



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/00MH/LRM/2015/0006

Property : 41 Waverley Road
Southsea
Hampshire
PO5 2PJ

Applicant : 41 Waverley Road RTM Company Limited

Representative : Samuels & Co Solicitors

Respondent : Waterglen Limited

Representative : Pier Legal Services

Type of Application : Application in relation to the denial of the
Right to Manage

Tribunal Member(s) : Judge McGrath, Chamber President
Judge Tildesley OBE

**Date and Venue of
Hearing** : 26 August 2015 at Portsmouth Combined
Court, The Courts of Justice, Winston
Churchill Avenue, Portsmouth PO1 2EB

Date of Decision : 7 September 2015

DECISION

Decision of the Tribunal

1. The Tribunal determines that the Applicant is entitled to acquire the right to manage the premises, known as 41 Waverley Road, Southsea, in accordance with section 90(4) of the 2002 and on the date that is three months after the date on which this determination becomes final as defined in section 84(7) of that Act.

The Application

2. The Applicant seeks a determination that it has the right to acquire the right to manage the premises, known as 41 Waverley Road, Southsea, in accordance with section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("the Act").
3. On 16 March 2015 the Applicant gave notice that it intended to acquire the right to manage the premises on 29 July 2015.
4. On 20 April 2015 the Respondent served a counter-notice denying the Applicant's claim because 41 Waverley Road did not qualify as premises for the purpose of the right to manage legislation.
5. On 18 June 2015 the Tribunal issued directions to progress the application. The hearing was fixed for the 26 August 2015.

The Dispute

6. The right to manage only applies to premises which meet the qualifying conditions as set out in section 72(1) of the 2002 Act, namely:
 - (a) which are a self-contained building or part of a building, with or without appurtenant property;
 - (b) which contain two or more flats held by qualifying tenants; and
 - (c) in which 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. The dispute was restricted to qualifying condition (a), namely, whether 41 Waverley Road (hereinafter referred to as the Property) was a self-contained building or a self-contained part of a building.

The Hearing

8. The Applicant was represented by Miss Jacqueline Samuels, solicitor of Samuels & Co. Mr John Gilmore was also in attendance for the Applicant. Mr Gilmore is a director of the Respondent and joint leaseholder of the ground floor and second floor flats in the Property.
9. The Respondent was represented by Miss Jawinder Veratch, trainee legal executive of Pier Legal Services. Mr James Buck, a senior asset manager for Pier Management Company, appeared as a witness for the Respondent.
10. The Tribunal admitted in evidence a jointly agreed bundle of documents. The decision refers to page numbers of the bundle in [].
11. The Applicant did not object to the late submission of the Respondent's skeleton argument and accompanying documents.
12. In September 2014 the Tribunal determined an application on reasonableness of service charges in respect of the Property (CHI/00MR/LIS/2014/0030) which involved the Respondent, Mr and Mrs Gilmore and the other long leaseholders. The Tribunal considered the previous proceedings relevant to this application, particularly the part which referred to the costs for the replacement of the roof. In those circumstances the Tribunal was of the view that Mr Gilmore should be called as a witness to give evidence about the previous proceedings. The Respondent consented to the admission of Mr Gilmore's evidence and declined the offer of an adjournment.
13. The Respondent had originally intended to call Miss Gabriella Mountford, a portfolio manager, as a witness, and her witness statement was included in the bundle [75-90]. At 16:41 hours on 25 August 2015 the Respondent e-mailed the Tribunal and the Applicant's representative saying Miss Mountford was on sick leave and, would not be attending the hearing the following day. The Respondent sought the Tribunal's leave to call Mr Buck in place of Miss Mountford, and attached his witness statement which the Respondent said was not materially different from Miss Mountford's statement.
14. The Tribunal permitted the Respondent to call Mr Buck. The Applicant raised no objections. After hearing from Mr Buck the Tribunal expressed its concern that he had not been properly advised about the legal consequences of signing a statement of truth. Although Mr Buck had read the file in respect of 41 Waverley Road, the Tribunal formed the view that Mr Buck was in effect giving Miss Mountford's evidence.
15. Prior to the hearing the Tribunal inspected the Property in the presence of Miss Samuels and Mr Gilmore. The inspection had originally been arranged for 10:00 hours but the Respondent's representative and witness had been delayed in traffic which resulted in the re-scheduling

of the inspection for 10:45 hours. The Respondent's representative then advised the Tribunal that they would go straight to the hearing and miss out on the inspection. The Tribunal decided to go ahead with the inspection.

