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RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL OF THE NORTHERN RENT ASSESSMENT PANEL

DECISIONS AND REASONS IN THE MATTER OF APPLICATIONS UNDER SECTION 84(3) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002, SECTION 168(4)

Properties

(1) The Cove, Captains Wharf, Martin Dock, South Shields, Tyne and Wear NE33 1JQ
(2) River View, Low Street, Sunderland, Tyne and Wear SR1 2AT
(3) (a) 3-47, (b) 52-70, (c) 71-119 Carr Mills, Meanwood Road, Leeds, West Yorkshire, LS7 2DG

Applicants:

(1) The Cove RTM Company Limited
(2) River View RTM Limited
(3) The Carr Mills RTM Company Limited

Respondents:

(1) (a) Residential Services Management Ltd
(b) UK Ground Rent Estates Ltd
(c) Bowesfield Investments Limited
(2) and (3) (a) UK Ground Rent Estates Ltd
(b) Adderstone Group Limited

Appearances

Mr Simon Charles (of counsel) for the Applicants
Mr. Paul Hutton solicitor for UK Ground Rent Estates Ltd and Adderstone Group Limited.

THE MEMBERS OF THE TRIBUNAL

Mr. M. Davey (Chairman)
Mr. A. Robertson

DECISIONS

1. The Tribunal determines, in the matter of the first and third set of applications that the respective Right to Manage companies were on the relevant date entitled to acquire the right to manage the respective premises under Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002.

2. The Tribunal determines that in the case of the second application River View RTM Limited was not on the relevant date entitled to acquire the right to manage the respective premises by reason of the premises

not being premises within Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 as defined in section 72 of that Act.

REASONS FOR DECISIONS

1. These are the reasons for decision of the Leasehold Valuation Tribunal ("LVT") in the matter of applications made on 14 April 2009 to the LVT under section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") by the Applicant right to manage ("RTM") companies formed to manage each of the blocks of flats referred to below. The applications are for a determination from the LVT that the RTM Companies formed in respect of each block were on the relevant dates entitled to acquire the right to manage the respective premises. The history of each application is dealt with in turn below.

The Cove

2. The Cove was developed in 2003. It is a block of flats in South Shields, Tyne and Wear, containing 28 apartments numbered 20 to 47. Each apartment was sold on a 125 year lease. The parties to each lease at the time were (1) the landlord, Bowesfield Investments Limited (Mandale House, 2 Sedgefield Way, Portrack Interchange Business Park, Stockton on Tees TS18 2SG (2) the Management Company, Residential Service Management Company Limited (Barcroft, 32 New Road, Yeadon, Leeds LS19 7SE) and (3) the Tenant.

3. The copy lease supplied (that for Plot 15 (Apartment 33)) shows the freehold title to the development as being registered under title Number TY388315. An official copy of that register of title, reveals that on 6 November 2009 the registered proprietor of the freehold was Bowesfield Investments Limited. It also shows that on 10 April 2007 save for some non-residential parts – including a number of bin stores under the apartments – the rest of the development had been removed from the title and registered under a separate title number TY415683. An office copy of that title shows that on 16 September 2008 the registered proprietor of that title was UK Ground Rents Estates Ltd., who had taken a transfer of the title on 12 September 2008.

4. On 1 October 2008 The Cove Right to Manage Company ("the RTM Company") of Cotton House, Radford Boulevard, Nottingham, Nottinghamshire NG7 3BR was incorporated under section 73 of the Commonhold and Leasehold Reform Act 2002 with a view to exercising the right to manage provided for by Chapter 1 of Part 2 of that Act. On 13 January 2009, the RTM Company, through its solicitors, Punch Robson, 35 Albert Road Middlesborough, TS1 1U, served a notice of claim to acquire the right, under section 79 of the Act, on Bowesfield Investments Limited, Residential Service Management Company Limited and UK Ground Rent Estates Limited. On 17 February 2009, Borneos, Solicitors Chancery

House, 199 Silbury Boulevard, Milton Keynes, Buckinghamshire, MK9 1JL, served a counter notice under section 84 of the 2002 Act, on behalf of their client Residential Service Management Company Limited.

5. The counter notice alleged that the RTM Company was not entitled to acquire the right to manage for the following reasons: viz; that by reason of:

   (a) Section 75(2) of Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002, Enda Huston (leaseholder of flats 21, 37,42,45 and 46) was no longer a qualifying tenant following her (*sic*) personal bankruptcy and the immanent (*sic*) sale of her flats;
   (b) Section 142 of the Commonhold and Leasehold Reform Act 2002, Patrick Rocca (leaseholder of flats 24, 29, 30, 35, 36, 38, 41, 44 and 47) was now deceased and no evidence had been provided to confirm that the personal representatives of the deceased wished to participate;
   (c) Section 79(5) of Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002, membership of the company did not include the number of qualifying tenants of flats contained in the premises [required] being less than one half of the total number of flats so contained.

