

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

**SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**

COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Case Number: CH1/OOHN/LRM/2005/003

Application under Section 84 (3) of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”)

Applicant: Marina Court (Paignton) RTM Company Limited

Respondent: Reginald Harold Gibbs

The premises: Marina Court, Roundham Road, Paignton, Devon TQ4 6DX

Date of Application: 11 July 2005

Venue: Oldway Mansions, Paignton

Representation: Kitson Hutchings, Solicitors for the Applicant
Moseley, Chapman and Skemp, Solicitors for the Respondent

Tribunal Members: Mr A L Strowger (Chairman)
Mr P J R Michelmore FRICS
Ms K Firth-Butterfield

Date of Hearing: 27 September 2005

DECISION

The Application and the proceedings

- 1 The Tribunal is asked to exercise its jurisdiction under section 84 (3) of the Commonhold and Leasehold Reform Act 2002 (“the Act”) for a determination that the Applicant company, established as a right to manage company and referred to as a “RTM” under section 71 of the Act, was on the relevant date entitled to acquire the right to manage the premises.

The Hearing

- 2 Prior to the Hearing the Tribunal made a site inspection of the premises in the presence of Mr R W Leeks, who showed the Tribunal the common areas and, by way of example, the

flat owned by himself and his wife, flat 7. The Tribunal noted that the building was in urgent need of maintenance, being exposed to a hostile marine environment.

- 3 The Hearing was attended by Mr and Mrs Leeks, Mr and Mrs Clarke (flat 6), Mr Hirst and Mrs Westwood (flat 12) and Mr R B Bewley (flat 9), all members of the Applicant company. Mr R Cross, solicitor of Kitson Hutchings, represented the Applicant. No representative appeared for the Respondent.
- 4 No witnesses were called.
- 5 In his submission Mr Cross confirmed that in accordance with section 78 of the Act, his firm had posted the Notice inviting participation in the RTM, to each person entitled to receive it. The receipts in the bundle of documents indicated those who wished to participate in the RTM. Mr Cross acknowledged that the Claim Notice subsequently served under section 80 was deficient in that it did not set out the full requirements of section 80 (3); it omitted the full names of each person who was both a qualifying tenant and a member of the RTM company. Mr Cross submitted that the defect in the Claim Notice did not invalidate it: under section 81 (1) a claim notice is not invalidated by any inaccuracy in the particulars required by or by virtue of section 80. Mr Cross pointed out that the Respondent landlord's Counter-notice was defective in that it was not dated and made no reference to the Company. There was, therefore, no valid response to the Notice. By contrast with section 81 (1) there was no corresponding provision in the Act in respect of any defect in a Counter-notice; it had to be perfect. In support of his argument as to the validity of the Notice and the invalidity of the Counter-notice, Mr Cross referred the Tribunal to the decision of the Leasehold Valuation Tribunal of 21 June 2005 in the case of 16 Royal Esplanade, Margate (Case No. CH/29UN/LOA/2004/002).
- 6 In seeking an order for costs under the provisions of clause 10 of Schedule 12 to the Act, Mr Cross referred the Tribunal to the correspondence with the Respondent's Solicitor in the agreed bundle of documents. The information sought by the Respondent's Solicitors as to the names of the nine qualifying tenants had been provided in the letter of 12 July 2005. His firm's letter of the 29 July to the Respondent landlord's Solicitors enclosed a copy of the Notice to Participate sent to the landlord and confirmed that the same Notice had been sent to the 11 other owners, 8 of whom wished to participate and had been issued with Membership Certificates. The letter also invited the Respondent landlord to withdraw the objection. Mr Cross referred to the follow-up letter written to the Respondent's Solicitors on 24 August repeating the invitation to withdraw the objection. The Respondent's Solicitors had not responded or attended today. If the Tribunal found in favour of the RTM then it would be appropriate to award it £500 costs as the Respondent had acted frivolously and had abused the process. There was also the issue as to whether there had been any objection to the Claim Notice as the Counter-notice was invalid.

Consideration and findings of the Tribunal on the facts of the case

- 7 The Act makes provisions to facilitate the management of flats by tenants through the establishment of a RTM. It is a technical procedure; no fault on the part of the landlord in managing the premises has to be established; provided the premises are within the terms of the Act, there are the appropriate number of qualifying tenants and the procedures are correctly followed, the RTM will acquire the right to manage. Only rarely should it be necessary for a landlord to serve a Counter-notice under section 84 (2) (b) alleging that the


RTM is not entitled to acquire the right to manage, leading to an application to the Tribunal under section 84 (3). In the present case there are apparently 12 qualifying tenants in the block of flats and so under the provisions of section 79 (5) at the date of Notice of the Claim the RTM must include at least six qualifying tenants. This information must be set out in the Claim Notice.

