SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00MS/LRM/2009/0002

Decision of the Tribunal under Section 84(3) of the Commonhold and Leasehold Reform Act 2002

Applicant:	Canute Castle RTM Company Limited
Respondent	Keystone Property Company Limited
Re:	**Canute Castle, 2 Royal Crescent Road, Southampton**
Date of Application	13th March 2008
Date of Inspection	none
Date of Hearing	18th June 2008
Representing the Applicant	Mr. D Innes (Flat 8)
Representing the Respondent	Mr. Boon (Eyre & Johnson)

Members of the Tribunal:

M J Greenleaves	Lawyer Chairman
S Griffin LLB	Lawyer

Date of Tribunal's Decision: 27th June 2008

Decision

1. The Applicant is not entitled to acquire the right to manage the Property under Part 2 of the Commonhold and Leasehold Reform Act 2002.

Reasons

Introduction.

2. This is an application made by Canute Castle RTM Company Limited (the Applicant) on 13th March 2008 under Section 84(3) of the Commonhold and Leasehold Reform Act 2002 (the Act) for a determination that it was, on the relevant date, entitled to acquire the right to manage the property known as Canute Castle, 2 Royal Crescent Road, Southampton (the Property).
3. The relevant date is the date on which the notice of claim to acquire the right to manage is given i.e. 3rd January 2008.
4. The claim notice was given by the Applicant to Keystone Property Limited (the Respondent)
5. By counter-notice dated 4th February 2008, the Respondent alleged that the Applicant was not entitled to acquire the right to manage by reason of Section 72(6) and Schedule 6 of the Act. It so alleged on the basis that the internal floor area of the non-residential parts of the Property exceed 25% of the internal floor area of the premises taken as a whole.

6. The issue to be determined by the Tribunal was whether the parts of the basement (those parts are hereafter referred to for convenience only as "empty basement" as opposed to the commercial area of the basement) not occupied as commercial premises were to be left out of the calculation in ascertaining whether non-residential parts of the Property exceeded 25% of the internal floor area of the Property taken as a whole

Evidence & Submissions

7. The Applicant's case, as submitted to the Tribunal prior to the hearing, was that
    a. The commercial premises are charged with 20.29% of the management charges and that the lessees believed these are charged in proportion to the floor area of the premises
    b. Only a third of the basement is leased to commercial use and the remainder (hereafter referred to by the Tribunal as "the empty basement") is not commercial in use and contains the water meters for the residential properties
8. At the hearing, Mr Innis said:
    a. A quarter of the basement is used for commercial purposes and is therefore non-residential and the other three-quarters being the empty basement, is communal parts and should be left out of account
    b. In the empty basement there are the 9 water meters installed in 2001, there is no lighting, none of the flats use it, there is no right in the lease to use it except possibly to read the water meters; the access door to the empty basement is locked and the key held by managing agents
    c. He referred to Paragraph 1(3) of Schedule 6 to the Act which provides that the empty basement is residential if it is intended for use in connection with the residential use.
    d. He noted that the Respondent's surveyor had allowed 5% for common area use of the empty basement. He considered that the common area use for access to the meters and the area taken by them would be about 50 sq metres.
    e. He had calculated that the commercial areas in the basement and ground floor totalled 1,407 sq ft, the flats 5,167 sq ft so that the area of the flats as a proportion of the total of those areas was 27%
    f. In the absence of any definition in the Act as to the meaning of "common parts" he did not accept that their definition in the lease should be taken instead.
9. Mr Boon, for the Respondent, submitted:
    a. The survey carried out on 16th April 2008 by Brian Lawrence, Chartered Surveyor to determine the percentage of non-residential occupation at the Property. He had measured and found those measurements to follow the drawings of the Property on the basis of which he had made his calculations. The result of the calculations was that the non-residential areas of the basement and ground floor formed 41% of the whole Property. Mr Boon noted that Mr Lawrence had allowed 5% of the empty basement for "common area".
    b. He referred to the lease definition of Common Parts which did not include the basement nor did the residential leases provide explicitly for its use by residents or for access to read the water meters. He conceded that such right of access might be implied. However, the allowance of 5% made by the surveyor would cover access to the meters.
    c. He also noted that there is no lighting in the empty basement so that it is dangerous to be in there.

Consideration

10. The Law. Schedule 6 to the Act provides:

"(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."

11. Status of the "empty basement".

    a. It is clear that no part of the empty basement is used for residential purposes in the sense of living accommodation. The definition of the flats contained in the First Schedule to the leases does not encompass any part of the empty basement and neither party submitted that it did. Rights of access to or use of it do not fall within the definition of "Common Parts" contained in the residential leases and it is noted that it contains no lighting and there is no free access to it. The Tribunal found that that definition was generally accepted in residential property and it was appropriate to construe Schedule 6 of the Act on that basis.

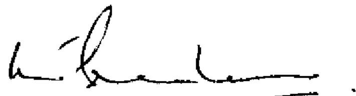
    b. It is difficult to say that the empty basement as a whole is intended for use in conjunction with a particular dwelling within the meaning of sub-paragraph (3) above. If it could be taken to be so used at all, it fails to come within that definition because it is plainly is not used by "a particular" dwelling. At best it is used by <u>all</u> the flats – not just one – to the extent of the siting and reading of meters. But the Tribunal did find that while no right of user at all is expressed in the residential leases, there can be taken to be actual use of the empty basement to the extent of the siting of the meters and access to read them within the meaning of sub-paragraph (3). The Applicant invites the Tribunal to say that because there is that limited use of the empty basement, the <u>whole</u> of the empty basement should be included in the calculation of the extent of the residential areas. The Tribunal could not accept that submission: there was no adequate reason to do so. It found that the empty basement is virtually all non-residential for the purposes of Schedule 6 to the Act. It further decided that the deduction of 5% as made by the Respondent's surveyor for "common areas" was wholly appropriate to provide for the actual usage.

12. The Applicant had made some calculations of the various areas to be taken into the calculation for the purposes of sub-paragraph (4). They did not have a professional survey and suggested the Tribunal might adjourn to enable them to do so. The Tribunal declined an adjournment as, first, it considered the Applicant had had ample opportunity to do so already and, secondly, the measurements made by the Applicant did not appear to show any variation from those made by

Mr Lawrence which would have any significant effect on his calculations. To sustain its claim to the right to manage, the Applicant would have to show that the non-residential parts of the Property did not exceed 25% of the internal floor area of the premises taken as a whole. Mr Lawrence calculated the percentage to be 41% - a very significant difference. The Tribunal accepted that professional evidence in preference to that put forward by the Applicant and that any margin of error that might possibly have occurred in the professional measurements would have no effect on its determination.

13. Mr Boon suggested, and the Tribunal accepted, that the management charges were apportioned on the basis of the total areas of the building. Occupied for commercial or residential purposes or neither, the entire building had nevertheless to be serviced and funded, but the calculation required by the Act has to be done on a different basis.

14. The Tribunal accepted the calculations made by Mr Lawrence that the non-residential areas formed 41% of the whole and accordingly that the Applicant was not entitled to the right to manage the Property.



Chairman
A member of the Leasehold Valuation Tribunal
appointed by the Lord Chancellor

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Case No: CHI/00MS/LRM/2009/0002

Section 84(3) of the Commonhold and Leasehold Reform Act 2002

Applicant:	Canute Castle RTM Company Limited
Respondent	Keystone Property Company Limited
Re:	**Canute Castle, 2 Royal Crescent Road, Southampton**
Date of Original Application	13th March 2008

Members of the Tribunal:

M J Greenleaves	Lawyer Chairman
S Griffin LLB	Lawyer

Date of Tribunal's Decision: 27th June 2008

Decision on the Applicant's application to the Tribunal for leave to appeal the above decision