River View

6. River View was developed in 2005. It is a 6 storey apartment block in Sunderland containing 86 apartments numbered 1-12 and 14-87. Each flat was sold on a 125 year lease. The parties to each lease were (1) the landlord, Teesdale Developments Limited (Mandale House, 2 Sedgefield Way, Portrack Interchange Business Park, Stockton on Tees TS18 2SG (2) the Management Company, Mandale Residential Management Company Limited (of the same address) and (3) the Tenant.

7. On 1 October 2008 River View RTM Limited ("the RTM Company") was incorporated under section 73 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") with a view to exercising the right to manage provided for by Chapter 1 of Part 2 of that Act. On 25 January 2009, the RTM Company, through its solicitors, Punch Robson, 35 Albert Road Middlesborough TS1 1U, served a notice of claim to acquire the right, under section 79 of the Act, on UK Ground Rent Estates Limited and Adderstone Group Limited (The Exchange Manor Court, Jesmond, Newcastle Upon Tyne NE2 2JA. On 17 March 2009, Mr Paul Hutton Director of UK Ground Rent Estates Limited and Adderstone Group Limited served counter notices under section 84 of the 2002 Act on behalf of those

companies.The counter notices stated that by reason of "74.1(a) and 78(1) of Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002" the RTM Company was not entitled to acquire the right to manage the premises specified in the claim notice.

Carr Mills

8. Carr Mills in Leeds was developed in 2005. There are three blocks. Each flat was sold on a 125 year lease. The parties to each lease at the time were (1) the landlord, Bowesfield Investments Limited (Mandale House, 2 Sedgefield Way, Portrack Interchange Business Park, Stockton on Tees TS18 2SG (2) the Management Company, Mandale Residential Management Company Limited (of the same address) and (3) the Tenant.

9. On 1 August 2008 The Carr Mills RTM Company Limited ("the RTM Company") was incorporated under section 73 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") with a view to exercising the right to manage, Carr Mills, provided for by Chapter 1 of Part 2 of that Act. On 25 January 2009, the RTM Company, through its solicitors, Punch Robson, 35 Albert Road Middlesborough TS1 1U, served notices of claim to acquire the right, under section 79 of the Act, on UK Ground Rent Estates Limited and Adderstone Group Limited (The Exchange Manor Court, Jesmond, Newcastle Upon Tyne NE2 2JA. On 20 February 2009, Mr Paul Hutton Director of UK Ground Rent Estates Limited and Adderstone Group Limited served counter notices under section 84 of the 2002 Act, on behalf of those companies.

10. The counter notices for flats 3-47 and flats 71 -119 stated that by reason of "72, 74.1(a) 75 and 78(1) of Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002" the RTM Company was not entitled to acquire the right to manage the premises specified in the claim notice. The counter notices for flats 52-70 stated that by reason of "74.1(a) and 78(1) of Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002" the RTM Company was not entitled to acquire the right to manage the premises specified in the claim notice.

Directions

11. Directions were issued to the parties by the LVT in respect of The Cove and Carr Mills on 8 July 2009 and in respect of River View on 9 September 2009. Further Directions, in relation to the applications relating to all three developments, which included a timetable for the matters to be heard on 17 November 2009, were issued by the

LVT on 8 October 2009. By a letter, dated 17 November 2009, and faxed to the Tribunal on that date, Borneos stated, in relation to The Cove that it had come to their attention that, on 28 July 2008, the Second Respondent, UK Ground Estates Limited, had acquired the freehold interest in the premises and that their client, Residential Service Management Company Limited, had assigned all its interest in the premises to the Adderstone Group Ltd. It followed, they stated, that their client should never have been a party to the proceedings, and they asked for confirmation that they were therefore no longer involved in the claim.

The Hearing

12. At the hearing Mr Paul Hutton appeared as solicitor and Director of UK Ground Rent Estates Limited and Adderstone Group Limited. The applicants were represented by Mr Simon Charles of counsel who was instructed by Punch Robson. Mr David Jarvis, Director of D & B Property Management Limited and a Director of all three RTM Companies also attended. Both Applicants and Respondents had made written submissions before the hearing and on which they elaborated at the hearing. Mr Charles also presented the Tribunal with a skeleton argument. He suggested that, in view of the differences between the parties and the many issues raised in the written submissions and other correspondence, the most that could reasonably be expected of the day's hearing was a clarification of the issues that remained in dispute and directions by the Tribunal as to how the determination of the applications might proceed.

13. Mr Hutton and the Tribunal agreed. However, Mr Charles also submitted that in the case of the Cove only Residential Service Management Company Limited, which was no longer involved in the management of the property, had served a counter notice and therefore all other named respondents should be excluded from contesting the application. Mr Hutton said that he would find copies of the counter notices that he was sure had been served by UK Ground Rents Estates Limited.

14. Mr Charles further submitted more generally (and without prejudice to the above submission with regard to The Cove) that the respondents in all cases should not be permitted to rely on matters not raised in the relevant counter notices. He drew the Tribunal's attention to section 84(2) of the 2002 Act which provides that

" A counter notice is a notice containing a statement either –

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

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

and containing such other particulars (if any) as may be required to be contained in counter notices, and complying with such requirements (if any) about the form of counter notices, as may be prescribed by regulations prescribed by the appropriate national authority."