Consideration

16. The Property is the end terrace of a block of four houses (35 -41 Waverley Road) with each house comprising four storeys. 35 Waverley Road is the mirror image of the subject Property on the southern end of the block with 37 and 39 Waverley Road forming the two mid-terraced houses. The block was constructed on or about the mid-Victorian period.
17. The Property was vertically divided from 39 Waverley Road. The Property has bay windows at the front to the ground and basement floors with beige stucco rendered elevations under a pitched tiled roof.
18. In the early 1980's the Property was converted into four flats. A communal front door approached by steps from the pavement provides access to the three upper flats. The basement flat has its own separate entrance at the side of the property, and the benefit of a small garden which was overgrown at the time of the inspection. At the rear of the basement flat the Tribunal observed a manhole cover which the Tribunal understood provided access to the waste-water and sewerage channels from the Property.
19. The Property comprises four flats subject to long leases, which had been granted for terms exceeding 21 years. This meant the four flats were held by qualifying tenants, which in turn satisfied the requirements of section 72 with respect to two or more flats held by qualifying tenants; and the total number of flats held by such tenants was not less than two-thirds of the total number of flats in the Property.
20. The Respondent was registered as the freeholder of the Property under title number HP241656. The Respondent did not own the neighbouring property of 39 Waverley Road.
21. Mr John Gilmore and Mrs Elaine Gilmore own the long leaseholds of the ground floor and second floor flats. They are the members of the Respondent, which was incorporated on 3 February 2015 with the stated object of acquiring and exercising the right to manage 41 Waverley Road. At the date of the notice of claim for the right to manage, the membership of the Respondent constituted no less than one half of the total number of flats held by qualifying tenants in the Property.
22. Mr Gilmore said it was the Applicant's failure to repair or replace the roof which prompted the establishment of the Respondent with a view to acquiring the right to manage the Property. The Tribunal observed at the inspection severe rain water penetration in the front small bedroom

of the second floor flat. Mr Gilmore advised the Tribunal that he had been unable to let the second floor flat because of the ongoing water ingress problems.

23. The Tribunal observed a fire door in the second floor flat which opened into 39 Waverley Road and provides an emergency escape route through that property. The previous Tribunal believed the fire door had been installed when the Property was converted into flats in the early 1980's.
24. At the inspection Mr Gilmore pointed out the external fire escape of metal construction at the rear of 37 Waverley Road.
25. The Tribunal is satisfied from its inspection that the Property had not been extended and retained the original footprint as at the date of construction.
26. The issue in this Application is whether the Property was self contained. Under the legislation the right to manage can only be invoked in respect of premises that are self contained. The reason for this restriction is to ensure the property concerned can be managed as a discrete unit. This in turn avoids potential disputes and uncertainties with other property owners about repairs of shared services and structural elements where the premises are not self contained.
27. In respect of self-contained premises the legislation envisages two situations. The first is where the building is structurally detached. The meaning of which was explored by the Upper Tribunal (Lands) in *No.1 Deansgate (Residential) Ltd v No.1 Deansgate RTM Ltd* [2013] UKUT 580 (LC). Essentially the Upper Tribunal held there should be no structural attachment (as opposed to non-structural attachment) between the building and some other structure.
28. Miss Samuels in her opening referred to the Upper Tribunal's decision in *Deansgate* implying that the Property might meet the requirement of "structurally detached". The Tribunal considered Miss Samuel's submission was not supported by the facts. The Property shares a vertical party wall with 39 Waverley Road which amounted, in the Tribunal's view, to a structural attachment.
29. The substantive dispute in this Application relates to the applicability of the second situation to the Property. The second situation is that the right to manage can be acquired in relation to premises which are a self contained part of a building.

30. Section 72(3) of the 2002 Act identifies the requirements that must be met in order for a property to be regarded as a self contained part of a building if:

- (a) it constitutes a vertical division of the building,
- (b) the structure of the property is such that it could be redeveloped independently of the rest of the building, and
- (c) subsection 4 applies in relation to it.

31. Section 74(4) & (5) states that

“This subsection applies in relation to a part of a building if the relevant services provided for the 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.”

32. The Tribunal observes the requirements of section 72(3) reflect the purpose of the legislation in that the right to manage can only be acquired in relation to a building that can be managed as a discrete unit. This purpose is more difficult to achieve where the property is part of a building which is why the requirements of vertical division, capable of independent redevelopment, and independent services or could be so provided without significant interruption have to be met before the right to manage can be acquired in relation to a part of a building.

33. The Respondent accepted the Property was vertically divided from 39 Waverley Road.

34. The Respondent, however, contended that the Property was not capable of re-development independently of the rest of the building. Further the Respondent argued the Property did not meet the requirements of section 72(4) because there was a distinct possibility that it shared service pipes with other parts of the building.

35. The Respondent had not inspected the Property but relied on various methods and resources available to it including site and aerial photographs.

