469

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference :	CHI/00MR/LRM/2014/0003
Property :	Whitehall Apartments, Kingston Road, Portsmouth, Hampshire PO2 7EG
Applicant :	Whitehall Apartments RTM Company Limited
Representative :	Mr S McCord
Respondent :	Freehold Guru Limited
Representative :	Mr J Tawse of Glanvilles LLP Solicitors
Type of Application:	Application under Chapter 1 Commonhold and Leasehold Reform Act 2002 relating to (No Fault) Right to Manage
Tribunal Members :	Judge P J Barber Mr K M Lyons FRICS Surveyor Member Miss J Dalal Lay member
Date and venue of Hearing :	30th June 2014 1st Floor, Midland House, 1 Market Avenue, Chichester, West Sussex PO19 1JU
Date of Decision :	17th July 2014

DECISION

Decision

1. The Tribunal determines in accordance with the provisions of Chapter 1 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that on the relevant date, Whitehall Apartments RTM Company Limited ("the RTM Company") was entitled to acquire the Right to Manage the premises at and known as Whitehall Apartments, Kingston Road, Portsmouth Hampshire PO2 7EG ("the Premises").

Reasons

BACKGROUND

2. The application dated 9th April 2014, is for a determination that on the relevant date the RTM Company was entitled to acquire the Right to Manage pursuant to Section 84(3) of the 2002 Act. The Applicant / RTM Company was incorporated at Companies House on 2nd January 2014 under Company Number 8829867; the RTM Company issued a claim notice on 8th February 2014, and served it upon the Respondent as the freehold owner. In the claim notice, the Applicant described the property in respect of which the claim was made as "*Whitehall Apartments ("the premises")*. By letter dated 11th March 2014, the Respondent`s solicitors Glanvilles LLP served upon the Applicant a Counter-Notice also dated 11th March 2014. The Respondent asserted in such Counter-Notice that the Premises did not qualify on 8th February 2014 and that in consequence, the RTM Company was not entitled to acquire the right to manage the Premises.

3. By written statement dated 2nd May 2014, the Respondent submitted through its solicitors Glanvilles LLP, that Flats 2,3,6,7,11 & 12 ("the Western Flats") at the Premises are vertically divided from the remainder of the Premises, and referred to the provisions of Section 72(3) & (4) of the 2002 Act, asserting that the Western Flats meet the criteria of Section 72(3) & (4), in that they are capable of independent development without significant interruption in the provision of relevant services. The Respondent asserts that the claim notice was defective since the Western Flats constitute a separate building for the purposes of Section 72. The Respondent requested that the claim be dismissed and the Respondent`s costs to be paid by the Applicant / RTM Company. The Respondent referred in its` statement, in relation to costs, to the case of *Fencott –v- Lyttleton Court [2014] UKUT 0027.*

4. By written supplementary statement (undated) the Applicant / RTM Company responded broadly to the effect that the Respondent :

   (a) Should have mentioned in its Counter-Notice the specific provision under Section 84(2)(b) of the 2002 Act, upon which it relied in alleging that the RTM Company was not entitled to the right to manage; and

   (b) Was incorrect in claiming that the Western Flats are vertically divided from the remainder of the Premises

(c) Was incorrect in suggesting that the Western Flats are separate owing to the Premises in reality being one contiguous building, always intended as one block of flats.

(d) Should not be allowed to make references to case law since the directions issued in the matter had required advance citation of any legal submissions and case law relied upon and in any event disputing the relevance of the case law cited.

THE LAW

5. Section 72 provides that :

72(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

7(2) A building is a self-contained building if it is structurally detached.

72(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

72(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.

Sections 84(1) & 84(2) of the 2002 Act provides that :

84 Counter Notices

(1) 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") to the

company no later than the date specified in the claim notice under section 80(6)

(2) A counter-notice is a notice containing a statement either-

(a) admitting that the RTM company was on the relevant date entitled to acquire the right to manage the premises specified in the claim notice, or

(b) alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled,

and containing such other particulars (if any) as may be required to be contained in counter-notices, and complying with such requirements (if any) about the form of counter-notices, as may be prescribed by regulations made by the appropriate national authority

INSPECTION

6. The Tribunal inspected the Premises in the morning of the day on which the hearing took place. The building is located on the corner of Malthouse Road and Kingston Road, Portsmouth and comprises 13 flats arranged over three floors, constructed in or about 2007. The building is constructed of face brick and rendered sections under a pitched and tiled roof; externally a number of different vertical expansion joints were in evidence. The roof of the building is in different sections; the roof above Flats 6,7,8,9,10 & 11 includes dormer window details, not included in the roof over the front part of the building closest to Kingston Road. The front section of the building on Kingston Road includes two ground floor flats, each with an independent entrance, and which flats are known as Nos. 211 & 213 Kingston Road. The building has a longer side frontage to Malthouse Road with two separate communal entrances; one entrance leads to Flats 1 & 2 (First Floor) and Flats 3 & 4 (Second Floor); the other entrance provides access to Flats 6 & 7 (Ground Floor); Flats 8 & 9 (First Floor) and Flats 10 & 11 (Second Floor). There is also an open bin & cycle store area accessible on the frontage to Malthouse Road, access to which is secured by a lockable gate. A small house apparently constructed at or about the same time as the rest of the building, adjoins and is attached to the building at the rear; the Tribunal was advised that the freehold of this house, known as 26 Malthouse Road, has been separately disposed of and is not subject to the service charge arrangements affecting the 13 flats in the building.