15. Mr Charles submitted that this required the Respondents to inform the Applicants of all the grounds on which it denied the respective claims. He said that in the case of each application the Respondents had raised in their witness evidence numerous issues in respect of each application that had not been referred to in their counter notices and he invited the Tribunal to rule that these issues could not now be relied upon by the Respondents.

16. The Tribunal adjourned for 2 hours to consider that submission and to enable the parties to consider what issues remained in dispute. Mr Charles relied on decisions of two other LVTs in different regions. The first decision was *Dawlin RTM Ltd v Oakhill Park Estate (Hampstead) Ltd and Others* (LON/00AG/LEE2005/00012). However, it is far from clear how that decision supports the proposition advanced by Mr Charles.

17. In that case the Respondent's counter notice simply stated that the RTM Company had failed to establish that it had complied with section 78(1). At the hearing the Respondents argued that (1) a single RTM Company could not be established to manage more than one building (2) the claim notices had not specified appurtenant property thereby failing to comply with the requirement in section 80(2), to specify the premises. The LVT actually dealt with each of these matters and found in favour of the Applicants. It is therefore difficult to infer that the LVT was not prepared to hear argument on those matters despite the fact that they were not raised in the counter notice.

18. In so far as the counter notice in that case stated that the claim notice had failed to comply with section 78(1) the LVT held that the Respondents had not (in the counter notice) indicated precisely how the Applicant Company had failed to establish that it had complied with section 78(1) (which requires the RTM Company to invite qualifying tenants to become members of the RTM Company before the right to mange is claimed). However, the LVT failed to provide any support from the statute for such a requirement to particularise its ground *in the counter notice itself*. The LVT says (in paragraph 29 of its reasons) that "This Tribunal considers that the respondents have failed to discharge the provisions of paragraph 9 of the Claim Notice in that they have not indicated the respects in which the Notices are considered to be inaccurate and precisely how the

Applicant company had failed to establish that it had complied with S78(1) of the Act." However, it is difficult to see how paragraph 9 relates to the section 78(1) point. Paragraph 9 of the Claim Notice stated that *"This notice is not invalidated by any inaccuracy in any of the particulars required by Section 80(2) to (7) of the 2002 Act or regulation 4 of the Right to Manage (Prescribed Particulars and Forms) (England) (Regulations) 2003. If you are of the opinion that any of the particulars contained in the claim notice are inaccurate you may notify the company of the particulars in question, indicating the respects in which you think that they are inaccurate."*

19. It can be seen that this request invites the Respondent to point out to the RTM company (not necessarily in the counter notice) any inaccuracies in the particulars required to be set out in the claim notice. It does not, for example, require the Respondent to particularise in the counter notice precisely how the RTM Company is alleged to have failed to comply with *section 78*. Such particulars would of course be required by the Tribunal in any LVT case under section 84(3). The required contents of a counter notice are set out in section 84(2) and the regulations referred to above. The sole issue therefore is whether section 84(2) or the regulations provide that (1) a Respondent cannot rely on grounds not set out in the counter notice and if not (2) whether the counter notice must particularise precisely how the RTM company has failed to comply with the specified provision relied on in the counter notice.

20. For the reasons set out above this Tribunal does not find that the *Dawlin* decision provides compelling support for either proposition. The LVT decision in *Re Sunhill House* addresses the problem more directly, although for the reasons set out above, it is perhaps claiming too much when it says, citing the *Dawlin* decision, that "It is now settled law that a Respondent in a claim such as this must fully plead its case and, in default thereof, will not be entitled to raise any other issues at a later stage in the proceedings." However, apart from the debateable point as to whether a single LVT decision can amount to "settled law," the later LVT considered that the decision was correct because in its view it is an express requirement of section 84(2)(b) of the Act, which does not contain a saving provision in this regard, that it is incumbent on the Respondent to inform the Applicant in the counter notice of **all** of the grounds on which the claim was denied. (See paragraph 16 of the decision).

21. Mr Charles also relied on the decision of the Court of Appeal in *Burman v Mount Cook Ltd* [2002] Ch 256. However, that decision was not on all fours with the present cases. It concerned a notice served under section 42 of the Leasehold Reform, Housing and Urban Development Act 1993 claiming the right to a new lease under that Act. The Act requires a landlord who receives such a notice to serve a counter notice either denying or admitting the tenant's right to a new lease and if denied stating which if any of the

tenant's proposals as to terms were accepted and which were not. The landlord's counter notice in that case did not contain the required statements and the notice was therefore invalid. This enabled the tenant to obtain an order as to the terms on which she could acquire a new lease.

22. The present case is quite different from *Burman*. It is about whether at an LVT hearing on an application under section 84(3), for a determination that the RTM company was on the relevant date entitled to acquire the right to manage the premises, a Respondent can rely on grounds other than, or additional to, those raised in the counter notice.

