Right to manage: Q Studios (Stoke) RTM Co Ltd v Premier Ground Rents No. 6 Ltd [2020] UKUT 197 (LC)

Winston Jacob explains the guidance provided by the President of the Upper Tribunal in Q Studios (Stoke) RTM Co Ltd v Premier Ground Rents No. 6 Ltd [2020] UKUT 197 (LC) as to when a separate set of premises is a "flat" and when it is "occupied, or intended to be occupied, for residential purposes" and therefore subject to the right to manage provisions of the Commonhold and Leasehold Reform Act 2002.

The Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") provides a no fault statutory right to manage to qualifying tenants of flats in premises to which it applies. Tenants who are dissatisfied with the provision of services or the amount of their service charges may seek to exercise the right via a right to manage ("RTM") company. However, landlords and management companies often oppose such claims to seek to avoid the loss of control and other benefits associated with their management functions.

In *Q Studios (Stoke) RTM Co Ltd v Premier Ground Rents No. 6 Ltd*, the President of the Upper Tribunal was faced with various challenges mounted by a freeholder and managing agent against a claim for the right to manage a block of purpose-built student accommodation. The claim was started in the First-tier Tribunal but transferred to the Upper Tribunal for determination on the basis that it involved a complex or important principle or issue. The Upper Tribunal was asked to consider the appropriate test for what constitutes a "flat" and when premises are "occupied, or intended to be occupied, for residential purposes".

The facts

The premises were a newly-constructed 5-story block of student accommodation, consisting of 292 student bedsits with en suite bathrooms (described in the leases as "studystudios") and common parts.

The studystudios were all individually let on 250-year leases, which restricted their use to student lettings. The vast majority were sublet to a company associated with the developer, which further sublet them to students attending nearby universities. The owners of the 250-year leases bought them as investments. They were never intended to occupy them; merely to receive a yearly return on their investment, paid to them from the proceeds of the intended student lettings.

Each studystudio contained a bed, desk, wardrobe, living area and small kitchen area, including hob, microwave, sink and fridge. There were no common kitchen or bathroom areas and no other living space provided on any of the floors of the building except the ground floor. On the ground floor, there were communal areas in the form of a lounge/cinema room, a gym and a laundry room.

The Upper Tribunal was required to determine whether, on the date the claim notice was given ("the relevant date") the RTM company was entitled to acquire the right to manage. On the relevant date, none of the studystudios were occupied; however, it was agreed that they were intended to be occupied by students under assured shorthold tenancies. Meanwhile, the communal areas had not yet been fitted out for use.

The statutory provisions

The right to manage applies to premises if, among other requirements, they contain two or more flats held by qualifying tenants (s. 72(1)(b)). A "flat" is defined by s. 112(1) as a separate set of premises which, among other matters "*is constructed or adapted for use for the purposes of a dwelling*".

Section 112(1) further defines a "dwelling" as:

"… a building or part of a building *occupied or intended to be occupied as a separate dwelling*".

Meanwhile, paragraph 1 of Schedule 6 to the 2002 Act exempts premises from the right to manage if more than 25% of their internal floor is non-residential. For these purposes, a part of premises is "non-residential" if it is neither part of the common parts nor "*occupied, or intended to be occupied, for residential purposes*" (paragraph 1(2)).

The Respondents' objections

They freeholder and management company argued that the right to manage did not apply to the premises for three principle reasons.

First, the studystudios were not "constructed … for use for the purposes of a *dwelling*" as they did not constitute a home for the students who were intended to occupy them. Rather, they would be merely their temporary residence while attending university.

Secondly, the studystudios were not "intended to be occupied as … *separate dwelling[s]*" as each student's dwelling would be both the studystudios and the shared communal areas; not the studystudio alone.

Thirdly, the studystudios were not "intended to be occupied for *residential* purposes", as the purpose of the intended student lettings was to provide a return on the long leaseholders' investments (i.e. it was a commercial purpose).

The Respondents therefore argued that the studystudios were not "flats" and/or they constituted "non-residential" parts of the premises, with the result that they were excluded from the right to manage.

The Upper Tribunal's decision

The President held that the requirement that a "flat" be "constructed or adapted for use for the purposes of a dwelling" is concerned with the physical characteristics of the premises (applying

the reasoning of the Court of Appeal in *Aldford House Freehold Ltd v Grosvenor (Mayfair) Estate* [2019] EWCA Civ 1848; [2020] 2 WLR 116, which concerned the identically-worded definition of "flat" in the Leasehold Reform, Housing and Urban Development Act 1993). The test is an objective one; not a question of what, subjectively, the developer or builder intended when carrying out the works, or how an owner for the time being intends to make use of the premises. The terms of the lease are irrelevant for the purposes of deciding whether premises constitute a "flat".

