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Residential
Property
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DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 84(3) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Ref: LON/00AZ/LOA/2006/0005

Property:	12 Amersham Road, London, SE14 6QE
Applicant:	Amersham Road RTM Company Ltd
Represented by:	Buy Your Own Freehold Ltd
Respondent:	Sinclair Gardens Investments (Kensington) Ltd
Represented by:	P Chevalier and Co Solicitors
Application Date:	18 August 2006 (received 21 August 2006)
Paper Hearing Date:	24 October 2006

Members of the Leasehold Valuation Tribunal:

Mrs J S L Goulden JP
Miss M Krisko BSc (EstMan) BA FRICS
Mr R D Eschle JP

LON/00AZ/LOA/2006/0005

PROPERTY: 12 AMERSHAM ROAD, LONDON, SE14 6QE

BACKGROUND

1. On 18 September 2006, a Pre-Trial Review was held in respect of an application dated 18 August 2006 made by the Applicant, Amersham Road RTM Company, seeking the right to manage 12 Amersham Road, London, SE14 6QE ("the Property") pursuant to Section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("the Act").

2. The Respondent, Sinclair Gardens Investments (Kensington Ltd), had challenged the right to manage the property on the basis that evidence of the statutory requirements pursuant to Sections 78 and 79 of the Act had not been supplied to the Respondent.

3. The issues before the Tribunal to be determined at the Paper Hearing were set out in the Tribunal's Directions of 18 September 2006 as follows:-

   (a) Was the Applicant required to disclose evidence of its compliance with Section 79(8) of the Act to the Respondent?

   (b) The date on which the right to manage, if so acquired, is to commence;

   (c) Penal costs under Section 12 paragraph 10 of the Act.

4. Written submissions were received from Buy Your Own Freehold Ltd on behalf of the Applicant, Amersham Road No 12 RTM Company Ltd, and P Chevalier & Co, Solicitors, on behalf of the Respondent, Sinclair Gardens Investments (Kensington) Ltd.

5. The salient parts of the submissions and the Tribunal's determinations are given under each head.

   (a) Was the Applicant required to disclose evidence of its compliance with Section 79(8) of the Act to the Respondent?

6. The Applicant's representative in its written submissions stated:-

   "The Respondent has no right pursuant to Section s79 (8) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") to require the Applicant to produce evidence that the Notice of Claim was given to each person who was a qualifying tenant of the flat in the premises on the relevant date.

   The Applicant in response to the Respondent's letter dated 19th July, 2006 sent the company's register of members as requested pursuant to section 356 (3) of the 1985 Companies Act.

   The Respondent's rights subsequent to the service of the Notice of Claim are set out in section 83 of the 2002 Act and are limited to

access to the building for the purposes of confirming its eligibility pursuant to the 2002 Act.

The Respondent's position could not possibly have been prejudiced by the non-production of the information on which its case lies. This is a case of a building with two flats with all three leaseholders being original members of the RTM company.

The freeholder has a lengthy history of rejecting Claim Notices on spurious grounds and this is no different."

7. The Respondent's solicitors, in their written submissions stated:-

"The Notice of Claim was served on 17th July 2006

The Applicant was requested to produce relevant documentation evidencing the right to manage on 19th July, 27th July and 3rd August

A further reminder was sent on 15th August stating that the Respondent would have no alternative but to deny the right to manage unless the requested documentation was produced

The Counter Notice was served on 18th August 2006

The Application to the Leasehold Valuation Tribunal exhibits copies of all the requested documents save for proof of compliance with Section 79 (8) of the Act. They were clearly in the possession of Buy Your Own Freehold at the time.

The Scheme of the Act

Section 79 (8) Commonhold and Leasehold Reform Act 2002 provides that the Notice of Claim shall be given to each person who was a Qualifying Tenant of a flat in the premises on the relevant date.

Our letter of 15th August is clear. It requested evidence as to compliance with Section 78 and 79 or the Respondent would have to proceed on the basis of non compliance.

The Respondent then obtained evidence itself of all matters save for compliance with Section 79 (8) of the Act.

The Respondent tried to save costs by obtaining documents which were in the Applicant's possession. In default it had no alternative but to duplicate expense by getting the documents itself but it could not obtain proof of service of a copy of the Notice of Claim pursuant to Section 79 (8) of the Act.

The Applicant declined and/or failed to produce 3 copy letters with the result that the Respondent was unable to admit the right to manage. All that was required after the Respondent obtained duplicates of the Official Copy Entries and Memorandum and Articles of Association was

copies of the 3 letters from the Applicant evidencing service of a copy of the Notice of Claim on the Qualifying Tenants and the right to manage would have been admitted. The Respondent's letter to the Tribunal in connection with the Pre Trial Review clearly stated that the right to manage would be admitted upon production of evidence. A copy of the letter was sent to the Applicant. It is not clear as to why the letters were not simply produced at the Pre Trial Review or shortly afterwards.

There is no express statutory provision requiring producing of evidence. Section 84 (3) however requires the Leasehold Valuation Tribunal to determine the right to manage. How can Leasehold Valuation Tribunal determine that the RTM company is entitled to exercise the right to manage without evidence?

Buy Your Own Freehold apparently has a policy of always applying to a Tribunal on the first possible date regardless of whether settlement can be achieved. . . .

This is the first occasion on which we have encountered a RTM company refusing to supply evidence. None of the decisions to which the Applicant refers found the Counter Notices were spurious. A valid argument was put forward based on a breach of the Act but in each instance the Tribunal decided that a breach of the Act did not invalidate the Notice. Does the Tribunal now go even further and find that the Respondent is not even entitled to investigate the right to manage and the Landlord has to proceed on the basis that the Company has complied with the Act without investigation?

