LON/00AZ/LRM/2008/0013

LEASEHOLD VALUATION TRIBUNAL

IN THE MATTER OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002, SECTION 84(3)

Applicant:	**BELMONT HALL COURT AND ELM COURT RTM COMPANY LIMITED**
Applicant's representation:	**Mr S. Gallagher, Counsel**
Also present:	**Mr M. Reiner, of Comptons solicitors**
	Mr P. Luck of flat 12 Elm Court, and director and company secretary of the Applicant
	Mr S. O'Reilly of flat 19 Belmont Hall Court
	Mr J. O'Mahony of flat 30 Belmont Hall Court
Respondent/landlord:	**THE HALLIARD PROPERTY COMPANY LIMITED**
Respondent's representatives:	**Mr S. Serota of Wallace LLP solicitors**
	Ms L. Gillard of Wallace LLP solicitors
Premises:	**Belmont Hall Court, Belmont Grove, London SE13 5DU**
	Elm Court, Belmont Hill, London SE13 5DX
Tribunal Members:	**Mr N.M. GERALD**
	Mrs H. BOWERS
Date of Application:	**24th November 2008**
Date of Hearing:	**29th January 2009**
Date of Decision:	**9th February 2009**

DECISION

INTRODUCTION

1. This is an application by the Applicant under section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") relating to Belmont Hall Court Belmont Grove, London SE13 5DU ("Belmont Court") and Elm Court, Belmont Hill, London SE13 5DX ("Elm Court"). Unless indicated to the contrary, all references to sections or Schedules are to those in the 2002 Act.

2. The Applicant was incorporated on 6th November 2006 with the object of acquiring and exercising the right to manage ("RTM") "the Premises", defined as Belmont Court and Elm Court, under the 2002 Act, as provided for by paragraph 3 of its Memorandum of Association. Membership of the Applicant is confined to qualifying tenants of a flat within "the Premises", namely, Belmont Court and Elm Court and, from the date of acquisition of the RTM, "a landlord under a lease of the whole or any part of the Premises": see Articles 1.1 and 2.2 of the Articles of Association.

3. Elm Court and Belmont Court have separate freehold titles which, since February 1970 and December 1973 respectively, have been are remain vested in the Respondent.

4. Belmont Court was constructed in the mid-1930s in the grounds of a substantial private dwelling then known as The Elms, which is now the site of Elm Court. It appears from the documents provided that Elm Court was constructed towards the end of the 1950s or possibly, but doubtfully, in the mid-1960s following demolition of The Elms.

5. Belmont Court comprises one single building which is separate from and not connected to Elm Court, which also comprises one single building although it encompasses three blocks served by three separate entrance doors and staircases. They were developed some thirty years apart at times when their respective freeholds were in separate ownership. There is no physical boundary between the two in the form of a fence or wall or such like, but equally it is common ground between the parties that there are no shared gardens, driveways, paths or such like.

6. Within the basement of Elm Court is a boiler room which houses two boilers (duty and standby) which provide hot water and central heating to the flats comprised within Elm Court and also Belmont Court. There are therefore hot water and central heating pipes connecting the two Courts and water and gas supplies to Elm Court which supply the boilers and hence serve both Courts.

7. The boilers were constructed and then operated under the aegis of two agreements. The first, made by the respective freehold owners on 14th August 1959, was replaced on 30th December 1965 ("the 1965 Licence") when the then freehold owner of Elm Court granted to the then freehold owner of Belmont Court the right to a free flow of hot water from the Elm Court boiler and boiler system for the provision of hot water and central heating to Belmont Court, determinable on six months' notice. It contains reciprocal covenants whereby the Elm Court freeholder covenanted to maintain the boilers and supply of hot water on payment by the Belmont Court freeholder of two-thirds of their costs.

8. The Respondent acquired the freehold to Elm Court in February 1970 and granted the first leases in 1971. Elm Court comprises fifteen flats, fourteen of which have been granted on long leases and are "Qualifying Tenants" within the meaning of section 75. Ten of the fourteen Qualifying Tenants are members the RTM company and support the Application.

9. The Respondent acquired the freehold to Belmont Court in December 1973 and granted the first leases in 1975. Belmont Court comprises thirty-two flats, thirty of which have been granted on long leases and are "Qualifying Tenants" within the meaning of section 75. Twenty-two of the thirty Qualifying Tenants are members of the RTM company and support the Application. When added to the Qualifying Tenants of Elm Court, there is overwhelming support for the Application.

