MIDLAND RENT ASSESSMENT PANEL **CASE NO: BIR/00CS/LEE/2006/0001**

Commonhold and Leasehold Reform Act 2002

DETERMINATION OF THE LEASEHOLD VALUATION TRIBUNAL

In the matter of

Churchfield Avenue RTM Company Limited **(the Applicant)**
and
Beamsafe Limited **(the Respondent)**

on the Applicant's applications:

(1) five applications under section 84 2002 Act for determinations that the Applicant was entitled to acquire the right to manage under that section
(2) that if and insofar as the Applicant acquires the right to manage the right should be exercised from the day 7 days after the date of the Tribunal's determination
(3) under section 94 2002 Act to determine the payment which falls to be made by the Respondent to the Applicant as the accrued uncommitted service charges held by the Respondent on the acquisition date

Premises: 1-54, Churchfield Avenue, Tipton, West Midlands DY4 9NF

Application dated: 5 August 2006

Heard at: The Panel Office
On: 13 and 14 December 2006

APPEARANCES:
For the Applicant: Mrs S Davis

For the Respondent: Mr W Hansen, Counsel instructed by Buller Jeffries, Solicitors

Members of the Leasehold Valuation Tribunal:

Mr T F Cooper BSc FRICS FCIArb (Chairman)
Mr W J Martin , Solicitor
Mrs C Smith

Date of Tribunal's determination: 16 FEB 2007

Determinations:

(1)(a) The Applicant was entitled to acquire the right to manage Blocks 1/11, 13/35 and 26/48;
(1)(b) The Applicant was not entitled to acquire the right to manage Blocks 2/24 and 37/54;
(2) The Applicant's s.90 Application to alter the s.90 'acquisition date' to an earlier date is dismissed; and
(3) The Applicant's s.94 Application to determine the accrued uncommitted service charges is stayed, with liberty to apply (dismissing the Respondent's application to dismiss/strike out the Applicant's s.94 Application).

The Applications:

1 By five applications (the '**s.84 Applications**') dated 5 August 2006 **Churchfield Avenue RTM Company Limited** (the '**Applicant**' and the '**Company**') applies to us under section 84 Commonhold and Leasehold Reform Act 2002 (the '**Act**') for determinations that the Applicant was entitled to acquire the right to manage:

Flats 1 to 11 (odd) (six flats)	('**Block 1/11**')
Flats 2 to 24 (even) (12 flats)	('**Block 2/24**')
Flats 13 to 35 (odd) (12 flats)	('**Block 13/35**')
Flats 26 to 48 (even) (12 flats)	('**Block 26/48**')
Flats 37 to 41 (odd) and 50 to 54 (even) (6 flats)	('**Block 37/54**')

(collectively, the '**Blocks**')

Princess Gardens, Churchfield Avenue, Tipton, West Midlands DY4 9NF (the '**Development**')

It is not contested that each of the five s.84 Applications shall be considered separately.

The Applicant's notice of claim to acquire the right was given on 6 July 2006 (the '**Date**').

2 By an application dated 5 August 2006 the Applicant applies: that if and insofar as the Applicant acquires the right to manage the right should be exercised from the day 7 days after the date of this Tribunal's determination ('**s.90 Application**').

3 By an application dated 5 August 2006 the Applicant applies: under s.94 for a determination of the payment which falls to be made by the Respondent to the Applicant as the accrued uncommitted service charges held by the Respondent on the acquisition date ('**s.94 Application**').

Pre-trial review:

4 Following a pre-trial-review held on 9 November 2006 Directions were issued on 9 November 2006 which include:

5 At para 2 - Stay/dismissal of the s.94 application: The Applicant's application to stay the s.94 application is allowed. The Respondent's application to dismiss/strike out the Applicant's s.94 application will be heard as a preliminary issue at the Hearing listed for 13 and 14 December 2006 (the '**Hearing**');

6 At para 5 - Dismissal of the Applicant's application to alter the s.90 'acquisition date' to an earlier date: The Respondent's dismissal application will be heard as a preliminary issue at the Hearing;

7 At para 6 - In respect of Block 37/54: The issue of the validity of the Applicant's Claim Notice will be heard as a preliminary issue at the Hearing; and

8 At para 7 - Respondent's application to stay part of the s.84 proceedings: The Respondent's application to stay the Applicant's applications relating to Blocks 2/24, 13/35 and 26/48 pending final disposal by the County Court of forfeiture proceedings in relation a lease(s) of a flat(s) in the three blocks will be heard as a preliminary issue at the Hearing.

