359

HM COURTS AND TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Application relating to no fault Right to Manage under Chapter 1 of the Commonhold and Leasehold Reform Act 2002 ("the Act")

Case number	**BIR/00CN/LRM/2012/0006**
Property	**Flats 1 – 12 The Willows, Walsall Road, Four Oaks, Sutton Coldfield B74 4QJ**
Applicant	**The Willows (Four Oaks) RTM Company Limited**
Applicant's representative	**Barclay Property Services**
Respondent	**Sinclair Gardens Investments (Kensington) Limited**
Respondent's representative	**P Chevalier & Co, Solicitors**
Date of inspection	**7 March 2013**
Tribunal	**Mr C J Goodall, LLB, MBA Chairman** **Mr S Berg FRICS**
Date decision issued	7 MAY 2013

Background

1. The Willows (Four Oaks) RTM Company Limited ("the Applicant") has served a notice upon Sinclair Gardens Investments (Kensington) Limited ("the Respondent") claiming to acquire the right to manage Flats 1 – 12 The Willows, Walsall Road, Four Oaks, Sutton Coldfield B74 4QJ ("the Property").

2. The notice is dated 10 September 2012. On 3 October 2012, the Respondent served a counter-notice claiming that the Applicant is not entitled to acquire the right to manage the Property.

3. On 15 November 2012, the Applicant applied to the Leasehold Valuation Tribunal for a determination that on the relevant date the Applicant was entitled to acquire the right to manage.

4. On 7 March 2013, the Tribunal inspected the Property and then considered the application. Both parties had consented to a determination without a hearing. The Respondent had made detailed submissions in a statement dated 6 January 2013. The Applicant responded to those submissions in a statement dated 7 February 2013. The Respondent made a further statement in reply dated 13 February 2013. As a result of its initial deliberations, the Tribunal requested further submissions from the parties in a letter dated 25 March 2013. The Respondent made further submissions dated 2 April 2013, and the Applicant made further submissions dated 4 April 2013. This decision is the outcome of the application by the Applicant, the Tribunal having considered the documentation listed.

The Inspection

5. None of the parties or their representatives attended the inspection. The building at the Willows is an "H" shaped block built of brick and which contains 12 flats. It is set slightly to the left hand side (viewed from the road) of an oblong site with road access from Walsall Road. Car access is via a driveway, laid to tarmac, to the right hand side of the site, which leads to a row of 12 garages at the rear of the site. According to the sample lease supplied to the Tribunal, each flat is let with one garage, so the Tribunal assumes that the 12 garages belong to the 12 flat owners. The residential building has lawn and some trees and shrubbery around it. The driveway at the site also provides access to some garages on an adjoining site.

6. Apart from what is likely to be a right of way along the driveway for access to garages on adjoining property, the whole site is a separate, discrete, self contained development of 12 flats with garages and garden area.

The Issues

7. By the time of the Respondent's second statement there were three remaining reasons that the Respondent claimed prevented the right to manage from being acquired:

a. That the Applicant had failed to comply with section 80(2) of the Act in that it had failed to supply reasons as to why the Property qualifies as "premises" falling within section 72(1)(a) of the Act

b. That the objects of the Applicant company had failed to define the premises properly so that the Applicant is not a properly constituted RTM company under section 73(2)(b) of the Act

c. That the claim notice under section 79 of the Act is defective in that it failed to state the full name of each person who is both a qualifying tenant of a flat contained in the premises and a member of the RTM company, contrary to section 80(3) of the Act

The Right to Manage scheme

8. By way of background, the Act sets up what is known as a "no fault" right for residents of flats to acquire the right to manage the property in which their flats are situated. The residents must apply for this right via a special type of company known as an RTM company. It is a company limited by guarantee and the company constitution is prescribed by regulations. The flat owners who form the RTM company must then serve notice on all the other flat owners in the building which they are seeking to manage, which is know as a notice inviting participation. If more than half of the tenants in the block join the RTM company, it may then apply to the landlord for the right to manage by submitting a claim notice (section 79(1) of the Act). The claim notice should be on a specific form which must contain specific information required by section 80 of the Act and by the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 ("the Regulations").

The arguments on the three issues raised and the Tribunal's determination of them

Issue 7a – the definition of premises

9. Section 80(2) of the Act requires the claim notice to:

"specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies".

10. Section 72(1) and (2) says:

"(1) This Chapter applies to premises if-

(a) they consist of a self-contained building or part of a building, with or without appurtenant property,
(b) [not relevant to this issue]
(c) [not relevant to this issue]

(2) A building is a self contained building if it is structurally detached."

