

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL



Re: The Lodge Western Road Crediton Devon EX17 3RD (the "Premises")

In the matter of an Application under section 84(3) of the Commonhold and Leasehold Reform Act 2002
(Right to Manage Application)

DECISION AND REASONS

Case Number: CHI/158/UK/LRM/2010/004

Applicant: The Lodge (Crediton) RTM Company Limited

Respondent: Mr Robin Hotton and Mrs Kathy Hotton

Appearances: Philip Muzzlewhite FRICS Whitton & Laing (for the Applicant)

In Attendance: Mr Robin Hotton
Mrs Kathy Hotton (for the Respondent)
Matthew Baker Whitton & Laing
Mr R. Wright (Flat 3)
Mr A. Cliff (Flat 25)
Mr John Cummings [freeholder of a property within the Premises]

Tribunal Members: Mr Terry Pinker (Clerk to the Tribunal)
Cindy A. Rai LLB Solicitor (Chairman)
William Gater FRICS ACI Arb Chartered Surveyor (Valuer Member)

Hearing Date: 11th May 2010

Decision Date: 7th June 2010

Decision

The Tribunal dismisses the application on account of the invalidation of the Claim Notice which is defective because prior to its service not all the "qualifying tenants" had been given a notice of invitation to participate pursuant to the provisions of section 79(2) of the Commonhold and Leasehold Reform Act 2002 (CLARA).

Background

1. On the 29th October 2009 the Applicant sent notices in the form prescribed under (CLARA) (the "Invitation Notice"). The Tribunal was provided only with a copy of a standard form of a signed and dated copy of the notice which was not addressed to any particular party but were told at the hearing by Mr Muzzlewhite, and this was not disputed by the Respondents, that the notice accompanied by a covering letter (a copy of which was not produced) was sent to the owners of Flats 1 -12, 14 – 22 and 23 – 29. and 1 – 3 Lower Lodge excepting Flats 12, 20 and 21 which are apparently owned by Mrs Kathy Hotton. The Invitation Notice refers to the premises, (defined as such in paragraph 1), as being, "The Lodge", Western Road, Crediton EX17 3RD
2. On the 9th December 2009 the Applicant gave a notice in the form prescribed under Commonhold and Leasehold Reform Act 2002 (CLARA) (the "Claim Notice") on Mrs K. Hotton and Mr R. Hotton that it intended to acquire the right to manage Flats numbered 1 – 12, 14 – 22 and 1 – 3 Lower Lodge, Western Road, Crediton.
3. On 4th January 2010 Robin Hotton served a counter notice on the Applicant (the "Counter Notice") disputing the validity of the Claim Notice by reason of sections 78(1) and 80(2) CLARA and referring also to section 84(2)
4. On the 21st January 2010 an application was made to the Tribunal under section 84(3) that the Applicant is entitled to acquire the Right to Manage
5. On the 26th January 2010 John Tarling a Tribunal Chairman issued Provisional Directions to the parties.
6. Each party sent statements to the Tribunal office and those statements together with the application the notices and the further documentation produced by each party formed the bundle of papers which were sent to the Tribunal prior to the Hearing. The pages of the bundle were numbered by the Tribunal staff.
7. A hearing ("the Hearing") was held on 11th May at the Boniface Centre Church Lane in Crediton at which the Applicant was represented by its company secretary Philip Muzzlewhite of Whitton & Laing and the Respondent primarily by Mr Robin Hotton.

Inspection

8. Prior to the Hearing the Tribunal inspected the readily accessible external parts of the Premises. The Premises formerly comprised part of a hospital which would appear to have been converted into residential accommodation in several separate phases. The initial conversion of 22 flats being those known 1 – 12, 14 – 22 and 1 – 3 Lower Lodge was apparently completed in or about 1993. Another wing of the original building comprising Flats 23 – 29 appears to have been more recently converted. Another part of a more recently converted wing apparently comprises a freehold block. The access to the whole development is common and shared with a commercial user. The Tribunal were told part of what appeared to be a parking area has apparently been transferred to the owners of the freehold block. The use of other external areas, including some garden area, is apparently shared and there

are common paths and yards serving the apartments. There may also be some common internal areas in respect of which usage is also shared.