10. It was common ground between the parties that the Elm Court leases are all in common form, and contain the usual service charge provisions; the totality of Elm Court expenditure is recouped rateably from Elm Court lessees; no rights

are granted over Belmont Court; and there is no provision for payment of any Belmont Court-related costs. The same can be said of the Belmont Court leases.

11. In other words, it was common ground that the leases of Elm Court and Belmont Court contain free standing provisions, and neither expressly grant any rights in respect of the other's building, curtilage or gardens. There is therefore no contribution in either service charge provision to "estate expenditure" *i.e.* for expenditure in relation to common services provided to both Elm Court and Belmont Court. Elm Court and Belmont Court are, however, managed together by the Respondent.

12. As a matter of fact, it was agreed, the only shared service is the boiler and boiler system situated within Elm Court. Whilst both Court's respective leases refer to the provision of hot water in identical terms, neither identify the physical location of the boiler room or attendant pipes. Neither do the respective leases refer to the 1965 Licence. As a matter of practice, these costs have been apportioned between the respective Courts by the manager, who manages both Courts as a single unit.

13. Notwithstanding that the Courts' respective leases are separate, the Respondent has managed both Courts as one building making due apportionments in the service charge between the two. The only shared expenditure relates to the boilers and their fuel and insurance, which is apportioned two-thirds to Belmont Court and one-thirds to Elm Court.

14. On or about 21st August 2008, the Applicant served two separate Claim Notices upon the Respondent under section 79 which respectively claim to acquire the right to manage Elm Court and Belmont Court.

15. On 25th September 2008, the Respondent served two Counter-Notices under section 84 which in substance stated that the Applicant was not a RTM company because it had as its objects the right to manage two separate sets of premises which was impermissible.

16. On 24th November 2008, the Applicant applied to the Tribunal under section 84(3) for determination of its claim to acquire the right to manage the whole of the Premises. The Tribunal issued Directions on 28th November 2008 ("the Directions").

ISSUES

17. There are three issues for determination by the Tribunal:

    (a) Can a RTM company be incorporated with the object of acquiring the RTM more than one building?

    (b) Are Belmont Court and Elm Court nonetheless to be treated as "premises" or a single "building";

    (c) Are the Claim Notices, which each refer to only Belmont Court and Elm Court, valid?

RLEVANT STATUTORY PROVISIONS

18. Section 71 provides as follows:

"(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."

19. Section 72 provides 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 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

(c) 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."

"'Appurtenant property' in relation to a building or part of a building or a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the building or part or flat": section 112(1).

20. Section 73 relates to RTM Companies and provides as follows:

"(1) This section specified what is a RTM company.

"(2) A company is a RTM company in relation to premises if-

(a) it is a private company limited by guarantee, and

(b) its memorandum of association states that its object, or one of its objects, is the acquisition and exercise of the right to manage the premises.

...

"(4) And 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.

"(5) If the freehold of any premises is conveyed or transferred to a company which is a RTM company in relation to the premises, or any premises containing or contained in the premises, it ceases to be a RTM company when the conveyance or transfer is executed."

21. Section 74 deals with membership of RTM companies and provides that:

"(1) The persons who are entitled to be members of a company which is a RTM company in relation to premises are-

(a) qualifying tenants of flats contained in the premises, and

(b) from the date on which it acquires the right to manage (referred to in this Chapter as the "acquisition date"), landlords under leases of the whole or any part of the premises."

22. Section 75(2) provides that "a person is a qualifying tenant of a flat if he is tenant of the flat under a long lease".

23. Section 78 provides that

"(1) Before making a claim to acquire the right to manage any premises, a RTM company must give notice to each person who at the time when the notice is given –

(a) is the qualifying tenant of a flat contained in the premises, but

(b) neither is nor has agreed to become a member of the RTM company.

"(2) A notice given under this section (referred to in this Chapter as a "notice of invitation to participate") must –

(a) state that the RTM company intends to acquire the right to manage the premises,

(b) state the names of the members of the RTM company,

(c) invite the recipients of the notice to become members of the company, and

(d) contain such other particulars (if any) as may be required to be contained in notices of invitation to participate by regulations made by the appropriate national authority."