11. Sub-sections (3) and (4) of section 72 assist with identifying when a part of a building may qualify under section 72(1)(a), but they do not apply here as the Applicant is applying for the right to manage the whole of the Property, which is a self contained building falling within the terms of section 72(2).

12. The claim notice states:

"1. ...The Company...claims to acquire the right to manage **Flats 1-12 The Willows, Walsall Road, Four Oaks, Sutton Coldfireld, B74 4QJ** ("the premises")

2. The Company claims that the premises are ones to which Chapter 1 of the 2002 Act applies on the grounds that

- **The Premises are self contained**
- ..."

13. The Respondent puts its argument as follows:

"4.1 The Notice of Claim must have the contents set out in Section 80. It must set out why the RTM can be acquired over the premises. It must supply reasons as to why the premises are "premises" falling within Section 72 of the Act. Materially it must explain whether the "premises" claimed include appurtenant property and whether they are a building or part of a building (section 72(1)(a)). Note 2 of the prescribed form refers to these provisions as being the ones that have to be satisfied in the prescribed notice which is set out in the RTM Regulations.

4.2 Section 80(2) requires the Claim Notice not only to specify the premises **but also** to contain a statement of the grounds on which it is claimed they are premises to which the Chapter applies. The mandatory grounds in Section 72(1) are that **premises** consist of a self-contained building or part of a Building with or without appurtenant property.

4.3 The grounds must therefore either specify that the premises are a self-contained building or part of a building **with** appurtenant property or a self-contained building or part of a building **without** appurtenant property; the grounds specified in the Claim Notice do not state whether the premises have any appurtenant property. **Indeed the grounds do not even mention Appurtenant property.**

4.4 – 4.6 [contains a discussion of the Ariadne case, on which see below]

4.7 To **solely** refer to "the premises being self-contained" does not specify whether the premises are either a building or part of a building. It is important that those receiving the Claim Notice are informed as to whether the building is part of a building since a part of a building only qualifies if the conditions in Section 72(3) are satisfied.

4.8 If there is appurtenant property it will be included in the right to manage. It is therefore important that those receiving the Claim Notice are informed as to whether the premises have Appurtenant property.

4.9 The Claim Notice therefore does not comply with Section 80(2). This is an entire omission, and not an inaccuracy. In the absence of compliance with Section 80(2), the Claim Notice does not evidence that the Company has discharged its burden of proof that the premises comply with Section 72.

14. In the view of the Tribunal, the Respondent's argument claims too much for section 80(2). That subsection requires two elements. The first is to specify the premises. In Schedule 2 of the Regulations, the prescribed form states that the "name of premises to which this notice relates" should be given. The Tribunal considers that in giving the full address of the premises in para 1 of its claim notice the Applicant has specified with sufficient clarity which premises the application relates to, and so it has complied with the first element of section 80(2).

15. The second element of section 80(2) is that the Applicant must state the grounds on which it is claimed these premises are premises to which the RTM provisions of the Act apply. The Tribunal agrees that this requires a statement of how section 72(1) applies. There is no issue in this case about compliance with section 72(1)(b) and (c). It is section 72(1)(a) that is at issue.

16. The Tribunal considers that this second element of section 80(2) requires the Applicant to show that the premises fall within the overall scope of section 72(1)(a) rather than outside it. It does not require the Applicant to explain which of the possible options contained in section 72(1)(a) are engaged. All the Applicant has to do is show that the premises are either a self-contained building, or part of a building which qualifies according to the tests in section 72(3) and (4), not which one of these options is the correct one in the particular case. Either of these qualify, whether they have appurtenant property or not. Note 2 to the Prescribed Form in the Regulations says "The relevant provisions are contained in section 72 of the 2002 Act (premises to which Chapter 1 applies). The company is advised to consider, in particular, Schedule 6 to the 2002 Act (premises excepted from Chapter 1)." This note supports the understanding of this Tribunal that the focus is on establishing that the premises fall within section 72 and not outside it.

17. The Applicant's statement is that "the Premises are self contained". It is picking up the wording which is the first of the options within section 72(1)(a). It seems clear to the Tribunal this means that the premises are a self-contained building (as the address of the premises clearly refers to a building).

18. The Tribunal also cannot ignore, but is not reliant upon, the fact that the premises patently are a self-contained building upon inspection, and that the Respondent is the owner of the premises and therefore no stranger to them.

19. The Respondent also challenges the absence of any reference in the claim notice to whether the premises include appurtenant property or not.

