RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference; LVT/00023/07/16

In the Matter of: Flats 62 – 67 Grangemoor Court, Cardiff, CF11 0AR

In the Matter of an Application under Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 ("the Act")

APPLICANT Grangemoor Court (No 8) RTM Co Ltd

RESPONDENTS Fairhold Holdings (2006) Appts Limited (First Respondent)
FirstPort Property Services (Second Respondent)

TRIBUNAL: David Foulds (Chair)
Neil Martindale (Surveyor)

Date of Hearing 2nd December 2016

Date of Decision 2nd December 2016

DECISION

That on the relevant date the RTM Company was not entitled to acquire the Right to Manage.

REASONS

1) The Application

This is an application for a determination that on the relevant date the Applicant was entitled to acquire the right to manage the premises known as Flats 62 - 67 inclusive Grangemoor Court, Dunleavy Drive, Cardiff Bay, Cardiff ("the Premises").

The Claim Notice dated 19 May 2016 was served on both Respondents and was met by a Counter Notice dated 23 June 2016 from the First Respondent and a Counter Notice dated 22 June 2016 from the Second Respondent.

2) Objections raised by First Respondent

The First Respondent raises three grounds of objection in its Counter Notice namely:

1) Contrary to section 72(1) of the Act the Premises do not consist of a self-contained building. This ground is not pursued in the First Respondent's Statement of Case. (Ground 1)
2) Contrary to section 78(2)(d) of the Act the Notice of Invitation to Participate ("NIP") did not contain the relevant information as may be required to be contained in Notices of Invitation to Participate by regulations made by the appropriate national authority. (Ground 2)
3) Contrary to section 80(3) of the Act the Applicant failed to provide the full address of the flats contained in the Claim Notice. (Ground 3)

In addition, in its Statement of Case, the First Respondent pursues two further grounds of objection namely:

4) The Applicant failed to give NIP's to qualifying tenants prior to serving the Claim Notices. (Ground 4)
5) The Applicant failed to give Claim Notices to all qualifying tenants. (Ground 5)

3) Objections raised by Second Respondent

The Second Respondent raises two grounds of objection in its Counter Notice namely:

1) Contrary to Section 80(3) of the Act, the Claim Notice does not contain the address of each person who is both a qualifying tenant of the flat contained in the Premises and a member of the Company. (See Ground 3 above)
2) Contrary to Section 79(8) of the Act, the Company has produced no evidence that a copy of the Claim Notice was served on each person who on the relevant date was a qualifying tenant of a flat forming part of the Premises. This objection has been withdrawn in writing by the Second Respondent and will not be further considered.

4) The Tribunal considered each ground in turn

First Respondents Objections:

1) **Ground 1**: Contrary to section 72(1) of the Act the Premises do not consist of a self-contained building. This ground is not pursued in the First Respondent's Statement of Case. The Tribunal did in any event inspect the Premises on 2nd December 2016 and were satisfied that the Premises did consist of a self-contained building and therefore this ground of objection is rejected by the Tribunal.

2) **Ground 2**: Contrary to section 78(2)(d) of the Act the Notice of Invitation to Participate (NIP) did not contain the relevant information as may be required to be contained in Notices of Invitation to Participate by regulations made by the appropriate national authority. The First

Respondent expands upon this ground in its Statement of Case. The First Respondent states that the NIP's are invalid for two reasons in that they:

i) Firstly failed to make reference to the name and address of the recipients. That, they say, is contrary to section 78(1) of the Act and/or Regulation 8(1) of "The Right to Manage (Prescribed Particulars and Forms)(Wales) Regulations 2011" ("the Regulations"). The Tribunal notes that it is section 78(3) of the Act that states that a NIP must comply with such requirements (if any) about the form of NIP's as may be prescribed by regulations so made. The Tribunal agrees that the failure to give the name and address of the recipient is contrary to Regulation 8 (1) that requires that the NIP be in the form set out in Schedule 1 of the Regulations. The form in Schedule 1 clearly refers to "[name and address]" at the start of the form and Note 1 of the form states that the form must be sent to each person who is, at the time the Notice is given, a qualifying tenant of a flat in the Premises but who is not already and has not agreed to become a member of the company. "Qualifying tenant" is defined in section 75 of the Act.

