

**HM COURTS AND TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL**

Case No: CHI/21UD/LRM/2012/0015

Between:

2 Devonshire Road RTM Company Limited

(Applicant)

and

Helene Avriel Stewart

(Respondent)

Premises: 2, Devonshire Road, Hastings East Sussex TN34 1NE ("the Premises")

Hearing: 20th November 2012

Tribunal: Mr D Agnew BA LLB LLM Chairman
Mr R Wilkey FRICS
Ms J Morris

DETERMINATION AND REASONS

DETERMINATION:

1. The Tribunal determines that at the relevant date, namely 29th May 2012 the Applicant was entitled to acquire the right to manage the Premises in accordance with Part 2 Chapter 1 of the Commonhold and Leasehold Reform Act 2002 ("the Act").

The Tribunal makes an order that the Respondent shall pay to the Applicant a contribution towards the Applicant's costs of £500.

REASONS:

Background

2. On 1st August 2012 the Applicant applied to the Tribunal under section 84(3) of the Act for a determination that on the relevant date the Applicant was entitled to acquire the right to manage the Premises. A claim notice had been given to the Respondent on 29th May 2012. The Respondent, through her solicitors, Conway and Co, served a counter-notice denying that the Applicant had the right to acquire the right to manage the Premises:

- a) by reason of section 79(3) of Chapter 1 of Part 2 of the Act because the Applicant was not an RTM company complying with section 79(5) of the Act
 - b) because the claim notice did not contain the particulars required by section 80(8) of Chapter 1 Part 2 of the Act and
 - c) because the claim notice did not contain the particulars required by section 80(9) of the Act.
3. Directions were issued by the Tribunal requiring the parties to file and serve their statements of case, which was duly done, and the matter came before the Tribunal for hearing on 20th November 2012. The Respondent's solicitors wrote to the Tribunal prior to the hearing to say that in the interests of saving costs there would be no appearance by or on behalf of the Respondent at the hearing but they relied on previous submissions (i.e. the statement of case) and they also made representations objecting to any order for costs being made in the Applicant's favour, should the Applicant be successful in obtaining the determination sought. At the hearing, the Applicant was represented by Mr Everett of Coole and Haddock, solicitors. Mr Alex Knox, who is a Director of both the Applicant company and Havelock Properties Limited and who had made a witness statement in connection with this matter, attended the hearing. Also in attendance as an observer was Mr Terry Williment on behalf of his son Alex Williment, the long lessee of the garden flat at the Premises.

The Respondent's case

4. In a nutshell, the Respondent's main objection to the Applicant being entitled as at 29th May 2012 to acquire the right to manage the Premises was that the Applicant was not an RTM company complying with section 79(5) of the Act. This section states that on the relevant date the RTM company must 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. Here there are five flats, so three qualifying tenants are required to satisfy the statutory provision. The Respondent's case was either that the only valid member of the company is the original subscriber, Mr Knox, who neither is nor ever has been a qualifying tenant in his own right, or, alternatively, the Tribunal is unable to assess whether the Applicant fulfilled the necessary requirements for three qualifying tenants being members of the company on the relevant date.
5. The Register of Members of the Applicant shows Mr Alexander Knox's name as being a Member with "Number of Membership Certificate 1" entered on 16th March 2011. Beside Mr Knox's name is a handwritten insertion linking Mr Knox's name with that of Havelock Properties Limited and the title "Director" is written underneath Havelock Properties Limited and beside the "Alexander" of Mr Knox's name. Against the words on the Register: "Date of Ceasing to be a Member" appears the date 5th August 2011 and under "Remarks" there is written

in handwriting: "Membership is entered in the name of Havelock Properties Limited on the 05/08/11 the Members letter being signed on that day. The Member is relisted as Member number 5 membership number 1 having been cancelled".

6. The Respondent points out that in a previous case involving the same issues (namely case number CHI/21UD/LRM/2011/0016) the Tribunal had on 6th February 2012 determined that due to what it considered to be the unreliability of the Applicant's evidence, it was not satisfied that Havelock Properties Limited had been entered in the Register of Members on 5th August 2011 as the register would appear to suggest. Partly this was because certificate number 5 does appear on the Register in the name of Havelock Properties Limited and does bear the date of entry on the Register as 5th August 2011 but certificate number 4 showing Glenn Nash and Angela Green as Members states that the date of entry on the register was 20th September 2011. This led the Tribunal to consider that the date of entry of Havelock Properties Limited was likely to have been on or after this date as it was unlikely that certificate 5 would have been registered before certificate 4. As 20th September 2011 was after the relevant date in that previous case, the Tribunal determined that the Applicant was not entitled to acquire the right to manage on that relevant date (i.e. 5th September 2011).
7. The Respondent points out that the Register of Members relied upon for this later case is exactly the same in so far as it applies to Havelock Properties Limited as in the previous case. She also makes the point that the Applicant's solicitors have admitted that the Register of Members was not being kept at the registered office, contrary to the provisions of the Companies Act 2006. She also puts the Applicant to proof of the removal of the non-qualifying tenant and the inclusion of Havelock Properties Limited by an authorised person. This had been an issue in the earlier case.
8. The Respondent's case under sections 80(8) and 80(9) of the Act were that it follows that if Havelock Properties Limited was not validly shown in the Register of Members as being a Member of the company on the relevant date then the claim form stating that it was did not comply with the regulations relating to the particulars to be contained in the claim notice and the form of the notice.