Hearing

9. Mr Muzzlewhite (for the Applicant) said that a meeting of some of the residents of the Property was held on the 19th October 2009 at Flat 4 the Lodge. Copies of the minutes of that meeting are included within the papers produced to the Tribunal prior to the Hearing. Those minutes are headed Minutes of extraordinary general meeting of the Lodge Management Co (Crediton) Ltd and are referred to in this decision as being "the Minutes". Doubt was expressed at the Hearing by the Respondent that Mr Muzzlewhite had authority to act on behalf of that company. Whilst this was discussed between the parties at the Hearing and with no agreement between them the Tribunal does not consider this contention to be relevant to its decision.
10. Mr Muzzlewhite told the Tribunal that his firm Whitton & Laing which is a firm of Estate Agents Auctioneers and Chartered Surveyors had for some time managed the Premises which included flats 1 – 12, 14 -22 and 1-3 Lower Lodge. Mr Muzzlewhite is a chartered surveyor. Owners of other properties within the "development" had been invited to attend the meeting. However Mrs Hotton despite her being an owner of Flats 12, 20 and 21 was not invited. The Minutes record that Mr Fernbank (No. 23) Mr Cliff (No. 25) and Mrs Smith (No. 28) attended the meeting. At the meeting it was proposed that a new RTM Company be created to manage the whole site. A debate ensued and concerns were recorded as to the potential shortcomings of such an arrangement as well as the possible merits on account of different maintenance regimes.
11. Questions put to both parties at the Hearing revealed that the leases of certain flats within the development were different in relation to the lengths of the terms granted, the ground rents and perhaps the maintenance schedules. Paragraph (d) of the Minutes records that those present at the meeting were unanimously in favour of forming a RTM Company and that it was suggested that a two thirds majority was needed from both groups to run the whole site and from each group separately. This does not reflect the provisions of section 79(5) of CLARA, which is set out in full later in this decision.
12. From the evidence disclosed at the Hearing it was clear that the first phase of the development comprises 24 flats being 1 -12, 14 – 22 and 1- 3 Lower Lodge; These are the flats managed by Whitton & Laing. A second phase comprising flats 23 – 29 has been developed more recently apparently by Mrs Hotton. In her evidence she disclosed that another block had been sold as a freehold and presumably developed by its buyer and which would appear to the Tribunal to comprise two further flats.
13. It was not disputed by either party that the Invitation Notice was given to all of the residents within the first phase of development, namely Flats 1 – 11, (not flat 12) Flats 14 – 19, Flat 22 – 29 and Flats 1 – 3 Lower Lodge. Therefore each leaseholder within the development received an Invitation Notice except for Mrs Hotton. It is noted from an examination of a copy of the form of Invitation Notice that it states

therein that the Applicant intends to acquire the right to manage the premises described as "The Lodge, Western Road Crediton EX17 3RD". That description is consistent with the description of the development in the example lease supplied to the Tribunal within the bundle of papers. The description of the premises is significant because of one of the Respondents grounds of opposition referred to in the Counter Notice

14. The Claim Notice refers to the Applicant claiming the right to manage Flats 1 -12, 14 – 22 and Flats 1 – 3 Lower Lodge and intending to acquire the right. It refers to 15 of the 23 owners of the flats being both qualifying tenants and members of the Applicant.
15. The Counter Notice served by one of the Respondents, Mr Hotton who is the superior landlord, stated that the Applicant was not entitled to acquire the right to manage the premises specified in the Claim Notice on the following grounds:-
 - a. That the Claim Notice does not specify the premises correctly (section 80(3))
 - b. That the Premises are not qualifying premises as they are not self contained and relevant services "namely the shared water supply and the electricity supply to the common areas are shared with Flats 23 – 31 and such services could not be independently provided without significant interruption to the occupiers of Flats 23 – 21 (sections 72 (3) (4) and (5))
 - c. No notice of invitation to participate was given to the owner of Flats 12, 20 and 21 who are qualifying tenants but are not nor have they agreed to become a member of the Applicant (section 78 (1))
 - d. As the Invitation Notice was sent to the owners of the 7 other flats being 23 – 29 as well as the 23 flats referred to and described in the Claim Notice as the premises less than 50% of the owners had agreed to participate. It was also suggested that the limitation of the premises to only 23 flats in the Claim Notice was a deliberate attempt to manipulate the required 50% majority.
16. On behalf of the Applicant Mr Muzzlewhite explained that following the meeting of the residents he had received 15 positive responses; He said that the Claim Notice correctly refers to the Premises. He said that the shared facilities would not cause management problems. The shared water supply was metered and the costs simply divided between the users. Electricity in communal areas costs about £50 per quarter; the wiring would enable separate metering but the costs of separation would not justify the costs of the separation works. There is agreement to share the costs of maintaining and repairing the drainage and shared drainage costs are not uncommon in developments of a similar type to this development.
17. Mr Wright commented that most residents would have liked an RTM Company which had the right to manage the whole site. He thought that there had been confusion about the water and electricity supplies and the different management regimes in the leases of different phases of the development. If these issues had been clarified residents may have voted for a single management regime.

