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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BG/LRM/2017/0025 & 0026 & 0027**
Properties	:	**Apollo Building, Galaxy Building, Orion Point and Nova Building, London E14**
Applicants	:	**Apollo Building Owners RTM Company Limited, Galaxy Building and Orion Point Owners RTM Company Limited and Nova Building Owners RTM Company Limited**
Respondents	:	**Proxima GR Properties Limited (First Respondent) and Firstport Property Services Limited (Second Respondent)**
Type of application	:	**Right to Manage**
Tribunal member	:	**Judge P Korn** **Mrs H Bowers MRICS**
Date of decision	:	**31st August 2017**

DECISION

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Decisions of the Tribunal

The applications are refused. The Applicants were not entitled on the relevant date to acquire the Right to Manage in respect of any of the three Properties.

The applications

1. This application is in fact three separate applications which are being considered together, as they relate to neighbouring properties and the issue is the same in each case (as is the identity of the Respondents).

2. Each of the Applicants seeks a determination pursuant to section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("**the Act**") that on the relevant date it was entitled to acquire the Right to Manage in respect of the relevant Property.

3. In relation to each Property, by a claim notice dated 28th April 2017 the relevant Applicant gave notice to the First Respondent that it intended to acquire the Right to Manage. By counter-notices dated 26th May 2017 the First Respondent denied that the Applicants were entitled to acquire the Right to Manage in respect of any of the Properties. The sole ground for the First Respondent's challenge was that the claim notices were not served on the Second Respondent as management company under each of the leases. The Applicants then applied to the Tribunal for a determination that they were entitled to acquire the Right to Manage in respect of each of the Properties.

Paper determination

4. The Tribunal has identified the case as being suitable for a determination on the papers alone without a hearing, and neither party has requested an oral hearing. Accordingly the case is being determined on the papers alone.

Applicants' case

5. The Applicants in their submissions note that the right-to-manage process is a 'no fault' process in that the leaseholders do not need to demonstrate failure on the part of the management company in order to be entitled to the right to manage. They state that they merely need to comply with the relevant legislation and they submit that they have done so.

6. The Applicants accept that the Second Respondent is the management company under each of the leases but state that they did in fact give the claim notice to the Second Respondent in compliance with the requirements of the Act.

7. The Applicants have set out a chronology of events, stating (inter alia) that on 28th April 2017 they gave a claim notice (presumably in respect of each Property) to the First Respondent and to the Second Respondent. Elsewhere in written submissions they make the following statement: *"The Applicants have fully complied with the above provisions by:- a) Giving notice of the claim which was made on 28 April 2017 by:- ..."*, and they then go on to list various actions, including *"giving a copy of the same to the Second Respondent's Development Manager (Shamiso Gondo) at the Second Respondent's office on The Odyssey Development. As Shamiso Gondo was absent from work on the date in question, the notice was left with a member of his Concierge staff (Mark Chase). This fulfils the requirement to give the notice to the Second Respondent".*

8. The Applicants also state that they later sent a copy of the claim notice direct to the Second Respondent. From the Second Respondent's response we infer that this was the copy of the claim notice which was accompanied by a covering letter dated 5th May 2017.

9. The Applicants note the Respondents' contention that the failure to state the name of the Second Respondent on the face of the claim notice meant that the claim notice was not 'given' to the Second Respondent but they reject this contention, stating that there is nothing in section 80 of the Act to indicate that this is a requirement. Similarly, the Applicants do not accept the proposition that merely giving the Second Respondent a copy of the claim notice falls foul of the requirement in section 79(6) to give to each relevant person "the claim notice".

10. In addition, the Applicants argue that the Respondents are being disingenuous in their challenge and that the challenge has been mounted for purely tactical reasons.

11. The Applicants also argue that section 84(1) (relating to counter-notices) has not been complied with by the Second Respondent and that it is therefore estopped from challenging the claim notice. As we understand it, the point is that the Second Respondent has not itself served a counter-notice.

12. The Applicants have also referred the Tribunal to what they consider to be the relevant case law, and this will be referred to later.

Respondents' case

13. The First Respondent states that claim notices must be served in accordance with section 79 of the Act and that, in particular, the Applicants were required to serve the claim notice on the Second Respondent by virtue of the provisions of section 79(6). The First Respondent does not accept that the claim notice was given to the

Second Respondent on 28th April 2017 and states that the Applicants only sent the Second Respondent a copy and that the Second Respondent did not receive it until 22nd May 2017.

14. The Second Respondent repeats the First Respondent's position, noting that the wording of section 79(6)(b) is mandatory. It contrasts the requirement in section 79(6) to give "the claim notice" to the persons specified therein with the requirement in section 79(8) only to give a "copy" of the claim notice to qualifying tenants. In this regard it notes that the claim notice is not addressed to the Second Respondent and states that it follows that the claim notice was not 'given' to the Second Respondent.

