FIRST-TIER TRIBUNAL
PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00MW/HTA/2019/0003
Property	**:**	Whitecroft Park, Newport, Isle of Wight PO30 3DW
Applicants	**:**	HTW Residents Association
Representative	**:**	Mr Malcolm Bulpitt
Respondent	**:**	Southern Property Developments Limited
Representative	**:**	Bridgeford & Co
Interested parties		Wordsworth Mansions RTM Company Ltd Hardy Villas RTM Company Ltd Tennyson Rise RTM Company Ltd Whitecroft Park Residents Association Hood Point Residents Association
Type of Application	**:**	Recognition of a Tenants Association
Tribunal Member(s)	**:**	Judge D. Agnew Judge M Tildesley OBE
Date of Decision	**:**	6th April 2020

DECISION

Background

1. By an application dated 10th February 2019 the Applicant applied to the Tribunal for a certificate of recognition of the Applicant as a recognised tenants' association under section 29 of the Landlord and Tenant Act 1985 ("the 1985 Act").

2. The property concerned comprises a mixture of freehold houses and leasehold flats. There are currently four blocks of flats with further blocks under development. The leaseholders of three of the four blocks have exercised teir right to manage their respective blocks under the commonhold and leasehold reform act 2002 ("the 2002 act"). Those leaseholders now wish to be involved in decisions about the management of the extensive land surrounding the freehold and leasehold properties comprising the wider Whitecroft Park estate. That is the reason for them applying for recognition as a tenants' association. This is an unusual situation. The members of the Applicant association do not seek recognition from the RTM companies because they are content in the manner in which their buildings are managed.

3. Section 29(1) of the 1985 Act provides that a recognised tenants association is

   " An association of qualifying tenants (whether with or without other tenants) which is recognised for the purposes of the provisions of this Act relating to service charges".

4. Recognition as a tenants' association under the Act confers certain benefits. They are:-

   (a) the association has a right to ask for a summary of costs incurred by a landlord (section 22 of the 1985 Act)

   (b) a right to inspect relevant accounts and receipts for expenditure (section 22 of the 1985 Act again)

   (c) a right to be sent estimates and to nominate contractors for tender under the section 20 consultation procedure of the 1985 Act

   (d) a right to ask for a written summary of insurance cover (the Schedule to the 1985 Act)

   (e) The right to be consulted about the appointment or re-appointment of managing agents (section 30B of the 1985 Act.

5. In the application form submitted to the Tribunal, Southern Property Developments Limited was named as landlord and it was

stated on the form that a request had been made of the landlord for recognition on 19th September 2018 but that the landlord had not responded.

6. There are two routes to the obtaining of recognition: the first is for the tenants' association to approach the landlord direct and request to be recognised. The landlord can, if it agrees, give Notice in writing to the secretary that it recognises the association (section 29(1)(a) of the 1985 Act). Alternatively, the association can apply to the Tribunal for a Certificate of Recognition (section 29(1)(b) of the 1985 Act). It is not mandatory for the association to have first asked the landlord for recognition.

7. The application form also stated that the application was being made in respect of three blocks of flats at Whitecroft Park, namely Hardy Villas, Tennyson Rise and Wordsworth Mansions, the first letter of each block of flats forming the name HTW Residents' Association. The form also informed the Tribunal that the are 27 flats in all in the three blocks and the owners of 22 of those flats are members of the HTW Residents' Association.

8. Originally, because the Tribunal had no reason to believe differently, only Southern Property Developments Limited was named as Respondent to the application. At a Case Management Hearing on 9th January 2020 it became apparent that there were other interested parties in this case. Their names are listed as Interested Parties on the front of this decision and they were added as Interested Parties at that hearing.

9. The Respondent, Whitecroft Park Residents Association and Hood Point Residents Association all opposed the application for recognition for various reasons which I will set out later in this decision.

10. Originally the case was due to be dealt with as a paper determination without a hearing. but it became apparent that an oral hearing would be required and it was listed for hearing on 20th February 2020 with the Tribunal Inspecting the Park immediately beforehand.

11. A copy of the constitution of HTW Residents' Association and a list of members had been filed with the Tribunal.

The Inspection

12. Whitecroft Park was previously a hospital set in the heart of the countryside a few miles out of Newport, Isle of Wight. The Tribunal does not know that it was, but it would have been ideally located for an isolation hospital. It had its own laundry and sports hall and the grounds are extensive.

13. The Park has been undergoing redevelopment for a number of years and they are now on their third developer. Currently, there are four blocks of flats: in addition to the three blocks constituting the Applicants in this case there is one further block called Hood Point.