20. The Applicant, in its response to the Respondent's first statement, has referred to a part of paragraph 14 from the Upper Tribunal judgement (the President, George Bartlett QC presiding) in the case of Gala Unity Limited v Ariadne Road RTM Company Ltd (LRX/17/2010). The whole of that paragraph reads:

"14. Section 72(1)(a) was drafted with such an economy of wording as to make its interpretation not entirely clear. The problem lies with the words after the comma, "with or without appurtenant property". Do these words mean that if the self-contained building has appurtenant property "the premises" for the purposes of the Act consist of the building plus such appurtenant property as the building may have? Or does it mean that if the building has appurtenant property "the premises" can either consist of the building plus the appurtenant property or the building alone, leaving it to the claim notice to specify under section 80(2) which of these, for the purposes of the claim, it is? I think it must be the first of these, so that the effect of a valid notice is to extend the right to manage to any property appurtenant to the building or part of a building. It would be unsatisfactory if a claim notice had to specify whether or not it was made in respect of appurtenant property. The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 do not require this, not does the form in Schedule 2 of the Regulations provide for any more than a statement of the name of the premises to which the notice relates."

21. The Property clearly does have appurtenant property. It is set in gardens, which the tenants of the flats have the right to use (see Second Schedule para (v) of the sample lease). It has the garages at the rear. The effect of the notice of claim, adopting the first interpretation of the section 72(1)(a) referred to in the above quotation, is that the right to manage applies to the building and this appurtenant property which goes with it. The Respondent cannot have had any doubt as to which building and appurtenant property the Applicant is seeking the right to manage.

22. The Tribunal is satisfied that the contents of the claim notice satisfy section 80(2) for the reasons set out in paragraphs 14 to 21 above, and the Respondent's first challenge to the claim notice fails.

Issue 7b - The objects fail to define the premises properly

23. Section 73(2)(b) of the Act requires that the objects clause of the Applicant must be the acquisition and exercise of the right to manage the premises.

24. The objects clause of the Applicants is:

"The objects for which the company is established are to acquire and exercise in accordance with the 2002 Act the right to manage the Premises."

25. Premises are defined as:

"Flats 1 to 12 (inclusive) The Willows, Walsall Road, Sutton Coldfield, West Midlands B74 4QJ."

26. The Respondent's argument is that the objects clause only allows the Applicant to manage the building and not appurtenant property as that appurtenant property is not separately identified within the definition of premises.

27. Bearing in mind the Tribunal's conclusions above to the effect that the right to manage specified premises extends the right to manage those premises to any property appurtenant to those premises without this having to be separately spelled out, the Tribunal considers that this point has no merit. The articles of the applicant, in the opinion of the Tribunal, comply with section 73(2)(b).

Issue 7c – the claim notice is defective contrary to section 80(3)

28. Section 80(3) says:

"It [the claim notice] 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.

29. It is accepted by the Applicant that an error was made in the Claim Notice under section 79(1). The error is that in paragraph 3 and Part 1 of the Schedule to the notice, which together are intended to comply with section 80(3) the names of the tenants of flat 5 are given as "Stephen Paul Butler and Columba Maria Butler".

30. In fact, whilst Mrs Butler was a prime mover in setting up the Applicant company and is indeed a member of it, Mr Butler was not at the time of the notice a member. He (and she) are the joint tenants of Flat 5. So Mr Butler was a qualifying tenant, but he was not also a member of the Applicant RTM company at the time of the claim notice.

31. The parties describe this error in slightly different ways. In its submission dated 7 February 2013 the Applicant describes the error as "the inadvertent omission of Stephen Paul Butler from the Register of Members". It its submission, the Respondent says the claim notice "names Stephen Paul Butler as a member of the company whereas according to the register of members this is incorrect". Whether it is the register of members that incorrectly omits Mr Butler, or the Claim Notice which incorrectly includes him, there is clearly an error.

32. The Applicant's statement dated 7 February 2013 contains a letter from Mr Butler to the Applicant's representative dated 1 Feb 2013 in which he says:

"I write to confirm that I have, at all times, been aware of the progress of this Right to Manage application and I am anxious that the right is acquired as quickly as possible. It was my wife and I who instigated this process when we approached you in May 2012 to ask for your assistance.

Only my wife has taken the position of director of the company and played an active role in the proceedings as I frequently work away from home during the week."

33. There is no evidence suggesting that Mr Butler ever applied to become a member of the Applicant company in this letter, and there is no reference to him being a member of the company on the Register of Members supplied to the Tribunal. The Tribunal therefore concludes that the Respondent's version of the error is the correct version on the evidence available. This is not so much an inadvertent omission of Mr Butler from the Register of Members as a failure to apply to become a member. The error is therefore that Mr Butler was named as a member of the company on the claim notice when in fact he was not a member.

