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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/LRM/2013/00013**
Property	:	**Brixton Court, Brixton Hill, London SW2 1QX**
Applicants	:	**Brixton Hill Right to Manage Company**
Representative	:	**Compton Solicitors LLP- Represented by Mr Compton**
Respondent	:	**Springquote Limited**
Representative	:	**Mr Carr- Counsel instructed by JP Leitch LLP**
Type of Application	:	**Application for a decision of the Leasehold Valuation Tribunal on a preliminary issue under section 84(3) of the Commonhold Leasehold Reform Act 2002**
Also in attendance	:	**Sarah Jennings** **Various leaseholders from Brixton Hill Court** **Mr Heimann FRICS (on behalf of the landlord**
Tribunal Members		**Ms M W Daley LLB (Hons)** **Mr I Thompson FRICS** **Mr A Ring**
Date and venue of hearing	:	**24 June 2013 and 19 July 2013 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	

DECISION

Decisions of the Tribunal

(1) The Tribunal has determined that the relevant notice of claim is the Notice dated 19 February 2013 (at page 7 of the hearing bundle).

(2) The Tribunal considers that the wording of section 81(3) of the 2002 act make it clear that there can be only one claim notice at a time. Accordingly the Tribunal has considered that any notice served after the first notice was invalidly served and does not have the effect of correcting any errors which may have occurred in the first notice.

(3) The Tribunal determines that the omission of two tenants from the claim notice has the effect of invalidating the Claim Notice.

(4) The Tribunal determines that the premises are made up of two buildings and that for the purpose of a Notice of claim to acquire the right to manage two notices ought to have been served.

(5) The Tribunal determines that one RTM Company may be set up and serve a valid claim notice in respect of the two buildings.

(6) In light of these findings, the Tribunal determines that the Applicant has not acquired the right to manage the property.

(7) The Tribunal make directions in relation to the separate application under Section 88 of CLARA 2002.

The application

(8) The Applicant pursuant to an application dated 7 May 2013 sought a determination that the Right to Manage Company had acquired the Right to manage the premises known as Brixton Court, Brixton Hill, London SW2 1QX ("the Premises").

(9) Directions were given on 10 May 2013 in which the Tribunal identified the following single issue-*: "Whether on the date on which the notice of claim was given, the Applicant was entitled to acquire the Right to Manage the premises specified in the notice.*

The background

(10) The premises are a development of 144 flats. The development consists of two blocks. The Front block comprises flats 1-88 and the rear blocks comprise 89-144. The blocks are connected by a concrete walkway.

(11) The Applicant served eight notices in total (issued in three sets) served on dated 19 February and 20 February 2013 and 12 March 2013, the Respondent by counter notices dated 22 March 2013 and 12 April 2013 disputed the claim alleging (a) that the Applicant had failed to comply with the act and (b) that the first claim notice dated 19 February 2013 had not been withdrawn or deemed to have been withdrawn prior to serving the second notice.

The matters in issue

(12) The Tribunal at the hearing determined that there were a number of issues in this case- which were as follows: (i) Whether the notices served after the first notice dated 19 February were validly served; (ii) Whether the Right to Manage Company can rely upon more than one claim notice; (iii) whether in respect of any errors in the claim notice, they have the effect of invalidating the notice; (iv)Whether the premises in issue were one or two buildings; (v)whether if the Tribunal determine that the premises are two separate buildings, the buildings may be managed by one RTM company

(13) The relevant legal provisions are set out in the Appendix to this decision.

The Hearing

(14) At the hearing the Applicant was represented by Mr Compton of Compton Solicitors and the Respondent was represented by Mr Carr Counsel instructed by J P Leitch Solicitors on behalf of the Respondent.
(15) The following additional documents were provided to the Tribunal -: The Applicant's Skeleton Argument and the Respondent's Skeleton Argument.
(16) The Tribunal at the conclusion of the hearing, due to lack of time directed the serving of written closing submissions (where these submissions are not referred to in this decision, this is because the largely repeat matters that have been set out in full in the Skeleton Arguments).

The legal effect and the validity of the service of multiple claim notices

(17) The Respondent in their Statement of Case in reply for the Respondent set out the scope of their objections to the Right to Manage application. In paragraph 2 stated -: *"... the applicant has served eight claim notices: (a)*

in respect of the entire development, notices were served dated February 19, 2013, February 20 2013 and 12 March 2013; (b) in respect of the front block, notices were served, dated 19 February 2013, and 12 March 2013... The claim notices served after 19 February 2013 appear to have been served "without prejudice" to each other. It was not made clear in the application which notice(s) are being relied upon and the respondent is accordingly obliged to address each possible variation..."

