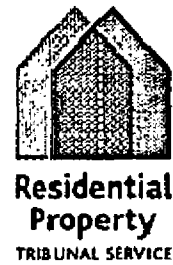


RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL



Re: Stones Court Albert Road St. Ives Cornwall TR26 2EN (the Premises)

In the matter of an Application under section 84(3) of the Commonhold and Leasehold Reform Act 2002

(Right to Manage Application)

DECISION AND REASONS

Case Number: CHI/15/UE/LRM/2009/0003

Applicant:: Stones Court (St Ives) RTM Limited

Respondent:: Mrs Teresa. Barnard

Appearances: Oliver Thorpe CVC (Solicitors for the Applicant)
and Mr Alan Barnard for the Respondent

In Attendance: Mrs Teresa Barnard (Respondent)
Maria Cochrane (Member Applicant)
John Pollard
Debbie Harding

Tribunal Members: Cindy A. Rai LLB Solicitor (Chairman)
Robert Batho MA BSc LLB FRICS Chartered Surveyor
(Valuer Member)
William Gater FRICS ACI Arb Chartered Surveyor (Valuer
Member)

Hearing Date: 3rd December 2009

Decision Date: 6th January 2010

Decision

The Tribunal dismisses the application on account of the Invitation Notice being defective in that it did contain or was not accompanied by the requisite information pursuant to the

provisions of section 78(4) of the Commonhold and Leasehold Reform Act 2002 to comply with section 78(6) of that Act.

Background

1. On 9th January 2009 CVC, the Applicant's Solicitor's ("CVC"), served notices in form RTM1 (the "Invitation Notice") on both Teresa Barnard (the "Respondent"), addressed to her at 18 Lynch Hill Park Whitchurch Hants RG28 7NF, and Alan Barnard, addressed to him at 14 Inglewood Altringham Cheshire WA14 2AP inviting each of them to become a member of the RTM Company .
2. On the 19th January 2009 the Respondent wrote to J Farrow, Company Secretary of the Applicant, acknowledging receipt of the RTM1 notice and asking for confirmation as to the identity of the appointed solicitors for the RTM, and that the Claim Notice be sent to her solicitors (Aaron & Partners LLP). On the same date she also wrote a similar letter to CVC again acknowledging receipt of the Invitation Notice, asking for confirmation that that firm acted for the Applicant and requesting that all further correspondence be sent to her solicitors (Aaron & Partners LLP).
3. On 14th April 2009 CVC served a notice in form RTM2 (the "Claim Notice") on the Respondent claiming that it intended to acquire the right to manage Stones Court Albert Road St Ives Cornwall ("the Premises"). This was again addressed to The Respondent at 18 Lynch Hill Park Whitchurch Hants RG28 7NF, rather than to her solicitors, as she had previously requested.
4. On 13th May 2009 Aaron & Partners LLP Solicitors acting on behalf of the Respondent served a counter notice on the Applicant (the "Counter Notice") disputing the validity of the Claim Notice by reason of sections 74(1), 78(6), 79(8) and 80(3) of the Act .
5. On the 10th July 2009 an application was made to the Tribunal to determine the validity of the notices.
6. On 26th August 2009 John Tarling a Tribunal Chairman issued Provisional Directions to the parties.
7. On the 16th September 2009 pursuant to the Provisional Directions the Respondent sent a written statement to the Tribunal office, a copy of which was also sent to the Applicant's solicitors. No Reply to that written statement was submitted by or on behalf of the Applicant.
8. A hearing, ("the Hearing") was held on 3rd December 2009 at the Porthminster Hotel in St Ives Cornwall at which the Applicant was represented by its solicitors CVC and Alan Barnard represented the Respondent.

