FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LRM/2018/0018**
Property	**:**	**PEMBROKE LODGE, 149 LEIGHAM COURT ROAD, LONDON SW16 2NX**
Applicant	**:**	**PEMBROKE LODGE RTM COMPANY LIMITED**
Applicant's Representative	**:**	**Matthew Withers, Counsel (Direct Access)**
Respondent	**:**	**AVON GROUND RENTS LIMITED**
Respondent's Representatives	**:**	**Scott Cohen Solicitors**
Type of application	**:**	**Application for (no fault) right to manage under section 84(3) of the Commonhold and Leasehold Reform Act 2002**
Tribunal members	**:**	**Judge T Cowen** **Mr J Barlow FRICS**
Venue	**:**	**10 Alfred Place, LondonWC1E 7LR**
Date of decision	**:**	**13 August 2019**

DECISION

Order of the tribunal

(1) The Tribunal determines that the Applicant was on the relevant date entitled to acquire the right to manage the premises.

(2) The Respondent shall by 28 August 2019 file at the Tribunal and serve on the Applicant any evidence or submissions to show cause why the Tribunal should not make an order for costs against the Respondent under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013

(3) Lorraine Scott of Scott Cohen Solicitors Limited shall by 28 August 2019 file at the Tribunal and serve on the Applicant any evidence or submissions to show cause why the Tribunal should not make an order for wasted costs against Scott Cohen Solicitors Limited under Section 29(4) of the Tribunals Courts and Enforcement Act 2007.

(4) The Applicant shall by 28 August 2019 file at the Tribunal and serve on the Respondent (a) evidence of the amount of the fee of Mr Withers of Counsel, (b) evidence of the amount of costs charged by Hodders Law in this matter after 15 November 2018 and (c) evidence of the amount of the fee of Mr Ray Cooper.

REASONS FOR ORDER

1. The background facts of this matter are contained in our order and decision dated 25 October 2018 together with all of the material events leading up to that date.

2. We do not intend to repeat any of those matters in this decision, but it would be useful to set out here the issues which were as follows:

   2.1. Whether the Property is itself premises to which the right of no fault RTM applies or whether it is excluded by virtue of paragraph 2 of Schedule 6 to the 2002 Act.

   2.2. Service of the claim notice: whether the Applicant failed to give notice of the claim to each person who is a landlord on the relevant date.

   2.3. Content of the claim notice and invitation to participate: whether members of the RTM company and qualifying tenants have been correctly identified and whether joint tenants have been correctly listed.

   2.4. Constitution of the RTM Company: whether its register of members is complete and accurate

3. On 25 October 2018, we made a determination on paper that the Applicant was entitled to acquire the right to manage on the relevant

date under section 84(3) of the Commonhold and Leasehold Reform Act 2002. We made our decision on the first issue (under Schedule 6 to the 2002 Act) on the balance of probabilities based on the very limited evidence we had. In recognition of the limitations of that evidence and the absence of a hearing, we also ordered on 25 October 2018 that if either party applied by 15 November 2018 to adduce further evidence, then our 25 October 2018 determination would be set aside and the matter would be listed for a hearing at which the parties could adduce further evidence on the Schedule 6 issue.

4. On 14 November 2018, the Respondent applied to adduce further evidence. The 25 October 2018 determination was therefore set aside and directions were given on 20 February 2019 for further evidence to be served by both sides.

5. In the meantime, on 5 December 2018, the Respondent also applied to this Tribunal for permission to appeal the determination of 25 October 2018. We refused permission on the grounds that the order appealed against had already been set aside. There was therefore nothing against which to appeal. The application for permission to appeal contained some substantive points of law which we will consider in this decision for the sake of completeness – not by way of appeal or permission to appeal, but because they are substantive points which have now been raised by the Respondent and which we ought therefore not to ignore.

6. On 12 March 2019, the Respondent requested an extension of time for serving evidence. On 13 March 2019, the Tribunal granted an extension for the Respondent to file and serve its evidence by 5 April 2019.

7. On 8 April 2019, the Respondent filed and served a witness statement of Lorraine Scott (the Respondent's solicitor). The witness statement essentially rehearses the details of the freehold title of the Property and exhibits office copy entries. All of that information was already before the Tribunal on 25 October 2018. The witness statement stated that the original block of the premises was built in the 1930s or 1940s and that the newer part of the building was constructed in about 2011.

8. The witness statement went on to say that "the Respondent has concerns regarding the applicability of Schedule 6…" and Ms Scott continues later "…I consider there is a reasonable basis to consider the original construction to be capable of being a self-contained part of the building – **and the Landlord is seeking further advice in relation to same**". (our emphasis)

9. We note two things from this witness statement:

9.1. The Respondent is continuing to express its position on the Schedule 6 issue in the same half-hearted terms as we noted in paragraph 18 of our 25 October 2018 decision; and

9.2. The Respondent was expressing an intention to provide some further material in support of its case (see bolded passage above). This was also apparent from the email to the Tribunal which attached the witness statement on 8 April 2019, in which the Respondent's solicitors requested permission for a 3 day extension of time for the filing and serving of an expert's report.

