LRX/16/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – right to manage – applications to LVT dismissed because agreed that notices had not been given to landlords – claim by landlords for costs – whether notices had been "given" for this purpose – whether RTM companies estopped from denying that they had been – held notices had not been given for this purpose but RTM companies estopped – Landlord and Tenant Act 1987 s 79(1), 88(1)

IN THE MATTER OF AN APPEAL FROM THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **(1) PLINTAL SA**
2) PALVETTO PROPERTIES INC **Appellants**

and

(1) 36-48A EDGEWOOD DRIVE RTM COMPANY LIMITED
(2) 50-62A EDGEWOOD DRIVE RTM COMPANY LIMITED **Respondents**

Re: 36-48A and 50 –62A Edgewood Drive, Orpington, Kent

Before: The President

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL on 29 February 2008

Nathaniel Duckworth instructed by H Gold, St Peter Port, Guernsey, for the appellants
Stan Gallagher instructed by Thackray Williams for the respondents

The following cases are referred to in this decision:

Scottish Widows Fund and Life Assurance Society v Abbas (LVT ref LON/ENF/259/98)
Twinsectra Ltd v Zadig (LVT ref LON/NL 12654/04)
Benedictus v Jalaram Ltd [1989] 1 EGLR 251

DECISION

1. This is an appeal against the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel on an application made to it by the appellants under section 88 of the Commonhold and Leasehold Reform Act 2002. That section, which is contained in Part 2 of the Act dealing with the right to manage and RTM companies, provides in subsection (1) that an "RTM company is liable for the reasonable costs incurred by a person who is – (a) landlord under a lease of the whole or any part of any premises in consequence of a claim notice given by the company in relation to the premises." Subsection (4) provides that any dispute about the amount of any costs payable by an RTM is to be determined by an LVT.

2. The second appellant is a company registered in Panama that is the freehold owner of two blocks of residential flats known as 36-48A and 50-62A Edgewood Drive, Orpington, Kent BR8 7QH. The first appellant, which is also registered in Panama, has a head leasehold interest in these premises. The respondents are companies incorporated for the purpose of acquiring the right to manage conferred under the Act.

3. On 15 July 2005 the respondents sent notices of claim under section 80 to the appellants. The notices were sent to "Plintal SA, c/o Samnat Management Ltd, 36A Wood Lane, Ruislip, Middlesex HA4 6EX" and "Palvetto Properties Inc., 8 Rue de la Douzaine, Fort George, St Peter Port, Guernsey GY1 2TA." On 16 August 2005 counter-notices under section 84 were sent to the respondents. Those on behalf of Plintal SA were signed the "Duly authorised agent of Plintal SA" by Helen Kemp of Samnat Management Ltd of the address to which the claim notices to Plintal SA had been sent. Those on behalf of Palvetto Properties Inc were signed by H Gold "Solicitor and Agent duly authorised on behalf of Palvetto Properties Inc" of the address to which the claim notices to Palvetto Properties Inc were sent.

4. Following receipt of the counter-notices the respondents applied to the LVT under section 84(3) for determinations that they were on the relevant date entitled to acquire the right to manage the premises. Under section 79(1) "the relevant date" is the date when the claim notice is given. In their statement of case dated 30 November 2005 the appellants contended that the RTM companies were not entitled to acquire the right to manage either or both of the blocks of flats (which were referred to as blocks A and B) because they had failed to comply with certain mandatory conditions precedent to such an acquisition. They specified three failures. Firstly they said that the RTM companies had failed to give invitation to participate under section 78(1) to Plintal SA, which was a qualifying tenant of three flats in each block. Secondly they said that the claim notices had not been effectively served on the appellants at their registered addressed in Panama or to places of business of the companies within the jurisdiction. They referred to the Civil Procedure Rules Part 6. Thirdly they said, in relation to block B, that the number of participating tenants were less than half the number of flats in the block and thus there was a failure to comply with section 79(1). Until the service of their statement of case the appellants had not identified the particular defects on which they relied.

