Y Tribiwnlys Eiddo Preswyl

Residential Property Tribunal Service (Wales)

Leasehold Valuation Tribunal (Wales)

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DECISION AND REASONS OF LEASEHOLD VALUATION TRIBUNAL (WALES)
COMMONHOLD AND LEASEHOLD REFORM ACT 2002 s.84(3) ("the Act")

Premises:	(1) St James Mansions, Mount Stuart Square, Cardiff Bay, Cardiff. (2) St Stephens Mansions, Mount Stuart Square, Cardiff Bay, Cardiff.
LVT ref:	LVT/0020/08/13
Applicants:	(1) St James Mansions RTM Company Limited (2) St Stephens Mansions RTM Company Limited Represented by Mr Christian Howells of Counsel
Respondents:	(1) Fairhold NW Limited (2)Peverel OM Property Management Limited Represented by Mrs Misbah Khan
Hearing:	16 and 17 October 2013
Order:	(1) St James Mansions – 17 October 2013 (preliminary point determined application, as set out in schedule 1 to this decision). (2) St Stephens Mansions – 13 November 2013
Tribunal:	Mr R S Taylor – Lawyer Chairman Mrs Ruth Thomas MRICS – Surveyor member

DECISION

1. The Right to Manage St James Mansions has been acquired.
2. The Right to Manage St Stephens Mansions has not been acquired.
3. Each party shall by noon on the 27 November 2013 file (3 copies) and serve (1 copy) their written submissions on the question of s.20C Landlord and Tenant Act 1985.

Legal Chairman

13 November 2013

(17 October in respect of St James Mansions as set out in Schedule 1)

REASONS

Background.

1. This case concerns applications brought by two Right To Manage companies under s.84(3) of the Commonhold and Leasehold Reform Act 2002 ("The Act"), concerning structurally attached buildings. The Respondents to each application are identical, the Applicants have the same representation and there are common issues in each application. It was therefore agreed that the two applications would be heard together.

2. The First Respondent is the freeholder of the estate which comprises both buildings. The Second Respondent is the manager appointed under the leases granted to individual leaseholders. The First Respondent took no active part in the proceedings and has, in effect, relied upon the Second Respondent to make the case on behalf of each of them.

3. St James Mansions and St Stephens Mansions comprise blocks of residential flats in Mount Stuart Square, Cardiff. St James Mansions RTM Company Limited and St Stephens RTM Company Limited were each incorporated with a view to them exercising their rights over the respective blocks under Chapter 1 of Part 2 of the Act.

4. The Applicants were represented by Mr Christian Howells and the Second Respondent was represented by Mrs Khan. We are grateful to both representatives for the assistance they have given the Tribunal in coming to its decision.

5. The Applicants each served a notice of invitation to participate in the RTMs on the 29 January 2013. Claim notices were served on 29 February 2013 and counter notices were served on 27 March 2013, denying that the Right to Manage had been acquired. Applications were made to the Tribunal on the 16 May 2013 (incorrectly dated 16 September 2013). During these proceedings the validity of the notices of invitation to participate were initially the subject of challenge by the Respondents. However, by way of letter dated 9 October 2013 the Second Respondent confirmed that the validity of the notices was no longer challenged and that the outstanding issues for determination were whether the buildings were self-contained and were capable of vertical division.

6. The application in respect of St James was determined on the 17 October 2013 by way of a preliminary point which is set out at in Schedule 1 to these reasons.

7. At the start of the hearing the Second Respondent conceded that the each building was capable of vertical division. In closing submissions the Second Respondent further conceded that the structure of St Stephens was such that it could be redeveloped independently of St James.

8. The remaining issue for the Tribunal to determine in respect of St Stephens was whether it could be said to be a self contained building by reference to s.72(4) of the Act which provides:

> "This subsection applies in relation to a part of a building if the relevant services provided for the 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."

9. By section 72(5)

> "Relevant services are services provided by means of pipes, cables or other fixed installations."

10. The particular issue upon which the parties joined issue was the supply of cold water to each building.

11. It was for the Tribunal to determine whether the existing supply of water is made independently to St Stephens and if it is not, whether it could be so provided without involving the carrying out of works likely to result in a significant interruption to the provision of any relevant services for occupiers of the rest of the building.

The Inspection.

12. Prior to the hearing on the 16 October 2013, the Tribunal inspected the premises accompanied by representatives of both parties and including the site concierge.