10. Until 7 August 2019 (5 days before the hearing), the Tribunal received no further communication at all from the Respondent or its solicitors: no expert report, no dates to avoid (both in breach of the orders of the Tribunal), no further applications for extensions of time, no explanations and no response to any letters or emails.

11. In the meantime, on 11 April 2019, the Tribunal granted the Respondent an extension until 15 April 2019 for the expert's report and an extension until 14 May for the Applicant's evidence. It should be noted that until after the filing and service of the witness statement of Lorraine Scott on 8 April 2019, there was nothing for the Applicant to do under the directions.

12. The Applicant then applied on 14 May 2019 for an extension of time for the filing and service of its evidence which was granted until 22 May 2019. On 21 May 2019, the Applicant served an expert's report from Mr Ray Cooper, a structural engineer.

13. After receiving dates to avoid (as ordered) from the Applicant but not from the Respondent, the Tribunal on 16 July 2019 sent out a notice of hearing to the parties fixing the hearing of this matter for 12 August.

14. On 7 August 2019, 3 working days before the hearing and three weeks after the notice of hearing, the Respondent's solicitors emailed the Tribunal (copied to the Applicant's director, Mr Keeble[1]) in the following terms:

> "We write in relation to that the above matter that has been listed for hearing at 10:00 am on 12 August 2019 at 10 Alfred Place…"
>
> "We write to inform you that our client will be unable to attend the hearing. In the absence of cross examination of the Applicant's surveyor it may be that the Tribunal would consider

[1] the Applicant's former solicitors no longer being instructed at this point

a paper determination and our clients confirms that it would not oppose same."

15. In fact, neither the Respondent nor any representative for the Respondent attended the hearing. The clerk to the Tribunal telephoned the Respondent's solicitor on the morning of the hearing at our request and the Respondent's solicitor confirmed that nobody was intending to attend on behalf of the Respondent. This raised the following matters for us to consider:

    15.1. Whether to proceed with the hearing in the absence of the Respondent under rule 34 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

    15.2. The Respondent's application for a paper determination of the case.

16. On the first of those matters, we decided to proceed with the hearing in the Respondent's absence because it was clear from the email of 7 August that the Respondent has been notified of the hearing and also because it was in the interests of justice to do so. The Respondent had had every opportunity to adduce whatever evidence and submissions it wished, no reason was given for the Respondent's absence and there was no application for an adjournment. The Respondent was clearly content for the matter to be decided without having any further involvement.

17. We also decided not to conduct a paper determination of the matter, because:

    17.1. The Applicant had not consented to a paper determination after 25 October 2018.

    17.2. The Respondent's application was far too late, being made only 3 working days before the hearing; and

    17.3. The Applicant had instructed counsel and an expert witness to attend the hearing. An order at that stage to decide the case on the papers would have meant refusing to hear from counsel and the expert witness which would have involved a gross injustice against the Applicant.

18. This leaves the Tribunal in the same position as on 25 October 2018, save that we have now had the benefit of reading and hearing the evidence of Mr Cooper. The evidence of Lorraine Scott does not take the matter any further for the reasons stated above and she did not attend to give that evidence in any event. We also have the opportunity

to deal with any new issues raised in the rejected application for permission to appeal, as discussed above.

19. In the light of all the above, we have decided to make the same determination as we made on 25 October 2018 (all of which are adopted as if fully set out here), for the reasons stated in that decision and for the following additional reasons:

19.1. Ray Cooper's expert evidence was of limited value to the Tribunal on the Schedule 6 issue because the principal question for the Tribunal was under section 72(4), relating to the amount of interruption which would be caused by the provision of independent services in the event of part of the building being developed independently of the rest. Mr Cooper very fairly and honestly gave evidence that his only expertise and experience related to the engineering aspects of demolition and splitting of buildings and not the effect on service media. It was common ground between the parties that there was a vertical division of the building (under section 72(3)(a)) and that the rear extension built in about 2011 (pursuant to planning permission obtained in 2010) could be independently redeveloped (under section 72(3)(b)). The only question for the Tribunal was whether such independent redevelopment would involve works likely to result in significant interruption in the provision of services to occupiers of the rest of the building. Mr Cooper could not give an opinion on that question.

19.2. Mr Cooper did, however, provide some useful factual evidence as a result of his inspection of the building and his perusal of the plans submitted to the planning authority in 2010. Those plans showed a staircase within the rear extension apparently serving all of the flats in the rear extension (other than those on the ground floor). In fact, Mr Cooper said, the staircase had never been built and the area where the staircase should have been was walled off. Mr Keeble of the Applicant had told him that this area was used for electrical plant on the second floor and for cabling and electrical ducting on the other floors. We accept that evidence. This means that (a) the only access to the upper floors of the rear extension is by means of the staircases in the original part of the building, and (b) any independent redevelopment of the rear extension would mean having to construct a staircase in that void and therefore moving all of the electrical plant and cabling currently in there. Mr Cooper also gave factual evidence that the electrical meters for all parts of the building were in the lightwell of the original part of the building and so all of those would have to be moved as part of any notional redevelopment.

19.3. The Applicant also produced at the hearing publicly available documents from UK Power Networks showing that there is one

single power source into the original part of the building. Copies of those documents were served on the Respondent with the hearing bundle on 5 August 2019, 7 days before the hearing. The Respondent's solicitors would therefore have received those documents prior to their email of 7 August 2019, in which they stated that they were happy for the matter to be determined on the papers.

19.4. We had already decided on the evidence before us on 25 October 2018 on the balance of probabilities (and with the benefit of the Tribunal's own expertise and experience) that such works would be likely to result in significant interruption to services. The factual evidence of Mr Cooper and the UK Power Networks documents are not conclusive, but they further support the conclusion which we reached on 25 October 2018. They show that significant work would be needed to create a staircase and an independent electrical supply to the rear extension and in our judgment (using this panel's expertise and experience) such work would be likely to cause the interruption envisaged by section 72(4)(b) of the 2002 Act.

19.5. For reasons stated above and because we are making a fresh decision on our determination as a result of the 25 October 2018 order being set aside, we have considered the substantive points of law raised in grounds 2(c) and (d) of the Respondent's rejected application for permission to appeal in relation to the Service issue set out in paragraph 2.2 above. Our decision on those points is as follows:

19.5.1. Contrary to the Respondent's submissions, the Tribunal has not decided this matter solely on the basis of the burden of proof. We refer to the first sentence of paragraph 20 of our decision of 25 October 2018 the reasoning of which has been adopted into this decision.

19.5.2. The Tribunal has decided (as recorded in paragraph 21 of the 25 October 2018 decision and adopted here) that there has been no defect in compliance with statutory procedures by the Applicant, because of the decision of Lewison LJ in paragraoh 71 of the *Elim Court* case cited in paragraph 21 of our earlier decision. So the reasoning in paragraph 40 of *Assethold Limited v 7 Sunny Gardens Road RTM Company Limited* [2013] UKUT 509 does not apply.

19.5.3. Contrary to the Respondent's submissions, we have considered section 85, even though we have not mentioned it explicitly, because we have decided that issue under section 79(7) of the 2002 Act (in paragraph 21

of the 25 October 2018 decision, adopted here) which itself expressly states that section 85 only applies when the claim notice is not required to be given to anyone at all. That is not the case in this application.

Conclusion and costs

20. For all the above reasons, the Tribunal makes the determination ordered above.

21. On the question of costs, the conduct of the Respondent through its solicitors in this matter, as described above, was appalling. It was the Respondent who triggered the requirement for evidence and a hearing. The Respondent's solicitors then simply failed to serve expert evidence (after seeking an extension to do so) and then failed to notify anyone of their intentions, before casually declaring their intention not to attend (with no explanation) on the basis that they "would not oppose" a paper determination. This conduct borders on contempt for the Tribunal and resulted in the Applicant incurring unnecessary costs of counsel and an expert and an unnecessary waste of court time and the allocation of public resources.

22. The outcome has been that the Applicant had to incur those costs simply in order to obtain the same decision as was made on 25 October 2018, if the Respondent had never applied to adduce further evidence. The conduct of the Respondent and its solicitors can be explained only as a cynical ploy to delay the outcome of the case and cause the Applicant to incur considerable unnecessary costs. It is an abuse of the process of the tribunal system and should not be tolerated. The Tribunal condemns this conduct in the strongest possible terms.

23. Under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, the Tribunal may make (a) an order in respect of costs if a person has acted unreasonably in conducting proceedings and (b) a wasted costs order against a legal representative under section 29(4) of the Tribunals, Courts and Enforcement Act 2007. Under rule 13(3), such orders can be made by the Tribunal on its own initiative. Even though the Respondent has not expressly made an application for costs, the Tribunal is minded of its own initiative to:

    23.1. Make a costs order against the Respondent under rule 13; and

    23.2. Make a wasted costs order against Scott Cohen solicitors under section 29(4) of the 2007 Act. The particular complaint against the solicitors in their personal capacity is their failure to communicate with the Tribunal between 8 April 2019 and 7 August 2019. Whatever their clients' instructions may have been, we cannot see any reason why Scott Cohen could not have kept the Tribunal informed. It was largely this lack of

communication (until 7 August, when it was too late) which caused the costs and court time and resources to be wasted.

24. Under rule 13(6), the Tribunal must not make such orders without giving the paying person an opportunity to make representations. We have therefore made the orders in relation to costs above.

Dated this 13th day of August 2019

JUDGE TIMOTHY COWEN

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).