24. Section 79 contains detailed provisions as to how the claim is to be made by the RTM company.

"(1) A claim to acquire the right to manage any premises is made by giving notice of the claim (referred to in this Chapter as a "claim notice"); and in this Chapter the "relevant date", in relation to any claim to acquire the right to manage, means the date on which notice of the claim is given.

"(2) The claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before.

"(3) The claim notice must be given by a RTM company which complies with subsection (4) or (5).

"(4) If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company.

"(5) In any other case, the membership of the RTM company must on the relevant date include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained.

...

"(8) A copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises.

"(9) Where a manager has been appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises, a copy of the claim notice must be given to the leasehold valuation tribunal or court by which he was appointed."

25. Section 80(2) provides that claim notice "must specify the premises and contain a statement of the ground of which it is claimed that they are premises to which this Chapter applies".

26. Section 81(3) contains supplementary provisions concerning claim notices, and provides that:

"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."

The parties' respective cases

27. Mr Gallagher for the Applicant submitted that a RTM company may be incorporated to acquire the RTM of more than one building, alternatively, that Belmont Court and Elm Court are to be treated as one building for the purposes of the 2002 Act and that the Claim Notices are valid notwithstanding that each only refers to one of the Courts.

28. Mr Serota for the Respondent submitted that a RTM company may only be incorporated to acquire the RTM of one separate detached building and not more and that in any event Belmont Court and Elm Court are separate and

distinct premises requiring separate RTM companies and in any event the Claim Notices are invalid.

Issue one: can a RTM company be incorporated to acquire the RTM of more than one building?

29. When determining whether or not "premises" as defined by section 72(1) can include more than one building, it is necessary to consider it in the context of the rest of the RMT provisions.

30. A company is only a RTM company if it relates to "premises": section 73(2). For these purposes, "premises" must consist of (a) a self-contained building or (b) part of a self-contained part of a building: sections 72(1)(a) and (3). In principle, there appears to be no reason why a larger self-contained building can not encompass within it a self-contained part of the building provided it complies with the statutory criteria set out in sections 72((3) and (4).

31. These sections demonstrate Parliament's concern to ensure that provided self-contained and structurally detached, a building could be free-standing or joined to other buildings (such as in a terrace) and constitute "premises", and also to ensure that a self-contained part of a building, provided vertically divided, could also be treated as "premises" to which the RTM provisions applied. In this regard, it might be said that Parliament was seeking to broaden the potential applicability of the RTM provisions with the purpose of giving long leaseholders the RTM their own premises.

32. A single building sub-divided vertically could constitute more than one "premises", or building", for the purposes of the 2002 Act. There is no express statutory restriction on the number of "premises" to which the RTM company may relate. Indeed, section 73(4) envisages that the RTM company may relate to more than one "premises" and, therefore, more than one "building", using the statutory definition.

33. That section excludes a company from the definition of RTM company in three situations. First, a company can not be a new RTM company if there is already a RTM company in relation to "*the premises*": the use of the definite article "the" may indicate that the reference to "premises" is in the singular *i.e.* only one "building", as statutorily defined, although it also refers to the premises which are the object of the RTM company and there may be situations where "the premises" include more than one "premises" as statutorily defined (for example, two blocks within a single mansion block building).

34. Secondly, a new RTM company is not permitted if there is already a RTM company in relation to "any premises containing ... *the premises*". This envisages the relatively common occurrence of a mansion block of flats which comprises a series of self-contained parts of a single building which is vertically divided into blocks with separate entrances. For the purposes of the 2002 Act, the whole building constitutes "premises" as does each separate block. The tenants have an choice: they can claim a single RTM for the whole building or for each block provided each constitutes a self-contained part of the building, and that their freeholds are not in different ownership (see section 72(6) and paragraph 2 of Schedule 6). "*The premises*" here referred to is at least one of

the blocks in respect of which a RTM is now sought: a RTM company can not be formed in relation to that block because a RTM company already exists in relation to the whole building. This is an example of a RTM company having been incorporated in respect of more than one "building", as statutorily definition, and therefore more than one "premises".

35. Thirdly, section 73(4) continues that if there is already a RTM company in relation to "any premises contained in ... *the premises*" a new RTM company is not permitted. This is the converse of the situation posited in the last paragraph. It envisages a RTM company already in existence in relation to at least one block within a series of self-contained parts of a whole building. "*The premises*" here referred to is the whole building in respect of which the RTM is now sought: a RTM company can not be formed in relation to the whole building because a RTM company already exists in relation to part of the building.

