

339



**HM Courts
& Tribunals
Service**

LEASEHOLD VALUATION TRIBUNAL

**Section 84 of Commonhold and Leasehold Reform Housing and Urban
Development Act 2002 ("the Act") Right to Manage Application**

Case Number:	CHI/00ML/LRM/2012/0021
Property:	53 Brunswick Place Hove East Sussex BN3 1NE
Applicant:	53 Brunswick Place RTM Company Limited
Appearances for the Applicant:	Ms. Ruth Bunbury
Respondent/freeholder :	Falcon Heath Limited
Appearance for the Respondent	Mr Jonathan Everett solicitor
Date of the Hearing:	28th February 2013
Tribunal:	Mr R T A Wilson LLB (Lawyer Chairman) Mr A Mackay FRICS (Valuer Member) Ms. J Morris (Lay Member)
Date of the Tribunal's Decision:	15th March 2013

The Application

1. This application is for a determination that with effect from the 19th October 2012, the Applicant was entitled to acquire the Right to Manage the Property.

Summary of The Decision

2. The Applicant was entitled to acquire the Right to Manage the property as from the 19th October 2012.

The Facts

In summary the facts are as follows:

3. The Respondent is the freeholder of the property, which is divided into eight flats. The Applicant is a company incorporated on or about the 4th September 2012 established in order to acquire the right to manage the property. All of the flats have been sold on long leases.
4. On the 19th October 2012 the Applicant served a claim notice on the Respondent seeking to acquire the right to manage the property ("the claim notice"). On or about the 29th October 2012 the Respondent served a counter notice on the Applicant alleging that by reason of the Applicants failure to comply with S.79(5) of the Act the Applicant was not entitled to the right to manage the property.
5. On the 21st November 2012 the Applicant made an application to the Tribunal for a determination that on the relevant date it was entitled to acquire the right to manage the property pursuant to S.84(3) of the Act.
6. The Tribunal gave directions for the Respondent to file a statement of case, for the Applicant to serve points in dispute and for the Respondent to file points in reply. Both parties complied with these directions with the result that the grounds relied upon by the Respondent have been narrowed to just one issue namely whether or not the Applicant had the requisite number of qualifying tenants at the relevant date which the parties agree is the 19th October 2012.

The Evidence

The Respondent's Case

7. It is the Respondent's case that on the relevant date the claim notice was not given by an RTM company which complied with S.79 (5) of the Act. S.79 (3) of the Act provides that the claim notice must be given by an RTM company which include a number of qualifying tenants of flats which is no less than one half of the total number of flats contained in the building. There are eight qualifying tenants of flats within the property and on this basis to comply with S.79 the Applicant would require at least four members.
8. The Respondent says that despite a number of requests the Applicant refused to supply its advisors with a copy of the Membership Register for the Applicant. Because of this refusal the Respondent could not satisfy themselves that the requirements of S.79(5) had been met. Accordingly they had no option other than to serve a counter notice claiming that the Applicant Company did not as at the 19th October 2012, have at least four members.

9. It was only at the hearing that the Respondents were for the first time granted access to the share register and this inspection revealed inconsistencies. Although the Register recorded 6 members, one member Karen Rourke was recorded as a member on the 21st November 2012, which was after the 19th October 2012, and therefore not a qualifying member capable of being included in the count. As to the other five members, Devon Jones, Simon Thetford, Scot Heinemann, Katie McConway & Ruth Bunbury were stated to be members as at the 17th September 2012. However this date conflicted with their signed letters of application, which in each case were stated to be the 24th September 2012, one week later.
10. The Respondents suggest that the correct inference to be drawn from this inconsistency is that either the Register shown to the Tribunal was a not a valid Register or that it was made up at a later date and that in either case the Applicants have not shown that as at the 19th October 2012 there were at least 4 qualifying tenants as members of the company. It is suggested that on these facts the Applicants claim must fail.

The Applicant's Case

11. It is the Applicant's case that at the relevant date there were five members of the company as reflected in the share register and that accordingly the conditions of S.79(5) of the Act were met.
12. Ms Bunbury told the Tribunal that she had formed the Applicant Company and was a subscriber member from incorporation. After formation of the Company there had been a lessees meeting at the property on the 17th September 2012 in which a further four lessees agreed to become members of the company with a view to exercising their right to acquire the right to manage the property. This meant that there were five lessees in total who had agreed to become members and the books of the Company had then been made up by her to reflect this agreement.
13. The Share Register had not been disclosed to the Respondents before now because she took the view that there was no requirement for the Applicant to do so. On being questioned by the Tribunal as to the nature and significance of the Share Register she accepted that the Register was a matter of public record and that by law it should be open to inspection by all at the Registered Office. Ms. Bunbury confirmed that she had brought the Register with her and on being invited by the Tribunal to show it to the Respondent's representative and members of the Tribunal she did so.
14. Ms. Bunbury was adamant that the Share Register was in existence on the 17th September 2012 and she rejected any allegation that it had been made up at a later date.
15. She could not provide an explanation as to why the lessees letters requesting membership were dated the 24th September 2012 i.e. after the date that they had been recorded as members, but she considered this to be a mere distraction because the Register showed membership of five lessees as at the 17th September 2012 with the consequence that the requirements of the Act had been met.

