FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**CHI/21UD/LRM/2022/0005**
Property	**:**	**21/22 Cornwallis Gardens, Hastings, East Sussex TN34 1LR**
Applicants	**:**	**21/22 CORNWALLIS GARDENS RTM COMPANY LIMITED**
Representative	**:**	**Rice-Jones & Smiths Solicitors Toby Boncey (counsel)**
Respondent	**:**	**Avon Ground Rents Limited**
Representative	**:**	**Scott Cohen Solicitors Robyn Cunningham (counsel)**
Type of application	**:**	**Application in relation to the denial of the Right to Manage**
Tribunal	**:**	**Judge Sheftel**
Date of decision	**:**	**5 October 2023**

DECISION

The application

1. These proceedings concern an application under section 84(3) of the Commonhold and Leasehold Reform Act 2002 (the "2002 Act") for a determination that, on the relevant date, the Applicant RTM company was entitled to acquire the right to manage premises at a development known as 21/22 Cornwallis Gardens, Hastings, East Sussex TN34 1LR (the "Premises").

2. The hearing of the application took place on 7 September 2023 at 10 Alfred Place, London. Although the proceedings are administered by the Southern Region, the matter was heard in London as it had previously been indicated that the Applicant would be represented by a counsel who was also a fee paid judge in the Southern region – although as it turned out the Applicant was in fact represented by different counsel.

3. At the hearing, the Applicant was represented by Mr Toby Boncey (counsel) and the Respondent by Ms Robyn Cunningham (counsel). The tribunal is grateful to both for the assistance and clear submissions. Also in attendance on behalf of the Applicant were Mr Robin Hill, Ms Catherine Crompton and the Applicant's solicitor, Mr Peter Burton.

Background

4. By Claim Notice dated 2 September 2022, the Applicant RTM company gave notice that it intended to acquire the right to manage the Premises**.** By counter notice dated 6 October 2022, the Respondent freeholder disputed the claim on various grounds.

5. The Premises contain 11 flats and there is no dispute that the Premises are ones to which Chapter 1 of the 2002 Act applies. By the time of the hearing, the position was that the application was opposed on two grounds:

   (1) does the Claim Notice specify a date, at least three months after that specified under s.80(6), on which the RTM company intends to acquire the right to manage the premises, so as to comply with s.80(7) of the 2002 Act?

   (2) on the relevant date (2 September 2022), were the leaseholders of flats 1, 4, 6 and 10 members of the Applicant, such that the RTM company membership on that date included a number of qualifying tenants of flats contained in the Premises which was not less than one half of the total number of flats so contained, so as to comply with ss.79(3) and (5) - and consequently did the Claim Notice contain the correct particulars for the purposes of ss.80(8) and (9) of the 2002 Act?

Preliminary matters

6. This case has had a long procedural history, which has included delay and non-compliance by the Applicant. Indeed, the application was struck out on 21 June 2023, although it was subsequently reinstated on 22 June 2023.

7. By order dated 17 July 2023, the tribunal gave what were intended to be final directions prior to the hearing. This included giving the Applicant permission to serve witness statements of Ms Crompton and Mr Burton.

8. However, on 31 August 2023, a week before the hearing, the Applicant made a further application seeking permission:

   (1) to rely on two further witness statements: a second statement of Ms Crompton and a statement from Mr Robin Hill, the former company secretary of the Applicant;

   (2) to include within the bundle various pieces of email correspondence between the parties' solicitors. This had in fact been requested by the Respondent's solicitors and was therefore not opposed; and

   (3) to include three prior claim notices which had been withdrawn.

9. Save for the documents in paragraph 8(2) above, the application was opposed by the Respondent. The application was considered at the start of the hearing. After hearing submissions from both counsel, I indicated that I would grant the Applicant's request for permission to adduce the additional evidence and would provide full written reasons in the Decision.

Additional witness evidence

10. With regard to the second witness statement of Ms Crompton, the additional statement sought to clarify aspects of her first statement and also to address points raised by the Respondent's solicitors in correspondence post-dating her first statement. Ms Crompton had already provided a witness statement and was to be called to give

evidence in any event. As such, while one option would have been for the clarification to have been provided in the course of oral examination, it was determined that it was in the interests of justice to admit her second statement as there was little if any prejudice in doing so.

11. As to the witness statement of Mr Robin Hill, this largely concerned the provenance of the purported register of members. It did not take maters much further than the evidence of Ms Crompton, albeit Mr Hill had compiled the purported register of members whereas Ms Crompton (who succeeded him as company secretary on 11 April 2023 - after the relevant date) relied on what Mr Hill had told her in this regard.

