FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/21UF/LRM/2018/0014
Property:	57 Brighton Road, Newhaven, East Sussex BN9 9NG
Applicant:	Moredan (South East) Limited
Representative:	Mrs J Bickmore
Respondent:	Mr David Benveniste
Representative:	Woodcocks Haworth and Nuttall, solicitors
Type of Application:	Section 84(3) Commonhold and Leasehold Reform Act 2002 No fault Right to Manage Application
Tribunal Member:	Judge A Cresswell
Date of Decision:	16 April 2019

DECISION

The Application

1. On 13 August 2018, the Applicant served on the Respondent a Claim Notice to acquire the right to manage the property under section 79 Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). The Respondent served a Counter Notice dated 13 September 2018 under section 84(2)(b) of the 2002 Act to the effect that the Applicant was not entitled to acquire the right to manage the property. The Applicant now applies under section 84(3) of the 2002 Act for a determination of entitlement to acquire the right to manage. The Respondent applies for its costs incurred in consequence of the Claim Notice under Section 88(4) of the 2002 Act.

Summary Decision

2. Under Sections 84(3) and 84(5)(a) of the 2002 Act, the Tribunal has jurisdiction to make a determination as to whether the Applicant was on the relevant date entitled to acquire the right to manage the property. The Tribunal has determined that the Applicant was not on the relevant date entitled to acquire the right to manage the property.
3. The Tribunal has determined that costs in the sum of £2,714.40 inclusive of VAT and disbursements of £4 were reasonably and properly incurred and are payable by the Applicant to the Respondent.

Directions

4. Directions were issued on various dates. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
5. The Applicant had been required to provide a bundle of documents in a specified form, but failed to do so and directions issued on 4 March 2019 required the Applicant to remedy this. The Applicant was also given a further opportunity to provide a response to the Respondent's Statement of Case dealing specifically with the objections raised.
6. The parties did not request an oral hearing. Each side made brief written representations which were considered by the Tribunal in making this decision.
7. This decision is made in the light of the documentation submitted in response to the directions. The Tribunal had 2 bundles of documents, being the Respondent's Statement of Case and the bundle submitted by the Applicant in response to the directions ("the bundle").

The Law

8. The relevant law the Tribunal took account of in reaching its decision is set out in the Appendix below.
9. In **Avon Ground Rents Limited v 51 Earls Court Square RTM Company Limited** (2016) UKUT 22 (LC), the Upper Tribunal gave the following guidance:

The statutory scheme

12. The acquisition of the statutory right to manage affects not only the members of the RTM company but also their immediate and superior landlords, as well as managing agents or contractors engaged to undertake the management of the premises on their behalf and lessees of flats in the building who are not members of the company; all of these may find their

contractual rights terminated or interfered with without fault, compensation, or even, in some cases, the opportunity for any objection of theirs to be heard. If the procedural requirements laid down by the 2002 Act are properly implemented the right to manage is acquired by operation of law, causing entitlement to the custody of substantial sums of money and responsibility for the performance of onerous covenants to be transferred and frustrating contractual rights. If there is doubt about the procedural integrity of a claim, significant problems may arise in the management of premises and in the legal relationships between affected parties.

13. The existence of a company, properly constituted as an RTM company in relation to premises to which the statutory regime applies, is the first of the procedural preconditions to the acquisition of the right to manage.

14. The right to manage regime is introduced by a statement in section 71(1) of the 2002 Act that provision is made "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)." The following sections identify the premises to which Chapter 1 applies and specify what is required for a company to be an RTM Company.

15. By section 72(1) the Chapter applies to premises if certain qualifying conditions are satisfied. The premises must consist of "a self-contained building or part of a building, with or without appurtenant property" and must contain two or more flats held by qualifying tenants.

Section 73(2) specifies what an RTM company is: "A company is a RTM company in relation to premises if –

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

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

It is apparent from section 73(2) that no company may be an RTM company in the abstract,

but only "in relation to premises". Those premises are required to be identified in its articles of association as premises over which it is the company's object to exercise the right to manage.

