FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LRM/2021/0004**
HMCTS code (paper, video, audio)		**V: CVPREMOTE**
Property	**:**	**15 Greyhound Lane London Sw16 5NP**
Applicant	**:**	**15 Greyhound Lane RTM Company Limited**
Representative	**:**	**The Leasehold Advice Centre**
Respondent	**:**	**Assethold Limited**
Representative	**:**	**Scott Cohen Solicitors Limited**
Type of application	**:**	**Application in relation to the denial of the Right to Manage**
Tribunal member(s)	**:**	**Judge Pittaway** **Mr T Sennett**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**24 July 2021**

DECISION on PRELIMINARY ISSUES

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: SKYPEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

At the hearing Mr Gallagher of counsel represented the Applicant, and Mr Bates of counsel represented the Respondent and the Tribunal heard submissions from both counsel.

The documents that the tribunal was referred to are a bundle of 142 pages, and the skeleton arguments on behalf of the Applicant and Respondent provided to the tribunal on the day of the hearing, the contents of which it has noted.

Decisions of the Tribunal

1. The onus of establishing that an RTM company is entitled to acquire the right to manage is on the company itself.

2. The roof spaces and the basement at the property are intended to be occupied for residential purposes.

3. The roof spaces and the basement are not 'flats' for the purposes of the Commonhold and Leasehold Reform Act 2002. Accordingly the lessees of those areas were not qualifying tenants and the Applicant did not therefore need to serve on them notice of invitation to participate.

The reasons for the Tribunal's decsions are set out below.

Background

4. The tribunal has received an application under section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("the **Act**") for a determination that, on the relevant date, the Applicant RTM company was entitled to acquire the Right to Manage premises known as 15 Greyhound Lane London SW15 5NP ("the **property**") following a claim notice served by the Applicant dated 10 November 2020 and a counter notice dated 16 December 2020 in which the Respondent freeholder disputed the claim alleging that the Applicant had failed to establish compliance with section 72(6) of the Act. The Respondent alleged that the Applicant is not entitled to aquire the right to manage the property because it is not one to which the relevant chapter of the Act applies by reason of the non-residential proportion of the property, and the provisions of Schedule 6 of the Act.

5. Directions were issued on 17 March 2021 and Further Directions on 27 May 2021. The latter Directions provided for there to be a preliminary hearing to determine

(a) Whether the basement and roof space of the property constitute residential or non-residential parts for the purposes of assessment and qualification of the property in the calculation of the non-residential part of the bulding; and

(b) Whether the lessees of the basement and roof spaces are qualifying tenants of a 'flat' for the purposes of the Act and therefore entitled, or not, to receive notice of invitation to participate.

6. At the hearing both counsel made submissions, as to the burden of proof as well as in relation to the points identified above.

Submissions

Burden of proof

7. For the Applicant Mr Gallagher submitted that if the Respondent wished to argue that the property was excluded from the Right to Manage provisions of the Act by reason of the exceptions set out in Paragraph 1 of Schedule 6 of the Act the burden of proof was on the Respondent to make out the factual basis of the exclusion that it relies on, it could not simply put the Applicant to proof. He submitted that the burden of proving whether or not the roof space and basement were non-residential lay with the Respondent because the provisions in paragraph 1 of Schedule 6 were exclusionary. He submitted the Respondent had failed to adduce any evidence that the roof spaces (the **'Roof Spaces**') above the first and second floor flats demised by the lease dated 10 April 2017 (the **'Roof Spaces Lease"**) or the basement (the '**Basement')** demised by a lease dated 30 August 2019 (the '**Basement Lease'**) were non-residential. Alternatively he submitted that once the Applicant had raised a prima facie case it was then for the Respondent to rebut it. Further in the alternative he submitted that if the burden of proof lay with the Applicant it was for the Tribunal to reach a decision on the balance of probabilities. The Respondent had provided no evidence while Mr Gallagher invited the Tribunal to consider the evidence of the terms of the leases, and the auction particulars from when the Roof Spaces Lease was sold.