5. In their reply dated 14 December 2005 the RTM companies contended that the counter-notices were invalid because they failed to identify the specific provisions relied on for their assertion that the RTM companies were not entitled to acquire the premises. They denied that Plintal SA was a qualifying tenant and that, since it was not, that the number of participating tenants in block B was too few. The reply then said, under the heading "Ineffective Service":

> "17. Subject only to the Applicants' principal contention, namely:
>
> a. the counter-notices are invalid and of no effect;
>
> b. the counter-notices define and constrain the basis of any challenge to the RTM company's right to manage; and
>
> c. in the absence of a valid and effective counter-notice that properly identifies the grounds that the Respondents seek to rely on, the Respondents' seek to rely on, the Respondents' defence to the Application should be dismissed,
>
> the Applicant admits and relies on the Respondents' connection that the purported notices of claim were not effectively served on either of the Respondent landlords. In the premises it is admitted and averred that (subject only to the Applicants' principal contention) that the Applicants cannot rely on the documents sent in July 2005. The Applicants further contend that it necessarily follows the Respondents cannot be heard to assert that notices of claim have been effectively served on either or both Respondent companies.
>
> Accordingly, it is contended that, in reliance on the Respondents' contention that the notices of claim were not dully served on either of the Respondent landlords, it remains open to the Applicants to now serve notices of claim on the Respondents without any requirement to first withdraw those "notices" that the Respondents' allege (and the Applicants admit, subject only to the qualification set out herein above) have not been effectively served on the Respondents: in the absence of effective service on the Respondents there can be no subsisting notices of claim.
>
> The Applicants therefore propose to now serve notices of claim on the Respondents, having first served notices of invitation on Plintal SA in respect of the Retained Flats, such notices to be served on Plintal without any admission that there is any requirement to do so. However, whether on an extra-statutory basis or otherwise, Plintal SA will be invited to join the Applicant RTM companies before the notices of claim are served: doing so will afford Plintal SA the opportunity to share the costs of exercising the statutory right to manage the properties and thereby displace Plintal SA's contractual rights and obligations imposed by the headlease to do so."

6. The RTM companies' application was the subject of a hearing by the LVT on 30 January 2006. The LVT raised with their counsel, Mr Stan Gallagher, who also appears for them before me, the issue of service, on the basis that, if it was conceded, as the reply appeared to concede, that the claim notice had not been served, the LVT had no jurisdiction to consider the applications. Mr Gallagher confirmed the concession, and the LVT accordingly in its decision of 10 February 2006 determined that it had no jurisdiction. It then said that the only outstanding issue was that of costs under sections 88 and 89, and it went on to deal with that matter. It said:

"12. Even though the Respondents had clearly received the claim notices, through their Managing Agents and solicitor, they had raised the issue of service. They need not have done so. They could simply have left the issues, relating to the identity and numbers of Qualifying Tenants, to us. If we have found in their favour then the applications would have been dismissed and they would have been entitled to their costs. Nevertheless the sufficiency of the service of the claim notices had been taken by the Respondents and it had been conceded by the Applicants. Where, as in the case, a concession is made with the benefit of legal advice it was not for us to question or go behind it.

13. It was agreed by both parties that the claim notices had not been served. Consequently it followed that the claim notices had not been given to the Respondents for the purpose of subsection 79(1) of the Act which reads as follows: '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); ...' We therefore concluded that the relevant provisions of the Act were simply not engaged and that we had no jurisdiction to entertain the applications, which could only be regarded as a nullity.

14. Everything flows from the 'giving' of the claim notice including any rights that a landlord might have to costs under Sections 88 and 89 of the Act. Logically therefore it followed that, the claim notices not having been served, the right to costs did not arise. We were however aware that in enfranchisement cases a landlord was still entitled to its costs even where the claim notice contains an error rendering it invalid on the basis that the tenant is estopped from denying the payability of the landlord's costs for so long as it asserts the validity of the claim notice (see paragraph 28-22 of the fourth edition of Hague). Although a considerable degree of elasticity would be required to extend that doctrine to a claim notice that had never been served the point had not been argued out before us, no doubt because the issue of jurisdiction only arose during the course of the hearing. In such circumstances we considered it premature to make a conclusive determination on the payability of the Respondents' costs, which in any event had not been quantified. If the Respondents wished to pursue their application for costs they could no doubt make an application under Sub-section 88(4) of the Act."

7. The appellants did make application under section 88(4), and this application was the subject of a hearing on 29 November 2006, when their counsel submitted that, although the claim notices had not been served as required by section 79(1), they had nevertheless been "given", in the sense of having been received, for the purposes of section 88(1). Alternatively he submitted that the RTM companies were estopped from denying the appellants' entitlement to costs. In its decision of 19 December 2006 the LVT said this:

"10. It is common ground between the parties that the Claim Notices were never served. It seems to us that the relevant part of s88 is sub-section (3) where it states that an RTM company is only liable for costs if the Tribunal dismisses an application for a determination that it is entitled to acquire the right to manage the premises. In this case no such dismissal has taken place. Rather the parties

agreed the service had not been effective and that the proceedings had therefore never technically started…

13. .... We must, it seems to us, fully consider the terms of the 2002 Act and although we are urged to avoid any arbitrary or unjust result we cannot ignore the wordings of the Act. Section 88(1) clearly states that the RTM company is liable for reasonable costs in consequence of the Claim Notice given by the company in relation to the premises. Further, and not we believe in isolation, an RTM company's liability for costs only arises if the Tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises (see 88(3)). Section 89 covers the position where the Claim Notice is withdrawn or deemed to be withdrawn and provides for costs to be recovered down to that time. We do not think that there is any need for us to attempt to second guess what Parliament might have intended. The Act, we find is clear on its face.

14. In this case it seems to us that the Applicants, who have been represented by solicitors from the very outset, should have taken the point on service at a much earlier time. That they did not do so until much later in the year is a matter for them. Indeed as was pointed out in the previous Tribunal Decision they need not have taken that point and could instead have relied upon other issues which may have resulted in a dismissal and thus the ability to recover costs. They chose not to do so. We do find the case of *Benedictus v Jalaram Ltd* of some assistance setting out the principles of approbation and reprobation. The Applicant does seek to have its cake and eat it. In going for the certainty of agreeing non-service, it must in our finding accept the repercussions.

15. We remind ourselves that the whole basis of the Right to Manage Provisions is no fault management. It is accepted that the Landlord would as a matter of good legal practice respond to the Notice to ensure its position was reserved but at that time should also have raised the question of non-service which presumably would have enabled the RTM company to have put its house in order and re-served correctly.

16. In the circumstances and having considered carefully the submissions made by Counsel on both sides, and the law, we have come to the conclusion that the Respondents' arguments are correct and that as the procedures under the Act were never instigated there is no liability on the Respondent companies to pay the costs to the Landlords in this matter. It is not therefore necessary for us to consider the level of costs which the landlords sought to recover although in passing we would comment that they did seem to be excessively high and had we considered the matter in detail would certainly have been the subject of substantial reduction."

8. The following provisions of the 2002 Act are to be noted:

> "79. Notice of claim to acquire right
>
> (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…
>
> (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.
>
> 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).
>
> 88. Costs: general
>
> (1) A RTM company is liable for reasonable costs incurred by a person who is –
>
> (a) landlord under a lease of the whole or any part of any premises,
> (b) party to such a lease otherwise than as landlord or tenant, or
> (c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,
>
> in consequence of a claim notice given by the company in relation to the premises.
>
> (2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.
>
> (3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before a leasehold valuation tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.
>
> (4) Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by a leasehold valuation tribunal.

89. Costs where claim ceases

(1) This section applies where a claim notice given by a RTM company –
(a) is at any time withdrawn or deemed to be withdrawn by virtue of any provision of this Chapter, or
(b) at any time ceases to have effect by reason of any other provision of this Chapter.

(2) The liability of the RTM company under section 88 for costs incurred by any person is a liability for costs incurred by him down to that time.

111. Notices

(1) Any notice under this Chapter–

(a) must be in writing, and
(b) may be sent by post.

(2) A company which is a RTM company in relation to premises may give a notice under this Chapter to a person who is landlord under a lease of the whole or any part of the premises at the address specified in subsection (3) (but subject to subsection (4)).

(3) That address is –

(a) the address last furnished to a member of the RTM company as the landlord's address for service in accordance with section 48 of the 1987 Act (notification of address for service of notices on landlord), or

(b) if no such address has been so furnished, the address last furnished to such a member as the landlord's address in accordance with section 47 of the 1987 Act (landlord's name and address to be contained in demands for rent).

(4) But the RTM company may not give a notice under this Chapter to a person at the address specified in subsection (3) if it has been notified by him of a different address in England and Wales at which he wishes to be given any such notice."

9. For the appellants Mr Nathaniel Duckworth advances two arguments. Firstly he says that the word "given" for the purposes of section 79(1) is to be construed as meaning "served" because it must be construed in the light of Part 6 of the CPR and section 111 of the 2002 Act. It was common ground that services of the claim notices had not been properly effected and accordingly that the claim notices had not been "given" for the purposes of section 79(1). But it was not necessary that "given" in section 88(1) should be given the same meaning. It should be construed as meaning "received" rather than "served". This would enable effect to be given to the clear legislative intent behind section 88(1), that a landlord should not be left out of pocket in dealing with unmeritorious claims for the right to manage.

10. Mr Duckworth says that support for this approach is to be derived from two LVT decisions, *Scottish Widows Fund and Life Assurance Society v Abbas* (LVT ref LON/ENF/259/98) and *Twinsectra Ltd v Zadig* (LVT ref LON/NL 12654/04). In the first, the

LVT held that two notices under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 were invalid. The landlord applied for its costs under section 33 of that Act. The tenants resisted the claim for costs on the basis that the notices were void and of no effect. Since entitlement to costs only arose "Where a notice is given under section 13 ..." they said that the LVT had no jurisdiction because no such notices had been given. The LVT rejected this contention and awarded costs. Similarly in *Twinsectra* it was argued by a tenant who had served a defective notice under section 42 of the 1993 Act that because the notice failed to comply with the requirements of sections 42(3)(f) and 42(5) of the 1993 Act there was no notice under section, but the LVT rejected the argument and awarded costs. In each case the LVT had adopted a purposive approach to the application of the costs provisions and Mr Duckworth says the same should be done here.

11. The alternative argument that Mr Duckworth advances is that the RTM companies are estopped from denying the appellants' right to costs, having maintained up to the first LVT hearing that the claim notice were valid and properly served. That argument is recorded in the LVT decision as having been raised before it, but it is not dealt with in the decision.

12. Both parties rely on what they contend are the merits of the case. I have to say that the position of each of them seems to me to be unmeritorious and it is difficult to say where the balance of the demerits lies. The appellants were in my judgment quite clearly given notice of the RTM companies' claims for the purposes of section 79(1). There is no requirement that notice must be given in a manner that would constitute service for the purposes of the CPR. Notice simply has to be given, and the Act is not prescriptive about the way in which notice must be given, other than that it must be in writing. Section 111 contains permissive provisions as to the method of service. In the present case there is no doubt that notice was given to the appellants for the purpose of section 79(1) because their duly authorised agents gave counter-notices under section 84. They had clearly received the claim notices; the notice had been given to them. The assertion in their statement of case in the first LVT proceedings, over 3 months after giving their counter-notices, that they had not been served with the claim notices so that the claim notices were invalid, was in my view without merit or any foundation in law. The fact that the RTM companies agreed with this contention and the LVT (quite correctly, in my view) determined the matter on the basis of this agreement, does not make the contention any less unmeritorious.

13. On the other hand the RTM companies' conditional acceptance of the contention, for what appear to me to be purely tactical reasons, is equally unmeritorious. Paragraph 17 of their reply in the first LVT proceedings made clear that they were seeking the LVT's determination under section 84(3) that they were entitled to manage the premises. Only if the LVT were to be against them on that would they admit and rely on the invalidity of the claim notices. It was, it appears, only when the LVT pointed out to Mr Gallagher the unreality of their position that he accepted that the application should be dismissed on the basis that the claim notices were invalid. Had they accepted this when the point on service was pleaded in the appellants' statement of case, the RTM companies would have withdrawn the LVT application and the costs of the unnecessary hearing would have been avoided. While the RTM companies continued to seek the LVT determination of their right to manage, however, the appellants were obliged to contest the proceedings.