The Civil Procedure Rules protocols all require evidence to be produced before litigation is commenced. Clearly there is no statutory requirement, for example, to produce evidence of a debt to a prospective Defendant if requested to do so but the Claimant proceeds at its own risk as to costs.

Even now all the Applicant has to do is to produce the evidence which it did not present at the Pre Trial Review or subsequently."

8. Section 79(8) of the Act states that **"a copy of the claim notice must be given to each person who on the relevant date is a qualifying tenant of a flat contained in the premises"**.

9. The Notice of Claim clearly set out the names of the three persons having an interest in the right to manage application. The landlord must of course have been aware that there were only two flats in the building (from its own knowledge and also from Land Registry entries copies of which were provided by the Applicant) and therefore there were no other persons on whom Notices should or could have been served. It is a matter of common sense. The Respondent concedes that there is no express statutory provision requiring production of evidence.

10. Further, the landlord's solicitors confirmed that they had applied for and received the Memorandum and Articles of Association of the right to manage company, which again showed the names of the same three persons as set out in the Notice of Claim, namely the tenants from each of the two flats in the property.

11. It is only where there are qualifying tenants who are not members of the right to manage company, that one should consider whether a Notice of Invitation to Participate should be given. Since all the qualifying tenants in this case are members of the right to manage company, the question of Notices of Invitation of Participate is superfluous.

12. The Tribunal is also critical of the Applicant's representative. No proper explanation has been provided as to why the Applicant's representative failed to answer correspondence from the Respondent's solicitors.

13. The Tribunal determines that the Applicant was not required to disclose evidence of compliance with Section 79(8) of the Act, and the Notice of Claim is valid.

14. In the view of the Tribunal, if both sides had been more co-operative, it may well have been the case that a paper hearing to determine this matter may not have been required at all.

(b) The date on which the right to manage is to commence

15. The Applicant's representative in its written submissions stated:-

> *"The date upon which management control should pass to the leaseholders should be as set out in the Claim Notice ie 23rd November, 2006. The Respondent should not benefit from retaining management control beyond a date which the 2002 Act intended, simply by contesting the Claim Notice."*

16. The Respondent's solicitors in their written submission stated:-

> *"The Respondent has already stated in its letter to the Leasehold Valuation Tribunal in connection with the Pre Trial Review that it will admit that the Applicant is entitled to exercise the right to manage on being supplied with the evidence of compliance with Section 79 (8) of the Act.*
>
> *Section 84 (5) provides that if a person by whom a Counter Notice is given agrees that the company is so entitled the company acquires the right to manage. The Leasehold Valuation Tribunal therefore does not need to make such an Order if evidence is produced.*
>
> *It is hoped that the Applicant will on reading these Submissions simply send copies of the letters serving the Notice of Claim on the Qualifying Tenants to the Respondent. If produced, the right to manage will be admitted and no further costs need to be incurred."*

17. In view of the Tribunal's determination that the Notice of Claim was valid, the Tribunal determines that the date on which the right to manage is to commence is 23 November 2006.

Penal Costs

18. The Applicant's representative in its written submissions stated:-

> *"The Respondent has no right whatsoever to the information sought, and is basing its rejection on the non-provision of this information.*
>
> *The Respondent continues to assert that the leaseholders had not the right on the relevant date to take over the management, and the Respondent has not produced any evidence to support its rejection. Furthermore in this case, the Respondent cannot possibly have been prejudiced and indeed nor could the leaseholders (and the Respondent is able to confirm this latter point by checking the Claim Notice complied with the 2002 Act).*
>
> *In these circumstances the Respondent's actions are frivolous in the extreme and appear to be motivated by a desire to retain management control beyond a date which the 2002 Act requires it to be handed over to the leaseholders."*

19. The Respondent's solicitors in their written submissions stated:-

> *"Costs can only be awarded if the Respondent has behaved frivolously, vexatiously, disruptively, or otherwise unreasonably. The Respondent has not done so.*
>
> *The correspondence prior to the service of the Counter Notice clearly sets out the Respondent's position.*
>
> *The Respondent has solely tried to save costs by obtaining documents already in the possession of the Applicant. In default it obtained separate Official Copy Entries and the Memorandum and Articles of Association. Once the Official Copy Entries and the Memorandum and Articles of Association were obtained it was clear that a Notice Inviting Participation was unnecessary.*
>
> *All the Applicant had to do was produce the letters serving copies of the Notice of Claim on the Qualifying Tenants* ***before*** *issuing the Application. Thereafter, if they had been produced at the Pre Trial Review there would be no need for these Submissions or any Submissions in response.*
>
> *In any event no details of the Applicant's costs have been provided for analysis by the Respondent."*

20. Schedule 12 paragraph 10 of the Act states:-

> **"(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).**
>
> **(2) The circumstances are where –**
>
> **(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with the regulations made by virtue of paragraph 7, or**
>
> **(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.**
>
> **(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed –**
>
> **(a) £500, or**
>
> **(b) such other amounts as may be specified in procedure regulations.**
>
> **(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provisions made by any enactment other than this paragraph."**

21. The power to award penal costs is a draconian measure and should be exercised with reluctance.

22. This Tribunal considers that both sides have been unreasonably intransigent and the views of the Tribunal are as set out in paragraph 14 above.

23. The Tribunal declines to make an Order under Schedule 12 paragraph 10 of the Act.

CHAIRMAN .....

DATE 30 October 2006

JG