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HM COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

IN THE MATTER OF AN APPLICATION UNDER SECTION 84(3) OF THE COMMONHOLD & LEASEHOLD REFORM ACT 2002
(NO FAULT RIGHT TO MANAGE)

Case No.	CHI/00MR/LRM/2012/0023
Premises:	Challis Court, 15 Western Parade, Southsea, Hampshire, PO5 3JF
Hearing:	16 April 2013
B E T W E E N:-	
Applicant:	Challis Court RTM Company Limited
Represented by:	Clare Joanne Sherratt, assisted by Gail Brown
Respondent:	Jane McCarthy and Nicholas Tweddell
Represented by:	Nicholas Tweddell
Members of tribunal:	Mr Paul Letman, Chairman Mr Donald Agnew BA LLB LLM

The Application

1. By application dated 14 December 2012 made under section 84(3) of the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') the applicant Challis Court RTM Company Limited ('the Applicant') applied to this tribunal for a determination that it was on the relevant date entitled to acquire the right to manage Challis Court, 15 Western Parade, Southsea, Hampshire PO5 3JF ('the Premises').

2. The said application is opposed by Mr Nicholas Tweddell, acting both on his own behalf in his capacity as the leaseholder of flat 7 at the Premises, and in his capacity as landlord of the Premises; he is the joint registered proprietor of the freehold reversion to the 7 long leasehold interests in Challis Courtwith Ms Jane McCarthy (together 'the Respondent'). The grounds of opposition are examined in detail below.

Summary of Decision

3. For the reasons stated in detail below the tribunal determine the Applicant was not entitled on the relevant date, namely the date on which the notice of claim is claimed to have been given, to acquire the right to manage the premises because the Applicant failed to comply with the relevant statutory time limits for giving such a notice orto give the claim notice to the correct party.

4. The present application is accordingly dismissed, and the Respondent entitled to the reasonable costs of responding to the notice pursuant to section 88 of the 2002 Act.

5. For the avoidance of doubt the above determination does not disentitle the Applicant from renewing its application in accordance with the provisions of the 2002 Act as and when it sees fit.

Procedure & Preliminary Matters

6. Further to the issue of the Application directions were made on 10 January 2013 providing amongst other things for the Applicant to state whether it accepted the grounds of opposition and if not, to state the reasons why it did not agree. The Respondent was directed to provide a Reply saying what matters remained in dispute and the reasons for opposing the right to manage.

7. In response to paragraph 3 of the directions Mr Michael Cross for the Applicant duly submitted a statement of case saying that the Applicant did not agree with the alleged non-compliance and setting out its reasons, which are considered below. Equally, pursuant to the directions the Respondent by letter dated 04 February 2013 set out grounds of opposition to the claim, largely reiterating the points made in the 2 counter-notices served (again reviewed below).

8. The Tweddell's letter dated 04 February 2013 in addition raised a procedural complaint that the correspondence address being used by the tribunal was incorrect, and that this had resulted in delayed receipt by him of documents from the tribunal.

For example he stated that he did not pick up the tribunal's letter dated 10 January 2013 until 26 January 2013. This was referred to the procedural chairman who by letter from the tribunal dated 12 February 2013 responded confirming that the points raised by Mr Tweddell would be considered by the tribunal when his case came before them in April 2013.

9. On or about 03 April 2016 Mr Tweddell hand delivered a bundle of documents for the hearing to the tribunal under cover letter which requested an adjournment of the 16 April 2013 hearing. By email dated 04 April 2013 time 13.41hrs Mr Tweddell renewed his request to the tribunal for an adjournment of the hearing, primarily so it appeared to obtain copies from the freeholder's solicitors of 'deeds of adherence' allegedly executed by a number of the current lessees when taking assignments of their long leases.