13. St James's and St Stephen's Mansions are located in Cardiff Bay at the North West corner of Mount Stuart Square. There were constructed in around 2002 and 2004 respectively as two adjoining blocks arranged in an " L " shape. We were told that the development of the site had taken place in 2 phases, St James's had been constructed first, running east – west, and later St Stephens, running north - south at right angles off the western end of St James. A single storey building ("the pump house") to house the water pump equipment had been constructed at the north–west corner within the site curtilage during phase 1 as it was needed to serve the entirety of the development. St James's comprises of 27 apartments on 4 levels and St Stephens comprises of 68 apartments on 5 levels. The Tribunal was shown the meter room serving St James's and which also had the electrical distribution board for the common parts including a circuit for the pump house.

14. The Tribunal was also shown an enclosed bin store incorporated into the ground floor of the St Stephens building and which occupiers of St James's and St Stephens used. There was a second open bin store area allocated within the smaller car park at the rear of St Stephens which was only accessible to some of the St Stephen's residents.

15. The two apartment blocks front directly on to the back edge of the pavement at Mount Stuart Square but allocated car parking is within the site curtilage at the rear of the buildings and is partly surface parking and partly undercroft to the St Stephens block. There is vehicular access to the car parks through archways in the buildings at two points, the left-hand giving access to surface and undercroft parking serving exclusively part of the St Stephen's block, and the right hand giving access to surface and undercroft parking spaces used by both St Stephens and St James's owners. The two car parks are segregated by a public walkway of about 6 metres width.

16. The present configuration of the water supply to St James and to St Stephens is as follows: There is one incoming underground mains cold water supply pipe which enters into the development from the highway at Mount Stuart Square, under the vehicular access at St James. It passes along an undetermined underground route and out into the self-contained pump house. . After entering the pump house vertically, the incoming supply pipe becomes above-ground and the water passes into a pair of holding tanks before passing into a pump set (three pumps used in rotation/backup/and in times of maximum demand, operated by smart technology). The pumps send pressurised water into the outflow pipe which divides before re-entering the ground. One branch pipe goes at 90° to the outside wall of the pump

house and the second goes out at an angle. No one was able to confirm where these pipes led to. The parties seemed to assume one pipe led to St James and one to St Stephens. The Second Respondent had a mathematical formula for calculating the division of the water consumption to allocate respectively to each service charge account of St James and St Stephens using the reading from the single supply meter. The water supply serves all of the flats in the development (i.e. both buildings) and the common parts, including the caretaker's welfare facilities.

The Second Respondent's application to amend its case to include consideration of drain services.

17. When at the inspection it was apparent to the Tribunal that the surface and foul water drains might be a significant question as to the provision of independent services. Prior to the inspection this had not been raised and the Tribunal enquired as to whether a plan was available to consider the configuration of the drains. There was no plan immediately available but we understand that the Second Respondent requested one.

18. At the start of the hearing in respect of St Stephens (much of the day having been taken up dealing with the preliminary point in respect of St James) the Second Respondent applied to "amend" its case by including consideration of the drains. Mindful of the recent authorities as to LVTs taking points of its own motion and/or not giving parties proper opportunity to deal with new points which arise during the course of a hearing, we indicated that we would require written submissions overnight as to the position.

19. Mrs Khan provided helpful written submissions overnight which referred to two cases. The first, *Fairhold Yorkshire Ltd* v *Trinity Wharf (SE16) RTM Co Ltd* [2013] UKUT 0502 (LC) made plain that the counter-notice is not to be treated as delimiting the Tribunal's jurisdiction. We note that the counter-notice here refers to s.72(4) of the Act in any event.

20. Mrs Khan's submissions also reminded the Tribunal of *Jastrzembski v Westminster City Council* [2013] UKUT 0284 (LC) in which Her Honour Judge Walden-Smith stated:-

> "The difficulty was succinctly set out by His Honour Judge Mole QC in *Regent Management Ltd v Jones* [2010] UKUT 369 (LC) where he said that (at paragraph 29): 'The LVT is perfectly entitled, as an expert Tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much. But it must do so fairly, so that if it is a new point which the Tribunal raise, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it."

21. Mrs Khan submitted that the drains may be an important issue as to the statutory test at s.72(4) and that it was appropriate for this issue to have been raised by the Tribunal and for her to seek to amend her case in this respect.

22. Mr Howells invited us to a different view and submitted that the Second Respondent was opportunistically seeking to amend its case in light of observations made by members of the Tribunal at the inspection. He submitted that the Second Respondent had not even produced any evidence which would assist in determining the relevance of the issue. He submitted that it was not fair and not in the interests of justice for an issue to be raised so late in the day and that prejudice was going to be caused to the Second Applicant in terms of delay and additional costs in dealing with the point, which might include a further hearing.

