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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AH/LRM/2018/0001**
Property	:	**3 Cargreen Road, London SE25 5AD**
Applicant	:	**3 Cargreen Road RTM Company Limited**
Representative	:	**Mr Phillip Delauncey**
Respondent	:	**Triplerose Limited**
Representative	:	**Scott Cohen Solicitors**
Type of Application	:	**Application in relation to the denial of the Right to Manage**
Tribunal Members	:	**Judge L Rahman** **Mr Barlow FRICS**
Date and venue of Hearing	:	**8th March 2018 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**19/3/18**

DECISION

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Decision of the tribunal

(1) The application is granted. The applicant is entitled to acquire the right to manage on the date which is three months after the tribunal's determination becomes final.

The application

1. The applicant seeks a determination pursuant to s.84(3) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that on the relevant date it was entitled to acquire the right to manage the property.

2. By a claim notice dated 31/10/17 the applicant gave notice that it intended to acquire the right to manage on 5/3/18. By a counter notice dated 30/11/17 the respondent disputed the claim on the ground that the applicant did not comply with the requirements of section 79(5) of the 2002 Act and that the claim notice was not given to each person required under the Act. The applicant applied to the tribunal for a determination that it was entitled to acquire the right to manage.

The hearing

3. The applicant was represented by Mr Phillip Delauncey and the respondent was represented by Ms Hemans of counsel.

4. On behalf of the respondent, it was conceded at the start of the hearing that the claim notice had in fact been correctly served on each of the qualifying tenants. However, the respondent questioned the validity of the present claim and whether the applicant had a sufficient number of members at the relevant date.

Validity of the claim notice by virtue of s.81(3) of the 2002 Act

5. The respondent stated as follows. The applicant had sent a notice on 21 September 2017 (the first notice). The respondent did not receive this notice and was unaware of this notice until it received the notice dated 31 October 2017 (the second notice) and the accompanying letter, stating "*Please find by way of service enclosed section 79 notice of claim, without prejudice to the notice sent on 21 September 2017*". The use of the words "without prejudice" suggested that the applicant still relied upon the validity of the first notice. Until the first notice was either withdrawn or ceased to have effect, the applicant could not rely upon the second notice by virtue of s.81(3), which stated "*Where any premises have been specified in a claim notice, no subsequent claim notice which specifies the premises...may be given so long as the earlier claim notice continues in force*". If the applicant could not rely

upon the second notice, the application becomes invalid. Even though the respondent had not received the first notice, the question of estoppel arose so long as the applicant apparently sought to rely upon the first notice.

6. The applicant stated as follows. It accepts that a notice was sent on 21 September 2017 (the first notice). The first notice was sent by "Royal Mail Guaranteed Next Day Delivery". This required the recipient to sign and confirm that the mail had been received otherwise the mail is returned to the sender. It was unclear why the mail had been returned to the applicant (see photocopy of envelope on page 33 of the applicant's bundle), however, it was returned unopened. Mr Delauncey stated that the applicant had presumed that the post was either not received by the respondent or was rejected by the respondent. Given the circumstances, Mr Delauncey, on behalf of the applicant, sought advice from LEASE, and was advised to send the second notice "without prejudice" to the first notice. When asked why LEASE had provided this advice, Mr Delauncey stated it was presumably because someone may have seen the first notice and therefore may rely upon it. However, even though the letter attached to the second notice stated that it was without prejudice to the first notice, given that the first notice was not in fact received by the respondent and the respondent was not even aware of it, it cannot be said that the first notice was in fact valid or in force at all.

7. In reply the respondent stated as follows. It was irrelevant whether the first notice was actually received by the respondent. Section 79(1) states "*A claim to acquire the right to manage any premises is made by giving notice of the claim...*" The Act does not define the meaning of "giving". Section 111 of the 2002 Act simply states that the notice must be in writing and may be sent by post. Once the applicant had decided to send the first notice to the respondent by posting it to the respondents address, the notice is "deemed" to have been served irrespective of actual receipt by the respondent. Ms Hemans referred the tribunal to section 7 of the Interpretation Act 1978 which states "*Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, prepaying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post*". Ms Hemans stated it was for the tribunal to determine whether the contrary had in fact been proven or not. It was submitted that the contrary had not been proven given that the second notice was served without prejudice to the first notice and the applicant had not withdrawn the first notice.

