UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges -- application to First-tier Tribunal for certificate of recognition in respect of a tenants' association -- Landlord and Tenant Act 1985 section 29 -- proper approach by First-tier Tribunal to such an application

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

BETWEEN:

ROSSLYN MANSIONS TENANTS' ASSOCIATION **Appellant**

and

WINSTONWORTH LIMITED **Respondent**

Re: Rosslyn Mansions,
21 Goldhurst Terrace,
London.
NW6 3HD

Before: His Honour Judge Huskinson
Sitting at Royal Courts of Justice, Strand, London WC2A 2LL
on
20 November 2014

Rebecca Cattermole, instructed by Jaffe Porter Crossick LLP on behalf of the appellant
John Hunt, director of the Respondent on behalf of the respondent

The following cases are referred to in this decision:
R v London Rent Assessment Panel ex p. Trustees of Henry Smith's Charity [1988] 1 EGLR 34
Minster Chalets Limited v Irwin Park Residents Association (LRX/28/2000)

DECISION

Introduction

1. This is an appeal from a decision of the First-tier Tribunal Property Chamber (Residential Property) (hereafter "the F-tT") dated 6 November 2013 whereby the F-tT determined that a certificate of recognition in favour of the appellant under section 29 of the Landlord and Tenant Act 1985 as amended should not be given.

2. Section 29 of the 1985 Act is in the following terms:

> "29. – Meaning of "*recognised tenants' association*."
>
> (1) A recognised tenants' association is an association of qualifying tenants (whether with or without other tenants) which is recognised for the purposes of the provisions of this Act relating to service charges either –
>
> (a) by notice in writing given by the landlord to the secretary of the association, or
>
> (b) by a certificate –
>
> (i) in relation to dwellings in England, of the First-tier Tribunal; and
>
> (ii) …..
>
> (2) A notice given under subsection (1)(a) may be withdrawn by the landlord by notice in writing given to the secretary of the association not less than six months before the date on which it is to be withdrawn.
>
> (3) A certificate given under subsection (1)(b)(i) may be cancelled by the First-tier Tribunal …..
>
> (4) …… for the purposes of this section a number of tenants are qualifying tenants if each of them may be required under the terms of his lease to contribute to the same costs by the payment of a service charge.
>
> (5) The Secretary of State may by regulations specify –
>
> (a) the procedure which is to be followed in connection with an application for, or for the cancellation of, a certificate under subsection (1)(b);
>
> (b) the matters to which regard is to be had in giving or cancelling a certificate under subsection (1)(b);
>
> (c) the duration of such a certificate; and
>
> (d) any circumstances in which a certificate is not to be given under subsection (1)(b).

(6) Regulations under subsection (5) –

(a) may make different provisions with respect to different cases or descriptions of case, including different provision for different areas, and

(b) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament."

3. At the commencement of the hearing I asked to be addressed upon the question of jurisdiction and of whether an appeal from the present decision of the F-tT refusing to give a certificate under section 29 was properly subject to an appeal to the Upper Tribunal. I raise this point because of text in the decision of the then President (George Bartlett QC) in *Minster Chalets Limited v Irwin Park Residents Association* (LRX/28/2000) especially in paragraphs 29 and 36 indicating that the refusal of a certificate by a member of a Rent Assessment Committee is an administrative act rather than a judicial one and could not be susceptible to appeal, although such a decision could be challenged by a judicial review, see *R v London Rent Assessment Panel, ex p. Trustees of Henry Smith's Charity Estate* [1988] 1 EGLR 34. It should be noted that as at the date of that decision the terms of section 29 were different and contemplated the giving of a certificate by "a member of the local Rent Assessment Committee Panel" rather than by the F-tT, as is now provided for in the amended section 29 so far as concerns an application for a certificate in relation to dwellings in England.

4. Miss Cattermole satisfied me that, whatever may have been the position in 2000, the position now after the coming into force of sections 11 and 12 of the Tribunals, Courts and Enforcement Act 2007 and the amendments made to section 29 of the 1985 Act (so as to make reference to a certificate of the F-tT) is that there is jurisdiction for the Upper Tribunal to consider such a matter upon an appeal. The reasons are in summary:

(1) In order to obtain a certificate under section 29 it is necessary to make an application, see section 29(5). This application needs to be made to the F-tT.

