HM Courts & Tribunals Service

Leasehold Valuation Tribunal
Case no. CAM/22UG/LRM/2012/0008

Premises:	Charles House and Stuart House, St Peters Street, Colchester, Essex CO1 1BY
Hearing:	4 March 2013
Applicants:	KOA RTM Company Ltd
Represented by:	Mr Jamie Sutherland of Counsel (instructed by Gotelee Solicitors of Ipswich) Mr John Richard Dixon (Director)
Respondent:	Jaygate Developments Ltd
Represented by:	Mr Robert Brown of Counsel (instructed by Brady Solicitors of Nottingham) Mr Terry Tarttelin of PMS Leasehold Management Ltd
Members of Tribunal:	Mr G M Jones - Chairman Mrs E Flint DMS FRICS IRRV Mr David W Cox
Type of Application:	Right to Manage claim under CLRA 2002 Part 2 Chapter 1

ORDER

UPON Reading the Hearing Bundle and Counsel's Skeleton Arguments
AND UPON inspecting the Premises in the presence of the parties' representatives
AND UPON hearing evidence from Mr Nixon and (*de bene esse*) of Mr Tarttelin
AND UPON HEARING submissions from Counsel for the parties

IT IS DECLARED THAT: -

1. The Applicant's claim notice in respect of Charles House and Stuart House, Colchester CO1 1BY dated 23rd July 2012 and served pursuant to section 79 of the Commonhold & Leasehold Reform Act 2002 was and is valid.

2. The Applicant's claim notices in respect of Charles House and Stuart House separately dated 23rd July 2012 were invalid.

3. The Applicant is entitled to the right to manage Charles House and Stuart House together (including the multi-storey car park forming part of Stuart House in accordance with the notice referred to at paragraph 1 above.

G M Jones
Chairman
21 March 2013

REASONS

0. BACKGROUND

The Premises

0.1 This application is phrased in the alternative and concerns three "premises". The development comprises two out of a set of three buildings originally built as offices for BT The first of the three buildings, Northgate House, is still an office block, though largely empty. This is not owned by Jaygate. The other two buildings, Charles House and Stuart House, were converted into flats in 1998-9, with a view to granting long residential leases. Charles House now contains 41 let flats and (on the 4th floor) a communal conservatory, with a secure bicycle store serving both buildings beneath part of the building. There are no flats at ground floor level.

0.2 Stuart House contains 54 let flats; a manager's office; and communal facilities comprising a 4th floor conservatory, a gym and an adjoining sitting room (on the ground floor). Use of the gym is available to residents of both buildings under the terms of their leases. There is only one flat at ground floor level, originally intended as a manager's flat but in fact let on a long lease. There is a detached building at the end of Stuart House which is used as a bin store for residents of Stuart House. The bin store for Charles House is in the ground floor of that building.

0.3 Stuart House is "L" shaped, with a central foyer, staircase and lifts at the join of the two wings. One wing of Stuart House is built on top of a secure multi-storey car park (the MCP) on seven split floors containing 210 individual parking spaces as shown on Exhibit TT1. Of these, two on the ground floor (Nos. 35 and 48) are now suitable only for motorcycles by reason of the space taken up by remote control security gates and one on the 6th floor (No. 172) is suitable only for a very small car.

0.4 95 spaces are reserved for residents. Each flat in each block has a reserved parking space apart, it seems, from 25 Charles House, while 21 Stuart House has two (Nos. 118 and 133). Of these spaces, 23 allocated to Stuart House residents and 20 allocated to Charles House residents are on the open top floors (Floors 6 and 7), leaving 52 covered spaces. In addition, there are 105 covered spaces and 9 uncovered, retained by the landlord. One space marked STJ is unidentified; this could be reserved for the site manager Stephen Johnson (in which case it would count as common parts). The retained spaces are let commercially, some in blocks to business organisations occupying nearby offices and some individually. Off-street parking in this area (near the centre of Colchester) is valuable because on-street parking is extremely restricted.

