RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Commonhold &Leasehold Reform Act 2002

Case Number: CHI/29UN/LRM/2009/0004

In the matter of Dickens Court, Harold Road, Cliftonville, Margate, CT9 2HN

Applicant:

Dickens Court RTM Company Ltd

Respondent:

Fairhold Homes (No15) Ltd

Date of Hearing: 8th February 2010

Date of Decision: 14th February 2010

Tribunal: **Mr. S. Lal LLM (Barrister, Chair)**
Mr. R. Athow FRICS
Mrs. L. Farrier

History

1. Provisional Directions were issued in this matter on 16th July 2009.

2. The matter was listed for Pre-Trial Review on the 20th August 2009. On that occasion, both parties attended and Directions were made for the mutual supply and service of documents relating to the substantive hearing of this matter. Both parties were notified that the target hearing date was to be 27th October 2009 and all documents to be relied upon to be served by the 14th October 2009. Considering the issues in this matter the Tribunal directed that the matter would be dealt with without an inspection of the subject premises.

3. The matter was set down for hearing on a date in October 2009. The matter did not proceed on that occasion because of the large volume of material placed before the Tribunal shortly before the hearing and in contravention of the above Directions. Further Directions were issued on that occasion for the eventual disposal of the matter.

4. The Tribunal were informed in advance of the present hearing by Mr. Dudley Joiner that any application in respect of other premises called Riverbourne Court was to be withdrawn and the only matter before the Tribunal concerned Dickens Court.

Representation

5. The Applicant Company was represented by Mr. Dudley Joiner and the Respondent Company by Mr. Serota, Solicitor, Wallace LLP. Mr. Joiner made legal submissions as well as giving evidence upon which he was questioned. Mr. Serota on behalf of his client made legal submissions as well as calling Ian Rapley, Company Secretary for the Respondents to give evidence. The Tribunal are pleased to note that both parties had complied with Directions and the Tribunal were in receipt of written submissions. Mr. Joiner placed amended written submissions before the Tribunal on the day of the hearing which were the same as an earlier document supplied in accordance with Directions but with references to the now defunct Riverbourne Court matter helpfully excised. The salient parts of the written and oral submissions are referred to below as and when necessary, the Tribunal has had regard to the totality of the documentary and oral material presented to it and the record of proceedings in coming to its decision.

The Legal Issue

6. The Applicant seeks a Determination from the Tribunal pursuant to s.84(3) of the Commonhold & Leasehold Reform Act 2002 (the "Act") that they were entitled to the right to manage and intrinsic to this whether the s.78 Notice under the Act was given to all those persons as required to be given under the terms of the Act.

7. No dispute is raised before the Tribunal as to the contents or otherwise of the Notice or the ability of the Applicant Company to issue such a Notice.

The Applicants Case

8. In the Applicants Outline Argument, the Applicant bases its argument on three distinct submissions. These are in the order of priority placed by the Applicant and are summarised as follows: firstly that the head-lease and under-lease are a sham and Respondent should not be entitled to receive a s.78 Notice by virtue of sham tenancy. Secondly that it is contrary to the intention of Parliament to allow a landlord to become a qualifying tenant until after the acquisition date by virtue of s.74 (1)(b) and thirdly (and this must be in the alternative) that the in any event a s.78 Notice was sent to the Respondent albeit by accident.

9. In respect of the first of the above arguments, the Applicant says that instead of retaining the freehold, the Respondent granted a lease on a flat (in this case it is Flat 72, the wardens flat) to an associate company called Littonace at a peppercorn rent. Littonace then leased the Flat back to the Respondent at a grossly inflated rent which is collected by the Respondent as part of the service charge by the managing agent Peveral, another associate company. Mr. Joiner advanced the argument that this is a naïve deception designed to defraud retired leaseholders of monies that they should not be required to pay.

10. In respect of the second argument raised, Mr. Joiner submits that the wording of s.74 (1) (b) is clear to the extent that Parliament did not intend the landlord to become a member of the RTM company until after the acquisition date and he seeks to adduce a Pepper v Hart submission so as to divine the intention of Parliament in this regard.

11. Lastly he submits and not withstanding the above, that a s.78 Notice was sent to the Respondent because a routine search of the register suggested that the Respondent was the owner of Flat 8 (both parties seem to agree that Flat 8 did not in fact exist, as its original floor space had been subsumed within another structure). He refers to an earlier meeting he had with Ian Rapely where he alleges that Mr. Rapely had said that the registered address for the Respondent which is the same as that for Littonace is like a "call centre" and "a lot of stuff does disappear, yes, it is very frustrating."

The Respondent's Case

12. This is summarised as follows; Mr. Serota submitted that in respect of any statutory interpretation issues the Act could not be clearer and that s.78 requires that a RTM company must give a Notice inviting Participation to each qualifying tenant of a flat contained in the premises. He then stated that s.75 defined what a qualifying tenant is and in respect of the present situation, he cited with approval s.75 (6) that where a flat is being held under two or more long leases, the superior tenant is not the qualifying tenant. In the instant case, he stated that the qualifying tenant could only be the Respondent Company and that the Applicant had incorrectly served the Notice on Littonace. He said that the Act could not be clearer and that the s.74 (1) (b) point raised by Mr. Joiner above, far from showing a statutory ambiguity, only demonstrated that a landlord when acting in that capacity should be constrained but a qualifying tenant who happened also to be a landlord was entitled to the same notice as any other qualifying tenant. He disputed the need to engage in a Pepper v Hart exercise to divine any Parliamentary intention.

