310

HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL SECTION 84(3) COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Case Reference:	**LON/00AN/LRM/2012/0016**
Premises:	91 Hazlebury Road, London SW6 2LX
Applicant:	91 Hazlebury Road London RTM Company Limited
Represented by:	Griffin Smith Farrington Webb LLP, Solicitors
Respondent:	Assethold Limited
Represented by:	Conway & Co., Solicitors
Leasehold Valuation Tribunal:	Ms F Dickie
Date of determination:	23 July 2012

Summary of Decision

1. The RTM Company is entitled to acquire the right to manage and by virtue of section 90(4) of the Act, the acquisition date will be the date three months after this determination becomes final. There is no order for costs.

Preliminary

2. By a claim notice dated 22 March 2012 the Applicant gave notice that it intended to acquire the Right to Manage 91 Hazlebury Road, London SW6 2LX ("the premises") in accordance with Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 ("the Act"). By a counter notice dated on 24 April 2012 the Respondent, being the freehold owner of the premises, alleged that by reason of sections 78(1), 79(3), (5) and (8) of Chapter 1 of Part 2 of the Act the Applicant was not entitled on 31 July 2012 to acquire the right to manage the premises.

3. On 20 June 2012 the tribunal received from the Applicant an application under section 84(3) of the Act and it gave Directions dated 21 June 2012 for the determination of the matter. The premises comprise 3 flats, which are let on long leases.

4. The relevant statutory provisions are sections 78-84 and section 111(5) of the Commonhold and Leasehold Reform Act 2002, which are not set out in this decision.

Decision and Reasons

Section 78(1) and (9)

5. It is not disputed that pursuant to Section 78(1) notice inviting participation had to be given to the non-participating leaseholder of the upper ground studio flat (BPT Ltd). That notice was dated 1 March 2012 and sent by post to the address held by the Land Registry, not to the flat. The Applicant does not accept that utilisation of the Land Registry address, which may be outdated, was due notification for the purposes of section 111(5) of the Act.

6. Mr Ongley, a partner in the firm of solicitors representing the Applicant, states in his witness statement that he sent a copy of the notice to Mr Blackford of BPT by email, who acknowledged it and responded that the company did not want to be a member of the RTM company. The documentation provided demonstrates, however, that the copy notice was sent to Mr Blackford but the reply came from Mr Szczurowski of Grainger plc, property manager for BPT, who did indeed acknowledge the notice and decline membership of the company.

7. I am satisfied that service in accordance with section 111(5) is not mandatory. The word "may" is permissive. The Respondent accepts that correspondence by a director or authorised person on behalf of BPT would satisfy evidence of service of the notice and I am satisfied that such correspondence took place. Accordingly I find there was good service of the section 79(1) notice.

8. The Respondent repeats its submissions regarding section 79(1) in relation to the duty under section 79(8) to give a copy of the claim notice to BPT Ltd., but observes that the Applicant makes no reference to this having also been emailed or sent otherwise to BPT. However, BPT Ltd. acknowledged the first notice without raising an issue as to the address for service to which the postal copy and covering letter were sent. It had the opportunity to do so, particularly as further correspondence was expressly anticipated, and since it did not I consider it to have implicitly confirmed service could be made at the Land Registry address. The section 79(8) claim notice was also sent there by post and not returned undelivered. I am satisfied that the address was not out of date and that good service is very likely to have taken place.

Section 79(3) and (5)

9. The Applicant disputes that on the relevant date the membership of the RTM company included not less than one-half of the total number of flats, as required by section 79(3) and (5). The "Register of Members" produced by the Applicant includes the names of the leaseholders of the basement flat as subscriber members, and the name of the leaseholder of the upper ground floor flat as a member with her date of entry recorded as 19 February 2012. The Respondent disputes this is a valid register of members. The Companies Act 2006 provides:

   Section 112
   (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

   Section 113
   (1) Every company must keep a register of its members.
   (2) There must be entered in the register –
      (a) the names and addresses of the members,
      (b) the date on which each person was registered as a member, and
      (c) the date at which any person ceased to be a member.

10. It is the Respondent's position that a person becomes a member when their approved application is entered by a director of the company upon the Register of Members. The Respondent observes that the given as the date of entry of membership for the leaseholder of the upper ground floor flat is the date of her signature on her application for members, which suggests the former is not the actual date of entry on the Register.