(18) In the reply the Respondent stated that the notices were invalid as a result of section 80 of the 2002 Act. In paragraph 4 of the Respondent's Statement of Case, the Respondent stated-: *"It is not permissible to serve a multitude of notices "without prejudice" to each other. A party is limited to one notice at any one time and, if they no-longer wish to rely on that notice, must withdraw it. If it is not withdrawn, it remains in force and prevents any further claim notice being given... (5) A claim notice must be withdrawn before a second notice is served. In the present case, no claim notice has been withdrawn and, hence the prohibition on giving any further notice applies."*

(19) The Applicant in their reply to the Respondent's Statement of Case, at paragraph 2 stated as follows-*: "... The Applicant served three sets of Notices. The first set was served on 19th February 2013 ("the First Set") the second set was served on 20th February 2013 ("the Second set") and the third set was served on 12 March 2013 ("the Third Set"). Comprising in the First and Third Sets are three notices one served in respect of the building as a whole and the other served in respect of two separate buildings (one for the front and one for the rear block) for the above reason. The Second Set contained only two Notices of Claim given that the omission of Yael Lowenstein only affected the Front part and not the Rear part. The First Set and the Second Set provide the date the right to manage is to be acquired on 3 July 2013 and the Third Set on 16 July 2013..."*

(20) Mr. Compton stated that the second set of notices had indeed been served "*without prejudice*" to the first. In adopting this approach, Mr. Compton relied upon the case of *Craft rule Limited and 41-60 Albert Place Mansions (Freehold) Limited [2011] EWCA Civ 185*. This was a case concerning sections 3 and 4 of the Leasehold Reform Housing and Urban Development Act 1993. Mr Compton firstly asserted that the provisions of this act which relate to enfranchisement (insofar as they set out principles for the serve of notices) were applicable to the provisions of CLARA 2002 as the provisions were similar in terms of the wording used, as applied to the serve of notices. In *Craft rule Limited* there was an issue as to whether more than one notice ought to have been given.

(21) In Craft rule Henderson J, determined that notwithstanding the configuration of the building, one notice could be served in respect of the whole building.

(22) (Although there was an issue in the case before the Tribunal on the configuration of the building, the Applicant's reference to Craft rule was primarily in relation to the question of service of notices)

(23) The Tribunal queried-: (1) what was the effect of serving multiple notices and (2) given the service of multiple notices, which one was to be relied on by the Applicant.

(24) Mr. Compton referred the Tribunal to the case of *Sinclair Garden Investments (Kensington) Limited –v- Poets Chase Freehold Company (2007) EWHC 1776.* In his Skeleton Argument, (at paragraph 18) Mr Compton stated (of *Poets Chase)* as follows-: *"... the landlord had attempted to argue that the tenants were unable to serve a Second Notice since Section 13 (8) of the Leasehold Reform, Housing & Urban Development Act 1993 states that you cannot serve more than one notice in relation to the same building and that the tenants would first have to withdraw their First Notice... Mr Justice Morgan states "if a mandatory contractual or statutory provision requires a party to give a notice in a particular form in order to achieve a result identified in the contract or statute and if a purported notice given by that party fails to comply with the mandatory contractual or statutory provision, then the normal position is that the notice has no legal effect."*

(25) Mr. Compton stated that in *Poets Chase,* it was held that as the first notice had no legal effect, there was therefore no prohibition on serving a further notice.

(26) He also asserted, in applying the provisions of the 1993 Act, to the case before this Tribunal, that if any of the earlier notices were considered by the Tribunal to be defective, then they were ineffective legally, and this put the Applicant in the position that the Applicant could serve a further notice without formally withdrawing the non-effective notice.

(27) In his Skeleton Argument he stated-: *"...It is submitted that given the Poets Chase authority, the Tribunal must interpret Section 80(3) in the same manner as Section 13(8) given the latter mirrors the former and determine that a second Notice of Claim can be served without a former Notice of Claim having to be withdrawn if that former Notice of Claim is invalid."*

(28) Mr. Compton in his Skeleton argument adopted the position that an invalid notice was one which had no legal effect, and as such the position was as if the notice did not exist.

(29) The Tribunal asked Mr Compton to clarify the date considered by the Applicant to be the date when the Applicant was deemed to have been entitled to acquire the Right to Manage?

(30) Mr. Compton stated that for this purpose he would rely on the third set of notices, also the provisions of section 90 (4) of the 2002 act provided that the deemed date is *"three months after the determination becomes final."*

(31) Mr Carr in reply, rejected the Applicant's proposition, stated that the wording in section 81 (3) was quite straightforward and that Subs.81 (3) created a statutory prohibition on the service of more than one claim notice in respect of a single premises. It provides:

Where any premises have been specified in a claim notice, ***no subsequent claim notice which specifies –***
The premises, or any premises containing or contained in the premises, may be given so long as the earlier claim notice continues *in force.*

(32) Mr. Carr submitted that the prohibition in subs.81 (3) only arose where -: "*...an earlier claim notice "continues in force". So the meaning of this expression is vital to determining when the prohibition arises. Subs. 81(4) defines what is meant by the expression "continues in force".* It states:

Where a claim notice is given by a RTM company it continues in force from the relevant date until the right to manage is acquired by the company unless it has previously – been withdrawn or deemed to be withdrawn by virtue of any provision of this Chapter, or ceased to have effect by reason of any other provision of this Chapter.

(33) Mr. Carr stated that as at the date of the hearing, none of the 8 "purported claim notices" had been withdrawn by the RTM Company. Further, none of the circumstances giving rise to a deemed withdrawal under s.87 has arisen and where subs.81(4)(a) had not been satisfied, the only way in which any of the purported claim notices could cease to continue in force was under subs.81(4)(b).

(34) So the key question was whether the purported claim notices "*ceased to have effect*" by reason of any other provision in Chapter 1 of Part 2 of CLRA.S.84 is the only provision in Chapter 1 of Part 2 of CLRA which specifies how a claim notice "ceases to have effect".