23. Mr Howell's drew our attention to an article entitled "Fairness and the Leasehold Valuation Tribunal" by Justin Bates, published in the 2013 Journal of Housing Law. The article helpfully summarised the cases where the Upper Tribunal has been critical of LVTs for taking points of its own motion and/or not allowing time for a new point to be dealt with properly. Mr Howells placed emphasis on the guidance set out by His Honour Judge Gerald in the case of *Birmingham CC v Keddie* [2012] UKUT 323 (LC), to which he also referred, in which it was stated that:-

    a. The parties should – whether in the application form or in a subsequent statement of case – give details of their case. Those documents would serve to limit the issues and to identify the scope of the dispute.

b. It is the function of the LVT to resolve issues which it was asked to resolve, provided that it is within its statutory jurisdiction. It is not the function of the LVT to resolve issues which it has not been asked to resolve, in respect of which it will have no jurisdiction

c. The LVT was not an inquisitorial Tribunal and did not have the jurisdiction to act as one.

d. There were, however, exceptional cases where a "new" issue could be said to fall within the broad scope of the application and where it may be appropriate for the LVT to determine an unpleaded issue. In such a case, however, the LVT would still need to bear in mind the principles of natural justice and give the parties an opportunity to comment.

24. We have in mind all of the authorities helpfully summarised in this article.

25. It was common ground between the parties that an "amendment" was going to result in an adjournment of the hearing. Whilst day 1 of the case had been taken up resolving the preliminary point taken by the First Applicant in respect of St James, a day of valuable hearing time, namely day 2, would be lost should the amendment/adjournment be granted.

26. The Tribunal invited Mr Howells to particularise the costs which would be wasted by such an adjournment. This was put at about £2,490 inclusive of VAT. The Tribunal gave Mrs Khan the opportunity take instructions as to whether, on an entirely voluntarily basis, as this Tribunal does not have (save in limited circumstances not pertaining here) a costs shifting jurisdiction, she wished to make an offer of costs thrown away to the Applicants in the event that the application to amend and adjourn was granted. Mrs Khan was unable to secure instructions to make such an offer (we understand because she was unable to contact the person with the authority to make such an offer) and indicated that the Second Respondent was able, without further instructions being taken, to offer the sum of £500 on account of costs thrown away.

27. This application was very finely balanced. On the one hand it is apparent that the drains may be a very relevant consideration for the statutory test we are applying. On the other hand, it was raised only at the inspection after the Tribunal had noted it, the result of which would be to cause an adjournment. The Second Respondent was not even able to put any evidence before us outlining the merits of pursuing the drains issue. We also had firmly in mind the Upper Tribunal authorities which discourage

new points being taken at the Tribunal's initiative – although the position was nuanced here as it was the Tribunal who flagged it up on the inspection which then resulted in an application by a party to amend at the hearing. However, the point remains that it is only in exceptional circumstances that it is appropriate for new points to be taken at such a late stage. In the absence of any indication of merits of pursuing the point the Tribunal was not inclined to allow an amendment. Further, the Second Respondent's inability, on a voluntary basis, to make good the financial prejudice caused by an amendment and adjournment sealed our view that the balance was against allowing the amendment.

The evidence in respect of St Stephens.

28. Both parties filed and served late expert evidence and neither, in the final analysis when before us at the hearing, objected to this being considered by the Tribunal.

29. On behalf of the Applicant Mr Chris Hyatt, consulting civil and structural engineer, gave evidence. On behalf of the Second Respondent Mr Robert Churches, an electrician, and Bob Jones, Regional Property Manager for the Second Respondent. submitted evidence – although the bulk of the evidence came from Mr Churches.

30. Mr Hyatt's evidence went principally to the questions of whether the St James and St Stephens were capable of vertical division to satisfy the 'self-contained part of a building' test at s.72(3) of the Act. This, as indicated, was conceded by the Second Respondent in any event. The Applicant therefore adduced no expert evidence on the issue of works to relevant services, Mr Hyatt conceding that he could not comment upon the technical issues relating to the pumps, beyond observing there was space in the pump house for a second set of pumps.

31. Mr Churches said he was the managing director of Ecolec Maintenance Installation Services Ltd, who had provided services to the Respondents at the development. Mr Churches qualifications were in the electrical field and he had maintained the electrically operated water pumps. His father, Gordon Churches, was the company's water specialist and an undated water risk assessment (the risk assessment refers to a date of 30 April 2012) was produced. This document was not particularly helpful to the issue but it did contain a schematic drawing of the water pipes within the plant room.

