UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 0580 (LC)
LT Case Number: LRX/93/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT -- right to manage -- whether a building structurally detached and therefore self-contained -- Commonhold and Leasehold Reform Act 2002 section 72

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE NORTHERN RENT ASSESSMENT PANEL

BETWEEN	**NO.1 DEANSGATE (RESIDENTIAL) LIMITED**	**Appellant**
	and	
	NO.1 DEANSGATE RTM COMPANY LIMITED	**Respondent**

Re: No.1 Deansgate, Manchester M3 1AZ

Before: His Honour Judge Huskinson

Sitting at 45 Bedford Square, London, WC1B 3AS
on 11 November 2013

Justin Bates, instructed by Brethertons LLP for the appellant
Martin Dray, instructed by Lopian Wagner for the respondent

DECISION

Introduction

1. This is an appeal from a decision of the Leasehold Valuation Tribunal for the Northern Rent Assessment Panel ("the LVT") dated 5 April 2012 whereby the LVT held that No 1 Deansgate, Manchester, M3 1AZ ("the building") was a self-contained building within section 72(2) of the Commonhold and Leasehold Reform Act 2002 and that in consequence the respondent, as the RTM company, was on the relevant date entitled to acquire the right to manage the building under that Act.

2. Section 72 provides:

> "Premises to which Chapter applies
>
> (1) This Chapter applies to premises if –
>
> (a) they consist of a self-contained building or part of a building, with or without appurtenant property,
>
> (b) they contain two or more flats held by qualifying tenants, and
>
> (c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.
>
> (2) A building is a self-contained building if it is structurally detached.
>
> (3) A part of a building is a self-contained part of the building if –
>
> (a) it constitutes a vertical division of the building,
>
> (b)the structure of the building is such that it could be redeveloped independently of the rest of the building, and
>
> (c) subsection (4) applies in relation to it.
>
> (4) This subsection applies in relation to a part of a building if the relevant services provided for occupiers of it –
>
> (a) are provided independently of the relevant services provided for occupiers of the rest of the building, or
>
> (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.
>
> (5) Relevant services are services provided by means of pipes, cables or other fixed installations.
>
> (6) Schedule 6 (premises excepted from this Chapter) has effect."

3. The nature of the building and the issues in this appeal can conveniently be found in the Statement of Agreed Facts and Issues which is set out below (subject to the deletion of various page references etc):

> "*About the building*
>
> 1. No. 1 Deansgate is a mixed commercial/residential development in Manchester. It was built between 1999 and 2002.
>
> 2. It comprises 14 floors of residential accommodation containing 82 flats.
>
> 3. There are five commercial units at ground level.
>
> 4. No 1 Deansgate was constructed as a stand-alone building before the surrounding properties were built at a later date. Therefore, when No.1 Deansgate was originally constructed, it did not touch any other properties.
>
> 5. It was built as a structurally detached development (in that it did not and does not derive any structural support or lateral stability from (or give any such support to) the adjoining properties).
>
> 6. When the surrounding properties were built, weathering features were introduced to cover the gaps between No.1 Deansgate and those other properties in order to prevent the water ingress that would otherwise have occurred because the later properties had been constructed alongside No.1 Deansgate.
>
> 7. As a result, No.1 Deansgate is now connected to the adjoining properties – but only by the weathering features.
>
> 8. The weathering features have no structural element and do not provide structural integrity to No.1 Deansgate.
>
> *Procedural history*
>
> 9. The respondent RTM Company served a notice of claim on or around July 25, 2011. A counter-notice was served on or around August 30, 2011. The case came before the LVT on February 28, 2012.
>
> 10. The appellant contended that as a matter of law No.1 Deansgate was not a "self-contained building" as it was not "structurally detached" within the meaning of s.72, Commonhold and Leasehold Reform Act 2002. It contended that No.1 Deansgate touches the adjoining properties and that, as a result, it is not structurally detached.
>
> 11. The respondent argued that whether a building was "structurally detached" was a more nuanced question of fact and that, in the present case, none of the touching was of a nature or degree that meant that No.1 was not "structurally detached".
>
> 12. The LVT found for the respondent. Whether a property was "structurally detached" was a mixed question of fact and law (LVT decision, para 57). It also found that the degree of attachment was insufficient to mean that No.1 Deansgate was not "structurally detached" from the adjoining properties (LVT decision, para 70).
>
> 13. The LVT refused permission to appeal. The former President of the Upper Tribunal (Lands Chamber) (George Bartlett QC) granted permission to appeal, noting that there was a realistic prospect of success and the issue was important.

