RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL
& LEASEHOLD VALUATION TRIBUNAL

COMMONHOLD AND LEASEHOLD REFORM ACT 2002

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

Case No. **CHI/29UN/LOA/2004/0002**

Property: **16 Royal Esplanade**
Westbrook
Margate
Kent
CT9 5DX

Applicant: **Ellithom RTM Company Limited**
c/o Messrs. Boys & Maughan, Solicitors, India House, Hawley Street, Margate, Kent CT9 1PZ

Respondent: **Landpoint Limited**
c/o Messrs. Marsden Douglas, Solicitors, 160 Northdown Road, Cliftonville, Kent, CT9 2QN

Date of Hearing: 18th May 2005

Members of the Tribunal: **Mr. R. Norman (Chairman)**
Mr. J.N. Cleverton FRICS
Mr. R. P. Long LLB

Date decision Issued:

RE: 16 ROYAL ESPLANADE, MARGATE, KENT

Background

1. The Applicant has made an application to the Leasehold Valuation Tribunal for a determination under Section 84 (3) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that the Applicant was on the relevant date entitled to acquire the right to manage the three flats at 16 Royal Esplanade, Westbrook, Margate, Kent ("the subject premises").

2. Our determination appears at paragraphs 25 to 31.

Inspection

3. The subject property is an end of terrace property which has been converted into three flats and beneath the flats there is a basement.

4. Present at the inspection were:
Mr. Reeves of Messrs. Boys & Maughan, Solicitors representing the Applicant.
Mr. Fairbank of Counsel representing the Respondent.
Mr. Marsden of Messrs. Marsden Douglas, Solicitors representing the Respondent.
Mr. Parkin, OBE FRICS, Surveyor instructed by the Respondent.

5. It was explained to us that in the statements supplied on behalf of the parties the property next door to the subject property had been referred to as No. 18. It was in fact No. 17.

6. We inspected in particular the basement and having done so, Mr. Fairbank after consulting with Mr. Marsden agreed that the exclusion from the right to manage provisions contained in paragraph 1(1) of Schedule 6 to the Act (any non-residential part of the premises exceeds 25% of the internal floor area) did not apply to the subject premises. No measurements of the basement had been made but our impression was that its extent coincided with the footprint of the subject property.

7. At the request of Mr. Fairbank we also inspected the staircase to flats 2 and 3 and found that whereas flat 1 had its own entrance, flats 2 and 3 had a common entrance and a common staircase up to flat 2.

Hearing

8. The hearing was attended by those who were present at the inspection and Miss V. Elliott of Flat 3, and Mr. and Mrs. Thomerson of Flat 1 at the subject premises.

9. A bundle of statements and other documents had been supplied to us by the parties in response to the Directions given and we have considered those statements and documents.

10. Mr. Fairbank wished to place before us two letters. He stated that the first was from a valuer concurring with Mr. Parkin and that the second was from a member of staff at the Office of the Deputy Prime Minister giving an overview of the thinking behind the Act. Copies of both letters had been given to Mr. Reeves on the morning of the hearing.

11. We heard argument from Mr. Fairbank and Mr. Reeves and announced our decision that the letter from the valuer could have been included earlier and that to admit it now was not justified and that as to the letter from the Office of the Deputy Prime Minister, whether we should see that depended on whether or not Mr. Fairbank could persuade us that there was some ambiguity in the wording of the Act and that in order to resolve that ambiguity the letter would assist us. Neither letter was placed before us.

12. We asked for clarification of the matters still in dispute.

13. Mr. Fairbank stated that these were:

(i) The validity of the counter notice.
(ii) The possibility of amending the counter notice.
(iii) The lack of a vertical division of the property as required by Section 72 (3)(a) of the Act. Mr. Fairbank confirmed that there was no challenge to the right to manage on any other basis.
(iv) The possibility of challenging the right to manage even if the counter notice were invalid and the time for serving a counter notice had passed.

