



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

Case Reference : **MAN/00CM/LRM/2018/0010**

Property : **Bodlewell House, High Street East,
Sunderland SR1 2AU**

Applicant : **Bodlewell House RTM Company Limited**

Respondent : **Ground Rent Trading Limited**

Type of Application : **Commonhold and Leasehold Reform
Act 2002 - Section 84(3)**

Tribunal Members : **Judge W.L. Brown
Mr I D Jefferson TD, FRICS**

Date of Determination : **1 May 2019**

Date of Decision : **13 May 2019**

DECISION

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ORDER: The Tribunal has determined that the Applicant has acquired the right to manage the Property as set out in its Notice of Claim dated 14 September 2018.

Background

1. By Application dated 24 October 2018 (the “Application”) the Tribunal was requested to make a determination under Section 84(3) of the Commonhold and Leasehold Reform Act 2002 (the “Act”) that the Applicant had acquired the right to manage the Property.
2. Directions were made by the Tribunal on 1 November 2018.
3. The Applicant served upon the Respondent a Claim Notice dated 14 September 2018 (the “Notice”) seeking an automatic right to manage the Property. The Respondent clearly accepts that the Applicant is a right to manage company (“RTM”). A Counter-notice dated 28 September 2018 was served on behalf of the Respondent denying the right to acquire the right to manage. It is alleged that the Property does not qualify for RTM as the commercial element of it exceeds 25% of the floor space of the Property.
4. The only issue for the Tribunal was whether the said allegation was proven so as to deny the Applicant qualification for RTM, in accordance with the exclusion provided for in paragraph 1(1) of Schedule 6 of the Act.
5. On 11 March 2019 the Tribunal inspected the exterior and part of the internal common parts of the Property and in the interior of Flat 8 on the top floor. Present was Mr Dominic Perrin, spouse of the leasehold owner of Flat 8.
6. The Property is a 4-storey building of brick construction probably built around the middle of the 20th century. The Tribunal observed at inspection that there are 6 flats on each of floors 1, 2 and 3, accessed by 3 stairwells. To the rear of the building there are private balcony areas accessed by locked doors for each flat. The ground floor now appears to comprise residential flats, accessed from a communal entrance at the front of the building – numbers not identified at inspection - and a self-contained flat at one end, understood from the papers to be known by the parties as the former Caretaker’s flat. That separate flat is accessed by its own entrance door to the rear of the building. There is communal space to the rear of the building which is used for parking.
7. The Tribunal inspected the Property on 11 March 2019 and subsequently convened in Newcastle upon Tyne to make its determination.

The Law

8. Relevant extracts from the Act state:

Section 84

- (2) “A counter-notice is a notice containing a statement
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- (b) *alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled*”
- (3) “Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the company may apply to the appropriate tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises.”

Schedule 6 Premises Excluded from Right to Manage

“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.”*

The Evidence and Submissions

9. It was not disputed by the parties that at the date of the Notice the whole of the ground floor of the Property was empty. The ground floor included a flat previously lived in by an on-site caretaker (the “Caretaker’s flat”) and this particular area remained for residential use. Nor was it at issue that historically the remaining area of the ground floor capable of occupation had been commercial office space but had been converted into residential flats in the recent past.

The Applicant

10. The Applicant produced a plan dated 5 October 2017 prepared by Cummings RIBA identifying both existing and proposed ground floor layout prior to conversion of three office units to residential units. The Caretaker’s flat is shown separately from the offices, as having its own entrance and is marked “existing apartment”. The Applicant also presented an unsigned statement marked as dated 21 January 2019 from Charlotte Collins, whose status was not identified. However, it set out the Applicant’s case and so had relevance for the Tribunal.
11. In denying the allegation contained in the Counter-notice, it was represented for the Applicant that on 30 November 2018 the Respondent had leased the whole of the ground floor to The Student Hotel Limited, a company formed on 20 November 2018 and alleged to have directors in common with the Respondent. The Applicant asserted that this lease was an attempt by the Respondent to defeat the RTM process, albeit taking effect two months after the date of the Notice.
12. Also, it was stated that the freehold of the Property contained a covenant preventing the ground floor to be used as a “hostelry”.
13. It represented that the balcony areas should be included in calculating the floor area occupied for residential purposes.

