UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – RIGHT TO MANAGE – overriding objective – duty to cooperate - refusal by RTM company to disclose documents requested by landlord until after landlord's final submissions to FTT – refusal by FTT to allow landlord to comment on documents – whether a fair procedure – whether despite unfairness FTT's decision should remain undisturbed - rule 3(4), Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

Between:

ASSETHOLD LIMITED

Appellant

and

63 HOLMES ROAD (LONDON) RTM COMPANY LIMITED

Respondent

Re: 63 Holmes Road,
London NW5

Determination on written representations

The following cases are referred to in this decision:

BPP Holdings Ltd v HMRC [2017] UKSC 55

Elim Court RTM Co Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89; [2018] QB 571

Lexi Holdings v Pannone and Partners [2010] EWHC 1416

Point West GR Ltd v Bassi [2020] EWCA Civ 795

Introduction

1. This appeal is about procedural fairness. It is also about the duty of parties in proceedings before the First-tier Tribunal (Property Chamber) ("the FTT") to cooperate with each other and with the FTT to ensure that their disputes can be dealt with fairly and justly.

2. The appeal is brought by the owner of the freehold of a block of flats at 63 Holmes Road, London NW5 and arises out an application by the respondent, an RTM company, under section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") for a determination that it is entitled to acquire the right to manage the block. The appeal is against the decision of the First-tier Tribunal (Property Chamber) ("the FTT") dated 31 July 2019 which confirmed that the company is entitled to that right.

3. The appellant complains that the procedure adopted by the FTT denied it any opportunity to respond to the RTM company's substantive case, the details of which had been deliberately withheld by the company until after the appellant had been required to state its grounds for resisting the application. The result, the appellant contends, is that the decision was fatally compromised by a substantial procedural defect and ought to be set aside.

4. The appeal had been listed to be heard in public on 5 May 2020 but restrictions imposed as a result of the Covid-19 pandemic caused the hearing to be cancelled. Both parties then agreed that the appeal could be determined fairly on the basis of their written representations alone. Those representations were submitted on behalf of the appellant by Mr Bates and Ms Seitler, and on behalf of the respondent by Mr Wiles. I am grateful to them all.

Acquisition of the right to manage

5. Chapter 1 of Part 2 of the 2002 Act provides for an RTM company to acquire the right to manage premises to which the Chapter applies if the following conditions are satisfied:

    (a) The premises must be a self-contained building or part of a building, with or without appurtenant property which contains two or more flats held by qualifying tenants (section 72).

    (b) The RTM company must be a company limited by guarantee whose objects include the acquisition and exercise of the right to manage the premises in question (section 73(2)).

    (c) At the date of service of the claim notice the members of the RTM company must be at least two in number and must be qualifying tenants of at least half of the flats in the premises (section 79(4)-(5)).

    (d) At least 14 days before serving the claim notice the RTM company must have served a notice of invitation to participate on all qualifying tenants who are not members of the RTM company and have not agreed to become a member (section 78(1)).

(e) A claim notice must be served on the landlord under a lease of the whole or part of the premises, any third party to such a lease, and any appointed manager (section 79(6)).

(f) By section 84(1) a person who receives a claim notice may give a counter-notice disputing the RTM company's entitlement to acquire the right to manage the premises.

6. If these steps are taken by an RTM company in relation to a building to which Chapter 1 of Part 2 applies, and no counter-notice is given in response to the claim notice, the right to manage is acquired by operation of law and without the need for a tribunal decision. As a result, specified management functions pass to the RTM company under section 96; accrued uncommitted service charges must be handed over to it under section 94; it becomes responsible (in part) for granting or withholding of approvals under the leases of flats in the building by sections 98 and 99; and it acquires rights to enforce un-transferred tenant covenants under section 100.

7. Section 84(2) requires that a counter-notice disputing the right asserted in the claim notice must contain a statement "alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled." The counter-notice may not simply put the RTM company to proof of its entitlement, it must identify a specific reason why the company was not entitled to acquire the right. Oddly, perhaps, there is no requirement to provide any further explanation of the challenge (such as a statement of the facts which are said to cause the specified condition not to be satisfied).

