RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Commonhold & Leasehold Reform Act 2002 Section 85
LON/00BE/2006/0003

Applicant: Finland Street 1-16 RTM Company Limited (Management Company)
Represented by : Mr Tim O'Keeffe CIMA, Enfranchisement Manager, Buy your Own Freehold

Respondent: Holding and Management (Solitaire) Limited (Landlord)

Represented by: Mr Justin Bates of Counsel

Re: 1 – 16 Finland Street, Norway Dock London SE16 7TP

Hearing Date: 7th July 2006

Tribunal:
Mr L.W.G. Robson LLB(Hons) MCIArb
Mr T. N. Johnson FRICS
Mrs M. P. Colville JP LLB

Preliminary:

1. The Applicant applied on 27th April 2006 for a determination under Section 84(3) of the Commonhold and Leasehold Reform Act 2002 that it was entitled to acquire the right to manage in accordance with the Act. The Applicant had previously served a Notice of Claim on or about 9th February 2006. The Respondent had served a counternotice denying the right on or about 27th February 2006. The reasons given by the Respondent for denying the right were:
   a) that the building was not self-contained, as part of the basement premises lay below a property which not included in the Notice of Claim, and a vertical severance of the building would lead to part of the basement car park and its roller shutter door being outside the area subject to the notice, contrary to Section 72(2).
   b) The structure of the building was not such that it could be redeveloped independently of the rest of the building contrary to Section 72(3)(b).
   c) Substantial works would need to be done to the electricity supply so as to sever the remaining buildings within the development from 1-16 Finland street, and this would result in a significant interruption in the provision of relevant services contrary to Section 72(4).

Inspection

2 The Tribunal inspected the property on the morning of the hearing in the company of Mr Parry (Flat 8). It was at one end of a long 4 storey block of flats built about 1990, with two storey town houses interspersed at intervals along the block, also with parking spaces and service areas

produce evidence, and if the Applicant still wished to proceed, then it should

below. The block was brick built under a tiled roof with stucco plaster applied to up to first floor level. There were clearly problems with the plaster, which had fallen off or been hacked off. Flats 1-16 had their own separate entrance to the internal common parts and the basement parking area, but the entrance to the parking area ran under the town house at Number 17. The roller shutter security door and the two nearest parking spaces were also under Number 17. The garage had 11 marked spaces for parking, and it appeared that all the spaces belonged to Flats 1-16, with the exception of the visitors' space. The Tribunal noted that all services were well visible and exposed in the basement and they all ran in ducting across the roof of the car park, particularly the electricity. The supply to Number 17 appeared to be separately metered.

Hearing

3. At the hearing Mr O'Keeffe, referred to a letter stated to be an expert opinion from Mr JW Meek FRICS dated 4th May 2006 giving his opinion that the building was self contained for the purposes of the Act, that it could be redeveloped separately within normal constraints and that the services could be separated without significant interruption. However it was clear that Mr Meek had not carried out a full inspection although he had seen the basement parking area. The letter did not comply with the RICS rules on expert witness statements, there were some inconsistencies, and Mr Meek was not available for examination at the hearing.

4. Mr Bates referred to a letter from Mr Martin Harris FRICS of Moss Kaye Pembertons Limited, a firm of chartered surveyors, dated 27th June 2006. Mr Harris considered that it was *"inconceivable that the car park level could be developed independently of the upper part"*. He further stated: *"On the grounds that the services supplied to the flats include maintenance and repair of the structure, exterior and common parts, which applies to both the flats and the garages combined, we do not consider that Subsection 4 applies"*. He further referred to the communal walkway at the rear and considered that *"it would be inappropriate to section off part of the development from this communal liability"*. Finally he stated: "*there was no vertical division in the basement garage area. There is a horizontal division, which is irrelevant for the purposes of the Act"* Mr Harris's letter suffered from similar defects noted in relation to that of Mr Meek, and he was also not available to be examined.

