UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 081 (LC)
Case Number LRX/47/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – right to manage – service of notice of intention to participate on qualifying tenant – definition of qualifying tenant – 'long lease' and shared ownership lease – interpretation of s76(2) Commonhold and Leasehold Reform Act 2002

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

BETWEEN	**CORSCOMBE CLOSE BLOCK 8 RTM COMPANY LIMITED**	**Appellant**
	ROSELEB LIMITED	**Former Respondent**

Re: Block 8 Corscombe Close,
Weymouth Dorset,
DT4 0UF

Before: His Honour Judge Mole QC

Sitting at: The Upper Tribunal (Lands Chamber), 45 Bedford Square, London, WC1B 3DN
on 24 January 2013

Counsel for the Appellant: *Mr Andrew Sheftel* instructed by Nantes, Solicitors.

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The following case is referred to in this decision:

Brick Farm Management Ltd v Richmond Housing Partnership Ltd [2005] EWHC 1650

DECISION

Introduction

1. The appellant is a RTM company. On 15 July 2011 it applied for a determination under section 84 (3) of the Commonhold and Leasehold Reform Act 2002 that at the relevant date it was entitled to acquire the right to manage Block 8, Corscombe Close, Weymouth, Dorset, DC 4 0UF. Block 8 contains 15 flats.

2. The respondent before the LVT, Roseleb Ltd., is the freehold owner of the block. The respondent has played no part in the appeal to the upper tribunal and, having failed to file a respondent's notice, is strictly speaking no longer a respondent by the operation of rule 25 of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010. However it is convenient to continue to refer to Roseleb Ltd as the respondent.

3. Flats 1, 6, 9 and 10 are held on shared ownership leases. In each case the freeholder granted the flat on a term of 125 years to the Weymouth & Portland Housing Association and then, under a shared ownership lease, the Housing Association granted the tenant a term of 125 years less three days, identifying an agreed capital value on the starting date, a tenant's percentage share, a first premium and a rent. The shared ownership lease contained provisions for the tenant to acquire increasing proportions of the ownership of the flat in steps of 10% up to 100%. In each case the tenant's percentage share was less than 100% at the relevant date.

The LVT's Decision

4. Neither party requested a hearing and, after seeking clarification on certain points the LVT determined the matter on the papers.

5. The respondent took a number of points relating to the proper service of the notice. One of them, the only one relevant to the present case, was that notice of invitation to participate should have been served on the housing association and not on the tenant in those four cases where the flats were held on a shared ownership lease and where the tenant's share was less than 100%.

6. The LVT found in favour of the respondent on the point that the notice of claim was defective in that it had not allowed sufficient time for the freeholder to serve a counter notice. The appellant does not challenge this conclusion and Mr Sheftel accepted that the claim must fail for that reason alone. However the LVT also decided against the appellant on another ground which remains of importance.

7. In paragraph 19 of its decision the LVT said:

"However, as regards Ground 1 the Tribunal noted that it was agreed between the parties that no Notice of Invitation to Participate had been served on Weymouth and Portland Housing Limited - the Lessees of Flats 1, 6, 9 and 10. The Tribunal did not however agree with the Applicant's argument that Weymouth and Portland Housing Ltd was not the qualifying tenant. A person is the qualifying tenant of a flat if he is the tenant of a flat under a "long lease" (section 72(2) of the Act). A "long lease" for the purpose of this chapter is defined under Section 76(e) where it is a Shared Ownership Lease, whether granted in pursuance of that part of that Act or otherwise, where the Tenant's total share is 100%."

8. The LVT then considered the evidence and the provisions of the lease and found as a fact that none of the under-lessees of the relevant Flats had achieved 100% ownership of their flats. The LVT concluded that the under-lessees were not qualifying tenants because they were not tenants under a "long lease" but Weymouth and Portland Housing Ltd was and therefore should have been served. The failure to serve was not one that could be saved. It is this part of the decision that the appellant challenges, arguing that on the proper interpretation of section 76 the tenants of the flats did hold under "long leases" and were qualifying tenants.

The Law

9. The relevant sections of the Commonhold and Leasehold Reform Act 2002 are as follows:

"75 (1) ….

(2) Subject as follows, a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease.

……

(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."

76

(1) This section and section 77 specify what is a long lease for the purposes of this Chapter.

(2) subject to section 77, a lease is a long lease if –

(a) it is granted for a term of years certain exceeding 21 years, whether or not it is (or may become) determinable before the end of that term by notice given by or to the tenant, by re-entry or forfeiture or otherwise,

.....

