FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00FA/LRM/2018/0009**
Property	**:**	**Warehouse 13, Kington Street, Hull, HU1 2DZ**
Applicant	**:**	**Warehouse 13 RTM Company Limited**
Representative	**:**	**Wilkin Chapman LLP** **Mr Pattison (Solicitor)**
Respondent	**:**	**Places for People**
Representative	**:**	**Womble Bond Dickinson (UK) LLP** **Ms Jabbari (Counsel)**
Type of Application	**:**	**Commonhold & Leasehold Reform Act 2002-Section 84(3)**
Tribunal Members	**:**	**Tribunal Judge J. Oliver** **Tribunal Member J. Jacobs (Valuer)**
Date of Determination	**:**	**12th July 2019**
Date of Decision	**:**	**6th August 2019**

DECISION

Decision

1. The Tribunal determines the non-residential part of Warehouse 13, Kington Road, Hull exceeds 25% of the internal floor area. Consequently, the Applicant cannot acquire the Right to Manage Warehouse 13.

Background

2. This is an application by Warehouse 13 RTM Company Ltd ("the Applicant") for a determination under section 84(3) of the Commonhold & Leasehold Reform Act 2002 ('the Act") that it is entitled to acquire the right to manage Warehouse 13, Kington Road, Hull ("the Property").
3. The respondent landlord, Places for People Ltd ('the Respondent") opposes the application upon the basis the commercial premises within the Property, namely a restaurant and marina, represent over 25% of the internal floor area of the Property. Consequently, the Applicant cannot acquire the right to manage pursuant to Paragraph 1, Schedule 6 of the Act.
4. The Applicant served its Claim Notice on 15th June 2018. The Respondent thereafter served a Counter Notice on 17th July 2018. In the absence of an agreement upon the issue, the Applicant filed an application for a determination by the First-tier tribunal on 17th September 2018.
5. Directions in respect of the application were issued on 3rd October 2018 providing for the filing of statements and for the application to be determined without a hearing. On 20th December 2018, further directions were issued providing for a meeting between the surveyors representing both parties in an attempt to narrow the issues.
6. The surveyors prepared a joint report that agreed floor areas but did not resolve the issues between the parties, namely whether certain areas within the Property could be classed as residential, common or commercial. The application was listed for a determination by way of an inspection and hearing on 12th July 2019.

The Property

7. The Property is held under a Headlease dated 20th March 1987 and made between Kingston upon Hull City Council (1) and the North British Housing Association Limited (2) for a term of 125 years from 20th March 1987. The Respondent is the Headlessee.
8. The Property comprises 36 flats, a restaurant and facilities forming part of a marina to include an amenity area on the ground floor, marina offices and reception.
9. The Tribunal inspected the Property in the presence of representatives of both parties and their surveyors. In particular it inspected the amenity area forming part of the marina, balconies and door recesses to the first-floor restaurant, ground floor door recesses and loft spaces on the top floor.

10. When inspecting the loft spaces, the Tribunal had access to the loft of Flat 36. This was fully boarded out and was fully utilised as a storage space. The present owner confirmed it had been boarded out when she had purchased the property approximately 10 years earlier. The Tribunal also had access to the loft space at Flat 31. Regrettably, the lessee was distressed following a letter received from the Respondent concerning her alleged use of the loft space and refused access to the Respondent's representatives. The Tribunal found here the loft space had not been boarded out, the loft insulation was fully visible and there was only one suitcase in the space.

The Issues

11. The Applicant's surveyor, Mr Nieuwkerk and the Respondent's surveyor, Mr Hodges prepared a joint expert report dated 24th January 2019. Their report set out the following agreed measurements:

    a) the area of the residential parts of the Property is 1734.005 sqm
    b) the area of the non-residential parts of the ground floor, as shown on a plan, is 259.283 sqm. The plan shows this area includes the door recesses that fall within the wall of the Property, but excludes the area that falls without on the ground floor.
    c) The area of the 3 door recesses on the ground floor is 11.89 sqm. This is the area within the walls as referred to in (b).
    d) The area of the Laundry and Washroom is 125.474 sqm
    e) The area of the non-residential part of the first floor is 347.77 sqm. The plan again includes door recesses within the walls of the Property
    f) The area of the door recesses on the first floor is 12.828 sqm
    g) The area of the balconies on the first floor is 6.006 sqm

12. Shortly before the hearing the Applicant submitted that the residents of some of the flats on the top floor used their loft space for storage and consequently argued that area should be classed as residential. They stated their surveyor had inspected 4 out of the 7 top floor flats and from that it was evident the loft spaces were being used. He had calculated this resulted in additional residential floor space of 215.91 sqm taking into account floor areas greater than 1 metre I height.
13. The issue for determination by the Tribunal was whether the disputed areas, namely the door recesses to the ground and first floor, the balconies to the first floor, the loft spaces on the top floor and the Laundry and washroom to the ground floor were commercial, common or residential areas.

