**RESIDENTIAL PROPERTY TRIBUNAL SERVICE**
**SOUTHERN LEASEHOLD VALUATION TRIBUNAL**

**Case Number:** CHI/00HY/LRM/2010/0002

**In the matter of** 9-12A Mayfield, London Road, Marlborough, Wiltshire, SN8 2AA

**And in the matter of** an application under Section 84(3) of the Commonhold and Leasehold Reform Act 2002 for a determination as to entitlement to acquire the right to manage premises.

**Between:**

| | | |
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| **9-12A Mayfield RTM Company Limited** | | Applicant |
| | and | |
| **Sinclair Gardens Investments (Kensington) Limited** | | Respondent |

Date of issue of claim: 11 January 2010
Date of hearing: 30 March 2010
Members of the Tribunal: Mr. J. G. Orme (Lawyer Chairman)
Mr. P. Smith FRICS (Chartered Surveyor member)
Mr. M. Cook (Lay member)
Date of decision: 1 April 2010

**Decision of the Leasehold Valuation Tribunal**

**For the reasons set out below, the Tribunal determines that:**

1. **On 9 October 2009, 9-12A Mayfield RTM Company Limited was not entitled to acquire the right to manage the premises at 9-12A Mayfield, London Road, Marlborough, Wiltshire, SN8 2AA.**

2. **Pursuant to Section 88(2) of the Commonhold and Leasehold Reform Act 2002, it was reasonable for the Respondent, Sinclair Gardens Investments (Kensington) Limited, to incur professional fees in obtaining legal advice in connection with the claim notice served on it by 9-12A Mayfield RTM Company Limited.**

## Reasons

### The Application

1. 9-12A Mayfield, London Road, Marlborough, Wiltshire, SN8 2AA ("the Premises") is a detached block of 5 self contained flats.

2. On 18 September 2009, 9-12A Mayfield RTM Company Limited ("the Applicant") was incorporated as a private company limited by guarantee with one of its objects being to acquire and exercise the right to manage the Premises in accordance with the provisions of Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 ("the Act").

3. Sinclair Gardens Investments (Kensington) Ltd ("the Respondent") owns the leasehold reversion in the Premises.

4. By a claim notice dated 9 October 2009 given by the Applicant to the Respondent, the Applicant claimed to acquire the right to manage the Premises.

5. By a counter-notice dated 10 November 2009, the Respondent alleged that the Applicant was not entitled to acquire the right to manage the Premises as it had failed to give a notice of invitation to participate to a qualifying tenant of a flat at the Premises who was not and had not agreed to become a member of the Applicant company.

6. By letter dated 31 December 2009, received by the Tribunal on 11 January 2010, the Applicant applied to the Tribunal to determine whether it was, on the date when the claim notice was given, entitled to acquire the right to manage the Premises.

7. The Tribunal made directions for the parties to exchange written statements of case and for the application to be listed for hearing. Both parties have made written submissions to the Tribunal.

8. By an email sent by the Applicant to the Tribunal on 30 March 2010, the Applicant applied to adjourn the hearing fixed to take place at 11.15am on that day.

### The Law

9. Chapter 1 of Part 2 of the Act makes provision for the acquisition and exercise of rights in relation to the management of premises to which the Chapter applies by a company which, in accordance with the provisions of the Chapter, may acquire and exercise those rights.

10. Section 72 of the Act defines the premises to which the chapter applies. The company exercising the rights must comply with certain requirements which are set out in Sections 73 and 74.

11. Qualifying tenants are defined by Section 75. In essence a tenant of a flat under a long lease is a qualifying tenant. Any qualifying tenant has a right to be a member of the RTM company.

12. Section 78(1) provides that *"Before making a claim to acquire the right to manage any premises, a RTM company must give notice to each person who at the time when the notice is given – (a) is the qualifying tenant of a flat contained in the premises, but (b) neither is nor has agreed to become a member of the RTM company."* Such a notice is called a *"notice of invitation to participate"* and must comply with the requirements set out in Section 78 and the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003 SI 2003/1988 ("the RTM Regulations").

