



587

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

**Case Reference** : BIR/ OOCU/LIS/2016/0002

**Property** : Pegasus Court, 155 Chester Road,  
Streetly, Sutton Coldfield, B74 3NW

**Applicant** : Pegasus Court (Streetly) RTM  
Company Limited

**Representative** : RTMF Services Limited  
Fairhold Properties No. 5 Limited

**First Respondent** : (Represented by Estates and  
Management Limited)

**Second Respondent** : Firstport Retirement Property  
Services Limited

**Type of Application** : Whether the Applicant effected  
service of notice of intention to  
participate and notice of claim upon  
all qualifying tenants for the purposes  
of sections 78(1) and 79(8)  
Commonhold and Leasehold Reform  
Act 2002

**Tribunal Members** : Judge A. McNamara  
G. S. Freckelton FRICS

**Date and venue of  
Hearing** : Paper determination (at the request of  
the parties) following consideration  
on 24 January 2017.

**Date of Decision Issued** : 26 January 2017

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**DECISION**

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### **The property & the parties**

1. This is an application which relates to Pegasus Court, 155 Chester Road, Streetly, Sutton Coldfield, B74 3NW (the property): it is divided into 43 residential flats with common parts and grounds; and each flat is held on a long lease.
2. The Applicant is a right to manage company, incorporated on 24 April 2016 under company number 10143909; and the Respondents are, respectively, freeholder and managing agent of the property.

### **The background**

3. On 19 May 2016, the Applicant served notices inviting participation (NIP), in an application for the right to manage, upon leaseholders at the property.
4. Next, on 14 June 2016, the Applicant also served notices of claim (NOC), to acquire the right to manage, upon each qualifying tenant at the property.
5. The Respondents took issue with the service of those notices and served counter notices dated 11 and 18 July 2016: together they took the view that no service of the NIP had been effected upon the qualifying tenants of flats 9, 16, 17, 19 and 36 by reason of their death; and that no service of the NOC had been effected upon the qualifying tenants of flats 9, 17, 19 and 36 again by reason of their death.
6. Accordingly, it was and is the Respondents' position that the requirements of sections 78(1), 79(8) and 111 had not been complied with rendering ineffective the Applicant's attempt to acquire the right to manage the property.

## **The application**

7. By an application dated 8 September 2016, the Applicant sought a decision in relation to Chapter 1 Commonhold and Leasehold Reform Act 2002 ('CLARA') regarding the legitimacy of the notices referred to above served upon the qualifying tenants for the purposes of sections 78(1) and 79(8) CLARA.
8. The application is opposed by the Respondents on the same basis as the Counter Notices, namely ineffective service due to the death of the qualifying tenants, although the Second Respondent no longer pursues the NOC point in relation to flats 20 and 37.
9. The Parties requested that the matter was suitable for disposal without a hearing; and so it proceeds as a paper determination. The Tribunal members met and considered the case on 24 January 2017.

## **The law**

10. The relevant statutory provisions are uncontroversial. The Tribunal is concerned with the following sections of CLARA:

### *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...*

### *79. Notice of claim to acquire right*

*...(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...*

## **111. Notices**

*(1) Any notice under this Chapter—*

*(a) must be in writing, and*

*(b) may be sent by post.*

*(2) A company which is a RTM company in relation to premises may give a notice under this Chapter to a person who is landlord under a lease of the whole or any part of the premises at the address specified in subsection (3) (but subject to subsection (4)).*

*(3) That address is—*

*(a) the address last furnished to a member of the RTM company as the landlord's address for service in accordance with section 48 of the 1987 Act (notification of address for service of notices on landlord), or*

*(b) if no such address has been so furnished, the address last furnished to such a member as the landlord's address in accordance with section 47 of the 1987 Act (landlord's name and address to be contained in demands for rent).*

*(4) But the RTM company may not give a notice under this Chapter to a person at the address specified in subsection (3) if it has been notified by him of a different address in England and Wales at which he wishes to be given any such notice.*

*(5) A company which is a RTM company in relation to premises may give a notice under this Chapter to a person who is the 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.*

11. In addition, all three parties have made reference to a decision of the Upper Tribunal (Lands Chamber), namely **Assethold Limited v 7 Sunny Gardens Road RTM Company Limited [2013] UKUT 0509 (LC)**, about which more below.

**The competing arguments and consideration of the cited authority**

12. The Applicant insists that the notices were legitimate and that the death of the qualifying tenants does not amount to ineffective service. In the Applicant's Statement of Case, dated 2 November 2016, at paragraph 5 is an extract from the judgment in the 7 Sunny Gardens case above.