Inspection

9. Prior to the Hearing the Tribunal inspected the readily accessible parts of the Premises, from which it could see seven garage doors but apparently only five flats. Access to the front doors of the five flats is from an open courtyard area at first floor level, with the flats themselves apparently located at first and second floor levels. This courtyard is approached via open stairs leading up from a covered ground floor forecourt off Albert Road which provides the vehicular access

Hearing

10. Mr Thorpe from CVC, for the Applicant, explained that it would be helpful to present the Applicant's case by dealing with the allegations of invalidity of the notices by reference to the Respondent's written statement.
11. That written statement, which was sent under cover of the Respondent's letter dated 16th September 2009, helpfully referred to each section of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") which the Respondent alleged provided separate reasons for the invalidity of the Applicant's notices. It refers to sections 74(1) 78(6) 79(8) and 80(3) and alleges that "by reason of these sections the Applicant was not entitled to acquire the right to manage the Premises."
12. There appears to be no dispute with regard to the identity of the Premises or indeed the dates upon which the Invitation Notice the Claim Notice or the Counter Notice were served.
13. **Section 74** of the 2002 Act is set out in full below

S74 RTM companies: membership and regulations

(1) The persons who are entitled to be members of a company which is a RTM company in relation to premises are—

- (a) qualifying tenants of flats contained in the premises, and
- (b) from the date on which it acquires the right to manage (referred to in this Chapter as the "acquisition date"), landlords under leases of the whole or any part of the premises.

(2) The appropriate national authority shall make regulations about the content and form of the memorandum of association and articles of association of RTM companies.

(3) A RTM company may adopt provisions of the regulations for its memorandum or articles.

(4) The regulations may include provision which is to have effect for a RTM company whether or not it is adopted by the company.

(5) A provision of the memorandum or articles of a RTM company has no effect to the extent that it is inconsistent with the regulations.

(6) The regulations have effect in relation to a memorandum or articles--

- (a) irrespective of the date of the memorandum or articles, but
- (b) subject to any transitional provisions of the regulations.

(7) The following provisions of the Companies Act 1985 (c. 6) do not apply to a RTM company--

- (a) sections 2(7) and 3 (memorandum), and
- (b) section 8 (articles)

14. The Respondent had suggested that John Farrow, who had been named in Schedule 2 of the Claim Notice as being a member of the RTM Company, is not a member by virtue of section 74 (5) of the 2002 Act. He is a lessee of a garage rather than of a flat, and so not a qualifying tenant, and should not have been so described in the Claim Notice.
15. Mr Thorpe accepted that this was correct that John Farrow is not a qualifying tenant but said that it did not matter that he was named as such in the Claim Notice, as by virtue of section 74(5) he is not a member of the RTM Company. Further or in the alternative, a Special Resolution of the company (a copy of which had been served the previous day) had removed him from membership of the Company.
16. The section set out in full above, refers to regulations. Regulations have been made pursuant to the 2002 Act and those relevant to England and Wales are the RTM Companies (Memorandum and Articles of Association (England) Regulations 2003 SI2003 / 2120. Clause g of the specimen Memorandum and Articles of Association for the RTM company found in Part 2 of the Schedule at Regulation 5 states that:- "No person shall be admitted to membership of the RTM Company unless that person, whether alone or jointly with others, is (a) a qualifying tenant of a flat contained in the Premises (being the premises defined in the Articles of Association) as specified in Section 75 of the Act.
17. The Applicant therefore contends that whilst John Farrow should **not** have been named as a member of the Applicant,(and this is accepted) this does affect the validity of the Claim Notice

Section 78(6)

18. The Respondent alleged that the Invitation Notice was rendered invalid because it contained an incorrect statement regarding the availability for inspection of the specified documents, but Mr Thorpe said that the statement in the Invitation Notice was correct. He suggested that it does not matter that the Invitation Notice does not comply with the requirements of section 78(6). Although no copy of the memorandum and articles of association was enclosed with it, the statement in the said notice did comply with the provisions of section 78(4)(b), because by implication the period of 7 days from the date of the Claim Notice would include a Saturday and Sunday, and the printed notes on the Invitation Notice confirmed that this was required. If anyone had attempted to inspect the memorandum and articles of association on any of those subsequent seven days (including a Saturday or a Sunday) a partner would have been in CVC's office. Section 78 of the 2002 Act is set out in full below.

S78 Notice inviting participation

(1) Before making a claim to acquire the right to manage any premises, a RTM company must give notice to each person who at the time when the notice is given—

- (a) is the qualifying tenant of a flat contained in the premises, but
- (b) neither is nor has agreed to become a member of the RTM company.