Issues on this appeal

14. The appeal gives rise to the following issues:

(a) what is required for a building to be "structurally detached" within the meaning of s.72(2), Commonhold and Leasehold Reform Act 2002; and, (b) does No.1 Deansgate meet that requirement?"

4. The LVT inspected the building. It stated that the purpose of section 72 is to permit a RTM company to manage discretely self-contained manageable premises and that it was necessary to afford a meaning to structurally attached in that context. The LVT concluded that the degree of attachment between the building and the adjoining buildings was insufficient to make the premises not "structurally detached". The LVT found that the word "structurally" was not superfluous. The LVT made the findings referred to in the Statement of Agreed Facts and Issues. In summary the LVT found that as a matter of fact and degree the extent to which there was any touching between the building and the neighbouring buildings by reason of the weathering features was insufficient to result in the building not being "structurally detached".

5. I was told that if the weathering features between the building and the neighbouring buildings were removed then there would be a gap between the buildings down which one could notionally drop a pebble so that it fell vertically to the ground between the buildings.

6. The appeal proceeded by way of a review of the LVT's decision.

Submissions on behalf of the appellant

7. On behalf of the appellant Mr Bates advanced the following arguments.

8 He argued that the House of Lords decision in *Parsons v Gage (Trustees of Henry Smith's Charity)* [1974] 1 WLR 435 was of crucial importance in the present case. That case concerned the proper construction of the words "structurally detached" in section 2 (2) of the Leasehold Reform Act 1967 which provides:

> "References in this Part of this Act to a house do not apply to a house which is not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house"

The decision of the House of Lords was given in the speech of Lord Wilberforce (with whom the other law lords agreed) and was to the effect that in deciding whether or not the premises were structurally detached it was not relevant to answer the question (which was the question the tenant argued was the relevant question) namely whether the premises were "properly separated" from other parts of the structure. Instead it was necessary to decide upon the meaning of the words "structurally detached". Mr Bates pointed out that the answer to this question was given at page 439 C to D in the following terms:

> "As a matter of ordinary English, I should regard the meaning as reasonably plain. "Structurally detached" means detached from any other structure. If it is said that this would be the meaning of "detached" alone, and that "structurally" is, on this view, superfluous, I would reply that the adjective is a natural addition because of the following reference to "the structure". The two words complement each other."

9. Mr Bates emphasised that Lord Wilberforce dealt with the matter entirely generally as a matter of the ordinary use of English. He found that "structurally detached" meant detached from any other structure. Mr Bates submitted that therefore once there is any attachment (e.g. in the form of touching) between building A and another structure building A ceases to be structurally detached. Lord Wilberforce did not find that an enquiry must be made as to whether the attachment is structural. Instead the simple question is whether or not there is an attachment to any other structure. The first two sentences of this quotation from the speech of Lord Wilberforce contain the finding of the House of Lords, they are in perfectly general terms and should be applied in any other statute where the identical expression namely "structurally detached" is used -- especially a statute dealing with a similar subject matter, namely the compulsory removal from a landlord of certain rights over its property.

10. He pointed out that in the 2002 Act the expression "structurally detached" is not defined. He therefore argued that the draftsman of the statute must have intended this expression to bear the meaning given to precisely these words in a previous statute (namely the Leasehold Reform Act 1967) as construed in the *Parsons* case. The question is not what is the degree of attachment -- instead the question is whether there is any attachment at all. In support of his argument that Parliament must have intended the expression to bear the same meaning as it had been found to bear in the 1967 Act he referred to *Welham v DPP* [1961]AC 103 at p.131.

