FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BG/LRM/2019/0012 &0013**
Property	:	**(1) Elite House, Edgemere House and Vale House, St Annes Street, London E14** **(2) Birkdale House, Slate House, Langan House, Wessex House, St Annes Street, London E14**
Applicants	:	**(1) Canary Gateway Block A (RTM Company) Ltd** **(2) Canary Gateway Block B (RTM Company Ltd)**
Representative	:	**Realty Law**
Respondent:	:	**Avon Ground Rents Ltd ("Avon")**
Representative	:	**Scott Cohen Solicitors Ltd**
Type of application	:	**Application in relation to the denial of the Right to Manage**
Tribunal members	:	**Judge Angus Andrew** **Mr Hugh Geddes** **Mr Luis Jarero BSc FRICS**
Date and venue of hearing	:	**20 January 2020** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**30 January 2020**

DECISION

Note: in this decision figures in [ ] are references to page numbers in the document bundle, "the Act" refers to the Commonhold and Leasehold Reform Act 2002, section numbers refer to section numbers in the Act and the "2009 regulations" refers to the RTM Companies (Model Articles) (England) Regulations 2009.

Decisions

1. We determine:

   (a) The premises as claimed in the Notices of Claim and as specified in the applicants' article of association qualify for the right to manage; and

   (b) The shared ownership lessees who have not staircased to 100% ownership are qualifying tenants; and

   (c) Metropolitan Housing Trust was not a qualifying tenant with respect to Vale, Edgemere and Wessex Houses; and

   (d) The applicants' failure to serve Notices of Invitation to Participate on Metropolitan Housing Trust Ltd does not invalidate the claims.

2. Consequently, the applicants are entitled to acquire the Right to Manage.

The application and hearing

3. On 31 May 2019 the Tribunal received the applicants' applications for determinations that they were on the relevant dates entitled to acquire the Right to Manage the properties under the Act.

4. We heard the applications on 20 January 2020. The applicants were represented by Mark Loveday and the respondent by Simon Allison. Both Mr Loveday and Mr Allison are barristers.

5. For reasons that will become apparent we did not hear any oral evidence. However, our attention was drawn to the witness statement of Yaron Hazan [262-471] the contents of which were not in dispute.

Background

6. Canary Gateway is a mainly residential development built approximately four years ago. The development consists of seven houses. Three are grouped together on the west side of St Annes Street: these are Edgemere House, Vale House and Elite House and together they are known as and referred to in this decision as Block A. The other four houses are grouped together on the east side of St Annes Street: these are Birkdale House, Slate House, Langan House and Wessex House and they are collectively known as and referred to in this decision as Block B. There is a small commercial element in the development but it was not relevant to the issues that we had to decide.

7. The development having been completed the then landlord granted leases of all its constitute parts [262-263]. In summary:

   (a) Elite House in Block A contains 57 Flats. The then freeholder granted long leases of each flat.

   (b) Edgemere House contains 17 flats. The then freeholder granted a head lease to Metropolitan Housing Trust Ltd ("Metropolitan") that has since granted 17 long shared ownership leases. We were told that at least two of these lessees have "staircased" to 100%.

   (c) Vale House contains 23 Flats. The then freeholder granted a head lease to Metropolitan, which lets the flats on rental tenancies.

   (d) Birkdale House contains 37 Flats. The then freeholder granted long leases of each flat.

   (e) Slate House contains 30 flats. The then freeholder granted long leases of each flat.

   (f) Langan House contains 36 flats. The then freeholder granted long leases of each flat.

   (g) Wessex House contains 33 flats. The then freeholder granted a head lease to Metropolitan, which lets the flats on rental tenancies.

8. There are therefore 97 flats in Block A of which 23 are let on rental tenancies, 17 are held under long shared ownership leases and 57 are held under long residential leases. There are 136 flats in Block B of which 33 are let on rental tenancies and the remaining 103 are held under long residential leases.

9. Both Canary Gateway (Block A) RTM Company Ltd and Canary Gateway (Block B) RTM Company Ltd are limited by guarantee and were incorporated respectively on 7 November 2018 and 12 November 2018. We do not know either the identity or the number of the original members but they clearly consisted of a large number of the long leaseholders of the individual flats in both blocks.