- 8 Kitson Hutchings started the procedure by their letter of 21 February enclosing the Notice of Invitation to participate in the RTM as required under section 78. The Tribunal accepts that the Notice was sent to all the tenants including Mr R H Gibbs, the landlord, who lives in flat 5. He has, however, given his son Mr A C Gibbs (who lives in Sutton Coldfield) an Enduring Power of Attorney. Mr Gibbs junior e-mailed Kitson Hutchings on 4 March 2005 to say that he had only just received the Notice which his father had forwarded on to him. He subsequently advised on 9 March that his father did not want to participate in the RTM. The Respondent's Solicitors, Messrs Mosely Chapman and Skemp are clearly out of order in subsequently telling the Tribunal office in their letter of 8 July that the Notice was not served on the Respondent.
- 9 On or before 10 March 2005 the nine tenants who had indicated that they wished to participate had become members of the RTM. The Claim Notice was duly signed on 10 March 2005 and the Tribunal is satisfied that it was sent on 11 March 2005 to the landlord at flat 5, with a copy to his attorney son, notwithstanding the Respondent's Solicitors subsequent claim that it was not sent. It is common ground that the Notice is defective in that it names only two persons who are both qualifying tenants and members of the company, namely Janet Clarke and Joy Faith Westwood, who were the two directors of the company. A Counter-notice was duly sent to the company's registered office, with a copy to Kitson Hutchings, within the prescribed time limits. It was undated but was accompanied by a letter dated 1 April 2005. The Application to the Tribunal under section 84 (3) was then made on 31 May 2005.
- 10 Given the defects in the Notice, Mosely, Chapman and Skemp properly wrote to Kitson Hutchings pointing out that the Claim Notice appeared to have been signed by only two tenants although the application indicated that there were nine qualifying members. This letter was incorrectly dated the 31 May 2005. Mosely, Chapman and Skemp subsequently said it should have been 31 June – a date not in the calendar! They reasonably asked for evidence that there were nine such members at the date of the application, going on to say that if there were less than six, the landlord would wish to continue his opposition (the Tribunal notes that, in any event, if there were fewer than six, the right to acquire would not arise). In response Kitson Hutchings in their letter of 12 July 2005 confirmed that there were indeed nine qualifying tenants at the relevant date but provided no evidence – they could, for example, have sent an extract from the company's membership register. Not satisfied with this response Moseley, Chapman and Skemp wrote again on 20 July requesting some form of evidence and copies of the invitation to join the company and of the tenants' replies. They did not indicate what evidence would satisfy them. The reply of Kitson Hutchings of 29 July 2005 gives more information and encloses the membership certificate of Mr and Mrs Clarke and the letter sent to them, by way of example. Since that date there has been no further response from Mosely Chapman and Skemp despite a reminder from Kitson Hutchings on 24 August 2005. This lack of response from Mosely Chapman and Skemp is regrettable.

- 11 The Tribunal appreciates that RTM procedure are novel and unfamiliar to practitioners. However the procedures are laid down in the Act and must be followed. Mr Cross pleaded that the defect in the Claim Notice did not render it invalid by virtue of section 81 (10). The Tribunal does not accept this. Section 80 (3) sets out the requirements of the Claim Notice and they are specific and precise. In the present case Mr Cross could not even claim that the list included the minimum of six of the nine qualifying tenants who were also members of the RTM; only two were named. The naming of six would have at least indicated to the landlord that the application was supported by the requisite number. However the Tribunal finds that even had this been the case, it would still not have met the requirements of the section. If there had been an error in the list - for example that certain initials or spellings of names were incorrectly set out, this might have amounted to an inaccuracy within the meaning of section 81 (1) that would not have invalidated the Claim Notice. The fact is that fundamental particulars were omitted altogether - the names of seven of the nine qualifying tenants. This cannot in any way be regarded as an inaccuracy that can fall within the slip provisions of section 81 (1) which is there to enable errors in particulars given to be disregarded, but not the omission of required particulars altogether. The Tribunal case referred to by Mr Cross was not comparable. In that case the particulars of the premises were provided but the description was inaccurate; this was found to fall within the ambit of section 81(1).
- 12 The Tribunal accepts that there is no statutory provision to enable any inaccuracy in a Counter-notice to be disregarded. In the present case, had the Claim Notice been valid, the Tribunal would have found the Counter-notice to be invalid. However this does not help the Applicant: as the Claim Notice is invalid, the validity or otherwise of the Counter-notice is irrelevant. The application did not get off the ground. It is unfortunate that when the omissions from the Claim Notice became apparent, Kitson Hutchings did not simply withdraw it and re-serve a fresh and correct Notice of Claim rather than try to correct the defect by giving information by letter and relying on section 81 (1). Given the information that is before the Tribunal, if a correct and accurate Claim Notice is now served, and the procedures thereafter strictly followed, the claim by the Applicant RTM to acquire the right to manage the premises is likely to be irresistible.
- 13 The Tribunal has considered the application for costs under paragraph 10 of Schedule of the Act. Whilst the failure of the Respondent's Solicitors to respond to recent letters and the inaccurate assertions previously made by them may be regrettable, even if they had withdrawn their Counter-notice, the invalidity of the Claim Notice, as they reasonably pointed out at the time, would have remained. It is the error on the part of the Applicant's Solicitors that has brought about the failure of the application. In the circumstances an order for costs is not appropriate.

Conclusion

- 14 The RTM is not entitled to acquire the right to manage as the Claim Notice is invalid.

Signed: 

Dated: 24 October 2005

A.L.Strowger, Chairman