FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AR/LRM/2019/0027**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Halyards Court and Eldon Court, 12 and 14 Western Road, Romford, Essex RM1 3GL**
Applicant	**:**	**Eldon & Halyards Court RTM Company Ltd**
Representative	**:**	**Mr Roger McElroy of Canonbury Management**
Respondent	**:**	**Avon Ground Rents Ltd**
Representative	**:**	**Mr Justin Bates of Counsel**
Type of application	**:**	**Right to Manage**
Tribunal members	**:**	**Judge P Korn** **Mr T Sennett FCIEH**
Date of hearing	**:**	**20th May 2021**
Date of decision	**:**	**28th May 2021**

DECISION

© CROWN COPYRIGHT

Description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which we have been referred are in an electronic bundle, the contents of which we have noted. The decision made is set out below under the heading "Decision of the tribunal".

Decision of the Tribunal

The Applicant was not entitled on the relevant date to acquire the right to manage in respect of the Property.

The application

1. The Applicant seeks a determination pursuant to section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("**the Act**") that on the relevant date it was entitled to acquire the right to manage the Property. The Respondent is the freehold owner of the Property.

The issues

2. By a claim notice dated 28th March 2020 the Applicant purported to give notice to the Respondent that it intended to acquire the right to manage in relation to the Property. The notice specified 2nd May 2020 as the date by which recipients of the notice could respond to it by giving a counter-notice.

3. The Respondent initially raised three separate issues ("**Issue 1, Issue 2 and Issue 3**") as to why in its view the Applicant was not entitled to acquire the right to manage.

4. Issue 1 is that, according to the Respondent, the Applicant is not entitled to acquire the right to manage because the notice gave too short a period for service of a counter-notice. Issue 1 remains a live issue and is referred to in more detail below.

5. Issue 2 related to the question of whether it was possible to have one RTM company acquiring the management of both of the two named blocks of flats. The Respondent has now withdrawn its objection on this issue.

6. Issue 3 relates to the status of the shared ownership leaseholders at the Property. The Respondent contends that a shared ownership leaseholder who has not 'staircased' to 100% ownership is not a qualifying tenant and is not entitled to be a member of an RTM company. Without those leaseholders as members of the RTM

company the Applicant is unable to claim the right to manage. However, as both parties are aware, the Upper Tribunal has recently made a decision on this legal point in *Avon Ground Rents Ltd v Canary Gateway (Block A) RTM Co Ltd (2020) UKUT 358 (LC)*. The decision of the Upper Tribunal in that case was that a shared owner is a qualifying tenant for the purposes of the right to manage however small its share is.

7. The Upper Tribunal's decision referred to above is binding on the First-tier Tribunal ("**FTT**"). Consequently, the Respondent accepts that its arguments on Issue 3 must fail before the FTT and therefore does not seek to argue Issue 3 before the FTT. It does, though, reserve the right to argue the point further on any appeal if the circumstances allow it to do so.

Relevant legislation

8. *Section 7 of Interpretation Act 1978*

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.

Section 79 of Commonhold and Leasehold Reform Act 2002

(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 ...

Section 80

(1) The claim notice must comply with the following requirements.

...

(6) It must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice under section 79(6) may respond to it by giving a counter-notice under section 84.

…

Section 81

(1) A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80.

…

Section 84

(1) A person who is given a claim notice by a RTM company … may give a notice (referred to in this Chapter as a "counter-notice") to the company …

(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 …

(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.

…

Applicant's position

9. In its statement of case the Applicant notes that it is the Respondent's position that the claim notice was only received by registered post. However, according to the Applicant what is more likely to have happened is that the claim notice would have been produced by automatic systems and would have been posted by both first-class post and registered post on Saturday 28th March 2020. It would not have been affected by days of the week or by the lockdown (due to the pandemic) because the computer systems and the automated printing, folding, posting systems are undertaken by machines that operate effectively for millions of documents issued by banks, governments, card companies etc.

They are audited and largely unattended systems operated by a third party.

10. Canonbury Management has used these systems for years and has previously explained to the FTT in detail how they operate. In the case of *61 Lewisham Hill (LON/OOAZ/LON/2018/0002)* at paragraph 20 onwards, the FTT heard about the process which Canonbury Management follows for the production and issuing of its documents and it was explained how both a first-class post and registered post version of the claim notice are issued concurrently through the printing/posting company's machines. The FTT stated in that case, at paragraph 30: *"The Tribunal is satisfied that the procedures used by Canonbury are robust. It [the claim notice] was delivered in the ordinary course of the post."* . The Applicant submits that the same procedures that were robust in 2018 and have been robustly churning out claim notices for thousands of claims since 2003 were equally robust in 2020 and are equally robust today.

