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H M COURTS AND TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case Number : CHI/19UJ/LRM/2011/0013

Between:

Corscombe Close Block 8 RTM Company Limited

(Applicant)

And

Rosleb Limited

(Respondent)

In the Matter of Section 84 of the Commonhold and Leasehold Reform Act 2002 ("CLARA")

Premises : Block 8 Corscombe Close, Weymouth, Dorset DT4 OUF ("the premises").

Date of Hearing: At the parties request determined on the papers without a Hearing

Tribunal:

Mr. S. B. Griffin. LLB (Lawyer Chairman)
Mr. D. Agnew. BA.LLB.LLM

Background

1. On 15th July 2011 The Applicant submitted an Application to the Tribunal under Section 84(3) of CLARA for a determination that as at the relevant date the Applicant was entitled to acquire the right to manage the premises under Chapter 1 of Part 2 of CLARA.

2. The Tribunal issued Directions on the 21st July 2011 for the determination of the Application upon the papers unless either party requested a Hearing. No such request was received and the Tribunal accordingly proceeded on the 29th September 2011 to determine this matter on consideration of the papers alone and without an oral hearing or inspection.

3. It then became apparent to the Tribunal that insufficient information had been supplied and accordingly on that date Further Directions were issued which provided:

(a) For the Respondent to provide to the Applicant and to the Tribunal documentary evidence by way of confirmation that the following parties were not qualifying tenants – Jason Paul Samways and Heidi Louise Scammell, Marie Lisa Robinson, Anthony Wilfred Johnson and Justin Richard Griffiths i.e. that all of such parties had not as yet stair-cased to 100% ownership.

(b) For the Respondent to provide to the Applicant and to the Tribunal copies of the specimen notices previously provided to it by the Applicant which allegedly differed substantially from those exhibited to the Applicant's Statement.

(c) For the Applicant to provide to the Respondent and to the Tribunal a copy of the Decision in the case Beanby Estates Limited –v-The Egg Stores (Stamford Hill) Limited 9th May 2003 (High Court Chancery Division) 2003 21EG190(CS) together with any other authority turning on the question of service by recorded delivery.

Both parties complied with the Further Direction and accordingly the Tribunal reconvened to consider the matter, again without a Hearing, on the 8th December 2011 at the Hearing Room, Southern Rent Assessment Panel, First Floor, 1 Market Avenue, Chichester PO19 1JU.

The Law

4. Chapter 1 of Part 2 of CLARA 2002 provides that a Right to Manage Company may acquire from the Landlord or a Management Company the right to manage premises (with or without appurtenant property) which comprises flats with the requisite number of qualifying tenants without there having been any fault on the part of the existing management. There are however certain qualifying conditions that must apply set out in the Act and a certain procedure to be followed before

the right to manage can be acquired. The rules concerning right to Manage companies are set out in Sections 73 and 74 of CLARA 2002 and in the RTM Companies (Model articles) (England) Regulations 2009 and the procedural requirements are set out in Sections 78 to 84 of CLARA 2002. The relevant provisions relating to this case are set out in the submissions below. In the event that the Landlord or Management Company opposes the right to manage being acquired by the RTM Company an application may be made to a Leasehold Valuation Tribunal under Section 84(3) of CLARA 2002 for a determination as to whether or not the RTM Company was on the relevant date (the date of giving the Claim Notice) entitled to acquire the right to manage.

5. Before any Notice may be served on the Landlord the RTM Company must first have served a "Notice of Invitation to Participate" under Section 78 of the Act on all qualifying lessees who are not already members of the RTM Company as non -participating lessees have the right to become members of the RTM Company.

A valid Notice of Intention to Participate must be in the form set out in Schedule 1 to the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 and must contain the information required by Section 78(2)(a) - (c) of CLARA and the Particulars set out in Regulation3(2).

6. Section 78 (2) of the Act provides that a Notice of Intention to Participate (NITP) 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 and

(c) Invite the recipients of the Notice to become Members of the Company

7. Regulation 3 (2) prescribes a further long list of particulars which must be included in an NITP designed to provide sufficient information to the recipient lessees in order for them to make an informed choice as to whether to join the RTM Company.

