1436

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00CN/LRM/2013/0003**
Property	:	**Flats 1 – 12 The Willows, Walsall Road, Four Oaks, Sutton Coldfield B74 4QJ**
Applicant	:	**The Willows (Four Oaks) RTM Company Limited**
Representative	:	**Barclay Property Services**
Respondent	:	**Sinclair Gardens Investments (Kensington) Limited**
Representative	:	**W. H. Matthews & Co, Solicitors**
Type of Application	:	**Application relating to no fault Right to Manage under Chapter 1 of the Commonhold and Leasehold Reform Act 2002 ("the Act")**
Tribunal Members	:	**Judge C Goodall, LLB MBA** **Mr D Satchwell, FRICS**
Date and venue of Hearing	:	**Paper determination**
Date of Decision	:	29 JAN 2014

DECISION

Background

1. The Willows (Four Oaks) RTM Company Limited ("the Applicant") has served a notice upon Sinclair Gardens Investments (Kensington) Limited ("the Respondent") claiming to acquire the right to manage Flats 1 – 12 The Willows, Walsall Road, Four Oaks, Sutton Coldfield B74 4QJ ("the Property").

2. The notice is dated 27 August 2013 and the Respondent accepts that it was served on 29 August 2013. On 23 September 2013, the Respondent served a counter-notice claiming that the Applicant is not entitled to acquire the right to manage the Property.

3. On 14 October 2013, the Applicant applied to the Leasehold Valuation Tribunal for a determination that on the relevant date the Applicant was entitled to acquire the right to manage.

4. On 7 January 2014, the Tribunal inspected the Property and then considered the application. Both parties had consented to a determination without a hearing. The Respondent had made detailed submissions in an undated statement received by the Tribunal on 11 December 2013. The Applicant responded to those submissions in a statement dated 17 December 2013. This decision is the outcome of the application by the Applicant, the Tribunal having considered the documentation listed.

The Inspection

5. None of the parties or their representatives attended the inspection, although one leaseholder made himself available to show the common parts to the Tribunal if required. In the event, the Tribunal was able to access the internal common parts without requiring attendance by the leaseholder. The building at the Willows is an "H" shaped block built of brick and which contains 12 flats, four on each of three floors. The flats are accessed via one common door accessing a communal area off which are the front doors for each flat. The whole building is set slightly to the right hand side (viewed from the road) of an oblong site with road access from Walsall Road. Car access is via a driveway, laid to tarmac, to the left hand side of the site, which leads to a row of 12 garages at the rear of the site. According to the sample lease supplied to the Tribunal, each flat is let with one garage, so the Tribunal assumes that the 12 garages belong to the 12 flat owners. The residential building has lawn and some trees and shrubbery around it. The driveway at the site also provides access to some garages on an adjoining site.

6. Apart from what is likely to be a right of way along the driveway for access to garages on adjoining property, the whole site is a separate, discrete, self-contained development of 12 flats with garages and garden area.

7. This is not the first occasion that the Applicant has sought the right to manage the Property. There was a previous case ("the Previous Case") before the Leasehold Valuation Tribunal relating to the same Property with the same parties under case reference was BIR/00CN/LRM/2012/0006, and the decision date in that case was 7th May 2013. The Applicant failed to acquire the right to manage in that case on one ground that is not in issue in this case. The Respondent however challenged the Applicant's right to manage in the Previous Case on the same grounds as are recorded in para 8(a) and 8(b) below, but the Tribunal in the Previous Case found against the Respondent on those grounds. The ground in para 8(c) is a new ground in this case. The Previous Case was determined by a Tribunal consisting of the same Chair as this Tribunal with a different surveyor member.

The issues

8. In its counter-notice, the Respondent's disputed the Applicant's right to manage on three bases:

    a. That by reason of section 73(2)(b) of the Act the Applicant was not entitled to acquire the right to manage.

    b. That by reason of section 80(2) of the Act the Applicant was not entitled to acquire the right to manage.

    c. That by reason of section 80(9) of the Act the Applicant was not entitled to acquire the right to manage.

9. The schedule to the counter-notice states:

    "1. Section 80 requires the Claim Notice to contain a statement of the grounds on which it is claimed they are premises to which the Chapter applies. The grounds must therefore either specify inter alia that the premises are a self-contained building **or** part of a building **with** appurtenant property **or** a self-contained building **without** appurtenant property.

    2. The Articles of a RTM company must accord with the premises in the Claim Notice and if any appurtenant property is deemed included in the premises specified in the Claim Notice, its articles must refer to that appurtenant property in its definition of the premises.

