RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL &
SOUTHERN LEASEHOLD VALUATION TRIBUNAL

Case Number: CH1/40UE/LRM/2007/0001

Re: Block A, Cedar Falls, Bishops Lydeard, Taunton, TA4 3HR

In the matter of an application under Section 84 of the Commonhold and Leasehold Reform Act 2002 (No fault Right to Manage)

Between:

Cedar Falls Apartments RTM Company Limited	Applicant
And	
Cedar Falls Limited	Respondent

Date of application: 19 June 2007
Date of hearing: 22 October 2007
Members of the Tribunal: Mr. J G Orme (Lawyer Chairman)
Mr. R Batho MA BSc LLB FRICS (Valuer chairman)
Date of decision: 29 October 2007

Decision of the Leasehold Valuation Tribunal

For the reasons set out below, the Tribunal determines that the Applicant, Cedar Falls Apartments RTM Company Limited, was not on 16 April 2007 entitled to acquire the right to manage premises described in the claim notice as Block A, Flats 1-10 Cedar Falls, Garages 1-7 Cedar Falls and the Flat Area, Cedar Falls (as edged purple on the leases of the flats and garages).

Reasons

Background

1. In this application, the Applicant, Cedar Falls Apartments RTM Company Limited ("the RTM Company") applies for a determination that it was on the relevant date, entitled to acquire the right to manage a block of flats at Cedar Falls, Bishops Lydeard, Taunton.

2. The Respondent, Cedar Falls Limited ("the Freeholder") is the freehold owner of an estate now known as Cedar Falls but previously known as

Watts House. The estate is about 32 acres in area. Mr. Ray Smith is the principal director of the Freeholder.

3. Mr. Smith purchased Watts House at auction in 1972. The property was vested in the Freeholder, then known as Trym Construction Ltd. At that time it consisted of a country house with a gate lodge and cottage. In 1976 the Freeholder obtained planning permission to alter, extend and restore Watts House to provide a service hotel. The plans provided for the erection of five new buildings to provide 60 residential suites. On 18 February 1976 the Freeholder entered into an agreement with the local planning authority under section 52 of the Town and Country Planning Act 1971 in connection with that proposed development.

4. Watts House is now known as Cedar Falls and is operated as a health farm. The Freeholder has erected only one of the new buildings, Block A. It is located immediately to the rear of the main house and it contains 10 flats which have been sold on 999 year leases. The leases are in a standard form and they give the leaseholders certain rights over other parts of the estate.

5. The leaseholders have decided that they wish to take over the management of Block A and they have formed the RTM Company for that purpose.

6. The RTM Company served on the Freeholder a claim notice under Section 79 of the Commonhold and Leasehold Reform Act 2002 (" the Act"). The claim notice was dated 16 April 2007. That is the relevant date for the purposes of Chapter 1 of Part 2 of the Act. It described the premises over which the RTM Company wishes to acquire the right to manage as *"Block A, Flats 1-10 Cedar Falls, Garages 1-7 Cedar Falls, and the Flat area, Cedar Falls (as edged purple on the leases of the flats and garages)."* The claim notice stated that Block A is a self-contained part of the Health Farm building with appurtenant property.

7. The Freeholder served a counter-notice under Section 84 of the Act. The counter-notice was served within the time allowed by the Act but the RTM Company says that it was defective. A further counter-notice was served to remedy the defects but the RTM Company says that it was served outside the time allowed by the Act. The counter-notice alleged that the RTM Company was not entitled to acquire the right to manage the premises specified in the claim notice on grounds that the premises do not comply with Section 72(3)(b) and (c) of the Act.

8. On 19 June 2007, the RTM Company applied, pursuant to Section 84(3) of the Act, to the Leasehold Valuation Tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises.

