

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

Ref Lon00AG/LEE/2006/0002

LEASEHOLD VALUATION TRIBUNAL

**DECISION ON APPLICATION UNDER
S.84 (3) OF THE COMMONHOLD AND LEASEHOLD REFORM
ACT 2002**

Property **Trinity Court 254 Gray's Inn Road London WC1X
8JX**

**Applicants/
Tenants** **Trinity Court RTM Company Limited**
**Respondents/
Landlord/Tenant** **Metropolitan Properties Co (FCG) Limited**

Application To determine, the Validity of a claim notice served by the
Applicant's under section 79 of the Commonhold and Leasehold
Reform Act 2002

Tribunal Ms M Daley Chairman (LLB.Hons)
Mrs. Davies FRICS
Mrs. West JP MBA

Date of Hearing 15^h January 2007

Appearances

Mr. D. Nichols Counsel on behalf
Teacher Stern and Selby Solicitors

Mr. S Serota on behalf of Wallace LLP

1. The Application and Matters in dispute

1) The Application

On 31st October 2006 the Tribunal received an application on behalf of Trinity Court RTM Company Limited for a determination under section 84(3) of the Commonhold and Leasehold Reform Act 2002("the Act") that it was entitled to acquire the right to manage (in accordance with the Act). The Notice of Claim was served on or about 28th July 2006. The Applicant received a Counter-Notice from the Respondent denying the Applicant's right to manage on the basis that the Applicant failed to comply with section 75(9) of the Act. The Counter-Notice was served on or about 30th August 2006.

At the Directions hearing on 3rd November 2006 the Tribunal gave directions which included a direction that the Applicant include a Summary of issues to be determined by the Tribunal. The Tribunal has adopted these issues as the Matters in dispute.

2) Matters in dispute

The Summary of issues identified the following issues that the Tribunal needed to consider-:

- a) *Whether the Membership of the Applicant (the RTM company) 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?*
- b) *The Sub-issues were Identified as(i) what was the relevant date? (ii) What was the membership of the Applicant company on the relevant date? (iii)is the membership of the Applicant company on the relevant date to be ascertained by reference to the Register of Members? (iv) If not how is it to be ascertained? (v)If so, what is the effect, if any of the Applicant's failure to keep its Register of Members at its registered office? (VI)When did its members become its members? (vii)What is the total number of flats in the premises*
- c) *The second main issue was-: Is the claim notice invalid because it fails to state the name and registered office of the RTM company?*
- d) *The Sub-issues to this issue were (i) What does the Counter-notice state in this regard and what should it have stated?(ii) Does this inaccuracy invalid the claim notice or is it caught by the provisions in section 81(2) of the 2002 Act?(iii) Is the Respondent's Counter-Notice dated 30th August 2006 invalid because it fails to comply with section 84(2) of the 2002 Act and regulation 8 of and Schedule 3 to the Right to Manage (Prescribed Particulars and Forms England Regulations 2003?*

2. Documents Received

- (i) Application to the Leasehold Valuation Tribunal dated 27.10.06
- (ii) Respondent's Statement of Case dated 14.11.06
- (iii) Applicant's final submissions dated 14.12.06
- (iv) Summary of Issues (Undated)
- (v) Directions by the Leasehold Valuation Tribunal dated 3.11.06
- (vi) Correspondence (various dates)

3. The Law

Section 78-81 of the Commonhold and Leasehold Reform Act 2002

- (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
- (3) A notice of invitation to participate must also comply with such requirements (if any) about the form of notices of invitation to participate as may be prescribed by regulations so made.
- (4) A notice of invitation to participate must either-
 - (a) be accompanied by a copy of the memorandum of association and articles of association of the RTM company, or
 - (b) include a statement about inspection and copying of the memorandum of association and articles of association of the RTM company
- 5) A statement under subsection (4)(b) must-
 - (a) specify a place (in England or Wales) at which the memorandum of association and articles of association may be inspected,
 - (b) specify as the times at which they may be inspected periods of at least two hours on each of at least three days (including a Saturday or Sunday or both) within the seven days beginning with the day following that on which the notice is given,

(c) specify a place (in England or Wales) at which, at any time within those seven days, a copy of the memorandum of association and articles of association may be ordered, and

(d) specify a fee for the provision of an ordered copy, not exceeding the reasonable cost of providing it.

