

was entitled to acquire the right to manage Newmount, 11 Lyndhurst Terrace, London NW3 ("the Premises").

2. No order is made as to costs.

Background

3. The Premises consist of ten flats each let on long leases. The Respondent is both freeholder in respect of the Premises and a leasehold owner (and in the meaning of the Act, qualifying tenant) of one of the flats in the Premises.
4. The Applicant was incorporated on 5 October 2007. The Applicant served on the Respondent a Claim Notice dated 2 November 2007 claiming to acquire the right to manage pursuant to section 79 of the Act. The Respondent served on the Applicant a counter-notice dated 7 November 2007 pursuant to section 84 of the Act.
5. These proceedings, for a declaration as to the Applicant's entitlement to the acquisition of the right to manage, were issued by the Applicant on 11 December 2007. The Respondent's counter-notice referred to above contained wide ranging objections to the Claim Notice. Those objections were narrowed and refined in the Respondent's Response served in these proceedings and dated 15 February 2008. The dispute over the Applicant's claim was accordingly, by the time of the hearing, reduced to five essential issues.

The issues and the Tribunal's decisions

Service of Notice of Invitation to Participate – issue 1

6. Section 78 of the Act provides that prior to making a claim to acquire the right to manage any premises, the RTM company must give Notice of Invitation to Participate ("the Notice/s") to all qualifying tenants who are not already members of the RTM company.
7. The Respondent's position on this issue was that he put the Applicant to proof that the Notice had been given to all qualifying tenants. He put forward no positive case or objection to the effect that he or other qualifying tenants had not actually received the Notice.
8. Mr O'Keeffe had signed a witness statement for the proceedings dated 1 February 2008. In that statement at paragraph 5 he stated:-

I drafted the Invitations to Participate in respect of the 10 flats. I used the wording prescribed by the Regulations to the 2002 Commonhold and Leasehold Reform Act. I printed 10 copies of the Invitations. I printed 10 copies of the Memo and Arts of the RTM company. I printed 10 copies of an accompanying letter. I attach a sample copy an (*sic*) Invitation to Participate and the accompanying letter. I placed a copy of the Memo and Arts, Invitations to Participate and accompanying letter in each of 10 envelopes and handed them to my colleague, Gosia Bandurska and instructed her to deliver the envelopes to each of the 10 flats at Newmount.....The Invitations were delivered on 17th October , 2007.

9. The Tribunal had the benefit of a signed witness statement from Ms Bandurska dated 1 February 2008. In that statement she said:-

On Wednesday 17 October, 2007 I was given ten envelopes by my manager Tim O’Keeffe to hand deliver at Newmount, 11 Lyndhurst Terrace, London NW3 4QA. I travelled by tube from Earls Court station to Hampstead station and walked to Newmount. On the exterior of the building to the right of the main door are located 10 mail boxes. I dropped one envelope in each mail box.

10. Mr O’Keeffe in his evidence to the Tribunal said that in response to the Notice sent out to each tenant, seven tenants had become members and two others acknowledged the Notice sent to them. The only person who did not respond was the Respondent. Mr O’Keeffe exhibited signed requests to become members from seven tenants and a letter sent on behalf of two other flats confirming interest in membership.

11. Mr O’Keeffe also exhibited a copy of an email dated 17 October 2007 the relevant parts of which read as follows:-

We have hand-delivered about now the Invitations to Participate.....

I attach here what was sent

1. A covering letter
2. the invitation, the form of which is prescribed by the legislation
3. the memo and arts of the company

12. In cross-examination Mr O’Keeffe said that he did not have any other contemporaneous record of delivery of the Notices other than as set out above. Mr O’Keeffe was not sure as to whether the envelopes containing the Notices had names and addresses on them, he thought they had been mail merged but was not sure.

13. The Tribunal took the view that it was up to the Applicant to show that it had, in accordance with section 78 given notice of invitation to participate. The Tribunal decided that question on the balance of probabilities and considers

that on the balance of evidence before it, the Applicant had given Notice to each qualifying tenant, including the Respondent.

