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**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | : | **MAN/00BY/LRM/2014/0011** |
| **Property** | : | **Liberty Place, Block C, Kent Street, East Village, Liverpool, L1 5FD** |
| **Applicant** | : | **Liberty Place RTM Management Company Limited** |
| **Represented by** | : | **Ms S Evans, Solicitor of Weightmans LLP, Solicitors** |
| **Respondents** | : | **Sarnia Construction Limited** |
| **Represented by** | : | **Mr D Gilchrist of Counsel instructed by Mr R Owen, Solicitor J B Leitch, Solicitors** |
| **Type of Application** | : | **Commonhold & Leasehold Reform Act 2002 – Section 84(3)** |
| **Tribunal Members** | : | **P J Mulvenna LLB DMA (Chairman)**<br>**R D Pritchard FRICS** |
| **Date and venue of Hearing** | : | **27 August 2014 at Liverpool Civil and Family Court, 35 Vernon Street, Liverpool, L2 2BX** |
| **Date of Decision** | : | **27 August 2014** |

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**DECISION**

## Order

That the application be dismissed.

## DETERMINATION AND REASONS FOR DECISION

## INTRODUCTION

1. By an application dated 27 May 2014, Liberty Place RTM Management Company Limited ('the Applicant') applied for a determination that the Applicant was entitled to acquire the right to manage Liberty Place, Block C, East Village, Kent Street, Liverpool, L1 5FD ('the Property') from Sarnia Construction Limited ('the Respondent').
2. The Applicant is a private limited company which was incorporated on 30 July 2013 with the object, amongst other things, of acquiring and exercising the right to manage the Property in accordance with the Commonhold and Leasehold Reform Act 2002 ('CLRA').
3. The members of the Applicant are the leaseholders of individual apartments at the Property who were granted leasehold interests by the Respondent to the individual leaseholder under the terms of underleases for terms of 150 years minus three days from 11 December 2002. Some of the leaseholders have interests in more than one apartment.
4. The Respondent has a leasehold interest in the Property for a term of 150 years from 11 December 2002 granted by a Lease dated 23 June 2003 and made between (1) Liverpool City Council ('the Council') and (2) the Respondent. The Council has a freehold interest in the Property.
5. On 26 February 2014, the Applicant served Notice to the Council and to the Respondent claiming the right to manage the Property. The Respondent served a Counter-notice alleging that the Applicant was not entitled to acquire the right to manage. The Council has not responded to the Notice. The Applicant subsequently made the application referred to in paragraph 1 above.

## THE PROPERTY

6. The Property is one of six blocks in a development ('the Development') undertaken on a phased basis by different builders/contractors in or around 2001/03. It is one of four blocks in the Development containing residential accommodation and is part new build and part conversion of former office accommodation, comprising 67 residential apartments and provision for commercial units, much of which is currently unoccupied. There is car parking provision beneath the building in which the Property is situate, such provision extending beyond the footprint of the building and incorporating land below the footprints of some of the other blocks in the Development. The car park is managed by East Village (Car Parks) Limited who have a lease of the whole of the car parking area from the Council. Car parking spaces are available by way of direct contract with East Village (Car Parks) Limited to the occupiers of premises in the Development. The leaseholders of apartments at the Property, in effect, have no right to a car parking space but have an opportunity to acquire a car parking space, subject to availability.

## PROCEEDINGS

7. Directions were issued by Mrs E Thornton-Firkin, procedural chairman, on 26 June 2014. The parties have complied with the Directions.

8. The Tribunal inspected the common parts of the Property on the morning of 27 August 2014. They were accompanied by Ms Anne Aubrey, the underlessee of Apartment 68 at the Property and a member of the Applicant; Mr David Gilchrist of Counsel and Mr Richard Owen, his instructing Solicitor, of J B Leitch, Solicitors representing the Respondent; and Ms Gemma Robertson and Mr Kevin Dodd of Andrew Louis Property Management Limited, managing agents for the Property.

9. The substantive hearing of the application was held on 27 August 2014 at the Liverpool Civil and Family Court, 35 Vernon Street, Liverpool, L2 3BX. At the substantive hearing, the Applicant was represented by Ms Sian Evans, Solicitor, of Weightmans LLP, Solicitors, assisted by Ms Jennifer Tate. Mr David Gilchrist, accompanied by Mr Richard Owen, his instructing Solicitor, represented the Respondent. Ms Anne Aubrey, and Ms Gemma Robertson and Mr Kevin Dodd also attended the hearing.

## THE LAW

10. The material provisions of CLRA are:

Section 71(1) This Chapter makes provision for the acquisition and exercise of rights in relation to the management of premises to which this Chapter applies by a company which, in accordance with this Chapter, may acquire and exercise those rights (referred to in this Chapter as a RTM company).
(2) The rights are to be acquired and exercised subject to and in accordance with this Chapter and are referred to in this Chapter as the right to manage.