12. Although the evidence which sought to be adduced was probative of the membership issue, it was not determinative having regard to the points raised by the Respondent. Moreover, it was not prejudicial insofar as tis was not a case where the Respondent, had it had more time, would have been in a position to file rebuttal evidence. As properly acknowledged in the Respondent's skeleton, the Respondent has no direct knowledge of relevant facts in dispute.

13. Further, the Respondent, who was professionally represented, had had sight of the statements for a week and would be able to cross examine the witness. It was also the position that the evidence did not amount to the Applicant putting a new case or changing its case. It was consistent with the Applicant's position that it did satisfy the requirement of section 79(5) of the 2002 Act and was, in effect, further evidence to try and demonstrate that.

14. On the other hand, the statement was served only one week before the hearing, notwithstanding that the point as to the membership of the RTM company had been set out in the Respondent's initial statement of case. Moreover, there had already been criticism of the way the proceedings had been conducted on behalf of the Applicant as noted above.

15. Ultimately, it was determined that notwithstanding the lateness of the statement and the Applicant's previous conduct with regard to

compliance with directions, on balance, it was in the interests of justice and in accordance with the overriding objective that the evidence be admitted. In order for the case to be dealt with fairly and justly, the tribunal was best served by having as full and clear a picture of the position as possible, particularly in a case where (i) the witness statement did not raise any new issues which had not been pleaded, but rather sought to confirm substantiate the Applicant's case; and (ii) the Respondent was not prejudiced by being unable to call rebuttal evidence had the statement been provided earlier as set out above. Nevertheless, it is stressed that the position is far from ideal, and it is incumbent on parties to comply timeously with the tribunal's directions.

Withdrawn claim notices

16. As indicated to the parties during the hearing and as further set out below, it was not entirely clear how the admission into evidence of previously withdrawn claim notices would assist the Applicant in its argument in relation to the validity of the Claim Notice in issue. Moreover, there was no evidence before the tribunal as to whether the claim notices had been served on the Respondent. On balance, it was considered that little prejudice would arise from admitting them now and consequently, they were allowed into evidence. However, in the event, little reliance was placed on them by the Applicant and so ultimately the point was largely moot.

17. As a consequence of the above decision, the tribunal heard evidence from Ms Crompton and Mr Hill – the evidence of Mr Burton was uncontested and did not go to the issues in dispute and so he was not called to give evidence.

The validity of the Claim Notice

18. The 2002 Act contains the following provisions which are relevant to the issue in dispute:

(1) By s.80(6), the Claim Notice must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice under s.79(6) may respond to it by giving a counter-notice under s.84; and

(2) The Claim Notice must specify a date, at least three months after that specified under s.80(6), on which the RTM company intends to acquire the right to manage the premises: s.80(7).

19. As noted above, in the present case it was not in dispute that the relevant date was 2 September 2022, being the date on which the Claim Notice was given. For the purposes of section 80(6), the date specified in paragraph 5 of the Claim Notice was 11 October 2022.

20. The difficulty comes from the fact that paragraph 6 of the Claim Notice stated that:

"*The company intends to acquire the right to manage the premises on 18th January 2022 being at least three months after the date specified in paragraph 5* [i.e., 11 October 2022]."

21. The Respondent contends that the Claim Notice is not valid as it does not specify a date at least three months after that specified under s.80(6), on which the RTM company intends to acquire the right to manage the Premises, so as to comply with s.80(7) of the 2002 Act. In other words, 18 January 2022 is not a date at least three months after 11 October 2022 – it is not only earlier than the date for a counter-notice but is also earlier than the date of the Claim Notice itself.

22. In the Applicant's submission, the reference to '2022' was plainly a typographical error; any reasonable recipient of the Claim Notice would have understood the Applicant to be referring to 18 January 2023. The Applicant relies on the authority of *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 for the proposition that notices, even where they contain errors, are to be regarded as valid where they are sufficiently clear and unambiguous that they would leave a reasonable recipient in no reasonable doubt over how they were intended to operate.

23. Further, in the Applicant's submission, the mistake was so obvious that a reasonable recipient would recognise not only that a mistake had been made but would know precisely what the giver of the notice had meant to say: it would have been obvious to a reasonable recipient that the reference to 18 January 2022 should have been to 18 January 2023. In support of this proposition, the Applicant submitted:

    (1) The language of paragraph 6 of the Claim Notice referred to 18 January 2022 as "*being a date at least three months after the date specified in paragraph 5*". Accordingly, it was obvious even on the face of the notice that there was a typographical error in respect of the year.

    (2) There could have been no reasonable doubt as to the date intended for the acquisition of the right to manage. There is no indication that there was any mistake in respect of the date of 18 January; the obvious intention was to acquire the right to manage on 18 January 2023.