14. In addition to the blocks of flats there are currently 37 freehold houses.

15. Further blocks are currently undergoing redevelopment but the former sports hall is derelict. Despite this, the estate is in good condition and the redevelopment to date has been carried out sympathetically. The grounds were neat and tidy and although some of the grassed areas remain to be finished off, bearing in mind that further development work is in progress, they were in a reasonable state.

The evidence

16. At the hearing, Mr Bulpitt who is the secretary of the Applicant association was invited to speak first in support of the application. He explained that the purpose for seeking recognition was to give the lessees of the three constituent blocks "a voice". He said that the current arrangement whereby no one could have direct access to the officers of Whitecroft Park Residents Association ("WPRA") but only by email to the secretary who would put the matter on the agenda for a meeting in one or two months' time meant that nothing got done. It was virtually impossible for HTW lessees to be elected onto the WPRA Committee because the freehold owners tended to side together and when the votes from Hood Point were added to those of the freehold owners HTW nominees were always outvoted. The HTW lessees feel that WPRA wish to "hold sway" over the estate.

17. Mrs Mary Long spoke next in support of the application. She owns Apartment 7 in Tennyson Rise and is one of the longest residents of Whitecroft Park. Indeed, she was instrumental in forming WPRA. She felt that after initial harmony, things started to go wrong when, at the beginning of 2017, the constitution of WPRA was changed. Originally, the constitution provided that every block would have a representative on the committee. That representative was chosen by the residents in each block. This meant that there was approximately 50:50 representation of freeholders and leaseholders. When the guarantee of representation to each block was removed by the change in constitution the influence of the freeholders has increased. The lessees of the bocks constituting HTW are critical of Bridgeford and Co's management of the estate. There is a slow or no response to requests from lessees, there is no discussion with HTW residents as to the setting of budgets and a request to hold an AGM has been refused. Since acquiring the Right to Manage the current managing agents of the three buildings, they feel, are doing an excellent job.

18. Mr Dunne of Apartment 9, Wordsworth Mansions had some specific items of complaint of lack of action by Bridgeford and Co and preferential treatment for one particular individual. Although not expressly stated as such the inference was that he supported the application as he considered it would give the HTW lessees a greater influence in the management of the estate.

19. Mr Olloman of Apartment 2, Wordsworth Villas, had concerns over the service charges being levied by Bridgeford and Co. This led to the formation of a Right to Manage Company and the lessees are now happy with their, lower, service charges, and the way their building is managed. He says that the seeking of Right to Manage aroused some antagonistic opposition from certain individuals but all they were doing in this and in seeking recognition, was protecting their own interests and not trying to create disharmony.

20 Mr Willis of Apartment 5, Hardy villas, confirmed that concerns over service charges had led to the Right to Manage being acquired and that the lessees are now happy with the management of their building. He feels that as a recognised group the leaseholders of HTW can work together to improve living at Whitecroft Park. His ongoing concern is that the grounds around his block were left "in a dangerous and incomplete state and still is after three years". Mr Willis also has concerns over the use of reserve funds to settle "bad debts". He does not expect WPRA to get involved in these matters but they are a reason for leaseholders to work together as a recognised association. He does not understand why Hood Point, which is still managed by Bridgeford and Co has received official recognition as a recognised tenants' association by the landlord but that HTW has been refused recognition. He feels that all lessees should be treated equally.

21. Mr Paul Miracca, Director of the landlord, Southern Property Development Limited wrote to the Tribunal to say that there is already in place a Residents' Association (WPRA), for all residents. It is only informally recognised because, as Whitecroft Park is a mixed development of freehold and leasehold properties and as WPRA is open to all residents, WPRA cannot be recognised under sec 29 of the 1985. Although membership of HTWRA is open to freeholders as well as leaseholders, the freeholders do not have a vote and therefore that association cannot represent the entire estate. Mr Miracca is of the opinion that formally recognising HTWRA would "cause an imbalance in the running of the estate and impede Bridgeford and Co's ability to carry out their responsibilities efficiently".