32. In his written evidence, Mr Robert Churches put forward two options “on the feasibility of separating the water supply services”. As to the first option, Mr Churches said “If the intention is to provide separate water tanks and pumps per block; then, due to the design and construction of the existing plant and equipment this would require additional pumps and water tanks to be installed. The plant room is large enough to accommodate the additional equipment”.

33. Mr Churches confirmed that there was a single electrical supply presently to the pump house, taken via the electrical supply and consumer unit in St James. If a separate second pump set and water tanks were to be provided, then a new separate electrical supply to these would be needed and this could be provided from St Stephens, in principle, from the consumer unit in the first floor meter cupboard in St Stephens, although detailed consideration would have to be given to the location of the supply cables as to whether these could be provided under or over ground to the plant room. There would be some complications as the meter cupboard is on the south side of the building and would at some point have to cross over to the north side.

34. However Mr Churches thought the first option would not be “the most prudent”. He therefore proposed a second option which amounted to the fitting of an electrical meter and two water sub meters to the existing arrangement of the pipes in the pump house. This would enable the electrical consumption of the pumps to be measured, and its corresponding costs divided for allocation to each part of the building, and the water meters, which would be fitted one each to the respective existing outgoing supplies, would enable independent water consumption measuring.

35. Mr Churches accepted that these options were adaptations to the *current single incoming water supply*. Up to the water meter at the entrance to St James, the pipes were the ownership and responsibility of the water authority. Everything after the meter was the ownership of the development. He did not know how the water authority might view a request for a second separate supply to serve the development. He felt he couldn't comment on where a second meter could be installed or the logistics of providing a second supply. He could say that a separate second supply would have to have its own tanks and pumps. As the capacity of the existing pumps and tanks serve the entirety of the development now, it would make more sense for these to supply St Stephens as there were a larger number of apartments in that part of the development. However whichever part of the development kept the existing arrangement, there would be only minor disruption to

the other either way, as the new pipes, pumps and tanks could be fitted prior to connection, and the water supply to the then redundant part of the old arrangement could simply be turned off at the existing isolating valves to allow for the commissioning of the new supply and pumps for the second supply. It was suggested that no more than 1 hour's disruption might be suffered. This was all dependent though on the water authority being able to supply the second independent supply. If the new pump was supplied to St Stephens, there would be no disruption to the St James's electrical supply.

Parties' submissions.

Second Respondent's submissions.

36. On behalf of the Second Respondent, Mrs Khan relied upon *Oakwood Court (Holland Park) Ltd v Daejan Properties Ltd* [2007] 1 EGLR 121. This was a case decided in the enfranchisement context under the Leasehold Reform, Housing and Urban Development Act 1993. Mrs Khan stated it was relevant in the Right to Manage context on the basis that the test in the 1993 Act and the Act were essentially the same.

37. We were referred to the five point test at paragraph [47] which states, when considering the issue of significant interruption caused by works to ensure relevant services are provided independently,

> "[47] The appropriate approach to deciding this issue under the Act is, in my judgment, to take the following five steps:-
>
> 1. Identify the services provided to occupiers of the enfranchising part that are in issue because they are not independently provided.
>
> 2. Consider whether those services can be provided to the enfranchising part independently of the provision of the same service(s) to the remainder of the building.
>
> 3. Ascertain the works required to separate the respective parts of the services supplying the enfranchising part and the remainder of the building, so that such services would thereafter be supplied to each such part independently of the other.

4. Assess the interruption to the latter services ... that carrying out those works would entail.

5. Decide whether this is "significant" within the meaning of the subsection.

[48] The first issue is a question of plain fact. The second, third and fourth are matters of expert evidence. The fifth is a question of construction of the Act and the application of that construction as a matter of fact and degree."

38. We were also referred to several paragraphs from [77] onwards, in particular:-

"[78] It must be remembered that section 3(2)(b)(ii) [in the RTM context s.72(4)(b) of the Act] is actually a mitigation of the basic principle set out in subsection 3(2)(b)(i) [in the RTM context s.72(4)(a)] that the badge of a 'self contained building' is that the 'relevant services *provided to the occupiers of that part are provided independently* of the relevant services provided to the occupiers of the remainder of the building." Subsection 3(2)(b)(ii) [RTM = 74(4)(b)] mitigates the strictness of this by providing that if this result can be achieved with sufficiently little alteration work it would not cause a significant interruption in the service to the other occupiers, that will still enable the enfranchising part to be regarded as sufficiently "self-contained" to qualify under the Act.

[79] ... the basic principle that one is looking to see if the part of the building as it exists is either clearly self contained or so nearly self-contained that it can effectively be so regarded.