Section72(1)This Chapter applies to premises if—
(a) they consist of a self-contained building or part of a building, with or without appurtenant property,
(b) they contain two or more flats held by qualifying tenants, and
(c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.
(2) A building is a self-contained building if it is structurally detached.
(3) A part of a building is a self-contained part of the building if—
(a) it constitutes a vertical division of the building,
(b) the structure of the building is such that it could be redeveloped independently of the rest of the building, and
(c) subsection (4) applies in relation to it.
(4) This subsection applies in relation to a part of a building if the relevant services provided for occupiers of it—
(a) are provided independently of the relevant services provided for occupiers of the rest of the building, or
(b) could be so provided without involving the carrying out of works likely to result in a significant interruption in the provision of any relevant services for occupiers of the rest of the building.
(5) Relevant services are services provided by means of pipes, cables or other fixed installations.
(6) Schedule 6 (premises excepted from this Chapter) has effect.

Section 78(1)Before making a claim to acquire the right to manage any premises, a RTM company must give notice to each person who at the time when the notice is given—
(a) is the qualifying tenant of a flat contained in the premises, but
(b) neither is nor has agreed to become a member of the RTM company.
(2) A notice given under this section (referred to in this Chapter as a 'notice of invitation to participate') must—
(a) state that the RTM company intends to acquire the right to manage the premises,
(b) state the names of the members of the RTM company,
(c) invite the recipients of the notice to become members of the company, and
(d) contain such other particulars (if any) as may be required to be contained in notices of invitation to participate by regulations made by the appropriate national authority.
(3) A notice of invitation to participate must also comply with such requirements (if any) about the form of notices of invitation to participate as may be prescribed by regulations so made.
...
(7) A notice of invitation to participate is not invalidated by any inaccuracy in any of the particulars required by or by virtue of this section.

Schedule 6:
1. (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...
5...
(3) The appropriate tribunal may, on an application made by a RTM company, determine that sub-paragraph (1)(b) is not to apply in any case if it considers that it would be unreasonable for it to apply in the circumstances of the case.

## THE EVIDENCE AND THE TRIBUNAL'S CONCLUSIONS WITH REASONS

11. At the hearing, the Tribunal heard oral evidence from Mr Dodd, together with oral submissions from Ms Evans on behalf of the Applicant and oral submissions from Mr Gilchrist on behalf of the Respondent. The Tribunal also had before them the documentary evidence provided by the parties.

12. The parties confirmed at the commencement of the hearing that the issues for determination were:

    (i) whether or not the Property was a structurally self-contained building as defined by Section 72 of CLRA;

    (ii) whether or not due notice had been given to all of the leaseholders in accordance with Section 78 of CLRA; and

    (iii) whether or not the Property was excluded from the right to manage by Schedule 6 of CLRA.

13. The Tribunal have considered these issues on the whole of the written evidence and the oral evidence and submissions now before them and, applying their own expertise and experience, have reached the following conclusions on the issues before them.

**(i) Structurally self-contained building issue**

14. It was submitted on behalf of the Respondent that the Property was not a structurally self-contained building for two reasons. First, the Property was built above the car park which extended beyond the footprint of the building within which the Property was situate and was part of the same structure. Secondly, it was submitted that the building within which the Property was submitted was structurally attached to an adjoining building by an archway and was thus part of the same structure. The Tribunal were taken to *Albion Residential Limited (1) Albion Riverside Commercial Limited (2) Albion Properties Limited (3) -v- Albion Riverside Residents RTM Company Limited [2014]UKUT 6 (LC),* which it was submitted supported the Respondent's case.

15. It was submitted on behalf of the Applicant that *Albion* did not deal with all material issues in relation to structural self-containment. In this particular case, the car park comprised the whole of the underground area, which was expressly excluded from the demised premises in the Respondent's lease. The visual impression was that the building was structurally self-contained. It was also indicated that the leaseholders had a separate car park and that the service charge accounts were administered separately. In relation to the archway, it was submitted that it was merely decorative and provided no structural function. The Tribunal were referred to *No 1 Deansgate (Residential) Limited -v- No 1 Deansgate RTM Company Limited [2013] UKUT 0580 (LC).*

16. In addressing this issue, the Tribunal has had regard to and adopted the test approved in *Deansgate*, that is, to examine 'not whether there was any attachment at all (such as touching) between the building and neighbouring structures' but 'whether there was any attachment of a structural nature.' The Tribunal also followed *Albion* in which it was said that structural detachment was 'an issue of fact which depends on the nature and degree of attachment between the Building and other structures.' It is evident from both of these authorities that the uses of the structures in question, or their visual appearance, are not material. It is their integral structural inter-dependence which is the deciding factor.

17. The first element of the Respondent's argument concerns the effect of the car park on the structural self-containment of the Property. The factual position in the present case is very much the same as that in *Albion*: the Property comprises a building from the ground floor and above that stands over a basement car park, which itself extends beyond the footprint of the building. The Tribunal is satisfied, on the evidence before them and confirmed by their own inspection, that the Property and the car park are part of the same structure. They have common foundations and there is patently an integral structural inter-dependence. They provide mutual structural support and stability and cannot, by any stretch of the imagination, be considered to be structurally independent and, therefore, self-contained within the meaning of Section 72 of CLRA. The disparate uses, the visual external appearance, the different ownerships and the separate service charge accounts are not material.