8. The requirement to identify a specified provision assumes that the recipient of a claim notice will have enough information to enable it to assess whether each of the qualifying conditions has been satisfied. Some of these should present little difficulty: the owner of the building will usually be in a position to know whether it is self-contained, for example. But other information will be known only to the RTM company and the statutory scheme makes provision for only some of the relevant information to be supplied with the claim notice. The RTM company must state the name and address of each person who is the qualifying tenant of a flat in the premises and a member of the company, together with sufficient particulars of each such person's lease to identify it, and it must give its own name and registered office (section 80(3)-(5)). Although there is provision in section 80(8) for regulations to require further particulars to be contained in claim notices, none have been made.

9. In practice, therefore, unless the RTM company has volunteered additional information which section 80 does not require, the recipient of a claim notice is unlikely to know whether the statutory conditions have been satisfied. Since the right to manage is a valuable right, and since the service of a counter-notice postpones it, an absence of information encourages a defensive response from the recipients of claim notices and their professional advisers, many of whom adopt an exhaustive approach to the content of their counter-notices. In practice many, if not all, of the provisions of the statute containing qualifying conditions are routinely specified in counter-notices.

10. If a counter-notice is served, the RTM company may apply to the FTT under section 84(3) for a determination of its entitlement to acquires the right to manage the premises. Paragraph 26(3) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules") requires an application to the FTT to be accompanied by the particulars and documents specified in any applicable practice direction.

11. The FTT's Practice Directions in Residential Property cases, at paragraph 6 and Schedule 6, require an application under section 84(3) to be accompanied by copies of only three documents, namely, the memorandum and articles of association of the RTM company, the claim notice, and the counter notice received.

12. By section 88, the RTM company is liable to pay the reasonable costs incurred by the landlord in consequence of a claim notice, but must only pay the costs of tribunal proceedings if the FTT dismisses its application for a determination that it is entitled to acquire the rights to manage.

The facts

13. 63 Holmes Road ("the Premises") is a block of eight leasehold flats, the freehold of which is owned by the appellant, Assethold Ltd. The respondent, 63 Holmes Road (London) RTM Company Ltd, is an RTM company whose objects are to acquire the right to manage the Premises.

14. On 23 April 2019 the respondent gave notice of its claim to the appellant. The claim notice identified the respondent as having 10 members, all of whom were qualifying tenants, each with an address at the premises, and gave particulars of leases of seven of the eight flats which were said to belong to those members.

15. On the following day the appellant's solicitors asked the respondent to provide information to enable them to make a full assessment of the claim. The information sought comprised the following documents:

    (a) up-to-date Land Registry office copy entries for each of the qualifying tenants;

    (b) a copy of the register of members and confirmation of its location;

    (c) copies of any correspondences serving the claim form;

    (d) copies of the notices of invitation to participate and letters enclosing the same;

    (e) a copy of the Articles of Association of the company;

    (f) copies of any applications for membership of the company.

16. The respondent did not respond to this request, nor did it do so when the request was repeated on 1 May when the appellant's solicitors explained that without the documents the appellant was unable to make an assessment of the claim. A further chasing email on 9 May was also ignored.

17. Although the appellant did not have the information it required to enable it to consider whether there were grounds to resist the acquisition, its solicitors served a counter-notice on 24 May. The counter-notice contained 10 positive assertions that, for reasons related to specific qualifying conditions, the respondent was not entitled to acquire the right to manage. Mr Bates described the counter-notice as "protective", by which he meant that it was intended to put the respondent to proof of its entitlement despite the appellant not being in a position to know whether the qualifying conditions were satisfied or not.

18. The respondent applied to the FTT for a determination under section 84(3) and its application was issued on 12 June 2019. It did not tell the FTT that documents had been requested by the respondent and the only documents it supplied with the application were those required by the FTT's Practice Direction.