Service of the Notice of Invitation to Participate – issue 2

14. Section 111(5) of the Act provides as follows:-

A company which is an RTM company in relation to premises may give a notice under this Chapter to a person who is a qualifying tenant of a flat contained in the premises at the flat unless it has been notified by the qualifying tenant of a different address in England and Wales at which he wishes to be given any such notice.

15. On behalf of the Respondent, Mr Gallagher argued that the Respondent had previously informed the Applicant of an address for the service of notices upon him, that address being 33 Maresfield Gardens, London NW3 5SD.
16. The Respondent's father, Michael Black, gave evidence by way of a witness statement dated 14 February 2007. In that witness statement he said that his son for some time had been residing abroad and not regularly or habitually at his flat in the Premises. In his capacity as landlord, the Respondent had made sure that he had given, in accordance with sections 47 and 48 Landlord and Tenant Act 1987, the other tenants at the Premises an address for service at 33 Maresfield Gardens. Exhibited to that witness statement were three invoices sent to Mrs Jacqueline Hayler, a tenant of flat 2 in the Premises, all of which contained the Maresfield Gardens address as an address for service. The latest such invoice was dated 22 August 2007. It is to be noted that the Applicant did not come into existence until October 2007.
17. It was argued that notice of the address for service on the part of the Respondent to Mrs Hayler was good notice on the RTM company. Mrs Hayler was a director and the sole subscriber to the Applicant company and so she carried the knowledge of the address for service with her to the Applicant when it was formed. Accordingly the Applicant was fixed with notice of the Maresfield Road address. Accordingly it should have, but did not, send the Notice to that address rather than to the Respondent's flat in the Premises.
18. The Tribunal rejects this submission. The address for service was given by the Respondent to Mrs Hayler prior to the Applicant coming into being. If the Respondent wanted to fix the Applicant with notice of the alternative address for service, he should have notified the Applicant company itself of that alternative address. Notification to a director of a company not given to that director in his or her capacity as director is not good enough in any event and certainly not in the circumstances of this case where the notification was to a

person who was not even a director at the time and at a time when the company in question was not even in existence.

19. Further, the notices relied on by the Respondent were notices sent in his capacity as landlord rather than in his capacity as qualifying tenant.

Service of the Notice of Invitation to Participate – issue 3

20. It was agreed by both parties that the Notices were delivered to the Premises by way of placing them through letter box openings (there being one such opening for each flat) that are in the outside front wall of the Premises next to the front door. Letters and documents put into these openings then fell into a separate box for each flat situated just inside the communal hallway.

21. It is the Respondent's case that these letterboxes do not form part of any individual flat and so any documents posted in them were not properly served on individual tenants.

22. Section 111(1) of the Act provides as follows:-

- (1) Any notice under this Chapter –
 - (a) must be in writing, and
 - (b) may be sent by post

23. Section 112 of the Act defines "flat" as follows:-

- a separate set of premises (whether or not on the same floor)-
 - (a) which forms part of a building,
 - (b) which is constructed or adapted for use for the purposes of a dwelling, and
 - (c) either the whole or a material part of which lies above or below some of the part of the building

The section also defines "appurtenant property" as follows:-

in relation to a building or part of a building or a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the building or part of flat

24. It was argued that the postboxes described above did not form part of any 'flat' as defined in the Act. The definition of flat in the Act could not extend to such postboxes, this point was emphasised by the fact that there was a separate definition in the Act for 'appurtenant property'. It was further argued that service of the Notice at the flat pursuant to section 111(5) constituted deemed service and accordingly there had to be strict compliance with the

letter of the Act and the Act in this respect needed to be read narrowly. Further, the Act was one that took away rights from landlords and accordingly had to be strictly and fairly interpreted.

