LRX/138/2006

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – right to manage – whether part of a building a vertical division of the building – Commonhold and Leasehold Reform Act 2002 s 72

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BY

HOLDING AND MANAGEMENT (SOLITAIRE) LTD

Re: 1-16 Finland Street
Norway Docks
London SE16 7TP

Before: The President

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 25 October 2007

Justin Bates instructed by Graham Harvey for the appellant

The following case is referred to in this decision:

Malekshad v Howard de Walden Estates Ltd [2003] 1 AC 1013

The following further case was referred to in argument:

Southend-on-Sea Borough Council v Skiggs [2006] 21 EG 132

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DECISION

1. This is an appeal by the landlord of flats 1-16 Finland Street, Norway Dock, London SE16 7TP against a decision of a leasehold valuation tribunal for the London Rent Assessment Panel on an application made to it under section 84(3) of the Commonhold and Leasehold Reform Act 2002 by Finland Street 1-16 RTM Company Limited. Permission to appeal was given by Judge Reid QC, who said that the case raised issues of potentially wide implication that had not previously been considered by the Lands Tribunal. The RTM Company does not respond to the appeal.

2. Chapter 1 of Part 2 of the 2002 Act makes provision for RTM companies, the members of which are qualifying tenants of premises to which the provisions apply, to acquire the right to manage the premises. A landlord who is given a notice claiming the right to manage by an RTM company may give the company a counter-notice alleging that the company is not entitled to acquire the right to manage the premises (section 84(2)), and the RTM company may then apply to the LVT for a determination that it was on the relevant date entitled to acquire such right (section 84(3)). In the present case the landlord served a counter-notice that alleged that the company was not entitled to acquire the right to manage because the premises did not satisfy the statutory requirements.

3. Section 72 provides:

> "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."

4. Before the LVT the landlord contended that the premises failed to satisfy the requirements in three respects. Firstly it said that (contrary to subsection (4)(b)) relevant services to the building could not be provided independently without significant interruption in the provision of the services. Secondly it said that (contrary to subsection (3)(b)) the structure of the building was not such that the premises could be redeveloped independently of the rest of the building. Thirdly it said that (contrary to subsection (3)(a)) the premises did not constitute a vertical division of the building. On all these issues the LVT concluded in favour of the RTM company and it upheld the company's claim to the right to manage. The landlord does not now contest the first two matters, and the appeal is confined to the third issue – whether the premises constitute a vertical division of the building.

5. At paragraph 2 of its decision the LVT said that it had inspected the property on the morning of the hearing, and it described it as follows:

> "...It was at one end of a long 4 storey block of flats built about 1990, with two storey town houses interspersed at intervals along the block, also with parking spaces and service areas below. The block was brick built under tiled roof with stucco plaster applied to up to first floor level. There were clearly problems with the plaster, which had fallen off or been hacked off. Flats 1-16 had their own separate entrance to the internal common parts and the basement parking area, but the entrance to the parking area ran under the town house at Number 17. The roller shutter security door and the two nearest parking spaces were also under Number 17. The garage had 11 marked spaces for parking, and it appeared that all the spaces belonged to flats 1-16, with the exception of the visitors' space. The Tribunal noted that all services were well visible and exposed in the basement and they all ran in ducting across the roof of the car park, particularly the electricity. The supply to Number 17 appeared to be separately metered."

6. The LVT dealt with the issue of vertical division as follows:

> "13. This was clearly the most difficult issue. There was mostly vertical severance in this building, but if the whole of the parking area was taken into account, there was also some lateral severance. While there were pillars directly under the point of vertical severance, the Tribunal did not consider that severance at that point could reasonably be said to produce a building that was self-contained, no matter how easily

a partition could be erected. That would leave two spaces and the roller shutter door outside the area of management, including one space let on a long lease to an occupier at Numbers 1–16. Such a configuration for management appeared untidy, and it did not seem to be within the terms of the Act.