(6) Where a notice given to a person includes a statement under subsection (4)(b), the notice is to be treated as not having been given to him if he is not allowed to undertake an inspection, or is not provided with a copy, in accordance with the statement.

(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.

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.

81. Claim notice: supplementary

- (1) A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80
- 2) Where any of the members of the RTM company whose names are stated in the claim notice was not the qualifying tenant of a flat contained in the premises on the relevant date, the claim notice is not invalidated on that account, so long as a sufficient number of qualifying tenants of flats contained in the premises were members of the company on that date; and for this purpose a "sufficient number" is a number (greater than

one) which is not less than one-half of the total number of flats contained in the premises on that date.

(3) Where any premises have been specified in a claim notice, no subsequent claim notice which specifies-

- (a) the premises, or
 - (b) any premises containing or contained in the premises
- may be given so long as the earlier claim notice continues in force

(4) Where a claim notice is given by a RTM company it continues in force from the relevant date until the right to manage is acquired by the company unless it has previously-

- (a) been withdrawn or deemed to be withdrawn by virtue of any provision of this Chapter, or
- (b) ceased to have effect by reason of any other provision of this Chapter.

Section 84 of the Commonhold and Leasehold Reform Act 2002

84 Counter-notices

(1) A person who is given a claim notice by a RTM company under section 79(6) may give a notice (referred to in this Chapter as a "counter-notice") to the company no later than the date specified in the claim notice under section 80(6).

(2) A counter-notice is a notice containing a statement either-

- (a) admitting that the RTM company was on the relevant date entitled to acquire the right to manage the premises specified in the claim notice, or
- (b) alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled,

and containing such other particulars (if any) as may be required to be contained in counter-notices, and complying with such requirements (if any) about the form of counter-notices, as may be prescribed by regulations made by the appropriate national authority.

(3) Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the company may apply to a leasehold valuation tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises.

(4) An application under subsection (3) must be made not later than the end of the period of two months beginning with the day on which the counter-notice (or, where more than one, the last of the counter-notices) was given

(5) Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the RTM company does not acquire the right to manage the premises unless

- (a) on an application under subsection (3) it is finally determined that the company was on the relevant date entitled to acquire the right to manage the premises, or
- (b) the person by whom the counter-notice was given agrees, or the persons by whom the counter-notices were given agree, in writing that the company was so entitled

(6) If on an application under subsection (3) it is finally determined that the company was not on the relevant date entitled to acquire the right to manage the premises, the claim notice ceases to have effect.

(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.

(8) An appeal is disposed of- a) if it is determined and the period for bringing any further appeal has ended or (b) if it is abandoned or otherwise ceases to have effect.

and also

Regulation 8 of and Schedule 3 to the Right to Manage (Prescribed Particulars and Forms England Regulations 2003.

4. Description of the Premises

90 flats situated at Trinity Court, 254 Gray's Inn Road London WC1X 8JX

5. The Hearing

(i) The Applicant's case

The Applicant's raised the issue of the validity of the Counter-notice, as in the view of counsel Mr. Nichols if the Counter-Notice was invalid the Tribunal had no Jurisdiction and the Respondent would have no valid objection to the Applicant's claim for the Right to Manage. The Tribunal considered that the issues concerning the validity of both the notice and counter-notice would be considered and would form part of the determination of the Tribunal .

On behalf of the Applicant Mr. Nichols stated the Applicant's position on the issues as follows:- That the Membership of the RTM company was defined in S79 (5), that is that the membership of the RTM company must on the relevant date include one half of the qualifying tenants of flats contained in the premises. The Relevant date at which the Applicant needed to have at least fifty percent of its members was the 28th July 2006, on the date when the Notice claiming the Right to Manage was served. Mr. Nichols stated that on that date the Applicant had 51 qualifying tenants. These members were set out in the Schedule to the claim notice. The Applicant relied on section 22 of the companies Act 1985, which states:-

(ii) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration shall be entered as such in its Register of Members.

