UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 0487 (LC)
LT Case Number: LRX/77/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – right to manage – articles of association of RTM company –– whether a company without "RTM" in its name can be an RTM company – Commonhold and Leasehold Reform Act 2002, s. 73 – RTM Companies (Model Articles) (England) Regulations 2009 - criteria for grant of permission to appeal - appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE NORTHERN RENT ASSESSMENT PANEL

BETWEEN:

FAIRHOLD MERCURY LIMITED — **Appellant**

HQ (BLOCK 1) ACTION MANAGEMENT COMPANY LIMITED — **Respondent**

Re: Block 1
HQ Development
Lower Hall Street
St Helens WA10

Before: Martin Rodger QC, Deputy President

Sitting at 45 Bedford Square, London WC1B 3AS
on 10 September 2013

Mr Justin Bates, instructed by JB Leitch, solicitors, for the appellant
Mr Benjamin Jenkins of Crooks Commercial Solicitors, for the respondent

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The following case is referred to in this decision:

Avon Freeholds Ltd v *Regent Court RTM Company Ltd* [2013] UKUT 0213 (LC)

DECISION

1. When is an RTM company not an RTM company? In this appeal the appellant's answer to that short question is: when its name does not include the words "RTM". The question arises in this way.

2. In Lower Hall Street in St Helens stands a large self-contained block of modern purpose-built flats known as Block 1, HQ Development ("the Premises"). The appellant, Fairhold Mercury Limited, is the owner of the freehold interest in the Premises and in that capacity it manages and insures them and collects service charges from the long lessees of the numerous flats in the Premises. The appellant is very keen to continue to continue to carry out those functions for as long as it can.

3. The respondent, HQ (Block 1) Action Management Company Limited, is a private company limited by guarantee whose articles of association state that its objects are to acquire and exercise the right to manage the Premises in accordance with the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act).

4. This appeal is against the decision of a leasehold valuation tribunal for the Northern Rent Assessment Panel ("the LVT") issued on 28 February 2012 on an application made by the respondent under section 84(3) of the 2002 Act for a determination that it is entitled to acquire the right to manage the premises from the appellants. The appeal, for which the LVT granted permission, is by way of a review of the decision.

5. The sole issue in the appeal is whether the respondent is prevented from being an RTM company, and so is unable to exercise the rights of an RTM company, because the letters "RTM" do not appear in its name. In order to appreciate the subtlety of the issue and to identify what an RTM company is it is necessary to refer to certain provisions of the 2002 Act and to the regulations made under it.

6. As section 71(1) informs us, Chapter I of Part 2 of the 2002 Act makes provision for the acquisition and exercise of rights in relation to the management of premises to which the chapter applies by a company which is referred to as an "RTM company" (to be strictly accurate the statute insists on referring infelicitously to "a RTM company"). The rights which are to be acquired and exercised in accordance with those provisions are referred to collectively, as "the right to manage".

7. The 2002 Act contains a helpful index of defined expressions in section 113, which records that the expression "RTM company" is defined by sections 71(1), to which I have already referred, and by section 73. No other source is suggested from which guidance on the meaning of the expression may be found, although it is obviously necessary to construe the state as a whole, as Mr Bates pointed out. Section 73 is therefore important and it provides as follows

73 **RTM companies**

(1) This section specifies what is a RTM company.

(2) A company is a RTM company in relation to premises if –

(a) it is a private company limited by guarantee, and

(b) its articles of association state that its object, or one of its objects, is the acquisition and exercise of the right to manage the premises.

(3) But a company is not an RTM company if it is a commonhold association (within the meaning of Part I).

(4) And a company is not a RTM company in relation to premises if another company is already a RTM company in relation to the premises or to any premises containing or contained in the premises.

(5) If the freehold of any premises is transferred to a company which is a RTM company in relation to the premises, or any premises containing or contained in the premises, it ceases to be a RTM company when the transfer is executed.

8. An RTM company requires a constitution and rules governing its internal arrangements which, like any company, are provided by its articles of association. Section 74(2)-(7) of the 2002 Act makes the following provisions for the articles of association of RTM companies.

74 (2) The appropriate national authority shall make regulations about the content and form of the articles of association of RTM companies.

(3) A RTM company may adopt provisions of the regulations for its articles.

(4) The Regulations may include provision which is to have effect for a RTM company whether or not it is adopted by the company.

(5) A provision of the articles of a RTM company has no effect to the extent that it is inconsistent with the Regulations.

(6) The Regulations have effect in relation to articles –

(a) Irrespective of the date of the articles, but

(b) Subject to any constitutional provisions of the Regulations

(7) Section 20 of the Company's Act 2006 (default application of model articles) does not apply to a RTM company.