23. The decision of this Tribunal is that it can. Once a claim notice has been given under section 79 the recipient has one month from the relevant date to serve a counter notice. If it either does not serve a notice under section 84(2)(b), denying the right, or serves a notice under section 84(2)(a), admitting the right, the claim will succeed. A notice under section 84(2(b) must contain a statement "alleging that by reason of a specific provision of this Chapter, the RTM company was on that date not so entitled" [that is to say to acquire the right to manage the premises specified in the claim notice]. Section 84(3) then provides that "Where the RTM Company has been given one or more counter-notices containing a statement such as is mentioned in subsection 2(b), the company may apply to a leasehold valuation tribunal for a determination that it was not on the relevant date entitled to acquire the right to mange the premises."

24. With respect to the LVT in the *Re Sunhill House* case it does not follow from the requirements of section 84(2)(b) that in any subsequent proceedings under a section 84(3) application the respondent cannot raise matters not raised in the counter notice. Indeed such matters may be raised by the LVT itself as an expert tribunal. The counter notice is not a pleading in proceedings, nor an early stage of proceedings, that at that stage have not even been commenced or might not commence. The salient requirement of section 84(2)(b) is that the notice must allege that by reason of a provision or provisions of that Chapter the RTM Company was not entitled to acquire the right to manage. It does not say that if the Company applies to the LVT the dispute in the Tribunal will be confined to matters raised in the counter notice. For these reasons the Tribunal finds that a respondent may raise such other matters or particularise grounds referred to in the counter notice before the Tribunal.

25. Following the adjournment referred to above the Tribunal told the parties their decision on this issue and that reasons would follow as part of the substantive decision document. The Tribunal ruled that no new issues could be raised after that date but the parties were at

liberty to submit new evidence if necessary, before the adjourned hearing date, to be confined to issues still agreed on 17 November as remaining in dispute.

26. At this point Mr Hutton said that he and the Applicants had been able to agree that some matters that had been in contention were no longer disputed. Objection was no longer raised as to the claim in relation to 52-70 Carr Mill and Mr Charles asked the Tribunal for an order to that effect. It was also agreed that Residential Service Management Company Limited should be removed as a Respondent at the Cove. The Tribunal agreed to inspect The Cove and River View and did so on 18 January 2010 together with Mr Charles and Mr Jarvis. It was agreed by the parties that an inspection of Carr Mill was not necessary. Mr Hutton was invited to the inspections at The Cove and River View but did not attend. The Tribunal reconvened on 25 January 2010. At the beginning of the hearing the parties stated that they had settled a number of disputed issues.

The Cove

27. Mr Charles submitted that the only counter notice served was that served by Residential Services Management Limited, who had since declined to take part in the proceedings, and that UK Ground Rents Estates Ltd and Adderstones were therefore precluded from disputing the Applicant's right to manage claim.

28. The Tribunal agrees with that submission. It has no evidence of any counter notice from the second or third defendants. However, even if it were wrong on that point, the Tribunal finds in favour of the Applicants for the following reasons.

29. Mr Hutton referred to the requirement of section 76(6)(a) that the claim notice must be given to each person who on the relevant date (i.e. the date on which notice is given: in this case 13 January 2009) is (a) landlord under a lease of the whole or any part of the premises, (b) party to such a lease otherwise than as landlord and tenant. He then referred to a contract of 25 July 2008 whereby Residential Services Management Limited's interest as a party to the lease had been transferred to the new Management Company, Adderstones, which thereby became a party to the lease other than as landlord or tenant. Mr Hutton submitted that because that company had been served with a claim notice, as required by section 79(6), the right to manage was not engaged.

30. Mr Jarvis in his statement of case dated 30 October 2009 stated that the Company had not been aware at the relevant date of the purported transfer from Residential Services Management Limited to Adderstones but that in any event the new management

company had not been prejudiced because Mr Hutton, who was a Director of both UK Ground Rents Estates Ltd (which had been served) and Adderstones was fully aware of the claim and indeed had made representations to the Tribunal.

31. The Tribunal finds that the site is held under two separate titles and that both freeholders (Bowesfield Investments Ltd and UK Ground Rents Estates Limited) were given notice of the claim at the relevant time. The claimants were not aware of the change of management company but in any event it is clear that UK Ground Rents Estates Limited and Adderstones are so closely associated through Mr Hutton that the notice should be deemed to have been given to Adderstones.

32. Mr Hutton initially sought to argue that the separate ownership of the parts comprised in title TY388315 prevented the premises in respect of which the claim is made from being qualifying premises but at the adjourned hearing he withdrew that assertion.

33. Mr Hutton made a number of assertions as to whether section 78(1) had been fully satisfied. That provision requires the RTM Company to give each qualifying tenant of a flat contained in the premises notice that the RTM Company intends to acquire the right to manage the premises and inviting them to become members of the company. At the adjourned hearing the debate was confined to the position at the relevant time with regard to Mr Bari and Mr Amin, the tenants of Apartment 26 (who currently reside in Saudi Arabia) and Mr Rocca (since deceased) tenant of apartments 24, 29, 30,35,36,38, 41, 44 and 47. After an adjournment Mr Hutton accepted that Mr Rocca had been served and was a member of the company before he died. That left Apartment 26 as the only one of 28 apartments where there was doubt as to whether notice had been "given" to the tenants. Mr Hutton said that the tenants had not been given notice where they lived and Mr Bari, to whom Mr Hutton had spoken, objected to not having had the opportunity to be involved. (It appears that notice sent to the tenants at a business address in Dublin, which premises Mr Hutton understood from his inquiries to have been vacant at the time). Mr Charles referred to a statement dated 16 November 2009 from Mr John Wilkin, a solicitor and partner at Punch Robson, who stated that he would have assumed that the recipients at the address to which the notice was sent would have forwarded the letter to the tenants.

