

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2020] UKUT 197 (LC)
UTLC Case Number: LRX/19/2020 - V

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – Right to Manage – student lets – meaning of “flat” in Commonhold and Leasehold Reform Act 2002, Part 2, Chap. 1 – meaning of “dwelling” – whether terms on which dwelling let relevant – whether communal facilities in large block were shared living accommodation, such that studios not “occupied as a separate dwelling”.

IN THE MATTER OF PREMISES KNOWN AS Q STUDIOS, NORTH STREET,
STOKE-ON-TRENT, ST4 7FA
AND IN THE MATTER OF PART 2 OF THE COMMONHOLD AND LEASEHOLD
REFORM ACT 2002

BETWEEN:

Q STUDIOS (STOKE) RTM CO LTD

Applicant

- and -

(1) PREMIER GROUNDS RENTS NO.6
LIMITED

(2) NORTH STREET (MANAGEMENT
COMPANY) LIMITED

Respondents

Re: Q Studios,
North Street,
Stoke-on-Trent,
Staffordshire,
ST4 7DQ

The Hon. Mr Justice Fancourt - Chamber President
Hearing: 3-4 June 2020
by Skype for Business

Mr Winston Jacob, instructed under the Direct Access scheme, for the applicants
Mr Justin Bates, instructed by Brethertons LLP and Brachers LLP, for the respondents

The following cases are referred to in this decision:

Aldford House Freehold Limited v Grosvenor (Mayfair) Estate [2019] EWCA Civ 1848; [2020] 2 WLR 116

Baker v Turner [1950] AC 401

Barras v Aberdeen Steam Trawling and Fishing Co. Ltd [1933] AC 402

Firstport Property Services Ltd v Settlers Court RTM Co Ltd [2019] UKUT 243 (LC)

Gaingold Ltd v WHRA RTM Co Ltd [2006] 1 EGLR 81

JLK Limited v Ezekwe [2017] UKUT 277 (LC); [2017] L&TR 29

Miltonland Ltd v Platinum House (Harrow) RTM Co Ltd [2015] UKUT 236 (LC); [2016] L&TR 9

Pineview Ltd v 83 Crampton Street RTM Co Ltd [2013] UKUT 598 (LC); [2014] 1 EGLR 65

R (N) v Lewisham London Borough Council [2014] UKSC 62; [2015] AC 1259

St Andrews Place (Liverpool) RTM Co Ltd v JLK Ltd (unrep., 21.1.16, Case Ref. MAN/00BY/LRM/2015/0006)

Uratemp Ventures Ltd v Collins [2001] UKHL 42; [2002] 1 AC 301

Introduction

1. This decision follows a fully remote hearing conducted via Skype for Business on 3 and 4 June 2020. Mr Winston Jacob appeared for the Applicant and Mr Justin Bates for the Respondent. I am grateful to them both for their written and oral arguments. The hearing was deemed to be a public hearing, by reason of its listing and accessibility to the press and public, and it was recorded. Any person is entitled, with the permission of the tribunal, to listen to the recording in suitable court or tribunal premises.
2. The Applicant company applies for a determination under section 84(3) of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) that it was on 31 July 2019 entitled to acquire the right to manage the above-named premises (“the Premises”).
3. The Premises are a large, modern, purpose-built block of studio accommodation with ancillary space, intended for use as student bedsits that were described in the publicity materials and leases as “Studystudios”.
4. The First Respondent acquired the freehold interest in the Premises from the developer, Alpha Developments (Stoke) Limited. The Second Respondent is the management company and a party to the long leases of each of the studios. The Applicant is an RTM company incorporated for the purpose of acquiring the right to manage the Premises under Chapter 1 of Part 2 of the 2002 Act (“Part 2”).
5. The principal issue for determination is whether each of the studios is a “flat” within the defined meaning in Part 2. The Respondents contend that none of the studios is occupied or intended to be occupied for residential purposes but that if they are then, by reason of other shared accommodation in the Premises available to lessees under their leases, the studios are not intended to be “occupied as a separate dwelling” and so are not “flats” within the defined meaning.
6. The Respondents raise other arguments why the Applicant is not entitled to acquire the right to manage the Premises, or at least to manage anything but the building itself, but they recognise that, realistically, these arguments can only avail them on appeal to a higher court.

Factual background

7. Planning permission for construction of the Premises was granted on 9 November 2016. Development involved the demolition of all existing structures on the land. The permission describes the proposed development as “three hundred student apartments with associated student social, meeting area and common facilities, gymnasium, laundry, landscaping, site re-grading and vehicle access and egress”.

8. The Premises comprise a single new building in an approximate V-shape, built around a courtyard with a ground floor and 4 upper floors. Part of the ground floor comprises a reception area and other communal space; the rest of the ground floor comprises studios and circulation space. The four upper floors comprise exclusively studios and circulation space.
9. Final completion of the development was not achieved until 2019. There were in fact 292 studios as built. They all have en-suite facilities, comprising a shower, sink and lavatory.
10. Long leases of each of the studios were sold off plan from about 2017. Eight were acquired by A1 Properties (Sunderland) Limited for the purpose of sub-letting directly to students. The other 284 studios were purchased by investors pursuant to a contract that also provided for a back-to-back underlease for a term of about 10 years to be granted by the investor to A1 Alpha Properties (Leicester) Limited. The contract and underleases contemplated further sub-lettings to student occupiers and provided the investors with a fixed rental return equivalent to 10% of the purchase price, and no outgoings, for the duration of the underleases.
11. The leases and underleases were granted between October and December 2018, with the actual dates of completion presumably depending on when practical completion of the individual studios was able to be certified by the developer's architects.
12. Unfortunately for the investors, the investment proved too good to be true when A1 Alpha Properties (Leicester) Limited went into administration as early as 21 February 2019, with no students in occupation. By November 2019, only 50 of the studios subject to underleases had been sub-let to students.
13. The studios comprise (in addition to the bathroom) a substantial bed sitting area with a double bed, a desk and bookcase unit, a wardrobe and a small kitchen, which has a built-in fridge, hob (2 rings), extract hood, work surface, sink unit and drainer, and a microwave within a small unit above the work surface. From the photographs of studios as built, there appears to be ample space for a table and chairs and an armchair or small sofa in the space between the bed and the kitchen area.
14. The Premises, as built, include space on the ground floor for a common lounge/cinema area and a laundry, with a reception/office. There is a small gymnasium for common use on the other side of the ground floor. These features were described in the sales literature, together with a landscaped courtyard, high speed wi-fi and parking facilities. However, they had not been completed by the date of grant of the leases.
15. The evidence of Stephen Fox, in a witness statement dated 14 December 2019, is that the lounge/cinema area and gym were not fitted out until after 5 August 2019, when fittings for those spaces were ordered, and so they were not fitted out for use by 2 August 2019, which is "the relevant date" for the purposes of the application of Part 2. On 31 July 2019, he says, no students were in the Premises. Mr Fox's evidence is not challenged.