(35) Subs.84(2) of CLRA defines what is a counter-notice and provides:

> *A counter-notice is a notice containing a statement either –*
> *... or alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled* Subs.84 (3) provides:
>
> *Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the company may apply to a leasehold valuation tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises.*

(36) Mr. Carr stated that the 2002 Act provided that the other circumstances in which the notice would cease to have effect, is on the determination of the Tribunal that the Applicant was not entitled to exercise the right to manage. In his submission the first notice continued to be valid unless one of the two situations referred to above arose.

(37) Mr. Carr further relied upon Section 90(2) of the 2002 Act as supporting his interpretation as if the landlord failed to serve a counter notice, in his submission the tenants would acquire the Right to Manage, whether or not the claim notice was valid.

(38) He submitted that notices served "*Without Prejudice*" are invalid. Mr. Carr further submitted that the position was very different from the 1993 Act, in which there was a prohibition in serving a further notice until a

specific period had passed, given this he did not accept Mr. Compton's submissions.

(39) The Tribunal were referred to paragraphs 53 to 55 of *Sinclair Gardens Investment Limited-v- Poets Chase Freehold Company (2007)EWHC*

(40) Which states-: *"... speaking generally if a mandatory contractual or statutory provision requires a party to give a notice in a particular form in order to achieve a result identified in the contract or statute and if a purported notice given by that party fails to comply with the mandatory contractual or statutory provision then the normal position is that the notice has no legal effect. This general position may be modified by for example a provision such as that contained in paragraph 15 of Schedule 3 to the 1993 Act which deals with inaccuracies and misdescriptions in the Section 13 notice. However the County Court Judge has held that the notice dated 19 December 2005 was not saved by that statutory provision...60. Having explained my understanding of how the scheme of Chapter 1 of part 1 works, it is my conclusion that there is nothing in that scheme which requires one to hold, contrary to the normal position with non-compliant notices, that a purported notice under section 13, which fails to be effective because it does not comply with Section 13 (3) nonetheless has some statutory consequences such that it is to be treated as a notice under Section 13 or a notice in accordance with Section 13 or as a notice which continues in force" until the tenants accept that the notice does not comply with Section 13 (3) and is ineffective."*

(41) Mr. Carr stated that the Decision in *Poets Chase* may be distinguished from this case, as it concerned the validity of multiple initial notices served under s.13 of the Leasehold Reform, Housing and Urban Development Act 1993 ("LRHUDA"). The decision did not concern the RTM provisions of CLARA. Mr. Carr submitted that the 1993 Act contained what he referred to as a "Safety Valve" as under the 1993 Act where a landlord has failed to serve a counter-notice, the court must still be satisfied that the participating tenants were, on the relevant date, entitled to exercise the right to collective enfranchisement, however in his submissions the 2002 Act contained no such provisions, and the effect of the landlord failing to serve a counter notice, was that the tenants would acquire the Right to Manage.

(42) In his submissions the reason for this was that parliament intended the two acts to have different consequences.

(43) The Applicant placed reliance on the decision in relation to the service of notices of 10 Mitcham Park RTM Company and sought to distinguish *Plintal SA*. Mr Carr submitted that 10 Mitcham Park (an LVT decision) was wrong, and as an LVT decision, was not binding on the Tribunal, this Tribunal ought not to follow it.

(44) The Tribunal asked Mr.Compton to specify which of the notices that had been served he considered to be the "super notice" that is the notice which was correctly served, and which the Tribunal should consider as containing all of the necessary requirements under the act.

(45) Although Mr.Compton did not invite the Tribunal to adopt the approach of disregarding the earlier notices, he submitted that the notice

served on 12 March 2013 (the third set) was the one which he considered to be compliant with the requirements under the 2002 Act.

(46) The Tribunal were of the opinion that in order to determine the application, if they accepted Mr Compton's submissions, they would have to consider each of the notices in turn, until they were in a position to decide on which of the notices (if any), was correct. Mr Compton did not disagree that this would be the approach that would need to be adopted by the Tribunal.

(47) Mr. Compton's alternative submissions were that insofar as the first notice had errors, the errors, did not invalidate the notice.

(48) Mr Compton in general terms argued that where the Respondent now sought to rely on matters which were not set out in the counter-notice and statement of case, these arguments ought to be disregarded by the Tribunal. (The Respondent did not in any event seek to advance these additional matters at the hearing).

(49) The submissions in respect of the errors are considered below.

The Tribunal's decision on the Claim Notice

(50) The Tribunal having considered the submissions of the Applicant and Respondent accepted the submissions of the Respondent. The Tribunal consider that the wording of section 81(3) of the 2002 act is such that it makes it clear that there can be only one claim notice validly served at a time, and that the serving of a subsequent notice is only valid when the first claim notice is deemed to have been withdrawn in accordance with section 81(4), or ceases to have effect as set out in section 84(6) of the 2002 Act.

(51) As none of the circumstances set out in those sections has occurred the Tribunal determines that the Applicant can only place reliance on the notice dated 19 February 2013 which referred to the premises as one building, and which had omissions in respect of two of the leaseholders, Yael Lowenstein & Lucy McCulloch in Particulars.

