



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

Case Reference : **LON/00BB/LRM/2019/0024**

Property : **Warehouses N, O, and P,
Mace Gateway,
The Royal Victoria Docks, London E16 1XL**

Applicant : **Grainstore RTM Company Ltd.**
Unrepresented

Respondent : **(1) Shenstone Properties Ltd
(2) GIA Land and Property Limited
(3) London International Exhibition Centre
Limited
(4) One Housing Group**

Date of Application : **21 August 2019**

Type of Application : **Section 84(3) Commonhold and Leasehold
Reform Act 2002 (“the Act”)**
**Determination of the entitlement to acquire
the Right to Manage the premises**

Tribunal : **Judge J. Oxlade
M.C. Taylor FRICS**

**Date and venue of
Hearing** : **22 October 2019
10 Alfred Place, London, WC1E 7LR**

DECISION

The Applicant having been served with a counter notice pursuant to section 84 of the Act by the First Respondent alleging that the Applicant was not entitled to acquire the right to manage, has failed to establish that on the date of service of the notice that it was entitled to do so.

REASONS

Background

1. The Applicant is a limited company (“the RTM Co.”), formed to acquire the right to manage the premises, which it pursued by serving a notice on the landlord (the First Respondent) on 24th May 2019 under section 80 of the Act.
2. In reply, the First Respondent served a counter notice on the RTM Co. pursuant to section 84(2)(b), alleging that the RTM Company was not so entitled.
3. The First Respondent’s challenges were set out by way of annex to the counter notice, under 7 headings: (a) the date included in the claim notice within which the First Respondent could reply, (b) the notes to the claim notice, (c) the failure to serve the claim notice on the freeholder, (d) the membership of the company, (e) the NIPs and timing of the claim notice, (f) the service of claim on qualifying tenants, and (g) that the premises were not qualifying premises.
4. So far as it is material to the decision made (as the hearing focused on the NIPs and timing of the claim notice), these are set out in full as far as they concerned the NIPs:

“11. The Company is required to prove that a NIP (containing all the information prescribed by section 78 and Regulation 3 and Schedule 1 to the Regulations) was served upon all persons upon whom (in accordance with Section 78(1)) such notices should have been served. The Company is also required to prove that such notices were served at the correct addresses (in accordance with section 111(5)).

12. In the event that the Company has fully complied with section 78(1), the company is required to prove that the claim notice was given at least 14 days after the date on which the latest of the NIP’s was given (as required by section 79(2))”.

Application

5. In light of the challenge to the entitlement to acquire the right to manage the Applicant filed an application before the Tribunal. Directions were made on 28th August 2019, in which the Tribunal identified as the sole issue whether or not at the date of the notice of claim given, the Applicant was entitled to acquire the right to manage the premises. It invited Respondents 2-4 to apply to be joined as parties, none of which did.
6. The Directions provided that the application be considered as the Applicant’s case, and the parties were directed to file – sequentially – statements of case; additionally, in the Applicant’s case, to file relevant and supporting documents.

7. The Respondent's statement of case substantially maintained the challenges made in the counter notice, and in respect of the NIP, at paragraph 17 said that it had sight of the NIPs, and referred to the failure to comply with the Regulations.

8. Alive to points made by the Respondent, the Applicant in the statement of case filed on 11th October 2019, and in respect of NIPs set out the response at paragraphs 14 and 15, said that the "NIPS were all posted on 25th April 2019 by first class post and special delivery. Service is on the date on which it could be expected to be delivered in the ordinary course of post – which for both methods of service is the next postal delivery, being 26th April 2019. Proof of posting was provided to the Respondent under the HLW witness statement" albeit that at 13.5 of the same statement of case the Applicant said that in respect of the HLW witness statement "we are unable to obtain a copy of the witness statement but it was marked as one of the enclosures to the above mentioned letter which the Respondent and its solicitors would have a copy of".

9. The Directions set the hearing at 10am on 22nd October 2019, and ahead of time both parties confirmed that legal representatives would not attend, but named those who would attend.

Hearing

10. The Respondent was represented at the hearing by Colin Walker, with Ray Mansell and Tania de Veiga in attendance. They signed it before 10.00 am, but the Applicant's representatives failed to attend by their named officers, or at all.

11. The Tribunal waited, and some enquiries were made by the case officer sending an email to the contact details provided to it, as no 'phone number had been provided; the Applicants having said that they were no longer represented by Howard Kennedy. Absent of any response, at 10:50 am the Tribunal started to hear the application in the absence of the Applicant, it being in accordance with Regulation 3(1)(e) of the Tribunal Procedure (First-tier)(Property Chamber) Rules 2013 that the Tribunal should seek to avoid delay, so far as compatible with proper consideration of the issues, and by regulation 34(a) of the Rules being permitted to hear an application in the absence of a party when satisfied - as we were from the file - that both parties had been correctly advised of the time and place of the hearing.

12. At the commencement, the Tribunal pointed out to the Respondent that Ms. Veiga had filed a witness statement as to matters outside the entitlement to acquire the right to manage and so would not consider them. This the Respondent accepted.

Submissions

13. The Respondent commenced submissions by asking the Tribunal to look at the NIPs, which were (logically), the starting point of the claim process.

14. It was conceded that the point taken as set out at 12 of the annex of the counter-notice was no longer in issue. However, there were three points which arose from the bundle filed by the Applicant on the Friday 18th October 2019.