10. The said request for an adjournment was considered in accordance with Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, regulation 15 'Postponement and adjournment', and declined on the basis that it was not then reasonable to permit an adjournment having regard to the grounds and timing of the request and the convenience at that stage of the Applicant. Nonetheless, Mr Tweddell was again informed that should he so wish, he could renew his application before the tribunal on 16 April 2013.

11. At the outset of the hearing on 16 April 2013, Mr Tweddell was asked whether or not he wished to renew his application for an adjournment. Mr Tweddell explained that he would rather carry on, with the tribunal deciding the issues he wanted to raise on the documentation currently available, but that should other documents become relevant then he might still want to revisit the question of an adjournment. On this basis Mr Tweddell confirmed that he was not then renewing his application for an adjournment, and was content for the hearing to continue; as it did without his again raising the issue of an adjournment.

The Grounds of Opposition

12. The grounds of opposition are (as indicated above) conveniently set out in the two counter-notices served by Mr Tweddell; the notices are identical save that one was given by Mr Tweddell on his own behalf and the other was stated to be served on behalf of the Challis Court Residents Association, because as Mr Tweddell explainedhe was unsure to whom the purported notice of claim was actually given.Further, with reference to the counter-notices it was accepted by Mr Tweddell at the hearing that for the purposes of determination his grounds may be conveniently enumerated as appears below.

(1) The Trust Point

13. The Respondent'sprimary submission relied upon the arrangements put in place in or about 1997 upon the acquisition of the freehold reversion of Challis Court by a group of its lessees including Mr Tweddell. At that time out of the 7 lessees only the lessees of flats 1, 2, 4, 5 and Mr Tweddell as the lessee of flat 7 were interested in participating. As Mr Tweddell related, they were advised by solicitors that in order to own the freehold they could either form a company or it could be held by 2 of their number on trust for all of the participants.

14. The 5 participating lessees chose the latter approach, and a draft of the trust deed prepared for the purpose was put before the tribunal by Mr Tweddell. His evidence, which the tribunal accepts, is that following a transfer dated 13 June 1997 of the freehold to himself and a Ms McCarthy (of flat 4) the deed was executed by the participants in substantially the same form ('the Trust Deed'). Indeed consistent with the Trust Deed the official copy entry (as at 17 April 2012) ofthe freehold of Challis Court (under registered title number HP338779) shows both Mr Tweddell and Ms McCarthy as the registered owners, with a restriction registered in favour of the lessees of flats 1, 2, 4, 5 and 7 for whom the title was and is held in trust.

15. In so far as is presently material the Trust Deed provided as follows:

15.1 At clause 2 'Trusts of Capital and Income', that the Trustees shall hold the capital and income of the Trust Fund (comprising, in accordance with clause 1,

the freehold interest in Challis Court and any additional monies) for the purposes of discharging the obligations of the Lessor under the Leases, and to secure compliance by the lessees of the obligations imposed upon them as such under the Leases.

15.2 At clause 5 'Administrative powers' the Trustees shall in addition without prejudice to all statutory powers have the powers and immunities set out in the Schedule to this Settlement provided that the Trustees shall not exercise any of their powers so as to conflict with the purposes and obligations set out and referred to in Clause 2 of this Settlement.

15.3 At clause 12A 'Personal promises of Mr Whitlock, Mr Seaman, Miss McCarthy, Miss Jazwinski and Mr Tweddell' (the then lessees), that if one of them assigns his or her interest in the Lease vested in them he or she will, amongst other things, procure that their assigns will act in their place as a Trustee of this Settlement and such assignee will execute a Deed of Adherence to confirm this; procure that their assigns shall assume obligations in identical terms to those imposed by this Clause 12A upon them and will execute an appropriate Deed to confirm this.

15.4 Under the Schedule, at paragraph 9 'Power to appoint agents', acknowledging Mr Tweddell's efforts and experience in managing Challis Court for the preceding 9 years, the Trustees declared that Mr Tweddell would be the chairman of any management committees set up by the Trustees should he wish to be and declared that Mr Tweddell will manage the daily affairs of the Trustees as regards the discharge of the obligations of the Lessor under the Leases and securing compliance by the lessees of the obligations imposed upon them under the Leases for so long as he desires.