Preliminary issues (see paras 5 to 8 above):

Dismissal of s.94 Application:

9 **Mr Hansen,** counsel for the Respondent, submits the Applicant's application for a determination of the accrued uncommitted service charges payment which falls to be made by the Respondent to the Applicant assumes: firstly, the Applicant's right to manage will be acquired which is not a foregone conclusion as the right is contested; and secondly, it should not be assumed that, even if the Applicant acquires the right to manage, the Respondent will not make payment as provided for in s.94. Accordingly, the Applicant's s.94 Application is premature, it should not be stayed or suspended, it should be dismissed. However, Mr Hansen does accept that in the exercise our discretion we could stay the s.94 Application. **Mrs Davis**, for the Applicant, says we should stay the Application as it cannot be assumed that the Respondent will comply with the s.94 payment requirements and if we dismiss the s.94 Application and the Respondent does not comply, a new application would have to be made.

10 We find and hold there is substance in Mrs Davis's contention and we dismiss Mr Hansen's application (to dismiss the Applicant's s.94 Application); finding this should cause no serious prejudice to the Respondent. We continue the stay, with liberty to apply.

Alteration of the s.90 'acquisition date':

11 Mrs Davis refers us to a history of management problems at the Development with the Respondent's managing agent, SM Properties, evidenced by the reasons in the LVT's determinations in: (a) *Sheryl Davis and Others v Beamsafe Limited* [25 October 2004] of (i) reasonableness of service charges under sections 19(2A) and 19(2B) Landlord and Tenant Act 1985 inserted by section 83(1) Housing Act 1996, and (ii) the appointment of Mr P Dening as manager under section 24(1) Landlord and Tenant Act 1987; and (b) discharging, by its decision 28 July 2006, Mr P Dening's appointment effective from 1 September 2006. Mrs Davis says an early transfer of management to the Applicant would avoid cumulative problems arising owing to the current (after Mr Dening's discharge) unsatisfactory management by the Respondent and its managing agent, SM Properties. Mrs Davis also refers us to the RPTS booklet '*LVTs Guidance on Procedure*' at page 11 'F' which says '[the LVT can deal with] an application by a RTM company for a determination that the right may be exercised early.' Mr Hansen submits we have no discretion to decide the s.90 date because s.90(4) is mandatory. S.90(4), applicable where the right to manage after a counter-notice(s) has been given, is prescriptive, specifying the acquisition date as three months after the determination on the right to manage becomes final.

12 While we appreciate current management difficulties may exist and an early acquisition date could well be in the interests of the tenants at the Development, we hold we accept Mr Hansen's submission and we have no discretion - the date is prescriptive. We believe Mrs Davis's reading of the RPTS booklet is misconceived: while the para may be misleading (implying an application for early exercise of the right may be made in all RTM applications), it does not bind a LVT. We hold we dismiss the Applicant's application to alter the s.90 'acquisition date' to an earlier date.

Validity of the Applicant's Claim Notice - Block 37/54:

13 The Respondent has given a s.84(2)(b) counter-notice alleging the Applicant was not entitled to acquire the right to manage Block 37/54 (six flats) because, on the relevant date, qualifying tenants' membership of the RTM Company was less than one-half. It is common ground that, on the Date, there were six qualifying tenants but only two of them were members of the Company. Mrs Davis says very substantial problems would arise if management of the Development (54 flats) was fragmented into 42 flats managed by the Company and six flats, at Block 37/54, not managed by the Company. Mr Hansen accepts that problems will exist if the other s.84 Applications (other four Blocks) are successful but stresses the provisions of the Act do not allow us to aggregate the Blocks; each Block, as a 'self-contained building' under s.72, should be decided on its own merits. He also refers us to the subs.79(5) pre-conditions (as to a minimum of one-half of qualifying tenants being members of the Company) being clearly mandatory and are not satisfied on the agreed facts before us.

