UPPER TRIBUNAL (LANDS CHAMBER)

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Case Number: LRX/17/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – right to manage – buildings forming part only of an estate – flats with rights in common over parts of estate – appurtenant property – whether RTM company entitled to manage such parts – Commonhold and Leasehold Reform Act 2002 ss 79, 80, 96 and 97 – appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL FOR THE SOUTHERN RENT ASSESSMENT COMMITTEE

BETWEEN **GALA UNITY LIMITED** **Appellant**

and

ARIADNE ROAD RTM COMPANY LIMITED **Respondent**

Re: 10 & 12 and 14 to 32 (even) Ariadne Road
Oakhurst
Swindon SN25 2JH

Before: The President

Sitting at Swindon Magistrates Court
on 20 September 2011

Mr B McGurk, director of the appellant company, for the appellant
Ms E Cameron-Daum, company secretary of the respondent company, for the respondent

The following cases are referred to in this decision:

Cawsand Fort Management Ltd v Stafford (LRX/145/2005

DECISION

1. This is an appeal, with permission granted by the leasehold valuation tribunal, against a decision of an LVT under section 84(3) of the Commonhold and Leasehold Reform Act 2002 determining that the respondent RTM company was entitled to manage two sets of premises that had each been the subject of a claim notice under section 79 of the Act. One notice related to a block containing two flats, 10 and 12 Ariadne Road, Swindon, and the other to a block containing ten flats, 14 to 32 (even) Ariadne Road. The appellant had served counter-notices under section 84 alleging that the RTM company was not entitled to manage the premises because in neither case did they constitute "premises" for the purposes of the Act. The question, which arises in relation to each claim notice, is one of law: and it requires a consideration of the statutory provisions; the physical nature and components of the property on which the blocks stand; the provisions of the leases of the flats: and the terms of the claim notices.

2. The Right to Manage provisions form Chapter 1 of Part 2 of the 2002 Act. Section 72(1) provides:

> "(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."

Pausing there, it is to be noted that the two flats in the one block and the ten flats in the other block are all held by qualifying tenants.

3. Subsection (2) provides:

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

Subsections (3), (4) and (5) are concerned with whether a part of a building is a self-contained part of the building. They were referred to by Mr McGurk for the appellants, but because of the conclusions to which I have come there is no need to set them out.

4. Section 79(1) provides that a claim to acquire the right to manage any premises is made by giving notice of the claim; and under section 80(2) the claim notice "must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies." Section 79(1) specifies the persons to whom the claim notice must be given. They include the landlord under a lease of the whole or part of the premises. A person who is given a claim notice may give to the RTM company a counter-notice (section 84(1)); and under section 84(2) a counter-notice either admits the right of the RTM company to acquire the right to manage the premises or alleges that, by reason of a specified provision of the Chapter, the RTM company was not on the relevant date (the date of the claim notice: see

section 79(1)) entitled to acquire such right. If the latter, the company may apply to an LVT for a determination that it was on the relevant date entitled to acquire the right to manage the premises (section 84(3)); and it will acquire the right to manage the premises if and when the LVT makes a determination in its favour (section 84(5)).

5. Where the RTM company has acquired the right to manage the premises section 96(2) provides that management functions which a person who is landlord under a lease of the whole or part of the premises has under the lease are instead functions of the company; and section 96(5) provides that "management functions" are functions with respect to services, repairs, maintenance, improvements, insurance and management. Under section 97(2) the landlord is not entitled to do anything which the RTM company is required or empowered to do under the lease by virtue of section 96 except in accordance with an agreement made by him and the RTM company.

6. Gala Properties Ltd is the freehold owner of land consisting of part of an extensive modern development on the outskirts of Swindon. Following the hearing I carried out a site inspection. On the land there stand the two blocks of flats to which the claim notices relate and also two free-standing "coach houses", which are first-floor flats with parking spaces underneath. The land is bounded on the north, east and west by estate roads that curve round it and on the south by other residential buildings. There is a short, brick-surfaced road that runs across the land from east to west, providing access on the north side to the 10 flat block and on the south side, where it opens out into a courtyard, to the two-flat block and the coach houses. On its western side the roadway also serves a house that is not within Gala's ownership. There are defined parking spaces on the roadway and the courtyard area and at the front of the 10-flat block. There is a free-standing dustbin store adjacent to the roadway and this serves all the flats on the land. Immediately to the north of the 10-flat block is an area of garden bounded by a wall but with open access. Between the estate roads that curve round the development and the 10-flat block and the garden area is a grassed area of varying width on which trees have been planted. There is also a small grassed area between the 2-flat block and the estate road. On the south side of the coach houses there is a courtyard accessible only on foot.

