FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AM/LRM/2019/0011**
Property	**:**	**Barcham House, Riversdale Road, N5 2LA**
Applicant	**:**	**Barcham House RTM Company Limited**
Representative	**:**	**Kristina Eriksen, Anthony O'Brien**
Respondent	**:**	**Rovergrange Limited**
Representative	**:**	**Jacob Weiner**
Type of application	**:**	**Right to manage**
Tribunal member(s)	**:**	**Judge Hargreaves** **Stephen Mason BSc FRICS FCIArb**
Date of decision	**:**	**23rd September 2019**

DECISION

Decisions of the Tribunal

The Tribunal determines that the Applicant was on the relevant date entitled to acquire the right to manage the premises pursuant to section 84(5)(a) of the Act, and the Applicant will acquire such right within three months after this determination becomes final.

REASONS

The application

1. This was an application to acquire the right to manage Barcham House, Riversdale Road, London N5 2LA ("the premises") under Part 2 of Chapter 1 of the Commonhold and Leasehold Reform Act 2002 ("the Act"). The Respondent freeholder has served a counter-notice asserting that the Applicant RTM company was not on the relevant date entitled to acquire the right to manage.

2. The notice is dated 27th March 2019. It claims to acquire *"the right to manage Barcham House and any common parts of that building which the lessees currently have use of under their leases (the premises)"*. The counter-notice is dated 8th April 2019. The application to the Tribunal was received on 21st May 2019. A limited trial bundle was supplied, which has been supplemented by further complete copies of part documents exhibited.

The law

3. The relevant provisions of the Act are referred to in the decision below.

The counter-notice

4. In its counter-notice, the Respondent raised two points. Briefly, the first point is that Barcham House is not a self-contained building or part of a building for the purpose of *s72 Commonhold and Leasehold Reform Act 2002* ("the Act"). The second point is that a right to manage was exercised by AB&R RTM Company Limited within the meaning of *s72(6), paragraph 5(1)(b) Schedule 6* of the Act, and therefore the Applicant is not entitled to acquire the right to manage Barcham House. The Applicant disputes the first and second points, and as to the second, makes an application to the Tribunal to disapply *paragraph 5(1)(b)* on the grounds that it is *"unreasonable to apply it in the circumstances of the case"*.

Barcham House description

5. We conducted a site visit after the hearing. Barcham House is one of three small blocks which looks as though it was developed in the thirties but actually 1954, built at the junction of two roads facing Clissold Park. It was attended by Ms Eriksen, Mr O'Brien, and Mr Weiner. We inspected the basement of Barcham House, went onto the roof of Barcham House and Richard Fox House, and walked round the garden and outside areas of the three blocks which comprise this small development. Barcham House fronts Riversdale Road, and the adjoining Richard Fox House is accessed from Queens Drive, as is

Alcock House, which adjoins Richard Fox House. The Applicant produced useful photographs at pages 3-5 of the bundle. See page 2 of Mr Weiner's letter dated 21st June for a plan.

6. Barcham House has nine flats arranged over ground, first and second floors, with a basement storage area which provides a storage cage for each of the flats in all of the blocks. Only one leaseholder, Mr Ashcroft, has a lease which includes a storage cage with his flat at Alcock House. At the site visit we were supplied with a copy of that lease but apart from an express demise of storage area no. 34, it contains no other express provisions relating to it except those which relate to *"the demised premises"* generally (thereby including the right of access etc). Everyone else has a casual ad hoc arrangement, full details of which were not supplied. Each storage cage seemed to be in use and well padlocked. Access to the basement is provided by an internal stairway from the ground floor in Barcham House which only those in Barcham House can use, and two other external doors, opened by keys available to all leaseholders. The electricity is fed through the Barcham House meters. In addition, the basement area contains storage/rooms used by the cleaner/gardener employed to work on the blocks and the communal gardens. Mr Weiner argues, somewhat loosely, that *"There is no question that the lower ground floor/basement of Barcham House is an estate wide affair."* By that we conclude that everyone in all three blocks has a storage cage and access to it, together with the cleaner and gardener.