18. The second element of the Respondent's argument concerns the archway which is attached to the Property and an adjacent building. It is clear that the archway is ornamental and provides no structural support, either to the Property or to the adjoining building. The Tribunal finds that there is no merit in this aspect of the Respondent's case.

19. The Tribunal has also considered whether or not the Property is part of a building which is structurally self-contained. The Tribunal has found that it is not. It does not satisfy the requirements of Section 72(3)(a) or (b) of CLRA: (a) any division of the Property from the car park would be horizontal rather than vertical as required by the Act; and (b) the structure of the Property is not such that it could be redeveloped independently of the car park. These conclusions are based on the evidence before the Tribunal and their own inspection.

**(ii) Section 78 Notices**

20. The Respondent referred to doubts that all of the qualifying tenants had been given notice of the Applicant's proposals to satisfy the requirements of Section 78 of CLRA. In particular, it was averred that the notices given by the Applicant to some of the tenants did not comply with the requirements of Section 111 of CLRA which requires the notice to be in writing and sent by post to a specified address. The Respondent referred to *Avon Freeholds Limited -v-Regent Court RTM Co Limited [2013] UKUT 0213 (LC)*. It was submitted on the Respondents behalf that, although it had been held in that case that the requirement was directory and not mandatory, it had also held that consideration must be given any prejudice suffered by any tenant who had not been given due notice. In the present case, whilst there was no evidence of actual prejudice, because of the numbers involved, the tenants of eight apartments, there was a risk of prejudice.

21. The Applicant submitted evidence as to the addresses to which notices had been sent. They did include addresses which, on the face of them, did not satisfy the requirements of Section 111 of CLRA, but they were sent to addresses which had been obtained from reliable sources, such as the correspondence addresses noted on the Proprietorship Register at HM District Land Registry. It was submitted that all reasonable steps had been taken by the Applicant to serve the notices to the tenants' known addresses.

**COSTS**

28. The Tribunal has power to award costs and/or reimburse fees under Rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 which provides, insofar as it is material to the present case:

'(1) The Tribunal may make an order in respect of costs only –

...(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –

...(ii) a residential property case...

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or any part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.'

29. Both parties made an application for the award of costs, although there was no detailed argument advanced on behalf of either party at the hearing. The Tribunal has determined that the issues for determination were arguable by both parties and that there was no circumstance or particular in which either party had acted unreasonably. The Tribunal concluded that it would not be appropriate or proportionate to award costs to either party or to make an order for the reimbursement of any fees.

22. The Tribunal find that it is arguable that the notices in question did satisfy the requirements of Section 111 of CLRA, particularly where sent to addresses revealed as correspondence addresses by Land Registry searches, but it is not necessary to decide the point. The Tribunal is satisfied on the whole of the evidence before it that, on the balance of probabilities, the notices were sent to addresses where they would be received by the tenants concerned. There was no risk of prejudice. The Respondent's case in this respect has no merit.

**(iii) Schedule 6 exclusion issue**

23. The Respondent alleged in the Counter-notice that the Property was excluded from the right to manage by virtue of paragraph 1 of Schedule 6 to CLRA as the internal floor area of the non-residential parts of the Property exceeded 25 % of the premises. In response, the Applicant provided evidence that the total floor area of the Property is 50,117 sq ft, of which the residential parts are 39,299 sq ft and the non-residential parts are 10,888 sq ft, thus arguing that the floor area of the non-residential parts did not exceed 25% of the whole.

24. The Respondent challenged the Applicant's evidence on the basis that it came from an unknown source and should, in any event, have been provided by way of expert evidence. The Respondent did not produce any evidence, even though the question had first been raised by Respondent in the Counter-notice. The Applicant called Mr Dodd who gave evidence that the information had been provided by the Respondent shortly after the completion of the development as the basis upon which the service charges should be apportioned. The information gave the gross floor areas for each unit of accommodation in both the residential and non-residential parts. The subsequent calculations were made by simple arithmetic.

25. The Tribunal has determined that expert evidence would be the most effective way of addressing the issue, but the need for such evidence would depend upon the quality and reliability of the evidence available to the Tribunal and the weight which the Tribunal considered that it merited. In this particular case, the evidence given by Mr Dodd was not challenged. The Tribunal is satisfied that the Respondent (albeit acting as building contractor and landlord at a time before the proceedings before the Tribunal were contemplated) would take the greatest care to ensure the accuracy of the information passed to the managing agents. In view of this, the Tribunal accords the evidence significant weight and accepts it as being sufficient to demonstrate that the internal floor area of the non-residential parts of the Property does not exceed the whole by more than 25%.

26. The Tribunal finds that there is no merit in the Respondent's case in this respect.

## CONCLUSION

27. The Tribunal concluded that, as the Property was not a self-contained building as defined by Section 72 of CLRA because of its structural attachment to the car park, the Applicant did not have the right to manage the Property and that, accordingly, the application should be dismissed.