FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**MAN/00BY/LRM/2022/0012**
Property	**28 – 30 Henry Street Liverpool L1 5BS**
Applicant	**The BB RTM Company Limited**
Representative	**Ms Parmar instructed by Monarch Solicitors**
Respondent	**Henry Street Freehold Limited**
Representative	**Andrew Vinson instructed by Quinn Barrow Solicitors**
Type of Application	**Application to acquire (No Fault) the Right to Manage pursuant to section 84(3) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**Judge R Watkin** **Regional Surveyor N Walsh FRICS**
Date and Venue of Hearing	**19 June 2023**
Date of Decision	**20 June 2023**

DECISION

DECISION

The Tribunal determines as follows:

1. the Applicant is not entitled to acquire the rights to manage **28 – 30 Henry Street Liverpool L1 5BS** as none of the units therein are flats for the purposes of s.112 of the Commonhold and Leasehold Reform Act 2002.

The Application

2. The Applicant is **The BB RTM Company Limited (**the "Applicant").

3. The Respondent is **Henry Street Freehold Limited** (the "Respondent").

4. By the Application dated 15 November 2022 ("the Application") the Applicant seeks a determination that they have acquired rights to manage the property known as **28 – 30 Henry Street Liverpool L1 5BS** ("the Property") pursuant to the **Commonhold and Leasehold Reform Act 2002** (the "2002 Act").

Directions

5. The Application was reviewed by legal officer Elena Dudley on 7 February 2023 when directions were given for the parties to exchange statements of case.

6. Thereafter, the Respondent provided a statement of case dated 27 February 2023 opposing the Application contending that as the units do not qualify as flats or dwellings for the purposes of s.112(1) of the 2002 Act, the Application must fail. The Applicant filed a Statement of Case dated 21 March 2023 contending that the units are separate dwellings and, as such, meet the qualifying criteria.

Inspection

7. The directions also provided as follows:

> *"8. The tribunal considers that an inspection of the property is necessary. Details of the inspection will also be provided in due course."*

8. By the time of the hearing, no inspection had taken place and the Tribunal indicated that consideration could be given to whether to conduct an inspection following the hearing.

9. Following detailed consideration of this case, including the plans provided and the submissions of the parties' representatives at the hearing, the Tribunal does not consider that an inspection is necessary to enable the Tribunal to determine the case.

The Documents

10. The Tribunal has received and considered two indexed bundles of documents, the Applicant's Bundle (pages 1 – 87) and the Respondents Bundle (pages 1 – 54) including Statements of Case from the parties and a Skeleton Argument from the Respondent.

Background

11. By **claim notice dated 19 August 2022** (the "Claim Notice"), the Applicant claimed a right to manage the Property pursuant to Section 79 of the 2002 Act. The Claim Notice specifies the relevant date for acquisition of the right to manage as 21 December 2022.

12. Within the Claim Notice, the Respondent contends that Applicant was not entitled to acquire the rights to manage because, contrary to Section 72 of 2002 Act, on the date the notice was served, the Property *"does not contain two or more flats held by qualifying tenants given that none contain a Kitchen and/or living area which facilities are only provided in common on each floor of the Premises and hence such units are not flats within the meaning of the Act"*

13. The Applicant submitted the Application to the First-tier Tribunal (Property Chamber) ("the Tribunal"), for a determination that it entitled to acquire the right to manage the Property, in accordance with section 84(3) of the 2002 Act.

The Law

14. Part 1 of the 2002 Act relates to the right to manage and contains sections 71 to 113.

15. The relevant sections of the 2002 Act are:

Section 71 - The right to manage

(1) This Chapter makes provision for the acquisition and exercise of rights in relation to the management of premises to which this Chapter applies by a company which, in accordance with this Chapter, may acquire and exercise those rights(referred to in this Chapter as a RTM company).

(2) The rights are to be acquired and exercised subject to and in accordance with this Chapter and are referred to in this Chapter as the right to manage.

Section 72 - Premises to which this Chapter applies

(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.

Section 112(1) - Defines the following terms (amongst others):

"flat" means a separate set of premises (whether or not on the same floor)—

(a) which forms part of a building,

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

(c) either the whole or a material part of which lies above or below some other part of the building,

"dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling,

16. Thus, in order for the right to manage provisions within the 2002 Act to apply, the relevant premises must contain flats which are a "*separate set of premises*" and which are "*constructed or adapted for use for the purposes of a dwelling"*. Therefore, the units must be "*separate dwellings"* for the Application to succeed.