The Law

14. Section 84 (3) of the Act provides that where a RTM company has been served with a counter-notice to a Claim Notice it may apply to a First-tier Tribunal for a determination that it was, on a relevant date, entitled to acquire the right to manage the premises.

15. Section 72 of the Act sets out those premises to which the right to manage applies.
16. Schedule 6 of the Act then sets out those premises that do not fall within the scope of section 72 as follows:
"*1. (1) This Chapter does not apply to premises falling within section 72(1) if the internal area-*
(a) of any 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 the premises is a non-residential part if it is neither –
(a) occupied, or intended to be occupied, for residential purposes, or
(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 premise (and accordingly is not comprised in any common part of the premises), it shall be taken to be occupied, or intended to be occupied, for residential purposes.

(4) For the purposes of determining the internal floor area of a building or 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 part shall be disregarded."

The Hearing

17. At the hearing the Applicant was represented by Mr Pattison, Solicitor, Mr Nieuwkerk, surveyor and Mr Edwards. Ms Jabbari, Counsel, Mr Hodges, surveyor and Mr Joyce represented the Respondent.
18. The Tribunal heard representations from both parties in respect of each of the disputed areas.

Loft areas

19. Mr Pattison submitted the late submissions regarding the loft spaces occurred because the Applicant had only been made aware of the situation a short time before the hearing. This had resulted in Mr Nieuwkerk visiting the Property and taking the measurements that had been submitted to the Tribunal. He argued the roof voids are accessible to the lessees/tenants of the top floor flats and have been used for storage over the long term.
20. Mr Pattison referred the Tribunal to a sample lease for Flat 36 that was included within the bundle and argued the lease does not exclude the loft area from the demised premises. It is not reserved from the description within the lease. It cannot be described as a common part. Further, the demised premises include fixture and fittings. There is a

water tank within the roof void for which the lessee is responsible and it must therefore form part of the flat.

21. Mr Nieuwkerk confirmed that when he had been advised of the issue regarding the loft space, he had inspected 4 out of the 7 top floor flats. It had not been possible to inspect them all due to the time frame and that accessibility was problematical given some of the flats are tenanted. He had calculated the usable spaces in all 7 flats taking that as more than 1 metre high. He confirmed he considered the loft spaces to be accessible and usable.
22. Ms Jabbari argued the late submission regarding the loft spaces to be unacceptable. The parties had been aware of the areas of dispute for at least 6 months and a joint expert had been prepared upon that basis. Mr Hodges, the Respondent's surveyor had had no opportunity to inspect the loft spaces, nor carry out his own measurements. The Applicant had not sought further directions from the Tribunal once this issue had become apparent.
23. Ms Jabbari further submitted:
    (a) the sample lease shows the roof and roof structure form part of the landlord's demise and therefore do not qualify as residential premises
    (b) Schedule 6 refers to "internal floor area". The ceiling joists provide support for the roof; the areas are not boarded and the joists are filled with insulating material. The areas are not intended for storage and reference was made to the RCIS Code of Measuring Practice 6th Edition that provides a method for calculating floor area. This does not apply here since that method required measurements to be taken from a perimeter wall that doesn't exist here since the roof attaches directly to the ceiling joists below.
    (c) The measurements applied by Mr Nieuwkerk to the loft spaces do not comply with the RCIS Code of Measuring Practice and are not accepted by the Respondent
    (d) The loft space has never been intended for storage and does not comply with Building Regulations.
    (e) Ms Jabbari referred the Tribunal to the decision of the Upper Tribunal in ***Gaingold Ltd v WHRA RTM Co Ltd [2006] 1 EGLR 81***, at paragraph 14, that states " *an unlawful use would have to be ignored for the purpose of applying paragraph 1*". The sample lease prohibits any structural alterations or additions. In order for the loft spaces to be residential the ceiling joists would require alteration. They only provide support for the roof and are not intended to bear weight. Their alteration would therefore be unlawful.

<u>Laundry and Washroom</u>

24. The parties accepted the laundry, toilets and washroom, on the ground floor of the Property form part of the premises demised to the marina and the marina is a non-residential part of the Property. However, the Applicant thereafter submitted that this area, described as an amenity area and measuring an agreed 125.474 sqm is a common area and does not form part of the commercial premises.