- (iii) *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.*

The Applicant stated that the Register of Members was prima facie evidence of compliance with section 79(5). Mr. Nichols then referred to the relevant sections of the Companies Act.

Section 353 of the Companies Act dealt with where the register was to be kept. Sect 722 of the same act dealt with how the register should be kept and sect 723 dealt with computerised registers.

Mr. Nichols stated that the Tribunal would need to consider the evidence of Joanna Sigalov, who dealt with the Applicant's Register of Members and the Witness Statement of David Konviser concerning what happened on his visit to inspect the Register at 49 South Molton Street London W1. Mr. Nichols stated, that the Tribunal would need to consider whether the location of the register was relevant to there being a Register of Members. The requirement of it being in a certain location was set out in the *Companies (Register and other Records Regulations 1985)*.

Mr. Nichols, asserted that the location was not relevant to there being a register as Sect 352 (2) of the 1985 act provided that failure to notify the registrar of companies of a change in location was an offence punishable by a fine. It therefore followed that the fact that the Registrar was not at South Molton Street did not mean that the register did not exist. The obligation to keep a register had been complied with. The Registrar did not cease to be a Register of Members because it was somewhere other than required by the Companies Act or because of a failure to give notice as to where the register was being kept. That was why in his view the obligation to notify was an offence. The Applicants had admitted the mistake in where the register was kept early on in the letter from their solicitors dated 14.9.06 which stated:-
“..It appears that our clients' Register of Members was not at the address which you attended upon on 10 August 2006.. The Register is now at 49 South Molton Street, London W1K 5LH”

The applicant also relied on the fact that the document attached to the notice of claim, giving the names and addresses of the members of the RTM company had been created on 19.7.06, as demonstrating that they had the requisite number of members. The Applicant had invited the Respondent's to consider the computer generated 'properties report' (which had data on the creation of the document), The Respondent in correspondence indicated that the document creation records could be altered and demonstrated this, although they did not claim that this had in fact occurred.

The Applicant's called Joanna Sigalov to give evidence on their behalf

Joanna Sigalov

Joanna Sigalov was a Director of Parkgate Aspen who had been charged with the task of setting up a data base with the Leaseholders details and updating it as leaseholder's responded to the invitation to become members of the RTM company. Ms Sigalov informed the Tribunal that she had updated this as the information came in by placing a Y in the RTM column for those who indicated that they wished to become members. J S explained that she created a Data base on her computer. She explained that there were 30 staff employed by Parkgate Aspen, and that if she had altered the date in the computer generated report, it would have affected the data for the whole of the company.

In cross examination by Mr. Sarota, Joanna Sigalov admitted that the access data base was always at Parkgate Aspen and that there had been no temporary transfer as set out in the letter of the 14.9.06, she was also unable to help The Tribunal with why the letter had referred to a temporary transfer. She stated that she had merged and produced the attachment to the Claim notice on the instructions of Teacher Stern and Selby solicitors and that she had created the data base from scratch. The RTM company had been created by a company called Jordan's who specialized in creating off the peg companies. She had been given a company kit which had a Register of Members, but she had used the data base instead, as the Company kit did not show the date that a Lessee had become a member Joanna Sigalov had not been instructed by Jordan's to create the Register.

Once the Register was formally at 49 Molton Street Joanna Sigalov continued to receive letters from Lessees who had indicated that they wished to join the RTM had advised the Accountant's who were holder of the Register that Lessees had become members and then had given them the necessary information to update the Register.

The Register of companies was not informed about the transfer of the records, until a notice was sent dated 13 December 2006. Counsel for the Applicant stated that section 353 (b) of the 1985 act allowed for temporary transfer for example when someone else was making up the register on behalf of the company. Mr. Nichols however conceded that the Register of companies should have been informed of the transfer in accordance with section 353 a of the Act.