16. The contracts of sale described the property to be sold and purchased by reference to areas edged red and numbered on floor plans of the Premises, and identified the Second Respondent as the management company. The lease and underlease in the forms annexed were to be granted on completion. Those forms can be assumed to be in substantially the same terms as the examples of the executed leases and underleases that were in evidence. There was no contractual obligation on Alpha Developments (Stoke) Limited to complete or provide any particular facilities, only “to complete the Property [sc the individual studio] within the Development ... in accordance with building regulations and planning permission applicable thereto and to a good standard”.
17. The leases were granted for a term of 250 years from 1 September 2018 and the property demised was “the Property” as defined (“the Studystudio shown edged red and numbered [2.18] on Plan 1 being part of the land comprised in the title above referred to situated on the [second] floor of the Block”). The demise was expressed to be with the benefit of rights in the terms granted in Part I of the Second Schedule to the lease.
18. Part I of the Second Schedule grants the right for the Tenant and all persons authorised by it (in common with all others having similar rights) among other matters:
 - “(f) to use the grounds intended for recreational use and comprised in the Common Parts for recreation purposes in a quiet and peaceful manner;
 - (g) to use any facilities or things provided for the common use of the Tenant and the registered proprietors of the titles to the Leases”.

These rights are identified in the prescribed particulars of the lease as easements granted for the benefit of the Property. “Leases” is defined as “Any leases granted or to be granted by [Alpha Developments (Stoke) Limited] of any flats comprised in the Development”

19. “Common Parts” is defined as being:

“All parts of the Development including the Main Structure pedestrian ways forecourts drives car parking spaces bin stores gardens and landscaped areas not comprised in the Leases including (but not restricted to) lifts cleaning cupboards landings and staircases (excluding the lift/plant or machinery rooms).”
20. It appears, therefore, that the lounge/cinema area, laundry and gymnasium are “facilities” or “things” within paragraph (g) of Part I of the Second Schedule but also “Common Parts”, as defined.
21. By clause 3 and paragraph 4 of the Third Schedule to the lease, the Tenant covenants:

“That no part of the Property shall be used for any purpose other than as a student let in the occupation of one part of a house of multiple occupation”.

22. Save for its different duration and rental terms, the terms of the underlease essentially mirror those of the lease, and the underlessee covenants not to use the Property for any purpose other than the use permitted by the lease.

Procedural background

23. Following service by the Applicant on all qualifying tenants of notices of invitation to participate, the Applicant posted notice of its claim to acquire the right to manage to the Respondents on 31 July 2019. It can therefore be assumed to have been “given” to them on 2 August 2019. The claim notice identified the premises as “Q Studios, North Street, Stoke on Trent, ST4 7FA”. It says nothing about any appurtenant premises, nor is there any place in the prescribed form for any appurtenant premises to be identified.
24. By the date of the claim notice, about two-thirds of the qualifying tenants of studios in the Premises had become members of the Applicant (so in excess of the statutory minimum of one-half). The claim notice asserted that Part 2 applied to the Premises because they were a self-contained building with or without appurtenant property, contained two hundred and ninety-two flats held by qualifying tenants, and the total number of flats so held was not less than two-thirds of the total number of flats in the Premises.
25. On 13 August 2019, the First Respondent served a counter-notice under section 84 of the Act, alleging that the Applicant was not entitled to acquire the right to manage because the Premises were more than 25% non-residential by internal floor area, referring to paragraph 1(1) of Schedule 6 to the 2002 Act.
26. Having received a negative counter-notice, the Applicant applied to the First-tier Tribunal (Property Chamber) on 15 August 2019 for a determination of its entitlement.
27. Following service of the application, the Second Respondent subsequently served a more detailed counter-notice, with explanatory letter attached, denying that the Applicant was entitled to acquire the right to manage by reason of non-compliance with twelve specified sections of the Act in addition to paragraph 1(1) of Schedule 6. The main grounds on which the right was disputed were that there were no “flats” within the statutory meaning within the Premises and that the Premises were non-residential. The counter-notice also contended that the claim notice was invalid for asserting rights over those parts of the Premises that were appurtenant property or alternatively that the right to manage did not extend to such parts. The Second Respondent was then added as a party to the existing application.
28. Following an application by the parties and with my agreement, the President of the First-tier Tribunal (Property Chamber) transferred this application to be determined by the Upper Tribunal pursuant to rule 25(3) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The relevant statutory provisions

29. Part 2 of the 2002 Act introduced provisions to confer on a majority of qualifying tenants of a residential building (or part of a building) the right – without proving fault on the part of the landlord – to take over the management of the building (or part), subject to various conditions and defined exceptions. In the following paragraphs, references to sections are to sections of the Act.

30. Section 72 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.

.....

(6) Schedule 6 (premises excepted from this Chapter) has effect.”

A qualifying tenant of a flat is a tenant under a long lease, provided that the tenancy is not a business tenancy. Where there is more than one long lease of a given flat, the tenant holding the inferior such interest is the qualifying tenant (s.75). A lease granted for a term of years exceeding 21 years, whether terminable or not, is a long lease for these purposes (s.76(1), (2)(a)).

31. There is no dispute in this case that the Premises are a self-contained building and that each of the tenants under the long leases granted by Alpha Developments (Stoke) Limited is a qualifying tenant. There is now no dispute that the Applicant is an RTM company and that sufficient qualifying tenants were on 31 July 2019 members of it so as to entitle the Applicant in principle to serve a claim notice. The issues turn on the definitions of “dwelling” and “flat”, and on the first exception in Schedule 6.

