FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/33UG/LRM/2017/0001**
Property	:	2–8 Lady Betty Road, NorwichNR1 2QU
Applicant	:	Lady Betty Road RTM Company Limited
Representative	:	Mr Glenn Stevenson, of Stevensons Solicitors & Ms Lesley Spicer
Respondent	:	RG Securities Limited
Representative	:	Ms Jemma Cox, solicitor
Type of Application	:	for an order that the applicant is entitled to acquire the right to manage the property [CLRA 2002, s.84(3)]
Tribunal Members	:	G K Sinclair, G F Smith MRICS FAAV REV & C Gowman BSc MCIEH MCMI
Date and venue of Hearing	:	Wednesday 3rd May 2017 at Norwich Magistrates Ct
Date of decision	:	22nd May 2017

DECISION

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Cases referred to

15a Richmond Rd, Ilford [LON/00BC/LRM/2013/0023] (FTT PC)
125 London Rd, St Leonards-on-Sea, East Sussex [CHI/21UD/LRM/2016/0004] (FTT PC)
Assethold Ltd v 14 Stansfield Road RTM Company Ltd [2012] UKUT 262 (LC)
Avon Freeholds Ltd v Regent Court RTM Co Ltd [2013] UKUT 213 (LC); [2013] L&TR 23
Dodds v Walker [1981] 1 WLR 1027; [1981] 2 All ER 609 (HL)
E J Riley Investments Ltd v Eurostile Holdings Ltd [1985] 1WLR 1139; [1985] 3 All ER 181 (CA)
Elim Court RTM Company Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89
Hogg Bullimore & Co v Co-operative Insurance Society Ltd (1985) 50 P&CR 105
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 449; [1997] 3 All ER 352 (HL)
Natt v Osman [2014] EWCA Civ 1520; [2015] 1 WLR 1536
Windermere Court Kenley RTM Company Ltd v Sinclair Gardens Investments (Kensington) Ltd [2014] UKUT 429 (LC)

Summary

1. 2–8 Lady Betty Road, Norwich is a self-contained block of four flats which, at a cursory glance, appears to be two large semi-detached houses. By a claim notice dated 22nd November 2016 the applicant RTM company claimed the right under Part 1 of the Commonhold and Leasehold Reform Act 2002 to manage the block, on and from 31st March 2017. Due to the Christmas holidays the date by which the landlord was required to respond was voluntarily extended by the applicant to 31st December 2016. On 23rd December 2016 the landlord served a counter-notice denying that the applicant RTM company was entitled to acquire the right to manage by reason of section 80(7) of the Act.

2. This case turns on the answer to one question : whether 31st March 2017, the date specified in section 80(7) as that on which the applicant wished to acquire the right to manage, was "at least three months after that specified under sub-section (6)", namely 31st December 2016.

3. However, the applicant also sought to argue a second point of law which it in fact prioritised : whether the landlord had actually served a valid counter-notice.

4. For the reasons which follow, and after listening to the legal arguments advanced by the parties and considering relevant case law, the tribunal determines that :
   a. The date specified in the applicant's notice of claim under section 80(7) was at least three months after that specified under sub-section (6); and
   b. By stating in paragraph 1 that "Cornwall Court RTM Company Limited" was not entitled to acquire the right to manage the counter-notice was

arguably confusing and therefore not a valid counter-notice, but the fact that this application was brought under section 84(3) surely requires an acceptance of its validity by the applicant.

The applicant was therefore at the relevant date entitled to acquire the right to manage. Further, the applicant is entitled to be reimbursed by the respondent for the application and hearing fees which it was obliged to pay to the tribunal.

Material statutory provisions

5. Acquisition of the statutory right to manage is initiated by an RTM Company by the service of a notice of claim under section 79. The contents of that claim notice are set out in section 80, the material parts being :

(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.

(7) **It must specify a date, at least three months after that specified under subsection (6)**, on which the RTM company intends to acquire the right to manage the premises. *[emphasis added]*

6. However, supplementary provisions in section 81 provide, inter alia, that :

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

7. This application is brought under section 84, which concerns counter-notices. Subsections (1)–(3) provide as follows :

(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).

(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,

and containing such other particulars (if any) as may be required to be contained in counter-notices, and complying with such requirements (if any) about the form of counter-notices, as may be prescribed by regulations made by the appropriate national authority.[1]

(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.

8. Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), then it does not acquire the right to manage the premises unless on an application under subsection (3)

[1] The regulations currently in force are the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 [SI 2010/825]

it is finally determined that the company was on the relevant date entitled to acquire the right to manage the premises, or (which is not this case) the person by whom the counter-notice was given agrees in writing that the company was so entitled.

