



**Property** : 27, 29, 31, 33, 35 & 37 Brimmers Way,  
Fairford Leys,  
Aylesbury,  
HP19 7HR

**Applicant** : Brimmers RTM Co. Ltd.

**Respondent** : Fairhold Freeholds (No. 2) Ltd.

**Date of Application** : 27<sup>th</sup> January 2013

**Type of Application** : For an Order that the Applicant was, on  
the relevant date, entitled to acquire the  
right to manage the property (Section  
84(3) Commonhold and Leasehold  
Reform Act 2002 ("the 2002 Act"))

**The Tribunal** : Mr. Bruce Edgington (lawyer chair)  
Mr. David Brown FRICS MCI Arb

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## DECISION

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1. This Application fails and the Applicant is therefore not entitled to acquire the right to manage the property.

### Reasons

#### Introduction

2. The relevant facts in this case seem to be agreed. The Respondent accepts that the Applicant is a right to manage company ("an RTM") whose objects are, amongst other things, to manage the property. Such RTM served OM Property Management with a claim notice on the 22<sup>nd</sup> November 2012 seeking an automatic right to manage the property and giving the 23<sup>rd</sup> December as the date by which a counter-notice must be served. On the 12<sup>th</sup> December 2012, Estates & Management Ltd ("E & M"), agents acting for the Respondent freehold owner, wrote to the Applicant pointing out that their principal had not been served, as is required by the 2002 Act.
3. On the 17<sup>th</sup> December 2012, the Applicant sent a claim notice to the Respondent freehold owner giving the 17<sup>th</sup> January 2013 as the date by which a counter-notice must be served. Of relevance is the fact that this was sent by recorded delivery post, according to the Applicant's evidence.

4. On the 19<sup>th</sup> December 2012, E & M served a counter-notice to the 1<sup>st</sup> claim notice alleging that (a) the Applicant had not served the freehold owner with the claim notice (b) the Applicant was incorporated on 20<sup>th</sup> November 2012 and the claim notice was served on the 22<sup>nd</sup> November and as there were qualifying tenants who were not members, the 14 days mentioned in Section 79(2) of the 2002 Act could not have been complied with, (c) the claim notice does not contain the prescribed explanatory notes and (d) Sylvia Hawley is said to be the lessee of flat 35 when she is not.
5. On the 9<sup>th</sup> January 2013, E & M served a counter-notice to the second claim notice alleging (a) Notices of Invitation to Participate had not been served on either Anthony Simon Gleeson, lessee of flat 29, or Michael Philip Rosaman and Roxanne Bennett, lessees of flat 35, and (b) less than one month had been given for service of the counter-notice.

### **Procedure**

6. The Tribunal decided that this was a case which could be determined on a consideration of the papers without an oral hearing. Notice was given to the parties in a directions order dated 13<sup>th</sup> February 2013 in accordance with Regulation 5 of **The Leasehold Valuation Tribunals (Procedure)(Amendment)(England) Regulations 2004** notifying the parties (a) that a determination would be made on the basis of a consideration of the papers including the written representations of the parties on or after 11<sup>th</sup> April 2013 and (b) that an oral hearing would be held if either party requested one before that date. No such request was received.

### **The Law**

7. Section 78(1) of the 2002 Act says that before serving a claim notice, an RTM must give notice to each person who is a qualifying tenant and "*neither is nor has agreed to become a member*" of the RTM. This is called a Notice of Invitation to Participate.
8. Section 79(1) defines the 'relevant date' as being the date when a claim notice is 'given'. Section 80(6) states that the claim notice "*must specify a date, not earlier than one month after the relevant date*" by which a counter-notice must be given.
9. Section 79 (2) says that if it is necessary to serve a Notice of Invitation to Participate, then 14 days must pass after such notice is served before a claim notice can be served.
10. Section 79(6) states that a claim notice must be served on the landlord, i.e. in this case, on the Respondent.
11. Section 7 of the **Interpretation Act 1978** ("the 1978 Act") as amended says that anything which is served by post is deemed to be delivered in the "*ordinary course of post*". There is nothing in the Tribunal's procedural regulations to clarify this but the rules in the civil courts say

that this is normally the second business day after posting (CPR 6.26 of the **Civil Procedure Rules 1998**).

12. The 1<sup>st</sup> Schedule to the 1978 Act states that a month is to be interpreted as being a calendar month unless stated otherwise. The 2002 Act does not state otherwise.

### **Conclusions**

13. It is clear that the first claim notice was not served on the Respondent landlord. The subsequent notice dated the 17<sup>th</sup> December is a separate notice because it is dated differently and has a different date for service of the counter-notice. It is not argued by either party that the first claim notice was withdrawn although it could be inferred from the fact that the second notice was served. The matter is very relevant because a second notice cannot be served whilst the first one remains in force (Section 81(3) of the 2002 Act).
14. As to whether qualifying tenants were served with a Notice of Invitation to Participate, the Applicant's evidence is that 5 of the 6 lessees attended a meeting. The 6<sup>th</sup> was abroad but was aware of the meeting. It was decided by the 5 owners present to form an RTM and the decision was endorsed by the 6<sup>th</sup> owner by e-mail. The evidence of the Applicant is *"All five owners were present and in agreement, so it was deemed that notices of invitation to participate were not required....As two of the owners were in the process of selling their flats it was decided not to include their details in the notice but to show qualifying owners of half the flats in the building. When the new owners are in occupation notices of invitation to participate in the required format, will be sent to each of them"*.
15. It is not said whether the lessees of flats 29 and 35 were members of the RTM but the only natural inferences to draw from the evidence are that no Notices of Invitation to Participate were served. Certainly no copies of any such notices have been produced in answer to the allegation. A copy of the members register of the RTM should have been produced in order to satisfy the Tribunal as to exactly who was a member and, hence, who, if anyone, needed to be served with such notice. The Applicant's assertion that it was not *"required"* would only be relevant if, in fact, all the qualifying lessees had been members. If not, then the service of such a notice is not optional.
16. The Tribunal considered whether to adjourn the case to consider submissions about whether the first claim notice was deemed to have been withdrawn and for the relevant RTM documents to be produced. However, it decided against this in view of the other allegation i.e. that the time given for the service of a counter-notice was too short. Section 81 of the 202 Act can provide a saving if there is *"any inaccuracy in any of the particulars required"* by Section 80. However, giving too short a time for service of a counter-notice is not an inaccuracy of a particular. It is a failing to comply with the minimum requirements.

17. The Applicant argues that 4 weeks was given because it took 'one month' "*to mean a 28 day period, a lunar month, as used in common contracts such as leases*". The Tribunal sees many hundreds of leases and is unaware of any such common usage of 28 days being interpreted as a month. The 1978 Act is clear. The 17<sup>th</sup> December was a Monday which means that the second business day after that was the 19<sup>th</sup> December. That was the deemed date of the 'giving' of the notice and 17<sup>th</sup> January is less than one calendar month away.
18. Thus, in summary, the reasons for not granting this application are firstly the fact that the first claim notice was not served properly; the probability that the second notice is void because the first notice appears to have been 'in force' when the second one was served; the uncertainty about who was a member of the RTM and who should have been served with a Notice of Invitation to Participate and the procedural failing in not giving sufficient time for service of the counter-notice.

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**Bruce Edgington**  
**President**  
**16<sup>th</sup> April 2013**