36. The Respondent referred to the following features which it said prevented independent redevelopment of the Property:
- (a) The roof over the rear projection for 39 Waverley Road and the Property was an intersecting roof system which meant there was no clear divide between the roofs of the respective rear projections of the properties [86].
 - (b) The guttering at the front stretched across the whole building with no break between the four properties of 37 to 41 Waverley Road. The Respondent acknowledged the down pipe for the Property was self-contained and separate from 39 Waverley Road [88].
 - (c) The existence of shared internal fire escape with 39 Waverley Road [90].
37. The Applicant challenged the Respondent's contentions about independent redevelopment and independent services. The Applicant argued there was no evidence to suggest that the relevant services provided to the Property were not provided separately from the other houses in the block. The Applicant stated the roof over the rear projection was an architectural feature of the building, and would not prevent the re-development of the Property.
38. The Applicant insisted the burden of proof rested on the Respondent to demonstrate that the Property was not a self-contained part of the building. In this respect the Applicant relied on the FTT decision in *Finland Street 1-16 RTM Company Limited v Holding and Management (Solitaire) Limited* (Case ref: LON/00BE/2006/0003) which said at paragraph 10:
- “The intention of Parliament was to grant a “no fault” right to manage to leaseholders subject to a counter-notice procedure to protect landlords in certain situations. If the landlord served a counter-notice, then the burden of proving the matters set out in the counter-notice should rest with the landlord on the basis of the well-known principle that “he who alleges must prove”. Thus the Tribunal considered the evidence in that light”.
39. The Respondent argued the FTT decision in *Finland Street* was not binding and should, therefore, be ignored by the Tribunal. The Respondent asserted that it had attempted to resolve the dispute amicably without the involvement of the Tribunal but the Applicant had declined to meet the Respondent's request to provide a structural surveyor's report dealing with the matters raised in the Respondent's counter-notice. The Respondent said that after the Applicant's refusal to provide an expert's report it had tried to engage the services of an expert but was unable to do so in the time remaining prior to the

hearing. In the Respondent's view, the Applicant had the responsibility to establish that the Property was a self-contained part of the building.

40. The Tribunal finds the parties' focus on the burden of proof unhelpful in resolving the dispute. The question of whether the Property met the self-contained requirement is a matter which engages the Tribunal's jurisdiction to hear the application rather than one that has to be proved by one of the parties. Thus if the property does not meet the definition of premises in section 72 of the 2002 Act the claim to acquire the right to manage fails regardless of whether the issue of the premises had been raised in the counter-notice. It follows the Tribunal must satisfy itself that it has jurisdiction and is entitled to embark on its own enquiries provided it acts fairly throughout the proceedings. In this regard the Tribunal considered it was necessary to hear from Mr Gilmore about the previous Tribunal proceedings ((CHI/00MR/LIS/2014/0030) which examined the state of the roof to the property. The Respondent did not object to the calling of Mr Gilmore and declined the offer of an adjournment.
41. The Tribunal is satisfied the Respondent's submissions on the guttering and the fire door did not impede the independent re-development of the Property. Mr Buck for the Respondent fairly accepted the guttering for the Property could be easily separated from that for 39 Waverley Road, particularly as they had their own down-pipes. Likewise, the Applicant, if need be, could close the fire door between the Property and 39 Waverley Road and erect a fire escape at its rear.
42. The Tribunal notes the Respondent's submission on the roof applied only to the roof over the rear projection which amounted to about 20 per cent of the total roof area for the property. The Tribunal observes the Property was an end terrace which meant the pitched roof to the north was not connected to another property. The Tribunal sees from the aerial photograph the presence of a valley on the southern flank between the pitch roofs of the Property and 39 Waverley Road.
43. The previous Tribunal considered the costs of replacing the roof to the Property. Mr Gilmore informed this Tribunal that the Respondent had provided him with a specification for the proposed replacement of the roof. According to Mr Gilmore, the specification did not require any works to the roof of 39 Waverley Road. The Tribunal accepts Mr Gilmore's evidence. The Respondent did not produce a copy of the report from the previous Tribunal proceedings and Miss Veratch could not explain why it had not been provided to this Tribunal.
44. Having regard to its findings in paragraphs 42 and 43, the Tribunal is not convinced that the roof structure would prevent the re-development of the Property independently from the rest of the building.

45. The parties gave no direct evidence on the provision of relevant services to the Property, and whether they were supplied independently from the rest of the building. The Tribunal considers that it was entitled to take a view on this issue having regard to the overall construction and configuration of the Property. The Tribunal is not convinced that it was necessary for expert evidence on this issue, merely because one party has raised it as a possibility. Also the Tribunal considers that its view doubting the necessity for expert evidence is supported by the flexibility in the structure of the legislation dealing with services. Section 72(4) of the 2002 Act does not insist on the independent provision of services, but allows as an alternative the possibility of providing independent services involving works which does not result in a significant interruption of services to the rest of the building.
46. The Tribunal finds the Property was originally designed as a separate dwelling house from the other houses in the block, and that there had been no significant external alterations to the original construction. The Property was located in an established urban area and was connected to the usual services with access to the drains at its rear. The Property had been converted into four flats which was an indication that the provision of services had not prevented the internal re-development of the property. Finally the Respondent adduced no evidence about how the services were provided to the Property.
47. Given the above findings the Tribunal is satisfied that the services to the Property were either provided independently or could be so provided without significant interruption to the occupiers of the rest of the building.

Decision

48. The Tribunal finds the Property is a self contained part of the building comprising 37 to 41 Waverley Road. The Property is, therefore, a premises to which the right to manage under section 71 of the 2002 Act applies.
49. The Tribunal, therefore, determines that the Applicant is entitled to acquire the right to manage the premises, known as 41 Waverley Road, Southsea, in accordance with section 90(4) of the 2002 and on the date that is three months after the date on which this determination becomes final as defined in section 84(7) of that Act.

RIGHTS OF APPEAL

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