

Commonhold and Leasehold Reform Act 2002

DETERMINATIONS OF LEASEHOLD VALUATION TRIBUNAL

On applications

- (1) under s.84 Commonhold and Leasehold Reform Act 2002 (the 'Act'): (a) to confirm the RTM Company was entitled to acquire the right to manage the Premises; and (b) the date of acquisition under s.90(5) of the right to manage; following the Landlord's s.84(5)(b) written agreement that the RTM Company was entitled to acquire the right to manage the Premises; and
- (2) under para 10 Schedule 12 the Act that the Landlord shall pay the costs incurred by the RTM Company

With liberty to apply for a determination of the RTM Company's liability for reasonable costs incurred under s.88.

Applicant RTM Company:

Enville Manor RTM Company Limited

Respondent Landlord:

S M Properties (21) Limited

Premises:

Enville Manor (also known as Enville Rectory and The Old Rectory), Bridgenorth Road, Enville, South Staffordshire DY7 5JA

Date of Company's s.79 Claim Notice claiming the right to acquire the right to manage the Premises: 13 July 2004

Date of Landlord's s.84 Counter-notice alleging the Company was not entitled to acquire the right to manage the Premises:

25 August 2004

Date of Landlord's s.84(5)(b) written agreement that the Company was entitled to acquire the right to manage the Premises:

7 January 2005

Application dated:

14 October 2004

Hearing at:

The Panel Office

On:

11 January 2005

Appearances:

For the Company:

Mr G M Thompson (Director and Secretary)
Mr R Davis, Buller Jeffries, Solicitors

For the Landlord:

Members of the Leasehold Valuation Tribunal:

Mr T F Cooper (Chairman)
Mr W J Martin
Miss B Granger

Date of Tribunal's decision: **11 FEB 2005**

Background:

1. By s.71 Commonhold and Leasehold Reform Act 2002 (the '**Act**') Enville Manor RTM Company Limited (the '**Company**') is a RTM company which may acquire and exercise rights in relation to management of Enville Manor (also known as Enville Rectory and The Old Rectory), Bridgenorth Road, Enville, South Staffordshire DY7 5JA (the '**Premises**'). S M Properties (21) Limited is the landlord (the '**Landlord**') of the Premises. By a s.79 Claim Notice dated 13 July 2004, the Company claims to acquire the right to manage (the '**Right**').
2. By a s.84 Counter-notice dated 25 August 2004 the Landlord alleges the Company was not entitled to acquire the Right.
3. By an application (the '**Application**') dated 14 October 2004 the Company, complying with subs.79(4) or (5), applies to the Leasehold Valuation Tribunal (the '**LVT**') under subs.84(3) for a determination that the Company was entitled to acquire the Right.
4. By letter 7 January 2005, **Mr Davis** for the Landlord, agrees in writing, under subs.84(5)(b), that the Company was entitled to acquire the Right.
5. Prior to the hearing on the Application on 11 January 2005, **Mr Thompson**, for the Applicant Company, confirmed to the LVT that the Landlord, by its subs.84(5)(b) written agreement, does not contest that the Company was, on the relevant date, entitled to acquire the Right. However, Mr Thompson applies for our confirmation of the Company's Right and the acquisition date (pursuant to subs.90(5)).
6. In the proceedings, Mr Thompson applies for £500 costs pursuant to para 10 Schedule 12 the Act.
7. It is common ground that we give liberty to apply for a determination of the Company's liability for reasonable costs incurred under s.88, if not agreed.

The Company's Right and the acquisition date:

8. As the Company's Right (to acquire the right to manage) is not contested, we determine, pursuant to subs.84(3), that the Company was, on 13 July 2004 (the relevant date), entitled to acquire the right to manage the Premises.
9. Pursuant to subs.90(5) the Act, the acquisition date is 7 April 2005 [three months after the Landlord's subs.84(5)(b) written agreement].

Schedule 12 costs incurred by the Company:

10. Mr Thompson refers us to the Landlord's Counter-notice 25 August 2004, effectively opposing the Company's Right, and the Company's subsequent correspondence to the Landlord disclosing evidence in support of the Company's Right; saying the Company has complied with the procedural regulations about the particulars that must be contained in its Claim Notice, its Right was clear and, on the evidence of entitlement to the Right, the Landlord had no reason to give a Counter-notice alleging non-entitlement. In reply, Mr Davis says the Landlord's Counter-notice was serious in content and there were outstanding matters at the time of the Application. Mr Thompson says that, consequent on the

Landlord's initial opposition to the Right, the Company has incurred additional costs between £900 and £1,000 (calculated as time engaged at £186 per hour plus VAT); and that the Landlord, by resisting a straightforward claim to acquire the Right, deliberately used delaying tactics to gain four months' time (evidenced by the letter from Mr Davis 31 December 2004, saying he has asked the Landlord for urgent instructions on the application generally). Mr Thompson points out the Landlord failed to comply with the LVT's Directions, by failing to lodge its case and documents relied on not later than 14 days before the hearing date. Collectively, says Mr Thompson, the Landlord has acted abusively, vexatiously, frivolously and unreasonably.