10. A number of the long leaseholders and all the shared ownership leaseholders of the individual flats were not originally members of the two companies. Accordingly, on 19 March 2019 the two companies served them with notices inviting them to become members of the companies. Surprisingly a specimen notice was not included in the hearing bundle. However, on the basis of the bulk certificates of posting [180-182] it is apparent that 24 long leaseholders in Block A and 33 long leaseholders in Block B were invited to become members of the companies. All 17 shared ownership leaseholders in Block A were invited to become members. However, an invitation was not given to Metropolitan and that omission is at the heart of this case. It will be recalled that Metropolitan is the head lessee of Edgemere House and Vale House in Block A and Wessex House in Block B.

11. It is apparent that a number of the long leaseholders who were invited to become members of the company accepted the invitation and certainly at least two of the shared ownership long leaseholders became members. There appears to be an assumption that these two shared ownership long leaseholders had "staircased" to 100% although we have no evidence of that.

12. On 6 April 2019 each of the applicants gave notice of its claim to acquire the Right to Manage the relevant block. In both claim notices the block was identified by reference to the postal addresses of the constituent houses. Thus, in the claim notice relating to Block A the company claimed the right to acquire the right to manage *"Elite House, 15 St. Annes Street, London E14 7PT and Edgemere House, 3 St. Annes Street, London E14 7QA and Vale House, St. Annes Street, London E14 7PF"*. This description was identical to the definition of *"the premises"* in the interpretation section of the articles of association of the Block A company.

13. In respect of Block A, the notice was given to Avon, Metropolitan and Capital Elite Global Ltd. The interest of Capital Elite Global Ltd in Block A was not explained to us. The schedule to the notice in respect of Block A gives details of 52 long leaseholders of individual flats who it is said are both qualifying tenants and members of the company. That number includes the two shared ownership long leaseholders who clearly accepted the invitations to become members of the company.

14. The notice in respect of Block B was given to only Avon and Metropolitan. The schedule to the notice lists 73 long leaseholders of individual flats who are said to be both qualifying tenants and members of the company.

15. On 21 May 2019 Avon gave a counter-notice in response to each of the two claim notices. Both counter notices asserted that the two companies were not entitled to acquire the right to manage. That is Avon objected to both claims. It is unnecessary to consider the original grounds of objection because by the time that the matter came before us the grounds had crystallised into the issues that we refer to below.

16. As far as we are aware no counter notice was given by either Metropolitan or Capital Elite Global Ltd.

The statutory scheme

17. The genesis of the statutory scheme is explained by Lord Justice Lewison in Elm Court RTM Company Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89 and we do not propose to repeat his explanation here. Although Lewison L.J. goes on to explain the statutory scheme itself it is helpful to provide an explanation that relates to the background facts of this case and in particular the failure to invite Metropolitan to become a member of the applicants prior to the service of the claim notices.

18. Long leaseholders intending to exercise the no fault right to manage granted by the Act must first satisfy themselves that section 72 of the Act applies to the premises containing their flats. Section 72(1) provides that the premises must *"consist of a self-contained building or part of a building"*. Those two terms are explained in section 72(2) and (3) in these terms: -

> *"(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) ....."*

19. The long leaseholders must then incorporate a Right to Manage Company limited by guarantee ("RTM Company"). Section 74 limits the persons who may be members of an RTM Company. Section 74(1) provides: -

> *"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".*

20. The term *"qualifying tenants"* is defined in section 75 and for the purpose of this decision the following are relevant: -

> *(2)Subject as follows, a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease.*
> *(3).....*
> *(4).....*
> *(5)No flat has more than one qualifying tenant at any one time; and subsections (6) and (7) apply accordingly.*
> *(6)Where a flat is being let under two or more long leases, a tenant under any of those leases which is superior to that held by another is not the qualifying tenant of the flat.*

21. The definitions section 112 provides that the terms *"lease"* and *"tenancy"* have the same meaning and both expressions include (where the context permits) – a sub-lease or sub-tenancy. Consequently, it would seem that a landlord under a rental tenancy is a landlord under a lease within the meaning of section 74(1).