9. Section 90 of the Act is also relevant if the applicant's submissions concerning the purported counter-notice are correct. The section provides, inter alia, that :
   (2) Where there is no dispute about entitlement, the acquisition date is the date specified in the claim notice under section 80(7).
   (3) For the purposes of this Chapter there is no dispute about entitlement if
      (a) no counter-notice is given under section 84,...

Submissions by the parties

10. This application having been issued on 26th January 2017, directions dated 8th February 2017 require the respondent to serve a statement of case stating exactly why the respondent does not consider that the applicant is entitled to manage, setting out evidence to support its contention. In particular the respondent was invited to address the question why the tribunal should not adopt the general principles established by the Upper Tribunal in the cases of *Assethold Ltd v 14 Stansfield Road RTM Company Ltd* and *Avon Freeholds Ltd v Regent Court RTM Co Ltd.*

11. The respondent duly served a statement in reply to the application dated 23rd February 2017. That prompted a lengthy statement in response by the applicant dated 9th March 2017. As that document referred to some case law from the House of Lords and Court of Appeal and contained legal argument based upon them the respondent filed a further statement in reply dated 16th March 2017.

12. Rather than focus upon the validity of the notice of claim Mr Stevenson sought first to advance an argument that the counter-notice was itself invalid because of an error on its face. He also criticised the argument advanced on behalf of the respondent that there is no statutory form of counter-notice under the Act and that the counter notice and the cover letter should be considered together. This, he said, was incorrect as the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 require a counter-notice to adopt the prescribed form appearing in Schedule 3.

13. In paragraph 1 this requires the respondent either to admit that the company by which the claim notice was given was entitled to acquire the right to manage or to allege that it was not. In the latter case the form requires the respondent to insert the name of the company by which the claim notice was given. In this particular instance the landlord's agent, in charge of a substantial estate, used a template counter-notice but in doing so forgot to alter the name of the RTM company serving the notice of claim and thus it ended up alleging that a company by the name of Cornwall Court RTM Company Ltd was not entitled to acquire the right to manage the premises specified in the notice.

14. In its statement of case the respondent, having set out the relevant statutory provisions, alleged that the applicant had failed to specify an acquisition date of at least three months after the counter-notice due date and sought the applicant's

confirmation that the claim notice was a nullity and withdrawn. The respondent sought in its written submissions to rely upon the House of Lords judgment in *Dodds v Walker*, the Upper Tribunal decision in *Windermere Court Kenley RTM Company Ltd v Sinclair Gardens Investments (Kensington) Ltd* and also two non-binding decisions of the First-tier Tribunal concerning leasehold premises in Ilford and St Leonard's-on-Sea.

15. The respondent's statement of case also addressed the two cases mentioned in the tribunal's directions.

16. In its reply the applicant chose to focus primarily upon its contention that the respondent had failed to serve a valid counter-notice because the party that it alleged was not entitled to acquire the right to manage was a completely separate entity. The applicant then went on to advance a detailed argument based upon *Dodds v Walker*, *Hogg Bullimore & Co v Co-operative Insurance Society Ltd* and the later Court of Appeal decision in *E J Riley Investments Ltd v Eurostile Holdings Ltd* to the effect that 31st March 2017 was an entirely legitimate date and therefore that the notice of claim was valid.

17. Following service of the applicant's statement of case the respondent then filed a further document challenging, in particular, argument that the counter-notice was invalid. In doing so the respondent relied upon the House of Lords decision in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* to demonstrate that the reasonable recipient of the counter-notice would have recognised that the reference to Cornwall Court RTM Co Ltd was a typographical error only and would not have been misled by it. The respondent drew the tribunal's attention to the identity of the applicant company being shown on the covering letter and elsewhere on the counter-notice itself.

18. In oral argument the parties expanded upon their written submissions. On the question of whether a reasonable recipient of the counter-notice would be misled by it Mr Stevenson, in his closing remarks, suggested the analogy of a letter from an examination board that was addressed to himself but then purported to confirm that Mr John Doe had successfully passed the exam. Would the recipient of that letter, he asked, be confident that its content referred to him or would he instead be seeking clarification from the exam board?

Discussion and findings

19. In *Elim Court RTM Company Ltd v Avon Freeholds Ltd*, at [63], Lewison LJ observed that :

> It is quite unrealistic to view a landlord who fiercely resists the acquisition of the right to manage as being in some way the guardian angel of the qualifying tenants.