22. In response to The Applicant's request, in its former incarnation as Whitecroft Tenants Association to be recognised by the freeholder, Mrs Hansford of Bridgeford and co, the freeholder's managing agent, replied on its behalf declining the request. A number of reasons were given. Some of the reasons related to the constitution of the association. Some of the reasons were not legitimate reasons, such as the assertion

that "the only association that can be recognised is a residents' association, not a tenants' association". The final objection was that there was already a Residents' Association at Whitecroft Park which represents all residents if they wish to join and is voluntarily recognised by Bridgeford and Co and has been in operation for 4 years". There are several problems with this statement. First, it is not for a landlord's managing agent to recognise a tenants' association, but a landlord. Secondly, the statement does not explain why if only one tenants' association (WPRA) is desirable recognition was given to the Hood Point Residents' Association. Thirdly, it misses the point that the existing tenants' association (WPRA) cannot have recognised status because it is open to freeholders as well as leaseholders and all have an equal vote.

23. Mrs Hansford, in response to Directions, forwarded to the Tribunal witness statements made by the Chairman of the WPRA, Ms Rose Wiltshire, and the Chairman of Hood Point Residents' association, Mr Gerry Coleman. She also informed the Tribunal that on completion of the development all owners will become members of the Management Company and will therefore take over the running of the estate. At that point the WPRA will dissolve and be replaced by the Gatcombe Manor Management Company. She said that this was expected to be in two years' time, although, as they were now on their third developer, that timescale could not be certain.

24 Mr Gerry Coleman of Apartment 8, Hood Point is Chair of Hood Point Residents' Association. He explained that his Association was formed in September 2018 following the then developer, Mildren Homes, ceasing trading and going into administration. Bridgeford and co were helpful in the process of obtaining recognition for the Association and they now "enjoy close co-operation with the managing agents", have agreed a five year plan for maintenance and have a healthy reserve fund. He said that all members of his Association were also members of HPRA. This is so that "there is only one recognised association dealing who would act in a concerted manner on behalf of all owners". He said that before seeking recognition, they did consider going down the Right to Manage route but could not see any benefit in it when they are already working in co-operation with the managing agent. They also bore in mind that on completion of the development all residents would become shareholders in the management company. With regard to HTW's application, his Association's view is that "it is difficult to see what will be achieved by second association with restrictions on membership being granted recognition when one exists that represents all owners".

25. Ms Rose Wiltshire is the Chair of WPRA. She told the tribunal that this Association was set up in 2014 for the benefit of both the freehold and leasehold owners of properties at Whitecroft Park. Membership is open to all residents, each household member has one vote and any member may stand for election to the Committee. There are currently 35

leasehold members and 37 freehold members. Many HTW residents' Association members are also members of WPRA. She says there is a good mix of freehold and leasehold owners on the Committee and they have a good working relationship with Bridgeford and Co.

26. Ms Wiltshire suggested that a lot of ill feeling was generated after Mr Bulpitt became a committee member of WPRA after an unsuccessful bid to become Chairman. He "undermined committee meetings" to the point that the then Chair felt he had to resign , followed by the resignation of other officers. She felt that the actions of a few members had the "insidious goal of trying to force it to disband".

27. A proposed meeting with the HTW group to discuss possible amalgamation of the two associations was discussed by the WPRA Committee in August 2019 but rejected. It was felt that there was no advantage to WPRA in an amalgamation. They felt that it would put their freehold members at a disadvantage as "leaseholders have powers within Leaseholders' Associations that freeholders do not have". She posed the question: "How could we continue to do our best for all members when leaseholders would have the advantage and control over any outcome on issues".

28. Mrs Hansford was asked if she would like to add anything to what she had already submitted but said that she did not.

29. During the course of the hearing a specimen lease was produced. This showed that there are two service charges payable by lessees: the first being a fixed proportion of the costs of maintaining each separate block and a second service charge of a "fair and equal proportion " of the cost of maintaining the estate. Mrs Hansford confirmed that the estate service charge was levied equally on freehold and leasehold owners alike.

Previous case law

30. No party referred to any case law at the hearing. However, in its consideration of the case after the hearing the Tribunal became aware of two previous decisions which are relevant to this case. They are *Gala Unity Limited v Ariadne Road RTM Company Limited [2012] EWCA Civ 1372* and *FirstPort Property services v Settlers Company RTM Limited [2019] UKUT 243 (LC).*

31. The Court of Appeal in Gala Unity held that where there is a mixed development of flats and houses with estate grounds (as at Whitecroft Park) and one block of flats acquires the right to manage, that RTM Company also acquires the right to manage "appurtenant property". "Appurtenant property" is defined for the purposes of the Right to Manage in the Commonhold and Leasehold Reform Act 2002 as including garden land …usually enjoyed with the building and so the RTM company acquired the right to manage the estate land. Further, in the FirstPort case, it was held that the lessees who had acquired the

right to manage no longer had any liability to contribute towards the landlord's costs of maintaining the estate lands.