8. For the Respondent Mr Bates referred the tribunal to the decision in *Assethold Ltd v 63 Holmes Road (London) RTM Co Ltd* [2020] UKUT 0228 (LC) ('**the *Holmes case'***), and in particular paragraph 37 which states that the onus of establishing that an RTM company is entitled to acquire the right to manage is on the company itself, and that the landlord's right of challenge was not limited to the company's assertion that the qualifying conditions had been satisfied.

9. Mr Gallagher submitted that the *Holmes case* was distinguishable as it related to issues of procedural fairness not the exception provisions of Schedule 6, relating to the Respondent's

entitlement to information it required to make its statement of case, not the extent of non-residential use.

Are the roof spaces and basement residential, non-residential or common parts?

10. Mr Gallagher submitted that for the roof spaces and the basement to be 'non-residential' they must not be occupied or intended to be occupied for residential purposes, or must not be common parts.

11. Mr Gallagher referred the Tribunal to clause 3.18 of each of the Roof Spaces Lease and the Basement Lease which contain a covenant by the tenant. '*at all times during the Term use the Demised Premises for residential purposes only.'* In his submission the exclusive residential user in the leases is the best evidence before the Tribunal of the intended use of these spaces for residential purposes. Storage by an occupier of one or more of the flats in the building would be user for 'residential purposes'. Schedule 6 paragraph 1(3) extends the meaning of 'residential purposes' to storage accommodation used in connection with a particular dwelling.The Roof Spaces can only be accessed from two of the flats. The areas can only be used in connection with those flats. The basement is acessible by all of the flat tenants and thus available to them all for ancillary storage. He submitted that the Respondent had adduced no evidence to contradict this. He submitted that the auction particulars from when the Roof Spaces Lease was sold at auction which describe the space as, 'a residential development opportunity' was a further indication of the intended use of the areas.

12. Alternatively Mr Gallagher submitted that the roof spaces and basement are 'common parts' and could be such even when the leaseholders did not have access to them. He referred the Tribunal to the decision in *LM Homes v Queen Court Freehold* [2020] QB 890 (CA) in support of his submission that it was the function to which areas were put, not title ownership, that is relevant.

13. As a further alternative Mr Gallagher submitted that the demises were not susceptible of measurement, and therefore did not fall within any of the three categories of non-residential, or used for residential purposes or common parts. The Roof Spaces demise was of, '*roof spaces above the first floor and the second floor',* without any reference to a floor. Mr Gallagher submitted that if the roof spaces and basement were intended to be occupied for residential purposes or that they were common parts it was a necessary implication that any such area must have a floor as the 25% qualification in the Act is by reference to 'internal floor area'. Further these areas are not susceptible of measurement because both the Roof Spaces and Basement have severe height restrictions.

14. Mr Bates submitted that whether something is occupied or intended to be occupied for residential purposes is a question of fact, referring the Tribunal to the decision in *Q Studios (Stoke) RTM Co Ltd v Premier Ground Rents No.6 Ltd* [2020] UKUT 197 (LC) in which it was

held that the studios in question were not non-residential parts of the Premises even though neither the lessee nor underlessee intended to occupy the studios for residential purposes, because it was the intention that non-lessee students occupy them for residential purposes. Mr Bates submission was that the Applicant had provided no evidence from the lessees of the Roof Spaces and Basement as to their intention in respect of these areas, arguing that clause 3.18 in each lease was not evidence of intent and that there was no evidence before the Tribunal of the individual leasholders to use their respective premises for residential purposes.

15. As to Mr Gallagher's submission that the leases comprise 'common parts' Mr Bates submitted that they were not, they are self-contained areas with their own leases. Mr Bates submitted that it was not appropriate to extrapolate decisions made on 'common parts' under the Leasehold Reform, Housing and Urban Development Act 1993 to the Act. The 1993 Act contains an extensive definition of common parts, whereas the Act does not define this term at all.

