FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LRM/2021/0018**
Property	**:**	**(1) Elite House, Edgemere House and Vale House, St Anne's Street, London E14** **(2) Birkdale House, Slate House, Langan House, Wessex House, St Anne's Street, London E14**
Applicants	**:**	**(1) Canary Gateway (Block A) RTM Co Ltd** **(2) Canary Gateway (Block B) RTM Co Ltd**
Representative	**:**	**Jobsons Solicitors** **Mark Loveday (counsel)**
Respondent	**:**	**Avon Ground Rents Limited**
Representative	**:**	**Scott Cohen Solicitors** **Justin Bates (counsel)**
Type of application	**:**	**Application in relation to the denial of the Right to Manage**
Tribunal member(s)	**:**	**Judge Sheftel** **Mrs E Flint FRICS**
Date of decision	**:**	**2 March 2022**

DECISION

This has been a remote video hearing which has been consented to by the parties. A face to face hearing was not held because it was not practicable and no request was made for a face-to-face hearing. The tribunal was provided with a bundle comprising 209 pages. In addition, the Applicants made an application to adduce a late witness statement. This is addressed in our decision below.

The order made is described at the end of these reasons.

The applications

1. These proceedings concern two applications under section 84(3) of the Commonhold and Leasehold Reform Act 2002 (the "2002 Act") for a determination that, on the relevant date, the Applicant RTM companies were entitled to acquire the Right to Manage premises at a development known as Canary Gateway.

2. The tribunal has previously considered an application to acquire the right to manage in respect of Canary Gateway. In proceedings LON/00BG/LRM/2019/012 & 013, the tribunal held that the RTM companies were entitled to acquire the right to manage their respective buildings. However, that decision was reversed by the Upper Tribunal (*Avon Ground Rents Ltd v Canary Gateway (Block A) RTM Co Ltd and others* [2020] UKUT 358 (LC)) on the basis that the Applicants had failed to serve one of the qualifying tenants with notice inviting participation. As a result, the Applicants have repeated the process and brought this further application, which is again opposed by the Respondent.

3. The remote video hearing took place on 1 February 2022. The Applicants were represented by Mr Mark Loveday (counsel) and the Respondent by Mr Justin Bates (counsel).

Background

4. Canary Gateway is a modern development at St Anne Street, London E14. The development is constructed on the south bank of the Limehouse Cut canal on either side of St Anne Street and comprises two "Blocks" (Blocks A and B). Each Block is divided into several "houses" and each house contains a number of flats.

   (1) Site A comprises three "houses" (Elite House, Edgemere House, Vale House)

   (2) Site B comprises four "houses" (Birkdale House, Slate House, Langan House, Wessex House) and a small commercial unit which is not relevant for the purposes of this case.

5. As the tribunal summarised in the previous proceedings:

   (1) Elite House in Block A contains 57 Flats. The then freeholder granted long leases of each flat.

   (2) Edgemere House contains 17 flats. The then freeholder granted a head lease to Metropolitan Housing Trust Ltd ("Metropolitan") that has since granted 17 long shared ownership leases. We were told that at least two of these lessees have "staircased" to 100%.

   (3) Vale House contains 23 Flats. The then freeholder granted a head lease to Metropolitan, which lets the flats on rental tenancies.

   (4) Birkdale House contains 37 Flats. The then freeholder granted long leases of each flat.

   (5) Slate House contains 30 flats. The then freeholder granted long leases of each flat.

   (6) Langan House contains 36 flats. The then freeholder granted long leases of each flat.

   (7) Wessex House contains 33 flats. The then freeholder granted a head lease to Metropolitan, which lets the flats on rental tenancies

6. As such, there are 97 flats in Block A, of which 23 are let on rental tenancies, 17 are held under long shared ownership leases and 57 are held under long residential leases. There are 136 flats in Block B, of which 33 are let on rental tenancies and the remaining 103 are held under long residential leases.

7. The First Applicant is an RTM company which seeks to acquire the right to manage Block A. The Second Respondent is an RTM company which seeks to acquire the right to manage Block B. The Respondent is the freeholder of both blocks.

8. By claim notices dated 9 March 2021, the Applicants gave notice that they intend to acquire the Right to Manage the premises on 27 July 2021.

9. By counter notices dated 23 April 2021, the Respondent freeholder disputed the claim alleging that the applicant had failed to establish

compliance variously with sections 72(1), 78(1), 79(2) and (3) of the 2002 Act.

10. According to the Respondent's statement of case, the application is opposed broadly on three grounds:

    (1) It is said that the tribunal does not have jurisdiction to hear the claim because, on the Respondent's case, the application was defective.