11. Mr Bates recognised that discussion in the textbooks to which he referred (see below) did not constitute actual legal authority, but he submitted that they were helpful as showing the opinion of the authors. He referred to Hague on Leasehold Enfranchisement (fifth edition) at paragraphs 2-07 and 21-02; to Service Charges and Management: Law and Practice, by Tanfield Chambers at page 385; and (with all due author's modesty) to Leasehold Disputes (second edition) by Francis Davey and Justin Bates at paragraph 9.18. He pointed out that these textbooks took the view that the decision upon the expression "structurally detached" in the *Parsons* case should guide the interpretation of the expression "structurally detached" in section 72 (2) of the 2002 Act. He recognised that another textbook, namely Leasehold Enfranchisement and the Right to Manage by Christopher Sykes (second edition) appeared to take a different view in stating at paragraph 5.7.3 that:

> "The building must be structurally detached, although this does not mean that it cannot be physically connected to other buildings."

However he submitted that, as this textbook did not refer to the *Parsons* case, it was of less help.

12. Mr Bates referred to the decision of the Lands Tribunal (George Bartlett QC, President) in *Re 1-16 Finland Street* LRX/138/2006, which was a case concerning section 72(3) where it was held

that, subject perhaps to de minimis exceptions, the requirement for a vertical division of the building was unqualified and could not be the subject of an imported test of materiality regarding the extent of any deviation from a vertical division. He submitted that similarly here, once again subject perhaps (although he reserved his position on this) to de minimis exceptions, the test was not whether there was an attachment between the building and some other building which could be described as a material or substantial or structural attachment -- the question instead was whether there was any attachment at all. In summary he submitted that any touching between one building and another meant that neither building could be said to be "structurally detached".

13. Mr Bates recognised the "absurdity arguments" which were advanced by Mr Dray, ie arguments to the effect that if his (Mr Bates's) contentions were correct then absurd results would follow. As regards the suggestion that some slight touching or connection between buildings (e.g. a metalwork triumphal arch with the royal coat of arms constructed between buildings on either side of a street, or a connection by a metal gangway in the nature of the fire escape, or even by a string of bunting) would have the "absurd" result that the building was excluded from the right to manage scheme, Mr Bates submitted that in fact in such circumstances section 72(3) would operate so as to bring the building back within the ambit of the right to manage scheme.

14. Mr Bates submitted that to construe the expression "structurally detached" in accordance with its construction in *Parsons* resulted in a simple question which could be easily answered in any particular case -- it would merely be necessary to ask whether the relevant building touched any other structure. In contrast he submitted that to construe the expression as requiring an enquiry as to whether any attachment was "structural" would give rise to a potentially complicated question which could only be answered in some cases by the calling of expert evidence. This was a further pointer towards the correctness of the simple construction adopted by Lord Wilberforce in *Parsons* and based upon the ordinary use of the English language.

15. In answer to questions put to him by the Tribunal Mr Bates agreed that when the building was first built it was structurally detached; that when the neighbouring buildings were first built (but before any weathering features were constructed) the building continued to be structurally detached; but he maintained that when the first piece of connecting material (by way of weathering feature) made a connection between the building and a neighbouring building the building thereupon ceased to be structurally detached. In answer to a question as to what the position would be if in a hypothetical case some kind of connecting weathering feature (e.g. slates) were placed so as to close the gap between building A and another building by the owner of the other building and without the knowledge or consent of the owner of building A, Mr Bates suggested that in such a situation it may be necessary to look at the lawfulness of the connection. Alternatively in such a case any potential problem could be resolved by reliance upon section 72(3).

Submissions on behalf of the respondent

16. On behalf of the respondent Mr Dray advanced the following arguments.

17. He pointed out that the LVT had inspected the building and had found as a fact that such touching between buildings as was provided by the weathering features did not constitute structural attachment because, while there was some attachment, the attachment was not of a structural nature. Accordingly the appellant's argument had to be the argument which was in fact advanced by Mr Bates, namely that in order to be structurally detached it was necessary that there was no attachment of any kind between the building and some other structure. Unless the appellant could succeed upon this ground the appeal should fail, because once the matter became a question of fact and degree as to the nature of the attachment the appellant was fixed with the findings of the LVT (against which there was no appeal) that the attachment was not structural.

18. Mr Dray submitted that the error in the appellant's argument was that it failed to give any significance to the adverb "structurally" in the expression "structurally detached". The word structurally must modify the meaning which would be imported by the simple use of the single word detached.

19. Mr Dray drew attention to certain definitions in the Oxford English Dictionary namely:

(1) "structurally" is defined as: "In structural respects; with regard to structure".