(2) A notice given under this section (referred to in this Chapter as a "notice of invitation to participate") must—

- (a) state that the RTM company intends to acquire the right to manage the premises,
- (b) state the names of the members of the RTM company,
- (c) invite the recipients of the notice to become members of the company, and
- (d) contain such other particulars (if any) as may be required to be contained in notices of invitation to participate by regulations made by the appropriate national authority.

(3) A notice of invitation to participate must also comply with such requirements (if any) about the form of notices of invitation to participate as may be prescribed by regulations so made.

(4) A notice of invitation to participate must either—

- (a) be accompanied by a copy of the memorandum of association and articles of association of the RTM company, or
- (b) include a statement about inspection and copying of the memorandum of association and articles of association of the RTM company.

(5) A statement under subsection (4)(b) must—

(a) specify a place (in England or Wales) at which the memorandum of association and articles of association may be inspected,

(b) specify as the times at which they may be inspected periods of at least two hours on each of at least three days (including a Saturday or Sunday or both) within the seven days beginning with the day following that on which the notice is given,

(c) specify a place (in England or Wales) at which, at any time within those seven days, a copy of the memorandum of association and articles of association may be ordered, and

(d) specify a fee for the provision of an ordered copy, not exceeding the reasonable cost of providing it.

(6) Where a notice given to a person includes a statement under subsection (4)(b), the notice is to be treated as not having been given to him if he is not allowed to undertake an inspection, or is not provided with a copy, in accordance with the statement.

(7) A notice of invitation to participate is not invalidated by any inaccuracy in any of the particulars required by or by virtue of this section.

23. The Tribunal found it difficult to accept the validity of Mr Thorpe's argument. The printed notes on the Invitation Notice were quite clear. The Memorandum and Articles of Association must either accompany that notice or be available for inspection on two hours on each of three days within the seven days following the day on which the said notice was served, and one of those specified three days must include either a Saturday or Sunday or both.

24. Although the standard wording of the Invitation Notice referred to a period of seven days, the period specified for inspection was simply Monday to Friday, which could not on any interpretation be deemed to include either a Saturday or a Sunday. This was not a mere "inaccuracy in any of the particulars" envisaged by section 81 of the 2002 Act, and as referred to further below. Whether or not there was any evidence that anyone attempted to inspect the Memorandum and Articles of Association seemed to the Tribunal to be irrelevant to its determination of whether or not the Invitation Notice was valid.
25. It seemed to the Tribunal that the entire difficulty with regard to the validity of the Invitation Notice had probably been caused by the person completing the standard printed form of notice inserting "Monday to Friday", when all that should have been inserted were the actual hours during which the Memorandum and Articles of Association of the Applicant would be made available for inspection. Furthermore the difficulty could have been avoided quite easily, by simply enclosing a copy of the Applicant's Memorandum and Articles of Association with the Invitation Notice.
26. The Respondent in its statement believed that the failure of the Invitation Notice to comply with the requirements of sections 78(4) and 78(5) was fatal to its validity as stated by section 78(6).

Section 79(8)

27. The Respondent had also complained that the provisions of section 79(8) of the 2002 Act had not been complied with. Section 79 of the 2002 Act is set out below:-

S79 Notice of claim to acquire right

(1) A claim to acquire the right to manage any premises is made by giving notice of the claim (referred to in this Chapter as a "claim notice"); 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.

(2) The claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before.

(3) The claim notice must be given by a RTM company which complies with subsection (4) or (5).

(4) If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company.

(5) In any other case, the membership of the RTM company must on the relevant date include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained.

(6) The claim notice must be given to each person who on the relevant date is—

(a) landlord under a lease of the whole or any part of the premises,
 (b) party to such a lease otherwise than as landlord or tenant, or
 (c) a manager appointed under Part 2 of the Landlord and Tenant Act 1987 (c. 31) (referred to in this Part as "the 1987 Act") to act in relation to the premises, or any premises containing or contained in the premises.

(7) Subsection (6) does not require the claim notice to be given to a person who cannot be found or whose identity cannot be ascertained; but if this subsection means that the claim notice is not required to be given to anyone at

all, section 85 applies.

