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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/OOAQ/LRM/2014/0010**
Property	:	**Platinum House, Lyon Road, Harrow, Middlesex**
Applicant	:	**Platinum House (Harrow) RTM Company Limited**
Representative	:	**Ms Moffet (solicitor)**
Respondent	:	**Miltonland Limited (landlord)**
Representative	:	**Mr Radley-Gardener (of counsel)**
Type of application	:	**An application for the determination as to whether the applicant is entitled to acquire the right to manage**
Tribunal member(s)	:	**Professor James Driscoll, solicitor (Tribunal Judge) and Mr Mel Cairns MCIEH (Tribunal Member)**
Date and venue of case management hearing	:	**The hearing took place on 5 June 2014 and the Tribunal Members also inspected the premises that day. The tribunal met on 4 July 2014 to consider its decision.**
Date of directions	:	**20 August 2014**

DIRECTIONS

The decision summarised

1. On the relevant date the applicant company was entitled to acquire the right to manage the premises

Introduction

2. This is an application by the RTM company which seeks on behalf of its members (who are leaseholders of flats in the building) to acquire the right to manage the premises. The relevant statutory provisions are contained in Part 2 of the Commonhold and Leasehold Reform Act 2002 ('the Act') and in various sets of regulations which have been made under these provisions ('the Act'). Under the Act, a majority of leaseholders are entitled to take over the management of the premises from the landlord. The right to manage is a no-fault based right. Provided the building qualifies under the Act, the leaseholders may take over management of the building whether the landlord agrees to this or not. However, in order to make a valid claim, there are various procedural matters that the participating leaseholders must first attend to.

3. Before exercising the RTM, the participating leaseholders must first incorporate an RTM company, a company limited by guarantee with a prescribed constitution. All leaseholders are entitled to be members of the company (as is the landlord). Matters such as which buildings qualify, the proportion of leaseholders who should support the application, and which leaseholders qualify to participate are, broadly speaking, the same as they are for the collective right to enfranchise accorded by Part I of the Leasehold Reform, Housing and Urban Development Act 1993.

4. RTM is initiated by the company giving a claim notice to the landlord. Although the RTM is a no-fault based right landlords have the right in

certain circumstances to object to the claim by giving a counter-notice to the company. Landlords may do this, for example, if they consider that the building does not qualify, or that the company has failed to follow the correct procedures. Where such a counter-notice is given, the company must (if it wishes to proceed) apply to this tribunal for a determination as to whether it is entitled to acquire the landlord's management functions under the RTM.

5. In this case the name of the RTM company is Platinum House (Harrow) RTM Company Limited ('the company'). The respondent to the application is a company by the name of Miltonland Limited which owns the freehold of the premises and which is the landlord under the leases of the flats in the premises ('the landlords'). It is currently the case that the landlords have appointed a company by the name of Comer Property Management to act as the managers of the building. This appointment will be superseded if the leaseholder's RTM claim is successful.

6. Platinum House, the subject premises, is a block of 168 flats. We were told at the hearing that 166 of those flats are held on qualifying leases as they are defined in section 75 of the Act. There is a large car park in the basement, part of which has been leased to the London Borough of Harrow which uses it as a public car park. The remainder of the parking spaces are let to the leaseholders under their leases. At the top of the building there is a leisure centre which includes a swimming pool and other recreational areas. These facilities, we were told, are for the exclusive use of the leaseholders. We summarise the results of the inspection we undertook on the morning of the hearing later in this decision.

The application

7. In this case a claim notice was given on or about 6 February 2014. On 14 March 2014 a counter-notice was given by the solicitors who act for the landlord denying that the company has the right to manage. Accordingly, those advising the RTM company applied to this tribunal in April 2014 seeking a determination that they are entitled to claim the RTM. A case management conference was held on 7 April 2014 when directions were given.

8. On 30 April 2014 a statement of case was given on behalf of the RTM company. This stated that in all, eighty participation notices were given to any leaseholder who was not already a member of the company. Copies of the certificate of posting and copies of the notices were exhibited to this statement.

9. It also stated that when the claim notice was given to the landlord there were ninety-nine leaseholders who were members of the company.

10. The landlord gave a statement in response objecting to the claim. This statement did not challenge the validity of the participation notice procedures though it did make other challenges.