0.5 Northgate House, Charles House and Stuart House are clearly all free-standing, self-supporting, vertically separated buildings; but they are physically connected. Adjoining end walls of Charles House and Stuart House are parallel and lie about 1.8m apart. These end walls are connected by two sets of fire escape stairs which serve both buildings. Fire escape from the upper floors of the adjoining parts of Charles House and Stuart House is via a footbridge to an external staircase adjoining and within the curtilage of Northgate House, rights to use it being appropriately reserved. There is also a fire escape staircase from the first floor of Charles House and Stuart House to the grounds of those residential blocks.

The Leases

0.6 The leases are all for terms of 125 years from 24 June 1999. The service charge provisions treat Charles House and Stuart House as separate blocks and provide for flats in both buildings to have designated car parking spaces in the MCP; and for residents of both blocks to enjoy the use of the cycle store beneath Charles House and the gym (in Stuart House) and "communal lounges". A separate service charge applies for the maintenance of the MCP, the costs of which are shared between landlord and tenants.

1. THE DISPUTE

1.1 The Applicant through its solicitors served by recorded delivery letter dated 23 July 2012 three claim notices, stating that: -

> "Without prejudice to the claim notice in respect of Charles House and Stuart House [together], we also enclose separate claim notices in relation to Charles House and Stuart House respectively."

While both blocks are currently managed together, there was clearly a concern that the existence and location of the MCP might create a complication in the RTM application. This concern was, as will be seen, certainly well-founded. The letter gives the impression that the primary case of the Applicant is based on the notice including both blocks; and this indeed proved to be the case, as the Respondent's Counsel accepts in his skeleton argument (paragraph 10).

3.2 The claim notices each relied upon the averment that the premises consisted of a self contained building (not a part of a building, which is an option under the Act). In the case of Stuart House only, there is a reference to appurtenant property. In fact, quite apart from the issue of the MCP, there is appurtenant property in the form of grounds and (in the case of Stuart House) the bin store,

3.3 By letter dated 20th August 2012 the Respondent through its solicitors served three counter-notices without prejudice to the contention that all of the claim notices were invalid. By paragraph 1 of each counter-notice, the Respondent relied on section 72(1)(a) (premises not consisting of a self-contained building or part of a building); section 72(2) – (6) (definitions and Schedule 6); section 72(3)(b) (the premises are not a self-contained part of a building because the structure of the building is not such that it could be redeveloped independently of the rest of the building); section 80(1) – (9) (deficiencies in contents of claim notice); section 81(3)-(4) (only one claim notice may exist at any one time); and Schedule (6) paragraph 1 (the 25% non-residential parts exclusion) of the Act.

3.4 Accordingly, on 15th October 2012 the Applicant made an application to the LVT. On the basis of the claim notices and counter-notices alone it was not obvious what were the live issues between the parties. The Chairman accordingly issued a Directions Order pursuant to which both parties served statements of case which made it tolerably clear what were the actual issues between the parties and how they put their respective cases.

2. THE ISSUES

2.1 The Applicant's heads of claim and the Respondent's defence (including the points raised in the supplemental statement of case) can be summarised as follows:

2.1.1 The Applicant rests its case as regards the "premises" subject to RTM primarily on Charles House and Stuart House taken together; in case that is wrong, it claims to be entitled in the alternative to serve separate claim notices. The Respondent says that all the notices are invalid.

2.1.2 The Applicant says that it is properly constituted to manage either or both of the blocks; the Respondent says it is not; the Applicant's claims are inconsistent with its memorandum and articles of association.

2.1.3 The Applicant says that Charles House and Stuart House together constitute "premises"; alternatively, they separately constitute "premises" to which Chapter 1 applies. The Respondent says there are no separate premises because neither block nor the two taken together is structurally detached; the blocks are attached to each other and to Northgate House. The Respondent further says that the Applicant cannot argue that the blocks, separately, or taken together, constitute a self-contained part of a building because the claim notices do not make that assertion. While under section 80(1) a claim notice is not invalidated by any inaccuracy in any of the required particulars, the Respondent argues that an omission is not an inaccuracy and cannot be cured by section 80(1).

