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Case No: LC-2024-516

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT REF: LON/00BB/LRM/2023/0043

4 December 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – RIGHT TO MANAGE – paragraph 1 of Schedule 6 to the Commonhold and Leasehold Reform Act 2002 - buildings with substantial non-residential parts – meaning of "internal floor area"

BETWEEN:

INTERFACE PROPERTIES LIMITED

Appellant

-and-

307 BARKING ROAD RTM COMPANY LIMITED

Respondent

309 Barking Road,
Plaistow,
London, E13 8EE

Upper Tribunal Judge Elizabeth Cooke and Mark Higgin FRICS FIRRV
18 November 2024

Mr Thomas Cockburn for the appellant, instructed by Lester Dominic Solicitors
Mr Stan Gallagher for the respondent, instructed by Salisbury Law

The following cases were referred to in this decision:

Connaught Court RTM Company Limited v Abouzaki Holdings Ltd [2008] 3 EGLR 175
Indiana Investments Ltd v Taylor [2004] 3 EGLR 63
R (Ball) v Hinckley & Bosworth Borough Council [2024] PTSR 1344

Introduction

1. This is an appeal from a decision of the First-tier Tribunal that the respondent is entitled to acquire the right to manage the building at 307 Barking Road, London E13. The appellant freeholder challenges that decision on the basis that the internal floor area of the non-residential parts of the building exceeds 25% of the internal floor area of the premises. The Tribunal therefore has to look at the requirements of paragraph 1 of Schedule 6 to the Commonhold and Leasehold Reform Act 2002.

2. The appellant was represented in the appeal by Mr Thomas Cockburn and the respondent by Mr Stan Gallagher, both of counsel, and we are grateful to them. We visited the building on 11 November 2024 and we thank the parties for allowing us access.

The legal background

3. Chapter 2, Part 1, of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") enables qualifying tenants of a self-contained building, or a self-contained part of a building, to acquire the right to manage it, through a nominee company known as an RTM company, on a no-fault basis; there is no need to prove that the landlord is not managing it properly. Section 72 of the 2002 Act says this:

> "(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."

4. The statute defines qualifying tenants as tenants under long leases and defines long leases. It prescribes a procedure for the acquisition of the right to manage, and there is well-known case law on what happens when that procedure is not properly followed. In the present case, the respondent's right to acquire the right to manage is challenged on substantive, not procedural grounds, namely that this is the wrong sort of building. The first paragraph of Schedule 6 to the 2002 Act says this:

> "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."

5. The obvious purpose of those provisions is to ensure that landlords are not deprived of their right to manage the building when substantial parts of it are non-residential; so a building more than one quarter of whose floor area is in commercial use is exempt from the right to manage provisions.

6. Provisions with almost the same wording and to the same effect are to be found at section 4(1)-(3) of the Leasehold Reform Housing and Urban Development Act 1993, which excludes premises from the right to collective enfranchisement where the premises have substantial non-residential parts. The explanatory note to the 2002 Act refers to paragraph 1 of Schedule 6 mirroring the exclusion from the right to collective enfranchisement.

7. We were referred to just two cases about these provisions. *Indiana Investments Ltd v Taylor* [2004] 3 EGLR 63 was a decision of the county court about section 4 of the 1993 Act, while *Connaught Court RTM Company Limited v Abouzaki Holdings Ltd* [2008] 3 EGLR 175 was a decision of the Lands Tribunal (HHJ Reid QC). Neither is binding upon us and neither addresses the issue in the present appeal which is as follows. The building contains commercial premises on the ground floor, four flats, and two roof voids. If the internal floor area of the whole building is taken to include the roof voids, and those are regarded as non-residential areas, then the proportion of non-residential areas in the building is more than 25% and the respondent cannot acquire the right to manage. If either or both is excluded then the respondent is entitled to acquire the right to manage. The FTT found that the roof voids were not part of the internal floor area of the building and that the right to manage was acquired.

The building, the evidence and the decision in the FTT

8. The appellant is the freeholder of 307 Barking Road ("the property"); the respondent RTM company seeks to acquire the right to manage the property on behalf of three of the four residential tenants. The property is a three-storey late nineteenth-century building at the end of a terrace; viewed from the front it is at the left-hand end. On the ground floor are commercial premises and a ground floor flat at the rear. On the first and second floors are three flats, and Flat D occupies the second floor. There are common parts, including a staircase by which the flats are reached. The staircase is narrow and steep; outside the top floor flat is a landing big enough for one person to stand on.

