FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/LRM/2013/0031**
Property	:	**8 & 9 Estreham Road, SW16 5NT**
Applicant	:	**8 & 9 Estreham Road RTM Company Limited**
Representative	:	**Canonbury Management**
Respondent	:	**Assethold Limited**
Representative	:	**Conway & Co Solicitors Mr Gurvits from Assethold present at the hearing**
Type of Application	:	**Right to Manage – Commonhold and Leasehold Reform Act 2002**
Tribunal	:	**Mr M Martynski (Tribunal Judge) Miss M Krisko BSc(EstMan) BA FRICS**
Date of Hearing	:	**21 May 2014**

DECISION

Decision summary

1. The Applicant's application for a declaration that it has acquired the Right to Manage is dismissed.

Background

2. The Building in question at 8 & 9 Estreham Road ('the Building') has been converted so as to contain five self-contained flats.

3. The Applicant's Claim Notice claiming the Right to Manage the Building is dated 1 October 2013.

4. The Respondent's Counter-Notice challenging the Right to Manage is dated 1 November 2013.

5. The Applicant's application to the tribunal seeking a declaration that it had acquired the Right to Manage is dated 5 December 2013.

6. Directions were given on the application on 4 February 2014. Those directions set the matter down to be decided at a hearing to take place on 22 April 2014.

7. The hearing set for 22 April did not go ahead and instead, by agreement between the parties, the matter was put on the Paper Track to be decided in the week commencing 21 April.

8. As papers were not received in time for the tribunal to consider the application on the papers, further directions were given on 28 April. Those directions provided that the case would be decided on the papers during the week commencing 19 May 2014. The directions went on to provide that if a hearing were requested, that hearing would take place on 21 May 2014.

9. On or about 15 May 2014 the Respondent, who was concerned as to a delay in receiving the Applicant's Statement of Case, requested that the application be decided at a hearing on 21 May rather than on the papers.

10. Upon being informed that a hearing would take place on 21 May, Canonbury Management, on behalf of the Applicant, requested an adjournment of the hearing on the basis that its representatives had prior commitments (unspecified). The matter was put before a Procedural Judge who refused the application for an adjournment on the basis that the Applicant had been aware since the directions given on the 28 April 2014 that the matter would be decided in a hearing on 21 May and that the Applicant had accordingly had sufficient notice of the possibility of a hearing on 21 May.

11. After being informed of the decision to proceed with the hearing, the Applicant's agents sent a further letter to the tribunal dated 16 May repeating its request for an adjournment.

12. At the hearing on 21 May, Mr Gurvits, a representative of the Respondent Company was in attendance. There was no appearance on behalf of the Applicant.

13. At the outset of the hearing we reconsidered the Applicant's request for a postponement. Before considering that request we established with Mr Gurvits that the only information he wished to supply to the

tribunal by way of his personal attendance at the hearing was to clarify the significance of documents from the Land Registry that were already in the bundle of documents prepared by the Applicant for the decision.

14. We discussed with Mr Gurvits the issue as to whether the Building was in fact one building or two separate buildings (as argued by the Respondent in its Statement of Case). In this discussion we had regard to the photograph of the Building supplied to us by the Applicant that had been marked by the Applicant demonstrating how flats within the Building spanned both sides of the Building, to support its contention that the Building was one building, not two.

15. Mr Gurvits was unable to provide any evidence to support his contention that numbers 8 & 9 were two separate buildings (the Building has only one Land Registry title).

16. Given the lack of evidence, Mr Gurvits at this point conceded the Respondent Company's objection to the application which had relied on this point (section 72(1) Commonhold and Leasehold Reform Act 2002) which was set out in paragraphs 1 and 2 of its Statement of Case.

17. We decided to proceed with the hearing because, apart from the matters recorded above, Mr Gurvits had nothing further to add. After making the submissions referred to above, Mr Gurvits left the hearing and we proceeded to decide the application on the arguments as had already been set out in each party's written Statement of Case and the papers prepared by the Applicant Company.

The grounds relied upon by the Respondent and the Tribunal's decisions

18. Section 78(1) of the Commonhold and Leasehold Reform Act 2002 ('the Act') provides that an RTM Company, before making a claim to acquire the Right to Manage, must serve any qualifying tenant in the building (who is not and who has not agreed to become a member of the RTM Company) with a notice inviting participation.

19. Section 79(8) of the Act provides that a copy of any Claim Notice must be given to a qualifying tenant.

20. Section 75(6) of the Act provides that where a flat is being let under two or more long leases, a tenant under any of those leases which is superior to that held by another is not the qualifying tenant of the flat.

21. The Respondent alleged that the Applicant had failed to establish that the qualifying tenant of flat 8A in the building had been served with a notice to participate or with a copy of the Claim Notice.

