UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Number: LRX/128/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT– right to manage – construction of terms of legal charge – right to serve counter-notice under the right to manage legislation – necessity to withdraw earlier notice – whether earlier notice invalid by failure to serve copy on qualifying tenants – appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN

ALLEYN COURT RTM COMPANY LIMITED **Appellant**

and

MICHA'AL ABOU-HAMDAN **Respondent**

Re: Alleyn Court,
123 Sussex Gardens
London W2 2RA

Before: Her Honour Judge Walden-Smith

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on
28 February 2012

Amanda Eillidge instructed by William Heath & Co on behalf of the Appellant
Stan Gallagher instructed by way of public access on behalf of the Respondent

The following cases are referred to in this decision:

Sinclair Gardens Investments (Kensington) Limited v Oak Investments RTM Company Limited LRX/52/2004,
R v Immigration Appeal Tribunal, ex parte Jeyeanthan [1999] 3 All ER 231.
9 Cornwall Crescent Ltd v Kensington LBC [2006] 1 WLR 1186
Poets Chase Freehold Co Ltd v Sinclair Gardens Investments (Kensington) Ltd [2008] 1 WLR 768.

DECISION

Introduction

1. This is an appeal by way of review from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel dated 19 August 2010. Permission to appeal was refused by the LVT but granted by the President on 15 December 2010. In granting permission to appeal, the President made the observations that each of the three grounds raised is reasonably arguable.

2. The three grounds raised in the Appellant's statement of case are:

(i) that, upon the true construction of the mortgage deed, the Respondent was not authorised to serve a counter-notice on behalf of the headlessees;

(ii) that the First Notice was not a valid notice and therefore did not need to be withdrawn prior to the service of the Second Notice;

(iii) that the Second Notice was valid as the requirement to serve a notice of invitation to participate could be dispensed with and ought to have been in the circumstances of the case.

3. I have been assisted in this case by the focused oral and written submissions from Counsel on behalf of the Appellant and Counsel on behalf of the Respondent.

Preliminary Matters

Requirement for an additional Respondent

4. An issue was raised in the papers before me as to whether there is any necessity to add Nawal Abou-Hamdan as an additional Respondent to the proceedings as she was registered as the freehold owner of Alleyn Court, 123 Sussex Gardens, London W2 2RZ ("Alleyn Court") on 8 June 2011. It was agreed between the parties and endorsed by me that there was no requirement to add Nawal Abou-Hamdan. The decision is made in rem and she will be bound by the decision in any event.

The Third Ground of Appeal

5. The third ground of appeal has been conceded by the Respondent. It is accepted that the requirement to serve on the tenant of flat 24, Alleyn Court a Notice of Invitation to Participate as is set out in section 78 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") is not mandatory and that it could properly have been dispensed with unless there was prejudice suffered by Mr Hamidi and Miss Journo. Reliance is placed upon *Sinclair Gardens Investments (Kensington) Limited v Oak Investments RTM Company Limited* LRX/52/2004, a decision of the President made under the written representations procedure in which he applied the principles enunciated by Lord Woolf MR in *R v Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All ER 231.

6. It is accepted by the Respondent that there was no such prejudice so that the Notice of Invitation to Participate should properly have been dispensed with. However, the concession on ground 3 of the appeal does not dispose of the appeal. The Second Notice is only effective if the Appellant succeeds on establishing that there was no requirement to withdraw the First Notice on the basis that it was invalid.

7. In order to succeed on the Appeal, the Appellant has to succeed on ground 1 (did Mr Hamdan have authority to serve a counter-notice); or ground 2 (was the Second Notice invalid because the First Notice was valid and had not been withdrawn prior to the service of the Second Notice). This is an appeal by way of review.

The Inherent Jurisdiction of the High Court

8. The Respondent's Counsel contends that if the Respondent is found not to be competent to serve a counter-notice then the LVT (and by extension the Tribunal) could not declare that the Appellant had acquired the right to manage under the 2002 Act as the LVT's jurisdiction is dependent upon the service of a negative counter-notice by virtue of the provisions of section 84(3) of the 2002 Act. In which case, he argues, the issue of entitlement to acquire a right to manage under the 2002 Act would fall to be adjudicated by the High Court under its inherent jurisdiction.

9. I cannot say that I agree with this proposition as section 90 of the 2002 Act provides the date which is the acquisition date where a RTM company acquires the right to manage any premises. It provides that where there is no dispute about entitlement, the acquisition date is the date specified in the claim notice under section 80 (7) and that there is no dispute about entitlement if no counter-notice is given under section 84 (see section 90(3)(a)) or the counter-notice or (where more than one is so given) each of them, contains a statement admitting that the RTM company was on the relevant date entitled to acquire the right to manage the premises specified in the claim notice (see section 90(3)(b) and section 84(2)(a)).