The Law

18. The relevant legislation is contained in CLARA and the sections referred to specifically within the decision are set out below in full.

S72 Premises to which Chapter applies

- (1) This Chapter applies to premises if—
- (a) they consist of a self-contained building or part of a building, with or without appurtenant property,
 - (b) they contain two or more flats held by qualifying tenants, and
 - (c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.
- (2) A building is a self-contained building if it is structurally detached.
- (3) A part of a building is a self-contained part of the building if—
- (a) it constitutes a vertical division of the building,
 - (b) the structure of the building is such that it could be redeveloped independently of the rest of the building, and
 - (c) subsection (4) applies in relation to it.
- (4) This subsection applies in relation to a part of a building if the relevant services provided for occupiers of it—
- (a) are provided independently of the relevant services provided for occupiers of the rest of the building, or
 - (b) could be so provided without involving the carrying out of works likely to result in a significant interruption in the provision of any relevant services for occupiers of the rest of the building.
- (5) Relevant services are services provided by means of pipes, cables or other fixed installations.
- (6) Schedule 6 (premises excepted from this Chapter) has effect.

S74 RTM companies: membership and regulations

- (1) The persons who are entitled to be members of a company which is a RTM company in relation to premises are—
- (a) qualifying tenants of flats contained in the premises, and
 - (b) from the date on which it acquires the right to manage (referred to in this Chapter as the "acquisition date"), landlords under leases of the whole or any part of the premises.
- (2) The appropriate national authority shall make regulations about the content and form of the memorandum of association and articles of association of RTM companies.
- (3) A RTM company may adopt provisions of the regulations for its memorandum or articles.
- (4) The regulations may include provision which is to have effect for a RTM company whether or not it is adopted by the company.
- (5) A provision of the memorandum or articles of a RTM company has no effect to the extent that it is inconsistent with the regulations.
- (6) The regulations have effect in relation to a memorandum or articles--
- (a) irrespective of the date of the memorandum or articles, but
 - (b) subject to any transitional provisions of the regulations.
- (7) The following provisions of the Companies Act 1985 (c. 6) do not apply to a RTM company--
- (a) sections 2(7) and 3 (memorandum), and
 - (b) section 8 (articles)

S75 Qualifying tenants

(1) This section specifies whether there is a qualifying tenant of a flat for the purposes of this Chapter and, if so, who it is.

(2) Subject as follows, a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease.

S78 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.

(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.

S79 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.

S80 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.

S81 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.

19. Section 79(8) provides that a copy of the claim notice must be given to each person who at the relevant date is a qualifying tenant of a flat contained within the premises.

Concluding submissions

20. Mr Hotton explained to the Tribunal that the development of the site had been undertaken in separate phases although the original intention had been to develop the whole site at one time. He suggested that it would cost in the region of £23,000 for separate metering of the water supply. The water pipes run into sections of the buildings and he compared these pipes to a spiders web because they did not run in logical lines. When the original development was undertaken it was too expensive to provide separate metering. He said that the drainage runs into land belonging to the Health Authority and that it was essential that there was common maintenance.
21. He said that the roads and accessways are in poor condition and whilst the Health Authority are obliged to contribute towards maintenance costs it is according to him only prepared to do so if an overall management company is responsible for undertaking repairs.
22. He suggested that the Claim Notice had restricted the premises to those which are already managed by Whitton & Laing. He suggested that the freeholder was not always supplied with copies of relevant correspondence and that communication between separate management regimes have caused confusion. In referring to a separate management regime he was referring to the management of the recently developed block the freehold of which was owned by Mrs Hotton.
23. He accepted that he had received a copy of a letter from Mr Thomas (although he had previously suggested in his statement in support of the Respondent's case that Mr Thomas had not agreed with the formation of the Applicant.
24. He still contends that the provision of separate water metering is not possible without significant disruption.
25. By way of further background he said that the leases of the different phases are similar except in relation to the ground rents length of lease and maintenance. Western Lodge Maintenance Limited (the Management Company that had been a party to the original leases) had been dissolved two years ago. An attempt had been subsequently made to regularise matters and an offer was made to Mr Thomas (one of the residents) to put in place a new Management Company which he had formed and "given" to the residents at the time together with the right to undertake their own

management of their phase of the development. Ten years later nothing significant in terms of management is being undertaken. Originally he had simply acquired a leasehold interest in the first phase and granted sub leases. Subsequently Mrs Hotton has acquired the freehold and developed another wing and granted seven leases of flats within that wing and sold the freehold of another building to Mr Cummings. In her capacity as freeholder she withdrew permission for the company to manage the first phase. He said that Whitton & Laing would not accept that this consent had been withdrawn. He said that no accounts had been produced and that repairs were not carried out. This was disputed by Mr Muzzlewhite.