22. The articles of association are promulgated by the 2009 regulations. It is not suggested that the articles of association of the two companies deviated from the 2009 regulations that in many ways mirror the provisions of the Act.

23. Article 26 specifies who may become a member. Sub-article (2) is in these terms:-

> *(2) No person shall be admitted to membership of the company unless that person, whether alone or jointly with others, is—*
> *(a)a qualifying tenant of a flat contained in the Premises as specified in section 75 of the 2002 Act; or*
> *(b)from the date upon which the company acquires the right to manage the Premises pursuant to the 2002 Act, a landlord under a lease of the whole or any part of the Premises.*

24. Article 27 specifies the circumstances under which a member ceases to be a member of the company. By sub-article (1) a member who is no longer either a qualifying tenant or a landlord ceases to be a member with immediate effect.

25. Article 33 deals with voting rights. A distinction is drawn between premises with no landlords and those with landlords. Where there are no landlords sub-article (2) provides that one vote shall be available to be cast in respect of *"each flat"* and that *"the vote shall be cast by the member who is the qualifying tenant of the flat"*.

26. Sub-article (3) deals with premises with *"any landlords under leases of the whole or part of the Premises"*. The authors of Tanfield (4th Edition) describe them as byzantine in their complexity. The votes are allocated by reference to *"residential units"* rather than flats. Sub-article (3)(c) provides that: -

> *The votes allocated to each residential unit shall be entitled to be cast by the member who is the qualifying tenant of that unit, or if there is no qualifying tenant of the unit, by the member who is the immediate landlord. The immediate landlord will not be entitled to the vote of a residential unit held by a qualifying tenant who is not a member of the RTM company;*

27. Consequently, it would seem that a landlord member of the company would have one vote for each residential unit within its demise that is, at the time of the vote, let to a tenant who is not a qualifying tenant.

28. Having been incorporated the RTM company must then give *"Notice inviting participation"* ("NIP") pursuant to section 78. The notice invites the recipient to become a member of the RTM company and sub-section (1) provides that it must be given: -

> *"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".*

29. Having given the NIPs and waited for at least 14 days the RTM company may then give notice of its claim to acquire the right to manage pursuant to section 79. Sub-section (6) specifies those persons who must be served. In particular section 79(6) provides that: -

> *"The claim notice must be given to each person who on the relevant date is –*
>
> *(a) Landlord under a lease of the whole or part of the premises....."*

30. Section 80 deals with the contents of the claim notice and in so far as relevant to this decision subsection (2) provides that the claim notice *"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".*

31. There is a saving provision in section 81(1), which provides that *"a claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80".*

Issues in dispute

32. This case has consumed a considerable amount of the tribunal's resource. There have been two case management hearings and at least three sets of directions. At one time the case was listed for the hearing of a preliminary issue but that did not proceed because the parties were unable to agree the wording of the preliminary issue. Avon made a very late postponement request that was rejected by Judge Andrew.

33. Throughout this procedure and until the morning of the hearing it had been understood that the central issue was whether all or some of the houses in each of the two blocks were structurally detached self-contained buildings such that a claim notice should have been served in respect of each house. As an aside it should be said that it was common ground that a right to manage claim can only be made in respect of a single structurally detached self-contained building.

34. Both parties relied on expert evidence and the expert reports were included in the hearing bundle. Indeed, the experts attended the tribunal with the intention of giving evidence. On the morning of the first day of the hearing we allowed a number of short adjournments to enable the parties to negotiate. Ultimately Avon accepted that none of the seven houses were structurally detached self-contained buildings. In particular Avon agreed that the top floor of block A over-sailed the party walls separating the three houses in block A and that the underground car park in block B under-sailed all four houses in that block. Consequently, Avon accepted that each of the two claim notices related to a structurally detached self-contained building.

35. The remaining issues resolved themselves into the following questions that were agreed between Mr Loveday and Mr Allison: -

(a) Do the premises as claimed in the Notices of Claim and as specified in the Applicants' article of association qualify for the right to manage given the way that they have been described?

(b) Are the shared ownership lessees (who have not staircased to 100% ownership) qualifying tenants?

(c) Was Metropolitan Housing Trust a qualifying tenant with respect to Vale, Edgemere and Wessex Houses?

