FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/29UP/LRM/2020/0001
Property	**:**	Surety House, Lyons Crescent, Tonbridge, Kent TN9 1EX
Applicant	**:**	Surety House RTM Company Limited
Representative	**:**	Southside Property Management Services Limited
Respondent	**:**	Assethold Limited
Representative	**:**	Scott Cohen Solicitors Limited
Type of Application	**:**	Determination of entitlement to acquire the Right to Manage – Chapter 1 Commonhold and Leasehold Reform Act 2002
Tribunal Member(s)	**:**	Judge J Dobson
Date and venue	**:**	On the papers
Date of Directions	**:**	9th April 2020

AMENDED DECISION
CORRECTING CLERICAL ERROR

Summary of the Decisions of the Tribunal

1. The Tribunal determines that the Applicant was entitled on the relevant date to acquire the right to manage Surety House, Lyons Crescent, Tonbridge, Kent, TN9 1EX.

2. The Tribunal orders the Respondent to pay to the Applicant the £100 application fee by 30th April 2020.

The applications made and history of the case

3. The Applicant made an application under Section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("the Act") for the Tribunal to determine whether or not the Applicant is entitled to acquire the right to manage ("the Right to Manage") in respect of Surety House, Lyons Crescent, Tonbridge, Kent, TN9 1EX ("the Premises").

4. By a claim notice dated 18 October 2019 ("the Claim Notice"), the Applicant gave notice that it intended to acquire the Right to Manage the Premises on 1 March 2020. By its counter-notice dated 22 November 2019, the Respondent disputed the Applicant's entitlement to acquire the Right to Manage, alleging that the Applicant had failed to establish compliance, inter alia, with Sections 73(2), 78(1) 79(2), 79(3) and 79(8) of the Act.

5. The directions given by the Tribunal on 27th January 2020 stated that the application would be determined on the papers without a hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013 unless a party objected in writing to the Tribunal within 28 days of the date of receipt of the directions. No such objection has been received.

6. The Tribunal has accordingly proceeded by way of a paper determination on the evidence and arguments produced by the parties. This is the decision made following that paper determination.

7. There is a single issue for determination, namely whether on the date on which the notice of claim was given, the Applicant was entitled to acquire the Right to Manage the premises specified in the notice.

The Issues in Dispute

8. In the Respondent's Statement of Case, the bases on which the Respondent contends that the Company is not entitled to acquire the Right to Manage are set out in further detail. Those bases, and therefore the matters for determination by the Tribunal are as follows:

    1) The definition of the Premises is "limited", to use the phrase used by the Respondent, to "Flat 1-10 Surety House, Surety House, Lyons Crescent, Tonbridge, Kent, TN9 1EX, being a "misdescription"

where it is "critical that the definition is correct and without ambiguity". The Respondent submits that the omission of the correct premises is "fatal". The correct answer in respect of the issue therefore depends upon the definition of the Premises.

2) There is a lack of evidence of the process by which Lesley Barbara Coates and Lorraine Elizabeth Askew, became members of the Company. The Respondent says that as they were not subscribers and as there are no applications for membership evidenced. In addition, if the two were not members then the Company's register of members was incorrect.

3) If the two were not members, the notice of invitation to participate ("the Notice of Invitation to Participate") and the Claim Notice (collectively "the Notices"), should have been given to them, in particular the Notice of Intention to Participate, an essential precondition to further progress and failing which the Claim Notice could not be served.

9. Whilst the Respondent sets out two separate points in its 2nd and 3rd issues- membership itself on the one hand and the notices on the other hand- both turn upon the answer the question of whether or not the two people were in fact members. I will therefore deal with those aspects, which I term the "membership issue" together. I term the 1st issue, adopting the word used by the Respondent, as the "misdescription issue".

10. It should be noted that the issues taken by the Respondent are expressed to be "concerns" and that there is criticism made by the Respondent that specific information was requested in 3 separate letters, exhibited to the Respondent's Statement of Case, in order to facilitate consideration of the validity of the Claim Notice but that was not forthcoming. It is also worthy of mention, for the avoidance of doubt, that the Respondent does not make similar comments to those made about Lesley Barbara Coates and Lorraine Elizabeth Askew in relation to Brigita Helen Bertram.

The Relevant Facts

11. The premises comprise a block of 10 flats, together with the common parts. There are 13 owners in total, whether sole or joint, of the 10 flats.

