

253.

**HM COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL**

**Section 84 of Commonhold and Leasehold Reform Housing and Urban
Development Act 2002 ("the Act") Right to Manage application**

Case Number:	CHI/00ML/LRM/2011/0017
Premises:	Kingsmere London Road Brighton East Sussex BN1 6UW
Applicant:	Kingsmere RTM Company Limited
Appearance for the Applicant:	Mr J. Sandham of Counsel
Respondent/freeholder:	Anstone Properties Limited
Appearance for the Respondent:	Mr S. Gallagher of Counsel
Dates of the hearing/ Determination:	14th February & 12th March 2012
Tribunal:	Mr R T A Wilson LLB (Lawyer Chairman) Miss C Barton MRICS (Surveyor Member)
Date of the Tribunal's Decision:	29th March 2012

The Application

1. This application is for a determination that, on the relevant date, the Applicant was entitled to acquire the Right to Manage the Premises.

Summary of The Decision

2. At the relevant date in respect of each claim notice the Applicant was not entitled to acquire the Right to Manage the Premises.

The Facts

In summary the facts are as follows:

3. The Respondent is the freeholder of the property, which comprises an estate on the outskirts of Brighton built in the 1970's comprising of 140 flats divided between 4 self contained separate buildings with garages and communal gardens.
4. The Applicant is a company incorporated on the 1st April 2011 established in order to acquire the right to manage the premises as defined in the articles of the company.
5. Claim notices in respect of three buildings were served on or around 22nd July 2011. The claim notice for the fourth building, building C was served on or around the 9th September 2011.
6. Counter notices were served on or around 25th August 2011 in respect of the first three buildings and on or around the 12th October 2011 in respect of the fourth building.
7. Each counter notice set out the same two grounds on which it was contended that the Applicant was not entitled to the right to manage the property.
8. On the 19th October 2011 the Applicant made an application to the Tribunal for a determination it was entitled to acquire the right to manage the property pursuant to S.84 (3) of the Act. The Tribunal gave directions for the Applicant to file a statement of case and thereafter for the Respondent to serve a reply.
9. Both parties complied with these directions and agreed a hearing bundle containing their statements of case and legal authorities. At the hearing Counsel for both parties ably and eloquently developed their arguments.
10. At the close of the hearing further directions were given for the parties to file notes with the Tribunal in respect of the application of the doctrine of ultravires in relation to the facts of the case. Counsel for both parties complied with these directions and submitted further submissions and evidence after which the Tribunal reconvened on the 12th March 2012 to make its determination.

The Issues

11. The Tribunal identified a single discrete issue for determination namely whether on the dates on which the notices of claim were given, the Applicant was entitled to acquire the right to manage the premises specified in the notices. The parties legal representatives agreed that it would be helpful for the Tribunal to have regard to the following questions in arriving at its determination:
 - a. Is the Applicant an RTM Company for the purposes of the Act? If it is an RTM Company, is it an RTM Company for the whole of the estate or for part of the estate (i.e. for each building individually) or for both?
 - b. If the Applicant is an RTM Company in respect of either the whole or part can it serve individual claim notices in respect of each self-contained building on the estate?
 - c. If it can serve individual claim notices must these notices be served at the same time?
 - d. Whether, as the individual claim notices are not seeking to acquire the right to manage the whole estate, the individual claim notices are ultravires of the Memorandum and Association of the RTM Company.

The Hearing

12. A hearing took place on the 14th February 2012 at the Holiday Inn hotel in Brighton. Mr Sandham of Counsel represented the Applicant and Mr Gallagher also of Counsel represented the Respondent freeholder. The Tribunal reconvened to make its determination on the 12th March 2012.

The Evidence

The Respondent's Case

13. The Respondent's case as set out in each of the four counter notices is that contrary to S.73 (2) (b) of the Act, the Articles of Association of the Applicant do not include within the company's objects the acquisition and exercise of the right to manage premises within the meaning of S.72 (1), namely a self-contained building or part of the building. Rather, the objects of the company are the acquisition and exercise of the right to manage the whole of the estate known as Kingsmere London Road, Brighton, as defined in the Articles, which is outside the statutory definition of premises. Accordingly, the company is not an RTM company.
14. Further, and in the alternative, they assert that the claim notices served for flats 1 to 40, 41 to 80, and 81 to 100 Kingsmere both collectively and individually are not claiming the right to manage the whole of the estate and are therefore ultravires the company's Articles of Association.
15. The Respondent points to the fact that the claim notice in respect of the final building was not served until some 49 days after the other three claim notices and therefore was not served contemporaneously with the other claim notices. Accordingly there are two relevant dates.