25. In support of these arguments the Tribunal was referred to the cases of *Beanby Estates Ltd v. Egg Stores (Stamford Hill) Ltd* [2003] EWCH 1252 (Ch) and *Cadogan and another v. McGirk* [1996] 4All ER CA 643. Cadogan is a case concerned with a claim for a new lease under the Leasehold Reform, Housing and Urban Development Act 1993 and the question of what is and what is not appurtenant property. Beanby Estates is a case concerned with service and section 7 of the Interpretation Act 1978. For reasons that will become apparent, neither case needs to be dealt with in detail.
26. The Tribunal rejects the Respondent's arguments. The Act, so far as is material for this issue, requires notice to be given to all qualifying tenants of their right to participate in the company (s.78). The Notice must be in writing and may be sent by post [s.111(1)]. The Notice may be given at the flat (that is flat as defined in the Act) [s.111(5)]. The Act does not require any particular method of service, all it requires is that notice is given. If a Notice were served by post, then section 7 of the Interpretation Act 1978 would come into play and there would be deemed service. That however is not the question in this case.
27. The Tribunal accepts that the post boxes in question are not part of the flat as defined by the Act. Accordingly service by placing the Notices in those letter boxes is not, in itself, service at the 'flat'. That does not necessarily mean by itself that there has been no valid service.
28. The Respondent made no positive assertion that he had not received the Notice. The Tribunal has found, as set out above, that qualifying tenants were given Notice.
29. Further, the Tribunal has had regard to the case of *Sinclair Gardens Investments (Kensington) Limited v. Oak Investments RTM Company Limited* – LRX/52/2004, a decision of the Lands Tribunal. In that case the landlord contended that a failure to serve a Notice on one of the participating tenants invalidated its claim to the right to manage. Giving judgement, the President of the Tribunal said, as to the failure of the RTM company to serve a Notice on one qualifying tenant:-

It is not the case that the failure to comply with a procedural requirement has the consequence of nullifying all subsequent steps unless there is some saving

provision in the statute enabling the question of prejudice to be taken into account. (paragraph 7)

The provisions [of the 2002 Act at sections 78 & 79 dealing with the Notice of Invitation to Participate and the Claim Notice] are thus designed to ensure that every qualifying tenant has the opportunity to participate in the RTM company and is informed that a claim notice has been made by the RTM company. In determining the effect of the failure to comply with one or other of these requirements the principal question for the Tribunal will be whether the qualifying tenant has in practice such awareness of the procedures as the statute intended him to have. The LVT considered this question and expressed itself as satisfied that Mr Mallon was fully aware of the proceedings and that his omission had been inadvertent. It also concluded that the landlord had not been prejudiced in any way by the failure to serve a notice inviting participation, and, given the purpose of the section 79(8) requirement, it was undoubtedly correct to do so. (paragraph 10)

30. If, contrary to the decision set out above, the Respondent was not given notice as a result of posting the Notices into the letterboxes at the Premises, then the Tribunal is satisfied that such failure of service is not fatal to compliance with section 78(1) as all qualifying tenants, including the Respondent, were aware of the Claim Notice and have been given the opportunity of applying for membership of the RTM company. No submission was made on behalf of the Respondent as to prejudice to him by virtue of him not being invited to join the RTM company at the same time as other qualifying tenants.

Membership of the RTM company as at 2 November 2007

31. The relevant parts of section 79 of the Act state as follows:-

- (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.
- (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.

The relevant date in this case is 2 November 2007.

32. The Respondent's position on this issue was that he put the Applicant to proof that, as at the relevant date, the Applicant had six members representing six flats (and hence not less than one half of the flats in the premises). He put forward no positive case.

33. Mr O’Keeffe in his witness statement at paragraph 8 gave evidence to the effect that on various dates from 18 to 30 October 2007 he received signed Invitations to Participate from six different leaseholders of different flats (numbers 2,3,4,7, 8 & 9) in the Premises. He exhibited to the statement copies of the six signed invitations and stated that all members were entered on the Register of Members on the date he received the invitations.

