FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BR/LRM/2014/0012**
Property	:	**Wardley Hall Court, 518 Manchester Road, Swinton, Manchester M27 9BB**
Applicant	:	**Wardley Hall Court RTM Company Limited**
Respondent	:	**Contour Property Services Limited**
Type of Application	:	**Commonhold & Leasehold Reform Act 2002 – Section 84(3)**
Tribunal Members	:	**Ms S O Greenan** **Mr W Tudor M Roberts FRICS**
Date of Decision	:	**9 December 2014 and 7 January 2015**

DECISION

Background

1. On 10 September 2014 the Applicant made an application to the First Tier Tribunal Property Chamber ("the FTT") for a declaration that it was on the relevant date entitled to acquire the right to manage the premises which were the subject of the application pursuant to section 84(3) of the Commonhold and Leasehold Reform Act 2002.

2. Directions were given on the application on 16 September 2014 for the Respondent to serve a Statement of Case and the Applicant to serve a Statement in Reply. The Tribunal determined that the application could be decided on the basis of an inspection and the submission of written evidence.

3. The case was listed for determination in Manchester on 9 December 2014 with an inspection of the properties concerned beforehand.

The law

4. The Commonhold and Leasehold Reform Act 2002 contains the following relevant provisions:

72 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.

75 Qualifying tenants

(1)This section specifies whether there is a qualifying tenant of a flat for the purposes of this Chapter and, if so, who it is.
(2)Subject as follows, a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease.

(3)Subsection (2) does not apply where the lease is a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies.
(4)Subsection (2) does not apply where—
(a)the lease was granted by sub-demise out of a superior lease other than a long lease,
(b)the grant was made in breach of the terms of the superior lease, and
(c)there has been no waiver of the breach by the superior landlord.
(5)No flat has more than one qualifying tenant at any one time; and subsections (6) and (7) apply accordingly.
(6)Where a flat is being let under two or more long leases, a tenant under any of those leases which is superior to that held by another is not the qualifying tenant of the flat.
(7)Where a flat is being let to joint tenants under a long lease, the joint tenants shall (subject to subsection (6)) be regarded as jointly being the qualifying tenant of the flat.

79 Notice of claim to acquire right

(1)A claim to acquire the right to manage any premises is made by giving notice of the claim (referred to in this Chapter as a "claim notice"); and in this Chapter the "relevant date", in relation to any claim to acquire the right to manage, means the date on which notice of the claim is given.
(2)The claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before.
(3)The claim notice must be given by a RTM company which complies with subsection (4) or (5).
(4)If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company.
(5)In any other case, the membership of the RTM company must on the relevant date include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained.
(6)The claim notice must be given to each person who on the relevant date is—
(a)landlord under a lease of the whole or any part of the premises,
(b)party to such a lease otherwise than as landlord or tenant, or
(c)a manager appointed under Part 2 of the Landlord and Tenant Act 1987 (c. 31) (referred to in this Part as "the 1987 Act") to act in relation to the premises, or any premises containing or contained in the premises.
(7)Subsection (6) does not require the claim notice to be given to a person who cannot be found or whose identity cannot be ascertained; but if this subsection means that the claim notice is not required to be given to anyone at all, section 85 applies.
(8)A copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises.
(9)Where a manager has been appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises, a copy of the claim notice must also be given to the leasehold valuation tribunal or court by which he was appointed.

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.
(3)Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the company may apply to a leasehold valuation tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises.

(4)An application under subsection (3) must be made not later than the end of the period of two months beginning with the day on which the counter-notice (or, where more than one, the last of the counter-notices) was given.

(5)Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the RTM company does not acquire the right to manage the premises unless—

(a)on an application under subsection (3) it is finally determined that the company was on the relevant date entitled to acquire the right to manage the premises, or

(b)the person by whom the counter-notice was given agrees, or the persons by whom the counter-notices were given agree, in writing that the company was so entitled.

(6)If on an application under subsection (3) it is finally determined that the company was not on the relevant date entitled to acquire the right to manage the premises, the claim notice ceases to have effect.

(7)A determination on an application under subsection (3) becomes final—

(a)if not appealed against, at the end of the period for bringing an appeal, or

(b)if appealed against, at the time when the appeal (or any further appeal) is disposed of.

(8)An appeal is disposed of—

(a)if it is determined and the period for bringing any further appeal has ended, or

(b)if it is abandoned or otherwise ceases to have effect.

Background

5. A claim notice was served by Wardley Hall Court RTM Company Ltd ("the RTM Co") on 17 June 2014 in relation to apartments 1 to 6 Wardley Hall Court. That claim notice identified as qualifying tenants and members of the company the lessees of apartments 1, 2 and 4 Wardley Hall Court.

6. A Claim Notice was served by Wardley Hall Court RTM Company Ltd on 17 June 2014 in relation to apartments 7 to 12 Wardley Hall Court. That claim notice identified as qualifying tenants and members of the company the lessees of apartments 8, 10 and 12 Wardley Hall Court.

