512

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CJ/LRM/2014/0015**
Property	:	**Mill House, Hanover Street, Newcastle Upon Tyne, Tyne and Wear, NE1 3AG**
Applicant	:	**Mill House RTM Company Limited**
Representative	:	**Punch Robson, solicitors**
Respondents	:	**Triplerose Limited**
Representative	:	**Scott Cohen, solicitors**
Type of Application	:	**Application for Right to Manage (Section 84(3) of the Commonhold and Leasehold Reform Act 2002)**
Tribunal Members	:	**P J Mulvenna LLB DMA (Chairman)** **D Bailey FRICS**
Date and venue of Hearing	:	**13 April 2015 at IAC Manchester Tribunal Office, 1st Floor, Piccadilly Exchange, 2 Piccadilly Plaza, Manchester M1 4JB (Determination on the Papers)**
Date of Decision	:	**13 April 2015**

DECISION

ORDER

That the application of Mill House RTM Management Company Limited for a determination pursuant to Section 84(3) of the Commonhold and Leasehold Reform Act 2002 that the Applicant is entitled to acquire the right to manage Mill House, Hanover Street, Newcastle upon Tyne, NE1 3AG, from Triplerose Limited is granted.

INTRODUCTION

1. By an application dated 28 October 2014, Mill House RTM Management Company Limited ('the Applicant') applied for a determination that the Applicant was entitled to acquire the right to manage Mill House, Hanover Street, Newcastle upon Tyne, NE1 3AG, ('the Property') from Triplerose Limited ('the Respondent').
2. The Applicant is a private limited company limited by guarantee which was incorporated on 15 September 2011 with the object, amongst other things, of acquiring and exercising the right to manage the Property in accordance with the Commonhold and Leasehold Reform Act 2002 ('CLRA').
3. The members of the Applicant are the leaseholders of individual apartments at the Property who each have leasehold interests in their respective apartments under underleases for terms of 125 years from 27 November 2006.
4. The Respondent has a leasehold interest in the Property (together with other land) for a term of 125 years plus 10 days from 27 November 2006 granted by a Lease dated 30 March 2009 and made between (1) Bowesfield Investments Limited and (2) the Respondent.
5. On 29 July 2014, the Applicant served Notice on Bowesfield Investments Limited (who have a freehold interest in the property) and on the Respondent claiming the right to manage the Property. The Respondent served a Counter-notice, dated 29 August 2014 alleging that the Applicant was not entitled to acquire the right to manage. Bowesfield Investments Limited has not responded to the Notice. The Applicant subsequently made the application referred to in paragraph 1 above.

THE PROPERTY

6. The Property is a self-contained building comprising six apartments.

PROCEEDINGS

7. Directions were issued by Judge J Holbrook, sitting as a procedural chairman, on 24 November 2014. The parties have complied with the Directions following the grant of extensions of time.

8. Neither party requested a hearing and the Tribunal proceeded by considering the matter on 13 April 2015 by reference to the papers placed before them. The Tribunal determined that, having regard to the nature of the matters to be determined, there was no need to inspect the Property.

THE LAW

9. The material provisions of CLRA are:

Section 71(1) : This Chapter makes provision for the acquisition and exercise of rights in relation to the management of premises to which this Chapter applies by a company which, in accordance with this Chapter, may acquire and exercise those rights (referred to in this Chapter as a RTM company).
(2) The rights are to be acquired and exercised subject to and in accordance with this Chapter and are referred to in this Chapter as the right to manage.

Section 73: (1) This section specifies what is a RTM company.

(2) A company is a RTM company in relation to premises if—

(a) it is a private company limited by guarantee, and

(b) its memorandum of association states that its object, or one of its objects, is the acquisition and exercise of the right to manage the premises.

Section74: (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

(b) from the date on which it acquires the right to manage (referred to in this Chapter as the "acquisition date"), landlords under leases of the whole or any part of the premises.

Section 78: (1) 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.

(2) A notice given under this section (referred to in this Chapter as a "notice of invitation to participate") must—

(a) state that the RTM company intends to acquire the right to manage the premises,

(b) state the names of the members of the RTM company,

(c) invite the recipients of the notice to become members of the company, and

(d) contain such other particulars (if any) as may be required to be contained in notices of invitation to participate by regulations made by the appropriate national authority.