2.1.4 It is common ground that the MCP is integral to Stuart House and thus to be treated as part of the premises (either Stuart House taken alone or both buildings together). The Applicant estimates that the non-residential car parking spaces within the internal floor area of Stuart House amounts to less than 25% of the total internal floor area; the Respondent says it is more than 25%. The Respondent says that Stuart House, taken alone, is not therefore premises to which Chapter 1 applies. Both agree that, if the two blocks are taken together, the landlord's parking spaces amount to less than 25% of the total internal floor area. A subsidiary issue arises in relation to this issue; ought the witness statement of Mr Tarttelin, served and filed on the morning of the hearing, be admitted in evidence? It is also in dispute where the burden of proof lies in relation to the 25% exception.

2.2 The arguments on both sides involved a good deal of reference to case law. This will be discussed in section 5 of these Reasons below.

3. THE EVIDENCE

3.1 The evidence is largely in documentary from, so that the task for the Tribunal is to draw appropriate inferences rather than to make primary findings of fact. However, there is a clear conflict of evidence between the witness statements of John Richard Nixon on behalf of the Applicant and Terry Tarttelin on behalf of the Respondent.

3.2 The issue to which the evidence of both witnesses is primarily directed is the question whether the non-residential parts of Stuart House exceed 25% of the internal floor area. Both witnesses have approached this on the basis that the covered areas of the MCP constitute part of the internal floor area of the building,

3.3 Applying the statutory calculation, which involves ignoring common parts, Mr Nixon says the percentage is 21.8%. He treated the 54 flats in Stuart House and 32 covered parking spaces allocated to some of those flats as residential parts; the gym, lobby, hallways, staircases and lifts, and the roads and ramps within the MCP as common parts; and 115 covered parking spaces retained by the landlord as non-residential. It is not entirely clear from his statement; but presumably (as this would be consistent with his approach) he treated the manager's office and the staircase within the MCP as common parts. Mr Nixon measured the parking spaces but otherwise scaled the areas from the 1:625 scale floor plans included in the title documents. Inevitably, this approach will not be entirely accurate because it will be difficult accurately to exclude the thickness of the walls when working from small scale plans. It is worth noting that, in one respect, the calculation is generous to the Respondent, since, in fact, only 105 (or possibly 106, depending on the status of the STJ space) of the non-residential spaces are covered.

3.4 The fundamental difficulty with Mr Nixon's evidence is that, as he freely admitted, he did not perform the calculations himself; he supplied his measurements to the Applicant's solicitors and they made the calculations. This process would have sufficed if the areas had not been disputed; but the evidence became useless once it was seriously challenged. Of course, had it been apparent upon exchange of witness statements that it was challenged, the defect could readily have been cured by a short witness statement from the person who performed the calculation.

3.5 Mr Tarttelin (as representative of the managing agents) had the benefit of a layout plan for the MCP which he has marked to show how the spaces (apart from the STJ space) were allocated as at 20th July 2012. He was also able to obtain from Wright Ruffell Cameron Architectural Design Services their assessment of the relevant internal floor areas of the flats, scaled from "as built" drawings prepared by architect Stanley Bragg in 1998. He, like Mr Nixon, measured the parking spaces with a tape measure. He treats the STJ space as a Charles House space. The Tribunal concludes that the STJ space is allocated to Mr Johnson and thus counts as common parts. Mr Tarttelin's figures are as follows: -

Total IFA of 54 flats	2950.13 m^2	
Total IFA of 32 Stuart House MCP spaces	358.08 m^2	
Total residential IFA for Stuart House	3308.21 m^2	70.6%
Total IFA of 21 Charles House MCP spaces	233.55 m^2	5.0%
Total IFA of 105 retained MCP spaces	1143.68 m^2	24.4%
Total IFA to be counted for Stuart House	4685.44 m^2	100 %

3.6 The Respondent argues that the Charles House spaces are clearly not a residential part of Stuart House nor are they common parts; therefore they count as non-residential for the purposes of the statutory calculation for Stuart House.