[81] In my judgment, the Act is looking, not at the possibility of the supply of independent relevant services in the abstract but at the possibility of effecting a separation of the existing relevant services as 'provided to the occupiers of that part' from those 'provided to the occupiers of the remainder of the building' with a minimal disruption to the latter. The works that would be required in the present case do not fall within that concept. They do not do so, in particular, with regard to the supply of central heating and hot water, with regard to the cold-water mains supply and, probably with regard to the cold-water down system, **because the necessary works do not, in my judgment, involve providing '*the relevant services* provided to the occupiers of that part' independently of those provided to the occupiers of the remaining**

> **part of the building at all, but rather providing *new 'relevant services.'***
>
> [84] ... it is not sufficient for the claimant to say that this could be done in principle; the claimant would at least have to demonstrate that it could in fact be done. At present, the evidence is purely theoretical and speculative and, in my judgment, insufficient to satisfy subsection 3(2)(b)(ii) [RTM = 72(4)(b)]." (our emphasis)

39. In Mrs Khan's submission the Applicant did not get past the second limb of the five point analysis set out in *Oakdale*. This is because the only evidence available was from Mr Churches whose two options were either (1) Provision of new pumps and tanks coming off the existing incoming water supply, or (2) metering off the same apparatus. The former does not involve provision of *the services* rather, she submitted, *new services,* as per the analysis in *Oakdale.* In any event, by sharing an incoming supply pipe, even after new pumps and tanks, the provision would not be independent.

40. Further, Mrs Khan argued that there was insufficient evidence to demonstrate that it was actually possible to bring a supply in via St Stephens. Furthermore, such a new supply would not be "the services."

Second Applicant's submissions.

41. Mr Howells for the Applicant advanced the following arguments.

42. s.72(5), he submitted, should be read so that the "relevant services" (here, water) are interpreted as meaning the actual utility which is transmitted by means of pipes, cables or other fixed installations, not the actual pipes etc themselves.

43. He then submitted that in this situation the relevant services were already, in fact, independently provided, thereby satisfying s.72(4)(a). He reminded the Tribunal of the Fifth Schedule to a sample lease which provides the Demise, at paragraph 4, the right of, "...free passage and running of water soil gas (if any) electricity telegraphic and other services from those parts of the Estate not included in the Demised Premises." He then moved on to say that just because water for both buildings came into the development in one pipe and went around the pump room media together, that did not mean that St Stephens did not enjoy independent provision of this service. He stated that if St James was knocked down there would still be a right of free passage of water over the estate and that if St James supply was capped off

upon exit from the pump room, St Stephens would continue to enjoy its supply. In short his point was that just because something was shared that did not mean that it could not still be regarded as independent. No authorities were provided in support of this interpretation.

44. Mr Howells then went on to submit that at s.72(4)(b) the words "could be so provided..." should not be read as if the word "so" was referring to "provided independently" in s.72(4)(a) above. Again, no authorities were provided in support of this interpretation.

45. He further submitted that we should disregard the reasoning in *Oakwood* as it had been decided in the enfranchisement context rather the RTM context and was only a first instance decision from the Central London County Court and therefore not binding upon us. Mr Howells placed particular emphasis, by way of comparison with the present RTM context, on paragraph [80] of *Oakwood* where the learned judge is "fortified" in her conclusions by analysing how the conveyancing transaction (which will be the consequence of a right to enfranchise decision) might work, stating,

> "This concept, again, does not work comfortably with a situation in which, in order to effect a separation of services to make the enfranchising part operate on a self-contained basis, a lengthy programme of works is required in practice, possibly involving the obtaining of planning permissions and entailing significant alterations to the enfranchising premises like erecting a boiler house or installing an entirely new cold-water main. Are such works to be effected before or after sale? If before, by whose license? If after, then by definition the enfranchising part is not self contained at the time of the sale."

Mr Howells short point is that as there is not a conveyancing transaction following a RTM decision the analysis at [80] can be set aside.

46. Mr Howells also submitted, in response to his lack of evidence from how the waterboard may react to a request for a new supply via St Stephens, that the Second Respondent carried an evidential burden to raise objections so that the Applicant was in a position to know what case it had to meet.

Determination.

