



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **LON/00AG?LRM/2022/0014**

HMCTS code : **P: PAPERREMOTE**

Property : **46 Belsize Road NW6 4TG**

Applicant : **46 Belsize Road RTM Company Limited**

Representative : **William Heath & Co (REF DMF)**

Respondent : **Assethold Limited**

Representative : **Scott Cohen Solicitors Henley on Thames**

Application : **Right to Manage**

Tribunal member : **Judge H Carr**

Date of decision : **22nd August 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has been not been objected to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined on paper. The documents that I was referred to are in a bundle of 108 pages, the contents of which I have noted. The order made is described at the end of these reasons.

Decisions of the Tribunal

- (1) The Tribunal determines the notice of invitation to participate was validly served upon Michael Duffy.
- (2) 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, and the Applicant will acquire such right within three months after this determination becomes final.

The application

1. This was an application to acquire the right to manage 46 Belsize Road NW6 4TG (“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.

The law

2. The relevant provisions of the Act are referred to in the decision below.

The counter-notice

3. In its counter-notice, the Respondent alleged that the Applicant failed to serve notices inviting participation to all qualifying tenants as required by s.78(1) and ss79(2). Having considered the documents in the bundle, the tribunal has made the following decision.

The argument.

4. The chronology of events, taken from the Applicant’s response to the Respondent’s statement of case is as follows:
 - (i) 23rd April 2021 – Mr Rogers completes his purchase of the first floor flat (the flat) .
 - (ii) 23rd April 2021 – Mr Rogers’ solicitors, Chadwick Lawrence LLP, apply to the Land Registry to register the transfer of the flat to him.

- (iii) End of January /early February – Land Registry cancel application for registration.
- (iv) 7th February 2022 – notice of invitation to participate given to Michael Duffy who was the previous owner of the flat who sold it to Mr Rogers
- (v) 9th February 2022 – Mr Rogers’ solicitors Chadwick Lawrence LLP apply again to the Land Registry to register the transfer of the flat to him.
- (vi) 22nd February 2022 – Land Registry registers transfer to Mr Rogers
- (vii) 24th February 2022 – Mr Rogers’ application to become a member of the RTM company.
- (viii) 24th February 2022 – register entries showing Mr Rogers title obtained by Applicant’s solicitors.
- (ix) 24th February 2022 – notice of claim to acquire right to manage sent by post to the Respondent. The Respondent’s solicitors confirmed in correspondence annexed to the application that this letter was received the following date, 25th February 2022.
- (x) 30th March 2022 – Applicant’s solicitors email to the Respondent solicitors explaining why notice of invitation did not have to be given to Mr Rogers.

The Respondent’s argument

5. In its statement of case the Respondent argues that the Applicant failed to serve Notice Inviting Participation on Joshua Rogers, who acquired the leasehold interest on 16th April 2021 and whose interest was registered on 9th February 2022, before it served the claim notice on 24th February 2022. This is required by s.78(1) and 79(2). This failure, the Respondent argues, invalidates the notice of claim.
6. On the claim notice dated 24th February 2022 served upon the Respondent Joshua Rogers is not noted as a member of the RTM company and as such the Respondent argues that Mr Rogers ought to have been served Notice Inviting Participation prior to the claim.
7. The Respondent says that the Applicant has instead served the previous leaseholder, Michael Duffy, with a notice inviting participation.

8. The Respondent refers the Tribunal to section 78(1) of the Act which requires that before making a claim to acquire the right to manage any premises, a RTM company 'must' give a NIP to each qualifying tenant who is not, or has not agreed to be, a member of the company. By section 79(2) a failure to do so prevents the giving of a claim notice.
9. The Respondent also refers the Tribunal to the recent Upper Tribunal case, *Avon Ground Rents Ltd v Canary Gateway (Block A) RTM Company Ltd and another* [2020] UKUT 358 which found that failure to give notice of invitation to a qualifying tenant who was not already a member, or who had not agreed to become a member, of the RTM company invalidated the claim notice. As well as stimulating the timescale for service of a claim notice, s.79(2) sets out the consequences of failing to serve a notice of invitation to participate in accordance with the statutory requirements.
10. For these reasons the Respondent denies that the Applicant had acquired the right to manage on the relevant date.

The Applicant's argument

11. The Applicant explains that it was always the intention that the owners of all 3 flats (Ms Martignoni and Mr Silva of 46A, Mr Andreev of Second Floor Flat and Joshua Rogers of the First Floor Flat) would participate in the acquisition of the right to manage and be members of the company.
12. The difficulty for the Applicant and the leaseholders was the delay in Mr Rogers being registered at the Land Registry as the owner of the first floor flat.
13. The Applicants argue that the Respondent's interpretation of s.78(1) is not clear.
14. Section 78(1) provides that

Before making a claim to acquire the right to manage of any premises, a RTM company must give notice to each person who at the time when the notice is given-

- (a) Is the qualifying tenant of a flat contained in the premises: but
- (b) Neither is nor has agreed to become a member of the RTM

15. The Applicant argues that the referent to 'at the time the notice is given' can only refer to the date when the notice of invitation to participate was

given and not the date of the claim notice. The Applicant says that this is the obvious reading of the section.

16. It says the relevant question is: who was the qualifying tenant of the Flat at the date the notice of invitation to participate was given to Mr Duffy? The notice was posted to him on 7th February 2022 and accordingly, under the Interpretation Act 1979, would be deemed to have been served when it would have been delivered in the normal course of post. That would either be the next day, 8th February 2022, or possibly 9th February 2022, the following day.
17. The Applicant says that on either of those dates Mr Duffy was the qualifying tenant of the Flat. It refers the Tribunal to the case of *Malferna House* in which the current Respondent was also the Respondent. In that case the Respondent successfully argued that although they had purchased the freehold of the property on 2nd March 2020, at the time when the notice of claim of the right to manage was served on them, they had not been registered at the Land Registry. At paragraph 10 of the decision it was said ‘this meant that there was a registration gap with the legal estate registered in the name of the old owner and the equitable estate vested in the new owner, the Respondent.’ The Tribunal determined that the claim for the right to manage had to be served on the legal owner and not the equitable owner. The Applicant argues that that decision must apply here. Mr Rogers was not the legal owner of the flat on the date that Mr Duffy was served the notice, he was the equitable owner.
18. If the notice served on Mr Duffy is deemed to have been served on 8th February 2022 there is no problem since at that date the application to register Mr Rogers as the owner of the flat had not been made. It was submitted the following date, 9th February. However, the issue is the registration gap. So although Mr Rogers is now to be considered as the legal owner of the Flat since the date of the application for registration, 9th February, this is essentially a backdating exercise. Up until the time that the registration was actually completed on 22nd February 2022, he was not the legal owner and therefore not the qualifying tenant. Therefore the notice of invitation to participate was correctly served on Mr Duffy who remained the legal owner until the registration was actually completed.
19. The Applicant notes the Respondent’s reference to *Avon Ground Rents*. However it points out that it has never been disputed that if Mr Rogers should have been served with a notice of invitation to participate, the failure to do so would have invalidated the notice.
20. The Applicant points out in support of its own argument a following point from *Avon Ground Rents* – ‘It is therefore very easy for the RTM company to serve each qualifying tenant and to identify them. Since, in

virtually all case, the qualifying tenants will be long lessees , their interests will be identifiable at the Land Registry.

21. The Applicants make the point that at the time the claim notice was prepared the Applicant had no idea how long it would take for Mr Rogers to be registered. Given that some 9 months passed between the application for the registration originally being made in April 2021 and being cancelled in January or early February 2022, it was quite likely that the subsequent application Mr Rogers' solicitors made would take many months to be completed. The Applicant could not have know that a new application having been lodged for registration on 9th February 2022, the Land Registry would complete it within 2 weeks.
22. The Applicant also deals with the possible interpretation of the Respondent's argument that the reference to 'the time when the notice is given' in s.78(1) is the time when the claim notice is given rather than the notice of invitation to participate. The Applicant does not consider this a correct interpretation but even it is, it argues it does not assist the Respondent. Mr Rogers applied to become a member of the RTM company on 24th February 2022 and accordingly the date of service of the claim note (the 25th February) he had 'agreed to become a member of the RTM company'. Therefore under s.78(1) (b) not notice of invitation ahd to be served don him.

The Tribunal's decision

23. Section 78 (1) requires that before making a claim to acquire the right to manage, the RTM company must give notice to a qualifying tenant who neither is nor has agreed to become a member of the RTM.
24. The Tribunal reads the requirement as the Applicant does, that 'at the time the notice is given' is the date when the notice of invitation to participate was given. This must be the common sense interpretation.
25. The Tribunal determines that on that date, either 8th or 9th February 2022, the qualifying tenant who had to be given notice in this case is Mr Michael Duffy because he was the legal owner of the flat at the time of the service of the notice of intention to participate. This is despite the fact that the flat was transferred to Joshua Rogers on 23rd April 2021.
26. The Tribunal is persuaded by the arguments of the Applicant and relies upon the decision of Judge Professor Robert Abbey in *Malferna House* case reference LON/00AM/LRM/2020/001 in reaching this decision. Judge Abbey points out that the effect of s.27(1) of the Land Registration Act 2002 is that a disposition of a registered estate, such as a transfer ,is

required to be completed by registration and it does not operate at law until the relevant registration requirements are met.

27. Joshua Rogers was not the legal owner but the equitable owner and therefore not entitled to participate on the relevant date. Joshua Rogers did not become the legal owner until 22nd February 2022 when the registration requirements were met. The fact that the Land Register shows that Joshua Rogers interest was registered on 9th February 2022 is a consequence of the Land Registry backdating registration to the time of the receipt of the application. It does not change the legal position that at the time the notice of intention to participate was given the legal owner was Michael Duffy.
28. The Tribunal therefore determines the notice of invitation to participate is valid.

Summary

29. Overall, 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.
30. Therefore, 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

31. 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 the appropriate 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.”
32. 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.

Name: Judge H Carr

Date: 22nd August 2022

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 right 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).