276.

HM COURTS & TRIBUNALS DECISIONS
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/21UD/LRM/2011/0016**
Property:	**2 Devonshire Road Hastings East Sussex TN34 1NE**
Applicant:	**2 Devonshire Road RTM Company Limited**
Appearances for the Applicant :	**Mr K. Pain of Counsel and Mr. Okines**
Respondent/freeholder :	**Helena Avriel Stewart**
Date of the hearing:	**14th January 2012**
Tribunal:	**Mr R T A Wilson LLB (Lawyer Chairman) Mr N Robinson FRICS (Valuer Member)**
Date of the Tribunal's Decision:	**6th February 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 Property.

Summary of The Decision

2. At the relevant date the Applicant was not entitled to acquire the Right to Manage.

The Facts

In summary the facts are as follows:

3. The Respondent is the freeholder of the property, which is divided into five flats. The Applicant is a company incorporated on the 28th January 2011 established in order to acquire the right to manage the property. All of the flats have been let out on long leases.

4. On the 5th September 2011 the Applicant served a claim notice on the Respondent seeking to acquire the right to manage the property ("the claim notice"). On about the 29th September 2011 the Respondent served a counter notice setting out numerous grounds on which the Applicant was not entitled to the right to manage the property.

5. On the 19th October 2011 the Applicant made an application to the Tribunal that on the relevant date it was entitled to acquire the right to manage the property pursuant to S.84(3) of the Act. On the 26th October 2011 the Tribunal gave directions for the Respondent to file a statement of case, for the Applicant to serve points in dispute and for the Respondent to file points in reply.

6. Both parties complied with these directions with the result that the matters for determination by the Tribunal were reduced to the issues as set out at paragraphs 7 to 10 below.

The Issues

7. Was Havelock Properties Limited (the leaseholder of Flat 3) a member of the Applicant at the relevant date (which the Tribunal takes to be the 5th September 2011 the date specified in the counter notice?)

8. In the light of 7 above:

   (a) did the Applicant have the required 3 qualifying tenants as members at the relevant date?

   (b) did the Applicant have a non qualifying tenant as a member?

   (c) was the notice inviting participation served on all members?

9. Was the claim notice invalid? In particular did:

   (a) the claim notice correctly identify the qualifying tenants, which were members of the Applicant?

   (b) did the claim notice comply with the appropriate regulations?

10. If the answer to 9 (a) or (b) is no, can the Applicant rely upon S.81 of the Act to cure the defects?

The Hearing

11. A hearing of the application took place on the 14th January 2012 at the Horntye Centre in Hastings. Mr Pain of Counsel ably and eloquently represented the Applicant with Mr Okines of Arco property management giving evidence. The Respondent was not represented at the hearing and rested on her written submissions.

The Evidence

The Respondent's Case

12. It is the Respondent's case that on the relevant date the claim notice was not given by an RTM company which complied with subsection 79 (5) of the Act. S.79 (3) of the Act provides that the claim notice must be given by an RTM company which include a number of qualifying tenants of flats which is no less than one half of the total number of flats contained in the building. There are five qualifying tenants of flats within the property and on this basis to comply with S.79 the Applicant would require three members.

13. The Respondent says that the copy of the register of members of the company sent to her solicitors contain three names listed on the register of members. Mr Alexander Knox is listed as the member with respect to flat three. However they contend that Mr Knox is not a qualifying tenant of the property because the land registry entries show that the registered proprietor of flat 3 is Havelock Properties Limited. On this basis it is the Respondent's position that on the relevant date there were only two qualifying members of the company and therefore a failure to comply with S.79 (3) of the Act.

14. It is also the Respondent's position that the claim notice fails to comply with the requirements of S.80(8) and 80(9) of the Act. S.80(8) of the Act requires that the claim notice must contain such other particulars as required by regulations made by the appropriate national authority being the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 (the Regulations). S.80(9) of the Act requires in addition that the claim notice must comply with such requirements about the form of claim notice as may be prescribed by the Regulations. Paragraph 8 of the regulations provides that the form of claim notice must comply with the prescribed form of notice exhibited in Schedule 2 to the Regulations.

15. The Respondent asserts that the claim notice has been served with reference to both the 2003 regulations (which have been repealed) and the 2010 regulations and therefore not in accordance with the 2010 regulations.

16. The Respondent further contends that the claim notice also fails to correctly specify the qualifying tenants who were members of the company for the reasons set out in paragraph 13. In particular the claim notice specifies Mr Knox as being a qualifying tenant of Flat 3 whereas the correct qualifying tenant of Flat 3 is Havelock Properties Limited.