16. In his evidence Mr Tweddelltold the tribunal that in accordance with the Trust Deed on each occasion that a lease of a flat in Challis Court had been assigned the assignee hadindeed entered a Deed of Adherence, accepting the terms of the Trust Deed including of coursethe provisions of paragraph 9 of the Schedule thereto. It is notable that the freehold title has not caught up with the assignments that have taken

place, in as much as the restriction in the proprietorship register (at entry 3) still refers to the lessees at the time the Trust Deed was entered. Nonetheless, for present purposes the tribunal is willing to accept Mr Tweddell's un-contradicted evidence in this regard, that Deeds of Adherence have been duly entered by each of the current lessees, including those who are members of the Applicant.

17. In these circumstances Mr Tweddell submits that the Applicant is not entitled to acquire the right to manage Challis Court under the 2002 Act. He puts the argument in a number of ways. Firstly, he relies upon the existence of a trust, specifically the trust upon which the freehold is held, and the effect of section 109 of the 2002 Act. In so far as is presently material section 109 provides as follows:

'(1) Where trustees are the qualifying tenant of a flat contained in any premises, their powers under the instrument regulating the trusts include power to be a member of a RTM company for the purpose of the acquisition and exercise of the right to manage the premises.

(2) But section (1) does not apply where the instrument regulating the trust contains an explicit direction to the contrary.'

18. With reference to section 109 Mr Tweddell argues that the leases are subject to a trust, and that paragraph 9 of the Schedule is 'an explicit direction to the contrary' within the meaning of section 109(2) so as to bar (in the case of all flats save 3 and 6) the right the lessees would otherwise have to acquire and exercise the right to manage.In consequence there would not be a sufficient number of qualifying tenants for the purposes of making a claim to acquire the right to manage; given that section 79(5) of the 2002 Act requires,in any case where there are more than 2 qualifying tenants, that 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.

19. Further or alternatively, Mr Tweddell submits that even if this is not correct, the Trust Deed entered by Clare Sherratt of flat 4 and Deed of Adherence entered thereafter by each of the assignees of flats 1, 2 and 3 operate to exclude the entitlement that theselessees would otherwise enjoy to acquire the right to manage under the 2002

Act. As he points out they haveeach thereby agreed to allow him the management of Challis Court, and the present claim is in direct conflict with that agreement.

20. More broadly Mr Tweddell argues thatthe 2002 Act ought not to be used to 'usurp'the operation of the 1993 Act and the control over the management that was granted to him by the lessees when exercising their right to buy in 1997. By extension Mr Tweddell adds that having signed these deeds, the lessees simply cannot be treated as qualifying tenants.

21. The tribunal respectfully disagrees and rejects each of these submissions. Section 109 is concerned only with the case where the lessee's interest is held on trust, where that is the trustees are the registered owner of a flat and the qualifying tenant of that flat. In such a case the section provides the trustees have the power to be a member of a RTM company, unless the trust deed expressly says otherwise. However, in the present case the lessees are not trustees at all, but beneficiaries under the trust of the freehold. Moreover, the trust on which Mr Tweddell relies is of the freehold and not of the tenant's interest under a long lease. It is not enough for section 109(1) and (2) to apply that the tenants are simply trustees, they must be trustees of the tenant's interest in a flat contained in the premises.

22. As to the alternative contention that the 4 lessees in question are bound to permit Mr Tweddell to manage Challis Court in accordance with paragraph 9 of the Schedule, this submission, as pointed out to Mr Tweddell in argument, ignores the terms of section 106 of the 2002 Act. That section provides as follows:

'106 Agreements excluding or modifying right

Any agreement relating to a lease (whether contained in the instrument creating the lease or not and whether made before the creation of the lease or not) is void so far as it-

(a) purports to exclude or modify the right of any person to be, or do any thing as, a member of a RTM company,

(b) provides for the termination or surrender of the lease if the tenant become, or does any thing as, a member of a RTM company or if a RTM company does any thing, or

(c) provides for the imposition of any penalty or disability if the tenant becomes, or does any thing as, a member of a RTM company or if a RTM company does any thing.