(d) If it was, does the applicants' admitted failure to serve Notices of Invitation to Participate on Metropolitan Housing Trust Ltd invalidate the claims?

Reasons for our decisions

Do the premises as claimed in the Notices of Claim and as specified in the Applicants' article of association qualify for the right to manage given the way that they have been described?

36. Avon's case as explained by Mr Allison was that a reasonable recipient of the claim notices would have assumed that the two claims were made in respect of three and four structurally detached self-contained buildings. He suggested that the descriptions of the two blocks in the claim notices were the cause of the confusion that led Avon to believe that each claim related to more than one structurally detached self-contained building. When we asked Mr Allison how the premises should have been described he said that either the descriptions should have been prefaced by the words *"A single building comprising..."* or by reference to an attached plan.

37. Our attention was drawn to Avon Ground Rents Limited v 51 Earls Court Square RTM Company Limited [2016] UKUT 0022 (LC) and Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd [2015] EWCA Civ 282. However, neither case assists Avon. 51 Earls Court Square concerned the RTM Company's articles of association and the issue was whether the description *"Flat 1-13, 51 Earls Court Square"* adequately described the premises as a whole. Unsurprisingly the Deputy President found that it did, commenting that the *"informed reader"* would conclude that *"the parties intended to refer to the whole of the Building..".* In passing it should be said that in 51 Earls Court Square Avon took no objection to the claim notice that identified the premises simply by reference to its postal address.

38. Ninety Broomfield Road is authority for the proposition that a valid claim notice may only include a single structurally detached self-contained building. Ultimately Mr Allison conceded that none of the seven houses in blocks A and B were single structurally detached self-contained buildings and Ninety Broomfield Road is not engaged.

39. An informed reader in this case would have understood that each of the claim notices described a structurally detached self-contained building. As Tribunal

Member Geddes pointed out even a cursory inspection of the architect's plans would have shown that the top floor of block A over-sailed the party walls separating the three houses in block A and that the underground car park in block B under-sailed all four houses in that block. The informed reader would or at least should have understood that it was not being suggested that the constituent houses in each block were single structurally detached self-contained buildings.

40. The only relevant requirement in the statutory scheme is that the claim notice must *"specify the premises... to which this Chapter applies"* a requirement that is echoed in the 2009 regulations. Both the articles of association and the claim notice did that. Consequently, and for each of the above reasons, we find that both the articles of association and the claim notices correctly described the premises and we answer the first question in the affirmative.

Are the shared ownership lessees (who have not staircased to 100% ownership) qualifying tenants?

41. Mr Allison conceded that we are bound by the decision of the Upper tribunal in Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd [2013] UKUT 81 (LC) which found that a lessee of a shared ownership lease for a term exceeding 21 years is a qualifying tenant. We therefore answer the question in the affirmative.

Was Metropolitan Housing Trust a qualifying tenant with respect to Vale, Edgemere and Wessex Houses?

42. The applicants' case as explained by Mr Loveday was that for a person to be a qualifying tenant of a flat within the meaning of section 75 that person must hold the flat under an individual long lease. A person who holds more than one flat under an individual lease cannot be a qualifying tenant and thus Metropolitan was not a qualifying tenant. Consequently, the applicants had not been obliged to give Metropolitan a *"Notice inviting participation"* under section 78.

43. Mr Allison, on behalf of Avon, pointed out that section 72(2) simply requires a qualifying tenant to be the *"tenant of the flat under a long lease"*. He argued that Metropolitan met that requirement because it held each of the flats in Vale and Wessex house under one of two long leases. The fact that more than one flat was held under each lease was irrelevant. Metropolitan was a qualifying tenant and the applicants should have given it a notice inviting participation.

44. Ultimately, we agree with Mr Loveday but for slightly different reasons. We go back to the statutory scheme. Section 74 envisages two categories of membership of an RTM Company. The first is qualifying tenants of flats who may be members from the date of incorporation. The second is *"landlords under leases of the whole or part of the premises"* who may only become members after the right to manage has been acquired.

45. That distinction is followed through both in the 2009 regulations and in subsequent sections of the Act. Section 78 only obliges the RTM Company to give a notice inviting participation to qualifying tenants whilst (in so far as relevant to this decision) section 79 only obliges the RTM Company to give the claim notice to landlords of *"the whole or part of the premises"*.

