



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **CHI/21UD/LRM/2022/0004**

Property : **3-4 The Ridge, Hastings, TN34 2AA**

Applicant : **St Helens Freedom RTM Co Limited**

Representative : **The Leasehold Advice Centre**

Respondent : **Assethold Limited**

Representative : **Scott Cohen Solicitors**

Type of Application : **s.84(3) CLRA 2002**

Tribunal Members : **Judge D Dovar**

Date of Decision : **18th April 2023**

DECISION

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Introduction

1. This an application by the Applicant for a determination that it was on the relevant date entitled to acquire the Right to Manage the Property pursuant to s.84 of the Commonhold and Leasehold Reform Act 2002 ('the Act').
2. Directions were given on 19th January 2023 in which the Tribunal notified the parties that it intended to deal with this matter without a hearing. Neither party has objected to the same, and this matter has been dealt with by way of paper determination.
3. The Applicant served a claim notice under s.79 of the Act dated 28th July 2022. The Respondent served a Counter-notice under s.84, dated 8th September 2022 denying the right to manage; that set out two grounds resisting the claim, each was light on detail. Only one ground survived in the Respondent's Statement of Case. That is that contrary to s.78(2), the notice of invitation to participate ('the NIP') did not correctly state who the members of the Applicant company were.

Exercising the Right to Manage

4. In broad terms the Act enables long leaseholders to collectively acquire the right to manage their block through a nominee company. Qualifying tenants who wish to utilise the Act must first form and subscribe to that nominee company's memorandum. Before sending out a claim notice to acquire that right, a NIP must be sent to those qualifying tenants who are not already members or have not agreed to be members, inviting them to

become members. It is the content of that notice, the NIP, which the Respondent says was wrong with the result that the whole process is invalidated and the leaseholders will have to start again.

5. Section 78 of the Act provides as follows:

78 Notice inviting participation

(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.

...

(7) A notice of invitation to participate is not invalidated by any inaccuracy in any of the particulars required by or by virtue of this section.

The Challenge

6. The Respondent alleges that the NIP wrongly included some leaseholders as members, who were not at that time members of the Applicant Company. Its investigations have shown that Zoe and Gordon Young, the leaseholders of Flat 10 applied to become members on 15th June 2022, yet the register of members of the Applicant Company records them as becoming members on 11th May 2022, over a month earlier. Most significantly, on 2nd June 2022, when the Applicant sent out its NIP, it recorded them as members *prior* to them applying to be members. This it is said fell foul of s.78(2)(b) and invalidated the process.
7. There is an email from Zoe and Gordon Young dated 15th June 2022 in which they confirm that they '*wanted to be a joint member*' with the other and confirmed that they '*had provided the relevant ID information.*' It is notable that each expresses themselves in the past tense.

8. The Register of Members does show that Zoe and Gordon Young are members of the Applicant Company as of the entry printed on 17th May 2022 and that their date of election, as with the other 11 members was 11th May 2022. It also shows that they were proposed by Becky Denise and Claire.
9. Finally, the NIP dated 2nd June 2022, lists the members in the Schedule and includes '*Zoe Young [Joint Member with Gordon Young] Gordon Young [Joint Member with Zoe Young]*'.
10. A similar conundrum it is said appears in relation to Carla Jane and Claire Victoria Hooley who were registered members as of 11th May 2022, but only applied to be members on 17th May 2022. The Respondent contends this throws into doubt the basis upon which members were registered on 11th May 2022; but this is not part of their direct challenge.
11. The Respondent says this is important. When the NIP is sent out, a non-member qualifying leaseholder will be influenced to join by perusing the list of those who are already members. Not only does it give an indication of the support for the process, but also an indication of the number of people who will share in the cost liability should the Respondent successfully scupper the plans to exercise the Right to Manage.

The Reason for the conundrum with dates

12. Prior to making this application, when the Applicant provided to the Respondent the documents it had requested so that it could undertake its forensic consideration of the claim, the Applicant explained that:

“... the point we suspect you are probably driving at, without making it clear, is that flats 3, 7, 10 and 11 are owned jointly. You are very well aware from our previous correspondence on other such matters that Companies House will not allow joint owners to be Members from the outset but by way of confirmation (application if you will) we attach emails from the joint owners confirming their agreement & desire to be Members of the RTM Company.

Members?

13. The Applicant company was incorporated on 11th May 2022.

14. Section 112 of the Companies Act 2006 provides that

‘(1) The subscribers of a company’s memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.

(2) Every other person 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.’

15. The Applicant states that Zoe and Gordon Young would have been subscriber members, but that due to the quirk of Companies House not

registering joint tenants as members, the email of 15th June 2022 was confirmation of their prior agreement to be members.

16. By reason of s.112, there are two essential conditions to be fulfilled before a person becomes a member. There must be agreement for them to be a member and they must be entered on the register. I am satisfied that both those criteria were met in this case prior to the NIP. Prior to incorporation and continuing from the moment of incorporation, the Youngs wished to be members. That that was agreed to by the Applicant company is demonstrable both from the entries on the register of members but also from the NIP and this application.

17. The Applicant's Articles of Association provide at article 26 (1) that

'Every person who is entitled to be, and who wishes to become, a member of the company shall deliver to the company an application for membership executed by him in the follow form (or in a form as near to the following form as circumstances allow or in any form which is usual or which the directors may approve): ...'

18. The Respondent has pointed out that the membership was not made in accordance with article 26. The Applicant has stressed the final provision which gives the directors considerable leeway in terms of how they accept applications for membership. They say they have exercised that in this case.

19. In any event, if the acceptance of membership was in breach of the articles, that is a matter for the members. They are the other parties to

the articles which forms an agreement between themselves and the Applicant to abide the internal regulations of the company.

20. Therefore as long as s.112 was complied with, which it was, the Youngs were members at the time the NIP was served.

Failure to serve one Flat

21. The Respondent takes no issue with the fact that there was only one NIP, which was served on Flat 8. They were the only qualifying tenants who were not members of the Applicant (or who had not agreed to be members).

22. The failure to serve a NIP on one out of 41 qualifying tenants was held in *Avon Freeholds Ltd v Regent Court RTM Co Ltd* [2013] UKUT 213 (LC) not to invalidate the process. It was a question of considering the prejudice. In this case there is also one omission, albeit out of 12 flats. However, the only prejudice that the Respondent can point to is that the inaccurate record of members, may have influenced participation on the basis of an indication of the level of support as well as the sharing of adverse costs. In this case, given that on the Respondent's case it was artificially high, that would have been a factor that may have convinced the recipient of the NIP to become a member; but they did not. It is therefore difficult to see how there was any prejudice.

23. Therefore even if there were any error in the NIP, it would not invalidate the process. In light of the fact that the recipient did not take up the offer, no harm has been done.

Conclusion

24. For the reasons given above, the Applicant has acquired the Right to Manage on the relevant date, which in this case was 11th December 2022.

JUDGE DOVAR

Appeals

A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk .

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.

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.

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.