(52) The Tribunal have adopted this notice as the first notice on the grounds that it is referred to as such by the parties, and the Applicant's in their document entitled- *Summary of legal effect of Claim notice,* have identified it as the first notice.

(53) The Tribunal considers that although the 1993 Act is helpful in giving guidance to the way that the courts have determined similarly worded statutes, there are material differences between the two acts, and that the case law referred to by the Applicants in their submissions turn on these differences.

(54) The Tribunal also considers that in the serving of a prescribed statutory notice, the parties cannot evoke a claim of "Without Prejudice" as the effect of this would be unfair, and is not within the scope of this act. It is clear to the Tribunal that the wording of section 88 provides that (1) an RTM company is liable for reasonable costs incurred by a person who is a landlord under a lease of the whole or any part of any premises...***in***

consequence of a claim notice given by the company in relation to the premises..."

(55) The Tribunal determines that the serving of a notice is intended to have certain consequences for both the Applicant and the Respondent landlord that may result in costs being incurred. Mr Compton submitted that if the notice was not validly served then it was not a claim notice; the Tribunal consider that Mr Compton is plainly wrong on this point.

(56) The Tribunal in reaching this decision considered all of the authorities referred to by Mr Compton including *10 Mitcham Park*, although the Tribunal have not rehearsed all of the Applicant's arguments in full in particular in relation to *10 Mitcham Park*, the Tribunal have carefully considered the authorities which were advanced by both parties in reaching its decision.

(57) The Tribunal do not accept that it is possible to use a "Without Prejudice" approach where such a notice has been served. It is also highly unusual for parties to require a Tribunal to consider "*Without Prejudice*" correspondence which includes a statutory notice, unless the Tribunal are being asked to consider the cost consequences of a particular approach, after the event which has been adopted or has failed to be adopted by one of the parties which, had the approach been taken, may have led to a prudent, less costly disposal of the matter.

(58) Accordingly the Tribunal has determined that all of the notices served ***after*** the notice referred to in paragraph 43 above are not valid, and as such have not been considered further by the Tribunal in reaching the determination.

(59) As the Tribunal has made its decision on this matter, the only notice which has been considered in relation to the question of errors is the notice dated 19 February 2013 (" the first notice").

The effect of the errors in the claim notice

(60) The Tribunal asked the Landlord to set out what their objections were to the claim notice (dated 19 February 2013), and why the Landlord submitted that the claim notice was invalid. Mr Carr stated that the notice failed to specify all the persons who should be specified in it, in particular Yael Lowenstein and Mabel McCulloch.

(61) Mr Carr referred the Tribunal to section 80(3) of the 2002 Act, which states that a claim notice must state the full name of each person who is both (a) the qualifying tenant of a flat contained in the premises and (b) a member of the right to manage company.

(62) Mr Carr accepted that there was a saving provision in section 81 (1) of the 2002 Act which states-: "*A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80.*"

(63) In Mr Carr's submission this provision applied were there was a misspelling of a name of a tenant or an incorrect address. In his submission this did not mean that you could leave out prescribed information altogether.

(64) Mr Carr, in his skeleton argument referred to *RTM Asset hold –v- Yonge Park* where HHJ Walden-Smith held: "*17. In my judgment section 81(1) is capable of applying to any of the details, or particulars, required*

*by any of the sub-sections 80(2) to (8) of the 2002 Act. Regulation 4(c) of the Right to Manage Regulations expressly provides that the claim notice must include a statement that the notice is not invalidated by any inaccuracy in any of the particulars (my emphasis) required by section 80(2) to (7). In my judgment, section 81(1) could save a claim notice from being invalid if there is an "inaccuracy" in any of the particulars set out in any of the subsections 80(2) to 80(8).*HHJ Walden-Smith's judgment continues (at paras 18 - 20):

> a. *However, section 80 sets out mandatory requirements of what must be included in the claim form. A failure to provide those details would clearly prevent the claim form from being valid; otherwise there would be no purpose in the statute providing that that inclusion of those details is a mandatory requirement. If, for example, the claim form did not include the name and registered office of the RTM Company it would be invalid. All that section 81(1) does is save the claim notice from invalidity if there is an "inaccuracy" in those mandatory details. So, for example, if there was a spelling or typing error in the name or registered office of the RTM company then that would be, in my judgment, an "inaccuracy" that section 81(1) would bite upon so that the claim notice would be saved from invalidity.*
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> b. *Providing the wrong name or the wrong registered office of the RTM company is not, in my judgment, an "inaccuracy". It is a failure to provide the mandatory information required by section 80. As Stuart-Smith LJ said in Cadogan v Morris: "the expression inaccuracy is hardly appropriate to be used in what must be specified or stated [in subparagraph (c-f) of section 43(3)]".*
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> c. *In my judgment, a failure to provide the information required in paragraphs 80(2) to 80(8) results in the claim notice being invalid. Section 81(1) cannot save it from invalidity. All that section 81(1) does is save from invalidity a claim notice that has an "inaccuracy" or "lack of exactness" in those particulars. This interpretation is consistent with the reasoning of the House of Lords in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749."*

(65) Mr Carr sought to distinguish *Yonge* from the case before the Tribunal as in his view, the Applicant's omissions were not "*inaccuracy or lack of exactness*".

