

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – right to manage – time of application of claim for right to Manage – notice of invitation to participate prior to making claim – appeal allowed – Commonhold and Leasehold Reform Act 2002 ss71-80, 84.

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

BETWEEN GATEWAY PROPERTY HOLDINGS LIMITED Appellant

and

6-10 MONTROSE GARDENS RTM COMPANY LIMITED Respondent

Re: 6-10 Montrose Gardens,
Castleford,
West Yorkshire WF10 5LG

Before: Her Honour Judge Walden-Smith

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 2 September 2011

Simon Serota instructed by Wallace LLP for the appellant
The respondent did not appear

No cases referred to.

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DECISION

Introduction

1. This is an appeal against a decision of the Leasehold Valuation Tribunal for the Northern Rent Assessment Panel dated 14 February 2011. Permission was granted by the President on 24 May 2011. The appeal is by way of review.
2. The Appellant appeals the determination of the LVT that the Respondent, 6-10 Montrose Gardens RTM Company Limited, was entitled to acquire the right to manage the premises at 6-10 Montrose Gardens, Castleford, West Yorkshire WF10 5LG (“the Premises”).
3. The appeal is on two grounds:
 - (1) That the application was made out of time and that the LVT erred in determining that the particulars and documents included with the faxed application received on 1 October 2010 were sufficient to enable the application to be determined;
 - (2) No notice to participate complying with the provisions of section 78 of the Commonhold and Leasehold Reform Act 2002 was given prior to the Claim Notice served on 9 July 2010.

If the Appellant succeeds on either or both of these grounds then the Appeal is successful and the determination of the LVT that the Respondent company has acquired the right to manage the Premises must be set aside.

4. Both these matters were before the LVT for consideration and dealt with in the decision dated 14 February 2011 and in the refusal of permission to appeal made by the LVT on 8 March 2011. They involve an interpretation of the relevant provisions of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) and the relevant provisions of the Leasehold Valuation Tribunals (Procedure) Regulations 2003 (“the LVT Procedure Regulations”) with respect to the right to manage.

The Statutory Framework

5. The Right to Manage legislation is set out in Part 2, Chapter 1 of the 2002 Act, sections 71 to 81. The sections relevant to the matters raised in this appeal are as follows:

71 The right to manage

- (1) This Chapter makes provision for the acquisition and exercise of rights in relation to the management of premises to which this Chapter applied by a company which, in accordance with this Chapter, may acquire and exercise those rights (referred to in this Chapter as a RTM company).

(2) The rights are to be acquired and exercised subject to and in accordance with this Chapter and are referred to in this Chapter as the right to manage.

72 Premises to which Chapter applies

- (1) This Chapter applies to premises if –
- (a) they consist of a self-contained building or part of a building, with or without appurtenant property,
 - (b) they contain two or more flats held by qualifying tenants, and
 - (c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises

[sub-sections (2) to (6) sets out various definitions and explanations and need not be recited for these purposes].

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

[sub-section (3) sets out what is not a RTM company; again, there is no need for it to be recited for these purposes].

Section 74 sets out the membership and regulations of RTM companies.

75 Qualifying tenants

- (1) This section specifies where there is a qualifying tenant of a flat for the purposes of this Chapter and, if so, who it is.
- (2) Subject as follows, a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease.

[sub-sections (3) to (7) set out the exceptions to who is not a qualifying tenant, but again do not need to be recited for these purposes]

Sections 76 and 77 set out provisions relating to what is a long lease.

78 Notice inviting participation

- (1) Before making a claim to acquire the right to manage 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 continued in the premises, but
 - (b) neither is nor has agreed to become a member of the RTM company.
- (2) A notice given under this section (referred to in this Chapter as a “notice of invitation to participate”) must –
- (a) state that the RTM company intends to acquire the right to manage the premises,
 - (b) state the names of the members of the RTM company,
 - (c) invite the recipients of the notice to become members of the company,
- and
- (d) contain such other particulars (if any) as may be required to be contained in notices of invitation to participate by regulations made by the appropriate national authority.
- (3) A notice of invitation to participate must also comply with such regulations (if any) about the form of notices of invitation to participate as may be prescribed by regulations so made.
- (4) A notice of invitation to participate must either –
- (a) be accompanied by a copy of the articles of association of the RTM company, or
 - (b) include a statement about inspection and copying of the articles of association of the RTM company.

[Subsection (5) sets out the requirements for inspection and subsection (6) provides that where a person is not allowed to undertake an inspection or given a copy of the articles of association then the notice is to be treated as if its not been given].

(7) A notice of invitation to participate is not invalidated by any inaccuracy in any of the particulars required by or by virtue of this section.

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;

[sub-sections (6) to (9) set out to whom the claim notice is to be sent].

80 Contents of the 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.

[sub-sections (8) and (9) set out further details for inclusion in the claim notice; again these do not need to be recited for these purposes].

84 Counter-notices

(1) A person who is given a claim notice by a RTM company under section 79(6) may give a notice (referred to in this Chapter as a “counter-notice”) to the company no later than the date specified in the claim notice under section 80(6).

(2) A counter-notice is a notice containing a statement either –

- (a) admitting that the RTM company was on the relevant date entitled to acquire the right to manage the premises specified in the claim notice, or

- (b) alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled,

and containing such other particulars (if any) as may be required to be contained in counter-notices, and complying with such requirements (if any) about the form of counter-notices, as may be prescribed by regulations made by the appropriate national authority.

(3) Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection 2(b), the company may apply to a leasehold valuation tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises.

(4) An application under subsection (3) must be made not later than the end of the period of two months beginning with the day on which the counter-notice (or, where more than one, the last of the counter-notices) was given.

6. The provisions relating to the making of an application to the Leasehold Valuation Tribunal are set out in the LVT Procedure Regulations which provide the following.

Particulars of applications

3. (1) The particulars to be included with an application are –
- (a) the name and address of the applicant;
 - (b) the name and address of the respondent;
 - (c) the name and address of any landlord or tenant of the premises to which the application relates;
 - (d) the address of the premises to which the application relates; and
 - (e) a statement that the applicant believes that the facts stated in the application are true.

[sub-paragraphs (2) to (4) are not relevant].

(5) Where an application is of a description specified in paragraph 4 of Schedule 1 (right to manage) the particulars and documents listed in paragraph 4 of Schedule 2 shall be included with the application.

(8) Any of the requirements in the preceding paragraphs may be dispensed with or relaxed if the tribunal is satisfied that –

- (a) the particulars and documents included with an application are sufficient to enable the application to be determined; and
- (b) no prejudice will, or is likely to, be caused to any party to the application.

Paragraph 4 of Schedule 1 is concerned with the right to manage applications, including applications made pursuant to the provisions of section 84 of the 2002 Act.

Paragraph 4 of Schedule 2 sets out the documents that are required to be submitted with the application.

The Factual Background

7. The Respondent RTM company served a claim notice pursuant to the provisions of section 79 of the 2002 Act upon the Appellant landlord on 9 July 2010. That claim was to acquire the right to manage the Premises. Pursuant to the provisions of section 84 of the 2002 Act, a counter-notice was served by the Appellant alleging (under section 84(2)(b)) that the RTM company was not entitled to acquire the right to manage the Premises as the claim notice had been given without a notice of invitation to participate being given to each person required to be given such notice at least 14 days before, contrary to the provisions of section 79 (2) of the 2002 Act. The counter-notice was given on 3 August 2010 and section 84(4) of the 2002 Act provides any application under section 84(3) must be made not later than the end of the period of two months beginning with the day on which the counter-notice was given.

8. In my judgment, as the two month period begins with the day on which the counter-notice was given, the time for making the application expired on 2 October 2010. If I am wrong on that point, the latest date for making the application was 3 October 2010.

9. An application form dated 30 September 2010 was faxed with a covering letter of the same date to the LVT. The fax was received at 10.01 on 1 October 2010 according to the transmission report. That fax would have been within the time constraints of section 84(4). The application did not contain with it any of the documents referred to in paragraph 4 of schedule 2.

10. The hard copy of the application was not received until 4 October 2010. The hard copy of the application contained with it a copy of the RTM company certificate of incorporation and copy memorandum and articles of association; a full list of the names and addresses of the directors and company secretary; a full list of the names and addresses of the members of the RTM company; the address of the registered office of the RTM company and copies of all notices to parties to participate. It did not enclose the claim notice and counter-notice, which are required to be served under paragraph 4(4) of Schedule 2 to the LVT procedure regulations.

11. The hard copy of the application, together with the documentation in support (save for the claim and counter-notice) were not made to the LVT within the time-limit stipulated by section 84(3) of the 2002 Act as it was not received until 4 October 2010. There is a question as to whether that would have complied with the requirements of the 2002 Act and the LVT procedure regulations, as the full requirements of paragraph 4(4) of Schedule 2 had not been satisfied, even if the hard copy had been received in time. However, that is not a matter that concerns me as it is clear, in my judgment, that the hard copy of the application was out of time and therefore could not have been entertained by the LVT.

The First Limb

12. The issue is whether the faxed application could satisfy the requirements of both the 2002 Act and the LVT procedure regulations. The Appellant no longer appears to take a point that the LVT cannot accept applications sent by fax. There is nothing with the LVT procedure regulations which would suggest that fax is an unacceptable method of communication and, without more on this point, I am of the view that fax is an acceptable method of lodging an application.

13. Plainly the faxed application did not fulfil the requirements of paragraph 3(5) as the documents listed in paragraph 4 of Schedule 2 were not included. The wording of paragraph 3(5) makes it clear that it is a positive requirement to include those documents and that the documents are to be included with the application: “shall be included with the application”.

14. The saving provision is contained in paragraph 3(8). As I have set out above, this provides that:

“Any of the requirements in the preceding paragraphs may be dispensed with or relaxed if the tribunal is satisfied that –

- (a) the particulars and documents included with an application are sufficient to enable the application to be determined; and
- (b) no prejudice will, or is likely to, be caused to any party to the application”.

15. This is a discretionary provision – the requirements “may” be dispensed with, but before a tribunal has such a discretion to dispense with or relax the requirements of the remainder of paragraph 3, the tribunal must be satisfied both that no prejudice will, or is likely to be caused to any party to the application (3(8)(b)), and that the particulars and documents included with an application are sufficient to enable the application to be determined.

16. The Appellant landlord does not, and has never sought, to establish that it would be prejudiced by the application. The narrow issue is whether the LVT did in fact have a discretion to exercise on the basis of what was submitted on 1 October 2010 (that is, within the necessary time frame). Were the particulars and documents included with the faxed application on 1 October 2010 “sufficient to enable the application to be determined”?

17. In order for a LVT to determine whether a RTM company has the right to manage the premises, certain information needs to be known. If that information is not known then the LVT cannot, in my judgment, dispense with or relax the requirements of paragraph 3(5) of the LVT procedure regulations, which requires the documents set out in paragraph 4 of schedule 2 to be included with the application.

18. In my judgment, the 2002 Act requires the following particulars and documents before a LVT could be satisfied that it has sufficient particulars and documents to enable the application to be determined.

- (i) Are these premises to which Chapter 1 of Part 2 of the 2002 Act applies (section 72)? Without that information the LVT cannot determine whether a company may acquire and exercise rights in relation to management of premises.
- (ii) Is the company an RTM company within the meaning of section 73? Again, without that information the LVT cannot determine whether the proposed company may acquire and exercise rights in relation to management of premises.
- (iii) Are there the requisite number of qualifying tenants (section 72 and 75)?
- (iv) Are the leases long leases (sections 76 and 77)?
- (v) Have the qualifying tenants been given notice inviting participation (section 78)?
- (vi) Has the claim notice been given to the relevant parties (section 79)?

Without the particulars and documentation to establish the above matters, and a claim notice containing the information set out in section 80, a LVT would not be able to determine the application.

19. Consequently, while paragraph 3(8) can provide a discretion to dispense with the requirement to provide all the documents listed in paragraph 4 of schedule 2, that discretion only arises if there is sufficient to enable the application to be determined. The only document received by the LVT within time was the faxed claim form. That form contains the information as to the name and address of the RTM company and the name and address of the company's representative; and the name and address of the landlord and the landlord's representative; together with the address of the premises. This information does not provide the particulars and documents necessary to enable the application to be determined. The discretion to dispense with the requirements of paragraph 3 of the LVT Procedure Regulations, including the requirements of paragraph 4 of schedule 2, thereby does not arise.

20. I therefore find that the LVT erred in holding that it had a discretion which it could exercise in favour of the applicant company. The discretion did not arise as the particulars and documents submitted with the application made by fax on 1 October 2010 (the only application which was not time-barred) were not sufficient to enable that application to be determined.

The Second Limb

21. The Appellant further contends that the company failed to serve the requisite notice to participate pursuant to the provisions of section 78 of the 2002 Act prior to the Claim Notice served on 9 July 2010.

22. It is accepted by both the Appellant and the Respondent that a notice to participate pursuant to the provisions of section 78 of the 2002 Act had been served prior to the first notice of claim being served under section 79 of the 2002 Act. Section 79(2) provides that the claim

notice may not be given unless each person required to be given notice of invitation to participate has been given such a notice at least 14 days before. There is no statutory maximum period between the invitation to participate and the notice of claim.

23. The claim notice served upon the Appellant on 9 July 2010 was the third claim notice, the first two having been withdrawn or deemed withdrawn. The Appellant contends that in order for that claim notice to be valid pursuant to section 79 of the Act there needed to be a further participation notice served in order for the provisions of section 79(2) of the 2002 Act to be complied with. Plainly, had the identity of those falling within section 78(1) of the 2002 Act altered then it would have been necessary for any new person falling within section 78(1) to be served with a participation notice. There was no such change of identity in this matter.

24. The Appellant contends that new participation notices need to be served under section 78 once there has been a withdrawal or deemed withdrawal of a claim notice on three grounds: (1) that the legislation clearly intends every qualifying tenant has an entitlement to participate in the RTM; (2) the legislation clearly envisages the possibility of a claim being withdrawn, or to be deemed to be withdrawn, and in those circumstances there is uncertainty if a notice inviting participation is not specific to each claim made; (3) each notice inviting participation is claim specific.

25. The LVT concluded that it was not necessary to serve a further participation notice if the identity of those entitled to a notice had not changed. The only time requirement was that the notice of invitation to participate being given at least 14 days before the notice of claim to acquire the right. There was no maximum time for the participation notice to be valid and consequently the withdrawal or deemed withdrawal of a claim would not adversely affect the validity of the invitation to participate. Further, there is nothing within the provisions of the 2002 Act that provides for a participation notice to be withdrawn or deemed withdrawn upon the withdrawal or deemed withdrawal of the notice of claim.

26. Clearly the right to manage legislation provides for every qualifying tenant to have an entitlement to participate in the RTM company. That entitlement to participate is protected by the requirement that the invitation to participate must be served at least 14 days before the notice of claim. In my judgment, a new invitation to participate will need to be served only if, subsequent to a withdrawal or deemed withdrawal of a notice of claim, the nature of the new claim is such that the existing notice to participate no longer complies with the provisions of section 78. In the same way that a further invitation to participate would need to be served if the identity of those entitled to participate in the RTM had changed, a further invitation to participate in the RTM would need to be served if there was an alteration in the new claim so that there was no longer compliance with section 78. If there was no such alteration in the identity of those entitled to participate or the nature of the new claim then, on a straightforward interpretation of the statutory provisions, there is no requirement to serve a further invitation to participate. An alternative interpretation would lead to entirely unnecessary and costly duplication.

27. I therefore find that the LVT was correct in concluding that there was no necessity for a new invitation to participate to be served simply because an earlier notice (or notices) had been withdrawn or deemed withdrawn.

Conclusion

28. I therefore find that the Appellant succeeds on the first limb of the appeal and fails on the second limb. That is sufficient for the Appellant to succeed on the appeal and the determination of the LVT that the RMT company had a right to manage from 9 July 2010 must be set aside.

Dated 8 September 2011

Her Honour Judge Walden-Smith