The Respondent had also indicated that they were taking issue with the fact that the address of 43 South Molton Street stated in the notice was wrong and that as a result the notice was defective. Mr. Nichols submitted that although section 80 (5) of the 2002 Act stated that the notice must state the name and address of the registered office of the RTM, and the address had been wrongly stated. Counsel for the Applicant, sought to rely on the provision in section 81 (1) of the 2002 Act which stated -:

"A Claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80." Mr. Nichols stated that this was sufficiently wide as to mean that the defect, should not invalidate the notice, given this the notice was not invalid and The Tribunal had Jurisdiction to decide the application.

(ii) The Respondent's case

Mr. Sarota stated on behalf of the Respondent, that the Register of Members was the only means of ascertaining that the minimum number of members had been satisfied by the RTM company. He also stated that the requirements were not a mere formality and that they were necessary in order to enforce the Statutory Rights in the 2002 Act. Mr. Sarota submitted that when considering what is the Register of Members? One of the central characteristics is that it is located in the place it is meant to be located. When the company was incorporated it had a company pack and on 19/7/06, Joanna Sigalov had printed out certain information and put it in the company pack, this did not make it a register as:-

- I. It was not at the Registered office
- II. The entries in the final column were incorrect no one could be a member before the 19.7.06 when the register was created.
- III. Despite the fact that this is when the register was created no one was registered on that date.
- IV. Additionally there was no evidence that anyone had asked Joanna Sigalov to keep the Register in the format that she had kept it in rather than keeping a hard copy format
- V. Given this document that came into existence on 19.7.06 was not a Register of Members.

Mr. Sarota stated that the Register had changed five times firstly there was the company kit that Jordans had created, then the electronic version that Joanna Sigalov updated, then the printout created on 19.7.06, then the document held at 49 Molton Street by the accountants. Mr. Sarota referred to the letters dated 14th and 20th September 2006. He stated that nothing in those letters indicated that the Register was a computerized record and that the implication was that it was a hard copy register; he cited the reference to "temporary transfer to Parkgate Aspen" as confirming this. Mr. Sarota submitted that the document that was created by Parkgate Aspen was in the wrong location and more importantly no one authorized Parkgate Aspen to keep the register in that format and that the register was not available for inspection when David Konviser visited the registered offices of the RTM company.

Mr. Sarota submitted that the claim notice was invalid, he invited The Tribunal to consider what would have happened if there was a failure to serve a counter-notice within the prescribed time. The position would have been that

the RTM company would have acquired the right to manage in default. The notice requires the Counter-notice to be sent to the address in the notice as the address did not exist, given this if the Respondent served at the correct address they could still have served an invalid notice as it would not have been served at the address in the notice.

The Respondent considered that this was a fundamental mistake, in the Respondent's view, putting in an incorrect office address is something which is capable of misleading, given this, such a failure cannot be excused by the provisions in section 81 (1) of the 2002 Act. Mr. Sarota sought to rely on the cases of *Sabella Ltd -v- Montgomery and others 1997* and *Tegerdine -v- Brooks 1977*, on Section 25 of the Landlord and Tenant Act 1954. In *Sabella Ltd -v- Montgomery*. The court had accepted that the defects made the notice invalid and that it was immaterial whether the defect had mislead the party on who it was served because of the defect.

In reply Mr. Nichols submitted that section 81 (1) of the 2002 Act the act did not distinguish between the matters set out in section 80 of the 2002 Act. Further the Respondent had not been prejudiced in serving the counter-notice as the Respondent could have conducted a company search (as indeed they had) or picked up the telephone and queried the inaccuracy or have served the notice on the Applicant's solicitors.

Mr. Nichols submitted that the Register of Members was the Access data base, since it was created it had always been the Register of Members, since November 2005 there had always been a document on which the information was recorded. The Applicant accepted that the Register was not where it was suppose to be, and that when David Konviser visited he was wrongly informed that there was no Register of Members. Also the requirement to notify the Register of companies had not been complied with.

