FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00MR/LRM/2014/0011
Property	:	59 Cottage Grove, Southsea, Portsmouth, Hants PO5 1EH
Applicant	:	59 Cottage Grove RTM Company Limited
Representative	:	Canonbury Management
Respondent	:	Christie Estates Southern Limited
Representative	:	E & J Estates
Type of Application	:	Right to Manage Part 2 Commonhold and Leasehold Reform Act 2002
Tribunal Members	:	Judge Greenleaves KM Lyons FRICS
Date and Venue of Hearing	:	none
Date of Decision	:	16 December 2014

Preliminary

1. The Tribunal made a decision in this matter dated 3 November 2014. By letter dated 6 November 2014 the Respondent applied for permission to appeal that decision on the ground that the Tribunal had erred in law, specifying its grounds in detail.

2. The Tribunal reviewed its decision and agreed with the Respondent's submission that the Tribunal had confused subsections (8) and (9) of Section 80 of the Commonhold and Leasehold Reform Act 2002 and had erroneously found that inclusion of the words "Leasehold Valuation" in the notes to the Claim Notice did not invalidate the notice by reason of Section 81(1) of the Act.

3. In those circumstances the Tribunal, being satisfied that the ground of appeal is likely to be successful, under section 9 of the Tribunals, Courts and Enforcement Act 2007 ('Review of decision of First-tier Tribunal'), hereby sets aside that decision and makes the decision set out below for the reasons given.

Decision

4. Under section 84 of the Commonhold and Leasehold Reform Act 2002, (the Act) the Tribunal determines that the Applicant was on the relevant date entitled to acquire the right to manage the premises known as 59 Cottage Grove, Southsea, Portsmouth (the property).

5. Accordingly under section 90 of the Act the acquisition date is the date 3 months after this determination becomes final.

Appeals

6. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

7. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

8. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

9. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Reasons

Introduction

10. This was an application made by the Applicant, 59 Cottage Grove RTM Company Limited, for a determination under section 84 of the Act that it was on the relevant date (at the date of the claim notice i.e. 19 June 2014) entitled to acquire the right to manage the property.

11. On the 17 July 2014, the Respondent gave counter notice that by reason of section 80 (9) of the Act the Applicant was not entitled to acquire the right to manage the premises specified in the claim notice.

12. The Applicant accordingly made this application to the Tribunal on 12 August 2014. In accordance with directions, the Respondent filed a statement dated 26 September 2014 setting out its case and the Applicant made a supplementary statement in reply dated 9 October 2014.

The Respondent's case

13. The Respondent's case is based on non-compliance with regulations as to the content of the claim notice:

    13.1. that the claim notice must comply with such requirements (if any) about the form of claim notices as may be prescribed by regulations so made (section 80 (9)) of the Act;

    13.2. that those regulations are the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010;

    13.3. Schedule 2 to the Transfer of Tribunal Functions Order 2013 (the 2013 Order) amended the 2010 regulations by replacing the reference in Note 1 to "leasehold valuation Tribunal" with "tribunal", that Order coming into force on 1 July 2013;

    13.4. that note 1 of the claim notice given on 19 June 2014 refers to "leasehold valuation tribunal";

    13.5. accordingly that the notice of claim does not comply with requirements about the form of claim notices as prescribed by regulations so that on the date of the claim notice the Applicant was not entitled to acquire the right to manage.

The Applicant's case

14. The Applicant's case:

    14.1. "Section 80 (1) (A)" of the Act provides that the notice is not invalidated by any inaccuracy in any of the particulars required by section 80 (2) to (7) of the Act or the 2010 regulations;

    14.2. that clause 9 of the claim notice, in terms, invited the Respondent to notify the Applicant of any inaccuracies in the notice;

14.3. the section with the inaccuracy is contained in regulation 5 of the 2010 regulations;

14.4. the inaccuracy is marginal: it is caught by clause 9 of the claim notice and that the notice is not invalidated by this minor error;

14.5. had it been brought to the attention of the Applicant by the Respondent, the claim could have been withdrawn and reissued with little effort and the need for the Tribunal hearing could have been avoided;

14.6. the Applicant is therefore entitled to acquire the right to manage under the Act.