14. The Tribunal considered that the real question to be answered was whether the area under Number 17 was 'material' for the purposes of the Act. Other legislation relating to enfranchisement has been interpreted to allow some minor deviation from the apparently strict concept of vertical severance, notably the Leasehold Reform Act 1967. The Tribunal rejected Mr Bates' argument that the RTM legislation should be viewed differently from other enfranchisement legislation. Mr Bates also accepted in answer to questions that some very minor deviation in the vertical severance might be within the terms of the Act, although he was quite clear that in this case he thought the deviation was too much. As noted above, the Tribunal concluded that the area within the deviation was approximately 2% of the floor area subject to the Notice of Claim. This seemed a minimal amount in the context of the notice, and the Tribunal concluded that it was not material for the purposes of the Act."

7. For the landlord Mr Justin Bates submitted that there was nothing in section 72 to suggest that the LVT had any discretion in determining whether or not a building was subject to the right to manage, so that, having concluded as it did in paragraph 13 that vertical severance in the basement could not reasonably be said to produce a building that was self-contained, it was in error in going on to consider whether the area excluded by such severance was material and in concluding that section 72(3)(a) was satisfied. It was moreover wrong to place reliance on the Leasehold Reform Act 1967 as to the test to be applied for this purposes, since the provision in that Act, at section 2, was in quite different terms.

8. In my judgment the appeal must succeed. The requirement that, to be a self-contained part of a building, a part of a building must constitute "a vertical division of the building" is unqualified. Deviations from the vertical that are de minimis could no doubt be ignored for this purpose. The LVT concluded that the area within the deviation, as it put it, was approximately 2% of the floor area subject to the notice of claim, that this seemed minimal in the context of the notice and was not material for the purpose of the Act. The question, however, it seems to me, is, not whether the area outside a line drawn vertically through the building is minimal in the context of the notice, or very small in relation to the total floor area, but whether, including the area in question, the part of the building was, physically, a vertical division of the building. Moreover in importing a test of materiality by reference to provisions in the 1967 Act, the LVT was in my judgment in error. The right to enfranchise under the 1967 lies only in respect of a house, so that what constitutes a house had to be provided for. Section 2, of that Act, so far as material for present purposes, provides:

> "(1) For purposes of this Part of this Act, 'house' includes any building designed or adapted for living in...and
>
> (a) where a building is divided horizontally, the flats or other units into which it is so divided are not separate 'houses' though the building as a whole may be; and

(b) where a building is divided vertically the building as a whole is not a 'house' though any of the units into which it is divided may be.

(2) References in this Part of this Act to a house do not apply to 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."

9. These difficult provisions have been the subject of judicial consideration, notably in *Malekshad v Howard de Walden Estates Ltd* [2003] 1 AC 1013. But they are provisions in quite different terms from those with which I am concerned, and they were created for a different purpose. Most importantly subsection (2) introduces the qualification of materiality: "... a house ... of which a material part lies above or below a part of the structure not comprised in the house." "Material" here means "substantial" and not "other than trivial" (per Lord Millett at 1032 C-D). By contrast, no such qualification appears in section 72 of the 2002 Act (or in the provision that is effectively in the same terms in section 3 of the Leasehold Reform, Housing and Urban Development Act 1993), and the proper conclusion from this is that no such qualification, which could have been included but was not, is to be implied. The LVT was in error, therefore, in asking itself whether the deviation from the vertical was material and basing its decision on the conclusion that it was not material.

10. On the facts that it had found – that the entrance to the car parking area ran under the adjoining town house and that the roller shutter security door and the nearest parking spaces were also under that house – the LVT was clearly right to conclude that there was "mostly vertical severance" but that "there was also some horizontal severance." The building as described was divided down one vertical plane at the ground and upper three floors and down a different vertical plane in the basement. No question properly arose for consideration as to whether the difference in the planes was "material", and it is clear that it was not de minimis. The part of the building in respect of which the claim was made did not constitute "a vertical division of the building". Accordingly it was not a self-contained part of the building for the purpose of Chapter 1 of Part 2 of the Act, and the RTM company was not entitled to the right to manage it. The appeal must therefore be allowed.

Dated 26 October 2007

George Bartlett QC, President