8. Section 78 (7) of the Act provides that an NITP is not invalidated by "any inaccuracy in any of the particulars required" by Section 78 or the Regulations.

9. The Regulations contain no saving for "notices substantially to the same effect" as in the prescribed form NITP.

The Respondent's Objections

10. The Respondent's case was as follows:

Ground 1. Section 78 1 (a) and (b) of the Act provides that before making a claim to acquire the Right to Manage any premises an RTM Company must give Notice to each person who at the time when the Notice is given is the qualifying tenant of a flat contained in the premises but neither is nor has agreed to become a Member of the RTM Company. No Notice of Invitation to Participate had been served on Weymouth and Portland Housing Limited, the Lessees of Flats 1, 6, 9 and 10.

Ground 2. The Notice of Intention to Participate failed to name the Managers, Peverel OM Limited at paragraph 4 thereof.

Ground 3. The Notice of Intention to Participate failed to include the explanatory notes as required by the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010.

Ground 4. The Claim notice named the following parties as qualifying tenants when they are not viz, Jason Paul Samways and Heidi Louise Scammell, Marie Liza Robinson, Anthony Wilfred Johnson and Justin Richard Griffiths.

Ground 5. The Claim notice failed to specify a date not earlier than one month after the Relevant Date by which the Freeholder may respond by giving a counter- notice under Section 84 of CLARA

The Respondent's Arguments

11. With regard to Ground 1 set out in paragraph 10 above, the Respondent's contention was that a shared ownership Lessee cannot be a qualifying tenant unless that Lessee had stair-cased to the full 100%. In support of this contention they put in evidence Land Registry Entries of the Registered Title of Weymouth and Portland Housing Limited together with a Land Registry copy of the Lease appertaining to Flat 1 dated 10th June 2005, that Lease bearing the legend "Shared Ownership Lease". It was the Respondent's further contention that the Respondent had a direct legal relationship with Weymouth and Portland Housing Limited who pay ground rent to the Respondent and that it is Weymouth and Portland Housing Limited who are the qualifying tenants. The Applicant's failure to serve them was a breach of the terms of the Act and not capable of being saved under Section 78(7) of the Act.

12. As regards Grounds 2 and 3 the Respondent put in evidence an unsigned and undated NITP which contained no explanatory notes and specified no manager.

13. As regards Ground 4 that by virtue of the Shared Ownership Lease and the failure to obtain 100% stair-casing, Jason Paul Samways and Heidi Louise Scammell, Marie Liza Robinson, Anthony Wilfred Johnson and Justin Richard Griffiths were not qualifying tenants.

14. As regards Ground 5 whilst it was common ground that the claim Notice had been sent out on the 28th April 2011 specifying a date for service of counter notice under Section 84 of the Act as being the 31st May 2011, insufficient notice had been given because 29th April 2011 and 2nd May 2011 were Bank Holidays and thus service could not have been effected until (at the earliest) 3rd May 2011.

The Applicant's Response

15. As regards Ground 1 whilst they agreed that no Notice of Invitation to Participate had been served on Weymouth and Portland Housing Limited this was because they were not (in the opinion of the Applicant) qualifying tenants of Flats 1, 6, 9

and 10 and there was therefore no requirement to serve them with such notice. Weymouth and Portland Housing Limited are Superior Tenants and it is the inferior Tenant who is the qualifying Tenant in accordance with Sections 75(5) and 75(6) of CLARA . The former provides that no flat may have more than one qualifying tenant at any one time, the latter that where a flat is being let under two or more long leases a tenant under any of those leases which is superior to that held by another is not the qualifying tenant of the flat.

16. As regards Ground 2 the relevant Notice of Invitation to Participate in force at the time the claim was submitted on 28th April 2011 is that dated the 7th April 2011. The Respondent was adverting to a previous Notice of Invitation to Participate sent on 3rd March 2011 which was subsequently withdrawn. An administrative error had occurred as the Guidance Notes that should have been attached to the original Notice of Invitation to Participate had been inadvertently removed. Consequently, the Applicant served the amended Notice of Invitation to Participate dated 7th April 2011. That amended Notice of Invitation to Participate now contained the explanatory notes. Whilst the amended Notice of Invitation to Participate still adverted in paragraph 4 thereof to the Managers as being "Peverel Limited" and not Peverel OM Limited that this was an inaccuracy catered for by Section 78 (7) of the Act which provides that 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.

