

615



**FIRST - TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **CHI/43UM/LRM/2017/0004**

**Property** : **Wentworth House, Pyrford Road  
West Byfleet, KT14 6LD**

**Applicant** : **Wentworth House (Pyrford  
Road) RTM Co. Ltd**

**Representative** : **Mr Charles, Case Manager,  
Urban Owners Ltd**

**Respondent** : **Gateway Properties LLP**

**Representative** : **Mr Serota, Solicitor, Wallace LLP**

**Type of Application** : **s.84(3) CLRA '02**

**Tribunal Member** : **Judge D Dovar**

**Date and venue of  
Hearing** : **22<sup>nd</sup> August 2017, Guildford**

**Date of Decision** : **16<sup>th</sup> October 2017**

---

**DECISION**

---

- b. Art.7 limits the liability of members to £1 each
- c. Art.26 (1) Provides that each person who wishes to become a member 'shall deliver to the company an application for membership' which needs to state that they are a qualifying tenant, wish to become a member and agree to pay £1 if the company is wound up;
- d. By Art.26 (4) 'A person who, together with another or others, is to be regarded as jointly being the qualifying tenant of a flat ... shall, once admitted, be regarded as jointly being a member of the company in respect of that flat ...' and '(5) Applications for membership by persons who are to be regarded as jointly being the qualifying tenant of a flat ... shall state the names and addresses of all others who are jointly interested with them, and the order in which they wish to appear on the register of members in respect of such flat ...'
- e. Art.33 sets out the various voting rights which in broad outline provide:
  - i. Where no landlord is a member, for one member one vote;
  - ii. Where a landlord is a member, for the votes to be recalibrated to account for landlord members;
  - iii. Where there are joint tenants of a lease, where more than one joint tenant votes, the vote of the senior is to be

counted. Seniority is determined by reference to the  
*'order in which the names of such persons appear in the  
register of members in respect of the flat or lease ...'*  
(art.33 (4)).

8. Section 73 of the Act sets out what an RTM Company is. The company is defined by its objects and by being limited by guarantee. No reference is made to membership in s.73.

9. Section 74 of the Act provides who can be a member, as

*1) The persons who are entitled to be members of a company which is a RTM company in relation to premises are—*

*(a) qualifying tenants of flats contained in the premises, and ...*

10. Section 75(5) of the Act provides that where a flat is let to joint tenants, the joint tenants shall be regarded as jointly being the qualifying tenant of the flat.

11. Section 112 of the Companies Act 2006 provides,

*(1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.*

*(2) Every other 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.*

12. In *Triplerose Ltd v. Mill House RTM Company* [2016] UKUT 80 (LC), paragraph 53, it was said by the Upper Tribunal, albeit that this was not the decisive point, that

*'Section 73 does not make it a condition of a company's status that an RTM company that its membership should be restricted exclusively to qualifying tenants of flats. It is true that section 74(1) provides that only persons who are qualifying tenants of flats may be members of an RTM company before the right to manage is acquired, but it does not follow from that, where the register of members identify someone who is not a qualifying tenant as a member, that the company is not an RTM company. ... As currently advised and without the benefit of fuller argument, it does not seem to me that the entitlement of such an RTM company to seek to acquire the right to manage is impaired in any way.'*

13. In that case, the Upper Tribunal recognised that if there was any doubt or uncertainty about the procedural integrity of a right to manage claim that that could cause significant problems in management and that strict compliance with the statutory scheme was essential, substantial compliance was not good enough.
14. This latter point was developed in *Elim Court RTM Co Ltd v. Avon Freeholds Ltd* [2017] EWCA Civ 89 where it was held by the Court of Appeal that not every defect invalidated a notice, that was a question of statutory construction. It also recognised that there may be a distinction

between a failure to satisfy jurisdictional requirements and purely procedural requirements.

### **The Respondent's submissions**

15. The Respondent's statement of case identified the following points as undermining the validity of the right to manage claim:
  - a. Each joint tenant has wrongly been registered as a member in their own right;
  - b. Therefore the membership of the RTM Company is not limited to qualifying tenants as required by s.74;
  - c. As a result of those two factors, the notice of claim failed to identify those who are both qualifying tenants and members of the RTM Company.
16. With respect to the comments in *Triplerose* regarding the constitution of the membership, the Respondent submitted that the facts were different in this case as that case dealt with the situation where the rogue members were non-qualifying tenants whereas in this case, they were qualifying tenants, it was just that they were not entitled to be recorded as being members individually.
17. Further, the Respondent contended that the fact that each member had guaranteed the liability of the Applicant, albeit to £1, was relevant as those who dealt with the company were entitled to rely on the fact that if necessary all those members could be pursued to the limit of their liability.

