Neutral Citation Number: [2024] EWCA Civ 187

Case No: CA-2023-000644

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
MR JUSTICE EDWIN JOHNSON, THE PRESIDENT
[2023] UKUT 26 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2024

Before:

LORD JUSTICE LEWISON
LORD JUSTICE PHILLIPS
and
LADY JUSTICE ANDREWS

- -

Between:

ASSETHOLD LIMITED	**Appellant**
- and -	
EVELINE ROAD RTM COMPANY LIMITED	**Respondent**

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- -

Justin Bates and Katherine Traynor (instructed by **Scott Cohen Solicitors**) for the **Appellant**
Stan Gallagher (instructed by **Direct Access**) for the **Respondent**

Hearing date: 27/02/2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 04/03/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. 36 Eveline Road, Mitcham ("No 36") was originally two terraced houses. They have been converted into four flats, two of which are contained in each of the original terraced houses. The lessees of the four flats have established a right to manage company (the "RTM company") with a view to acquiring the right to manage (the "RTM") the four flats. Although No 36 is not itself structurally detached (since it shares a party wall with No 38), it falls within the definition of "premises" in section 72 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). But each of the original terraced houses also falls within that definition. The question posed by this appeal is whether the RTM company is entitled to acquire No 36 as a whole; or whether two RTM companies must be formed, and separate claims made in respect of each original terraced house.

2. The Upper Tribunal (Edwin Johnson J, President) answered that question in the RTM company's favour; but granted permission to appeal. His decision is at [2023] UKUT 26 (LC), [2023] HLR 33.

3. At the conclusion of the hearing, we announced that the appeal would be dismissed, for reasons to be given in writing. These are my reasons for joining in that decision.

The legislative framework

4. The RTM was created by Part 2 Chapter 1 of the 2002 Act as a fault-free way to enable lessees of flats holding under long leases to manage the buildings containing those flats. Before that time, it had been necessary to apply to the court for the appointment of a manager, but that usually required the lessees to show some kind of default by the landlord in performing his obligations. It was recognised to be a burdensome, expensive and cumbersome procedure, which the RTM was designed to replace.

5. Section 71 of the 2002 Act states that it provides for the acquisition and exercise of the RTM "premises to which this Chapter applies". The right must be exercised by an RTM company (I eschew the unpronounceable statutory phrase "a RTM company").

6. Section 72 defines the premises to which the RTM applies. It relevantly provides:

> "(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.

> (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 the 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 provided 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."

7. Schedule 6 provides for the exclusion of premises from the RTM. Schedule 6 para 2 provides:

> "Where different persons own the freehold of different parts of premises falling within section 72(1), this Chapter does not apply to the premises if any of those parts is a self-contained part of a building."

8. Section 73 specifies what is an RTM company. Section 73 (4) provides that:

> "… a company is not a RTM company in relation to premises if another company is already a RTM company in relation to the premises or to any premises containing or contained in the premises."

9. Section 74 deals with the articles of association of an RTM company. Their detailed contents are prescribed by regulations. The regulations define "Premises" by reference to an address; and article 4 states that the object for which the RTM company is established is to manage "the Premises".

10. Section 75 defines who is a qualifying tenant. The RTM is exercised by the service of a claim notice: section 79. The RTM can only be claimed by an RTM company which satisfies section 79 (4) or (5). Where there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company: section 79 (4). In any other case, the membership of the RTM company must include a number of qualifying tenants of flats contained in the premises which is not less than half of those flats: section 79 (5).

11. The claim notice must "specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies": section 80 (1). Section 81 (3) provides:

> "Where any premises have been specified in a claim notice, no subsequent claim notice which specifies—
>
> (a) the premises, or
>
> (b) any premises containing or contained in the premises,
>
> may be given so long as the earlier claim notice continues in force."

A few more facts

12. No 36 is at the eastern end of a terrace of houses in Eveline Road. It comprises four flats: Flats A, B, C and D. Flats A and C are ground floor flats; and Flats B and D are first and second floor maisonettes. The western half of No 36 (which was one of the original terraced houses) consists of Flats A and B; while the eastern half (which was the other original terraced house) consists of Flats C and D.

13. The terrace as a whole is structurally detached. On its eastern side, No 36 is not structurally attached to anything. But on its western side, it shares a party wall with No 38. It is not, therefore, a self-contained building; but it is a self-contained part of the building.