8. The tribunal found as follows. The tribunal notes that the first notice was returned unopened. It was unclear why this was so. It could have been because of a failure to sign and confirm receipt of the letter or a

simple refusal to accept the mail or for some other reason. But the fact remains that the first notice was returned unopened. In this regards the tribunal also notes that the respondent accepts that it did not in fact receive the first notice. Section 79(1) of the 2002 Act refers to *"giving"* notice of the claim. Section 111 of the 2002 Act states that the notice must be in writing and may be sent by post. The tribunal found section 7 of the Interpretation Act to be of relevance, as it covers the situation where an Act authorises any document to be served by post and whether the expression *"give"* or some other expression is used. In this instance, the 2002 Act permits the notice to be given by post and we note that the applicant chose the option of sending the first notice by post. Notice is deemed to be effected by properly addressing, prepaying and posting a letter containing the notice, and is deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved. We find as a fact that the letter was not in fact delivered in the ordinary course of post as it was returned to the applicant unopened. We therefore find that the first notice was not in fact *"given"* to the respondent and therefore, irrespective of the applicants decision to give the second notice "without prejudice" to the first notice, the first notice was not in fact valid or in force at the time the second notice was given to the respondent. In the circumstances, the tribunal found that the second notice was valid .

Whether membership of the applicant company, on the relevant date, included not less than one half of the total number of flats?

9. The respondent stated as follows. By virtue of section 79(3) and (5) of the 2002 Act, the applicant must show that its membership on the relevant date included a number of qualifying tenants of flats contained in the premises which is not less than one half of the total number of flats so contained. The 2002 Act refers to *"membership of the RTM company"* therefore whether a person was a member of the company or not was a question of Company Law. Section 112(1) of the Companies Act 2006 states that 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. The respondent accepts that Mr Theodorou of flat 4 became an automatic member by virtue of s.112(1).

10. However, by virtue of s.112(2), every other person must agree to become a member of the company and their name must be entered in its Register of Members, before they can be considered a member of the company. Furthermore, the applicant's Articles of Association states at paragraph 26(1) *"Every person who is entitled to be, and who wishes to become, a member of the company shall deliver to the company an application for membership..."* for the director(s) to approve.

11. The respondent states that Mr Thomas of flats 1 & 2 submitted an application for membership dated 8th September 2017. Mr & Mrs Midtsaeter of flat 3 submitted an application for membership dated 20th September 2017. According to the "Register of Company Members" their membership started on 8th and 20th September respectively. Given the timing of the entry in the Register, the respondent was not satisfied that the Register was accurate as it was unlikely that an application could be made, considered by the Director, and entered in the Register, on the same day. This was because the Director would need time to consider the application and it was unlikely that it could be entered in the Register on the same day. In particular, according to the email on page 26 of the applicants bundle, Mr & Mrs Midtsaeter only confirmed at 15:10 on 20th September 2017 that they would like to become members. Given it was so late in the day, it was unlikely that their application could have been considered and entered in the Register on the same day. The applicant had failed to provide evidence to explain how it could all have been done on the same day.

12. Mr Delauncey stated the following on behalf of the respondent. He supplied the blank application forms to the respective tenants. Mr and Mrs Midtsaeter had already decided to become members. He referred the tribunal to the email he sent to them on 20 September 2017 at 12:39 (the tribunal notes that the email was also sent to Mr Thomas and Mr Theodorou, the Director (the email addresses on page 26 of the applicants bundle match the contact details on the Register on page 22 of the bundle). The email briefly sets out the background and explains the steps taken in forming the applicant company. In particular it states "*As far as 3 Cargreen Road is concerned, we already have the requisite number of leaseholders who are members (there needs to be at least 50%) because the owners of flats 1, 2 and 4 have expressed their intention to proceed. Therefore you can opt out of membership if you want and it will not affect the outcome. Obviously we hope that you will agree...*"). He stated that Mr and Mrs Midtsaeter emailed him back at 15:10 on the same day confirming that they both wanted to be part of the applicant company (the tribunal notes that the reply was also sent to Mr Theodorou and an individual called Kevin Carr). Once the membership application had been received from them, either Kevin Carr or Mr Theodorou the director entered the information in the Register.