10. In any event, I was informed by both Counsel at the commencement of the hearing that it was not a matter that I need concern myself with.

The Background

The Application to the LVT

11. An application was made to the leasehold valuation tribunal by the Appellant, Alleyn Court RTM Company Limited, pursuant to the provisions of section 84(3) of the 2002 Act for a determination that it was, on the relevant date, entitled to acquire the right to manage Alleyn Court.

12. The hearing was spread over 3 days: 26 April 2010 and 7 and 11 June 2010. On 26 April, the Respondent was represented by Mr J O'Mahoney and by Mr Gallagher on the June dates. Mr Gallagher appears on the appeal on behalf of the Respondent. Mr Fleming, of the solicitors William Heath & Co appeared throughout on behalf of the Appellant before the LVT and he has instructed Ms Eillidge to appear at the Upper Tribunal (Lands Chamber) (hereinafter referred to as "the Tribunal").

The Property

13. At the time of the application to the LVT, Alleyn Court comprised 24 flats. 23 of the flats had already been let on long leases and, on 6 November 2009, a long lease of the basement flat, flat 24, was created. This long lease was registered at the Land Registry on 15 April 2010 under title number NGL9010087.

The Respective Interests in the Property

14. The freehold interest in Alleyn Court is owned by the Church Commissioners for England; the headlease was registered in the joint names of Mr Aboo Reyhana and Miss Michelle Journo ("the Headlessees") with Miss Journo holding her legal interest as nominee for Mr Hamidi, who was himself made bankrupt on 11 February 2009. As I have noted above Namal Abou-Hamdan became the registered headlessee of Alleyn Court on 8 June 2011.

15. Pursuant to a mortgage deed dated 30 November 2005 ("the mortgage"), the Respondent is the registered mortgagee of the headlease. He obtained possession of the headlease by an order made by consent on 6 February 2008.

Validity of the Claim Notice (the second ground of appeal)

16. A claim notice was served by the Appellant on 9 December 2009 ("the First Claim Notice") pursuant to the provisions of section 79 of the 2002 Act. The Appellant subsequently considered that the First Notice was invalid as it had not been given in accordance with the provisions of section 79 of the 2002 Act (as copies had not been

given to any of the qualifying tenants in accordance with the provisions of section 79(8) of the 2002 Act).

17. The Appellant served a second claim notice on 15 December 2009 ("the Second Claim Notice"). The Second Claim Notice was in identical form as the First Claim Notice. Copies of the Second Claim Notice were served upon the qualifying tenants in accordance with the provisions of section 79(8) of the 2002 Act.

18. The Respondent contends that the Appellant's notice was not invalid and that, by virtue of the provisions contained in section 81(3) of the 2002 Act, the Appellant is not entitled to rely upon the Second Claim Notice. It is the Respondent's case that the First Claim Notice continued in force until after the service of the Second Claim notice as there was no withdrawal of the First Claim Notice prior to 15 December 2009

19. The Appellant contends that the First Claim Notice was not effective and that there was therefore no need to withdraw the First Claim Notice prior to service of the Second Notice. This is the second ground of appeal.

The Respondent's Standing to Serve a Counter-Notice (the first ground of appeal)

20. The First Claim Notice and the Second Claim Notice were both served upon the Commissioners and the Headleases. The Commissioners served counter-notices in respect of both the First Claim Notice and the Second Claim Notice admitting the Appellant's right to manage. The Headlessees did not serve a counter-notice but, by email dated 17 December 2009, Mr Hamadi stated that *"we acknowledge the notice and confirm the acceptance of the right to manage and totally welcome the proposal."*

21. If, as the Appellant contends, only the Commissioners and the Headleases have the locus to serve a counter-notice then, by virtue of the provisions of sub-section 90(2) and sub-section 90(3) of the 2002 Act, the RTM company would acquire the right to manage on the date specified in what the Appellant submits is the valid claim notice, that is the Second Claim Notice.

22. However, the Appellant served the First Claim Notice and the Second Claim Notice upon the Respondent, it is said as a matter of courtesy, and the Respondent served counter-notices disputing the right to manage. The LVT determined that the Respondent was authorised by virtue of the provisions of paragraph 10.3 of the Mortgage Deed dated 30 November 2005 to serve a counter-notice pursuant to the provisions of section 84(1) of the 2002 Act. This is the first ground of appeal.