32. A “flat” for the purposes of Part 2 is defined in section 112(1) as:

“...a separate set of premises (whether or not on the same floor) –

(a) which forms part of a building,

(b) which is constructed or adapted for use for the purposes of a dwelling,
and

(c) either the whole or a material part of which lies above or below some other part of the building”.

33. “Dwelling” is also defined there and means:

“... a building or part of a building occupied or intended to be occupied as a separate dwelling”.

“Unit” is defined as:

“(a) a flat;

(b) any other separate set of premises which is constructed or adapted for use for the purposes of a dwelling, or

(c) a separate set of premises let, or intended for letting, on a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies.”

Other than in the definitions of “flat” and “unit”, the word “dwelling” is barely used in Part 2.

34. The definitions of “flat” and “dwelling” are identical to their definitions in Part I of the Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”). In that context, the Court of Appeal has held that the meaning of “flat” is concerned with its physical state and the purpose for which it was constructed or adapted: Aldford House Freehold Limited v Grosvenor (Mayfair) Estate [2019] EWCA Civ 1848; [2020] 2 WLR 116. However, no issue arose in that case about the meaning of “separate dwelling”, as distinct from the meaning of “a separate set of premises”.

35. Section 84 provides (so far as material):

“(1) A person who is given a claim notice by a RTM company under section 79(6) may give a notice (referred to in this Chapter as a “counter-notice”) to the company by no later than the date specified in the claim notice under section 80(6).

(2) A counter-notice is a notice containing a statement either –

(a) admitting that the RTM company was on the relevant date entitled to acquire the right to manage the premises specified in the claim notice, or

(b) alleging that, by reason of a specified provision of this Chapter, the RTM Company was on that date not so entitled”

36. Paragraph 1 of Schedule 6 provides (so far as material):

“(1) This Chapter does not apply to premises falling within section 72(1) if the internal floor area –

(a) of any non-residential part, or

(b) (where there is more than one such part) of those parts (taken together),

exceeds 25 per cent. of the internal floor area of the premises (taken as a whole).

(2) A part of premises is a non-residential part if it is neither –

(a) occupied, or intended to be occupied, for residential purposes, nor

(b) comprised in any common parts of the premises.....”

37. Schedule 6 contains other exceptions, which are immaterial.

The Issues

38. The parties have agreed that the following 5 issues fall to be addressed, though the Applicant contends that I should hold that issue 5 does not arise on this claim:

- a. Is each Studystudio “a separate dwelling” within the defined meaning of “dwelling”?
- b. Are the Studystudios “constructed or adapted for use for the purposes of a dwelling” within the defined meaning of “flat”?
- c. Are the Studystudios neither occupied nor intended to be occupied for residential purposes, within the meaning of the exclusion in para 1 of Schedule 6 to the 2002 Act?
- d. Must the claim notice define any appurtenant property over which the right to manage is claimed?
- e. Does the right to manage extend to appurtenant property beyond that demised with and exclusively serving the Studystudios?

39. While agreeing with and respecting the parties’ views that these are questions raised by the statements of case and fall to be addressed, it seems to me that the first two issues go together, because of the way that Part 2 defines “flat” by reference to the defined term

“dwelling”. The relevant question is not whether a studio is a separate dwelling, but whether each studio (which it is agreed is a “separate set of premises”) is constructed or adapted for use for the purposes of a dwelling, where “dwelling” has the defined meaning of something that is or is to be “occupied as a separate dwelling”.

40. In order to begin to answer that question, it is necessary to understand the purpose served by the defined meaning of “dwelling”, given that the definition of “flat” could very well have stood as written in section 112(1) (see paragraph 32 above) without the need for further definition.
41. The essential difference between the parties’ cases in this regard is that the Applicant contends that the purpose of the definition of “dwelling” is a limited one, specific to Part 2 of the 2002 Act, namely to ensure that rooms within what would commonly be called a flat or in a house cannot themselves be considered each to be “flats”. The Respondents on the other hand argue that the expression “separate dwelling” has its generally understood meaning and function in residential landlord and tenant law, derived from the Rent Acts, namely that it excludes a dwelling that is let on terms that provide for the tenant to share living accommodation with others.
42. The third issue is a discrete issue and the fourth and fifth issues again fall to be determined together. In relation to these three issues, however, the Respondents effectively conceded that authority that was either binding on me or previous decisions of this tribunal that I would be very likely to follow mean that I should decide the issues against them, but thereby giving them the opportunity – with permission, if granted – to pursue the arguments in the Court of Appeal or in the Supreme Court.

Applicant’s Case: the Studystudios are “flats”

43. The Applicant contends that the definition of “flat” requires consideration only of the physical character of the separate set of premises in question and that the terms on which the premises are let to the tenant are irrelevant to whether it is constructed or adapted for use for the purposes of a dwelling, and irrelevant to the question of whether it is occupied or intended to be occupied as a separate dwelling. It submits that this is a “bricks and mortar” test and that the terms of any lease of the separate set of premises are irrelevant.
44. To support that argument, Mr Jacob relied on the decision of the Court of Appeal in Aldford House, where Lewison LJ emphasised that the test was whether the putative flats had been sufficiently constructed to make them suitable for use for the purposes of a dwelling, i.e. it was a question of the physical condition of the premises in question. He also said that the Rent Acts authorities were of no assistance to him, since the issue in those cases was whether premises had been let as a separate dwelling, which directed attention to the terms of the letting rather than the physical condition of the property.
45. The decision in Aldford House is of relevance because, although it was a case decided under the 1993 Act, the definitions of “flat” and “dwelling” are identical there. Further, the Law Commission’s Draft Bill and Consultation Paper “Commonhold and Leasehold Reform” (2000), which led to the 2002 Act, makes clear that there should be correlation

between the entitlement of tenants collectively to manage their property and their entitlement collectively to acquire the freehold of it. It is evident, regardless of what is said in that report, that there are intended to be close parallels between the application of Chapter 1 of Part 2 of the 1993 Act and Chapter 1 of Part 2 of the 2002 Act.