The Applicant's case

9. The Applicant's evidence in the form of Mr Knox's witness statement was that he had indeed authorised Mr Okines of Arco Property Management to make the alterations to the register of Members to delete his name (as it should never have been there) and to add Havelock Properties Limited as the correct Member. He says he did this on the day the entries were made, namely the 5th August 2011. He also exhibited to his witness statement the document required by the Articles of Association of the Company stating that Havelock Properties

Limited wished to become a Member. Again this document was dated 5th August 2011. He asserted, therefore, that Havelock Properties Limited was indeed registered as a Member of the RTM company on 5th August 2011 even though the earlier Tribunal, who had not had the benefit of the extra evidence that he was able to supply, had considered that this had probably not been done until after 20th September 2011. Mr Everett submitted that the earlier Tribunal had the evidence before it that Havelock Properties Limited was registered as a Member of the RTM company by the date of the hearing of that earlier case on 14th January 2011 and so whether or not Mr Knox's new evidence is accepted as the date of entry on the register as being 5th August 2011, nevertheless the company was registered as a Member prior to the relevant date in the current case (29th May 2012) and as there is no challenge (save for questioning the authority of the person who made the changes to the register) as to the validity of the registration of the other two qualifying tenants, then it follows that the Applicant was an RTM company satisfying section 79(3) of the Act and that both the requirements as to the particulars to be supplied and the form of the notice were also complied with.

10. Mr Everett further submitted that even if the date of 5th August 2011 appearing on the Register of Members was wrong, that would not mean that the Applicant failed to comply with section 79(5) of the Act. He quoted the Upper Tribunal decision of *Assethold Limited v 14 Stansfield Road RTM Company Limited* [2012] UKUT 262 (LC) at paragraph 21 where the President, George Bartlett QC, said: "A defect in the register would not be sufficient to show that section 79(5) was not complied with, and indeed it could be insufficient even to raise a doubt as to compliance".
11. As for the Applicant not keeping the Register of Members at the registered office of the company, Mr Everett explained that he had advised the Respondent's solicitors in a letter dated 7th June 2012 that the register of Members was "currently located" at his office. This was because he had it there in connection with the preparation of the right to manage claim and that it would be returned once it was no longer required for that purpose. He asserted that this was entirely reasonable and that in any event the temporary absence of the Register at the company's solicitor's office could not invalidate the claim.

Costs

- 12 Mr Everett made an application that the Respondent pay the maximum amount that the Tribunal can order by way of costs (£500) as a contribution towards the Applicant's costs under paragraph 10(2) of Schedule 12 to the Act. He claimed that the Respondent had acted unreasonably in making it necessary for the Applicant to have to attend the hearing after it had supplied the evidence of Mr Knox that he had authorised Mr Okines to make the necessary alterations to the register of Members. Once this had been established there was no doubt that

there were three qualifying tenants who were registered as members of the RTM Company as at the date of the claim notice and that all the necessary formalities for the Applicant to be entitled to acquire the right to manage the premises were complied with. He had put the Respondent's solicitors on notice that he would reserve the right to make the application for costs if he and his clients were compelled to attend the hearing. His charging rate was £220 per hour. He had been involved in more than £500's worth of time on the day of the hearing alone.

13. In response the Respondent's solicitors oppose the making of a costs order. They say that the Applicant's prior conduct in connection with its claim to acquire the right to manage the premises has given rise to concerns as to the company formation process and registration of Members and in a situation where monies held in trust and the management and repairing responsibilities are to be handed over to the RTM Company it is only reasonable for the Respondent to protect her interests by having the matter decided by the Tribunal. They cite the case of *Ridehalgh v Horsefield* (1994) 3 All ER where the Master of the Rolls considered the meaning of "unreasonable" in this context. He said at paragraph 13:-
" 'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as reflecting on a practitioner's judgment, but it is not unreasonable."

The Relevant Law

14. Section 79(1) of the Act states that "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")"
15. By section 79(3) of the Act: "The claim notice must be given by a RTM company which complies with subsection (4) or (5).
16. Subsection (5) states that 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.
17. Section 80(3) of the Act requires the claim notice to state the full name of each person who is both –
(a) a qualifying tenant of a flat contained within the premises; and

(b) a member of the RTM company.

18. Section 80(8) and 80(9) of the Act requires the claim notice to contain such other particulars as are required by regulations and for the claim notice to be in a form required by regulations.
19. By paragraph 10(1) of Schedule 12 to the Act a leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party where that party has, in the opinion of the tribunal, acted "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings" and by sub-paragraph (3) of that paragraph, the amount that the tribunal can order a party to pay in costs is limited to £500.

The Determination.

20. The Tribunal accepts Mr Knox's evidence that he, as a Director of the Applicant company, authorised Mr Okines to record on the Register of Members that he cease to be a Member and to record Havelock Properties as a member and that he so authorised him to do this on 5th August 2011. The Tribunal also accepts his evidence that the document stating that Havelock Properties Limited wished to be a Member of the Applicant company is dated 5th August 2011. That evidence was not before the Tribunal when it was considering the previous case as to whether the Applicant was entitled to acquire the right to manage as at 29th September 2011. It is not for this Tribunal to speculate whether or not this further evidence would have produced a different result in the earlier case. This Tribunal is not bound by the decisions of other leasehold valuation tribunals but even in that earlier case the Tribunal did not find that Havelock Properties Limited had not been registered as a Member of the Applicant company at all. They found that it became a registered Member "some time after 20th September 2011". It follows that Havelock Properties Limited was a Member of the company and whose name was in the company's Register of Members on a date prior to the hearing of that earlier case on 14th January 2012. It was still on the Register of Members as at 29th May 2012, the relevant date for the purposes of the current application to the Tribunal. There was no challenge by the Respondent that the two other qualifying tenants, Alex Lloyd Willment (1) and Glen Andrew Nash and Angela Peggy Green (2) were duly registered Members of the RTM Company. Consequently the Tribunal finds that on the relevant date, 29th May 2012, there were three qualifying tenants, namely Havelock Properties Limited, Alex Lloyd Willment and Glen Andrew and Angela Peggy Green, who were members of the Applicant company and therefore section 79(5) of the Act was satisfied. It follows that the requirements of sections 80(8) and 80(9) of the Act were also satisfied in this respect.
21. Even if 5th August 2011 as the date stated in certificate 5 of the Register as the date of Havelock Properties Limited being entered as a

Member of the company had been incorrect, however, this would not, in the Tribunal's view following the extract from the judgment in the Assethold case referred to in paragraph 10 above, have invalidated the claim notice.

22. The Tribunal finds no merit in the point that the Register of Members was not being kept at the company's registered office. The Tribunal accepts Mr Everett's explanation that the Register was temporarily at his office whilst preparing the application for right to manage. It is entirely reasonable that the document should be temporarily at the company's solicitor's office and the Tribunal could find nothing in the Act to suggest that, even if the Register of Members were kept elsewhere this would invalidate a right to manage claim.

23. With regard to costs, the Tribunal finds that the Respondent was acting unreasonably in failing to concede the claim once the further evidence from Mr Knox had been received. This dealt with, amongst other things, the question as to whether Mr Okines had authority to make the entries in the Register of Members to rectify the situation to show that Havelock Properties Limited and not Mr Knox personally, was the Member of the company. Once this was established it should have been clear that the Respondent's challenge could not be sustained. The Respondent seems to have placed undue reliance on the fact that in the previous case the Tribunal had not been persuaded that there were three qualifying tenants who were members of the Applicant company as at the relevant date in that case. But that case was different from the current case. In the current case, the relevant date was after Havelock Properties Limited had clearly been entered in the register as a Member in certificate number 5 and so there could have been no doubt that three qualifying tenants were Members of the RTM company at that date. The Tribunal is mindful of the dictum of the Master of the Rolls, Sir Thomas Bingham in *Ridehalgh v Horsefield* as to what constitutes "unreasonable". It considers that after receipt of the Applicant's statement of case and witness statements, the insistence on the case proceeding to a Tribunal determination was akin to "harassing the other side rather than advancing a resolution of the case". The Tribunal did not consider that the justification for proceeding to a Tribunal determination contained in the Respondent's solicitors' letter to the Tribunal of 15th November 2012 was convincing or amounted to a "reasonable explanation" therefor. Once it was clear that at 29th May 2012 there were three qualifying tenants as Members of the RTM company, any concerns as to the "formation process and registration of members" was or should have been resolved as far as the process for acquiring the right to manage as set out in the Act was concerned. The raising of the point about where the Register of Members was being held had the air of clutching at straws about it. In the Tribunal's view, the Applicant had been put to unnecessary additional expense whilst the Respondent chose not to send her own solicitors to the hearing to challenge the witness evidence produced by the Applicant. The Tribunal considered that this was more than just an

over-optimistic view of its own client's case by the Respondent's solicitors and that in the circumstances the Respondent's conduct of the case after the receipt of the Applicant's statement of case and witness statement, having been put on notice by the Applicant's solicitors that they reserved the right to make an application for costs, was unreasonable and an order for costs would be made. The evidence was that the costs of the hearing day alone would exceed £500. The Applicant's solicitors' charging rate at £220 per hour is reasonable. An order is made, therefore that the Respondent shall pay to the Applicant a contribution of £500 towards its costs.

Dated this 10th day of December 2012

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D. Agnew BA LLB LLM
Chairman