34. Mr Charles also relied on the decision of the Lands Tribunal in *Sinclair Gardens Investments (Kensington) Limited v Oak Investments RTM Company Limited* LRX/52/2004). In that case the Applicant had failed to comply with the service requirements in sections 78(1), 79(2) and 80(3) of the of the 2002 Act in respect of one of three tenants. The Lands Tribunal held that the test was whether the interest of the tenant in question has been protected

and stated in its decision that "In determining the effect of failure to comply with one or other of these requirements, the principal question for the Tribunal will be whether the qualifying tenant has in practice had such awareness of the proceedings as the statute intended him to have...It [the LVT] also concluded that the landlord had not been prejudiced in any way by the failure to serve a notice inviting participation. " This approach was also adopted in the *Re Sunhill* decision referred to above.

35. In *Sinclair* the LVT was satisfied that the tenant who had not been served was fully aware of the claim and indeed had subsequently applied to be a member of the RTM company. The Lands Tribunal held that this approach could not be faulted. However, Mr Charles took another approach on the prejudice point. He said that for an RTM Company, in respect of premises with more than two qualifying tenants, to be able to give notice of claim under section 79 it will suffice if at least half are members of the Company. Thus in the present case because that requirement was satisfied, neither the tenants of Apartment 26 nor the landlord would have been prejudiced by failure to give those tenants notice under section 78 Mr Hutton said that is not the point. He says that section 78 is mandatory and that the tenants had lost the opportunity to be involved.

36. The Tribunal disagrees with the Respondent. The decision of the Lands Tribunal in *Sinclair* (above) clearly approves of a purposive construction of section 78 in the light of all the circumstances. The President said that "The provisions are thus designed to ensure that every qualifying tenant has the opportunity to participate in the RTM Company." In *Sinclair* the tenant who was not served under section 78 nevertheless was aware of the notice and the right to participate. Furthermore, he applied to join the RTM company at the earliest opportunity (which was after service of the claim notice by the RTM company). In the present case the Tribunal has no evidence that Mr Bari has been prejudiced by failure to receive a section 78 notice at the time those notices were sent. He can still apply to join the RTM Company. Indeed Mr Wilkin has written to the tenants of Apartment 26 (who apparently live in Saudi Arabia) to inform them of the proceedings. The Tribunal is not satisfied that the tenants of Apartment 26 or the landlord have been prejudiced by any failure to send the 78 notice to the correct address. The Applicants clearly did their best to send the notices to an address that they reasonably believed to be the most likely address at which the notice would be received by the recipient tenants. They have since sent notices to the tenants at the addresses supplied by Mr Hutton and it is open to the recipients to apply to be members of the RTM Company.

River View

37. Mr Hutton raised the question of whether the premises in respect of which the right to manage is claimed are premises to which the Act applies.

38. Section 72(1)(a) of the 2002 Act provides that the right to manage regime applies to premises if they consist of 'a self-contained building or part of a building, with or without appurtenant property.' Section 72(2) provides that 'A building is a self-contained building if it is structurally detached.'

39. Mr Hutton says that the building at River View is not a self contained building because it is not structurally detached (from any other structure). The configuration of the development is unusual and is accurately described in Mr Hutton's statement of 16 October 2009 as follows. "The structure of the building at Low Street Sunderland comprises a "lower deck" essentially on basement level with the ground/first floor comprising a structural "upper deck" suspended over the basement car park on which the apartment block and five houses developed at the site are constructed. The 5 houses (not included in the RTM process) themselves are constructed to the first/second floor level with allocated parking spaces on the level beneath." Mr Hutton said that he had referred the development to a structural engineer (Patrick Parsons Engineers) who in a letter dated 16 November 2009 (and which was put in evidence) advised that the building forms a clear contiguous structural unit with the parking spaces, ground floor deck, houses and apartment block linked and each part inescapable of independent development. Parking spaces allocated to the apartment block are located vertically under the houses and similarly access ways, storage facilities, refuse collection facilities and parking serving the houses are located vertically beneath the apartment block, which is not structurally detached from the remainder of the development at Low Street.

40. Mr Hutton also submitted that the apartment block did not alternatively, if not structurally detached, constitute a self contained part of a building. Section 72(3) provides that "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."

41. Section 72(4) provides that –

"This subsection applies in relation to part of a building if the relevant services provided for 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."

"Relevant services" are defined in section 72(5) as "services provided by means of pipes, cables or other fixed installations."