16. They contend that it is fundamental to the scheme of the Act that the applicable qualifying criteria are to be satisfied at the relevant date. They submit that this is not possible where there is more than one relevant date, unless each claim notice may be treated in its own right as being the initiating notice of a single claim to acquire the RTM of the individual building.
17. Developing these arguments they say that the Applicant's application must be advanced in one of two ways, either on the basis that each claim notice is to be treated as initiating a claim to acquire the RTM of a single building, ("the individual claim basis") or on the basis that all four claim notices are to be treated as notices of a single composite claim to acquire the RTM of the entirety of the estate. ("the composite claim").
18. They submit that the composite claim cannot succeed not least of all because there is more than one relevant date.
19. Alternatively, if the individual claim basis is relied on this claim is also bound to fail because each is brought by the same RTM company whose Memorandum and Articles of Association speak of the objective of acquiring the management of the whole of the estate i.e. all four buildings on the estate rather than only the individual building to which each individual claim notice relates. They submit that this is contrary to the scheme of the Act and that in the result the Applicant is not an RTM company in respect of any of the individual buildings.
20. In addition, they contend that as the individual notices are not seeking to acquire the management of the whole of the estate, they are each ultravires of the Applicant's Articles of Association.

The Applicant's Case

21. The Applicant's case on the first issue simply put is that the content and form of their Articles of Association is as prescribed by statute and that there is no objection to the articles specifying all four buildings on the development and that this approach does not invalidate the articles. Thus they say there is no merit in this objection. They pointed the Tribunal to a number of decided cases where it was held that it is permissible for there to be individual claim notices for each self contained building on an estate.
22. The Applicant's case on the second point, namely that the claim notices both collectively and individually are not claiming the RTM to manage the entire estate and are therefore ultravires, is also addressed in a straightforward way. They contend that the current position is that 4 claim notices have been served covering all four buildings on the estate. Should the Tribunal find for them it will acquire the RTM in respect of all management functions under any lease of a flat and they say that this overcomes the issue of ultravires.

The Tribunal's determination

23. At the hearing the Tribunal was presented with, and taken through the relevant legislation and regulations together with numerous authorities and has had regard thereto. The Tribunal also considered and had regard to the further written submissions and evidence filed by the parties in accordance with the Tribunal's directions given at the conclusion of the hearing.

24. The Tribunal first reminded itself of the qualifying conditions of an RTM with particular reference to the definition of premises. The qualifying rules are set out in S.72 and S.75-77 of the Act. The basic qualifying provision is found in S.72 (1) which provides that RTM applies to premises which are a self contained building or part of a building with or without appurtenant property which contain at least two flats held by qualifying tenants and in which the total number of flats held by such tenants is not less than two thirds of the total number of flats contained in the premises. The required minimum of qualifying tenants in an RTM company must be equal to at least half the total number of flats in the building.
25. S.73 of the Act provides that a RTM company must be a private company limited by guarantee, and that its Memorandum of Association includes the acquisition and exercise of the right to manage as one of its objects. The company does not qualify if there is already a RTM company for the premises. Since there is no RTM Company for the premises in existence, the Applicant does not fall foul of this provision.
26. The Tribunal considered the constitution of the Applicant. The RTM Company (Memorandum and Articles of Association) (England) Regulations 2003 state at paragraph 2 that the memorandum of association of a RTM company shall take the form, and include the provisions set out in part I of the Schedule to these regulations. The Articles of Association of a RTM company shall take the form of and include the provisions, set out in part II of the Schedule.
27. It is accepted by the parties that the constitution of the Applicant follows the form set out in the Schedule referred to above.
28. Paragraph 4 of the Memorandum of Association of the Applicant states that the objects of the company are the exercise in accordance with the 2002 Act of the right to manage the premises.
29. The premises are described as *Kingsmere, London Road, Brighton (under postcodes BN1 6UW, BN1 6UN and BN1 6UY, and comprising four buildings, containing flats 1-40, 41-80, 81-100 and 101-120, the 1-40 building further comprising two self-contained sub buildings, containing Flats 1-20 and 21-40 and the 41-80 building also comprising two self-contained sub buildings, containing flats 41-60 and 61-80.*
30. The Tribunal construes the objects clause as stated above as referring to all four buildings on the estate. That is to say on any reasonable reading of the articles the reader would understand the articles to refer to the whole of the estate to include all four buildings as opposed to part of the estate or any individual building.
31. Having regard to the above the Tribunal is satisfied that the Applicant is a validly constituted RTM company for the whole of the Kingsmere estate comprising all the flats contained in all four buildings together with the appurtenant property. The content and form of the articles are, as accepted by the Respondent, in prescribed form and in the judgment of the Tribunal there is no objection to the articles specifying all four buildings on the development and this approach does not invalidate the document. The Applicant company is a private company limited by guarantee of which the Memorandum of Association states that its objects are the acquisition and exercise of the right to manage premises within the meaning of S.72 (2) of the Act and therefore falls squarely within the definition of an RTM company as defined in S. 73.
32. The next issue to be determined is whether or not the Applicant is capable of being an RTM company for just parts of the estate i.e. one or more of the four buildings. The Applicant contends that it is an RTM company for both parts of the estate i.e. of the individual buildings and also for the whole estate comprising all four buildings

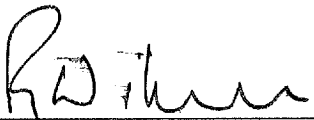
and the appurtenant property. The Respondent contends that the Applicant is an RTM company for only the whole. They say that the drafting and description of the premises as set out in the articles relates to the whole only.