16. As to the Air Spaces and Basement being excluded from being non-residential parts because they cannot be measured Mr Bates submitted that the Tribunal cannot read words into Schedule 6 that are not there. The measuring process may be difficult but paragraph 1(4) Schedule 6 of the Act sets out the hypothetical assumptions to be used.

<u>Are the Roof Spaces and Basement 'flats' for the purposes of the Act?</u>

17. Mr Gallagher submitted that as neither the Roof Spaces nor the Basement were adapted for the purposes of a dwelling they are not 'flats' for the purposes of the Act and their lessees accordingly are not qualifying tenants.

18. Mr Bates submitted that if the areas are intended to be used for 'residential purposes' then they are also flats. As no notice of invitation to participate was served on the lessees of either the Roof Spaces or the Bsement the Applicants claim must fail.

Mr Bates referred the Tribunal to s112 of the Act which defines a flat as,

'a separate set of premises (whether or not on the same floor)-
(a) Which forms part of a building,
(b) Which is constructed or adapted for use for the purpose of a dwelling, and
(c) Either the whole or a material part of which lies above or below some other part of the building';

and to the definition of 'dwelling' in that section, which is as a building or part of building occupied or intended to be occupied as a separate dwelling.

In Mr Bates' submission if the areas are intended to be occupied for 'residential purposes' then they are also intended to be occupied as a separate dwelling.

Reasons for the tribunal's decisions

19. The provisions of the Act to which the Tribunal referred in reaching its decision are set out are set out in the Appendix to this decision.

Burden of Proof

20. The application is that of the RTM Company. The Tribunal do not accept the distinction made by Mr Gallagher as a reason for not applying the *Holmes case*. Accordingly the Tribunal find that the onus of establishing that an RTM company is entitled to acquire the right to manage is on the company itself. It is for the RTM Company to establish on the balance of probabilities that the property is one to which Chapter 1 of Part 2 of the Act applies and that it does not fall within the exceptions set out in the Sixth Schedule paragraph 1.

Are the roof spaces and basement residential, non-residential or common parts?

21. The tribunal does not consider the Roof Spaces or the Basement to be 'common parts'. It notes that neither the Roof Spaces Lease nor the Basement Lease define 'common parts'. The rights over common areas granted to each tenant (and the Tribunal presumes to the tenants of each of the flats) are limited, in paragraph 4 of the Second Schedule of each lease to, 'Full right and liberty for the Tenant and all persons authorised by him (in common with all other persons entitled to like right) at all times by day or night to go pass and repass over and along the pathways staircases and common passages of the Building (if any) giving access to and from the Demised Premises.' Neither the Roof Spaces nor the Basement is referred to. Further an express right of access to the utilities in the Basement is reserved to the Landlord and the other tenants in paragraph 5 of the Third Schedule of the Basement Lease, indicating that these were not considered to be in a common part.

22. The tribunal does not find that the Air Spaces and Basement should be treated as non-measureable because of the absence of a floor in the Air Space or the restricted height of each area. The Tribunal notes that the Air Spaces Lease expressly refers to the floors of the Demised Premises in the description of the premises demised. The Tribunal accepts Mr Bates submission that if the areas require measurement it can be on the hypothetical basis set out in the Act.

23. The tribunal find that on the balance of probabilities it is the intention of each of the lessees of the Air Spaces and the Basement to use

the areas for residential purposes. There is no evidence before it of any intention to use the areas for any other purpose. It agrees with Mr Gallagher that the best evidence before it is clause 3.18 of each lease. These clauses evidence that the landlord who granted each lease intended that the use should be for residential purposes. This is clearly stated and each lessee must be aware of this requirement. It is difficult to see what other use the lessees could intend in the circumstances, as any other use would be in breach of the terms of its lease. The premises may not be so used now but the Tribunal have seen no evidence of any other intention on the part of the lessees.