9. By letter dated 31 August 2007, the solicitors acting for the Freeholder made a request to the Tribunal to dismiss the application under Regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 on the grounds that it is frivolous or vexatious or otherwise an abuse of the process of the Tribunal. The reasons were stated to be:

   1. *""The Premises" as described above in the Applicants Claim Notice includes "The Flat Area" Cedar Falls (as edged purple on the plans to the leases of the Flats and garages). ("The Flat Area")*
      a. *The "Flat Area" is not premises falling within the definition of Premises to which Chapter 1 applies as defined by Section 72(1)(a) of the Act being neither a self-contained building nor part of a building.*
      b. *There is no qualifying tenant of The Flat Area as defined by Section 75 of the Act as there is no long lease as defined by Section 76 of the "Flat Area".*

   2. *The Tribunal has no jurisdiction to make a determination in respect of land which is held in fee simple in the beneficial ownership of the Respondent Landlord and which is not held for a term of years devised by a lease to the members of the Applicant RTM."*

10. A hearing was held at the Holiday Inn, Deangate Avenue, Taunton on 22 October 2007. The RTM Company was represented by Mr. B G Whittall, a director of the RTM Company. The Freeholder was represented by Mr. Wightwick of counsel.

11. At the outset of the hearing, it was agreed that there were 3 main issues:
    a. The application to dismiss for abuse of process. In reality this raised questions over the RTM Company's right to serve a claim notice and accordingly over whether the Tribunal had jurisdiction to make any determination in respect of the matter;
    b. The validity of the counter-notice;
    c. The substantive issue raised by the counter-notice. This also raises the question of jurisdiction of the Tribunal.

    Evidence and submissions on the issue of jurisdiction, which crosses over between issues (a) and (c), were completed by the end of the first day of the hearing. This decision deals only with that issue but is determinative of the whole application.

The Inspection

12. The Tribunal inspected the site prior to the hearing in the presence of the parties and their representatives.

13. The Tribunal saw the main house (the original Watts House) with Block A built to the rear of it. The space between the main house and Block

A has been partially enclosed in the process of forming an indoor swimming pool. The sidewall of Block A is understood to have been built as a retaining wall to accommodate differing ground levels. The swimming pool was subsequently built on the higher ground, so that the retaining wall serves it and the same wall, at a higher level, supports the pool roof. In this way, Block A is connected to the main house. The Tribunal was shown that the flats within Block A have individual electricity and water meters and that there is a further electricity meter in the basement of Block A for the common parts.

14. The Tribunal was shown the extent of the area edged purple on the leases. This area includes garden ground, driveways and paths, a block of 7 garages with an additional parking area, an outdoor swimming pool including the filtration plant and sheds for the storage of machinery and equipment. We were told that the sheds are used by the estate staff and have a supply of electricity and water. The garages have been built on one of the areas shown on the lease plan as set aside for car parking. The sheds are on another. The third area shown as set aside for car parking has not been constructed.

15. The Tribunal was shown an electricity sub-station beside the main house and outside the purple area. This supplies electricity to the whole estate. Inside the main house there are electricity meters for the outdoor swimming pool and for external lighting.

Evidence

16. Prior to the hearing, the Tribunal received documentary evidence in the form of documents attached to the application, documents attached to 3 submissions by the RTM Company on the 3 issues and a bundle of documents from the Freeholder. At the hearing, the RTM Company submitted further documents in the form of a copy of one of the garage leases and electricity and water bills for Flat 1 and the common parts.

17. At the hearing oral evidence was given by Mr. Smith and by Mr. Mike Buswell, an architect, on behalf of the Freeholder and by Mr. Whittall on behalf of the RTM Company.

The Law

18. The issue of jurisdiction involves consideration of the question of whether or not the premises over which the RTM Company is seeking to acquire the right to manage are premises to which Chapter 1 of Part 2 of the Act applies. If not, then the RTM Company has no right to manage and the Tribunal has no jurisdiction to make a determination.

19. Section 72 of the Act 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.*

2) *A building is a self-contained building if it is structurally detached.*
3) *A part of a building is a self-contained part of a building if-*
   a. *it constitutes a vertical division of the building,*
   b. *the structure of the building is such that it could be redeveloped independently of the rest of the building, and*
   c. *subsection (4) applies in relation to it.*
4) *This subsection applies in relation to a part of a building if the relevant services provided for the occupiers of it-*
   a. *are provided independently of the relevant services provided for occupiers of the rest of the building, or*
   b. *could be so provided without involving the carrying out of works likely to result in a significant interruption in the provision of any relevant services for occupiers of the rest of the building.*
5) *Relevant services are services provided by means of pipes, cables or other fixed installations.*
6) *Schedule 6 (premises excepted from this Chapter) has effect.*

20. Section 112(1) of the Act defines "appurtenant property" in the following terms:

> *""appurtenant property", in relation to a building or a part of a building or a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the building or part or flat,"*