14. Mr. Reeves stated that there was no longer any challenge to the right of Mr. Smart to sign the counter notice.

15. Mr. Fairbank submitted that the real issue for us to determine was not whether the counter notice was valid but whether or not the premises qualified under the right to manage provisions in the Act.

16. Mr. Fairbank stated that Mr. Parkin was a witness rather than an expert on the law and that he supported the contention that the subject property is a building divided horizontally into self contained flats and that it did not fall within the entitlement to right to manage qualifications in Sections 71 and 72 (particularly Section 72 (3)(a)) of the Act. The flats are horizontally divided and because there is an external staircase they are all individual and the building is divided horizontally not vertically. Section 72 (3) (a) implies there could be different forms of division and may have envisaged the situation where there is more than one flat on one level and vertically divided.

17. We heard full argument and submissions by Mr. Fairbank and Mr. Reeves.

18. The case advanced by Mr. Fairbank on behalf of the Respondent was as follows:

(a) He accepted that the counter notice was not clear. The reference to Chapter One Part Two was correct but could have been better worded and he accepted that to say it complied with Section 84 (2)(b) would in his words be "pushing it".

(b) He submitted that the claim notice was defective in that 2 (a) should have read "they consist of a self contained part of a building...." rather than "they consist of a self contained building....".

(c) He would seek to amend the counter notice. He could not direct us to any provision giving us jurisdiction to give leave to amend but submitted that if a strict view were taken of the counter notice then a strict view should be taken also of the claim notice. He accepted that Section 81 (1) of the Act provided that a claim notice was not invalidated by any inaccuracy in any of the particulars required by or by virtue of Section 80 of the Act and that there was no corresponding provision in relation to counter notices. However, he queried whether that was the intention of Parliament and submitted that the Act should be interpreted broadly. He submitted there was an inherent power to correct typographical mistakes. For example if a capital letter had been missed out of the counter notice it would not be considered to be invalid. In the present case a similar sort of correction was required but on a larger scale. He accepted that in the present case this was not a typographical error but was contrary to the provisions of the Act but submitted there was an inherent power to overlook errors. He also suggested that the notes in the margin of the counter notice form could have mislead the person completing the counter notice.

(d) He further submitted that the Act only applied to premises which are within Section 72 (1) and that if the premises do not come within that Section then the absence of a valid counter notice would not change that fact and there could be no right to manage. The mere service of a claim notice could not give rights Parliament did not intend. There was a need for the premises to comply and he suggested that it would be sad to lose if there were merit in the Respondent's case. Although he appreciated that the Act set out a procedure for the service of a claim notice followed by the opportunity for a landlord to serve a counter notice if he wished to contest the matter, Mr. Fairbank did not agree that if no valid counter notice were served then the right to manage could arise in circumstances where a counter notice could have been served. He submitted that the right to manage company must have the right to claim before a claim notice can be issued. It was put to him that Section 90 of the Act appeared to provide that failure to contest the claim resulted in the automatic right to manage but he did not agree. He submitted that Section 90 related only to the acquisition date and that the failure to contest by the service of a valid counter notice could not create a right where no right existed.

(e) It was put to Mr. Fairbank that if, for example, no counter notice were served but there was no entitlement and the right to manage were acquired and continued for say two years and the landlord then realised that the building did not qualify and there should have been no right to manage, there appeared to be no mechanism under the Act to remedy the situation. Mr. Fairbank considered that in those circumstances all the landlord could do would be to apply to the High Court to exercise its inherent jurisdiction.

(f) Mr. Fairbank submitted that Section 72 was ambiguous because it referred only to a vertical division, that Nos. 16, 17 and 18 comprise the whole building and that the flats are the self contained parts of that building.