9. The property has a butterfly roof: looked at from the front or back the profile of the roof is a V. The two halves of the roof do not interconnect and a gutter runs between them taking

water to the back of the property. The right-hand roof forms an apex with the left-hand roof of number 309, the next one along the terrace, whereas the left-hand roof forms an asymmetrical apex with the left-hand flank wall of the property. In cross-section they form two right-angle triangles with the hypotenuse of each forming the roof slope.

10. The right-hand roof void can be accessed using a step-ladder through a hatch in the ceiling of Flat D (there are neither stairs nor a pull-down ladder). But it is not demised with the flat so the lessee of Flat D has no right to go up there. Equally, as things stand, the landlord has no access without the tenant's permission. It would be possible to construct a hatch from the landing to give access from the undemised part of the building; it would also be possible for the landlord to construct an access from the roof space above number 309 through the party wall. But neither of those things has been done.

11. As we have already said, the internal cross-section of the void or loft is triangular; at its tall side, but nowhere else, it might be high enough for a person to stand up (cautiously, on a joist: the Tribunal did not venture into the loft but looked in through the hatch from the top of the step-ladder). This is a photograph of the interior of the roof space:

12. The void has no floor, only joists between which the upper surface of the ceiling of Flat D can be seen. There is some roof insulation lying around. Attached to one of the rafters is a notice which reads:

> "Danger: Ceiling joists may be covered by insulation material. The floor between the joists is fragile and it will not carry your weight. You should not enter unless crawl boards are placed against the joists."

13. There is no access to the left-hand roof void; what if anything is in there is not known. It is not a continuous space because a skylight in the roof provides daylight for one of the bedrooms in Flat D.

14. There is an extension at the back of the building, perhaps constructed when it was converted to flats, and it has a roof with a shallow void. References to "the roof voids" in this decision do not include the space within the extension roof; the appellant did not seek to argue that that space was part of the internal floor area of the building. Why that area was not part of the appellant's case is not known, and Mr Cockburn said that the omission of that area was not to be taken as a concession that its floor area was not part of the floor area of the building.

15. When the respondent served its claim notice in order to acquire the right to manage one of the grounds of opposition set out by the appellant in its counter-notice was that the proportion of non-residential floor area in the building exceeded 25% and that therefore the building was excluded by paragraph 1 of Schedule 6 to the 2002 Act. The respondent said that the two roof voids above the second floor (but not the one above the back extension) were part of the "internal floor area of the premises (taken as a whole)". Once proceedings were commenced in the FTT directions were given for the instruction of a single joint expert to measure the internal floor area of the residential and non-residential parts so as to provide the figures necessary for the calculation required by paragraph 1 of Schedule 6.

16. Mr Artur Manzukok MRICS of Ambit Surveys was instructed and produced a report setting out the internal floor area of the building, excluding common parts as required by paragraph 1 of Schedule 6, and excluding the roof voids. He excluded the roof voids because the *Royal Institution of Chartered Surveyors Property Measurement Code (2nd edition, 2018)* excludes such spaces from its definition of Net Internal Area and Gross Internal Area. As the report put it:

> "A non-habitable under-roof space or a loft conversion cannot be used for living and therefore cannot be considered for measuring and calculating NIA. An attic can be included in GIA if there is access to it via a fixed, permanent stairway or ladder, but not if by a pull-down ladder. Void loft spaces should be excluded within GIA assessment of the building."

17. As it was the appellant's cases that the two roof voids should be included the surveyor was then instructed to measure them, which he did by deducing the dimensions from the interior of Flat D. It is not in dispute that if both the roof voids are included in the total internal floor area of the building, and in the floor area of the non-residential parts of the

building (thus the whole gets bigger and the non-residential parts become a higher proportion of the whole), then the property is excluded from the right to manage provisions; if either of the voids is not included then the building is not within the terms of paragraph 1.

18. The FTT expressed its decision about the roof space as follows:

> "28. The Tribunal is satisfied from our inspection that the roof space is dead space The only access is from a hatch in the top floor flat. The tenant has no contractual right to use this space. This limited roof space is retained by the landlord. However the landlord has no practical means of access to this space. Even if it did, the landlord could make no practical use of it.
>
> 29. The Tribunal is satisfied that the roof space should not be taken into account in computing any "non-residential part" of the premises. It is therefore common ground that the non-residential parts of the Premises do not exceed 25%."