(8) A copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises.

(9) Where a manager has been appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises, a copy of the claim notice must also be given to the leasehold valuation tribunal or court by which he was appointed.

30. Section 79(8) provides that a copy of the claim notice must be given to each person who at the relevant date is a qualifying tenant of a flat contained within the premises. Alan Barnard said that he did not receive a copy of the Claim Notice until a few days before the Respondent needed to respond, and that accordingly he had no time to comment upon it. He considered that he had been prejudiced by not being able to make his views known to the Respondent before she instructed solicitors to serve the Counter Notice. He also said that the Applicant had been given notice of the correct addresses both of the Respondent and for him as a "qualifying tenant". Therefore the Claim Notice should not have been sent to the Respondent at the address shown on the notice.
31. The Applicant points out that the section does not provide a time period within which such notice should be sent to other qualifying tenants.
32. It is not disputed that a copy of the Claim Notice was sent to Alan Barnard, albeit some time after the notice was sent to the Respondent. Furthermore, what is not disclosed is whether a copy of the Claim Notice was sent to any other qualifying tenant, or whether this was unnecessary because all of the other four qualifying tenants had already agreed to become a member of the Applicant.
33. The Tribunal is not persuaded that this was a defect which would invalidate the Claim Notice. It accepts the Applicant's argument that the 2002 Act does not specify a time period for sending a copy of the Claim Notice to other qualifying tenants. Nor does it require that a Respondent would be obliged to consider comments from non participating qualifying tenants. Whilst what the Respondent stated about the Respondent having a defined period of 28 days to consider a Claim Notice was correct, it was only a freeholder who could issue a counter notice or make comment. The legislation makes no provision for a qualifying tenant to do so; see section 84(1) of the 2002 Act which is set out below:-

S84 Counter-notices

(1) 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") to the company no later than the date specified in the claim notice under section 80(6).

Section 80(3)

33. Section 80(3) of the 2002 Act is the next section which the Respondent states has not been complied with. The Respondent suggests that the inclusion of John

Farrow (earlier confirmed not to be a qualifying tenant of a flat within the premises but the leaseholder of a garage) has resulted in the Applicant not complying with section 80(9). Section 80 of the 2002 Act is set out below.

S80 Contents of claim notice

- (1) The claim notice must comply with the following requirements.
- (2) It must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies.
- (3) It 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 RTM company, and the address of his flat.**
- (4) And it must contain, in relation to each such person, such particulars of his lease as are sufficient to identify it, including—
 - (a) the date on which it was entered into,
 - (b) the term for which it was granted, and
 - (c) the date of the commencement of the term.
- (5) It must state the name and registered office of the RTM company.
- (6) It must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice under section 79(6) may respond to it by giving a counter-notice under section 84.
- (7) It must specify a date, at least three months after that specified under subsection (6), on which the RTM company intends to acquire the right to manage the premises.
- (8) It must also contain such other particulars (if any) as may be required to be contained in claim notices by regulations made by the appropriate national authority.
- (9) And it must comply with such requirements (if any) about the form of claim notices as may be prescribed by regulations so made.**

36. The Tribunal however having considered this section, concluded that all it had to determine is whether such facts would or might invalidate the Claim Notice. In fact it determined that it was not necessary to consider this because it decided that in fact the Invitation Notice should be treated as not having been given to the Respondent because of section 78(6).
37. The Applicant had, (for reasons which did not become clear at the Hearing), disregarded the very clear provisions of the wording of both the section of the 2002 Act and Note 2 on the printed form of notice it had used. That printed form of notice had been drafted to comply with the provisions of the 2002 Act, and only required completing in accordance with the provisions of the said section and with aid from the printed notes provided by way of guidance within the form of notice. The arguments put forward by CVC on behalf of the Applicant were not found by the Tribunal to be persuasive and have not convinced the Tribunal that it would be either an appropriate, or correct, interpretation of the legislation to ignore its provisions.
38. The Tribunal however has noted the provisions of section 81(1) of the 2002 Act which states that:-

S81 Claim notice: supplementary

(1) A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80.