(66) In reply, Mr Compton submitted that the omissions amounted to inaccuracies which could be saved by the provisions in Section 81(1) of the 2002 Act. In his Skeleton Argument at paragraph 41 the Applicant submitted "*The inaccuracies specifically the omission of Yael Lowenstein and Mabel McCulloch affected the Applicant's case as oppose to the Respondents. The Respondent therefore has not suffered any prejudice whatsoever. The Land Tribunal in Sinclair Gardens (Investments) Ltd v.*

Oak Investments RTM Company Ltd LRX/52/2004 had held that there is a freestanding power in the Tribunal to waive any defect where it considers there has not been any prejudice to the Landlord (see Para 12 at p.350). The Applicant requests that this discretion is used in this case owing to the fact that the Respondent has not been prejudiced..."

(67) Mr. Compton referred the Tribunal to the first instance decision of the Tribunal rather than the decision of the Lands Tribunal. At Paragraph 12 of the LVT decision, the LVT stated-: "*It is clear that the notice of claim is flawed since it does not comply with Sections 78(1), 79(2) and 80(3) of the 2002 Act. However the Tribunal must look at the intention of the parties and the consequences of the error... the Tribunal considers that the omission of one of the joint tenants is rather more than an inaccuracy and that this would not be covered by Regulation 49 (C). 13. The Tribunal has come to the conclusion that the Respondent has not been prejudiced in any way by the failure to serve a notice inviting participation. The Respondent did not state specifically the nature of their objection in the counter notice and did not respond to ... the Applicant's solicitors inviting them to proceed without the necessity of an application to the Tribunal.*"

(68) The Tribunal in the *Sinclair Gardens case* then concluded that it was not in the interest of the parties to refuse the application.

(69) Mr Carr submitted that *if* there is a freestanding power for the LVT to look at prejudice and determine that there has been no prejudice to the landlord, this would have been set out in the legislation. In his submissions, it is not for the Tribunal to make an enquiry as to whether there has been prejudice to the landlord, in the circumstances of this case, as in his view there had been a complete omission not an inaccuracy.

(70) In his Closing submissions Mr Carr again referred to *Asset hold Limited –v- 15 Yonge Park RTM Company Limited [2011]* where HHJ Walden-Smith provides an example of such an inaccuracy to be a spelling or typing error, rather than an omission of information (as stated above).

The Decision of the Tribunal on whether the errors in the notice invalid the claim

(71) The Tribunal having considered the submissions of the parties preferred the submissions and legal argument of the Respondent over those advanced by the Applicant. In so doing the Tribunal accepted that there is a distinction to be drawn between an error or an inaccuracy and that of an omission as established by HHJ Walden-Smith in *Yonge*.

(72) It is clear in the decision of *Oak Investments* that at the Lands Tribunal the President rejected what was referred to as the "Conventional approach" of categorising the procedural requirement as directory or mandatory and adopted the approach referring to Lord Woolf's decision in R-v-Immigration Appeal Tribunal, ex parte Jeyeanthan (1999), (in which the question of non-compliance with a procedural requirement was considered.)

(73) The President of the Land's Tribunal stated-: "*...I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there*

are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test...Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so has there been substantial compliance in the case in issue even though there has not been strict compliance...Is the non-compliance capable of being waived, and if so , has it, or can it and it be waived in this particular case...If it is not capable of being waived or is not waived then what is the consequence of the non-compliance..."

(74) The Tribunal noted that although *Sinclair Gardens (Investments) Ltd v. Oak Investments RTM Company Ltd,* went some way, to consider the question of prejudice to the parties and the overall effect of an error on the parties, in the opinion of this Tribunal, on its own, does not amount to a freestanding power/discretion of the Tribunal to make an enquiry as to whether there has been prejudice to the landlord, and in the absence of prejudice, then this would result in making a finding in the Applicant's favour.

(75) If the Tribunal are wrong on this point, and there is a discretion to consider the relative prejudice to the parties, then the Tribunal would in considering all of the circumstances of this case, which include multiple claim notices, (with the possibility that these notices could give rise to confusion, and have almost certainly increased the cost to the Respondent) find that it would not be appropriate for the Tribunal to allow section 81 to correct an omission in this way.

(76) Accordingly the Tribunal finds that the Omission of Yael Lowenstein and Mabel McCulloch, has the effect of invalidating the claim.

Whether the Building which was the subject of the Right to Manage Application was one building or two buildings

(77) The importance of this point to the Applicant's case was if the Tribunal determined that the building was in fact two buildings, then two separate notices should be served for each building. There was also an issue as to whether you could have one RTM Company for two separate buildings.

(78) In the Skeleton Argument, Mr Carr stated-: "*...The Tribunal will note that some of the RTM Company's purported claim notices are given in respect of the both the front and the rear buildings, some are given in respect of the front building only and some are given in respect of the rear building only. The freeholder maintains that the premises the subject of this application comprise 2 buildings and that:*

(79) the RTM can only be obtained by service of a separate claim notice for each building; and

(80) If so, by separate RTM companies for each building, rather than one RTM company for both."

(81) The Tribunal were invited to consider photographs and a plan of the building. Mr Carr submitted that the premises were in fact two separate building which were joined by a covered walkway. He also submitted that although the usual access to the building was through the front building which was situated on Brixton Hill, there were in fact two potential access

points, there was a passage way which was currently fenced off which could be opened up and used as an alternative access point, alternatively access could be provided by the garages.