19. So the FTT's decision was that the roof space was to be excluded from the internal floor area because it is "dead space", being neither accessible nor usable. The appellant has permission to appeal that decision.

The arguments in the appeal

The appellant's case

20. For the appellant, Mr Cockburn expressed the issue in the appeal as follows:

> "Should a non-residential part of premises falling within section 72(1) of the Commonhold and Leasehold Reform Act 2002 that is inaccessible to the landlord and unfloored as at the 'relevant date' be treated as part of the 'internal floor area' of the premises for the purposes of paragraph 1(1) of Schedule 6 to the Act?"

21. The appellant's case is that neither the fact that it is unfloored, nor the fact that it is presently inaccessible to the landlord, excludes it from the calculation of the internal floor area of the premises. The appellant also says that the roof voids could potentially be of use to the appellant, contrary to the FTT's finding, but acknowledges that that by itself is not a sufficient basis on which to set aside the FTT's decision.

22. Mr Cockburn argued that while "internal floor area" is not defined in paragraph 1 of Schedule 6, paragraph 1(4) prescribes a methodology for measuring the internal floor of the whole building and of the non-residential parts:

> "(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."

23. The language of that provision, said Mr Cockburn, is wide, emphasising the extent of the floor area "without interruption", "throughout" the building and indeed "the whole of the interior". The wording permits no gloss by which qualifications may be introduced other than those defined by the statute (such as the exclusion of the common parts). There is no exclusion of parts of the building that do not have flooring or are inaccessible, and no adoption of any extraneous definition of internal floor area such as that of the RICS Code. To imply any such qualifications would be to contradict the express words of the statute, which is an illegitimate approach to statutory construction (*R (Ball) v Hinckley & Bosworth Borough Council* [2024] PTSR 1344, where the Court of Appeal referred to *Bennion* at page 426, "An implication cannot properly be found which goes against an express statement").

24. Mr Cockburn referred to the respondent's reliance on the RICS definition of "floor area" in *Property Measurement 2nd ed* :

> "The area of a normally horizontal, permanent, load-bearing structure for each level of a Building"

and contended that the roof voids have a "floor" that complies with that definition; the notice in the right-hand void refers to "the floor between the joists", and even if that area will not carry weight it has not been suggested by the respondent that the joists are not load-bearing. The term "floor" does mean a surface for walking on but in addition it is wide enough to encompass the bottom or base of any area.

25. In any event, according to Mr Cockburn, paragraph 1(4) does not require there actually to be a floor in all parts of the internal floor area. The floors of the building are to be 'taken to extend". It is a deeming provision that applies even if the surface for walking upon does not in actual fact extend throughout the whole of the area.

26. Mr Cockburn argued that the following points also support the appellant's case:

    a. The use of the definite article in paragraph 1(1) before "internal floor area", which he said indicates that it is assumed that every non-residential part will have an internal floor area.
    b. The fact that in *Indiana Investments* it was said that a sealed and completely inaccessible coal vault was to be included in the floor area – albeit that finding was *obiter* since the judge ultimately found that the vault was not part of the building.
    c. The conclusion in *Indiana Investments* that the width of non-permanent wall facings ("ashlars") (which was, in effect, "dead space") was to be included within the calculation of the internal floor area.
    d. The absence of any reference in paragraph 1(4) of Schedule 6 to the condition of the part being measured. Mr Cockburn suggested that if the respondent's argument was correct then an RTM company could take advantage of the renovation of commercial premises by serving a s79 notice at a time when the floor had been temporarily lifted.
    e. The appellant's construction is consistent with the only other use of the term "internal floor area" in the 2002 Act. Section 103(4) uses it as the

reference point by which the proportion of service charges payable by a lessee who is not a qualifying tenant is calculated as follows:

> "the appropriate proportion in the case of each such person is the proportion of the internal floor area of all of the excluded units which is internal floor area of the excluded unit in relation to which he is the appropriate person."

If that calculation were dependent upon there being a particular "floor covering", as Mr Cockburn put it, a tenant could escape liability for contributions to the service charge by stripping out the flooring during a period of non-occupation. That is clearly contrary to the scheme of s103.

