

Residential  
Property  
TRIBUNAL SERVICE

**LONDON RENT ASSESSMENT PANEL  
LEASEHOLD VALUATION TRIBUNAL**

**Case Reference: LON/00BK/LBC/2007/0053**

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

COMMONHOLD & LEASEHOLD REFORM ACT 2002 – SECTION 84(3)

ADDRESS OF PREMISES:	ST JAMES'S CLOSE PRINCE ALBERT ROAD LONDON NW8 7LG
APPLICANT	ST JAMES'S CLOSE RTM COMPANY LIMITED
REPRESENTED BY:	BUY YOUR OWN FREEHOLD LIMITED
RESPONDENT (FREEHOLDER)	ST JAMES'S CLOSE MANAGEMENT COMPANY LIMITED
REPRESENTED BY:	SYLVESTER AMIEL LEWIN & HORNE LLP SOLICITORS
APPEARANCE FOR THE APPLICANT	MR. TIM O'KEEFE – DIRECTOR OF BUY YOUR OWN FREEHOLD LIMITED
APPEARANCE FOR THE RESPONDENT	MR. J GAVAGHAN - COUNSEL
TRIBUNAL :	MS F DICKIE MR F JAMES FRICS MR D WILSON JP
HEARING	WEDNESDAY 28 <sup>TH</sup> NOVEMBER 2007

## SUMMARY OF DECISION

1. The RTM Company was not entitled to acquire the right to manage on 13<sup>th</sup> September 2007.

## PRELIMINARY

2. By a claim notice dated 13<sup>th</sup> September 2007 the Applicant gave notice that it intended to acquire the Right to Manage St. James's Close, Prince Albert Road, London NW8 7LG ("the premises") in accordance with Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 ("the Act"). By a counter notice dated 18<sup>th</sup> October 2007 the Respondents, being the freehold owner of the premises, alleged that by reason of section 72(6), Schedule 6(1) and section 79(5) of the Act the Applicant was not entitled on 13<sup>th</sup> September 2007 to acquire the right to manage the premises.
3. On 19<sup>th</sup> October 2007 the Tribunal received from the Applicant an application under section 84(3) of the Act and on 24<sup>th</sup> October it gave Directions to the parties in which a single issue for determination was identified – namely whether on the date on which the notice of claim was given the Applicant was entitled to acquire the Right to Manage the premises specified in the notice.
4. The Respondent requested an oral hearing, which took place at 12:00 on 28<sup>th</sup> November 2007. The Tribunal had carried out an inspection of the premises at 10:00 that same day. The premises are a block of flats overlooking Regent's Park, and consist of 47 flats let on long leases arranged across 6 floors, and a porter's flat. There are 44 parking spaces and 39/40 store rooms contained within the basement level only.
5. Section 72(6) gives effect to Schedule 6, Paragraph 1 of which excludes from the Right to Manage any premises in respect of which any non-residential part (or all such parts taken together) exceeds 25 per cent of the internal floor area of the premises (taken as a whole). Non-residential parts are defined and measured in accordance with Paragraph 1(2)-(4). However, the Tribunal having inspected the property, the Respondent sensibly clarified at the hearing that it no longer maintained that the premises were excluded by virtue of Schedule 6 Paragraph 1.

## THE LAW

6. S 78 provides:

(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.

(2) A notice given under this section (referred to in this Chapter as a “notice of invitation to participate”) must—

(a) state that the RTM company intends to acquire the right to manage the premises,

(b) state the names of the members of the RTM company,

(c) invite the recipients of the notice to become members of the company, and

(d) contain such other particulars (if any) as may be required to be contained in notices of invitation to participate by regulations made by the appropriate national authority.

....

(7) A notice of invitation to participate is not invalidated by any inaccuracy in any of the particulars required by or by virtue of this section.

### Section 79 provides:

(1) A claim to acquire the right to manage any premises is made by giving notice of the claim (referred to in this Chapter as a “claim notice”); and in this Chapter the “relevant date”, in relation to any claim to acquire the right to manage, means the date on which notice of the claim is given.

(2) The claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before.

(3) The claim notice must be given by a RTM company which complies with subsection (4) or (5).

(4) If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company.

(5) In any other case, the membership of the RTM company must on the relevant date include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained.

(6) The claim notice must be given to each person who on the relevant date is—

(a) landlord under a lease of the whole or any part of the premises,

(b) party to such a lease otherwise than as landlord or tenant, or

(c) a manager appointed under Part 2 of the Landlord and Tenant Act 1987 (c. 31) (referred to in this Part as “the 1987 Act”) to act in relation to the premises, or any premises containing or contained in the premises.

