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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AY/LRM/2018/0018**
Property	:	**PEMBROKE LODGE, 149 LEIGHAM COURT ROAD, LONDON SW16 2NX**
Applicant	:	**PEMBROKE LODGE RTM COMPANY LIMITED**
Applicant's Representatives	:	**Hodders Law**
Respondent	:	**AVON GROUND RENTS LIMITED**
Respondent's Representatives	:	**Scott Cohen Solicitors Limited**
Type of application	:	**Application for (no fault) right to manage under section 84(3) of the Commonhold and Leasehold Reform Act 2002**
Tribunal members	:	**Judge T Cowen** **Mr J Barlow FRICS**
Venue	:	**10 Alfred Place, LondonWC1E 7LR**
Date of decision	:	**25 October 2018**

DECISION

Order of the tribunal

(1) By 4 pm on 15 November 2018, any party who wants to apply for permission to adduce further factual or expert evidence on the issue of the exclusion under paragraph 2 of Schedule 6 to the Commonhold and

Leasehold Reform Act 2002 shall give written notice of that application to the Tribunal and to the other party.

(2) If either party makes such an application by that deadline, then the determination at paragraph (4) shall be set aside and the Tribunal shall give further directions in relation to that issue thereafter.

(3) If no application is received by the Tribunal by that deadline, then the determination at paragraph (4) shall take immediate effect.

(4) The Tribunal determines that the Applicant was on the relevant date entitled to acquire the right to manage the premises.

(5) No order as to costs.

REASONS FOR ORDER

1. This is an application under section 84(3) of the Commonhold and Leasehold Reform Act 2002 by the Applicant seeking a determination that it was on the relevant date entitled to acquire the right to manage the premises .

2. The Applicant is an RTM company formed on behalf of 32 participating tenants of 24 participating flats. A claim notice under section 79 of he 2002 Act was served on 19 April 2018, which is the "relevant date" under section 79(1) of the Act, and the Respondent freeholder disputed the claim by a hostile counter-notice under section 84(2)(b) dated 23 May 2018. The application to the Tribunal was made on 18 July 2018 by the Applicant. Directions were given by the Tribunal on 30 July 2018 for statements of case with supporting documentation with a view to a paper determination (unless the parties requested an oral hearing).

3. The Applicant's claim form was ordered to stand as the Applicant's statement of case and the Respondent's statement of case was served on 22 August 2018. On 12 September 2018, the Applicant's solicitors wrote to the Tribunal and to the Respondent's solicitors giving notice of the Applicant's intention to withdraw its claim "in view of the Tribunal's decision to refuse to grant" an extension of time for service of a Statement in Reply to the Respondent's Statement of Case. On the same date, the Respondent's solicitors applied to the Tribunal by email for an order dismissing the application with a view to enabling the Respondent to recover its costs under section 88(3) of the 2002 Act.

4. On 18 September 2018, Judge Vance of this Tribunal refused consent to the withdrawal, directed that the parties should elect whether the matter should be dismissed or determined on the basis of the

information already before the Tribunal and gave directions for written representations by the parties. By letter dated 25 September 2018, the Applicant elected to have the matter determined on the papers and made written representations on the substantive application. By letter dated 02 October 2018, the Respondent sent written representations in reply.

5. It therefore falls to this Tribunal to determine this matter on the papers on the basis of the material before us as set out above.

The Property and its title

6. The Property comprises 28 flats and is included within two separate freehold titles. Flats 1-20 are within freehold title number LN38259, of which the Respondent is the registered freehold proprietor. Flats 21-28 are within a separate unregistered freehold title. They are within leasehold title number LN38260 of which the Respondent is the registered leasehold proprietor under a 999 year lease dated 1866. The Applicant has asserted that Network Rail is the freehold proprietor of that land. That appears to be likely given that there was a deed of variation of the lease dated 26 March 2015 to which Network Rail Infrastructure was a party.

7. It is important to note that the Property appears to be one building and that the division line between the two freehold titles runs through the middle of the building, apparently separating a section containing 20 flats from another section containing 8 flats.