The provisions of that section would save a claim notice which contained incorrect information with regard to the factual matters which should be included and which are set out in full in that section and could rescue the incorrect inclusion of a member who was not a qualifying tenant when the notice was given.

39. Other evidence emerged in course of the Hearing. Prior to the beginning of the Hearing, Debbie Harding of Flat 2 made herself known to the Tribunal and explained that she was in attendance on behalf of herself and Philip Sedgeman, but may have to leave before the conclusion of the Hearing due to a prior appointment. However it appeared that in fact Ms Harding was not necessarily a qualifying tenant (although this does not affect her entitlement to attend the public hearing).
40. Ian Hutchinson (named on both the Invitation Notice and the Claim Notice as a member of the Applicant) had sold his flat on the 31st July 2009, apparently to Deborah Harding and Philip Sedgeman. However, the Tribunal were told by Alan Barnard that it appeared from an on line Land Registry search made by the Respondent that Flat 2 is registered in Philip Sedgeman's sole name. Furthermore the Respondent had been advised by the Applicant that the flat had been transferred to a Philip Goodman.
41. It appears that following the transfer the Applicant has invited both Deborah Harding and Philip Sedgeman to become members of the Applicant although only one is a qualifying tenant. (see letter 5th October 2009). In addition to the confusion regarding the names of the tenant of Flat 2 there is also some confusion as to the spelling of Sedgeman but this was never entirely clarified to the Tribunal.
42. It also became apparent that an earlier claim notice served by the Applicant had been withdrawn on account of inaccuracies. It seems possible that at least some of these inaccuracies were repeated again in the Claim Notice considered by the Tribunal.

Concluding submissions

43. Mr Barnard said that the Applicant had an opportunity to respond to the Respondent's Statement as "directed" in the Provisional Directions and had failed to do so and therefore should lose the opportunity to do so.
44. The Tribunal explained to him that proceedings before the Tribunal were informal and that the direction did not enable the Tribunal to "enforce" non compliance or omissions.
45. Mr Barnard also said that the Respondent accepted that inaccuracies in the particulars would not invalidate the notices. The errors which the Applicant had made, however, were not in the particulars. He considered that the Applicant had made too many mistakes. The 2002 Act specifies the requirements to be followed. These are to protect both landlords and tenants. He was concerned that

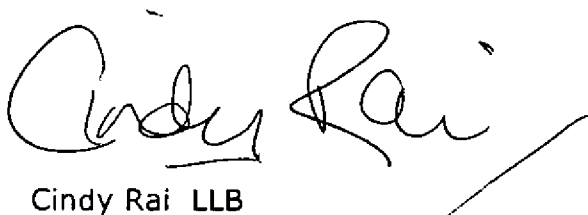
acceptance of notices containing inaccuracies and omissions such as were in the Invitation Notice and the Claim Notice in this case would set an unacceptable precedent which might be followed by other RTM companies seeking the right to manage under the 2002 Act.

46. In response Mr Thorpe said:-

- a. that he did not think that an unacceptable precedent would be set if the Tribunal found in the Applicant's favour. He said that if the Tribunal did not grant the right to manage it would adversely affect and prejudice the tenants. He said that no real prejudice has been caused to the Landlord.
- b. Philip Sedgeman is a qualifying tenant. As only one party from any flat has voting rights it does not matter if more than one is a member of the Applicant

Conclusion

47. For the reasons set out above the Tribunal therefore determines that the Invitation Notice is invalid on account of Section 78(6) of the 2002 Act because it omitted the information it was required to include; either a statement that was compliant with the 2002 Act which stated where the information could be inspected and on the days required or a copy of the memorandum and articles of association of the Applicant. The invalidity cannot be rescued by any other provision within the 2002 Act, notwithstanding the best efforts of the Applicant's solicitor to persuade the Tribunal that it should. It must therefore follow that any subsequent Claim Notice could not be validly given because under section 79(2) of the 2002 Act it must be preceded by a valid Invitation Notice given at least 14 days before, which in this case it was not. Therefore the Applicant is not entitled to acquire the right to manage the Premises.



Cindy Rai LLB

Chairman

A member of the Panel appointed by the Lord Chancellor