RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Commonhold & Leasehold Reform Act 2002 Part 2 Chapter 1
LON/00AU/LRM/2007/0012

Applicant: Drayton Park Management Company Limited (Management Company)
Represented by : Ms Tamsin Cox of Counsel

Respondent: Freehold Managers (Nominees) Limited (Landlord)

Represented by: Mr Oliver Radley-Gardner

Property: 100 Drayton Park, Highbury, London N5 1NF

Hearing Date: 10th March 2008

Tribunal:
Mr L.W.G. Robson LLB(Hons) MCIArb
Mr T. W. Sennett MA FCIEH
Ms S. Wilby

Preliminary

1. The Applicant applied on 12th December 2007 for a determination under Section 84(3) of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act) that it was entitled to acquire the right to manage in accordance with the Act. The Applicant had previously served a Notice of Claim on 18th September 2007. The Respondent had served a counter-notice denying the right on 18th October 2007. The reason given by the Respondent in the counter-notice for denying the right was that the Applicant already had the right to manage the property by virtue of the various long leases under which individual flats were held. The Respondent's statement of case dated 21st February 2008 further denied that the Applicant was an RTM company within the meaning of the 2002 Act.

Hearing

2. At the hearing on 10th March 2008, Ms Cox made oral submissions following a written submission dated 9th March. Mr Radley-Gardner made oral submissions following the statement of case dated 21st February 2008 and in reply to the submissions of Ms Cox.

3. Ms Cox raised the preliminary point that the Respondent should be debarred from reliance on the claim that the Applicant was not an RTM company. She submitted that if the matter was not raised in the counter-notice, it could not be relied upon. The Respondent had only raised this point on 21st February after the application had been issued, and the Applicant was entitled to know the case being made against it prior to making a reasoned decision as to whether

to make an application. The counter-notice did not comply with Section 84(2) of the 2002 Act. It did not specify the objection that the Applicant was not an RTM company as it should have done. In support she relied upon Oakhill Park Estate (Hampstead) Limited LON/00AG/LEE/2005/00012 where a Leasehold Valuation Tribunal had rejected a notice by a Respondent which had failed to specify precisely how the Applicant had failed to establish that it had complied with Section 78 of the 2002 Act.

4. Mr Radley-Gardner submitted that the Respondent was merely amplifying the objection in the counternotice in its statement of 21st February 2008 and did not add a new ground. The notice complied with Section 84(2)(b). The Applicant could end up with a hornet's nest if successful in its present submission relating to the hand over of management powers if it was not in fact an RTM company.

5. On the substantive point Ms Cox submitted that the Applicant was clearly a management company with management powers set out in the Leases of the property. The only power it did not have under the lease was to insure. This was the right it hoped to acquire. The Applicant was entitled to some of the management functions noted in Section 96 of the 2002 Act. The Act entitled it to acquire the remainder. Section 73(2) required an RTM company to satisfy two requirements. These requirements are that the company should be a private company limited by guarantee, and that its memorandum of association should have an object which is the acquisition and exercise of the right to manage the property. Ms Cox agreed that the word "acquire" was not in the objects of the Applicant, but the Respondent was claiming that the 2002 Act did not confer a retrospective right on companies formed previously, and that the company had to be constituted in a very particular way. This was a very narrow interpretation.

6. However Section 74(3), (4) and (5) envisaged that there could be RTM companies which did not comply with the Act and provided for Regulations to deal with the issue. The RTM Companies (Memorandum and Articles of Association) (England) Regulations 2003, paragraph 2(3) dealt with the matter clearly. Subsection 4 was crucial. It related to Memoranda and Articles of Association which had been adopted before the coming into force of the Regulations, i.e. the 30th September 2003, The commencement regulations also brought that part of the Act into force at that time. It was thus a necessary consequence that an RTM company could be incorporated prior to the Act.