14. The freehold is registered under three separate titles, but Assethold is the registered proprietor of each.

15. The RTM company gave notice of claim on 28 July 2021, identifying No 36 as the premises over which the RTM was claimed. Assethold served a counter-notice denying the RTM. On 19 October 2021 the RTM company applied to the FTT for a determination that it was entitled to acquire the RTM.

16. The FTT determined that issue in favour of the RTM company; but on a basis that the UT held was legally incorrect. Nevertheless, the UT remade the decision, and found in favour of the RTM company, but for different reasons.

17. In essence, the UT held:

    i) Neither No 36 nor its constituent parts qualified as a self-contained building.

    ii) The terrace as a whole was a self-contained building.

    iii) No 36 satisfied the definition of a self-contained part of a building (i.e. the terrace); but so too did each of the original terraced houses.

    iv) There was nothing in the 2002 Act which excluded from the RTM a self-contained part of a building which itself contained a self-contained part or parts of the same building.

v) Therefore, the RTM company was entitled to acquire the RTM in respect of No 36.

The arguments

18. Mr Justin Bates, for Assethold, argued that where a building or part of a building satisfies the definition of "premises" in section 72, but is itself capable of division into smaller parts which also satisfy that definition, then the RTM company must serve its claim notice in respect of the smallest part satisfying that definition.

19. He supported that argument by reference to the decision of this court in *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2015] EWCA Civ, [2016] 1 WLR 275; and the policy considerations that were discussed in that case.

20. In his skeleton argument Mr Stan Gallagher, for the RTM company, contended that the Upper Tribunal was correct for the reasons that it gave. We did not, however, find it necessary to hear his oral submissions.

Ninety Broomfield Road v Triplerose Ltd

21. The appeal in *Triplerose* was in fact a number of joined appeals heard together. The common feature of all the appeals was that the RTM company in each case claimed the right to manage more than one block of flats. In each of the appeals, each block of flats was a structurally detached building. In some of the appeals the right was claimed by separate claim notice served in relation to each block; and in others the right was claimed by a single composite claim notice. Gloster LJ defined the issue at [2]:

> "The question which arises in these appeals is whether a RTM company can acquire the management of more than one set of premises as defined in section 72 of the Act."

22. At [45] she said:

> "Section 71 makes it clear that Chapter 1 of the Act makes provision for the acquisition of the right to manage only in relation to "premises to which this Chapter applies "and only by a company "which, in accordance with this Chapter may acquire and exercise those rights." Section 72(1) makes it clear that Chapter 1 only applies to premises if they satisfy the three separate conditions set out in sub-paragraphs (a), (b) and (c) of section 72(1). Importantly for present purposes sub-paragraph (a) imposes the condition that the premises "consist of a self-contained building or part of the building", which satisfies the conditions in sub-paragraphs (b) and (c) in relation to qualifying tenants and number of flats held by qualifying tenants. This makes it clear that the acquisition and the exercise of rights to manage applies not … to a number of blocks or self-contained buildings in an estate, but to a single self-contained building (ie structurally detached—see section 72(2)) or part of a building."

23. Although she did not say expressly what led her to that conclusion, Mr Bates submitted that it was the indefinite article "a" self-contained building to which she was referring. I am content to assume that he is correct.

24. Gloster LJ went on to say that the model articles of association for RTM companies supported this interpretation. So, too, did the procedure for inviting lessee participation in the claim to the RTM. Thus, she said at [50]:

> "Similarly, sections 79 and 80 of the Act are wholly inconsistent with the idea that "premises" as defined can include different premises beyond the single "self-contained building or part of the building" referred to in section 72(1)(a). For example, section 79(5) provides that the claim notice to be served by the RTM company can only be served if a requisite number of qualifying tenants of flats "contained in the premises" have joined the company; and section 80(2) provides that the claim notice must specify "the premises"."

25. She then discussed the practical problems that could arise if an RTM company could acquire the RTM blocks of flats in different geographical locations, which she outlined at [52] and [53]. For example, where two blocks of different sizes were managed by one RTM company, it was likely that the members belonging to the larger block would dominate decisions referable also (or even solely) to the smaller block; the possibility of such domination remained even if the blocks were of similar size. There was obvious potential for conflict of interest between the leaseholders of different blocks on a range of matters which were, in context, of considerable importance to leaseholders. The acquisition of the RTM could not be exercised against an existing RTM company, so that the leaseholders in the smaller block would in practice be fixed with the choice of the RTM company for all time. However attractive it might seem superficially for a smaller block to have joined in a single, estate-wide RTM, in reality this meant that the smaller block could not achieve the objective of self-management which was the purpose of the provisions.