15. Point 1 was that the Respondent did not believe that the NIP's were properly sent out to all 111 lessees. Page 138 appeared to be a covering letter from the RTM Company,

signed by the then Directors, which was undated, and was not addressed to anyone. The Respondent could not see any evidence that each person to whom the NIP should be sent, had been sent it and the Respondent's concern was that not all lessees knew about the application. The Tribunal asked if there was any evidence filed in the bundle which showed to whom it had been sent, when and how. The Respondent said not; as set out in the Applicant's case summary (as detailed at paragraph 8 herein and 15 of the Applicant's case summary) the witness statement of HLW was not available to the Applicant (the reasons for which were not stated) and so had not been filed. The counter notice (paragraph 11) had put the Applicants to proof, so the Applicant was aware that the point would be taken. The Respondent said that the message to the recipient ("if you are renting please kindly pass to your landlord/agent") reinforced the concern.

16. The second point ("point 2") was to question what had been enclosed with the NIP ? The letter at page 138 referred to two enclosures - the NIP and application form for membership of the RTM Co. However, section 78(4) requires the NIP to be accompanied by the Articles of Association ("AOA") (or if not, to include a statement as to inspection and copying). This covering letter did neither. So, it seemed from the covering letter that the Articles were not included, although this conflicted with paragraph 2 of page 140 of the NIP. The Respondent considered that there was an indication of further conflict with page 139 which refers to the AOA being available electronically.

17. The third point ("point 3") was to ask the address to which the lessee was to return the form ? The covering letter at page 138 referred to returning them "to us" and the RTM Co address being at the bottom of the page (Grainstore RTM Co Limited at Unit 4 Excel Marina Western Gateway London E16 1 AT) yet this conflicted with the next page, which referred to an application for membership, which was to be returned to PBM at 395 Centennial Ave.

18. At this point, at approximately 11:20, the case officer came into the hearing room to indicate that the Applicant had 'phoned the Tribunal to say that they believed that the hearing was at 2pm. I asked the case officer to make enquiries to ask why the Applicant thought so – eliminating any possibility that the Tribunal had sent out conflicting information as to the hearing time – on which enquiry the case officer was told that the 3 members of the Applicants thought it was 2:30 pm, though they realised now on considering the documents, that the hearing was indeed set for 10am. They said that they would set off, but from where they did not say.

19. The Tribunal considered adjourning the application, but decided against doing so: the Applicants had been notified in the Directions of the correct time and date, the hearing had been scheduled to last a day, and the Applicants had started to present their case and were half an hour into their submissions. The Tribunal decided to proceed in the absence of the Applicant as permitted under regulation 34(a).

20. Further, having had an opportunity to discuss the matter, the Tribunal took the view that some of the Respondent's points made about NIPS were made with force, and if any one of them was correct, then the process was flawed and so the notices fell away. It was unnecessary to consider the multitude of other points.

21. The Tribunal gave an oral decision and the application was dismissed, on the basis that fuller reasons would be provided. The Respondent referred to costs, and it was suggested that a written application be made, if the principle and/or quantum of costs could not be agreed with the Applicant.

Relevant Law

22. The burden rests on the Application to show on a balance of probabilities that the Applicant has an entitlement to acquire the right to manage in accordance with the 2002 Act, and Regulations.

Reasons

23. The Applicant was alerted to the Respondent's argument that the NIPs were not compliant and so the burden rests on the Applicant to show that this is so.

24. We find that some of the Respondent's points have force.

25. As to point 1, the Applicant's case summary at paragraphs 15 and 13.5 (effectively) concedes that the affidavit/witness statement proving service of the NIPs was not available to it, so to be able to file it with the Tribunal. It is crucial to the effectiveness of the process that all lessees are alerted to the application in good time. The fact that a good proportion responded does not show that all were alerted, and we do not consider it proper to so infer. The fact of a covering letter made to an unnamed person does not remedy this evidential problem. So, we are not satisfied on the evidence filed that all lessees who should have been served, were indeed served. We do not give weight to the Respondent's argument that the message to the recipient ("if you are renting please kindly pass to your landlord/agent") reinforced their concern.

26. As to the point 2, we have not been provided with clear evidence as to what was enclosed with the NIP. The covering letter at page 138 referred to two enclosures - the NIP and application form for membership of the RTM Co. However, section 78(4) requires the NIP to be accompanied by the Articles of Association (or if not, to include a statement as to inspection and copying) and the covering letter did neither. So, absent of being satisfied on a balance of probabilities, we find that point 2 has force. In essence, the Applicant has failed to prove it. We do not give weight to the Respondent's point that page 139 refers to the AOA being available electronically; that could simply be an offer of convenience for those who like that as a format.

27. As to the third point ("point 3"), it was not entirely clear as to where the NIP was to be returned: the covering letter at page 138 referred to returning them "to us" but by did not specify an address where "us" would receive it. It could be assumed that this was the RTM Co address, but the recipient could equally have been confused by the other address on the next page. Though potentially confusing, we did not find that this undermined the integrity of the NIP.

28. In light of the findings at paragraphs 25 and 26 herein, we find that there was before us insufficient evidence that the NIPs were served in accordance with statutory requirements. We therefore dismiss the application.

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22nd October 2019

J. Oxlade