7. Mr Weiner did not cite any provisions in any of the leases which supports this proposition. None of the leases were provided for the hearing but we got copies of two later at the site visit. Mr Ashcroft's lease (Flat 1, Alcock House, 1972) refers to the three blocks as "*the Estate"*. Mr O'Brien's lease of Flat 8 Barcham House is dated 29th April 1999, describes *"Flat Owners"* by reference to flat owners in *"the Building"* (ie Barcham House only) and is, without going into detail, in a rather different format, though again, seems to share the lack of reference to a storage cage. Given the disparity between the two leases, and the facts as we understand them to be in respect of the storage cages, there is no evidence that apart from access to storage cages they are an *"estate wide affair"*. Even the service charge provisions seem to be different. The question of contractual rights to the cages is not something we can or need to determine.

8. That said we were handed a clip of correspondence at the hearing which consists of 12 identical letters signed and dated in September 2019 (identical except for personal identification etc) from leaseholders of flats in Richard Fox House and Alcock House raising concerns about their access to their storage spaces if the application succeeds. None of the writers attended to give evidence and we have no idea how these identical letters were procured or who drafted them. Since the Applicants' representatives were not cross-examined by Mr Weiner about any proposals to block continued access to storage spaces,

neither do they have any on the basis of the evidence we heard, we have noted the letters. They are of limited evidential value and do not assist on the first point in any event.

9. Barcham House is constructed with load bearing brick walls, solid floors and has a solid flat roof with low parapet walls. Windows and external doors were originally painted steel, single glazed; some windows have been replaced with uPVC versions. The internal common parts have vinyl sheet floor coverings and painted plastered walls and ceilings. The hardwood front doors to the hall appear to be original. Gas, water and electrical supplies were noted to enter Barcham House at basement level. The basement is separate physically apart from the staircase (ie the residential floors are built on top of a concrete base which forms the roof to the basement). There are clear signs of separate gas and water supplies to the other two blocks forming the development and it was not disputed between the parties that both Allcock House and Richard Fox House have separate electrical supplies. The exterior of Barcham House is in need of repair and redecoration; in particular there are signs of disrepair to concrete lintels.

10. Because Barcham House sits higher than the other two blocks, its basement area is not totally below ground. For example, where it adjoins Richard Fox House, the basement level is adjacent to a ground floor flat at Richard Fox House. Neither Alcock House nor Richard Fox House have basement areas. They are both four storeys high. The roof levels are the same for all three blocks. As the photograph at page 3 of the bundle shows, the only way that it is currently possible to access part of the flat roof of Richard Fox House is via the access on top of Barcham House. That houses access and water tanks. Access to part of the Richard Fox House roof is achieved by accessing the Barcham House roof which adjoins it and walking over to it, which we did. Access to the Alcock House roof running along Queens Drive is obtained from Richard Fox House. (Alcock House now has its own RTM company in place.) It would be relatively easy, we observed, to run a cat ladder from the Richard Fox House roof access to the part of the roof accessed from Barcham House, or even build a bridge. In other words, although the current lay out is convenient, it is not the only way to access that part of the roof of Richard Fox House which adjoins Barcham House, subject to some relatively minor adjustments.

The first point

11. The Applicant instructed McCarthy Partnership to provide a report on the first point taken by the Respondent. It is not a Part 35 compliant expert report. The report is dated 3rd July 2019, the Respondent took no issue on its admissibility, and it was completed by Paul McCarthy whose qualifications are BSc (Hons) MSc MRICS. The Respondent did not file and serve any evidence. Mr Weiner has neither legal nor surveying qualifications and assists the Respondent with planning

matters. So Mr McCarthy's report with our own observation plus such submissions as were made during the hearing, are the best evidence we have. The point is that the Respondent had plenty of time to file and serve evidence in response to Mr McCarthy's report, but chose not to, neither did it send a representative to give evidence.

12. Mr McCarthy states he was specifically instructed to *"inspect and report on whether the building Barcham House could be redeveloped independently from Richard Fox House and Alcock House"*. For the principal reason that there is a 225mm party wall separating Barcham House from Alcock House, he concluded that Barcham House could be separated vertically and *"demolished and redeveloped in isolation from the other property"*. He noted that Barcham House had its own utilities and his observations on the supplies to the other blocks coincide with our own.

