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IN THE LEASEHOLD VALUATION TRIBUNAL Ref: LON/00AM/LEE/2006/0003

DECISION

re: King's Wharf, 301 Kingsland Road, London E8 4DS

Applicant : KW RTM Co. Ltd.

Represented by : Mr A Radevsky, counsel

Respondent : Lemonland (Kings Wharf) Ltd.

Represented by : Mr S Ilyas, counsel

Tribunal: Mr NK Nicol - Chairman
Mr N Martindale
Mr DJ Wills ACIB

1. The Applicant is a company formed by 33 lessees at King's Wharf, 301 Kingsland Road, London E8 4DS with a view to exercising the right to manage under Part 2 of the Commonhold and Leasehold Reform Act 2002 ("the Act"). They sent the relevant claim notice to the Respondent in August 2006. The Respondent then served a counter-notice on 29th September 2006, disputing the Applicant's entitlement to exercise the right to manage.

2. The Applicant has applied to the Tribunal under s.84(3) of the Act for a determination that it was on the relevant date entitled to acquire the right to manage the premises. The hearing of the application took place on 10th April 2007. The parties' cases were set out in their respective amended statements, supported by helpful skeleton arguments provided by each party's counsel. Evidence was given by two of the Applicant's members, Mr Oliver John and Mr Colin Crist, and by Mr James Thornton of the Respondent's managing agents, Hurford Salvi Carr, and Mr David Phillips, a director of the Respondent company.

3. King's Wharf was developed in accordance with planning permission granted by the London Borough of Hackney on 23rd June 2000. It comprises 14 commercial units and 57 live/work units. At the time, Hackney had a particular planning policy to encourage the development of live/work units and imposed a number of conditions

to the planning permission with the stated aim of ensuring "that the employment use of the building is safeguarded and not lost through sub-division of the building." Floor plans of the live/work units were included in the planning permission. The majority of the live/work units are arranged on two levels and the floor plans indicated that the upper level, known as mezzanine, should be used as the relevant work space.

4. The Respondent's case is that, when the mezzanine floors of the live/work units are taken into account as being used for non-residential purposes, the right to manage is excluded by the relevant provisions of the Act which read as follows:-

S71 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.

S72 Premises to which 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.

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

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

S75 Qualifying tenants

(1) This section specifies whether there is a qualifying tenant of a flat for the purposes of this Chapter and, if so, who it is.

(2) Subject as follows, a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease.

(3) Subsection (2) does not apply where the lease is a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies.

SCHEDULE 6
PREMISES EXCLUDED FROM RIGHT TO MANAGE
Buildings with substantial non-residential parts

Para 1

(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),

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.

5. Mr Thornton had arranged for two members of his firm to measure two of the commercial units, which are the same size as the live/work units, and provided detailed measurements to show that, when the mezzanine areas of the live/work units are added to those of the commercial units, the floor area exceeds 25% of the total across the whole of King's Wharf. The Respondent argued that this meant that the premises did not fall within the right to manage under s.72(1) because they were excluded by paragraph 1(1) of Schedule 6 to the Act. The Applicant had some minor quibbles about the measurement but conceded that these did not bring the relevant area below 25%. Instead, they argued that the mezzanine areas should not be taken into account at all.

6. The Applicant had two principal arguments:-

(a) The mezzanine areas were occupied for residential purposes and so were not non-residential parts of the premises within the meaning of paragraph 1(2) of Schedule 6.

(b) The Respondent accepted that the Applicant's members were qualifying tenants. This implied that they accepted that the premises occupied by them were "flats" as referred to in s.75 and, in particular, flats which did not have a substantial business element because they did not fall within Part II of the Landlord and Tenant Act 1954 as referred to in s.75(3). Therefore, the whole of each unit was a flat and fell to be regarded as residential in its entirety.