15. Specifically in relation to the copy of the notice accompanied by a letter dated 5th May 2017 (which it states was not received until 22nd May), the Second Respondent states that this copy of the notice did not comply with section 80(6) as it did not *"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"*. As a result of late receipt of the notice the Second Respondent was not in a position to serve a counter-notice.

16. In addition, the Second Respondent comments that all of the management functions under the leases are reserved to it and therefore that it was particularly important for it to receive the claim notice in a timely manner.

17. The Second Respondent has also provided a witness statement from its in-house solicitor Azmon Rankohi. In relation to the Applicants' statement on 11th August 2017 that they left a copy of the claim notice with the concierge staff of the Second Respondent's development manager, he characterises this as a remarkable assertion to make at such a late stage in the proceedings. He does not accept (on behalf of the Second Respondent) that the notice was served as stated and he notes that the Applicants do not state the date on which this alleged service of a copy of the notice took place, nor who effected delivery nor at what time. No copies of the documentation allegedly served have been provided and there are no covering letters and no receipt or acknowledgement of receipt.

18. Mr Rankohi further states that the relevant member of the concierge team was not authorised to accept receipt of claim notices or other legal documents and that, in any event, service at an office based on a development is not sufficient service.

Tribunal's analysis

Relevant excerpts from the Act

19. Under section 79(1) of the Act, *"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".*

20. Under section 79(6) of the Act, *"The claim notice must be given to each person who on the relevant date is – (a) landlord under a lease of the whole or any part of the premises, (b) party to such a lease otherwise than as landlord or tenant, or (c) a manager ...".*

21. Under section 79(8) of the Act, *"A copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises".*

22. Section 80 of the Act lists various requirements with which the claim notice must comply, including, by virtue of section 80(6), the requirement that *"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".*

23. Under section 81(1) of the Act, *"A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80".*

24. Under section 84(1) of the Act, *"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)".*

Requirement to give claim notice to Second Respondent

25. It is clear from section 79(6)(b) of the Act that the Applicants were obliged to give the claim notice to the Second Respondent (as well as to the First Respondent), and the Applicants accept this.

Notice or copy notice

26. The Respondents state that the Second Respondent only received a copy of the claim notice and that section 79(6) requires it to receive "the" claim notice. We do not accept that this is a correct basis for determining that the Applicants are not entitled to exercise the right to

manage. Whilst it is true that, unlike section 79(6), section 79(8) refers specifically to a "copy" of the claim notice, we do not accept that this is as significant as the Respondents suggest. The reference in section 79(6) is to the claim notice in the singular, and taken literally this requirement would be extremely difficult to comply with whenever there was more than one person or organisation meeting the criteria contained in section 79(6). The Applicants would have needed to give "the" claim notice to the First Respondent and then attempted to retrieve it from the First Respondent in order then to give it to the Second Respondent. In our view, therefore, it is sufficient where there is more than one person or organisation meeting the criteria contained in section 79(6) to give the original to one party and a copy to the other party (or each of the other parties if more than one).

Second Respondent not named on claim notice

27. The Respondents argue that the claim notice was not given to the Second Respondent because the Second Respondent was not named on the notice. We do not accept this. Section 80, which itself is subject to the provisions of section 81(1), does not specify this as a requirement. In any event, it is hard to see how the Second Respondent could realistically have been prejudiced by not being specifically named on the claim notice.

Whether the claim notice was given to the Second Respondent on 28th April 2017 (or thereabouts)

28. We note the parties' respective submissions on this point, including Mr Rankohi's witness statement, and on the balance of probabilities we prefer the Respondents' evidence on this point. The Applicants' evidence is not wholly clear on this issue, the phraseology of their statement of case being somewhat ambiguous. It is not clear to us, for example, precisely what the Applicants are saying was given to whom on 28th April 2017.

29. Even it we were to assume that the Applicants are stating that they gave a copy of the claim notice to the Second Respondent's concierge on 28th April 2017, they have not provided any evidence to support this assertion. In our view the contents of Mr Rankohi's witness statement – Mr Rankohi being a solicitor and his having signed a statement of truth – cast some doubt on the accuracy of the Applicants' evidence on this point, and on the balance of probabilities we do not accept that a copy of the claim notice was given to the concierge on or around 28th April 2017.

30. In any event, we agree with the Second Respondent that leaving a copy of a claim notice with the concierge of a development managed by the party entitled to receive the claim notice is not sufficient service to satisfy the requirement to give that claim notice to that party. The

Applicants had no reason to suppose that the concierge had authority to accept service, and (even assuming that they did hand him a copy of the notice) they did not take the elementary step of establishing whether he had authority. Nor, seemingly, did they obtain or try to obtain a receipt, and nor did they do anything to follow up until much later.