13. In respect of whether a Notice was in any event given, he called Mr. Ian Rapley to give evidence, who after confirming the contents of his witness statement, admitted that he may have described the registered address as being like a call centre but denied that things got lost. He admitted that it may take some days for letters to find their eventual destination but that the registered address was able to cope with letters addressed to the various incarnations of the Respondent's company name, the instant Respondent being Fairhold (15). He admitted that all correspondence in respect of Littonace or Fairhold (in any of their incarnations) would eventually be placed before him or one other senior employee. Mr. Serota queried with the Tribunal how the alleged s.78 Notice to the Respondent came about and that it was odd that it was the one thing that had become "lost" out of the all the documents sent to the Registered address.

The Tribunal's Decision

14. The starting point for the Tribunal's analysis must be the wording of the statute itself. That requires at s.78 that 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.....".

15. The above is as much a forensic issue as it is a construction of law. The word "given" in the context of s.79 (1) is not defined in the Act although the Tribunal are aware of a decision in Re 88 Berkley Road [1971] Ch 648, where in connection with a notice of severance under a completely different Act, the court held there is no distinction between "given" and "served." It seems to the Tribunal that as the Respondent is the "qualifying tenant" (without at this stage making any observation as to the fides of this arrangement) for the purposes of the current application, that Notice under the Act can be given by service at its registered offices. In this case, all agree that this is Molteno House 302 Regents Park Road, N3 2JX. If notice had been sent to this address than the Tribunal would satisfied that Notice has been given as required by the Act. It has certainly not been advanced by the Respondent that Notice needs to be "received." It seems to the Tribunal that it must begin by resolving the factual issue in dispute. In doing so it may render the other issues which are strictly legal redundant, in other words if the Applicant can show that Notice3 was given, than the matter will end there.

16. The burden and standard of proof is on the Applicant to the civil standard of a balance of probabilities. The Tribunal are satisfied by the evidence before it that the Applicant's did give Notice to the Respondent's registered address. The Tribunal accepts that this was almost certainly, as accepted by Mr. Joiner, done accidentally. The Tribunal are satisfied that matters in respect of the fictitious Flat 8 did alert the Applicant Company to give Notice to the Respondent Company. No criticism is made of the contents of the Notice, the Tribunal notes that that would not in any event be fatal (s.78 (7).

17. The criticism made by the Respondent is that they did not receive it but this rather misses the point, the Act does not require receipt. In fact the Tribunal finds, as Mr. Rapley accepted under cross -examination that Moreno House may well have been described by him in the past as having been like a "call centre" with about 100 different companies using this as their Registered Office address. Mr. Rapley pointed to correspondence addressed to the various incarnations of Fairhold and Littonace as eventually finding themselves to him, sometimes after a few days delay. The picture created is not one of efficiency due to the potential for misdirecting post once it has arrived at Moreno House and leaves open the distinct possibility for confusion and misplaced post.

18. The Tribunal finds in all probability that the Respondent was given Notice in respect of the fictitious Flat 8. It does not any event have to speculate what happened to the Notice, whether it was lost internally or misfiled because that is essentially irrelevant as the Act does not require actual receipt. When the Notice was served, the Respondent would have been assumed to have had the Notice required under the Act. It would be absurd to argue that the Respondent's interests as qualifying tenant for Flat 72 would have been nullified or compromised, not only does the Tribunal find established as a matter of fact that Notice was given to the Respondent Company but Littonace was also given Notice. Clearly from the evidence of Mr. Rapley, it would be either him or one other that would process the post for both entities. Mr. Rapley acknowledged that he had received the notice served on Fairhold Homes (no15) Ltd.

19. The statutory purpose behind S.78, namely that any qualifying party is not left out of the right to manage process at the outset, has been fulfilled by the Tribunal accepting the Applicant's case that Notice was given to the Respondent. The Respondent may well raise the issue of proof of service. Be that as it may, the Tribunal are perfectly entitled to accept the evidence of Mr. Joiner as capable of discharging the burden of proof in the absence of proof of service as it was made clear to the Tribunal that at that time, the Applicant Company may not have used Registered or Recorded Delivery Post. In the light of the above the Tribunal does not need to go on to consider whether the lease and under lease arrangement was a "sham" as advanced by the Applicant nor whether the landlord would ever be entitled to receive such Notice albeit in a different capacity prior to acquisition . These matters become irrelevant because the Tribunal finds on the balance of probabilities that Notice was given to the Respondent in the correct form as required by the Act.

20. For the above Reasons the Tribunal concludes that the Applicant Company was entitled to acquire the right to manage the premises on the relevant day.

21. The Tribunal makes no Order under Schedule 12 of the Act as requested by the Applicant; the Respondent cannot be described as meeting the high threshold test of acting frivolously, abusively, disruptively or otherwise unreasonably. The matter has been decided ultimately by the Tribunal resolving a factual dispute as to the giving of a Notice and this was a matter wholly appropriate to the way these proceedings have been conducted by both sides.

22. Having regard to the guidance given by the Land Tribunal in the Tenants of Langford Court v Doren LRX/37/2000, the Tribunal considers it just and equitable to make an order under s.20C of the Landlord and Tenant Act 1985. The Applicant has to a large part succeeded in respect of his central submission as to the giving of Notice. The Tribunal directs that no part of the Applicant's relevant cost incurred in the application shall be added to the service charges as a just and equitable outcome in light of its substantive decision.

Chairman.....