18. An unambiguous identification of the premises in relation to which a company is an RTM company is obviously important to the statutory scheme. Two examples will help to explain why. It is the policy of the Act that there cannot be more than one RTM company in relation to the same premises, and by section 73(4) a company is not an RTM company in relation to premises if another company is already an RTM company in relation to those premises or to any premises containing or contained in those premises. The need clearly to identify the premises is further emphasised by section 74(1) which initially restricts the membership of an RTM company in relation to premises to the qualifying tenants of flats

contained in the premises. It is therefore important to be able to identify whether, in relation to any premises, there exists an RTM company and the premises in respect of which it is an RTM company.

19. Under the statutory scheme the only source of that information is the company's articles of association, and in particular the definition of "Premises" in article 1(1) of the model articles.

20. Mr Loveday submitted that it was not necessary for the premises to be defined with precision at the point at which an RTM company is formed. Precision was required only when the company gave a claim notice which, in accordance with section 80(2), is required to "specify the premises". Mr Loveday contrasted the requirement for a claim notice to specify the premises with the model articles of association which, he suggested, require only the name and address of the premises. I do not accept that any contrast is intended. Nor do I accept that the Act contemplates a process of refinement in the identification and specification of the premises in relation to which a company may be an RTM Company. It seems to me to be clear from section 73 that the premises in respect of which a Company seeks the right to manage must be those which are identified by their name and address in its articles of association. It is only those premises in relation to which the company will be an RTM company, and only those for which it will be within its objects to seek to acquire the right to manage.

10. In **Elim Court RTM Company Ltd v Avon Freeholds Ltd** [2017] EWCA Civ 89, the failure of the RTM Company to comply precisely with the requirements for a notice of intention did not automatically invalidate all subsequent steps. The failure to specify a Saturday or Sunday for inspection of the company's articles of association and the failure to serve a claim notice on the intermediate landlord of a single flat with no management responsibilities were both held not to invalidate the notice and a failure to sign the claim notices in accordance with Section 44 Companies Act 2006 would not be fatal as the notice of claim was signed by someone who was actually authorised by the RTM company to sign it.

11. The consequences of non-compliance were not fatal to the claim. In moving away from the traditional mandatory/directory distinction, the Court of Appeal considered **Natt v Osman** [2014] EWCA Civ 1520; [2015] 1 WLR 1536, in which Etherton C identified [at 25], two categories of cases, i.e. those involving decisions of a public body and those involving statutory requirements relating to property, or similar rights affecting individuals. It was accepted that the acquisition of the right to manage fell within the second category in which the "substantial compliance approach" was not to be adopted. *The court has interpreted the notice to see whether it actually complies with the strict requirements of the statute; if it does not, then the court has, as a matter of statutory interpretation, held the notice to be wholly valid or wholly invalid.*

12. However, Lewison LJ held that it did not follow that if a case falls within the second category every defect in a notice or in the procedure, however trivial, invalidates the notice. The court must nevertheless decide as a matter of statutory construction whether the notice is "*wholly valid or wholly invalid*".

13. *Where the notice or the information which is missing from it is of critical importance in the context of the scheme the non-compliance with the statute will generally result in the invalidity of the notice. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely ancillary, the notice may be held to have been valid: see [34]. One useful pointer is whether the information required is particularised in the statute as opposed to being required by general provisions of the statute. In the latter case the information is also likely to be viewed as of secondary importance. Another is whether the information is required by the statute itself or by subordinate legislation. In the latter case the information is likely to be viewed as of secondary importance. In this connection it must not be forgotten that while the substantive provisions of a bill may be debated clause by clause, a draft statutory instrument is not subject to any detailed Parliamentary scrutiny. It is either accepted or rejected as a whole. A third is whether the server of the notice may immediately serve another one if the impugned notice is invalid. If he can, that is a pointer towards invalidity*.

Consideration and Determination

The Respondent

14. The Respondent states that at the time of the service of the claim notice, the Applicant was not a company incorporated in accordance with the Act. When serving the Counter Notice, the Respondent explained that the Articles of Association of a RTM company are prescribed and it appeared that the Applicant had instead adopted model articles for companies limited by guarantee (Sections 73(2)(b) and 74(2) & (3)).
15. Frampton & Co subsequently acknowledged in correspondence that it did not adopt the model articles for RTM companies until 28 September 2018, which was after the relevant date and service of the Counter Notice.
16. The claim notice does not appear to state the full names and addresses of each person who is both a qualifying tenant of the building and a member of the RTM company and the address of the flat (Section 80(3)).
17. It did not contain details of the leases so as to identify the flat and show the date on which the lease was entered into; the term for which it was granted; or the date of commencement of the term (Section 80(4)).
18. It did not specify a date at least 3 months after the date specified under Section 80(6). 13 December 2018, referred to in paragraph 7 of the notice, is less than 3 months following 14 September 2018, the date for service of the Counter Notice.
19. The Respondent attempted, via correspondence, to dissuade the Applicant from proceeding further with a flawed process, but a response was not received and it then transpired that an application had been made to the Tribunal.