14.7. In response to the Tribunal inviting the Applicant's reply to the Respondent's case, Canonbury Management wrote on 9 December 2014: "With reference to clause 2 of the grounds of appeal, the applicant submits that it is not common ground that the applicant RTM Company did not use the correct form of claim notice. The Applicant submits that the correct form of claim notice was used, save for the fact that 'Leasehold Valuation Tribunal; was referred to instead of 'Tribunal'. Otherwise we are not instructed to respond to the appeal on behalf of [the applicant].

Consideration

15. The Tribunal took into account the terms of the claim notice, the counter notice and the statements put forward by both parties as referred to above.

16. The Tribunal suspects the Applicant's reference to section 80 (1) (A) of the Act is an error but takes it to be a reference to section 81 subsection (1) of the Act which may apply to the case. It provides "A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80."

17. So far as material to the issue raised by the Respondent in this case, section 80, at subsection (9) provides "and it must also comply with such requirements (if any) about the form of claim notices as may be prescribed by regulations so made."

18. It is not disputed by the parties that the 2010 regulations apply and that they were on 1 July 2013 amended by the 2013 Order.

19. The consequence of those regulations and the 2013 Order is that, as the Respondent submits, note 1 in the claim notice ought to have referred to the "tribunal" instead of "leasehold valuation tribunal".

20. While section 81 of the Act provides that inaccuracy of any particular in such a notice does not invalidate it, there is no equivalent provision in relation to the requirements as to the form of the notice which the tribunal is satisfied includes the notes contained in that notice. It seems to the

tribunal rather perverse that this may suggest that the form is more important than the substantive content of the notice.

21. However, the tribunal has considered relevant authorities as to how it should approach this issue raised by the respondent.

22. The tribunal has referred particularly to the case of Sinclair Gardens investments (Kensington) Ltd and Oak Investments RTM Company Limited Respondent [2005] EWLands LRX_52_2004 Lands Tribunal (the Sinclair case). This case related to whether a claim notice for right to manage under the Act was invalid. The case turned on whether a claim notice was valid despite there being a failure to serve a notice of invitation to participate on a lessee. In this case the Leasehold Valuation Tribunal had found that the landlord had not been prejudiced by failure to serve a notice inviting participation. The landlord's appeal to the Lands Tribunal was dismissed.

23. George Bartlett QC at Paragraph 7 said "It is not the case that the failure to comply with the procedural requirement has a consequence of nullifying all subsequent steps unless there is some saving provision in the statute enabling the question of prejudice to be taken into account. The effect of procedural irregularities is explained in the Court of Appeal decision in *R v Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All ER 231. At 235c-e and 235j-236a Lord Woolf MR said this:

> "*What should be the approach to procedural irregularities?*
>
> The issue is of general importance and has implications for the failure to observe procedural requirements outside the field of immigration. The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorised as directory it is usually assumed it can be safely ignored. If it is categorised as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect. The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory. The requirement is never intended to be optional if a word such as 'shall' or 'must' is used... Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter

irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that tribunal's task will be to seek to do what is just in all the circumstances (see *Brayhead (Ascot) Ltd v Berkshire CC* [1964] 1 All ER 149, [1964] 2 QB 303 applied by the House of Lords in *London and Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876, [1980] 1 WLR 182)."

