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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AZ/LOA/2018/0002**
Property	:	**61 Lewisham Hill, London, SE13 7PL**
Applicant	:	**61 Lewisham Hill RTM Company Ltd**
Representative	:	**Roger McElroy (Director)**
Respondent	:	**Assethold Limited**
Representative	:	**Ronnie Gurvits (Office Manager, Eagerstates Limited)**
Type of application	:	**Right to manage**
Tribunal member(s)	:	**Judge Robert Latham** **Ms Sue Coughlin**
Date and Venue of Hearing		**8 October 2018 at 10 Alfred Place, WC1E 7LR**
Date of decision	:	**26 October 2018**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that the claim notice was properly served on the Respondent, in that it was delivered to its Registered Office on Wednesday, 28 February 2018 and gave the Respondent the statutory one month period in which to give a counter-notice.

(2) The Tribunal is further satisfied that the notice of claim was valid.

(3) The Tribunal determines that on 9 July 2018 the Applicant was entitled to acquire the right to manage the premises pursuant to section 84(5)(a) of the Act, and the Applicant will acquire such right within three months after this determination becomes final.

(4) The Tribunal determines that the Respondent shall pay the Applicant £300 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

The Application

1. On 14 May 2018, the Applicant issued this application to acquire the right to manage 61 Lewisham Hill, London, SE13 7LP ("the premises") under Part 2 of Chapter 1 of the Commonhold and Leasehold Reform Act 2002 ("the Act"). The Respondent freeholder has served a counter-notice asserting that the Applicant RTM company was not on the relevant date entitled to acquire the right to manage.

2. On 20 June, the Tribunal gave Directions. The Tribunal noted that by its counter-notice, the Respondent had disputed that the Applicant had complied with sections 79(3), 80(6), 80(8), and 80(9) of the Act. The Tribunal set the matter down for a paper determination. Pursuant to these Directions:

   (i) The Respondent filed a Statement in Response to the Application, dated 3 July 2018 (at R1);

   (ii) The Applicant filed a Response, dated 17 July 2018, which is attested by a statement of truth signed by Roger McElroy, a director of the Applicant Company (at A1).

3. On 17 August, the Tribunal gave Further Directions. Judge Vance, having perused the papers, determined that there should be an oral hearing to determine the dispute of fact as to when the claim notice had been received by the Respondent. The Judge directed that there should be a concurrent exchange of witness statements on or before 3 September 2018 addressing the factual issue in dispute. The parties were directed to exhibit any evidence of posting/receipt.

4. Whilst the Tribunal served these Directions on the Respondent, these were not served on the Applicant. On 3 October, Scott Cohen, the Respondent's Solicitor, sent the Tribunal a witness statement from Ronni Gurvits, an Office Manager with Eagerstates Limited ("Eagerstates") who manage the property on behalf of the Respondent. The Solicitor did not seek to contact the Applicant to arrange a concurrent exchange of witness statements. Had it done so, it would have alerted the Applicant to the Further Directions which had been made.

The Hearing

5. The Applicant was represented Mr Roger McElroy. He is a director of Investment Technology Ltd which trades as Canonbury Management ("Canonbury"). He is also a director of RTM Nominee Directors Ltd, a company which has been established to be a corporate director of the RTM companies that he establishes. He is also a director of the Applicant Company, as of a number of other RTM companies which Canonbury has established. Mr McElroy stated that he intended to rely on the Applicant's Response as his evidence.

6. The Respondent was represented by Mr Gurvits. In his witness statement, he gives his address as 5 North End Road, London, NW11 7EH. This is rather the address of his accountants. He works from a residential address some five minutes away. He provided the Tribunal with this address, but asked that we should not record this in our decision.

7. The Tribunal heard evidence from Mr McElroy and Mr Gurvits. References to the Applicant's Bundle are prefixed by "A" and to the Respondent's Bundle by "R".

8. There is a single issue which the Tribunal is required to determine, namely the date on which notice of the Claim was given to the Respondent. The letter which enclosed the notice of claim is at A4. The notice is at A5-9. The date by which the Respondent is required to serve a counter-notice is specified as 3 April 2018. The date on which the Applicant intended to acquire the RTM is specified as 9 July 2018.