(3) A notice of invitation to participate must also comply with such requirements (if any) about the form of notices of invitation to participate as may be prescribed by regulations so made.

Section 79: (1) A claim to acquire the right to manage any premises is made by giving notice of the claim (referred to in this Chapter as a "claim notice"); and in this Chapter the "relevant date", in relation to any claim to acquire the right to manage, means the date on which notice of the claim is given.
(8) A copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises.

Section 80: (1) The claim notice must comply with the following requirements. ...

(8) It must also contain such other particulars (if any) as may be required to be contained in claim notices by regulations made by the appropriate national authority.

(9) And it must comply with such requirements (if any) about the form of claim notices as may be prescribed by regulations so made.

Section 81: (1) A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80.

(2) Where any of the members of the RTM company whose names are stated in the claim notice was not the qualifying tenant of a flat contained in the premises on the relevant date, the claim notice is not invalidated on that account, so long as a sufficient number of qualifying tenants of flats contained in the premises were members of the company on that date; and for this purpose a "sufficient number" is a number (greater than one) which is not less than one-half of the total number of flats contained in the premises on that date.

Section 84: (1) A person who is given a claim notice by a RTM company under section 79(6) may give a notice (referred to in this Chapter as a "counter-notice") to the company no later than the date specified in the claim notice under section 80(6).
(2) A counter-notice is a notice containing a statement either—

(a) admitting that the RTM company was on the relevant date entitled to acquire the right to manage the premises specified in the claim notice, or

(b) alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled,

and containing such other particulars (if any) as may be required to be contained in counter-notices, and complying with such requirements (if any) about the form of counter-notices, as may be prescribed by regulations made by the appropriate national authority.

(3) Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the company may apply to a [Tribunal] for a determination that it was on the relevant date entitled to acquire the right to manage the premises.

THE EVIDENCE AND THE TRIBUNAL'S CONCLUSIONS WITH REASONS

10. The Respondent alleged in the counter notice that the Applicant was not entitled to acquire the right to manage the Property for the following reasons. The Respondent enlarged on the reasons as indicated in its statement of case.

(a) The claim notice did not contain the particulars required by The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 in accordance with Section 80(8) of CLRA.

In its statement of case, the Respondent indicated that the particulars which were not contained in the claim notice were the prescribed details for the service of the counter-notice which were stated (at paragraph 5(c)) as the name and address of the Applicant's solicitors rather than the name and registered address of the Applicant.

(b) The claim notice did not comply with the form of claim notices as prescribed by The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 in accordance with Section 80(9) of CLRA.

In its statement of case, the Respondent made the same observations as recorded in (a) above.

(c) The claim notice was not given to each person as required by Section 79(8) of CLRA.

In its statement of case, the Respondent indicated that an inference had been drawn from the absence of copy letters to interested parties other than the landlord and its agent that notice had not been given to other interested parties.

(d) On the relevant date the Applicant included persons who were not qualifying tenants in relation to the Property as defined by Section 74(1) of CLRA.

In its statement of case, the Respondent indicated that a copy of the register of members sent on 27 August 2014 by the Applicant's solicitors included the names of David Jarvis and John Desmond Dillon who were believed not to be qualifying tenants.

(e) The notice inviting participation did not contain the particulars prescribed by The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 in accordance with Section 78(2) of CLRA.

In its statement of case, the Respondent indicated that it appeared that the notice inviting participation did not include the notes contained in the prescribed form of notice.

(f) The notice inviting participation did not contain the particulars prescribed by The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 in accordance with Section 78(3) of CLRA.

In its statement of case, the Respondent made the same observations as recorded in (e) above.

11. The Applicant has made the following representations in reply to the Respondent's allegations:

(a) & (b) The name and address given (at paragraph 5(c) of the claim notice) for service of the counter notice is simply an address for service and it would be absurd to deem the notice as being invalid on that ground.

(c) The notices were in fact served and the Respondent was advised that such was the case by the letter dated 27 August 2014 which enclosed the claim notice. The Applicant has provided a copy of the notice served on Bowesfield Investments Limited.