7. The Applicant's first argument requires as examination of the meaning of paragraph 1(2) of Schedule 6 to the Act. The Tribunal had sympathy for the Respondent's argument that occupation ought to be by reference to the legal position under the lease, i.e. if the lease said that premises were to be used for work purposes then the lessee could not turn it to residential use for the purposes of the

Act. However, the wording of paragraph 1(2) does not appear to support that interpretation. The words "occupied or intended to be occupied" would appear to require a consideration of what is actually happening, i.e. how the relevant premises are actually being occupied rather than the intended legal position. Alternatively, the phrase "intended to be occupied" refers to the legal position, leaving "occupied" to refer to what is actually happening in fact.

8. There can be little doubt that Hackney intended, when they granted the planning permission, that the live/work units at King's Wharf should be occupied for a combination of residential and non-residential purposes. Therefore, it is arguable that the live/work units were intended to be occupied for non-residential purposes within the meaning of paragraph 1(2). However, paragraph 1(2) states that the premises must be "neither occupied or intended to be occupied." That means that, even if it was intended that the live/work units should be occupied, at least in part, for non-residential purposes, they are residential premises for the purposes of paragraph 1(2) if they are actually occupied in that way.

9. Mr John gave evidence that just over half of the Applicant company's members were owner-occupiers, with the rest sub-letting. He had been into the owner-occupied premises and was able to see that the mezzanine areas in those properties were being used for residential purposes. He had also spoken to the lessees who were sub-letting and they told him that they, too, were using the mezzanine areas for residential purposes. In respect of the non-members, he had spoken to many of the lessees and had been into four or so of their properties. Again, he was able to see or was told that the mezzanine areas were being used for residential purposes. He confirmed that there were no signs outside any of the properties to indicate that they were being used for non-residential purposes.

10. The Tribunal was referred to the Council Tax position and other indications that third party organisations had accepted that the live/work units were used for residential purposes. However, the Tribunal do not know the factual basis on which any of these third parties made their respective decisions and so cannot be satisfied that they support any particular view of the use of any part of King's Wharf.

11. The Respondent was unable to call any evidence as to the actual use of any of the live/work units. Mr Philips strongly asserted the commitment of his company to the live/work concept and the proper use of live-work units for their intended purpose. However, he also stated that the policy of his firm was not to engage in rigorous or draconian enforcement of such terms. Moreover, he could not give any evidence as to the actual use of any of the live/work units. He had been in Mr John's property for a meeting but had not noticed the use to which he had put the mezzanine area. Neither Mr Philips nor anyone in or on behalf of his firm had attempted to inspect any of the properties at any time to find out how they were actually being used. Mr Ilyas admitted that the Respondent's evidence really only went to whether the properties were intended to be occupied for non-residential purposes rather than whether they actually were.

12. In the circumstances, the Tribunal is satisfied that at least the majority of the live/work units are actually occupied entirely for residential purposes even if that was not the original intention of the local authority or the developers. On the above analysis of paragraph 1(2) of Schedule 6 to the Act, this means that no part of those live/work units is used for non-residential purposes. This further means that, on any analysis of how the proportion of non-residential use is calculated, it is less than 25% and King's Wharf is not excluded from the right to manage.

13. The Respondent had further argued that the actual use by the lessees of their properties for residential purposes constituted a breach of their respective leases and that such unlawful occupation should be disregarded for the purposes of paragraph 1(2). They further asked the Tribunal to make a finding that the relevant lessees had breached their covenants.

14. The Respondent conceded that the lessees' use of their properties for residential purposes was not a breach of the user covenant. To the extent that authority was required, they accepted the finding in *Bishopsgate Foundation v Curtis* [2004] 3 EGLR 57 that a covenant requiring use as a live/work unit meant live *or* work so that either or both uses were permitted. Instead, they relied on clause 3.4 of the lease which stated,

> The Tenant covenants with the Landlord ... To comply in all respects with the

Planning Acts and all notices orders licences consents permissions and conditions (if any) issued granted or imposed under them so far as they relate to or affect the Premises or their use or any operations or works carried out on the Premises.

15. The Respondent pointed to the condition contained in the planning permission from Hackney which stated,

> The workspace of the live/work unit(s) hereby approved and identified on the approved drawings shall be used for work purposes only and not as residential accommodation.