12. The Applicant, Surety House RTM Company Limited "the Company", was incorporated on 19th December 2018. There were 6 subscribers, agreed to have been members of the company from that date.

13. 10 members of the Company, all stated to be qualifying tenants, are listed in the Claim Notice, namely the 6 original subscribers and additionally Lesley Barbara Coates, Nicholas Sullivan, Brigita Helen Burcham and Lorraine Elizabeth Askew. It is not disputed that Mr Sullivan subsequently became a member of the Company on 1st

February 2019 or thereabouts by later application. Between them, they owned 7 of the 10 flats. There were 4 owners in total of the other 3 flats.

14. The articles of association of the Company ("the Articles of Association") adopt the model form prescribed by the RTM Companies (Model Articles) Regulations 2009 "the Articles Regulations".

15. It is accepted that the particular premises defined in the Articles of Association of the Company are as being "Flats 1-10 Surety House, Lyons Crescent, Tonbridge, Kent, TN9 1 EX". It is not in dispute that the Claim Notice informing the Respondent of its claim to acquire the Right to Manage correctly identified the Premises, ie Surety House, Lyons Crescent, Tonbridge, Kent, TN9 1 EX.

16. The only factual matter in dispute is whether or not Lesley Barbara Coates and Lorraine Elizabeth Askew were members of the Company at the time of the Notice of Invitation to Participate and later Claim Notice and therefore did or did not need to be given a Notice of Invitation to Participate and a copy of the Claim Notice.

17. It is not in dispute that Lesley Barbara Coates and Lorraine Elizabeth Askew were not as a matter of fact given either a Notice of Invitation to Participate or a copy of the Claim Notice.

The Law

18. The statutory scheme is set out in sections 71 to 94 inclusive of the Act. The relevant parts of that scheme for the purpose of this application are those which set out the key general provisions and those upon which the Respondent has based its objections, namely 73(2), 78(1) 79(2), 79(3) and 79(8).

19. Section 71 provides that a Right to Manage company may acquire the right to manage premises. Section 72(1) defines premises as needing to consist of "a self- contained building or part of a building, with or without appurtenant property". The premises must contain two or more flats held by qualifying tenants. Section 73(2) provides that a Right to Manage Company is a private company limited by guarantee whose Memorandum of Association states that its object, or one of them, is the acquisition and exercise of the right to manage premises.

20. Section 78(1) requires that the notice inviting participation is to be served on all qualifying tenants who are not members of the Right to Manage company and have not agreed to become members of the company. A qualifying tenant is one who holds a long lease. The following clause, section 78(2) sets out the information to be provided.

21. The relevant parts of Section 79 similarly provide that (79(2) the claim notice may not be given unless each person required to be given a notice of invitation to participate require has been given such a notice at least 14 days before, that (79(3) the claim notice must be given by an

RTM company which complies with subsection (4) and (5) [which relate to the membership of the RTM company] and that the claim notice must be given to the landlord, as well as (79(8) a copy of the claim notice being given to every qualifying tenant of a flat.

22. Article 1(1) of the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 ("the Forms Regulations") comprises a list of defined expressions, including most importantly for the purpose of this application, a definition of "the Premises" as meaning the "name and address". The term "name and address" is contained in square brackets in the Regulations, indicating the need to insert the relevant actual address in the Articles of the specific Right to Manage company and so define the premises in relation to which the Right to Manage Company is intended to be such a company.

23. There has been a significant quantity of decisions variously of the First Tier Tribunal (Property Chamber), the Upper Tribunal (Lands Chamber) and the Court of Appeal in respect of disputed claims for the right to manage, involving what has been described as "trench warfare". The Applicant relies on some 7 decisions in the determination bundle.

24. Those decisions include 4 First Tier Tribunal decisions, which merit careful consideration by this Tribunal but which are not binding upon it and which in any event relate to the particular factual matrix before the First Tier Tribunal on each given occasion. In any event, there is no need to make specific reference to any in light of the authorities below.

25. In addition, the Applicant relies upon 3 further authorities, namely the judgment of the Court of Appeal in *Elim Court RTM Company Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89 and the Upper Tribunal (Lands Chamber) judgments in *Avon Ground Rents Limited v 51 Earls Court Square RTM Company Limited* [2016] UKUT 22 (LC) and *Assethold Limited v 110 Boulevard RTM Company Limited* [2017] UKUT 316 (LC).

