to in this Chapter as a "counter notice") under section 80(6)."

The Respondent's Case

6. The Counter notice served by the Respondent did not admit the Right to Manage. The grounds upon which the Right To Manage were contested were that the notice of invitation to participate was not given to each person entitled to participate in the Right To Manage and that, there were eligible tenants who were not given notice and had not agreed to become members of the company contrary to section 78 of the Act.
7. A further ground was that the premises "... *do not consist of a self-contained building or part of a building with or without appurtenant property contrary to section 72(1) a.*"
8. The Tribunal noted that the Respondent, in the statement of case dated 29 September 2010, stated that "... *The Applicants are two companies limited by guarantee, incorporated on 1st July 2010. 3.1 The Memorandums of Association are in identical form except that one is formed in respect of 9 Byng Street and the other in respect of 11 Byng Street.3.2 With the exception of 2 flats in 9 Byng Street all flats are owned by John Corless...3.3 The Applicants have produced copies of participation notices purported to be served on the lessees of flat 38 and 39, 9 Byng Street, Those notices are neither dated nor signed and... in addition the notices are defective as clause 2 does not comply with the provision for inspection set out in paragraph 2 and 3 of the notes which are attached to the Invitations to Participate*"
9. The Respondent also relied upon the structure of the buildings, noting that at ground floor level there was a fire station comprising a single storey building fronting Westferry Road with a yard behind and a vehicular access from Byng Street. The Respondent also referred to a small tower building that was part of the fire stations demise. Although this was not expressly referred to in the Respondent's submissions, the Tribunal noted, (and it is common ground) that there was also a

Restaurant (which is referred to in the inspection report prepared by Richard Guy Alford (on behalf of the Applicant).

10. The Respondent in their Statement of Case also referred to a previous Right to Manage Application and the fact that the RTM companies that were created had not been dissolved. It was the Respondent's case that pursuant to the provisions of Section 73(4) of the Act, the Applicant could not be a RTM Company in relation to the premises referred to in their Claim Notices, as there already exists a RTM Company in relation to the premises.

The Applicants case

11. The Applicants in their Reply to the Respondent's statement of claim -:
"... Unfortunately the firm who were instructed to act in assisting the purported previous right to manage company, Canary South Right to Manage Company (hereafter referred to as CSRC) in undertaking such an application failed to make the appropriate application to the Leasehold Valuation Tribunal..."
12. In their reply the Applicant noted that although the previous Right to Manage Company had been set up it was not a Right to Manage Company in relation to the premises as no Right to Manage had been exercised. The Applicant also objected to this ground being added to the Respondent's objections, at this stage, as it had not been set out in their Counter Notice.
13. The Applicant contended that the Notice to Participate was validly served on the tenants of flats 38 and 39, 9 Byng Street. In support of this, the Applicant produced a copy of the notice. The Applicant also referred to the fact that the Memorandum and Articles of Association of the Right to Manage Company were enclosed with the Notice of Invitation to Participate. The Applicant referred to the fact that the covering letter together with the notice had been served by first class post on the 8 July 2010. The Tribunal noted that although the covering letter was dated 8 July 2010, the notice was not dated and had not been signed.

14. The Applicant in their reply noted that the Respondent had not raised this objection in respect of 11 Byng Street.
15. The only objection in respect of 11 Byng Street was the question in common with 9 Byng Street of whether the premises qualified in accordance section 72 of the Act.
16. The Applicant in their case stated that both properties were self-contained buildings within the meaning of section 72(2). In paragraph 38 of the reply the Applicant states:- *"It is the Applicants position that both properties 9 and 11 Byng Street are part of a building (the Development) and that both premises are self-contained."*
17. The Applicant stated that in keeping with the test established in section 72, 9 Byng Street can be vertically divided and removed from the rest of the building and that 9 Byng can be redeveloped independently from the rest of the building. In the submission it was stated that although the premises consists of the second to the fifth floor it is capable of being vertically divided from the building without impact on the rest of the building. The Applicant relies upon a similar submission in respect of 11 Byng Street (paragraph 46 of the statement in reply).
18. The Applicant also relies upon the *Report of Richard G Alford*. In his report Richard G Alford BSc MRICS .stated that he is a partner in the firm of Copping Joyce Chartered Surveyors, and a specialist in the valuation of commercial and residential properties including leasehold enfranchisement. Mr Alford stated that he had over 9 years experience of managing residential properties.
19. Mr Alford's report considers section 72 of the act, at paragraph 5.2 he stated -: *"...In my opinion the two properties, 9 and 11 Byng Street, pass this test under (a) because they form part of a building and (b) [they contain two or more flats] and (c) because of the number of flats therein and the ownership of the flats..."*
20. Mr Alford in his report considered the test laid down in the section in relation to each of the blocks in question. Of 9 Byng Street at paragraph 5.9 he stated:- *"... The question, therefore, that must be*

asked is what the Act means by 'a vertical division of the building'. If the buildings constitute a vertical division from the basement up to the sixth floor, inclusive of all accommodation, then there cannot be considered to be a vertical division. However, it is my view, and that of my instructing Fellow of the Institute of Legal Executives, that the Act considers that the building constitutes the property to which the RTM wishes to take control..."