7. Ms Cox made it clear that she did not submit that any company could be an RTM company. Section 74 of the 2002 Act set out the conditions. She submitted that the overall effect of the Regulations was to avoid the necessity of a management company having to set up a new company to take the RTM powers. The Act and Regulations should be construed broadly. The only possible effect of construing the Regulations as suggested by the Respondent was to delay the inevitable. If the Tribunal decided that the Applicant was an RTM company that would be the end of the matter.

8. Mr Radley-Gardner submitted that an RTM company was a statutory company. The Applicant was not an RTM company under the terms of the 2002 Act. Section 79(3) states that a Claim Notice is to be given by an RTM company. The concept of an RTM company was created by the 2002 Act. The company had to have the right to "acquire and manage". Section 74 requires the company to have a particular Memorandum and Articles of Association. The deeming provisions are only triggered if the company is an RTM company envisaged in Section 73 of the 2002 Act. The Applicant company was incorporated in 1997. The question to be asked was whether this company by accident could have the right under the Act to acquire and manage. The application was predicated on a mistake. The retrospective effect in the 2003 Regulations was intended to deal with RTM companies which had been formed in anticipation of the Regulations after the passing of the Act in July 2002. He did not agree with Ms Cox that such a reading of the Regulations would lead to an absurdity or a waste of money. All that the Applicant needed to do was to vary its Memorandum and Articles of Association. The danger was that if the company was not an RTM company, it would have none of the statutory powers.

Decision

9. The Tribunal considered the submissions. While it did not agree with Mr Radley-Gardner that the statement of case on 21st February 2008 merely amplified the objections originally made in the counter-notice, upon consideration of Oakhill Park Estate (Hampstead) Limited LON/00AG/LEE/2005/00012, it concluded that the terms of the counternotice in that case were so vague as to be meaningless and amounted, in essence, to a bare assertion that the relevant section had not been complied with, without any further reasoning or explanation. The counter-notice in this case was rather more detailed, and gave some indication at least that the status of the company was the point in dispute. Further, the Tribunal considered that if the Applicant was not an RTM company within the terms of the 2002 Act, the application was fatally flawed, and no decision by the Tribunal could cure this flaw. Thus the procedural point raised by the Applicant was rejected. The Tribunal noted that if costs against the Applicant became a live issue, it might well consider how late the particularisation of the Respondent's case had occurred in making its costs decision.

10. The Tribunal then considered the substantive issue, which in essence was whether the Applicant was an RTM company within the terms of the 2002 Act. Neither Ms Cox nor Mr Radley-Gardner was able to discover any other analogous legislation which might have assisted the Tribunal's interpretation. In the end we considered that all the statutory references quoted by the parties relating to companies with Memoranda and Articles of Association predating the 2003 Regulations could only reasonably be intended to refer to Memoranda and Articles of Association which had the intention of creating an RTM company, as opposed to any other type of management company which just happened to have similar objects. The Tribunal was fortified in this view by the last paragraph of the explanatory note to the 2003 Regulations which (although not binding but helpful) states:

"Where a RTM company adopts a memorandum and articles before the coming into force of these Regulations, the memorandum and articles are treated as including such of the content set out in the Schedule as is necessary to secure that those documents comply with the Regulations".

If the regulations had been intended to apply to any company, we consider that the qualification of the word "company" by the abbreviation "RTM" would be superfluous.

11. The Tribunal also decided to look at the broader issues. If the Act was to be construed so as to apply to any pre-existing company with similar objects to those mentioned in Section 74, the result would be a lottery. Ms Cox also took the view that a decision in favour of the Respondent would merely delay the inevitable and waste money. That did not seem a very strong argument. The Tribunal agreed with Mr Radley-Gardner that the Applicant merely needed to vary its memorandum and articles before making its application.

12. The Tribunal noted that neither party had addressed it on the question of costs, even though the counter-notice from the Respondent asked for costs against the Applicant. Section 88 of the 2002 Act allows for an applicant to be liable for the reasonable costs of a landlord in the event that an application is dismissed, with any question as to the amount of costs to be determined by the Tribunal in default of agreement. In the circumstances no order for costs is made.

Signed: ..... Lancelot Robson.
Chairman

Dated: ..... 8th April 2008