14 While recognising the Company's likely difficulties, we accept Mr Hansen's s.72 and subs.79(5) submissions; we hold the Company is not entitled to acquire the right to manage Block 37/54.

Respondent's application to stay the s.84 proceedings relating to Blocks 2/24, 13/35 and 26/48 (amended at the Hearing to Block 26/48 only):

15 Mr Hansen submits we should stay the Applicant's application to acquire the right to manage this Block (12 flats) because there are currently forfeiture proceedings in relation to it in the County Court and the Court's judgment will critically affect the s.79(5) number of qualifying tenants and, hence, the Company's acquisition of the right to manage. He cites *City of Westminster Assurance Co Ltd v Ainis and Others* [1975] 29 P & CR 469 (CA), at p471, saying that if the Respondent is successful in the County Court forfeiture will relate back to the date when the claim for possession on the ground of forfeiture was made (November 2004) which date is before the Date on which the Company gave its s.79 notice of claim (6 July 2006); hence, on the Date (date of s.79 notice), the s.79(5) pre-conditions may not have been met. Mrs Davis points out that Mr Hansen is inferring that, because one tenant holds leases of three of the flats in the Block, that one tenant with three flats should be counted as only one member of the Company. She disagrees, saying that one tenant should be counted as three members and, accordingly, even if the Court orders possession of four of the flats, there were, on the Date, six qualifying tenants who were members of the Company (one-half of the total).

16 We accept Mrs Davis's contention that one person holding separate leases of three flats is counted as three for s.79(5). Accordingly, we find and hold the Respondent's application to stay our proceedings on Block 26/48 is dismissed. Even if we are wrong in our construction of s.79(5) numbers, we hold that, on the Date and for the purposes of ascertaining the s.79(5) 'one-half' number, we include tenants on whom a claim for possession for forfeiture had been made and is unresolved; relying on the principle that the claim in the Court does not terminate the lease, confirmed in *Driscoll v Church Commissioners for England* [1957] QB 330 and affirmed in *Ainis*. Further, we decide it would be contrary to the general tenor of the Company's 'right to manage' in the Part 2 Chapter 1 of the Act if we stayed our proceedings pending the Court action which may only be finally disposed of at a future distant date.

Substantive issues previously decided by us:

17 We have decided, at para 14 above, that the s.84 Application in respect of Block 37/54 is dismissed.

18 At para 12 above we have dismissed the Applicant's s.90 Application to alter the s.90 'acquisition date' to an earlier date.

19 At para 10 we have stayed the Applicant's s.94 Application to determine the accrued uncommitted service charges, with liberty to apply (dismissing the Respondent's application to dismiss/strike out the Applicant's s.94 Application).

Substantive issues to decide (s.84 Applications for Blocks 1/11, 13/35, 2/24 and 26/48):

20 Firstly, Mr Hansen says we should not allow these four Applications because the Company did not have a requisite register of members on the Date sufficient to establish the s.79(5) 'one-half' number.

21 Secondly, as to Block 2/24 (twelve flats), he says the Company's s.78 notice of invitation to participate was not given to Mr Curtis of flat 10 (a qualifying tenant but not a member of the Company) and, under s.79(2), as a s.78 notice is a pre-condition to a s.79(1) claim notice, the Applicant's s.79(1) claim notice is invalid; so, the Block 2/24 Application should fail.

Requisite register of Company's members (see para 20 above):

22 Submitting we should dismiss the four Applications Mr Hansen refers us to ss.73 and 74 as to a RTM company, its membership and regulations relevant to s.79(5); saying that, on the Date, there was no register of members compliant with the Companies Act 1985 (the **'1985 Act'**) which Act has not been disapplied by the Act save as to specific matters in s. 74(7); and if there was no register the only members were the three

subscribers to the memorandum of association at flat nos. 4, 46 and 25. Three members, each in different Blocks, is clearly insufficient to satisfy the one-half requirement in s.79(5).