Case Law on the Meaning of a "Separate Dwelling"

17. There is a large amount of case law in relation to the meaning of "separate dwelling".

18. The Tribunal has had regard to the following cases:

a. Cole v Harris [1945] 1 KB 474 ("*Cole*")

b. Neale v Del Soto [1945] 1 KB 144 *("Neale")*

c. Winters v Dance [1945] L.J.R. 165 *("Winters")*

d. Baker v Turner [1950] AC401 *("Baker v Turner")*

e. Goodrich v Paisner and Others [1956] W.L.R. 1053 (“*Goodrich”)* (House of Lords Decision)

f. *Marsh Ltd v Cooper [1969] 1 WLR 803 (“Marsh Ltd”)*

g. Uratemp Ventures Ltd v Collins [2002] 1 AC301 (“*Uratemp*”) (House of Lords Decision)

h. R (N) v Lewisham London Borough Council [2014) UKSC 61 (Supreme Court) (“*Lewisham*”)

i. JLK Ltd and others v Ezekwe [2017] UKUT 277 (“*Ezekwe*”)

j. Q Studios (Stoke) RTM Co Ltd v Premier Ground Rents No. 6 Ltd [2020] UKUT 197 (LC) (“*Q Studios*”)

19. Whilst these cases are not all focused on the 2002 Act, the principle is essentially the same.

20. In *Neale* [1945], the Court of Appeal considered that where the tenant occupied two rooms with shared use of a kitchen, bathroom and toilet, this was not a letting of a separate dwelling but the sharing of the house.

21. *Winters* [1945], is referred to in *Goodrich,* as follows:

> *“although the room shared was so small that there could only be successive and not simultaneous user, the rule in Neale v Del Soto was applied.”*

Thus, where only successive user is possible, that is not sufficient for the shared room not to be part of the dwelling and the dwelling could not be considered a separate dwelling.

22. In *Baker v Turner* [1950], the above principles were met with approval, and it was stated that:

> *“(1) a proportion of the house which is let by a landlord to a tenant, even if in itself separate, ceases to be a separate dwelling or to be protected by the Acts if the terms of the letting contain a provision that the tenant shall have the right of using a living room belonging to the landlord: Neale v Del Soto(2) to take away the protection of the Acts, the room over which rights are given must be a living room: a bathroom, lavatory or cupboard will not avail, but for this purpose a kitchen is a living room: see Cole v Harris [1945] 1 KB 474”*

23. In *Neale* and *Baker v Turner,* the tenancies were stated not to be of a "*separate dwelling*" where they contained provisions allowing the tenant to use "*living room(s*)" belonging to the landlord. However, the same will apply if the communal areas are shared by other tenants – in the words of Lord Reid in *Baker v Turner*:

> *"If a tenant has to share with another person a living room which is not let to him, it is in my view impossible to find anything which is let to him as a separate dwelling … his having to share another room shows that the let rooms are only a part of his dwelling place."*

24. In *Goodrich* [1956], the House of Lords considered all the principles in detail in deciding whether the right to use a back bedroom could prevent the dwelling from being a *"separate dwelling"*. The case was highly fact specific but contained useful analysis of the law, particularly in relation to the meaning of a "living room". The following part of the decision of Lord Moreton of Henryton is of note:

> *"…. both Lord Porter and Lord Reid used the phrase "a living room" without the adjective "essential," and I do not think that adjective is particularly appropriate. Some people find it possible to cook, eat, sleep and spend their leisure time in one and the same room. If there is a sharing in any* living room*, prima facie the letting is outside the Acts. But sharings may differ widely in kind and degree; the test must be applied with due regard to the facts of each case and, in particular, to the nature and extent of the rights of user granted to the tenant over the* living room. *A recent instance of a case where a letting was held to be "separate," although the tenant was given a limited right of user of the kitchen, is Hayward v. Marshall.* [100] *One tenant of unfurnished rooms had the right to draw water in the kitchen, and to use the gas stove in the kitchen once a week for the purpose of boiling her washing, but had no other right to use the kitchen. Another tenant had only the right to draw water in the kitchen. I agree with the reasoning which led the Court of Appeal to decide that in each case there was a separate letting, and I also agree with the reasoning which led the Court of Appeal to reach the opposite conclusion in Winters. Dance,* [101] *where the right granted was to use what was called a kitchenette "in common with the landlord," with no restriction as to the nature of the user. In the former case the position was similar to the position when a tenant is granted the right to use a bathroom. The latter case was, in my view, indistinguishable from Neale v Del Soto,* [102] *the so-called kitchenette was merely a small kitchen."*

