FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AX/LRM/2020/0009 P**
Property	**:**	**Bramshott Lodge, 18a South Bank, Surbiton, Surrey KT6 6DB**
Applicant	**:**	**Bramshott Lodge RTM Company Ltd**
Representative	**:**	**Canonbury Management**
Respondent	**:**	**Assethold Limited**
Representative	**:**	**Scott Cohen Solicitors Limited**
Type of application	**:**	**Application in relation to the denial of the Right to Manage**
Tribunal member(s)	**:**	**Judge Sheftel**
Date of Decision	**:**	**4 September 2020**

DECISION ON PRELIMINARY ISSUE

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1. This has been a remote determination on the papers which has not been objected to by any of the parties. The form of remote determination was P: Paper Determination. A face to face hearing was not held because it was not sought or practicable and all issues could be determined on the papers.

2. The documents that I was referred to are as follows, the contents of which I have noted:

- The Respondent's email to the tribunal of 8 July 2020, challenging whether a valid application had been made in time. The email

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attached a copy of the Upper Tribunal's decision in *Robert Court RTM Company Limited v The Lough's Property Management Limited* [2019] UKUT 0105 (LC). The email also includes correspondence between the Respondent's solicitors and the tribunal as to when copies of the claim notice and counter-notice had been provided to the tribunal;

- The Applicant's representatives' response of 21 July 2020 with supporting documents, totalling 13 pages;
- Further emails from the Respondent's solicitors dated 6 and 24 August 2020.
- The application notice and supporting documents and previous directions by the tribunal.

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

<u>Background</u>

4. The substantive proceedings concern an application 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 company was entitled to acquire the right to manage premises known as Bramshott Lodge, 18a South Bank, Surbiton, Surrey KT6 6DB ("the premises").

5. By a claim notice dated 27 January 2020, the Applicant gave notice that it intends to acquire the right to manage the premises on 7 June 2020. By counter notice dated 27 February 2020, the Respondent freeholder disputed the claim alleging that the Applicant had failed to establish compliance with section 80(5), 80(8) and 80(9) of the 2002 Act. According to the Applicant's representatives, the counter-notice was sent with a cover letter dated 28 February 2020 and received on 29 February 2020.

6. An application under section 84(3) of the 2002 Act was subsequently made to the tribunal, the circumstances surrounding which are set out in more detail below. Standard directions were initially issued on 3 July 2020.

7. By email to the tribunal dated 8 July 2020, the Respondent's solicitors raised an issue as to whether the tribunal had jurisdiction to hear the application on the basis that a completed application had not been made in time, in accordance with the provisions of the 2002 Act. On 10 July 2020, the tribunal made directions for this to be determined as a preliminary issue.

8. The Applicant provided written submissions in relation to the preliminary issue on 21 July 2020 and the Respondent provided a response on 6 August 2020.

9. Prior to the determination of the preliminary issue but following the reopening of the London Regional office of the tribunal at 10 Alfred Place to a skeleton staff, it became possible to process the post that was sent to the tribunal office during lockdown. As such, the tribunal was able to ascertain that the hard copy application (with attachments) was received by the tribunal on 17 April 2020. The content of what was received was forwarded to the parties, details of which are set out below – the tribunal did not locate a cover letter. In view of this additional information, directions were given allowing the parties the opportunity to make further written submissions if they so wished. The Respondent's solicitors sent a further email on 24 August 2020 (copied to the Applicant's representative). Although the email was sent one working day after the date originally stipulated for further submissions, the tribunal has considered this on the basis that it contained only legal submissions and did not refer to any new authorities. No further submissions have been received on behalf of the Applicant in response to the tribunal's invitation for further directions or the Respondent's solicitors' email of 24 August 2020.

<u>The making of the application</u>

10. As set out in the Applicant's submissions of 21 July 2020, the making of the application has been impacted by the Covid-19 Pandemic.

11. According to the Applicant's representatives:

- the application was originally posted to the tribunal on 16 April 2020, accompanied by the claim notice and counter-notice. The Applicant's representatives' letter states that "*We had issued this by fist class post to the tribunal because in the pre-covid world, this was the due process followed, however, it does appear that the usual process of keeping copies of this document's cover letter has not been possible at the time, probably due to Covid related issues.*"

- The Applicant's representatives chased its progress on 22 and 28 April and on 28 April the tribunal replied stating that it had not received the application and asked for an electronic version.

- An electronic version was sent on 30 April, although could not be signed. On 11 May 2020, the tribunal confirmed that this had been received on 30 April.

- On 20 May 2020, the tribunal wrote again stating "*Thank you for your application, however I have notice that you have not add your name in the statement of truth section and also you have not tick the type of Application in the Annex 1 : List of Application. I have attached your application to this email, please re-send once this has been.*"

- On 21 May 2020, the Applicant's representative replied with a copy of the application form where the tick box is selected showing the application is for the determination of a right to manage claim.

- Following further chasers by the Applicant's representatives, the tribunal wrote on 25 June 2020 stating that "*directions are in preparation for this case. However, I have had a request for copies of the original claim notice and counter notice, as we do not appear to have received these*". Copies of the claim notice and counternotice were sent the following day.

The Respondent's application in relation to jurisdiction

12. The Respondent's solicitors' initial position was to query whether the application before the Tribunal satisfied the minimum requirements of

Section 84(3) of the 2002 Act on the basis that the claim notice and counter notice were not sent to the tribunal with the application emailed on 30 April 2020 (and not sent until 26 June 2020).