The Tribunal's Consideration

16. The Tribunal has come to the conclusion that at the relevant date there were sufficient qualifying tenants who were members of the RTM company to comply with S.79 of the Act. It has come to this conclusion on the basis of having inspected what it was told was the original Share Register of the Applicant Company. The Register of


members is the definitive record of the members of a company for the time being and the Tribunal's reading of the Register was that as at the 17th September 2012 there were five qualifying lessees recorded as members of the Company. Five qualifying lessees satisfies the requirements of S.79 of the Act. This is the case even though the letters of application might show an application date of the 24th September 2012. In the Tribunal's judgment the inconsistency of dates in the Share Register and the letters of application does not, as the Respondents contend, lead one to the conclusion that the Register of Members was either so defective as to render it invalid or as not being in existence at the qualifying date. The Tribunal takes the view that in the event of there being an inconsistency between the letters of application and the share register then the dates in the Share Register prevail.

17. The Tribunal heard evidence from Ms. Bunbury that the Share Register, with the entries as seen by the Tribunal, was in existence before the qualifying date and there was no probative evidence before the Tribunal to establish otherwise.
18. The Tribunal carefully reviewed the Register and was satisfied that a reader of the Register as at the 19th October 2012 (the relevant date) would have been in no doubt that the Company had five members at that time.
19. In the Tribunal's judgment on the facts of this case, the existence of the Share Register and entry therein of the names of the qualifying tenants with the dates of membership as at the 17th September 2012 is sufficient to satisfy the requirements of S.112 of the Companies Act 2006. S.112 of this Act provides that a 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 Respondent's argument that the agreement documentation was defective with the result that the entries in the Share Register must also be defective is rejected. The Tribunal accepts the evidence of Ms. Bunbury that four lessees had agreed to become members of the Applicant Company on the 17th September 2012 and in consequence had their names entered into the Register of Members as at the 17th September 2012 i.e. before the 19th October 2012. Copy letters from some of the lessees contained in the hearing bundle supports this sequence of events.
20. Neither is the Respondent assisted by the case on which it seeks to rely namely Southall Court Residents Ltd and others v Buy Your Freehold Ltd and others, a Lands Tribunal appeal case. Although some of the underlying facts may be similar there are significant distinguishing facts. In the Southall case, it emerged at the hearing that the RTM company did not have any Register of Members. On these facts it was held that in the absence of a Register of Members a person's name could not be entered on the Register and so a person could not be a member, whether or not that person had agreed to become a member. It followed that none of the 24 leaseholders who were said to have agreed to become members of the RTM were members at the date of its application to the LVT. Therefore the RTM company did not fulfill the requirements of S.79(5) and its claim notice was invalid. In the case before this Tribunal it has not been established that the share register does not exist. Indeed the contrary is the case.
21. Accordingly for the reasons stated above the Tribunal determines that at the relevant date the Applicant was entitled to acquire the Right to Manage.
22. Bearing in mind that the Applicants have been successful in establishing their right to manage, the Tribunal declines to make an order of costs against the Applicant pursuant to Paragraph 10 of Schedule 12 to the 2002 Act as requested by the Respondent. The Tribunal is not persuaded that the Applicants failure to provide a copy of the Share Register to the Respondent's representatives prior to the hearing was such as to amount to vexatious frivolous abusive disruptive and/or otherwise unreasonable behavior. In arriving at this decision the Tribunal is mindful that the

Register of Members is a public document to be held at the Registered Office of the RTM company, and it was open to the Respondent to exercise its statutory right of inspection. There was no evidence before the Tribunal that the Respondent had sought to exercise that right.

23. Nonetheless the Tribunal records its dissatisfaction at the Applicant's refusal to voluntarily disclose details of the Register upon request by the Respondent's solicitors. This was a perfectly reasonable and understandable request. There is little doubt that the Applicants failure to produce a copy of the Register of members to the Respondent's representatives prior to the hearing will have a bearing on the costs payable by them pursuant to S.88(3) of the Act.

Signed
Chairman


RTA Wilson

Date 15th March 2013