23. In the tribunal's view Mr Tweddell is seeking to rely upon the terms of the Trust Deed and Deed of Adherence and specifically paragraph 9 of the Schedule to exclude the rights of the lessees of flats 1, 2 4 and 5 to join in as members of the RTM company. This is plainly prohibited by section 106. The parties cannot contract out of the right to manage granted by the 2002 Act as submitted by Mr Tweddell or at all. Equally, to seek to construe the Trust Deed or Deed of Adherence so thatany of the lessees are not to be treated as qualifying tenants is to seek to give to those agreements an effect which again is prohibited by the terms of section 106. The tribunal accordingly determines that the Trust Point and the arguments in support are mistaken, and that there is nothing in these arguments that disentitles the Applicant from claiming to acquire the right to manage. Given that, as agreed with Mr Tweddell at the hearing, each of the objections raised under paragraphs 1(a) to (d) of the counter-notices were predicated on the same basis, each of those grounds is likewise rejected.

(2) Participation Notice Point

24. Under paragraphs 1(e) and (f) of the counter-notices Mr Tweddell maintains that in breach of section 78 'Notice inviting participation', no notice of invitation to participate was given to the requisite qualifying tenants (namely, all those who were neither members nor had agreed to become members of the RTM company) because, so he alleges, he was not given such a notice prior to service of the alleged claim notice itself.

25. The significance of this allegation is that section 79(2) of the 2002 Act provides that '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.' It is therefore contended for the Respondent, that unless notice of invitation was given to him in accordance with that section, the claim notice on which the present application relies is invalid.

26. The Applicant's representatives at the hearing, whilst contesting the matter on the facts (as to which see below), did not argue against this proposition, and in the judgement of the tribunal they were correct not to do so. Section 79(2) of the 2002 Act is not merely procedural but plainly establishes a substantive condition precedent to the service of a valid claim notice. Failure to comply with this mandatory requirement will accordingly invalidate a purported claim notice.

27. The issue between the parties, therefore, is one of fact as to whether a notice of invitation was duly given, and this was investigated at the hearing. It was common ground that at Challis Court rather than post being delivered to individual flats, there is a dedicated pigeonhole in the common parts for each flat to receive its post. On behalf of the Applicant Ms Sherratt confirmed that the notice of invitation was placed personally by her into the pigeonhole for flat 7 on 07 September 2012.

28. This is consistent with what she had previously told Mr Mike Cross, who has informally advised the Applicant, as referred to in his email dated 28 March 2013. It is also consistent with he reply of the same date to that email, in which she stated '..I can confirm that I placed the invitation to participate and the section 82 in Nick Tweddell's pigeon hole on 7thsep 12. This envelope was stamped urgent..'.

29. Further, the tribunal queried with Ms Sherratt why the covering letter to the notice of invitation was dated 02 September 2012but the notice was not delivered before 07 September 2012. In response Ms Sherratt explained that it would have taken time to print out and prepare all the notices, and time practically to get them into lessees' pigeonholes. She added that although it was known that Mr Tweddell did not live at flat 7, putting the notice into the pigeonhole was in accordance with 'normal procedures' for service on lessees including Mr Tweddell, and that in the ordinary course of events it was to be expected that the post would be passed on to him within at the most the next couple of days.

30. For his part Mr Tweddell denied that he had received the notice of invitation at or about 07 September 2013 (so as it was not given then). In his letter to the tribunal dated 04 February 2013 Mr Tweddell asserted that although he received the claim notice by email on 18 September 2012 (consistent with the stated intention in the

email of Mr Cross to Ms Sherratt dated 17 September 2012 refers), it was only in early November 2012, some time after service of the counter-notices dated 18 October 2012, that he recalled receiving hard copies of both notices. Further, he insisted that even before September 2012 he had informed members of the Applicant that documents should be sent to him at his home address or by email.

