

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL
(PROPERTY CHAMBER)

LANDLORD AND TENANT – RIGHT TO MANAGE – RTM company failing to give notice of invitation to participate to qualifying tenants – claim notice failing to include names of every person who was both a qualifying tenant and a member of the RTM company - whether right to manage acquired – ss. 78 and 80, Commonhold and Leasehold Reform Act 2002 – appeal allowed

BETWEEN:

BARON ESTATE MANAGEMENT LIMITED

Appellant

-and-

WICK HALL (HOVE) RTM COMPANY LIMITED

Respondent

**Re: Wick Hall,
Furze Hill, Hove,
East Sussex**

Martin Rodger KC, Deputy Chamber President

Hearing date: 21 February 2023

*Mr Paul Letman, instructed by Dean Wilson LLP, for the appellant
Mr Dudley Joiner of RTMF Services Ltd for the respondent*

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The following cases are referred to in this decision:

Avon Ground Rents Ltd v Canary Gateway (Block A) RTM Co Ltd [2020] UKUT 358 (LC)

Elim Court RTM Company Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89

Tripleroose Ltd v Mill House RTM Co Ltd [2016] UKUT 80 (LC)

Introduction

1. This is another appeal in which the issue is whether a failure to comply with the procedure for acquiring the right to manage under the Commonhold and Leasehold Reform Act 2002 has the effect that the right has not been acquired by an RTM company.
2. Two procedural defects are relied on in this case. The first is that, before making its claim, the RTM company did not serve notices on some of the qualifying tenants inviting them to participate in the acquisition by becoming members of the company, contrary to section 78(1) of the Act. The second is that the claim notice omitted the names of some of those who were both qualifying tenants of a flat in the premises and members of the RTM company, contrary to s.80(3) of the Act.
3. In a decision issued on 10 August 2022, the First-tier Tribunal (Property Chamber) (the FTT) decided that neither defect was sufficiently serious to prevent acquisition of the right to manage. It subsequently granted permission to appeal that decision.
4. At the hearing of the appeal the appellant, which is the owner of the freehold of Wick Hall in Hove and the immediate landlord of the qualifying tenants, was represented by Mr Paul Letman. Wick Hall (Hove) RTM Company Ltd, the respondent, was represented by Mr Dudley Joiner of RTMF Services Ltd, a company which specialises in assisting leaseholders to acquire the right to manage and which has been acting for the participating leaseholders in this case.

The statutory procedure

5. The statutory right to manage premises to which Chapter 1 of Part 2 of the Act applies is available to an RTM company which follows the procedure laid down by the Act. The company must first serve notice of invitation to participate on each person who is a qualifying tenant of a flat contained in the premises (section 78(1)). Qualifying tenants are tenants holding a flat under a long lease (section 75(2)). Where a long lease is vested in joint tenants, both are qualifying tenants (section 75(7)).
6. Section 78 is concerned with providing information to qualifying tenants and inviting them to participate in the acquisition. Section 78(1)-(2) provide:

“78. Notice inviting participation

(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 the flat contained in the premises, but
- (b) neither is nor has agreed to become a member of the RTM company.

(2) A notice given under this section (referred to in this Chapter as a “notice of invitation to participate”) must –

- (a) state that the RTM company intends to acquire the right to manage the premises,
 - (b) state the names of the members of the RTM company,
 - (c) invite the recipients of the notice to become members of the company, and
 - (d) contain such other particulars (if any) as may be required to be contained in notices of invitation to participate by regulations made by the appropriate national authority.”
7. The purpose of a notice of invitation to participate is to extend the opportunity of membership of the RTM company to all qualifying tenants who are not yet members and to give them information relevant to their decision whether to take up that opportunity. In that way all qualifying tenants can influence the RTM company’s decisions, including the decision to make a claim to acquire the right to manage. The content of the notice reflects that purpose. As provided by section 78(7), a notice of invitation to participate is not invalidated by any inaccuracy in any of the particulars required to be included in it.
8. Having given notices of invitation to participate to each qualifying tenant who is not already a member of the RTM company and having allowing time to elapse to enable recipients to apply to become members, the company may then make a claim. A claim is made by serving a claim notice under section 79 on each person who is a relevant landlord.
9. The consequence of failing to give a notice of invitation to each qualifying tenant entitled to receive one is specified in section 79(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.”
10. Section 80(1) provides that a claim notice must comply with the requirements of that section. By section 80(3):
- “It 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,
- and the address of his flat.”
11. In relation to each person identified in the claim notice it must also contain sufficient particulars of the lease to identify it (section 80(4)).
12. Section 81 contains supplementary provisions, two of which describe the consequences of particular errors in a claim notice. By section 81(1), a claim is not invalidated by any inaccuracy in any of the required particulars. Section 81(2) then provides:

“Where any of the members of the RTM company whose names are stated in the claim notice was not the qualifying tenant of a flat contained in the premises on the relevant date, the claim notice is not invalidated on that account, so long as a sufficient number of qualifying tenants of flats contained in the premises were members of the company on that date; and for this purpose a “sufficient number” is a number (greater than one) which is not less than one-half of the total number of flats contained in the premises on that date.”