23 His proposition (that there was no register) rests on non-compliance with the Company's articles and the 1985 Act.

24 As to the Company's articles - Mr Hansen says they provide for a three stage procedure for membership:

(a) an application for membership shall be in the form (or similar) to that set out in article 7. - compliance with this article is not contested by Mr Hansen;

(b) the Directors shall be satisfied as to an applicant's application and entitlement to membership as set out in article 9. - Mr Hansen contends that 'satisfaction' has not been established; and

(c) if stages (a) and (b) have been satisfied the Directors shall register an applicant as a member as required in article 9. - Mr Hansen contends none of the alleged members (alleged by Mrs Davis) were registered as members.

25 As to the 1985 Act - he refers us to:

subs.22(2):

> 'Every other person [other than the subscribers of the memorandum of a company] 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.';

subss.352(1) and (2):

> '(1) Every company shall keep a register of its members and enter in it the particulars required by this section.
> (2) There shall 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.';

subss.722(1):

> '(1) Any register, ... required by the Companies Acts to be kept by a company may be kept either by making entries in bound books or by recording the matters in question in any other manner.';

subs.723(1):

> '(1) The power conferred on a company by section 722(1) to keep a register or other record ... includes power to keep [it] by recording those matters otherwise than in a legible form, so long as the recording is capable of being reproduced in a legible form.';

and commentary by John R Birds LL.M *Gore-Browne on Companies* Update 60, Chapter 10 'Membership'.

26 Mr Hansen emphasises, and says *Gore-Browne* emphasises, subs.22(2) as to 'entered on its register' as a requirement of membership but acknowledges a person may agree by word of mouth or conduct, informally, to become a member. However, the Company's articles specify (see para 24 above) a procedure for admission which must be complied with and it cannot be said there has been compliance. While accepting as not conclusive, he says there has not been strict compliance with s.353 1985 Act as to keeping the register at the Company's registered office or, where not kept at the registered office, notification to the Registrar of where it is kept; it is common ground that the record of members is kept at an address other than the Company's registered office. Mrs Davis says she left a note at the Company's registered office saying where the register of members is, believing this to be adequate.

[Continued]

27 Mrs Davis produces a list of members created on computer on 20 September 2006 but derived from a paper list, as evidence of the register with sufficient numbers to satisfy the s.79(5) one-half requirement; saying that the list was created from separate paper applications (in the requisite Company's article 7. form or similar) from each qualifying tenant on the list, that their applications to become a member were made more than 14 days prior to the Date and that those applicants became members more than 14 days prior to the Date and before the Company gave s.78 notices of invitation to participate. She produces copies of each tenant's application to become a member:

Block	Number of qualifying tenants in the Block	Number of members whose copy applications are produced
1-11 (even)	Six	Four
13-35 (odd)	Twelve	Seven
2-24 (even)	Twelve	Nine [1]
26-48 (even)	Twelve	Ten [2]

Notes
1 - Includes Magnarent Limited as two tenants (Flats 14 and 16). See para 16 above
2 - Includes Magnarent Limited as three tenants (Flats 28, 30 and 32). See para 16 above

28 Mrs Davis says she had a hand-written list of members (including their name, address and date of membership) but admits that paper list was destroyed at about the time she made the computer list; saying she did not attach any importance to a 'cluttered' paper list when she prepared a 'neat' computer version. She recollects convening meetings at which applications to become members were considered and, while she made a written record of the applications when they were received and meetings were not formally convened, the meetings approved the applications as the applicants were all entitled to membership. She says that, as she filled in the list of members with new members as and when their applications were received, the list, on occasions, became untidy with a cluttered appearance; so, she rewrote the list to tidy it up and admits that at times there would have been more than one document containing the list.

29 Mr Davis, Mr Robinson and Mr Coates say, in oral evidence as witnesses of fact: that there have been informal meetings of the Company but there are no minutes nor resolutions recorded; that on more than one occasion they saw more than one hand-written list of members as a new list was written when the previous list became untidy; that they believed (until this Hearing) a tenant's application to be a member is the most important record of membership, particularly the date of application and the applicant's signature on it. Mr Davis says he has seen Mrs Davis writing a list of members prior to the Date. Mr Coates says he saw a hand written list of members on 1st or 2nd July 2006 as it was necessary to make a final count of members to decide whether to make the s.84 Applications.

