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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/34UE/LRM/2017/0005**
Property	:	**Regent Gate, Regent Street, Kettering NN16 8JD and Kings Walk, King Street, Kettering NN16 8JF**
Applicant	:	**Regent Gate Old Bakery RTM Company Limited**
Representative	:	**Mr Dudley Joiner and Mr Nick Bignall of RTMF Services Limited**
Respondent	:	**Powell & Co Property (Brighton) Limited**
Representative	:	**Mr Sean Powell accompanied by Mr Patrick Goubel and Mr Richard Eisler**
Type of Application	:	**Application under section 84(3) of the Commonhold and Leasehold Reform Act 2002 for the right to acquire the right to manage**
Tribunal Members	:	**Tribunal Judge Dutton** **Miss M Krisko BSc (Est Man) FRICS** **Mr R Thomas MRICS**
Date and venue of Hearing	:	**Best Western Hotel, Rockingham Road, Corby on 22nd February 2018**
Date of Decision	:	**7th March 2018**

DECISION

DECISION

The Tribunal determines that the Applicant was on the relevant date entitled to acquire the right to manage the premises known as Regent Gate and Kings Walk, Kettering.

We exercise our powers under Rule 50 to correct the clerical mistake, accidental slip or omission at paragraph 33 of our Decision dated 7th March 2018 . Our amendments are made in bold. We have corrected our original Decision because the date of acquisition is wrongly recorded.

BACKGROUND

1. By a claim notice dated 22nd June 2017 Regent Gate Old Bakery RTM Company Limited (the Applicant) gave notice to the Respondent Powell & Co Property (Brighton) Limited of its intention to acquire the right to manage Regent Gate, Regent Street, Kettering NN16 8JD and Kings Walk, King Street, Kettering NN16 8JF (the Premises). The notice indicated that the Applicant intended to acquire the right to manage the Premises on 3rd November 2017.

2. By a counter notice dated 12th July 2017 served within the period specified in the claim notice, the Respondent denied the Applicant the right to manage for reasons as set out in section 72(2) and (3)(a), (b) and (c) of Chapter 1 of part 1 of the Commonhold and Leasehold Reform Act 2002 (the Act). In an accompanying letter, it is also said that the Applicant is the owner of Regent Gate only and not Kings Walk which was owned by a company entitled Studio Letto Limited. It was also said that the claim did not apply because Regent Gate could not be structurally detached as there we no vertical division between it and Kings Walk to enable it to be redeveloped independently.

3. On 26th July 2017 the Applicant applied to the Tribunal for a determination under section 84(3) of the Act that at the relevant date the Applicant was entitled to acquire the right to manage the Premises.

4. Appended to the application was the certificate of corporation for the applicant company showing it was incorporated on 11th May 2017. We were also provided with the memorandum and articles of association confirming the objects for which the company had been established were to acquire and exercise, in accordance with the Act, the right to manage the Premises. Directions were issued by the Tribunal on 23rd August 2017 and we regret to say have not been wholly complied with. We will refer to that in due course.

5. It was not considered necessary to inspect the Premises, indeed initially the matter was to be determined by way of written submissions. However, the Respondents requested a hearing and one was organised for 22nd February 2018.

6. The Premises are well known to the Tribunal and two members of the panel had inspected last year in respect of another application. The description is not in dispute and no inspection was called for by the parties.

DOCUMENTS

7. Prior to the hearing we received a bundle of papers prepared by the Applicant. These included the application, the Tribunal's directions the Respondent's statement of case dated 11th September 2017, the Applicant's statement of case dated 27th September 2017 and documents said to have been disclosed in October. There was further correspondence from the Respondent to the Tribunal and to the Applicant sent in September of last year.

8. On the day before the hearing we were provided with a skeleton argument prepared by Mr Joiner from RTMF Services Limited, the contents of which we noted. We had also received in the passage of post a letter from RTMF dated 13th February 2018 which enclosed a copy of the Register of Title no NN349879 dated 31st January 2018 showing Studio Letto Limited as being registered as the proprietor of part of the Premises on 27th June 2017. This entry from the Land Registry confirms that there are flats both at Kings Walk and Regent Gate transferred to Studio Letto.

