634

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/22UG/LRM/2017/0006**
Property	:	**349-385 Quayside Drive, Colchester CO2 8GT**
Applicant	:	**Quayside (Colchester) NO.3 RTM Company Limited**
Representative	:	**Mr D Joiner** **RTMF Services Limited**
Respondent	:	**Theowal Limited**
Representative	:	**Mr M McIntosh** **Estates & Management Limited**
Type of Application	:	**Section 84(3) Commonhold and Leasehold Reform Act 2002 – to determine whether the applicant has acquired the right to manage the Property**
Tribunal Members	:	**Judge John Hewitt** **Mr Roland Thomas MRICS** **Mr John Francis QPM**
Date and venue of hearing	:	**2 July 2018** **Colchester Magistrates Court**
Date of Amended Decision	:	**16 July 2018**

AMENDED DECISION

NB We exercise our powers under Rule 50 to correct accidental slips and an omission in paragraph 2 of our decision dated 12 July 2018. Our amendments are shown in bold below.

Judge John Hewitt
16 July 2018

The issue before the tribunal and the decision of the tribunal

1. This is an application made pursuant to s84(3) Commonhold and Leasehold Reform Act 2002 (the Act). The issue before the tribunal was whether the applicant was, on the relevant date, entitled to acquire the right to manage the Property.

2. The decision of the tribunal is that the applicant was, on the relevant date, entitled to acquire the right to manage the Property. The acquisition date of that right shall be the date provided for in s90(4) of the Act, namely three months after the determination becomes final. Where there is no appeal a determination becomes final **28** days after the date on which the decision was sent to the parties **as provided for in ss84(5)(a) and 84(7)(a) of the Act**. If there is an appeal the parties are referred to s84(7)(b) and (8) of the Act.

NB Later reference in this decision to a number is square brackets ([ ]) is a reference to the page number of the trial bundle provided for our use at the hearing. The prefix 'S' is a reference to the supplemental trial bundle.

Procedural background

3. By a claim notice dated 31 July 2017 [35] given pursuant to s70 of the Act, the applicant sought to acquire the right to manage the Property.

4. By a counter-notice dated 4 September 2017 [39] the respondent alleged that by reason of s72 of the Act the applicant was not entitled to acquire the right to manage the Property, but no details of the matters relied upon were given.

5. On 6 October 2017 the tribunal received an application dated 3 October 2017 [1] from the applicant seeking a determination pursuant to s84(3) of the Act.

6. Directions were given on 13 October 2017 [43]. Pursuant to those directions we have been provided with a trial bundle. The respondent's statement of case in answer is at [54] and the applicant's statement of case in reply is at [67].

   It emerged from those documents that there was an issue between the parties as to whether the Property was a self-contained part of a building within the meaning s72(3) of the Act. The respondent had, for the first time, raised the question of the supply of water services to the Property. Both parties had exchanged some correspondence about that issue and the implication of the pumps in the pump room (which is not

part of the Property) and the extent to which they serve a supply of water to the accommodation within the tower, or rotunda, which is part of the Property. The applicant relied upon information from a Mr Spalding of Whitecode Design Associates which had carried out original design work for the developer, Barratt Eastern Counties and the respondent relied upon information from a Mr Moseley of Lynx Maintenance Limited which company currently services the pumps in the plant room. The information provided was brief, conflicting and not at all in the form of an expert report compliant with rule 19 of the tribunal's rules.

7. On 5 February 2018, prior to the proposed hearing we had the benefit of a site visit. Present were: Mr Nick Bignall for the applicant, Mr M McIntosh and Ms Emma Graham for the respondent and Ms Sue Stewart of First Port, the respondent's managing agents. At the site visit we were informed that neither Mr Spalding nor Mr Moseley had been requested to attend the hearing to give oral evidence to support their conflicting views.

8. The Property comprises a number of flats over three floors in what have been referred to as the 'low level flats' and a number of flats over about five floors in a circular part of the building sometimes referred to as 'the rotunda' and sometimes as 'the tower'. Both parties drew to our attention a number of physical features concerning the Property.

9. Ms Stewart kindly made arrangements for us to visit the plant room which is not situate within the Property, but which is situate in a building further along which is connected to the low level flats of the Property. The plant room is an internal room. The electric light was not working and using some small torches we were just about able to see what appeared to be three pumps and associated pipework. None of the persons present were able to answer any questions as the means or mechanics as to how water was pumped from the plant room to and distributed around the Property or where any water meters serving the Property were located.