1. The Tribunal refuses leave to appeal on the grounds set out below.
2. The grounds of the Applicant's application (using the Applicant's lettering) may be summarised as follows:
    a. That on the Applicant's case the non-residential areas of the building would be below 25% and the Tribunal refused an adjournment
    b. That the hearing was to be preliminary rather than a full hearing so an adjournment should have been granted to enable surveyors to give evidence.
    c. The Tribunal heard the matter without having oral evidence from the Respondent's surveyor about "significant discrepancies" or enabling the Applicant to ask questions of the Respondent's surveyor.
    d. The Tribunal used the 5% deduction without explanation other than it was provided by the Respondent's surveyor.
    e. The Tribunal was wrong in its application of paragraph 1(3) of Schedule 6 of the 1993 (sic) Act (the Applicant presumably intends to refer to the 2002 Act) in respect of relevant calculations.
    f. The Applicant appeared in person, its advisors having pulled out shortly beforehand: the Tribunal should also have granted an adjournment for this reason.
    g. The effect of the Tribunal's decision not only negates the right to manage but also affects a right to enfranchisement and has a consequential effect on value.

h. The importance of interpretation of Schedule 6 to the 2002 Act such that the Tribunal should not make its decision without attendance of surveyors.

Consideration of the above Grounds as fully stated in the letter of application dated 22nd July 2008.

3. Adjournment. Sub-paragraphs a, b and f of the present application.

    a. It is correct that the Applicant, in the course of the hearing, applied for an adjournment and that application was refused by the Tribunal. The Tribunal was not aware (until now) of the contention in sub-paragraph f. above.

    b. Provisional directions had been made in this case on 26th March 2008. Paragraph 1 stated the directions were issued for the Tribunal to determine the validity of the Applicant's notice to acquire the right to manage. Paragraph 2 stated the matter would be the subject of a Preliminary Hearing on 18th June 2008 and, in terms, that the parties should submit their representations, documents and submissions to the Tribunal and each other by 30th April 2008. No further directions were sought or issued.

    c. The Tribunal took the view therefore that each party should have prepared their case at least 6 weeks before the hearing so should by 18th June be fully ready for trial of the preliminary issue; and further that the use of the words "Preliminary Hearing" could only refer to hearing of the preliminary issue – not that is was to be preliminary to a further hearing of the preliminary issue.

    d. The Tribunal notes that the Applicant did not comply with Paragraph 2 of the directions at all when, on sub-paragraph f of the present application, they seem to have been represented until shortly before the hearing.

    e. The evidence and submissions that the Tribunal had had from both parties by the time of the application for adjournment, did not suggest that an adjournment would result in any further evidence on behalf of the Applicant which might be expected to change the Applicant's known case significantly especially as that case should have been fully prepared 6 weeks earlier. Further, in the interests of economical disposal of the case and avoiding further delay, inconvenience and further expense to the Respondent it was right, in the Tribunal's opinion, not to grant an adjournment.

4. Sub-paragraphs c, d and h of the application.

    The Tribunal is not required to take oral evidence. It was satisfied that on the evidence it had before it and the submissions made that it could fairly determine the issues. It did not feel there were any significant discrepancies in the Respondent's evidence having taken into account the Applicant's evidence also. The Tribunal preferred the evidence for the Respondent based, as it was, largely on inspection and calculations from a surveyor, even if certain formalities had not been complied with.

5. Sub-paragraph e of the application.

    a. The Tribunal does not consider its interpretation of the law applicable was wrong. It did not hear any submissions from the Applicant such as are now advanced. It is not open to the Tribunal now to alter its decision in any event.

b. If the Applicant had prepared its case and complied with directions, such matters as are advanced here ought to have been before the Tribunal at the hearing.

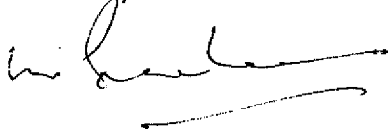
6. <u>Sub-paragraph g of the application.</u>

    a. The Tribunal does not consider this is itself a ground for appeal as it does not bear on whether the Tribunal's decision is right or wrong.

    b. It is perhaps more a possible consequence of its failure to prepare its case and present it in the way it now advances it.

7. For the above reasons the Tribunal refuses leave to appeal.

Dated 25th July 2008



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