    3. A Claim Notice has not been served which complies with Schedule 2 of the Transfer of Tribunal Functions Order 2013."

The Right to Manage scheme

10. By way of background, the Act sets up what is known as a "no fault" right for residents of flats to acquire the right to manage the property in which their flats are situated. The residents must apply for this right via a special

type of company known as an RTM company. It is a company limited by guarantee and the company constitution is prescribed by regulations. The flat owners who form the RTM company must then serve notice on all the other flat owners in the building which they are seeking to manage, which is known as a notice inviting participation. If more than half of the tenants in the block join the RTM company, it may then apply to the landlord for the right to manage by submitting a claim notice (section 79(1) of the Act). The claim notice should be on a specific form which must contain specific information required by section 80 of the Act and by the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 ("the Regulations").

The arguments on the issues raised and the Tribunal's determination of them

Issue 7a – the Applicant's Articles of Association – section 73(2)(b)

11. Section 73 (2) provides:
"(2) A company is a RTM company in relation to premises if –
(a) ..., and
(b) Its [articles of association state] that its object, or one of its objects, is the acquisition and exercise of the right to manage the premises."

12. Article 4 of the Applicant's Articles of Association state:

"The objects for which the company is established are to acquire and exercise in accordance with the 2002 Act the right to manage the Premises."

13. Premises are defined in the Articles as:

"Flats 1 to 12 (inclusive) The Willows, Walsall Road, Sutton Coldfield, West Midlands B74 4QJ."

14. In their written submission, the Respondent's solicitors have not explained why they say the Applicant has failed to comply with section 73(2)(b), or indeed mention the point at all. In para 2 of the Schedule to the counter-notice, the Respondent expands on the point a little, and the Tribunal understands the argument to be that that the objects clause only allows the Applicant to manage the building and not appurtenant property as that appurtenant property is not separately identified within the definition of premises in the Articles. The Applicant is therefore not an RTM company set up with the object of managing "the premises" as is required by section 73(2)(b).

15. The Tribunal does not accept this argument. As was determined in the Previous Case, the right to manage specified premises extends the right to manage those premises to any property appurtenant to those premises without this appurtenant property having to be separately spelled out in

the Articles. The articles of the applicant, in the opinion of the Tribunal, comply with section 73(2)(b).

16. The Tribunal finds that there is no reason, under section 73(2)(b) of the Act, that prevents the Applicant from being entitled to acquire the right to manage.

Issue 7b – the definition of premises – section 80(2)

17. Section 80(2) of the Act requires the claim notice to:

"specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies".

18. Section 72(1) and (2) says:

"(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) [not relevant to this issue]
(c) [not relevant to this issue]

(2) A building is a self contained building if it is structurally detached."

19. Sub-sections (3) and (4) of section 72 assist with identifying when a part of a building may qualify under section 72(1)(a), but they do not apply here as the Applicant is applying for the right to manage the whole of the Property, which is a self contained building falling within the terms of section 72(2).

20. The claim notice states:

"1. ...The Company...claims to acquire the right to manage **Flats 1-12 The Willows, Walsall Road, Four Oaks, Sutton Coldfireld, B74 4QJ** ("the premises")

2. The Company claims that the premises are ones to which Chapter 1 of the 2002 Act applies on the grounds that
- **The Premises are self contained**
- ..."

21. In the Previous Case, the Respondent sought to argue failure to comply with section 80(2). In relation to that issue, that Tribunal found for the Applicant. Paragraphs 13 to 22 of that decision are set out here:

"13 The Respondent puts its argument as follows:

"4.1 The Notice of Claim must have the contents set out in Section 80. It must set out why the RTM can be acquired over the premises.

It must supply reasons as to why the premises are "premises" falling within Section 72 of the Act. Materially it must explain whether the "premises" claimed include appurtenant property and whether they are a building or part of a building (section 72(1)(a)). Note 2 of the prescribed form refers to these provisions as being the ones that have to be satisfied in the prescribed notice which is set out in the RTM Regulations.

4.2 Section 80(2) requires the Claim Notice not only to specify the premises **but also** to contain a statement of the grounds on which it is claimed they are premises to which the Chapter applies. The mandatory grounds in Section 72(1) are that **premises** consist of a self-contained building or part of a Building with or without appurtenant property.

4.3 The grounds must therefore either specify that the premises are a self-contained building or part of a building **with** appurtenant property or a self-contained building or part of a building **without** appurtenant property; the grounds specified in the Claim Notice do not state whether the premises have any appurtenant property. **Indeed the grounds do not even mention Appurtenant property.**

4.4 – 4.6 [contains a discussion of the Ariadne case, on which see below]

4.7 To **solely** refer to "the premises being self-contained" does not specify whether the premises are either a building or part of a building. It is important that those receiving the Claim Notice are informed as to whether the building is part of a building since a part of a building only qualifies if the conditions in Section 72(3) are satisfied.

