

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**



S.79 and S.84 Commonhold & Leasehold Reform Act 2002 ("the Act")

DECISION AND ORDER

Case Number:	CHI/21UF/LRM/2008/0005
Property:	Flats 1-27 with their parking spaces Litlington Court Surrey Road Seaford East Sussex BN25 2NZ
Applicant:	Litlington Court (Seaford) RTM Ltd
Respondent:	Sinclair Garden Investments (Kensington) Ltd
Appearances for the Applicant:	Philip Sissons of Counsel
Date of Inspection /Hearing	16th February 2009
Tribunal:	Mr R T A Wilson LLB (Lawyer Chairman) Mr N I Robinson FRICS (Valuer Member) Ms J K Morris (Lay Member)
Date of the Tribunal's Decision:	9th March 2009

SUMMARY OF DECISION

The Tribunal determines that the Applicant was entitled to acquire the right to manage the Property as at the 21st July 2008.

BACKGROUND PRELIMINARY MATTERS

1. This is an application for a determination that on the date on which its notice of claim pursuant to section 79 of the Act was given, the Applicant was entitled to acquire the right to manage the Property. The application is made pursuant to section 84 (3) of the Act.
2. The relevant law is set out in part 2 chapter 1 of the Commonhold and Leasehold Reform Act 2002 and reference to the same is made in the body of this decision as appropriate.
3. The Applicant served a claim notice under section 79 of the Act dated the 21st July 2008 on the Respondent, and the Respondent served a counter notice dated the 28th August 2008 disputing the Applicant's entitlement to acquire the right to manage.
4. In its counter notice the Respondent did not give any reason for disputing the Applicant's entitlement to acquire the right to manage save to refer to several sections of the Act.

INSPECTION

5. The Tribunal inspected the Property prior to the hearing in the presence of a representative from the Applicant who was accompanied by his Counsel Philip Sissons and his instructing solicitor Rachel Gayles.
6. Litlington Court comprises a self contained structurally detached building understood to have been built around 1977, containing 26 flats (numbered 1 – 27, no No. 13) and 40 parking spaces. It is situated on a sloping site and five stories, or levels, tall, of brick and concrete construction, with tile hung infill sections between some windows, under a flat roof. The design is typical for the era. The front of the building faces approximately east and the rear approximately west. The first (lowest) level is at ground level at the rear. The third level is at ground level at the front. The original doors and windows to the flats would have been of timber but a number have been replaced in UPVC. The building shows signs of age with some defective pointing to brickwork, patch repairs to walkway surfaces and further areas in need of repair.
7. The two lowest levels are rectangular in shape and each comprises an access way and car park along the eastern side of the building with twenty parking spaces. The first level is accessed from a roadway on the southern end of the building and the second level is accessed from a ramp at the northern end of the building. The parking spaces at the first level are all included within demises of flats in Litlington Court. At the second level, fourteen parking spaces are understood to be demised with flats at Selmeston Court with the remaining six being demised with flats at Litlington Court. The rear (west facing) side of the two levels comprises a series of two storey maisonettes accessed at the first level from the rear of the property.
8. At the first level, there is an electricity sub-station at the northern end of the building and

actually situated under the second level ramp. This is outside the footprint of the main building and is not included within the Right to Manage proposal. At first and second levels, there is access to a lift leading to the third and fourth levels but not to the fifth level.

9. The third level is different in layout to the two lowest levels; being “T” shaped with a section missing where the tail of the “T” normally would meet the top bar of the “T”. This projecting “island” section comprises the lift shaft from the lower levels going up to the upper levels and a staircase going upwards only. The top part of the “T”, running north to south, comprises flats with access directly off the roof of the car park area below. This roof is shown as visitor parking on the drawings but the visitor parking has subsequently been moved outside the footprint of the lower levels and also outside the area now intended to form part of the Right to Manage Company’s responsibility. These level three flats are set back on the western elevation, allowing space for a communal walkway / terrace along the length of the building.
10. The fourth level forms a complete “T” with the tail once again containing the lift and staircase but at this level the flats are set slightly back along the front east facing elevation where there is an open access walkway to the flat front doors.
11. The fifth level is similar to the fourth level but is not served by the lift.