    (2) The Respondent asserted that there was a failure to serve all qualifying tenants with notices inviting participation.

    (3) Finally, the Respondent raises an issue as to who is the qualifying tenant in shared ownership leases. However, it was accepted by the Respondent that it could not succeed on this issue as there are two Upper Tribunal decisions against it on the point: *Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd* [2013] UKUT 81 (LC) and *Avon Ground Rents Ltd v Canary Gateway (Block A) RTM Co Ltd and others* [2020] UKUT 358 (LC). Nevertheless, the Respondent preserves its position in the event of any possible future appeal.

11. The Applicants' response to the Respondent's statement of case rejected the Respondent's arguments and maintained that they are entitled to acquire the right to manage the premises.

12. We deal first with the issue of jurisdiction – although at the hearing, the two issues were considered in reverse order because the question in relation to service of notices inviting participation effectively came down to the tribunal's decision whether to admit late evidence. This is addressed in more detail below, including, as requested by the Respondent, full reasons as to why the tribunal allowed the evidence in question.

Jurisdiction

13. The Respondent's submission that the tribunal does not have jurisdiction arises from the fact that the claim notices which were attached to the

present application are not the same as those which were served on the Respondent.

14. The reason why it is said that this is fatal to the making a valid application is as follows: when an RTM company has received a counter-notice which denies that it is entitled to acquire the right to manage, it must apply to the tribunal for a determination that it is so entitled (s.84(3) of the 2002 Act), and such application must be made within two months of the date on which the counter-notice was given (s.84(4) of the 2002 Act). The form and content of the application is governed by rule 26 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Those rules require the application to comply with any relevant Practice Direction. The relevant Practice Direction is dated 9 September 2013. It provides that, in an RTM case, the documents which must accompany the application include "a copy of the claim notice and a copy of the counter notice received" (Schedule 6, para.4(6)).

15. In the present case, the claim notices which were attached to the application to the tribunal, differed from the claim notices that had been given to the Respondent in several respects. These included:

    (1) they give different dates for service of a counter-notice (22 April 2021 as per FTT notice; 26 April 2021 as per true notice);

    (2) they give different dates on which the RTM is proposed to be acquired (23 July as per FTT notice; 27 July as per true notice);

    (3) the notices given to the FTT are unsigned whereas the ones given to the landlord are signed and dated; and,

    (4) they give different details as to who is a member of the company. As Mr Bates pointed out, this information is important, not least on the question of who is potentially liable for costs where a claim ceases under section 89 of the 2002 Act.

16. As a result, the application did not attach a 'copy' of the claim notices as required by the Practice Direction.

17. Mr Loveday stressed that there was no suggestion that the claim notice that had been served on the Respondent was in any way defective.

Further, on instructions, Mr Loveday stated that the fact that the wrong version had been attached to the tribunal application was simply an error. However, the only evidence before the tribunal of the reason for the discrepancy was an email from the Applicants' solicitors to the Respondent's solicitors dated 21 July 2021, which stated "*we were unaware that the Claim Notices had been altered from the copies which had been sent to us*".

18. In any event, in Mr Bates's submission, the consequence of the fact that the wrong version had been attached to the tribunal application was that no valid application has been made within the time period specified by s.84(3) of the 2002 Act and this application should therefore be dismissed. Further, he contended that the error could not be saved by rule 8 of the 2013 Rules as it is a fundamental error which goes to the heart of s.84(3) of the 2002 Act.

19. Both sides referred us to the Upper Tribunal's decision in *Lough's Property Management Limited v Robert Court RTM Company Limited* [2019] UKUT 105 (LC), in which the Upper Tribunal drew a distinction between failure to comply with the substantive requirements of the statute and failure to comply with the tribunal's own Practice Direction. In that case, the applicant had failed to provide any copy of the claim notice whatsoever and had also failed to tick the box of the tribunal's application indicating what type of application was being made (whereas in the present case, the relevant box was ticked by the Applicants).

20. In Louth's, the Upper Tribunal confirmed:

> "39. … rule 8 cannot be used to cure a defect in compliance with the minimum requirements of section 84(3). Those requirements are substantive and they had either been satisfied by 9 June by the making of an application for the relevant determination or they had not. If they had not been satisfied by that date, because no request had yet been made for a determination of entitlement, the consequence of deemed withdrawal provided for by section 87(1)(a) would befall the claim notice. That consequence is specified in the statute and cannot not be avoided by reliance on rule 8 or any other procedural tool.
>
> 40. Rule 8 could of course be relied on to preserve an application under section 84(3) from any adverse consequences of a failure to supply the documents required by the FTT's own practice direction (the claim notice and counter-notice). Compliance with the practice direction is a requirement of the Rules, and the consequence of non-compliance can therefore be provided for by the Rules. But the Rules cannot modify the requirements of the 2002 Act itself.