(82) The Tribunal were referred by Mr Carr to section 72(2) which provides that a building is "a self-contained building if it is structurally detached". Mr. Carr referred the Tribunal to the case of ***Parsons v Gage (Viscount) and Others (Trustees of Henry Smith's Charity)*** [1974] 1 WLR 435 at p. 439, Lord Wilberforce held (in the context of leasehold enfranchisement) as follows:

(83) "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.

(84) Mr. Carr submitted that in respect of the building that -: "*...The walkway between the two buildings is precisely that: it is an independent, self-supporting structure between the two buildings. It does not structurally connect the two buildings and does not form an integral part of either of the buildings.*"

(85) In reply, Mr. Compton questioned whether the building was accessible via the rear, he noted that access to the building was via a key fob system and that there was a buzzer system which served the whole of the building, and given this in his view the building was only accessible from Brixton Hill.

(86) Mr. Compton relied on a number of factors which in his submissions supported the Applicant's contention that the premises (in issue) were in fact one building. The first primary point was that the premises were considered to consist of two portions and were referred to as such in the lease. The premises were constructed as one building; this was indicated by the fact that the rear building had no street presence.

(87) In the skeleton argument the Applicant stated-: "*There is a substantial permanent concreted roofed, pillared and decorative walkway which inextricably links the two parts of the building at ground floor level. Its existence creates unison between the separate parts of the building providing a covered corridor from the front portion to the rear portion. If the two parts of the building were intended to be detached from one another then such a permanent and significant architectural feature of the building would not exist.* "

(88) The Applicant's also relied upon the title to the freehold which was in respect of the whole premises, and the lease which referred to the building in the singular when referring to Brixton Hill Court, in respect of the two parts these were referred to as "portions" rather than separate buildings. In respect of the arrangements under the lease, the flats within both parts were consecutively numbered.

(89) There were also common services such as water drainage pipes and electricity which as well as the shared access (dealt with above) common entrance hall, garage space and communal gardens. Brixton Hill court was

managed as one building with one service charge account which was then apportioned amongst the tenants.

(90) In the Applicant's Skeleton Argument Mr Compton relied upon paragraph 21-02 of Hague on Leasehold Enfranchisement (Radevsky, Greenish, Sweet & Maxwell, 5th Edition, 2009):"*For the purpose of section 3 a building is a self- contained building if it is structurally detached. This is a mandatory requirement of the Act. If it is not structurally detached it is not self- contained even if it could be so deemed in common parlance. "Structurally detached is not defined in the 1993 Act; it will be construed in the same way as under section 2(2) of the 1967 Act*". **It is submitted** that the same interpretation be used in relation to Section 72 of the 2002 Act.

(91) Mr Crampon further relied upon Lord Wilberforce in 429C Parsons V Viscount Gage where it was stated that "*As a matter of ordinary English... structurally detached means detached from any other structure. 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 the natural edition...*"

(92) Mr. Compton reiterated in his Skeleton argument that-:" *mere touching would therefore mean a building is not structurally detached from another and that with Brixton Hill Court the two parts are touching each other by virtue of the permanent concrete roof between the two parts and therefore-: "* ***it*** *cannot be said that they are separate structures but one of the same since they are continuous by virtue of the walkway (no matter how minor the touching may be) and so legally can be described as the same self- contained building...*"

(93) Mr.Compton further stated that-: *"the two portions are physically, legally, practically and politically intertwined to such an extent that they can be reasonably described as a single self- contained building in accordance with Section 72(1)(a).*

(94) In Mr. Compton's submission he considered that any attempt to describe the premises as two separate buildings was to "over simplify matters", as the walkway was a significant architectural feature.

(95) The Tribunal were urged, in the event that they were not with Mr Compton to consider the application of section 72 (3)-a-c of the 2002 Act, in that both portions could be considered to be self-contained parts of one building, as in Mr Compton's submissions the Applicants would be entitled to serve a single Notice of Claim in respect of both parts of the building provided they meet the requisite qualifying criteria in each case.

(96) In reply Mr. Carr stated in his skeleton argument that -: *The walkway between the two buildings is precisely that: it is an independent, self-supporting structure between the two buildings. It does not structurally connect the two buildings and does not form an integral part of either of the buildings. The two buildings are structurally detached both from each other and the walkway. Any one or all of the buildings and the walkway could be removed without impacting on the others.*

(97) Mr Carr in relation to the submissions made by Mr Compton in relation to the services shared by the two portions, stated that these issues were irrelevant, and related to management issues, easements and rights which had little to do with whether or not the building was to be considered as structurally detached.

(98) In answer to Mr Compton's submissions on section 72 (3)-a-c of the 2002 Act, Mr Carr stated that, the criterion at s.72 (3) (a) states that a part of a building is a "self-contained part of a building" if "it constitutes a vertical division of the building". It cannot be said (and it does not appear to be contended by the RTM Company) that the two buildings each form a self-contained part of one building.

(99) On 18 July 2013 the Tribunal carried out an inspection of the premises. At the inspection the Tribunal were provided by the applicant with a copy of the plan of the building, The Respondent objected to the handing over of a plan at the inspection, and as such made representations to the Tribunal to this effect on 13 August 2013, as they considered it to be evidence in the case. As a result of the Respondents objections the Tribunal extended the time for the making of representations solely on this piece of evidence. No representations were received.