ii) The Tribunal considers that the failure to state the name and address of the recipient renders the NIP incomplete. The question then arises as to whether this "defect" can be "cured" by information contained in an accompanying document namely the covering letter accompanying the NIP?. On the facts of the present case the Tribunal does not have to go far in considering this issue in light of the fact that the covering letters were addressed to "the Leaseholder". In the view of the Tribunal this is not sufficient to cure the defect. This would only be the case if the terms "Qualifying Tenant" and "Leaseholder" were synonymous with each other so the description of the recipient as such would comply with the need for the name and address of the qualifying tenant to be stated. The defect is therefore not cured by the covering letter and the NIP is therefore non-compliant with Regulation 8 to the extent that it fails to include this information.

iii) The question that then arises is whether this non-compliance is sufficient to render the NIP invalid?.

iv) The Tribunal has approached this question taking account of the decision of Triplerose Limited v Mill House RTM Company Limited [2016] UKUT 80 (LC) and the guidance given in respect of the "proper approach to non-compliance with the statutory procedures for the acquisition of the right to manage". Paragraph 25 of the Triplerose decision states "*tribunals should be slow to relax the need for full compliance…. It is preferable for tribunals to reject defective claims at an early stage rather than to see them rejected at an appeal or for some interested third party later to*

dispute that the right to manage has ever successfully been acquired".

v) Paragraph 32 states "*The correct approach to defects in compliance with statutory schemes for the acquisition of property rights is therefore to ascertain the intention of Parliament concerning the consequences of non-compliance in the light of the statutory scheme as a whole. This is a question of construction of the statute which does not depend on the circumstances of an individual case". Natt v Osman [2014] EWCA 1520 Civ. is then given as an example on the three considerations applied to reach the conclusion that no valid notice had been served in that case. Most helpfully, paragraph 35 of Triplerose states "The importance of any procedural provision must be assessed before considering the practical consequences of non-compliance on the facts of a particular case. In light of the specific prohibition in section 79(2) on the service of a claim notice until 14 days after a notice of invitation to participate has been given to everyone required to be given one, I do not think it can be suggested that the provisions designed to ensure that every qualifying tenant has to participate are inessential, or can be substituted by some alternative means of knowledge*."

vi) Paragraph 40 goes on to state "*The giving of a valid notice of invitation to participate to each person who at the time when the notice is given is the qualifying tenant of a flat in the premises and is neither a member nor has agreed to become a member of the RTM Company is therefore an essential pre-condition to any further progress towards the acquisition of the right to manage*."

vii) The Tribunal is satisfied that as a matter of construction of the statutory scheme the failure to give the name and address of the recipient of the NIP's in the present case is essential to the validity of the NIP's and it follows that the statutory scheme has not been followed and the right to manage has not been acquired.

viii) The First Respondent secondly argues that the Applicant failed to properly complete section 9 of the NIP which, they say, is contrary to regulation 3 (2) of the Regulations. The First Respondent states that the Applicant has not ticked section 9.1 of the NIP thereby meaning that it is not intended to appoint a managing agent. However the Applicant has then gone on to name a managing agent implying that it is its intention to appoint this agent. The First Respondent states that any reasonable recipient would be left in doubt as to exactly what were the intentions of the Applicant. It is clear to the Tribunal that the form has not been correctly completed. The information concerning the appointment (or otherwise) and identity of a managing agent is part of the required particulars (Regulation 3 (g)) and it therefore follows that a failure to complete 9.1 is a failure to state whether a managing agent is to

be appointed and therefore this part of the required particulars has not been given. In the Tribunal's view such a failure is not saved by section 78(7) of the Act as this is not an inaccuracy in the particulars but a failure to give the required particulars. The question that then arises however is whether this is a sufficient discrepancy to render the NIP invalid.

ix) Applying the same jurisprudence as set out in the Respondents first objection above, the Tribunal is satisfied that as a matter of construction of the statutory scheme the failure to properly complete section 9.1 is essential to the validity of the NIP's and it follows that the statutory scheme has not been followed and the right to manage has not been acquired.

