FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AZ/LRM/2013/0028**
Property	:	**37 Whatman Road, London SE23 1EY**
Applicant	:	**37 Whatman Road RTM Company Ltd**
Representative	:	**Canonbury Management**
Respondent	:	**Assethold Limited**
Representative	:	**Scott Cohen, solicitors**
Type of application	:	**Application to determine whether an RTM Company has the right to acquire**
Tribunal member	:	**Judge Timothy Powell**
Date and venue of hearing	:	**14 January 2015, at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**26 January 2015**

DECISION

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Decisions of the Tribunal

(1) The Tribunal determines that, on a balance of probabilities, the respondent did not receive the notice of withdrawal of the first claim notice sent by letter dated 10 September 2013; and that therefore

(2) The applicants' Right to Manage is denied.

The application

1. The applicant RTM Company applied under section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("the Act") for a determination as to whether, on the relevant date, it was entitled to acquire the Right to Manage in respect of 37 Whatman Road, London SE23 1EY ("the Premises").

2. This was the second such application and details relating to the first application are still relevant.

3. On 31 March 2013, the applicant served a claim notice seeking to exercise the right to manage ("the first claim notice"). The respondent having served a counter-notice denying the right to manage, on 14 June 2013 the applicant issued proceedings before the Tribunal under section 84(3) ("the first proceedings"). That application was decided by a paper determination dated 28 August 2013 in the respondent's favour, that is to say the Tribunal on that occasion decided that the applicant had not acquired the right to manage. The time to appeal that decision expired on 27 September 2013.

4. Rather than appeal, the applicant wrote to the respondent on 10 September 2013 withdrawing the first claim notice and shortly afterwards gave the respondent a fresh, second claim notice dated 16 September 2013.

5. By counter-notice dated 18 October 2013, the respondent disputed that the applicant was entitled to acquire the right to manage on five grounds, the first of which related to section 81(3) of the Act, namely that the earlier claim notice continued to be in force.

6. On the strength of the second claim notice, the applicant subsequently applied for second time to the Tribunal under section 84(3) of the Act for a determination that it was, on the relevant date, entitled to acquire the right to manage the Premises ("the second proceedings").

7. On 3 March 2014, a differently-constituted Tribunal issued its decision in relation to the second proceedings ("the second decision") and

determined that the applicant was entitled to acquire the right to manage the Premises. The respondent appealed and, by decision of the Upper Tribunal dated 11 November 2014, the second decision of this Tribunal was set aside.

8. By paragraph 23 of the Upper Tribunal decision, the application was remitted to the First-tier Tribunal for it to decide upon the following single question, namely:

> ".... whether the letter of 10 September 2013 (which is not before me) constituted a valid notice of withdrawal under section 86 which was given, prior to the date of service of the second claim notice, to each person which it was required to be given pursuant to section 86(2)."

9. Directions were given in relation to the matter remitted and a hearing took place before me on 14 January 2015. At that hearing, the parties agreed with the Upper Tribunal's assessment that a positive answer to the question will lead to the right to manage being confirmed; and a negative answer will lead to the right to manage being denied.

The hearing

10. At the hearing, I had the benefit of a bundle of relevant documents, which included the witness statement of Roger McElroy, the CEO of Canonbury Management, who was directly involved on the applicant's behalf with the RTM process, and a witness statement of Mr Ronni Gurvits, an employee of Eagerstates Ltd, which company is instructed to act as managing agent of the Premises by the respondent freeholder. Both Mr McElroy and Mr Gurvits attended the hearing to give evidence and to make submissions in support of their respective cases.

The Tribunal's decision

11. Having heard that evidence and considered the documents, I determine that, on a balance of probabilities, the respondent did not receive the notice of withdrawal of the first claim notice sent by letter dated 10 September 2013 and that, therefore, the right to manage is denied.

Reasons for the Tribunal's decision

12. By section 81(3) of the Act,

> "Where any premises have been specified in a claim notice, no subsequent claim notice which specifies—
>
> (a) the premises, or
>
> (b) any premises containing or contained in the premises,

may be given so long as the earlier claim notice continues in force."

13. By section 81(4) of the Act,

    "Where a claim notice is given by a RTM company it continues in force from the relevant date until the right to manage is acquired by the company unless it has previously—

    (a) been withdrawn [...]"

14. By section 86(2) of the Act, a notice of withdrawal must be "given" to the landlord, to each qualifying tenant, to any other party to the lease and to any manager appointed under Part 2 of the 1987 Act. In the present case, the only relevant recipients are the landlord and the two qualifying tenants.

15. The position with regard to the service of documents by post is governed by section 7 of the Interpretation Act 1978, which reads as follows:

    "References to service by post

    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."

16. At the outset of the hearing, I handed a printed copy of the relevant section to the parties and explained that I was required to carry out a two-stage process:

    (i) First, I had to decide on the balance of probabilities whether the four letters dated 10 September 2013 (i.e. one to the landlord, one to the landlord's managing agents and one each to the two qualifying tenants) had been properly addressed, pre-paid and posted. If they had been, then there was a presumption that they were deemed served at the time at which the letters would be delivered in the ordinary course of post. In the case of the letters of the 10 September 2013, that would mean deemed service on 12 September 2013;

    (ii) However, if the recipient can prove otherwise, which in the present case means that the letters had not been received, then the presumption is rebutted so there is no deemed service. In this latter case, the first claim notice would have continued in force (i.e. would not have been withdrawn), which by section 81(3) of

the Act would invalidate the second claim notice and result in the denial of the right to manage.

17. Mr Gurvits accepted that the letters of 10 September 2013 had all been properly addressed to their respective recipients. Mr McElroy explained how the documents had been produced by Canonbury's fully-automated computer system which, he said, "programmatically" prints the letters produced. The envelopes are then franked using the Royal Mail's "Smart Stamp" system, with the letters being collected by the Royal Mail from Canonbury's office.

18. Although Canonbury keeps a separate record of letters that are sent by registered post from its office, there is no separate record to say that the ordinary post had left the office, apart from the electronic copy of the letter on its task management system.

19. The claim notices and all other documentation had been generated and posted in the same fashion, without going astray. One letter had been sent to the respondent, Assethold Ltd, and one to its managing agents Eagerstates Ltd. The electronic copies of each letter stated clearly that they had been "Sent by: Post". It was a system that had been operating satisfactorily for many years, without problem, and there was no reason to believe that the letters had not been collected from his firm's office and, therefore, posted.

20. The two letters sent to the qualifying tenants had been sent by e-mail, which fact was, once again, endorsed on the electronic copy of each letter. Although Mr Gurvits queried why no proof of sending by e-mail had been produced, Mr McElroy explained that their system had a direct link to the server and that e-mails were sent directly and programmatically from their task management system, not as an attachment to an e-mail. Had an e-mail not been received, it would have bounced back but, Mr McElroy said, this had not happened.

21. I had no reason to doubt Mr McElroy and, on the basis of his evidence, I was satisfied that the letters dated 10 September 2013 had been properly addressed, pre-paid and posted, that is, they had been given into the care of the Royal Mail for delivery.

22. That being the case, the presumption arises that the letters had been duly served, unless the contrary was proved.

23. For the respondent freeholder, Mr Gurvits gave evidence to the effect that he had been employed by Eagerstates Ltd, the managing agents, for the past four years and that it had been his responsibility for the past three years to open all of the post. Where letters are sent to Assethold Ltd, they are delivered to the freeholder's accountant at 5 North End Road, London NW11. When this happens, the accountant

telephones Eagerstates and Mr Gurvits goes in person to collect the unopened mail.

24. Mr Gurvits told me he could personally say that he had not seen the letters of 10 September 2013 at the relevant time. In preparation for this hearing, he had checked his paper file relating to the Premises again, and the storage archive, to make doubly-sure that the letters had not been received; and they had not.

25. When questioned, Mr Gurvits said that Eagerstates Ltd does not maintain a "post received" book, has no date-stamping procedure and does not keep any correspondence on computer (it is all kept in hard copy format).

26. He said that in their past dealings with Canonbury, Eagerstates Ltd often received letters by e-mail or fax, but Canonbury had used neither to give the notice of withdrawal. In reply to this point, Mr McElroy said that documents such as claim notices and notices of withdrawal are only ever sent by post, because it can never be certain that the recipient will accept service by e-mail.

27. As with Mr McElroy, I found Mr Gurvits to be a clear, straightforward and convincing witness. Without more, it may have been tempting for me to conclude that Mr Gurvits was mistaken in his recollection and that at least one of the two letters addressed to Eagerstates Ltd and to Assethold Ltd must have "got through" and been delivered by the Royal Mail. The matter was finely balanced. However, there was a further aspect to the case which tipped the balance in favour of the respondent.

28. Mr Gurvits said that he recalled receiving the second claim notice dated 16 September 2013, probably on the following day or the day after. He scanned it and sent it by e-mail to Assethold's then solicitors, Conway & Co, for them to draft the counter-notice. His e-mail would have said something to the effect of: "Please carry out the usual checks and then call to discuss." Mr Gurvits recalls having that discussion with Conway & Co, where the solicitors raised issues that they had identified with the second claim notice, giving the strengths and weaknesses of each issue. On this occasion, Mr Gurvits recalled the solicitors making reference to the first claim notice and asking him whether it was "still in play", i.e. whether he had received notice of withdrawal. Mr Gurvits had checked the file at the time and when he discovered that no notice of withdrawal had been received, he told the solicitors to "Please proceed with that point."

29. The counter-notice was dated 18 October 2013. The first of the five points of challenge to the validity of the second claim notice alleged that, by reason of section 81(3) of the Act, the applicant "was not entitled to acquire the right to manage the premises specified in the

claim notice as at the date the claim notice was given an earlier claim notice remained in force."

30. In my view, the only ground on which that allegation could have been made was that the notice of withdrawal dated 10 September 2013 had not been received by the respondent at the time when the second claim notice was received.

31. Had the applicant considered the allegation immediately upon receipt of the counter-notice, it would have been immediately obvious that there was a question as to the effectiveness of the notice of withdrawal sent from the Canonbury offices about five weeks earlier. The mere possibility that the notice of withdrawal might not have been received by the respondent could and should have alerted the applicant, at the very least, to the need to check the position with respondent, and possibly to abandon the second claim notice and serve a fresh notice of withdrawal and/or a fresh claim notice.

32. It follows from the above that I determine, on balance of probabilities, that the respondent did not receive the notice of withdrawal dated 10 September 2013. Therefore, the presumption in section 7 of the Interpretation Act 1978 that there had been deemed service is rebutted. This means that on the date the second claim notice was given by the applicant, the first claim notice continued in force. As a result, at the date of the giving of the second claim notice the respondent was not entitled to serve a claim notice because of section 81(3), with the result that second claim notice was invalid.

33. Consequently, the right to manage is denied.

Name: Judge Timothy Powell **Date:** 26 January 2015