The Applicant

20. The Applicant stated that the RTM company was formed on 15 May 2018 and is a company limited by guarantee with no share capital issued. The Applicant could not afford a solicitor and was assisted on a no-fee basis by Frampton & Co, Chartered Certified Accountants. The company used Model Memorandum and Articles of Association for a company limited by guarantee "*having reviewed fully the Commonhold and Leasehold Reform Act 2002 and with the intention to comply with this*". After seeing the Counter Claim Notice, the

RTM company adopted new Memorandum and Articles of Association which were filed at Company House on 28 September 2018.

21. The members of the RTM company are also 100% of the qualifying tenants of the property, being Mrs Jackie Bickmore, Mrs Erica Jordan and Mr Paul Jordan.
22. The claim notice issued complied with the requirements of the Act. The Applicant would be happy to reissue the claim notice and revise dates if necessary, but felt there was no option other than to apply to the Tribunal due to the growing level of fees and demands for payment from the Respondent's managing agent.

The Tribunal

23. The Tribunal has followed the guidance of the Upper Tribunal in **Avon Ground Rents Limited v 51 Earls Court Square RTM Company Limited** which deals with the operation of the statutory scheme and of the Court of Appeal in **Elim Court RTM Co. Ltd. v Avon Freeholds Ltd** which deals specifically with the importance of procedural technicalities in right to manage cases.
24. The Tribunal was not provided with a copy of the Model Articles initially adopted by the Applicant. Certainly the Applicant has not argued that those Articles were in the correct form so as to comply with the 2002 Act. Indeed, following the mistake being pointed out by the Respondent, the Applicant went on 1 SEP by members' resolution of 17 September 2018 (signed on 28 September 2018) to adopt Articles in the correct format.
25. Section 73 of the 2002 Act specifies what a RTM company is. It must be a private company limited by guarantee and its Articles of Association must state that its object, or one of its objects, is the acquisition and exercise of the right to manage the premises. There is no evidence before the Tribunal or argument made by the Applicant that it could be described as a RTM company compliant with the 2002 Act, as specifically required by Section 73, when notice of claim was given on 13 August 2018, such that the Tribunal finds that no valid notice of claim was made.
26. For the above reasons, on the basis of the evidence before it, the Tribunal has determined that the Applicant was not on the relevant date entitled to acquire the right to manage the property.
27. That, effectively, disposes of the current application. It is not necessary for the Tribunal to enter an exercise of considering the effect of further claimed breaches of the 2002 Act under the guidance provided in **Elim Court RTM Co. Ltd. v Avon Freeholds Ltd** or otherwise, but some thoughts expressed on other issues may be of assistance to the parties.
28. It is clear from the guidance in **Avon Ground Rents Limited v 51 Earls Court Square RTM Company Limited** that a basic minimum requirement is that the Articles identify the premises sought to be the subject of the RTM. Unfortunately, the Articles here are blank; paragraph 1(1) simply records " *"the Premises" means (name and address);*" Had the Applicant been a RTM company compliant with the 2002 Act when notice of claim was given on 13 August 2018 and had it used the correct form of Articles, then it would also have failed in its application by reason of failing to identify the premises in those Articles. This was not an argument raised by the Respondent, but was a situation obvious from the papers submitted.
29. Rather than having to counter arguments about the details provided within the Notice of Claim, when considering the service of a further Notice the

Applicant should reflect upon the requirements of law and upon the challenges to the current Notice.