32. Legal commentators have recognised that real practical difficulties have been created by these decisions as they mean, in effect, that there are two different entities each with dual responsibility for maintaining estate land.

33. As neither of these authorities had been referred to at the hearing, it was incumbent upon the Tribunal to bring them to the attention of the parties, to invite their comments thereon and to request further information and copy documentation concerning the RTM process for each of the three blocks that acquired the Right to Manage. This further information and documentation was to be received by 3rd April 2020.

34. The Applicant instructed solicitors, Roach Pittis, who made representations by the stated date. They agreed the Tribunal's interpretation of the effect of the two cases referred to in paragraph 27 above but maintained that as there are currently four entities who have an obligation to manage the estate (the three RTM Companies and the freehold management company) it would make negotiations on the management of the estate easier if one entity (HTW Residents' Association) were to negotiate on behalf of the three RTM Companies and implied that this would be more effective if that Association were a recognised tenants' association.

The statutory framework

35. By section 29 of the 1985 Act a "recognised tenants' association is an association of qualifying tenants (whether with or without other tenants) which is recognised for the purposes of the provisions of this Act relating to service charges either-

(a) by notice in writing given by the landlord to the secretary of the association, or

(b) by a certificate –

(i) in relation to dwellings in England, of the First-tier Tribunal, and

(ii) [not relevant]"

36. By section 29(4) of the 1985 Act, " a number of tenants are qualifying tenants if each of them may be required under the terms of his lease to contribute to the same costs by payment of a service charge".

37. By section 29(5) of the 1985 Act it is provided that the Secretary of State may by regulations specify-

(a) the procedure which is to be followed in connection with an application for….a certificate….

(b) the matters to which regard is to be had in giving or cancelling a certificate....

(c) the duration of such a certificate, and

(d) the circumstances in which a certificate is not to be given...."

38. No such regulations were made until 2018 when, on 3 October 2018 the Tenants Associations (Provisions Relating to Recognition and Provision of Information)(England) Regulations 2018 SI 2018/1043 came into force.

39. Regulation 3 of those regulations set out the matters to which regard must be had by the Tribunal in giving a certificate. They are:-

- the composition of membership of the tenants' association
- the tenants' association's rules regarding membership, including whether tenants who are not qualifying tenants are entitled to become members
- the tenants' associations rules regarding decision making
- the tenant association's rules regarding voting
- the extent to which any fees or charges payable in connection with membership apply equally to all members
- the extent to which the constitution takes into account the interest of all members
- the extent to which the tenants' association is independent of the landlord
- whether the association has a chairperson, secretary and treasurer
- whether the constitution may be amended by resolution of the members and rules regarding amendment
- whether the association, accounts and list of members are kept up to date and available for public inspection
- the extent to which the association operates in an open and transparent way.

40. By section 96(2) of the Commonhold and Leasehold Reform Act 2002 ("CLARA") "Management functions which a person who is landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company".

The leases

41. The Tribunal was not supplied with copies of the leases of the apartments until after the hearing. They are tri-partite leases between the landlord of the one part, the apartment owner of the second part and the management company, Gatcombe Manor Management Company Limited of the third part. The lease also refers to an "Intervening Lease". The Particulars state that the "Intervening Lease" means "the lease to be granted to the Management Company pursuant to an agreement for lease dated 21 March 2013 and in the Recitals it

states that "The Management Company has agreed to join in this lease and will, while the Intervening Lease subsists, assume the responsibility for the performance of the covenants contained in clause 6…." [i.e. the covenant, inter alia, to maintain the estate]. The landlord's covenant in regard to the maintenance of the estate land applies until such time as the Intervening Lease is executed or if the Management Company fails to perform its covenant. The lessee covenants in clause 5.2 of the lease to become a member of the Management Company.

42 It is not clear to the Tribunal on the evidence submitted as to whether the Intervening Lease to the Management Company has yet been exercised but on the basis that it was clearly the understanding of the parties that upon completion of the development the maintenance of the estate lands would be under the control of the members of the Management Company and as Bridgeford and Co professed to be the freeholder's agent and the freeholder's evidence was that the management of the estate by Bridgeford and Co was satisfactory, it would seem that it is still the freeholder that is responsible for the repair and maintenance of the estate land (together with the Hood Point block).