The Issues

8. The primary issue is whether the Tribunal should make an order under section 84(3) of the 2002 Act. The issues raised by the Respondent are these:

   a. Whether the Property is itself premises to which the right of no fault RTM applies or whether it is excluded by virtue of paragraph 2 of Schedule 6 to the 2002 Act.

   b. Service of the claim notice: whether the Applicant failed to give notice of the claim to each person who is a landlord on the relevant date.

   c. Content of the claim notice and invitation to participate: whether members of the RTM company and qualifying tenants have been correctly identified and whether joint tenants have been correctly listed.

   d. Constitution of the RTM Company: whether its register of members is complete and accurate

9. We shall deal with each of those categories as follows.

The Schedule 6 Issue: Separate freeholds

10. Paragraph 2 of Schedule 6 to the 2002 Act is as follows:

> **"Buildings with self-contained parts in different ownership**
>
> Where different persons own the freehold of different parts of premises falling within section 72(1), this Chapter does not apply to the premises if any of those parts is a self-contained part of a building.

11. A self-contained part of a building is defined in sections 72(3) to 72(5) as follows:

"(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."

12. As mentioned above, this is a case in which different persons own the freehold of different parts of the premises. The Respondent puts its position in paragraphs 14-15 of its statement of case as follows:

> "As a provisional view, the Respondent reasonably has concerns regarding the applicability of Schedule 6 paragraph 2 of the 2002 Act...The Respondent considers that without an expert

opinion or surveyor report no party can be certain whether or not the Premises are exempted. Due consideration has to be taken by the Tribunal on this point..."

13. Neither party has seen fit to supply the Tribunal with an expert opinion or surveyor report. Nor has the Tribunal been supplied with any material on which to decide this issue other than those paragraphs in the Respondent's statement of case and a bald assertion to the contrary by the Applicant in an email dated 15 June 2018. Instead the parties have simply consented to a paper determination by the Tribunal based on the material available. There are not even any photographs or witness statements nor any documents (such as utility bills) from which any inference can be drawn about the provision of relevant services to different parts of the building.

14. The only documents which give any idea as to the arrangement of the building are the land registry filed plans attached to the office copy entries for the registered titles mentioned above. From those plans, it is possible to see that there is a vertical division between the parts of the building which are in separate ownership. It is also possible to infer, using the Tribunal's specialist expertise and from looking the shape of the footprint of the building and the position of the dividing line between the separate titles, that it may be possible to redevelop the separately-owned parts of the building independently from each other.

15. It is not, however, possible so easily to work out whether the relevant services are provided to each separately owned part of the building independently, nor whether they could be so provided without significant interruption to those services to the other part. The Respondent rightly identifies that the question cannot be answered with certainty without expert surveying evidence.

16. The question for the Tribunal is what to do in such a situation. A decision has to be made as to whether this part of the Act applies to this building, because the issue has been raised by the Respondent. That involves making a decision whether either of the separately owned parts of the building is a self-contained part of a building within the meaning of the Act. A decision either way involves a finding by the Tribunal which it has insufficient evidence to make with any degree of certainty.

17. One solution is to rely on the burden of proof. Which party bears the burden of proof on this issue? On one view, the Applicant bears the burden of proving that the Property qualifies under this part of the Act and the Applicant has provided no evidence from which the Tribunal can conclude that the building does so qualify. On that view, in the absence of evidence, the Tribunal should find in favour of the Respondent and reject the application on the grounds that the Applicant has failed to prove on the balance of probabilities that the Act

applies to the building. But that is not a satisfactory result. It effectively involves a binding finding of fact by the Tribunal that at least one of the separately owned parts of the building is a self-contained part of a building within the meaning of section 72.

18. On another view, the burden of proving the question should be on the Respondent who positively asserts that the building is excluded under one of the exclusions contained in Schedule 6 to the Act. Since the Respondent raises the exclusion and then fails to prove it with any evidence, the Applicant should succeed. That result would have a similar unsatisfactory feature to that described in the previous paragraph, but the other way round. It is, however, superficially more attractive in this case, because of the half-hearted way in which the Respondent has raised this fundamental issue, by pleading its "provisional view" that it "reasonably has concerns" that "no party can be certain" and that "due consideration has to be taken by the Tribunal".

19. One could also see an argument that the assumption of the relevant parts of the Act taken as a whole is that whole buildings are generally not divisible into self-contained parts unless proven otherwise. That would also incline towards the view that the burden of proof ought to be on whomever asserts the exclusion, rather than on the Applicant.