THE HEARING

12. The hearing took place at the Downs Leisure Centre, Sutton Road, Seaford, East Sussex on Monday the 16th February 2009. The Applicant was represented by Philip Sissons of Counsel. The Respondent did not attend and was unrepresented.
13. From the written submissions of the Respondent, it was evident that they objected to the application on five grounds as follows:-
 - i) Litlington Court is not a qualifying building.
 - ii) The non residential parts of the Property exceed 25% of the total floor area.
 - iii) The notice of claim is defective
 - iv) The notice inviting participation from qualifying leaseholders is incomplete.
 - v) The difficulty of managing the Property in view of the responsibility for the car parking spaces mentioned above.
14. The Tribunal invited Mr Sissons to deal with each of the disputed areas in turn.

QUALIFYING PREMISES

15. Mr Sissons developed the points made in his written submissions that by section 72 (1) of the Act the right to manage can be exercised in respect of premises if,

‘(a) they consist of a self contained building or part of a building, with or without appurtenant property’.

16. Mr Sissons asserted that it followed that premises qualify under the Act if they are ‘either’

a self contained building 'or' part of a building fulfilling the additional criteria in sub-section 72(3) of the Act.

17. By sub-section 72(2) '*a building is a self-contained building if it is structurally detached*'.
18. Mr Sissons asserted that Litlington Court was a self-contained, freestanding building with no attachment to any other structure. He confirmed that the Applicant sought to acquire the right to manage the whole of that building. Accordingly it was wholly irrelevant that the premises did not fulfill the requirements in sub-section 72(3) because they satisfied the alternative requirement of being a self-contained building.
19. In its written submissions the Respondent asserted that Litlington Court did not constitute a vertical division of the entire building and the structure of part of the building, comprised in the application for the right to manage, was such that it could not be developed independently of the rest of the building. As Litlington Court could not be divided either laterally or vertically to include the car parking space belonging to Litlington Court only, it could not be said that the building complied with the requirements of section 72, and therefore the right to manage did not apply. In support of this contention, the Respondent refers to the case of *Re: Holding and Management (Solitaire) Ltd 2008*.
20. On this issue, the tribunal accepts the submissions made by the Applicant. In particular it accepts that for a property to qualify under the Act it must either be a self-contained building or part of a building fulfilling the additional criteria set out in section 72(3) of the Act. From its inspection of the Property the tribunal were satisfied that Litlington Court is indeed a self-contained free standing building with no attachment to any other structure. In these circumstances it is of no consequence that the Property does not fulfill the requirement in sub-section 72(3) because it satisfies the alternative requirement of being a self-contained building. The Tribunal reviewed the case of *Re: Holding and Management (Solitaire) Ltd*, but formed the view that the case was not helpful because it dealt with the application of the requirements of sub-section 72(3) (part of a building). In that case the LVT found that the premises were at one end of a long four-storey block of flats, with two storey town houses interspersed at intervals along the block and parking spaces below. Whilst the flats had their own separate entrance to the internal common parts and the basement parking area, the entrance to the parking area ran under the town house at number 17. The roller shutter security door and two nearest parking spaces were also under number 17. The facts of this case are different in that the right to manage is sought in respect of a self contained structurally detached building. For these reasons the tribunal considers that the Respondent's objections have no merit.

NON RESIDENTIAL PARTS

21. Paragraph 1 of Schedule 6 to the Act provides:-

PREMISES EXCLUDED FROM RIGHT TO MANAGE

- (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.*
- (3) *Where in the case of any such premises any part of the premises (such as, for example, a garage, parking space or storage area) is used, or intended for use, in conjunction with a particular dwelling contained in the premises (and accordingly is not comprised in any common parts of the premises), it shall be taken to be occupied, or intended to be occupied, for residential purposes.*
- (4) *For the purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part shall be taken to extend (without interruption) throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part shall be disregarded.*