30 While Mr Hansen does not contest the form of tenants' applications to become members (see para 24(a) above), he says those applications are not evidence of membership. He contends the Company should have produced Mrs Davis's hand-written list in compliance with the LVT's directions dated 24 August 2006 which include an order for disclosure of 'all documents which affect the case' not later than 13 October 2006; saying Mrs Davis should have been aware (from the directions) of the need to provide her hand-written list and she should not have destroyed it on or about 20 September 2006, being several weeks after the directions were issued. Mr Hansen refers us to the Company's bound register of members (produced by Mrs Davis) which contained only three names; saying we should not prefer to rely on a now non-existent (assuming it had existed) hand-written document not entitled 'Register of Members'.

31 Clearly, Mrs Davis, a lay person attending meetings of the Company, listing members of the Company, making the s.84 Applications and having conduct of the Applicant's case, has done what she believed was right to achieve the right to manage.

32 By reference to s.22(2) 1985 Act, the issues are:

(a) Had the tenants listed in the 20 September 2006 computer list agreed to become members before the Date? and

(b) If 'Yes' to (a), had their names been entered on the Company's register before the Date?

Further, by reference to the Company's articles:

(c) Was the Company satisfied as to the person's application and entitlement to membership before the Date? and

(d) Were the applicant persons registered as a member?

33 As to para 32(a) above - The 20 September 2006 list replicates the relevant information on the tenants' applications (made before the Date) to become a member. We find and hold that the copy applications for membership (produced to us) are evidence of an agreement to become a member - supported by *Gore-Browne* at p10-3A.

34 As to 32(b) above - We find, on the evidence of four witnesses (including Mrs Davis) that the Company had a hand-written list(s) of members before the Date written by Mrs Davis. It is not contested that the 20 September 2006 list replicates the hand-written list(s). It is not contested that the list contains the subs.352(2) required information. Mrs Davis argues for a wide meaning of a register; Mr Hansen argues for a narrower meaning. We hold that Mrs Davis's list(s) (reproduced in her September list) is, pursuant to subs.722(1), 'by recording the matters in question in any other manner'; accordingly a register on the Date was kept by the Company. We hold that, pursuant to subs.723(1), Mrs Davis's document on her computer (hard copy generated 20 September 2006 produced to us) is a register 'otherwise than in a legible form, so long as the recording is capable of being reproduced in a legible form'; we hold that for the register to be the register it does not have to be in a bound form despite the existence of a bound register of members document. We, therefore, find and hold that the tenants who had made applications to become members (and had agreed to become a member - see para 33 above) had been entered on the Company's register before the Date.

35 As to para 32(c) - We accept Mrs Davis's evidence that, as the applicants for membership were all entitled to membership - their applications could not be refused as they were all qualifying tenants - the Company meetings were satisfied as to the person's application and entitlement to membership before the Date.

36 As to para 32(d) above - The applicants for membership were registered as a member, as we have decided (at para 34 above) the applicants had been entered on the Company's register before the Date.

37 In summary on the question of the Company's register of members: we find and hold there was, on the Date, a Company register and its number of members were those we identify in the right hand column in the table at para 27 above.

Giving s.78 notice of invitation to Mr Curtis, flat 10, Block 2-24 (see para 21 above):

38 It is common ground: (a) that Mr Curtis was a s.75 qualifying tenant but not a member of the Company; (b) that, under s.79(2), a claim notice (to acquire the right to manage) this Block may not be given unless the Company had given Mr Curtis a s.78 notice of invitation to participate; (c) that the form of the s.78 notice of invitation was consistent with the s.78 requirements as to content; and (d) that, under subs.111(5) the Act, Mr Curtis had not notified the Company of an address different from his flat and, under subs.111(1), the notice of invitation was in writing and sent by post. It is not contested that s.7 Interpretation Act 1978 applies to the 'giving' of the notice of invitation, sent by post.

39 Mr Hansen submits the Company has not 'given' a s.78 notice of invitation to Mr Curtis; Mrs Davis submits a s.78 has been given to him.

40 Mr Hansen relies on Mr Curtis's witness statement: Mr Curtis says he has never received a notice of invitation but accepts it may have been sent to him by recorded delivery when he was away on holiday and,

as he was away, he would not have been able to receive it before it was returned to the Company by Royal Mail undelivered.