19. The FTT gave directions that the application would be dealt with on paper unless the appellant requested an oral hearing. The directions provided that the application and its accompanying documents were to stand as the respondent's statement of case. The appellant was required to file a statement of case in response, and the respondent was to have the opportunity to file a brief statement in reply.

20. The appellant's solicitors complied with the direction to file a statement of case. They took one point about the articles of association of the company but without access to the other documents they had requested they were only able to suggest there was uncertainty in relation to the membership of the company and the service of the notice of invitation and copies of the claim notices on those entitled to receive them. They explained that the respondent had failed to answer their request for other relevant documents but they did not at that stage ask the FTT to make any order in relation to that failure.

21. On 12 July the respondent's representative, Mr Wiles of Prime Management Ltd, filed a further statement of case in reply to the appellant's. At the same time he provided most of the remaining information which the appellant's solicitors had been requesting since 24 April, by disclosing copies of applications for membership of the RTM company, a notice of invitation addressed to the one tenant who was not a member of the company, up-to-date Land Registry office copy entries for each of the qualifying tenants, and a copy of the register of members.

22. The respondent's new statement of case explained why the same information had not provided when it was first requested. It was, Mr Wiles suggested, "simply not in the RTM Company's interests to correspond with this particular respondent in this way." This was because, whatever evidence was provided, the appellant would always serve a counter-notice opposing the claim. To comply with its request for information "achieves nothing except an increase in costs for the RTM Company (through s.88 of the Act) …".

23. On 23 July the appellant's solicitors asked the FTT for an opportunity to respond to the new documents. The respondent objected to this request, and suggested that if the appellant wanted to make further representations it should request an oral hearing. Why the further delay which that course would inevitably have involved was thought to be preferable to allowing the appellant a short period of time within which to make any additional points it considered were open to it was not explained by Mr Wiles.

The FTT's decisions

24. The appellant's request for time to respond was referred to a procedural judge who refused it on 25 July on the basis that:

> "the [RTM company] has responded to the issues raised by the [appellant] and there is no need for further argument prior to the determination of the application next week."

25. The procedural judge nevertheless suggested that the appellant might wish to renew its request to the FTT panel which was due to determine the substantive application on paper the following week. The appellant duly did so on 29 July.

26. In its final determination dated 31 July 2019, the FTT considered the appellant's renewed request and refused it for a second time. After referring to the original request for information, and the respondent's explanation for its refusal to provide it, the FTT gave the following reasons for its decision, at [3]-[4]:

> "We are satisfied that the Respondent has had an opportunity to put its case. We note that in its Counter-Notice, the Respondent took every procedural point that was open to it without providing any factual averments to support its ground of challenge. The Respondent has not established any evidential basis for suggesting that there has been any procedural error.
>
> "… We have regard to the decision of the Court of Appeal in *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89; [2018] QB 571. The Court of Appeal noted that the Government's policy was that the RTM procedures should be as simple as possible to reduce the potential for challenge by obstructive landlords on purely technical grounds and that the legislation should be construed having regard to this legislative intent."

27. The FTT then dismissed the appellant's challenges to the application on the basis that they were a "fishing expedition" unsupported by evidence and contradicted by the evidence now produced by the RTM company showing its membership, the invitation to participate served on the one qualifying tenant who was not a member, and establishing service of the claim notice.

28. At [18]-[19] the FTT referred to the respondent's failure to disclose relevant documents earlier and its justification of that conduct:

> "It is for a RTM Company to satisfy a tribunal that it has established the statutory RTM. We are satisfied that the Applicant has done this. We note that the Respondent has sought a delay of this determination to enable it to respond to the material filed by the Applicant. However, the Respondent has not established any evidential basis for suggesting that there has been a procedural error.
>
> "If the Respondent is able to adduce any new evidence that there has been any procedural irregularity that defeats the statutory RTM, it is open to it to

> seek permission to appeal. On any such application, this Tribunal has jurisdiction to review its decision. It is the duty of this Tribunal to determine any application fairly and in a proportionate manner. Had we adjourned the application there would have been delay and additional cost to both parties and to the tribunal."