7. A Claim Notice was served by Wardley Hall Court RTM Company Ltd on 17 June 2014 in relation to apartments 14 to 19 Wardley Hall Court. That claim

notice identified as qualifying tenants and members of the company Brookhead Estate Limited who are the lessees of all the apartments.

8. Wardley Hall RTM Company Ltd is a company formed on 30 January 2012.

9. On 14 July 2014 Contour Property Services ("the Respondent") served Counter-Notices in relation to apartments 1 to 6 Wardley Hall Court and apartments 14 to 19 Wardley Hall Court in which it admitted that the RTM Co was entitled to acquire the right to manage on 17 June 2014. On the same date it served a Counter-Notice in relation to apartments 7 to 12 in which it alleged that by reasons of sections 75(2) and 79(5) of the 2002 Act the RTM Co was not entitled to acquire the right to manage.

10. It appeared therefore that the Respondent disputed that in the case of the premises containing apartments 7 to 12 not less than half the qualifying tenants were members of the RTM Co.

11. On 10 September 2014 the RTM Co made its application to the Tribunal.

12. On 22 October 2014 the Respondent served a statement from Oliver Thompson, a leasehold officer. He indicated that a right to manage claim had first been intimated on 24 January 2013 and rejected by the Respondent on the basis that "one leaseholder had sold their property, six leaseholders were not registered as legal owners at the Land Registry, and the Company had no support from the four leaseholders at Wardley Mews." On this basis, only one block of four qualified for the right to manage.

13. In paragraph 8 of his statement, Mr Thompson indicated that although "the matters concerning the three blocks at Wardley Hall Court appear to have been resolved, we have rejected the claim on the basis that the Right to Manage Company still has no support from the four leaseholders at Wardley Mews, an integral part of the development and part of the lease".

14. The RTM Co filed Statement in Reply dated 6 November 2014. It also wrote to the Tribunal and the Respondent on 22 October 2014. The Respondent responded to that letter on 3 November 2014. In addition on the same date it served a revised Counter-Notice in relation to apartments 7 to 12, admitted that the RTM Co was entitled to acquire the right to manage at the relevant date.

The inspection

15. The Tribunal inspected the properties on the morning of 9 December 2014. Present during the inspection were Mr Thompson of the Respondent, together with a colleague, and Mr Scott of the RTM Co. Only an external inspection was required.

16. Apartments 1 to 19 are situated in three blocks of 6, each being self-contained with a single entrance and internal common parts. To the exterior are parking areas, grassed common space, and bin stores.

17. On the opposite side of the busy A6 Manchester Road is Wardley Mews, comprising four walk-up flats, each with its own entrance. To the exterior are parking areas, grassed areas, and bin stores.

Findings

18. The RTM Co's case was that it would be easy to separate out the charges for Wardley Mews, while still using the same contractors for Wardley Hall Court and Wardley Mews. This was already done with the cleaning services as the cleaning at Wardley Mews, which have no internal common parts, was less extensive than at Wardley Hall Court.

19. The Respondent's case was that the reasonableness and ability to recover service charges was in issue if it was left managing only four units in a twenty-two unit development. The properties shared a common lease and service charge proportions.

20. The Respondent supplied a copy lease for one of the properties in Wardley Mews indicating that the service charge for the property was 1/22nd of the service charges for "the Building" which was defined (not very clearly) as "the Apartments... situated on and forming part of the Site to be erected as Apartments".

21. The same lease had been used for Wardley Mews as for Wardley Hall Court, although it included provision for "the cost of keeping entrance halls staircases passages and other parts of the Building sufficiently cleaned lighted and furnished." Wardley Mews does not have any internal common parts.

22. In response to the Claim Notices served by the RTM Co, the Respondent had served Counter-Notices admitting the right to manage in relation to two of the three blocks concerned. In relation to apartments 7 to 12, it had denied the right solely on the basis of section 79(5).

23. When serving a Counter-Notice under section 84 of the 2002 Act the person giving the Counter-Notice is required to state "by reason of a specified provision of this Chapter" why the applicant is not entitled to acquire the right to manage.

24. The Counter-Notice in relation to apartments 7 to 12 made no reference to section 72 of the Act and did not raise any issue in relation to fact that Wardley Mews was not the subject of a similar application by the RTM Co and would therefore remain managed by the Respondent.

25. Prior to the hearing the Respondent withdrew its Counter-Notice in relation to apartments 7 to 12 by serving a Counter-Notice which stated that, as at 3rd November, the RTM Co was entitled to acquire the right to manage. The Respondent put forward no coherent evidence that this had not been the position as at the date of the notice.

26. The position at the hearing therefore appeared to be that the Respondent accepted that the RTM Co was entitled to acquire the right to manage all three blocks.

27. Despite this apparent concession, the Respondent sought to continue to argue a point not taken in any Counter-Notice.

28. The Respondent was not seeking to argue that a single RTM Co could not acquire the right to manage more than one block. Such an argument might have been anticipated in view of the grant of leave to appeal in the case of *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd*, but in its letter to the RTM Co and the Tribunal dated 3rd November 2014, the Respondent said:

    "You are correct in stating that a single RTM company can declare the Right to Manage of more than a single block and we have never disputed this."