13. Mr Weiner wrote a letter to the Tribunal dated 21st June which we take to be the Respondent's statement. In addition to the point he makes about the basement storage area, he maintains that the configuration of access to the roofs is such that *"There is no way for either Alcock House or Richard Fox House to access all areas of their respective roofs without undertaking significant structural modifications to the freehold building communal areas – something which is obviously not allowed under the terms of the leases"*. He cites no support for this proposition either in respect of the lease terms on which he relies, and his observations on the facts are contradicted by our own observations in any event. Further, this point did not apply to the Alcock House RTM. The fact that he maintains the Alcock House RTM succeeded by default because the Respondent did not serve a counter-notice is not a good point. Apparently, a counter-notice has been served in respect of an application by Richard Fox RTM, but we are unsure what the situation is in respect of that.

14. As to the Respondent's case made by Weiner that Barcham House fails the vertical separation test, we reject his assertion that there is no separation of utilities on the facts, that the access to the roof is a relevant consideration to the test to be applied, and that basement access is relevant to the application of the statutory test. We conclude that Barcham House is on the evidence before us, within the provisions of *s72* of the Act. Barcham House is a self-contained part of a building (with or without the basement, as *"appurtenant property"*). It is a self - contained building because there is a vertical division (the party wall) and the structure could be redeveloped independently of the adjacent Richard Fox House. If we are wrong about the services/utilities, then the proviso in *s72(4)* would apply (and the Respondent produced no evidence to the contrary).

15. The Applicant therefore succeeds on the first point. The premises including the basement as "*appurtenant*" fall within *s72* (though it is

unclear whether the Applicant wishes to manage the basement or not). This accords with the principles outlined in *Gala Unity Limited v Ariadne Road RTM Company Limited* [2012] EWCA Civ 1372. See also *Firstport Property Services Limited v Settlers Court RTM Company Limited and others* [2019] UKUT 0243 (LC). We note, moreover, that the landlord's legal representative made written submissions to the Tribunal to this effect in LON/00AM/LRM/2017/0005 (15th March 2017). In paragraph 12 of those submissions this was stated: *"Pursuant to section 72(3)(a) the Respondent* [Rovergrange Limited] *believes that each of Alcock House, Barcham House and Richard Fox House is a self-contained part of the Estate because each constitutes a vertical division of the building, the structure of the building is such that [each] could be redeveloped independently of the rest of the building, and the relevant services provided for occupiers of [each] are provided independently of the relevant services provided for occupiers for the rest of the Estate, or 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 Estate."* We refer to these proceedings below in relation to the second and third points, but they concerned (in part) the effect of *Triplerose Limited v 90 Broomfield Road RTM Company Limited* [2015] EWCA Civ 282, and the application (to put it in the vernacular) of the one building/one RTM company principle. In those proceedings Ms Eriksen and Mr O'Brien (with one other) wrote to the Tribunal by letter dated 9th March 2017 submitting that they believed the one building/one RTM principle in *Triplerose* would now apply to the "Estate" so that a separate RTM for Barcham House would be appropriate, and that they had been advised that *"we have a vertical plane of separation"*. Therefore, in coming to our conclusion we are agreeing with both the current Applicant and the Respondent in views expressed in writing to the Tribunal in March 2017.

The second point

16. *Paragraph 5, Schedule 6* is engaged in this case (via *s72(6)*). That provides: *"(1) This Chapter does not apply to premises falling within section 72(1) at any time if – (a) the right to manage the premises is at that time exercisable by a RTM company, or (b) that right has been so exercisable but has ceased to be so exercisable less than four years before that time." Paragraph 5(2)* is not relevant. *Paragraph 5(3)* provides a "get out" for the Applicant if the landlord succeeds on the second point in relation to *5(1)(b)* because it provides that *"The appropriate tribunal may on an application made by a RTM company, determine that sub-paragraph (1)(b)* is not to apply in any case if it considers that it would be unreasonable for it to apply in the circumstances of the case."