The Respondent

14. In support of the argument that the Property contained a commercial element of “... just over 25% of the total floor area” (from a letter dated 26 December 2018 from Moreland Estate Management for the Respondent) the following were produced: Non-domestic rate notices from Sunderland City Council for 2017/18 and 2018/19 in which the property description was “offices and premises”, but it offered no further written explanation as to the relevance of that document. In addition, it produced a change of occupancy acknowledgement from Npower, regarding an energy supply contract, showing change of occupancy effective on 1 December 2018 with the outgoing occupier being Capulet Enterprises Limited and the incoming being The Student Hotel Limited.

15. It produced a copy of a lease dated 30 November 2018 between Ground Rent Trading Limited (1) and The Student Hotel Limited (2) (the “Lease) for a term of five years and one month from 1 December 2018 regarding property described as “All that ground floor units forming part of the Building known as flat 1A, 1B, 2A, 2B, 3A & 3B Bodewell House.....more particularly edged red on the Plan” in which the use provision is described as “...only for the provision of Serviced Apartments or Apart Hotel.”
16. The Respondent also produced a letter dated 29 January 2018 from Michael Massey, who described himself as “...the former director of Capulet Enterprises Limited, owners of Bodewell House Freehold until October 2016.” He described the building as comprising commercial units and a caretaker’s flat with separate entrances on the ground floor and that the intention was to “...modernise and utilise the ground floor for commercial units for our company offices and after refurbishment, the caretaker flat ...would be let out.” When his company sold the property the ground floor offices had been refurbished and the caretakers flat was “...part way through refurbishment with the kitchen fitted...”
17. Auction particulars regarding the sale were produced from Andrew Craig – Auctions which referenced as part of the description of the premises “ground floor commercial units numbered 1,2 and 3 Bodewell House”, of which 1 and 2 were described as “office/retail unit” and number 3 as “a large office suite”. It recorded that office suite number 2 was occupied on licence by a local charity. Included also in the sale was “3A Bodewell House” described as “a modernised, 3 bed flat...”.
18. The Respondent’s agent, Moreland Estate, in a letter of 22 January 2019, recorded that the Property had not received building regulation approval to convert to “hotel status”. It also referred to a decision of the “First Tier Tribunal based in London” that balconies are not included in calculating residential area of a building, but no copy of the decision was provided, nor was a case reference or an address for the property involved identified.

THE TRIBUNAL’S FINDINGS AND DECISION

19. The question of eligibility for the RTM in this matter depends upon the extent of non-residential use of the Property as at the date of the Notice - 14 September 2018. If more than 25% of the internal floor area of the Property is non-residential the objection in the Counter-notice succeeds.
20. From inspection the Tribunal found that balconies were allocated for individual flats, accessible through a locked door to each balcony. As each flat occupier has exclusive use of this floor space, it is factually part of the residential floor space of the Property.
21. Neither party provided for the Tribunal dimensions or estimates of the internal floor area of the residential, commercial or the totality of the property. Using its own expertise the Tribunal estimated that the ground floor was approximately one quarter of the floor area of Property. By reference to the plan attached to the Lease, the architect’s plan of Cummings RIBA, the

sales particulars and inspection the Tribunal found that the former offices on the ground floor comprised approximately 80% of the ground floor space capable of occupation. Therefore, as the Caretaker's flat is clearly residential the 25% non-residential space exclusion to the RTM is not satisfied, even having regard to the absence of internal floor measurements.

22. The Tribunal determined that the non-domestic rating bills and NPower change of owner (dated 1 December 2018, after the date of the Notice) to carry no persuasive value.
23. No evidence was presented to the Tribunal that the Caretaker's flat had ever been commercial, nor had there been a change of use from residential.
24. The Respondent sought to rely on the Lease being for commercial use – as “serviced apartments and/or apart hotel”. That Lease is for the whole of the ground floor. However, it is dated and the lease term commences (1 December and 30 November 2018) after the date of the Notice (14 September 2018) so evidence of purported use as therein recorded is for a period after the relevant date. This recent use therefore is of no relevance for this determination.
25. From the totality of the evidence the Tribunal was satisfied that the Caretaker's flat at all material times was for occupation for residential purposes. By reference to the identification on the Cummings RIBA plan and the Tribunal's inspection the evidence was clear of use as a Caretaker's residence from at least 5 October 2017.
26. As explained in paragraph 21 the Tribunal found that the area of the Caretaker's flat was around 20% of the ground floor and the ground floor is approximately one quarter of the Property. Therefore, the extent of commercial area at the date of the Notice is clearly less than 25% of the entirety of the Property. It follows that the objection to the RTM in the Counter-notice must fail and the Tribunal found that the Applicant is entitled to the RTM.