11. The RTM company also gave a 'skeleton' written set of detailed submissions on 4 June 2014.

The inspection

12. We carried out an inspection of the premises on the morning of 5 June 2014. The following people met us and accompanied us as we walked

around the building and its common parts. The leaseholders present were Ms V. Johnson (flat 519), Ms E. McNamara (flat 121) and Mr D. Hobbs (flat 524) but Mr Hobbs left the site at an early stage. On the landlord's side, Mr P. Dwane and Ms H. Eaves of the managing agents were present throughout our time at the building.

13. Platinum House consists of eight storeys with six of the levels containing flats over two levels of car parks. There are secure access points to the building and internal lifts and stairs to all the flats. As we remarked above, on top of the building are various recreational facilities for use of the leaseholders, and we visited these as part of the inspection. It was apparent on a visual inspection that the car parking areas are a relatively small part of such a large building.

14. The building has the appearance of having been originally built as a block of offices and later converted into its current use as which is predominately residential. The only part of the building that is in commercial use is one of the car parks which we have already noted is leased to the local authority for use as a public car park. Other parts of the building, include the car park area used by the leaseholders who have parking rights under their leases, the entrance points and the stair wells. We inspected the slip road surrounding the building, the communal parts and the recreational areas at the top of the building. We did not inspect the interior of any of the flats (their condition not being an issue for the tribunal to consider).

The hearing

15. Later that day, a the hearing of the application took place at the tribunal. The company was represented by their solicitor Ms. M. Mossop of Mayfields solicitors. A number of leaseholders were also present. For the landlords, Mr O. Radley-Gardner of counsel appeared with Mr

L.Bradley of Brethertons solicitors. We are grateful to Ms Mossop and Mr Radley-Gardner for the clarity with which they presented their submissions at the hearing.

16. We were told that the landlord's objections to the claim are (1) that the claim notice was defective having wrongly referred to land within the boundaries as appurtenant land when is it not; and (2) the building is exempt from the RTM as its internal floor area has more than 25% for non-residential use. As we note below, Mr Radley-Gardner also sought to raise another challenge to the procedures.

17. Ms Mossop had prepared a bundle of documents consisting of some 1,042 pages in length. It included copies of the notices, a specimen lease, office copy entries, a copy of the constitution of the RTM company, copies of the invitation notices that were given to the non-participating leaseholders, various statements and copies of the legal authorities relevant to this case.

18. Two preliminary matters were raised after the hearing opened. First, the landlord wished to rely on a statement made by a Mr Sheppard who works for the managing agents. However, Mr Sheppard was unable to attend the hearing. As the landlord's solicitors put it in an email sent to the tribunal on the morning of the hearing, Mr Sheppard had an 'urgent professional commitment' as a result of which he could not attend the hearing to give evidence. It emerged at the hearing that Mr Sheppard was taking an examination on the date of the hearing. In their email they solicitors added 'Mr Sheppard would be more than happy to answer any written queries which you or the tribunal may wish to put to him, following the hearing, and prior to the written determination'.

19. In essence, Mr Sheppard includes in his written statement the results of various internet searches which he says shows that many of the flats are

used for various forms of commercial use and do not therefore qualify as leases for the purposes of the Act. He also claims that several flats are sublet, which he submits is a form of commercial activity and as a result they are no longer held for a residential use.

20. Ms Mossop objected to the landlord relying on this statement. She complained that it was prepared only shortly before the hearing and she and her clients simply have not had the time to respond to the assertions contained in the statement. In her view Mr Sheppard's written statement should not be considered by the tribunal as he is not available to be questioned on its contents.

21. Mr Radley-Gardner submitted that we should consider it giving it appropriate weight as the maker of the statement was not available to give the evidence orally and to be cross-examined on its contents. In his submission the evidence is relevant to the issue of whether the building qualifies for the RTM or not.

22. We will give our reasons for our decision on this evidence below. For now, we simply say that the evidence should not be admitted and that in any event its contents even if true to not support the conclusion the landlord argues for.