(e) it is a shared ownership lease, whether granted in pursuance of that Part of that Act or otherwise, where the tenant's total share is 100 per cent, ..."

10. Section 76 (3) defines "shared ownership lease". It is agreed that the leases in question in this case are "shared ownership" leases within that definition.

11. There is no doubt that these are confusing provisions. The tenants of the flats in question had been granted leases "for a term of years certain exceeding 21 years" and on that basis appear to fall within section 76 (2) (a). On the other hand they were shared ownership leases and those are dealt with specifically under section 76 (2) (e) but under that provision they only qualify where the total share is 100%. It could be difficult to see what the purpose of subsection (e) is unless it is assumed that it imposes a specific and exclusive rule for shared ownership leases.

12. In the case of *Brick Farm Management Ltd v Richmond Housing Partnership Ltd* [2005] EWHC 1650, Mr Justice Burnton considered the almost identical provisions in sections 5 and 7 (1) of the Leasehold Reform, Housing and Urban Development Act 1993. It was contended that the act should be construed to mean that the unqualified ambit of the definition under (a) was intended to be restricted by the specific cases in the following sub-sections. In support of that submission it was pointed out that the reference to a "shared ownership lease", ... where the tenant's total share is 100%" would otherwise be otiose.

13. In Paragraph 15 of his judgment Burnton J. turned to consider the provisions of the 1993 act -

> "Mr Arden drew to my attention another curious feature of the 1993 Act. Shared ownership leases, as defined in section 7, *(which is a definition in identical terms to section 76 (3) of the 2002 Act)* are always, or virtually always, for a term of years exceeding 21 years. Such leases have, or are expected to have, a capital value; they have either been granted on payment of a premium, or confer on the tenant a right to a proportion of the value of the premises; or they must therefore be for a term having a realisable value, and that means a term of 60 or 99 years or more. It follows that in practice all shared ownership leases are long leases within the meaning of section 7 (1) (a) of the 1993 Act. On the face of it, therefore, para (d) of section 7 (1) is otiose. Indeed, the restriction of the paragraph to a shared ownership lease where the tenant's share is 100% suggests that a tenant under such a lease with a share of 90% of the value of the premises is not a qualifying tenant. It was for this reason that Mr Arden submitted that paragraph (a) has to be read as referring to leases other than a shared ownership lease. Despite the curious result that paragraph (d) appears to have no practical effect, I cannot accept this submission, which does of violence to the words of section 7 of the 1993 Act. Parliament cannot be taken to have intended to restrict the unqualified ambit of paragraph (a) of section 7 (1) by adding a paragraph purporting to widen rather than to narrow the definition of "long lease".

14. Burnton J. remarked (in paragraph 23) that this conclusion was less surprising given that other provisions of the 1993 act (similarly found in the 2002 Act) appeared to have little or no effect. As the LVT noted in granting leave to appeal, Burnton J.'s comments were obiter dicta.

Consideration and Conclusion

15. The starting point is always to consider what the most natural meaning of the section is. The definitions in section 76 (2) (a) to (f) can either be read as a series of gateways; so it is enough to pass through any gate to qualify as a 'long lease'. Or it can be read as a stack of sieves; so a lease can fall through (a) but then be caught by the specific mesh of (e). In my judgement section 76 makes much more sense if it is read in the former way. The definitions of a long lease in 76(2)(a)-(f) are additive: a lease qualifies as a "long lease" if it falls under any one of those definitions. Thus if a lease that is a shared ownership lease is granted for a term of years certain exceeding 21 years and comes under (a), it is a "long lease". It does not also have to qualify under (e), so it does not matter if it does not do so. The draughtsman did not intend (e) to operate to exclude a shared ownership lease that would otherwise have qualified under (a). As Burnton J put it in paragraph 15 of the Brick Farm case: "Parliament cannot be taken to have intended to restrict the unqualified ambit of paragraph (a) of section 7 (1) by adding a paragraph purporting to widen rather than to narrow the definition of "long lease". He preferred to concentrate on the natural meaning of the relevant sections, as do I. Certainly Burnton J's comments were obiter and about a different statute. However the wording of the definition of 'long lease' and 'shared ownership lease' is almost identical, the purposes of the legislation similar and I find Burnton J's analysis very persuasive. I have some sympathy for the LVT which dealt with the case on written submissions and was not referred to the *Brick Farm* case, which would probably have led it to a different conclusion.

16. I conclude that the Appellant succeeds on this point. The tenants under the shared ownership leases held 'long leases' under section 76(2)(a) and were the qualifying tenants who needed to be and were served with notice.

Dated 21 February 2013

His Honour Judge David Mole QC