26. She then found further support for this interpretation in the Consultation Paper that preceded the 2002 Act and in certain observations made during the Parliamentary debate.

27. She concluded at [62]:

> "Accordingly in my judgment the relevant provisions of the Act, construed as a whole, in context, necessarily point to the conclusion that the words "the premises" have the same meaning wherever they are used (save where otherwise expressly provided). That means that the references in section 72 to "premises" are to a single self-contained building or part of the building, and that likewise references to "the premises" or "premises" or "any premises" in sections 73, 74, 78, 79 and other provisions of the Act are likewise references to a single self-contained building or part of the building. That interpretation is consistent with the provisions for model articles contained in the Regulations and is the only basis on

> which the machinery for acquisition of the right to manage can operate. *Accordingly in my view it is not open to a RTM company to acquire the right to manage more than one self-contained building or part of a building* and the Upper Tribunal was wrong to reach the decision which it did." (Emphasis added)

28. Patten LJ and Sir David Keene agreed.

29. Taken literally, the emphasised sentence supports Mr Bates' submission. To apply that sentence to the current facts in the form of a syllogism: it is not open to an RTM company to acquire the right to manage more than one self-contained part of a building. Each constituent part of No 36 is a self-contained part of a building. Therefore, the RTM is only entitled to acquire one of them and not both. But as in the case of any judgment, it is not to be interpreted as if it were the statute itself. Our task is to interpret the 2002 Act, not a judicial gloss on it.

30. I should mention in passing that in the only case (so far) about the RTM to reach the Supreme Court the decision in *Triplerose* was not challenged: *FirstPort Property Services Ltd v Settlers Court RTM Co Ltd* [2022] UKSC 1, [2022] 1 WLR 519.

Settlers Court

31. The issue in *Settlers Court* was a very different one. In that case the RTM company of a single block of flats claimed to be entitled to share in the management of estate-wide services. The Supreme Court (overruling a previous decision of this court) held that it was not so entitled. The RTM conferred on an RTM company was confined to that which it could manage on its own. There would be insuperable difficulties if the RTM company's functions included the management of shared estate facilities. The decision in that case therefore does not have a direct bearing on this appeal.

32. In the course of his judgment, however, Lord Briggs discussed the general policy of the 2002 Act. At [38] he said:

> "It may fairly be said that a fundamental purpose of the 2002 Act is to confer management rights and responsibilities on a body (the RTM company) which is accountable to and controlled by the very tenants who will be affected by the conduct of that management, through their right to be members of the RTM company, rather than by either the landlord or a third party manager which will have its own agenda. That works perfectly well if the right to manage is confined to the relevant building which contains the flats occupied by those tenants, together with any facilities which they use exclusively. But it produces the opposite effect if the RTM company's rights extend to the management of estate facilities used by tenants who are complete strangers to the RTM company."

33. Nevertheless, it is inherent in the requirements that an RTM company must fulfil before serving a claim notice that there may be a substantial minority of qualifying tenants who do not wish to acquire the RTM. Even if that is the case, the RTM

company will be accountable to the qualifying tenants of the relevant premises (including the dissentients); and the management functions of the RTM company will be confined to those premises. There is no question of the RTM company in this case having to share management with anyone else.

34. At [40] Lord Briggs said:

> "The starting point lies in section 72, which imposes a much tighter qualification requirement in relation to premises than the equivalent provision in the [Landlord and Tenant Act 1987]. The premises must be self-contained. If they constitute a whole building it must be structurally detached. If part of a building that part must be divided vertically from the rest of the building, be capable of being independently redeveloped and have services which either are or could without interruption to the rest of the building be made independent. All these requirements point strongly towards confining the right to manage to separate premises within which the quality of the management provided by the RTM company affects only the occupants of that building or part of it."

35. No 36 satisfies these requirements. The quality of management provided by the RTM company will affect only the occupants of No 36.

Does *Triplerose* apply to this case?

36. Whether premises satisfy the definition of "self-contained building or part of a building" is a purely physical test. The definition is concerned only with the structure of the built envelope, its internal structure, and the separability of services.

37. Mr Bates accepted that there was nothing in the 2002 Act itself which supported his argument. But, he said, it could be extrapolated from *Triplerose*.

38. On the facts in *Triplerose*, each of the relevant blocks of flats was a self-contained structurally detached building, and there is no indication that they could have been sub-divided in a way that would have resulted in any of the blocks being made up of smaller self-contained parts of buildings. *Triplerose* was concerned only with the outer limits of what could be claimed in a claim notice. So, the problem that confronts us was simply not on the horizon in *Triplerose*.