The hearing

10. At 11:00 on 5 February 2018 the hearing commenced. The applicant was represented by Mr N Bignall of RTMF Services Limited. The respondent was represented by Mr M McIntosh of Estates & Management Limited which we believe to be an asset manager engaged by the respondent.

11. We clarified the issues to be determined. S72 of the Act provides:

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.***
[Emphasis added]

13. As regards s72(3), at the hearing Mr McIntosh conceded that the Property met the requirements of sub-sections (a) and (b) but asserted that sub-section (c) was not met by reason of s72(4)(b).

14. As regards s72(4) Mr Bignall contended that there was an independent supply of water to the rotunda in the Property albeit it came via the plant room located in a different but adjacent property. Mr McIntosh contended that if the equipment on the plant room were no longer to be available to the applicant RTM company, that company would be required to provide an alternative route of supply and would have to show what that was and that it could be delivered or provided in conformity with s72(4)(b).

15. Neither Mr Bignall nor Mr McIntosh had with them any technical evidence to support their rival submissions.

16. Mr Bignall made several passing references to an authority; *St Stephens Mansions RTM Company Ltd & anor v Fairhold NW Ltd & anor* [2014] UKUT 0541 (LC) a decision of the Deputy President, Mr Martin Rodger QC, but copies were not provided to us. Mr Bignall appeared to submit that that case was authority for the proposition that water supply was not a problem and that technical evidence was not required. We rejected that submission.

17. Post the hearing the tribunal took the opportunity to consider *St Stephens Mansions*. It is plain from paragraph 60 that there was evidence before the original tribunal from a civil engineer who explained how a supply of water could be achieved at the development in question and it is clear that the Upper Tribunal relied upon that evidence when coming to its conclusions. Paragraph 66 from that authority set out what the focus of the technical evidence should be.

66. It was not suggested by either party that it was necessary for the RTM company to demonstrate an intention actually to carry out any of the work described by Mr Churches. That consensus seems to me to be sound. The question posed by s.72(4) is whether relevant services are provided independently to one part of the building, or could be so provided without significant interruption to the supply to the remainder of the building. It is irrelevant that the RTM company proposes to continue with the current arrangements and to cooperate with the owners or managers of the remainder of the building in providing a service on a common basis, rather than independently.

18. That authority was drawn to the attention of the parties and further directions were given as below:

Further directions

18.1 The applicant shall by **5pm Friday 16 March 2018** serve on the respondent a copy of the report of the expert witness upon whom it relies.

18.2 The respondent shall by **5pm Friday 20 April 2018** serve on the applicant a copy of the report of the expert upon whom it relies.

18.3 The two experts shall by **5pm Friday 11 May 2018** meet (or if preferred speak on the telephone) to try to narrow the issues between them and shall, by that time and date jointly sign a schedule comprising two parts:
Part A shall set out a summary of the matters upon which they are agreed;
Part B shall set out a summary of the matters upon which they are not agreed together with a brief summary of their rival positions and why they are not agreed upon them.
The applicant's expert shall take the lead role to endeavour to ensure compliance with this direction.

18.4 The hearing of the application is postponed to a date to be fixed, probably in June or July 2018.

18.5 The applicant shall by **5pm Friday 25 May 2018** serve on the applicant (free of charge) a supplemental hearing file duly page numbered comprising the experts' reports and the Schedule referred to above and shall file with the tribunal four copies of the supplemental hearing file.

Extensions of time were granted to accommodate the illness of Mr Fryer, the respondent's expert.

The resumed hearing

19. The resumed hearing took place on Monday 2 July 2018. The applicant was represented by Mr Dudley Joiner and the respondent was again represented by Mr Milton McIntosh, an in-house counsel.

20. We were provided with a supplemental trial bundle. It contained:

20.1 A report of Mr Spalding (applicant) dated 28 March 2018 [S12];
20.2 A report of Mr Fryer (respondent) dated 11 May 2018 [19]; and
20.3 A full copy of the St Stephens Mansions authority [22].

21. At the commencement of the hearing Mr McIntosh handed in his skeleton argument and a full copy of another authority – *Oakwood Court (Holland Park) Limited v Daejan Properties Limited* [2007] 1 EGLR 121.

22. We were told that the parties had agreed between themselves that neither Mr Spalding nor Mr Fryer need attend the hearing on the basis that the technical expert evidence was not in dispute and that both reports were agreed. To be crystal clear on this it was put to the parties:

'Are you both agreed that the tribunal is to proceed on the basis that both expert reports are correct? The answer was 'Yes'.