17. Finally the Respondent contends that a notice inviting participation was not sent to Havelock Properties Limited, the qualifying tenant of Flat 3. With respect to Flat 3 a notice inviting participation was sent to Mr Knox of Seacox Properties Ltd. It is therefore the Respondent's position that the Applicant failed to serve notices inviting participation in accordance with the requirements of S.78(1) to all qualifying tenants.

The Applicant's Case

18. It is the Applicant's case that at the relevant date Havelock Properties Limited was a member of the RTM company and therefore there were three members of the company at the relevant date. This being the case the Applicant did not have anyone other than qualifying tenants and the Applicant was not required to serve a notice on Havelock because by the relevant date Havelock had already agreed to become and had been registered as a member of the Applicant.

19. The Applicant further asserts that the notice correctly identifies the qualifying tenant of the first-floor flat as Havelock Properties Ltd and does contain the reference required by regulations 4(c) and (e) being the reference to the 2010 regulations. They also claim that the claim notice is in the form set out in Schedule 2 to the 2010 regulations, save that the required references to the 2010 regulations in paragraph 5 of the claim notice and in the notes thereto are instead reference to the earlier 2003 regulations.

20. In the alternative, and only in the event that the Tribunal finds that there are errors or omissions in the claim notice, they contend that the claim form should be construed subjectively. A reasonable recipient would understand that it was Havelock Properties Ltd who was the qualifying tenant and member of the Applicant, and that the claim form referred to the 2010 regulations. They rely upon the case of *Mannai Investment Company Limited v Eagle Star Life Assurance Co Limited* which held that the question is how a reasonable recipient would understand the notice bearing in mind the context. If there would be no doubt that the recipient would understand the effect and contents of the notice then an error in the notice would not render it invalid.

21. Again in the alternative, the Applicant relies upon S.81 (1) of the Act, which can be used to cure any minor defects that might exist. In particular any error in the identification of qualifying tenants is an error in the particulars and can be cured by S.81. They say that the reference to Mr Knox of Seacox Properties rather than Havelock Properties was at worst an error in the particulars which can and should be cured by S. 81.

22. In the same way any failure to follow the form of claim notice is also an error in the particulars, which can be cured by S.81. In particular references to the 2010 regulations were not omitted, but provided inaccurately in two out of three occasions.

23. In these circumstances they contend that the Applicant is entitled to rely upon S.81 (1) of the Act to cure any of the inaccuracies and they invite the Tribunal to determine that the Applicant was, on 5th September 2011, entitled to acquire the Right to Manage the premises.

The Tribunal's Consideration

24. The Tribunal has come to the to the conclusion that at the relevant date there were not sufficient qualifying tenants who were members of the RTM company to comply with S. 79 of the Act and thus the claim must fail. It has come to this conclusion by its interpretation of the Register of members of the RTM Company as at the relevant date. The Register of members is the definitive record of the members of a company for the time being and thus it is the register which holds the key to determining whether there were at least three qualifying tenant members on the relevant date.

25. The Applicant relies upon the evidence given by Mr Okines in this regard as it was he who had responsibility for conducting the claim on behalf of the Applicant. Mr Okines drew the Tribunals attention to an extract of the register of members of the RTM company contained in the hearing bundle. He told the Tribunal that he and his secretary had been responsible for writing up the register of members and certificate 1 had been made up in three stages. The original entries had been made by his secretary and reflected that Alexander Knox was entered as a member of the company on 16th March 2011. This entry was amended by him personally on the 5th August 2011 when Mr Knox came into his office to complete the paper work. On that day he amended the register by adding in the remarks section of the register for certificate 1 the words *membership is entered in the name of Havelock Properties Ltd on 5 August 2011 the members letter being signed on that day.* At the same time he added brackets alongside the name of Alexander Knox and the words *Havelock Properties Limited* and *Director*. Finally on the same day he completed the section entitled "Date of ceasing to be a member" with the date 05/08/11.

26. At a later date, which he says was some time after 20th September 2011, he made a further amendment to certificate 1 by adding the following words *"the member is relisted as member 5, membership number 1 having been cancelled."* In these circumstances Mr Okines contends that Haverlock had been entered into the register of members having agreed to become a member on the 5th August 2011. He asserts that entry on the register of members of the name of the qualifying tenant alone is sufficient to satisfy the requirement of S.112 of the Companies Act 2006. S.112 states that a 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. The amendments made by him to the register thus had the effect of registering Havelock as a member of the RTM company as at 5th August 2011.

27. The Tribunal is not persuaded that the register can properly be read in the way suggested by Mr Okines. It considers that a reader of the register as at the 5th September 2011 (the relevant date) would have considered that in the period leading up to the 5th August 2011 it was Mr Knox who was registered as the member as representative for Havelock Properties Ltd. However it is common ground that Mr Knox is not and never was a qualifying tenant as it was Havelock Properties Ltd and not he who was the leaseholder of Flat 3.

28. Because the section entitled *date of ceasing to be a member* was also completed by Mr Okines on the 5th August 2011 the Tribunal considers that a reader would have concluded that on this date Mr Knox as representative for Havelock Properties Ltd

ceased to be a member. In the opinion of the Tribunal a reader would not have gone on to conclude that the various amendments had the effect of confirming Havelock Properties Ltd as the new member as at the 5th August 2011.

29. In arriving at this conclusion the Tribunal notes that there are inconsistencies with the order upon which the members appear on the register. The leaseholders for the ground floor flat have been entered as number four on the register with date of entry as 20th September 2011 and yet Havelock Properties Ltd are entered after that entry with membership number five and yet is dated 5th August 2011. This inconsistency points to the actual date of entry of Havelock Properties Ltd as a member as being after the 20th September 2011 and not at the 5th August 2011 as asserted by the Applicant. In these circumstances it cannot be relied upon by the Applicant.

30. On being questioned by the Tribunal Mr Okines claimed that he was secretary to the RTM company from its incorporation and thus had clear authority to make up and amend the register in the manner outlined above. However when a little later it was pointed out to him that the memorandum of the RTM stated that the company did not have a secretary he at once changed his position and accepted that he must have been mistaken and he then agreed that he never had been the secretary. He continued to maintain, however, that he had the authority to amend the register.

31. Having regard to this stark change of position the Tribunal concludes that Mr Okines recollection of the events is not to be relied upon and it is not persuaded that the register of members, certificate 1, did go through three stages as pleaded by the Applicant. The Tribunal considers that on the evidence provided it could plausibly be argued that the amendments made to the register of members could have taken place on the same day sometime after the 20th September 2011. This being the case the Tribunal considers that it cannot be said with any certainty that at the 5th September 2011 the register of members did reflect Havelock Properties Ltd as a member. Accordingly on the relevant day it has not been proven by the Applicant that the RTM company did have three qualifying tenants as members. The Tribunal in this instance wishes to stress that where there is ambiguity in drafting, the rule of construction known as the *contra proferentum rule,* dictates that the ambiguity should be construed against the person relying upon it, in this case the Applicant.

32. The Applicant's case was also not assisted by the fact that Mr Okines did not bring to the hearing the original Members Register, a point made at the hearing by the Tribunal.

33. Although the above conclusions dispose of the application the Tribunal also considered the validity of the claim notice itself. In her counter notice the Respondent contends that the claim notice is invalid for two reasons. Firstly because the notice fails to properly identify the name of the qualifying tenant and secondly because the notice is not in the prescribed form. First she relies upon the point that the notice fails to correctly specify the qualifying tenants who were members of the company for the reasons set out in paragraphs 12 and 15 above. The Tribunal considers that this requirement relates to "particulars" for the purpose of S. 81(1) and that the defects may be rescued.

34. With respect to the first challenge the Tribunal does not consider that the failure to properly identify the name of the qualifying tenant can be characterised as a mere "inaccuracy". It is a wholesale omission to state the correct name of the qualifying tenant and a failure to provide the mandatory information required by S.80. This is a serious error and therefore it is not saved by S.81(1). Neither is the Tribunal

persuaded that the principals set out in *Mannai Investment Company Limited v Eagle Star Life Assurance Co Limited* can be applied to these facts and circumstances.

35. With respect to the second challenge that the notice wrongly refers to the 2003 regulations, the Tribunal adopts a purposive approach and considers that this is an inaccuracy which can and is saved by S.81(1). The Tribunal can detect no prejudice to the Respondent by the inclusion in the claim notice of a reference to the old 2003 regulations in addition to the reference to the correct 2010 regulations. In arriving at this conclusion the Tribunal has had regard to the case *of Tudor v M25 Group Ltd [2003] EWCA Civ 1760* which concerned a collective enfranchisement claim in which the trial judge stated "one ought to remember that these sorts of statutory provisions are aimed at providing a commercially fair result so that recipients of notices are told what they have to be told but that the object of the exercise is the giving of information and the defining of issues, not the prescription of steps in a ritual dance or complex game one false step in which is intended to produce disaster."

36. For all of the reasons stated above the Tribunal determines that at the relevant date the Applicant was not entitled to acquire the Right to Manage.

Signed

R T A Wilson

Chairman

Date 6th February 2012