31. In his evidence before the tribunal Mr Tweddell was rather more equivocal about when exactly he might have received the notice of invitation, but nonetheless he was clear that he had not received it until some considerable time after 07 September 2012.

32. In the light of the evidence there is an obvious difficulty for the Applicant as regards compliance with section 79(2) of the 2002 Act. Even on the Applicant's own evidence the earliest that the notice of invitation could have been given to Mr Tweddell was 07 September 2012, so that where the alleged claim notice was given (as to which see further below) on 18 September 2012, as is common ground (at least in so far as dates are concerned) there was a maximum of 11 days separating the claim notice from the notice of invitation rather than the mandatory minimum of 14 days.

33. Presented with this difficulty at the hearing Ms Sherratt queried whether the 07 September 2012 might not be a mistaken reference. However, given the contents of the emails referred to above and the repetition therein of the 07 date it seems to the tribunal that there is little if any scope for treating this an error. Furthermore, in her evidence Mr Sherratt had offered her own specific explanation and justification for that date.

34. On the basis of the evidence adduced, therefore, the tribunal find that the earliest the notice of invitation could have been given to Mr Tweddell was on 07 September 2012 by its being put in the pigeonhole of flat 7, and further that the alleged claim notice was given on 18 September 2012. Thus in breach of section 79(2) the Applicant failed to allowthe requisite minimum period of 14 days between giving the notice of invitation and the alleged claim notice, with the result that in the tribunal's judgement the claim notice relied upon by the Applicant was premature and is invalid.

(3) The RTE Co. Point

35. Under paragraphs (g) and (h) of the counter-notices, Mr Tweddell refers to the constitution of Right to Enfranchise companies, and goes on to request that in the event that the notice of claim herein is valid, as a qualifying tenant he would like to have the opportunity to consider and possibly join the RTM company.

36. At the hearing before the tribunal Mr Tweddell acknowledged that this was not a point going to the Applicant's entitlement or otherwise on the relevant date to acquire the right to manage the premises. The tribunal concurs, but for the avoidance of doubt determines that there is nothing under paragraphs (g) and (h) of the counter-notices which constitutes a sensible ground of opposition to the Applicant's claim or that would in itself disentitle the Applicant from acquiring the right to manage claimed herein.

(4) The Landlord Point

37. However, on behalf of the Respondent the further point is taken (at paragraph (j) of the counter-notice) that the claim notice is defective and invalid because it was only addressed to Challis Court Residents Association ('CCRA'). Section 79(6) provides that the claim notice must be given to amongst others, each person who on the relevant date is the landlord under a lease of a whole or any part of the premises. The only relevant landlords are the Respondents as the registered freehold proprietors of the freehold, albeit holding the freehold title as trustees for all the participators and their successors in title each of whom is beneficially entitled to the freehold.

38. By its statement of case (under the first paragraph) the Applicant originally argued that Mr Tweddell and Ms McCarthy held the freehold on behalf of the participators in the freehold acquisition, and that they together with those others were collectively known as CCRA. Further, that Mr Tweddell has been holding himself out as the representative of the CCRA, including issuing demands (some of which are before the tribunal) for rent and service charge in the name of the CCRA.In her evidence before the tribunal Ms Sherratt explained that the Applicant did not have an address

for Ms McCarthy so the claim notice was sent to the CCRA instead. She felt, so she stated, that the landlord and CCRA were one and the same.

39. The tribunal respectfully disagrees. Firstly, it is incorrect to treat all the participators as the landlord, given that they are not all the registered legal proprietors (see in this regard the definition of landlord at sections 112(3) and 112(5) of the 2002 Act). However, where, as the Applicant asserts, the CCRA comprises both the registered proprietors and the other beneficial owners it does not constitute the landlord but another, larger group. In the premises the tribunal does not accept that the CCRA is equivalent to the landlord as asserted by the Applicant. The claim notice should have been addressed to Mr Tweddell and Ms McCarthy as the landlord, unless and until the title is altered or corrected as appropriate.