17. As regards Ground 3 Jason Paul Samways and Heidi Louise Scammell, Marie Liza Robinson, Anthony Wilfred Johnson and Justin Richard Griffiths were the qualifying tenants and that in any event Section 78 (7) would also apply.

18. As regards Ground 4 the Applicant had complied with the requirement to specify a date not earlier than one month after the relevant date for service of the counter notice pursuant to Section 84 of the Act. The notice of claim was sent by Recorded Delivery on the 28th April 2011 and stated the date for response as 31st May 2011. The Applicants contention was thus that the period of time given was not less than one month. In support of this contention, the Applicant prayed in aid the decision in the case of Beanby Estates Limited –v-The Egg Stores (Stamford

Hill) Limited 9th May 2003 (High Court, Chancery Division) (2003) 21EG190(CS). which the Applicant considered supported its contention that when a document is sent by recorded delivery it is the date on which it is posted which is the date of service. It follows from this that sufficient notice had been given.

The Determination

19. As this is a paper determination the Tribunal was forced to rely on the relatively brief written submissions made on behalf of the parties. However, as regards Ground 1 the Tribunal noted that it was agreed between the parties that no Notice of Invitation to Participate had been served on Weymouth and Portland Housing Limited – the Lessees of Flats 1, 6, 9 and 10. The Tribunal did not however agree with the Applicant's argument that Weymouth and Portland Housing Limited was not the qualifying tenant. A person is the qualifying tenant of a flat if he is the tenant of a flat under a "long lease" (Section 72 (2) of the Act). A" long lease" for the purposes of this chapter is defined under Section 76 (e) where it is a Shared Ownership Lease, whether granted in pursuance of that part of that Act or otherwise, as where the Tenant's total share is 100%. It was clear from the documentary evidence supplied by the Respondent pursuant to the aforesaid Further Directions that the Head Leases in respect of Flats 1, 4, 6, 9 and 10 were vested in Weymouth and Portland Housing Limited and the Under Leasehold Titles were vested in Lynne Carole Arnold (Flat 1), Kirsty Louise Dell (Flat 4), Marie Louise Robinson (Flat 6), and Anthony Wilfred Johnson (Flat 9), and Justin Richard Griffiths (Flat 10).(Jason Paul Samways and Heidi Louise Scammell no longer being the Under Lessees of Flat 4). In each of the copy Land Registry Entries there is provision that no disposition is permitted without the consent in writing of the proprietor of the Head Lease. It was apparent from the Office Copy Shared Ownership Lease dated 10th June 2005 in respect of Flat 1, 8,Corscombe Close, supplied by the Respondent that there was provision in paragraph X1 thereof as follows:

"From the date on which the Tenant becomes the owner of 100% of the Flat:

(A) The Tenant may transfer this Lease to any person without paying to the Landlord a share of the Capital Value and without obtaining the Landlord's approval and may sub-let the whole of the Flat .....

(B) Neither of the restrictions entered on the register of the Tenant's Title in accordance with clause 25 shall continue to apply and both restrictions may be removed from the register on application by the tenant".

The Respondent's also put in evidence an e-mail by way of confirmation from the Housing Association (now called Synergy) which confirmed that according to their records the affected Flats, 1, 6, 9 and 10 are still the subject of shared ownership. The Tribunal found on a balance of probabilities that the underlessees had not staircased to 100% ownership of their flats as they were not long lessees within the definition of Section 76(e) CLARA and the Tribunal concluded that in consequence there had been a failure by the Applicant to serve all non - participating qualifying tenants and that such failure was not an inaccuracy that was capable of being saved by Section 78 (7) of the Act.

20. As regards Grounds 2 and 3 the Tribunal considered that the failure to name the Managers at paragraph 4 as being Peverel OM Limited instead of Peverel Limited was an inaccuracy which was capable of being saved by Section 78 (7) of the Act. Furthermore the Tribunal was satisfied on the evidence that the explanatory notes as required by the Right to Manage (Prescribed Particulars and Forms) (England) Regulation 2010 had been included in the amended Notice dated the 7th April 2011.