(2) An application to the F-tT in the manner in which proceedings are commenced before the F-tT, see Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Once such an application is made it will (unless otherwise terminated) be dealt with by a decision, see Rule 31.

(3) Accordingly an application under section 29 for a certificate from the F-tT is dealt with by a decision of the F-tT.

(4) Section 11 of the 2007 Act permits a party (with permission) to appeal to the Upper Tribunal on any point of law arising from a decision made by the F-tT other than certain excluded decisions (which do not include a decision under section 29).

(5) Accordingly section 12 of the 2007 Act is engaged. If the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law, then the Upper Tribunal has the powers set out in that section.

5. Accordingly I conclude that the F-tT's decision to refuse a section 29 certificate in the present case is a decision which is properly appealable to the Upper Tribunal.

6. So far as concerns the factual background to the appellant's application for a certificate under section 29 constituting it a recognised tenant's association ("RTA") they can be summarised at follows.

7. Rosslyn Mansions is a building comprising thirteen residential flats. Eight of those flats are let upon long leases at low rents which include the requirement to pay a variable service charge. The respondent is the freehold owner and is the landlord upon these leases. Four of these leases are held by members of the appellant, namely Mr John Ingledew (Flat 2), Mr Gary Bortz (Flats 9 and 10), and Mr Jonas Wandrin and Mrs Aparna Wandrin (Flat 7). One of the flats held upon a long lease (Flat 8) is held by Mr John Hunt, namely the director of the respondent who represented the respondent at the hearing before me. Mr Hunt does not wish to become a member of the appellant. The tenants who hold the long leases of the other three flats which are let upon long leases (namely Flats 1A, 2A and 6) have indicated that they do not wish to join the appellant and they do not support the application by the appellant for recognition as a RTA.

8. The appellant applied to the F-tT for a certificate recognising it as a RTA by an application dated 1 August 2013. Particulars in support of the application were given by the appellant in a letter dated 20 September 2013. This letter identified in paragraphs (a)-(j) reasons why the appellant sought a certificate under section 29. It is not necessary to set out in any detail in this decision the nature of these particulars, but they included claims to the effect that there was an archaic management system at the building; that there has been a refusal by the landlord to communicate and an absence of any forum for dialogue with the landlord; that there has been a failure by the landlord to consult and there have been opaque tendering methods leading to major contracts being awarded by the landlord to Mr Hunt (who effectively controls the respondent landlord) or members of his family; that there has been a refusal by the respondent to participate in informal residents' meetings or to engage with the tenants; and that there has been an expression of concern regarding lack of transparency, signs of neglect and financial and practical mismanagement.

9. The appellant's letter to the F-tT enclosed also certain supporting documentation including the constitution of the appellant and details regarding the occupancy of the various flats and as to who did and who did not support the appellant's application for a certificate and indicating the percentage of the aggregate of the variable service charges which was payable in respect of each relevant flat.

10. By a letter dated 26 October 2013 (with enclosures) Mr John Hunt on behalf of the respondent wrote to the F-tT with the respondent's reply to the application taking issue with many of the matters complained of and stating that most of the tenants not wishing to join the appellant had expressed their concerns regarding the motives and intentions of those supporting the appellant. The letter went item by item through paragraphs (a) – (j) of the appellant's letter giving a reply on each point. The letter also pointed out that the number of qualifying tenants supporting the appellant constituted only 57% of the tenants liable for variable service charges (it seems the 57% was calculated on the basis of 4 out of 7).

11. So far as concerns this reference by the respondent to a 57% participation figure, the position as at the date of the application to the F-tT and the F-tT's decision was that there existed a document issued by the Department of Communities and Local Government entitled "Residential Long Leaseholders – a guide to your rights and responsibilities" which included on page 15 some guidance regarding recognised tenant's associations. This document included the following passage:

> "As a general guide, an association should represent at least 60% of the flats in the block in respect of which variable service charges are payable."

