FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BD/OLR/2020/0296 P**
Property	**:**	**2 Grovewood, 345 Sandycombe Road, Richmond TW9 3NF**
Applicant	**:**	**Seema Vijan & John McConnell**
Representative	**:**	**Perfectly Legal LLP**
Respondent	**:**	**Stoll Construction Limited**
Representative	**:**	**Wallace LLP**
Type of application	**:**	**S.48(1) of the Leasehold Reform, Housing and Urban Development Act 1993**
Tribunal member(s)	**:**	**Judge Sheftel**
Date of decision	**:**	**27 May 2020**

DECISION ON JURISDICTION

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1. This has been a remote determination on the papers which has not been objected to by any of the parties. The form of remote determination was P: Paper Determination. A face to face hearing was not held because it was not sought or practicable and all issues could be determined on the papers.

2. The documents that I was referred to are as follows, the contents of which I have noted:

   (1) The Applicants' bundle of 22 pages;

   (2) The Applicants' legal submissions totalling 3 pages;

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(3) The Respondent’s bundle of 20 pages, including the index;

(4) The Respondent’s legal submissions, totalling 12 pages including authorities;

(5) The Respondent’s solicitors’ supplemental letter of 13 May 2020 totalling two pages, containing responses to the Applicants’ legal submissions. On 14 May 2020, the Applicants’ solicitors questioned whether the Respondent’s should be entitled to make such further submissions. As the letter did not introduce any new issues of fact or law but instead comprised comments on the Applicants' submissions and largely reiterated parts of the Respondent's earlier submissions, it was determined that the proper course was not to exclude the letter but rather, in the interests of fairness, directed that if the Applicants' solicitors wish to respond to the submissions made in the letter, they could do so by 20 May 2020. In the circumstances, no further submissions were received by the tribunal.

3. The order made is described at the end of these reasons.

The application

4. The Applicants are the lessees of 2 Grovewood, 345 Sandycombe Road, Richmond TW9 3NF.

5. By notice dated 2 July 2019, the Applicants sought to exercise the right to acquire a new lease pursuant to section 42 of Leasehold Reform, Housing and Urban Development Act 1993 (the “1993 Act”).

6. On 5 September 2019 the Respondent served a counter-notice pursuant to section 45 of the 1993 Act, admitting the Applicants’ right to acquire a new lease.

7. Subsequently, the Applicant applied to the tribunal on the basis that the terms of acquisition had not been agreed and/or the parties had failed to enter into a new lease. According to the evidence filed on behalf of the Applicants, although the Applicants’ representatives had believed that the premium for the new lease had been agreed, they were informed by the Respondent’s solicitors that it had not. Consequently, the application to the tribunal was made.

8. It should be noted that there is no dispute of fact as between the parties as to the relevant dates. In paragraph 3 of the witness statement of Russell

Leckstein on behalf of the Applicants, it is stated that the "*Section 45 Counter Notice was served on 5 September 2019*". Similarly, with regard to the application to the tribunal, notwithstanding that the form is dated 4 March 2020, both parties agree that the application was made on 5 March 2020. Again, in paragraph 3 of Mr Leckstein's witness statement it is stated that "*an application was filed with the Tribunal on 5 March 2020 for the determination of the premium*".

9. By letter dated 23 March 2020, the Respondent's solicitors alleged that the application had been made out of time and by email dated 25 March 2020 the Respondent's solicitors urged the tribunal to determine that it does not have jurisdiction. In correspondence, the Applicant's solicitors disputed he Respondent's submissions and maintained that the application had been made in time.

10. On 1 April 2020, I issued directions for the issue of jurisdiction to be determined as a preliminary issue and provided each party with the opportunity to file evidence and submissions. It was also proposed that the matter be determined on the papers unless either party requested a hearing, which neither has done.

The issues between the parties

11. As noted above, there is no dispute of fact between the parties as to the date of the giving of the counter-notice (5 September 2019) or the making of the application to the tribunal (5 March 2020). Accordingly, in determining whether the application was made in time, the sole issue is over the correct interpretation of section 48 of the 1993 Act. This provides as follows:

"(1) Where the landlord has given the tenant—

> (a)a counter-notice under section 45 which complies with the requirement set out in subsection (2)(a) of that section, or
>
> (b)a further counter-notice required by or by virtue of section 46(4) or section 47(4) or (5),

but any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date when the counter-notice or further counter-notice was so given, the appropriate tribunal may, on the application of either the tenant or the landlord, determine the matters in dispute.

(2) Any application under subsection (1) must be made not later than the end of the period of six months beginning with the date on which the counter-notice or further counter-notice was given to the tenant.

... ”

12. The key section is subsection (2) which provides that the application must be made “*not later than the end of the period of six months beginning with the date on which the counter-notice ... was given to the tenant*.”

13. In the Respondent’s submission, this means that the last day for making the application was 4 March 2020, which would mean the application was made out of time. In contrast, the Applicants assert that the application was made in time in accordance with the provisions of the 1993 Act.

14. For completeness, it is worth noting that if the application was not made in time as the Respondent contends, the Applicants’ initial notice will be deemed withdrawn. Section 53(1) of the 1993 Act provides as follows:

“Where—

> (a) in a case to which subsection (1) of section 48 applies, no application under that subsection is made within the period specified in subsection (2) of that section, or
>
> (b) in a case to which subsection (3) of that section applies, no application for an order under that subsection is made within the period specified in subsection (5) of that section,

the tenant’s notice shall be deemed to have been withdrawn at the end of the period referred to in paragraph (a) or (b) above (as the case may be).”

The parties’ submissions

The Applicant’s submissions

15. The Applicant relies principally on what has been described as the ‘corresponding date rule’. In *Dodds v Walker* [1981] 2 All ER 609, at 610f, Lord Diplock explained the rule as follows:

> “My Lords, reference to a “month” in a statute is to be understood as a calendar month. The Interpretation Act 1889 says so. It is also clear under a rule that has been consistently applied by the courts since *Lester v. Garland (1808) 15 Ves 248* , that in calculating the period that has elapsed after the occurrence of the specified event such as the giving of a notice, the day on which the event occurs is excluded from the reckoning. It is equally well established, and is not disputed by counsel for the tenant, that when the relevant period is a month or specified number of months after the giving of a notice, the general rule is that the period

> ends upon the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given."

16. According to the Applicants' written submissions, "*the service date of the counter notice is excluded from the 6-month time limit for making an application to the Tribunal, this would mean that the last day for making the application fell on 6 March 2020, the day after the application was in fact filed. However, even if the service date of the counter notice is included within the calculation, Dodds-v-Walker is authority for the proposition that the corresponding date rule applies and therefore the Applicants' application to the Tribunal was made in time, namely by 5 March 2020*".

17. Pausing there, if the rule in *Dodds v Walker* were to apply in the present case, the last day for compliance would have been 5 March 2020, not 6 March 2020 – albeit were 5 March 2020 the relevant date, the application would still have been in time. As the passage above from Lord Diplock states: "*… when the relevant period is a month or specified number of months after the giving of a notice, the general rule is that the period ends upon the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given*".

18. The Applicants also make reference to a previous decision of the Leasehold Valuation Tribunal in *Ms H McColgan-v-Sinclair Gardens Investments (Kensington) Limited* LON/00AD/OLR/2012/1096. At paragraph 4 of that decision, it is noted that, in relation to section 48(2) of the 1993 Act, it was common ground that an application had to be made within 6 months and, moreover, at paragraph 5 that "it is also common ground that the counter-notice was served on 22 March 2012 and that the 'corresponding date rule' applies". However, as is apparent from the above, the point in issue here was not argued before the tribunal in that case (as the parties agreed that the rule *did* apply), and in any event, the decision is not binding on this tribunal.

The Respondent's submissions

19. The Respondent position is that the 'corresponding date rule' does not apply in relation to section 48(2) of the 1993 Act. In support of this, the Respondent relies on section 30-19 of the 6th edition of *Hague on Leasehold Enfranchisement* and the decision of the Administrative Court in *R (Zaporozchenko) v City of Westminster Magistrates Court* [2011] 1 WLR 994.

20. Specifically, the Respondent's submission is that "*Dodds v Walker relies on service of any notice or document where the relevant statute expresses a period stated to commence from a certain day, is to be construed to exclude that day in calculating the relevant period, whereas R (Zaporozchenko) is authority that a statutory period expressed to begin on a specified day, includes that day in the calculation of the period in question*".

21. That case concerned the construction of section 99(3) of the Extradition Act 2003, which contained a time limit for the Secretary of State to make a decision as to whether a person is to be extradited following the making of an extradition order by a court. Section 99(3) of that Act provides that:

"The required period is the period of 2 months starting with the appropriate day".

22. On the facts, the 'appropriate day' was 3 September 2010, being the date on which the Magistrates Court made the extradition order. The court held that pursuant to the legislative scheme, the Secretary of State was obliged to order the extradition of the claimant by 2 November 2010.

23. The Court concluded that where the period within which the act is to be done is expressed to be a period beginning with a specified day, it held that the specified day must be included in the period. At paragraph 15 of the court's decision, it is stated:

"In our judgment, the corresponding date rule depends for its application upon the exclusion of the day of occurrence of a specified event. Lord Diplock recorded the well-established canon of construction that excludes that day when a statute specified a time limit after the occurrence of an event. He then noted that it was common ground that in circumstances where the statutory provisions excluded that day, the corresponding date rule applied. Thus if section 99(3) had said "the required period is the period of 2 months after the appropriate day" the corresponding date rule would have applied. However, because the appropriate day was included in the calculation of the period the two months ("starting with the appropriate day") the time limit expired on the day preceding the

corresponding date. To conclude otherwise would extend the period to one month and one day in defiance of the clearly expressed intention of Parliament. *Dodds v Walker* said nothing which calls into question the correctness of the reasoning in either *Hare v Gocher* or *Trow v Ind Coope*".