22. Mr Sissons stated that the Act provides that when more than 25% of the premises are non-residential then the Act does not apply. Both parties accepted this test and there was no dispute over the floor areas themselves. The only difference between the parties was how you applied the calculation. The dispute related to how one treated the access roads and the access balconies. It was his contention that you first disregarded both the common parts and the balconies before comparing the residential and non-residential parts. On this calculation, if you disregarded both the car park access road and the access balconies, then the percentage of non-residential parts to the building equaled 7.93% and the RTM could be established. If on the other hand the Tribunal took the view of the Respondent, namely that the common parts access road and the balconies should be added to the area of the car parking spaces belonging to Selmeston Court floor, before applying the test, then the percentage of non-residential parts to the building amounted to 28.85% and the RTM could not be established.

23. Mr Sissons asserted that the Respondent's calculation was flawed. In coming to this conclusion he relied upon the case of *Indian Investments v Taylor 2004* in which the judge explained the correct approach to this calculation under the materially identical provisions set out in section 4 of the Leasehold Reform, Housing & Urban Development Act 1993. The judge held that the proper method is to deduct the area of the common parts from the total area of the premises. The question was whether the non-residential parts then exceeded 25% of the remaining area. The judge explained in the case, "*common parts that are neither business nor residential are treated as irrelevant in two ways:-*

- i) *as not being part of the definition of either business or residential, and therefore not part of the 'part' that is compared with the 'whole' and*
- ii) *as not being comprised in the 'whole' with which the 'part' is compared.*

In short you left it out of both sides of the calculation so that in reality what is compared is business: aggregate of business and residential.

24. Mr Sissons asserted that in the present case the car park access roads within the building and the access balconies on levels four and five were common parts and so were left out of the calculation. Further, any car parking spaces demised to the leaseholders in the premises were also left out of the calculation.

25. Adopting the measurements relied upon by the Respondent but applying his test the appropriate percentage of non-residential parts amounted to 7.93%. It followed that when the proper calculation method was applied the non-residential parts of the premises were considerably less than 25% and so the exclusion in paragraph 1 of schedule 6 does not apply.
26. The question for the Tribunal to answer therefore was how you calculate the 25% ratio. In particular do you include the common parts? The Tribunal considers that the answer lies in section 101 of the Leasehold Reform, Housing and Urban Development Act 1993 which contains materially identical provisions to the 2002 Act. This section has the effect of excluding common parts, which is defined as including the structure and exterior and any common facilities within. Thus the area of common parts is first deducted from the total gross internal area and you apply the 25% test to the remaining area. The tribunal considers that this is the correct approach even if there are clearly commercial only common parts in a separate part of the building. The fact that the common parts are not relevant to the residential users does not matter, i.e. all common parts of whatever nature are deducted. The Tribunal formed the view that as the balconies in this case are not fully enclosed then they should not be counted as internal.
27. The tribunal therefore finds that when applying the proper calculation, the non-residential parts of the premises are considerably less than 25% and so the exclusion in paragraph one of schedule 6 does not apply.

NOTICE OF CLAIM

28. Mr Sissons stated that as far as he was aware from the written submissions of the Respondent, the Respondent appeared to suggest that the notice of claim was defective in not identifying the premises in relation to which the right to manage was sought. He rejected this assertion and contended that the notice of claim adequately and accurately described the premises. It did so by giving the postal address of the flats held by qualifying leaseholders (1 to 27 Litlington Court, Surrey Road, Seaford, East Sussex BN25 2NZ in paragraph 1). The notice then went on to indicate at paragraph 2 that the premises contained appurtenant property. The reference to a self contained building in paragraph 2 of the notice made it abundantly clear that the claim related to the whole of Litlington Court.
29. In his opinion any reasonable recipient of the notice with knowledge of the premises would have understood that the claim related to the whole building. He referred to the case of *Mannai Investment Co Limited v Eagle Star Life Assurance* which set out the appropriate test to apply to the construction of notices. Mannai held that where a tenant served a notice purporting to exercise his contractual right to determine a lease, that notice would be effective to do so notwithstanding the fact that it contained a minor misdescription, provided that, construed against its contextual setting, it would unambiguously inform a reasonable recipient how and when it was to operate. Mr Sissons asserted that although Mannai related to a contractual provision there was no reason for it not to apply in relation to the construction of a statutory notice.
30. Mr Sissons further contended that it was apparent from subsequent correspondence between the parties' advisors that the Respondent was well aware that the Applicant's claim notice referred to the whole of Litlington Court. In the covering letter sent with the

Respondent's counter notice, the Respondent's solicitors contended, "the building in respect of which the claim is made are not premises to which chapter 1 of part 2 of the Commonhold and Leasehold Reform Act 2002 applies".

