FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LRM/2020/0006**
HMCTS code (paper, video, audio)	**:**	**V : CVPRemote**
Property	**:**	**Block D The Jam Factory, 21a Rothsay Street, London SE1 4BF**
Applicant	**:**	**The Jam Factory (Block D) RTM Company Limited**
Representative	**:**	**Mr Justin Bates – Counsel instructed by Commonhold and Leasehold Experts Limited**
Respondent	**:**	**AGHR Limited**
Representative	**:**	**Ms Julia Petrenko – Counsel instructed by Coleman Coyle solicitors**
Type of application	**:**	**Right Manage**
Tribunal members	**:**	**Tribunal Judge Dutton** **Mrs S F Redmond BSc (Econ) MRICS**
Venue	**:**	**Video hearing 31 March 2021**
Date of decision	**:**	**6 April 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V : CVPRemote. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that we were referred to are in a bundle of 97 pages, with skeleton argument for the respondents. We have noted the contents of same.

Decisions of the tribunal

(1) The Tribunal determines that the Applicant was on the relevant date entitled to acquire the right to manage the premises pursuant to section 84(5)(a) of the Act, and the Applicant will acquire such right within three months after this determination becomes final.

(2) The Tribunal determines that the respondents have not acted unreasonably in the conduct of or defending these proceedings as provided for under the provisions of rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 for the reasons set out below.

BACKGROUND

1. On 10 December 2020 the tribunal issued a decision in respect of the applicant's entitlement to acquire the right to manage the Property (the Decision). This was a preliminary issue. We decided that the matter should proceed with the application being amended to allow the respondent AGHR to be added as a party, the more so as the solicitors for AGHR indicated they would be adopting the terms off the existing counter-notice. Directions were issued at the same time.

2. On 5 January 2021 AGHR sought permission to appeal, which by a decision of even date, we refused. The Upper Tribunal also refused permission to appeal. The matter was listed for hearing on 31 March 2021.

3. Prior to the hearing on 31 March 2021, we were provided with a supplemental bundle which included the Decision, the respondent's statement of case dated 22 January 2021, the applicant's statement of case dated 16 March 2021 and a witness statement of Mr Robert Marsh dated 9 March 2021. We were also provided with certain correspondence detailed in the index to this bundle. We were also in possession of the original bundle for the hearing leading to the Decision.

4. On the day of the hearing we received a skeleton argument on behalf of the respondents submitted by Ms Petrenko, counsel, which had attached to it a list of the non-participating tenants and a bundle of authorities. We carefully noted all that she had said.

5. Mr Bates had provided a copy of the case of Assethold Limited v 14 Stansfield Road RTM Co. Ltd. [2012]UKUT 262 (LC).

6. The respondent's statement of case at pages 11 to 14 of the bundle sets out the history, which neither Counsel sought to refer to, highlighting the provisions of Article 26 of the Articles of Association of the applicant and section 78 of the Commonhold and Leasehold Reform Act 2002 (the Act).

7. It was asserted that there were two objections. The first was that the applicant, through its representative Commonhold and Leasehold Experts Limited (CLE), had indicated in an email, that the Notice of Invitation to Participate (NITP) were hand delivered on 8 December 2019, which was less than 14 days before the Claim Notice was served on the then respondents. In her skeleton argument Ms Petrenko accepted that this was an error and that this point was no longer taken.

8. However, the respondent moved from the position in the statement of case and instead adopted an allegation in Ms Petrenko's skeleton argument that not each NITP had been validly served. This was based on the possible margin of error in delivering 22 letters, which it was said one could have been dropped or that multiple envelopes had been posted, unintentionally, into a single letter box. Reference to Mr Marsh's statement, in which he said he had delivered two envelopes to certain flats as it was thought a stair-casing company may have been involved, was also raised.

9. The second objection was that the NITP's were invalid as they erroneously included details of the members of the company whose membership was covered by Article 26 of the Company's articles of association. It is said that in the case of one couple Meena and Krishnappa Jayaraju the application for membership was faulty. The fault was that their address was not shown on the application for membership of the RTM company. This, it was said, did not comply with Article 26(1). As a result, s78(2) (b) was not complied with as it included the names of Mr and Mrs Jayaraju as members, when it is alleged by the respondent that they were not and cited s112(2) of the Companies Act 2006 in support.

10. In response to these written submissions set out both in the respondent's statement of case and the skeleton argument Mr Bates responded as follows.

11. As to the service of the NITP's he would rely on the evidence of Mr Marsh and would tender him for cross examination. There was no evidence called by the respondent to show that any particular tenant did not receive the envelopes. He referred us to the case of Assethold Limited v 14 Stansfield Road RTM Co. Ltd and drew our attention to segments of the judgment of the then President of the Tribunal, which we have noted.

12. In respect of the second objection he took us to Article 26 in the Articles of Association of the applicant company, helpfully supplied by Ms Petrenko. This sets out the requirements of becoming a member and the form of wording for such application, which we noted. The important words, Mr Bates said, are those in parenthesis in 26(1) (*or in a form as near to the following form as circumstances allow or in any other form which is usual or which the directors approve)*. The only missing detail was the address for Jayaraju, but the two directors of the applicant, Mr Marsh and Mrs Nowak, as stated by Mr Marsh in his statement knew them both, where they lived and approved the form of application and admitted Mr and Mrs Jayaraju as member of the applicant.

13. He rejected the submission by Ms Petrenko that the same form should be used for all, citing an example of a blind applicant, or one whose first language was not English. This was at best an inaccuracy, not an omission and of secondary importance as it could not cause prejudice to the respondent.