4.8 If there is appurtenant property it will be included in the right to manage. It is therefore important that those receiving the Claim Notice are informed as to whether the premises have Appurtenant property.

4.9 The Claim Notice therefore does not comply with Section 80(2). This is an entire omission, and not an inaccuracy. In the absence of compliance with Section 80(2), the Claim Notice does not evidence that the Company has discharged its burden of proof that the premises comply with Section 72.

14 In the view of the Tribunal, the Respondent's argument claims too much for section 80(2). That subsection requires two elements. The first is to specify the premises. In Schedule 2 of the Regulations, the prescribed form states that the "name of premises to which this notice relates" should be given. The Tribunal considers that in giving

the full address of the premises in para 1 of its claim notice the Applicant has specified with sufficient clarity which premises the application relates to, and so it has complied with the first element of section 80(2).

15 The second element of section 80(2) is that the Applicant must state the grounds on which it is claimed these premises are premises to which the RTM provisions of the Act apply. The Tribunal agrees that this requires a statement of how section 72(1) applies. There is no issue in this case about compliance with section 72(1)(b) and (c). It is section 72(1)(a) that is at issue.

16 The Tribunal considers that this second element of section 80(2) requires the Applicant to show that the premises fall within the overall scope of section 72(1)(a) rather than outside it. It does not require the Applicant to explain which of the possible options contained in section 72(1)(a) are engaged. All the Applicant has to do is show that the premises are either a self-contained building, or part of a building which qualifies according to the tests in section 72(3) and (4), not which one of these options is the correct one in the particular case. Either of these qualify, whether they have appurtenant property or not. Note 2 to the Prescribed Form in the Regulations says "The relevant provisions are contained in section 72 of the 2002 Act (premises to which Chapter 1 applies). The company is advised to consider, in particular, Schedule 6 to the 2002 Act (premises excepted from Chapter 1)." This note supports the understanding of this Tribunal that the focus is on establishing that the premises fall within section 72 and not outside it.

17 The Applicant's statement is that "the Premises are self contained". It is picking up the wording which is the first of the options within section 72(1)(a). It seems clear to the Tribunal this means that the premises are a self-contained building (as the address of the premises clearly refers to a building).

18 The Tribunal also cannot ignore, but is not reliant upon, the fact that the premises patently are a self-contained building upon inspection, and that the Respondent is the owner of the premises and therefore no stranger to them.

19 The Respondent also challenges the absence of any reference in the claim notice to whether the premises include appurtenant property or not.

20 The Applicant, in its response to the Respondent's first statement, has referred to a part of paragraph 14 from the Upper Tribunal judgement (the President, George Bartlett QC presiding) in the case of Gala Unity Limited v Ariadne Road RTM Company Ltd (LRX/17/2010). The whole of that paragraph reads:

"14. Section 72(1)(a) was drafted with such an economy of wording as to make its interpretation not entirely clear. The problem lies with the words after the comma, "with or without appurtenant property". Do these words mean that if the self-contained building has appurtenant property "the premises" for the purposes of the Act consist of the building plus such appurtenant property as the building may have? Or does it mean that if the building has appurtenant property "the premises" can either consist of the building plus the appurtenant property or the building alone, leaving it to the claim notice to specify under section 80(2) which of these, for the purposes of the claim, it is? I think it must be the first of these, so that the effect of a valid notice is to extend the right to manage to any property appurtenant to the building or part of a building. It would be unsatisfactory if a claim notice had to specify whether or not it was made in respect of appurtenant property. The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 do not require this, not does the form in Schedule 2 of the Regulations provide for any more than a statement of the name of the premises to which the notice relates."

21 The Property clearly does have appurtenant property. It is set in gardens, which the tenants of the flats have the right to use (see Second Schedule para (v) of the sample lease). It has the garages at the rear. The effect of the notice of claim, adopting the first interpretation of the section 72(1)(a) referred to in the above quotation, is that the right to manage applies to the building and this appurtenant property which goes with it. The Respondent cannot have had any doubt as to which building and appurtenant property the Applicant is seeking the right to manage.

22 The Tribunal is satisfied that the contents of the claim notice satisfy section 80(2) for the reasons set out in paragraphs 14 to 21 above, and the Respondent's first challenge to the claim notice fails."

22. In this instant case, the Respondent repeats the argument that the claim notice must set out whether there is appurtenant property. It is said that the second limb of section 80(2), whereby the Applicant must set out the grounds upon which the right to manage arises, requires information about whether or not the building has appurtenant property. The reason for this, it is argued, is that **if** there is appurtenant property, it will be included in the claim. The recipient of the notice therefore needs to know the component parts of the property. This is a statutory obligation, and failure to provide this information is an omission of required information.