7. The Tribunal did not inspect any of the flats internally but viewed the two respective entrance hall, stairs and landing areas; each was laid with a blue carpet and the walls were plain emulsion painted; there were no lifts. There were individual water meters for 7 flats and electric supply in a cupboard leading off the bin store area, which was in a generally untidy condition and the adjoining cycle store was unlit and also untidy. The Tribunal observed that the second communal entrance serving Flats 6,7,8,9,10 & 11, included at ground floor level a cupboard with a further 6 water meters and electric supply.

HEARING AND REPRESENTATIONS

8. Mr McCord attended and spoke on behalf of the Applicant / RTM Company; also present with Mr McCord were Ms Welch, Mr Adam McCord and Mr Vaughan. Mr Tawse of Glanvilles LLP represented the Respondent and was accompanied by Mr Neil Hawkins FRICS of Chandler Hawkins chartered surveyors and Mr Sealy, a director of the Respondent company.

9. The Tribunal gave initial consideration to a preliminary issue which had been raised, namely whether or not a report prepared by Mr Neil Hawkins for the Respondent and dated 29th May 2014, but only delivered to the Tribunal offices on 30th May 2014, should properly be taken into account by the Tribunal in course of making its` determination. Mr McCord submitted that under the directions issued by the Tribunal, the Respondent should have sent its` statement setting out in detail the reasons why the premises do not qualify, by no later than 7th May 2014; Mr McCord said there were in any event, also errors in the report. Mr Tawse submitted that Mr Hawkins` report had only been obtained once it had become clear that the Applicant disputed the question of "vertical division" of part of the building; Mr Tawse added that Mr Hawkins was present and able to be examined on the report, but nevertheless acknowledged that the report was not tendered as expert evidence. For his part, Mr McCord requested that he may be allowed to refer in his submissions to the case of *Ninety Broomfield Road RTM Company Limited -v- Triplerose Ltd [2013] UKUT 0606 (LC)*. The Tribunal considered the matter and determined that the report may be introduced in evidence, since Mr Hawkins was present and in a position to be examined upon it and also that inclusion of the report may assist in making a proper determination of the substantive issues. The Tribunal further determined that the Applicant may, in the course of its` submissions, make reference to the *Ninety Broomfield Road* case. During a short adjournment, the Tribunal received a copy of Mr Hawkins` report and read it.

10. The Grounds of Opposition

(1) Defective Counter-claim notice

In this regard Mr McCord submitted that the Respondent`s counter-notice was invalid since, he said it did not make specific reference to the provision in the 2002 Act by which it was alleged by the Respondent that the Premises do not qualify for the right to manage. Mr Tawse submitted that the counter-notice was sufficient within the ordinary interpretation of the words in Section 84(2)(b), since he said it specified adequately the relevant provision in Chapter 1 of the 2002 Act, namely Section 72.

(2) Vertical Division of the Western Flats

Mr McCord said that the term "Western Flats" was not one in general use in regard to the Premises and that it had been termed for the first time by the Respondent in its` written statement dated 2nd May 2014. Mr McCord said that in any event the statement was incorrect in that it referred to the Western Flats as being Flats 2,3,6,7,11 & 12, whereas in reality that part of the building actually comprises Flats 6,7,8,9,10 & 11. Mr Tawse accepted that there was a discrepancy, but said that the issue is not the numbering of the flats, but that a separate claim notice should have been issued in respect of the Western Flats, since they are capable of being a separate part of the building, pursuant to the provisions of Section 72(3). Mr McCord said that the building had never been designed as two separate structures,

and that in reality it was a single building constructed as one, containing 13 flats all managed as one, and with each flat contributing an equal share of the service charge costs for the whole building, and all sharing a single bin & cycle store.

(3) Separation of the Western Flats

Mr Hawkins gave evidence in regard to his report; he said he was very familiar with the building and had been involved in its` construction from the foundations upwards. Mr Hawkins said he accepted it was built as one building but said the issue was whether it was capable of division. The Tribunal questioned Mr Hawkins in regard to the plans at Tab 3 of the bundle, and in particular the fact that what appeared to be solid nine inch walls were indicated on several edges of what Mr Hawkins had referred to as a building capable of separation and/or vertical division, namely the Western Flats. Mr Hawkins said that these plans had been prepared for planning purposes and may differ from the more detailed plans which would have been used for building regulations purposes. Mr Hawkins was also asked to explain how it could be possible to redevelop the Western Flats independently of the rest of the building in circumstances where the Western Flats are bounded at least in part, merely by nine inch solid walls, being not of weatherproof or cavity type construction. Mr Hawkins remained of the view that the Western Flats are capable of being redeveloped independently. Ms Welch, the lessee of Flat 11, said that she is able to access the roof space, or void, above her flat and that the dividing wall between the Western Flats and the front part of the building at that point consists of solid blocks, rather than a party wall. Mr McCord submitted that the 13 flats in the building comprise a self contained building within Section 72(1)(a) and that each flat has the benefit of the bin & cycle store, making the whole effectively a single inter-dependant structure.

