FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AD/LRM/2018/0023 V:FVH**
Property	**:**	**20, Upper Wickham Lane, Welling, Kent, DA16 3HE**
Applicant	**:**	**20 Upper Wickham RTM Company Limited**
Representative	**:**	**Mr K Wijesinghe**
1st Respondent	**:**	**Assethold Limited**
Representative	**:**	**Mr Gurvits**
Type of application	**:**	**Application in relation to the denial of the Right to Manage**
Tribunal members	**:**	**Ms H C Bowers – Chair** **Mr A Lewicki**
Date of decision	**:**	**10 December 2020**

DECISION

The Tribunal finds that 20, Upper Wickham Lane, Welling, Kent, DA16 3HE are premises excluded from the Right to Manage. The Reasons for this decision are set out below.

REASONS

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V:FVH. A face-to-face hearing was not held because it was not practicable, and no request was made for a face-to-face hearing. The documents that the Tribunal was referred to were in a bundle of 42 pages, an expert report of 25 pages produced by Vasil Gulev and a second bundle of 5 pages that was provided by the Applicant on the day of the hearing by the contents of each set of documents have been noted.

The remote video hearing took place on 5 November 2020. The Applicant was represented by Mr K Wijesinghe and the Respondent by Mr R Gurvits.

The application

1. This is an application to acquire the 'right to manage' of 20 Upper Wickham Lane, Welling, Kent, DA16 3HE ("the premises") under Part 2 of Chapter 1 of the Commonhold and Leasehold Reform Act 2002 (the "2002 Act").

2. The claim is opposed on the basis that the premises are excluded from the right to manage due to the commercial element of the premises being greater than 25%.

Background

3. 20 Upper Wickham Lane is a mixed-use property with a shop unit on the ground floor and four flats. The freehold is held by Assethold Limited.

4. The single issue in relation to the Right to Manage was the proportion of the commercial unit in respect of the other areas with the premises. The parties had initially provided some evidence in relation to the relevant floor areas. However, given the limitations on inspections due to the Covid-19 pandemic, the parties agreed that the way to resolve this issue was the appointment of a Single Joint Expert (SJE).

The Hearing

5. The hearing was held on 5 November 2020 by a remote video platform, FVH. In attendance was Mr Wijesinghe representing the Applicant and Mr Gurvits representing the Respondent.

6. At the start of the hearing Mr Wijesinghe referred to an additional bundle that he had submitted a few minutes before the start of the hearing. Mr Gurvits accepted that he had received the additional bundle but submitted that as it had been sent so late, it should be ignored. The Tribunal considered the contents of the additional bundle and noted that there were five pages and included the office copy entry of one of the flats, 20B Upper Wickham Lane, with a plan showing the flat and the garden that was demised with the flat; a definition of 'appurtenant

property' from section 112 of the 2002 Act and a one-page extract of the decision in Gala Unity Limited v Ariadne Road RTM Company Limited [2012] EWCA Civ 1372 (Gala Unity). On consideration of the documents the Tribunal considered that there was no prejudice caused to the Respondent and that Mr Gurvits was in a position to be able to respond to them. Therefore, the Tribunal allowed the last-minute submission of the additional bundle.

The Evidence

7. In the twenty-four hours before the hearing, the Expert Report from the SJE, Mr Gulev, was submitted. The Tribunal was also copied into correspondence from the parties on the extent of the expert report. The Applicant had asked Mr Gulev to include the measurements for the garden area that was included in the demise of flat 20B. The Respondent commented that this area was not required given the requirements of the statute. In the end the additional measurement was not provided.

The Expert Report:

8. The report prepared by Vasil Gulev was dated 4 November 2020 and included a statement of truth. The inspection of the property was carried out on 30 October 2020 at 2:00pm.

9. From the description, plans and photographs the subject property is a two-storey terrace property. On the ground floor is a retail unit and three flats, 20B, 20C and 20D. On the first floor is one flat, 20A. Access to the four flats is by a rear passageway.

10. The internal measurements taken by the SJE for each unit is set out below:

Unit	Floor Area sqm
Shop	37.65
20A	47.15
20B	19.87

20C	20.55
20D	17.18
Total	142.4

11. The conclusion of the SJE is that the shop unit is 26.44% of the total internal floor area (37.65/142.4 x 100).

Submissions

12. Mr Wijesinghe argued for the Applicant that the garden area of flat 20B should be taken into account. He relied upon the decision in Gala Unity Limited v Ariadne Road RTM Company Limited [2012] EWCA Civ 1372 as authority that the garden that was demised to flat 20B was appurtenant property and therefore should be included when deciding if the property was subject to the right to manage.

13. Mr Wijesinghe also wished to dispute the findings of the SJE in the context of previous surveys and measurements carried out on the behalf of the Applicant.

14. In response Mr Gurvits submitted that the garden area was not an internal area and therefore not relevant in the consideration of whether a property qualifies for the Right to Manage and that the Gala Unity decision was not relevant.

The Law

15. The relevant test as to whether premises are excluded from the Right to Manage is set out in Schedule 6 to the 2002 Act.

16. Paragraph 1 of Schedule 6 states:

Buildings with substantial non-residential parts

(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),

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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.

Conclusion and decision of the Tribunal

17. Section 72 of the 2002 Act sets out a definition as the type of premises where the Right to Manage applies. Within that section there is reference to appurtenant property. The Tribunal agrees with the Applicant that the definition of appurtenant property will include the garden to flat 20B. However, that is not the issue in this case and therefore the decision in Gala Unity is of no assistance. The issue before the Tribunal is whether the premises are excluded from the Right to Manage by paragraph 1 to Schedule 6 of the 2002 Act. Under these provisions a property is excluded from the Right to Manage if the internal floor area of any non-residential part exceeds 25% of the internal floor area of the premises. Sub-paragraph 1(4) goes on to define the internal floor area of a building as excluding any common parts of the building. There is no reference to any external area. The evidence from Mr Gulev is that the floor area of the internal part of the commercial premises (37.65) is 26.44% of the whole internal floor area (142.4). Given the test in paragraph 1 to Schedule 6, the non-residential element is over 25% of the internal floor area of the premises and therefore the premises are excluded from the Right to Manage.

18. The Tribunal noted that the Applicant raised some objections to the findings of Mr Gulev and wished to compare those findings with the surveys and measurements previously carried out on the Applicant's

behalf. However, given that the parties had agreed to a SJE and that the duty of the SJE was to the Tribunal, it would not be appropriate to re-open any other evidence in relation to the floor areas.

Costs

19. The Applicant has already made an application under the provisions of section 20C of the Landlord and Tenant Act 1985 for an order limiting costs in relation to service charges. It is not clear whether the property owner is seeking costs under the provisions of the leases or under some other basis. However, the Tribunal will shortly issue Directions so that this aspect can be determined in due course.

Name: Ms H C Bowers **Date:** 10 December 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

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