Subsequently it seems in July 2014 further guidance has been issued by HM Courts & Tribunals Service in document T545 entitled "Guidance on Recognition of Tenant's Association" on page 2 of which there is the following passage:

> "There is no statutory specification of the matters to which the tribunal is to give regard in giving or cancelling a certificate of recognition and each application will be considered on its merits.
>
> In practice the tribunal will want to be satisfied that the constitution and rules of the association are fair and democratic and that it is independent of the landlord and, in the case of a company landlord, its employees. The tribunal will be concerned to see that the actual paid up membership of the association represents a substantial proportion (as a general rule not less than 60%) of the potential membership."

The F-tT's decision and the Permission to Appeal

12. It was agreed between the parties that the matter would be dealt with by the F-tT upon written representations and without an oral hearing.

13. The F-tT issued a decision dated 6 November 2013 comprising six paragraphs which were in the following terms:

> **"**1. The applicant(s) applied for a Certificate of Recognition of their Tenants' Association, under S.29 of the Landlord & Tenant Act 1985 in relation to the block known as Rosslyn Mansions. The application is dated 20 September 2013 and stated that there were 13 flats in the block, of which 7 paid a variable service charge. Six flats occupiers were members of the association, with 4 being subject to variable service charges. This represents 57% of the tenants liable to pay a variable service charge.
>
> 2. The application and supporting documents were sent to the landlord for comment, and these were received by the Tribunal on 30 October 2013, together with 4 letters from residents stating that they did not wish to join the association, and wished to keep the status quo.
>
> 3. The criteria used by the Secretary of State, although advisory, is usually adopted by Tribunals, and the recommendation is that Recognition only be given to those Associations who represent at least 60% of the variable service charge payers. In this instance, the proposed Association falls short of that requirement.

4. In addition, the Tribunal has noted that the Constitution entitled membership to Leaseholders, although tenants may become honorary members. It is customary for all tenants and leaseholders to be members of such associations, with voting rights in relation to the Landlord & Tenant Act 1985 matters being restricted to those liable for a variable service charge. The tribunal notes that this is not the case in the constitution submitted.

5. Finally, the Tribunal notes from some of the correspondence supplied by the parties that there appear to be disputes in relation to the management of the building, however the Tribunal cannot see that recognition of the Association would solve these issues, which may be pursued through the Tribunal under the relevant legislation. Similarly, the rights of leaseholders are not diminished by the lack of recognition, especially to service charge matters.

6. For these reasons I determine that a certificate of recognition should not be issued."

The reference in paragraph 3 to the recommendation that recognition should only be given to associations who represent at least 60% of the variable service charge payers is a reference to the first mentioned guidance referred to in paragraph 11 above.

14. The appellant applied to the F-tT for permission to appeal to the Upper Tribunal. The grounds included an argument that, while the qualifying tenants supporting the appellant may only have been 57% of the potential qualifying tenants (i.e. 4 out of 7), these tenants between them paid about 70% of the total amount paid by way of service charge by all of the tenants in the building who paid a variable service charge. It was submitted that this point should have been taken into consideration by the F-tT. However the F-tT refused permission to appeal stating that it had taken account of all the points raised by the appellant when reaching its original decision and adding:

"In particular there is nothing in the guidelines issued by the Secretary of State for a Tribunal to take account of the different percentages of service charge payable by any tenant. …. The Tribunal was and remains satisfied that insufficient membership of the proposed association exists for the grant of a certificate in this instance."

15. On 11 March 2014 the Upper Tribunal granted permission to appeal and added the following observations:

1. The weight which may be given to the relative contributions payable by leaseholders through a variable service charge to the costs of maintaining a building when a tenant's association seeks recognition under section 29 of the Landlord and Tenant Act 1985 is a matter of general significance and suitable for consideration by the Tribunal, as is the status of the recommendation given in guidance T545 that "as a general rule" not less than 60% of the potential membership of an association should have become members before a certificate of recognition is appropriate.

2. The applicant's application for permission to appeal may stand as its notice of appeal and statement of case.

3. If Winstonworth Limited wishes to respond to the appeal it should submit a respondent's notice and statement of case by 11 April 2014.

4. The appeal will be dealt with as a review with a view to a re-hearing under the Tribunal's standard procedure.

16. The appeal before me preceded on the basis of a review of the F-tT's decision. At the hearing before me the appellant was represented by Miss Cattermole of counsel who advanced legal arguments to the effect that the F-tT's decision could not stand. On behalf of the respondent Mr John Hunt stated that he could not comment on legal matters as he was not qualified to do so. He did however draw attention to certain factual matters which he wished the Tribunal to have in mind.