The appeal

29. Mr Bates and Ms Seitler advanced two arguments in support of their general case that the FTT's determination of the application had been unfair. They argued first that the approach taken by the FTT was procedurally flawed since it allowed the appellant no opportunity to respond to the details of the respondent's case either in argument or by producing evidence. Secondly, the FTT had not dealt appropriately with the respondent's deliberate refusal to supply relevant documents to the appellant, and instead had encouraged a lack of cooperation which was inconsistent with its overriding objective of dealing with cases fairly and justly.

30. Mr Wiles submitted that there was no requirement for an RTM company to provide information of the sort requested in this case. The respondent had disclosed everything which was required of it by the FTT's Practice Directions in good time to enable the FTT to reach a decision based on the full facts. To have disclosed material earlier would simply have allowed the landlord to pass the costs of reviewing that information back to the RTM company under section 88 of the Act. It was, he suggested, for an RTM company to decide whether to provide information at an early stage, rendering itself liable for the landlord's costs of assessing the claim, or, by withholding it until after an application had been made to the FTT, to avoid those costs. The respondent took a conscious decision not to engage, in the interests of its members (as it perceived them).

31. Mr Wiles disputed the suggestion that the appellant had not had an opportunity to answer the RTM company's case. The FTT's directions had been clear and if the appellant had considered itself at any disadvantage an oral hearing should have been requested. If it was accepted that the appellant should have a right of reply, submissions would be endless as each party would always require the same opportunity.

32. In any event, the majority of the information requested by the appellant could have been obtained from other sources. Land Registry records could be purchased online; company articles could be obtained from Companies House; other documents could be requested from the company under the Companies Act. He did not accept that an RTM company could be put to proof of its compliance with the statutory procedure.

Discussion

33. By rule 6(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the FTT may regulate its own procedure. When it does so it must seek to give effect to the overriding objective identified in rule 3(1), namely, to deal with cases fairly and justly. That includes dealing with each case in ways which are proportionate to its importance and complexity, the anticipated costs and the resources of the parties and of the FTT itself; it also

includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings, and avoiding delay, so far as is compatible with proper consideration of the issues (rule 3(2)(a)).

34. Rule 3(4) places an important onus on the parties themselves in proceedings before the FTT. They have a positive obligation to help the FTT to further its overriding objective, and to co-operate with it generally. Although the rule does not say so explicitly, helping the FTT to further its overriding objective also requires parties to cooperate with each other. If a statement of that obvious proposition is required, it can be found in decisions of the courts on the analogous provisions of the Civil Procedure Rules. Although they govern litigation only in the courts, in *BPP Holdings Ltd v HMRC* [2017] UKSC 55 at [23] the Supreme Court recognised that decisions under the CPR were capable of providing important guidance to tribunals in the application of their own distinct procedural rules.

35. The duty imposed on parties in FTT proceedings by rule 3(4) to help the tribunal further its overriding objective finds its equivalent in CPR r.1.3 which was considered by Briggs J in *Lexi Holdings v Pannone and Partners* [2010] EWHC 1416, a case involving very serious allegations of dishonesty made against a firm of solicitors by its former client. At [7] and [8] the learned judge was critical of the parties' failure to cooperate with each other to identify and narrow issues:

> "The litigation of issues of bad faith and dishonesty may of course generate intense feelings of bitterness on both sides, and a determination to leave no stone unturned, regardless of cost, and all the more so in high value cases such as this one. Nonetheless the parties and their legal teams are obliged by CPR 1.3 to help the court to further the overriding objective. While a case is being prepared for trial this requires the parties and in particular their legal teams to put on one side their understandable feelings of mutual outrage and hostility, and to cooperate with each other in a process of preparation for trial which incurs only proportionate costs and uses no more than an appropriate share of the court's resources."

36. Although the context in which Briggs J made those remarks was very different from this case, the importance of parties cooperating with each other, as a necessary component of their duty to assist the tribunal, is equally applicable.