46. The Applicant therefore contends that questions of what is meant by “let as a separate dwelling” in the Rent Acts and “occupied or intended to be occupied as a separate dwelling” in section 38 of the Landlord and Tenant Act 1985 (the statutory provision in issue in the case of JLK Limited v Ezekwe [2017] UKUT 277 (LC); [2017] L&TR 29) are no guide to what is meant by “occupied or intended to be occupied as a separate dwelling” in the definition of “dwelling” in Part 2 of the 2002 Act. The context of the 2002 Act, it argues, is different, as is the statutory definition of “flat”, so there is no presumption that Parliament intended the expression “as a separate dwelling” to have its well-known Rent Acts meaning.
47. The Applicant accepts that the terms of the lease of the studio are relevant for certain purposes, such as the question of whether the lease is a business tenancy and whether it is a long lease, as defined, but not for the purposes of determining whether the studio is a flat.
48. The Applicant prayed in aid, as a persuasive analogy, the approach taken on the question of whether a building or part of a building “has been constructed or adapted for use as self-contained living accommodation” and so is a “self-contained unit” for the purpose of The Council Tax (Chargeable Dwellings) Order 1992 (S.I. 1992 No. 549). On authority in that context, the focus is on the physical characteristics of the building or part of a building as presently constructed and adapted, and whether as such it was “reasonably suitable” for use as self-contained living accommodation. However it seems to me that any authority on the defined meaning of “self-contained unit” in a different context, which turns on whether the building or part is suitable for use “as self-contained living accommodation”, is not going to assist in interpreting the meaning of “occupied as a separate dwelling” in the 2002 Act.
49. The Applicant also relied on the fact that the lounge/cinema, gym and laundry had not by the relevant date been fitted out and so were not then available for use. It contends that they should not therefore be taken into account. It also pointed out that if, contrary to its case, the terms of the long leases of studios are relevant, they provide no express right to use any defined areas, or to the use of a lounge/cinema, gym or laundry, although these attractive features were prominent in the advertising material provided to would-be investors.
50. It submits that if, nevertheless, such facilities are to be taken into account, on the basis that it was intended that they would be provided and available for use by the occupiers of the studios, they are merely facilities of the Premises that the occupiers may use and are not essential living space of the studios. The lounge/gym is, it submitted, only about five times the area of a studio, and so 292 occupiers could not possibly use or have been intended to use the lounge/cinema as their living space forming part of their dwelling, but only as an occasional and additional facility in the building. The studios themselves have

all the space and amenities needed for living accommodation. Comparison was made with the lounge area usually provided in retirement developments: its presence does not mean that self-contained flats owned by the residents are not “flats”.

The Respondents’ Case: the Studystudios are not “flats”

51. Mr Justin Bates, on behalf of the Respondents, submits that the critical question is the meaning of “as a separate dwelling” in the definition of “dwelling”. He argues that “separate dwelling” must have been intended to have the same meaning as the expression has in the Rent Acts, and so if the studio is let or intended to be let on terms that provide for the use of any shared living accommodation, the studio cannot be “occupied or intended to be occupied as a separate dwelling” and so is not a “dwelling” and cannot be a “flat” as defined in Part 2.
52. He also submitted that the studio was not a dwelling because it is intended to be the home of neither the lessee nor the student occupier. The lessee (an investor) will not live there because the studio must be used as a student let, and the student will not occupy the studio as his or her home; only as a residence while at the local university. He submits that “dwelling” connotes use as a home, but accepts that that argument is not available to him in this tribunal.
53. Mr Bates accepted in argument that, on the basis of his submission, the question was therefore ultimately a factual one: what, if anything, is to be taken to be the tenant’s dwelling and does it include shared living accommodation? For that purpose, he submitted that the background to the occupation or intended occupation, including planning documents, could be taken into account, and that the terms of the lease and underlease were material. He referred in particular to the fact that – although the Premises were not a licensed house in multiple occupation – the user covenant in the lease contemplates that they would be used in that way. He argued that the Premises were conceived, built and let on a communal living model, which meant that although the studios could be called “dwellings” (see Uratemp Ventures Ltd v Collins [2001] UKHL 42; [2002] 1 AC 301) they would not be occupied as “separate dwellings”.
54. In support of his argument, Mr Bates relied strongly on the decision of this tribunal in JLK Ltd v Ezekwe and submitted that the decision in Aldford House was of no assistance because it did not address the meaning of the expression “as a separate dwelling”, as it was not an issue in that case.
55. The Ezekwe case was concerned with whether the lessees of bed-sitting rooms in a building adapted to provide student accommodation paid a “service charge”, such that the First-tier Tribunal had jurisdiction under the Landlord and Tenant Act 1985 (“the 1985 Act”) to consider the reasonableness of the services provided and their cost. For the jurisdiction to arise, the sums paid for services had to be paid by the “tenant of a dwelling” (s.18(1) of the 1985 Act). “Dwelling” was defined by section 38 of the 1985 Act as:

“... a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it”.

The first part of the definition is therefore in identical terms to the definition of “dwelling” in Part 2 of the 2002 Act, however it is clear from the words that follow that it has a more extended meaning than in the 2002 Act, including ancillary space and appurtenances usually enjoyed with the building or part of a building.

56. The relevant facts found by the First-tier Tribunal in Ezekwe were that the bedsit units had been individually pre-let on 250-year leases. Each unit comprised a single bedroom, wardrobe and desk with (apart from six units) an en suite shower, washbasin and w.c. Each cluster of 5 units had the use of a communal kitchen and a communal living area, usually adjacent to each kitchen area. A gym and communal laundry were in the basement. The leases granted the right in common with all others having a similar right to use “the Facilities” on the same floor of the building, and these were defined as “the kitchen, bathroom and shower and other areas provided for communal use by the owners of the Units in the Building”.
57. In Ezekwe, the Deputy President of this tribunal first rejected the argument that a dwelling had to be used or intended to be used as someone’s home. He then considered whether each unit was occupied or intended to be occupied as a separate dwelling or whether the right of each tenant under their lease to access communal facilities meant that the necessary element of separateness was missing (para 16(1)). In deciding whether units are occupied or intended to be occupied as a separate dwelling, the Deputy President had regard to the terms of the leases. That is hardly surprising in the context of the service charge provisions of the 1985 Act, where the relevant question is whether sums payable under a lease are payable by the tenant of a dwelling. The focus is on sums payable under the lease of the units and the question is whether the demised premises, if occupied, are at the time of the disputed charges (see para 37 of the decision) occupied “as a separate dwelling”.
58. Having referred to the decision of the House of Lords in the Uratemp case, the Deputy President cited well-known Rent Acts cases on what is meant by “let as a separate dwelling” and in particular Lord Reid’s explanation in Baker v Turner [1950] AC 401 at 437 of why, if a tenant has to share a living room which is not let to him, it is impossible to find anything which is let to him as a separate dwelling:

“It cannot be the let rooms plus the right to use the other room, because that other room is not let to him at all – he is only a licensee there. And it cannot be the let rooms alone, because his having to share another room shows that the let rooms are only a part of his dwelling place.”