11. Relevant to Mr Thomson's claim for costs, sub-paras 10(1) and (2) effectively provide:

'A LVT may determine that the Landlord to proceedings shall pay the costs incurred by the Company in connection with the proceedings in any circumstances where, in the LVT's opinion, the Landlord has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.'

12. Mr Davis says that, as a matter of interpretation, we should apply a two stage test:

13. Firstly, the Landlord must have 'acted in the proceedings'; Mr Davis says 'acted' requires a positive action and any suggestion of the Landlord's failure to act is not relevant as it is not within the meaning of 'acted' in sub-para 10(2)(b). He submits 'in the proceedings' means the proceedings before us and events before them are not matters we should take into account. He points out the Counter-notice was before these proceedings, the Landlord did not have relevant documents from the Company prior to these proceedings and, in any event, the Landlord sought advice and acted on it.

14. Secondly, if we decide the Landlord has 'acted in the proceedings', which is not admitted, Mr Thompson has not established that the Landlord has acted unreasonably (meaning the actions set out in sub-para (2)(b)) and, as we have a discretion (we 'may' determine), Mr Thompson's claim for costs should fail. In any event, says Mr Davis, we have no evidence that the Company has incurred, or will incur, relevant costs. In reply, Mr Thompson accepts the Landlord was entitled to serve a Counter-notice but, between 14 October 2004 (the date of the Application to us) and 7 January 2005 (four days before the hearing), the Landlord has done nothing despite the Company's solicitor's letter 5 October 2004 to the Landlord's solicitor requesting acceptance of the Right without which an application would be made to the LVT for a determination. Mr Thompson stresses that the Landlord's failure to accept the Company's Right until four days before the hearing caused the Company to incur costs to comply with the LVT's directions (to lodge its case 14 days before the hearing) and the Landlord has not complied with the LVT's directions; Mr Thompson does not accept that 'acted' is limited to positive actions, saying it includes a failure to act, and says 'in the proceedings' includes proceedings before the Application.

15. On the meaning of 'acted in the proceedings', we hold: (a) that an unreasonable failure to act is within the meaning of 'acted' in sub-para (2)(b), as a failure to act is within the meaning of 'otherwise unreasonably' in the sub-para; (b) that 'in the proceedings' are, as submitted by Mr Davis, restricted to proceedings in the LVT, which, in the case before us, are proceedings on or after the Application (14 October 2004).

16. We find: (a) on the evidence of copy correspondence introduced, that, after 13 October 2004 (when

proceedings commenced), there was no information outstanding from the Company to the Landlord relevant to the Company's claim to acquire the Right; (b) the Landlord acted unreasonably by only agreeing that the Company was entitled to the Right at the 'eleventh hour', four days before the hearing, despite having relevant information from the Company before 14 October 2004; and (c) other than Mr Davis acknowledging having conduct of the Landlord's case and being unwilling to agree to a determination without an oral hearing, the Landlord, has, since 14 October 2004 and until 7 January 2005, without reasonable cause, failed to act reasonably in connection with the proceedings, by not complying with the LVT's directions and knowing, or ought reasonably to have known, that the Company would be likely to seek to comply with the LVT's directions, thereby the Company incurring costs or a liability for costs.

17. We accept Mr Thompson's evidence that the Company's costs in connection with the proceedings amount to substantially more than £500 and it is accepted that, by sub-para 10(3), the amount which the Landlord may be ordered to pay shall not exceed £500. As we find and hold the Landlord has acted unreasonably in connection with the proceedings, we determine the Company shall recover its costs up to a maximum of £500 on production of a relevant invoice(s).

Our determination on Schedule 12 costs incurred by the Company:

18. We determine the Landlord shall pay the costs incurred by the Company in connection with this LVT's proceedings on the Company's production of a relevant invoice(s) up to but not exceeding £500 (Five hundred pounds), with, subject to the permission of the county court, enforcement under Regulation 19, *Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003* (SI 2003/2099).

Permission to appeal:

- 19 Under Regulation 20, *Regulations 2003* either party may make an application to the LVT for permission to appeal this determination to the Lands Tribunal within the period of 21 days starting with the date of this determination.

Date: **11 FEB 2005**

T F Cooper
CHAIRMAN