3.7 If the Tribunal were to admit the evidence of Mr Tarttelin, it does not follow that his evidence would be accepted. He is not an expert and, like Mr Nixon, is dependent upon the expertise of others for his overall conclusion. No application was made and no permission given to adduce expert evidence. The Tribunal notes that Mr Nixon's methodology is different from that of Mr Tarttelin in that Mr Nixon appears to have ignored the Charles House spaces. The Tribunal is satisfied that this is the wrong approach; the Charles House spaces (apart from the STJ space) are not, as regards Stuart House, taken alone, common parts. Although used for residential purposes, they are not used for the purposes of Stuart House residents. It could not be right to include them as residential spaces or common parts in relation to Stuart House. Schedule 6 calls for a comparison of the residential and non-residential parts with the IFA of the premises (taken as a whole). Clearly the Charles House spaces are part of Stuart House (taken as a whole). Accordingly, the Tribunal is satisfied that, for the purposes of Schedule 6, Mr Nixon's approach is not correct.

3.8 However, the Tribunal has doubts about the approach adopted by both parties on this issue. It is far from clear that it is correct to treat the covered car parking spaces as part of the internal floor area of the premises. It is not an indoor car park (in contrast e.g. with an underground car park below a building). A car port would surely not be treated as part of the internal floor area of a house, whereas a lockable integral garage perhaps would? Moreover, there is no practical difference between a covered and an uncovered parking space. A method of calculation that depends upon the way in which car parking spaces are allocated (i.e. whether covered or uncovered spaces are allocated to the relevant leaseholders) seems arbitrary. The premises (taking Stuart House alone) are essentially a block of flats to which the MCP is appurtenant. The Tribunal would (if necessary) want to consider that point.

3.9 The Tribunal is, in any event, not satisfied that Mr Tarttelin's calculation is mathematically correct. If the Tribunal is required to determine the 25% issue, it would adjourn that issue and order an expert report by a single expert. That approach found favour with both parties. However, on the other findings of the Tribunal, that exercise is unnecessary, as will be seen.

4. THE LAW

Right to Manage under CLRA 2002 Part 2 Chapter 1

4.1 The Commonhold and Leasehold Reform Act 2002 introduced a new collective right for long leaseholders (basically those with leases for a fixed term of more than 21 years) to manage premises as defined in section 72 through the medium of a right-to-manage or RTM company. A RTM company is a company limited by guarantee one of whose objects is the acquisition and exercise of the right to manage the premises in question. There can be only one RTM company in respect of any particular premises at any one time. Its members can only be qualifying tenants or, from the date on which it acquires the right to manage, landlords of the whole or any part of the premises. The company must be incorporated in accordance with the RTM Companies (Model Articles) (England) Regulations 2009 SI 2009/2767, replacing with effect from 9 November 2009 the RTM Companies (Memorandum and Articles of Association) (England) Regulations 2003 SI 2003/2120.

4.2 The right to manage applies to premises only if they consist of a self-contained building or part of a building, with or without appurtenant property; they contain two or more flats held by qualifying tenants; and 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. A building is a self-contained building if it is structurally detached. A part of a building is to be treated as self-contained if it constitutes a vertical division of the building; the structure of the building is such that it could be redeveloped independently of the rest of the building; and if the relevant services provided for occupiers of it (i.e. services provided by means of pipes, cables or other fixed installations) are provided independently of such services provided for occupiers of the rest of the building, or could be so provided without involving the carrying out of works likely to result in a significant interruption of any relevant services for occupiers of the rest of the building.

4.3 Schedule 6 paragraph 1 provides that there is no right to manage premises if the internal floor area of any non-residential part or parts (taken together) exceeds 25% of the internal floor area of the premises (taken as a whole). In performing this calculation, the area of any common parts is disregarded altogether. This provision is frequently important where a building includes commercial premises (e.g. shop or office units with flats above). There is no statutory definition of internal floor area.