20. Ultimately, however, we do not think it is safe to rely solely on the burden of proof in this matter, because of the uncertainty and the unsatisfactory implications of such an approach. In the interests of dealing with the case fairly and justly and keeping in mind all of the provisions of the overriding objective in rule 3 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, we have decided to adopt the following approach:

    a. Doing the best we can with the material available and making effective use of the Tribunal's specialist expertise, we have decided that on the balance of probabilities neither of the separately owned parts of this building are self-contained parts of a building within the meaning of section 72 of the Act. This is because it is unlikely, in the Tribunal's view, that a building of this nature would have separate supplies of utilities and other relevant services to its different parts or that it would be possible to separate the relevant service supplies without significant interruption to the other part of the building.

    b. Since we have decided this issue on paper with very little material and given the potential impact of this finding on the management of the building, we have decided to give the parties the opportunity in the next 14 days to elect to adduce factual and expert evidence on this issue, if they wish to pursue this issue more vigorously. If neither party so elects, then the decision we

have made on the issue in the previous sub-paragraph will stand as the Tribunal's determination of it.

Service of the claim notice: section 79(6).

21. The claim notice was not served on the freeholder of the land comprised in leasehold title number LN38260 who is probably one of the Network Rail companies. The claim notice clearly needed to be served on that freeholder (unless they are untraceable under section 79(7)) because it is the landlord of the 1866 lease and therefore the landlord of a lease of part of the premises. The Applicant relies on the dictum of Lewison LJ in the Court of Appeal in paragraphs 71 and 74 of his Lordship's judgment in *Elim Court RTM Limited Company v Avon Freeholds Limited* [2017] EWCA Civ 89 to the effect that the defect is not necessarily fatal to the claim notice. In this case, over 150 years ago the unregistered freeholder granted a 999 year lease of which the Respondent is the current lessee. The unregistered freeholder has no management responsibilities, no interest in the management of the relevant part of the premises and is unlikely to be affected by the application or its consequences in any way. We therefore decide that the failure to serve the unregistered freeholder does not invalidate the notice.

Contents of the Claim Notice and the Invitation to Participate

22. The Tribunal agrees with the Applicant's submissions (in its solicitors' letter of 25 September 2018) that paragraphs 64 and 67 of the *Elim* decision have the effect that any omissions to serve the correct people with invitations to participate do not invalidate the claim notice for the reasons given in *Elim*. The fact that the claim notice itself has been served on all joint tenants in this case means that any of them can still apply (if they wish) to become members of the RTM company.

23. As to any mistaken inclusion of non-members of the RTM company in the list of members pursuant to section 78 of the 2002 Act, in our judgment the process is saved by subsection 78(7) which reads:

> "A notice of invitation to participate is not invalidated by any inaccuracy in any of the particulars required by or by virtue of this section."

24. The claim notice is required by section 80(3) to state the full name of each person who is a qualifying tenant and member of the RTM company. The claim notice has done so in this case. The inclusion of the full name of others is not strictly a breach of that requirement, but in any event is not an invalidating defect because of the reasoning in *Elim* above. Any defect in the particulars of the claim notice is further saved by the provisions of sections 81(1) and (2) which read:

"(1) A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80.

(2) Where any of the members of the RTM company whose names are stated in the claim notice was not the qualifying tenant of a flat contained in the premises on the relevant date, the claim notice is not invalidated on that account, so long as a sufficient number of qualifying tenants of flats contained in the premises were members of the company on that date; and for this purpose a "sufficient number" is a number (greater than one) which is not less than one-half of the total number of flats contained in the premises on that date."

The constitution of the RTM Company

25. The Respondent has exhibited to its statement of case at exhibit 4 a register of members of the RTM Company showing that the requisite number of qualifying tenants were members of the company from 21 March 2018. The fact that the register of members was only supplied to the Respondent after service of the counter-notice does not prevent the RTM Company from having been properly constituted as at the relevant date for this application. There is no evidence that it was not.

Conclusion and costs

26. For all the above reasons, the Tribunal makes the orders set out above.

27. Each side has mentioned the issue of costs. The Tribunal has the jurisdiction under section 88 of the 2002 Act to make an order for costs in the event of withdrawal or dismissal of the RTM claim, but neither of those has happened. Other than that the Tribunal only has jurisdiction to determine any dispute about the **amount** of costs under section 88(1) of the 2002 Act, but there is no such dispute referred to the Tribunal. There is also no application by either side under rule 1 of the 2013 Rules. The Tribunal therefore makes no order as to costs.

Dated this 1st day of November 2018

JUDGE TIMOTHY COWEN

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).