26. The only decision relied upon by the Respondent is the decision of the First Tier Tribunal in *59 Huntingdon Street London N1 1BX v Assethold Limited* (unreported, case reference LON/00AU/LRM/2014/0017), a case in relation to the description of premises and again involving this Respondent, which I simply observe at this stage pre-dates the Court of Appeal and Upper Tribunal decisions above.

27. I refer to and apply, insofar as relevant, the 3 further authorities relied upon by the Applicant and that relied upon by the Respondent below.

Discussion of Issue 1)- the misdescription question- and conclusion

28. The essence of this issue is whether or not the definition of the Premises as the flats- Flat 1-10- as opposed to the building as a whole is

such that the Company is not a right to manage company in respect of the Premises and so is unable to acquire the Right to Manage.

29. The Applicant makes reference in its Statement in Response to the various cases cited by it, contends that the address given in the Articles of Association should not be interpreted as relating to a part only of the Premises of which the Right to Manage is sought and that the leaseholders could not have intended the Right to Manage to apply to only the leasehold flats as opposed to the block as a whole.

30. As briefly summarised above, the Respondent in its Statement of Case had highlighted the error in definition of the Premises and suggested that the Company could only have the Right to Manage the flats listed. In contrast, the Respondent contends that the Company is not a right to manage company for the actual Premises. The Respondent made no reference to any of the cases subsequently cited by the Applicant and has not sought to do so by any later submission.

31. The leading judgment of the Court of Appeal in *Elim Court RTM Company Ltd v Avon Freeholds Ltd* was given by Lewison LJ and included a careful consideration of the background to and reasoning behind the statutory scheme which now applies in respect of the right to manage. That includes the important description of a "no-fault right" and an aim of the Government to "reduce the potential for challenge by an obstructive landlord", whilst recognising and safeguarding the landlord's interest. The observation of Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber) in the case of *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC) was quoted by Lewison LJ, as follows:

> "Small and apparently insignificant defects in notices, or failures of strict compliance, are relied on again and again by landlords seeking to stave off claims to acquire the right to manage and to avoid the resulting losses of control and of other benefits."

32. The specific issues in *Elim Court* were different to this case, although not of a wildly dissimilar nature. The right to manage company was found not to have entirely complied with the requirements of the Act and the Forms Regulations.

33. However, the Court of Appeal considered the appropriate consequences of that lack of compliance, analysing in particular the judgment of Etherton C in Natt v Osman [2014] EWCA Civ 1520 and subsequent consideration and application of that, dealing with such consequences in detail in paragraphs 49 to 59 inclusive. Lewison LJ said in paragraph 56:

> "However, it does not follow that if a case falls within the second category [cases where statute confers a property or similar right] every defect in a notice or in the procedure, however, trivial, invalidates the

> notice..... the court must nevertheless decide as a matter of statutory construction whether the notice is "wholly valid or wholly invalid".

34. He went on to explain in paragraphs 57 and 58 that:

> "Finally, it may be that even non-compliance with a requirement is no fatal. In all such cases, it is necessary to consider the words of the statute or contract, in light of its subject matter, the background, the purpose of the requirement, it that is known or determined, and the actual or possible effect of non-compliance on the parties..... ..In light of the general policy described in the consultation paper, the focus must be on whether Parliament intended that a landlord (or other person entitled to serve a counter-notice) could successfully contend that a defect in the relevant notice was fatal to its validity."

35. And further in paragraph 59 that:

> "Lastly, there may be a distinction to be drawn between a failure to satisfy jurisdictional or eligibility requirements on the one hand, and purely procedural requirements on the other. That was certainly part of the Government's policy...."

36. In light of those matters, the Court of Appeal found that any consequences of the non- compliance in that case were not such as to prevent the right to manage having been acquired.

37. Lewison LJ poignantly stated in the final paragraph of his judgment as follows:

> "the Government's policy that the procedures should be as simple as possible to reduce the potential for challenge by an obstructive landlord. That policy has not been implemented by the current procedures which still contain traps for the unwary..... I fear that objections based on technical points which are if no significant consequence to the objector will continue to bedevil the acquisition of the right to manage."