14. I do not think that a claim notice, given as required by section 79(4), ceases to be a claim notice for all purposes under the Act if it is later found to be invalid (most obviously, for example, if it fails to comply with the requirements of section 80). It is to be noted that section 81(1) provides: "A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80". This implies that a claim notice could be invalidated for other reasons, but as a matter of language it would not be inappropriate still to refer to it as a claim notice. The LVT would say that it found the claim notice to be invalid, not that it found that the notice give to party X purporting to be a claim notice was not a claim notice at all. Thus I see no difficulty in reading section 88(1), where it refers to "a claim notice" as including a claim notice that has been found to be invalid.

15. I cannot accept Mr Duckworth's contention, however, that a claim notice can have been "given" for the purposes of section 88(1) even though it was not "given" for the purposes of section 79(1). I cannot see how there can be two different tests for what constitutes the giving of a claim notice in different sections or what the different criteria for "giving" under section 88(1) would be. The language used is in my judgment only consistent with the same meaning applying throughout. My conclusion, therefore, is that unless a claim notice has been given under section 79(1) there is no entitlement to costs under section 88(1). The LVT determined the applications under section 84(3) on the basis of the parties' agreement that the notices had not been given for the purposes of section. Accordingly, given the conclusion that I have just expressed, section 88(1) could not operate so as to entitle the landlords to costs on the basis that the notices had been given to them.

16. The LVT rejected the claim for costs applying the principle that the appellants could not approbate and reprobate, and they relied (as Mr Gallagher does before me) on *Benedictus v Jalaram Ltd* [1989] 1 EGLR 251. That principle would not apply if the appellants were right in saying that "given" means different things in section 79(1) and section 88(1), but it does apply once their contention on that point has been determined against them. However, its application is subject to Mr Duckworth's alternative argument.

17. This alternative argument is that the RTM companies are estopped from denying the appellants' right to costs under section 88, having maintained until the first LVT hearing that the claim notices were valid and properly served. He relies on a passage from Hague on Leasehold Enfranchisement (4th Edn) at paragraph 28-22 that expresses the view that where a purported initial notice (under section 13 of the 1993 Act) is served which turns out to be invalid, the nominee purchaser and participating tenant are estopped from denying that section 33 costs are payable at any time while they assert that it is a valid notice. Mr Duckworth says that the same applies here mutatis mutandis, and he points out that the principle was referred to in the *Scottish Widows* and *Twinsectra* cases.

18. Mr Gallagher's response is that the passage in Hague is predicated on the services of the initiating notice, in contrast to the appellants' case here, which is that no claim notices were given. Further, he says, it was not apparent until the services of the appellants' statement of case on 30 November 2005 that it became apparent that the appellants' position was that claim notices had not been given.

19. In my judgment the appellants' contention is correct. By maintaining their application to the LVT the RTM companies were asserting that the claim notices were valid and were validly served. They were asking the LVT to determine that they had the right to manage the premises. That was their primary contention as expressed in their reply. It was only if the LVT found itself unable to determine in their favour the right to manage that they sought to accept and rely on the appellants' contention that the claim notices had not been validly served. In these circumstances the appellants could not have sat back in reliance on the RTM companies' acceptance that the notices had not been validly served because that acceptance was only contingent on the failure of the RTM companies' primary case. The LVT would have determined that the RTM companies had the right to manage, and that determination would have been effective for all purposes.

20. Accordingly, the appellants were in my judgment entitled to their costs from the date of the RTM companies' reply on 14 December 2005, which is the basis of the estoppel, and the LVT should have so concluded. The appeal is therefore allowed. Both parties asked me, if I concluded in the appellants' favour, to remit the matter to the LVT so that the reasonable costs of the appellants can be assessed, and I do so.

Dated 5 March 2008

George Bartlett QC, President