25. In *Uratemp* and *Lewisham* the meaning of the word "*dwelling*" was considered. It was concluded that the word generally connotes "*a place where a person lives, regarding and treating it as home*" (*Uratemp, per Lord Irvine of Lairg LC at [3]).* The decision clearly set out that there was no requirement for a "dwelling" to comprise any particular living space.

> *"4. Decisions on the infinite factual variety of cases are for judges of trial and their decisions on the facts of individual cases should neither be treated nor cited as propositions of law. I would not myself, for example, regard a bed, any more than cooking facilities, as an essential prerequisite of a "dwelling": every case is for the judge of trial but I would have no difficulty with a conclusion that one could live in a room, which is regarded and treated as home, although taking one's sleep, without the luxury of a bed, in an armchair, or in blankets on the floor.*

26. *Uratemp* was a decision that considered the meaning of the word *"dwelling"* but also revisited a large amount of the case law in relation to the meaning of *"separate dwelling"*. Lord Millet considers the position in relation to sharing in detail and the previous cases. He compared the fact that in *Winters* a small kitchen of seven by six feet had been held to be a living room but that in *Marsh Ltd v Cooper [1969] 1 WLR 803,* an alcove in which there was not space to do anything other than cook was not. Therefore, the ability to cook in an area is not key to whether the room is classed as a living space – even though a kitchen is classed as living space (*Cole* and *Baker v Turner).* He also dealt with the question of whether the shared rooms need to "*essential living accommodation*" for them to prevent the dwelling being separate. He states at paragraph 50:

> *"The cases did not decide that a kitchen is an essential part of a dwelling, so that premises which lack cooking facilities are not a dwelling. What they decided was that the essential feature of a dwelling is that it contains living accommodation, and that every room which forms part of the tenant's living accommodation, including the kitchen if there is one, forms part of his dwelling."*

27. *Ezekwe* is a decision of the UK Upper Tribunal in relation to whether cluster type units (where the occupiers each had an individual unit, but each also shared a kitchen, lounge, shower and toilet with the occupiers of the other units) were separate dwellings. The Upper Tribunal determined that they were not and, therefore, that it did not have jurisdiction to consider Application under the Landlord and Tenant Act 1985.

28. It was held that the units were not "*occupied or intended to be occupied as a separate dwelling*" as the bed-sitting room "*is not occupied as the tenant's dwelling, but only as part of it*" and "*the bed-sitting room plus the right to use the communal space will not satisfy the requirement because the tenant is not the tenant of the whole of that*

accommodation, but only part of it".

29. The position was considered further in the case of *Q Studios* in which the President endorsed the position set out in the previous cases and considered that:

> *"76.....If the separate set of premises lacks living accommodation that one would expect to see in a dwelling and this living accommodation is provided as common space for use by the occupier of the premises and others, then the premises are not constructed or adapted for use for the purposes of a separate dwelling. If no such shared accommodation is provided then, as long as the premises are a dwelling in the ordinary meaning of that word (as to which, see Uratemp), they are likely to be constructed or adapted for use for the purposes of a separate dwelling."*

30. The President then proceeds to find that the Studystudios in that case were of ample size in terms of living space and also had a small kitchen. Therefore, based on this reasoning in paragraph 76 (quoted above), there was no reason for him to consider the matter further. However, he then continues to consider the communal space but finds it doesn't contain living accommodation that "*one would expect to see in a dwelling*". There were 292 studios in the one building, no common kitchen or bathroom areas and no living space on any floors except the ground floor where there was a lounge /cinema room of reasonable size but not large enough to provide for 292 occupants of the studios, or even a significant fraction of them (paragraph 81). The president concluded that:

> "82. *... The studios were doubtless constructed so that the student occupier could take advantage of the intended communal facilities on the ground floor, but each of the studios has ample living accommodation for occupation as a separate dwelling. Significantly, there is no space in the building that was created to be used by the occupiers as part of their dwelling space. The lounge/cinema, gym and laundry are in the nature of social and recreational facilities (and a laundry) that they could make use of.*