21. Mr. Wightwick referred the Tribunal to a line of cases which deal with the definition of appurtenances. In particular, he relied on the decision of the Court of Appeal in the case of **Cadogan and another v McGirk [1996] 4 All ER 698.** In that case the Court was considering the definition of "appurtenant property" contained in Section 1(7) of the Leasehold Reform, Housing and Urban Development Act 1993 which is in very similar terms, namely:

> *"In this section-"appurtenant property", in relation to a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the flat..."*

22. Lord Justice Millett, having reviewed the history of the use in statutes of the phrase "appurtenant property", went on to consider the meaning of

"appurtenances". Having approved of an earlier decision which confined the word "appurtenances" to the curtilage of a house, he said:

> *"The "appurtenance" must be an appurtenance of the flat in the sense that it must belong to or be usually enjoyed with the flat and must be let with the flat. The question is whether it must also be within the curtilage (if any) of the flat or whether it is sufficient if it is contained within the premises of which the flat forms part or is situate within the curtilage of those premises. I am of the opinion that the latter is sufficient."*

The Leases

23. The Tribunal had before it a copy of the lease of Flat 6, Block A. The Tribunal was told that the leases of all 10 flats in Block A were in similar form.

24. The second recital to the lease records that the landlord has laid out an area edged purple on the plan attached to the lease, referred to as the Flat Area. It records that the landlord has built Block A on the Flat Area and intends to construct additional blocks of flats on the Flat Area.

25. The lease is of flat 6 as shown edged red on the plans attached to the lease, together with easements, rights and privileges set out in the second schedule. The rights granted by the schedule include the right to use the lift in Block A, rights of way over the common parts of Block A and the paths in the Flat Area, rights of way with vehicles over the main driveway of the estate and the access way to the Flat Area, the right to use the car parks shown on the plan for the parking of a car in a space allocated by the landlord, the right to use the outdoor swimming pool, the garden ground forming part of the flat area and the amenity area. There is also a right to use the existing sewers, cables, pipes etc running through the estate.

26. There are exceptions and reservations mentioned in the third schedule. The lease is for a term of 999 years from 1 April 1982.

27. The lessee covenants to keep the flat in good and tenantable repair and to contribute towards the landlord's management costs.

28. The landlord covenants to insure Block A, to maintain the main structure, the lift and common parts of Block A, and to maintain the pipes, cables etc under the Flat Area. He also covenants *"on completion of the flat development"* to keep the main driveway, the access to the Flat Area, the paths within the Flat Area, the car parks, the garden ground in the Flat Area, the outdoor swimming pool and the amenity area in good condition.

29. The garage block is the subject of a separate set of leases. A copy of the lease of garage 7 was produced to the Tribunal. The Tribunal was told that the other garages were let on similar terms. The garage lease

was expressed to be supplemental to the flat lease. It is for the same term. There are provisions preventing the disposal of the garage lease to anyone other than a leaseholder of one of the flats.

The Respondent's case

30. Mr. Wightwick's primary case was that by including the "Flat Area" within the premises over which the RTM Company was seeking the right to manage, the RTM Company had taken the premises out of the scope of the legislation. It was seeking the right to manage property that was not appurtenant property, in particular, the garden ground, the outdoor swimming pool, the car parks and the paths, all of which are in the purple area. The flat owners do not have exclusive rights over these areas. They have only rights to use them in common with others. He submitted that the appurtenant property must be either property which is specifically mentioned in the definition of "appurtenant property" i.e. a garage, outhouse, garden or yard or it must fall within the definition of "appurtenances" in which case it must be within the curtilage of Block A. He submitted that the curtilage of Block A is the footprint of the building itself, with the possible addition of the small terrace areas included within the leases of the basement flats.

31. Mr. Wightwick's secondary case was that Block A does not come within the definition of a self-contained part of a building because it does not comply with the provisions of Section 72(3)(b) and (c) of the Act in that it could not be redeveloped independently of the rest of the building and the relevant services could not be provided without a significant interruption in the provision of relevant services to occupiers of the rest of the building. In particular, he relied on difficulties in separating out the electricity and water supplies to the outdoor swimming pool and the sewage system for the flats.

32. In the case of the sewage system, he said that the principal difficulties were that the RTM Company had no rights over any land which might be required for a separate system and the operation of such a system. The evidence that the Tribunal heard from Mr. Buswell was that the existing system required regular maintenance and that unless all of the properties used it, it would not work properly, so that it was unlikely that either of two separate systems would work on their own.

The Applicant's case

33. Mr. Whittall read out his written submissions on both the first and third issues.

34. In essence, he says that the Flat Area is other property enjoyed by the tenants of the flats under their leases. He relies on paragraph 125 of the explanatory notes to the Act which says that the premises can include "*other property enjoyed by the tenants under the lease.*" He further relies on Section 81(1) of the Act which says, "*A claim notice is*

not invalidated by any inaccuracy in any of the particulars required by virtue of Section 80."

35. In relation to Section 72(3)(b) and (c) of the Act, Mr. Whittall says that there is nothing to prevent the independent development of Block A; that, in any event, no structural work is required to make it independent of the health farm and that independent services could be provided without interruption to the health farm.

36. Mr. Whittall says that the RTM Company is in a position to take over management without any interruption of services. He points out that water and electricity are already independently metered for the individual flats and for Block A and that the leaseholders already have the legal right to use the existing sewage system, which they would continue to use. In relation to the outdoor swimming pool, he points out that the Freeholder's obligation to maintain the pool (and other parts of the estate) does not arise under the leases until completion of the flat development, which has not yet occurred.

Findings of Fact

37. Building or part of a building: The Tribunal agrees with the parties and finds as a fact that Block A is not a self-contained building within the meaning of Section 72(2) of the Act. It is not structurally detached from the main house, being connected to it by the indoor swimming pool.

38. Curtilage: Based on its own inspection of the estate and a consideration of the terms of the leases, the Tribunal finds as a fact that the curtilage of Block A is restricted to the area formed by the footprint of Block A to include the areas of garden or terrace specifically included in the demise of the basement flats. Although the leaseholders have rights of way over the paths and driveways and have rights to use the garden ground, the car parks (when constructed), the amenity area and the outdoor swimming pool, those rights are shared with others. They are not included in the curtilage of Block A. The garage block is a separate building which is the subject of separate leases and, again, does not form part of the curtilage of Block A. The leaseholders have no rights over the land on which the other blocks might be built, although that land lies within the Flat Area.

39. The Flat Area: It is self-evident that the Flat Area does not fall within *"a self-contained building or part of a building"* in Section 72(1)(a) of the Act. The question is whether it falls within the definition of "appurtenant property". We were not addressed as to whether the garages and the garden area belong to or are usually enjoyed with Block A or the flats. The garages are the subject of separate leases. The garden does not belong to the leaseholders although they do have the right to use it. We leave open the question as to whether or not the garages and garden are appurtenant property. However, in so far as the Flat Area is not garages or garden and, in so far as the Flat Area is outside the

curtilage of Block A, the Tribunal finds as a fact that it does not fall within the definition of "appurtenances" and therefore does not fall within "appurtenant property". It follows that it is not premises over which the right to manage exists.

40. Independent redevelopment: Mr. Buswell accepted that it would be physically possible to redevelop Block A provided that the end wall, which retains the indoor swimming pool, remains in place. However, his evidence was that the local planning authority would not permit any development which separated Block A from the health farm. At pages 308 to 331 of the bundle is a letter from Mr. Buswell setting out the planning history of Cedar Falls together with supporting documents including the section 52 agreement dated 18 February 1976. Mr. Buswell gave evidence that the local planning authority in 1975 was insisting on a restriction so that the development was seen as a service hotel and that the flats should not become separate dwellings in open countryside. For that reason, the linkage with the hotel was seen as very important. He said that this remains the view of the local planning authority.

41. Mr. Whittall says that there is nothing in the planning documents to prevent the flats from being used independently. He says that paragraph 4 of the preamble to the section 52 agreement is part of the preamble and not an operative part of the agreement. He says that the original vision of a service hotel has not become a reality and that in practice, there is now no significant linkage between Block A and Cedar Falls. There is nothing in the leases that binds the two. In any event, there is no intention to change the way in which Block A is used.

42. The Tribunal finds as a fact that although it would be difficult, it would be physically possible to redevelop Block A but that such development is unlikely to be permitted by the local planning authority if it involves breaking the linkage with the service hotel.

43. Services: Mr. Smith gave evidence that he installed a water supply and an electricity supply for the whole estate. Those supply both the main house and Block A as well as other parts of the estate. He accepts that water and electricity supplies for the flats are separately metered.

