



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

**Case Reference** : **MAN/30UH/LRM/2019/0006**

**Property** : **Cinnabar House,  
Poulton Road,  
Morecambe  
LA4 5BW**

**Applicant** : **Cinnabar House RTM Co Ltd**

**Representative** : **Mr S. Kelly, Counsel  
Mr B. Barbour, BG Solicitors**

**Respondent** : **MW Freeholds Limited**

**Representative** : **Mr P. Simon, Counsel.**

**Type of Application** : **Commonhold and Leasehold Reform  
Act 2002 – Section 84**

**Tribunal Members** : **Regional Surveyor N. Walsh  
Judge J. Holbrook**

**Date of Decision** : **17 April 2020**

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**DECISION**

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## **Decision**

**The Applicant was not served with a valid counter-notice to the claim notice served on 19 February 2019 under section 84 of the Commonhold and Leasehold Reform Act 2002.**

**The Applicant therefore acquired the Right to Manage the premises with effect from the date specified in the claim notice, the 8 July 2019.**

## **Background**

1. The Tribunal received an application dated 2 August 2019 seeking a determination that on the relevant date the Right to Manage Company was entitled to acquire the Right to Manage the premises. The application was made by Cinnabar House RTM Co Ltd in respect of Cinnabar House, Poulton Road, Morecambe LA4 5BW ('the Premises').
2. A case management hearing (CMH) was held on 21 January 2020 at the Tribunal's hearing room in Manchester. The Applicant was represented by Mr Barbour, its solicitor, and the Respondent was represented by Counsel, Mr Simon.
3. At the CMH the Tribunal outlined to the parties' representatives that from an initial review of the papers there appeared to be a number of preliminary questions that required consideration. Both parties agreed that these preliminary issues should be determined prior to considering the substantive questions raised in the application, as they could potentially dispose of these proceedings.
4. Mr Simon raised the additional preliminary and practical point that a recent Tribunal decision in respect of service charges (MAN/30UH/LSC/2018/0079-85) found that the Leases at the Premises did not provide for the recovery of insurance premiums through the service charge. Mr Simon contended that without the ability to recover the cost of insurance the RTM company would quickly become insolvent and would be unable to discharge its function.
5. The Tribunal's preliminary view was that, while noting the difficulties this could pose for all concerned, there was no statutory bar within the 2002 Act on the RTM company proceeding notwithstanding the practical problems that could arise from the RTM company being unable to recover the cost of insurance under the terms of the Lease. The Tribunal advised Mr Simon that he was however at liberty to and would have the opportunity to make further submissions on this point, should he wish to do so.
6. The Tribunal issued a CMH note, outlining the following directions and identifying the preliminary issues to be determined.

1. The Applicant and Respondent will submit written submissions to this Tribunal within 21 days from the date of these directions, copied to the other party, on the following preliminary issues:
  - a. Was the Applicant, by virtue of its previous claim notices and the operation of Schedule 5, para 5(1)(b) of Act, statutorily barred from giving the claim notice dated 19 February 2019?
  - b. What is the date upon which the Respondent's counter-notice dated 28 February 2019 was given (or is deemed to have been given) and what are the consequences that flow from this pertaining to this application?
  - c. The Respondent and the Applicant are also at liberty to make further submissions as to the implications for the RTM company of the Tribunal's findings in (MAN/30UH/LSC/2018/0079-85), should they wish to do so.
2. The parties' submissions should specifically address and refer the Tribunal to the relevant law, including pertinent statutes and case authorities such as the Commonhold and Leasehold Reform Act 2002, the Interpretation Act 1978 and any relevant Upper Tribunal (Lands Chamber) decisions.
7. Written submissions were received from Mr Kelly, Counsel for the Applicant, for which the Tribunal is grateful. The Respondent did not comply the Tribunal's directions and chose not to make any further submissions.
8. The Tribunal is also grateful to both parties' representatives for the helpful background they provided at the CMH and for their assistance in confirming the following matters:
  - The first claim notice was served on 16 April 2018 to which a counter-notice was served on 8 May 2018. This notice was deemed to have been withdrawn by virtue of the fact that no further action was taken prior to the expiry of the two-month period allowed for within section 84(4) of the 2002 Act.
  - The second claim notice was served on 16 August 2018 with the corresponding counter notice being served on 20 September 2018. Again, this notice was deemed to have been withdrawn by virtue of s84(4).
  - The third and final claim notice was served on 19 February 2019 and required any counter-notice to be given by 1 April 2019. The Respondent's counter-notice is dated 28 February 2019 but was allegedly only received by the Applicant on 19 June 2019. The

Applicant's application to this Tribunal was allegedly made within two months of the date of receipt of the counter-notice on 5 August 2019.

## **Law**

9. The Commonhold and Leasehold Reform Act 2002 is the applicable statute for the purposes of this application and the relevant provisions are:

10. Section 71 - The right to manage

(1) This Chapter makes provision for the acquisition and exercise of rights in relation to the management of premises to which this Chapter applies by a company which, in accordance with this Chapter, may acquire and exercise those rights (referred to in this Chapter as a RTM company).

(2) The rights are to be acquired and exercised subject to and in accordance with this Chapter and are referred to in this Chapter as the right to manage.

11. Section 84 - Counter-notices

(1) A person who is given a claim notice by a RTM company under section 79(6) may give a notice (referred to in this Chapter as a "counter-notice") to the company no later than the date specified in the claim notice under section 80(6).

(2) A counter-notice is a notice containing a statement either—

(a) admitting that the RTM company was on the relevant date entitled to acquire the right to manage the premises specified in the claim notice, or

(b) alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled,

and containing such other particulars (if any) as may be required to be contained in counter-notices, and complying with such requirements (if any) about the form of counter-notices, as may be prescribed by regulations made by the appropriate national authority.

(3) Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the company may apply to [the appropriate tribunal] for a determination that it was on the relevant date entitled to acquire the right to manage the premises.

(4) An application under subsection (3) must be made not later than the end of the period of two months beginning with the day on which the counter-notice (or, where more than one, the last of the counter-notices) was given.

(5) Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b),

the RTM company does not acquire the right to manage the premises unless—

(a) on an application under subsection (3) it is finally determined that the company was on the relevant date entitled to acquire the right to manage the premises, or

(b) the person by whom the counter-notice was given agrees, or the persons by whom the counter-notices were given agree, in writing that the company was so entitled.

(6) If on an application under subsection (3) it is finally determined that the company was not on the relevant date entitled to acquire the right to manage the premises, the claim notice ceases to have effect.

(7) A determination on an application under subsection (3) becomes final—

(a) if not appealed against, at the end of the period for bringing an appeal, or

(b) if appealed against, at the time when the appeal (or any further appeal) is disposed of.

(8) An appeal is disposed of—

(a) if it is determined and the period for bringing any further appeal has ended, or

(b) if it is abandoned or otherwise ceases to have effect.

12. Section 87 - Deemed withdrawal

(1) If a RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b) of section 84 but either—

(a) no application for a determination under subsection (3) of that section is made within the period specified in subsection (4) of that section, or

(b) such an application is so made but is subsequently withdrawn, the claim notice is deemed to be withdrawn.

Acquisition of Right

13. Section 90 - The acquisition date

(1) This section makes provision about the date which is the acquisition date where a RTM company acquires the right to manage any premises.

(2) Where there is no dispute about entitlement, the acquisition date is the date specified in the claim notice under section 80(7).

(3) For the purposes of this Chapter there is no dispute about entitlement if—

(a) no counter-notice is given under section 84, or

(b) the counter-notice given under that section, or (where more than one is so given) each of them, contains a statement such as is mentioned in subsection (2)(a) of that section.

(4) Where the right to manage the premises is acquired by the company by virtue of a determination under section 84(5)(a), the acquisition date is the date three months after the determination becomes final.

(5) Where the right to manage the premises is acquired by the company by virtue of subsection (5)(b) of section 84, the acquisition date is the date three months after the day on which the person (or the last person) by whom a counter-notice containing a statement such as is mentioned in subsection (2)(b) of that section was given agrees in writing that the company was on the relevant date entitled to acquire the right to manage the premises.

(6) Where an order is made under section 85, the acquisition date is (subject to any appeal) the date specified in the order.

### Exercising of right

14. Section 95 - Introductory  
Sections 96 to 103 apply where the right to manage premises has been acquired by a RTM company (and has not ceased to be exercisable by it).
15. Schedule 6 – Premises excluded from right to manage  
Premises in relation to which rights previously exercised  
5 (1) This Chapter does not apply to premises falling within section 72(1) at any time if—
  - (a) the right to manage the premises is at that time exercisable by a RTM company, or
  - (b) that right has been so exercisable but has ceased to be so exercisable less than four years before that time.

### Submissions

16. Mr Barbour, the Applicant's solicitor contended at the CMH that Schedule 5, para 5(1)(b) did not apply because the exercisable right in relation to the first and second claim notices ceased when the notices were deemed to have been withdrawn. Further, in respect of the date of service of the last counter-notice, dated 28 February 2019, he outlined that the date of actual receipt was 19 June 2019, as mentioned and confirmed in subsequent correspondence between the parties. Accordingly, he contends the application was made within time having been submitted within two months from the date of receipt of the Counter-Notice.
17. The Applicant's submissions were further and significantly refined by Mr Kelly's, Counsel for the Applicant's, written submissions following the CMH which are summarised below. Mr Kelly also submitted that preliminary issue b. should be dealt with ahead of a. However, for the purposes of this decision nothing turns on the order in which these issues are dealt with and the Tribunal has therefore chosen to continue to address them in alphabetical order for ease of reference.
18. In considering the effect of paragraph 5(1)(b) of Schedule 6 of the Act, Mr Kelly submits that a distinction exists under the Act between 'acquiring' and 'exercising' the right to manage. Specifically referring the Tribunal to sections 79(1), 84(5), 90(4) and 90(5), Mr Kelly contends

that the right is only exercisable after it has been acquired and further, this can be on only one of the three following possible dates:

- “The date specified in the claim notice (if there is no dispute)
  - Three months after the determination becomes final (if the Tribunal decides)
  - Three months after agreement by the person or persons giving a counter-notice.”
19. The Applicant also denies receiving the Counter-Notice dated 28 February 2019 until 19 June 2019. The Applicants submits that the Respondent has provided no proof of service of the Counter-Notice on 28 February 2019 and this contrasts with the Applicant’s position where all its notices and letters are accompanied by proof of postage.
  20. Mr Kelly cites the authorities of *Alleyn Court RTM Company Ltd v Abou-Haman* [2012] UKUT 74 (LC) and *St. Stephen’s Mansions RTM Company Ltd v Fairhold NW Ltd* [2014] UKUT 0541 (LC) in support of his contention that the Tribunal has the jurisdiction to determine the validity of a counter-notice.
  21. In assessing the consequences of not serving a valid counter-notice, Mr Kelly prefers the *Alleyn Court* decision and contends it supports that “the consequences of a failure to serve a valid counter-notice are prescribed by Section 90(2)”. Namely, that the right to manage is acquired from the date specified in the claim notice and the Tribunal need not and should not concern itself with the question of whether the application is well founded or not.
  22. In respect of the recovery of insurance premiums, the Applicant outlines that the difficulty arises because only the management company referred to in the leases is entitled to recover the cost of insuring the premises from the tenants but the company has never been formed. Mr Kelly submits that as neither the Applicant nor the Respondent is the management company, they both are in the same position. Nevertheless, it is in the tenants’ interest to voluntarily meet this cost to ensure that the building is properly insured and not to do so would place them at a significant disadvantage and risk.
  23. As noted above the Respondent chose not to comply with the Tribunal’s directions following the CMH and has not made any additional submissions. The Tribunal does however have the benefit of Counsel for the Respondent’s oral submission at the CMH. At the CMH Mr Simon relied primarily upon Sched 6, para 5(1)(b) and contended that consequently the current application was time barred. He outlined in accordance with subsection (1)(b) “that right has been so exercisable” on the Applicant making its first claim notice but for whatever reason the Applicant had chosen not follow “due process” and pursue the application within the time allowed to the Tribunal.

24. When Mr Simon established that the Respondent appeared to serve a counter-notice on 28 February 2019, Mr Simon not being previously aware of this fact until it was brought to his attention by the Tribunal at the CMH, he contended that the current application to the Tribunal was consequently made outside the time permitted. Mr Simon also advised the Tribunal at the CMH that the Respondent maintained thorough postal records and that he would be able to provide evidence as to proof of postage.

## **Determination**

### Paragraph 5(1)(b) of Schedule 6 of the Act

25. The Tribunal accepts and agrees with Mr Kelly's submissions that the Act distinguishes between 'acquiring' and 'exercising' the right to manage. This is evident and clearly denoted by the sub heading 'Acquisition of right' in the Act above section 90 and similarly in the sub heading 'Exercising rights' above section 95, which make this separation and distinction clear. As section 95 itself states:

"Sections 96 to 103 apply where the right to manage premises has been acquired by a RTM company (and has not ceased to be exercisable by it)."

26. We do not see how a party can exercise a right without first having acquired that right. Section 90 details the possible dates upon which the right to manage can be acquired by reference to previous sections of the Act that set out how the right to manage can be acquired, particularly referring to section 84 but not exclusively.

27. In fact, section 84(5) specifically sets out the position, as in this case, where one or more counter-notices have been served to be as follows:

"(5) Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the RTM company does not acquire the right to manage the premises unless—

(a) on an application under subsection (3) it is finally determined that the company was on the relevant date entitled to acquire the right to manage the premises, or

(b) the person by whom the counter-notice was given agrees, or the persons by whom the counter-notices were given agree, in writing that the company was so entitled."

28. In respect of the first two claim notices, it is not disputed by the parties that by virtue of section 87 these notices were "deemed to have been withdrawn" in 2018. The Respondent's contention is however that by having made previous claim notices and by not pursuing these to a conclusion, through making applications to the Tribunal under section 84(3), the Applicant had potentially exercisable rights to manage. We



cannot accept this argument when the Act clearly articulates when the right has been acquired and section 5(1)(b) of Schedule 6 expressly states that for the Chapter not to apply to the premises “the right has been so exercisable but has ceased to be so exercisable”. Section 84(5) establishes that the right is not acquired, even potentially, by the mere making of claim notices and similarly it therefore cannot be exercisable. We therefore find that the Applicant was not precluded from making the current claim notice dated 19 February by virtue of Schedule 6 section 5(1)(b).

#### Service of the Counter-Notice

29. Section 7 of the Interpretations Act applies to service under this Act and states:

“Where an Act authorises or requires any document to be served by post (whether the expression “serve” or the expression “give” or “send” or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

30. It is alleged that the Counter-Notice was only received on 19 June 2019, significantly outside the time allowed under section 84 of the Act. The Applicant’s solicitor wrote to the Respondent on the 17 June 2018 highlighting the fact that no Counter-Notice had been received and indicating that accordingly it was the Applicant’s intention to take over the management of the property with effect from 8 July 2019.
31. In response the Respondent replied on 19 June 2019 enclosing a copy of a letter dated 28 February 2019 on non-headed paper and referring to an enclosed Counter-Notice. A copy of the Counter-Notice referred to accompanied the application form submitted to the Tribunal and is in fact a copy of a previous counter-notice with the typed date crossed out and in manuscript the date of 28 February 2019 inserted.
32. Clearly it is possible that the letter dated 28 February 2019 was posted but went astray in the post and was never received by the Applicant. The Tribunal should, applying section 7 of the Interpretations Act, deem service to have been effected if evidence is presented that the letter was properly addressed, pre-paid and posted with the Counter-Notice enclosed. This evidence has not however been provided.
33. The Tribunal notes that the Applicant’s solicitor has previously requested proof of postage from the Respondent but none has been forthcoming. We also are reminded from the CMH note that Mr Simon, Counsel for the Respondent, “advised the Tribunal that the Respondent maintained thorough postal records and he would be able to provide evidence as to proof of postage.”

34. Given that no evidence of proof of postage has been produced and the fact that Mr Simon appeared unaware of the existence of the alleged Counter-Notice dated 28 February 2019 until it was brought to his attention at the CMH, the Tribunal can draw only one inference. That is for an experienced and professional management company such as Moorland Estate Management to be unable to provide proof of postage, when it routinely maintains thorough and comprehensive postal records, the Counter-Notice was in all likelihood served late and only after the letter Applicant's letter of 17 June 2019 prompted a response. We make this finding of fact based upon the balance of probabilities and for the reasons outlined above. As a consequence a valid counter-notice was not served within the time permitted under section 84 of the Act.
35. Without the service of a valid counter-notice, there can be no dispute about entitlement and the acquisition date is the date specified in the claim notice under section 80(7). In this instance the date specified was 8 July 2019.
36. This is confirmed in section 90(3) of the Act as follows:
- (3) For the purposes of this Chapter there is no dispute about entitlement if –
- (a) No counter-notice is given under section 84, ...
37. This interpretation is also supported by the *Alleyn Court* case cited. Having reviewed the other authority cited, *St Stephen's Mansions*, the Tribunal is satisfied that the Deputy President of the Upper Tribunal is raising in obiter purely the jurisdictional issue of where a Tribunal is concerned that premises may, by dint of not meeting the fundamental requirements set out in section 72 of the Act, not be qualifying premises. This jurisdictional issue does not however arise in this case, it has not been raised by any party and none of the grounds stated in the Counter-Notice dated 28 February cite section 72. Instead the statutory grounds of opposition are listed as being section 78(4) and 79 (2), (5) and (8) all of which concern the 'notice inviting participation' and the 'notice of claim to acquire right'. These are not grounds which raise a fundamental question of jurisdiction for the Tribunal.

## Insurance

38. The Tribunal gave a preliminary view when this issue was first raised at the CMH that the inability of the Respondent and the RTM Company, should their application be successful, to recoup the cost of insurance premiums incurred through the service charge was not a relevant consideration under the Act. The Respondent was afforded the opportunity to make further submissions on this point should they wished to do so but none were received. In the absence of any submissions to support this assertion, in particular referencing relevant

sections within the Act to support this argument, the Tribunal is not minded to reverse its existing view on this matter.

39. As the Applicant observes, the RTM Company would simply be in the same position as the Respondent and there will be a strong incentive for most if not all tenants to ensure that the building is properly insured. Now we have the situation where the majority of the tenants are supporting this application and so it is probably even more likely than not that they will voluntarily pay their fair share to a RTM Company.

N Walsh  
Regional Surveyor  
17 April 2020