(g) He further submitted that:
(i) Section 72 (1)(a) leads to how the building is divided. The building is No. 16 and the division is an individual flat. The application does not relate to the basement and there is a non vertical division between the basement and the ground floor.
(ii) The intention of the Act was not to exclude the landlord from getting access to parts of the building which were not part of the property which the right to manage company would manage. The water service pipes for the ground floor flat run through the basement which is not a part of this application.
(iii) The basement is not an appurtenant property although there are rights of support and of access to deal with the services. The basement is not in the leases.

19. The case advanced by Mr. Reeves on behalf of the Applicant was as follows:

(a) He submitted that as to the "vertical division" in Section 72 of the Act, the "premises" is the structure containing the three flats. There could be an argument that the flats are a self contained part of building and under Section 72 (3)(a) of the Act "it constitutes a vertical division of the building". In that case "it" is No. 16 Royal Esplanade within which are horizontally divided flats. If the argument put forward in Mr. Parkin's letter at page 63 of the bundle were accepted then the Act would apply only to terraced properties, not flats and the Act refers to flats. It would be a nonsense to accept the Respondent's

argument. To interpret the Act as suggested by the Respondent would mean that the Act would not apply to most if not all the flats in this country.

(b) Mr. Reeves submitted that the access to the premises is irrelevant. There was no reference in the Act to access. Most flats have a separate means of access. The Respondent was approaching the case on the basis that the individual flats were making this application and that was not the case. The right to manage company makes the application on behalf of that part of No. 16 Royal Esplanade which falls within their leases. There could be no other logical interpretation of Section 72.

(c) As to the validity of the counter notice Mr. Reeves submitted that Section 84 (2)(b) of the Act required that the counter notice contain a "specified provision of this Chapter" and the counter notice in this case did not specify a provision of the Chapter. Even the marginal notes on the form remind the landlord to specify the provision of Chapter 1 Part 2 relied on. The counter notice is meant to alert the right to manage company to what is wrong with their application. The counter notice in this case did not specify and is invalid. The result is that the situation is as if no counter notice had been served and on that basis the right to manage was automatically acquired on the 20th January 2005. The Respondent agreed that the counter notice strictly was defective but argued that on public policy grounds that should be overlooked. If, for example, tenants who were not entitled to claim the right to manage succeeded in doing so because the landlord did not serve a counter notice then the Act provides that the right to manage is automatically acquired on the acquisition date. The landlord's remedy in such circumstances is to go to the County Court to ask for an injunction to stop the tenants doing what is not in their tenancy agreements. The remedy is not to serve a late counter notice or to serve a form of counter notice within the counter notice time limit but which is worded vaguely. The automatic provisions in the Act are there for a purpose. The right to manage company should acquire the right if no valid counter notice is served. In this case Mr. Reeves submitted that there was no valid counter notice, there was no provision to amend and no application had been made to amend. Parliament could not have intended there to be the possibility of amendment but if the Tribunal were to entertain an amended counter notice then, although it was not accepted that there was any fault with the claim notice, the amendment of any fault in the claim notice should also be entertained.

(d) Mr Reeves submitted that in Section 81 of the Act Parliament made the position clear as to inaccuracies in the claim notice and made no similar provision as to the counter notice. That omission was very important. If it was intended that a counter notice could be amended after the date for service, the Act could have made provision for it but the automatic acquisition of the right to manage would have been unworkable.

(e) The claim notice at p 48 of the bundle was in respect of the whole of No. 16 Royal Esplanade except the basement to which it could not apply. At the time there was a dispute as to whether the basement was in Mr. Thomerson's lease but subsequently it had become clear that it was not in his lease. It remains with the landlord. The rest of the basement appears to run partially under No. 17 and part of the basement is full of rubble almost to the joists of the ground floor. The basement is retained by the landlord. It is not part of the application.

(f) Asked about the argument concerning the horizontal division between the basement and Flat No. 1 Mr. Reeves submitted that vertical referred to what part of a building is. It did

not refer to the basement. It referred to the division between Nos. 16 and 17. The basement is not vertically divided from the rest of the building but that is irrelevant. The claim can only refer to what is in the leases of the three flats. If there was an inaccuracy in the claim notice it was covered by Section 81 of the Act.