47. The Tribunal noted and drew the parties' attention the passage in Service Charges and Management Law and Practice (2nd edition, Tanfield Chambers) at 29-005 which states, "...the qualifying rules for RTM are the same as for collective enfranchisement under LRHUDA 1993 following amendments to that Act by CLRA 2002. Reference may therefore be made to a standard text of leasehold enfranchisement, such as Hague ..." At paragraph 29-006 there is also reference to the LVT case of *Stamford Hill Mansions RTM Company Ltd v Daejan Properties Ltd* (unreported), LON 00AM/LRM/2007/007 which states at paragraph [36]

> "In the view of the Tribunal and in the absence of any express authority to the contrary the Tribunal concludes that it would be appropriate to apply the test set out in Section [3] of the 1993 Act. In each Act the draftsman is considering the character of the property which should be excluded from the provisions of the Acts in question, collective enfranchisement in the first and a right to manage in the second. The words used in each Act are similar so that it is likely that Parliament would have had in mind the same test for exclusion to be applied in each case."

48. We are not persuaded by Mr Howells that we should depart from the helpful analysis that is available in the enfranchisement context. The statutory provisions are the same and we can see no justification for like provisions being treated differently in this context. Neither the Tanfield Chambers book nor another decision of the LVT is binding upon us in any way but we accept the reasoning contained therein and adopt it as our own.

49. We are also not persuaded by Mr Howells analysis that the water supply is already independent. It seems to us that shared services here (i.e. water in one pipe which is then served by one set of pumps) means that they are not independent and no authority was put to us which supported Mr Howells submission. We do not think we need to resolve Mr Howells suggested interpretation of s.72(5) having made this finding.

50. We also reject entirely the invitation to not read the applicability of "independent" into 72(4)(b). s.72(4)(b) is part of the same sentence which s.72(4) as a whole comprises. The word "so" as the "mitigating" (per *Oakwood*) clause to s.72(4)(a) is clearly referring to "independent provision."

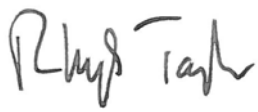
51. Our finding is that Mr Churches' option one would result in the provision of new services, rather than provision of *the services*, which is a pre-requisite of s.72(4). Further, as the incoming pipe would still be shared, we do not find that it would be independent in any event.

52. We were not provided with evidence as to the feasibility of bringing in a new supply via St Stephens.. The Second Applicant called no evidence in respect of this and we do not accept that it was incumbent upon the Second Respondent to first raise objections. The ultimate burden of proving the Right to Manage rested squarely upon the Second Applicant. We remind ourselves of paragraph [84] of *Oakwood*, which seems to us to be applicable here also. In any event, a new supply via St Stephens would not be part of *the services,* but a new service. Option two, metering, is also not providing independent services on the basis of the findings we have made.

53. It follows that the application for Right to Manage in respect of St Stephens is dismissed.

s.20C Landlord and Tenant Act 1985

54. After the end of a very full 2 day hearing, very brief submissions were made upon the issue of s.20C. No authorities were cited and no detailed arguments were made. The Tribunal has in mind the comments of Her Honour Judge Karen Walden-Smith in *Avon Estates (London) Limited v Sinclair Gardens Investments (Kensington) Limited* [2013] UKUT 0264 (LC) and Her Honour Judge Alice Robinson in *Kuller v Kingsoak Homes Ltd* [2013] UKUT 015 (LC). The Tribunal would like to give each party an opportunity to set their cases out in writing in respect of s.20C before we make a final decision on this point.



Legal Chairman

13 November 2013

SCHEDULE 1

Background.

1. This is a preliminary decision concerning the validity of two counter-notices served upon the First Applicant, St James Mansions RTM Company Limited.

2. The brief background is as follows. St James Mansions and St Stephens Mansions comprise blocks of residential flats in Mount Stuart Square, Cardiff. St James Mansions RTM Company Limited ("St James") and St Stephens RTM Company Limited ("St Stephens") were each incorporated with a view to them exercising their rights over the respective blocks under Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 ("the Act"). The First Respondent is the freeholder of both blocks and the Second Respondent is the manager appointed under the leases for the individual flats. The form of notices and counter-notices required to be served under the Act are set out in the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011 ("the Regulations.")

3. We were invited to consider the validity of the two counter-notices as a preliminary issue on the first day of a two day final hearing on 16 October 2013 which was listed to consider both St James and St Stephens' RTM applications.

4. Both RTMs served claim notices upon the First and Second Respondents, pursuant to the Act and Regulations, on the 29 February 2013. The counter-notice in respect of St James, from the First Respondent, is dated 27 March 2012 [sic] (no point was taken concerning this obviously incorrect date) and the counter-notice from the Second Respondent is dated 27 March 2013. Each counter-notice contains an error in that, whilst the document is addressed to St James at the top of the document and there is a subheading referring to "Re St James Mansions" near the top of the document, the part of the form which sets out why the Right to Manage is not accepted, refers to "St Stephens Mansions RTM Company Ltd."