18. There were also instances where the Act required the membership of the Applicant to be disclosed to third parties (i.e. ss.78 and 80) and this indicated that it was important to get this right as otherwise those particulars would be incorrect and the recipients misled.
19. The Respondent contended that these were not simply arid technical points. Whilst not a ground for objecting per se, the Respondent maintained that a landlord is in a difficult position where validity was in doubt as there is a risk that a landlord who wrongly accepts a right to manage claim which is invalid, could find itself liable for failing to comply with its covenants.
20. A tenant who was not a member or acquired their lease after the right to manage had been exercised might in certain circumstances turn around to a landlord and say that there had not been a valid exercise of the right to manage and that they had been liable on their covenants throughout. In the event of a breach of covenant causing loss, the tenants would be unable to sue the RTM as it had no assets and it was possible that they would look around for someone else to pursue, such as the landlord.

### **The Applicant's Submissions**

21. In its statement of case, the Applicant maintained that the inclusion of all joint tenants as members individually rather than collectively was a simple clerical error which has since been rectified. It was said that this error did not invalidate the exercise of the right to manage.

22. Further, the Applicant relied on the passage set out above in *Triplerose* for the proposition that the alleged error with the register of members was not fatal to a right to manage claim and did not render the Applicant company incapable of exercising the right.
23. The Applicant also relied on art.26 (4) as providing that even if separately registered, joint tenants are to be treated as a joint member.

### **Discussion**

24. The Tribunal did not consider that this was simply a clerical error. It was an error in that the joint members should have been jointly registered, but that was not a slip of the pen. Further, the Tribunal was concerned that this might have had some impact on the voting rights within the Applicant company, skewing those in favour of the joint tenants and possibly against a member landlord. The Tribunal also had regard to the fact that the statute did require the membership to be disclosed and that must mean both an accurate disclosure and one that conformed with the legislation. Given the error in this matter, the notice was also in error given the underlying membership.
25. However, despite those reservations, the Tribunal does not consider that the process was invalidated.
26. Fundamentally the Tribunal accepts the passage in *Triplerose* as raising an important distinction between a properly constituted RTM company (s.73) and who can be its members (s.74). Further that it follows, as recognised in *Triplerose*, that the fact that there were rogue members

did not mean that the RTM company was improperly constituted or even incapable of serving a notice of claim. The Tribunal does not see any relevant distinction with the facts in this case where the rogue members are joint tenants.

27. Given that distinction between s.73 and s.74, the Tribunal does not consider that an error in membership necessarily invalidates a claim. It also follows that that disposes of the £1 contribution point. By its nature an error in membership will give a false impression as to those who have provided a very limited indemnity to the company. That therefore cannot of itself invalidate the process.
28. Further, given that an error in membership is not necessarily fatal, it must also follow that an error in the notice regarding membership is not necessarily fatal. The Tribunal does not consider that the error in this case was fatal given: a.) the greater flexibility in approach following *Elim Court*; b.) that the notice actually set out how the membership ought to have been registered; and c.) the various deeming provisions in the legislation and articles (such as s.75(5) and arts.26(4) and 33(4)).
29. Finally, in terms of voting, the Tribunal considers that art.33(4) would prevent an imbalance of voting by both joint tenants in that only one would be allowed.
30. Whilst the Tribunal recognises that errors were made in the process, it does not consider that they had the effect of invalidating the claim. The Tribunal appreciates the points taken by the Respondent and in particular the concern that those errors may have invalidated the claim



process and therefore potentially rendered the Respondent liable should the process have been challenged at a later stage. That concern should however now be allayed given this determination.

31. For those reasons, the Tribunal determines that the Applicant was entitled to acquire the right to manage on the date that the notice of claim was given.

A handwritten signature in black ink, appearing to read 'D. Dovar', with a long, sweeping horizontal stroke at the end.

Judge D Dovar

## **Appeals**

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.

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.

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.

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.