46. Mr Allison acknowledged that Metropolitan is a landlord within the meaning of sections 74 and 79. Consequently if his argument is correct the applicants should have served both a notice inviting participation and a claim notice on Metropolitan.

47. This interpretation gives rise to a number of anomalies. It seems unlikely that Parliament would have intended that a person could both participate in a right to manage scheme whilst at the same time being permitted to object to it as a recipient of a claim notice. Mr Allison suggested that the intention may have been to enable a landlord to persuade the participating qualifying tenants not to proceed with the claim before the claim notice was served. That strikes us as a nebulous benefit not least because a landlord is entitled to object to the scheme upon receipt of the claim notice. In any event a landlord will still have the opportunity to use its persuasive powers after the service of the claim notice and before the right is acquired.

48. Furthermore, the logical extension of Mr Allison's argument is that an RTM Company must serve both a notice inviting participation and a claim notice on every qualifying tenant who has sub-let their flat to a rental tenant in so far as a flat is *"part of the premises"*.

49. The two categories of membership attract different rights and obligations. The qualifying tenant of a flat has the right to participate in the scheme from the outset and has only one vote. The landlord has the right to object to the scheme upon receipt of the claim notice and may only participate in the scheme from the date upon which the right to manage is acquired. If the landlord chooses to participate in the scheme then it has one vote in respect of each residential unit let to a rental tenant at the time of the vote.

50. Having regard to the statutory scheme we consider that the two categories of membership were intended to be mutually exclusive. That is, the same person cannot be both a qualifying tenant member and a landlord member of the RTM Company. Equally a leaseholder may only be served with either a notice inviting participation or a claim notice: it cannot be served with both.

51. Although the term *"part of the premises"* is not defined it must apply to each of the seven self-contained houses. Consequently, Metropolitan was only entitled to be admitted as a landlord member of the applicants and not as a qualifying tenant member. Equally the applicants were only obliged to give the claim notices to Metropolitan and they were not obliged to give notices inviting participation to Metropolitan. We therefore answer the third question in the negative.

<u>If it was, does the applicants admitted failure to serve Notices of Invitation to Participate on Metropolitan Housing Trust Ltd invalidate the claims?</u>

52. Given our answer to the previous question it is strictly speaking unnecessary for us to answer the fourth question. We do so because we recognise that our decision is likely to be the subject of an appeal. Our answer does of course assume that we answered the previous question in the affirmative: that is, the applicants should have given notice inviting participation to Metropolitan.

53. Both Mr Loveday and Mr Allison relied on the judgment of Lewison L.J. in the Elm Court case and in particular the often-quoted observation at paragraph 56:

> *"In considering the question of validity, although the court should not inquire into the question whether prejudice has been caused on the particular facts of the actual case that does not mean that prejudice in a generic sense is irrelevant."*

In Elm Court Lewison L.J. went on to decide that the failure to give a claim notice to an intermediate landlord with no management responsibilities did not invalidate the claim.

54. The question that we must answer is this: does the failure by an RTM Company to give notice inviting participation to a qualifying tenant that is entitled to receive a claim notice in its capacity as a landlord invalidate the claim?

55. The rights granted to a landlord upon receipt of a claim notice are at least equal to and arguably exceed the rights granted to qualifying tenants. It has the right to object to the claim, which a qualifying tenant does not. Once admitted as a member it will have a block vote in respect of each residential unit within its demise let to a rental tenant at the time of the vote. If it applies for membership it will have considerably more influence over the running of the RTM Company and the management of the premises then it would have as a single qualifying tenant.

56. In short, a person who is both a qualifying tenant and a landlord is not prejudiced in the generic or indeed any sense by the failure of an RTM Company to give it a notice inviting participation. Consequently, and for each of the above reasons the failure by the applicants to give notices inviting participation to Metropolitan does not invalidate the claims and we answer the question in the negative.

Conclusion

57. Having answered all four questions in favour of the applicants it follows that they are entitled to acquire the Right to Manage.

Name: Judge Angus Andrew **Date: 30 January 2020**

Rights of appeal

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

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

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

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