5. Mr O'Keeffe and Mr Bates agreed with the Tribunal that there was in fact little evidence and no case law directly on the points at issue. Mr Bates had only recently been instructed and was prepared to agree to an adjournment for the parties to obtain better evidence, but Mr O'Keeffe wished to press on with the hearing, despite the deficiencies in the evidence. The Tribunal decided that it should not adjourn, as both sides had had a reasonable opportunity to produce evidence, and if the Applicant still wished to proceed, then it should be allowed to do so.

6. Mr O'Keeffe submitted that the walkways referred to in Mr Harris' letter were managed by the Respondent, but at the direction of a company owned by the Leaseholders. It was not envisaged that that situation would change. He agreed

with the Tribunal that Mr Meek's letter was difficult to follow. He stated that the Applicant was prepared to take over the whole of the parking area under the property, but if that was not possible it wanted to take over the area directly under Flats 1-16. He agreed that this would leave two parking spaces and the roller shutter door outside the area to be managed. He drew attention to the fact that one of the partners of Moss Kaye Pembertons, Mr G. Shapiro, was financially interested in the Respondent.

7. Mr Bates made three points; firstly that "vertical division" meant exactly that. If the property cannot be self contained when divided by a vertical division then it cannot be enfranchised or subject to the RTM provisions in the Act. In response to questions he submitted that case law relating to enfranchisement should not be implied into the RTM legislation, although he agreed that the RTM procedure could be a precursor to an enfranchisement application. He agreed that minor discrepancies from the vertical might be permitted but he contended that the area of two parking spaces and a roller shutter door was too great. He also submitted that a vertical and a horizontal severance was not within the terms of the Act.

8. His second point was the basement area could not be redeveloped separately from the rest of the building. Thirdly there would be significant interruption to the services if the services had to be severed.

9. Section 72 states as follows:

(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 such tenants is not less than two-thirds of the total number of flats contained in the premises.

(2) A building is a self-contained building if it is structurally detached.

(3) A part of a building is a self-contained part of a building if-
(a) it constitutes a vertical division of the building,
(b) the structure of the building is such that it could be redeveloped independently of the rest of the building, and
(c) subsection (4) applies in relation to it.

(4) This subsection applies in relation to a part of a building if the relevant services provide for occupiers of it-
(a) are provided independently of the relevant services provided for occupiers of the rest of the building, or
(b) could be so provided without involving the carrying out of works likely to result in a significant interruption in the provision of any relevant services for occupiers of the rest of the building.

(5) Relevant services are services provided by means of pipes, cables or other fixed installations.

(6) *Schedule 6 (premises excepted from this Chapter) has effect.*

Subsection 6 is not relevant to this case.

10. Mr Bates had submitted that the burden of proof lay upon the Applicants to show that the property came within the terms of Section 72. However that does not seem quite right. The intention of Parliament was to grant a "no fault" right to manage to leaseholders, subject only to a counternotice procedure to protect landlords in certain situations. If the landlord served a counternotice, then the burden of proving the matters set out in the counternotice should rest with the landlord, on the basis of the well-known principle that "he who alleges must prove". Thus the Tribunal considered the evidence in that light.

Interruption of services

11. The third issue was the easiest to deal with. From its inspection of the property, the Tribunal considered that the services were easily accessible, and that the statutory undertakers must have easements already. Very little, if any work would need to be done to separate the services, and any that needed to be done could be done without any significant interruption to any occupier. While the Respondent took a different view, the evidence from Mr Harris was positively Delphic in its terms, and did not advance the discussion much at all. The Tribunal decided that the landlord had not satisfied us that the services issue was a valid one.

Redevelopment

12. The second issue was slightly more difficult, but again the evidence was equivocal. Despite Mr Harris's blunt assertion in his letter, the Tribunal did not see the relevance of his suggestion that the question was whether the basement could be developed independently of the upper parts. Most of the basement lies directly below Flats 1-16 and the parking spaces are let to the leaseholders of that property, with the sole exception of only one space, the visitors' space. Further the Tribunal calculated the total area under Number 17 at approximately two per cent of the total floor area of the property subject to the Notice of Claim. It was easily accessible from the rest of the basement. Again the evidence from Mr Harris was difficult to follow, and the Tribunal considered that the Respondent had not satisfied it on the redevelopment point.