Discussion and decision

43.It seems to the Tribunal that all parties to these proceedings have been operating under various misconceptions. The first of such misconceptions is that the recognition of a tenants' association gives that association the right to be consulted about prospective service charges. Whilst this may be what happens in practice in many cases, that is not actually the legal position. Paragraph 4 above sets out the rights given to a recognised tenants' association and it will be seen that the only right of consultation is granted in respect of major works expenditure under section 20 of the 1985 Act and in respect of the appointment of the landlord's managing agent. In the evidence given to the Tribunal by the lessees supporting the application for recognition, a major factor in wanting to seek recognition was the alleged lack of consultation by the managing agent with regard to expenditure. The lessees concerned seemed to be unaware that they could as individual tenants or collectively challenge the service charges under section 27A of the 1985 Act. Be that as it may, the achieving of recognition of their tenants' association would not be the panacea they expected it to be as there would still be no right for the association to be consulted on prospective expenditure.

44.Another misconception is that recognition should be sought from and given by the freeholder, Southern Property Developments Limited. The effect of the obtaining of Right to Manage status has seemingly been overlooked. As has been pointed out at paragraph 40 above, the effect of acquiring the Right to Manage is that the landlord's management functions become those of the RTM company. This

means that the correct entity to whom to apply for recognition is the respective RTM Companies in respect of each of the three blocks of flats, Hardy Villas, Tennyson Rise and Wordsworth Mansions. Once this is realised it will be appreciated that this whole application was unnecessary because a request could have been made of each of the RTM Companies and they would have consented to recognise the Applicant Association. This would have been otiose, however, because the Applicant Association has no issue with their RTM Companies and even if they were granted recognition this would have no effect upon the actions of the freeholder or its managing agent.

45.The third misconception is that, following the acquisition of the Right to Manage the freeholder retains the obligation to manage the estate land and the right to recover a share of the cost thereof from those lessees whose blocks have the Right to Manage. The two cases referred to at paragraphs 30-32 above show that this is not so. There is a dual responsibility between the freeholder or the Management Company, Gatcombe Manor Management Company Limited and the Right to Manage companies. This is a misconception shared by all the parties to these proceedings. What needs to happen is an agreement between them. The RTM companies could, if they wish, delegate the negotiation to the Applicant Association, whether or not it is recognised by them. In this way either the RTM Companies, or their delegated representative will achieve what they have sought by this application for recognition, even without achieving recognition which adds nothing to their bargaining position.

46.So, should the Tribunal grant a certificate of recognition notwithstanding that recognition is not necessary and would not achieve anything in the context of this case? The Tribunal does not think so. In the case of *Rosslyn Mansions Tenants' Association v Winstonworth Limited [2015] UKUT 0011 (LC)* held that there is no reason for approaching an application on the basis of a presumption in favour of granting a certificate. The Tribunal retains a discretion even after having taken into account the matters set out in the Regulations in paragraph 39 above. If, despite the legal position as set out in this decision the Applicant Association still thinks it wishes to have recognition, this would readily be granted on a request being made to the respective RTM Companies.

47.Even if the Applicant could have persuaded the Tribunal that it would be appropriate in principle for recognition to be granted, the Tribunal has some issues with the Association's constitution in its current form. They are as follows:-

(a) The Property covered by the Association is stated to be "Houses and Apartments" amenity areas and common areas of Whitecroft Park". The houses are freehold. The definition of a tenants' association in section 29(1) of the 1985 Act is that it is an association of qualifying tenants (whether with or without other tenants). Whilst the freehold

owners do not have a vote under the Applicant Association's constitution, nevertheless it would seem that a mixture of freehold and leasehold owners cannot constitute a recognised tenant's association, any more than the WPRA can be a recognised tenants' association.

(b) Under the heading "Membership" associate membership can be extended to anyone residing at the property, which could include freeholders . However, subscriptions are payable "in respect of each flat" which implies that only full members are required to pay a subscription. That may be what is intended as a freeholder would not have a vote or be able to stand for office but the status of associate members is unclear. Do they count, for example, when considering if there is a quorum for meetings where reference is made simply to "members of the association" or to a percentage of the membership.

Conclusion

48..For all the reasons stated above, the Tribunal declines to grant a certificate of recognition under section 29 of the 1985 Act to HTW Residents Association. The Applicant's aim of having a seat at the negotiations for the maintenance of the estate grounds and the cost thereof has already been achieved by the acquisition of the Right to Manage by each of the blocks of Hardy Villas, Tennyson Rise and Wordsworth Mansions. Any rights conferred by recognition would only be exercisable against the respective RTM Companies, which is not what the Applicant seeks.

Dated the 6th day of April 2020

Judge D. Agnew (Chairman)

APPEALS

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to

appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking