First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00MC/LRM/2015/0012**
Property	:	**10-28 Upcross House, Upcross Gardens, Reading RG1 6HY**
Applicant	:	**Upcross Gardens 10-28 RTM Co. Ltd.**
Represented by		**The Head Partnership Solicitors LLP**
Respondent	:	**Wallace Estates Ltd.**
Represented by		**Stevensons Solicitors**
Date of Application	:	**26th November 2015**
Type of Application	:	**For an Order that the Applicant is entitled to acquire the right to manage the property (Section 84(3) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"))**
The Tribunal	:	**Mr. Bruce Edgington (lawyer chair)** **Mr. David Brown FRICS**

DECISION

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1. This Application succeeds and the Applicant therefore acquires the right to manage the property on the 4th May 2016 (Section 90(4) of the 2002 Act).

Reasons

Introduction

2. The Respondent accepts that the Applicant is a right to manage company ("RTM"). Such RTM gave the Respondent a Claim Notice on or about the 3rd September 2015 seeking an automatic right to manage the property. A Counter-notice dated 29th September 2015 was served denying the right to acquire the right to manage on a single ground, namely that not all the qualifying tenants who were not members of the RTM had been served with invitations to participate. That remains the sole ground for opposition.

3. There is no dispute that if non participating tenants were served by post then this was an appropriate means of service. It is the addresses to which the notices were posted and possibly the lack of proof of posting which are the issues.

Procedure

4. The Tribunal decided that this was a case which could be determined on a consideration of the papers without an oral hearing. At least 28 days' notice was given to the parties that (a) a determination would be made on the basis of a consideration of the papers including the written representations of the parties and (b) an oral hearing would be held if either party requested one. No such request was received.

5. It should be said at the outset that the Respondent urges the Tribunal not to take the Applicant's response to its statement of case into account as it was served after the date in the directions order. It also adds that the statement of the solicitor Rebecca Yasmine Cardy, filed on behalf of the Applicant, should be ignored. That statement claims that the Notices of Invitation to Participate were served by 1st class pre-paid post but it does not say that Ms. Cardy personally posted them.

6. The Tribunal does not accept either of these arguments. Whilst orders made by the Tribunal should obviously be complied with, they are not 'unless' orders. If the facts set out in the Applicant's response were to be challenged or the statement of Ms. Cardy was to be challenged, it was always open to the Respondent to seek an oral hearing for the purpose of cross-examination. The Respondent and/or its solicitor clearly took the view that this was not necessary or desirable.

7. What the Tribunal has are legal arguments and factual statements made by the Applicant's representatives which the Respondent's representatives have had a chance to respond to and they have. These include a signed statement with a statement of truth by an officer of the court saying that the relevant notices were sent by 1st class prepaid post. There is no evidence from any of the alleged recipients of the notices that they were not received.

The Law

8. As to the service of the Notice Inviting Participation, the statutory provision is in sub-section 111(5) of the 2002 Act which say that the qualifying tenant's address for the 'giving' of such notice is the flat of that tenant unless the RTM has been notified by the qualifying tenant of a different address in England and Wales at which the tenant wishes to be given such notice.

Discussion

9. There is no doubt that the statutory and regulatory burden on a right to manage company is substantial. In the years since the relevant part of the 2002 Act has been in force, the emphasis on compliance has changed. Landlords take the view that the right to manage provisions are effectively a compulsory purchase of their right to manage their

own properties and every possible technical objection was raised and often succeeded. It is fair to say that in recent times, the pendulum has started to swing the other way.

10. In the decision of **Assethold Ltd. V 14 Stansfield Road RTM Co. Ltd.**[2012] UKUT 262 (LC); LRX/180/2011, at the end of the judgment dismissing the landlord's appeal, the then President of the Upper Tribunal remarked:-

> *"It is not sufficient for a landlord who has served a counter-notice to say that it puts the RTM company to 'strict proof' of compliance with a particular provision of the Act and then to sit back and contend before the LVT (or this Tribunal on appeal) that compliance has not been strictly proved. Saying that the company is put to proof does not create a presumption of non-compliance, and the LVT will be as much concerned to understand why the landlord says that a particular requirement has not been complied with as to see why the RTM company claims that it has been satisfied."*

11. In **Avon Freeholds Ltd. v Regent Court RTM Co. Ltd.** [2013] UKUT 0213 (LC), the Upper Tribunal (per the President, Sir Keith Lindblom), determined that the provision to strictly serve all non participating qualifying tenants with a Notice of Invitation to Participate was not mandatory. In that case, there was clear evidence that a non participating qualifying tenant had not been served with a Notice of Invitation to Participate and, in fact, had no knowledge of it. It had not even been served at the relevant flat.