42. Mr Hutton says that the apartment block does not constitute a vertical division of the building, nor is the structure of the building such that the apartment block could be redeveloped independently of the rest of the building and the apartment block does not receive independently relevant services and the works necessary to provide such services would result in a significant interruption to the provision of any relevant services for occupiers of the rest of the development. He says that a vertical division of the apartment block would extend into the sole means of vehicular access and egress to and from the houses at the development and render these properties incapable of independent occupation. It would also remove access from shared facilities and sever the shared services supply. The nature of the structure at Low Street, being a contiguous unit supported on the lower and upper decks forming the car park space would render the apartment block incapable of independent re-development.

43. Mr Charles says that the Applicant disagrees. He submitted first that the flats are in themselves a self contained building because they are structurally detached from the town houses. He says that if one looks at them at ground level they are clearly two separate buildings. It does not matter that they happen to be constructed on a slab which is understandable if as is likely the whole site was developed by the same developer. If he were wrong on that point he submitted that the apartment block is a self contained part of a building because a sky to earth vertical division could be made between the apartment block and the houses and this would be unaffected by the garage which is classified as "appurtenant property" by section 112 which provides that, for the purposes of section 72, 'appurtenant property', in relation to a building or part of a building or a flat, means any garage, outhouse, yard or appurtenances belonging to, or usually enjoyed with, the building or part or flat. Finally, Mr Charles said that alternatively the metal structure at the rear of the car park is a vertical division within the meaning of section 72(3)(a).

44. Having inspected the property the Tribunal agrees with Mr Hutton that the apartment block is not a structurally detached building. This is because a significant part of the apartment block is constructed on a concrete slab which also supports the town houses that are not part of the current application. The slab is an integral part of the

overall building comprising the Apartment block fronting Low Street and the five town houses to the rear of the apartment block with frontage to High Street East. Whilst from the third floor level (from the Low Street perspective), the apartments and town houses may appear to be separate buildings, the construction is such that the town houses are built up from the slab, the integrity of which is dependant upon the structure of the apartment block. Substantial pillars from the garages at the Low Street ground floor level, which go up through the first floor garage level, support the slab.

45 The next issue is whether the apartment block is a self contained part of a building. The Tribunal does not accept Mr Charles's submission with regard to the garage being appurtenant property. Although Mr. Charles correctly states that the Act draws a distinction between a building and any appurtenant property, both of which can together constitute 'premises', it does not follow that because the basement car park at River Low might be described as a 'garage' it must therefore be appurtenant property as defined. This is flawed logic. It might equally be described as a car park. As a matter of construction it is first necessary to decide what 'the building' is. A building can clearly contain non-residential parts without ceasing to be a building. It is equally clear that a non-residential part can be a car park/garage. Indeed this is assumed in other parts of the relevant Chapter of the Act. See for example paragraph 1 of Schedule 6 dealing with the circumstances in which non-residential parts will take premises outside the Act.

46. The Tribunal finds that the basement car park/garage at River Low is not appurtenant property within the meaning of section 112. Appurtenant property is property that does not form an integral part of a building but which is separate although belonging to or enjoyed with the building, for example a separate garage or other outbuilding. The car park/garage at River View is an integral part of the building itself and as such a common part.

47. For a part of a building to be a self contained part of that building it must constitute a vertical division of the building and have a structure which would enable it to be redeveloped independently of the rest of the building. (Section 72(3)(a) and (b) of the 2002 Act). Given that the concrete slab at River View extends from the front to the rear of the site, that the apartment block envelops the front half of the slab (at third floor level) and the town houses are built up from the rear of the slab, the Tribunal cannot agree that a sky to earth vertical division between the apartments and the town houses could be made, as suggested by Mr Charles. (For the unqualified nature of the vertical division requirement see also the decision of the Lands Tribunal in *Re Holdings & Management (Solitaire) Limited* LRX/138/2006).

48. Having so decided, the Tribunal did not further consider the issues of the independent redevelopment of each part or the building or the independence of services to those parts. The Tribunal determines that the apartment block is not a self contained part of the building within section 74 of the 2002 Act.

49. Without prejudice to the question of whether the apartment block is qualifying premises, Mr Hutton claimed that section 78 notices of invitation to participate were given to qualifying leaseholders **after** the section 79 claim Notice thereby invalidating the latter. However, by his evidence Mr Jarvis has satisfied the Tribunal that this was not the case and that the section 78 notices were served on 3 November 2008 being not less than 14 days before the claim notice was served on 25 January 2009.

50. Mr Hutton's second line of attack was that there was no, or defective, service of section 78 notices in the case of a number of qualifying tenants, although he withdrew that claim at the hearing in relation to some of those apartments. As a general point he said that Mr Jarvis had been relying on a list of registered proprietors that was at least 12 months out of date.

51. The disputed notices that remained related to apartments 5, 9, 12, 16 and 59. Mr Hutton says that receivers had been appointed on 22 December 2008 in respect of Apartment 5 and that there is no record of notice having been given to the tenant or the receivers. In any event the 'tenant', Mr Shaw, claims that he was defrauded and had no proprietary interest in this Apartment and was therefore not the qualifying tenant. Mr Jarvis says that notice was served on Mr Shaw before the receivership. With regard to Apartment 9 Mr Hutton said that the registered proprietor, Mr Manjeet Singh Kler, had not been invited to participate. (The notice had been sent to a company whose address had changed in 2008). Mr Jarvis explained that the notice had been sent inadvertently to Mr Kler's company address but not bearing his name. Mr Charles also pointed out that the change of company address post-dated the Land Registry entry relied on by the Applicant.