27. Mr Cockburn then turned to the other aspect of the FTT's finding, namely that the landlord would not have been able to use the roof voids even if it had access to them. It is not in dispute that the appellant has applied for planning permission to replace the butterfly roof with a mansard arrangement and to use the resulting space for storage, gaining access through the partition from number 309. Permission has been refused, but it may be sought again. The current condition of the right-hand roof void does not prevent flooring being laid and the space being used for such purposes as storage.

The respondent's case

28. For the respondent, Mr Gallagher contended first that in a literal construction of the statute, to be part of the internal floor area of the building a space must have a floor. The roof voids do not, and that alone, he said, was sufficient to uphold the FTT's conclusion.

29. Beyond that, Mr Gallagher argued that the term "internal floor area" must "import a limitation or qualifying criterion", namely that areas of no practical use are excluded. That is essential, he said, to avoid an absurd result. It cannot be right to include, for example, a void beneath the ground floor, too shallow for use as a cellar, a roof void with a height of only a few inches, or the floor area created by adding a false floor part-way up the height of a room. Without some limitation, some "de minimis" qualification, absurd results would follow and the way to avoid that and to achieve the purpose of the statutory provision is to exclude areas that cannot be used.

30. Mr Gallagher pointed out that Schedule 6, paragraph 1, requires an assessment of the building by taking a snapshot in time; what matters is its condition now, not what might be done in the future if the building were developed.

Discussion and conclusion

The nature of the appeal

31. This is of course an appeal on a point of law. The appellant disagrees with the FTT's construction of the relevant statutory provision. Nevertheless some of the appellant's arguments appear to question the facts to which the FTT had regard. In particular, it is argued that the base of the right-hand roof-void is a floor, meeting the RICS' definition and meeting the dictionary definition which extends to the base of an area.

32. At paragraph 27 of the FTT's decision the FTT said: "The roof space is unfloored". That was not expressed as a finding of fact, but as an observation made in the course of the site visit. Insofar as it is a finding of fact the appellant does not have permission to appeal it, but in any event it could not sensibly be challenged. The space between the joists of the roof void that we saw, of which we reproduced a photograph above, is not a floor. It is the upper surface of a ceiling. No-one could realistically call it a floor, and the notice pinned to the rafter is incorrect insofar as it refers to a floor.

33. That much is obvious without the need for a dictionary or for any technical specification. The Shorter English Dictionary defines a "floor" as "the under surface of the interior of a room"; of course the word can be used in other senses, but only in other contexts – so we can talk about the ocean floor but that is no guide to what might be regarded as a floor in a building. The RICS definition (a "normally horizontal, permanent, load-bearing structure for each level") captures what is normally meant by a floor, and what is seen in the right-hand roof void cannot be regarded as satisfying that definition or any common-sense view of what a floor is.

34. We proceed on the basis that the right-hand roof void has no floor. And there is no evidence that the inaccessible left-hand void has a floor.

35. The appellant also disagrees with the FTT's view that the landlord would not be able to use the roof void if it had access to it. We regard that as an inference drawn from the facts rather than a finding of fact, but in any event the appeal fails even if the FTT was wrong about it.

The meaning of "internal floor area"

36. We have to construe paragraph 1 of Schedule 6 to the 2002 Act so as to decide whether the roof voids, being non-residential parts of the building, are part of the "internal floor area of the premises (taken as a whole)". The respondent did not suggest that the roof voids are a residential area on the basis that they are or were intended as storage spaces for the top floor flat and therefore intended to be occupied for residential purposes (paragraph 1(3)); the parties agreed that the building had been converted to flats some time after its construction so that that could not be taken to have been the purpose of the roof voids. So if they are included they are non-residential parts of the building.

37. Furthermore, neither party argued that paragraph 1 of Schedule 6 should be read as if it incorporated the criteria set out in the RICS' *Property Measurement (2nd edition)* for Gross Internal Area or Net Internal Area. Previous decisions have not done so, and in *Indiana Investments* the judge suggested that those criteria should be "applied with circumspection" and indeed did not follow them.

38. We turn to the words of the paragraph itself. We do not agree that the use of the definite article before "internal floor area" in paragraph 1(1) means that it is assumed that all parts of the building have a floor. Rather, it is for the parties and the FTT to ascertain what that area is in order to do the calculation required by paragraph 1. We agree with the appellant that "floor area" is not defined, and that paragraph 1(4), which we repeat for ease of reference, is a deliberately wide provision:

> "(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. There is no express stipulation there that the space concerned must be in use or potentially useful, and we agree with the appellant that such a stipulation should not be implied or inferred; had Parliament wanted to make that a requirement it would have said so. Therefore, although we agree with the appellant that it could potentially use at least the right-hand void for storage if access were constructed via the landing or the next-door roof, we also agree that that is not relevant to the decision whether that void is now part of the internal floor area of the premises.

40. Digressing for a moment, it might perhaps be thought odd that usefulness, or potential usefulness, is not mentioned in paragraph 1 of Schedule 6. Its purpose is to protect the landlord's right to manage the non-residential areas when they are substantial, and therefore parts of the building that are not usable are irrelevant. But Parliament chose not to achieve its purpose that way, perhaps because usefulness, or being useable, is an imprecise concept and could generate considerable argument.

41. A floor, by contrast, is physical and obvious. It is a continuous surface, whether that is the earth floor of a cellar or boards laid over joists. Its presence or absence is obvious, without importing any technical language or specification, or any requirement about the extent of the load that a floor will bear. There are of course bad floors and good ones. But the minimum requirement to be part of the internal floor area of a building is the presence of a floor.

42. We agree that paragraph 1(4) is a deeming provision. But it is aimed at interruptions such as non-structural partitioning (hence the "ashlar" in *Indiana Investments*, which closed off space under the eaves of a room in order to support a radiator). It may be aimed at temporary interruptions, so that an area that is normally floored but has had its floor taken up for repair would be included. That is what we think is meant by "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", and we do not understand that wording to encompass areas that do not actually have a floor. A space that might have a floor one day, or even a space that is going to have a floor because planning permission has been granted for development, is not – at the point in time when paragraph 1 of Schedule 6 is relevant – part of the internal floor area of the premises.

43. That alone eliminates the most absurd of possible results. The shallow roof void postulated by Mr Gallagher is most unlikely to have a floor and therefore will not be within the calculation. It accords with the purpose of the statutory provision which is to protect the landlord's right to manage the non-residential parts of the building when they are substantial, because an area without a floor is most unlikely to have a use and therefore does not need to be managed.

44. We do not regard that construction as causing any difficulty in the context of section 103(4) of the 2002 Act (see paragraph 26(e) above); the idea that "internal floor area"

refers to areas that have, or normally have (excluding temporary interruptions), a floor is likely to be as appropriate in the context of service charges as it is in the context of the assessment of the non-residential parts of the building for the purpose of the right to manage.

45. That eliminates the right-hand roof void in the present appeal, and therefore the appeal fails because it is agreed that if either roof void is taken out of the calculation the respondent is entitled to acquire the right to manage. In any event it also eliminates the left-hand roof space, to which no access at all is possible at present and whose internal condition cannot be known; it is most unlikely to have a floor, and the appellant cannot show that it has a floor.

46. The FTT's decision therefore stands, albeit on the basis of different reasoning.

47. The FTT regarded accessibility, and potential usefulness, as crucial. As we have said above, potential usefulness is not a criterion that can be extracted from paragraph 1 of Schedule 6. As to accessibility, we do not agree that the absence of legal access for the landlord to the right-hand roof is relevant; to import such a requirement would contradict the deliberately wide wording of paragraph 1(4). Whether physical accessibility is relevant is another matter; arguably an area to which there is no present access and to which access could not be gained without making physical changes to the building is not within the natural meaning of "internal floor area". That would also accord with the purpose of the statutory provision which is to protect the landlord's right to manage substantial non-residential parts of the building, to which inaccessible spaces are even more obviously irrelevant than unfloored spaces. But we do not have to decide that in the present appeal.

48. Accordingly although we disagree with the FTT's reasoning, and in particular with what the FTT said, the appeal fails because we have reached the same result as the FTT, albeit by different reasoning which does not add to the words of the statute.

Conclusion

49. In conclusion, the appeal fails. Neither of the roof voids has a floor and therefore neither is part of the internal floor area of the premises taken as a whole. The FTT's decision was correct: the RTM company was entitled to acquire the right to manage. It is agreed that the date for that acquisition was wrongly said by the FTT to have been 23 November 2023 when in fact it was 24 July 2023; and the FTT's order that the appellant pay the respondent's costs of the FTT proceedings remains undisturbed.

Upper Tribunal Judge Elizabeth Cooke **Mark Higgin FRICS FIRRV**

4 December 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.