17. This takes us back prior to the March 2017 proceedings referred to above. Some of the facts are taken from Judge Dutton's decision dated 12th April 2017 and some from information we obtained from the

parties at the hearing we had.[1] In 2009 a RTM company, AB&R RTM Company Limited acquired the right to manage all three blocks. The landlord served no counter-notice. This was before the *Triplerose* decision so the result might well now be different. We are not required to decide that. AB&R was struck off the companies register pursuant to *s1000 CA 2006* on 6th May 2014 at which point the right to manage ceased to be exercisable pursuant to *s105* of the Act. On or about 29th November 2016 AB&R was restored to the register. Mr Ashton, a director of AB&R brought an application before the Tribunal (which we have not seen) asking for control of the management to be restored to AB&R as soon as possible. For various reasons (set out) Judge Dutton concluded (paragraph 21) *"that as a result of the restoration of the company to the register in November 2018 the right to take back the management of the Property has now arisen and that accordingly the RTM company should take back the management"*.

18. Since then, AB&R was dissolved in August 2018 (by resolution of its members, it is said).

19. So, the impact of *paragraph 5* is as follows. Because AB&R was dissolved in 2018, *paragraph 5(1)(a)* is not a bar to granting the application because no right to manage the premises is exercisable by any other RTM company. But *paragraph 5(1)(b)* is a problem for the Applicant because in the four years prior to the notice dated 27th March 2019 ie from 27th March 2015 – 27th March 2019 the effect of Judge Dutton's decision is that control was restored to AB&R (if it was ever removed) for at least the period 29th November 2016-August 2018. So, for part of the relevant four year period control was exercisable by another RTM.

20. Of course, it has not escaped us that the irony in this case is that the Respondent landlord now seeks to rely on that decision to its advantage whereas in 2017 it argued to the contrary (and obtained permission to appeal it as an arguable point) and further argued that AB&R was not a proper RTM anyway because of the *Triplerose* decision. We do not intend to consider whether Judge Dutton was right or whether the appeal would have been successful. Neither party came equipped to deal with those areas of law. So, on the second point we find for the Respondent. That is not the end of the application.

[1] The Respondent in those proceedings, Rovergrange Limited, applied for permission to appeal. Judge Dutton refused permission. The Deputy President of the UT granted permission on 25th July 2017 because interesting points arose on (i) the effect of restoration to the register of a struck off RTM on its right to manage and (ii) the effect of a right to manage more than one block, where the RTM was granted prior to the *Triplerose* decision. The appeal was struck out because the Appellant did not pay the required fee.

The third point

21. What we can do is take the Applicant's application for dispensation from the impact of *paragraph 5(1)(b)* and apply *paragraph 5(3)*. It would clearly be reasonable to allow this RTM company to manage Barcham House and therefore the Applicant succeeds on the third point:-

    (i) The property needs repair and maintenance. There is evidence of historic neglect to the exterior. The Applicant says that it wishes to proceed on its own terms to get on with this. That is understandable.

    (ii) Alcock House is now managed by a separate RTM, in line with the *Triplerose* approach. That makes a separate RTM for Barcham House equally sensible. There is a notice in respect of Richard Fox House.

    (iii) AB&R is dissolved. It clearly had a rocky history and does not appear to have been effective judging by the exterior of the blocks. It was dissolved, on the Applicant's evidence by its representatives, to enable this application to be made (post *Triplerose*). Some thought has gone into trying to work through a difficult area of law in the best interests of Barcham House.

    (iv) Rovergrange did not pursue its appeal against Judge Dutton's decision. If it had been successful then arguably *paragraph 5(1)(b)* would not have applied, though we hesitate to use this as more than a point to demonstrate that the background law and facts in this case are not straightforward, so, a more practical merits based approach on the facts adds to what is *"reasonable"*.

    (v) The landlord has changed position in various applications to suit its preferred outcome.

<u>Summary</u>

22. Overall, the Tribunal determines that the Applicant was on the relevant date entitled to acquire the right to manage the premises pursuant to section 84(5)(a) of the Act.

23. Therefore, in accordance with section 90(4), within three months after this determination becomes final the Applicant will acquire the right to manage these premises. According to section 84(7):

> "(7) A determination on an application under subsection (3) becomes final—
>
> (a) if not appealed against, at the end of the period for bringing an appeal, or
>
> (b) if appealed against, at the time when the appeal (or any further appeal) is disposed of."

Costs

24. Section 88(3) of the Act states:

> "(3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before a leasehold valuation tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises."

25. In the light of the Tribunal's decision, there is no question of awarding any costs of the proceedings to the Respondent because the application for the right to acquire has not been dismissed.

Judge Hargreaves
Stephen Mason BSc FRICS FCIArb
23rd September 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not

complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).