38. The approach adopted by the Court of Appeal was applied by the Upper Tribunal (Lands Chamber) in *51 Earls Court*. The judgment of the Upper Tribunal in that case is binding on this Tribunal unless it must properly be distinguished. I can identify no basis upon which it could so properly be distinguished and I unhesitatingly follow it.

39. As noted by the Deputy President in *51 Earls Court*, and adopting his words, an unambiguous identification of the premises in relation to which a company is an RTM (ie Right to Manage) company is obviously important to the statutory scheme, for the reasons explained by him in paragraph 18 of that judgment. As he further noted, the only source of information about the premises is the articles of association of the RTM company, and in particular the definition of the "Premises" in article 1(1). The Deputy President went on to explain that the premises which the RTM company seeks to acquire the right to manage must be those identified in the articles of association.

40. Accepting submissions that the right to manage only applies to premises which are self- contained and comprise two or more flats, Martin Rodger QC found that if the qualifying conditions are not satisfied, the right to manage cannot be acquired in relation to the given premises.

41. Counsel very experienced in such cases argued respectively for and against the adequacy of the description of the particular premises in that instance and did so where the manner in which the premises were defined and the asserted inadequacy of that definition were strikingly similar to the situation in this application. Indeed, the nature of the description and any failing in that could scarcely have been more akin to that arising in this case.

42. The premises in *51 Earls Court*, were defined as "Flat 1-13, 51 Earls Court Square", whereas the definition ought to have been "51 Earls Court Square". The definition identified the flats contained in the building and not the building itself. In this application, the Premises are Surety House, Lyons Crescent, Tonbridge, Kent, TN9 1EX, whereas the definition in the Articles of Association of the Company is of Flat 1-10, Surety House, Lyons Crescent, Tonbridge, Kent, TN9 1EX.

43. The issue in this case, as in *51 Earls Court* therefore turns on what the members of the Company meant when they defined the Premises. As Martin Rodger QC explained within paragraph 26 of his judgment:

> "the meaning of the Company's articles must be determined objectively, by asking what the parties using those words in those circumstances must reasonably be understood to have meant."

44. Further, he said in paragraph 27:

> "Where a document, including a company's articles of association, is ambiguous or reasonably capable of bearing more than one meaning, the court or tribunal required to interpret that document will give it a meaning which is more consistent with the parties' presumed intention. If a document contains an obvious mistake, and it is clear what the parties must have intended, the document will be interpreted in accordance with that intention."

45. Applying that test and other caselaw quoted, the Deputy President described the effect as follows, in paragraph 30:

"With that principle in mind the answer to the question posed seems to me to be obvious. If the premises described in its articles are not a self-contained building or part of a building as defined in section 72, the company will not be a RTM company and will be unable to exercise the statutory right to manage. Yet it is quite clear that this Company, and any company which adopts the model articles of association prescribed by the 2009 Regulations intends to do exactly that."

46. It was therefore further said, later in paragraph 32 by the Deputy President that the relevant circumstances:

> "....make it indisputable that the premises specified in article 1(10 are intended to be premises capable of forming the subject matter of the statutory right. The document must be read and understood with that in mind, as it would by any reasonable informed reader."

47. Accordingly, it was held, in paragraph 32 of the judgment:

> "There is only one possible answer to that question namely that the parties intended to refer to the whole of the Building, it being the only unit of property capable f being the subject of an application for the acquisition for the right to manage".

48. Applying that reasoning to this application, as I do, "the only possible answer" is that by referring to Flats 1-10 Surety House, the members of the Company intended to refer to Surety House as a whole. Therefore, the Company was able to give the Claim Notice asserting the right to manage the Premises.

49. There was indeed no other answer to the question which there was ever any realistic prospect of this Tribunal giving. It is disappointing that despite the observations of the Court of Appeal as to the purpose of the statutory scheme generally in *Elim Court* and the particular judgment of the Upper Tribunal on this very point, there is a challenge to the acquisition of the right to manage on the basis of the mis-definition of the Premises.

50. It is to be hoped that challenges will in future be limited to matters of substance. It will be a matter for parties in future cases to decide whether to seek the Tribunal decide such points as preliminary matters or otherwise to use any of its case management powers and similarly to make any applications in respect of costs. It is not for this Tribunal to pre-judge the outcome of any such applications.

51. None of those comments alter the patent good sense of right to manage companies and those who advise them taking every care to ensure that all steps up to and including formation of the right to manage company and all steps thereafter are taken with great care, minimising the prospect of even the most obstructive landlord taking points. That there are points which ought not to be taken is unlikely, caselaw indicates, to always prevent the taking of those points where they are left available.

