Neutral Citation Number: [2024] UKUT 109 (LC)

Case No: LC-2023-659

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT REF: LON/00AJ/LRM/2023/0013

2 May 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – Right to Manage – contiguous blocks sharing underground car park – whether a self-contained building – split freehold – whether a self-contained part of a building – inadequacy of evidence – ss. 72, 73 Commonhold and Leasehold Reform Act 2002 – appeal allowed – application remade and dismissed

BETWEEN:

GUV HARBOROUGH & SALTLEY HOUSE RTM COMPANY LIMITED

Appellant

-and-

ADRIATIC LAND 3 LIMITED (1)
TRINITY (ESTATES) PROPERTY MANAGEMENT LIMITED (2)
NOTTING HILL GENESIS (3)

Respondents

Harborough House, Taywood Road, Northolt UB5 6GW (1)
Saltley House, Taywood Road, Northolt UB5 6GU (2)
Brecon House, Taywood Road, Northolt UB5 6GU (3)

Martin Rodger KC, Deputy Chamber President

2 April 2024

Carl Fain, instructed by Jobsons Solicitors, for the appellant
Robert Bowker, instructed by the second respondent's legal department for the second respondent

The following cases are referred to in this decision:

Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd [2014] UKUT 6 (LC)

Assethold Ltd v Eveline Road RTM Co Ltd [2024] EWCA Civ 187

Consensus Business Group (Ground Rents) Ltd v Palgrave Gardens Freehold Ltd [2020] EWHC 920 (Ch); [2022] HLR 1

Triplerose Ltd v 90 Broomfield Road RTM Co Ltd [2015] EWCA Civ 282; [2016] 1 WLR 275

Introduction

1. Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act) makes provision for the acquisition by qualifying tenants of the right to manage premises to which Chapter 1 applies. Section 72(1)(a), 2002 Act requires that for Chapter 1 to apply the premises concerned must consist of a self-contained building or part of a building.

2. The right to manage is acquired through a company, known as an RTM company, but in *Triplerose Ltd v 90 Broomfield Road RTM Co Ltd* [2015] EWCA Civ 282 (*Triplerose*) the Court of Appeal determined that an RTM company may not manage more than one building.

3. The main issue in this appeal is whether premises in the Grand Union Village in Northolt comprise a single self-contained building over which the right to manage can be acquired. The First-tier Tribunal (Property Chamber) (the FTT) decided that they comprised three buildings rather than one and that the right to manage was not available to the appellant RTM company. But only a few weeks earlier a differently constituted panel of the FTT had decided that three different but similar buildings in the Grand Union Village were a single self-contained building eligible for the right to manage. When that decision was brought to the attention of the FTT in this case it granted permission to appeal its decision.

4. The appellant is the RTM company, GUV Harborough & Saltley House RTM Co Ltd. At the hearing of the appeal it was represented by Mr Carl Fain, who did not appear before the FTT.

5. There are three respondents to the appeal, although only one has participated, Trinity (Estates) Property Management Ltd, which I will refer to as the Management Company. It was represented at the hearing of the appeal by Mr Robert Bowker who again had not appeared before the FTT.

The facts

6. Grand Union Village is a substantial residential development adjoining the Grand Union Canal in West London. It was completed in about 2009 and comprises at least 30 named blocks of flats as well as a number of freehold houses and commercial units.

7. The premises with which this appeal is concerned comprise three of the named blocks. Two of them, Harborough House and Saltley House, are connected and comprise a single block with two separate entrances. The block is approximately L-shaped with Harborough House, containing 44 flats, forming the shorter and part of the longer limbs with Saltley House, containing 27 flats, as the rest of the longer limb. The third building, Brecon House, is entirely detached from the other two blocks at ground level and above. It too is an L-shaped block, comprising 46 flats.