24. In contrast, the Respondent argued that the principle from *Mannai* is not relevant to the present case. Instead, Ms Cunningham sought to draw on the line of authority concerning the requirements for statutory notices: principally *Natt v Osman* [2014] EWCA Civ 1520 and *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89.

25. In *Natt v Osman*, the Court of Appeal drew a distinction between two types of notices, the latter being cases in which a statute confers a property or similar right on a private person. In such cases, it was held that the issue is whether non-compliance with the statutory requirement precludes that person from acquiring the right in question.

26. According to Sir Terence Etherton at para.25 of *Natt v Osman*:

    "*The modern approach is to determine the consequence of non-compliance as an ordinary issue of statutory interpretation, applying all the usual principles of statutory interpretation. It invariably involves, therefore, among other things according to the context, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole.*"

27. Similarly, Lewison LJ in Elim Court stated at para.52:

> *"…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 secondar importance or merely ancillary, the notice may be held to have been valid …".*

28. In the Respondent's submission, the s.80(7) commencement date is crucial because if no counter-notice is served disputing the entitlement to the right to manage, s.90(2) CLRA 2022 provides that this will be the acquisition date. Getting this date correct is critical to the working of the statutory scheme. Further, it was contended that this is not a mere inaccuracy, which may be saved by s.81(1) of the 2002 Act and accordingly, the Claim Notice was invalid.

29. The difficulty with the Respondent's argument is that there is no reason in principle why the two lines of authority cannot be read together. The principle set out in *Mannai* can be used to determine what the notice intended to say. Once that is done, the principle from *Natt v Osman* and *Elim Court* can be applied to determine whether the notice has complied with the applicable statutory requirements.

30. One point of possible distinction is that *Mannai* was concerned with contractual rather than statutory notices and therefore the question arises as to whether *Mannai* is of assistance in a case such as the present. However, in answer to this, Mr Boncey relied on the Court of Appeal's decision in *Pease v Carter* [2020] 1 WLR 1459, in which Arnold LJ, with whom Floyd and Underhill LJJ agreed, reached (inter alia) the following conclusions at para.39 (which was endorsed as "the correct test" by Underhill LJ at para.57):

    (1) "A statutory notice is to be interpreted in accordance with Mannai v Eagle [1997] AC 749, that is to say, as it would be understood by a reasonable recipient reading it in context.

    (2) If a reasonable recipient would appreciate that the notice contained an error, for example as to date, and would appreciate

what meaning the notice was intended to convey, then that is how the notice is to be interpreted.

(3) It remains necessary to consider whether, so interpreted, the notice complies with the relevant statutory requirements. This involves considering the purpose of those requirements.

(4) *Even if a notice, properly interpreted, does not precisely comply with the statutory requirements, it may be possible to conclude that it is substantially to the same effect as a prescribed form if it nevertheless fulfils the statutory purpose. This is so even if the error relates to information inserted into or omitted from the form, and not to wording used instead of the prescribed language.*"

31. Although *Pease v Carter* was concerned with a notice under section 8 of the Housing Act 1988, there is no reason in principle why it should not also apply to a claim notice in relation to right to manage under the 2002 Act.

32. Accordingly, in the present case, applying the principle from *Mannai*, I agree with the Applicant that the reference to '2022' in paragraph 6 of the Claim Notice was plainly a typographical error and that, moreover any reasonable recipient of the Claim Notice would have understood the Applicant to be referring to 18 January 2023.

33. Upon reaching such findings, it must follow that the statutory requirements of the 2002 Act have been complied with and so the issues identified in *Natt v Osman* and *Elim Court* do not arise. In the circumstances, I therefore find that the Claim Notice was valid.

The membership issue

34. Pursuant to section 79(5) of the 2002 Act, in order to give a valid Claim Notice, '*the membership of the RTM company must on the relevant date* [i.e. the date on which the Claim Notice was given] *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*'. In the present

case, this means that qualifying tenants of at least six flats were required to be members of the Applicant as at the date the Claim Notice was given, 2 September 2022.

35. The Applicant's position is that this requirement was satisfied and that on the relevant date eight qualifying tenants of flats were members of the RTM company. However, the Respondent questioned whether this was the case in respect of the tenants of flats 1, 4, 6 and 10, notwithstanding that all were listed on the Claim Notice. According to the Respondent's statement of case, it was argued that "the document produced as the Register is unable to evidence membership at the relevant date as the necessary details have been omitted from the document" and "the Applicant has not kept a valid Register and as such has not produced evidence to establish that at the relevant date, its membership comprised qualifying tenants of not less than 50% of the flats in the Premises". Accordingly, the question came down to whether the leaseholders of flats 1, 4, 6 and 10 were members of the Applicant on the relevant date.