34. The Tribunal has to decide whether this error is fatal to the claim. Generally, a failure to provide information required by section 80 of the act is fatal. The position is that section 80 has to be complied with for the claim notice to be a valid notice.

35. There are two possible arguments that might be advanced however to save the claim. The first is to invoke the protection of section 81(1) of the Act. The second is that the Tribunal might be entitled to waive the error on the grounds that its overriding obligation is to do what is just in all the circumstances, and as the error caused no prejudice to the Respondent, there is a right for the Tribunal to waive the error.

36. In relation to the first of these arguments, section 81(1) of the Act provides:

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

37. However, the authorities suggest that "inaccuracy" in section 81(1) should be given a narrow meaning and only cover matters such as obvious typing errors in the claim notice, where it would be facetious for the landlord to argue the notice was invalid as a result.

38. The Applicant has now conceded that it cannot claim the protection of section 81(1), and the Tribunal therefore finds that this provision cannot prevent the claim notice from being invalid.

39. So far as the second ground for waiving the error is concerned, the Applicant has cited an LVT case called *The Zenith RTM Company Ltd v Sinclair Gardens Investments (Kensington) Ltd (BIR/00FN/LRM/2011/0003)* in support of its argument that lack of prejudice suffered by the Respondent can result in the Tribunal waiving the error. In this decision the LVT held that the RTM company was entitled to acquire the right to manage despite errors in serving notices served upon qualifying tenants inviting them to participate in the right to manage company, under section 78(2) of the Act. The basis of that LVT's decision was the Court of Appeal decision in *R v Immigration Appeal Tribunal ex parte Jeyeanthan [2000] 1 WLR 354* ("Jeyeanthan").

40. In Jeyeanthan, Lord Woolf, the Master of the Rolls, said:

"Because of what can be the very undesirable consequences of a procedural requirement that is so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity, it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the Tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that Tribunal's task will be to seek to do what is just in all the circumstances: *see Brayhead (Ascot) Ltd v Berkshire County Council* [1964] 2 QB 303, applied by the House of Lords in *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182.

41. Jeyeanthan was applied in *Sinclair Gardens Investments (Kensington) Ltd v Oak Investments RTM Company Ltd (LRX/52/2004)* ("Oak Investments"). This was a Lands Tribunal (as it then was) decision which was about failure to comply with section 79(2) and 79(8) of the Act which require service of an invitation to participate upon every qualifying tenant and service of a copy of the claim notice also upon every qualifying tenant. The President of the Lands Tribunal said:

"In determining the effect of the failure to comply with one or other of those requirements the principal question for the Tribunal will be whether the qualifying tenant has in practice such awareness of the procedures as the statute intended him to have. The LVT considered this question and expressed itself as satisfied that [the qualifying tenant in question] was fully aware of the proceedings and that his omission had been inadvertent. It also concluded that the landlord had not been prejudiced in any way by the failure to serve a notice inviting participation and, given the purpose of the section 79(8) requirement, it was undoubtedly correct to do so."

42. The preceding authorities clarify that the LVT has jurisdiction to consider prejudice in relation to a breach of the procedural requirements of section 78 and 79. The Tribunal has to consider whether this can extend to a breach of section 80. Section 80 seems to the Tribunal to be different in nature from sections 78 and 79. These two sections deal with the giving of notices to various parties at various stages of the process of acquiring the right to manage. Section 80 sets out what a Claim Notice must contain. The word "must" appears at the beginning of every sub-section. In terms of the debate around whether provisions are directory or mandatory, these provisions are clearly mandatory.

43. The Tribunal's attention has been drawn by the Respondent to three cases where the Upper Tribunal has considered non-compliance with section 80. These are *Moskovitz v 75 Worple Road RTM Company Limited ([2010] UKUT 393)* ("75 Worple Road"), *Assethold Limited v 15 Yonge Park RTM Company Limited ([2011] UKUT 379)* ("15 Yonge Park"), and *Assethold Ltd v Stansfield Road RTM Company Ltd ([2012] UKUT 262)* ("Stansfield Road").

44. In 75 Worple Road, an RTM company made an error in complying with section 80(6) of the Act, which requires the RTM company to specify a date, being not less than one month after the date of the claim notice, by which the recipient of the notice may respond with a counter-

notice. In error, the RTM company specified a date that was one or two days too early. The Upper Tribunal found for the freeholder. It regarded (in paragraph 12) the terms of section 80 to be mandatory requirements. That case concerned the application of section 81(1), which is not in issue in this case, but nowhere in that case is there any reference to the possibility of lack of prejudice coming to the aid of the RTM company.

45. In 15 Yonge Park, contrary to section 80(5), requiring the name and registered office of the RTM company, an incorrect address was given in the claim notice. Paragraph 4 of the judgement of Her Honour Judge Walden-Smith is instructive. She says there:

"The Respondent further concedes that the LVT were wrong to conclude that as there was no evidence of prejudice suffered by the Appellant in connection with the inaccuracy of the address, this avoided any issue with respect to any inaccuracy in the address. There is no balance of prejudice test and, as is properly recognised by the Respondent, the reference to it by the LVT was misconceived.

46. Judge Walden-Smith also states at paragraph 18:

"...section 80 sets out mandatory requirements of what must be included in the claim form. A failure to provide those details would clearly prevent the claim form being valid, otherwise there would be no purpose in the statute providing that those inclusion of those details is a mandatory requirement..."

47. and at paragraph 20:

"In my judgement a failure to provide information required in paragraph 80(2) to 80(8) results in the Claim Notice being invalid".

48. In Stansfield Road, there were two issues relating to compliance with section 80. The first was that an out of date form had been used, and the second was that the form had not been properly signed. The first was considered by the Upper Tribunal (Lands Chamber) to be an "inaccuracy" which was saved by section 81(1). The Upper Tribunal disagreed with the freeholder on the second point and held that the form had been properly signed.

49. In paragraph 14 of Stansfield Road, the President of the Upper Tribunal stated:

"...Under section 81(1) a distinction falls to be drawn between the failure to provide the required particulars and an inaccuracy in the statement of the particulars. A claim notice is saved from invalidity only in the case of the latter..."

50. The approach of the Upper Tribunal to section 80 errors is clear, in the opinion of the Tribunal, from these cases above. Section 80 is mandatory and must be complied with perfectly, save only in respect of narrowly defined inaccuracies which might be saved by section 81(1). The Tribunal considers that there is no basis supported by the authorities brought to the attention of the Tribunal for concluding that the lack of prejudice principle can apply equally to section 80 as to section 78 and 79. Whereas under section 78 and 79 it is

legitimate to consider the purpose of the sections, and whether non compliance with the requirements of causes prejudice, under section 80 it is not.

51. The Tribunal has carefully considered whether the error in this case can be categorised in a different way than the errors in the other cases referred to above. It is distinctive in that the contents of the claim notice do actually contain everything required by section 80(3), as the full name of everyone who is both a qualifying tenant and a member of the RTM company are given, which is what is required by Section 80(3). But one additional name is also added, of someone who is a qualifying tenant, but is not a member of the RTM company. Superficially, perhaps all the information required by section 80(3) has been provided. In the end the Tribunal has rejected this argument. The plain fact is that the information is incorrect, and the Tribunal has concluded that it was therefore not in full compliance with section 80(3). The consequence is that the claim notice is not a valid notice to acquire the right to manage the Property.

52. The conclusion reached by the Tribunal does not require consideration of whether the Respondent has suffered prejudice. The Tribunal would have found, however, that no prejudice had been suffered by the Respondent by the error in the claim notice. The Respondent needs information from the claim notice to check compliance with the requirements of Chapter 1 of Part 2 of the Act. However, as Mrs Butler was both a qualifying tenant (of which there can only be one per flat) and a member of the RTM company (for the purposes of, say, compliance with section 79(5)), the Tribunal can see no reason why the inaccurate information actually affects the Respondent. The only reason that it would be prejudiced offered by the Respondent (at paragraph 3.4 of its statement dated 13 February 2013), namely that it needs to know the names of the members for the purposes of pursuing its costs remedies contained in section 88(4) of the Act, is rejected by the Tribunal. The Applicant, correctly in the opinion of the Tribunal, identifies that the source of knowledge of the membership of the company, if that remedy is to be pursued, is the publicly available Register of Members rather than the claim notice.

Summary of determination

53. The Tribunal:

    a. concludes that the claim notice is valid save in respect of its compliance with section 80(3) of the Act;

    b. finds that the claim notice failed to comply with the requirements of section 80(3) in that the identification of the full names of each person who is both a qualifying tenant of a flat contained in the premises and a member of the Applicant company was given incorrectly;

    c. concludes that there is no legal basis upon which a failure to comply with section 80 of the Act can be saved by waiver of the breach because the breach causes no prejudice to the Respondent;

d. determines therefore that the application for a determination that the Applicant is entitled to acquire the right to manage the Property under the Commonhold and Leasehold Reform Act 2002 is refused.

Date - 7 MAY 2013

C. Goodall

C J Goodall
Chair
Leasehold Valuation Tribunal