23. Putting it another way, the Respondent argues that it is a requirement of the Act that the claim notice informs the Landlord of the grounds why

chapter 1 of the Act applies to the premises, which in turn requires the claim notice to explain why the right to manage is exercisable over each component part of the premises. The recipient needs to know the position as to appurtenant property, and it is therefore said that in section 2 of the claim form, an applicant should say something along the lines of "the premises are ones to which Chapter 1 applies because they are a self-contained building with its own appurtenant property but [if it be the case] excluding its shared appurtenant property...". So the argument is that the **grounds** for acquiring the right to manage must include information about appurtenant property.

24. The Tribunal rejects this argument for four reasons:

    a. Firstly, it appears to the Tribunal to be virtually the same argument as that which has already been rejected in the Previous Case.

    b. Secondly, the Tribunal considers that the Respondent is reading too much into the second limb of section 80(2), which only requires that the grounds on which the premises are said to be premises to which the Act applies be given. Whether the premises are indeed such premises depends on whether they fall within the definition of premises given in section 72(1). By stating in the claim notice that the premises are self contained, the Applicant has claimed that section 72(1)(a) of the Act applies, and has, by doing so, provided the ground on which it claims the right to manage. It has therefore satisfied the statutory requirement.

    c. Thirdly, the Gala Unity case supports this reading of section 80(2), as appears in paragraph 14 of that case. There, the President makes no distinction between compliance with the first and second limbs of section 80(2).

    d. Fourthly, as drawn to the attention of the Tribunal by the Applicant, further judicial support for this decision is given in the case of Pineview Limited v 83 Crampton Street RTM Company Limited (LRX/29/2012). In paragraph 61 of that decision, Mr Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber) says:

        "... The purpose of the [claim] notice is to identify the premises, but that is sufficiently achieved by identifying each self contained building to which the claim relates, as was done in Gala Unity. Both the giver and the receivers of the notice know the additional property, if any, which is appurtenant to that building because they are all either parties to the leases of the building which confer rights over the appurtenant property or a tribunal appointed manager of the building. The identification of the building over which RTM is claimed is therefore a sufficient specification of the premises to satisfy the requirement of section 80(2)."

25. The Tribunal therefore determines that that there is no reason, under section 80(2) of the Act, that prevents the Applicant from being entitled to acquire the right to manage.

Issue 7c – Form of the Claim Notice – section 80(9)

26. Section 80(9) of the Act provides:

> "[The Claim Notice]... must comply with the requirements (if any) about the form of claim notices as may be prescribed by regulations."

27. Regulations have been made which set out the form of the Notice. The current regulations are the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010. Schedule 2 of the regulations (as applying before 1 July 2013) sets out the form, which includes a requirement to include notes to the form, including note 1, in the following terms:

> "1. A claim notice (a notice in the form set out in Schedule 2 to the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 of a claim to exercise the right to manage specified premises) must be given to each person who, on the date on which the notice is given, is—
> (a) landlord under a lease of the whole or any part of the premises to which the notice relates,
> (b) party to such a lease otherwise than as landlord or tenant, or
> (c) a manager appointed under Part 2 of the Landlord and Tenant Act 1987 to act in relation to the premises, or any premises containing or contained in the premises.
> But notice need not be given to such a person if he cannot be found, or if his identity cannot be ascertained. If that means that there is no one to whom the notice must be given, the company may apply to a leasehold valuation tribunal for an order that the company is to acquire the right to manage the premises. In that case, the procedures specified in section 85 of the 2002 Act (landlords etc not traceable) will apply."

28. Under para 43 of Schedule 2 of the Transfer of Tribunal Functions Order 2013, an amendment to the content of Note 1 was made. The amendment is that the words "leasehold valuation" (in line 14 above) were deleted. The date this change came into force was 1 July 2013.

29. The Respondent makes a passing reference only to this point in its written submission. The Tribunal's copy of the Claim Notice from the Respondents bundle contains a copy of the claim form in the amended form required by the Transfer of Tribunal Functions Order (i.e without the words "leasehold valuation" appearing in Note 1). The Tribunal therefore determines that there is no reason, under section 80(9) of the Act, that prevents the Applicant from being entitled to acquire the right to manage.

Summary

30. The Tribunal finds that none of the grounds for objecting to the acquisition of the right to manage the Property by the Applicant are made out and therefore determines that the Applicant was on the relevant date, entitled to acquire the right to manage the Property.

Appeal

31. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Date – 9 JAN 2014

Judge C J Goodall
Chair
First-tier Tribunal (Property Chamber)