In the event, despite the direction as 18.3 above, the experts had not met and had not prepared the schedule. Whether they were instructed not to meet or whether they decided themselves not to meet given the extent of the agreement between them, we do not know.

The agreed expert evidence

23. Both reports are fairly short. We need not recite them in full. Key extracts are:

Mr Spalding

"9. If the intention is to separate the supplies to some of the upper apartments within Building 3 then another tank and boost pump set would be required. At this stage, we would suggest locating this equipment in within the cycle store adjoining the existing pump room. However, it is possible to install a new pump room at other locations around the perimeter of the building.

10. The new boosted water mains supply would then be routed in the ground to then rise into the tower, where a new water riser would be required. We would suggest this riser be located adjacent to the existing water riser, where the new boosted mains would then rise and connect to the individual supplies for the individual apartments.

11. In my opinion these works could be carefully programmed so that the interruption of supply to occupiers is kept to a minimum and is limited to a short duration of switchover from the existing pump set to the new pump set.

12. ...

13. I have not been asked to indicate the cost of installing a new supply as it is not relevant to the Tribunal's decision.

14. In conclusion it is my professional opinion that the water supply to occupies of 'the premises' can be provided independently and that the carrying out of the relevant works and installation of new equipment required will not result in a significant interruption in the provision of water supplies for the occupiers of the rest of the building."

Mr Fryer

*"**Option 1***

The existing booster set could be left in its current position and be fed by the same electricity supply, using a separate meter to monitor usage.

The outlet pipework from the booster set serving flats 333, 335, 345 and 347 could be capped off to remove from the existing setup in order for this set to serve the Tower alone.

A new booster set and cold water storage tank could then be installed within the same plant room or local store room (next door) and be connected to the outlet pipe serving the four flats listed above.

There would be very limited water disruption should this option take place.

A PC Sum to carry out the works suggested above would be £15,000 + VAT.

Option 2

The booster set could be left in its current position and be fed by the same electricity supply.

The outlet pipework from the booster set serving the tower could be capped off to remove from the existing setup in order for this set to serve flats 333, 335, 345 and 347 alone.

An outbuilding could be built to house the new booster set to serve the tower. Water and electricity would need to be supplied to the outbuilding in order to install the set.

There would be very limited water disruption should this option take place.

A PC SUM to carry out the works suggested above would be in excess of £40,000 + VAT.

***NB** There are a number of alternate options, however we feel that these should be discussed in person due to the complexity."*

The rival submissions

24. Mr Joiner put his shortly. Mr Joiner drew attention to the agreed expert evidence, to the material provisions of s72(4)(2), to the nature of the test as explained in *St Stephens Mansions* and submitted that the test is plainly met.

25. Mr McIntosh took a different view. Mr McIntosh drew attention to the five tests set out in *Oakwood*. Mr McIntosh acknowledged that in *St Stephen's Mansions* it was emphasised that the test was practical but he submitted that it has to be viewed in the real world and it cannot be fanciful.

Test 1 – What services are in issue?
No dispute that the service in issue is the cold water supply.

Test 2 – Can the cold water supply be provided to the RTM part independently of their provision to remainder of the building?
Mr McIntosh submitted the key word is 'independently' and that the supply is not independent if is coming from a plant room within the non-RTM part of the building. Mr McIntosh also rejected the suggestion that the adjacent cycle store might be utilised because lessees have rights to use that store and there would be a derogation from grant if the freeholder granted a right to place a booster set in it. Even if that was achieved it would still not be independent as it would be located in a non-RTM part of the building. Mr McIntosh sought to explain the observation in paragraph 88 of *St Stephens Mansions* that " *In order to give the statue a sensible effect it is therefore necessary to disregard the question of entitlement to carry out the necessary work'.* He submitted that that observation was directed at the argument set out in paragraph 84 which referred to new tanks within an existing pump room and the possibility of laying a new supply pipe beneath the car park, which, it was said the RTM company would not have the right to do. Mr McIntosh said that was quite a different point and the laying of a pipe line would not have interfered with property rights vested in other lessees and thus the question of derogation from grant did not arise. We observe that forcing a landowner to grant an easement to permit the laying of a water supply pipe beneath a car park is as much an interference with a property right as making a slight reduction in the available space in a cycle store which a lessee, in common with other lessees, has a right to use.