41. I agree that in this respect the appeal is analogous to the situation in the *Aldford House* case, where it was eventually acknowledged by leading counsel and accepted by the Judge that a failure to take the substantive step required by the Act (making an application based on a valid notice) could not be remedied by the procedural device of amending the claim form out of time to refer to a different notice.

42. The application required by section 84(3) need not be in any particular form but in my judgment, as a minimum, it must ask for a determination of entitlement to acquire the right to manage. If it does not do so it will not be possible to describe it as an application under section 84(3) for the purpose of meeting the deadline imposed by section 84(4).

43. The 2002 Act contains no saving provision of its own which protects an intended application from invalidity if it is affected by some inaccuracy or irregularity. In that regard an application under section 84(3) is different from a notice of invitation to participate under section 78 or a claim notice under section 80, both of which are protected by a specific provision that an inaccuracy will not invalidate the document (see sections 78(7) and 81(1) respectively). That is not surprising given the nature of the requirement, but it does emphasise the necessity of taking steps within time which can be recognised as amounting to an application for a determination of entitlement.

44. For these reasons I consider the FTT ought not to have found that an effective application had been made to it within the two-month time limit. It ought instead to have dismissed the application as having been made too late. I would hold that an application was not made until 12 June 2017 when the form was first returned to the FTT with option (a) in Annex 1 having been ticked. The omission of the required supporting documents was not fatal to the validity of that attempt because they could be cured by reliance on rule 8."

21. Mr Loveday also referred to the subsequent decision in *Assethold Limited v 20 Upper Wickham RTM Company Limited* [2019] UKUT 0368 (LC), where a similar approach was adopted by the Upper Tribunal. At paragraph 20, after noting that failure to make the requisite application could not be saved by the exercise of the FTT's discretion under rule 8, the Upper Tribunal stated:

"By contrast, if the applicant had failed to send with the form one of the documents required by the FTT's own practice direction, the FTT could have waived that requirement under rule 8. But it had no power to cure a failure to make the application required by the statute."

22. In Mr Bates's submission, the errors set out in paragraph 15 above meant that the minimum requirements of section 84(3) had not been met, with the result that no valid application had been made. In this regard, reference was made, in particular, to the error at paragraph 15(1) above. The version of the claim notice attached to the application gave a

deadline for the counter-notice of 22 April 2021. Given that the Respondent's counter-notice had been served after that date, this meant that on its face there was no valid application before the tribunal because an application under section 84(3) is dependent on a counter-notice being served in time.

23. Of course, the reality is that the counter-notice *was* served in time based on the date given in the *actual* claim notice served on the Respondent. However, Mr Bates's point was that so far as the tribunal would have been concerned, on the face of the Applicants' application, this is not an application to which s.84(3) applies and the FTT has no jurisdiction – although bizarrely the consequence of this would have been that the Applicant would simply have acquired the right to manage on the date specified in the claim notice by virtue of section 90 of the 2002 Act – something which naturally the Respondent does not accept.

24. The difficulty with the Respondent's argument is that the Upper Tribunal in *Louth's*, specifically found that the omission of the claim notice "*was not fatal to the validity of that attempt because they could be cured by reliance on rule 8*" (para.44).

25. We accept that whether or not the minimum requirements of section 84(3) have been met in any particular case will be a matter of fact and will depend on the precise circumstances of that case. Nevertheless, it is difficult to reconcile the notion that while in *Louth's* the complete absence of a claim notice did not render an application a nullity whereas here it is argued that an incorrect copy of the claim notice puts an applicants in a worse position and does render it a nullity. Applying the Respondent's argument above, the complete absence of a claim notice also would mean that the tribunal would not necessarily know that a counter-notice had been served on time. However, the Upper Tribunal concluded that this did not render the application invalid.

26. Ultimately, we conclude that the statutory requirements have been met in the present case and that the application is not a nullity. Applying the reasoning in *Louth's*, we consider that the error in question was a

procedural defect, which can potentially be cured under rule 8. Rule 8 of the 2013 Rules provides as follows:

> "(1) An irregularity resulting from a failure to comply with any provision of these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.
>
> (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as the Tribunal considers just, which may include
>
> (a) waiving the requirement … ."