13. A claim is made by a RTM company by serving a claim notice on the landlord and certain other specified persons. Section 79(2) provides *"The claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before."*

14. If the recipient of a claim notice alleges that the RTM company was not entitled to acquire the right to manage on the day of the giving of the claim notice, he may serve a counter-notice under Section 84 whereupon the RTM company may apply to a leasehold valuation tribunal for a determination that it was so entitled.

15. The costs of such proceedings are dealt with by Section 88 which provides:

*"(1) A RTM company is liable for reasonable costs incurred by a person who is -*

*(a) landlord under a lease of the whole or any part of any premises,*

*(b) ...*

*(c) ...*

*in consequence of a claim notice given by the company in relation to the premises.*

*(2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.*

*(3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this chapter before a leasehold valuation tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.*

*(4) Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by a leasehold valuation tribunal.*

**Inspection**

16. The Tribunal carried out an inspection of the Premises prior to the hearing on 30 March 2010. Neither party was represented at the inspection.

17. The Tribunal noted that the Premises are detached and appear to consist of 5 self-contained flats, 4 of which are accessed via a communal hall and staircase. The other flat has a separate access.

**The Hearing and the Issues**

18. The hearing took place at the offices of Marlborough Town Council on 30 March 2010. The Applicant was not represented at the hearing. As the hearing was due to begin, the Tribunal received an email sent by Mr. Roger McElroy, an employee of Canonbury Management, a company which had been corresponding with the Tribunal on behalf of the Applicant. In the email, Mr. McElroy informed the Tribunal that he would not be able to attend the hearing and he requested that it be adjourned to another date as *"Unfortunately, we seem to have missed out on correspondence from the LVT providing the time and location of today's hearing."*

19. P Chevalier & Co, solicitors, act for the Respondent in this application and they had already informed the Tribunal in their written submissions dated 25 March 2010 that they would not be attending the hearing and they asked the Tribunal to proceed in the absence of the Respondent.

20. The Tribunal considered the request for an adjournment. The Tribunal clerk informed the Tribunal that letters had been sent to Canonbury Management on 4 and 11 March giving details of the date, time and place of the hearing and that there had been a telephone conversation with the office of Canonbury Management during the week commencing 22 March to confirm the details of the hearing. The email from Mr. McElroy did not suggest that notice of the hearing had not been given to the Applicant. Indeed, the email made it clear that Mr. McElroy was aware of the hearing. The email from Mr. McElroy gave no substantive reason or explanation for the request for an adjournment. In the circumstances, the Tribunal determined to refuse the request for an adjournment.

21. Being satisfied that notice of the hearing had been given to the parties in accordance with the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, the Tribunal determined to proceed with the hearing in the absence of the parties in accordance with paragraph 14(8) of those regulations.

22. The issue raised by the counter-notice and to be determined by the Tribunal was the simple issue of whether or not notice of invitation to participate had been given to the owners of flat 11 at least 14

days before the giving of the claim notice. The Premises consist of 5 flats numbered 9, 10, 11, 12 and 12A. The leasehold owners of flats 9, 10, 12 and 12A were and are members of the Applicant. It was not in dispute that the owners of flat 11 were and are qualifying tenants and are not members of the Applicant. Therefore, Section 78(1) of the Act required the Applicant to serve notice of invitation to participate on them before making a claim to acquire the right to manage.

**The Evidence and submissions**

23. The Applicant's evidence was filed with the Application. It consisted of a statement signed by Mr. McElroy dated 31 December 2009. In the statement he stated that he is one of the directors of the Applicant company.

24. In the statement, Mr. McElroy deals with the formation of the Applicant company, he gives details of the members of the Applicant; he deals with the service of the claim notice and the counter-notice. Those issues are not in dispute.

25. Mr. McElroy does not give any evidence in his statement as to when, how or in what form a notice of invitation to participate was sent to the owners of flat 11. He confirms that *"all documents sent out to parties were posted on the date shown in the document before close of business and were sent by first class post."* Later he says *"In the instant case, the only party who had not agreed to become a member of the RTM Company was the lessee-owner of flat 11 and as a result of this, they were the only party required to be served with an invitation notice under the Act. Mr. Chevalier, solicitor for the freeholder, was advised of this by way of provision of a register of members and non-members sent to him with the claim notice."*

26. In his statement, Mr. McElroy asked the Tribunal to determine, under Section 88(2) of the Act, whether costs incurred by the Respondent in seeking advice about the counter-notice would have been incurred if the Respondent was personally liable to pay those costs.