Mr McIntosh accepted that this argument did not arise if the existing plant room was utilised, but said it still raised the question of 'independent'. Mr Joiner countered the arguments by submitting that the existing pump room was 'appurtenant property' within the meaning of s112 and the RTM company would have rights to use.

Mr McIntosh accepted that both experts agreed that a new outbuilding to house a new booster set was a practical possibility but he criticised both for not identifying where it might be located. Given that one of the experts was his own, it was a little rich of Mr McIntosh to suggest the evidence was incomplete or not clear on this point. Mr McIntosh is reminded that he invited the tribunal to determine the dispute on the basis of the agreed evidence. Mr McIntosh also speculated that planning permission might be required to construct a new pump house but no evidence on that point was put forward by him.

We preferred the submissions of Mr Joiner. The focus is on practicality There are options available and the agreed expert evidence was to the effect that from a practical perspective a new independent supply could be installed.

Test 3
What works are required to separate the water supply?
Mr McIntosh observed that in *Oakwood* at paras 80 – 81 it was said that 'a lengthy or programme of works in which to separate the supply and the need for planning consent did not sit comfortably with the Act'. HHJ Marshall concluded that it is not sufficient for a claimant to say the works could be done in principle, the claimant would at least have to demonstrate that it could be done in fact be done. Mr McIntosh submitted that to an extent that sentiment was echoed in *St Stephens Mansions* in paragraph 82. There the judge acknowledged it was a question of fact and degree as to when a line would be crossed.

Mr McIntosh was again critical of the lack of evidence on this point. He submitted that it was necessary to look at the nature and extent of the proposed works and what would be entailed. He again raised the planning issue if a new pump house was to be erected and that the cost would be substantial and if to be borne by lessees would have to be the subject of a consultation process. Mr McIntosh was critical that there was no evidence as to the scale or magnitude of the works contemplated under any of the options.

Mr McIntosh submitted the burden of proof lay with the applicant and he said that the burden had not been discharged in connection with this test.

We disagree. Given our clear directions as regards expert evidence we infer that both experts were fully briefed on the background and context. If the expert report of Mr Fryer submitted on behalf of the respondent did not address this point then it was open to the respondent to instruct Mr Fryer to address it. With regard to the report of Mr Spalding, Mr McIntosh invited us to treat it as being correct.

Neither report suggests that the various options available are of such a scale and magnitude that they would fall within the observations of HHJ Marshall in *Oakwood* or cross the line mentioned by Mr Martin Rodger QC, Deputy President in *St Stephens Mansions*.

Test 4
What would be the interruption to the services provided to the remainder of the building which would be caused by the carrying out of the works?
Mr McIntosh claimed that the expert evidence was very limited on this. Mr McIntosh accepted that in this context the experts had used expressions such as *'kept to a minimum'*, *'short duration'* and *'very limited'*, but he was highly critical that neither had given any explanation or definition or quantification of the terms used.

In so far as Mr Fryer's report is concerned, if the respondent was unclear as to the meaning of an expression used, it could (and should) have clarified it with him.

We reject that the test has not been met. Again we infer that both experts were briefed on what they should consider. Taken in context the expressions deployed are plain and mean what they say, no further clarification is required. Again, we reiterate we were invited to treat the reports as being correct.

Test 5
Would the interruption be 'significant'?
To a large extent Mr McIntosh relied upon the same arguments as for Test 4. He submitted there was a lack of evidence as to the duration of the proposed works and again asserted that the applicant had failed to discharge the burden of proof.

The statutory provision is whether services
(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.***
[Emphasis added]

The test is not concerned with the duration of any proposed works, but with the duration and scale of the interruption in the provision of the services, here the supply of water. As regards their preferred options:

Mr Spalding said: *"... the interruption of supply to occupiers is kept to a minimum and is limited to a short duration of switchover from the existing pump set to the new pump set."* We find that in context that is quite clear.

Mr Fryer said: *"There would be very limited water disruption should this option take place."*

We reject Mr McIntosh' submission that the applicant has not discharged the burden as regards this test.

Conclusion

25. We find it was quite clear what issues the experts were to address. They have both done so. We were invited to proceed on the basis that both expert reports were agreed and correct. We find their evidence was clear and overwhelming. They both agreed that from a practical point of view an independent supply of water could be achieved without a significant interruption of that supply to the occupiers of the non-RTM part of the building.

26. In these circumstances, and for the reasons set out above, we find that the applicant has met the required threshold such that it was, on the relevant date, entitled to acquire the right to manage the Property.

Judge John Hewitt
16 July 2018

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.