27. This, therefore, leads to consideration of the Respondent's alternative argument as to whether the breach should be cured under rule 8 of the 2013 Rules. The Respondent's position was that rule 8 is a discretionary power which necessitates consideration of the three *Denton* criteria set out by the Court of Appeal in *Denton v TH White Ltd* [2014] 1 WLR 3926, which must be considered in an application for relief from sanctions. Although Denton was a case under the Civil Procedure Rules, the Supreme Court has confirmed that the same approach applies to tribunals (*BPP Holdings v Commissioners for Her Majesty's Revenue and Customs* [2017] UKSC 55), i.e.

    (a) is this a serious or significant breach?
    (b) why did the breach occur?
    (c) consider all the circumstances of the case.

28. In the Respondent's submission, this is a serious breach without adequate or any explanation and having regard to all the circumstances, the tribunal is urged not to waive the failure.

29. In contrast, in the Applicants' submission, this was not a *Denton* case as no sanction had been applied. Further, Mr Loveday stressed that rule 8(1) confirms that an irregularity resulting from a failure to comply with a practice direction does not of itself render void the proceedings. He also accepted that, to the extent that it was necessary, the tribunal could waive the defect. In this regard, he submitted that there had been no prejudice to the Respondent by the error given that the Respondent had been served with the correct version of the claim notice.

30. In our view, it is not correct to characterise the present circumstances as a *Denton* case. Not only was this not how the issue was analysed by the Upper Tribunal in the *Lough's* or *Assethold* cases referred to above, but moreover, as a matter of principle, there is no sanction imposed as a result of failure to attach a true copy of the claim notice. In all the circumstances, we consider that it is appropriate to exercise our discretion under rule 8(2) to waive the breach of the Practice Direction. We consider that no prejudice has been caused to the Respondent by the error, noting that the Respondent had been served with the correct claim notice and that there is no suggestion that the true claim notice was in any way defective. In the alternative, even if we were required to apply the *Denton* criteria, we would reach the same result. We do not consider that it is the most serious of breaches given that the correct claim notice had been served on the Respondent (limb 1), although accept that there has been little explanation for why the breach occurred (limb 2). Further, having regard to all the circumstances of the case (limb 3) and, in particular, to the lack of prejudice identified above, we consider that it would be appropriate to grant relief.

31. Accordingly, and for the reasons set out above, we consider that the Respondent's argument on jurisdiction must fail.

Service of notices inviting participation

32. According to section 78 of the 2002 Act, it is a condition precedent to the service of a claim notice that the RTM company must give a notice inviting participation to all qualifying tenants who are not already members of the RTM company (or who have not agreed to become members). Section 78(1) provides as follows:

> "(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."

33. Similarly, section 79(2) of the 2002 Act provides as follows:

> "(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.

34. The Respondent, in its statement of case, had raised various instances where it was said that the Applicants had failed to serve notices inviting participation on qualifying tenants who were required to be served. In the Applicants' reply, the Respondent's assertions were denied. In summary, it was said that: all qualifying tenants who were required to be served had been served (in certain cases qualifying tenants were members of one of the RTM companies at the relevant time and were therefore not required to be served with a notice inviting participation) and; an area identified by the Respondent was not in fact a flat for the purposes of the 2002 Act and accordingly no notice was required to be served in respect of that area.

35. The tribunal was therefore left to determine a question of fact.

36. Curiously, however, as the hearing approached, neither side had submitted any factual evidence on this issue. Then, on the afternoon of 27 January 2022 (the Thursday before the hearing the following Tuesday), the Applicants' solicitors emailed the tribunal and the Respondent's solicitors with a witness statement from John Hemmingway dated the same day, dealing with the above factual issues. At the hearing, Mr Loveday formally sought to adduce the evidence and confirmed that Mr Hemmingway would be available for cross examination if necessary. The application was strongly opposed by the Respondent. The Respondent did, however, concede that if the tribunal allowed the evidence to be admitted, the Respondent could not offer any positive case in response with the result that inevitably, the Respondent's objections under this issue would fail.

37. In terms of how the parties reached this point, it is necessarily to have regard to the history of these proceedings.

38. Directions dated 22 June 2021 were issued following a case management hearing at which the parties were represented (although in neither case by the counsel who appeared at the final hearing).

39. The Directions specifically record at paragraph G that:

> "*It was agreed with both parties that, at this stage, there did not appear to be any requirement for any factual or expert evidence because the issues raised in this case appeared to be purely legal ones*."