The Jordan's Green book was not a document in which the information was recorded it is not the register, when one looks at sect 352 the fact that other information was recorded on the data base record did not prevent the document being the register.

6. The Decision of the Tribunal

The Tribunal considered the two Jurisdictional issues that had been raised by the Applicant and Respondent and which was referred to in the matters in dispute:-

(c) Is the claim notice invalid because it fails to state the name and registered office of the RTM company?

(d)iii. Is the Respondent's Counter-Notice dated 30th August 2006 invalid because it fails to comply with section 84(2) of the 2002 Act and regulation 8 of and Schedule 3 to the Right to Manage (Prescribed Particulars and Forms England Regulations 2003?)

The Tribunal decided that it did have jurisdiction to consider both the Claim notice and the counter- notice. The Tribunal considered that there was a valid notice by virtue of section 81(1) of *the 2002 Act*. There was nothing in the act that limited the subsection to inaccuracies in section 80(4) of the 2002 Act as suggested by Mr. Sarota.

Insofar as the Applicant suggested that the counter-notice was inaccurate the Tribunal considered that the Counter-notice substantially complied with the

Right to Manage (Prescribed Particulars and Forms England) Regulations 2003.

The Tribunal considered that the bracketing of certain words did not of itself invalidate the notice.

The Tribunal considered that the central issue as set out in the matters in dispute was-:

(a) Whether the Membership of the Applicant (the RTM company) 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?

The Tribunal considered that the relevant date was when the claim notice was served, was the 28th July 2006, and that, whether the requisite number of members existed could only be ascertained by reference to the Register of Members.

Sect 73 of the 2002 Act defines the RTM company in 73(2) it states-:

(2) A company is a RTM company in relation to premises (a) it is a private company limited by guarantee and

(b) its memorandum of association states that its object or one of its objects is the acquisition and exercise of the right to manage the premises.

In order for the RTM company to be a private company limited by guarantee it must comply with the formalities of the Companies Act 1985.

Section 22 of the Companies Act 1985 Defines member as follows-:

- (2) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration shall be entered as such in its Register of Members.
- (3) 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.

The Tribunal therefore determined that as at the 28.7.06 the qualified number of tenants should have been capable of being evidenced by the Register of Members.

The Tribunal then considered the sub-issues identified by the parties.

(b) What was the membership of the Applicant company on the relevant date? (iii) is the membership of the Applicant company on the relevant date to be ascertained by reference to the Register of Members? (iv) If not how is it to be ascertained? (v) If so, what is the effect, if any of the Applicant's failure to keep its Register of Members at its registered office? (VI) When did its members become its members? (vii) What is the total number of flats in the premises

The Tribunal decided that the membership could only be ascertained by reference to its Register of Members. Whilst the Tribunal accept that there was a data-base record, the record had been created by Joanna Sigalov, and from her evidence the Tribunal considered that her data base was created in order to have a record of the information that she needed to prepare the documentation for the Notice of claim, rather than being the Register of Members. The Tribunal did not consider that there was a failure to keep the register at the address of the Registered office.

The Tribunal considered, that Ms Sigalov was creating a record for her own purpose and that no register was transferred to her. From Joanna Sigalov evidence, it was not clear that she considered herself to be the keeper of the Register of Members. The Tribunal consider that she had no instructions to keep the Register of Members from a director or any one else who was authorized by the company. Ms Sigalov had continued to keep her record and although the responsibility was now with the Registered office at 49 South Molton Street, the data base record continued to exist.

For this reason the Tribunal considered that the membership of the Applicant company could not be ascertained by reference to the Register of Members on 28.7.06, and on that date the Records held by Ms Sigalov was a data base record rather than the Register of Members.

The Tribunal consider that the Claim notice must fail as the RTM could not evidence that it had satisfy the requirement to have a membership of one half of the total number of tenants at the date when the claim notice was served.

CHAIRMAN.....*M. Kelly*
DATE 7/3/07