Copy notice allegedly sent to Second Respondent on 5th May 2017 (but according to the Second Respondent received on 22nd May)

31. The issue in relation to this copy of the notice is one of timing. Section 80(6) states that the claim notice *"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"*.

32. Section 81(1) states that *"A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80"*, which at first sight might appear to indicate that none of the requirements of section 80 are such that non-compliance invalidates the claim notice. In our view this cannot be what section 81(1) means, and we consider that the word "particulars" should be construed narrowly and that the intention of the legislation is to avoid a claim notice being invalidated by virtue of specific details being inaccurate, for example a mistake as to the length of term for which the lease is stated to have been granted. The requirement in section 79(6), on the other hand, that the notice must specify a date by which the counter-notice needs to be served which is at least a month after the date on which notice of the claim is given, seems to us to be a fundamental requirement.

33. The intention of the legislation, in specifying the period of a month, must have been to allow the recipient of the claim notice that period of time in which to consider the claim notice and to consider whether and – if so – on what basis to challenge it. As manager of the Properties, the Second Respondent clearly has the primary interest in relation to the management of the Properties. Even if the copy notice was received close to 5th May 2017 the Second Respondent would have had significantly less than a month to consider the matter, but the Second Respondent's evidence – which on the balance of probabilities we accept – is that the claim notice was not received until 22nd May 2017, leaving the Second Respondent very little time to consider the matter.

The case law cited

34. The Applicants have cited the case of *R v Soneji (2005) UKHL 49*, seemingly as authority for the proposition that the distinction between mandatory and directory requirements is an artificial one and is not absolute. However, first of all *Soneji* is a criminal case and secondly it does not follow that Parliament in this case did not intend non-

compliance to render the notice invalid. In our view material non-compliance with section 80(6) is sufficiently fundamental that Parliament did intend material non-compliance to render the claim notice invalid.

35. The Applicants have also cited the case of *Natt v Osman (2014) EWCA Civ 1250*, which is authority for the proposition that the word "must" does not – detached from the statutory scheme as a whole – throw any particular light on whether the legislature intended non-compliance to result in invalidity. Again, though, in the present case in relation to the relevant statutory scheme our view is that material failure to comply with the requirements of section 80(6) was intended to result in the notice being rendered invalid. The legislation gives the recipient of the notice a certain amount of time to consider it, and there is good reason to believe that Parliament intended recipients of such notices to be able to object to their validity where they had received much less than the requisite month's notice. This is particularly so because, whilst it is indeed a no-fault process, it still needs to contain the appropriate safeguards to allow a manager sufficient time to object to its powers of management being removed.

36. The Applicants also refer to the very recent Court of Appeal decision in *Elim Court v Avon Freeholds (2017) EWCA Civ 89*, but in our view this case is of more assistance to the Respondents' position. Lewison LJ states that where the notice or missing information is of critical importance in the context of the scheme the non-compliance with the statute will generally result in the invalidity of the notice, and this Court of Appeal decision relates specifically to the validity of an RTM notice. He then goes on to quote with approval the statement of the Deputy President in *Natt v Osman* (see above) as follows: *"It seems to me quite clear that the acquisition of the right to manage under the 2002 Act falls into the second category of procedures ... i.e. those which confer a property or similar right on a private person, for which compliance with the strict requirements of the statutory scheme is essential and substantial compliance is simply not good enough."*

37. The Applicants also quote from the case of *Avon Freeholds v Regent Court (2013) UKUT 213* but although it relates to the Act we do not consider that the point being relied on assists the Applicants in this case.

38. In conclusion, we do not accept that the case law cited by the Applicants supports their position, and instead we consider that it supports the contrary view that a failure to give nearly as much notice to a mandatory recipient of a claim notice will invalidate that notice.

Estoppel

39. The Applicants argue that the Second Respondent is estopped from objecting because it did not itself serve a counter-notice. We do not accept this. A counter-notice was served by the First Respondent and in our view there is no reason in principle why the First Respondent should not be entitled to raise the points which it has raised. The fact that the Second Respondent has not also served a counter-notice does not render invalid the objections raised by the First Respondent. In other words, the Second Respondent does not need to object because the First Respondent has already done so.

The argument that the Respondents have been disingenuous

40. We do not accept this argument on the part of the Applicants. Whilst it is possible that the Respondents' objections are purely tactical, the Respondents are entitled to make their objections and in our view (to the extent, if at all, that this is a necessary criterion) there is sufficient evidence that the Second Respondent was or could have been prejudiced by the late service of the claim notice that these are proper objections to have made.

Decision

41. In conclusion, the Applicants have not given the claim notice to the Second Respondent in accordance with the Act and the Applicants are therefore not entitled to acquire the Right to Manage in respect of any of the Properties.

Name: Judge P Korn **Date:** 31st August 2017

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then

look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.