37. As the FTT recognised in this case, the onus of establishing that an RTM company is entitled to acquire the right to manage is on the company itself. It is axiomatic that the landlord or other party which has served a counter-notice must have a proper opportunity to answer the case on which the RTM company relies. The case which a landlord is entitled to challenge is not limited to the company's assertion that the qualifying conditions have been satisfied. It includes the facts asserted by the company and the evidence it relies on to make those assertions good.

38. The procedure adopted by the FTT in this case ensured that the appellant had no opportunity to respond to the evidence on which the RTM company relied. The FTT's refusal to allow the appellant to respond to the documents produced by the RTM company after the appellant

had made its own submissions prevented the appellant from challenging the veracity of the documents themselves, or from pointing out any respects in which they failed to satisfy the qualifying conditions. The FTT was satisfied that the material belatedly relied on was sufficient to demonstrate the company's entitlement, but it reached that conclusion without considering any argument to the contrary or allowing the appellant the opportunity to adduce evidence which might cast doubt on it. In my judgment that procedure was clearly unfair.

39. The procedural judge who refused the appellant's request for the opportunity to make further submissions on 25 July considered that there was no need for further argument because the company had responded to the issues raised by the appellant. That would have been a good reason for refusing the application if the company had been required to produce the material on which it relied before the appellant stated its case. But the FTT's directions designated the application itself, and the limited documents which were required to be provided with it, as the company's statement of case. There was therefore no need for the company to produce the documents which it knew the appellant wished to see until after the appellant had explained its own case. That sequencing might have been fair if the application had been determined at an oral hearing. The appellant would then have had the opportunity to make any points it wished to make on the new material at that hearing (although if it had wished to call evidence to rebut the new material it would have required the FTT's permission). But this application was to be determined on paper, with the evidence and argument being restricted to the statements of case and documents served with them. That made it necessary either that the company disclose all of the material on which it wished to rely before the appellant responded, or that the respondent be given a chance to comment on the material which it saw for the first time when the company filed its statement of case in reply.

40. The FTT's refusal of the appellant's renewed application in its decision of 31 July 2019 suffered from the same defect. The FTT was satisfied that the appellant had had an opportunity to put its case. But there was no onus on the appellant to prove anything; the opportunity it required was to respond to the company's case and the evidence the company relied on to establish it. The FTT referred to the fact that the appellant had taken every procedural point that was open to it in its counter-notice without providing any factual averments to support its ground of challenge. As I have explained, that approach is the consequence of the requirement that a landlord must raise any objections it wishes to rely on before it has seen the material on which the RTM company relies to establish its entitlement. The FTT's complaint that the appellant had not established any evidential basis for suggesting that there has been any procedural error overlooked the fact that the details of that procedure had been produced only after the appellant had been required to close its case.

41. The decision of the Court of Appeal in *Elim Court* to which the FTT referred does indeed emphasise that the policy of the legislation is that the procedure for acquiring the right to manage should be as simple as possible to reduce the potential for challenge by obstructive landlords on purely technical grounds and that the legislation should be construed accordingly. But no question of the construction of the legislation was raised by the appellant, and the only procedural issue for the FTT was whether the procedure it had laid down at the outset, before it knew that the appellant had already requested information, was fair and just.

42. The FTT assumed that there was nothing the appellant could say which would defeat the company's entitlement to acquire the right to manage. That assumption may well turn out to be correct, but for the FTT to act on that assumption by refusing the appellant the opportunity to respond to the company's case was not consistent with the FTT's overriding objective.

43. The FTT was aware that it was denying the appellant the chance to adduce any new evidence or argument it could to defeat the company's case but it suggested that the appellant was safeguarded by the opportunity which would be available to the FTT to review its own decision in the event of an application for permission to appeal. It suggested that dealing with the appellant's response to the company's case in that way would be fair and proportionate. I do not agree. As the Court of Appeal has recently confirmed in *Point West GR Ltd v Bassi* [2020] EWCA Civ 795, at [41], the FTT's power under rule 55 to review its own decisions is limited to a review on a point of law. Although, in appeals from tribunals, the scope of points of law is wide, it is not infinitely elastic, and a tribunal would not be entitled to review its decision on the basis of new evidence which had not been adduced at the proper time. The procedure contemplated by the FTT would also have placed on the appellant the onus of demonstrating that a decision in the company's favour, made on incomplete evidence and argument, was wrong. That is not a fair approach to the determination of any application.