Ground 1: The "Authorised by the Landlord" Issue

23. The LVT determined that the mortgagee in possession is not to be considered to be a landlord for the purposes of the 2002 Act as there is nothing within the Act to provide for that to happen and the LVT rejected the Respondents contentions based upon other legislation. This determination has not been the subject of a cross-appeal on the part of the Respondent. The sole issue is, therefore, whether clause 10.3 of the legal charge gives the lender the standing to serve a counter-notice.

24. Clause 10.3 of the legal charge dated 30 November 2005 provides that:

> "The Borrower hereby irrevocably appoints the Lender and their substitutes and separately any such receiver as aforesaid severally to be the attorney of the Borrower for the Borrower in the name and on behalf and as the act and deed of the Borrower to execute seal and deliver and otherwise perfect and to do all such assurances instruments deeds acts matters and things as the Lender or such receiver shall in their or his absolute discretion think fit for the full exercise of all or any of the powers confirmed by this clause to which may be deemed expedient by the Lender or such receiver or in connection with any sale lease or disposition realisation or getting in by the Lender or any such receiver the Borrower covenants with the Lender and separately with any such receiver to ratify and confirm any deed assurance agreement document at and thing an all transactions entered into by such attorney or by the borrower at the instance of such attorney in the exercise or purported exercise of the powers conferred by this Deed aforesaid."

25. There has not been any appointment of a receiver, but this sub-clause appoints "the Lender and their substitutes and separately (my emphasis) any such receiver" to be the attorney of the Borrower; and as attorney of the Borrower to act in the name of and on behalf of the Borrower. The counter-notices served by the Respondent, both the counter-notice to the First Notice of Claim and the counter-notice to the Second Notice of Claim were signed by the Respondent as "duly authorised Agent" or the leasehold owners: Aboo Reyhan Hamidi and Michelle Journo. No point was taken by the Appellant with respect to whether in those circumstances the counter-notices were being given "in the name of" the Borrower. I am content that counter-notices in this form were being given in the name of the Borrower.

26. The issue is, therefore, whether clause 10.3 gives the Lender (and their substitutes) the standing to do all such "acts matters and things" which in their or his "absolute discretion" think fit for the full exercise of any of the powers confirmed by this clause to which may be "deemed expedient" by the Lender in connection with any sale lease or disposition realisation or getting in by the Lender.

27. The Appellant contends that clause 10 is principally concerned with the right of the Lender to appoint and remove a receiver and the power of the receiver. Certainly, clause 10.1 gives the Lender the power to appoint a receiver with all the powers contained in

the Law of Property Act 1925, without the restrictions contained in section 103 of that Act, and "without limitation" additional specified powers, clause 10.2, as is standard, provides that the receiver is the agent of the borrower and not the Lender and it is the borrower who is responsible for the remuneration of the receiver and responsible for his acts and defaults, and clause 10.5 deals with the power to remove the receiver; but I do not accept that the entirety of clause 10 is dealing with the power to appoint and remove a receiver. Clause 10.3, as I have already set out, deals with the appointment of the Lender (and substitutes) as attorney of the borrower and separately the appointment of any receiver as attorney of the borrower. Clause 10.4 provides that the power of attorney granted by clause 10.3 is irrevocable and the consideration for such appointment is part of the security constituted by the Legal Charge.

28. As irrevocably appointed attorney for the borrower, the Lender (and substitutes) is given power in extremely wide terms "to do all such … acts matters and things as the Lender … shall in their or his absolute discretion think fit for the full exercise of all or any of the powers confirmed by this clause to which may be deemed expedient by the Lender … or in connection with any sale lease or other disposition realisation or getting in …". In my judgment, this sub-clause gives the Lender the power to take any steps deemed expedient by the Lender in the protection of his security.

29. The Appellant contends that the acquisition of the right to manage by the Appellant could not impact upon the Respondent's right to grant sub-leases or other interests in the property; and while the sub-clause would give the Respondent, as Lender, the right to serve a notice, for example, to evict a squatter – that having an immediate adverse impact upon the property – it does not give power to serve a counter-notice under the 2002 Act.

30. Clause 10 does not expressly mention the 2002 Act, and it could have done, the mortgage deed having been entered into in 2005. However, it does not mention any specific Acts, such as the various Planning Acts which could properly have been mentioned. Plainly any inclusion of specific Acts can give rise to further complications in construing a deed as a failure to mention one particular Act, when others are expressly mentioned, could give rise to a quite proper construction that the Act not mentioned is not one that is included. In my judgment, the fact that the Commonhold and Leasehold Reform Act 2002 is not mentioned does not assist in construing the meaning of sub-clause 10.3.