   (i) The Applicant contends that the Notice of Claim was sent by first class post on Tuesday, 27 February 2018 and would have been received in the normal course of the post on 28 February.

   (ii) The Respondent contends that it was not received until Monday, 5 March. The Applicant sent three copies of the letter to two different addresses. All these letters were received on the Monday.

9. The Respondent did not proceed with the other technical challenges which had been raised in its counter-notice and its Statement of Case. In *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89; [2018] QB 571, the Court of Appeal noted that the Government's policy was that the RTM procedures should be as simple as possible to reduce the potential for challenge by obstructive landlords on purely technical grounds and that the legislation should be construed having regard to this legislative intent.

The Law

10. The relevant provisions of the Act are set out in the Appendix. The following provisions are relevant to our determination:

(i) A claim to acquire the right to manage any premises is made by giving notice of the claim, namely a "claim notice" (Section 79(1));

(ii) The notice of claim must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice under section 79(6) may respond to it by giving a counter-notice under section 84 (Section 80(6));

(iii) The "relevant date" means the date on which notice of the claim is given (Section 79(1)).

(iv) A notice may be sent by post (Section 111(1)(b)).

11. Section 7 of the Interpretation Act 1978 provides:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

12. The leading House of Lords' authority on the computation of time is *Dodds v Walker* [1981] 1 WLR 1027. Section 29 (3) of the Landlord and Tenant Act 1954 provides that no application for a new tenancy under section 24 (1) "shall be entertained unless it is made not less than two nor more than four months after the giving of the landlord's notice under section 25 of this Act." The landlord gave notice on 30 September. The House of Lords held that the last day for making an application was 30 January. Thus, the period of four months started to run at midnight 30th September/1 October and ended at midnight 30th-31st January.

13. The following passages are taken from the speeches (emphasis added):

> "My Lords, reference to a 'month' in a statute is to be understood as a calendar month. The Interpretation Act 1978 says so. It is also clear under a rule that has been consistently applied by courts since *Lester v Garland* (1808) 15 Ves 248 [1803-13] All ER Rep 436 that, in calculating the period that has elapsed after the occurrence of the specified event such as the giving of a notice, the day on which the event occurs is excluded from the

reckoning. It is equally well established, and is not disputed by counsel for the tenant, that when the relevant period is a month or a specified number of months after the giving of a notice the general rule is that the period ends on the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given." (Lord Diplock at 1029B-C)

"My Lords, it is common ground that in this case the period of four months did not begin to run until the end of the date of the relevant service on 30th September, i.e. at midnight 30th September-1st October. It is also common ground that ordinarily the calculation of a period of a calendar month or calendar months ends on what has been conveniently referred to as the corresponding date. For example, month period, when service of the relevant notice was on 28th September, time would begin to run at midnight 28th-29th September and would end at midnight 28th-29th January, a period embracing four calendar months. It is to be observed that the number of days in the court month period in that example is in one sense inevitably limited by the fact that September and November each contains but 30 days." (Lord Russell of Killowen at 1030 C/D)

14. In *Windermere Court Kenley v RTM Company Ltd v Sinclair Gardens Investments (Kensington) Ltd* [2014] UKUT 420 (LC), the Upper Tribunal applied these principles to the computation of time under section 80(7) the Act. The date specified for giving a counter-notice under section 80(6) was 30 September 2013. The issue was whether or not 31 December 2013 satisfied the requirements of section 80(7) as "a date, at least three months after that specified under subsection (6)" or whether the earliest date was 1 January 2014. HHJ Gerald held (at [8]) that the date must be 'after' midnight on 30th-31st December 2013 from which it follows that specifying the date as being the 31 December 2013 (being 'after' midnight on 30th-31st) satisfied the requirements of section 80(7).

15. In the current case, the date specified for giving a counter-notice under section 80(6) was 3 April 2018. The Applicant was therefore required to give notice of the claim no later than Friday, 2 March 2018.

16. Mr Gurvits referred us to the Upper Tribunal decision in *Moskovitz v 73 Worple Road RTM Company Ltd* [2010] UKUT 393 (LC). The issue in that case (see [15]) was whether an error in specifying a date for the landlord's response could be saved from invalidity by section 81(1) on the basis of an "inaccuracy". This is not an issue which arises in the current case. The Tribunal further notes that in the subsequent decision of *Assethold Limited v 14 Stansfield Road RTM Company Ltd* [2012] UKUT 262 (LC), the President doubted whether his decision had been correct (see [14]).

17. The Tribunal has had regard to the Upper Tribunal decision in *Southwark LBC v Akhtar* [2017] UKUT 150 (LC); [2017] L&TR 36, in which HHJ Elizabeth Cooke considered (i) the weight to be given to evidence that notices have been sent out through a robust mechanical process; and (ii) the clarity of the evidence required to rebut the presumption that a document would be delivered in the ordinary course of post.

The Submissions of the Parties

18. Mr McElroy gave evidence that the lessee of Flat C had approached Canonbury Management in December 2017 as the lessees of the eight flats were dissatisfied with the way the block was being managed by Eagerstates on behalf of Assethold. They are all members of the RTM.

19. Mr McElroy stated that he had established thousands of RTM companies. He explained how all RTM applications are "programmatically generated" by their systems. Clients complete an interface. Invoices are sent to subscribers who are prospective members. They are asked to confirm that they understand the process and to pay a fee. Upon the payment of the appropriate fees, the RTM company is established. This is computer generated through an interface with Companies House. Once the Company is established, the system determines whether it needs to send out notices inviting participants. This was not required in the current case where all eight lessees were members of the RTM Company.

20. Mr McElroy described how all the relevant claim notices were electronically generated and printed on their printing facilities and posted on the same day. The batch process starts at 00.00 on Tuesday, 27 February 2018, and would make the first post collection of the day. The correspondence was sent first class and would arrive next day, on Wednesday, 28 February. Three claim notice were sent to the Respondent. The critical letter (at A4) was sent to Assethold Limited at its registered office at 5 North End Road, Golders Green, London, NW11 7RJ. Further letters were sent to "Assethold Limited c/o Eagerstates Limited" and to "Eagerstates Limited" at PO Box 1369, NW11 7EH.

21. Mr McElroy stated that the mail was put into bundles by File Print for the Royal Mail to collect. This company also dispatches bank and credit card statements and statutory demands for a number of public authorities. This procedure does not generate any receipt of posting. However, there would be an alert if the procedure did not operate as programmed.

22. Mr McElroy stated that there are some five challenges to their RTM applications each year. In cross-examination, he stated that he was not sure how many of these related to disputes over service. However, only

two landlords raised issues of late service, one of which was Assethold/Eagerstates. The problems with a second landlord had ceased when a Solicitor had retired.

23. Mr McElroy stated that the notices always give a few extra days for a response. His normal practice is to send an additional copy of the letter by "signed for" mail. The problem is that if there is no one to sign for the delivery, it is returned to the Royal Mail delivery office. His practice is to send one letter by normal mail and one by "signed for" delivery. If no one is available to sign for the mail, there would be a record of the date of attempted delivery. There would be compelling evidence that the second letter was delivered on the same date. In February 2018, this practice was not being followed.

24. Mr Gurvits gave evidence that Eagerstates employs six people. He goes to the accountant's office at 5 North End Road, NW11 7RJ every weekday day at about 12.00. The mail has normally been delivered by this time. If not, he will return to collect it. He also goes daily to the delivery office to collect the mail sent to the PO Box. Sometimes, this mail is also delivered to his address. The delivery office is in North End Road on the opposite side of the road to the accountants.

25. Mr Gurvits was certain that all three letters had been not been delivered on or before Friday, 2 March. He collected the letters on Monday, 5 March. He had not retained any of the envelopes in which the letters had been delivered. He has no system of stamping letters with the date of receipt.

26. The Respondent was less specific about what happened in their Statement of Case (at R1-5):

> "14. The records of the agent indicated that both notices were received at the same time on the 5th March 2018 and not before that date. The copy of the notice was then sent onto the Respondent's Solicitor by e-mail on 5th March for response on behalf of the Respondent"

27. In his witness statement, dated 17 September 2018, Mr Gurvits gives the following account:

> "2. A member of our office in fact attends the offices of the accountants each day to pick up all communications delivered by the post on the day."

> "4. The notice was collected from the registered office on the 5th March and not earlier."

"5. A copy of the notice was also received at the office at Eagerstates Limited. Again, this was received only on the 5th March 2018 and not earlier."

"8. In this instance the post of the 5th March was opened at Eagerstates and I sent the copy notice to the solicitors instructed by the Respondent on the same date. I confirmed the date of receipt of the notice to them as 5th March 2018."

28. Mr Gurvits did not produce any "records" of the date of receipt. Neither did he produce his e-mail to his Solicitor. On 5 March (at p.34), Scott Cohen, Assethold's Solicitor, wrote to Canonbury stating that they had received a copy of the claim notice and requested a number of documents. There was no suggestion in the letter that the claim notice failed to give the requisite notice and had been received out of time.

29. Mr McElroy suggested that it was extremely unlikely that the Solicitor would have sent out the letter on the same day, particularly as it had only been e-mailed to him in the afternoon. In cross-examination, Mr Gurvits stated that he could not find the e-mail which he had sent to his Solicitor. Mr McElroy submitted that Mr Gurvits' evidence had been confused. It was not a truthful and accurate account.

The Tribunal's Decision

30. The Tribunal finds, on a balance of probabilities, that the claim notice was given to the Respondent on Wednesday, 28 February, at its registered office at 5 North End Road. It was posted early on Tuesday, 27 February as described by Mr McElroy. The Tribunal is satisfied that the procedures used by Canonbury are robust. It was delivered in the ordinary course of the post. The Tribunal is also satisfied that the two further copies of the claim notice were delivered to PO Box 1369, NW11 7EH on 28 February, again in the ordinary course of the post.

31. With first class mail, the Royal Mail aim to deliver the post on the next working day. Their target is to deliver 93% of mail within this period. In August 2018, a Quality of Service report showed that 92.1% of mail is delivered within this target.

32. The Tribunal would have required clear and cogent evidence to rebut the presumption that these letters had been delivered in the normal course of the post. The Respondent has failed to adduce such evidence.

33. The Tribunal is unable to accept the evidence of Mr Gurvits that the claim notice was delivered to the Respondent's registered office at 5 North End Road after Friday 2 March 2018. We did not find him to be a satisfactory witness. We highlight the following:

(i) On 27 February, the Applicant posted three copies of the claim notice to two different addresses. In the ordinary course of the post, they would all have been delivered on Wednesday, 28 February. On Mr Gurvits' evidence, all three letters would have been delayed by at least three days. We find this most unlikely.

(ii) Mr Gurvits understood the significance of the date of delivery. Had the requisite claim notice been received late, the Tribunal would have expected him to keep the envelope with the date stamp, together with a contemporaneous file note recording the circumstances of the delivery. No such evidence was produced.

(iii) Mr Gurvits stated that he had confirmed the date of receipt to Scott Cohen, the Respondent's Solicitor. If he had done so, the Tribunal would have expected Scott Cohen to have raised the issue of short notice in their letter, dated 5 March 2018 (at A34). Were a landlord to fail to take such a critical point at the earliest opportunity for tactical advantage, it would open itself to severe criticism.

(iv) The account given by Mr Gurvits in his evidence is difficult to reconcile with the Respondent's Statement of Case and his witness statement. In his evidence, he sought to emphasise his role in collecting deliveries as opposed to "a member of our office". No "records" of the agent" were produced. Three copies of the claim notice were sent; the witness statement only deals with two of these.

(v) We also question Mr Gurvits account as to what happens to mail sent to the PO Box. He stated that either he collected it or the Royal Mail delivered it to his address. We understand that the Royal Mail offers two services: (i) PO Box Collect – where the customer collects their mail from the local delivery office; or (ii) PO Box Delivery – where the mail is delivered to the customer's address. The Tribunal considers that it is most unlikely that a customer would be able to combine these two services.

Summary

34. The Tribunal determines that the Applicant was on the relevant date entitled to acquire the right to manage the premises pursuant to section 84(5)(a) of the Act.

35. In accordance with section 90(4), within three months after this determination becomes final the Applicant will acquire the right to manage these premises. According to section 84(7):

> "(7) A determination on an application under subsection (3) becomes final—
>
> (a) if not appealed against, at the end of the period for bringing an appeal, or

(b) if appealed against, at the time when the appeal (or any further appeal) is disposed of."

Costs

36. Section 88(3) of the Act states:

> "(3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before a leasehold valuation tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises."

37. In the light of the Tribunal's decision, there is no question of awarding any costs of the proceedings to the Respondent because the application for the right to acquire has not been dismissed.

38. At the end of the hearing, Mr McElroy applied for a refund of the fees of £300 that he had paid in respect of the application pursuant to Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal orders the Respondent to refund any fees paid by the Applicant within 28 days of the date of this decision.

Judge Robert Latham
26 October 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any Pright of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix

The Commonhold and Leasehold Reform Act 2002

79 Notice of claim to acquire right

(1) A claim to acquire the right to manage any premises is made by giving notice of the claim (referred to in this Chapter as a "claim notice"); and in this Chapter the "relevant date", in relation to any claim to acquire the right to manage, means the date on which notice of the claim is given.

(2) The claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before.

(3) The claim notice must be given by a RTM company which complies with subsection (4) or (5).

(4) If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company.

(5) In any other case, the membership of the RTM company must on the relevant date include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained.

(6) The claim notice must be given to each person who on the relevant date is—

(a) landlord under a lease of the whole or any part of the premises,

(b) party to such a lease otherwise than as landlord or tenant, or

(c) a manager appointed under Part 2 of the Landlord and Tenant Act 1987 (c. 31) (referred to in this Part as "the 1987 Act") to act in relation to the premises, or any premises containing or contained in the premises.

(7) Subsection (6) does not require the claim notice to be given to a person who cannot be found or whose identity cannot be ascertained; but if this subsection means that the claim notice is not required to be given to anyone at all, section 85 applies.

(8) 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.

(9) Where a manager has been appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises, a copy of the claim notice must also be given to the tribunal or court by which he was appointed.

80 Contents of claim notice

(1) The claim notice must comply with the following requirements.

(2) It must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies.

(3) It must state the full name of each person who is both—

(a) the qualifying tenant of a flat contained in the premises, and

(b) a member of the RTM company, and the address of his flat.

(4) And it must contain, in relation to each such person, such particulars of his lease as are sufficient to identify it, including—

(a) the date on which it was entered into,

(b) the term for which it was granted, and

(c) the date of the commencement of the term.

(5) It must state the name and registered office of the RTM company.

(6) It must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice under section 79(6) may respond to it by giving a counter-notice under section 84.

(7) It must specify a date, at least three months after that specified under subsection (6), on which the RTM company intends to acquire the right to manage the premises.

(8) It must also contain such other particulars (if any) as may be required to be contained in claim notices by regulations made by the appropriate national authority.

(9) And it must comply with such requirements (if any) about the form of claim notices as may be prescribed by regulations so made.

81 Claim notice: supplementary

(1) A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80.

(2) Where any of the members of the RTM company whose names are stated in the claim notice was not the qualifying tenant of a flat contained in the premises on the relevant date, the claim notice is not invalidated on that account, so long as a sufficient number of qualifying tenants of flats contained in the premises were members of the company on that date; and for this purpose a "sufficient number" is a number (greater than one) which is not less than one-half of the total number of flats contained in the premises on that date.

(3) Where any premises have been specified in a claim notice, no subsequent claim notice which specifies—

(a) the premises, or

(b) any premises containing or contained in the premises, may be given so long as the earlier claim notice continues in force.

(4) Where a claim notice is given by a RTM company it continues in force from the relevant date until the right to manage is acquired by the company unless it has previously—

(a) been withdrawn or deemed to be withdrawn by virtue of any provision of this Chapter, or

(b) ceased to have effect by reason of any other provision of this Chapter.