13. He stated the respondent was seeking to question the veracity of the Register. However, all the applicant had to show was that it had a Register which listed its members and stipulated the date on which they became members. It was not necessary to show the mechanics of how all of that was done. The 2002 Act did not say that there was a need to comply with the Companies Act.

14. He further stated that the Register of Company Members for the applicant company (on page 22 of the bundle) was not from Companies House. It was a document produced and kept by the applicant.

Therefore, once the relevant application had been received from the prospective member(s), the information could be updated / included on the Register on the same day.

15. The respondent stated the following in reply. The reply from Mr and Mrs Midtsaeter did not refer to any attached membership application form and no such document was attached to the email. Although Mr Delauncey states that the Register is on a spreadsheet i.e. kept on a computer and the entry could be made by an individual and was not required to be included / updated by Companies House, there is no evidence before the tribunal to show who had updated the Register. The witness statements do not explain this and none of the relevant individuals had attended to give oral evidence. It was essential for that individual to have stated what they had done and when it was done and whether it had been backdated.

16. The tribunal found as follows. In determining whether a person was a member of the applicant company or not, the Companies Act 2006 was of relevance. The applicants own Articles of Association states that *"member" "has the meaning given in section 112 of the Companies Act 2006"*.

17. We note the respondent states that it is "unlikely" that the applicant could receive an application from a prospective member, consider and authorise it, and then enter the information in the Register on the same day. We note the sequence of events highlighted by the respondent. We note that there is no evidence from anyone on behalf of the applicant, either in a witness statement or in oral evidence, to provide any explanation. However, we note also that the specific point raised at the hearing on behalf of the respondent, namely, whether it was possible to consider, approve, and enter the details of the member in the Register on the same day, was not specifically raised in the respondent's statement of case. We note that the applicant company was incorporated on 7th September 2017. We note the respondent accepts that Mr Theodorou was a member on the relevant date. We note that Mr Thomas is the lessee of flats 1 & 2 and he therefore has two votes. We note also that Mr Thomas was a keen advocate of the right to manage the premises and the formation of the company (see paragraph 16 of the applicant's statement of case). We note that Mr Thomas completed his membership application on 8 September 2017. We note that Mr and Mrs Midtsaeter completed their membership application form on 20 September 2017. We note that the applicants Register of membership can be updated/added to by the applicant without needing to involve Companies House. Given the small number of individuals involved, on balance, we do not find it unlikely that the applicant could receive an application from a prospective member, consider and authorise it, and then enter the information in the Register on the same day. It is a simple process of the applicant anticipating and receiving the relevant applications, for Mr Theodorou to approve their membership (which is essential and necessary and therefore it is

unlikely to take much time to consider and approve), and for the Register to be updated on a spreadsheet. The respondent is simply speculating that it was unlikely without explaining why this simple process could not be completed on the same day within a reasonably short period of time. The tribunal further notes the contents of the email dated 20 September 2017 on page 26 of the applicants bundle. Although the point was not specifically highlighted by Mr Delauncey at the hearing, the tribunal notes that the email specifically states ""*As far as 3 Cargreen Road is concerned, we <u>already have the requisite number of leaseholders who are members</u> (there needs to be at least 50%) because the owners of flats 1, 2 and 4 have expressed their intention to proceed*". This we find further supports the applicant's case that Mr Thomas was already a member.

18. For the reasons given, the tribunal is satisfied that the applicants membership on the relevant date included a number of qualifying tenants of flats contained in the premises which was not less than one half of the total number of flats so contained.

Name: Mr L Rahman **Date:** 19/3/18

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.