9. The regulations made under section 74 of the 2002 Act applicable to RTM companies which exercise the right to manage in England are the RTM Companies (Model Articles) (England) Regulations 2009 ("the 2009 Regulations"). Regulation 2 of the 2009 Regulations provides that:

2.- **Form and content of articles of association of RTM companies**

(1) The articles of association of a RTM company shall take the form, and include the provisions set out in the Schedule to the Regulations.

(2) Subject to regulation 3(2), the provisions referred to in paragraph (1) shall have effect for a RTM company whether or not they are adopted by the company.

10. The combined effect of section 74(4) and 74(5) of the 2002 Act taken together with regulation 2 of the 2009 Regulations is that, if a company is an RTM company, its articles of association are those prescribed in the schedule to the 2009 Regulations whether or not they have been adopted as such. Any omission to adopt or include a prescribed article is cured by regulation 2. If different articles had been adopted then they will also form part of the articles of association of the RTM company provided they are not inconsistent with the prescribed articles. Any adopted article which is inconsistent with a prescribed article has no effect (section 74(5)).

11. The prescribed articles of association found in the schedule to the 2009 Regulations bear the following title:

"Articles of association of [name] RTM Company Ltd"

Article 2 of the prescribed articles provides as follows:

"The name of the company is [name] RTM Company Ltd"

12. The articles of association of the respondent are substantially in the prescribed form. By Article 4 the objects for which the company is established are described as being to acquire and exercise in accordance with the 2002 Act the right to manage the Premises. By Article 5 the company is given power to do all such things as may be authorised or required to be done by an RTM company by and under the 2002 Act. By Article 7 the liability of each member of the company is limited to £1, being the amount which each member undertakes to contribute to the assets of the company in the event of its being wound up.

13. The respondent appears to satisfy the description of an RTM company as it is defined by section 73(2) of the 2002 Act: it is a private company limited by guarantee and its articles of association state that its object is the acquisition and exercise of the right to manage the Premises. If the analysis stopped there, it would be clear, in the language of section 73(2), that the respondent is an RTM company "in relation to the premises".

14. The appellant's case was submitted in writing to the LVT, and has been developed before me by Mr Bates. It focuses on the single point of distinction between the prescribed articles of association and the articles adopted by the respondent. That distinction is that article 2 of the respondent's adopted articles states:

"The name of the company is HQ (Block 1) Action Management Company Limited"

Article 2 of the prescribed articles, by contrast provides that:

"The name of the company is [name] RTM Company Limited."

Thus the Letters "RTM" are missing from the respondent's name.

15. Mr Bates submitted that whether a company is an RTM company must be determined by considering the requirements of sections 73 and 74 of the 2002 Act and the requirements of the 2009 Regulations. Only if all of the relevant requirements are complied with, he argues, can a company be an RTM company. Mr Bates suggests that as a matter of statutory interpretation it is necessary to read section 73 in the light of the power to make regulations conferred by section 74 and to bear in mind the regulations made under that power. If this is done, he suggests, it can be seen that a company will only be an RTM company is its articles of association correspond exactly to the prescribed articles. He points out that no sanction or other consequence is laid down by the 2002 Act for a failure to comply with the regulations and submits that it is therefore to be inferred that a company cannot be an RTM company and cannot enjoy the rights conferred by the Act unless its articles of association are compliant with the 2009 Regulations including by incorporating the letters "RTM" in the company's name.

16. Mr Bates suggested that there was an overarching rule of public policy that companies must make clear their status in their name. That rule was for the protection of third parties dealing with a company, and in the case of an RTM company it was essential that third parties be made aware that the entity with which it was proposing to contract was dependent on service charges as its sole source of income. In support of the existence of that rule of public policy Mr Bates referred to sections 58 and 59 of the Companies Act 2006 which deal with the naming of limited companies and require that they include the words "limited" or "public limited company" as the case may be.

17. The LVT was untroubled by the omission of "RTM" from the respondent's name and had no hesitation in rejecting the appellant's argument. In paragraph 12 of its decision it distinguished between compliance with the 2009 Regulations and satisfaction of the statutory requirements for a company to be an RTM company which, it considered, were to be found exclusively in sections 71(1) and 73 of the 2002 Act. If the respondent satisfied the criteria in section 73 (as the LVT found it did), then it was an RTM company regardless of whether its articles of association conformed to the 2009 Regulations.

18. Mr Benjamin Jenkins who appeared for the respondent submitted that the LVT's conclusion and reasoning were correct. I agree with him.