13. It is relevant to refer to the RTM company’s liability under section 88 to pay costs incurred by a landlord and others in consequence of a claim notice having been given if the claim is subsequently withdrawn or dismissed. By section 89(3) each person who is or has been a member of the RTM company is also jointly and severally liable for those costs.

The facts

14. Wick Hall is a block of 168 flats in Hove. In September 2021 the respondent RTM company was incorporated with the object of acquiring the right to manage the block. On 8 September notices of invitation to participate were prepared by the company’s adviser, RTMF Services Ltd (RTMF), and on 9 September these were served by post on all those qualifying leaseholders of whom RTMF was aware who were not already members of the company.
15. The registered proprietors of the lease of flat 121 were joint tenants. By mistake, as Mr Joiner openly acknowledged before the FTT, the notice of invitation to participate served by RTMF at flat 121 was addressed to only one of the two joint tenants.
16. RTMF had searched the land register on 2 September 2021 to ascertain the identity of all leaseholders who might be qualifying tenants. Its search focussed on the head-leasehold title vested in the appellant’s predecessor, Dorrington Housing Ltd (Dorrington), out of which long leases of individual flats had been granted. From that search RTMF concluded that no long leases had been granted in respect of flats 30 and 154 and that there were therefore no qualifying tenants of those flats. As a result, no notices of invitation to participate were served at flats 30 and 154 on 9 September or at any time before the appellant served its claim notice on Dorrington on 28 September.
17. Unfortunately, a week after RTMF’s search of the register a new long lease of flat 30 was registered on 9 September, the same day as the notices inviting participation were served by RTMF on those qualifying tenants known to it. RTMF did not become aware of that lease until much later and no notices inviting participation were served on the new leaseholders of flat 30 in the 14 days before the claim was made on 28 September (notices were eventually served in March 2022).
18. For reasons which are not clear, RTMF addressed the notice inviting participation which it served at flat 154 to previous joint leaseholders who had sold their lease on 17 March 2021. The purchaser was registered as the new proprietor on 23 April 2021 but no notice inviting her to participate was served by RTMF before the claim was made (once again, notice was eventually served in March 2022).

19. The claim notice served by RTMF on 28 September 2021 listed 112 members of the RTM company who were qualifying tenants. The appellant's case before the FTT was that four additional members had been omitted from the list of qualifying tenants in the claim notice. This case had been refined by the time of the appeal and it is now said that one member of the company who was also a qualifying tenant was omitted from the claim notice, the leaseholder of flat 87. The FTT made no such finding, despite having been provided with copies of the claim notice, the official copy of the land register for flat 87 and the register of members of the company. One of the appellant's grounds of appeal is that the evidence was only consistent with the conclusion that the qualifying tenant of flat 87 was a member of the company and should therefore have been included in the claim notice.

The FTT's decision

20. The FTT found that at the date the claim was made notices inviting participation had not been served on one of the two qualifying tenants of flat 121, or on the qualifying tenants of flats 30 and 154.
21. Having first directed itself by reference to the decision of the Court of Appeal in *Elim Court RTM Company Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, the FTT decided that the relevant question was whether the failure to serve notices on all the qualifying tenants was "serious enough, in the context of the applicant's entire claim, to invalidate it." It posed a series of subsidiary questions including: had the omissions caused difficulty; were they likely to have serious consequences; could they be treated as trivial; could the invalidity be easily rectified by undertaking the process again?
22. The FTT considered that repeating the statutory procedures would not be simple, as flats would have been transferred since the claim had been made and identifying new leaseholders would be complicated. There was no evidence that the leaseholders who had not been invited to participate had been disadvantaged, and the FTT was satisfied that the RTM company had not known they were qualifying tenants when it served its notices of invitation to participate. It therefore determined that the claim should not fail because of the failure to serve the required notices.
23. It reached the same conclusion regarding the suggested defects in the claim notice. It had not been suggested that too few members had been named in the claim notice to satisfy the threshold in section 79(5). Some names had been omitted by the company because it had not been sure if all of those recorded in the register of members were qualifying tenants on the date the claim notice was given. The FTT said it had not been persuaded "that any of the omissions were incorrect", but even if it had been it would not have regarded them as fatal to the validity of the claim, for the same reasons as it had given in relation to the notices of invitation (particularly the difficulty it perceived in repeating the procedure and bringing a further claim).

The grounds of appeal

24. The FTT gave permission to appeal on three separate issues:

1. Whether the failure to serve notices of invitation to participate had invalidated the claim.
2. Whether on the evidence it should have found that the claim notice failed to include the names of each person who was both a qualifying tenant and a member of the RTM company.
3. If so, whether the failure to include the name of the qualifying tenant of flat 87 (who was a member of the company on the relevant date) in the claim notice invalidated the claim.