21. *The RTM does not wish to take control of the fire station below the property, nor indeed the car park itself. To this end, a vertical division of those sections of the property that they do wish to take control of, being the majority of the whole of the building, with the exception of the aforementioned fire station and car park itself... a vertical division is practicable and meets with the requirements of the Act. Such a building is capable of being maintained and managed as a separate building and this should be considered as such."*

22. Mr Alford, in setting out the case for 11 Byng Street stated at paragraph 5.13; That this building presents a more straightforward proposition in-: *"... that the only part of the building i.e. the first floor, runs over the entrance to the fire station situated to the north of the property..."*

23. Mr Alford in considering whether the premises could be developed relied upon the ordinary usage of the word 'developed' as set down in the Oxford English Dictionary, in considering this definition, Mr Alford was of the view that it was capable of development.

24. Mr Alford stated that he could perceive of the buildings being developed, he stated *"...I am of the opinion that these premises can be developed. I could perceive an upgrade of the accommodation, or indeed its change of use from flats to offices, which whilst such a change may not be economically viable would certainly be viable in terms of the development of the property..."*

25. In addition to the expert report and the written submissions the Tribunal were provided with copies of the plans for the building and photographs.

The Tribunal's Determination

26. The Tribunal having carefully considered the submissions and evidence provided by the parties; have determined on a balance of probabilities that the Applicant does not have the right to manage, and accordingly the Application must fail.

The reason for the Tribunal's decision -:

27. The Tribunal upon inspecting the premises considered that the property that is 9 Byng Street is not self-contained. In coming to this decision, the Tribunal have considered the structural layout of the property, which as stated in the report of Mr Alford is a curved elevation running to West Ferry Road and incorporating on the part of the ground floor a restaurant and some offices. It is also common ground that parts of the property overlay a fire station. The Tribunal is not satisfied with the Applicant's expert's submission that the Tribunal may consider the proper definition of the building as "*constituting only those parts of the property over which the Applicant wishes to exercise the right to manage*". The real question is whether those parts of the property amount to a vertical division. The Tribunal are of the view that the property 9 Byng Street (one of the subject properties) of the Application cannot be considered to be a vertical division.

28. The Tribunal also considered the issue of whether the property is capable of development, although the interior of the property can be independently developed (as set out in Mr Alford's report), any structural development would inevitably impact on the rest of the building. For example the addition of a penthouse would require an investigation of the structural integrity of the whole building (including the Restaurant and Fire Station), and this would determine whether or not it could be developed.

29. If the building needed to be reinstated, for example because of a fire, at the restaurant level this would have an impact on the use of the upper part of the building, given this we consider that in answering the question of whether it is capable of being developed, this question cannot be determined merely by considering the ordinary dictionary meaning of the word "developed", and a broader consideration of the reality of building construction and planning permission needs to be considered. It may well be that the development obstacles are not insurmountable, however it is not for the Tribunal to speculate, and although we consider that there are practical issues which may impact on development, we have no expert planning evidence on this issue, and the evidence we have in the form of Mr Alford's report is limited.
30. Given this the Tribunal are not satisfied on a balance of probabilities that the building is capable of separate development, and as a result this application must fail.
31. The Tribunal have also considered the service of the notice of invitation to participate which was served in respect of flats 38 and 39, 9 Byng Street, that "*Those notices are neither dated nor signed*" as stated by the Respondent although the covering letter was dated. There is a formal requirement in accordance with The Right to Manage (Prescribed etc) (England) Regulations 2003 Schedule 1, which provides the form of Notice and provides for both a signature and a date. As this did not occur, the notice is defective.
32. The Tribunal have noted in respect of 11 Byng Street that part of the building runs over the entrance of the fire station, we consider that this building cannot be considered a vertically separate building, and we note that although the issues are less acute in respect of this building, the issue of being capable of independent redevelopment arises (which have been set out in paragraphs 22-23 above). On a balance of probabilities, for reasons which we have already rehearsed in respect of 9 Byng House, we cannot be satisfied that the building satisfies the test in section 72 of the Act and for this reason the application must fail.

Signed *M. O. Selby*

Dated 1-12-2010 .