31. The Appellant further contends that as the management functions of a RTM company are defined in section 96(5) as "functions with respect to services, repairs, maintenance, improvements, insurance and management" they could not possibly be something that could have an impact upon the Respondent's right to grant subleases or, as put more widely, the Respondent's right to protect his security. I do not accept that contention. The management of a block can have a serious and immediate effect upon the Lender's ability to protect its security. A badly-run block is likely to diminish in value and the attractiveness of any flat will drop. A well-run block is likely to hold its value or increase in value and the attractiveness of any flat might increase. There is,

therefore, a clear interest in the Lender ensuring that there is good management of the block.

32. It is to be remembered that the right to manage under the 2002 Act is not predicated on establishing any shortcomings on the part of the landlord (as was the case under the Landlord and Tenant Act 1987) and, if the statutory requirements are satisfied then the RTM company will gain the right to manage. This is based upon an assumption that leaseholders will all have a similar interest in relation to their investment and in relation to the value for money which they want to get. That assumption is not always going to be proved to be accurate as some leaseholders may wish to have extremely high levels of management; others may wish to make short-term financial savings. However, the statutory scheme is that if the requirements are satisfied then the right to manage will be obtained by the RTM company. Part of the statutory requirements is that a person who is given a claim notice by a RTM company under section 79(6) may give a counter-notice pursuant to the provisions of section 84. The persons who must be given a claim notice are the landlord, any other party to a lease other than a landlord or tenant; or a manager appointed pursuant to the provisions of part 2 of the LTA 1987.

33. In my judgment, the Respondent falls within section 79(6) and therefore is entitled to serve a counter-notice under section 84 by virtue of the provisions of clause 10.3 of the mortgage deed, which irrevocably appoint him as attorney to the Borrower (the landlord) and entitles him to do all acts matters and things (including the service of notices) that in his absolute discretion thinks fit.

34. Ground 1 of the appeal therefore fails and I uphold the decision of the LVT on this ground.

Ground 2: The "Failure to Withdraw" Issue

35. The First Claim Notice was served by the Appellant on 9 December 2009. The Appellant subsequently considered that the First Notice was invalid as copies had not been given to any of the qualifying tenants in accordance with the provisions of section 79(8) of the 2002 Act.

36. The Appellant served the Second Claim Notice on 15 December 2009 in identical form as the First Claim Notice. Copies of the Second Claim Notice were served upon the qualifying tenants in accordance with the provisions of section 79(8) of the 2002 Act.

37. Section 81(3) of the 2002 Act provides that: "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". Consequently, if the First Claim Notice was valid and in force, the Second Claim Notice served on 15 December 2009 would have no effect.

38. A claim notice can be withdrawn by a RTM company at any time prior to acquiring the right to manage the premises by giving a notice of withdrawal pursuant to the provisions of section 86 of the 2002 Act. In order for the notice of withdrawal to be effective it must be given to each person within section 86(2) namely the landlord under the lease; a party to the lease other than the landlord or tenant; a manager appointed under part 2 of the 1987 LTA (that is all the persons who are to be served with the notice of claim to acquire the right to manage under section 79(6)) and the qualifying tenants of a flat contained in the premises (that is each person who is to be given a copy of the claim notice pursuant to the provisions of section 79(8) of the 2002 Act).

39. While the Respondent wrote to the Appellant's solicitors on 8 January 2010 seeking confirmation that the First Notice of Claim has been withdrawn or superseded by amendment, and on 13 January 2010 served two counter-notices depending upon whether reliance was being placed upon the First or Second Notice of Claim, there was nothing which could be interpreted as a withdrawal of the First Notice of Claim pursuant to the provisions of section 79 of the 2002 Act until the email from the Appellant's solicitors on 14 January 2010 stating that "we confirm that the second Notice supersedes the first."

40. The Appellant contends that there was no need to withdraw the First Notice as the First Notice of Claim was invalid. Support for the proposition that an invalid notice does not need to be withdrawn is contained in the decision of Auld LJ in *9 Cornwall Crescent Ltd v Kensington LBC* [2006] 1 WLR 1186 and the decision of Morgan J in *Poets Chase Freehold Co Ltd v Sinclair Gardens Investments (Kensington) Ltd* [2008] 1 WLR 768. Both these cases were concerned with notices served pursuant to the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") but, in my judgment, the same principle applies. The significant difference, for these purposes, between the 1993 Act and the 2002 Act, is that if a notice is withdrawn then a year has to pass before a further notice can be served. In the case of the 2002 Act there is no such prohibition against the service of a further notice, once the first is withdrawn.

41. A principle in the interpretation of the enfranchisement legislation, is that its purpose is to confer benefits upon tenants:

> "When considering the proper approach to construction of this type of legislation, it is important to remember that, whilst its effect is expropriatory in nature, that is a necessary consequence of its main purpose, which was to confer benefits on tenants. It is not, therefore, appropriate to construe it strictly in favour of landlords whose property is being subjected to compulsory acquisition, but, as Millett LJ said in Cadogan v McGirk [1996] 4 All ER 643, 648, "fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy." (Per Auld LJ in 9 Cornwall Crescent.)

42. With respect to the withdrawal of notices, Auld LJ held as follows:

> "If, for some reason, the notice is agreed or held to be invalid for want of compliance with the requirements of section 13 [of the 1993 Act], there would be no bar to the tenants giving a valid notice without delay. And, if by the operation of some provision of Chapter I of Part I of the Act, it is withdrawn or deemed to have been withdrawn or otherwise ceases to have effect, then the only inhibition on the giving of a further notice by the tenants in respect of the same premises is, as provided by section 13(9), read with section 13(11), that they must wait a year from the date of withdrawal or of it ceasing in some other way to be of effect before doing so."

43. In applying *9 Cornwall Crescent*, Morgan J in *Poets Chase v Sinclair Gardens* held that:

> "Speaking generally, if a mandatory contractual or statutory provision requires a party to give a notice in a particular form in order to achieve a result identified in the contract or statute and if a purported notice given by that party fails to comply with the mandatory contractual or statutory provision, then the normal position is that the notice has no legal effect"

44. Consequently, if the First Claim Notice was invalid it would have no legal effect and would not need to be withdrawn prior to the Second Claim Notice being effective. However, if the First Claim Notice was not invalid then it would have been extant at the time of the Second Claim Notice which could not, by virtue of the provisions of the 2002 Act, have effect. Two claim notices could not be valid at the same time.

45. The issue, therefore, is whether the First Claim Notice was valid. There was nothing on the face of the notice to make it invalid. Indeed, it was in the same form as the Second Claim Notice served on 15 December 2009. The Appellant says that it was invalid as a result of the failure to serve copies of the First Claim Notice on the qualifying tenants pursuant to the provisions of section 79(8) of the 2002 Act.

46. Section 80 of the 2002 Act provides that the Claim Notice must comply with various requirements, including 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. It is only those who are given a notice under section 79(6) who may give a counter-notice under section 84. Section 81(1) provides that a claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80.

47. The First Claim Notice was therefore valid on its face and was properly served upon those who must be served with the Claim Notice under section 79(6) who are entitled to give a counter-notice under section 84 of the 2002 Act. The only fault was in the Appellant failing to serve a copy of the First Claim Notice upon the qualifying tenants pursuant to the provisions of section 79(8), but that antecedent failure to comply with a mandatory requirement did not make the notice invalid as it was open to the Appellant to serve copies of the First Claim Notice upon the qualifying tenants at a later

stage as the Appellant was not restricted by the "not earlier than one month" requirement of section 80(6).

48. I accept the Respondent's contentions that the First Claim Notice was a valid notice, being valid on its face, and that it was validly served upon those who must be served with the notice pursuant to section 79(6). The failure to serve a copy of the notice upon the qualifying tenants does not retrospectively make the valid notice invalid, as the claim notice had been given and it remained in force until withdrawal pursuant to the provisions of section 81(4). Withdrawal did not happen until 14 January 2010, after service of the Second Claim Notice which could not have effect as a result of the provisions of section 81(3) of the 2002 Act.

49. The Respondent raised a possible failure to comply with section 79(8) as a possible ground for contesting the right to manage claim in his counter-notice to both the First Claim Notice and the Second Claim Notice. This objection was part of a "splatter gun" approach whereby the Respondent stated that, as he could not satisfy himself that various provisions had been fulfilled, he was not admitting that there was a right to manage. I do not consider that this is sufficient to give rise to an estoppel whereby the Respondent is now not entitled to contest that the First Claim Notice was in fact valid and ought to have been withdrawn prior to the . It was always for the Appellant to determine whether the particular claim notice was valid or not and the raising of section 79(8) in the counter-notice to the Second Claim Notice did not give rise to any such estoppel argument.

50. Ground 2 of the appeal therefore fails and I uphold the decision of the LVT on this ground as well as on ground 1.

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Dated 7 March 2012

Her Honour Judge Karen Walden-Smith