4.4 Notice of a claim to the right to manage must be given by a RTM company whose membership includes a number of qualifying tenants of flats in the premises which is not less than half the total number of flats in the premises. (The RTM company must first under section 78 invite all qualifying tenants to become members.) The claim notice must comply with section 80 but, under section 81(1), is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80. The claim notice must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which Chapter 1 applies; it must identify the RTM company and the qualifying tenants; and it must specify dates for the giving of a counter-notice (not less than one month after service of the notice) and the intended date of acquisition of the right to manage (not less than three months after that); and it must comply with the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 SI 2010/825 (replacing SI 2003/1988).

4.5 By section 81(3), where any premises are specified in a claim notice, no subsequent claim notice which specifies the premises, or any premises containing or contained in the premises, may be given so long as the earlier claim notice continues in force. A claim notice continues in force until the right to manage is acquired by the company unless it has previously been withdrawn (see section 86) or deemed to be withdrawn (under section 87), or ceases to have effect, under the provisions of Chapter 1. The recipient of a claim notice may give a counter-notice under section 84 which may either admit the right to manage the premises or, by reference to a specified provision of Chapter 1, deny the entitlement of the RTM company to manage. The form of the counter-notice must comply with the 2010 Regulations. If the right is denied, the company has two months to apply to the LVT for a determination, in default of which the company's claim notice ceases to have effect. Obviously, the claim notice will also cease to have effect if the LVT determines that the company is not entitled to acquire the right to manage.

4.6 A RTM company is liable for the reasonable costs of the landlord, other lease parties and any manager appointed under Part 2 of the LTA 1987; but such costs do not include costs of proceedings before the LVT unless the company's application is dismissed. Any question arising in relation to the amount of costs payable is, unless agreed, to be determined by the LVT.

5. DISCUSSION AND CONCLUSIONS

5.1 The view the Tribunal takes of the witness evidence makes it unnecessary to decide whether to exclude the evidence of Mr Tarttelin or (at this stage at least) to rule upon the question where the burden of proof lies in relation to the 25% exception. The first issue to be determined is thus the validity of the claim notices.

5.2 Mr Brown argues that it is for the Applicant to establish that the "premises" identified in the initial notice fall within the statutory definition. Charles House and Stuart House taken together or separately are not a "self-contained building or part of a building" because they are not structurally detached from each other or from Northgate House. He relies in this respect on the decision of the House of Lords in ***Parsons –v- Trustees of Henry Smith's Charity*** [1974] 1 WLR 435. Moreover, they are not vertically divided from each other and from Northgate House so cannot qualify as a self-contained part of a building; also the claim notice did not rely upon section 72(3). In any event, they could not be separately developed, nor has it been established that the relevant services are provided independently of the relevant services provided for occupiers of the rest of the building. Thus section 72(3) does not assist the Applicant.

5.3 In ***Parsons*** the tenant sought to acquire the freehold of a dwelling house under section 1 of the Leasehold Reform Act 1967. The issue was whether the house was within section 2(2), which excluded a house "which is not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house". Mr Parsons (who acted in person) accepted that a material part of the house overhung the garage of adjoining premises but argued that it was structurally detached because it was "properly separated" from the adjoining property. The House held that, for this purpose, "structurally separated" meant "detached from any other structure". Lord Wilberforce, with whom all his brethren agreed, commented that the Act intended to allow enfranchisement of terraced houses and dwellings vertically divided, except where overhanging was by mere projection, without structural attachment.

5.4 In the judgment of this Tribunal, the ***Parsons*** ruling does not apply to the facts of this case. Under section 72(2) a building is clearly not a self-contained building if it is not structurally detached and a part of a building is not self-contained if it does not constitute a vertical division of the building. But if a building is structurally detached, it does not matter whether it is vertically divided from adjoining buildings. Stuart House is free-standing and no part of it overhangs Charles House or Northgate House. The Tribunal can see no reason whatsoever why they could not be separately developed; indeed, the two residential blocks clearly were re-developed for residential purposes separately from Northgate House.

5.5 Charles House is free-standing and no part of it overhangs Stuart House or Northgate House. There may be an issue, if the buildings are taken separately, as to whether the position of the cycle store for Stuart House (which is under Charles House) or the parking spaces for Charles House (which are in the MCP, part of Stuart House) present problems with the statutory definition. However, if one takes Charles House and Stuart House together, these problems do not arise. There is a footbridge joining the upper fire escape from adjoining wings of Charles House and Stuart House to a staircase forming part of and owned together with Northgate House; they are attached to Northgate House by a structure. But it stretches language considerably to say that, because of the footbridge, the two residential buildings are ***structurally*** attached to Northgate House. In the judgment of this Tribunal, they are not. They are structurally separate for the purposes of the Act. It is unrealistic to view Northgate House, Charles House and Stuart House, together with the fire escapes, footbridge and external staircase, as a single building and the Tribunal is satisfied that the Act does not require that. The footbridge (insofar as it is within the freehold title of the Respondent) ought properly to be viewed as appurtenant property within the meaning of section 72(1).

5.6 It can be argued that, on the Tribunal's finding, Charles House and Stuart House ought to be regarded, by the same logic, as two buildings and not as "a building" for purposes of the Act. This argument appears to have been dealt with by Geoffrey Vos QC (now, of course, Vos J) sitting then as a Deputy High Court Judge in ***Long Acre Securities –v- Karet*** [2005] Ch 61. In that case, it was held that a group of buildings forming an integrated development can be regarded as "a building" for the purposes of section 1(2)(a) of the Landlord & Tenant Act 1987. The Tribunal finds that this principle applies equally to RTM applications under the Act of 2002. Charles House and Stuart House clearly form an integrated development and can, in the judgment of the Tribunal, properly be considered as "a building" for the purposes of section 71 or, as the Tribunal finds that they are clearly vertically divided from Northgate House, part of a building for the purposes of section 72(3)(a).

5.7 It would be very surprising, given the different function and separate ownership of Northgate House, if the relevant services to the residential blocks were not provided independently of those serving Northgate House. There is no evidence that any easements for service media exist between the residential blocks and the office block. The Tribunal concludes on the evidence that section 72(4) applies.

5.8 This issue arises only pursuant to section 72(3), which is not mentioned in the Applicant's initial notice. If the Applicant is entitled to rely upon section 72(3), it can overcome one of the Respondent's key arguments (see paragraph 5.2 above).

5.9 The Respondent argues that the initial notice does not mention section 72(3) and that the omission of any reference to that subsection from the initial notices cannot be cured by section 81. The Respondent relies upon the decision of the Court of Appeal in ***Speedwell Estates v Dalziel & Ors*** [2001] EWCA Civ 1277. That was a decision under the Leasehold Reform Act 1967; but the scheme of the 1967 Act and the statutory provisions are in important respects very similar to the Act of 2002.

5.10 Like section 81(1) of the Act of 2002 paragraph 6(3) of Schedule 3 to that Act provides that the tenant's claim notice shall not be invalidated by any inaccuracy in the particulars required by that paragraph and (unlike section 81) provides that in relation to misdescription of the precise extent of the premises the notice may with leave of the court be amended. There is no power to amend other particulars. The Court of Appeal held that the complete omission of certain factual particulars invalidated the tenants" notices. However, the Court made it clear that each case must be considered on its facts and Lord Justice Pill expressed the view that what the statutory scheme required was that the applicant must make a serious attempt to provide all the statutory particulars and must give basic particulars in order to be entitled to the protection of paragraph 6(3) as regards inaccuracies in the form.

5.11 The Tribunal does not consider that it is obliged by the ***Speedwell*** decision to hold that the omission of a reference to section 72(3) rules out reliance upon it; it is a question of fact whether it can be treated as an inaccuracy which section 81 requires the Tribunal to overlook. The well-known ***Mannai*** principle applies. The Court of Appeal accepted in ***Speedwell*** that, in some cases, partial omissions might be saved by paragraph 6(3). Section 80(2) provides that the claim notice must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which Chapter 1 applies. The notice must also be in the form and contain the particulars required by the 2010 Regulations, which include the information provided in the notes to the statutory form. The relevant note is Note 2, which refers to section 72 and Schedule 6 but do not expressly require that the subsections of section 72 relied upon must be identified.

