



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case Reference : LON/00AL/LRM/2018/0013

Property : Seren Park Gardens, Greenwich,
London SE3 7RP

Applicant : Seren Park Gardens RTM Co Ltd

Respondent : Sanhall GR Ltd

Representative : Estates & Management Ltd

Type of Application : Right to Manage

Tribunal : Judge Nicol
Mr PS Roberts DipArch RIBA

**Date and Venue of
Hearing** : 18th July 2018
10 Alfred Place, London WC1E 7LR

Date of Decision : 23rd July 2018

DECISION

Decision of the Tribunal

The Tribunal has determined that the Applicant's Notice of Claim is not invalidated by their failure to have served a Notice Inviting Participation on the lessee of one flat and the Right to Manage may proceed.

Relevant legislation is set out in an Appendix to this decision.

The Tribunal's reasons

1. By claim notice dated 1st February 2018, the Applicant, whose members are 122 out of 218 qualifying tenants, sought to exercise the right to manage Seren Park Gardens. On 6th March 2018 the Respondent served a counter-notice alleging non-compliance with various sections of the Commonhold and Leasehold Reform Act 2002 (“the Act”), in particular section 79(2). At the hearing held on 18th July 2018 the parties, represented by Mr Dudley Joiner, a director of the Applicant company, and Ms Eileen Fingleton, a solicitor with Estates & Management Ltd, both accepted for the purposes of determining this application that the Applicant had failed to serve a Notice Inviting Participation on the lessee of one flat, number 192A (Ms Fingleton did not seek to pursue other issues which had been raised in the Respondent’s statement of case). The issue was whether this failure invalidated the subsequent Notice of Claim or not.
2. Under section 78(1) of the Act, before making a claim to acquire the right to manage any premises, a RTM company must give notice to each person who at the time when the notice is given is the qualifying tenant of a flat contained in the premises but neither is nor has agreed to become a member of the RTM company. The Applicant fully intended to do that but were led into an innocent mistake. A flat was added to the development that was not included in the original plans and so was not originally registered at the Land Registry. It was initially registered under the number 219 but on 20th July 2015 the Royal Borough of Greenwich served a notice requiring its designation to be number 192A. The number was changed on the Land Registry entry for the leasehold interest but not the freehold interest. The Applicant could have discovered this with sufficient investigation but they missed it and failed to serve the requisite Notice Inviting Participation on the lessee of that one flat in accordance with section 78(1).
3. Ms Fingleton argued that the Applicant’s failure was fatal to their claim because section 79(2) states that the Claim Notice may not be given without the Notice Inviting Participation having been given at least 14 days earlier. Further, she relied on the judgment of Martin Rodger QC, Deputy President, in *Triplerose Ltd v Mill House RTM Co Ltd* [2016] L&TR 23.
4. The leading authority on the subject of the effect of failures to comply with the RTM requirements is *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2018] QB 571 in which the Court of Appeal considered *Triplerose*. The relevant parts of Lewison LJ’s judgment are as follows:

50 *Osman v Natt* is the most recent authoritative consideration of the applicable principles. It is binding on us for what it decided. In analyzing the cases Sir Terence Etherton C drew a distinction between two broad categories, at para 28 :

“... (1) those cases in which the decision of a public body is challenged, often involving administrative or public law and judicial review, or which concern procedural

requirements for challenging a decision whether by litigation or some other process, and (2) those cases in which the statute confers a property or similar right on a private person and the issue is whether non-compliance with the statutory requirement precludes that person from acquiring the right in question.”

51 In the first category, substantial compliance could be good enough. But in the second category he said, at para 31 :

“... The Court of Appeal cases show a consistent approach in relation to statutory requirements to serve a notice as part of the process for a private person to acquire or resist the acquisition of property or similar rights conferred by the statute. In none of them has the court adopted the approach of “substantial compliance” as in the first category of cases. The court has interpreted the notice to see whether it actually complies with the strict requirements of the statute; if it does not, then the court has, as a matter of statutory interpretation, held the notice to be wholly valid or wholly invalid ...”

52 The outcome in such cases does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by non-compliance on the particular facts of the case: see para 32. The intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole: see para 33. Where the notice or the information which is missing from it 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. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely ancillary, the notice may be held to have been valid: see para 34. ...

53 The first issue that arises under this head is whether a claim notice which, if effective, would transfer the right to manage from the landlord to the RTM company falls within the first or the second of the two broad category of case to which Sir Terence Etherton C referred, or whether it falls outside each of those categories. ...

54 In *Triplerose Ltd v Mill House RTM Co Ltd* [2016] L & TR 23 the UT (Martin Rodger QC, Deputy President) considered this question. ...

55 Having referred to a number of cases including *Osman v Natt* the Deputy President said, at para 33:

“It seems to me to be quite clear that the acquisition of the right to manage under the 2002 Act falls into the second category of procedures considered by the Chancellor in *Osman v Natt* 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. Although it is true that no interest in land is created or transferred by the acquisition of the right to manage, the same policy of providing certainty in relation to the existence, acquisition and transfer of property interests is fully engaged in the circumstances I have described in para 12 above.”

56 I agree. However, it does not follow that if a case falls within the second category every defect in a notice or in the procedure, however, trivial, invalidates the notice. As Sir Terence Etherton C pointed out even if there is no principle of substantial compliance the court must nevertheless decide as a matter of statutory construction whether the notice is “wholly valid or wholly invalid”.