36. The provisions of section 73(4) are reinforced by section 81(3) which prohibits more than one claim notice subsisting in relation to the same premises at any one time. It is also reflected in section 79(9), which deals with situation where a manager has been appointed under Part 2 (appointment of managers) of the Landlord and Tenant act 1987 "in relation to the premises, or any premises containing or contained in the premises".

37. Given that the 2002 Act envisages a RTM being made in respect of more than one "building", or "premises", it would seem somewhat odd and perhaps artificial if it was confined to "premises" consisting of a single structure. If it is so confined, it would exclude, for example, a substantial number of estates which comprise more than one separate building which are nonetheless and otherwise fully integrated, having been designed and constructed at one and the same time with common services and reciprocal rights and service charge obligations relating to the provision of estate, as distinct from building, rights and services. In *Dawlin RTM Limited v Oakhill Park Estate (Hampstead) Limited and others* LON/00AG/LEE2005/00012, which concerned a RTM application for an estate which comprised five blocks, the Leasehold Valuation Tribunal had no hesitation in holding that the claim was valid.

38. In support of his submission that "premises" as defined by section 72 can not be two separate structurally detached buildings, Mr Serota submitted that the threshold requirement that fifty percent of qualifying tenants of flats contained "in the premises" is only consistent with a RTM being limited to one building. If a RTM can be claimed in respect of two or more buildings, then it would prevent "for all time" the RTM of one of the individual buildings.

39. This argument breaks down because a RTM can be claimed in respect of a single "building" comprising separate blocks which each also constitutes a "building" for the purposes of section 72. If one or more of the blocks has not already claimed its own RTM, a single claim can be made globally for the whole building. In that scenario, it appears that voting is to be on a "premises wide" basis, not block by block as there is no provision for block by block voting[1]. Once

[1] Unlike, for example, section 5(3) of Part 1 to the Landlord and Tenant Act 1987 (as amended) which provides that "where a landlord proposed to effect a transaction involving the disposal of an estate or interest in more than one building ... he shall, for the purpose of complying with this section, sever the transaction so as to deal with each building separately."

the RTM is acquired in respect of the whole, that represents the exercise of the RTM from which it necessarily follows that the individual block can not sever itself from the RTM of the whole. If that applies in these circumstances, it is difficult to see why it should not apply if there are two or more separate buildings.

40. Next, Mr Serota submitted that the purpose of the legislation is to enable long lessees of individual blocks to exercise the RTM. That is true, but the legislation also permits a RTM to be exercised in respect of larger premises which contain self-contained parts as described above. It would appear that the intent of the legislation is to grant long lessees of "premises" the RTM those "premises", whilst maintaining maximum flexibility as to the physical entity in respect of which the RTM may be sought. That may well be in recognition of the fact that premises come in all shapes, sizes and configurations: some constitute a single structure; some constitute a single structure but contain multiple vertically divided self-contained parts; some constitute multiple structures which can nonetheless properly be regarded as a whole as "premises"; some consist of a single structure horizontally divided into self-contained parts (this being the one instance where a RTM can only be claimed in respect of the whole structure because no part can be structurally detached and there is no vertical division). Ultimately, it is up to the long lessees how to manage their RTM claim. Whatever system is adopted and in the absence of unanimity, there will always be a minority.

41. Mr Serota also pointed out that section 72 is virtually identical to section 3 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") save that the latter omits the section 72(1)(a) reference to "with or without appurtenant property". If a RTM was made in respect of Belmont Court and Elm Court and Elm Court long lessees were then to exercise their right to collectively enfranchise, they would still be bound by the RTM, from which it must follow that a RTM can only be acquired in respect of a single structure. Precisely the same result would follow if a RTM were granted in respect of a whole building comprising self-contained mansion blocks, and one block subsequently collectively enfranchised.

42. Mr Serota finally submitted that if two or more separate buildings were permitted to be the objects of a RTM company, it would follow that a RTM could be incorporated to acquire the RTM of, say, one building in Brixton and one in Hampstead. This argument fails because the RTM can only be acquired in respect of "premises" which have some sort of common identity or can be regarded as a single entity, as in *Oakhill Park Estate*. In other words, "premises" may consist of more than one structure.