3) **Ground 3**: Contrary to section 80(3) of the Act the Applicant failed to provide the full address of the flats contained in the Claim Notice. The First Respondent refers to the fact that the Applicant has stated within Schedule 1 of the Claim Notice the flat number of each person who is a qualifying tenant but not the full postal address. This, it says, is contrary to section 80(3) of the Act which provides that a Claim Notice must state the full name of each person who is both the qualifying tenant of a flat contained in the premises and a member of the Applicant and the address of his flat. It seems to the Tribunal that the question is whether the words "the address of his flat" in section 80(3) require the full postal address to be given. The Tribunal notes that there is nothing to this effect in the section. The Tribunal concludes that sufficient detail has been given by the Applicant such that it is clear to any recipient of the Claim Notice which flat address is being referred to and the Tribunal rejects this ground of objection.

4) **Ground 4**: The Applicant failed to give NIP's to qualifying tenants prior to serving the Claim Notices. The First Respondent states that the NIP's have been sent out under cover of letters addressed to "the Leaseholder". It states that the recipient of the NIP may have been a leaseholder by virtue of having, say, an assured shorthold tenancy of the flat, but they would not have been the "qualifying tenant" as required by statute. The Tribunal agrees. A "qualifying tenant" is defined by section 75 of the Act and is a particular type of "leaseholder" but the terms are, of course, not synonymous. Simply addressing a legal notice to the "leaseholder" is not sufficient to comply with the requirement that it be given to a qualifying tenant. It does not then fall to the Tribunal to consider whether there has been substantial compliance with the requirement to give the NIP's to qualifying tenants (i.e. if only a small number had been incorrectly addressed) as the failure to comply applies to the majority of the flats.

   Section 79(2) of the Act states that the Claim Notice may not be given unless each person required to be given a NIP has been given such a notice at least 14 days before. It follows that section 79(2) has not been complied with and the Claim Notice is not valid.

5) **Ground 5**: The Applicant failed to give Claim Notices to all qualifying tenants. For like reason as stated in Ground 4, the Applicant has failed to give a copy of the Claim Notice to qualifying tenants. Section 79(8) of the Act states that 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. The only evidence before the Tribunal is that copies of the Claim Notice were sent by letter addressed to "the leaseholder". For the same reasons as set out in Ground 4 above the Tribunal is not satisfied that the required Notice has been given to the qualifying tenants and the right to manage process was therefore not complied with.

5) Validity of Counter Notices

1) The Applicant states in its Statement of Case that there are errors contained in the Counter-Notices. In respect of both Respondents' Counter-Notices the Notes, and in respect of the First Respondent's Counter-Notice paragraphs 2 and 3 in addition, contain the wording required under the English regulations. The Applicant states these errors are material and render both Counter-Notices invalid. Of importance the Applicant then goes on to state that the consequence of such invalidity is that "the Tribunal should consider the Claim Notices without any regard to the matters raised by the First and Second Respondent".

2) The Second Respondent basis its representations concerning the validity of the Counter-Notice on the jurisprudence set out in the authorities of Avon Freeholds Limited v Regent Court RTM Co Limited [2013] UKUT 0213 (LC) and Natt v Osman referred to above in the context of whether there has been substantial compliance and the purpose and importance of the statutory requirement in the context of the statutory scheme as a whole, and thus what the consequences are on non-compliance. However in the Tribunal's view it is not necessary to consider the Counter-Notice in the context of this jurisprudence as to do so assumes there was a need for a valid Counter-Notice to prevent the right to manage being acquired. The Tribunal prefers the reasoning of the First Respondent. In its Statement of Case the First Respondent disagrees that the errors are material but in any event states the RTM fails due to the fundamental flaws with the NIP and Claim Notice and thus the errors in the Counter-Notice are academic.

3) The Tribunal agrees with the First Respondent and in doing so notes the observation of the then President of the Upper Tribunal Lands Chamber, Sir Keith Lindblom in the decision in the Avon Freeholds Limited decision where he states "In my view, however, one must read section 90 of the 2002 Act as assuming a valid claim notice under section 80 and, in the circumstances envisaged in section 90(3)(b), a valid counter-notice under section 84. Parliament cannot have intended that a right to manage could be acquired on the basis on notices that were inherently unlawful, or that there should be no remedy to prevent that result."

The Tribunal therefore finds that it need not determine whether the Counter-Notice was valid as the defects in the NIP and Claim Notice prevent a lawful right to manage being acquired in any event.

Dated this 20th day of January 2017

CHAIRMAN