11. The claim notice sent by first class post on 28th March 2020 would have arrived at the Respondent's office on Monday 30th or Tuesday 31st March 2020. The Applicant adds that the *61 Lewisham Hill* case is also useful on another point, in that the FTT identified in that case that in August 2018 the Royal Mail delivered 92.1% of all first-class mail on the next working day, and the Applicant suspects that the figure would have been similar in 2020.

12. The Applicant notes that the notice sent by registered post was signed for on 5th April 2020, which is a Sunday, and it expresses surprise that someone was in the office on a Sunday and also expresses scepticism as to how, despite claiming to be very busy, the Respondent was able to read the notice and instruct its solicitors on or before Monday 6th April 2020 and as to how the solicitors could be sufficiently free of other work to read and provide a written response to the claim notice. The Applicant considers it more likely that a copy of the claim notice sent by ordinary first-class post was received earlier than the copy sent by registered post and that the Applicant's solicitors were instructed during the week beginning 30th March 2020. There was no urgency to respond on 6th April 2020 and therefore it is unlikely that the instruction would have been seized upon and actioned so promptly.

13. At the hearing Mr McElroy for the Applicant said that it was difficult to prove service by ordinary post. He also made the point that modern processes such as the one used by Canonbury Management were more mechanised than they used to be. In addition, he referred the tribunal to the letter dated 8th April 2020 from David Breare of Canonbury Management to the Respondent's solicitors

stating that the claim notice was issued on 28th March 2020 by first-class post.

14. Mr McElroy also argued at the hearing that the Respondent had failed to provide adequate evidence that the letter had not been received and had not provided a witness statement. As regards the quality of the Applicant's own evidence, Mr McElroy said that the statement of case was put together by him and contained something akin to a statement of truth and suggested that it could therefore be treated as a witness statement.

Respondent's position

15. The Respondent notes that section 80 of the Act lists various requirements with which the claim notice must comply, including, by virtue of section 80(6), the requirement that *"It must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice under section 79(6) may respond to it by giving a counter-notice under section 84"*.

16. The Respondent's position is that the notice was received on 5th April 2020 at Avon House, 2 Timberwharf Road, London N16 6D8 and that the notice provided the date for response as 2nd May 2020. The Respondent therefore submits that the notice did not comply with section 80(6) of the Act as the date provided was less than one month after service of the claim notice and therefore the relevant section had not been complied with.

17. In the Respondent's submission, an error such as specifying a date for service of a counter-notice which is earlier than that required by the statute cannot be saved as an "inaccuracy" provided for by the saving provision in section 81(1) of the Act: see the decision of the Upper Tribunal in *Moskovitz v 75 Worple Road RTM Co Ltd* [2010) UKUT 393 (LC); (2011] 1 EGLR 95.

18. Scott Cohen Solicitors wrote to the Applicant's representatives on 6th April 2020 making them aware that the claim was received on 5th April 2020, and they sought confirmation as to whether the Applicant intended to rely on the claim notice given. This correspondence also asked for copies of any correspondence serving the claim notice, including any proof of posting or evidence of delivery. The response of the Applicant's representatives confirmed that their client intended to rely on the claim notice as served. The response also asserted that the notice was issued on 28th March 2020 by first-class post and deemed served 2 days later. However, the claim notice received by the Applicant on 5th April 2020 had been sent by recorded signed- for post. There was a tracking code

and the tracking report shows that it was signed for and delivered on 5th April 2020.

19. The Applicant has asserted that the claim notice was served by both first-class post and registered (or recorded) post, but it has produced no letter addressed to the Respondent, nor any date-stamped and signed certificate of posting to support the assertion that it was sent by first-class post.

20. Section 7 of the Interpretation Act 1978 states *that "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"*. The Respondent submits that there are two stages to this process. The first is that the person relying on section 7 must prove that the notice was properly addressed, put in a pre-paid (i.e. a stamped or franked) envelope and posted. If that is done then one moves to the second stage. At the second stage, the person who denies receipt must prove that the document was, in fact, not received: see *Calladine-Smith v Saveorder Ltd* [2011] EWHC 2501 (Ch).

21. The Applicant fails at the first stage of the process referred to above. It has not provided any evidence that this notice was put in a properly addressed envelope, the postage paid and actually posted. There is (for example), no certificate of postage. There is no witness statement from anyone who is prepared to say that they actually did these things. The first stage of section 7 is therefore not made out and so the claim must fail. If the Respondent is wrong on this point, then in the alternative it submits that it has proved that in fact it did not receive any notice until 5th April 2020 and, again, the claim must fail.

22. At the hearing, Mr Bates for the Respondent submitted – in relation to the *61 Lewisham Hill* case – that it was irrelevant what a different tribunal decided on a different case with different facts, evidence and circumstances. The factual decision in that case cannot serve as a precedent to be followed in the present case. The present case relates to the issue of deemed service, and therefore the sender of the notice needs to provide evidence that it put the letter containing the notice in the system.

23. Mr Bates noted that it was common ground that the copy of the notice sent by registered (or recorded) post was received on 5th April 2020. However, in relation to the copy of the notice alleged to have been sent by ordinary post there was no evidence to indicate that it was sent. In

the *61 Lewisham Hill* case at least there were witness statements, but there were none in the present case. Furthermore, the decision of the High Court in *Calladine-Smith v Saveorder Ltd (2011) EWHC 2501 (Ch)* is authority for the proposition that the burden of proof in respect of the first limb of section 7 of the Interpretation Act 1978 is on the sender of the notice. Regarding the second limb of section 7, the Respondent has no record of having received the notice.

Tribunal's analysis

24. Under section 80(6) of the Act, which is set out in paragraph 8 above, a claim notice served by a RTM company wishing to acquire the right to manage must specify a deadline for serving counter-notices which is not earlier than one month after the "relevant date". Section 79(1) of the Act, also set out in paragraph 8 above, states that the "relevant date" for this purpose (amongst other purposes) means the date on which notice of the claim is given. It follows, therefore, that the deadline for serving a counter-notice specified in the Applicant's claim notice needed to be not earlier than one month after the date on which notice of the claim was given.

25. Section 80(6) states that the notice "must" specify a date which is not earlier than one month after the relevant date and therefore it appears on its face to be a mandatory provision. The Respondent notes that section 81(1), also set out in paragraph 8 above, states that a claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80, but it argues that specifying a date which falls foul of the requirements of section 80(6) is not a mere inaccuracy. In support of its position the Respondent brings the decision of the Upper Tribunal in *Moskovitz v 75 Worple Road RTM Co Ltd* [2010) UKUT 393 (LC); (2011] 1 EGLR 95.

26. The Applicant has not sought to argue that specifying a date which falls foul of section 80(6) amounts to a mere inaccuracy for the purposes of section 81(1), and we agree with the Respondent's interpretation of the law on this point. Therefore, if the date specified in the claim notice does not comply with the requirements of section 80(6) it will not be saved by section 81(1).

27. In relation to the copy of the notice sent by registered (or recorded) post, it is common ground between the parties that it was received by the Respondent on 5th April 2020. As the notice specified a date of 2nd May 2020 for serving a counter-notice and as that date is earlier than one month after the relevant date it follows that the notice sent by registered (or recorded) post falls foul of section 80(6) and is therefore invalid.

28. However, it is clear from the Applicant's submissions that it does not rely on that copy of the notice. The Applicant's position is that as well as (and probably at the same time as) it sent a copy of the notice by registered (or recorded) post it would also have sent a copy by ordinary first-class delivery.

29. In a letter to the Respondent's solicitors dated 8th April 2020, Mr David Breare of Canonbury Management states that *"the claim notice was issued on 28/03/2020 by first class post as required under civil procedure rules and is deemed served 2 days later"*. However, in its statement of case the Applicant employs rather less definite language than that used by Mr Breare, as it refers instead to "what is more likely to have happened".

30. In its written submissions, the Applicant objects to the Respondent's arguments on this issue, in part on the basis that the same "approach" has been tried by the Respondent's representative in another case. The Applicant then goes on to state that the suggestion that the notice was not in fact served by normal first-class post is an easy suggestion to make and difficult to disprove because there is no receipt for ordinary postage. The implication of these assertions taken together appears to be that the Respondent's arguments are somehow improper, but on the facts of this case we do not accept that such an implication is either fair or appropriate.

31. Although this point is not made clear in the Applicant's statement of case, we assume that the Applicant is adopting Mr Breare's position (in his letter referred to above) and that it is arguing that the notice was sent by first-class post on 28th March 2020 and that it should be deemed to have been served 2 days later. This brings us to section 7 of the Interpretation Act 1978.

32. Under section 7 of the Interpretation Act 1978, *"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."*. There are two distinct limbs to this section. The first limb provides for deemed service by post if the requirements of that first limb are met and there is no appearance of a contrary intention. The second limb provides a caveat, whereby even if the sender can meet the requirements of the first limb this will not be sufficient if the intended recipient can prove "the contrary".

33. In the case of *Calladine-Smith v Saveorder Ltd (2011) EWHC 2501 (Ch)*, the High Court considered section 7 of the Interpretation Act

1978 in the context of a counter-notice purported to have been served under section 45 of the Leasehold Reform, Housing and Urban Development Act 1993. Morgan J divided section 7 into the two limbs or parts referred to above and stated: *"The first part of s.7 imposes the burden of proof on the sender of the letter, not the addressee of the letter. It requires the sender to prove that the sender has properly addressed, prepaid and posted the letter. If the sender cannot do that, then the sender cannot rely on s.7."*.

34. *Calladine-Smith v Saveorder Ltd* is therefore authority for the proposition that in order to be able to rely on section 7 the Applicant needs to prove that the letter was properly addressed, prepaid and posted. The standard of proof is only the civil standard, i.e. on the balance of probabilities, but these points do need to be proved to this standard.

35. As noted above, in its statement of case the Applicant merely refers to what it considers is likely to have happened. This is not evidence or proof; it is merely speculation. As regards the Applicant's reference to the FTT having been persuaded that a claim notice had been properly served in the case of *61 Lewisham Hill*, the Applicant appears to be suggesting that just because its position was accepted in that case it follows that its position should be accepted by this tribunal in this case. However, there are various problems with this. First of all, the tribunal is not bound by previous FTT decisions. Secondly, for obvious reasons, the tribunal cannot be bound by a factual finding in another tribunal case. Just by way of example of the problem of importing the factual findings in one case to another, the tribunal cannot simply assume that what happened – or was held to have happened – in the earlier case will have happened the same way or at all on a different building two years later between different parties (albeit that the two cases involve the same firm of managing agents).

36. The Applicant has provided no witness statements from anyone who was involved in the process of addressing, prepaying and/or posting the claim notice. We do not accept that the statement of case is, or can serve as, a witness statement, but in any event it does not contain any evidence. Instead it consists of a set of assumptions and assertions coupled with a reference to a factual finding in a completely different case. The fact that back in 2018 an FTT panel found Canonbury Management's procedures to be 'robust' based on whatever evidence was brought in that case does not prove that in the present case a notice was posted on behalf of this Applicant to this Respondent by ordinary first-class post on 28th March 2020 or at all.

37. If and to the extent that the Applicant is seeking to argue that its system is so mechanised that it is not possible to prove on the balance of probabilities that any notice has actually been sent, the answer cannot be that therefore no proof is needed. But in any event, we are not

persuaded that it is not possible in these circumstances to bring any evidence beyond mere conjecture to prove that a notice has been sent.

38. As regards the scepticism expressed by the Applicant as to how the Respondent's solicitors could have responded so quickly to the notice sent by registered or recorded post, we do not accept that such scepticism has any force as a substitute for evidence and we will work on the assumption that it was a careless remark rather than an attack on the Respondent's solicitors' integrity or a suggestion that they failed to comply with their duty to the tribunal.

39. We will just briefly touch on the Respondent's secondary argument, namely that even if the tribunal is not with the Respondent in relation to the first limb of section 7 of the Interpretation Act 1978 the Respondent should still be successful in relation to the second limb. The second limb states that service of the relevant letter is deemed to be effected "unless the contrary is proved", and the Respondent asserts that it has proved "the contrary". We do not accept the Respondent's position on this point. Whilst we agree that it is difficult to prove a negative, nevertheless section 7 specifically requires proof and a mere assertion by the Respondent is in our view insufficient for these purposes.

40. However, the Respondent's primary argument on section 7 of the Interpretation Act 1978 succeeds as the Applicant has failed to prove that it properly addressed, prepaid and posted by ordinary first-class post (on or around 28th March 2020) a letter containing a copy of the claim notice. It can therefore only rely on the copy of the notice sent by registered post which was received on 5th April 2020. The notice specified a deadline of 2nd May 2020 and that date fell foul of the mandatory provision in section 80(6) of the Act which requires that the claim notice must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice under section 79(6) may respond to it by giving a counter-notice. Under section 79(1) the "relevant date" is the date on which notice of the claim is given. The specifying of a date which falls foul of section 80(6) is not a mere inaccuracy for the purposes of section 81(1) and therefore the failure to specify a date which complies with section 80(6) cannot be saved by virtue of section 81(1).

41. Accordingly, the claim notice was invalid and the Applicant was not entitled on the relevant date to acquire the right to manage in respect of the Property.

Costs

42. No cost applications were made at the hearing.

Name: Judge P Korn **Date:** 28th May 2021

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.