20. Nonetheless, and notwithstanding section 81(1), he noted that a finding that the applicant RTM company had failed to serve a notice complying strictly with the statutory provisions could have the serious consequence that it be declared invalid. In so doing Lewison LJ referred at paragraphs [50]–[52] in his judgment to that of the present Chancellor of the High Court, Sir Terence Etherton C, in *Osman v Natt* and the different emphasis applied in public law cases on the one hand and those, as here, where a 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.

21. The answer, he said (at [52]) was that :

> The outcome in such cases does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by non-compliance on the particular facts of the case: see [32]. The intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole: see [33]. Where the notice or the information which is missing from it is of critical importance in the context of the scheme the non-compliance with the statute will generally result in the invalidity of the notice. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely ancillary, the notice may be held to have been valid: see [34]. One useful pointer is whether the information required is particularised in the statute as opposed to being required by general provisions of the statute. In the latter case the information is also likely to be viewed as of secondary importance. Another is whether the information is required by the statute itself or by subordinate legislation. In the latter case the information is likely to be viewed as of secondary importance.

22. By specifying 31st March 2017 as the date on which the applicant company wished to acquire the right to manage was it committing an error? If so, was it fatal to the notice?

23. In *Dodds v Walker* the question related to the requirement in section 29(3) of the Landlord and Tenant Act 1954 that a tenant's application for a new tenancy be made not more than four months from the giving of the landlord's notice. That notice had been given on 30th September 1978 and the tenant's application was made on 31st January 1979. It was held by the House of Lords that the application was one day too late.

24. Lord Diplock explained how periods of time expressed as months are to be calculated :

> My Lords, reference to a "month" in a statute is to be understood as a calendar month. The Interpretation Act 1889 says so. It is also clear under a rule that has been consistently applied by the courts since *Lester v Garland* (1808) 15 Ves.Jun. 248 , that in calculating the period that has elapsed after the occurrence of the specified event such as the giving of a notice, the day on which the event occurs is excluded from the reckoning. It is equally well established, and is not disputed by counsel for the tenant, that **when the relevant period is a month or specified number of months after the giving of a notice, the general rule is that the period ends upon the corresponding date in the appropriate subsequent month**, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given.
>
> The corresponding date rule is simple. It is easy of application. Except in a small minority of cases, of which the instant case is not an example, all

that the calculator has to do is to mark in his diary the corresponding date in the appropriate subsequent month. Because the number of days in five months of the year is less than in the seven others the inevitable consequence of the corresponding date rule is that one month's notice given in a 30 day month is one day shorter than one month's notice given in a 31 day month and is three days shorter if it is given in February. Corresponding variations in the length of notice reckoned in days occur where the required notice is a plurality of months.

This simple general rule which Cockburn CJ in *Freeman v Read* (1863) 4 B. & S. 174, 184 described as being "in accordance with common usage ... and with the sense of mankind," works perfectly well without need for any modification so long as there is in the month in which the notice expires a day which bears the same number as the day of the month on which the notice was given. Such was the instant case and such will be every other case except for notices given on the 31st of a 31 day month and expiring in a 30 day month or in February, and notices expiring in February and given on the 30th or the 29th (except in a leap year) of any other month of the year. In these exceptional cases, the modification of the corresponding date rule that is called for is also well established: the period given by the notice ends upon the last day of the month in which the notice expires.
[emphasis added]

25. *Dodds v Walker* was soon considered by Whitford J in the Chancery Division in *Hogg Bullimore & Co v Co-operative Insurance Society Ltd* and thereafter by the Court of Appeal in *E J Riley Investments Ltd v Eurostile Holdings Ltd,* upon both of which Mr Stevenson relied. In the latter case Fox LJ stated :

> It is said on behalf of the landlord in the present case (and it was accepted by the judge) that two months from 23 March did not expire until midnight on 23/24 May and that accordingly the application could not be made until 24 May. I do not feel able to accept that. There are three relevant groups of dates, namely, (1) the dates which are more than two months after 23 March 1983. These are 24 May 1983 and subsequent dates. (2) The dates which are less than two months after 23 March 1983. These are 24 March to 22 May (inclusive). (3) The date which is two months from 23 March 1983. It seems to me that is 23 May 1983.
>
> ...**In my opinion, just as there are dates which are less than two months after 23 March and dates which are more than two months after 23 March, there must be a date which is simply two months, no more and no less, after 23 March. That in my view is 23 May.**