21. As regards Ground 4 Jason Paul Samways and Heidi Louise Scammell, Marie Liza Robinson, Anthony Wilfred Johnson and Justin Richard Griffiths were not qualifying tenants for the reasons above stated.

22. As regards Ground 5 that the notice of Claim failed to specify a date not earlier than one month after the relevant date by which the Freeholder may respond by giving a counter notice under Section 84 of the Act, the Tribunal felt constrained to agree with the Respondent's contention that insufficient time had been

provided between the notice of Claim being given and the date specified for a counter- notice to be served .

23. Section 80 (6) of CLARA, in combination with Section 79 (1) requires the date specified for submission of such counter notice to be not earlier than one month after the date on which the notice was "given".

24. The Tribunal appreciates that whilst there is much case law and Statutory law on the meaning of "service" and "served" in the context of Notices , the word "given" does not have an absolutely clear cut meaning. The Applicant argues that the notice of Claim was sent by recorded delivery on the 28th April 2011 and that this date should be regarded as the relevant date.It claims that when a document is sent by recorded delivery it is the date on which it is sent that is the relevant date. In support of this contention the Applicant prayed in aid the decision in Beanby Estates Limited –v-The Egg Stores (Stamford Hill) Limited 2003.

25. However the Tribunal considered that the case of Beanby Estates can be distinguished from the present case under consideration. That case was concerned with the renewal of a commercial lease under the Landlord and Tenant Act 1954. Section 66(4) of that Act provides that the service of notices thereunder is governed by Section 27 of the Landlord and Tenant Act 1927. This states that "any notice.....Shall be in writing and may be served by sending it through the post in a registered letter addressed to him there". The Recorded Delivery Service Act 1962 extends these provisions to delivery by recorded delivery. The Tribunal decided that the case of Beanby Estates was authority only for the services of notice by recorded delivery under Section 66(4) of the 1954 Act and Section 23 of the 1927 Act.

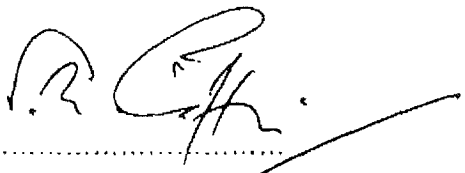
26. Section 111 of CLARA provides that any Notice under Chapter 1 of the Act must be in writing and may be sent by post. Its terminology is therefore different from Section 23 of the 1927 Act. It does not refer to the word "service" or the "giving" of notice. It simply refers to a method by which the notice may be sent to the

recipient. In Beanby Estates the court has construed the specific wording of Section 23 of the 1927 Act as providing for the moment that service is effected as being the moment when a notice is placed in the post by recorded delivery but this Tribunal does not accept that that case is authority for a general proposition as advanced by the Applicant that service of any document sent by recorded delivery is effected at the moment of posting.

27. Section 7 of the Interpretation Act 1978 states that ..."where any Act authorizes or requires a document to be served by post.....then unless the contrary intention appears the service is deemed to be effected by properly addressing, pre-paying and posting the letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of post". The Tribunal considers that the service of the notice of Claim under CLARA is subject to this provision. This begs the question what does "ordinary course of post" mean? The Tribunal considers that the meaning given in Rule 2.8 of the Civil Procedure Rules by analogy should apply to provide the necessary definition of "ordinary course of post". This Rule provides that this means the second working day after posting (excluding Sundays and Bank Holidays) where the letter is sent by first class post. Thus the Notice posted in this case on the 28th April 2011 would not be deemed to have been served or given until 3rd May 2011(both 29th April and 2nd May 2011 being Bank Holidays and 1st May 2011 being a Sunday). It follows that the stipulation in the notice of Claim that any counter-notice should be given by 31st May 2011 gave insufficient time for the landlord's response and the Claim notice is therefore invalid on this ground as well as coming after an invalid NITP.

28. Accordingly for the reasons given above the Tribunal finds that the Applicant was not entitled on the 28th April 2011 to acquire the right to manage the premises.

Dated this 17th January 2012



S B Griffin LLB (Lawyer Chairman)