31. At paragraph 84, the President deals in more detail with the consideration of the effect of the existence of communal areas and states:

> "*84. It is very common in modern apartment blocks for there to be gym and other facilities, such as an extended reception area with comfortable a seating for communal use. Such facilities do not mean apartments in the block is a "flat" within the meaning of the 1993 and 2002 Acts any more than would extensive gardens for shared use. It would, however, be different if each of the apartments lacked a kitchen and if adequate and convenient kitchen facilities were provided on each floor of block. It is then clear from the*

construction of the apartments and the common areas that the occupiers of the apartments are meant to share use of the kitchen areas."

32. Thus, it is apparent that the President's view was that he would have viewed the situation in *Q Studios* differently if there had been no kitchen in the Studystudios and adequate and convenient kitchen facilities were provided on each floor.

Property

33. The Tribunal was referred to the Sample Leases provided by both parties and, in particular, the plans showing the layout of the Property and the individual units or pods.

34. The property consists of student accommodation of 102 units. Each unit is around 12 to 14 square metres in size. The property contains 5 floors of such units.

35. The units appear to be grouped into clusters of 8 or 9 units along one corridor with a large communal area that is situated between the clusters, shared between two clusters (16-18 units in total) containing 4 small kitchen areas and a larger seating area. The Applicant's bundle contained a typical layout showing 18 units. The penthouse floor has fewer units.

36. It is understood that the units contain a desk, chair, a bed, a cupboard and a small ensuite shower room. It is understood that there is space within the units for microwaves, kettles, fridges.

37. There can be no doubt that the units do not contain kitchen facilities or a kitchen and that, despite the doors between the units and the communal areas, that the kitchens provided are adequate and convenient.

Applicant's Position

38. Ms Parmar on behalf of the Applicant relied upon the Applicant's Statement of Case, the content of which is not repeated.

39. It is the Applicant's contention that the units did not need to have a kitchen within them to be a dwelling. She relied upon *Uratemp,* as referred to at paragraph 66 of *Q Studios,* that:

> "*the purposes of a dwelling are, generally: living, eating, sleeping and open brackets in modern times, at least] washing, though it has been authoritatively held that premises may be a dwelling in ordinary parliaments without the presence of any cooking facilities: See per Lord Millett in the Uratemp case. The same conclusion would apply to the absence of the bathroom.*"

40. Ms Parmar requested that the Court consider that there was no obligation upon the occupiers of the units to use the common areas and many may choose not to do so. Therefore, she contended that the units were sufficient as dwellings irrespective of the presence of the communal areas. However, the Tribunal does have to consider all of the living space available to the occupiers on an objective basis.

41. Furthermore, the Tribunal must consider whether the unit, lacks any key area of living space (that is, a kitchen, seating or sleeping area) and, if any of those are missing, then regard needs to be had to whether that living space is provided elsewhere. The Tribunal does not accept that the question to be considered is whether the separate part of the accommodation is sufficient for the needs of any occupant. In this regard, Ms Parmar highlighted the fact that the occupiers of the units were able to bring microwaves, kettles and other food preparation equipment into the units. She also pointed out that the bed can be used to sit on, as a sofa and, therefore, that she did not consider that the units lacked any living accommodation.

42. Ms Parmar also considered that the communal areas were unlikely to be considered a part of the dwelling as it is unlikely that any occupier of the units would keep their personal belongings within the kitchens. However, it was identified that each kitchen contains a refrigerator. Irrespective of the relevancy of this point, the Tribunal finds that where there is a refrigerator, it is likely that the occupiers of the units will utilise them, thereby leaving personal items in the refrigerator if not other cooking items and foodstuffs in the kitchens.

The Respondent's Submissions

43. Mr Vinson relied upon his skeleton argument which is not repeated herein.

44. He stressed that the Tribunal should consider the living space available to the occupiers of the units as a whole. He accepted that a dwelling does not need a kitchen but stressed that the absence of the cooking facilities was fatal to the Applicant's claim due to the presence of cooking facilities in the shared communal area.