5. The First Applicant challenges the validity of the counter-notices upon the basis that, absent of referring to the correct RTM, the counter-notices are not valid counter-notices and the end result is that the Right to Manage has been acquired by lack of any counter-notices having been served to challenge the claim notice.

Submissions

6. Mr Howells, on behalf of the Applicants, but in this context specifically on behalf of the First Applicant made the following submissions.

7. s.84(2)(b) defines a counter-notice which does not admit the Right to Manage as, "... a notice containing a statement ... alleging that, by reason of a specified provision of this Chapter, *the* RTM company was on that date not so entitled, and containing such other particulars (if any) as may be required to be contained in counter-notices, and complying with such requirements (if any) about the form of the counter-notices, as may be prescribed by regulations made by the appropriate national authority."

8. Mr Howells drew attention to the requirement in the notice to refer to "*the* RTM Company" and further referred us to the Regulations, in particular regulation 5(c) and 8(3). The Regulations provide prescribed clauses and notes which must be inserted in the counter-notice for it to be a valid counter-notice. Mr Howells submitted that by referring to the wrong RTM the notice did not comply with the regulations as any reference to the "the company" must be read as if it was referring to the wrong company.

9. We should note that, contained within the First Respondent's counter-notice, is a reference to the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010. Mr Howells took no objection to this and advanced no submission we should do anything about it. We therefore ignore this aspect.

10. The Tribunal invited the parties to consider a full transcript of *Assethold Limited v 15 Yonge Park RTM Company Limited* [2011] UKUT 379 (UT). Mr Howells invited us to adopt the approach of Her Honour Judge Walden-Smith in this case. In this case the wrong address was given in a RTM claim notice. Unlike the provisions for the counter-notice, the claim notice provisions include a "saving" provision at s.81(1) which states "A claim notice is not invalidated by any inaccuracy in any of the particulars required by or be virtue of section 80." Her Honour stated,

> "17. In my judgment section 81(1) is capable of applying to any of the details, or particulars, required by any of the sub-sections 80(2) to (8) of the 2002 Act. Regulation 4(c) of the Right to Manage regulations[1] expressly provides that the claim notice must include a statement that

[1] For these purposes, the same as the Regulations.

> the notice is not invalidated by any in accuracy in any of the particulars ([HHJ's] emphasis) required by s.80(2) to (7). In my judgment, section 81(1) could save a claim notice from being invalid if there is an 'inaccuracy' in any of the particulars set out in any of the subsections 80(2) to 80(8).
>
> 18. However, section 80 sets out mandatory requirements of what must be included in the claim form. A failure to provide those details would clearly prevent the claim form from being valid, otherwise there would be no purpose in the statute providing that th[e] inclusion of those details is a mandatory requirement. If, for example, the claim form did not include the name and registered office of the RTM Company it would be invalid. All that section 81(1) does is save the claim notice from invalidity if there is an 'inaccuracy' in those mandatory details. So, for example. If there was a spelling or typing error in the name or registered office of the RTM company then that would be, in my judgment, an 'inaccuracy' that section 81(1) would bite upon so that the claim notice would be saved from invalidity.
>
> **19. Providing the wrong name or wrong registered office of the RTM company is not, in my judgment, an 'inaccuracy.' It is a failure to provide the mandatory information required by section 80 ... "** (my emphasis)

11. Whilst the counter-notice provisions contain no "saving" provision in like terms to section 81(1), Mr Howells submitted to us that the analysis provided by HHJ Walden-Smith is instructive for us when considering a counter-notice which has the wrong name inserted.

12. Mr Howells also referred us to the case of *Assethold Limited v 14 Stansfield Road RTM Company Limited* [2012] UKUT 262 (LC) in which the then President of the Upper Tribunal (Lands Chamber), George Bartlett QC endorsed the approach taken by HHJ Walden-Smith in *15 Yonge Park RTM Company Limited*, stating that

> "Under section 81(1) a distinction falls to be drawn between the failure to provide the required particulars and an inaccuracy in the statement of the particulars. A claim notice is saved from invalidity only in the case of the latter."

13. Whilst this analysis is dealing, again, with s.81(1) (for which there is no corresponding provision for counter-notices) we were invited to adopt the reasoning and to find that there had been a failure to provide the 'required particulars' on account of the wrong name having been provided.

14. Mr Howells invited us to discount the reasoning of the LVT in *The Circle (No 3) RTM Company Limited & Others v Tenacity Limited*, unreported LON/00BE/LRM/2008/2009, in which the wrong names on counter-notices did not invalidate the notice on the basis of the "reasonable recipient" test derived from *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749. This provided that when construing notices an objective view should be taken and consideration given to how would the reasonable recipient have understood the notice? Would the recipient have understood the mistake and was there an obvious correction to the mistake?