....

(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.

...

### Section 111 provides:

(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.

## THE APPLICANT'S CASE

7. Mr. O'Keefe argued that the Respondent's challenge to the Right to Manage could not extend beyond the remaining objection raised in the counter notice dated 18<sup>th</sup> October 2007 – that is, the challenge under section 79(5) of the Act. He offered no authority in support of the point, but argued that having had 5 weeks to prepare its counter notice the Applicant could not be put to strict proof of all elements of its entitlement to the Right to Manage on the relevant date. He submitted that the administrative burden in demonstrating compliance with every stage of the Act would be unreasonable in the circumstances.
8. It was the Applicant's case that on 13<sup>th</sup> September 2007 there were 25 qualified tenants who were members of the RTM company – and they are listed on the claim notice. It was agreed that there are 47 long lease flats in St. James Close, and that the requisite one half of the total of flats so contained, for the purposes of s.79(5) was 24.
9. The Tribunal received a Statement in Reply from Mr. O'Keefe on behalf of the Applicants, with a copy of the Land Registry title register showing the following particulars:
  - a. 11 St. James's Close – leaseholders Louis Freedman and Joan Beryl Freedman.
  - b. 19 St. James's Close – leaseholder Duaij Investments Limited (incorporated in Guernsey).
  - c. 20 St. James's Close – leaseholder Balleny Limited (incorporated in Guernsey).
  - d. 37 St. James's Close – leaseholder Joponita S.A. (incorporated in Panama).
10. The Applicant also produced copies of the applications for membership of the RTM Company in respect of the 4 flats mentioned in paragraph 9 (there being a single application in respect of flats 19 and 20, signed in the name of Badrya Al-Sabah). That for Flat 37 was signed in the name of Joponita Ltd.
11. The supporting documents on which the Applicant also relied included:
  - a. An e-mail from John Freedman (son of Louis and Joan Beryl Freedman confirming the form was knowingly and conscientiously signed by each of them in his presence on 31<sup>st</sup> July).
  - b. A letter dated 20<sup>th</sup> November 2007 signed by a Susan Watts P.A., Business Manager U.K. purportedly on behalf of Duaij Investments Ltd c/o Administrative Office, 65 Harley Street, London W1G 8QY. The letter confirmed that Miss Badrya Al-Sabah is a director of Duaij Investments Ltd. and Ballenny Ltd. The letter refers to a copy

of Miss Al-Sabah's passport to verify her signature. Relying on this evidence, Mr. O'Keefe argued that the application for membership had been properly signed by Miss Al-Sabah as a director of both companies.

- c. A letter dated 22<sup>nd</sup> November 2007 apparently received by fax from a Kalliope Panopoulou, confirming her to be a director of Joponita SA and having authority to sign the invitation to participate on behalf of the company.
- d. A copy of the Companies House Form 288a appointing Mr. O'Keefe as a director of the RTM company, dated 26<sup>th</sup> July 2007, together with e-mails of the same date between Mr. O'Keefe and Mr. Konialides (leaseholder of Flat 17) concerning that appointment. Mr. O'Keefe gave evidence that this form was sent to Companies House on 27<sup>th</sup> July 2007 but that on subsequent enquiry Companies House said they had no record of it and a further copy was sent. The Applicant produced the RTM company's Annual Return for the period ending 15/11/2006 showing details of its officers and a full list of shareholders.

12. Regarding service of the notice of invitation under s.78, Mr. O'Keefe gave evidence that he packed the letters and instructed a part time employee of 2.5 years (Marzena Kowalczyk) to hand deliver them through each flat door or to boxes in the hall if they existed. He said he did not have a record of service, the point not having been raised in any of the other 35 RTM cases in which his company had been instructed, including 4 which had been considered by the LVT. Only 1 refusal was received. Mr. O'Keefe said from the time of the company's incorporation on 25<sup>th</sup> July 2007 it had received no notice of any other address for service of any leaseholder prior to service of the notices of invitation on 27<sup>th</sup> July. Mr. O'Keefe stated that the Notices of Claim had been served on 13<sup>th</sup> September by another employee, Gosia Balthus, who started at the beginning of September 2007 and that Buy Your Own Freehold Ltd. had never used a process server. His company personally served documents where there are a lot of flats, and otherwise does it by post. He believed that the Respondent's request for copies of the notice of invitation was a fishing expedition, and said he still had the letter on his computer but did not produce it.

## **THE RESPONDENT'S CASE**

13. The Respondent sought to put the Applicant to strict proof that it is entitled to exercise the Right to Manage. It was submitted that there had been insufficient time for a full investigation to take place but that there was serious cause for concern that the requirements of the Act had not been met. It was argued for the Respondent that the Tribunal's jurisdiction under the Act was a complete enquiry into the Applicant's entitlement to the Right to Manage on the relevant date, and was not limited simply to the issues raised in the counter notice. The Respondent's case was that where it had raised specific objections in the tribunal proceedings the burden was on the Applicant to demonstrate the Right to Manage – and

that this was not the same as requiring the Tribunal to examine every single document in the process to satisfy itself of the compliance with the requirements of the Act.

14. In its Case the Respondent raised a number of issues. The Respondent put the Applicant to proof that the RTM company was a properly constituted RTM company within the Act, since the Memorandum and Articles of Association were not signed by the members and they suggest there is only 1 member, and that when signing the notice of claim Mr. O'Keefe was a duly appointed officer of the RTM company. The Respondent produced:

- a. a copy of the Certificate of Incorporation of the RTM
- b. the Electronic Statement of compliance with registration requirements
- c. the form 10(ef) recording the first director as Mr. Nicolas Konialides and company secretary as Athena Koureli
- d. the Memorandum and Articles of Association
- e. the form 288a bar coded by Companies House with a date of 25<sup>th</sup> October 2007.

15. The Respondent contended that a number of qualifying tenants were not served with a s.78 notice of invitation to participate, including:

- Flat 32 – Pallin Management SA
- Flat 28 – Mrs. Benjamin – Mr Mirzaee
- Flat 46 – Mr and Mrs. Markson
- Flat 34 – Elhan Saudi.

16. It was pointed out for the Respondent that whilst s.78 requires certain pieces of information to be given in these notices, and Mr. O'Keefe asserted that these documents complied with the Act, neither the Applicant nor the Tribunal had seen them. Mr. Gavanagh argued that the saving provision in s.78(7) applying to any inaccuracy in the content of the notice of invitation to participate does not assist the Respondent where it has not demonstrated the content of the notices at all. The Respondent also believed that the claim notice was not served on all qualifying tenants under s.79(8).

17. The Respondent disputed that at least 24 qualifying tenants had complied with the requirement in Article 7 of the Articles of Association to personally execute an application for membership. It referred to the following extract from Article 7:

*"Every person who is entitled to be, and who wishes to become a member of the Company, shall deliver to the Company an application for membership executed by him in the following form (or in a form as near to the following form as circumstances allow or in any other form which is usual or which the directors may approve... (the text of the application then follows).*

18. The Respondent claimed that 4 individuals listed as members did not actually agree to become members:

- Flat 11 Dr. Louis Freedman

Flat 19 Dualj Investments Limited  
Flat 20 Balleny Limited  
Flat 37 Joponita SA

19. Regarding the single signed application for membership for flats 19 and 20, the Respondent argued that the document did not state that it was being signed on behalf of a company, and could not therefore make the company liable under the costs provision contained in it. The declaration "I ... wish to become a member..." is signed by an individual – Badraya Al-Sabah. Regarding the letter from Susan Watts PA dated 20<sup>th</sup> November 2007 the Respondents doubted its provenance, it not being written on company notepaper and having the appearance of being "homemade".
20. The application in respect of Flat 37 is signed on behalf of Jopinta Ltd (not Jopinta SA). It was argued that the letter from Kalliope Panopoulou dated 22<sup>nd</sup> November 2007 is self-serving and not sufficiently good evidence that this person is a director of Jopinta SA, being signed by the same person who signed the application for membership.
21. Mr. Morris Findlay of 32 St. James Close gave evidence on behalf of the Respondent. He said that he did not receive a notice of invitation to participate and that the leaseholder of Flat 28 lives in Chelmsford and told him he had never received one at his residential address. Mr. Findlay also said that he had been told by Mrs. Markson of flat 46 and the owner of flat 34 that they had not received a notice of invitation, and by Dr. Freedman that he had signed only to become a member of the resident's association and not concerning the right to manage. Mr Findlay confirmed that he was not a director of the management company, and that Pallin Management, for whom he holds power of attorney, is a shareholder of the freeholder.

## **DECISION**

### Section 79(5)

22. On the evidence presented the Tribunal finds Dr. and Mrs Freedman were members of the RTM Company on the relevant date, having signed the membership application which contained a clear statement of its nature.
23. The single application for membership of the RTM company signed by Badrya Al-Sabah is not accepted by the Tribunal as an application by either Dualj Investments Ltd. or Ballenny Ltd. Neither company is mentioned on the application, which therefore purports to be made by an individual in that capacity and not on behalf of a company. There is in any event insufficient evidence that this person is a director of both companies. The letter is signed by someone who describes herself as a personal assistant and refers to no registered address or company number. The Applicant ought at least to have obtained a document signed by an officer of the company. Provision of official company documentation would have removed any doubt.

24. Concerning Flat 37, the Tribunal is satisfied that the application for membership was made on behalf of the leaseholder, notwithstanding that it contains an obvious error in that it states Joponita Ltd not Joponita SA. Again the supporting letter produced in evidence refers to no company registration number or registered address. This information should have been requested by the Applicant. However, notwithstanding the Respondent's argument that the letter from Ms Panopoulou is self-serving, it does at least purport to be signed by a Director. The standard of proof the Tribunal must apply is the balance of probabilities and the Tribunal finds in this case that this application for membership was valid.
25. Accordingly the Tribunal finds that on 13<sup>th</sup> September 2007 there were 23 members of the RTM company. Since this is less than the minimum number of 24 the company was not entitled to exercise the Right to Manage on that date.

#### Compliance with other provisions in the Act

26. Since there was no evidence that any of the leaseholders had provided an alternative address for service under s.111(5), service could be effected at the flats. Given the importance of the service of documents in the RTM procedure, the Tribunal was surprised at the very limited and hearsay evidence of service that was available from the Applicant.
27. Since the Applicant did not produce a copy of the notice of invitation, and in spite of the saving provision, the Tribunal was not satisfied that the content of any such correspondence was sufficient to constitute a notice under s.78.
28. Mr. Findlay did appear to have a vested interest in the success of the Respondent's case, and the Tribunal did not find his hearsay evidence about service on properties other than his own to be particularly helpful. However, he did give direct (and convincing) evidence that a notice of invitation was not delivered to his flat and it was not fanciful to expect the Applicant to prove service on each flat.
29. Mr. O'Keefe gave evidence about what members of his office staff did. However we did not find this sufficient to demonstrate on the balance of probabilities that service of the notice of invitation to participate was made to each and every property. It was not disproportionate to expect the Applicant to prove service of the s.78 notices and they were not "ambushed" by the Respondent on this issue. Rather, evidence of service of a document is a routine matter and it appeared to the Tribunal that the Applicant declined to produce evidence at the hearing of the content of the notices of invitation and their service. Had there been s.78 compliance, the Tribunal considers this could have been demonstrated easily – for example by way of a sample copy of the notice and a certificate of service.
30. The service of a notice of invitation is a preliminary to reaching the 50% membership quota raised by the Respondent in the counter notice. The

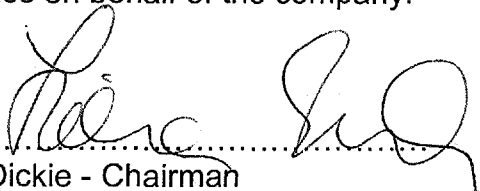


issue was raised in a timely and fair manner in these proceedings and should not have placed an onerous burden on the Applicant. Service of the notice of intention is the cornerstone of the right to manage procedure and the Tribunal did not consider in law or in the interest of justice that it was in this case bound to confine itself strictly to consideration of s.79(5) in isolation from the context in which it sits.

31. The Tribunal therefore finds on the balance of probabilities that there has been a failure to comply with s.78. The Tribunal would have expected to have seen some direct or documentary evidence of delivery, such as a signed certificate of service from the person who effected it. The Tribunal makes the same findings as to the evidence of service of the Claim Notice on 13<sup>th</sup> September 2007.

32. The Respondent had significantly broadened the ambit of its challenge in asking the Applicant to demonstrate that the RTM company was properly constituted and Mr. O'Keefe duly authorised to sign the claim notice on 13<sup>th</sup> September 2007. However, the Tribunal did not find substance in these objections and having seen the evidence produced it is satisfied that the Applicant is a properly constituted RTM company, that the Form 288a to appoint Mr. O'Keefe as a Director was submitted to Companies House as he described in his evidence, and that he properly signed the claim notice on behalf of the company.

Signed

  
.....  
F. Dickie - Chairman

Dated

18<sup>th</sup> January 2008