27. Attached to the statement was a document headed *"Example invitation notice"*. It was not addressed to anyone but the body of the notice contained the details of the Applicant company, its members, directors and secretary, stated the address of the Premises and identified the Respondent as the landlord. It was dated 21 September 2009 and signed by Mr. McElroy on behalf of RTM Secretarial Limited and RTM Nominee Directors Limited, both companies being stated to be directors of the Applicant.

28. Also attached to the statement was a copy of the register of members of the Applicant and a document headed *"Register of Non*

*Members"* which sets out the details of the owners of flat 11 as *"Jacqueline Wendy Harris & Vinnie".*

29. Attached to the Respondent's case dated 26 January 2010, is a copy of a letter dated 2 November 2009 sent by Canonbury Management to P Chevalier & Co which says, amongst other things, *"Please see enclosed copy of invitation notice served upon Flat 11."* The copy enclosed is in exactly the same form as the notice attached to the application but omits the words *"Example invitation notice"* and is addressed to *"Flat 11".*

30. It was on the basis of that copy that the Respondent served its counter-notice alleging that addressing the notice to *"Flat 11"* rather than to the qualifying tenant by name did not comply with the provisions of the Act.

31. Also attached to the Respondent's case was a copy of the notice of assignment of the lease of flat 11 which specified the names of the owners as *Jacqueline Wendy Harris and Vinnie Elizabeth Ethel Harris.*

32. In reply to the Respondent's case, Canonbury Management wrote to P Chevalier & Co on 29 January 2010 saying *"Attached to this document is a copy of the invitation notice sent to Flat 11 and provided to the Respondent upon request."* The copy enclosed is, again, in exactly the same form as the copy attached to the application except that the words "*Example invitation notice"* are omitted and the letter is addressed to *"Jacqueline Wendy Harris & Vinnie Elizabeth Ethel Harris"* at flat 11. The names are inserted in upper case whereas the rest of the address appears in a mixture of upper and lower case.

33. The Respondent's case is set out in 2 documents dated 26 January and 25 March 2010. The Respondent does not take issue with the formation of the Applicant company nor the identity of its members. It accepts that the owners of flat 11 are a qualifying tenant and that a notice of invitation to participate only had to be given to them. It accepts that a claim notice was served on it on 13 October 2009. In the case dated 26 January, it submitted that a notice addressed to *"Flat 11"* is insufficient if it is not addressed to a named person.

34. In its case dated 25 March it invited the Tribunal to consider why the copy of the notice of invitation to participate sent to them on 2 November was in a different form to the copy sent on 29 January, how the latter notice came to have the full names of Vinnie Harris and why their names appeared in a different type face to the rest of the address.

35. In relation to costs, the Respondent says that it has a legitimate interest in ensuring that the Applicant company is properly

constituted and that it exercises its powers properly so as to ensure that other qualifying tenants have not been excluded from the process.

36. In the email received by the Tribunal from Mr. McElroy on 30 March 2010, Mr. McElroy sought to respond to the issues raised by the Respondent. He says *"the invitation notices sent out are always sent to the legal owner of the flats to which they relate."* That information is obtained from the members of the company and HM Land Registry. He says *"Mr. Chevalier was sent a sample copy of an invitation notice (at his request) rather than a specifically addressed copy. The legal requirement under the legislation is that we send all non-members an invitation notice and we believe that this requirement has been satisfied by our so doing."* He says that the names are not typed in a different type face and that the names as shown in the register of non-members have been truncated by their systems.

37. On 29 March 2010, the Tribunal chairman obtained copies of documents registered with Companies House relating to the Applicant company. Form 10(ef), which records the first directors and secretary and the intended situation of the registered office, records the initial company secretary as Louise Simpson and the initial directors as Louise Simpson, John Taylor, Paul Blair, Jason Spink, RTM Nominee Directors Limited and RTM Secretarial Limited. Further documents filed at Companies House show that RTM Nominee Directors Limited and RTM Secretarial Limited resigned as directors on 23 November 2009.