15. Mr Howells invited us to discount the "reasonable recipient" approach on the basis that HHJ Walden-Smith held that her approach in *15 Younge Park RTM Company Limited* was consistent with the reasoning in *Mannai*. Further, we should simply follow the Upper Tribunal decisions as a source of binding authority in preference to another LVT decision which is not so binding.

16. In the alternative, if the Tribunal found that it was appropriate to construe the document using the "reasonable recipient" approach, it was far from clear what a reasonable recipient would have made of the counter-notice. The reasonable recipient would, for these purposes, be aware that St Stephens had also served a claim notice on the same day. Upon receipt of the counter-notice, would the reasonable recipient obviously have known that which was incorrect on the counter-notice. It might equally have been assumed that the heading and sub heading were incorrectly addressed to St James Mansions RTM and that the entry, referring to a neighbour who had served a notice on the same day, was correct.

17. We were invited to discount the LVT decision of *Portobello Pads RTM Company Limited v UK Investments Limited*, unreported, LON/00AW/LRM/2005/0013 on the basis that the more recent Upper Tribunal decisions do not appear to follow this approach. In *Portobello* the incorrect date had been inserted in paragraph 1 of the prescribed counter-notice and the LVT were persuaded that the inclusion of the relevant date was a permissive (rather than mandatory) requirement only and that

the purpose of the counter-notice was to inform the RTM company if its claim was opposed, and the counter-notice had served this purpose.

18. Mr Howells stated that the service of incorrect counter-notices from both Respondents was apt to compound the confusion.

19. For her part, Miss Khan sought to persuade us to adopt the reasoning in *Portobello*, namely, that the mistake was not so material (the correct name appeared twice elsewhere in the counter-notice) as to mislead the recipients in this case, who had the benefit of legal representation, and who, in due course, responded to the counter-claim in any event.

20. Miss Khan invited us to apply a "reasonable recipient" test as per *The Circle (No 3)* and find that the mistake is not fatal to the counter-notice. Her submission was that the mistake was obvious and the required reading-in of the correction was obvious as well.

21. Miss Khan submitted that the fact that both Respondents had made the same mistake made it more likely that the mistake would have been obvious to the reasonable recipient.

22. Miss Khan also took us through the Regulations, pointing out that, save for the inclusion of the wrong name at one point, the Regulations had been complied with.

23. Miss Khan also referred to the case of *Avon Freeholds Ltd v Regent Court RTM Co Ltd* [2013] UKUT 213 (LC). This was a case which deals with a different stage of the Right to Manage process, namely the compliance or otherwise with the requirements to give notice to participate under s.78 of the Act. As we were concerned with the issue the validity of counter-notices, we did not derive assistance from this case.

Decision.

24. We prefer the submissions of Mr Howells. Whilst we think there is very little mileage in his submission that the form of the counter-notice was contrary to the Regulations, we are satisfied by other arguments, namely:-

    a. By definition, a counter-notice in s.84(2)(b) of the Act must contain a statement alleging why *the* RTM company was not entitled to exercise Right to Manage Functions.

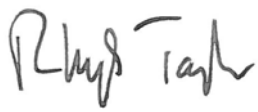
b. *14 Stansfield Road RTM Company Limited* and *15 Yonge RTM Company Limited* appear to regard the name on a notice as a 'required particular' which goes to the validity of the notice.

c. *15 Yonge Park RTM Company Limited* states that the above approach is consistent with *Mannai Investment Co*, thereby precluding us from applying a 'reasonable recipient' test. Even if we are wrong about that, we are far from satisfied that (1) the mistake (2) the correction, are obvious. This unfortunate slip has occurred in circumstances where neighbouring blocks served notices on the same date. A reasonable recipient might believe that the title and subheading was incorrect, given the statement in the counter-notice wherein St Stephens Mansions is referred to. We accept that a reasonable receipt *might* have concluded that the reference to St Stephens was an error, but this is not the only reasonable interpretation.

25. Miss Khan's submissions were hampered by the fact that they were based on the reasoning of LVT decisions, when contrasted with the more up to date Upper Tribunal decisions, whose reasoning we should be following and whose reasoning we prefer in any event.

26. We suspect that the fact that two incorrect counter-notices were served simply compounds the potential for confusion for a reasonable recipient, even if we were to apply that test, which we have not.

27. It follows from this short determination, which shall be annexed as a schedule to the final decision we make in respect of St Stephens, that there was no valid counter-notice served and the Right to Manage has been acquired by the First Applicant.



Lawyer Chairman 17 October 2013