8. Harborough/Saltley House (as I will now refer to them) and Brecon House form three sides of a quadrangle. The fourth side is formed by another block of flats called Fazeley House which is also detached from the others at ground level and above. The centre of the quadrangle comprises an open recreation area at ground level, beneath which there is a large underground car park. The car park is used by the residents of all three buildings (and possibly also by residents of Fazeley House, but there is no evidence about that).

9. The appellant RTM company was incorporated on 19 May 2022. At that time its articles of association identified its objects as being the acquisition of the right to manage Harborough/Saltley House only.

10. On the same day a separate RTM company, Brecon House RTM Co Ltd, was also incorporated, its object being the acquisition of the right to manage Brecon House alone.

11. On 13 July 2022 the RTM companies submitted claim notices asserting their entitlement to acquire the right to manage. The appellant claimed the right to manage Harborough/Saltley House and Brecon House RTM Co Ltd claimed the right to manage Brecon House.

12. The Management Company disputed the appellant's entitlement to acquire the right to manage Harborough/Saltley House on the grounds that the freehold interest in Saltley House was vested in Notting Hill Genesis, the third respondent, which retained responsibility for its management, whereas at Harborough House management was the responsibility of the Management Company. Those facts were said to disentitle the appellant from acquiring the right to manage the combined block.

13. The Management Company also disputed the Brecon House claim notice. It relied on section 72(1)(a) of the 2002 Act and asserted that "the premises is not a self-contained building of part of a building by virtue of its attachment to an underground car park (which also serves other blocks) and shared pump room with Harborough House."

14. On considering the counter-notices given by the Management Company, the appellant and Brecon RTM Co Ltd decided to withdraw their original claims. Their solicitor communicated that decision to the respondent on 27 September 2022 in a letter in which she said that she agreed that the three blocks were joined by the underground car park.

15. On 27 September 2022 the appellant passed a resolution at an extraordinary general meeting replacing its articles of association with new articles. These identified the objects of the company as being the acquisition of the right to manage Harborough/Saltley House and Brecon House.

16. On 7 February 2023 a new claim notice was given by the appellant, this time asserting its right to acquire the right to manage all three blocks. The claim notice explained that the 2002 Act applied to the premises because "they consist of a self-contained building or part of a building with or without appurtenant property". The Management Company's counter-notice gave three reasons for disputing the appellant's claim. These were, first, that the acquisition of the right was prohibited because the premises were not a self-contained building or part of a building and so did not satisfy the requirement of

section 72(1)(a), 2002 Act. Secondly, it was said that the appellant is not an RTM company in relation to the three blocks because Brecon House RTM Co Ltd remains in existence with the object of acquiring the right to manage Brecon House and in those circumstances section 73(4), 2002 Act prohibits any alternative claim. Thirdly, it was said that the appellant had failed to give a notice inviting participation in the company to one qualifying tenant of a flat in Brecon House, contrary to section 78(1).

The proceedings

17. The appellant applied to the FTT for a determination that it had acquired the right to manage all three blocks. In due course the Management Company filed a statement of case in which it gave three reasons for disputing the appellant's claim.

18. The Management Company first explained that the first respondent, Adriatic Land 3 Ltd, is the owner of the freehold interests in Harborough House and Brecon House and that the Management Company is party to the leases of the individual flats within those blocks with responsibility for their management. In contrast, the freehold of Saltley House is owned by Notting Hill Genesis, the third respondent. All 27 flats in Saltley House are let on shared ownership leases under which Notting Hill Genesis, and not the Management Company, is responsible for management and the provision of services. It was asserted that the right to manage is not available in respect of blocks of flats owned by different freeholders, a proposition said to be supported by the decision of the Court of Appeal in *Triplerose*.

19. The Management Company next asserted that the property in respect of which the right to manage was claimed (i.e. all three blocks) does not comprise a single building for the purposes of the Act. It pointed out in particular that Brecon House is divided above ground from Harborough/Saltley House. The appellant responded to this point in its statement of case by referring to the counter-notice given by the Management Company in 2021 in answer to the previous claim by Brecon House RTM Co to acquire the right to manage Brecon House alone. It was said that the Management Company had accepted in that counter-notice that Brecon House was attached to an underground car park and had a shared pump room with Harborough House. The appellant also claimed in its response that Harborough/Saltley House and Brecon House were all joined by the same car park and that the appellant was therefore entitled to acquire the right to manage all three blocks. The Management Company filed a response to the appellant's statement of case in which it made no reference to the assertion that the three blocks are connected by the underground car park.

20. Neither party filed any evidence in the proceedings. The only material available to the FTT on which to base its decision was therefore contained in the statements of case and supporting documents. These included one sample lease from Harborough House and another from Saltley House. Each lease includes some very small scale plans: one no bigger than 2 inches square showing the relationship of the buildings to each other; another of the same size showing the position of the underground car park between the buildings; and a third, larger plan showing part of the car park, indicating the location of some lifts and staircases, but not the relative position of the structures above. The plan leaves a number of unanswered questions including, in particular, whether Saltley House

and Fazeley House (which is not part of the premises over which the right to manage is claimed) are positioned above any part of the car park.

21. Despite the inadequacies of the evidence the FTT decided both that it was appropriate to determine the application without a hearing and that it was unnecessary to undertake an inspection of the premises.

22. The FTT's decision is quite short and concludes that the appellant is not entitled to acquire the right to manage the three blocks. The substance of the reasoning is contained in three paragraphs, as follows:

> "12. The tribunal accepts the respondent's submission that the 2002 Act was not intended to entitle a right to manage to be acquired by a single RTM Company where the premises it is seeking to manage comprise a number of blocks whose freehold is held by different freeholders and on different lease terms. In this respect the tribunal follows the judgment in *Triplerose Ltd v 90 Broomfield Road RTM Company Limited* [2015] EWCA Civ 282.
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> 13. The tribunal also finds the subject premises do not form a single building for the purposes of the Act. The tribunal finds Brecon House is vertically divided above ground from Harborough House and Saltley House and each block has its own designated separate entrance and both Harborough House and Brecon House have their own gas meter room notwithstanding there is a car park that runs continuously below the three blocks.
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> 14. The tribunal also finds that there was already at the time of the service of the notice of claim dated 7 February 2023 and remains in existence an RTM Company in respect of Brecon House namely GUV Brecon House RTM Company Limited, the sole object is the acquisition of the right to manage part of the subject premises which forms part of this application i.e. Brecon House and therefore the applicant is not in compliance with section 73(4) of the 2002 Act."

23. The FTT described the question whether a notice inviting participation had been served on the leaseholder of flat 31 as "a dispute of fact" and made no findings on it.

The grounds of appeal

24. The FTT was asked to grant permission to appeal on two issues only namely:

(1) whether the premises over which the right to manage is claimed consist of a self-contained building within the meaning of section 72(1)(a); and

(2) whether Brecon House RTM Company is an RTM company in respect of part of the premises of which the right to manage is sought such that the appellant cannot be an RTM Company in its own right.

25. In his skeleton argument for the appeal, Mr Fain sought permission to appeal on two additional issues. The first sought to challenge the FTT's determination in paragraph 12 of its decision that the right to manage cannot be acquired over premises comprising a number of blocks the freehold of which is held by different freeholders. The second concerned the issue of fact on which the FTT made no determination, but that issue fell away in the course of the appeal as Mr Bowker accepted that the required notice had been given to the leaseholder of flat 31.

Issue 1: Is the subject of the application a self-contained building?

26. Section 72(1)(a), 2002 Act provides that Chapter 1 of Part 1 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 self-contained if it is "structurally detached".