41 Mrs Davis says a notice of invitation was sent by recorded delivery on 10 June 2006 (more than 14 days (as required by s.79(2)) before the Date (of the Applicant's claim to acquire the right to manage - 6 July 2006) but admits it was returned to her by Royal Mail; she produces the original sealed envelope and contents returned to her - the envelope is marked 'not called for' and she opened it before us. She says the notice was given again to Mr Curtis on 6 July 2006; we hold that a notice given on 6 July 2006 was 'not at least 14 days' before the Date, so could not have complied with the pre-condition in s.79(2).

42 In support of his submission that a notice of invitation was not 'given' to Mr Curtis, Mr Hansen refers us to: *Halsbury's Laws of England* Vol 41, p874, para 667; and cites *R v County of London Quarter Sessions Appeals Committee, Ex parte Rossi* [1956] 1 QB 682 (CA) (applied in *A/S Cathrineholm v Norequipment Trading Ltd* [1972] 2 QB 314 (CA) and applied in *Hewitt v Leicester Corporation* [1969] 1 WLR 855 (CA)).

43 S.7 Interpretation Act 1978 includes:

> '... unless the contrary intention appears, the service [or 'giving' of any document required to be sent by post] shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinarily course of post.'

44 Mrs Davis says the Company has complied with s.7 1978 Act and subs.111(1) the Act, by sending the notice of invitation by recorded delivery well before 14 days before the Date; adding that every tenant (irrespective of whether a member of the Company or not) was served with a notice of invitation by standard post, recorded delivery or by hand (save two by email to members of the Company). In support of her contention that notice was given to Mr Curtis, she relies on advice from The Leasehold Advisory Service saying she has followed the advice by 'ensuring that evidence of the satisfactory delivery of, or posting of, the notice(s) is retained'.

45 Mr Hansen submits all three cases cited by him are clear confirmation that when, in the present dispute before us, Mrs Davis accepts that the notice was returned unopened, marked 'not called for', the notice was not 'given' and we cannot import the 'deeming' provision in s.7 (see para 43 above) because we have proof, by unequivocal evidence, of 'the contrary'.

46 It is not contested that it is known that Mr Curtis did not receive the 10 June 2006 notice. We are, therefore, led to the inevitable conclusion that the 12 June 2006 s.78 notice was not 'given' to Mr Curtis because 'the contrary is proved'.

47 We find and hold that the Applicant Company has not, as a pre-condition of a valid s.79 claim to acquire the right to manage, given a s.78 notice of invitation to participate to Mr Curtis (a qualifying tenant who was not a member of the Company). Accordingly, the Applicant's s.84 Application for Block 2/24 is dismissed.

48 At the Hearing Mr Hansen also challenged the giving of a s.78 notice of invitation to Ms Sidhu, flat 18 (if we decided her contested membership of the Company in favour of the Respondent). We have no need to decide this question as a reason for our determination.

49 While we appreciate the best intentions of Mrs Davis (in sending the notice by recorded delivery to prove posting of it) she appears not to have been aware of the established law on 'giving notice by post', consistent with s.111 the Act whereby the notice (at subs.111(1)(b)) 'may be sent by post'. The Company chose to send the notice by recorded delivery when it could have 'given' it by hand, with, if necessary a witness to that effect, as s111(1)(b) provides it '*may* (our emphasis) be sent by post'.

Summary of our decisions on the substantive issues:

50 (a) The three s.84 Applications for Blocks 1/11, 13/35 and 26/48 are allowed and we determine that on 6 July 2006 (the 'relevant date') the Company was entitled to acquire the right to manage these three Blocks;

(b) The two s.84 Applications for Blocks 2/24 and 37/54 are dismissed and we determine that on 6 July 2006 (the 'relevant date') the Company was not entitled to acquire the right to manage these two Blocks;

(c) We dismiss the Applicant's s.90 Application to alter the s.90 'acquisition date' to an earlier date; and

(d) We stay the Applicant's s.94 Application to determine the accrued uncommitted service charges, with liberty to apply (dismissing the Respondent's application to dismiss/strike out the Applicant's s.94 Application).

Date: 16 FEB 2007

T F Cooper
Chairman