(d) The two persons included in the register of members were the original members of the company and their names had not been removed from the register.

(e) & (f) The recipients of the notices are the qualifying tenants of the Property who unanimously support the application. They are not prejudiced by any defect.

12. The Tribunal has considered the issues on the whole of the written evidence and submissions now before them and, applying their own expertise and experience, have reached the following conclusions on those issues.

13. In relation to the alleged defects in the notices, the Tribunal finds, as matters of fact, as follows:

(a) & (b) The relevant wording in paragraph 5(c) of the prescribed claim notice reads as follows:

'...you may respond to this claim notice by giving a counter-notice...to the Company c/o Quality Solicitors Punch Robson 35 Albert Road, Middlesbrough, TS1 1NU...'

The prescribed notice reads:

'...you may respond to this claim notice by giving a counter-notice...at the address in paragraph 1...'

The address at paragraph 1 (as prescribed) is the address of the RTM's registered office. It is clear that the notice does not comply in all respects with the prescribed requirements.

(e) & (f) The omission of the prescribed notes on the notices inviting participation is non-compliance with the prescribed requirements.

14. The Tribunal has, however, considered the position with the benefit of the decision of the Court of Appeal in *Friends Life Limited -v- Siemens Hearing Instruments Limited [2014] EWCA Civ 382*. The appeal was from a decision of Mr Strauss QC (sitting as a Deputy High Court Judge) reported at *[2013] EWHC B15 (Ch)*. Whilst the appeal was allowed, there was no criticism of the review at first instance of the law relating to the validity of statutory notices. Lewison LJ said (at paragraph 20):

'In a careful and closely reasoned judgment the judge first considered whether the notice given by the tenant satisfied the requirement that it should have been expressed to have been given under section 24(2) of the Landlord and Tenant Act 1954. He held at [21] that it did not. He then went on to consider whether there was "a strict and inflexible rule relating to options, whereby any non-compliance with its terms is fatal": see [23].

At [24], having referred to *Newbold v The Coal Authority [2013] EWCA Civ 584; [2013] RVR 247* and *Cusack v London Borough of Harrow [2013] UKSC 40; [2013] 1 WLR 2022*, the judge said:

"The flexible approach indicated by the above is apparent in many cases on statutory or contractual requirements, where the statute or the contract says nothing about the consequences of non-compliance. The traditional distinction is between requirements which are mandatory and those which are merely directory, or permissive, but recent case law demonstrates that there are also some requirements which might be described as hybrids. In such cases, the consequence of the non-compliance may depend on its extent: has there been adequate compliance? Or it may depend on its effect: has it made a difference to the other party?"

...He summarised his conclusions at [39] as follows (omitting some references to authority):

"From these authorities, it seems to me that the position relating to non-compliant notices is as follows:-

(a) The principles apply equally to statutory and contractual notices.

(b) Where the statute or the contract term provides that a non-compliant notice will be invalid or ineffective, that is of course the end of the matter: see for example section 26(3) of the 1954 Act.

(c) Where it does not, the court must assess the statutory or contractual intention by the usual objective criteria, including the background and purpose of the provision, and the effect if any of non-compliance.

(d) Where the notice is provided for by a statute or by a professionally drafted contract, and the draftsman has not provided, either way, for the consequence of non-compliance, one may reasonably assume that this is deliberate, and that it has been left to the court to decide; while it may go too far to say that there is a presumption, it is natural to conclude that it was intended that the notice should, at least in some circumstances, but not necessarily in all, survive non-compliance.

(e) The use of "must", "shall" etc. is not decisive, as Millett LJ indicated in *Petch v Gurney*. I do not think Lord Denning MR was going any further in *Yates* than to say that the provisions of that lease which were so worded were mandatory. The court will look to the substance, not the form.

(f) What is often decisive in practice is the effect of the non-compliance: see in particular the dictum of Lord Steyn in *Soneji* cited at para. 28 above. Was the omitted information material which it was essential for the other party to have? Has the non-compliance prejudiced the other party? For this reason, notice provisions may be what I have called hybrids, sometimes "mandatory", sometimes not, depending on the nature and extent of the error, and its effect.