27. In *Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd* [2014] UKUT 6 (LC) the Tribunal considered the availability of the right to manage in the case of a seven storey building with a car park extending beneath it and continuing below another adjacent building. It explained that before considering whether premises are a building which is structurally detached it is first necessary to identify the premises to which the claim relates. In that case the claim related to the whole of the building including the service core and structural columns which extended below ground level into the car park and through the basement concrete slab. The Tribunal decided that the building was not structurally detached from the floor or ceiling of the underground car park, saying this, at [33]:

> "We agree with Mr Rainey that the car park itself would not ordinally be regarded as part of the building (although that part of it which lies beneath the structure of the building probably would be); but that is not the issue. The issue is whether the building is structurally detached from the car park and from any other structure. In circumstances where continuous concrete structures – the ground and basement floor slabs – are major and integral components of the building and of the car park, the piazza and building 1, it is not possible in our judgment to regard the building as structurally detached."

28. More recently, in *Consensus Business Group (Ground Rents) Ltd v Palgrave Gardens Freehold Co Ltd* [2020] EWHC 920 (Ch), Falk J determined that five attached residential blocks together with the whole of a basement car park beneath them and extending underground beyond the ground level footprint of the blocks were "structurally detached" and therefore comprised a self-contained building for the purposes of the right to collective enfranchisement under Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993 (the material terms of which are indistinguishable from those of the 2002 Act).

29. On behalf of the appellant, Mr Fain submitted that the FTT had been wrong to hold that the three named blocks did not comprise a single self-contained building simply because Brecon House was vertically divided above ground from Harborough/Saltley House and each block had its own separate entrance. On the contrary, taken together with the car

park, the three blocks comprised a single building which was structurally detached and therefore self-contained within the meaning of section 72(1)(a) and (2).

30. Mr Fain acknowledged the absence of evidence concerning the construction of the blocks and their attachment to the underground car park. He accepted that the degree of overlap, if any, between the buildings above ground and the car park below ground was not apparent from the inadequate plans included in the two sample leases. Nevertheless he relied on four points to demonstrate that the proposition that the three blocks were structurally attached to the underground car park had not been in dispute.

31. Two of these points concerned the previous abortive claim by Brecon House RTM Co Ltd. The Management Company's own case in response to that claim had been that Brecon House was not a self-contained building or part of a building by virtue of its attachment to the underground car park which also served other blocks. The appellant's solicitors, in their letter of 27 September 2022, had agreed that all three of the blocks were joined by the underground car park and it was on that basis that the appellant's articles of association had been amended to include Brecon House as part of the premises over which the appellant sought the right to manage. When the Management Company came to respond to the current application its statement of case pointed out that Brecon House was vertically divided above ground from the other two blocks, but it said nothing at all about the underground car park. Mr Fain also relied on the assertion in the appellant's statement of case that all three blocks were joined by the underground car park, which had not been disputed by the Management Company in its response.

32. Against that background Mr Fain submitted that the FTT had been entitled to make the finding of fact in paragraph 13 of its decision that "there is a car park that runs continuously below the three blocks". It had failed to appreciate the consequence of that arrangement, which was that all three blocks were a structurally detached, self-contained building.

33. For the Management Company Mr Bowker relied on the FTT's acknowledgement that there was a car park running continuously below the three blocks and on its conclusion, notwithstanding that fact, that the three blocks were not "a single building for the purposes of the Act". He accepted that there was little or no evidence on which the FTT could base a decision on the construction of the buildings and he acknowledged that the Management Company, having originally asserted that Brecon House was structurally attached to the car park, had then pleaded no case in response to the appellant's assertion that the three blocks were all structurally attached below ground. The Management Company had had no positive case on that issue and Mr Bowker did not consider that he was in a position to explain why the FTT had reached the conclusion it did.

34. The FTT's conclusion in paragraph 13 that the subject premises do not form a single building for the purposes of the Act was, on one view, an acceptance of the Management Company's counter-notice which asserted that the premises were not a self-contained building. However, the FTT did not explain its conclusion and did not direct itself by reference to the statutory test. Section 72(1)(a) requires that a building must be "self-contained". Section 72(2) explains that a building is a self-contained building if it is "structurally detached". The FTT did not refer to the issue of structural detachment anywhere in its decision. The question it addressed in paragraph 13 was whether the

subject premises formed "a single building for the purposes of the Act". It then proceeded to describe what could be seen of the blocks above ground level describing them as "vertically divided above ground … notwithstanding there is a car park that runs continuously below the three blocks." The FTT failed to say what it made of the presence of the car park. I accept Mr Fain's submission that it must be taken to have found that the car park runs continuously below the three blocks. It was therefore necessary for it to come to a conclusion on the extent of the structural connection between the car park and the blocks themselves. If the blocks and the car park (alone) formed a single structurally detached unit then they were a self-contained building for the purpose of the Act, but the FTT did not address that question. If it considered that question and reached a conclusion against the appellant for some specific reason, it failed to state what that reason was. On either basis, its decision cannot stand.

35. I am unable to accept Mr Fain's submission that it was not in dispute before the FTT that the three blocks and the car park comprised a self-contained building. The Management Company had asserted the contrary proposition in its counter-notice, and in its statement of case, although the only reason it gave was that Brecon House was vertically divided above the ground from Harborough/Saltley House. It did not refer to the underground structures, but nor were those structures referred to in the notice of claim which simply identified the subject of the claim In the claim notice the premises identified as the subject of the claim were described simply as Harborough House, Saltley House, and Brecon House, with the postal address of each being given but no indication of the extent of what was intended to be included or excluded below ground level. Nor did the Management Company abandon its general assertion that the blocks did not comprise a self-contained building. The solicitors' letter of 27 September 2022 purported to agree something which had not been asserted by the Management Company, namely that all three buildings were structurally attached to the car park; the only point it made was that Brecon House was structurally attached.

36. It was for the appellant to lead the necessary evidence to demonstrate that the right to manage could be acquired in respect of all three blocks together. The only material provided to the FTT is before me and I do not think it is possible, on the basis of that material alone, to form any conclusion on the critical question. The specific difficulty I have is in interpreting the basement level floor plans in the two sample leases. I find it impossible to be satisfied that the four sides of the quadrangle which I earlier described can be divided into one self-contained building comprising Harborough/Saltley House and Brecon House, and another separate self-contained building comprising Fazeley House alone. The Fazeley House lease plan suggests that it is at least as attached to the underground car park, and therefore to the whole of the subject of the application, as Saltley House which is also shown on the same plan.

37. The conclusion I have reached is that, on the information available, it is not possible to determine whether the structures described in the claim notice are a self-contained building, or part of a building, or whether they are three self-contained buildings or part of a larger self-contained building comprising all four blocks and, if so, whether the three blocks are a self-contained part of that larger structure. The reasons given by the FTT in paragraph 13 of its decision for its determination that the statutory pre-condition was not met did not engage with the issues and did not support its conclusion.

Issue 2: Is the appellant prevented from being an RTM company by the existence of another RTM company whose objects include acquiring the right to manage Brecon House?

38. Section 73, 2002 Act specifies what is an RTM company. Subsection (2) provides that:

> "A company is a RTM company in relation to premises if –
>
> (a) it is a private company limited by guarantee, and
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> (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."

Subsection (4) creates an exclusion, as follows:

> "And a company is not a RTM company in relation to premises if another company is already a RTM company in relation to the premises or to any premises containing or contained in the premises."

39. The Court of Appeal has recently considered section 73(4) in *Assethold v Eveline Road RTM Co Ltd* [2024] EWCA Civ 187, where Lewison LJ explained its purpose as follows, at [40]:

> "Sections 73(4) envisages the theorical possibility of two RTM companies: one in respect of "premises" and another in respect of premises "containing or contained in" the premises. It solves that problem by preventing the second company from being an RTM company."

40. In this case Brecon House RTM Co Ltd was incorporated on the same date as the appellant, 19 May 2022. At that time section 73(4) caused no difficulty, because the appellant's objects did not include the acquisition of the right to manage Brecon House. The position changed when the articles of association of the appellant were amended to include the acquisition of the right to manage Brecon House as one of its objects.

41. The FTT decided, at paragraph 14 of its decision, that the appellant was not an RTM company in respect of the whole of the premises of which it claimed the right to manage because Brecon House RTM Co Ltd remained in existence. Mr Fain submitted that Brecon House RTM Co Ltd was not an RTM company and its objects were therefore irrelevant and did not engage section 73(4). He relied on the explanation of the scheme of Chapter 1 provided by Gloster LJ in *Triplerose,* at [62], which underpinned the Court of Appeal's determination that an RTM company cannot acquire the right to manage more than one set of premises as defined in section 72(1):

> "Accordingly in my judgment the relevant provisions of the Act, construed as a whole, in context, necessarily point to the conclusion that the words "the premises" have the same meaning wherever they are used (save where otherwise expressly provided). That means that the references in section 72 to "premises" are to a single self-contained building or part of the building, and that likewise reference to "the premises" or "premises" or "any premises" in

> section 73, 74, 78, 79 and other provisions of the Act are likewise references to a single self-contained building or part of the building. That interpretation is consistent with the provisions for model articles contained in the Regulations and is the only basis upon which the machinery for acquisition for the right to manage can operate."

42. Mr Fain submitted that the reference to "premises" in section 73(4) meant premises to which Chapter 1 of Part 2 of the 2002 Act apply, as defined in section 72(1). That requires that those "premises" must themselves be a self-contained building or part of a building. It follows that a company which has as its object the acquisition of the right to manage premises which do not comprise a self-contained building or part of a building, as defined in section 72, is not an RTM company.

43. I accept Mr Fain's submission on this point. A company is only an RTM company if it satisfies the description in section 73(2). Thus, a company can only be an RTM company "in relation to premises" and only then if its object is the acquisition and exercise of the right to manage those "premises". Each of the references to "premises" in section 73 is to premises as defined in section 72(1), namely, to a self-contained building or part of a building. A company having as its objects the acquisition and exercise of the right to manage property which does not comprise a self-contained building or part of a building and which therefore does not comprise "premises" for the purposes of the Act (such as a single flat, or a number of flats in different parts of the building), is not an RTM company. In my judgment the existence of a company having those objects, which cannot itself be an RTM company, would not prevent the formation of a properly constituted RTM company whose objects were the acquisition and exercise of the right to manage the whole of the building (or a self-contained part of the building).

44. However, even if the appellant is right that, taken together, all three blocks are a self-contained building, it would still be necessary to determine whether Brecon House alone is or is not a self-contained part of that larger building. If it is, section 73(4) and the existence of Brecon House RTM Co Ltd at the time the appellant changed its objects to include the acquisition of the right to manage Brecon House, would prevent the appellant from being an RTM company in relation to the three blocks.

45. Whether part of a building is a self-contained part is to be determined in accordance with section 72(3) and (4). One requirement is that the part in question must constitute a vertical division of the building. Another is that the structure of the building must be such that it could be redeveloped independently of the rest of the building. Without even a plan of Brecon House showing its relationship to the structures within the underground car park it is not possible to know whether either of these conditions is satisfied. Section 72(4) imposes further conditions in relation to the separation of services, about which there is simply no evidence.

46. I cannot therefore be satisfied that the FTT was correct in its conclusion that the appellant is not an RTM company; the evidence available to it did not justify a conclusion one way or the other. Had it undertaken an inspection of the buildings it may have been able to make the necessary findings of fact. As it is, it made no relevant findings and did not consider the critical questions. I set aside its decision on this issue for those reasons.

Issue 3: The split freehold issue

47. The third issue in the appeal concerns the FTT's statement in paragraph 12 of its decision that the 2002 Act was not intended to enable the right to manage to be acquired where the subject premises comprise a number of blocks whose freeholds are held by different freeholders. The FTT supported that statement with a reference to *Triplerose*, but it is common ground that the proposition to which it referred was contained in a consultation paper which predated the original draft bill and is not a commentary by the Court of Appeal on the Act itself. The Act gives partial effect to the statement in the consultation paper in paragraph 2 of Schedule 6.

48. Schedule 6 identifies premises which are excluded from the right to manage and paragraph 2 provides that:

> "Where different persons own the freehold of different parts of premises falling within section 72(1), this Chapter does not apply to the premises if any of those parts is a self-contained part of the building."

The consequence of parts of a self-contained building being held in different freeholds is therefore more complicated than the simple statement referred to by the FTT.

49. In this case the freehold interest in Saltley House is held by Notting Hill Genesis. The freehold in Harborough House is held by Adriatic Land 3. Saltley House and Harborough House are structurally attached to each other. If one or other is self-contained, as described in section 72(3) and (4), Chapter 1 of Part 2 of the 2002 Act will not apply to the whole of the building.

50. Although there is a little more evidence concerning Saltley House, in the form of one of the sample leases which shows its outline at basement level immediately adjoining the car park, it is not possible from that plan to determine whether it constitutes a vertical division of the larger building comprising the three blocks and the car park, nor it is possible to know whether it could be redeveloped independently of the rest of those structures.

51. The only point Mr Bowker made about this issue was that permission to appeal had not been granted to enable the point to be taken. His only response to Mr Fain's request for permission to appeal to be granted at this stage, was that no explanation had been given why the point had not been taken earlier. That objection does not dissuade me from granting permission to appeal on this issue. The Management Company relied on the split freehold issue and persuaded the FTT that it was fatal to the application, but it did so without adducing the necessary evidence to demonstrate that Saltley House or Harborough House were self-contained. Without that evidence the point ought not to have succeeded.

52. Once again, therefore, although the FTT did not consider the relevant questions and its decision must be set aside, it is not possible for me to make any determination of my own on the basis of the evidence available.

Disposal

53. For these reasons I allow the appeal.

54. On an appeal, having set aside the decision of the FTT, the Tribunal has power either to remit the case to the FTT with directions for its reconsideration, or to re-make the decision (section 12(2), Tribunals, Courts and Enforcement Act 2007). If it decides to re-make the decision the Tribunal may make any decision which the FTT could make and may make such findings of fact as it considers appropriate (section 12(4)).

55. I am unable to make a determination of my own based on the facts found by the FTT and I am unable to make any further findings of fact on the basis of the material which was before it. How should I proceed in this situation? The FTT chose to soldier on in the face of inadequate evidence and poorly developed argument, but it need not have done so. The first and most basic question was whether the applicant had demonstrated that the premises over which it sought to acquire the right to manage were premises to which Chapter 1 of Part 2 of the 2002 Act applied. It provided no evidence on that issue. The parties had each agreed that the application should be determined without a hearing and there was no obligation on the FTT to conduct an inspection of its own to obtain evidence which the parties had neglected to provide (nor is there any such obligation on this Tribunal). In the circumstances the only options available to the FTT were to dismiss the application as unproven or to give directions for additional evidence.

56. Sending the matter back to the FTT for reconsideration of the current application seems to me to be the least satisfactory disposal of this appeal. The application has not been properly thought through and is vulnerable on a number of fronts, not least on the fundamental question of what premises below ground level, if any, are included in the claim and whether any or all of the components of those premises are self-contained. The better course, for both parties, is to dismiss the application as unproven, and to leave the qualifying tenants to consider the issues properly before serving such further notices and making such further application or applications as may be appropriate.

57. The appeal is therefore allowed but, after reconsideration of the application for a determination that the appellant is entitled to acquire the right to manage, that application is dismissed.

Martin Rodger KC,

Deputy Chamber President

2 May 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which

case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.