43. Mr Gallagher sought to persuade the Tribunal that "building" means "either a single building or one or more buildings, where the occupants of the qualifying flats in each of those buildings share the use of the same appurtenant property". This submission derived from the judgment of Geoffrey Vos QC sitting as a deputy High Court Judge of the Chancery Division in *Long Acre Securities Limited v Karet* [2005] Ch 61 at paragraph 74. That concerned the meaning of "building" in Part 1 of the 1987 Act, whose provisions are different from the 2002 Act and therefore does not bind upon this Tribunal.

44. The Tribunal rejects this submission. There is no need to put a gloss on the statutory wording. Whilst the nature and extent of the shared use of appurtenant property will no doubt be of relevance, it is but one factor to take into account in determining whether a building or part or parts of a building or buildings or a collection of separate structures, or buildings (as in *Oakhill Park Estate*), are "premises" for the purpose of the 2002 Act. Whether or not buildings taken as a whole constitute "premises" is a question of fact and degree to be considered in the circumstances of each case.

Issue two: are Belmont Court and Elm Court nonetheless to be treated as "premises"?

45. There can be little doubt that had it not been for the boiler and boiler room, Belmont Court and Elm Court could not be treated as "premises": they were constructed some thirty years apart by different freeholders on different freehold titles with different names and addresses and, it is common ground, share no common facilities or services. The fact that they are, and for some years have been, managed by the same agents can not convert two distinct buildings into one "premises" for the purpose of the 2002 Act.

46. Does it make any difference that there are shared boilers? In the view of the Tribunal, it does not. The boilers were not installed as part of a redevelopment of two distinct buildings into one estate, but were installed under the provisions of the 1965 Licence and its predecessor which specifically provided that a mere licence determinable on six months' notice was being granted. At any time, the Elm Court freeholder could have terminated the1965 Licence which would have brought about the end of any possible argument that the two buildings together constitute "premises".

47. The 1965 Licence amounted to no more than an agreement between adjoining freeholders. In return for granting the determinable hot water arrangements, Elm Court was granted fee simple rights to use the sewage water and soil pipes and drains under the land forming part of Belmont Court. There were no submissions from either party that these rights subsisted because it was not known whether or not the same pipes were still used or, if they were, whether they had been adopted. However, in the view of the Tribunal, it would be a step too far to treat the grant by adjoining landowners of reciprocal rights of different tenure as justifying treating two separate buildings as constituting one "premises" for the purpose of the 2002 Act.

48. Does it make any difference that all leases were granted at a time when the freehold was owned by the same landlord? Both parties' submissions were on the premise that the 1965 Licence continued in force, so that the Respondent was free to determine the 1965 Licence on six months' notice. However, the Tribunal was unable to accept these submissions because it is difficult to see how the Respondent could serve a notice on itself, and licences, as with easements, usually merge on unity of seisin of both dominant and servient lands. As the freeholder to all of the leases of both Courts, the Respondent was free to make covenants in respect of both Courts because it owned their freehlolds.

49. Whatever the status of the 1965 Licence, it is the view of the Tribunal that the fact that the leases of both Courts were granted at a time when the Respondent

owned both freeholds does not alter the position. Common ownership is not the touchstone of whether buildings constitute "premises". The most that can be said is that around forty to fifty years ago the boilers were installed to supply hot water to both Courts. If the boilers had have been constructed in a separate building, that would not have constituted the two buildings as "premises" for the 2002 Act, although it would most probably have constituted "appurtenant property" within section 112(1). Otherwise, there is no physical or practical relationship between Belmont Court and Elm Court.

50. The Tribunal also rejects Mr Gallagher's submission that by sharing "appurtenant property" (the boilers) the two otherwise separate buildings can be treated as one for the purpose of the 2002 Act. As Mr Serota pointed out, that is probably incorrect because the boilers are within Elm Court so not "appurtenant property". Either way, in the view of the Tribunal, the essential question is not whether they are separate structures but whether they can properly be called "premises". For the reasons set out above, it is the view of the Tribunal that they can not, so that the Applicant is not a RTM company within the meaning of section 73.

Issue three: are the Claim Notices valid?

51. Mr Serota submitted that if the Applicant were a RTM company, then the Claim Notices were invalid because they did not identify the premises as being Belmont Court and Elm Court but treated them separately. In view of the decision the Tribunal has reached, it is unnecessary to determine this issue.

Chairman .....Monday 9th February 2009