Dwelling need not be a home

The question of whether premises have been constructed or adapted for use for the purposes of a dwelling is concerned with its physical characteristics, not with whether it is the occupier's home. In *JLK Ltd v Ezekwe* [2017] UKUT 277 (LC); [2017] L&TR 29, the Upper Tribunal held that, in the context of the Landlord and Tenant Act 1985 ("the 1985 Act"), a "dwelling" need not be a home. Such a conclusion applied more strongly in the context of the 2002 Act, the statutory purpose of which is to allow those with the greatest financial stake and long-term interest in a building to have control of its management. The right to manage has nothing to do with protecting lessees in their homes.

Separate dwelling requirement

In *JLK Ltd v Ezekwe* [2017] UKUT 277 (LC); [2017] L&TR 29, the Upper Tribunal held that the expression "occupied or intended to be occupied as a separate dwelling" in s. 38 of the 1985 Act could not be interpreted without regard to the meaning which has been given to the expression "as a separate dwelling" for the purpose of the Rent Acts and the Housing Act 1988. In *Q Studios*, the Upper Tribunal agreed that the words could not be construed without regard to this well-known meaning.

However, the test was not the same as the Rent Acts test, which considered the terms upon which the premises were let. The test under the 2002 Act depends on the physical characteristics of the separate set of premises, considered in the context of the building and any appurtenant property of which they form part. Nevertheless, the Rent Acts criterion of sharing living accommodation serves the purpose of the 2002 Act, where the primary focus is on what, objectively, the premises are constructed or adapted for use as.

If the separate set of premises lacks living accommodation that one would expect to see in a dwelling *and* this living accommodation is provided as common space for use by the occupier of the premises and others, then the premises are not constructed or adapted for use for the purposes of a separate dwelling. If no such shared accommodation is provided then, as long as the premises are a dwelling in the ordinary meaning of that word, they are likely to be constructed or adapted for use for the purposes of a separate dwelling. It will generally only be possible to conclude that the demised unit is part only of the dwelling if it lacks essential living space and this has been created elsewhere.

In the context of student let arrangements, there is a clear factual distinction between a case where each separate unit comprises all the usual facilities required for residential living and no further living accommodation is provided for use by occupiers, on the one hand, and a case where the separate set of premises lacks certain living accommodation that is provided elsewhere, on a

shared basis, on the other hand. What is in any given case living accommodation for shared use by more than one occupier, as compared with communal facilities of a building provided for all occupiers to use, will be a question of fact and degree. For this purpose, bathroom accommodation is not treated as "living accommodation" but a lounge area and kitchen area are. Only shared living accommodation would prevent a separate set of premises constructed or adapted for use for residential purposes from being premises constructed or adapted for use for the purposes of a separate dwelling.

Occupied or intended to be occupied for residential purposes

The point at issue was effectively decided in the Lands Tribunal in the case of *Gaingold Ltd v WHRA RTM Co Ltd* [2006] 1 EGLR 81, in which the President said that there was no justification for reading into the statutory provision the qualification that it is the underlying purpose of the person providing the residential accommodation that must be treated as the determinant of whether the part is occupied for residential purposes.

Those who occupy or who are intended to occupy the premises are the relevant occupiers. If the purpose of their occupation is residential, the premises are occupied, or intended to be occupied, for residential purposes. The purpose of the qualifying tenants, or any other parties, who may let the premises for profit are irrelevant.

Application to the facts

The fact that the lounge/cinema, gym and laundry had not been fitted out for use by the relevant date did not mean that they could be disregarded, as the building and studystudios had been constructed on the basis that they would be so available. However, the lounge/cinema, gym and laundry were in the nature of social and recreational facilities (and a laundry) for the benefit of all occupiers, not essential living accommodation for each of them. The lounge/cinema was only large enough to accommodate up to 50 students and was certainly not large enough to provide a living room for 292 occupants of the studystudios.

The studystudios were constructed so that the occupier could take advantage of the communal facilities on the ground floor, but each studystudio has ample living accommodation for occupation as a separate dwelling. The shared facilities intended to be provided in the ground floor therefore did not prevent the studystudios from being for use for the purposes of a separate dwelling. It is very common in modern apartment blocks for there to be gym and other facilities, such as an extended reception area with comfortable seating for communal use. Such facilities do not mean that none of the apartments in the block is a "flat" within the meaning of the 2002 Act.

The studystudios did not need to be a home for the students intended to occupy them and the commercial purpose of subletting the studystudios to students did not mean that their intended occupation was not for residential purposes.

The Upper Tribunal therefore held that the RTM company was entitled to acquire the right to manage the premises.

Comment

In holding that the test for determining what is a flat is concerned with the physical characteristics of the premises, and that the terms of the letting and the subject intent of the developer or builder are irrelevant, the Upper Tribunal has limited the extent of the enquiry in the event of a challenge to the right to manage. This is likely to assist those who might seek to acquire the right to manage; making it easier for them to identify, merely by considering the physical layout of the building, whether it contains "flats" within the meaning of the 2002 Act. It should also prevent developers/freeholders from seeking to draft their way out of the right to manage by careful wording in the leases. Meanwhile, the Upper Tribunal has confirmed that the test for whether premises are occupied or intended to be occupied for residential purposes is a straightforward consideration of the purpose of the occupant, not the qualifying tenant.

Author: Winston Jacob, barrister, Lamb Chambers