40. Further, if there is a difficulty, as indicated by the Applicant, in finding Ms McCarthy for the purposes of giving the notice to her, section 85 'Landlords etc not traceable' of the 2002 Act, provides the means by which this can be overcome, including making an appropriate application to a leasehold valuation tribunal. As matters stand, however, not only is the purported claim notice given on 18 September 2012 invalid for failure to serve notice of invitation at least 14 days before (see above), but it is also in our judgment invalid for failure to give notice in accordance with section 79(6) to each person who on the relevant date was a landlord.

(5) Internal Floor Area Point

41. At paragraph (k) of the counter-notices Mr Tweddell correctly notes that pursuant to section 72(6) and Schedule 6 of the 2002 Act, Part 2 Leasehold Reform Chapter 1 Right to Manage, does not apply to premises falling within section 72(1) if the internal floor area (a) of any non-residential part, or (b) (where there is more than one such part) of those parts (taken together), exceeds 25 per cent of the internal floor area of the premises (taken as a whole). Further, he suggested after an initial inspection and calculation that this section applied to Challis Court.

42. Ms Sherratt in her evidence was clear that there are no non-residential parts of Challis Court. The tribunal enquired of her whether there were any commercial

premises such as shops that would come within the definition of non-residential. She confirmed that there was not. Indeed it emerged at the hearing that this was common ground with Mr Tweddell. In the light of this evidence the tribunal has no hesitation in finding that Challis Court is exclusively residential, that it is not excepted from Chapter 1 under section 72(6), and thus in rejecting this ground of opposition.

(6) Miscellaneous

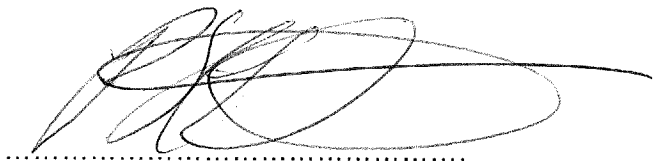
43. In addition by way of grounds of opposition to the Applicant's claimed entitlement to the right to manage, the Respondent at paragraph (l) of the counter-notices referred to and relied upon sections 73, 74 and 95 and again section 109(2) of the 2002 Act. However, Mr Tweddell did not pursue any further or other ground of opposition to the Applicant's claim by reference to these sections. For completeness only the tribunal therefore determines that this paragraph of the counter-notices discloses no grounds upon which it could determine that the Applicant was not entitled on the relevant date to acquire the claimed right to manage.

Conclusions

44. As set out above, in the judgement of the tribunal,unlike the other points taken by Mr Tweddell on behalf of the Respondent,the Participation Point and Landlord Point are sustainable and render the claim notice relied upon for this applicationinvalid. Thus the tribunal determines for the purposes of section 84(3) of the 2002 Act that because of the Applicant's failure to comply with sections 79(2) and 79(6) on the relevant date (here 18 September 2012) the Applicant was not entitled to acquire the right to manage Challis Court under the 2002 Act. For these reasons only the present application is dismissed.

45. In the premises the Applicant is liable under section 88 of the 2002 Act for the reasonable costs incurred by Mr Tweddell as landlord in consequence of the claim asserted by the Applicant. Further, pursuant to section 88(4) any question arising in relation to the amount of any costs payable by the Applicant shall, in default of agreement, be determined by a leasehold valuation tribunal. Thus if the amount of

costs for which the Applicant is liable cannot be agreed between the parties, separate application should be made to the tribunal for those costs to be determined.



Paul Letman
Chairman

A member of the Tribunal
Appointed by the Lord Chancellor

Decision of the leasehold valuation tribunal dated 20 May 2013