Issue 1: The consequence of failing to serve notices of invitation to participate on all qualifying tenants who were not already members of the RTM company

25. This issue must be regarded as settled at this level by the decision of the Tribunal (Sir Timothy Fancourt, President) in *Avon Ground Rents Ltd v Canary Gateway (Block A) RTM Co Ltd* [2020] UKUT 358 (LC), to which unfortunately the FTT was not referred.
26. In that case the Tribunal decided that the effect of non-service of notices of invitation to participate on all those qualifying tenants who were required by section 78(1) to be served was prescribed by section 79(2) and was that a claim notice may not be given. That had been the Tribunal's conclusion in *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), which had been referred to by the Court of Appeal in *Elim Court* without disapproval. There was no inconsistency between that conclusion and the approach to validity taken in *Elim Court*, in which Lewison LJ had explained, at [52], that in cases concerning the acquisition of rights over property (including the right to manage) the intention of Parliament "as to the consequences of non-compliance with the statutory procedure (*where not expressly stated in the statute*) is to be ascertained in the context of the statutory scheme as a whole" (emphasis added). As the President's analysis in *Canary Gateway* at [80] to [90] explains, section 79(2) is an express statement of the consequence of non-compliance with the requirement to serve notices of invitation on all qualifying tenants who are not already members. It is therefore unnecessary to consider the statutory scheme as a whole to ascertain whether Parliament intended non-compliance with section 78(1) to have the effect that the notice of claim was wholly valid or wholly invalid. Parliament has said expressly that a notice of claim may not be served where section 78(1) has not been complied with.
27. When this binding authority was pointed out to the FTT in Mr Letman's grounds of appeal it did not take the opportunity, as it would have been entitled to do, to review its decision and having identified the incompatibility of its decision with the Tribunal's in *Canary Gateway*, to have set it aside and remade it, substituting a determination that the right to manage had not been acquired. Instead, it granted permission to appeal. But in view of the Tribunal's decisions in *Triplerose* and in *Canary Gateway* there is no more that can be said on the issue at this level, and Mr Joiner was understandably unable to advance any new argument which pointed to a different outcome.
28. The appeal must therefore be allowed for the reasons given in *Canary Gateway*. The FTT's conclusion that notices inviting participation were not served on the qualifying tenants of flats 30 and 154 is sufficient to settle the issue, without the need to consider the rather different case of flat 121, where notice was served on only one of two joint tenants. The

parties did not include a copy of the notice which was served at flat 121 in the appeal documents and, without seeing it, I am not prepared to reach any conclusion on its effect.

Issue 2: Did the evidence establish that the leaseholder of flat 87 was both a qualifying tenant and a member of the RTM company?

29. The FTT found that the current leaseholder of flat 87 appeared in the register of members of the company but was not named in the claim form. It nevertheless felt unable to conclude that there had been a breach of section 80(3). It is not clear what the source of that difficulty was and the FTT did not explain it with specific reference to flat 87. Instead, it dealt compendiously with a number of flats the circumstances of which were each different and suggested that there was insufficient evidence to enable it to form a view. But the official copy of the register of title for the flat, which I was told was among the documents provided to the FTT, showed clearly that the leaseholder identified in the register of members had owned the flat for a year before the claim notice was given. Mr Joiner did not quarrel with the proposition that the leaseholder's name should have been included in the claim notice and I am satisfied that that was the only conclusion properly open to the FTT on the evidence.

Issue 3: Did the failure to include the name of the qualifying tenant of flat 87 in the claim notice invalidate the claim?

30. This issue has not yet been the subject of consideration in this Tribunal. As *Elim Court* establishes, it is a question of interpretation of the statute whether a failure to comply with the requirement in section 80(3) to include the name of each person who is both a qualifying tenant and a member of the RTM company in the claim notice is fatal to the validity of the claim. The answer to that question does not depend on the circumstances of any individual acquisition and should therefore be the same in the case of a block of ten flats as in a block of one hundred.
31. In support of his argument that a failure to include the names of all qualifying tenants who are members of the company in the claim notice renders it wholly void, Mr Letman was able to point to the fact that the requirement is included in the statute itself, and not in secondary legislation or a prescribed form, and must be taken to have been regarded by Parliament as being of central importance. He was also able to say that in section 81(2) the Act identifies circumstances in which one type of defect in a claim notice will not invalidate the claim, but they did not include the circumstances of this case.
32. The register of members of a company is not a public document and it is likely that the information required by section 80(3) is to be included so that the landlord can verify for itself whether the RTM company has the necessary support, and perhaps also so that it knows who will be liable for its costs if the claim fails. These are all reasons why the inclusion of that information might be considered of sufficient importance that its omission should be fatal. On the other hand, the 2002 Act lacks a clear statement dealing with the consequences of non-compliance, such as is found in section 79(2).
33. The RTM company in this case is not legally represented and Mr Joiner's submissions related mainly to explaining the facts and the practical difficulties, as he saw them, of

maintaining an up to date list of all qualifying leaseholders in a substantial block of flats. Given my conclusion on the first issue the outcome of this appeal does not turn on the answer to this final issue. The issue is an important one, and in those circumstances I prefer not to reach a concluded view on it in this case and will leave it for decision in a case where the answer matters.

Disposal

34. For these reasons I allow the appeal on issues 1 and 2 and make no decision on issue 3. The result is that the RTM company was not entitled to make the claim and did not acquire the right to manage.

Martin Rodger KC,
Deputy Chamber President

13 March 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.