44. Mr. Smith also gave evidence that there is a private sewage system for the whole estate which services both the hotel and Block A. There is one pipe which runs from the hotel and Block A to 3 tanks by the entrance to the estate. The third tank empties sewage into the main sewer by means of an inverted siphon. In order to make this work, the Freeholder has to pump water into the tank to provide sufficient flow. If the sewage from Block A was to be diverted away, there would be insufficient flow to make the system work. There is an alarm system for the sewage pumping station which rings an alarm in the house occupied by Mr. Smith's son.

45. Mr. Buswell referred to clause 4 of the Section 52 agreement which regulates the sewage treatment plant. He said that he did not consider that it would be possible for Block A to have a separate sewage system because the leaseholders own no land or rights to enable such a system to be installed. Block A would have to continue to use the existing system.

46. Mr. Whittall said that the flats already enjoy separate supplies of electricity and water and he produced utility bills to show that they were separately billed and that the flat owners can choose their suppliers. As far as sewage is concerned, he says that there is no need for a separate system because the leaseholders have the right under their leases to use the existing system. He envisages that Block A would continue to use the existing system. He gave no evidence as to the possibility of installing a separate system.

47. The Tribunal accepts the evidence of Mr. Smith and Mr. Buswell on this aspect. The existing water and electricity supplies for Block A come from a shared supply to the estate and are separately metered. The Tribunal makes no finding as to whether or not those supplies could be provided independently as there was no evidence as to whether or not suppliers would have statutory rights to provide a supply across the estate.

48. In relation to the sewage system, the Tribunal finds as a fact that the RTM Company would not be able to provide an independent supply for the simple reason that the leaseholders have no legal rights to install such a system over the surrounding land. Even if they could, the Tribunal accepts the evidence of Mr. Smith that the sewage system would not work for either Block A or the health farm alone and that would constitute a significant interruption in the provision of sewage services to occupiers of the health farm.

Conclusions

49. By including the Flat Area in the claim notice, the RTM Company was including a claim to manage property which is not property appurtenant to Block A. The Flat Area is not premises to which Chapter 1 applies. The RTM Company is seeking the right to manage premises greater than that allowed by the Act.

50. The RTM Company relies on the provisions of Section 81(1) to save the claim notice. This submission was not the subject of full argument at the hearing and the Tribunal makes no finding on that aspect in view of our subsequent findings.

51. The terms of Sections 72(3)(b) and (c) have been set out above. It is important to appreciate that those provisions apply to the part of the building as it exists. It does not matter what the intentions of the RTM

Company may be in respect of the future use or management of the part of the building. It does not matter that the RTM Company and the leaseholders may have no intention to redevelop the premises or that they have the right to and are happy to continue to use the services as they exist. What matters is whether the premises fulfill the criteria set out in those sub-sections.

52. To be a self-contained part of the building, Section 72(3)(b) requires that the structure of the building could be redeveloped independently of the rest of the building. The Tribunal has found that it is unlikely that independent development would be permitted by planning controls. The Tribunal concludes that Block A could not be redeveloped independently of the rest of the building, namely the health farm.

53. In relation to Section 72(3)(c) the Tribunal has found that it would not be possible for the RTM Company to provide an independent sewage system at all due to the fact that it would not have the land on which to provide it nor the rights to do so. Whilst it may be possible to provide other services such as water, electricity and security services independently, the Tribunal takes the view that the inability to provide an independent sewage system is determinative of the issue.

54. The Tribunal concludes that Block A does not satisfy the requirements of Section 72(3)(b) and (c). As such, Block A is not a self-contained part of the building of which it forms part and is not, therefore, premises to which Chapter 1 applies. In those circumstances, the RTM Company did not have the power to serve a claim notice, whether or not it included the Flat Area, and the Tribunal has no power to make any determination under Section 84(3) of the Act.

55. For those reasons, the Tribunal determines that the RTM Company was not on the relevant date entitled to acquire the right to manage the premises described in the claim notice.

56. The Tribunal has made no mention of a considerable amount of evidence which was adduced relating to the provision of an alternative electricity supply to the outdoor swimming pool. Section 72(4) refers to services provided for occupiers of a building. As the outdoor swimming pool does not form part of the building, the provision of services to the swimming pool is not relevant to the issue.

Mr. J G Orme
Chairman

Dated 29 October 2007