9. We also received a letter from the Respondent dated 15th February 2018 addressed to RTMF which set out a number of matters essentially seeking a withdrawal of the application and comments concerning liabilities for costs. The letter also attached correspondence from PIB Insurance Brokers again dated 15th February 2018 concerning insurance for the property known as the Old Bakery, Crown Street, Kettering. With these papers we also received a copy of a letter sent by the Applicants to the Tribunal dated 16th February 2018, the contents of which are noted and which in particular raised concerns that the Applicant appeared not to have instructed a manager to attend the hearing on 22nd February. We noted all that was said in those letters.

10. The production of documentation at the last minute did not stop there. It appears that although the Respondents had prepared witness statements in October by Mr Powell, Mr Eisler, Mr Goubel and Mr Lee, the Applicants for reasons, which were unacceptable, had failed to include these statements in the bundles before us. It was said by Mr Joiner that it was not considered the witness statements were relevant. As was pointed out to him, it was not for him to make that decision. We therefore had to adjourn the hearing for a short while to enable us to read the statements. Mr Joiner on behalf of the Applicants confirmed that the witness statements should included and could be considered by us.

HEARING

11. The skeleton argument prepared by Mr Joiner set out at paragraph 6 what he considered to be the issues for us to determine. They were as follows:

- Is the Premises excluded from RTM by virtue of sections 72(2) and (3)(a), (b) and (c) and schedule 6 paragraph 2 of the Act.
- Were the notices inviting participation given as required by section 78 of the Act.
- Was the notice of claim given as required by section 79 of the Act.
- Was the claim notice a valid claim notice.

The skeleton argument went on to set out the various sections of the Act applicable to this matter and dealt with each of those points in turn. It was very helpful of Mr Powell to confirm that he agreed those were the issues between the parties.

12. The Applicants called no evidence but relied on Mr Joiner's submissions and the skeleton argument. We have noted all that has been said. Briefly on the points it is said as follows:-

a. The Premises issue. It is said that it is undisputed that the Premises comprise both Regent Gate and Kings Walk. This was relied upon by the Applicant and in support we were referred to the Tribunal decision at CAM/34UE/LSC/2013/0130 where the description of the property clearly refers to both Regent Street and King Street as being 'The Building' being originally a bakery and a food warehouse. They have now been converted into 24 flats. It is also relevant to note that the letter from PIB concerning insurance does not seek to differentiate between Regent Court or Kings Walk. The property is described as the Old Bakery, Crown Street, Kettering. We think it is right to say that the Respondent through Mr Powell did not seek to argue that the two properties together did not form one building. His case rested upon the transfer away of part of the property to Studio Letto in June of 2017 as meaning that it was not possible to divide the Premises vertically with the set-up which had been created. Indeed in the Respondent's statement of case produced for this matter on 11th September 2017, at paragraph 7 it is said for the Respondents that: *"Regent Gate is not a self-contained building as it is not structurally detached from Kings Walk. Further, Regent Gate does not have a vertical division between it and Kings Walk and so cannot be redeveloped independently to Kings Walk."*

b. The next point related to the validity of the claim notice. In this regard we were referred to page 41 in the bundle, which is an official copy of the Register of Title for No NN49889 which describes the property as being the land and buildings on the west side of Crown Street, Kettering and shows, as at 22nd June 2017, the Respondent as the registered proprietor. That is of course the date upon which the claim notice was issued.

We had also been provided before the hearing with a copy of the Register of Title dated 31st January 2018 now for title NN349879 which shows Studio Letto Limited as the registered proprietor of part of the property originally registered under title number NN49889 above, such registration having been concluded on 27th June 2017.

c. The third point was whether or not the Premises were excluded from the right to manage because of the last minute transfer of part of the freehold which we have referred to above. In this regard the Applicants relied on schedule 6 paragraph 2, which on their argument says that the different ownership is not relevant as those parts are not self-contained and accordingly the Chapter relating to the right to manage still applies.

d. The fourth point concerned the notices inviting participation. It was said that each lessee had been given the notice in writing to the flat address. Where there was another address known, notices were also sent there. During the course of

the hearing Mr Joiner told us that he had in fact carried out searches against each of the leasehold titles to see if additional addresses were shown on the register of proprietorship and where they were notices were despatched to those addresses as well.