25. The Applicant stated the amenity area is accessible 24 hours each day, unlike the other commercial parts of the Property. Further, the marina lease, prohibits the ground floor "*for any purpose other than in connection with the marina including use as a marina reception and associated offices, changing facilities and amenities for Marina users".*
26. The Applicant further stated the amenity area can be used by all "*resident and visiting boat users and all persons associated with them, whether they be mariners, crew members, family, friends or contractors or others visiting those on the boats, and even those who borrow boats from other people".*
27. Consequently, the amenity area is for shared use and is a "common part" of the Property and therefore is not "non-residential".
28. The Applicant also argued that, in the alternative, if the Tribunal finds the amenity area is not a common area, then it is residential. It stated that even if the area is used in connection with a business, it is immaterial. The Applicant referred to ***Gaingold*** and stated "*the use of an area for residential purposes, regardless of any business connection, means the area is taken to be occupied or intended to be occupied for residential purposes and therefore cannot be deemed as a non-residential area".* It continued that there is no requirement within Schedule 6 that part or parts must be self-contained to be residential. The Applicant submitted " *Use or intended use of an area for residential purposes, regardless of whether there is a business connection, means that the area in question is taken to be occupied or intended to be occupied for residential purposes (Cf.* ***Gaingold v WHRA RTM Co Ltd [2006] 1 EGLR 81 (LT)****) and therefore cannot be deemed a non-residential area".*
29. The Respondent responded that the entirety of the marina is contained within one lease and the lessee, British Waterways Marinas Limited is entitled to the exclusive occupation of it. No other tenants from the remainder of the Property have any rights over it. Therefore, it cannot be considered to be a common part.
30. Ms Jabbari referred the Tribunal to ***Marine Court (St Leonards on Sea) Freeholders Ltd v Rother District Investments Ltd [2008] 1 EGLR 39,*** where the common areas of a *Building* are "*those areas that are not specifically demised (or intended for demise) to a commercial occupant but are used by two or more occupants of [the Building] whether commercial occupants or not".*
31. Ms Jabbari continued by referring to ***Westbrook Dolphin Square v Friends Life [2014] EWHC 2433 (Ch); [2014] L&TR 28.*** This considered whether certain areas of premises were common parts as in this case, where those areas are demised under a single commercial lease. Here, the Court considered a gym that was run as a commercial operation. It was determined that irrespective of whether the gym was available to residents or non-residents, the primary purpose of it was to make a profit. Consequently, it was argued the amenity area within the marina is not a common part. It is there to provide a facility for fee paying members, or their guests, of the marina; it is not a facility that is available to either the residential or other commercial lessees of the Property.

32. In response to the Applicant's submission the amenity area is occupied for residential purposes, it was said the circumstances here are different to ***Gaingold.*** There, the area that was the subject of dispute was a restaurant where the issue related to a basement used by employees of the business. It was being used as a living space. It was established that "occupied for residential purposes" as referred to in Schedule 6 was wider than "residential accommodation" and would include purposes that are ancillary to residential use. Here, it could not be argued that the amenity area, albeit containing washing facilities and toilets, had any element of residential use. It is not occupied ancillary to residential use.

Post Boxes

33. The Applicant confirmed the agreed area occupied by post boxes is within the amenity area and measures 10.5536sqm. They are for the benefit of the users of the marina and thus are a common part or, in the alternative, the area is occupied for residential purposes.
34. The Respondent relied upon the same arguments as for the amenity area as a whole.

Door recesses and Balconies

35. These areas comprise three door recesses to the ground floor (Ground Floor Recesses), and six balconies on the first floor, three of which have door recesses. The joint experts measured these areas as 11.89 sqm for the former, 6.006 sqm for the balconies and 12.828 for the first floor door recesses.
36. The Applicant submitted the Ground Floor Recesses are outside the internal floor area, as described for the purposes of the Act and consequently cannot be included within the non-residential area of the Property. The same argument can be applied to both the first floor balconies and door recesses.
37. The Respondent refuted this argument, relying upon the RCIS Code of Measurement (6th Edition) that provides the gross internal area is calculated by reference to the perimeter wall. Where door recesses and balconies fall within the perimeter wall, they should be included within the internal area. The Tribunal was referred to ***Marine Court*** where there was a similar issue relating to balconies. There the Court adopted the RCIS Code (then 5th Edition) as defining the gross internal area, being "*the area of a building measured to the internal face of the perimeter walls at each floor level … including…internal open sided balconies".*