The Deputy President then held that it was not “possible to interpret section 38 of the 1985 Act without regard to meaning which has been given over the years to the expression ‘as a separate dwelling’ for the purpose of the Rent Acts and the Housing Act 1988”.

59. Applying that meaning, he concluded:

“The tenant of each of the units has the right to share a kitchen, lounge, shower and w.c. with every other tenant on the same floor. Can it then be said that the tenant is the tenant of a part of the building which is occupied or intended to be occupied as a separate dwelling? I do not think it can, for the reasons given by Lord Reid in *Baker v Turner*. The bed-sitting room plus the right to use the communal space will not satisfy the requirement because the tenant is not the tenant of the whole of that accommodation, but only of part of it; the bed-sitting room itself will not do, because that is not occupied as the tenant’s dwelling, but only as part of it. That was the decision in the *St Andrews Place* case, and in my judgment it was correct.”

60. The reference to the *St Andrews Place* case is to St Andrews Place (Liverpool) RTM Co Ltd v JLK Ltd (unrep., 21.1.16, Case Ref. MAN/00BY/LRM/2015/0006), a decision of the First-tier Tribunal (Property Chamber). As its name suggests, this was a decision on Part 2 of the 2002 Act. It concerned a church that had been adapted for 100 units of student accommodation, laid out on five floors surrounding a central atrium. 90 were found to be the same size as a single hotel bedroom, with a single bed, small desk and chair and en suite shower room and w.c., with insufficient room to accommodate an armchair or sofa and no cooking facilities. 10 units were larger, and had a double bed and room for a small sofa and a fridge, but no cooking facilities. With the exception of the ground floor, each floor in the building had two identical common rooms, equipped with sofas and a dining table and chairs and a double kitchen area, designed to provide communal facilities for each group of five units. On the ground floor was a communal gym and laundry.

61. The tribunal referred to the principle in Lord Millett’s speech in Uratemp, to the effect that a single room could be a “dwelling” but that if in addition to being granted exclusive possession of that room the tenant is also granted the right to the shared use of other rooms, the question is whether the room or rooms of which he has exclusive possession are his dwelling place or only part of it. It held that the same principle should be applied to determine whether the units were “a separate dwelling” for the purposes of the definition of “dwelling” in the 2002 Act, and that none of the units was intended to be occupied as a separate dwelling because none formed the whole of the dwelling of the student to whom it was let. That was because the common living areas provided each student with the right to use cooking facilities and space to sit and eat and were properly to be regarded as living rooms. It is unclear whether the terms of the long leases granted such rights or whether the tribunal was referring to the terms of the assured shorthold tenancies granted to the students.

62. Mr Bates submits that the same approach should be taken in the instant case: the concept of “separate dwelling” must have been meant by Parliament to have its well-understood meaning in this similar residential property context (see Barras v Aberdeen Steam Trawling and Fishing Co. Ltd [1933] AC 402 at 411, *per* Viscount Buckmaster). Accordingly, the definition of “dwelling” in section 112 is concerned with whether the separate set of premises was let or intended to be let as a separate dwelling, and if the studio was let on terms that provided for shared living space outside the studio then it was not “occupied or intended to be occupied as a separate dwelling”.

Discussion and decision

63. The matter in issue in this case is whether each studio in the Premises is a “flat” for the purposes and within the meaning of Part 2. If each studio is a “flat”, the right to manage legislation applies to those Premises: there are no other “flats” in the Premises that are let to non-qualifying tenants.
64. However, the jurisdictional threshold in Part 2 does not depend only on whether a long lease held by a qualifying tenant is a lease of a flat. It depends on how many flats are in the building or part of a building and how many of them are held by qualifying tenants. The answer to whether Part 2 applies is therefore not to be found in the terms of long leases on which individual premises are let.
65. The principal requirement for a “flat”, in this context and in the context of Part I of the 1993 Act, is a separate set of premises constructed or adapted for use for the purposes of a dwelling. As explained and decided in the Aldford House case, that is a question about the physical characteristics of the premises. It is clearly an objective test, not a question of what, subjectively, the developer or builder intended when carrying out the works, or how an owner for the time being intends to make use of the premises.
66. The purposes of a dwelling are, generally: living, eating, sleeping and (in modern times, at least) washing, though it has been authoritatively held that premises may be a dwelling in ordinary parlance without the presence of any cooking facilities: see *per* Lord Millett in the Uratemp case. The same conclusion would apply to the absence of a bathroom.
67. I turn then to the question of whether “dwelling” connotes a home. It is true that Lord Millett referred to a dwelling as being in ordinary parlance a habitation, or an abode – the place where one lives and makes one’s home – and to which one returns and which forms the centre of one’s existence. His Lordship considered that the word “dwelling” suggested a greater degree of settled occupation than the word “residence”. However, the only issue in that case was whether a room that had no cooking facilities could be a “dwelling” within the meaning of Part I of the Housing Act 1988 (assured tenancies).
68. In R (N) v Lewisham London Borough Council [2014] UKSC 62; [2015] 1259, Lord Neuberger of Abbotsbury PSC disagreed with Lord Millett’s view that the word “dwelling” implied a greater degree of permanence than “residence”, at least in a Rent Act context. Lord Hodge JSC considered that there was much to be said for the Council’s argument that, in order for premises to be “let as a dwelling”, they must be occupied as a settled home. However, that was in the context of an alleged infringement of section 3 of the Protection from Eviction Act 1977, where it was common ground that the language of the statute carried the same meaning as in the Rent Acts. A statutory tenancy can only exist under the Rent Act 1977 if the tenant occupies the dwelling-house as his home.
69. The statutory context in Part 2 of the 2002 Act is quite different. It is concerned with allowing those with the greatest financial stake and long-term interest in a building to have control of its management. This tribunal, in the Ezekwe case, decided that in the

Landlord and Tenant Act 1985 there was no requirement for a dwelling (defined as “a building or part of a building occupied or intended to be occupied as a separate dwelling...”) to be occupied as someone’s home. Mr Bates realistically accepted that this tribunal is likely to follow that decision and reserved his detailed argument for a higher court.