*(100)*The Tribunal did not refer to the plan when reaching its determination.

(101) At the inspection the Tribunal noted that the property consists of two, six storey buildings, one behind the other: the front building (flats 1-86), which overlooks Brixton Hill, has a brick façade to its front elevation with stone embellishments, whilst its rear elevation has a painted rendered façade. The rear building (flats 89-142) has painted rendered elevations. The main communal entrance for both buildings is situated on the front elevation of the front block. Access to the rear block is gained via the ground floor communal lobby of the front block and via a covered walkway (see paragraph 93) to the communal entrance of the rear block. Both these entrances are served by entry phone systems. To the right hand flank, the tribunal noted a gated vehicular access drive. A further gated vehicular drive is located to the left hand side of the front block which provides access a garage block.

*(102)*Between the front and rear block is a covered walkway: this is a single storey concrete structure with asphalted flat roof and colonnade style open sided walls. The tribunal noted that this structure, although abutting the front and rear blocks, was not built into them and is, as such, free standing.

The Tribunal's Decision on the Premises

*(103)*The Tribunal noted that the building which had been constructed in the nineteen thirties was constructed in a particular style, which included the walkway as a feature. The Tribunal noted that as far as the leaseholders were concerned the two portions or buildings had a common identity, and all the leaseholders had interest in common, in particular the management of the premises, the payment and apportionment of insurance and service charges. (This was borne out by the fact that there was only one tenants

association which acted in the interest of all of the tenants within the premises).

*(104)*Insofar as the leaseholders were concerned they were all residents of Brixton Hill Court.

*(105)*Had the Tribunal been determining the matter on the way in which the building had been managed and the fact that there are shared utilities then the Tribunal would have formed the view that for the purpose of the Right to Manage, the "two portions" were capable of being described as one building.

(106) However the Tribunal, in reaching its decision applied the test in Section 72 (2) of the 2002 Act. The Tribunal were obliged to consider whether the wording of the section was ambiguous or unambiguous and if so did it give rise to the interpretation urged on the Tribunal by the Applicant.

*(107)*The Tribunal noted that the wording of the provisions was straightforward and unambiguous-: *"A building is a self-contained building if it is structurally detached."*

*(108)*The Tribunal in considering the wording of the statute then considered whether in the meaning and ordinary use of the words "structurally detached" it could be said, that the premises (that is) the two buildings that made up Brixton Hill Court were structurally detached.

*(109)*It was clear to the Tribunal that the covered walkway was not structurally part of either the front building, or the rear building, and that removal of the walkway would not in any way effect the integrity of the two buildings.

(110) Perhaps a useful analogy would be to consider a hospital or a school which has more than one building, which for convenience of use had a walkway, to enable access. Although the identity would remain as one school or one hospital, it is clear that in that instance each building could be developed separately although they would in all probability have shared services, and shared management of the facilities.

(111) For the reasons set out above the Tribunal considers that the only correct interpretation of section 72(2) is that the premises are two buildings and that two claim notices ought to have been served in the absence of any other permissible interpretation in the 2002 Act.

(112) The Tribunal noted that the Applicants had however served two notices on 19 February 2013, which may have complied with the requirements, however in accordance with the Tribunal's determination that the Applicant can only rely on one notice at a time, the two further notices were not validly served.

Whether the RTM Company could acquire the Right to Manage over more than one building

(113) Mr Carr submitted that the wording of the 2002 Act, was such that an RTM Company could only be the RTM in respect of one building, and that the Tribunal should construe 72(1) as requiring an RTM as capable of existing only in relation to one building.

(114) Mr Carr stated that if this was not the case, and a single RTM could manage more than one building, then there would be some surprising

results, in that there could be an RTM Application in relation to geographically different locations.

(115) Mr Carr also stated that in the event of two buildings being managed by one RTM Company there could be a situation where the two buildings are very different in size. In his view this would mean that the will of those tenants in the larger building would always prevail. He submitted that this could not be right as the clear intention of parliament was that tenants would have a say in the management of their building.

(116) There was also an issue of whether or not the RTM Company was an RTM Company within the meaning of Section 73(b) of the 2002 Act (this section dealt with the purpose of the RTM Company as set out in the Article of Association). Mr Carr asserted that if you were to ask someone does the RTM have the requisite objective to manage my building? Then there could be no answer in the affirmative. In his submissions this was a clear erosion of section 39(1) of the Companies Act 2006

(117) Mr. Compton in his Skeleton argument submitted that one RTM Company could clearly acquire the Right to Manage over two self-contained blocks. He Submitted that -: " The Court of Appeal authority of *Gala Unity Limited v Ariadne Road RTM Company Ltd [2011] UKUT 425 (LC)* dealt *with two entirely separate buildings which had served two separate Notices of Claim and one RTM Company had been incorporated to manage both buildings. Paragraph 13 of the decision stated as follows. "...The claim notices identified "the premises" for the purposes of the claim as, in one case "the block of flats numbered 14 to 32 Ariadne Road" and, in the other case, "the block of flats numbered 10 to 12 Ariadne Road". Each of these buildings is undoubtedly self-contained since it is structurally detached (see section 72(2)); and accordingly on the relevant date the RTM company was entitled to acquire the right to manage them." Although the decision concerned the extent of appurtenant property there is absent any comment whatsoever that questioned whether a single RTM could in fact manage two separate buildings..."*

(118) Mr. Compton submitted that if there had been any controversy concerning whether a single RTM could manage two separate buildings, and then this would have been mentioned by the Court of Appeal. Mr. Carr did not accept that lack of controversy was relevant. He cited that in Ariadne Road the Court of Appeal was in fact presented with a "fait accompli".