13. We should perhaps also mention a couple of matters that are included in the skeleton argument. The first is the impact that the resignation of Rachel Allen as a director of the RTM company may have had. It was, it seems, accepted that she had resigned as a director but was unable to withdraw her membership until the acquisition date or withdrawal or deem withdrawal as provided under the articles of association, which says as follows: 27(3) *"A member may withdraw from the company and thereby cease to be a member by giving at least seven clear days' notice in writing to the company. Any such notice shall not be effective if given in the period beginning with the date on which the company give notice of its claim to acquire the right to manage the Premises and ending with the date which is either (a) the acquisition date in accordance with section 90 of the 2002 Act; or (b) the date of withdrawal or deem withdrawal of that notice in accordance with sections 86 or 87 of that Act."* It is said, therefore, that she remains a member and that any suggestion that 50% membership had not been met was erroneous.

14. In the course of correspondence, the Respondent had indicated that the Applicant's directors had underestimated the challenge of managing the Premises and in particular insuring same. That was the reason for the letter from PIB. However, it was asserted by the Applicants that these are not matters that are relevant to the Tribunal's jurisdiction under section 84(3).

15. During the course of this submission it was said on behalf of the Applicant that Studio Letto was an associated company of the Applicants, the control resting with Mr Powell. Mr Joiner also said that the phrase "given" under section 79(1) where the wording is as follows: *"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 the notice of claim is given"* meant the date that the claim notice was dated. Mr Powell confirmed that the Respondent had received the claim notice at 11.30am on 23rd June 2017.

16. Mr Joiner went on to suggest that the hiving off of part of the property to Studio Letto was intended to do nothing other than to defeat the RTM claim, which it failed to do because of the provisions of schedule 6 and that the transfer was in truth a red herring.

17. We then heard from Mr Powell who had made a number of witness statements. There was a statement of case dated 11th September 2017 as well as a further statement which was not seen by us until the day of the hearing dated 9th October and a third statement received the day before the hearing by the Tribunal dated 20th February 2018. We noted all that was said. We also had the statements of Mr Eisler who is a person known to us having attended a number of hearings in the past and who is the caretaker for the property. His witness statement dealt with the service of the Notice of Invitation. He did accept that by 10th June 2017 he had found the Notice of Invitation whilst cleaning the car park. It appears that he immediately contacted Mr Bignall from RTMF and engaged in email

correspondence concerning the matter. It is said also that a Mr Connor O'Sullivan and a Mr Brian Conn did not receive Notices of Invitation but there is no evidence from them to support this contention. Mr Eisler confirmed the contents of his statement to us and although he said he could not actually remember when he had found the notice it was drawn to his attention that the witness statement said it was on 10th June 2017 and he accepted that that was probably right. He said that post is frequently strewn around the property as the post boxes have been vandalised. He was concerned that the Applicants would be unable to run the development properly and also was concerned that the directors may not have knowledge as to the running of an RTM company.

18. Mr Goubel had also provided a witness statement. He is a business associate of Mr Powell and his statement essentially dealt with the efforts that had been put into trying to resolve the problems that the Premises undoubtedly suffers from in respect of building control and other matters. Mr Goubel mentioned Mrs Rachel Allen who he suggested had been misled into joining the RTM company but that had subsequently resigned. We had no statement from Mrs Allen. We did have a statement from Mr Lee which dealt with the transfer of ownership to Studio Letto Limited. he did not attend the hearing

19. The contents of these witness statements have also been noted by us.

20. Mr Powell drew to our attention a search at the Land Registry of part with priority dated 15th June 2017 showing Studio Letto as an applicant. It was said by Mr Powell that this priority search should have alerted the Applicant to the fact that there was an interest by Studio Letto in acquiring part of the Premises and that they should, therefore, have taken that into account in proceeding with the notice of claim. We were also provided with a copy of the transfer which was exhibited to the witness statement of Mr Michael Lee. The transfer, a TP1, is on the face of it dated 20th June 2017 and transfers part of the property, which is difficult to discern from the plan provided. It is clear that no consideration was exchanged. Mr Powell also showed us on his telephone an email from the Land Registry which confirmed that they had received the transfer dated 20th June 2017, although he accepted that registration of that transfer had not been noted on the Register of Title until 27th June 2017.