Later in his judgment, having referred to the words of Lord Hailsham of St Marylebone LC in his speech in *London and Clydeside Estate Limited v Aberdeen DC* [1979] 3 All ER 876 at 882 to 883 on the categorisation of statutory requirements into mandatory and directory, Lord Woolf went on to say (at 238j-239b):

"Bearing in mind Lord Hailsham LC's helpful guidance I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.) Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

24. George Bartlett QC concluded his judgment in the Sinclair case by saying:

> "In my judgment, in the light of the considerations referred to by Lord Woolf in *Jeyeanthan*, the LVT was entirely correct in approaching the question of the effect of the failure to comply with the statutory requirements in the way that it did. The purpose of requiring notice of invitation to participate to be served on a qualifying tenant who neither is nor has agreed to become a member of the RTM Company is clearly to ensure that the interest of that tenant is protected. Under section 79(8) a copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises. The provisions are thus designed to ensure that every qualifying tenant has the opportunity to participate in the RTM Company and is informed that a claim notice has been made by the RTM Company. In determining the effect of the failure to comply with one or other of these requirements the principal question for the Tribunal will be whether the qualifying tenant has in practice had such awareness of the procedures as the statute intended him to have. The LVT considered this question and expressed itself as satisfied that Mr Mallon was fully aware of the proceedings and that his omission had been inadvertent. It also concluded that the landlord had not been prejudiced in any way by the failure to serve a notice inviting participation, and, given the purpose of the section 79(8) requirement, it was undoubtedly correct to do so. The appeal must be dismissed."

25. The Tribunal also considered the decision of the Upper Tribunal (Lands Chamber) Elim Court RTM Co Ltd & Avon Freeholds Ltd & two other cases (LRX/25/2013,LRX/81/2013 & LRX/87/2013) which related to service of notices required by the Act and due signature of notices. The Tribunal found that they did not conflict with the cases quoted at paragraph 20 above and related to issues which were of a higher level of significance than the case before it.

26. The present case relates to contents of a notice being served. In principle, if it does not comply with regulations it may be said, as the Respondent seeks to do, that a proper notice has not been served.

27. The difference between the cited cases and that before the Tribunal is that none of them deals with notes attached to a notice. There seem to be no cases on this aspect, probably because normal practice is to use printed up to date forms which would ensure compliance in the notes. The Applicant in this present case has not adopted the correct form.

28. The Tribunal found there was no distinction between the cited cases and the instant case such that it would be wrong not to follow those principles.

29. The Tribunal accordingly takes from the Sinclair case that the relevant issues in the instant case are:

    29.1. What was the legislator's intention should follow from non-compliance?

29.2. Has there been substantial compliance?

29.3. Can non-compliance be waived and should it be waived in the this case?

29.4. Focusing on these questions should avoid unjust and unintended consequences rather than focusing on an approach solely dependent on dividing requirements into the mandatory ones or directory ones.

30. The Tribunal is satisfied that:

30.1. There has undoubtedly been almost total compliance;

30.2. The legislature did not intend the procedure to be invalidated by reason of such a minor non-compliance as inclusion of the two words "leasehold valuation" on which the Respondent relies:

30.2.1. the Respondent could not possibly contend that it had thereby been in any way misled or disadvantaged by the non-compliance in its dealings with the consequences of the claim notice and it does not pretend to do so: it has in no way suffered and could not suffer the slightest prejudice: it relies purely on a technicality;

30.2.2. the note containing the error is only relevant to a situation where the claim notice cannot be given to the landlord, a party to a lease other than the landlord or tenant, or a manager appointed under the Landlord and Tenant Act 1987, *if any such person cannot be found or the identity cannot be ascertained (our italics).* It is a note explaining what the *RTM company* can do in those circumstances – not what the recipient of the claim notice may do, so it is entirely immaterial to the Respondent's position. There is no suggestion whatever from the Respondent that the note is in any way relevant to the issues the subject of the claim notice;

30.3. justice requires that complete compliance should and is to be waived in the present case to the extent of the inclusion of the words of which the Respondent complains.

31. Accordingly the Tribunal found not only that the claim notice is not invalidated by the non-compliance, but that the Respondent's taking the point is entirely without merit.

32. The Tribunal made its decision accordingly.