Appellant's submissions

17. On behalf of the appellant Miss Cattermole advanced the following arguments.

18. She drew attention to the recognition in *R v London Rent Assessment Panel ex p. Trustees of Henry Smith's Charity* [1988] 1 EGLR 34 as to what was the purpose of the provision relating to RTAs namely it:

> "… is, in my judgment, to permit a number of tenants, each of whom is given rights under the provisions to exercise those rights through the medium of an association, which can exercise those rights on behalf of the tenants concerned."

19. Miss Cattermole drew attention to the various ways, all potentially beneficial to tenants, in which an RTA can become involved on behalf of tenants and can exercise powers, see paragraph 24a – k of her skeleton argument and also paragraph 25 in relation to section 84 of the Housing Act 1996.

20. She drew attention to the absence of any regulations made under section 29(5). She submitted that a wide discretion was conferred upon the F-tT when considering an application for recognition under section 29. As to the manner in which this wide discretion should be exercised, Miss Cattermole submitted that the F-tT was required to grant a certificate of recognition unless there were good reasons not to do so. She further submitted that if this first submission (i.e. that there should be presumption in favour of granting the certificate) was wrong, then effectively the same position was reached by the following analysis. There was a wide discretion; the F-tT needs to look at the purpose for which it is contemplated by the legislation that an RTA can exist; this purpose is essentially to enable tenants to ensure that their building is managed properly and that their service charges are properly charged; and that if an application for a certificate is supported by a majority of the qualifying tenants (i.e. who are paying a variable service charge) who also are paying between them the majority of the variable service charge, then there should be a grant of a certificate (at least in the absence of good reasons to the contrary).

21. Miss Cattermole submitted that, in considering whether a majority of qualifying tenants supported an application for a certificate under section 29, account should only be taken of qualifying tenants who are independent of the landlord. She submitted that a tenant, who would otherwise be a

qualifying tenant paying a variable service charge, who was connected with a landlord was ineligible to be a member of an RTA and should be ignored for the purpose of considering whether a substantial proportion of the qualifying tenants supported the recognition of an RTA.

22. Miss Cattermole developed her arguments in relation to the four grounds of appeal relied upon by the appellant in the light of her general submission as to the proper approach as recorded above.

23. Ground 1 of the grounds of appeal was an argument that the F-tT applied the wrong test in that it had effectively found as determinative of the entire application the fact that the appellant's application was supported by only 57% (not the 60% referred to in the guidance) of the qualifying tenants. She submitted that this constituted a blind application of the 60% threshold and slavish adherence to the guidance as if it were a prescribed requirement in the statute (which it is not). It was clear from the F-tT's decision and also from its reasons for refusing permission to appeal that this perceived lack of sufficient support was the crucial point which led the F-tT to decide as it did.

24. As regards ground 2 Miss Cattermole argued that the F-tT had failed to take into account a relevant factor, namely that the 57% of service charge payers were responsible for about 70% (this was recognised as being an overstatement and was reduced to 65%) of the quantum of the service charges payable by the relevant qualifying tenants. Miss Cattermole submitted that this was a point which the F-tT had failed to take into account as a relevant point at all, see the text of its decision refusing permission to appeal (para 14 above). Bearing in mind the underlying purpose of RTAs (namely to be vigilant for tenants upon the question of service charges and management of the building) the percentage of service charge payable must also be a relevant consideration as well as the numerical percentage of the potential qualifying tenants who supported the application for a certificate.

25. As regards ground 3 Miss Cattermole submitted that the F-tT was wrong to conclude that the constitution of the appellant was contrary to the guidance. Also she drew attention to the wording of the statute itself which contemplates that an RTA is an association of qualifying tenants "whether with or without other tenants". There is no statutory requirement that any tenant in the building (including those who are not qualifying tenants paying service charges, for instance assured shorthold tenants) must be entitled to demand membership of an RTA. In any event the constitution of the appellant allowed such tenants to be admitted to members. The constitution of the appellant had been taken from some generally used precedents.

