617

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference : **MAN/00EM/LRM/2017/0005-7**

Properties : **Flats 2-24 (Even) Fairfield Drive North Seaton Ashington Northumberland NE63 9SL**
Flats 25-47 (Odd) Woodlands Road North Seaton Ashington Northumberland NE63 9TS
Flats 1-23 (Odd) Woodlands Road North Seaton Ashington Northumberland NE63 9TS

Applicants : **Flats 2-24 (Even) Fairfield Drive RTM Company Ltd**
Flats 25-47 (Odd) Woodlands Road RTM Company Ltd
Flats 1-23 (Odd) Woodlands Road RTM Company Ltd

Respondent : **Castleview Securities Ltd**

Type of Application : **Commonhold and Leasehold Reform Act 2002 – section 84(3) (the "Act")**

Tribunal Members : **Judge W L Brown**
Mr I R Harris FRICS

Date of Decision : **11 December 2017**

DECISION

Decision

On the Relevant Date (27 April 2017) the Applicants were entitled to acquire the right to manage the Properties.

Background

1. These are three linked applications for the Right to Manage ("RTM") under Chapter I of the Act. They relate to adjoining blocks of flats in North Seaton, Ashington, Northumberland. The premises contain a total of 36 residential flats in three self-contained blocks and each block contains 12 flats. The Applicants are the three Right to Manage companies. The Respondent was registered at Land Registry on 19 January 2016 as proprietor of the freehold of each block.

2. Within the blocks, each flat is subject to an individual head lease dated 16 May 2002 for a term of 125 years from 25 March 2002. The head leases are vested in Mr Ramesh Dewan and his wife Zalina Dewan. Each flat is then subject to an individual occupational underlease dated 27 April 2012 for a term of 125 years (less 30 days) from 25 March 2002. The Underleases are vested in Mr Dewan alone.

3. On 5 April 2017, the RTM companies were registered at Companies House. Mr Dewan was the sole original subscriber to each of the three RTM companies. His name and address were entered into the register of members of each RTM company.

4. On 27 April 2017 ("the Relevant Date") the Applicants gave claim notices under section 79 of the Act to the Respondent. The premises specified in the claim notices were Flats 2-24 (Even) Fairfield Drive, Flats 25-47 (Odd) Woodlands Road and Flats 1-23 (Odd) Woodlands Road, all of North Seaton Ashington Northumberland ("the Premises").

5. The Respondent served counter-notices on 1 June 2017 alleging that the Applicants were not entitled to acquire the right to manage the Properties on the Relevant Date, relying on three grounds contained in ss. 79(3), 79(6) and s.79(8) of the Act. The latter two objections were withdrawn on 17 November 2017.

6. On 14 June 2017 additional entries were made in the register of members for each RTM company to record Mr Dewan 12 times. There is no provision in the register to identify the flat for which the entry is being made.

7. By separate applications dated 25 July 2017 (the "Applications") each Applicant made application to the Tribunal under section 84(3) of the Act for a determination that each Applicant was on the Relevant Date entitled to acquire the right to manage their respective parts of the Properties.

8. The Tribunal made directions on 22 August 2017 and a hearing was held at SSCS Manorview House, Manors, Newcastle upon Tyne on 24 November 2017. The Applicants were represented by Mr Mark Loveday of Counsel and the Respondent by Mr Richard Granby of Counsel. Each party presented a bundle of documents. The Tribunal did not inspect the Properties.

The Law

9. A right to manage (RTM) company is entitled to acquire the right to manage if:

   • the premises in question satisfy the requirements of section 72 of the Act;

   • the RTM company is properly constituted (in accordance with section 73);

   • it has given, before making a claim to acquire the right to manage, all necessary notices (under section 78) inviting participation in the process; and

   • it has then given a valid claim notice to each person to whom such a notice is required to be given by section 79.

10. A person who is given a claim notice by an RTM company is entitled to give a counter-notice under section 84 of the Act. The counter-notice may allege that, by reason of a failure to satisfy any of the above conditions, the RTM company is not entitled to acquire the right to manage the premises in question. Service of a counter-notice entitles the RTM company to apply to the Tribunal (under section 84(3) of the Act) for a determination that it was on the relevant date entitled to acquire the right to manage the premises.

11. It is important to note that the right to manage regime established by the Act does not depend upon any finding of fault on the part of the landlord: if the statutory conditions are satisfied then the RTM company is entitled to acquire the right to manage without more. A claim notice given under the Act cannot be successfully challenged for any other reason than for a failure to satisfy one or more of the above conditions. In the matter of the Applications only the requirements of Section 79 of the Act are at issue.

12. Relevant to this case are:

    Section 75 of the Act states:

    "Qualifying tenants

    (1) This section specifies whether there is a qualifying tenant of a flat for the purposes of this Chapter and, if so, who it is.

    (2) Subject as follows, a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease.

    (3) Subsection (2) does not apply where the lease is a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies.

    (4) Subsection (2) does not apply where—

(a) the lease was granted by sub-demise out of a superior lease other than a long lease,

(b) the grant was made in breach of the terms of the superior lease, and

(c) there has been no waiver of the breach by the superior landlord.

(5) No flat has more than one qualifying tenant at any one time; and subsections (6) and (7) apply accordingly.

(6) Where a flat is being let under two or more long leases, a tenant under any of those leases which is superior to that held by another is not the qualifying tenant of the flat.

(7) Where a flat is being let to joint tenants under a long lease, the joint tenants shall (subject to subsection (6)) be regarded as jointly being the qualifying tenant of the flat."

Section 79 of the Act states:

"Notice of claim to acquire right

(1) A claim to acquire the right to manage any premises is made by giving notice of the claim (referred to in this Chapter as a "claim notice"); and in this Chapter the "relevant date", in relation to any claim to acquire the right to manage, means the date on which notice of the claim is given.

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

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

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

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

13. Also relevant to the parties' submissions is Companies Act 2006:

Section 112:

"(1) The subscribers of the company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.

(2) 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."

Section 113:

"(1) Every company must keep a register of its members.

(2) There must be entered in the register –

(a) the names and addresses of the members,

(b) the date on which each person was registered as a member, and

(c) the date at which any person ceased to be a member."

Submissions

14. The Applicants asked the Tribunal to view the Applications as arising from "highly technical" objections and Mr Loveday quoted Lewison LJ in Elim Court RTM Co Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89; [2017] 3 W.L.R. 876 at para 42 who described such matters as a "....trench warfare over the Right to Manage....". Mr Granby indicated that whether there had been compliance with the Act was a fundamental issue, i.e. whether the Applicants were able to undertake the right to manage, which had practical relevance to the Respondent because of the handing over of obligations and any funds it was holding.

15. As the Applicants were largely responding to the Respondent's objection this decision will deal first with the submissions of the Respondent.

The Respondent

16. The Respondent's remaining objection was that Section 79(3) of the Act provides that the claim notice must be given by a RTM company which complies with subsection (4) or (5). The latter was the relevant subsection in these circumstances and the challenge was on two basis:

    (i) The RTM legislation was not ".....intended to provide rights to a single leaseholder to acquire the Right to Management of Premises where such leaseholder was in possession of multiple flats" (its Statement of Case at paragraph numbered 2). Therefore ".....at least two separate qualifying tenants [are] required or a number of same which is not less than one half of the total number of flats....." (its Statement of Case at paragraph numbered 2.) This had not occurred in the position of Mr Dewan, as sole occupational lessee.

    (ii) However, if the Tribunal is satisfied that a single individual can hold multiple memberships of the RTM company it also had to be satisfied that the Applicants had complied with the provisions of their Articles of Association and the Companies Act 2006 in the registration of members. The Applicants had at the relevant date insufficient members in compliance with section 79(5) and/or the Tribunal is unable to assess whether it fulfilled the requirements of that subsection.

17. In support of (i), Mr Granby invited the Tribunal to understand "qualifying tenant" for the purposes of Section 75 of the Act as a personal status. This is supported by Section 79(4). Mr Dewan could not be a qualifying tenant 12 times over – i.e. for each flat of which he was the occupational leaseholder. This followed into the Model Articles of the RTM companies, where a person is a member of the company only once.

18. References in Section 79 to more than "...two qualifying tenants...." and ".....number of qualifying tenants....." indicate a requirement for at least two separate individuals.

19. Mr Granby went on to submit that if the Tribunal considered that there was ambiguity in interpretation of what is meant by "qualifying tenant", to aid the Tribunal's interpretation of Section 75(2) the Tribunal was referred to the consultation document which preceded the 2002 Act – the Commonhold and Leasehold Reform Draft Bill and Consultation Paper (August 2000) (Cm 4843) (the "Consultation Paper"). He further drew to the attention of the Tribunal the decision of the Court of Appeal in Triplerose Ltd v Ninety Broomfield Road RTM Co Ltd and related matters [2015] EWCA Civ 282 concerning interpretation of "the premises" in Chapter 1 Part 2 of the Act and its decision that it is not open to an RTM company to acquire the right to manage more than one block on an estate.

20. Mr Granby argued that the Act was intended to benefit the "little man", where people come together to take on management and that RTM was a stepping stone to enfranchisement. RTM was exercisable by a group of tenants, it was not intended that there should be "one flat, one vote", or that the effect could be to transfer the management function from one body to another single body (or person sitting behind the RTM company).

21. In the alternative, on point (ii), the RTM company is a company limited by guarantee, so there is no issue of shares to members to signify membership. It is only by the entry upon the register of members that membership of the company is completed.

22. On the relevant date the evidence of the register of members for each Applicant was that there was only a single member of each company. The single entry for Mr Dewan in each register is contrary to s.112 of the Companies Act 2006. Therefore even if the leaseholder of each flat in each block separately qualifies and is entitled to membership of the company then the company register of members should record membership for each flat, otherwise the requirement of subsections 75(3) and (5) of the Act cannot be fulfilled.

23. The Companies Act 2006 defines who is a member by reference to subscribers appearing on the register of members and those members who subsequently are so registered. The registers were only updated on 14 June 2017, to record for each RTM company Mr Dewan 12 times, after the relevant date. The records as at the relevant date were deficient; the RTM companies had insufficient members. The Respondent argues there was therefore an insufficient number of members to satisfy s.79(3).

The Applicants

24. The Applicants relied upon Mr Dewan as being the appropriate "qualifying tenant" of each flat in each of the three blocks, thereby fulfilling subsections 79(3) & (5) of the Act. He had joined in the claim notice, so a majority of qualifying tenants have exercised the Right to Manage. He also was a member of each of the three RTM companies.

25. On the interpretation point of the meaning of Section79(5) Mr Loveday stated that the secondary material did not show intention behind Chapter I of the 2002 Act such that it does not apply where there is a single leaseholder with multiple flats.

26. Section79(5) must be read with s.75, which defines the "qualifying tenant". The operative words are s.75(2), which state that "a person is the qualifying tenant of a flat if he is a tenant of the flat under a long lease". The legal status of each qualifying tenancy is separate, individual and distinct and the mere fact they happen to vest all in Mr Dewan personally, does not mean the leases merge. Section 79(5) does not deal with the personality involved. It deals with the qualifying tenant (and the "number of flats"). Mr Dewan is the "qualifying tenant" of each of the 36 separate flats, and he therefore meets the test in Section 79(5). There are 12 qualifying tenants in each block – they just happen to be the same person.

27. The draftsman of the Act could have (but did not) limit the category of tenants that qualified to exercise the RTM in some way. Subsections 75(3)-(7) qualify the general words in s.75(2) in various circumstances, such as where there are two or more joint tenants of one flat. None limit the definition in ss75(2) in the way suggested by the Respondent.

28. Mr Loveday contrasted Section 75 with the equivalent provision relating to collective enfranchisement at ss5(5) of the Leasehold Reform Housing and Urban Development Act 1993. That does expressly prohibit one person being the qualifying tenant of more than 2 flats, but a similar provision was not included in the Act.

29. The Respondent has not explained how its formulation would work in practice. Does it mean Mr Dewan is a qualifying tenant who may not be a member? Or that he is not a qualifying tenant?

30. The Respondent's argument is inconsistent with the mandatory RTM articles of association imposed by the RTM Companies (Model Articles) (England) Regulations 2009. There is nothing in Art.26 to prevent lessees with multiple leases from becoming members, or anything in Art.27 which requires persons who subsequently acquire all the leases in a block to cease to be a member. There is nothing in Art.33 to say that such persons cannot vote at General Meetings.

31. With regard to the register of members of each RTM company the additions made on 14 June 2017 were to protect the position of the Applicants by making 11 further entries for Mr Dewan in the registers. The Applicants have served further RTM notices, which are not the subject of the Applications.

32. On the second point of objection of the Respondent (see paragraph 16 point (ii)) this objection is not made in the counter-notices. Paragraph 1 of each counter-notice refers to ss79(3) in the context of subsection 79(5) alone. It is not open to the Respondent also to object on the ground of s.112 and 113 of the Companies Act 2006.

33. The Applicants state that there is no requirement in s.113 of the 2006 Act for "each membership granted" to be entered in the register. All it says is that the register should include the names and addresses of the members, the date on which each person was registered as a member and the date at which any person ceased to be a member. The Applicants have complied with the requirement.

34. There is no concept within the scheme of the 2002 or 2006 Acts of a person having multiple memberships of a RTM company. Section 113 of the 2006 Act. and Articles 33(2)-(4) of the standard RTM Articles identify voting rights being set by the number of flats or residential units held by the tenant, not by the number of "memberships" a person might have. Membership is separate and distinct from ownership of a lease -Arts.26(3), Art.27(4) and Art.26(2).

35. There is no express (or implied) requirement in the 2006 Act for the register of members to list the "flats against which membership has been entered" as suggested by the Respondent or to give any other information.

36. Mr Loveday indicated that a third issue arises if the Tribunal finds that the Applicants have not complied with the Companies Act 2006, which is whether any such deficiency is fatal to the Right to Manage in this case. In the Elim case, referred to at paragraph 14, the Court of Appeal determined that the Right to Manage fell within the second limb of Natt v Osman [2015] 1 WLR 1536 and that the test is one of actual (not substantial) compliance with statute. Lewison LJ described the principles as follows at para 52:

"Where the notice or the information which is missing from it is of critical importance in the context of the scheme the non-compliance with the statue will generally result in the invalidity of the notice. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely ancillary, the notice may be held to have been valid. One useful pointer is whether the information required is particularised in the statue as opposed to being required by general provisions of the statue. In the latter case the information is also likely to be viewed as of secondary importance. Another is whether the information is required by the statute itself or by subordinate legislation. In the latter case the information is likely to be viewed as of secondary importance. In this connection it must not be forgotten that while the substantive provisions of a bill may be debated clause by clause, a draft statutory instrument is not subject to any detailed Parliamentary scrutiny. It is either accepted or rejected as a whole. A third is whether the server of the notice may immediately serve another one if the impugned notice is invalid."

At para 56, Lewison LJ went on to say:

"However, it does not follow that if a case falls within the second category every defect in a notice or in the procedure, however, trivial, invalidates the notice. As Sir Terence Etherton C pointed out even if there is no principle of substantial compliance the court must nevertheless decide as a matter of statutory construction whether the notice is "wholly valid or wholly invalid". In considering the question of validity, although the court should not inquire into the question whether prejudice had been caused on the particular facts of the actual case (Osman v Natt, at para 32) that does not mean that prejudice in a generic sense is irrelevant. 7 Strathray Gardens Ltd v Pointstar Shipping & Finance Ltd [2005] HLR 20, is an example of a case falling within the second category where a failure to comply with the literal requirements of Regulations was not fatal to the validity of a counternotice".

Mr Loveday argued in his written Opening Submissions document that the application of these principles were:

"a. Having a register in proper form is not in any way "critical" to the Right to Manage. If all the members are listed, and they are qualifying tenants, it is pointless exercise simple repeating the same entries numerous times. It does not provide anyone with any more information than if the register has the information only once. This is a clear from the register entries in this case.

b. The requirement to list every member separately is not "particularised" in the legislation. It is therefore of "secondary importance".

c. The information is not required "by the statue itself", namely the 2002 Act.

d. The server of the notice may immediately serve another one if the impugned notice is invalid. This has in fact happened here.

e. Prejudice "in a generic sense" is non-existent. If a person has a sufficient number of qualifying flats to exercise the Right to Manage, what prejudice is caused to a landlord by the register not showing proper entries? After all, the landlord has no rights to see the register before the notice is given."

Mr Loveday also quoted from Assethold Ltd v 14 Stansfield Road RTM Co Ltd [2012] UKUT 262 (LC); [2012] 43 EG 115 (C.S), in which the Upper Tribunal Stated:

"21. The appellant's case, therefore has always been, not that the RTM company does not comply with section 79(5), but that the register of members that was supplied was not valid and therefore the company had failed to show that it did comply with this provision. However, despite the LVT having said that the appellant had failed to specify the defect that it said invalidated the claim, its statement of case still fails to do this. It does not even hint at any particular defect. The appeal must necessarily fail for this reason, since the LVT's decision has not been shown to be wrong. ***In any event 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.***" (emphasis added by Mr Loveday).

The Tribunal's Reasons and Conclusion

37. The Tribunal rejected the argument that a "qualifying tenant" in Section 75(2) of the Act confers personal status. It determined that it is a legal status. In reaching this decision the Tribunal had regard to the secondary source material to which it had been referred by counsel, but it was satisfied that the words of the statute was sufficiently plain as to its intention. The Tribunal understood that the aim of Parliament was to permit legal ownership as a leaseholder to be the starting point for eligibility as a qualifying tenant. It did not qualify the status by reference to limit or extent of such ownership in a block of flats.

38. The Respondent has added to the objections appearing in the counter-notices the objection set out at point (ii) in paragraph 16 above. The Tribunal's attention was not drawn to any authority on whether it is permissible or not for a late objection to be allowed. However, taking a pragmatic view the Tribunal proceeded to make a determination on the substance of that objection.

39. On the question of the content of the register of members of each RTM company the Tribunal was persuaded that the requirement of the Section 112 Companies Act 2006 is that each member of a company should be entered into its register of members. As Mr Dewan has legal status as a qualifying tenant for each of the flats of which he is the occupational leaseholder, then he is conferred with the right to membership of the respective RTM company according to the number of flats in which he has such an interest, it is one member, one vote. In consequence, the registers at the relevant date were defective in recording him only once as a member. On the basis that he appeared as a member only once there technically were insufficient members served with the claim notice to fulfil the requirement of Section 79(5) of the Act.

40. However, the Tribunal considered carefully the matter of the effect of the deficiency in compliance. Was the requirement of Section 79(5) of the Act in the circumstances of this case, an "all or nothing"? Or was the failure so trivial on the facts so as not to be fatal? The Tribunal at paragraph 36 has quoted at length from the written submission of Mr Loveday and his extracts from, in particular, the Elim case. The Tribunal is persuaded that Mr Dewan was the only individual whose details could – and should - have appeared in the register of members of the RTM companies. It was not disputed that he had been aware of the claim notices and had been alert to their presentation to the Respondent. The Respondent was objecting only on the basis that Mr Dewan's name and address should have appeared in each register 12 times (albeit without reference to the flat for which he was a member). That failure of recording caused no prejudice in a generic sense. The question is whether the failure was of "critical importance" (per Lewison LJ in the Elim case at paragraph 52). On the facts of this case the failure was not critical to the outcome, as the Respondent has submitted no other reason for objecting than this particular technical one, at out in paragraph 16. Therefore the Tribunal determined that the Applicants were entitled on the Relevant Date (27 April 2017) to acquire the right to manage the Properties.