11. Mr Fraser Quigan in his witness statement confirms that he accepted the membership on 19 February 2012. The notice inviting participation was dated 1 March 2012. The Respondent considers the Applicant's evidence is inconsistent. It considers Mr Ongley's evidence is suggestive that by mere acceptance by Mr Quigan the leaseholder of the upstairs flat became a member and observes there is no reference to the date the entry was actually made on the Register.

12. It is the Respondent's contention that the Applicant has not kept a valid register of members. The Respondent relies on *Southall Court Residents Ltd. & Others v Buy Your Freehold Ltd. & Others*, Lands Tribunal, LRX/124/2007, in which HHJ Reid QC held that the materially identical provisions of section 22 of the Companies Act 1985 applied to RTM companies and, where it was found that there was no valid register, it was held that there were no members other than the original subscribers and accordingly the RTM company was not validly constituted.

13. Mr Ongley states:
   "I issued Deolinda [the leaseholder of the upper ground, first and second floor maisonette] with the prescribed form for application for

membership, which she duly signed and returned to me. Upon seeking Fraser's consent, Deolinda became a member of the Applicant Company on 19 February 2012. I update [sic] the Company Register accordingly.
Once the Applicant company had been formed, and we had a majority of qualifying tenants, I drafted a Notice Inviting Participation for service on the non-participating tenant, BPT Limited".

14. I find no reason to suppose that the date of entry onto the register being the same as the date of application is suggestive that the former date does not represent the date of entry at all. The register was prepared by Mr Ongley, a solicitor and officer of the court, and he has signed a statement of truth to the effect that he updated the register and then drafted the statutory notice of invitation to the non-participating tenant. I am satisfied on the evidence that on the relevant date there were the requisite number of members of the company. I am not persuaded that the Register is defective, and I am satisfied that (by virtue of the wording of section 113) any such defect would not render the Register invalid in any event. A Register was maintained and the facts are dissimilar from those is the *Southall Court* case. In any event, the legislation is not expressed to require me to determine whether there had been compliance with section 113, but rather to determine whether there had been the requisite number of members on the relevant date, and in doing so I may look at all the available evidence.

15. No other grounds of objection have been maintained, and for the reasons above I find that the Claim Notice was valid and that the Applicant is entitled to acquire the Right to Manage.

Costs

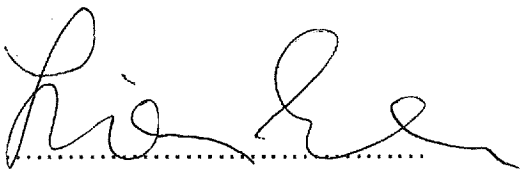
16. The Applicant seeks an order for costs limited to £500 on account of the Respondent's unreasonable behaviour, and relies on its failure to expand on its reasons as to why it considered the notice to be defective. That application was made before sight of the Respondent's statement of case and evidence, and no new submissions on costs have been made in light of the case that has been advanced by the Respondent in these proceedings.

17. The tribunal is empowered with discretion as to costs by Schedule 12 of Paragraph 10 of the 2002 Act, and may make an award where a party "has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings."

18. The Respondent contends that the decision to serve the counter notice and the content of correspondence thereafter is not "in connection with the proceedings" and that therefore the tribunal has no power to make an order for costs in relation to the conduct relied upon. I do not agree. Pre action costs are indeed capable in my view of giving rise to a power to award costs under Schedule 12 where they are properly "in connection with the proceedings". In the present case once the counter notice had been served such proceedings were clearly in the contemplation of both parties and the

correspondence of 1 and 18 May was obviously sent in an attempt to avoid proceedings.

19. The Respondent's solicitor's response dated 21 May was in vague terms and obscure as to the actual issues. Whilst the Respondent's evasive response might arguably be classified as "unreasonable" and "in connection with the proceedings" I would in any event have discretion whether to order costs. The Applicant has had the Respondent's evidence since 16 July. The Applicant makes no suggestion that the Respondent has been unreasonable in advancing the issues it did in this appeal (and it is not necessary for me to seek further representations on this point). That is not the basis on which this application is brought, I am not satisfied it has been unreasonable in that respect, or that it is likely the costs of bringing these proceedings could have been avoided in any event. In the circumstances I refuse the application for costs.

Signed 

Chairman 23 July 2012