26. Agreeing with him, Sir Roger Ormrod said, of *Dodds* :

> In that case their Lordships endorsed the general rule, called the "corresponding date rule," which provides that **where the relevant period is a specified number of months after the relevant event, the period ends on the corresponding day of the subsequent month**; i.e. in this case, the relevant event occurred on 23 March, the period is two months, so that the period ends on 23 May. This rule is simple and based on common sense. If Mr Pryor is right, the

corresponding date rule becomes the corresponding date plus one rule.
[emphasis added]

27. Section 80(7) requires the RTM company "to specify a date, at least three months after that specified under subsection (6)". The corresponding date rule means that three months after 31st December 2016 is 31st March 2017. "At least" means that the date specified can be (and for practical reasons often is) later – or even much later, but the requirement is three months; not at least three months and a day.

28. This principle seems to have been overlooked by HHJ Gerald in *Windermere* and by Judge Dutton in *15a Richmond Rd, Ilford*. In the latter case the reference, in paragraph 10, to the use of the word "after" as meaning that the date must be after 27th September completely misconstrues what Lord Diplock actually said in *Dodds* in the passage highlighted above, even though that precise excerpt was quoted earlier in the tribunal's decision.

29. In *125 London Rd, St Leonard's-on-Sea*, also relied upon by Ms Cox, the date by which a counter-notice had to be given was said to be 31st March 2016. The date specified in the claim notice as that upon which the applicant intended to acquire the right to manage was 30th June 2016. This, it was said at paragraph 10 of Judge Tarling's decision :

> ...is less than three months after 31st March 2016. In order to comply with the Act this date should have been 1st July 2016 or later.

In fairness to the tribunal the case of *Dodds* had not been cited, as this seems to be a complete misunderstanding of the "corresponding date rule" where months are of differing lengths.

30. Ms Cox argued that as *Windermere* is a decision of the Upper Tribunal it is binding upon this tribunal. We disagree. Faced with a decision of the House of Lords, followed soon after by a decision of the Court of Appeal which has not since been overturned, both of which conflict with *Windermere* and the later First-tier Tribunal decisions mentioned above, this tribunal has no hesitation in following the two most senior judgments.

31. Turning then to the argument concerning the validity of the counter-notice, which Mr Stevenson sought to advance as his principal argument, the tribunal considered that the correct name of the applicant company was scattered about the covering letter and the counter-notice itself so frequently as to ensure that the reasonable recipient would understand precisely what was intended. However, the exam results metaphor did later give it pause. The tribunal considers that it is indeed arguable that a reasonable recipient would be uncertain about the intention of its author, and bearing in mind that the identification of the party which it is alleged is not entitled to acquire the right to manage is a fundamental requirement of the regulation it is a moot point whether, following the logic of Etheridge C in *Natt v Osman* and Lewison LJ in *Elim Court*, such error should lead to the invalidity of the counter-notice or to its forgiveness.

32. The applicant faces another problem however. It has brought these proceedings under section 84(3) of the Act. That surely requires an acceptance by it that the counter-notice served by the respondent landlord was valid.

33. The tribunal's primary finding, however, is that the notice of claim specified a date for the acquisition of the right to manage which was precisely 3 months after the date specified under section 80(6). It wishes to record that in future it would be sensible if the intended date for acquisition of the right to manage bore some resemblance to the accounting or interim payment dates for service charges in the relevant lease and made sufficient allowance for the practicalities of adjusting existing contracts for services arranged by the landlord or its managing agents with third parties. Three months is a minimum, but not always a sensible date.

34. Pursuant to the tribunal's directions the applicant indicated in advance of the hearing its desire, if successful, for reimbursement by the respondent landlord of the application and hearing fees paid by the applicant under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The tribunal so orders.

35. Finally, the tribunal wishes to endorse Lewison LJ's concluding remarks in *Elim Court*, at paragraph 77 of the Court of Appeal's judgment :

> I have drawn attention to the Government's policy that the procedures should be as simple as possible to reduce the potential for challenge by an obstructive landlord. That policy has not been implemented by the current procedures which still contain traps for the unwary. This is, we were told, the third attempt by the RTM company to acquire the right to manage Elim Court. The Government may wish to consider simplifying the procedure further, or to grant the FTT a power to relieve against a failure to comply with the requirements if it is just and equitable to do so. Otherwise I fear that objections based on technical points which are of no significant consequence to the objector will continue to bedevil the acquisition of the right to manage.

Dated 22nd May 2017

Graham Sinclair

Graham Sinclair
Tribunal Judge