19. In my judgment Mr Bates' contentions cannot be accepted for a number of reasons. First, while the proposition is unexceptional that a statute must be construed as a whole, giving appropriate weight to each of its provisions in order to read it coherently, regulations made under a statute are not an orthodox or permissible aid to construction. The 2009 Regulations, made six years after the commencement of the 2002 Act in substitution for earlier regulations, were not part of the material

forming the background or context of the terms of the Act itself and cannot be taken into account as an aide to its interpretation. Regulations cannot impose additional conditions to be satisfied for a company to be an RTM company unless the 2002 Act so provides, which it does not. It follows that, whatever must be in its articles of association, a company will be an RTM company if it satisfies the requirements of section 73(2) and is not excluded by any of the provisions of sections 73(3)-(5).

20. Secondly, and contrary to Mr Bates' submission that there is no sanction or consequence for a failure to comply with the 2009 Regulations, section 74(4) and (5) and regulation 2(1) make it clear that to the extent that the adopted articles of an RTM company are inconsistent with the prescribed articles, the adopted articles have no effect. It follows that if the omission of the words "RTM" is to be regarded as an inconsistency between the respondent's adopted articles and the prescribed articles, the omission has no effect. Instead, if the letters "RTM" are essential, then they must be, and are, part of the name of the respondent because it is an RTM company and because Regulation 2(2) provides that the prescribed articles are to have effect whether or not they are adopted.

21. There is no justification for Mr Bates' suggestion that there is an overarching rule of public policy on the naming of companies which supplements the relevant statutory provisions and is capable of altering the status of a company if the rule is broken. No doubt a concern to alert third parties to the character of the entity they are dealing with lies behind sections 58 and 59 of the Companies Act, and perhaps even behind article 2 of the prescribed articles, but it goes no further than that. Section 64 of the Companies Act 2006 provides an enforcement procedure with sanctions to ensure appropriate naming of limited companies, so the invention of non-statutory sanctions is both unnecessary and impermissible. The 2002 Act and 2009 Regulations deal with the issue differently by making the prescribed articles applicable in all cases, whether adopted or not. In those circumstances there is no public policy justification for depriving a company which satisfies the requirements of section 73(2) of its RTM status.

22. Finally, and in any event, it does not follow that because a statute or regulation prescribe that a certain procedure "shall" be adopted, a failure to adopt that procedure will be fatal to the validity of the steps permitted by the statute. Mr Bates argument overlooks what is sometimes called the distinction between mandatory and directory provisions which was reviewed by the Tribunal (Sir Keith Lindblom, President) in its recent decision in *Avon Freeholds Ltd* v *Regent Court RTM Company Ltd* [2013] UKUT 0213 (LC). It is not necessary for me to reconsider that material (which was not relied on by the respondent). If it is the intention of a statute that a failure to follow a procedure renders the step taken of no effect, that is usually made clear. In this case, the 2009 Regulations make it clear that if there is a failure on the part of an RTM company to adopt one of the prescribed regulations or if there is an inconsistency between the adopted articles and the prescribed articles, the prescribed articles take precedence. From that I take it to have been Parliament's intention that the incorporation of the letters "RTM" in the name of a company which otherwise satisfies the requirements of section 73 of the 2002 Act was not to be fatal to the company's status.

23. For these reasons the appeal is dismissed. The respondent is an RTM company and, as the LVT found, it is entitled to acquire the right to manage the Premises.

24. I would add a brief comment on the grant of permission to appeal in this case. Permission was granted by the LVT on 26 March 2012, and it has taken almost 18 months for the appeal to be concluded and dismissed. The effect of the appeal has therefore been to delay the date on which the respondent is able to take up the right to manage to which the LVT found it was entitled, and to prolong the appellant's management of the Premises for the same period. No criticism can be directed at the appellant for applying for permission to appeal and pursuing the appeal once permission had been granted; it was entitled to do both. Nonetheless, it is unfortunate that the important and valuable right conferred by the 2002 Act has been kept in abeyance for so long on such relatively flimsy grounds.

25. When permission to appeal is requested in a case such as this, raising a discrete question of the interpretation of a statutory provision, the first-tier tribunal should consider whether there is a reasonable prospect of the applicant demonstrating that the tribunal has wrongly interpreted or applied the relevant law. The first-tier tribunal should ask itself whether the appeal has a real or realistic prospect of success, as opposed to only a fanciful prospect. If the first-tier tribunal, having heard the argument and made its own decision, is satisfied that there is no real prospect of the Upper Tribunal coming to a different conclusion, it should refuse permission; if it considers that the point in issue remains fairly arguable, it should grant permission. If the point on which permission is sought is a purely technical one, as it was in this case, the first-tier tribunal should be slower to grant permission than in cases of more substance.

Dated 3 October 2013

Martin Rodger QC
Deputy President