52. With regard to Apartment 12 Mr Hutton says that the tenant Ms Liew never received the notice because it was sent to the wrong address. Mr Jarvis said that even if that were the case it does not follow that Ms Liew never received the notice. In any event Mr Wilkin says that Ms Liew had since written indicating her desire to support the RTM.

53. Mr Hutton says that in the case of Apartment 16 the tenant Ms Ross had become bankrupt at the relevant time and therefore notice should have been given to the trustee in bankruptcy but a

notice was not given to either Ms Ross or the trustee. Mr Jarvis said that he did not believe that the trustee could have been prejudiced by lack of opportunity to participate given the transient nature of his involvement. Mr Hutton said that on the contrary a Trustee would be likely to oppose a change of management company. Mr Charles says that it is unlikely that creditors would want to persuade a trustee to object and that it is in any event only one flat in 86, although Mr Hutton riposted that many properties are in the hands of insolvency practitioners.

54. Finally, according to Mr Hutton, Apartment 59 had been sold, sometime around March 2008, by a mortgagee who had taken possession from the tenant, Mr W.T.J. Brown whereas the section 78 notice had been sent to a 'Ms Brown' at an incorrect address. Mr Hutton said that no section 78 notice had been given to the mortgagees or the new tenant, Mr A.J. Herd. However, Mr Wilkin said that Mr Herd had contacted him and he had since emailed that he wished to support the RTM.

55. In relation to the issue of giving tenants notice generally under section 78, the Applicant says that they relied on the information that they had at the time as to the ownership of the flats and the address of the registered proprietors. This is a difficult task because the apartments are all buy to let investments and are sub-let on assured shorthold tenancies. This makes it difficult to keep track of owners. Rather than sending section 78 notices to the apartments the Applicant says it has done its best to send them to what they believed to be the address most likely to ensure that they were received by the owners. In all cases where other addresses had since come to light they had informed tenants of the current proceedings. In the case of the five, out of 86, disputed notices, two of those tenants have since stated that they supported the RTM.

56. The Applicant also relies on the 'lack of prejudice' principle that it seeks to distil from *Sinclair*. In particular it says that section 79(5) provides that at the time of the Claim notice under section 79(1) the membership of the RTM company must include a number of qualifying tenants of flats contained in the premises which is not less than one half of the total number of flats involved. Mr Charles submitted that if that quota has been satisfied it follows that if others have not been properly invited to join the company it should not necessarily be fatal to the claim because the RTM claim will go ahead in any event. Thus neither the tenants nor the landlord would be prejudiced. Furthermore, it does not follow that tenants who have been invited at a later stage thereby lose the opportunity to be involved. It follows, Mr Charles says, that to force the Applicant to go through the process again would be futile given the inevitable outcome.

57. Mr Hutton says that the Applicant should have done better because he (Mr Hutton) had been able to identify what he perceived to be a catalogue of errors as to the giving of the section 78 notices. He also submitted that the requirement for notice to be given to all qualifying tenants is unqualified and therefore mandatory. Mr Hutton said that it makes a mockery of section 78 if a RTM Company could obtain its 50% membership needed to claim the RTM and then ignore the rest. He said that section 78 is not 'box ticking'. It is about the opportunity to be involved and indeed *Sinclair* is about the ability of a tenant to influence the RTM claim process. Mr Charles says that is all well and good but if the RTM Company has 50%+ membership how can other tenants exert 'influence'? Furthermore, the tenants of 2 of the five remaining apartments in dispute at River View have indicated their support for the RTM.

58. In the present case it is clear that in all disputed instances the Applicant has sent notice to an address that it believed to be the correct address. The RTM Company has not cynically obtained 50% membership and then failed to give notice to other tenants. It has attempted to give notice in all cases, albeit without having done the detective work assiduously carried out by Mr Hutton to discover whether the actual addresses of the tenants were used. In all cases the RTM companies had sufficient membership to be able to serve the claim notices and it is difficult to conclude that failure to identify the actual addresses of every single qualifying tenant should invalidate the claim in such circumstances. The Tribunal therefore holds that had it found that the premises were qualifying premises it would not have found that any failure to give a section 78 notice to the tenants in the disputed instances would have invalidated the claim.

Carr Mills

59. At the hearing Mr Hutton said that the claim in respect of Apartment blocks 3-47 and 52-70 was no longer opposed. By contrast, the claim in respect of Apartment block 71-119 was denied.

60. Mr Hutton drew our attention to section 72(1)(b) of the Act, which applies the RTM Chapter to premises that contain two or more flats held by qualifying tenants, and to section 75(2), which states that " a person is the qualifying tenant of a flat if he is the tenant of the flat under a long lease." Finally he referred to section 112 , which defines "flat" as a "separate set of premises...which is constructed or adapted for use for the purposes of a dwelling." A "dwelling" is defined as a "building or part of a building occupied or intended to be occupied as a separate dwelling.

61. The disputed block at Carr Mills was constructed in accordance with planning permission as a student hall of residence. The long leaseholders, through a company vehicle, sub-let the flats to Leeds University on a sub-lease that has since been surrendered. Each flat is self contained and typically contains 6 self contained bedrooms, with shower area, each occupied by a student. The occupiers have shared use of kitchen and dining facilities within the flat. Since the surrender of the sub-lease, the occupiers now hold directly from the head leaseholders.

62. Mr Hutton submitted that, to qualify for RTM, a flat had to be separated horizontally from some other part of the building and he relied in support on the definitions of a flat in The Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419) and section 60 of the Landlord and Tenant Act 1987. He said that the "flats" at Carr Mills did not qualify as "a separate set of premises" because they were essentially a collection of 200 or so student rooms with shared kitchen/dining facilities off common corridors. The Tribunal disagrees. They have seen the plan submitted by Mr Jarvis in the bundle which shows that each flat is, as described in the previous paragraph, self-contained with no shared facilities. Furthermore, the flats, which are on six floors, are divided horizontally from another part of the building. Mr Hutton's description of the living areas as 'units' with shared facilities outside the confines of the flat in which they are contained is simply wrong. Each flat is clearly self contained.

63. Mr Hutton further submitted that because at the relevant date the premises were let to the University of Leeds for use as a hall of residence that was not use of the units as a dwelling. He referred to section 92B(3)(b) of the Finance Act 2001 which provides that "a hall of residence for students in further or higher education is not use of a building as a dwelling." Mr Hutton concluded that this means the units were not dwellings because they were in fact halls of residence. Quite apart from the fact, as Mr Charles rightly pointed out, that section 92 of the Finance Act is about stamp duty, the Tribunal does not accept Mr Hutton's argument. It is based on the fallacy that the use of the "building" as a hall of residence, and not as a dwelling meant that the separate apartments could not be flats. In fact the question raised by section 112 is whether the individual flats, not the building, can be said to be constructed or adapted for use for the purposes of a dwelling

64. Finally, Mr Hutton submitted that a qualifying tenant had to be a tenant under a long lease, not being a business tenancy within Part II of the Landlord and Tenant Act 1954. He said that use by the University under its sub-lease as student accommodation is business user and referred to *Groveside Properties Ltd v Westminster Medical School* [1983] 2 EGLR 68. He further submitted that the business use by the University flowed to their

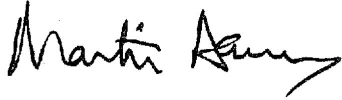
immediate landlord (the long leaseholders) who would in turn occupy for purposes protected by the 1954 Act. He said that the investor long lessees at Car Mills never intended to occupy and had bought their flats with a view to sub-letting to the University of Leeds. Thus their user was for business purposes. Mr Jarvis refuted Mr Hutton's submission which he says confuses the business sub-tenancy, held by the University at the time, with the head leases held by the qualifying tenants of the freeholder which are not business tenancies. This contention was developed at the hearing by Mr Charles.

65. The Tribunal agrees with the Applicant that the head leases under which the long leaseholders hold are not business tenancies just as a lease to a long leaseholder investor who has bought to sub-let on an assured shorthold tenancy would not be a business tenancy. The *Groveside* case is distinguishable because the decision turned on whether the letting of a flat with four study bedrooms to a medical school which sublet the flat to students was a business tenancy. For Part II of the 1954 Act to apply the flat would need to have been occupied by the school for the purposes of a business carried on by it. The Court of Appeal held that Part II did apply to the tenancy because the business user was the running of a major medical school and the school 'occupied' the flat by virtue of the degree of control it exercised over it and the furniture and equipment which it provided. However, it will be noted that the case was about the medical school's tenancy. In Carr Mills it is about the leases from the freeholder to the Applicant lessees and not the sub-lease granted to the University.

66. In so far as Mr Hutton was arguing that the superior lease was in turn itself a lease under which the flats were occupied by the lessees for the purposes of a business that business could only be the business of sub-letting (to the University) for commercial purposes. But the lessees retained no control under that lease and it is well established that if the lessee sub-lets the whole of the property under a lease without retaining control that lessee cannot himself be in occupation for the purposes of a business, even if it were established that the user were for business purposes. See *Graysim Property Holdings v P & O Holdings Ltd* [1996} AC 329. The tribunal accordingly holds that it is impossible for the freeholder of Carr Mills to maintain that the leases granted to the long lessees were business tenancies within Part II of the Landlord and Tenant Act 1954.

67. Mr Hutton also argued that the Applicant failed to give a section 78 notice to each person who at the time when the notice was given was qualifying tenant of a flat contained in the premises and that at the relevant date the RTM Company had insufficient members to exercise the right to manage. This was refuted by Mr Jarvis who said that notices were served and the response was

overwhelmingly in favour of the RTM. He relied on the statement of Mr Wilkin, of Punch Robson, to that effect. The Tribunal agrees that section 78 has been satisfied. It follows that the Applicant was at the relevant date entitled to exercise the right to manage at 71-119 Carr Mills and the Tribunal so determines.



Martin Davey
Chairman