40. Accordingly, no direction was given for the provision of witness evidence. This is not to criticise the representatives who appeared at that hearing. As was pointed out to the tribunal, it was not until the Respondent's statement of case, dated 20 July 2021, that it was clear to the parties precisely what was in issue.

41. It was, however, apparent following the Respondent's statement of case in July 2021, and certainly the Applicants' Reply dated 12 August 2021, that this question of fact was live. Both statements of case contained a statement of truth. However, neither party provided witness evidence nor, to the extent that it was necessary, sought permission to adduce witness evidence, until shortly before the hearing as noted above.

42. In determining whether to admit the evidence, Mr Bates submitted that it was necessary for the tribunal to apply the *Denton* test. He noted that the Applicants had waited 163 days since the service of their Reply to seek permission to adduce witness evidence to substantiate the assertions in their statement of case and that on any view this was a serious breach. He also noted that no real explanation for this failure had been provided. In the Respondent's submission, this was an ambush and the Respondent did not have time to investigate whether it could respond to any of the points raised. No application was made for an adjournment or for permission to adduce rebuttal evidence. Rather, in Mr Bates's submission, the witness statement should simply be kept out.

43. In Mr Loveday's submission, the evidence was highly probative, going directly to the issues between the parties. He also submitted that there was no prejudice because the Applicants had put their factual case clearly

in their Reply. In this regard, he also noted that the Respondent could have investigated the matter and had not put in any evidence to contradict the Applicants' assertions.

44. Further, Mr Loveday rejected the assertion that the *Denton* test was applicable in the circumstances. In his submission, there is no sanction from which relief is required. Further, he submitted that, unlike the CPR, there is nothing in the 2013 Rules which restricts evidence. Under the 2013 Rules, the tribunal has general case management powers, but the rules about witness evidence are relatively brief. By rule 18(1), the tribunal may give directions as to:

> "(f) any limits on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;
>
> (g) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given (i) orally at the hearing or (ii) by written submissions or witness statement …"

In the present case, there has been no restriction on witness evidence – indeed issues of fact only arose following the parties' statements of case. Accordingly, the Applicants' position was they were simply asking to admit a document – the witness statement – in accordance with the tribunal's general case management powers under rule 6. The Applicants' fallback position was that the tribunal could admit the statement under rule 8 in any event.

45. After adjourning to consider the parties' submissions, the tribunal granted permission to adduce the witness statement. While the application was made very late, the evidence was highly relevant to the issue in question. Also, although this was the first occasion that we had received actual evidence on this subject, the witness statement did not raise any new issues which had not been pleaded. Rather, it sought to confirm what was in the Applicants' statement of case. Further, we considered that it would not be in the interests of justice to exclude the only factual evidence before us and that this would not lead to the case being dealt with with fairly and justly. In reaching this decision, we also note that the Respondent did not seek permission to adduce rebuttal evidence, whether by requiring an adjournment or otherwise.

46. We do not agree with the Respondent's submission that reaching such decision necessitates an application of the *Denton* principles. On the facts of the case, there was no sanction that had been imposed from which relief was required. Instead, we consider this to be a question of the tribunal's discretion in accordance with our powers under rule 6 and/or rule 8, having regard to the overriding objective as set out above.

47. If we are wrong and *Denton* is applicable, then applying those principles we nevertheless reach the same conclusion. With regard to limb (1), we would accept that any failure to file witness evidence in a timely manner is serious. Similarly, with regard to limb (2), we agree with the Respondent that there is no clear explanation as to why permission was not sought sooner, at least once statements of case had been exchanged. Nevertheless, limb (3) provides that we must consider all the circumstances of the case. For the reasons given above, we consider that it is in the interests of justice that the statement be admitted and moreover, conclude that this outweighs the seriousness of the breach and absence of a satisfactory explanation.

48. As set out above, by admitting the witness statement and on the basis that the evidence is unchallenged, we therefore find in favour of the Applicants on this issue.

Conclusion and decision of the tribunal

49. For the reasons set out above, we find in favour of the Applicants on the two issues that we have been asked to determine. Accordingly, the Tribunal determines that the Applicants were on the relevant date entitled to acquire the right to manage the premises pursuant to section 84(5)(a) of the 2002 Act.

50. Therefore, in accordance with section 90(4), within three months after this determination becomes final the Applicants will acquire the right to manage these premises. According to section 84(7):

> "(7) A determination on an application under subsection (3) becomes final—

(a) if not appealed against, at the end of the period for bringing an appeal, or

(b) if appealed against, at the time when the appeal (or any further appeal) is disposed of."

Name: Judge Sheftel **Date:** 2 March 2022

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),