Paragraph 34 of the judgment of the Deputy President provides:

*34. As qualifying tenants, the personal representatives were also entitled to receive a copy of the claim notice. A copy of that notice was sent by the respondent's agent to each of the leaseholder's of the three flats and one such notice was addressed to Mrs Foskett at Flat 7A. It is not known whether this copy of the claim notice came to the attention of Mrs Foskett's personal representatives, but whether it did or not, I am inclined to think that the effect of section 111(5) of the 2002 Act was that the requirements of section 79(8) were satisfied. An RTM company may give a notice to a qualifying tenant of a flat contained in the premises at the flat itself, unless it has been notified by the qualifying tenant of a different address in England and Wales at which such notices can be given. A notice addressed to Mrs Foskett at Flat 7A would, it seems to me, be a good notice for the purpose of communicating with her personal representatives, although they were not named in the notice and may not even yet have been appointed.*

13. The Applicant relies upon part of that passage as support for the proposition that service at the address of the qualifying (but deceased) tenant is sufficient to put any personal representatives on notice of the Applicant's desire to acquire the right to manage.
14. Conversely, although the same passage, amongst others, is set out in both Respondents' Statements of Case (20 October 2016 and 18 October respectively), the Respondents take the view that the death of the qualifying tenant makes effective service an impossibility and the attempt to acquire the right to manage nugatory. They rely upon the apparent similarities between the current case and the 7 Sunny Gardens case.
15. The relevant facts of the 7 Sunny Gardens case are as follows. In the 7 Sunny Gardens case there were only 3 flats at the property and the three leaseholders had resolved between them to acquire the right to manage and that they would all be directors of the Right manage (RTM) company. Sadly, before the RTM company could be established, one of the trio, Mrs. Foskett, died before she could ever become a director (a prerequisite for the application to acquire the right to manage for the purposes of section 74 CLARA).
16. The death of the tenant, Mrs. Foskett, was rather more fundamental in that case, by reason of the intention that she was to be a director of the RTM company. In the case of a director of an RTM company, it is a requirement that that person is a qualifying tenant. Clearly that was no longer possible in Mr. Foskett's case by reason of her death.
17. In this context the Deputy President said this at paragraph 32:

*Mrs Foskett herself had agreed to become a member of the respondent, but that agreement had been procured at least seven months before the claim notice was given on 27 April 2012. There*

*does not seem to me to be any basis to suggest that the benefit of her willingness to become a member was itself property comprised in Mrs Foskett's estate capable of passing to her personal representatives on her death. The personal representatives were qualifying tenants but were not members of the respondent company. It follows that they were entitled to receive a notice of invitation to participate under section 78(1).*

18. Accordingly, because the assumption was that Mrs. Foskett was still alive and a director of the RTM company, no notices were served inviting her (or her personal representatives') participation. In turn, since the personal representatives were not served, the notice provisions were not complied with.
19. It is the Tribunal's view that the factual situation in that case was different to the present case.

### **Discussion**

20. The requirement to effect service in section 111(5) requires that notices 'may' be given to the qualifying tenant at the flat, unless the RTM company has been notified of the qualifying tenant's alternative address by the tenant. There is no evidence before the Tribunal as to whether such notification had been provided by any of the tenants. The closest one gets is in the document 'Bulk Certificate of Posting' set out at the top of page 80 of the Second Respondent's bundle, where it appears that Sorrento Holdings were served (although it is unclear in relation to which flat or flats).
21. That document serves as proof that all relevant tenants were served with the appropriate notices by the Applicant.
22. The Tribunal considers that some assistance can be gleaned from other situations in which notices are required:

- a. Section 196(3) of the Law of Property Act 1925 provides as follows:

*(3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage...*

- b. Albeit for the purposes of civil litigation, Part 6.9 of the Civil Procedure Rules (where a Defendant gives no address at which it may be served) also provides that service can be effected at the ‘*Usual or last known residence of the individual...*’.

23. Clearly both of those provisions are merely persuasive, rather than determinative, of the point here.

### **Conclusion**

24. Ultimately this case is one in which the Tribunal is bound by the rationale of the Deputy President at paragraph 34 of the 7 Sunny Gardens case quoted at paragraph 11 above. Although repetitious, the Tribunal is also ‘*inclined to think that the effect of section 111(5) of the 2002 Act was that the requirements of section 79(8) were satisfied. An RTM company may give a notice to a qualifying tenant of a flat contained in the premises at the flat itself, unless it has been notified by the qualifying tenant of a different address in England and Wales at which such notices can be given. A notice addressed to Mrs Foskett at Flat 7A would, it seems to me, be a good notice for the purpose of communicating with her personal representatives, although they were not named in the notice and may not even yet have been appointed*’.



25. As said above, although merely persuasive, we also pray in aid the well-established principle set out in, amongst others, section 196 Law of Property Act 1925 regarding the service of notices in relation to property. Clearly the principle of the 'last known address' is a well-established one in the context of service of notices and/or proceedings.

26. Accordingly, the Tribunal concludes that the service of a notice upon a qualifying, but deceased, tenant at the flat is good service since it is compliant with section 111 CLARA and the route to the deceased's personal representatives whether yet appointed or not. Therefore, the Applicant did comply with the notice requirements in respect of those tenants put in issue by the Respondents.

27. In the circumstances the Tribunal allows the application.

Judge A. McNamara

26 January 2017