14. Mr Bates tendered Mr Marsh for cross examination by Ms Petrenko. He confirmed that each flat had an independent letter box and that he had served the letters by hand on 8 November 2019 on the non-participating tenants, whose addresses were listed in the applicant's statement of case. He confirmed that although he had referred to photographic evidence of service in an email to CLE, he had not produced that evidence at the hearing. He also confirmed that he had served details on Pathfinder as they were involved in the shared ownership leases and they had been included on a 'belt and braces' basis.

15. In her closing Ms Petrenko said the starting point was paragraph 90 of the case of Avon Ground Rents v Canary Gateway, which was included in the bundle of authorities supplied to us.

16. There were, she said two reasons to doubt service. The first was that Mr Marsh had failed to provide the photographic evidence and secondly that there had been service on Pathfinder, which may have been in error as it was alleged they had no interest in some of the non-participating tenants flats.

17. As to the company membership it was said that the directors could not "waive a defect on the hoof". The inclusion of Mr and Mrs Jayaraju as members when they had not completed the application form correctly meant they should not have been included as a members of the applicant company and in so doing it rendered the NITP's invalid. It was said that the provisions of s78(7) did not apply to the provisions of s78(2)(b) as it only related to "such other particulars" as set out at s78(2)(d).

18. Mr Bates responded briefly. The Avon Ground Rents claim addressed service issues. There was no evidence of non-service in this case. The question of photographic evidence was not mentioned in the respondent's statement of case and only seems to have arisen in the cross examination of Mr Marsh and we should accept Mr Marsh's statement.

19. As to the membership point he submitted that the Article should not be construed so narrowly as suggested by the respondent. The provisions of s81 of the Act can be applied to the NITP's. He pointed out that a person can join the RTM company at any time and that there was overwhelming support for the RTM to acquire the right to manage the Property.

FINDINGS

20. We have considered all that has been said by the parties, both in the statements of case, the witness statement of Mr Marsh, Ms Petrenko's skeleton argument and the submissions made to us at the hearing on 31 March 2021.

21. Dealing with the two objections in the statement of case, one of which was changed by Ms Petrenko in her skeleton. Mr Bates took no issue with her departing from the statement of case to attack the method of service. We are quite satisfied that Mr Marsh has accurately set out the steps he took to serve the NITP's on the non-participating tenants. No evidence has been produced by the respondent to support this attack. It is all supposition. No non-participating tenant has provided evidence that they were not served. The lack of photographic evidence is hardly compelling. It was not until the hearing that this was even raised.

22. We have no hesitation in rejecting this objection,

23. Turning to objection two relating to the membership of Mr and Mrs Jayaraju. The application for membership was produced and showed that they had not included their address. We accept the evidence of Mr Marsh that he and Mrs Nowak knew them, knew where they lived and as directors approved their membership. We can see nothing in the Articles which prevents this. They are shown on the register of member

for the applicant company and s112 (2) of Companies Act 2006 states *"Every other person who agrees to become a member of a company, and whose name is entered in its register of members is a member of the company"*. Mr and Mrs Jayaraju appear in the Register of Members for the applicant at entry 23 dated 22 August 2019, as was disclosed to the respondent.

24. We find therefore that at the time the NITP's were served the membership details were correct. We should perhaps comments on the interplay of s78(2)(b) s78 (2)(d) and s78(7). We consider that s78(7) applies to totality of s78, not just s78(2)(d). It says that "*A notice of invitation to participate is not invalidated by any inaccuracy in any particulars required by or by virtue of this section"*. S78(d) is a catch all and should not in our findings be construed so narrowly as suggested by Ms Petrenko. In truth it matters little as we have found that the membership details included in the NITP's was correct.

25. Accordingly, we reject objection two. Our finding therefore is that the applicant is entitled to acquire the right to manage the Property and we so order.

COSTS

26. Although not referred to by Counsel the statements of case and the skeleton do address the issue as to costs. There are two which we can deal with together. They are under s20C Landlord and Tenant Act 985 and Part 5A Schedule 11 to the Commonhold and Leasehold Reform Act. We do not consider either relate to this case. This is an application under the Commonhold and Leasehold Reform Act 2002 relating to right to manage legislation. This is not a landlord and tenant matter.

27. The respondent is entitled to recover some costs under the provisions of s88 of the Act but does not include attendances before the tribunal. The respondent should make an application for costs in the usual way and directions can then be given, in all likelihood, to determine the matter on paper, without the need for a hearing, unless a party requests same.

28. The question of costs under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 is a matter we can consider. Both sides have made submissions and we have noted all that has been said.

29. The threshold for establishing that a party has acted unreasonably is high. Extracts from the leading authority Willow Court Management Co. Ltd v Alexander show this. At paragraphs 27 and 28 of the judgment the Tribunal said this:

27. When considering the rule 13(1)(b) power attention should first focus on the permissive and conditional language in which it is framed: "the Tribunal may make an order in respect of costs only … if a person has acted unreasonably…." We make two obvious points: first, that unreasonable conduct is an essential pre-condition of the power to order costs under the rule; secondly, once the existence of the power has been established its exercise is a matter for the discretion of the tribunal. With these points in mind we suggest that a systematic or sequential approach to applications made under the rule should be adopted.

28. At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

30. We consider that the submission made by Ms Petrenko at paragraph 29 of her submission carries weight. Certainly, the respondent has not given up their case lightly, the more so as they rather came to it after the event. No matter, a company in the position of the respondent is entitled to challenge the applicant to establish that the proper procedure and paperwork has been complied with. Certainly we are well used to seeing respondents seek to challenge almost every step of an Act that does appear to lay certain traps for the unwary. Is this unreasonable conduct within the meaning of the Rule? We think not and therefore decline to make a finding that the provisions of Rule 13 apply in this case.

Andrew Dutton

Tribunal Judge Dutton Date: 6 April 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).