23. The second preliminary matter arose in this way. Mr Radley-Gardner told us that as he had only received his instructions very shortly before the hearing and that after reviewing the documents the day before the hearing, there were in his submission several instances of the participation notices being invalid. In some cases, the names given for the leaseholders did not match the corresponding office copy entry supplied by the Land Registry; in others no office copy entries had been included in the bundle; is other cases still, the addresses to which the notices were sent did not match the addresses on the office copy entries. He also told us that in

some cases there were no notices given at all (or at least no copies were included in the bundle).

24. Ms Mossop took issue with this and she submitted that we should not consider these points. For her part, she said that to investigate these apparent shortcomings would require an adjournment to allow her to consider these points in detail. Moreover, after she was told that the landlord's solicitors said some pages were missing all were resent and the solicitors replied to her on 16 May 2014 confirming receipt and they did not suggest that it was still incomplete She complained also of these matters being raised by the landlord so late in the day. She urged us to exclude these points from our consideration of the issues.

25. Ms Mossop told us that the participation notices were sent to the address of the flats owned by the non-participating leaseholders. In all 80 such notices were sent. Under section 111(5) of the Act, service can be effected by posting the notice to the address of the leaseholder's flat. This is the course that those advising the RTM company chose to take. So far as she is concerned all the non-participating leaseholders were properly served with a notice inviting them to become a member of the company.

26. On this issue we decided that on balance it would not be fair to allow the landlord to raise such issues at the hearing when they have had several weeks and ample time to seek clarification of the manner in which the RTM company had complied with this aspect of the procedures with those advising the company.

27. It should also be recalled that the notice of claim was given in February 2014. The landlord did not raise any issues on the participation procedures in either its counter-notice, or in the statement of case, except to state that it wanted the RTM company to show that it had complied

with the procedures. This issue was not raised in Mr Sheppard's statement either.

28. We also note that the directions stated that the hearing had been estimated to take up three hours. Each party was invited to propose a longer hearing if they thought this appropriate by writing to the tribunal explaining why they consider a three hour hearing to be an unrealistic estimate. Such a representation should be made two weeks before the hearing date (directions, paragraph 10, 4 April 2014). In the event, neither party did so.

29. If the landlord had been allowed to pursue its criticisms of the participation notice procedures we would have had to adjourn the hearing to allow those advising the RTM company to respond to the points raised by counsel for the landlord. This would have resulted in additional legal and possibly other professional costs to the parties to say nothing of the waste of the tribunal's time in adjourning a hearing date that had been fixed for several weeks.

30. The landlord argues that the RTM company failed to comply with the requirement that before a claim notice can be given it must give a participation notice to any leaseholder who is not already a member of the company. This notice must (in summary) give information on the claim and invite the leaseholder concerned to become a member. Failure to comply with this requirement means that the claim notice cannot be given. As we noted above, Mr Radley-Gardner, counsel for the landlord, told us that having read the documents, he considers that there are a number of deficiencies in some of the notices. Ms Mossop objected to this point being raised, in her submission, at such a late stage. For her part she contends that the company has complied with the participation notice requirement.

31. After hearing these rival submissions we have decided not to allow the landlord to challenge the validity of the participation notices at such a late stage in these proceedings. We accept that counsel only had access to the papers shortly before the hearing but the landlord and their advisors have had details of the claim since February this year. In our view, they have had ample time to consider all aspects of the claim.

32. There is also the question of prejudice. Clearly, if any non-participating leaseholder was not in fact given a participation notice, they would have suffered prejudice. This is mitigated, though, by the fact that any leaseholder is entitled to apply to become a member of the RTM company by virtue of the prescribed articles of association (see Regulations). It is hard to see what prejudice the landlord would have suffered if it's challenge to the validity of the participation procedures were made out. To put it another way, even if some of the leaseholders were not invited to become members of the RTM company, it is hard to see what prejudice would have been suffered by the landlord.

33. This was one of the issues that was considered by the Upper Tribunal in *Avon Freeholds Limited v Regent Court RTM Co Limited* [2013] UKHT 0213 (The President, Sir Keith Lindblom). In that case it was established that some of the leaseholders were not given such a notice but that in the circumstances of that case they had in the judgement of the UT suffered no prejudice. On the prejudice point the Tribunal added '..Parliament cannot have intended that in circumstances such as these the whole of the right to manage process will be defeated by the RTM company failing to comply fully with the provisions for giving notice of invitation to participate' (paragraph 56).

34. The UT added 'As to prejudice to the appellant as landlord one must remember.... that the statutory provisions for the giving of notices to

tenants were not designed to protect landlords, nor to aid them in opposing a right to manage process...'(paragraph 53).

35. In this case Ms Moffat remained adamant that the participation notice procedures were complied with. Mr Radley-Gardener wanted to challenge this after studying the copies of the notices. To have allowed him to do so would have required an adjournment and for all the reasons we have given we did not consider that it would be fair to do this. As a result we do not have to consider whether any leaseholder has suffered prejudice as the applicant company appears to have complied with the invitation notice procedures.

36. In summary, we conclude that the landlord has simply left it too late to challenge the validity of this aspect of the procedures. Even if the landlord had proved that some of the leaseholders had not been served it is difficult to see what prejudice the landlord has suffered. We told Mr Radley-Gardner that if we had to adjourn the hearing we considered that his clients should pay the reasonable legal and any other professional costs of the leaseholders (reminding him that the tribunal has jurisdiction to make costs orders under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013)) . He took instructions and told us that he had decided to withdraw this objection to the claim. Accordingly we proceeded on the assumption that the participation notice procedures were complied with.

Reasons for our other decisions

A defective claim notice?

37. We now turn to the landlord's objections to the RTM claim taking them in the same order as they appear in their counter-notice. In reaching these conclusions, we considered all the statements made by the parties and the

oral submissions made at the hearing. Their first objection is that the notice incorrectly refers to land which is not part of the property. Counsel for the landlord did not appear to us to pursue this objection with much vigour at the hearing. We consider that he was right not to do so. The plan submitted to which objection was taken was confirmed by Mr Radley -Gardner to be the land Registry plan for the property. As Ms Mossop submits, the claim notice correctly identified the premises and insomuch as it should not have referred to a strip of land this is an inaccuracy that under section 81(1) of the Act can be excused. On the claim notice point, therefore we prefer Ms Mossop's submissions. If there was a mistaken reference to land which is not appurtenant this is an inaccuracy that can be excused.

Is the building excluded from the RTM on account of the non-residential use?

38. The next and perhaps the most fundamental objection is that the building is excluded by the Act as more than 25% of its floor area is used for non-residential use. Under schedule 6, paragraph 1 of the Act such buildings are excluded from the right to manage.

1.This paragraph reads as follows: *This Chapter does not apply to premises falling within section 72(1) if the internal floor area (a) of any non-residential part, or (b) (where there is more than one such part) of those parts (taken together), exceeds 25 per cent. of the internal floor area of the premises (taken as a whole). (2) A part of premises is a non-residential part if it is neither (a) occupied, or intended to be occupied, for residential purposes, nor (b) comprised in any common parts of the premises. (3) Where in the case of any such premises any part of the premises (such as, for example, a garage, parking space or storage area) is used, or intended for use, in conjunction with a particular dwelling contained in the premises (and accordingly is not comprised in any common parts of the premises), it shall be taken to be occupied, or intended to be occupied, for residential purposes. (4) For the*

purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part shall be taken to extend (without interruption) throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part shall be disregarded.

39. The landlord's submission in support of this challenge is two-fold. First, it contends that the car park is used for non-residential use and it must be treated as part of the non-residential area in the building. Second, it is argued, many of the flats are used for business rather than residential purposes. The second part of this challenge is itself in two parts: first, that in some cases the leaseholder sublets the flat and second, that other leaseholders use the flats for business purposes. The latter point is evidenced, according to the landlords, by the fact that internet marketing gives the address of certain flats as the flat itself. This point appears in the statement of Mr Sheppard which we referred to above.

40. Ms Mossop replies to this by submitting that on the first point, that most of the garage spaces are used by leaseholders and are therefore to be treated as being occupied for residential purposes as provided for in schedule 6, paragraph 1(3) of the Act. Her second point is that those leaseholders who give the address of their flat as that of a business may have done so for convenience. There is no evidence, she contends, that any leaseholder is actually operating a business in the flat itself. More generally she submits that the fact that a leaseholder might be in breach of their lease does not alter the fact that the only legitimate use to which any of the flats can be put is for residential use. In other words, a breach does not alter the character of the lease: if it was granted as a qualifying lease it remains so even if the leaseholder is in breach of covenant (and she does not accept that the landlord has proved that any leaseholder is in breach)

41. On this fundamental issue the landlord relies on the statement of Mr Sheppard which we referred to above. Miss Mossop objected to this

statement being tendered in evidence. Mr Radley-Gardner told us that we should consider it but the weight to be given to it might be tempered by the fact that Mr Sheppard was not available to give evidence at the hearing.

42. On balance we agree with Ms Mossop that it should not be considered. It was apparently prepared just before the hearing and after the date set the production of statements when the directions were given. It is surprising that those advising the landlords should have left it so late in the day before introducing evidence in support of their contention that the property is excluded from the Act. This left little time for those advising the RTM company to investigate Mr Sheppard's claims and to respond to them.

43. We are also surprised that Mr Sheppard was chosen to undertake this task when the landlord's advisors knew that he could not attend the hearing to give his evidence. Why did they not instruct another member of staff employed by the managing agents to undertake this task? Nor were we impressed with the suggestion by the landlord's solicitors that we could send Mr Sheppard written questions. That would have been no substitute, in our opinion, for oral evidence and also for the opportunity for the applicants to ask questions in cross-examination and for the witness to respond to questions from the tribunal.

44. Our conclusions on this procedural issue are also influenced by reading the contents of this written statement. In paragraphs 11 and 12, Mr Sheppard proposes that (a) the internal floor area of those flats that the leaseholder concerned has sublet and (b) that in other cases the leaseholder concerned is operating a business from the flat address should all be excluded from consideration as residential use. We cannot see how either factor causes the flats concerned to cease being used for residential use. This is most obviously the case with the sublet flats. It is common

knowledge that what is popularly known as 'Buy to Let' has become a significant feature of housing in London and elsewhere in the country. There is, of course, no residence qualification for leaseholders who wish to participate in an RTM claim. It is our conclusion that the subletting certainly does not mean that the flat concerned is no longer used for residential purposes. On the contrary it shows that the flats, which are sublet, are being used for residential purposes.

45. As to the business issue, it seems most likely that some leaseholders may have done this for convenience and we take Ms Mossop's point that the flats are all of a modest size so that in practical terms, a business could not be carried out. In particular the car repair business that figured largely in Mr Sheppard's exhibit, simply could not operate from a modestly-sized flat.

46. We do not agree with the landlord that any use of flats in breach of the covenants in the lease means that the flat is no longer in residential use. If there is such a breach (and in these proceedings the landlord has not in our view proved that any of the leaseholders are in fact in breach of covenant) the landlord has remedies including the right to apply to this tribunal for a determination that a leaseholder is in breach as prelude to seeking forfeiture of the lease. The right to forfeit is retained by a landlord even though the RTM has been established. As to the landlord's reliance of the decision of a county court in *Smith v Jafton* [2013] 2 EGLR 104, we note that this was a case on the effect of so-called 'Apartment hotels' where premises are adapted for use as a hotel for very short-term lets. The court decided that on these facts the flats in the building that had been converted were not held on qualifying leases for the purposes of an enfranchisement claim made under the 1993 Act. We do not consider that the decision is of assistance to the resolution of this dispute which concerns a building which was built or converted into a large block of residential flats almost all of which have been sold on long leases.

47. All of these points lead us to the conclusion that all of the floor spaces of the flats and the common parts added together means that only a small part of the building, that is the car park leased to the local authority and a commercial office space is used for non-residential use and these do not exceed the 25% requirement. None of the flats which are held on long leases are disqualified by the fact that they have been sublet or are used as a business address. In making this point, we do not accept that the landlord has proved that any of the flats are being used in breach of the covenants in the lease. It was common ground that area of the car park leased to the local authority is far less than 25% of the floor area of building.

Summary and conclusion

49. In summary, we conclude that the claim notice was valid and that the building qualifies for the right to manage. The claim is supported by a majority of the leaseholders and all qualifying leaseholders who are not currently members are entitled to apply to become a member.

50. This leads us to the conclusion that the RTM company was entitled to the acquire the right to manage at the relevant date (that is the date on which the notice was given to the landlord (see, section79(1) of the Act)).