(2) "structural" is defined (in meanings 1 and 2 of the definitions) as: "Of or pertaining to structure" and as "Of or pertaining to the structure of a building as distinguished from its decoration or fittings".

(3) "detached" is defined as: "disconnected, disengaged, separated; separate, unattached, standing apart, isolated".

20. Mr Dray argued that there was no justification for concluding that the expression structurally detached required the absence of mere touching. He drew attention to The Building Regulations 1965 and 1972 which used the expression "wholly detached" in certain places. This showed that when Parliament intended to make provision which was to be applicable where there was total detachment (i.e. the absence of even mere touching) then Parliament was well able to do so.

21. Mr Dray advanced the arguments, anticipated by Mr Bates, to the effect that Mr Bates's arguments could lead to absurd results if they were correct, for instance two otherwise entirely independent self-contained detached buildings being joined by a decorative arch or fire escape or bunting or a washing line. He submitted it could not have been the intention of Parliament for such buildings to be treated as not being structurally detached within section 72(2) and therefore not self-contained within section 72(1). It was no satisfactory answer to these absurdities for the appellant to argue that section 72(3) would remedy the situation and enable such a building to fall within the right to manage provisions. This is because in, for instance, the example of two self-

contained buildings A and B connected by a metal-work triumphal arch, it would be difficult to say that building A was "a part of the building" so as to enable it to fall within subsection (3).

22. He argued that the fact that in certain cases evidence (including perhaps expert evidence) might be needed in order to establish whether the attachment between two buildings was structural (so that neither of them was structurally detached) was no reason for straining the construction of the statutory words so as to avoid such a problem by making the test one of the simple question of whether there was any touching whatsoever between the buildings. He further argued that such evidence may well be needed when a question arises as to whether a part of the building falls within section 72(3), so there is no reason to suppose that Parliament intended that there should be no question of such evidence being necessary for the purpose of deciding whether a building was self-contained (i.e. structurally detached) within section 72(2).

23. Turning to the *Parsons* case, Mr Dray argued that the Leasehold Reform Act 1967 (which was relevant in *Parsons*) is a statute framed in materially different terms and dealing with a different subject matter as compared with the right to manage provisions in the Commonhold and Leasehold Reform Act 2002. In the *Parsons* case it was plain that the premises were not structurally detached -- see the diagram forming part of Lord Denning's judgement in the Court of Appeal which shows that if the garage had been physically removed a part of the subject premises would have been likely to fall to the ground. In order to have any hope of success in *Parsons* it was necessary for the tenant to argue that structurally detached meant "with proper separation". The House of Lords held it did not mean that. Mr Dray submitted that Lord Wilberforce was not seeking to lay down a definition of the words "structurally detached" to be applied in all statutes whatever their subject matter and whatever the intent of the legislation and the context in which they words were used. He pointed out that section 72(2) is seeking to define the expression "a self-contained building", which is not an expression used in the 1967 Act, and it is provided that the building is a self-contained building "if it is structurally detached". Thus the expression "structurally detached" is used as a freestanding expression. That position should be contrasted with the wording of section 2(2) of the 1967 Act where there is a significant amount of text after the use of the words "structurally detached" namely "..... and of which a material part lies above or below a part of the structure not comprised in the house". The word "structure" appears in this text and the words "structurally detached" have to be construed as part of this entire wording. He pointed out that Lord Wilberforce did not use any description such as "touching" or "slightest touching" or "actual physical detachment".

24. As regards *Welham v DPP* Mr Dray drew attention to the passages in Lord Denning's speech where he stated that if the language of a statute were clear and unambiguous it would not be right to embark upon a close consideration of previous authorities to see its meaning; and where he said:

> "I cannot help thinking that when Parliament..... used a phrase so hallowed by usage, it used it in the sense in which it had been used by generations of lawyers."

Mr Dray pointed out that this latter passage was in a paragraph introduced with the words

"Seeing, therefore, that the words of the statute are of doubtful import, it is, I think, legitimate to turn for guidance to the previous state of the law before the Act."

Conclusions

25. I am unable to accept Mr Bates's arguments. My reasons for so concluding are substantially those given in argument by Mr Dray. I express them briefly in my own words as follows.