7. The leases of the 14 flats on the land are in similar terms. I was provided with copies of the leases of 28 Ariadne Road (a second-floor flat in the 10-flat block) and 14 Ariadne Road (one of the two flats in the other block). Forming part of the demise of each lease is a numbered car port. (In the leases of other flats, I understand, a car parking space rather than a car port forms part of the demise.) Each lease is for a term of 125 years from 1 July 2006 and is expressed to be made between the lessor, "the Management Company" (Hazelvine Ltd) and the lessee. The lessee pays rent to the lessor (under clause 2.1) and a service charge to the Management Company (under clause 2.2). The lessor covenants (clause 4.1 and paragraph 6-2.1 of Schedule 6) to provide the services set out in Schedule 7. Schedule 7 specifies six categories of services and sets out under them the particular services that are to be provided. One of these (Category D) relates to lifts and has no application because there are no lifts in any of the buildings. The other categories are as follows:

> Category A, relating to the Estate Common Parts (excluding the Car Park);
>
> Category B, relating to the Building Main Structure;

Category C, relating to the Building Common Parts;

Category E, relating the Car Park; and

Category F, relating to Insurance.

8. The following definitions in the lease are to be noted:

> "'The Estate Common Parts' means the areas and amenities in the managed estate available for use in common by the Lessee and the owners and all persons expressly or by implication authorised by them, including pavements, footpaths, forecourts, visitor car parking spaces, cycle store, roads, drives, landscaped areas, gardens and areas designated for the keeping and collecting of refuse, but not limited to them.
>
> 'The Managed Estate' means the land shown edged blue on the Plan and includes the Buildings and all other structures (including boundary walls and fences) erected on the Managed Estate.
>
> 'The Development' means the land comprised in the Lessor's Land Registry title number."

The land edged blue on the Plan is the land that I have described in paragraph 6 above. It is, I assume, co-terminous with the land comprised in the title number, but nothing turns on this.

9. Under Schedule 2 the Lessee and all persons authorised with him are given rights of way, in common with the Lessor and all other persons having a like right, over and along the roads, drives, forecourts and pavements on the Development, the right to use appropriate areas of the Estate Common Parts, the right to use car parking spaces available for common use and the right to use the dustbin area.

10. Before the LVT Gala and Hazelvine argued that, because of the car-ports underneath the coach-houses and the shared access road and visitors' parking spaces, the buildings were not structurally detached or self-contained. The tribunal rejected this contention, saying:

> "The Section specifically makes it clear that 'appurtenant property' does NOT affect the status of the building as a whole, and the Tribunal found that the car-ports and common parking areas were exactly the sort of facilities which were envisaged when the Section was drafted. If a 'garage, out-house or yard' falls within the definition, then we are satisfied that the facilities in Ariadne Road also fall within that definition."

11. The LVT said that it considered that it was important to clarify what precisely it was that the new company had the right to manage. It went on:

> "It seems logical that the new company should have control of all the service-charge categories set out in Categories A, B, C, D, E and F of the leases. This means that they will take on responsibility for all the common areas, both those shared with the coach-houses and those exclusively for the use of those in the other 2 blocks. The insurance of all areas will also be in their hands, but the insurance of all that property defined in the coach house leases will be excluded.

> In effect, there may be some duplication of service provision initially, but nothing in this decision precludes the lessees of the coach-houses from applying to a Leasehold valuation tribunal for variation of their leases, or for a decision as to reasonableness of service charges. Variation could provide that they should pay a lesser percentage of the total service-charge in view of the fact that the majority of the maintenance is being undertaken and paid for by the RTM company, and not by the landlord's managers.
>
> Similarly, it may make more economic sense for the site to be managed as one whole, and insured as one whole, but this is beyond our jurisdiction."

12. The LVT granted permission to appeal. It said that "it would be helpful and constructive to hear whether the Lands Tribunal agree with us on this point: namely whether the blocks in question could be defined as 'self-contained and structurally detached'; and that "it would be helpful to have some guidance as to the extent to which Tribunals in these circumstances are required to speculate upon – and make provision for – the practical difficulties which may flow from their decisions."

13. The claim notices identified "the premises" for the purposes of the claim as, in one case "the block of flats numbered 14 to 32 Ariadne Road" and, in the other case, "the block of flats numbered 10 to 12 Ariadne Road". Each of these buildings is undoubtedly self-contained since it is structurally detached (see section 72(2)); and accordingly on the relevant date the RTM company was entitled to acquire the right to manage them. The question arises, however, to what other parts, if any, of the Managed Estate the right to manage extends. The right to manage can only be acquired in relation to the premises that are the subject of a claim notice; and a claim notice can only be served in relation to premises that "consist of a self-contained building or part of a building, with or without appurtenant property" (see section 72(1)(a)).