21. We invited the parties to make final submissions. Mr Powell's was succinct. His view was that two companies now owned the building and, therefore, the RTM company was not entitled to take over the management. He raised the issue that Mr Eisler, and it is said to others, had not been served with the Notice of Invitation, the resignation of Mrs Allen and the date of the transfer to Studio Letto and the registration of same.

22. Mr Jordan responded to a question raised by Mr Powell as to why there had not been a search or a request for information under section 82 of the Act. This provides that an RTM company can request information from any person. However, the requirement is not compulsory and can take up to 28 days for it to be dealt with. His view was that the split of the freehold was not an issue as neither part was self-contained and schedule 6 therefore covered the matter. On the question of the Notice of Invitation we were referred to the case of Avon Freehold v Regent Court, an Upper Tribunal case apparently under reference [2011]

UKUT3490. He submitted there was no obligation on the Applicant to serve other than at the flat address and that the requirement for service under the Act was met if the notice was sent by post. Indeed, as he had indicated, service had been affected at other addresses where they were known. Further, it was suggested that Mr Eisler had not been prejudiced and indeed had the opportunity to become a member of the RTM company.

23. At the conclusion of submissions, we asked why there had been the transfer by the Respondent to Studio Letto of part of the building. We were told that it was to assist in the management.

THE LAW

24. The law applicable to this matter is set out below.

FINDINGS

25. As we indicated above, the issues to be determined are agreed between the parties. We will deal with those in the order that they appeared in the skeleton argument.

26. The first is whether the Premises are excluded by virtue of section 72. We find that they are not. It is accepted that Regent Court and Kings Walk form one building. Indeed Mr Powell in his statement of case does not argue against that. In fact the premise of his statement of case is on the basis that it is one building and cannot be subdivided because of the transfer of part to Studio Letto. As we indicated above, it is also noted that the insurance appears to refer just to the Old Bakery, Crown Street and there is no indication on any of the documentation or indeed on the ground that this constitutes anything other than a single building.

27. The question, therefore, we need to consider is whether or not the transfer to Studio Letto which was dated 20th June 2017 frustrates this application.

28. Although at the hearing Mr Powell sought to justify the transfer for management reasons, we find that an uncompelling argument. The Register of Title for Studio Letto includes flats both at Kings Walk and Regent Gate. The separation of the management would based on our knowledge of the building and the development be unworkable. There would be differing service charge provisions to take into account and a split of services between the various flats would be well-nigh impossible to deal with. Furthermore, it is quite clear that this is troubled property. There are difficulties with building control and planning as well as the type of occupancy which appears to cause problems, there being as we understand it, no lessee who is resident. We heard all that was said by Mr Powell about the Applicant's ability to manage the property and indeed to obtain insurance. That is not, however, a matter that we need to consider. The Act is 'no fault' right to manage. There are procedural minefields to negotiate to meet the necessary statutory requirements, but one of them is not whether the RTM company is capable of undertaking the management arrangements. Nor is it necessary for the RTM company to bring before us any manager that they intend to employ to manage the property. There appear to have been some misunderstanding on that point but the existence or not of a potential appointee as manager is irrelevant to the matters that we need to consider.

29. We are satisfied that on balance of probability the transfer to Studio Letto was done for no reason other than to frustrate the RTM claim. The notice of invitation is dated 22nd May 2017. Mr Eisler says he did not find it in the car park until 10th June. It seems to us, however, that the intentions of the Applicant were well known to the Respondent and that this in our finding prompted the transfer to Studio Letto. As we have indicated above, we would reject any suggestion that such transfer for management purposes.

30. It is then necessary to consider the chronology. The transfer is dated 20th June 2017. We accept that. The claim notice is dated 22nd June 2017 and was received by the Respondent on 23rd June. It is our understanding of the Land Registration Act 2002 that registration of the disposition is only completed when registration has taken place. Such registration was not until 27th June 2017. Accordingly we find that at the time the claim notice was issued and at the relevant date as provided for under section 79 of the Act, the person required to be given notice was the Respondent and not Studio Letto. Furthermore, there is support that the division of the property does not affect this claim under the provisions of schedule 6 paragraph 2, which states that 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. It is clear from our findings, and indeed we understand accepted by both parties, that Regent Gate and Kings Walk constitute a single building and that indeed the ownership had not been transferred to Studio Letto until after the relevant date. In those circumstances, therefore, we find that the claim notice is effective.

31. On the question of the Notice of Invitation, we accept the Applicant's proposition that service was effective under section 111 of the Act by sending it to the flat address. The question of vandalism to the letter boxes at the Premises is not, it seems to us, an issue for the Applicant. They served in accordance with the Act. However, the Applicants have gone beyond this because they have carried out searches of the individual leasehold titles and where other addresses are shown have served those notices there. It is noted that only Mr Eisler has provided any evidence as to non-service, although he himself seems to accept that he received it by 10th June and the claim notice was not issued until 22nd June. In that intervening period it appears from the papers that he had engaged with the agents for the Applicant and it is difficult to see, therefore, what prejudice he has suffered. The other two people named have given no evidence and there is nothing before us to support the fact that they were not served. However, it seems that they had the matter drawn to their attention by 10th June as well. In those circumstances, we find that the notice of invitation has been properly served and that there is no issue in that regard.

32. We considered the case put to us by Mr Joiner at the hearing of Avon Freeholds Limited v Regent Court RTM Company Limited. The correct reference for this is [2013]UKUT0213(LC). This is a decision of the President Sir Keith Lindbolm which considered the service of notices of invitation where it was accepted that these statutory provisions were directive and not mandatory. We are satisfied that on his own evidence Mr Eisler knew of the notice by 10th June some 12 days before the notice of claim was issued and it is difficult to see, therefore, in the light of his contact with the Applicant's representative, that he was in any way prejudiced.

33. Accordingly our finding is that the Applicant is entitled to acquire the right to manage of the Premises which, for the avoidance of doubt, is both Regent Gate and Kings Walk. Under section 90 the acquisition date will be three months after the determination becomes final, which will be **4th July 2018, allowing 28 days for any appeal.**

34. We should perhaps just comment briefly on a couple of other issues. The question of Mrs Allen is it seems to us something of a red herring. We understand that her resignation as a director has been accepted but it is quite clear, as we have indicated above, that the articles of association prohibit her resignation as a member for the time being.

35. The question of insurance of the Premises is also irrelevant in our determination, although we accept it is important. Mr Joiner drew to our attention the possibility of delegating back certain management issues to the landlord which could include insurance. Mr Powell, however, said that the insurance company would not be prepared to provide cover if they were not managing the property. Certainly the letter from PIB indicates that ordinarily a stand alone insurance for the property would not be available in its current state but that it was covered under the portfolio that Mr Powell through Powell & Company operated. It is something that clearly the Applicant will need to address as a matter of urgency.

36. Mention was also made, more in correspondence than anything else, of the lack of appointment of a manager to deal with property. In our finding that is an irrelevance because there is a three month period before formal acquisition takes place (possibly longer) and therefore ample time for a manager to be appointed.

37. It seems to us that the directors of the RTM company would be well advised to work with Mr Powell and his company in trying to resolve the serious problems from which this development suffers. The problems with the building itself are bad enough but this is also exacerbated by the letting policy and the lack of control that there appears to be in respect of some of the tenants as evidenced by the vandalism of the post boxes.

Judge: Andrew Dutton

A A Dutton

Date: 7th March 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 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 to 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 (ie 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.

The relevant Law

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.

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 tribunal or court by which he was appointed.

111 Notices
(1)Any notice under this Chapter—

(a)must be in writing, and

(b)may be sent by post.

(2)A company which is a RTM company in relation to premises may give a notice under this Chapter to a person who is landlord under a lease of the whole or any part of the premises at the address specified in subsection (3) (but subject to subsection (4)).

(3)That address is—

(a)the address last furnished to a member of the RTM company as the landlord's address for service in accordance with section 48 of the 1987 Act (notification of address for service of notices on landlord), or

(b)if no such address has been so furnished, the address last furnished to such a member as the landlord's address in accordance with section 47 of the 1987 Act (landlord's name and address to be contained in demands for rent).

(4)But the RTM company may not give a notice under this Chapter to a person at the address specified in subsection (3) if it has been notified by him of a different address in England and Wales at which he wishes to be given any such notice.

(5)A company which is a RTM company in relation to premises may give a notice under this Chapter to a person who is the qualifying tenant of a flat contained in the premises at the flat unless it has been notified by the qualifying tenant of a different address in England and Wales at which he wishes to be given any such notice.