31. Mr Sissons contended that it was implicit in that contention that the Respondent understood that the claim related to the whole of the building. Accordingly if, which was denied, there was any defect in the claim notice, there had been no prejudice whatsoever to the Respondent.
32. The Respondent's contention was that paragraph 1 of the notice claim defined the premises in respect of which the right to manage was sought as 1-27 Litlington Court with no mention of any appurtenant property. Contradictingly in paragraph 2 of the claim notice the premises was stated to include appurtenant property. Any appurtenant property to be included in the right to manage needed to be specified, as it was essential that all parties concerned knew whether the right to manage company was to be responsible for the management of such property. "Whilst it may well be that a failure to specify the premises as required by section 80 (2) did not invalidate the notice, the notice of claim still had to be amended if the right to manage was to extend to a appurtenant property." However, the Respondent asserted that the Act provided no procedure for the amendment of a notice of claim. Under these circumstances it was their assertion that the notice was irretrievably defective.
33. The tribunal has come to the conclusion that the notice of claim does contain the matters required by the Act. As to the contents of the notice section 80 of the Act provides:

(1) The claim notice must comply with the following requirements.

(2) It must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies.

(3) It must state the full name of each person who is both--

- (a) the qualifying tenant of a flat contained in the premises,*
and
- (b) a member of the RTM company,*

and the address of his flat.

(4) And it must contain, in relation to each such person, such particulars of his lease as are sufficient to identify it, including--

- (a) the date on which it was entered into,*
- (b) the term for which it was granted, and*
- (c) the date of the commencement of the term.*

(5) It must state the name and registered office of the RTM company.

(6) It must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice

under section 79(6) may respond to it by giving a counter-notice under section 84.

(7) It must specify a date, at least three months after that specified under subsection (6), on which the RTM company intends to acquire the right to manage the premises.

(8) It must also contain such other particulars (if any) as may be required to be contained in claim notices by regulations made by the appropriate national authority.

(9) And it must comply with such requirements (if any) about the form of claim notices as may be prescribed by regulations so made.

34. The Respondent appears to suggest that the notice fails to comply with Section 80 (2) because it does not accurately specify the premises as required by Section 80 (2) as there is a failure to specify the extent of appurtenant premises included in the RTM. The written submissions do not allege a breach of any other requirements contained in Section 80 (3) to (9) inclusive of the Act
35. The tribunal rejects this argument. In the opinion of the tribunal the notice does adequately describe the premises to be the subject of the right to manage. At paragraph 1 there is a clear and unambiguous definition of the premises. The notice contains the correct postal address of the flats held by qualifying leaseholders and includes the postal code. In paragraph 2 the reference to a self contained building makes it clear that the claim related to the whole of Litlington Court.
36. The tribunal also accepts the Applicant's contention that subsequent correspondence from the Respondent's solicitors shows that the Respondent must have understood that the claim related to the whole building. The Respondent appears to argue that the premises over which the right to manage is sought is not clear from the claim notice as it only refers to the flats and unidentified appurtenant property in paragraph 2. The tribunal considers that the absence of a definition of appurtenant property does not render the notice invalid.
37. In the tribunals view the existence in the premises of car parking spaces belonging to non qualifying tenants does not detract from the validity of the notice because of the effect of clause 96 of the Act. This section sets out the management functions relating to the whole or any part of the premises which apply once a claim has been established. Clause 96(6) states that management functions do not apply in relation to,
- “a) functions with the respect to a matter concerning only part of the premises consisting of a flat or other unit not held under a lease by a qualifying tenant or*
- b) functions relating to re-entry or forfeiture”*
38. This clause is designed to establish the extent of premises to be included in a right to manage once the right itself has been established. Applying this clause to the case in hand, section 96(6) makes it clear that the right to manage functions will not apply to car parking spaces on level 2 demised to the tenants of Selmeston Court. This is the case because the tenants of Selmeston Court are not qualifying tenants and therefore their car parking spaces are excluded.