20. The parties agreed that:

(a) There must be a right of support over the basement.

(b) There appears to be a right of passage of water and other utilities for at least Flat 1 through the basement.

(c) Section 72 3(b) of the Act was satisfied because the structure of the building is such that it could be redeveloped independently of the rest of the building as in fact that had been done.

21. Mr. Parkin stands by his view in his letter at page 63 in the bundle but accepts that Flats 2 and 3 do have a common entrance and therefore they are not entirely self contained.

22. Asked about seeking a remedy in the County Court in circumstances where the claim notice was not challenged but the building or the lessees did not qualify, Mr. Reeves considered that if the building did not qualify then it could never be the subject of right to manage. Mr. Fairbank considered that as it was now conceded that the County Court would have the jurisdiction to deal with such a situation it seems that the Tribunal are dealing with whether the building comes within the Act and counter notice validity is irrelevant.

23. We heard full argument and submissions from Mr. Reeves and Mr. Fairbank as to costs under both Section 88 and Schedule 12 to the Act.

24. The members of the Tribunal met in the absence of the parties and considered the bundle of statements and documents submitted on behalf of the parties and the arguments and submissions made at the hearing.

Determination

25. As to the validity of the claim notice, it was argued that the claim notice was defective but we found that Section 81 (1) of the Act provided that a claim notice was not invalidated by any inaccuracy in any of the particulars required by or by virtue of Section 80 and as a result even if the claim notice was defective as suggested it was still valid.

26. As to the validity of the counter notice, we found that it did not contain a specified provision as required by Section 84 (2)(b) of the Act and that in particular Section 84 contains no provision equivalent to Section 81 (1). We found nothing to suggest that the omission of a provision in relation to a counter notice similar to that in relation to a claim notice in Section 81 was anything other than intentional. If Parliament had intended to make similar provision in respect of a counter notice it could easily have done so. Our interpretation of the Act was that it was clear from the wording that Parliament had intended to create a procedure whereby the failure to serve a valid counter notice would result in the automatic creation of the right to manage.

27. The advocates considered that where the building or the lessees did not qualify for the benefit of the right to manage provisions of the Act then a remedy could be sought from either the High Court or the County Court. However, our attention was not drawn to any provision in the Act permitting a challenge to the right to manage where a valid counter notice had not been served, nor to any provision in the Act for extending the time for service of a counter notice or for its amendment and we found no such provisions ourselves. Mr. Fairbank suggested that we should be flexible in our reading of the counter notice and that if there were for example a typographical error we should overlook it and that the problem with the counter notice was similar but on a larger scale. We could not agree with that. This was not a typographical error but a failure to provide information that the Act specifies so the analogy is not in any case appropriate. We found that the counter notice failed to comply with the Act and consequently was invalid.

28. We therefore determined that the Applicant was on the relevant date, as defined in Section 79 (1) of the Act, entitled to acquire the right to manage the premises. The acquisition date is the date three months after the determination becomes final as provided by Section 90(4) of the Act.

29. We were urged by Mr. Fairbank to ignore the validity or otherwise of the counter notice and to make a decision on whether or not the building qualified under the right to manage provisions in the Act. If we are wrong in our finding that the counter notice was invalid and the result which followed from that, we would say that we find that the part of No. 16 Royal Esplanade consisting of the three flats is a self contained part of a building with appurtenant property namely the basement which constitutes a vertical division of the whole building and that being the only challenge to the right to manage, the right to manage that part of No. 16 consisting of the three flats is therefore acquired. The fact that the building is also divided horizontally is not mentioned in the Act and we find is irrelevant. We were told that the Respondent may have applied for planning permission to develop the basement but we found that the acquisition of the right to manage would not in any case inhibit such development should it ever become possible. We hope this will assist the parties.