(4)Case Law

Both parties made only passing or general references to case law in the course of their submissions. Mr McCord said that in reality the building is one single block and that as a result of the *Ninety Broomfield Road* case, there was no requirement for separate notices since it is as it stands, one single set of premises and in respect of which the claim was made. Mr McCord further submitted that it would not be possible in the context of section 72(4)((b) to provide relevant services independently for the Western Flats, without significant interruption in the provision of services for occupiers of the rest of the building.

11. In closing, Mr Tawse said that the Respondent was entitled to refer to the Western Flats as a separate part of the building and that Section 72(3)(b) made no reference to the practicalities of redevelopment, and that the position remained that the Western Flats could be so redeveloped. In regard to costs, Mr Tawse referred to the amounts claimed at Appendices 3 & 4 to the Respondent`s written statement of 2nd May 2014, asserting that the Respondent was entitled to reasonable costs.

12. In his closing Mr McCord said that there had never in reality been any intention to treat the building as two separate blocks and that it would be absurd if the Applicant were required to serve separate notices providing for the hypothetical possibility, that some part or parts of the building could or might be redeveloped independently. In regard to costs, Mr McCord said that the challenge to validity of the claim was entirely spurious and that the reference to two or separate blocks was entirely imaginary. In consequence he said the costs claimed were entirely unnecessary.

CONSIDERATION

13. We, the Tribunal, have taken into account all the oral evidence and those case papers to which we have been specifically referred and the submissions of both parties.

14. In regard to the validity of the Respondent`s counter-notice, Section 84(2)(b) requires that the counter-notice shall contain a statement "*alleging that by reason of a specified provision of this Chapter, the RTM company was on that (relevant) date not so entitled*". Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 comprises Sections 71 – 113; Section 72(1) provides as to the premises to which Chapter 1 applies. Mr Tawse submitted that the Respondent`s counter-notice was sufficient for this purpose in that it alleged by reason of Section 72, that the premises do not qualify. Mr Tawse explained during the course of the hearing that in essence the Respondent was of the view that the building constitutes separate premises, for which more than one claim notice would have been required and that in consequence, the service by the Applicant of a single claim notice in respect of the building was insufficient.

15. The Tribunal considers that the counter-notice was in these circumstances literally sufficient so as to comply with the requirements of Section 84(2)(b), although considers that it would have been more helpful had the Respondent elaborated more clearly in its counter-notice upon the basis of the Respondent`s objection, which only became entirely clear at the hearing itself.

16. In regard however to the substance of the Respondent`s allegations that the claim notice failed to comply with the requirements of Section 72, the Tribunal has considered carefully the nature of the building in the light of the evidence of both parties. The claim notice was served in respect of Whitehall Apartments; it was apparent from the inspection and the evidence that such building is run and managed as a single whole and it was noted that each of the 13 flats physically comprised in Whitehall Apartments currently contributes an equal share of the service charge costs for the whole building. Expansion joints were visible in various places on the outside vertical walls of the building; however no clear evidence had been presented to prove that substantive party walls existed behind such joints; the evidence of Ms Welch suggested the contrary.

17. The Tribunal is satisfied that the claim notice issued by the Applicant relates to the self contained building known as Whitehall Apartments and including all 13 flats. The claim under Section 72(1)(a) was made in respect of one self contained building; the fact then, that some part of that building might or might not be capable of being redeveloped independently is not relevant. Taken to its` logical extreme, the consequences of the Respondent`s argument about the potential for premises to be vertically divided, would mean that any claimant RTM would be obliged prior to issuing a claim, to carry out a very detailed surveying and/or engineering assessment of the premises concerned, on an almost forensic basis and potentially at significant cost, in order to ascertain whether vertical divisions of any part or parts of the premises may be possible, resulting in a need for multiple claims for a single building, merely as a result of the hypothetical possibility of vertical sub-divisions being contrived. Consequently the Tribunal determines that the Applicant is entitled to acquire the right to manage those premises to which the claim notice relates, namely Whitehall apartments, including all 13 flats.

18. The application for determination by the Tribunal was only in regard to Section 84(3) of the 2002 Act and not in regard to costs. The Tribunal notes that the Respondent had referred to various claimed costs at Appendices 3 & 4 to its` statement of 2nd May 2014. The costs referred to at Appendix 4 claimed pursuant to Section 88(3) of the 2002 Act would only arise in circumstances where a Tribunal dismisses a claim to acquire the right to manage. So far as the Respondent`s costs referred to at Appendix 3 are concerned, these fall to be agreed between the parties pursuant to the provisions of Sections 88(1) & 88(2) of the 2002 Act and in default of such agreement separate application may be made to the Tribunal for determination thereof.

19. We made our decisions accordingly.

Judge P J Barber

Appeals :

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.