Vertical Severance

13. This was clearly the most difficult issue. There was mostly vertical severance in this building, but if the whole of the parking area was taken into account, there was also some lateral severance. While there were pillars directly under the point of vertical severance, The Tribunal did not consider that severance at that point could reasonably be said to produce a building that was self-contained, no matter how easily a partition could be erected. That would leave two spaces and the roller shutter door outside the area of management, including one space let on a long lease to an occupier at Numbers 1-16. Such a configuration for management appeared untidy, and it did not seem to be within the terms of the Act.

14. The Tribunal considered that the real question to be answered was whether the area under Number 17 was "material" for the purposes of the Act. Other legislation relating to enfranchisement has been interpreted to allow some minor deviation from the apparently strict concept of vertical severance, notably the Leasehold Reform Act 1967. The Tribunal rejected Mr Bates' argument that the RTM legislation should be viewed differently from other enfranchisement legislation. Mr Bates also accepted in answer to questions that some very minor deviation in the vertical severance might be within the terms of the Act, although he was quite clear that in this case he thought the deviation was too much. As noted above, the Tribunal concluded that the area within the deviation was approximately 2% of the floor area subject to the Notice of Claim. This seemed a minimal amount in the context of the notice, and the Tribunal concluded that it was not material for the purposes of the Act.

15. One further point should be dealt with for the sake of completeness. In answer to a question Mr Bates suggested that the Notice of Claim related only to Numbers 1-16 and not to the basement below. While the notice did not refer specifically to the basement, the spaces are with one exception let to Flats in the block. The other space is reserved for visitors. The Tribunal kept in mind Section 81 of the Act, which provides that inaccuracies in the particulars required by Section 80 will not invalidate a notice. While the particulars in the notice might have been ambiguous, nothing seems to turn on the ambiguity. Certainly the Respondent was not misled as to the extent of the claim, and did not plead it as a defect.

16. In the light of its findings above the Tribunal decided that the Respondent had not proved its case on the validity of the counternotice. Consequently it upheld the Applicant's Notice of Claim to manage the Property, with effect from the date three months after the date of this decision.

Signed: ..... Lancelot Robson
Chairman

Dated: 1st August 2006

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DECISION ON APPLICATION FOR LEAVE TO APPEAL

A. The Tribunal has considered the Respondent's request for Leave to Appeal dated 21st August 2006 and determines that Leave be refused.

B. In accordance with Section 175 of the Commonhold and Leasehold Reform Act 2002, the Respondent may make further application for Leave to Appeal to the Lands Tribunal.

Reasons for Refusing Application to Appeal

1. On 21st August 2006 the Respondent applied for leave to appeal against the decision of the Tribunal dated 1st August 2006 in this case setting out 5 grounds of appeal, firstly that the case raised matters of potentially wide implication; secondly and thirdly that the Tribunal had wrongly interpreted and/or wrongly applied the wording of Section 72 of the Commonhold and Leasehold Reform Act 2002 in relation to two matters; thirdly, fourthly and fifthly that the Tribunal had taken account of irrelevant considerations and/or a substantial procedural defect occurred in relation to three matters.

2. The Tribunal considered the points set out in the application for leave to appeal but it is satisfied that it came to the correct decision for the reasons already stated in its decision dated 1st August 2006.

3. One point relating to paragraphs 21 and 22 of the application for leave requires clarification. It is not correct to state that the Tribunal made its decision "in the absence of any expert evidence" (per paragraph 22(a)ii). As the decision shows, the parties both produced letters (rather late in the

Respondent's case) from chartered surveyors attempting to deal with the points in issue, but neither was available for examination on their evidence. In its decision the Tribunal explicitly considered the evidence produced.

4. The Tribunal considers that this case raises matters of potentially wide implication, but does not consider that it has come to the wrong decision. The findings made by the Tribunal were open to it on the material which was before it, and the findings cannot be said to be irrational or perverse.

5. Thus the Tribunal determined that leave to appeal be refused as the applicant has no reasonable prospects of success.

Signed: .....
Chairman

Dated: 12th September 2006