29. The Tribunal had considerable difficulty in identifying what the legal basis was for the Respondent's continued objections. In the letter of 3rd November the Respondent stated that:
    "the matter of [Wardley Mews] ... does require determination by the Tribunal."

30. No application in relation to Wardley Mews was before the Tribunal.

31. It does not appear to the Tribunal to be a ground of objection to an application to acquire the Right to Manage that properties in another physically separate building should have been the subject of the same application, or a contemporaneous application by the same RTM Co. Such a ground does not appear in, and cannot be read into, the relevant part of the Act.

32. Wardley Mews is registered under a separate freehold title to Wardley Hall Court.

33. It is clear since the decision in *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372 that the existence of "appurtenant property" which is shared with other dwellings which are not the subject of the right to manage application is not a bar to the success of such an application. In this case, the position is less complicated than in *Gala Unity* as Wardley Mews shares

no common areas with Wardley Hall Court. From a management point of view it would be extremely simple to manage and bill it separately. The lessees of Wardley Mews may well welcome this as they are currently, it appears, paying 1/22nd of a bill which includes heating, lighting, and cleaning the internal common areas at Wardley Hall Court.

Application to admit further evidence

34. On 24 December 2014 the Respondent (through Mr Thompson) emailed the Tribunal in the following terms:

> Dear Sir/Madam,
> In relation to the above application for the Right to Manage.
> Following discussions with leaseholders of Wardley Hall, it transpires that Doris Peachey of 12 Wardley Hall Court has moved to a residential care home in November 2014. She is diagnosed with dementia and has moved accommodation due to her deteriorating health. According to an email received by myself on 19 September 2014 Chris Bishop and Nicola Islam visited Mrs Peachey on 18 September to discuss the Right to Manage application and were "...satisfied that she fully understands what is going on with regards to this matter."
> I would put it to the Tribunal that unless Ms Islam and Mr Bishop are also medical practitioners, they lack the qualifications to certify that Mrs Peachey had capacity to make such a decision.
> I hope you will consider the above point in making a determination in the New Year and would also remind you that John Ashton sold his interest in 2 Wardley Hall Court on 10th October 2014. Given Mrs Peachey's current situation, this Right to Manage application would now appear to have minority support.

35. On 29 December 2014 the RTM Co (though its solicitor Mr Bishop of Slater Heelis) emailed the Tribunal as follows:

> I confirm that I am solicitor 22 years qualified and now also managing partner of Slater Heelis. It is correct that I visited Doris Peachey at her home with my assistant Nicola Islam (5 years qualified) and was satisfied that she had capacity to support the RTM application which she had registered support for some time earlier.
>
> She was living independently at home on her own. I had no doubt that she retained capacity and as such did not seek a second opinion from a medical expert. This is not required unless I had concerns over her capacity.
>
> She spoke of her diagnosis and understood that her dementia would in time impair her capacity.
>
> The respondents representation is without foundation and the tribunal should proceed to make its determination on the basis that there is the requisite majority.

36. On 7 January 2015 the Tribunal considered whether to admit the further evidence submitted by the Applicant and the Respondent.

37. The Tribunal considered that the evidence in relation to Mrs Peachey's capacity could have been obtained by the Respondent prior to the decision-making meeting of the Tribunal on 9th December 2015. The test in *Ladd v Marshall* [1954] EWCA Civ 1 as set out by Lord Denning is as follows:

"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

38. The Tribunal considered that none of these criteria were met. The Respondent could have made enquiries in relation to the condition of Mrs Peachey. The evidence was contradicted by other readily available evidence. The Tribunal was not satisfied, in view of the way in which the Respondent had dealt with this application, that mere assertion on the part of the Respondent should be regarded as apparently credible.

39. If the Tribunal had decided to admit this evidence, it would also have admitted, and accepted, the evidence of Mr Bishop as to Mrs Peachey's capacity at the time she was seen by him.

Conclusion on the substantive application

40. The Tribunal therefore determined that at the date of the Notices of Claim the Applicant RTM Co was entitled to acquire the right to manage apartments 1 to 19 Wardley Hall Court.

Costs

41. The RTM Co had indicated in its letter dated 22 October 2014 that it intended to seek an order for costs against the Respondent.

42. It had repeated this point in its Statement in Reply.

43. A costs schedule was sent to the Tribunal on 14 November 2014 together with a letter confirming that it had been served on the Respondent.

44. The Tribunal is considering making an order for costs against the Respondent from 20 July 2014 pursuant to the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Regulations 2013 rule 13(b) on the basis that the Respondent has acted unreasonably in conducting and defending these proceedings. The Tribunal is also considering making an order pursuant to rule 13(2) for reimbursement of the Tribunal fees.

45. The following directions shall apply in relation to this issue:

    a. The Respondent shall by 4pm on 23 February 2015 send to the Tribunal (3 copies) a skeleton argument setting out why it should not be ordered to pay the costs of this application from 20 July 2014;

b. The Applicant shall by 4pm on 4 March 2015 file a skeleton argument in reply.

46. The Tribunal shall thereafter determine the matter on the basis of those written representations.