5.12 The Tribunal was also referred to the decision of George Bartlett QC, President of the Upper Tribunal (Lands Chamber), in ***Moskovitz & Ors –v- 75 Worple Road RTM Co Ltd*** [2010] UKUT 393 (LC). The President considered the decision of the Court of Appeal on similar provisions in section 42(3) and paragraph 9(1) of Schedule 12 to the Leasehold Reform Housing & Urban Development Act 1993 in ***Earl Cadogan –v- Morris*** [1999] 1 EGLR 59. In the latter case, it was held that the expression "particulars" in paragraph 9(1) (the equivalent of section 81(1)) refer only to those matters described as particulars in section 42(3)(b) (the equivalent of section 80(4) and (8)), Accordingly, the President held that matters referred to in other subsections of section 80 were not "particulars" within the meaning of section 81(1). If correct, this decision would rule out reliance by the Applicant in this case upon section 81(1) and might (unless some other argument were available, which has not been urged upon this Tribunal by either party) prevent the Applicant from relying on section 72(3).

5.13 However, in ***Assethold Ltd –v- 15 Yonge Park RTM Co Ltd*** [2011] UKUT (LC) HHJ Walden-Smith pointed out that the President had not been referred to the 2010 Regulations, in particular Reg. 4(c), which states that the claim notice must include a statement that the notice is not invalidated by any inaccuracy in any of the particulars required by section 80(2) to (7) ... Accordingly, the decision of the President was given *per incuriam.* In the judgment of HHJ Walden-Smith, the reasoning in Cadogan did not apply to section 81(1), which is capable of applying to any of the details, or particulars, required by any of the subsections 80(2) to (8).

5.14 This Tribunal considers that the decision of HHJ Walden-Smith is correct and section 81(1) does apply to the details required by section 80(2). The Applicant's notices state in each case that the premises consist of a self-contained building and Schedule 6 of the 2002 Act does not apply. Had the Applicant understood at the outset that it might be necessary to rely upon section 72(3), the words "or part of a building" would have been sufficient to make that clear. The Tribunal concludes that there was a serious effort to provide correct particulars in this respect and that sufficient basic particulars have been provided; accordingly, the omission to mention section 72(3) is a partial omission and ought to be treated as an inaccuracy which, by reason of section 81(1), would not invalidate the notice in circumstances where the premises turned out to be part of a building. The Respondent was not, in the judgment of the Tribunal, misled. Clearly inaccuracies must be corrected before the Tribunal made its decision, which would cause no prejudice to anyone.

5.15 As regards the 25% non-residential exception, the Tribunal would if necessary hold that the burden of proof lies on the Respondent, following the approach of HHJ Cooke in ***Indiana Investments Ltd –v- Taylor*** (2004) 50 EG 86. Although this is only a County Court decision, any decision of HHJ Cooke is worthy of considerable respect; and the Tribunal agrees with his common sense approach on this issue. The general principle is that he who asserts must prove. Where a Respondent seeks to rely upon an exception to the right to manage, it is the Respondent who makes the assertion and he must prove it. If the Tribunal were required to decide the matter on the evidence currently before it, we would reject the Respondent's reliance on this point as we would not admit the evidence of Mr Tarttelin whose calculations, in any event, we did not consider to be reliable.

5.16 Mr Brown raises a further objection to the validity of the initial notices. He argues that section 81 makes it clear that there can be only one claim notice at any one time and that the Applicant must opt for one notice at a time. By serving three notices at once (albeit on a "without prejudice basis") the Applicant invalidated all the notices. The first obvious objection to this argument is that, if it is correct, the result would be very inconvenient in cases where there was (as in this case) doubt about which unit comprised "the premises". Mr Sutherland says that the purpose of section 81 is to prevent two or more opposing hostile applications from proceeding at the same time by giving precedence to the first in time. One could envisage a situation in which a building (or buildings) might qualify as relevant "premises" while parts of the whole might equally qualify, either as a building or as part of a building.