44. The FTT also referred to the undesirable consequences of acceding to the appellant's request for time to make further submissions: an adjournment of the application would have caused delay and additional cost to both parties and to the tribunal. But the FTT did not weigh those undesirable consequences against the basic requirements of fairness and justice, and in particular the need to hear the evidence and argument on both sides before making a decision. Nor did it consider the circumstances in which those consequences would arise, in particular the fact that, until the very last minute, the company had refused to provide documents on which it relied to make good its case. Finally, the FTT does not appear to have considered the risk that those consequences would be compounded by the inevitability of an appeal from its decision, as has come to pass.

45. None of the points made by Mr Wiles in his submissions justify either his own conduct of the application or the FTT's decision. At the root of those submissions is a misconception of the obligation on parties to cooperate with the FTT to further its overriding objective. There was no good reason for refusing to disclose, when requested, documents on which the company itself wished to rely to establish its entitlement. The reasons advanced by Mr Wiles were all bad reasons.

46. The company knew what documents it had been asked to produce, but did not mention those requests to the FTT when it made its application. Had it done so an appropriate direction could have been given and the issues in this appeal would not have arisen. It ought not to have been necessary for there to be a direction since compliance with the duty to cooperate in order to assist the FTT in furthering its overriding objective ought to have seen the requested information disclosed before the appellant gave its counter-notice.

47. Mr Wiles appreciated that the documents would have to be put before the FTT eventually, but he considered there was an advantage to the company in withholding them until after the application had been made, so that the costs of considering them would not form part of the costs payable under section 88(1). That does not seem to me to be a legitimate tactic, and is arguably unreasonable. The statute recognises that it would be unfair for a party to be required to pay the costs of being deprived of its own rights in favour of someone else. The reasonable cost of considering whether an RTM company has a valid claim is part of the costs liable to be incurred by a landlord in consequence of a claim notice, and is recoverable under section 88(1). To seek to avoid those costs by holding back information until proceedings have commenced is unattractive. It is also counterproductive, as it has contributed to the very substantial delay in resolving the application as a result of this appeal.

48. Mr Wiles explained to the FTT that there was no point in providing information to the appellant because it would always serve a counter-notice. He may be right, but even if so, that is no reason for an applicant to be deliberately obstructive in response. The sooner the real issues are identified and focused on the more efficiently they will be dealt with, to the benefit of both parties and other tribunal users.

Disposal

49. For these reasons I am satisfied that the appellant was deprived of a fair opportunity to put its case in answer to the application.

50. That does not necessarily mean that the FTT's decision should be set aside and the matter sent back to it for reconsideration. Nowhere in the grounds of appeal or the written submissions filed in support does the appellant identify any argument which it was prevented from making to the FTT which might have produced a different outcome. Nor does it identify any evidence which it wanted to adduce but was prevented from relying on. There must inevitably be a strong suspicion that the appeal has been brought in the hope of delaying the acquisition of the right to manage, rather than with any expectation of defeating it altogether. If so, the FTT's decision would have been the correct one, despite having been the result of an unfair procedure.

51. The unfairness created by the FTT's refusal to consider further argument in response to the new material relied on by the company can be rectified by giving the appellant the opportunity now to identify any additional argument or evidence on which it would have relied. If such further submissions fail to disclose any grounds for thinking the company is not entitled to acquire the right to manage, the proper course will be to dismiss the appeal. If the appellant is able to cast doubt on the company's entitlement I will give further consideration to the best means of finally determining the application.

52. I therefore direct that, within 14 days of the date of publication of this decision, the appellant may make such further submissions as it wishes to in response to the material disclosed by the company on 12 July 2019. A copy should be sent to the company's representative at the same time but no further submissions need be filed by the company unless the Tribunal requests them.

Martin Rodger QC
Deputy Chamber President

20 July 2020