52. For completeness, I add firstly, that the decision of the First Tier Tribunal in *59 Huntingdon Street* included a finding that there was a "material difference" between 59 Huntingdon Street and Flat 1-6 Huntingdon Street. However, with appropriate respect to the members of that Tribunal, the determination is directly in contradiction to the judgement of the Upper Tribunal in *51 Earls Court*, must consequently be wrong on that point and ought not to be cited in future.

53. Secondly, whilst reference has been made to the Applicant placing reliance on the Upper Tribunal decision in *Assethold v 101 Boulevard RTM Company Limited*, that decision also applies *Elim Court* to the issues in that case. As those issues were different, although again not wholly dissimilar, I consider it unnecessary to comment on that decision, other than to observe that the Upper Tribunal took essentially the same approach to that taken by me above.

Discussion of Issue 2)- the Membership issue- and conclusion

54. This issue can be dealt with more concisely than Issue 1).

55. The Respondent casts doubt on the membership of the company of Lesley Barbara Coates and Lorraine Elizabeth Askew on the basis that they are not named as subscribers and there are no later applications for membership evidenced. In effect, the Respondent queries how, in the absence of either of those, the two became members. The Respondent has no positive evidence to advance.

56. The Applicant contends that whilst Lesley Barbara Coates and Lorraine Elizabeth Askew were not original subscribers, applications to become members were received and they were added to the register of members on the day of formation of the Company, immediately following confirmation of incorporation. Hence there is no later application to become members.

57. I accept that explanation, which is logical and cogent and against which there is no contrary evidence. Accordingly, I find as a fact that both Lesley Barbara Coates and Lorraine Elizabeth Askew did become members of the company on the day of its incorporation.

58. The answer to the dispute in respect of this issue flows inevitably from the finding of fact made.

59. The Applicant is required by the various sections and sub-sections, to give a Notice of Invitation to Participate and a copy of the Claim Notice to all leaseholders at the time who are not already participating members of the Company. That class of persons by definition excludes those qualifying tenants who are members of the Company.

60. It necessarily follows from the finding that Lesley Barbara Coates and Lorraine Elizabeth Askew were members of the Company as at the date at which the Notice of Invitation and the Claim Notice would otherwise have needed to be given to them, that those persons were not required to be given those Notices.

61. The Applicant has provided copies of the Notices of Invitation to Participate which were served and of the copies of the Claim Notice served. However, no issue is taken in respect of those matters by the Respondent and so nothing else need be said.

62. Having been critical of the Respondent for raising the issue of the misdescription of the Premises, it is only appropriate to comment on the Respondent's requests for clarification of the membership of the Company of Lesley Barbara Coates and Lorraine Elizabeth Askew and how those were dealt with by the Applicant.

63. The response of the Applicant in its Statement of Response is that "There is no obligation for an RTM Company to provide the information requested." The Applicant then asserts that "Given the Respondent's history at the Tribunal, there was no reason to suppose this information would have been used by the Respondent to agree an earlier acceptance of the RTM Company's legitimate entitlement to acquire the right to manage the Premises." That is followed by an assertion that "the information may not be directly relevant to the Respondent in their consideration of the validity of a claim notice" and a repetition of a lack of obligation to the provide the information.

64. The Applicant may or may not be correct in that assessment of the Respondent and its consideration of matters. However, the request for information contained in the 3 letters sent by the Respondent's solicitors was not obviously unreasonable and neither would the provision of that information have been unduly onerous or disproportionate.

65. The provision of the information may well not have prevented this application proceeding to an extent as it did and being opposed to an extent as it was. However, the provision of the information might have avoided one line of argument, which opportunity was prevented by the lack of provision of the information. It is regrettable that the Applicant did not provide that information.

Applications in respect of costs and refund of fees

66. The Respondent must reimburse the Applicant with the £100 Tribunal application fee.

67. The Respondent has failed in its challenge to the Applicant's acquisition of the Right to Manage and the application has been successful. Whilst there has been a specific criticism in this Decision of the Applicant in respect of, but limited to, the lack of provision of information requested, that weighs some way less heavily than the Respondent's approach to the misdescription and the outcome of the application overall.

Judge J. Dobson

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking