IN THE MATTER OF THE TENANTS' ASSOCIATIONS (PROVISIONS RELATING TO RECOGNITION AND PROVISION OF INFORMATION) (ENGLAND) REGULATIONS 2018 (SI 2018 NO.1943)

OPINION

Introduction

1. I am instructed on behalf of the All- Party Parliamentary Group on Leasehold and Commonhold Reform to advise in relation to the main difficulties presented by the Tenants' Associations (Provisions Relating to Recognition and Provision of Information) (England) Regulations SI 2018 No.1943 ("the Regulations"). This Opinion is based on my notes used for the purposes of a meeting with the Ministry of Housing, Communities and Local Government on 19th October 2018 which I attended at short notice. It does *not* address issues relating to data protection and the General Data Protection Regulations ("GDPR") as advice/ assistance was sought on this previously.

Statutory framework

2. Section 29(1) of the 1985 Act, defines a recognised tenants' association ("RTA") as:

> "an association of qualifying tenants (whether with or without other tenants) which is recognised for the purposes of the provisions of the Act relating to service charges either by notice given by the landlord or by a certificate in relation to dwellings in England of the First- tier Tribunal."

3. Subsection (4) defines "qualifying tenants":

> "…for the purposes of this section a number of tenants are qualifying tenants if each of them may be required under the terms of his lease to contribute to the same costs by the payment of a service charge."

4. Service charge is defined in s.18 as an

"amount payable by a tenant of a dwelling as part of or in addition to the rent-

(a) which is payable, directly, or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's cost of management, and
(b) the whole or part of which varies or may vary according to the relevant costs."

5. Subsections (5) and (6) confer power on the Secretary of State to make regulations specifying:

- the procedure which is to be followed in connection with an application for, or for the cancellation of, a certificate;
- the matters to which regard is to be had in giving or cancelling a certificate;
- the duration of such a certificate; and
- any circumstances in which a certificate is not to be given.

6. The Regulations[1] mark the first occasion this power has been utilised. The purpose is, according to the Explanatory Memorandum to the Regulations, to help qualifying tenants to set up and gain recognition of their tenants' association by:

a. reducing the threshold for recognition from 60 to 50%;

b. setting out matters FTT must have regard in determining whether to issue, or refuse to issue, a certificate;

c. requiring the landlord to provide contact details of qualifying tenants.

The position before the coming into force of the Regulations

7. Prior to the Regulations, the FTT's power to grant a certificate was triggered if:

[1] The MHCLG carried out a consultation although only a summary of the consultation responses and the government response was published in October 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746926/Recognising_residents_associations_-_consultation_response.pdf.pdf

a. the applicant was an association of tenants (whether with or without other tenants); and
b. each of those tenants were required under the terms of their respective leases to contribute to the same costs by the payment of a service charge.

8. Section 29 itself did not impose any other limitation.

9. The DCLG discussion paper dated March 2015[2] referred to "current guidelines" having been in place since October 1980 and helpfully appended the *text* of guidance purported to be issued by Housing Division 5, Department of the Environment Housing (Policy) Division 4, Welsh Office[3]. That text explained the absence of regulations as being due to insufficient information about the circumstances of tenants' associations and the desirability of seeing how the procedure for recognition would operate in practice.[4]

10. Although it was suggested in the discussion paper that the 1980 guidance remained "in force", there have, of course, been successive "guidance documents" issued since, including the DCLG document "Residential Long Leaseholders: A guide to your rights and responsibilities" and the Ministry of Justice "Guidance on Recognition of Tenants' Association General Information about the process" known as T545 in July 2014 and revised in January 2015.[5]

11. Any guidance, however, was simply that: guidance. It was neither regulatory nor statutory guidance.[6] The guidance was flawed in many respects and two recent cases[7] have illustrated the fallibility of the guidance.

[2]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417786/150325_-_RTA_discussion_paper_-_final__2_.pdf
[3] It has not been possible to obtain a copy of the actual guidance issued.
[4] The length of time taken to bring forward secondary legislation and the risk of an over formulaic approach with rigid criteria leading to some associations not being recognized have been cited.
[5] This was surprisingly revised in January 2015 without reference to the most recent developments brought about by Rosslyn Mansions and shortly before the discussion paper was issued.
[6] Non- statutory or regulatory guidance may be taken into account as persuasive authority on the legal meaning of its provisions *R v Montila* [2004] UKHL 50. And it may throw light on the background to the legislation thereby enabling the court to understand better its purpose. However, that is as far as it goes:
[7] *One West India Quay Residents Association v One West India Quay Development Company (Eastern) Limited (1) and No.1 West India Quay (Residential) Limited* LON/00BG/LRA/2013/0008

The main issues

12. Aside from a misunderstanding of data protection, the main issues presented by the Regulations may be divided into five broad categories:

    a. Minimum threshold;

    b. Retrospectivity;

    c. Landlord "sanctions";

    d. Factors opposing, rather than granting, a certificate;

    e. Other barriers in obtaining recognition under Part 3 of the Regulations.

Minimum threshold

13. Since 1980, the Secretaries of State have considered that as a general rule the membership of the proposed RTA should represent at least 60% of the flats in the block, being a figure equating to a substantial proportion of tenants. There was, however, no statutory underpinning of such conditions. The 1985 Act imposed no minimum 60% threshold for the recognition of a tenants' association. The only numerical limitation was that there had to be more than one tenant. It was an arbitrary figure which only appeared in non- statutory guidance.

14. The Upper Tribunal decision in *Rosslyn Mansions TA v Winstonworth Ltd* [2015] UKUT 0011 (LC) held that the FTT has wide discretion as to whether to grant a certificate and was not constrained by a minimum percentage of qualifying tenants.

15. Regulation 4(1) fundamentally changes the position. It reads:

> "The First- tier Tribunal must not give a certificate to a tenant's association in relation to a premises where the tenants' association represents fewer than 50% of the qualifying tenants of dwellings situated in the premises."[8]

[8] Equivalent provision is made where the tenants' association represents qualifying tenants of in dwellings situated in related premises who contribute to the same costs through the service charges.

16. Thus, by the imposition of a 50% threshold, the FTT's power is now constrained. Regulation 4 has both deprived the FTT of the wide discretion it enjoyed in being able to grant a certificate, and erected a barrier for tenants' associations.

17. This is best illustrated by the following examples:

    a. It is now impossible for tenants to obtain a certificate without 50% of qualifying tenants (save where there has been non- compliance by the landlord which is addressed below and is itself not without difficulty). This was not the position previously.

    b. There is now a two- tier system: a landlord may grant recognition of tenants' associations by notice even if the 50% threshold is not reached because the Regulations do not apply to landlords; the FTT "must not give a certificate" [9] unless the 50% threshold is reached.[10]

    c. Since the Tribunal no longer has power to grant a certificate of recognition unless the minimum threshold of 50% is reached, there is now even less of an incentive for landlords to recognise tenants' associations. The landlord is not obliged to recognise the tenants' association and can refuse to do so with little risk of an application being made to the Tribunal if 50% threshold cannot be reached (or he can prevent it happening by delaying provision of information). Previously, it was within the Tribunal's jurisdiction to entertain the application; that is no longer the case.

    d. A tenants' association whose members may amount to less than 50% of the qualifying tenants but contribute the largest proportion of service charge are now precluded from being able to obtain a certificate. This was the situation in *Rosslyn Mansions TA v Winstonworth Ltd*; under the Regulations, the tenants' association would have failed in their application.

[9] Emphasis added

[10] If there was any intention to prevent multiple RTAs, that too is not achieved by the Regulations. Regulation 4(3) only applies to RTAs where the Tribunal must not give a certificate if a certificate has previously been given in relation to a premises and certificate is in force. Of course, a landlord may recognise a tenants' association without a certificate so it is, therefore, possible for there to be more than one RTA in relation to premises.

e. The Regulations ignore the practicalities of obtaining 50% membership on large estates.

f. The imposition of a 50% threshold, and removal of the wide discretion, facilitates manipulation of percentages by landlords (e.g. granting leases to related persons or associated companies or ensuring disruption at meetings).

18. In short, the imposition of a threshold which had never been enshrined in statute or regulations, does not enable tenants to obtain a certificate, rather it has limited their rights.