**Conclusions**

38. On the basis of the records filed at Companies House, the Tribunal is not satisfied that Mr. McElroy has ever been a director of the Applicant company. Had he appeared at the hearing, the Tribunal would have asked him to prove his appointment as a director and his authority to appear on behalf of the Applicant. The Tribunal suspects, but has no evidence, that Mr. McElroy is a director of either RTM Nominee Directors Limited or RTM Secretarial Limited or both but by 31 December 2009, when he signed the statement on behalf of the Applicant, those companies had resigned as directors of the Applicant. The Tribunal must, therefore, question whether Mr. McElroy had any authority to act on behalf of the Applicant in connection with this application. The Tribunal does not need to determine that issue in order to reach its conclusion.

39. The Tribunal is satisfied that the Premises are premises to which Chapter 1 of Part 2 of the Act applies. From its own inspection, it noted that the Premises are structurally detached and appear to contain 5 flats. It is not disputed that all flats are owned by qualifying tenants.

40. The Tribunal has been presented with 3 versions of a notice of invitation to participate, all of which are in the same form apart from the addressing of the notice. The Applicant's main evidence produced a copy of a notice headed *"Example invitation notice"* with no address at all. When asked for a copy by the Respondent's solicitors, a further notice was produced addressed to *"Flat 11"*. In response to the Respondent's case which set out its arguments, a further version was produced addressed to *"Jacqueline Wendy Harris & Vinnie Elizabeth Ethel Harris"*.

41. Each version of the notice is dated 21 September 2009 and bears the signature of Mr. McElroy.

42. The Tribunal does not find Mr. McElroy's explanations for the difference in the 3 forms of notice to be convincing. The Tribunal does not understand Mr. McElroy's explanation that he sent Mr. Chevalier a sample notice. In this case, it is accepted that only one notice needed to be served and that was on the owners of flat 11. All of the versions that the Tribunal has seen have been specifically prepared to refer to the Premises and contain all the information needed apart from the details of the addressee. There was no need for a sample or example notice. There was only a need for one notice addressed to the owners of flat 11.

43. Furthermore, there was no clear evidence from Mr. McElroy or from anyone else on behalf of the Applicant to say that a notice had been served on the owners of flat 11, when or in what form. The only evidence was implied evidence from the terms of the correspondence. It would not have been difficult for Mr. McElroy or one of the other directors of the company to appear at the hearing to give clear evidence as to what had been served, on whom and when. That evidence was lacking. Even the email from Mr. McElroy sent on the day of the hearing does not provide that evidence. The Tribunal is not satisfied on the balance of probabilities that any notice was given to the owners of flat 11, particularly a notice addressed to them by name. In the circumstances, the Tribunal finds as a fact that no notice of invitation to participate was served on the owners of flat 11.

44. It follows from that finding of fact that the Applicant has not complied with Section 78(1) and was not, therefore, in a position to give a claim notice on 9 October 2009. It was not, on that date, entitled to acquire the right to manage the Premises.

45. Even if the Tribunal had been satisfied that a notice had been given addressed to *"Flat 11"*, the Tribunal would not have been satisfied that the Applicant had complied with Section 78(1). The Act requires that notice is given to *"each person"* who is a qualifying tenant. A notice addressed to *"Flat 11"* is not addressed to a person.

46. Although it is not directly relevant to the Tribunal's findings, the Tribunal is not satisfied that the notice of invitation to participate which was produced by Mr. McElroy complies with the Act and the RTM Regulations in 2 respects:

    1) The notice says that the Applicant's articles of association may be inspected *"at any time during office hours"*. There is no indication whether those office hours include a Saturday or Sunday as required by Section 78(5)(b).
    2) The notice names RTM Secretarial Limited as the company secretary when it appears that the secretary was Louise Simpson. It names RTM Nominees Limited and RTM Secretarial Limited as directors when it appears that there were 4 other directors. Paragraph 3(2)(a) of the Regulations requires the notice to state the names of the company's directors and secretary.