45. The Tribunal questioned Mr Vinson as to the correctness of this given that in *March Ltd,* an alcove containing kitchen facilities was not held to be part of the dwelling and as *Baker v Turner* states that a kitchen is a living room. Therefore, it may not be the kitchen facilities that are key but the kitchen as a living area, where it is a living area. In the present case, the kitchen also contains seating and, therefore, is also a living area.

46. Mr Vinson was requested to compare the communal area with the communal area in *Q Studios* which the President decided was *"in the nature of social and recreational facilities"*. Mr Vinson emphasised that the test was an objective one and contended that there was insufficient living space within the units which would result in the occupiers utilising the kitchen area.

Determination

47. Considering the analysis set out in *Q Studios,* earlier case law, and, particularly, the President's comment that decisions will *"inevitably be fact specific"* (paragraph 84 of *Q Studios),* the Tribunal notes that the evidence shows that the units were between 10 and 15 square metres, did not contain kitchens or separate sitting areas and that kitchens and sitting areas were provided elsewhere.

48. As such, following the test set out by the President at paragraph 76 of *Q Studios,* the Tribunal concludes that, when viewed objectively, the Tribunal concludes that the dwelling must include both the unit and the communal kitchen and sitting areas. As such, not all of the dwelling is separately occupied by the occupiers of the units and, therefore, it cannot be that the units are separate dwellings but that the dwelling is the unit (or separate area) together with the communal area. Together they form the dwelling, and that dwelling cannot be said to be separate.

49. The fact that a dwelling does not need to have kitchen facilities to be a dwelling is immaterial. The fact is that the dwelling does have kitchen facilities which are shared with others in circumstances where they had no kitchen facilities within the units. This is different to the position in *Q Studios* as, in that case, the Studystudios were of ample size, with all key living areas present within them and, therefore, the was no requirement for the occupiers to use the shared areas. Furthermore, the shared areas in that case were not suitable living areas but were social/recreational space which were not large enough to accommodate even a significant fraction of the occupants and were not areas where successive user would be appropriate.

50. In this case, the units are small with no kitchen and no sitting area and with a kitchen/living area provided elsewhere. Therefore, the units are not separate premises as the kitchen/living area is part of the demise. The occupants live in the room to which they have exclusive possession as well as in the common areas, both parts are part of their dwelling. In those circumstances the dwellings are not separate premises. Therefore, the Applicant is not entitled to acquire the right to manage the Property as none of the units are flats for the purpose of s.112 of the 2002 Act and, accordingly the Application is dismissed

Costs

51. Pursuant to section 88 of the 2002 Act:

(1) A RTM company is liable for reasonable costs incurred by a person who is—

(a) landlord under a lease of the whole or any part of any premises,

(b) party to such a lease otherwise than as landlord or tenant, or

(c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,

in consequence of a claim notice given by the company in relation to the premises.

(2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3) An RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before (the tribunal) only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.

(4) Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by (the Tribunal) .

52. Section 89 states:

"Costs where claim ceases

(1) This section applies where a claim notice given by an RTM company—

(a) is at any time withdrawn or deemed to be withdrawn by virtue of any provision of this Chapter, or

(b) at any time ceases to have effect by reason of any other provision of this Chapter.

(2) The liability of the RTM company under section 88 for costs incurred by any person is a liability for costs incurred by him down to that time.

(3) Each person who is or has been a member of the RTM company is also liable for those costs (jointly and severally with the RTM company and each other person who is so liable).

53. In the event that the Respondent seeks to recover its costs, it must notify the Tribunal and the Applicant of the claim within 14 days of receiving this decision and, at the same time, provide a Statement of Costs setting out the amount claimed.

54. In the event that the Applicant wishes to oppose any claim for costs made by the Respondent, either in principle or the quantum, it must do so by providing the Respondent and the Tribunal by providing written submissions setting out the basis of objection within 7 days or receiving the Respondent's claim and Statement of Costs.

55. The Respondent may provide a brief response to any such submissions by the Applicant within a further 7 days.

56. The case will be reviewed by a legal officer on the next available date after 28 days and either listed for determination of the costs issue or a final order will be made.

Appeal

57. If either party is dissatisfied with this decision and believes that they may have grounds to appeal, an application may be made to this Tribunal for permission to appeal to the Upper Tribunal, Property Chamber (Residential Property) on a point of law only. Any such application must be received within 28 days after these reasons have been sent to

the parties under Rule 52 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 201

Judge R Watkin

Regional Surveyor N Walsh FRICS