Are the Roof Spaces and Basement 'flats' for the purposes of the Act

24. The Tribunal do not find, as submitted by Mr Bates, that an area intended for residential purposes is of necessity occupied as a seperate dwelling. Storage, which can be a residential purpose if used in connection with the residential premises to which it is connected, it is not a separate dwelling. In this case the Roof Spaces can only be used in connection with the flats on the first and second floors by reason of no alternative means of access. The Roof Spaces are therefore not separate dwellings, and according not 'flats'. Further, at the relevant date neither the Roof Spaces nor the Basement had been constructed or adapted for use for the purpose of a dwelling. Accordingly neither was a 'flat', the lessees were not qualifying tenants and the Applicant did not therefore need to serve on them notice of invitation to participate.

Name: Judge Pittaway **Date:** 24 July 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Relevant legislation

Commonhold and Leasehold Reform Act

Section 75 Qualifying tenants

(1)This section specifies whether there is a qualifying tenant of a flat for the purposes of this Chapter and, if so, who it is.

(2)Subject as follows, a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease.

(3)Subsection (2) does not apply where the lease is a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies.

(4)Subsection (2) does not apply where—

(a)the lease was granted by sub-demise out of a superior lease other than a long lease,

(b)the grant was made in breach of the terms of the superior lease, and

(c)there has been no waiver of the breach by the superior landlord.

(5)No flat has more than one qualifying tenant at any one time; and subsections (6) and (7) apply accordingly.

(6)Where a flat is being let under two or more long leases, a tenant under any of those leases which is superior to that held by another is not the qualifying tenant of the flat.

(7)Where a flat is being let to joint tenants under a long lease, the joint tenants shall (subject to subsection (6)) be regarded as jointly being the qualifying tenant of the flat.

Section 78 Notice inviting participation

(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.

(4)A notice of invitation to participate must either—

(a)be accompanied by a copy of the articles of association of the RTM company, or

(b)include a statement about inspection and copying of the articles of association of the RTM company.

(5)A statement under subsection (4)(b) must—

(a)specify a place (in England or Wales) at which the articles of association may be inspected,

(b)specify as the times at which they may be inspected periods of at least two hours on each of at least three days (including a Saturday or Sunday or both) within the seven days beginning with the day following that on which the notice is given,

(c)specify a place (in England or Wales) at which, at any time within those seven days, a copy of the articles of association may be ordered, and

(d)specify a fee for the provision of an ordered copy, not exceeding the reasonable cost of providing it.

(6)Where a notice given to a person includes a statement under subsection (4)(b), the notice is to be treated as not having been given to him if he is not allowed to undertake an inspection, or is not provided with a copy, in accordance with the statement.

(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.

Section 112 Definitions

(1)In this Chapter—

- "appurtenant property", in relation to a building or part of a building or a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the building or part or flat,
- "appropriate tribunal" means—

  (a) in relation to premises in England, the First-tier Tribunal or, where determined by Tribunal Procedure Rules, the Upper Tribunal; and

  (b) in relation to premises in Wales, a leasehold valuation tribunal;
- "copy", in relation to a document in which information is recorded, means anything onto which the information has been copied by whatever means and whether directly or indirectly,
- "document" means anything in which information is recorded,
- "dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling,
- "flat" means a separate set of premises (whether or not on the same floor)—

  (a) which forms part of a building,

  (b) which is constructed or adapted for use for the purposes of a dwelling, and

  (c) either the whole or a material part of which lies above or below some other part of the building,
- "relevant costs" has the meaning given by section 18 of the 1985 Act,
- "service charge" has the meaning given by that section, and
- "unit" means—

  (a) a flat,

  (b) any other separate set of premises which is constructed or adapted for use for the purposes of a dwelling, or

  (c) a separate set of premises let, or intended for letting, on a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies.

SCHEDULE 6 PREMISES EXCLUDED FROM RIGHT TO MANAGE

1. Buildings with substantial non-residential parts

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.

(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.