34. The dates referred to in paragraph 8 of Mr O’Keeffe’s witness statement were in fact the dates which were put on the signed invitations by those who had signed them. There was no proof by way of date stamps of the date on which the signed invitations had actually been received. Mr O’Keeffe relied on the following as evidence that signed invitations had been received by 2 November:-

- (a) Flats 3 & 7 – email dated 2 November enclosing “the RTM notices” with the signed notices that MR O’Keeffe said were attached to that email exhibited.
- (b) Flat 4 – there was an accompanying letter dated 22 October and the letter stated that it was being sent by post and fax
- (c) For all flats Mr O’Keeffe relied on his own recollection plus he referred the Tribunal to a copy of an email dated 2 November 2007 the relevant part of which stated;

We have today served the claim notice for the RTM on Black and we have more than 50% of the flats having given acceptances.....

I am attaching here the register of members of the company for Chris to hold

That attached register of members was exhibited by Mr O’Keeffe and showed the six qualifying tenants of six different flats as being members.

35. The Tribunal decided the issue on the balance of probabilities and considers that on the balance of evidence before it, the Applicant had six members representing six flats by 2 November 2007.

Claim Notice

36. The Respondent’s position on the issue of the Claim Notice (which has to be served pursuant to section 79 of the Act) was that he put the Applicant to proof that the Claim Notice was given to the qualifying tenants (as required by sub-section 79(8)). He put forward no positive case or objection to the effect that qualifying tenants had not actually received the Claim Notice. The Respondent did however specifically confirm that he had received a copy of the Claim Notice sent to his Maresfield Road address.

37. In Mr O'Keeffe's witness statement for the proceedings at paragraphs 10 & 11 he stated:-

10. On 2.10.2007 I wrote to my clients by email with a copy of the Claim Notice and a copy of the Register of Members. I attach a copy of this email.

11. On 2.11.2007 I printed 10 copies of the Claim Notice and personally placed them in 10 envelopes and instructed my colleague, Gosia Bandurska, to hand deliver the copies. She hand delivered them on Monday 5.11.2007.

38. Mr O'Keeffe stated in evidence to the Tribunal that the date of 2 October referred to in paragraph 10 of this statement was a mistake, the correct date should be 2 November. The relevant parts of the email referred to above state:-

Lastly we are required by the legislation to leave a copy of the claim at the flat of each of the leaseholders and we are doing that this morning

39. Ms Bandurska's witness statement, referred to earlier, said this on the issue;

On Monday, 5th November 2007 I was given ten envelopes by my manager Tim O'Keeffe to hand deliver at Newmount, 11 Lyndhurst Terrace, London NW3 4QA. I travelled by tube from Earls Court station to Hampstead Station and walked to Newmount. On the exterior of the building to the right of the main door are located 10 mail boxes, I dropped one envelope in each mail box.

40. At the hearing before the Tribunal, under cross-examination, Mr O'Keeffe stated that it was not his practice to serve a covering letter with Claim Notices and that he did not have a checklist or other contemporaneous note of serving the notices. He did not recall if the envelopes in which the Claim Notices were put were addressed or if they were blank.

41. The Tribunal considers that on the balance of evidence before it, the Claim Notices were served on the qualifying tenants.

Costs

42. Mr O'Keeffe for the Applicant made an application for costs on the basis that the Respondent had acted frivolously and otherwise unreasonably. The Tribunal has power to award costs of up to £500 by virtue of paragraph 10 of Schedule 12 of the Act.

43. Mr O'Keeffe was concerned that the Respondent's original Counter Notice to the Claim Notice contained a number of objections that were not then relied upon in

these proceedings. Mr O'Keeffe stated that he had immediately on getting the Counter-Notice written to the Respondent asking for explanations of the matters set out in the Counter-Notice but had no response. The Respondent had insisted that the Applicant prove every part of its case.

44. The Tribunal declines to make any award for costs. The Respondent's behaviour could not be described in any sense as frivolous or unreasonable. The Respondent was entitled to set out any matters it wished in the Counter-Notice. The issues set out in the Counter-Notice were then refined for the hearing in good time before the hearing. Although the Tribunal has found against the Respondent, the issues finally relied on by him were properly put and well argued by his Counsel.


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Mark Martynski (Chairman)

28 March 2007