33. The Respondent's objection is that each claim is brought by the same RTM Company whose objective is the acquisition of the whole of Kingsmere estate i.e. all four buildings rather than an individual building to which each individual claim notice relates. They contend that this is contrary to the scheme of the Act and that the Applicant is not an RTM company in respect of any of the individual buildings. Further as each individual notice is not seeking to acquire the management of the whole of the estate they are each ultravires of the Applicant's Articles of Association.
34. Both parties cite previous Tribunal and Upper Tribunal cases which they claim support their arguments, however the Tribunal has come to the conclusion that none of the cases assist because the facts in this case can be distinguished. In each of the relevant cited cases the claim notices in respect of each building comprising part of the premises to be acquired were served on the same date giving rise to a single relevant date. However in this case the dates of the claim notices in respect of each building are not the same. The first three claim notices were all served on or about the same day giving rise to one relevant date namely the 20th July 2011. However the claim notice in respect of the fourth building, Building C, was served some 49 days later i.e. the 9th September 2011 and accordingly the relevant date for this building is materially different from the relevant date of the other three buildings. None of the decisions referred to cover this situation.
35. On this issue the Tribunal accepts the submissions of the Respondent. The Tribunal concludes that the Applicant's Articles speak of the objective of acquiring the whole of the estate with all four buildings and not anything less than the whole. In coming to this conclusion the Tribunal notes that the description of the premises is contained in one paragraph which identifies and describes the estate as a whole. There are no words which sever part of the estate from the whole for example an expression such as " or any part thereof." The Tribunal considers that if it was intended that the Applicant could acquire the right to manage something less than the whole then there would or should have been clear words to this effect. As there are no such words, the position is at the very least ambiguous and applying the contra proferentum rule of construction the Tribunal construes the ambiguity against the party seeking to rely upon it; in this case the Applicant.
36. Neither is the Tribunal persuaded by the Applicant's arguments that S.39 of the Companies Act 2006 prevents the Respondent from pleading the doctrine of ultravires. The Tribunal accepts that S.39 of the Companies Act 2006 may have for the most part abolished the doctrine of ultravires which states that the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution. However in the Tribunal's judgment S.39 only applies to outside third parties and does not apply so as to regulate the internal affairs of a company. The Respondent is not a third party rather a prospective member of the Applicant with a justifiable expectation that the Applicant will act solely in accordance with its objects. These objects are to acquire the RTM of the whole estate and not individual buildings, in the words of the Respondent, "piecemeal with the possibility of never acquiring the whole estate".
37. So, in this case the Tribunal finds that the Respondent as a prospective member is not precluded from objecting if the RTM exceeds its powers and in seeking to acquire the RTM of less than the whole, the Applicant has exceeded its powers. The consequence of this is that it has acted ultravires and for these reasons the individual claim basis must necessarily fail.

38. In the Tribunal's judgment the statutory RTM must relate to a building, so, in an estate of separate buildings which is to be under one management, each building needs to qualify separately and an individual RTM notice served in respect of each separate building. Accordingly the Tribunal finds that the Applicant was right to serve individual claim notices in respect of each building. However, not only was it necessary for a separate claim to be made in respect of each building, it was also necessary for those claim notices to be served in such a manner as to give rise to one relevant date to enable the qualifying criteria to be assessed.
39. Whilst the Applicant has served individual notices in respect of each building, the notices were not all served contemporaneously but with a gap of some 49 days. The effect of this is that there is not one but two relevant dates. The Tribunal has concluded that the consequence of more than one relevant date on these facts is that the composite claim basis must also fail for the reasons set out below.
40. The Tribunal had before it unchallenged evidence that at the first relevant date only 7 out of 20 qualifying tenants in building C were members of the Applicant with the result that this building failed to meet the qualifying statutory requirement of at least 50% membership of qualifying tenants. Whilst it may be the case that at the second relevant date the qualifying number of tenants did exceed the 50% threshold the Tribunal accepts the submissions of the Respondent that it is fundamental to the scheme of the Act that there must be just one relevant date to judge the criteria.
41. The Tribunal considers that in this case the relevant date must be taken to be the relevant date triggered by the notices served in respect of the first three buildings i.e. 20th July 2011. If that were not the case then there could be no certainty as to when or if further notices might be served giving rise to an alternative or second relevant date. There would be nothing to prevent an alternative or a second relevant date applying months or even years after the first. A landlord would be faced with uncertainty as to the status of an RTM claim and as to the intentions of the RTM company in respect of buildings on the estate not subject to a claim notice. This is an unattractive consequence and not one which we consider that Parliament could have intended. It could also have the effect of preventing the leaseholders of a building, which did not initially wish to participate in the RTM "going it alone" by forming its own RTM company at a later date because of the consequences of S.73 of the Act which prevents a second RTM company being formed for the management of the same premises.
42. Accordingly for the reasons stated above the Tribunal determines that both the individual claim basis and the single composite claim basis to use the expressions adopted by the Respondent both fail with the consequence that at the relevant dates the Applicant was not entitled to acquire the Right to Manage the Premises.

Signed

Chairman


RTA Wilson LLB

Date 29th March 2012