26. As regards ground 4, Miss Cattermole submitted that the F-tT was wrong to disregard the fact that there were substantial complaints regarding the running of the building. She recognised that the appellant was not seeking as part of the present application to the F-tT to secure a determination upon the merits of all of the matters in issue between the parties regarding the running of the building. However the fact that complaints existed was relevant to the merits of an application for a certificate especially, so she submitted, in circumstances where the landlord might be seen to be being obstructive to the obtaining of the certificate.

Respondent's submissions

27. As already mentioned Mr Hunt did not seek to advance any arguments of law. However he drew attention to the fact that he held flat 8 under a long lease from the respondent (of which he was a director). He paid a variable service charge. He constituted one of the qualifying tenants. Accordingly only 50% (namely 4 of our 8) of the qualifying tenants supported the appellant, not 57%. Also so far as concerns the percentage of the service charges payable by these four tenants, he draw attention to page 166 of the bundle and to the amounts payable by these four tenants as compared with the total expenditure upon the building for the year ending 30 September 2012. The total expenditure was £16,147.68. The total amount payable by these four tenants was £5,280.31 (namely £799.31 plus £1,614.78 plus £1433.11 plus £1433.11). This came to only 32.7% of the total costs of running the building.

Conclusions

28. I accept Miss Cattermole's submission that the F-tT has a wide discretion under section 29. It is possible that such discretion will be circumscribed by the contents of regulations if and when they are eventually made under section 29(5), but for the moment no such regulations exist.

29. I do not accept Miss Cattermole's submission that an F-tT should approach an application for a certificate under section 29 on the basis that such an application should be granted unless there are good reasons to the contrary. There is no reason for approaching an application on the basis of a presumption in favour of granting a certificate. It is for the F-tT to decide whether a certificate should be granted having regard to all the relevant facts of the case.

30. Miss Cattermole did not seek to submit that the question of whether or not the application for recognition was supported by a substantial proportion of the qualifying tenants was an irrelevant consideration. I agree. It plainly is a relevant consideration. The two instalments of guidance (see paragraph 11 above) which the Government has issued correctly recognises that it is a relevant consideration.

31. However while the size of the proportion of potential membership which the RTA represents is a relevant consideration, it is only one relevant consideration. I do not accept that it is an appropriate approach for an F-tT to consider an application for a certificate under section 29 on the presumption that, absent special circumstances, the certificate should be refused if the proposed RTA represents less than 60% of potential membership. There is no requirement in section 29 for a minimum percentage of the total qualifying tenants to support the proposed RTA. The more substantial the percentage support the stronger may be the merits of the application for the certificate, but the application must be looked at in the light of all the relevant circumstances.

32. I accept Miss Cattermole's argument that (contrary to the view apparently taken by the F-tT) it is relevant to consider not only the numerical proportion of potential members who support the proposed RTA but it is also relevant to consider the proportion of the overall variable service charges payable by these supporters. It would be possible to have a building where there were, say, three large flats paying 20% of the total service charges each and five small flats paying 8% of the total service charges each. In considering an application for a certificate recognising a proposed RTA

supported by the tenants of the three large flats plus the tenant of one of the small flats it would be relevant to take into account not merely that the supporters were only four out of eight in number but also to take into account the fact that they paid 65% of the service charges between them.

33. In the present case I consider, with respect, that the F-tT was in error and that its decision cannot stand because:

(1) It treated as irrelevant a factor which was relevant, namely the proportion of total variable service charge paid by the flats supporting the application for a certificate; and

(2) It approached the application on the basis that the normal result for an application for a certificate supported by less than 60% of the potential numbers should be a refusal; and

(3) It did not go on to consider whether the history of complaints and the apparent breaking down of confidence between the tenants supporting the appellant on the one hand and the respondent on the other hand (whether justified or not) was a factor which weighed in support of the giving of a certificate. The F-tT does not appear to have considered the significance of this, but instead merely observed that any complaints could be dealt with through the existing rights for tenants under the legislation (and without the necessity of an RTA).

34. In the result therefore I allow the appellant's appeal. I quash the decision of the F-tT. I remit the appellant's application, i.e. for a certificate of recognition under section 29, back to the F-tT to be considered again, such reconsideration to be pursuant to a hearing at which each party will be entitled to produce evidence and make representations.

Dated: 13 January 2015

His Honour Judge Huskinson