350

MAN/30UF/LRM/2012/0006
MAN/30UF/LRM/2012/0020
MAN/30UF/LRM/2013/0001

HM COURTS AND TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL
OF THE NORTHERN RENT ASSESSMENT PANEL

DECISION AND REASONS IN THE MATTER OF APPLICATIONS UNDER SECTION 84(3) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002.

Property	Various premises at: (1) Queens Manor, Clifton Drive South, Lytham St Annes FY8 1GJ (2) 1-12 Elizabeth Court, King Edward Avenue, Lytham St Annes FY8 1FF (3) 19-24 Bailey Avenue, Queens Manor Development, Lytham St Annes FY8 1FL
Applicant	QMS (RTM) Company Limited
Respondent	QMS (Lytham) Management Co Ltd represented by Residential Management Group Limited
Tribunal members	Mr M Davey (Chairman) Mrs E. Thornton-Firkin
Date of decision	25 April 2013

The Applications

1. In each of the three applications referred to above, the Right to Manage Company Applicant, having served a claim notice on, and received a counter notice from, the Respondent Management Company, sought a determination from the leasehold valuation tribunal ("the Tribunal"), under section 84 (3) of the Commonhold and Leasehold Reform Act 2002 ("the Act"), that it was on the relevant date entitled to acquire the right to manage the respective premises.

2. The applications were listed for hearing by the Tribunal on 26 February 2013. On 13 February 2013 the counter notices were withdrawn and the Respondent agreed that the Applicants were entitled to acquire the right to manage the respective premises.

3. The Applicant's applications to the Tribunal were accordingly withdrawn. However, the Applicants asked the Tribunal to award the Applicant costs of £1500 which it claims to have incurred in connection with the proceedings. It says that the Tribunal may award such costs under paragraph 10 of Schedule 12 to the Act on the basis that the Respondent had acted frivolously, vexatiously, abusively, or disruptively or otherwise unreasonably in connection with the proceedings. The Respondent resists that claim.

4. The three section 84(3) applications were received by the Tribunal on (1) 9 June 2012, (2) 13 November 2012 and (3) 28 December 2012. Accordingly the proceedings began on those dates respectively.

The Applicant's submissions

5. The Applicant argues in essence as follows. First, that the grounds raised in the Respondent's three counter notices were untenable and that it should have withdrawn those notices at a much earlier stage. Second, that the Respondent failed to comply with the Directions of the Tribunal, which had ordered the Respondent to file its statement of case (in the consolidated proceedings) first by 7 January 2013 and then, as extended, by 14 January 2013. Indeed the Applicant says that the Respondent had still failed to comply at the point when the counter notices were withdrawn on 13 February 2013. The Applicant says that the Respondents had taken legal advice from two firms of solicitors between July and October 2012 but had not disclosed the nature of their case to the Applicants or the Tribunal. The Applicants inferred that this was to delay the inevitable and to profit from receipt of management fees in the interim.

The Respondent's submissions

6. The Respondent says that proceedings have been protracted for a number of reasons. First because, in respect of the first application, the Applicant sought a preliminary determination as to whether the Respondent's counter notice was served in time. The Tribunal determined this matter, on the basis of written representations, in favour of the Respondent on 21 November 2012. Second because there was a dispute as to whether the grounds could be included in the claim. This centred on the fact that some of the leases of flats in the development had a different basis for calculation of service charge contributions in respect of maintenance of the gardens and grounds to others. The development consists of a number of blocks and all lessees have shared use of the gardens and grounds. The Respondent

had argued that this could cause problems because if the RTM claim were to succeed the Applicant may be charging tenants on a different basis to that on which other tenants would be charged by the Respondent. It had taken time to resolve this issue by agreement.

7. However, the Respondent conceded that that these difficulties did not in themselves form grounds for serving a counter notice. It sought to justify the service of the counter notice in case (1) as follows. First that its solicitors had not received from the Applicant, as requested, sight of the register of members of the RTM Company and of the participating notices served on all long lessees. It accordingly asserts that "the formation, membership and regulations of the company did not appear to satisfy the qualifying rules under section 74(1). Second that there was a discrepancy between the definition of Premises in the Articles of the RTM Company and the definition in the claim notice which was not corrected by an amendment to the Articles on 24 November 2011, which changed the definition of Premises. This is because it required two directors approve a proposal to circulate to members a written resolution to adopt new Articles and a second director was not appointed until 22 January 2012. The same basis was relied on for serving counter notices in cases (2) and (3). Furthermore, in these two cases the Respondent claimed that, even as expressed in the replacement Articles adopted, the definition of Premises did not appear to satisfy the requirements of the Act

8. The Respondent also says that it was not notified of the second and third applications until 14 November 2012 and January 4 2013 respectively. On 13 February 2012 the parties agreed on a provisional divide of the managed land whereby the Applicant RTM Company would take over management of an area of land which contained all three blocks. This was despite the ongoing concern of the Respondent with regard to the structure of the leases and the matter of whether the RTM Company was valid within the meaning of the Act.

The Law

9. By paragraph 10 of Schedule 12 to the Act

    (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
    (2) The circumstances are where –
        (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
        (b) he has in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed-

(a) £500, or
(b) such other amount as may be specified in procedure regulations.