30. The address of the flat of Mr and Mrs Jordan is not given (Section 80(3)), even if it might be obvious to the Respondent; precise details of the dates and terms of the leases are not given (Section 80(4)), even if they might already be known to the Respondent; the date stated for acquisition was not at least 3 months after the date specified for any Counter Notice (Section 80(7)). These are all issues easily addressed and which would remove the need for legal argument.
31. The Tribunal emphasises that, whilst applications for Right to Manage are seemingly currently very complex (there being some proposals to ease this for the future), any discussion in this decision should not deter the Applicant, if making a further claim, to satisfy itself that it meets **all** legal requirements for such a claim.
32. What is in issue in respect of the Respondent's application for costs is whether the costs claimed were reasonably incurred and are reasonable in sum and whether the costs are payable in accordance with the Act of 2002 and whether the Applicant should be required to pay those costs.
33. The costs are detailed in a schedule forming part of the Respondent's Statement of Case. The Tribunal notes that there is no submission by the Applicant either that any of the costs incurred were not properly incurred in response to the service by it of the Claim Notice or that the costs are not reasonable in their amount. The Tribunal has, nevertheless, gone on to consider those issues.
34. The Tribunal notes with some sadness that the Applicant made its application to the Tribunal after a fatal error had been pointed out to it and thereby incurred further costs for the Respondent.
35. RTM claims are complicated issues. The Tribunal cannot criticise the Respondent for instructing a solicitor, given such complications.
36. The Tribunal has analysed the work conducted by the solicitor, which is helpfully detailed in its schedule and partially illustrated by relevant documentation in the Applicant's Statement of Case, and finds that the work detailed was what the Tribunal would have expected to occur given the nature of the case and that the time recorded as expended is reasonable. The Tribunal disallows, however, a claim for disbursements of £350 plus VAT of £70 for an Agent Fee as the work performed appears to be work which could have been done by the solicitor herself and is allowed for by the Tribunal in assessing whether the legal fees claimed are reasonable and the Tribunal could see no good reason for this additional fee.
37. The Tribunal finds that Section 88(2) is also satisfied as the Tribunal has noted the complexity involved in RTM claims, a factor likely to lead a party to engage a solicitor and can see no suggestion that the Respondent would not otherwise be liable to pay the costs himself and notes a statement to that effect in the schedule of costs.
38. The costs of £2,262 plus VAT (£2,714.40) and disbursements of £4 claimed by the Respondent arose as a result of the service by the Applicant of its Claim Notice. Having found that the costs were reasonably incurred and that they are a reasonable sum, reflecting the work actually and properly conducted, the Tribunal concludes that they are payable by the Applicant to the Respondent.

Judge A Cresswell

APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

Commonhold and Leasehold Reform Act 2002 (c. 15)

79 Notice of claim to acquire right

(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.

(2) The claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before.

(3) The claim notice must be given by a RTM company which complies with subsection (4) or (5).

(4) If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company.

(5) In any other case, the membership of the RTM company must on the relevant date include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained.

(6) The claim notice must be given to each person who on the relevant date is—

(a) landlord under a lease of the whole or any part of the premises,

(b) party to such a lease otherwise than as landlord or tenant, or

(c) a manager appointed under Part 2 of the Landlord and Tenant Act 1987 (c. 31)(referred to in this Part as "the 1987 Act") to act in relation to the premises, or any premises containing or contained in the premises.

(7) Subsection (6) does not require the claim notice to be given to a person who cannot be found or whose identity cannot be ascertained; but if this subsection means that the claim notice is not required to be given to anyone at all, section 85 applies.

(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.

(9) Where a manager has been appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises, a copy of the claim notice must also be given to the leasehold valuation tribunal or court by which he was appointed.

80 Contents of claim notice

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

(2) It must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies.

(3) It must state the full name of each person who is both—

(a) the qualifying tenant of a flat contained in the premises, and

(b) a member of the RTM company,

and the address of his flat.

(4) And it must contain, in relation to each such person, such particulars of his lease as are sufficient to identify it, including—

(a) the date on which it was entered into,

(b) the term for which it was granted, and

(c) the date of the commencement of the term.

(5) It must state the name and registered office of the RTM company.

(6) It must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice under section 79(6) may respond to it by giving a counter-notice under section 84.

(7) It must specify a date, at least three months after that specified under subsection (6), on which the RTM company intends to acquire the right to manage the premises.

(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.

88 Costs: general

(1) A RTM company is liable for reasonable costs incurred by a person who is—

(a) landlord under a lease of the whole or any part of any premises,

(b) party to such a lease otherwise than as landlord or tenant, or

(c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,

in consequence of a claim notice given by the company in relation to the premises.

(2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before [the appropriate tribunal] only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.

(4) Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by [the appropriate tribunal].