22. In the papers before us were two extracts from the Land Registry relating to flat 8a. The first extract showed a lease of flat 8a dated 18 March 2009 for a period of 125 years from 29 September 2007. The parties to that lease are shown as Blue Door Investments Ltd and the Bank of Ireland. The proprietorship register shows the proprietor as the Bank of Ireland. The extract has a schedule of leases and it shows an under-lease of the property of 25 years from 18 March 2009 and gives the title number of that lease.

23. The second extract shows the under-lease referred to in the previous extract. More details of the lease are given. The parties to the lease are the Bank of Ireland and a Mr Mohammed Khan. In the charges register to that extract it is shown that there is a charge on the title in favour of the Bank of Ireland.

24. From these two extracts one can clearly see that in respect of flat 8A, the Bank of Ireland has a long lease of 125 years and out of that lease it has created a sublease of 25 years to Mr Khan which has approximately 20 years left to run.

25. Applying section 75(6) one must conclude that the qualifying tenant of flat 8a is and was at all material times Mr Khan.

26. According to the Respondent, the Applicant could only demonstrate that it had served the Bank of Ireland, not Mr Khan with the invitation to participate and the Claim Notice.

27. The documents seen by the tribunal only included letters to the Bank of Ireland, not Mr Khan. In its Statement of Case the Applicant said as follows:-

> It is not accepted that there was any further requirement to serve any notice of invitation on the owner of flat 8A, which was Mr Khan, prior to the flat being repossessed by the Bank of Ireland.
>
> We can confirm that the Applicant's director had requested that the invitation notice be served on the owner at the premises and at the address of the bank and likewise with the claim notice. On our computer system where the invitation and claim notices are stored against each flat, there is only room for a single invitation notice and a single claim notice to be stored and the one which has been stored and later provided to the respondent's solicitors.
>
> A copy of the second invitation notice for flat 8A, is attached and clearly identifies the owner of the flat in question. We can confirm that a copy of this notice was issued to the Bank of Ireland at the address contained within the registry view also. It is simply the case that we cannot hold, on our systems, two invitation notices against the flat in question and so the copy of this letter was not provided to the respondent's solicitors. The conclusion that they had drawn is incorrect.

28. It seems to us that there was clearly some confusion on the part of Applicant as to who the qualifying tenant of flat 8a is for the purpose of acquiring the Right to Manage. There was no evidence before us

that the Bank of Ireland had reposed the flat from Mr Khan or that his lease had been brought to an end by the Bank or anyone else.

29. There was no direct evidence before us of the service of any notice upon Mr Khan and no documents from which service could be presumed.

30. The only conclusion that we can draw is that the Applicant has failed to establish that the necessary notices were served upon Mr Khan.

31. The question for the tribunal is set out inthe Lands Tribunal decision of *Sinclair the Gardens investments (Kensington) Ltd v Holt Investments RTM Limited* LRX/52/2004. In that case the tribunal rejected the proposition that a failure to observe the requirements of section 78(1) of the Act was a fatal to an application by an RTM company to acquire the Right to Manage. The tribunal stated:-

> The right approach here, I believe, is to consider whether the statutory provisions have been substantially complied with, and whether such prejudice has been caused as to undermine rights to manage the process as a whole.

32. In *Assethold Limited v 7 Sunny Gardens Road RTM Company Limited* [2013] UKHT 0509 (LC), a decision of the Upper Tribunal (Lands Chamber), the tribunal confirmed that the burden of satisfying a tribunal that a defect in compliance with the statutory procedure set out in the Act has not caused prejudice, falls on the party asserting that the Right to Manage has been successfully acquired.

33. In *7 Sunny Gardens*the Upper Tribunal, having made the decision thatthere had been a failure to serve a notice inviting participation and a Claim Notice by the RTM company, was invited to remit the matter back to the Leasehold Valuation Tribunal from whom the appeal was made for consideration of the question of prejudice. The Upper Tribunal declined to take that course of action, Martin Roger QC the Deputy President making the decision, said as follows:-

> It was open to the respondent [the RTM Company], forewarned of the opponent's contentions [that there had been a failure to serve the notice of invitation and the Claim Notice] by its statement of case, to produce evidence that there was no prejudice..... the respondents did not take that opportunity and there seems to me to be no reason why the tribunal should give it a further opportunity to justify the original defective procedure. Where an RTM company leads no evidence and presents no argument which would enable a first tier tribunal, or the tribunal on appeal, to conclude that no relevant prejudice had been suffered, the appropriate course of action will usually be for the request for a determination of entitlement to acquire the rights to manage under section 84(3) to be dismissed.

34. Accordingly we consider that the same approach should be adopted in this case. The Applicant in the application before us was warned of the Respondent's objections and has failed to deal with those and has

failed to address the issue of prejudice. Accordingly that leads to the dismissal of its request for a determination that it has acquired the Right to Manage.

35. A further ground of objection was set out in the Respondent's Statement of Case but this was relied upon only in the eventuality of this tribunal not accepting its objections in respect of service of the notice inviting participation and the Claim Notice and accordingly we do not need to deal with that further objection.

Mark Martynski, Tribunal Judge
9 June 2014