13. However, as noted above, following the reopening of the London Regional office of the tribunal at 10 Alfred Place, it became possible to process the post that was sent to the tribunal office during lockdown. As such, the tribunal was able to ascertain that the application was received on 17 April 2020, within the two-month time limit. That application included copies of the claim notice and counter notice.

14. Nevertheless, crucially, so far as the Respondent is now concerned, the Applicant had failed to tick any box in Annex 1 to the application, showing what type of application under the right to manage legislation was being made. Annex 1 is a single page on which are listed six different types of application under Chapter 1 of Part 1 of the 2002 Act. A column adjacent to the list is headed "tick here" and contains one tick-box for each type of application. For each type the relevant section of the Act is specified, the nature of the application is described. The first entry in the list refers to section 84(3), which it explains is "an application for a determination that on the relevant date the RTM Company was entitled to acquire the Right to Manage". The other types of application include: missing or absent landlords; costs; service charges; approvals under long leases; and determinations under paragraph 5(3) of Schedule 6 to the 2002 Act.

15. According to the chronology above, a version of the application with a box ticked indicating what type of application was being made was first supplied to the tribunal on 21 May 2020 in electronic form. For the reasons set out below, in the Respondent's submission, the fact that no box in Annex A was ticked on the initial application (received on 17 April) means that there was no effective application was made in time and that accordingly, the tribunal does not have jurisdiction.

Discussion

16. Section 84(3) of the 2002 Act provides:

> “Where the RTM company has been given one or more counter-notices containing a statement [that the company was not entitled to acquire right to manage], the company may apply to the appropriate tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises.”

17. Section 84(4) provides that “*an application must be made “... not later than the end of the period of two months beginning with the day on which the counter-notice ... was given*”.

18. Insofar as the application had been first sent on 30 April 2020 (the first electronic version sent), this was more than “*the period of two months beginning with the day on which the counter-notice ... was given*” for the purposes of section 84(3) of the 2002 Act and so would have been out of time in any event aside from the issue of the absence of the claim notice and counter-notice. However, as noted above, the tribunal now accepts that the hard copy application notice, received on 17 April 2020, was sent in time. Instead, the issue for the tribunal is whether this was a complete and valid application given that no box was ticked in Annex 1 to the application form to indicate what type of application was being made. As set out above, a ticked application form was only sent on 21 May 2020, which was outside of the 2-month time limit.

19. Before turning to the parties’ submissions, it is also worth noting Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, which provides that:

> “(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—
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> (a) waiving the requirement;
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> (b) requiring the failure to be remedied;
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> (c) exercising its power under rule 9 (striking out a party’s case);
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> (d) exercising its power under paragraph (5) [referring the matter to the Upper Tribunal]; or
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> (e) barring or restricting a party’s participation in the proceedings.
>
> ...”.

20. In the Applicant's representatives' submission, it is requested that if and to the extent that if a valid application was not made timeously, the tribunal should nevertheless exercise its discretion to allow the application to proceed. In the Respondent's submission, however, the Tribunal's power under Rule 8 to remedy is not an open-ended power. Further, the Respondent contends that the power under rule 8 can only arise if the Tribunal has already been given sufficient material to enable the application to be determined.

21. As noted above, the 2002 Act provides only that where a RTM company has been given an opposing counter-notice, the RTM company may apply to the appropriate tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises – and that such application must be made not later than the end of the period of two months beginning with the day on which the counter-notice was given.

22. In support of the submission that no valid application was made on time, the Respondent relies on the decision of the Upper Tribunal in *Robert Court RTM Company Limited v The Lough's Property Management Limited* [2019] UKUT 0105 (LC). In that case, not only did the applicant not attach the claim notice and counter-notice to the application, it also failed to indicate on the application form what sort of application was intended to be made.

23. The Upper Tribunal concluded that a valid application had not been made in time:

> "38. The FTT said that it knew when it received the application form on 1 June that it was an application regarding one of six possible matters in respect of which it has jurisdiction under Chapter 1 of the 2002 Act. That was a reasonable inference, strengthened by the subject line of the covering letter which referred to such an application. Even that inference, however, depends on the assumption that the mistake made by the intended applicant was in failing to tick one of the options in Annex 1, rather than some other error such as using the wrong standard form or seeking to make an application of a type for which the FTT has no jurisdiction.
>
> 39. I nevertheless agree with Ms Madjirska-Mossop's submission that 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.
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> 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.
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> 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.
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> 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).
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> 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.
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> 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."

24. In the Upper Tribunal's determination, the application need not be in a particular form, but as a minimum, it must ask for a determination of entitlement to acquire the right to manage – and 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) of the 2002 Act. Accordingly, the Upper Tribunal found that an effective

application had not been made in time as there was no effective application until option (a) in Annex 1 had been ticked. In so finding, the Upper Tribunal distinguished this omission from failure to provide the supporting documents, which could have been cured under Rule 8.

25. On the facts of the present case, although the claim notice and counter-notice were provided with the application received on 17 April 2020, Annex 1 was left unticked. In the circumstances, there does not appear to be any basis for concluding other than that an effective application had not been made in time as there is nothing in the original application form itself to indicate what type of application is being made, or, as per the Upper Tribunal's decision in *Robert Court*, it did not "ask for a determination of entitlement to acquire the right to manage". Rather, in the tribunal's determination, no complete application was made until 21 May 2020, which was out of time. Moreover, applying the Upper Tribunal's reasoning, it is considered that the question of discretion or reliance on Rule 8 cannot arise because the minimum requirements of the Act had not been met.

Conclusion

26. In the circumstances, the tribunal determines that a valid application was not made in time and that consequently, the tribunal does not have jurisdiction.

Name: Judge Sheftel **Date:** 4 September 2020

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).