39. Moreover, there are indications in the 2002 Act itself that Parliament considered that premises which themselves satisfied the definition in section 72 could contain smaller premises which themselves also satisfied that definition.

40. Schedule 6 para 2 envisages premises to which section 72 applies containing more than one self-contained part of a building. What excludes such premises from the Act is nothing to do with their physical configuration, but turns on different ownership. Clearly, Parliament envisaged that if the self-contained part of a building were owned by the *same* person, they would be "premises" to which the Act applied with the consequence that a claim notice could be served in respect of all of them. Section 73 (4) envisages the theoretical possibility of two RTM companies: one in respect of

"premises" and another in respect of premises "containing or contained in" the premises. It solves that problem by preventing the second company from being an RTM company. If Assethold's argument were correct, then it would be impossible for premises to *contain* other premises which satisfied the definition. Section 81 (3) is to similar effect. It, too, envisages two units of property, one within the other, each of which satisfies the definition of "premises". But this time it solves the problem by preventing a second claim notice from being served, while the earlier claim notice continues in force. If the earlier claim notice ceases to be in force, then there is nothing to prevent another claim notice from being served in relation to one or other of those units of property.

41. This reasoning corresponds closely with the reasoning of this court in *41-60 Albert Mansions Ltd v Craftrule Ltd* [2011] EWCA Civ 185, [2011] 1 WLR 2425, which concerned the interpretation of very similar statutory provisions in the Leasehold Reform, Housing and Urban Development Act 1993. Although it was concerned with a different Act of Parliament, the reasoning is equally applicable to the 2002 Act. *Craftrule* does not appear to have been cited in *Triplerose* or in *Settlers Court*.

42. The consequence of Mr Bates' argument is that property which in fact satisfies the definition of "premises" is disqualified from being premises to which the RTM applies. There is, as he accepted, nothing in the 2002 Act which supports that argument.

The decision of the Upper Tribunal

43. The Upper Tribunal said at [80]:

> "The relevant set of premises in the present case is [No 36]. It can of course be said that the RTM Claim has in fact been made in respect of two sets of premises; namely the Parts. This however seems to me to beg the question. If [No 36] can qualify as a single set of premises for the purposes of Section 72 , and it seems to me quite clear from the language of Section 72 that [No 36] can so qualify, it is hard to see why [No 36] should then be disqualified because it also comprises two sets of premises, namely the Parts, to which Section 72 also applies. This was not the situation which the Court of Appeal was considering in [*Triplerose*], and it does not seem to me that the decision of the Court of Appeal can be said to have been directed to this situation."

44. At [85] the Upper Tribunal accepted that:

> "… it is necessary to construe Section 72 in the context of the RTM provisions as a whole, and that it is necessary to look at the purpose of the RTM legislation as a whole in order to determine whether, either by virtue of Section 72 or by virtue of some other provision or provisions or by virtue of a combination of Section 72 and some other provision or provisions, RTM claims are not permitted in relation to a self-

> contained part of a building which has within it a self-contained part or self-contained parts of the same building."

45. The conclusion was stated at [86]:

> "As I have pointed out however, I cannot find any such restriction in the wording of Section 72, and I do not consider it possible to write such an additional restriction into Section 72. Mr Bates was not able to direct me to any other provision of the 2002 Act which can be said, at least in express terms, to constitute such a restriction. In these circumstances, where it seems to me that the statutory language is perfectly clear in not containing such an additional restriction, I am doubtful that arguments based on the operation and effect of the RTM provisions can supply a restriction which Parliament has not itself supplied."

46. The Upper Tribunal summarised its conclusion at [89]:

> "In summary, I do not think that there is anything in the scheme of the RTM provisions in the 2002 Act which supports the argument that an RTM claim cannot be made in respect of a self-contained part of a building which itself contains a self-contained part or self-contained parts of the same building. Nor do I think that [*Triplerose*] provides support for this argument."

47. I agree. Not only is there nothing in the 2002 Act which positively supports Assethold's argument, there are, as I have said, strong and clear indicators that point the other way.

48. I would affirm the reasoning of the Upper Tribunal.

Result

49. It was for these reasons that I joined in the decision to dismiss the appeal.

Lord Justice Phillips:

50. I joined in the decision to dismiss the appeal on the basis of the reasoning set out in Lewison LJ's judgment.

Lady Justice Andrews:

51. I agree with both judgments.