(119) Mr. Compton in his Skeleton Argument also relied upon the cases of *Dawdling RTM Ltd v. Oakhill Park Estate (Hampstead) Ltd LON/00AG/LEE2005/00012 Belmont Hall Court and Elm Court RTM Company Ltd LON/00A2/CRM/2008/0013* and a Tribunal decision of case of *14-44 Dapperly* (which is considered below).

(120) The Tribunal's decision on whether one RTM could acquire the Right to Manage more than one building

(121) The Tribunal noted that there were a number of Tribunal decisions which considered this question, and whilst the Tribunal was not bound by these decisions, the Tribunal found that it was helpful to consider the approach adopted by other Tribunals when considering this question.

(122) The Tribunal were particularly struck by the reasoning in *14-44 Apperley Bir/00CR/LRM/2010/0005-0010* a case which dealt with a similar issue, which mirrored issues considered by this Tribunal.

(123) This was a case decided by the Midlands Tribunal concerning a number of properties which were located in mansion blocks on an estate. In this case the issue was whether or not one RTM Company was able to manage the Blocks. The Tribunal in the Apperley case noted that there was nothing in the 2002 Act which prohibited this. At paragraph 38 the Tribunal stated-: "*What both Applicants are proposing does not alter the practicalities of managing the estate. The Applicant RTM companies will simply do what the landlord for the time being had been doing for nearly 40 years. Each mansion is self-contained and is one set of premises comprising a fully integrated estate for the purpose of the right to manage. The alternative suggestion put forward by Counsel for the Respondent that an RTM company should have been formed for each of the blocks is unnecessary, cumbersome, and expensive and would leave arrangements relating to the maintenance of the common grounds unduly complex and probably unworkable in practice*"

(124) The Tribunal in *Apperley* then considered the description of the premises in the Articles of Association noted that the definition of the premises mirrored the actual position on site, and noted that -: "... *in interpreting the objects clause of an RTM Company, those objects shall not be restrictively construed but the widest interpretation shall be given to them...*"

(125) The approach adopted in *Apperley* commended itself to this Tribunal. The Tribunal noted that nothing in the act demanded the narrow interpretation urged upon the Tribunal by Mr. Carr, and that the formation of two RTM's with respective rights to manage each distinct building was not supported by the leaseholders, who had consented to one company being formed. There was also the practical problems referred to in paragraph 106 described by the Tribunal in *Apperley.*

(126) For all of the reasons cited above the Tribunal find that there is nothing in the 2002 Act which requires each building to be managed by a separate RTM Company. The Tribunal also finds that the RTM Company complies with its purpose set out in the articles of association.

(127) At the hearing the Respondent wished the Tribunal to award cost under section 88 of the 2002 Act. The Respondent was directed to make a separate application in respect of their claim for cost. This has been received by this Tribunal, who has made further separate directions in respect of this matter.

Name: Ms M W Daley **Date:** **25 September 2013**

Appendix of relevant legislation

A summary of the legislation is set out below

The Law

The Act sets out the procedural requirements that a right to manage company must follow before it can acquire the right to manage. The relevant sections for the purposes of this application are ss72 to 84.

Premises subject to the right to manage:

Section 72 defines the premises that maybe subject to the right to manage.

Right to manage companies:

Section 73 provides that the right to manage can only be acquired and exercised by a RTM company and the company must be a private company limited by guarantee that includes the acquisition and exercise of the right to manage as one of its objects. The company does not qualify if there is already a RTM company for the premises.

Membership of the company:

Section 74 75 and 76 provide that membership of the RTM company must consist of any qualifying tenant, defined as a residential tenant under a long lease of a flat in the premises and that there can only be one qualifying tenant per flat, no less than half the qualifying tenants (subject to a minimum of two must be members of the company on the date when the company serves the claim notice. From the time that the company acquires the right to manage the premises, any person who is a landlord under a lease of the whole or any part of the premises can be a member of the RTM company.

Notice of invitation to participate:

Section 78 - before making a claim to acquire the right to manage any premises, a RTM company must give notice to all qualifying tenants who are not members of the company inviting them to become members for the purposes of acquiring the right to manage.

Claim Notice:

Section 79 (1) – "A claim to acquire the right to manage any premises is made by giving notice of the claim and in this Chapter the relevant date in relation to any claim to acquire the right to manage means the date on which notice of the claim is given" and (6) The claim notice must be served on each person who on the relevant date is

(a) a landlord under a lease of the whole or any part of the premises,

(b) a party to such a lease otherwise than as landlord or tenant or

(c) appointed as manager of the premises under Part 2 of the Landlord and Tenant Act 1987."

Counter Notice:

Section 84 "A person who is given a claim notice by a RTM company under section 79(6) may give a notice (referred to in this Chapter as a "counter notice") under section 80(6)