(g) Although provisions relating to the exercise of an option are usually mandatory, any such rule is the court's servant, not its master, and is not inflexible. I agree with Mr. Fancourt's submission that, whilst non-fulfillment in any respect of the conditions for the exercise of an option (in this case the pre-conditions to be fulfilled by 23rd August next), will be fatal, the same may not be true as to the form of an advance notice of the exercise of the option, which in this case was explicitly required to be timely, but not explicitly required to be in due form, to be effective."'

15. Lewison LJ went on to consider (at paragraph 59) the case of *Petch v Gurney [1994] 3 All ER 731*. The case concerned a tax appeal by way of case stated from the Special Commissioners. The statute under consideration required the case stated to be transmitted to the High Court within 30 days of its receipt. The taxpayer was late in transmitting his case stated to the court. Millett LJ said:

'The question whether strict compliance with a statutory requirement is necessary has arisen again and again in the cases. The question is not whether the requirement should be complied with; of course it should: the question is what consequences should attend a failure to comply. The difficulty arises from the common practice of the legislature of stating that something "shall" be done (which means that it "must" be done) without stating what are to be the consequences if it is not done. The Court has dealt with the problem by devising a distinction between those requirements which are said to be "mandatory" (or "imperative" or "obligatory") and those which are said to be merely "directory" (a curious use of the word which in this context is taken as equivalent to "permissive"). Where the requirement is mandatory, it must be strictly complied with; failure to comply invalidates everything that follows. Where it

is merely directory, it should still be complied with, and there may be sanctions for disobedience; but failure to comply does not invalidate what follows.'

16. In the particular case, Lewison LJ found that there was 'no room for the notion of substantial compliance' as the answer to the question as to compliance was to be answered 'Yes' or 'No'. It could not be answered 'Almost'. He allowed the appeal and observed, 'The clear moral is: if you want to avoid expensive litigation, and the possible loss of a valuable right to break, you must pay close attention to all the requirements of the clause, including the formal requirements, and follow them precisely.'

17. Applying these principles to the present case, the purpose of the statutory provisions is made clear by section 71(1) of CLRA:

'This Chapter makes provision for the acquisition and exercise of rights in relation to the management of premises to which this Chapter applies by a company which, in accordance with this Chapter, may acquire and exercise those rights.'

18. CLRA does not make any provision for the consequences of any failure to comply with the provisions relating to notices, save that section 81 expressly provides that a claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80 or where any of the members of the RTM company whose names are stated in the claim notice was not the qualifying tenant of a flat contained in the premises on the relevant date.

19. The Tribunal finds that the provisions relating to the content of notices are directory rather than mandatory because they are generally silent as to the consequences of non-compliance. The Tribunal has assessed the effect of the defects in the claim notice and finds as a matter of fact that none of the parties, and in particular the Respondent, has been prejudiced by the defects. Neither the claim notice nor the notices inviting participation is invalidated by the defects.

20. In relation to ground (c) of the Respondent reasons for challenging the claim notice, the Tribunal finds that, having regard to the unchallenged evidence of the Applicant, there is no logical basis for the inference drawn by the Respondent. The Tribunal finds as a matter of fact, based on the evidence produced by the Applicants that notices were served on all relevant persons.

21. In relation to ground (d) of the Respondent for challenging the claim notice, the Tribunal finds as a matter of fact based on all the evidence before it that David Jarvis and John Desmond Dillon were not members of the Applicant Company at the material time and were not held out to be qualifying tenants. There is no merit in the reason for challenge.

CONCLUSION

22. The Tribunal concluded that the Applicant was entitled to acquire the right to manage the Property at the relevant date and that, accordingly, the application should be granted.

COSTS

23. The Tribunal has power to award costs and/or reimburse fees under Rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 which provides, insofar as it is material to the present case:

'(1) The Tribunal may make an order in respect of costs only –

... (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –

... (ii) a residential property case...

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or any part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.'

24. None of the parties has made an application for the award of costs, although there is still an opportunity to do so (see Rule 13(5)). The Tribunal has, however, considered the position on its own initiative and has determined that, on the basis of the evidence at the time of the Decision, there was no circumstance or particular in which any of the parties had acted unreasonably. The Tribunal concluded that it would not be appropriate or proportionate to award costs to any party.