26. When he had heard about the residents meeting he was in favour because he wanted a different regime and a better management set up. However he believes that that majority of qualifying tenants has been manipulated. He maintains that it is not possible to split the management of the premises between the phases. It might be useful at this point to clarify the requirements of CLARA. For an application to be made by an RTM Company two thirds of the Flats within the building to which the application is to relate must be qualifying tenants. (Section 72) All tenants who are residential tenants of flats under long leases are qualifying tenants. In order to serve a notice of claim 50% of the qualifying tenants must be members of the RTM Company (Section 79(5)).
27. In response Mr Muzzlewhite produced copies of some accounts for The Lodge Management Co. (Crediton) Ltd. He said that accounts had been submitted to each resident and these accounts were managing agents company accounts and that these were full accounts.
28. He asked that the Tribunal confirm that the Applicant has the right to manage. He said that the purpose of CLARA is to "free tenants" from exploitation. He does not believe that "his" residents want to be managed by the freeholder. He says that if the Tribunal does not accept legitimacy of the application the residents will be disadvantaged.
29. In conclusion Mr Hotton said that the Respondents continue to rely upon the content of their statements previously submitted. They are not "bogeymen" He wants an overall management regime in place. He is fearful that split management would not work effectively and would be disruptive. He accepts that a regime is required but does not accept what is proposed would be effective.

Decision

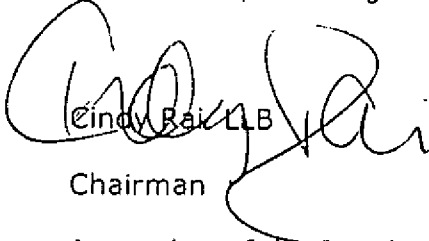
30. Mr Muzzlewhite explained his omission to give Mrs Hotton an Invitation Notice by reference to Note 7 in the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003/1988. ("The Regulations") Note 7 is found at the end of Schedule 1 in which the prescribed form of an invitation notice is set out. It is a note which is referred to after paragraph 11 of the form which paragraph invites the person to whom the notice is given to become a member of the company. It states simply that:-

"all qualifying tenants of flats contained in the premises are entitled to be members. Landlords under leases of the whole of any part of the premises are also entitled to be members but only once the right to manage has been acquired by the company."

31. In his statement dated 24th February 2010 and made on behalf of the Lessees of the Lodge in response to Mr Holton's statement Mr Muzzlewhite said that formal notice was not given to the freeholder (Mrs Holton) and the Leaseholder (Mr Hotton) in respect of the three flats 12, 20 and 21 owned by Mrs Hotton in accordance with Note 7.
32. Unfortunately the Tribunal concluded that Mr Muzzlewhite interpretation of Note 7 is not correct. Note 7 does not suggest that the Invitation Notice should not be given to all qualifying tenants because they might also be a landlord and a freeholder. Mrs Hotton owns the three flats to which he refers as a leaseholder under a long residential lease. Therefore it follows that she must be a qualifying tenant within the definition contained in section 75 (2) of CLARA and that an Invitation Notice must be given to her. No invitation notice was given to her and therefore the provisions of clause 79(2) of CLARA have not been complied with and the Claim Notice is defective. All that Note 7 does is to indicate that in addition to the qualifying tenants Landlords under leases of the whole or any part of the premises are also entitled to be members but not until the right to manage has been acquired by the company. Mrs Hotton is also the freeholder but as a leaseholder she is a qualifying tenant because she is a tenant of a flat under a long lease and therefore is entitled to receive an invitation notice.
33. Whilst it is not relevant to this decision the Tribunal did not consider that the fact that the Invitation Notice refers to a different description of the Premises than the Claim Notice would necessarily cause the Claim Notice to be defective. It may be helpful also to refer the parties to the provisions of clause 79(5) of CLARA which sets out the membership requirement of the RTM company.
34. Furthermore whilst it was also not relevant to its decision the provisions of section 81 could save a claim notice which contained incorrect information with regard to the factual matters which should be included, (and which are set out in full later in that section) and might for example rescue the incorrect inclusion of a member who was not a qualifying tenant when the notice was given.

Conclusion

39. For the reasons set out above the Tribunal therefore determines that the Claim Notice is invalid because no Invitation Notice was given to Mrs Hotton as the qualifying tenant of flats 12, 20 and 21 which are included within the Premises at least 14 days before the Claim Notice was given. Therefore the Applicant is not entitled to acquire the right to manage the Premises.



Cindy Bai LLB

Chairman

A member of the Panel appointed by the Lord Chancellor