Reasoning and Decision

10. The issues for the Tribunal are (1) whether paragraph 10(2)(b) been satisfied; (2) if so whether the Tribunal should exercise its discretion in favour of the applicant; (3) whether any award is limited to £500 or £1500 and (4) what costs have actually been incurred by the Applicant in connection with the proceedings

11. With regard to the first issue a party needs to show a relatively high degree of culpability on the part of another for the Tribunal to make an order against that other party on the ground set out in paragraph 10(2)(b). In the circumstances of the present case the issue amounts to whether the Respondent behaved vexatiously or otherwise unreasonably in connection with the proceedings. It seems tolerably clear that the term vexatious envisages conduct that is designed to hinder or harass a party rather than conduct which is calculated to enhance the resolution of the case. In not dissimilar vein, unreasonable conduct indicates conduct that does not permit of a reasonable explanation.

12. So can the Respondent's persistence with its case until a week before the hearing, when the counter notices were withdrawn, be said to be conduct that falls within this description? That depends to a large degree on the substance of the Respondent's case.

13. The Respondent's counter notice in case (10 stated

"We allege that, by reason of section 71(1), section 72, section 73(2)(b) and section 74(1) of the Commonhold and Leasehold Reform Act 2002, on 27 April 2012, QMS (RTM) Company Limited ("the Company") was not entitled to acquire the right to manage the Premises specified in the Claim Notice."

14. A covering letter of 29 May 2012 expanded upon the counter notice by stating that the objection was that

(1) the objects of the RTM Company specified premises that did not qualify for the right to buy because they were not a self contained building or part of a building;
(2) that in so far as the RTM Company had sought to change its articles on 21 November 2011 that was of no effect because

there was only one resident director who was therefore unable to authorise the company to make a special resolution on that date to substitute the articles.

15. In a statement which accompanied its application to the Tribunal on 6 June 2012 the Applicant sought to answer these submissions.

16. The Tribunal issued Directions on 26 July 2012 which were amended on 15 August 2012, the parties having agreed that the Tribunal should decide as a preliminary issue the matter of whether the Respondent's counter notice of 29 May 2012 had been given in time. Following submissions of the parties the Tribunal decided this matter in favour of the Respondent on 19 November 2012.

17. On 13 November 2012 the Tribunal received an application in respect of another block at the same development. (Case 2). The Respondent's counter notice of 12 November 2012 had raised similar objections to that given in respect of case (1) and in addition stated that the definition of Premises under both the original and substituted sets of Articles was wrong. Directions were issued on 15 November 2012. They required the Respondent to provide a statement of case within 21 days.

18. On 21 November the Applicant notified the Tribunal that the Respondent had conceded the RTM claim in Case 1 as far as the building was concerned and the only remaining dispute in that case concerned the appurtenant land to be included. The applicant also requested that the hearing of cases (1) and (2) be consolidated.

19. The Tribunal agreed and on 17 December 2012 issued Directions for the hearing of the outstanding matters in both cases. They required the Respondent to provide a statement of case within 21 days.

20. On 28 December 2012 the Tribunal received from the Applicant an application in relation to another block, (case 3) at the same development. The Respondent's counter notice of 19 December 2012 raised similar objections to that given in respect of case (2). The Tribunal issued Directions on 8 January 2013, amended its Directions in cases (1) and (2) and required the Respondent to provide a statement of case within 21 days.

21. A consolidated hearing was arranged for 26 February 2013 but was abandoned on 20 February following the Respondent's withdrawal of its counter notices on 13 February 2013.

22. The question therefore is whether, a hearing having been arranged for 26 February 2013, the Respondent's decision on 13 February 2013 to withdraw its counter notices, served on 29 May 2012, 12 November 2012 and 19 December 2012 permits of a reasonable explanation. The Applicant's request for the preliminary issue of whether the counter

notice in case (1) was served in time is not relevant to this matter, notwithstanding the fact that that issue was decided in favour of the Respondent. That was a reasonable request in the circumstances. The fact is that the counter notices denied the claims on grounds that have since been withdrawn despite the opportunity for the Respondent to defend them at a hearing. This has had the effect of delaying the date on which the RTMs take effect by significant periods. Despite several sets of Directions no statement of case has ever been produced by the Respondent, although the Respondent has from the beginning stated its grounds.

23. The crux of the matter is that one of the two stumbling factors to resolution of this dispute was the matter of the land to be included in the RTM claims and, as the Respondent acknowledges, this is not a matter that was mentioned in the counter notice nor could it have been legitimately so included as aground of objection. The second stumbling block was the ground of objection contained in the counter notices, which related to the correct specification of the premises to be the subject of the RTM claims and the assertion by the Respondent that the objects clauses of the Applicant were flawed. The Respondent continues to assert the validity of these claims despite withdrawal of the counter notices. At the same time the Respondent acknowledges that "it would be a simple matter for the Applicant to properly correct these clauses by Special Resolution, provided that it has sufficient support from its members for such resolution. This fact has been a major contributor to the Respondent's decision to withdraw the counter notices." (Respondent's submission to Applicant's claim for costs).

24. The Tribunal considers that (a) in these circumstances the actions of the Respondent in leaving it until very late in the day to withdraw its counter notices was unreasonable conduct which has caused the Applicant to incur unnecessary costs and (b) the Tribunal should exercise its discretion to make an award of costs to the Applicant under paragraph 10 of Schedule 12 to the 2002 Act.

25. The Applicant claims its costs in connection with all three applications each constituting proceedings relating to different properties albeit that the properties are at the same development and that all three applications were to be dealt with at a consolidated hearing. The Respondent says that the piecemeal approach of three applications has contributed to the incurring of costs by both parties. However, if the first counter notice had been withdrawn at an earlier stage the need for counter applications and further applications in cases (2) and (3) could have been avoided.

26. The Tribunal accordingly determines that the Respondent should pay the relevant costs incurred by the Applicant in connection with the Tribunal proceedings on the Company's production of a relevant invoice(s) up to but not exceeding £1500.

M Davey
Chairman of the Tribunal