Determination

Loft areas

38. The Tribunal considered the issue of the loft spaces and, firstly, whether they should be taken into account at all, given the fact this issue had only been raised shortly before the hearing. It noted the initial e-mail from the Applicant about the matter was dated 5th July, before the hearing on 12th July 2018.
39. The Tribunal determined it would consider this issue to clarify the matter for the future.
40. In other circumstances, it is highly unlikely the Tribunal would have allowed the matter to be introduced, given the Applicant's failure to consult with the Respondent and notify them of their intended submissions. Upon the basis there is a joint expert report on all other matters, to then introduce unilateral measurements at such a late stage is unacceptable. The Tribunal cannot know whether the submitted measurements are accurate or how many occupiers have utilised their loft spaces, when only 4 out of 7 flats have been inspected.
41. The Tribunal determined the loft spaces are not to be taken as part of the residential premises as required by Schedule 6 of the Act. The Tribunal considered the sample lease provided and noted the description of Flat 36 included "fixtures and fittings therein". Although the Applicant argued this included the water tank in the loft space, it had not shown whether the water tank served Flat 36 and/or other flats. It was therefore unclear whether the water tank was a fixture/fitting of the flat.
42. The Tribunal further considered the Respondent's submissions, namely that for the loft spaces to be used as storage areas there would need to be alterations made for the floor to be load bearing. The Tribunal noted that although these alterations had been made in Flat 36, no such modifications had been made in Flat 31. It further noted from its inspection of Flat 31 there were warning notices regarding where to step. The only item in this loft space was a suitcase. It is therefore not suitable as a storage space in its current form and one suitcase does not transform it into a storage area. Consequently, Clause 3(6)(a) of the sample lease, prohibiting alterations to the interior of the flat, would be breached by any alterations to alter the loft space into a storage area. In ***Gaingold*** the Upper Tribunal found a lessee should not benefit from a breach of their lease. Accordingly, the Tribunal determines the loft spaces are not residential parts of the premises for the purposes of Schedule 6 of the Act.

Laundry and Washroom

43. At the inspection of the laundry and washroom, the Tribunal noted it to be an area separate to the remainder of the Property. It is only accessed from the marina and is locked by a code key. It was confirmed by the parties that the residents have no access to the area; they are not provided with the code to unlock the door. The only users are the marina users, whether the members or their guests.

44. The Tribunal is not persuaded by the Applicant's arguments that the amenity area is a common part. When considering ***Marine* Court** and its description of a common part, the amenity area does not fall within the description at any point. The area is demised within the commercial lease of the marina and the residents of the remainder of the Property, whether commercial or residential, have no access to it.
45. The Tribunal considered ***Westbrook*** and the Respondent's contention that the amenity area is similar to the gym that was the issue in that case. In ***Westbrook*** it was found the gym was run as a commercial operation and although it was there to provide a facility, its primary purpose was to make a profit. This distinguished it from the basement flat in ***Gaingold.*** The Respondent submitted the sole purpose of the amenity area is to provide a service for the members of the marina, or their guests; it does not provide a facility for any other lessees within the Property.
46. The Tribunal also considered the Applicant's submission that, in the alternative, the amenity area is a residential area; its use being that of a laundry and providing washing and toilet facilities. Again, the Tribunal does not accept this argument. It considers that to describe washroom and laundry facilities ancillary to a marina as residential is far beyond the circumstances in ***Gaingold.*** There, the basement was occupied by the employees of the restaurant business and consequently used it as a living space. Here, the amenity area has no element of occupation; it provides facilities for marina guests who "reside" elsewhere, namely on their boats within the marina.
47. The Tribunal determines that, for the reasons stated, the amenity area is neither a common part, nor is it residential and is, for the purpose of the application a non-residential area of the Property.

Post Boxes

48. The Tribunal considered the post boxes situate within the amenity area. Upon the basis they form part of that area it did not consider this to be a separate element from the amenity area. The purpose of the post boxes is to provide a service to the marina. Consequently, it finds this area is a non-residential area, for the same reasons as those given for the amenity area.

Door Recesses and Balconies

49. The Tribunal, having considered the arguments upon this issue, determined the RCIS Code of Practice (6th Edition) clearly establishes how both the door recesses and balconies are be measured in order to determine which forms part of the internal area as required by Schedule 6 of the Act. The Code clearly states that those parts of either the recesses or balconies outside the perimeter wall do not form part of the internal area.
50. The Tribunal, for this reason, cannot accept the Applicant's contentions that the whole of the door recesses and balconies are excluded and do not form part of the internal area.

51. The Tribunal, from their determinations upon those areas of dispute, finds the Applicant cannot meet the requirement that the non-residential part of the Property is less than 25%.
52. The joint experts agreed the measurements for the disputed areas, other than the roof spaces. Since the Tribunal has not found the roof spaces to be residential areas, the residential area is 1734.005sqm. In order for the non-residential area to exceed 25%, it must measure more than 578.002sqm.
53. The non-residential area of the Property comprises the following:
    - The non-residential ground floor measuring 259.283 sqm
    - The first-floor non-residential area (restaurant) measuring 347.77 sqm

    These areas total 607.053 sqm and thus exceed 25% of the internal floor area.
54. The Tribunal therefore finds the Applicant cannot acquire the Right to Manage the Property due to the non-residential floor area exceeding 25% of the internal floor area as contained within Schedule 6 of the Act.

Judge J Oliver

06 August 2019

J