39. In the case of *Tudor v M25 Group Ltd* decided in 2003 which concerned the validity of an initial notice given in pursuance of a collective enfranchisement claim the trial judge stated *“one ought to remember that these sorts of statutory provisions are aimed at providing a commercially fair result so that the recipients of notices are told what they have to be told but that the object of the exercise is the giving of information and the defining of the issues, not the prescription of steps in a ritual dance or complex game , one false step in which is intended to produce disaster “*
40. In our opinion the notice in this case does on the face it provide the information required by statute and in particular the combination of paragraphs 1 & 2 of the notice of claim coupled with section 96(6) of the Act do establish with sufficient certainty the extent of property over which the right to manage is sought. The tribunal reminded itself of the purpose of the notice. The purpose of the notice is two fold. firstly to notify the landlord that the tenant wishes to exercise its right to manage and secondly to provide information to the landlord to determine whether the notice is valid. In the tribunals opinion the notice achieve both these aims and therefore should be held valid.
41. Further more in so far as there is any ambiguity then, applying the reasonable recipient test as set out in the Mannai case, the ambiguity as to the extent of the appurtenant property is not so great as to render the notice defective as the Respondent has not been prejudiced as a result of that ambiguity.

NOTICE INVITING PARTICIPATION

42. By the time of the hearing the Respondent’s objections in this respect had been withdrawn and accordingly there was no need for the tribunal to consider this point.

MANAGEMENT DIFFICULTIES

43. Mr Sissons asserted that any historic or future issues relating to the management and the effect of the acquisition of the right to manage, raised by the Respondent were irrelevant to this application. The tribunal was only concerned to determine whether or not the Applicant was entitled to acquire the right to manage at the date the claim notice was served and that it has followed the necessary procedural requirements.
44. In the Respondents written submissions they raise a number of practical management issues, which may arise if the right to manage claim is upheld. They suggest that difficulties will arise because of the existence of the car parking spaces relating to Selmeston Court being owned by a third party. They assert that if the tribunal determines that there is an entitlement to the right to manage, the appurtenant property needs to be defined. If appurtenant property is included in the right to manage, they assert that the date of acquisition needs to be stayed pending determination by the Tribunal pursuant to section 37 of the Landlord and Tenant Act 1987 of appropriate variations.
45. The tribunal rejects the submissions made by the Respondent as to management difficulties. The jurisdiction of the tribunal is defined under section 84(3) and (4) of the Act. The jurisdiction is for a determination as to whether or not on the relevant date the RTM Company is entitled to acquire the right to manage the premises. Whether or not practical difficulties exist if the tribunal is satisfied that the requirements of the right to

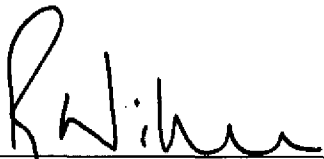
manage have been established as set out in the Act then it must make an RTM order. In this case we are satisfied that the statutory requirements for an RTM have been met.

46. In any event the tribunal considers that the difficulties identified by the Respondent are exaggerated. The Applicant has sought the right to manage the flats in the premises and not the common parts. The responsibility for the car parking spaces let to tenants in other properties will be unaffected. The tribunal heard evidence that the ownership of the freehold of Litlington Court and Selmeston Court had been separated some years back and it was alleged that there had been no management problems. Furthermore under section 96 of the Act referred to above, the car parking spaces over which tenants in other blocks have rights are not held under a lease by a qualifying tenant and therefore the Respondent's position in relation to those areas will be unaffected by this order.

CONCLUSION

47. It is therefore held that each and every objection raised by the Respondent in relation to this application is without merit and the Applicant is entitled to exercise the right to manage conferred by the Act.

Chairman



R.T.A. Wilson

Dated 9th March 2009