16. The Respondent argued that breach of this planning condition constituted breach of clause 3.4. The Applicant in reply pointed to the following provisions of the Town and Country Planning Act 1990:-

> **171B Time limits**
> (2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
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> **191 Certificate of lawfulness of existing use or development**
> (1) If any person wishes to ascertain whether—
> (a) any existing use of buildings or other land is lawful;
> (b) any operations which have been carried out in, on, over or under land are lawful; or
> (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,
> he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.
> (2) For the purposes of this Act uses and operations are lawful at any time if—
> (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
> (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

17. The Applicant asserted that the residential use of the whole of the live/work units at King's Wharf had gone on for more than four years, during which Hackney had taken no enforcement action and had indeed abandoned its former policy on live/work units. This would mean that no enforcement action could now be taken and the current use would be regarded as lawful under the above provisions of the Town and Country Planning Act.

18. In the Tribunal's opinion, the Applicant's case is more than arguable but it would not be appropriate to reach a conclusion on whether there has been a breach of covenant by any of the lessees. The Tribunal does have the power under s.168(4) to determine whether a breach of covenant has occurred but only on proper application. The Applicant did not even receive notice that the Respondent would ask the Tribunal to make such a finding until shortly before the hearing. Further, the Tribunal is not satisfied that the same evidence has been called and submissions made as if a proper application had been made. In the circumstances, it would be grossly unfair to make a final determination on the alleged breach of covenant.

19. More significantly, the Applicant argued that the lawfulness of the residential occupation was irrelevant. In the above-mentioned *Bishopsgate* case, HHJ Roger Cooke stated [at p.62H],

> "... the circumstances when a qualifying tenant cannot make a claim are fully and exhaustively set out in the statute [Leasehold Reform, Housing and Urban Development Act 1993]. Breach of covenant is a common enough concept in a landlord and tenant statute, and, indeed, where the draftsman needs to refer to it he does so. To that extent the presumption that the law of ordinary contract applies will abate."

20. The Applicant argued that the principle also applied to the Act in this case, namely that, if the lawfulness of the residential use was relevant, the Act would have said so and, since it does not, whether it is lawful is irrelevant. In reply the Respondent relied on *Gaingold Ltd v WHRA RTM Co Ltd* [2006] 03 EG 122 in which the Lands Tribunal stated [at §14] that they accepted the submissions of counsel for one of the parties that user would have to be lawful for the purposes of paragraph 1 of Schedule 6 to the Act.

21. Both parties' counsel accepted that the passages they relied on from the two cases were *obiter*, i.e. they were not essential to the conclusion in each judgment and so incapable of being definitive statements of the law. However, it would also seem that *Gaingold* was decided without the benefit of argument from both sides, which may also be the reason why *Bishopsgate* was not mentioned to or by the

Lands Tribunal. Although *Gaingold* was dealing with the same statute as in this case, that in *Bishopsgate* appears to be indistinguishable in principle on this issue. In the circumstances, the Tribunal is persuaded that the *Bishopsgate* case represents the correct law. This means that, even if the lessees at King's Wharf were in breach of covenant by using the mezzanine areas for residential purposes, that is irrelevant for the purposes of the Act.

22. The Tribunal has, therefore, decided that the first of the Applicant's arguments (see paragraph 6(a) above) is correct. This disposes of the substantive issue in this application and it is not necessary to go on and consider further arguments.

Costs of proceedings

23. The Applicant also made an application under s.20C of the Landlord and Tenant Act 1985, the relevant parts of which read as follows:-

> (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
>
> (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

24. The Respondent was wrong to oppose the right of the lessees who are members of the Applicant company to exercise the right to manage. The fact that there are provisions dealing with costs in the right to manage provisions of the Act does not exclude the use of s.20C. In the circumstances, the Tribunal is satisfied that it is just and equitable to make an order under s.20C.

Conclusion

25. In summary, the Tribunal has determined:-

(a) The Applicant was at the relevant date entitled to acquire the right to manage the relevant premises; and

(b) The costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in

determining the amount of any service charge payable by the tenants who are members of the Applicant company.

N.K. Nicol

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N.K. Nicol
Chairman
16th April 2007