26. This is an appeal by way of review. There is no appeal against the LVT's factual findings as regards the nature of the building and the nature and extent of the weathering features bridging the gap between the building and neighbouring structures. The LVT found as a fact that the degree of attachment between the building and the neighbouring structures was insufficient to make the premises not "structurally detached". Accordingly if the matter is one of fact and degree the present appeal must fail, because in those circumstances the LVT will have applied the correct test in law and will have reached a conclusion on the facts which was open to it (and which in any event is not the subject of an appeal).

27. Accordingly it is necessary for the appellant to submit (and this is what Mr Bates does submit on the appellant's behalf) that a building is only "structurally detached" within the meaning of section 72(2) if there is no touching or attachment (or at the most de minimis touching or attachment) between that building and some other structure.

28. I accept that the two sentences in Lord Wilberforce's judgement upon which Mr Bates particularly relies, if they are to be applied literally and in all circumstances, could be taken to indicate that a building is only structurally detached if it does not touch and is in no way attached to any other structure. The two sentences are these:

> "As a matter of ordinary English, I should regard the meaning as reasonably plain. "Structurally detached" means detached from any other structure."

However I am unable to accept that Lord Wilberforce was intending to lay down that the words "structurally detached" should always be construed in precisely this manner in all statutes irrespective of the subject matter and intent of the statute and the context in which the words are used. I accept the argument of Mr Dray summarised in paragraph 23 above. The meaning of the words "structurally detached" in the 1967 Act as construed by Lord Wilberforce cannot be taken as determinative of the meaning of those words in section 72(2) of the 2002 Act.

29. I agree with the LVT's observation (paragraph 68 of its decision) that the purpose of this part of the 2002 Act is to permit a RTM company to manage premises which are self-contained and which are in consequence susceptible to being managed as a discrete unit. Section 72(2), which provides that a building is a self-contained building if it is structurally detached, should be construed in that context.

30. I accept Mr Dray's argument that to construe "structurally detached" as requiring the absence of any attachment or touching between the subject building and some other structure is to construe section 72(2) as though it said "detached" or "wholly detached" rather than "structurally detached". What is required is that there should be no structural attachment (as opposed to non-structural attachment) between the building and some other structure.

31. I consider the extracts from the Oxford English Dictionary to be helpful. In particular I note the definition of the word "structurally" as meaning: in structural respects; with regard to structure. It is attachment of this sort which prevents a building being structurally detached.

32. I note Mr Dray's reference to the Building Regulations. The present case does not, of course, have anything to do with the Building Regulations. However the point can perfectly properly be made, without reference to such documents, that if Parliament had intended to convey the meaning wholly detached it could have easily done so.

33. I accept Mr Dray's argument that if Mr Bates's arguments are correct then there would indeed be absurd results such as those Mr Dray gave by way of example. It may be that the example of the string of bunting or the washing line could be accommodated (supposing Mr Bates's arguments were correct) on the basis that the attachment there was de minimis. However a more substantial connection such as the hypothetical triumphal metalwork arch connecting two otherwise entirely self standing and separate buildings could not, so I would have thought, be dealt with on a de minimis basis. If such an attachment meant (as Mr Bates argued) that neither building was structurally detached, the result would be that neither building would be a self-contained building within section 72(2). In these circumstances I am unable to accept Mr Bates's argument that the apparent absurdity could be circumvented by reliance upon section 72(3) -- this is because in such circumstances neither building would seem capable of being properly described as "a part of a building" so as to enable it to fall within section 72(3).

34. As regards *Welham v DPP* I do not consider the words of section 72(2) to be of doubtful import, nor do I consider that the phrase "structurally detached" can be described as a phrase which is hallowed by usage and which has been used in a particular sense by generations of lawyers. Accordingly I reject Mr Bates's argument that the Tribunal should approach the expression "structurally detached" on the assumption that (absent some clear indication to the contrary) it means the same as it was found to mean in the *Parsons* case.

35. In the result I conclude that the LVT was correct. It examined not whether there was any attachment at all (such as touching) between the building and neighbouring structures. Instead the LVT examined the correct question, namely whether there was any attachment of a structural nature. The LVT found (as it was clearly entitled to do) that such attachment as existed was not structural and that the building was therefore structurally detached and was in consequence a self-contained building within the right to manage provisions.

36. The appellant's appeal is dismissed.

37. Neither party made any application regarding costs.

His Honour Judge Huskinson

Dated: 22 November 2013