47. The Applicant has asked the Tribunal to determine whether it was reasonable for the Respondent to incur professional fees in considering whether to serve a counter-notice. The Applicant submits that the Respondent's resistance to the claim notice was spurious and a calculated ploy to maintain management of the Premises for a further period of time.

48. The Tribunal does not accept the Applicant's submissions. It accepts the submissions made by the Respondent. If a landlord is served with a notice claiming the right to manage one of its properties, it is clearly right for the landlord to consider whether or not that right is being properly exercised. In this case, the Respondent had a concern which the Tribunal has found to be justified. The Act lays down a procedure whereby the Applicant is able to take over management of the Premises. It is for the Applicant to follow that procedure correctly and to prove that it has done so, if required. The Tribunal is satisfied that if the Respondent had known that it would be responsible for paying the costs of that advice, it might reasonably have been expected to obtain legal advice as to whether the Applicant had complied with the requirements of the Act.

49. The Tribunal is not in a position to deal with the amount of any costs. If the parties are not able to agree the amount between them, they will have to make a further application to the Tribunal under Section 88(4).

Mr. J G Orme
Chairman
Dated 1 April 2010

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**SOUTHERN LEASEHOLD VALUATION TRIBUNAL**

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**And in the matter of** an application under Section 84(3) of the Commonhold and Leasehold Reform Act 2002 for a determination as to entitlement to acquire the right to manage premises.

**Between:**

**9-12A Mayfield RTM Company Limited** Applicant

and

**Sinclair Gardens Investments (Kensington) Limited** Respondent

Date of substantive decision: 1 April 2010
Date of application for permission to appeal: 14 April 2010
Members of the Tribunal: Mr. J. G. Orme (Lawyer chairman)
Mr. P. Smith FRICS (Chartered surveyor member)
Mr. M Cook (Lay member)
Date of refusal of permission to appeal: 21 April 2010

**Decision of the Leasehold Valuation Tribunal on the application by the Applicant for permission to appeal**

**For the reasons set out below, the Tribunal refuses permission to appeal.**

**Reasons**

1. In its decision dated 1 April 2010, the Tribunal determined that, for the reasons set out in its decision, on 9 October 2009 the Applicant was not entitled to acquire the right to manage premises at 9-12A Mayfield, London Road, Marlborough.

2. By letter dated 14 April 2010, Canonbury Management, on behalf of the Applicant requested permission to appeal the decision to the Lands Tribunal now the Upper Tribunal (Land Chamber).

3. The letter set out 2 grounds on which the Applicant says that the decision was wrong, namely:

a. *"We were disappointed to read a large number of factually inaccurate matters were stated and must request that these be corrected."*

b. *We were particularly surprised to learn that the tribunal did not take account of the fact that their letters had not been received by our office and therefore did choose to proceed with a hearing with no parties present. It has clearly been prejudicial to our client because none of the evidence we provided has been considered by the tribunal."*

4. The Tribunal's decision sets out its reasons for refusing the Applicant's last minute request for an adjournment in circumstances which showed that the Applicant was aware of the date, time and venue fixed for the hearing. The Applicant has produced no new evidence to show that the Tribunal's decision was wrong.

5. The Tribunal's decision sets out the evidence which it took into account in coming to its decision. The Applicant has not identified any evidence which it says was not taken into account by the Tribunal. The Applicant has not given any grounds for alleging that the Tribunal was not able to come to its decision on the basis of the evidence before it.

6. In the absence of any substantive grounds for appealing the decision, the Tribunal does not consider that the Applicant has any real prospect of success in an appeal. The Tribunal does not consider that there is any other compelling reason why the Applicant should be given permission to appeal. The Tribunal refuses permission to appeal.

7. The Applicant may make a further application under Section 175 of the Commonhold and Leasehold Reform Act 2002 for permission to appeal to the Upper Tribunal (Land Chamber). The Lands Tribunal Rules 1996 (SI 1996 No.1022) set out the procedure for making such an application. Any such application must be made to the Upper Tribunal within 14 days of the date on which this decision is sent to the Respondent. The address of the Lands Tribunal is: 43-45 Bedford Square, London WC1B 3AS.

Signed
Mr. J G Orme
Chairman
Dated 21 April 2010