30. As to costs, it was accepted on behalf of the Respondent that by Section 88 (3) of the Act, a right to manage company could only be liable for costs incurred by the Respondent as a party to these proceedings if the Tribunal dismissed the company's application. Consequently, the Applicant is not liable for the Respondent's costs in connection with these proceedings.

31. We considered the provisions of paragraph 10 of Schedule 12 to the Act in relation to costs and determined that the Respondent had not been unreasonable in contesting this application because this is new legislation and the Respondent had an arguable point and had not acted in a way specified in paragraph 10(2)(b). There would therefore be no order as to costs.

R. Norman
Chairman

APPLICATION FOR LEAVE TO APPEAL

Case No. **CHI/29UN/LOA/2004/0002**

Property: **16 Royal Esplanade**
Westbrook
Margate
Kent
CT9 5DX

Applicant: **Ellithom RTM Company Limited**
c/o Messrs. Boys & Maughan, Solicitors, India House, Hawley Street, Margate, Kent CT9 1PZ

Respondent: **Landpoint Limited**
c/o Messrs. Marsden Douglas, Solicitors, 160 Northdown Road, Cliftonville, Kent, CT9 2QN

An application has been received from the Solicitors representing the Respondent for permission to appeal the Leasehold Valuation Tribunal's determination in this case.

The Tribunal has considered the application and has determined that permission should be granted for an appeal to the Lands Tribunal on the point of whether the counter notice was valid and whether in circumstances where the Leasehold Valuation Tribunal makes a determination that the counter notice is invalid the acquisition date should be three months after the determination becomes final as provided by Section 90(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act").

Whilst the Act appears to be prescriptive upon the point, and the Tribunal was plainly entitled to reach the decision it made on the wording of the Act for the reasons it gave, nonetheless this is new legislation and it is in the public interest to have any possible doubt clarified.

Other matters were set out in the application and permission to appeal in respect of those matters is refused for the following reasons.

The question whether a non residential part of the building may or may not exceed 25% of the whole is one of fact that could have been established with reasonable diligence before the hearing and advanced at it if there seemed reason to do so. The question was not canvassed at the hearing and indeed at the inspection Mr. Fairbank (Counsel for the Respondent) after consulting with Mr. Marsden (Solicitor representing the Respondent) agreed that the exclusion from the right to manage provisions contained in paragraph 1(1) of Schedule 6 to the Act (any non-residential part of the premises exceeds 25% of the internal floor area) did not apply to the subject premises. An appeal is not an appropriate vehicle for further grounds to be advanced in that fashion.

As to the letter from a member of staff at the Office of the Deputy Prime Minister which Mr. Fairbank stated he wished to place before the Tribunal, it was noted that it was only on the morning of the hearing that a copy had been given to Mr. Reeves (Solicitor representing the Applicant) even though there had been ample opportunity for it to have been produced in good time had the Respondent taken reasonable steps to do so. The Tribunal heard argument from Mr. Fairbank and Mr. Reeves and determined that whether the Tribunal should see the letter depended on whether or not Mr. Fairbank could persuade the Tribunal that there was some ambiguity in the wording of the Act and that in order to resolve that ambiguity the letter would assist the Tribunal. The letter was not placed before the Tribunal and it is not appropriate for the letter to be produced upon appeal as further evidence.

The Tribunal did not have to consider the point but it is doubtful whether a letter from a member of staff at the government department concerned, as opposed to the production of an extract from Hansard, is admissible to clarify an unclear passage in an Act.

The Respondent now seeks to produce in evidence original deeds of 1910 but if the Respondent had wished to rely on such deeds then they should have been produced at the hearing. The parties had time to prepare their cases and no adjournment was requested to obtain further evidence. It is not appropriate to an appeal procedure for the deeds to be produced as further evidence.

While in no way seeking to tie the hands of the President of the Lands Tribunal it is suggested that as the matter in issue is the interpretation of the Act it would be appropriate to have the appeal considered by a legally qualified member of the Lands Tribunal.

R. Norman
Chairman.

15/8/05