5. Essentially, Ms Fingleton understood the Deputy President to be saying that any default was fatal to the process but Lewison LJ has said that is not the case. In *Elim Court*, the Court of Appeal had to consider whether the failure to serve a Claim Notice on an intermediate landlord would invalidate it but decided that it would not “without more”. In paragraph 71 of his judgment, it is clear that Lewison LJ reached this conclusion by examining the statutory context. His decision is not binding as to the validity of the particular notice because he was dealing with the Claim Notice, not the Notice Inviting Participation. However, it is necessary to follow the same approach.
6. It is noteworthy in the current case that there were some lessees who acquired their interests in the subject property between the service of the two notices, namely the Claim Notice and the Notice Inviting Participation. Therefore, at the time the Claim Notice was served, they were qualifying tenants but had not been invited to participate. This possibility is expressly envisaged by the statute. Section 79(2) of the Act provides that there must be a minimum 14-day gap between the two notices. That is a period during which leasehold interests may change hands. Therefore, it cannot possibly be necessarily fatal to a claim notice that there are qualifying tenants who have not been invited to participate.
7. If a flaw in the process is not necessarily fatal to it, that leaves open the question as to the criteria to be used to work out whether it is actually fatal. Lewison LJ said further in *Elim Court*:

57 *Newbold v Coal Authority* [2014] 1 WLR 1288 was also treated in *Osman v Natt* [2015] 1 WLR 1536, para 31, as a category 2 case. In *Newbold's* case Sir Stanley Burnton said, at para 70:

“Finally, it may be that even non-compliance with a requirement is not fatal. In all such cases, it is necessary to

consider the words of the statute or contract, in the light of its subject matter, the background, the purpose of the requirement, if that is known or determined, and the actual or possible effect of non-compliance on the parties.”

58 Nothing in *Osman v Natt* casts any doubt on this approach.

8. In the current case, the Applicant’s failure to serve a Notice Inviting Participation on the lessee of number 192A meant that they were ignorant of both the possibility of participating in the RTM and what that would entail. Ms Fingleton was correct to say that it is important that any potential participant is aware of the significant responsibilities that come with participation. However, the Tribunal needs to look at “the actual or possible effect of non-compliance on the parties.”
9. If the Notice Inviting Participation had been correctly served, the lessee in question could have made the choice at that time to participate or not. However, their choice would have made no difference to the outcome. 122 out of 218 qualifying tenants decided to go ahead with the RTM. Whether one further lessee joined them or not would not have changed this fact. The Respondent faced the same outcome either way.
10. The person really affected by non-compliance with the notification requirements is the lessee of number 192A. There is no suggestion that that lessee has any objection to the process going ahead. Nor is it easy to see that they would have grounds to object, not least because there is no barrier to their joining in at any point at which the exercise of the RTM comes to their notice.
11. In the circumstances, the Tribunal is satisfied that the Applicant’s failure to serve the Notice Inviting Participation on the one lessee does not invalidate their Claim Notice.

Name: NK Nicol

Date: 23rd July 2018

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 78

Notice inviting participation

- (1) Before making a claim to acquire the right to manage any premises, 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, but
 - (b) neither is nor has agreed to become a member of the RTM company.
- (2) A notice given under this section (referred to in this Chapter as a "notice of invitation to participate") must—
 - (a) state that the RTM company intends to acquire the right to manage the premises,
 - (b) state the names of the members of the RTM company,
 - (c) invite the recipients of the notice to become members of the company, and
 - (d) contain such other particulars (if any) as may be required to be contained in notices of invitation to participate by regulations made by the appropriate national authority.
- (3) A notice of invitation to participate must also comply with such requirements (if any) about the form of notices of invitation to participate as may be prescribed by regulations so made.
- (4) A notice of invitation to participate must either—
 - (a) be accompanied by a copy of the memorandum of association and articles of association of the RTM company, or
 - (b) include a statement about inspection and copying of the memorandum of association and articles of association of the RTM company.
- (5) A statement under subsection (4)(b) must—
 - (a) specify a place (in England or Wales) at which the memorandum of association and articles of association may be inspected,
 - (b) specify as the times at which they may be inspected periods of at least two hours on each of at least three days (including a Saturday or Sunday or both) within the seven days beginning with the day following that on which the notice is given,
 - (c) specify a place (in England or Wales) at which, at any time within those seven days, a copy of the memorandum of association and articles of association may be ordered, and
 - (d) specify a fee for the provision of an ordered copy, not exceeding the reasonable cost of providing it.
- (6) Where a notice given to a person includes a statement under subsection (4)(b), the notice is to be treated as not having been given to him if he is not allowed to undertake an inspection, or is not provided with a copy, in accordance with the statement.

- (7) A notice of invitation to participate is not invalidated by any inaccuracy in any of the particulars required by or by virtue of this section.

Section 79

Notice of claim to acquire right

- (1) 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.
- (2) The claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before.
- (3) The claim notice must be given by a RTM company which complies with subsection (4) or (5).
- (4) If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company.
- (5) In any other case, the membership of the RTM company must on the relevant date include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained.
- (6) 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 appointed under Part 2 of the Landlord and Tenant Act 1987 (c. 31) (referred to in this Part as "the 1987 Act") to act in relation to the premises, or any premises containing or contained in the premises.
- (7) Subsection (6) does not require the claim notice to be given to a person who cannot be found or whose identity cannot be ascertained; but if this subsection means that the claim notice is not required to be given to anyone at all, section 85 applies.
- (8) 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.
- (9) Where a manager has been appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises, a copy of the claim notice must also be given to the leasehold valuation tribunal or court by which he was appointed.