5.17 The Tribunal accepts that section 81(3) must be applied; clearly the Tribunal cannot conclude that more than one initial notice is valid. However, the Tribunal can see no reason why it should not consider several notices on a provisional basis, which is the obvious way of determining which is valid. This must surely be the case whether they were served by different applicants competing for the right to manage or by a single applicant unsure of how to proceed. The fact that more than one notice was served at precisely the same moment ought not to prevent this from being the proper approach. The Applicant must decide upon which notice he primarily relies, since more than one might be potentially valid. The Applicant made it clear from the outset that the joint notice is its preferred option.

5.18 Accordingly, the Tribunal considers that it can consider the notices in the Applicant's preferred order and, once it has found a valid notice, declare that the other alternative notices are invalid. Accordingly, the Tribunal has considered the joint notice first and, in the light of its conclusion in relation to that notice, considers it unnecessary to examine further the separate notices.

5.19 Mr Brown raises further objections to the validity of the joint notice on the ground that the memorandum and articles of the Applicant do not comply with the requirements of the Act of 2002 and the RTM Companies (Model Articles) (England) Regulations 2009 SI 2009/2767. A RTM company is a company limited by guarantee and its articles of association must be in the form specified in the Regulations and set out in the Schedule thereto. The essence of the Respondent's argument, which is developed in the Respondent's Supplementary Statement of Case, is that, under section 73(2) of the Act, one of the objects of the company must be to manage "the premises" specified in the initial notice. The model articles specified in the Regulations (and set out in the Schedule) require "the premises" to be defined in Article 1, while Article 4 provides that: "the Objects for which the company is established are to acquire and exercise in accordance with the 2002 Act the right to manage the premises" so defined.

5.20 This Tribunal considers that a RTM company is entitled to include in its objects the right to manage more than one set of "premises", at all events where they form part of an integrated development. Both Charles House and Stuart House are identified in the articles of the Applicant. The Tribunal is satisfied that the Applicant is entitled to serve notice in relation to either or both together.

5.21 The Respondent argues further that the articles are deficient because they do not refer to any appurtenant premises. The Tribunal rejects this argument. Section 72(1)(a) clearly defines "premises" as building or part of a building. Premises may come with or without appurtenant property. The 2009 Regulations clearly require the articles to identify the premises. There is no reference to appurtenant property. The Tribunal concludes that the articles need not refer to or identify appurtenant premises; that is a matter left to be dealt with in the claim notice (which may do so in general terms, expressly or by implication) and determined by agreement or, if necessary, by the Tribunal.

5.22 Accordingly, the Tribunal concludes that the claim notice relating to Charles House and Stuart House together is valid. It follows that the other two claim notices were invalid. The Applicant is entitled to the right to manage the premises specified in the Notice (including the multi-storey car park) together with any appurtenant premises.

5.23 In the circumstances, the Tribunal has no power to award costs as between the parties. For the avoidance of doubt, the costs (if any) the Respondent is entitled to recover from the Applicant do not include any costs incurred in relation to this Application. Moreover, it appears to the Tribunal that such costs do not constitute service charge costs or administrative costs the Respondent is entitled to recover from the tenants generally under the lease terms.

5.24 In theory there remains the possibility that the parties may be unable to agree the definition of appurtenant property, though this seems unlikely, given that the obvious conclusion is that the whole of the Respondent's title is included. There may be a dispute over the amount of the Respondent's costs to be recovered under section 88. However, those issues will, if necessary, be dealt with by the Court or LVT (as may be appropriate) under a separate application.

Geraint M Jones MA LLM (Cantab)
Chairman
21 March 2013

NOTE:

Appeal from this Decision lies to the Upper Tribunal (Lands Chamber) with the permission of the LVT or Upper Tribunal. Application for permission must first be made to the LVT in writing, with reasons.