Hare v Gocher [1962)] 2 QB 641 and *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 QB 899 were two other decisions where the period within which the act is to be done is expressed to be a period beginning with a specified day, it held that the specified day must be included in the period.

24. Accordingly, in the Respondent's submission, the six-month period identified in section 48(2) of the 1993 Act, begins from the date the counter notice was given (5th September 2019) and as any application to the Tribunal must be made no later than the end of the period of six months <u>beginning</u> with the date the counter notice was given, the last date by which the application had to have been made to the Tribunal was 4th March 2020.

<u>Discussion</u>

25. The Applicants raise a number of points in opposition to the Respondent's submissions, including highlighting that *R (Zaporozchenko)* is an immigration case and thereby questioning its relevance to proceedings before the tribunal.

26. The Applicants also note that the passage in Hague relied upon by the Respondent relates to a landlord's application to the court under section 46(2) of the 1993 Act following a counter notice not admitting a section 42 lease claim for a new lease and not section 48(2) - indeed the tribunal has not been referred to any passage in Hague addressing how the time period in section 48(2) is to be calculated.

27. Section 46(2) of the 1993 Act provides:

"Any application for an order under subsection (1) [to the court] must be made not later than the end of the period of two months beginning with the date of the giving of the counter-notice to the tenant."

According to Hague:

"The corresponding date rule will not apply so that, if the counter-notice is served on the April 4, the application must be issued no later than June 3."

28. While the Applicants are correct that the above passage does not refer to section 48(2) – and indeed the tribunal has not been referred to any passage in Hague addressing how the time period in section 48(2) is to be calculated – in the tribunal's view, the central issue is the interpretation of the relevant part of the 1993 Act itself and accordingly it is necessary to examine the words used.

29. This leads to a more general point raised by the Applicants regarding ambiguity in the interpretation of legislation. The Applicants note that the 4th edition of Hague (which is now in its 6th edition) apparently considered that the corresponding date rule *did* apply. Whatever the reasons for such apparent change, the Applicants' solicitors' general point is that there is an ambiguity in the legislation which should be exercised in favour of the lessees. In this regard, they cite the Court of Appeal in *Cadogan v McGirk* [1996] 2 EGLR 92, that "*It is the duty of the court to construe the Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy*."

30. While the tribunal does not dissent from the Applicants' submissions as to the policy behind the 1993 Act, the tribunal must still apply the legislation as it has been drafted. There are two consequences to this. First, the tribunal has no power under the 1993 Act to extend the time for compliance or waive any failure to apply to the tribunal within the time limit imposed by Parliament.

31. Secondly, turning to the construction of the legislation itself, as noted above, Parliament has chosen to use different formulations for the calculation of time within the space of just a few sections: section 42(5) uses the phrase "*...two months <u>after</u> ...*" whereas section 48(2) uses the phrase "*...six months <u>beginning with</u>...*" –section 46(2) of the 1993 Act with which the highlighted passage in Hague is concerned, uses similar language as set out above.

32. While no explanation has been provided as to why Parliament would choose to draft the sections differently, the fact remains that it has done. In the tribunal's view, this is not a question of ambiguity. Rather, the

different formulations lead to differing approaches as to how the applicable time limit is calculated.

33. The passage in *Dodds v Walker* is concerned with a period of time formulated as per section 45(2) of the 1993 Act: "*…when the relevant period is a month or specified number of months <u>after</u> the giving of a notice, the general rule is that the period ends upon the corresponding date in the appropriate subsequent month…*". However, that is not the formulation with which the tribunal is concerned in the present case.

34. Had section 48(2) of the 1993 Act stated that "Any application under subsection (1) must be made not later than the end of the period of six months <u>from/after</u> the date on which the counter-notice or further counter-notice was given to the tenant", then the corresponding date rule would have applied. However, it in fact uses the words: "Any application under subsection (1) must be made not later than the end of the period of six months <u>beginning with</u> the date on which the counter-notice or further counter-notice was given". Accordingly, in the tribunal's view, the date on which the counter-notice was given must be included for the purposes of calculating time and the corresponding date rule does not apply.

35. The Applicants' solicitors note that there is clear authority that the corresponding date rule applies in relation to section 42(5) of the 1993 Act, concerning the date to be specified in an initial notice for the service of a counter-notice. However, in the tribunal's view, this further highlights the very distinction between when the corresponding date rule applies and when the approach in *R (Zaporozchenko)* applies. Section 42(5) specifies that the relevant date "*must be a date falling not less than two months <u>after</u> the date of the giving of the notice*" (emphasis added). The language in section 42(5) is to be contrasted with that in section 48(2) by the use of the word 'after' rather than 'beginning with'.

<u>Conclusion</u>

36. In the circumstances, the tribunal determines that the date on which the counter-notice was given must be included for the purposes of calculating time and that accordingly, the last date for making the application to the

tribunal was 4 March 2020. As the application was not made until 5 March 2020, it was out of time and the tribunal has no jurisdiction to hear the application.

Name: Judge Sheftel **Date:** 27 May 2020

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).