12. Sir Keith's conclusion, at paragraph 56 of his decision, was to adopt a submission by counsel for the RTM when she said that *"Parliament cannot have intended that in circumstances such as these the whole of the right to manage process will be defeated by the RTM company failing to comply fully with the provisions for giving notice of invitation to participate....there has been – to adopt the expression used by Lord Woolf in* ***R v Immigration Appeal Tribunal, ex parte Jeyeanthan*** *[1999] 3 AER 231 – 'substantial compliance' with the statutory requirements, and the consequences of non-compliance in this case were not such as to justify denying the respondent the right to manage the premises".*

13. The Court of Appeal, in **Osman and another v. Natt and another** [2014] EWCA Civ 1520, at paragraph 28 of the judgment of Sir Terence Etherton C, sought to classify cases into (a) those in which the decision of a public body is challenged and (b) those *"where the statute confers a property or similar right on a private person and the issue is whether non-compliance with the statutory requirement precludes that person from acquiring the right in question".*

14. In the latter category, the case is made that there should be strict compliance with statutory provisions. Paragraph 30 of that judgment then sets out a whole series of cases falling into such category, all of which are either lease extension or collective enfranchisement cases. None of them are right to manage cases and there is no suggestion in the remaining part of the judgment that such cases would be included. Patten LJ and Gloster LJ simply agreed with the lead judgment.

15. In this case, the Respondent seeks to distinguish **Avon Freeholds Ltd. v Regent Court RTM Co. Ltd.** by saying that the failure to serve just one qualifying tenant had little impact on that case and the Upper Tribunal had, in effect, treated it as *de minimis*. In this case, however, it is said that the number of non participating tenants is much smaller and consequently, the procedural omissions are that much more serious.

The Non-participating Qualifying Tenants

16. There are 18 flats in the property and 10 qualifying tenants who are members of the company. The other 8 and the alleged addresses for service are as follows. This information is contained in the statement of evidence from Rebecca Yasmine Cardy, which confirms that the originals of the notices exhibited were sent by 1st class pre-paid post:

Name	flat no.	Service address
Mr. & Mrs. Poulton	18	an alternative address
Mr. & Mrs. Santos	19 & 25	an alternative address
Mr. & Mrs. Potter	20	an alternative address
Miss. R. J. Ormisher	22	the subject flat
Miss. M. Talmer	23	the subject flat
Mr. B. Brickwood	27	the subject flat
Mr. and Mrs. M. Keiller	28	the subject flat

17. The Tribunal has the alternative addresses which are known to the parties. As this is a public document, it is not felt necessary to give particulars of those addresses which, according to the Applicant, were given to them by the managing agents as addresses where those tenants had asked to be sent communications relating to their flats.

18. There are then signed documents produced from Mrs. Poulton on behalf of herself and Mr. Poulton, Mr. and Mrs. Santos and Mr. Potter on behalf of himself and Mrs. Potter saying "*please accept this statement as confirmation that...*" notices under the 2002 Act are to be served at the addresses where they were served rather than the flats. Only one of those documents is dated and the date is 22nd November 2015 i.e. after the event.

Conclusions

19. The solicitors for each side have made a number of points and quoted from some cases in addition to the above. They should be aware that the Tribunal has carefully considered all points made, including the cases quoted, even though they may not be specifically mentioned in these reasons.

20. The Tribunal is satisfied, from the evidence produced and the arguments put forward, that Notices of Invitation to Participate were served by 1st class pre-paid post on all the non participating qualifying tenants. Whilst the notices confirming the alternative addresses for those tenants appear to post date the notices themselves, it seems clear to the Tribunal that such tenants were merely confirming the fact that such addresses were to be used.

21. In other words, whilst there may have been a technical breach in that the alternative addresses may not have 'been notified' i.e. past tense, it seems clear to the Tribunal that "*the consequences of non-compliance in this case were not such as to justify denying the respondent the right to manage the premises*" which were the words relied upon in the **Avon Freeholds Ltd. v Regent Court RTM Co. Ltd.** case referred to above. If it is relevant, there cannot possibly have been any prejudice suffered by the Respondent as a result of any technical non-compliance.

22. It is true that the Applicant and its solicitors have not been as forthcoming as they should have been about producing the information they have, at the last minute, now produced. They have apologised for this but it is a bit late in the day. Equally, once the Respondent's solicitors knew of the facts, they could well have reconsidered their position and withdrawn their opposition.

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Bruce Edgington
Regional Judge
4th February 2016

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. 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.

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

iv. 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.