36. In order to refute the Respondent's challenge, the Applicant relied on the evidence of Ms Crompton and Mr Hill. The Applicant had also provided a purported register of members in the bundle, as well as copies of applications for membership. It is fair to say that the evidence was not as clear as it might have been – even with the late additional witness statements adduced by the Applicant.

37. Turning to the legal framework, s.112(2) of the Companies Act 1985 provides that in relation to members (other than the original subscribers):

"*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.*"

38. In other words, in order to become a member, that person must (a) have agreed to become a member and (b) had their name entered in the register of members. There was no dispute between the parties as to (a): various applications for membership were contained in the bundle.

Rather, the issue in dispute was whether the leaseholders of flats 1, 4, 6 and 10 had been entered as members on the Applicant's register of members by the relevant date – albeit the copy register of members contained in the bundle did include the leaseholders of flats 1, 4, 6 and 10.

39. S.113 of the Companies Act provides that:

(1) "*Every company must keep a register of its members; and*

(2) There must be entered on 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*."

40. It was not disputed that the register of members did not comply fully with the requirements of s.113 of the Companies Act and, in particular, did not show the date when leaseholders were registered as members.

41. The Respondent did not go so far as to submit that the fact that the register of members did not comply with the provisions of section 1113 of the Companies Act meant that the tribunal could not find that section 79(5) of the 2002 Act was satisfied. Further in this regard, Mr Boncey cited the comments of George Bartlett QC in *Assethold Ltd v 14 Stansfield Road RTM Co Ltd* [2012] UKUT 262 (LC) at para.21 that a defect in the register of members is not necessarily sufficient to show that s.79(5) was not complied with – albeit it was accepted that this was obiter:

"*In any event a defect in the register would not be sufficient to show that section 79(5) was not complied with, and indeed it could be insufficient even to raise a doubt as to compliance*."

42. However, the Respondent submitted that less weight should be ascribed to it and that taking the evidence as a whole, the Applicant had not discharged the burden of proof.

43. The evidence of Ms Crompton was that the persons listed in the Claim Notice and on the purported register of members were all members as at the relevant date of 2 September 2022. However, she also accepted that she had not been company secretary at that time and so relied on what she had been told by Mr Hill who previously had been company secretary. Although Mr Hill demonstrated some uncertainty as to dates in cross examination (for example the dates when he was company secretary), his evidence was that the register of members contained in the bundle was made by him on 4 September 2022, but records the membership as it was on 2 September 2022 (the relevant date). Moreover, according to his evidence, the membership of the Applicant was the same as it had been in a previous version of the register which had been produced on 1 July 2022 (which had included the relevant lessees), albeit he had removed some information relating to non-members. As such, both maintained that the leaseholders of flats 1, 4, 6 and 10 were members of the Applicant on the relevant date.

44. I agree with Mr Boncey's submission that there is no requirement in the 2002 Act to state or adduce evidence of the date on which qualifying leaseholders specified in the notice became members of the RTM company. Rather, the question using the language of s.79(5) is whether the membership of the RTM company included on the relevant date 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. I have some sympathy for the Respondent's position that this issue might have been avoided had the Applicant simply produced a compliant register of members. Nevertheless, having regard to the evidence on behalf of the Applicant – albeit some of which was served late – I am satisfied that the evidence taken as a whole, is sufficient to find that on the relevant date, the leaseholders of flats 1, 4, 6 and 10 had been entered on the register, such as it was, and were members of the company. Accordingly, I find that the membership of the RTM company must on the relevant date included 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 for the purposes of section 79(5) of the 2002 Act.

45. In the circumstances, I find for the Applicant on this issue.

Conclusion and decision of the tribunal

46. For the reasons set out above, I find in favour of the Applicant on the two issues that were in dispute. Accordingly, the Tribunal determines that the Applicant was on the relevant date entitled to acquire the right to manage the premises pursuant to section 84(5)(a) of the 2002 Act.

47. Therefore, in accordance with section 90(4), within three months after this determination becomes final the Applicant will acquire the right to manage the premises. According to section 84(7):

> "(7) A determination on an application under subsection (3) becomes final—
>
> (a) if not appealed against, at the end of the period for bringing an appeal, or
>
> (b) if appealed against, at the time when the appeal (or any further appeal) is disposed of."

Name: Judge Sheftel **Date:** 5 October 2023

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the Regional Office which has been dealing with the case. The application should be made on Form RP PTA available at https://www.gov.uk/government/publications/form-rp-pta-application-for-permission-to-appeal-a-decision-to-the-upper-tribunal-lands-chamber

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

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).