14. Section 72(1)(a) was drafted with such an economy of wording as to make its interpretation not entirely clear. The problem lies with the words after the comma, "with or without appurtenant property". Do these words mean that if the self-contained building has appurtenant property "the premises" for the purposes of the Act consist of the building plus such appurtenant property as the building may have? Or does it mean that if the building has appurtenant property "the premises" can either consist of the building plus the appurtenant property or the building alone, leaving it to the claim notice to specify under section 80(2) which of these, for the purposes of the claim, it is? I think it must be the first of these, so that the effect of a valid notice is to extend the right to manage to any property appurtenant to the building or part of a building. It would be unsatisfactory if a claim notice had to specify whether or not it was made in respect of appurtenant property. The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 do not require this, nor does the form in Schedule 2 of the Regulations provide for any more than a statement of the name of the premises to which the notice relates.

15. Thus the right to manage in the present case extends to the two blocks of flats and to appurtenant property. Property is appurtenant for this purpose, in my view, if it is appurtenant to a flat within the block. The appurtenant property attaching to each flat under the lease of it is of two sorts. Firstly there is the car port or car parking space that is included in the demise,

and there can be no doubt, in my judgment, that each flat's car port or parking space is appurtenant property for the purposes of the statutory provisions. The second sort of appurtenant property consists of the incorporeal rights of way and other rights granted under Schedule 2 of each flat's lease. These are rights that are not exclusive to the particular flat but are shared with all or some of the other flats, including flats within the Managed Estate that are not within either of the two blocks in respect of which the claim notices were served. There is, I think, no reason why the right to manage should not extend to the maintenance of land over which tenants have incorporeal rights (cf, in relation to the appointment of a manager under Part II of the Landlord and Tenant Act 1987, *Cawsand Fort Management Ltd v Stafford* (LRX/145/2005 at paragraph 17)).

16. There is clearly an argument, however, that it is implicit that "appurtenant property" should be construed as relating to land that appertains exclusively to the premises, excluding, therefore, land over which the tenants of the premises have rights in common with others whose flats (the two coach houses) are not the subject of the right to manage claim. The reason for such a construction would be that, if such land were included in the right to manage this could conflict with the rights in relation to that land of both the tenants of the coach houses and the landlord and any management company. Moreover section 97(2), which removes the landlord's entitlement to do what the RTM company is required or empowered to do, might be thought to lend some support for this. I had myself reached the conclusion that this was indeed the correct approach, so that in the present case "the premises" would only extend to the buildings themselves and the car ports and parking spaces that were included in each demise, and I inquired of the RTM company whether, in the light of this, it wished to pursue its claims. Its response was that it did wish to do so. On further consideration I do not think that "appurtenant property" is to be so narrowly construed. There is nothing in the wording itself that would suggest this, and, although the scope for conflict of the sort that I have mentioned exists, this is insufficient reason for imposing a restriction on the meaning of the provision.

17. The effect of treating the premises as extending to the land over which tenants of flats in the claim notice buildings have rights is this. Under section 96(2) the RTM company succeeds to the duties of the landlord and the management company, under each lease of a flat in these buildings, in relation to the services to be provided in categories A, B, C, E and F. It owes these duties to the landlord as well as to the tenants (see section 97(1)). Under section 97(4) the tenant's liability to the service charge is owed to the RTM company. The landlord and the management company have no entitlement under any of those leases to carry out such services (including, for instance, maintenance of the roadway and gardens), with the exception of category F (insurance): see section 97(2) and (3). But the landlord is still required, and therefore entitled, under the leases of the coach houses to provide the services in categories A, B, C, D and F, including, therefore, maintenance of the of those parts of the Managed Estate over which those tenants have rights; and the tenants of those flats are still liable to pay to the landlord the service charge as provided under their leases. However, it would seem to me that if the landlord and management company continued to provide services in relation to those parts of the estate that the RTM company is obliged to the tenants of the 12 flats in the two blocks to maintain, the cost of such services would not be reasonably incurred and could be disallowed under section 19(1) of the Landlord and Tenant Act 1985.

18. For their part the tenants of the coach houses have indicated that they support the claims of the RTM company; and it clearly makes economic sense, as the LVT said in its decision and Mr McGurk acknowledges, for the estate to be managed as a single whole. In the light of this recognition and the view that I have expressed in the penultimate sentence of the last paragraph, I would hope that agreement can be reached between the RTM company, the landlord and the management company on how that is to be achieved. The appeal is dismissed.

Dated 25 October 2011

George Bartlett QC, President