Retrospectivity

19. Regulation 5 governs the cancellation of certificates granted by the Tribunal. In determining whether to cancel a certificate, one of the matters the Tribunal "must, in particular, have regard to" is whether the tenants' association to which the certificate relates represents fewer than 50% of the qualifying tenants of dwellings situated in the premises to which the association relates (Regulation 5(b)). This is designed to ensure that if the numbers fall below the threshold, the certificate may be cancelled.

20. The obvious issue is that where a tenants' association represented 50% of the qualifying tenants at the time of grant, but one of the leases is subsequently assigned, and the incoming tenant does not wish to join the tenants' association, the RTA is at serious risk of losing its certificate of recognition. This may be convenient for the landlord at a time when the RTA is seeking to exercise one of the only real powers it has in addition to an individual tenant, namely, the right to appoint a surveyor who has statutory rights of access to documents and premises (section 84 of, and Schedule 4 to, the Housing Act 1996).

21. There is, however, a more worrying effect; it is now open to a landlord to apply for cancellation of a certificate granted to a tenants' association before the Regulations came into effect, and, in particular, a tenants' association where membership did not amount to 50%.

22. In other words, those tenants' associations which were able to take advantage of the previously wide discretion of the Tribunal (as held by the Upper Tribunal) and expended considerable sums in doing so in the face of strong opposition from the landlord, are now at real risk of certificates being cancelled because of these Regulations.

23. It is true that the Tribunal has a discretion whether or not to cancel the certificate but that has to be seen in the context of the very clear wording of the Regulation which says the 50% threshold is a factor which it must especially have regard to; the importance of the threshold could not have been emphasised more.

Landlord "sanctions"

24. Under Regulation 4(5), the Tribunal's jurisdiction to grant a certificate is not conditional on the minimum 50% threshold or that another RTA has not been granted a certificate if:

    a. a landlord has not complied with an order to comply with Regulations 8, 9 and 10; and
    b. the tenants' association represents a substantial number of qualifying tenants of dwellings in the premises or, as the case may be, the related premises.

25. It is unlikely that this will prove to be an effective "sanction" or deterrent to a recalcitrant landlord because of the steps required to reach the stage where the Tribunal's jurisdiction is not constrained by a minimum threshold or there being no other RTA. It is not a simple case of non- compliance with the Regulations. Regulation 4(5) only applies where:
    a. the landlord has not complied with any of Regulations 8, 9 or 10;
    b. following non- compliance, the tenants' association applies to the Tribunal for an order that the landlord has failed to perform his duty under regulations 8, 9 or 10 and does not have a reasonable excuse for that failure;
    c. the Tribunal makes a determination to that effect and grants an order;

d. the landlord does not comply with that order.

26. The Regulations have, therefore, introduced additional stages (or hurdles) in seeking to obtain a certificate in the face of an uncooperative landlord. Whereas under the test formulated by the Upper Tribunal in *Rosslyn Mansions*, the landlord's refusal to provide information would have been one of the factors taken into account on an application for a certificate (particularly important where members did not form a majority of the qualifying tenants), under the Regulations, the tenants are now required to make a separate application, and obtain a separate order, before being able to apply for the certificate, or indeed for the Tribunal's power to be triggered. In short, it adds hurdles, increases the opportunities for delay, and requires additional expenditure, because the pre- existing arrangements sufficed (or, rather, were better than the new system) to deal with the uncooperative landlord. The Regulations, therefore, do not facilitate, but hinder, the setting up of an RTA.

27. Related to this is that even if such an order was obtained, the tenants' association would still need to show that they represented a "substantial number of qualifying tenants".

28. This is not conducive to facilitating the grant of a certificate in light of the Regulations as a whole. Take this scenario:

    a. A block comprises ten qualifying tenants. Five of those qualifying tenants are leaseholders associated with the landlord. Only two qualifying tenants at present form the tenants' association. They need to find out about other 3 qualifying tenants in a block.

    b. The landlord ignores all requests for information.

    c. The tenants' association applies to the Tribunal and obtains an order under Regulation 11. The Landlord still fails to comply.

d. The tenants' association applies for an order for a certificate, but because they only represent two out of ten qualifying tenants the Tribunal has no power to grant a certificate.

29. The problem is compounded if you multiply those numbers on a large mixed use estate in London whose landlord has deep pockets.

30. It seems, therefore, that rather than providing an incentive to a landlord to comply with its duties in respect of information, Regulation 4(5) merely provides another route by which a landlord can prevent recognition.

Absence of factors in favour of granting a certificate

31. There is no presumption in favour of granting certificate. There are, in fact, no factors listed which the Tribunal must, or may take into account, in favour of granting a certificate. There are, however, a list of circumstances in which the Tribunal does not have jurisdiction to grant a certificate, and a list of matters which the Tribunal must take into account in cancelling certificate.

32. In interpreting the Regulations, and notwithstanding what might be suggested in the Explanatory Memorandum or any non- statutory guidance, a court may very well take the view that the Regulations are not designed to protect tenants or confer additional rights, but to protect landlords and remove existing rights. In other words, since the Regulations are formulated negatively, any matters in favour of recognition, contained in a memorandum or non- statutory guidance will be given less weight because they were not seen to be important enough put into the Regulations themselves. It is an arguable point.

Other barriers

33. Tenants' associations now have to overcome other barriers (which did not exist previously) in seeking recognition. I list them briefly here:

More than one request notice

34. Regulation 7(3) provides that where the secretary of a relevant tenants' association gives more than one request notice in respect of the same relevant qualifying tenant, the later notice supersedes all earlier notices. Prima facie, that seems simple enough. However, what happens in this scenario?
    i. The secretary requests a notice regarding three qualifying tenants.
    ii. A second request is made in respect of another four (one of whom is a qualifying tenant in the first request notice but the secretary did not know because that tenant owns ten different flats).
    iii. Does that mean the first request notice is invalid against all of the first three qualifying tenants?
    iv. And how does the secretary know that is the case if the unknown tenant does not want the landlord to disclose that information, so the secretary continues to make the same mistake each time, and on each occasion the landlord says the request notice is superseded by the later notice?

Listing all members of RTA

35. Regulation 7(2)(a)(i) requires that the secretary of the tenants' association lists all qualifying tenants who are members each time a Request Notice is sent. Arguably, this information: (a) allows the landlord to identify how many more tenants are required to join in order to reach the 50% threshold; (b) enables the landlord to target tenants; and (c) acts as a deterrent for a tenant to join a tenants' association in the first place.

Validity of notices

36. Regulation 8 leaves it wide open for landlords to respond to a request notice by alleging it is invalid (for any number of reasons) potentially leading to lengthy arguments before the tribunals at first instance and on appeal.

Time for the tenant to give consent for known information to be provided to the tenants' association

37. Regulation 9(2)(i) gives 28 days for a tenant to respond to the landlord's information form (sent as a consequence of the request notice). This is lengthy; it is only 2 days less than a tenant is given to comment on the landlord's intention to enter into a qualifying long term agreement or undertake proposed works. In contrast, regulation 9(2)(i) concerns the giving of consent to give "known information" defined in regulation 7(6) as the name, address for which the tenant pays a service charge, an address to which service charge demands are sent and the tenant's email address.

Substantive response

38. The 4 months' response period in Regulation 10(1) is inexplicably long.

39. Further, Regulation 10(2)(a)(ii) provides that the landlord may respond by saying that there is no such known information. This is a nonsense if one considers the definition of "known information" in Reg 7(6). It would be impossible for a landlord not to know any, or most of, this information.

Conclusion

40. In conclusion, the professed good intentions in the Explanatory Memorandum are not matched by the Regulations themselves. The Regulations cannot be amended, or the defects cured, by either the Memorandum or non- statutory guidance.

41. For a matter which should be relatively straightforward, tenants must now grapple with statute; regulations; explanatory notes; an explanatory memorandum; and forthcoming non- statutory guidance. Applying for recognition is now fraught with

difficulty. The Regulations will prove either to be a charter for litigation or will act as a powerful deterrent for many tenants. It is abundantly clear in what it does not do, that is, make it easier for tenants to obtain recognition.

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