70. It seems to me that if, in the context of the 1985 Act, a “dwelling” does not necessarily connote a “home”, that conclusion will apply more strongly in the 2002 Act, which has the statutory purpose that I have just identified. It has nothing to do with protecting lessees in their homes and is concerned to reflect substantial ownership of a building or part of a building by long leaseholders. For those purposes, the test is whether there are sufficient flats in the building let to qualifying tenants. Whether something is a “flat” depends on what it was constructed or adapted for use for the purposes of. This is a question of the physical characteristics of the premises in question, not a question of whether it is the occupier’s home. I therefore reject the argument that a “flat” must be occupied or intended to be occupied as a home.
71. The question under Part 2 does not end with an analysis of whether the premises were constructed or adapted for use for any or all of the purposes of a dwelling identified in paragraph 66 above. That is because the term “dwelling” is itself defined in Part 2 of the 2002 Act. At risk of repetition, it is a building or part of a building occupied or intended to be occupied *as a separate dwelling*”. What, then, was the purpose of the draftsman in adding this definition? The definition is primarily to qualify the meanings of “flat” and “unit”, for apart from in those definitions in section 112(1) the only reference to a “dwelling” appears to be in the resident landlord exception in paragraph 3(6) of Schedule 6, where a requirement for actual use “as a dwelling” is imposed. Otherwise, Chapter 1 of Part 2 of the 2002 Act is concerned with “flats”, not with “dwellings” as such.
72. The draftsman therefore must have had a particular purpose intended to be served by adding the definition of “dwelling”. The words used have clear Rent Acts connotations, and it is not easy to see what other meaning could have been intended, given that one is concerned with *a separate set of premises* constructed or adapted for use for the purposes of a dwelling.
73. Other theoretical possibilities can be advanced. One possibility is use without the right to share any accommodation or facilities elsewhere in the building or its curtilage (other than easements of access over common parts, presumably). Another might be that the dwelling has to be able to satisfy *all* the purposes of a dwelling (i.e. include facilities for cooking and washing as well as living and sleeping). But these would be new meanings, unsupported by previous case law, and different from the generally understood meaning of “dwelling”. Had the draftsman intended to strike out on a new definitional path, the choice of “as a separate dwelling” as the preferred description is wholly implausible, first because of its imprecision to achieve any such objective, and second because it already has a different meaning long established by authority.
74. Mr Jacob submitted that the use of the expression “occupied ... as a separate dwelling” should be understood to be designed to prevent rooms in a flat or in a house from

themselves being treated as “flats”, such that a lessee of the flat or house could claim to be the qualifying tenant of several “flats”. It is of course wholly improbable that a long lease would be granted separately of an individual room in a flat or house. If Mr Jacob is right (which I doubt) that such a room could ever be a separate set of premises constructed or adapted for use for the purposes of a dwelling, the reason why it would not then be occupied as a separate dwelling, on Mr Jacob’s argument, is that it is not objectively for use separately from the rest of the flat or house. (The explanation could not be that it was not separated from the rest of the flat or house because it is assumed for these purposes that the room is a separate set of premises. Nor could it be that the tenant of the whole flat had the right to use the rest of the flat, because the Applicant contends that the terms of any letting of the premises are irrelevant).

75. As soon as one sees the explanation advanced by the Applicant in that way, it is clear that the same explanation is capable of applying in a case like St Andrews Place (Liverpool), where the units themselves did not provide all the living space: the kitchen and living areas were available for use in adjacent, common space. The units (being very small and inadequately equipped) were not objectively for use separately from the shared accommodation provided, even though they were separately let. In my judgment, therefore, even the Applicant’s attempt to explain a more limited meaning of “as a separate dwelling”, divorced from the Rent Acts notion of sharing living accommodation, ends up with essentially the same test: is the occupier’s dwelling the premises that are let to him or those premises and other property the use of which is shared?
76. Although the focus here is not what the premises are “let as”, which is the test under the Rent Acts, the criterion of sharing living accommodation serves the purpose of the draftsman of the 2002 Act where the primary focus is on what, objectively, the premises are constructed or adapted for use as. If the separate set of premises lacks living accommodation that one would expect to see in a dwelling *and* this living accommodation is provided as common space for use by the occupier of the premises and others, then the premises are not constructed or adapted for use for the purposes of a separate dwelling. If no such shared accommodation is provided then, as long as the premises are a dwelling in the ordinary meaning of that word (as to which, see Uratemp), they are likely to be constructed or adapted for use for the purposes of a separate dwelling.
77. It is important to emphasise that, in all these cases, the test is not the terms on which the premises are let, if they are occupied. That would equate the Rent Acts test of what the dwelling is “let as”, and the words of the 1993 Act and the 2002 Act deliberately eschew such language. That is because the test is one that depends on the physical characteristics of the separate set of premises, considered in the context of the building and any appurtenant property of which they form part. It is also because it may be necessary, when determining whether Part 2 applies, to consider what premises other than those let on long leases to qualifying tenants are “flats”. Although flats held by qualifying tenants will be let, other flats may not be.
78. I agree with the Deputy President’s conclusion in the Ezekwe case that the expression “occupied or intended to be occupied as a separate dwelling”, in the 2002 Act as well as the 1985 Act, cannot be construed without regard to the well-known meaning of the

phrase “as a separate dwelling” in a residential landlord and tenant context. For the reasons that I have given, it is difficult to attribute another discrete meaning to that phrase.

79. However, the test under the 1985 Act is not the same as the test under the 1993 and 2002 Acts. Whether monies are payable by “a tenant of a dwelling” is a very different question from whether a separate set of premises is constructed or adapted for use for the purposes of a dwelling. The tribunal in St Andrews Place (Liverpool) appears to have applied the test of whether units were let as separate dwellings, taking into account the terms of the leases (or occupational tenancies). Although, if it did so, it was wrong to apply that test, on the facts the same conclusion would have been reached if the tribunal had asked itself whether, objectively, the units were constructed or adapted for use for the purposes of a separate dwelling. The size, layout and facilities of the units, in the physical context of adjacent living area and kitchens provided for the use of the occupiers, made it clear that the dwelling space of each occupier was his private unit together with the shared living accommodation.
80. Since the terms of any letting are, I consider, irrelevant to the question of the number of flats contained in a building or part of a building, it will generally only be possible to conclude that the demised unit is part only of the dwelling space of the occupier, and so not a “flat”, if the unit itself lacks essential living space and this has been created elsewhere. That is because, in such a case, it will generally be clear, objectively, that the unit was constructed or adapted for use with the communal living space. Although this issue did not arise in *Ezekwe*, it seems clear that, had it done so, the units would have been held not to have been constructed or adapted for use for the purposes of a separate dwelling, as the units were small, lacked kitchen facilities and were adapted for use with an adjacent communal living area and kitchen for each 5 units.
81. Turning to the facts of this case, each of the studios is of ample size in terms of living space and has a small kitchen. There were 292 studios in the building as built. There were no common kitchen or bathroom areas and no living space provided on any of the floors of the building except the ground floor. The lounge/cinema there is of reasonable size but certainly not large enough to provide a living room for 292 occupants of the studios, or even a significant fraction of them. From the plans, it appears to be of a size that could comfortably accommodate 25 students as a lounge, and perhaps double that number for a film showing, party or other social event.
82. In my judgment, the lounge/cinema, gym and laundry are in the nature of extra facilities for the benefit of all the occupiers of the studios, not essential living accommodation for each of them. The studios were doubtless constructed so that the student occupier could take advantage of the intended communal facilities on the ground floor, but each of the studios has ample living accommodation for occupation as a separate dwelling. Significantly, there is no space in the building that was created to be used by the occupiers as part of their dwelling space. The lounge/cinema, gym and laundry are in the nature of social and recreational facilities (and a laundry) that they could make use of.

83. In fact, the lounge/cinema, gym and laundry had not been fitted out for use by the relevant date. However, the building and the studios had been constructed on the basis that these facilities would be available and so they were intended to be available for use. It would not be appropriate therefore to disregard them, though for the reasons that I have given their intended presence does not mean that the studios were not to be occupied as separate dwellings.
84. It is very common in modern apartment blocks for there to be gym and other facilities, such as an extended reception area with comfortable seating for communal use. Such facilities do not mean that none of the apartments in the block is a “flat” within the meaning of the 1993 and 2002 Acts any more than would extensive gardens for shared use. It would, however, be different if each of the apartments lacked a kitchen and if adequate and convenient kitchen facilities were provided on each floor of the block. It is then clear from the construction of the apartments and the common areas that the occupiers of the apartments are meant to share use of the kitchen areas.
85. Retirement or care homes are another example of residential accommodation where communal facilities are often provided: sometimes in addition to self-contained apartments, and sometimes in addition to individual bedrooms with en suite facilities. If there are qualifying tenants of some of the apartments or rooms, similar questions will arise as to whether any of them are “flats” within the meaning of the Acts. This will depend, among other criteria, on what the apartments or bedrooms have been constructed or adapted for use as. I prefer not to express any view on how the Acts may apply to these potentially different cases, save to say that decisions will inevitably be fact specific.
86. In the context of student let arrangements, such as the facts of the instant case, the St Andrew’s Place (Liverpool) case and the Ezekwe case, there is in my judgment a clear factual distinction between a case where each separate unit comprises all the usual facilities required for residential living and no further living accommodation is provided for use by occupiers, on the one hand, and a case where the separate set of premises lacks certain living accommodation that is provided elsewhere, on a shared basis, on the other hand. What is in any given case living accommodation for shared use by more than one occupier, as compared with communal facilities of a building provided for all occupiers to use, will be a question of fact and degree. For this purpose, as under the Rent Acts, bathroom accommodation is not treated as “living accommodation” but a lounge area and a kitchen are. Only shared living accommodation will suffice to prevent a separate set of premises constructed or adapted for use for residential purposes from being premises constructed or adapted for use for the purposes of a separate dwelling, within the meaning of Part 2.
87. On the facts of the instant case, the shared facilities intended to be provided in the ground floor of the building for use by the students are not such as to prevent the studios from being for use for the purposes of a separate dwelling and so each Studystudio is a “flat”, as defined.

Additional issues

(1) Non-residential parts

88. The third issue is whether the Studystudios are neither occupied nor intended to be occupied for residential purposes, within the meaning of paragraph 1 of Schedule 6 to the 2002 Act.
89. The Respondents argue that the intended occupation of the studios is non-residential because they were constructed for financial purposes and therefore are neither occupied nor intended to be occupied for residential purposes. The financial purposes are those surrounding the grant of the long leases of the studios, under which each of the lessees paid a premium for the lease and (except in eight cases) underlet the studio to a company related to the developer, in return for a guaranteed income of 10% of the purchase price for each of the 10 years of the term of the underlease. Thereafter, each lessee would be able to sub-let directly to a student for the residue of the term of the lease but not occupy the studio himself, as use is restricted to use as a student let.
90. The relevant question is whether each of the studios is (on the relevant date) occupied or intended to be occupied for residential purposes. The evidence is that on the relevant date the studios were probably not occupied, but they were intended to be occupied. By whom were they intended to be occupied? They were clearly intended to be occupied by students, not by the lessee or the underlessee. The students would occupy the studios for residential purposes – to reside there – regardless of the motive of the lessees and underlessees for letting them into occupation.
91. The point at issue was effectively decided in the Lands Tribunal in the case of Gaingold Ltd v WHRA RTM Co Ltd [2006] 1 EGLR 81. A mixed block, containing 13 self-contained flats and retail and restaurant premises, was let as a whole to Gaingold Ltd. WHRA applied to acquire the right to manage it. The restaurant, a basement beneath it and a basement beneath the retail unit were underlet together to a commercial tenant. The basement beneath the retail unit contained 5 bedsits, a common kitchen and bathroom and an office. Whether more than 25% of the internal floor area of the block was not let for residential purposes (etc.) depended on whether the basement was occupied or intended to be occupied for residential purposes.
92. The President, George Bartlett QC, said:
- “The distinction for which para 1 expressly provides is between the residential and non-residential parts of the premises, and I can see no justification for substituting “commercial” for “non-residential” as an aid to understanding its effect. The question to be asked is whether the basement is occupied, or is intended to be occupied, for residential purposes. If it is not, it is a non-residential part of the premises. If part of premises is, in fact, used for residential purposes, those living there are appropriately referred to as occupiers or occupants... and the part of the premises can appropriately be said to be occupied for residential purposes. I can see no justification in the provision for ignoring the occupation of these occupiers and treating as the sole occupier of the basement the person operating the restaurant business, or for reading into the provision the qualification that it is the underlying purpose of the person providing the residential

accommodation that must be treated as the determinant of whether the part is occupied for residential purposes.”

93. Although, in this case, the studios were not occupied on the relevant date, the same test must apply: those intended to occupy the studios are the relevant occupiers and the studios can appropriately be said to be intended to be occupied for residential purposes. The lessee and underlessee are not the intended occupiers, and their purposes in sub-letting each studio to a student are irrelevant.
94. Accordingly, the studios are not non-residential parts of the Premises and the exclusion in paragraph 1 of Schedule 6 does not apply to exclude the right to manage.

(2) Appurtenant property

95. The Respondents contend that the claim notice in this case is deficient in that it does not identify the extent of any appurtenant property falling within the scope of the premises over which the right to manage is claimed.
96. By section 80(1) of the 2002 Act, a claim notice must comply with the requirements set out in that section. It must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which Part 2 applies (s.80(2)). The premises will be a self-contained building or part of a building, with or without appurtenant property (s.72(1)(a)). The claim notice must contain such other particulars as may be required to be included, and comply with such requirements as to the form of claim notices as may be prescribed, by regulations (s.80(8),(9)). It is therefore the claim notice that must identify the premises over which the right to manage is to be acquired.
97. The landlord (among others) then has a right of access to any part of the specified premises, if reasonable in connection with any matter arising out of the claim notice. A counter-notice, if served, must either admit that the RTM company was entitled to acquire the right to manage the premises specified in the claim notice or allege, by reason of a specified provision of the 2002 Act, that the RTM company was not so entitled.
98. By reg. 4(c) of The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 (SI 2010/825) (“the Regulations”), a claim notice must contain a statement that the notice is not invalidated by any inaccuracy in any of the particulars required by section 80 (2) to (7) of the 2002 Act or by the Regulations. Reg. 8(2) requires a claim notice to be in the form set out in Schedule 2 to the Regulations. The prescribed form requires the name of the premises to which the claim notice relates and the grounds on which it is claimed that the premises are ones to which Part 2 of the 2002 Act applies to be stated. No further definition of the premises in question, or of any appurtenant property, if any, is required by the terms of the form.
99. The question is therefore whether a notice is non-compliant if the claim notice does not specify what appurtenant property (if any) is part of the premises, and if so what the consequence of non-compliance is.

100. The Respondents accept that any argument that they have in this regard needs to be addressed to a higher court. That is because this tribunal has twice held that there is no need to specify in a claim notice whether any appurtenant property falls within the claim: Pineview Ltd v 83 Crampton Street RTM Co Ltd [2013] UKUT 598 (LC); [2014] 1 EGLR 65 and Miltonland Ltd v Platinum House (Harrow) RTM Co Ltd [2015] UKUT 236 (LC); [2016] L&TR 9.
101. In Gala Unity Ltd v Ariadne Road RTM Co Ltd [2012] EWCA Civ 1372; [2013] 1 WLR 988, the Court of Appeal held that the fact that appurtenant property, as defined in Part 2 of the 2002 Act, was used in common by occupiers of other property as well as by occupiers of the premises for which the right to manage was being claimed, did not affect the entitlement of the RTM company to acquire the right to manage the premises and any property appurtenant thereto. I was told by Mr Bates that that decision is regarded as controversial and that permission to appeal to the Court of Appeal another case raising the same issue has been granted recently. That may be so, however Mr Jacob submitted (without demur from Mr Bates) that that particular issue does not arise in relation to the Premises in the instant case, as there is no appurtenant property shared with other occupiers or owners.
102. In the absence of any argument presented by the Respondents as to why the previous decisions of this tribunal should be regarded as plainly wrong, or why otherwise circumstances exist that should lead me not to follow them, I propose to do so, without adding unnecessarily to the length of this decision.
103. The claim notice dated 31 July 2019 was not defective by failing to specify any appurtenant property or that none existed.
104. The Respondents seek to argue that in any event the Applicant can acquire no right to manage property that is appurtenant to the building because an RTM company can only acquire management rights over the “block”, not over the “estate”. Appurtenant property means property appurtenant to the flats within the building, not property appurtenant to the building. That way of seeking to avoid or negate the decision in Gala Unity was rejected by this tribunal in Firstport Property Services Ltd v Settlers Court RTM Co Ltd [2019] UKUT 243 (LC), where it was argued that Gala Unity was decided *per incuriam* and the argument was rejected.
105. The particular issue decided in Gala Unity does not arise in this case. I consider that, as submitted by Mr Jacob, unless and until a higher court provides a different explanation of the law from that given previously by this tribunal, no issue arises as to what appurtenant property, if any, is part of the Premises. As explained by the Deputy President in the Pineview case, the First-tier Tribunal is given no function under the 2002 Act to determine any such matter as part of the procedure arising from claim notice, counter-notice and application for determination.
106. In the absence of any detailed argument on behalf of the Respondents as to why I should reach any other conclusion, I shall express no further reasons but reject the argument that no right to manage property that is appurtenant to the building can arise under Part 2.

Disposal

107.I accordingly conclude that the Applicant RTM company was entitled on the relevant date to acquire the right to manage the Premises. The acquisition date will be determined under section 90(4) of the Act.

Mr Justice Fancourt

President

19 June 2020