



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **LON/00AW/LRM/2018/0029**

Property : **Lexham House 45-53 Lexham
Gardens, London W8 5JT**

Applicant : **Lexham House RTM Company
Limited**

Representative : **Samuels & Co**

Respondent : **European Investments and
Development (Properties) Limited**

Representative : **Wallace LLP**

Type of application : **Application in relation to the denial
of the Right to Manage**

Tribunal members : **Mrs E Flint FRICS
Mr T Sennett**

**Date and venue of
determination** : **28 November 2018 10 Alfred Place,
London WC1E 7LR**

Date of decision : **4 December 2018**

DECISION

Decisions of the tribunal

The tribunal determines that the Applicant is not entitled to acquire the Right to Manage the property known as Lexham House, 45 – 53 Lexham Gardens, London W8 5JT.

The application

1. The tribunal has received an application under section 84(3) of the Commonhold and Leasehold Reform Act 2002 (the “**Act**”)
2. By a claim notice dated 19 July 2018 the Applicant gave notice that it intended to acquire the right to manage the property known as Lexham House, 45-53 Lexham Gardens, London W8 5JT (the “**Property**”) on 30 November 2018.
3. By counter notice dated 20 August 2018 the Respondent disputed the claim alleging that by reason of section 79(6) of the Act on 2 June 2018 the applicant was not entitled to acquire the right to manage the premises specified in the notice because the Claim Notice was not given to each person who on the relevant date was a landlord of the whole or any part of the premises.
4. Directions were made dated 17 October 2018 for this matter to be considered by way of a paper determination unless either party requested an oral hearing. The respondent requested an oral hearing on 28 September 2018. The directions provided for the application to stand as the applicant’s statement of case with the respondent making a statement in reply and the applicant having an opportunity to make a supplemental reply.

The respondent’s case

5. The respondent made written submissions opposing the right to manage. At the hearing Mr Serota on behalf of the respondent reiterated and expanded upon those submissions.
6. Mr Serota explained that the Respondent is the freeholder of the property which is a block of 24 flats.
7. The leases of three of the top floor flats grants to each of those lessees the exclusive right to use and enjoy such part of the roof of Lexham House as is above their flat.
8. On 16 September 2015 the Respondent granted to European Investments and Development (London) Limited (“**London**”) a lease

of the roof of Lexham House. The demised premises comprise the surface of the roof and the structure beneath the surface comprising everything above the ceiling joists of the flats immediately below the roof. The roof lease was granted subject to the rights of the lessees of the top floor flats.

9. Mr Serota said that London is a landlord of part of Lexham house, accordingly the Claim Notice should have been given to London as required by S79(6)(a) of the Act and a failure to have given the Claim Notice to London invalidates the claim.
10. The grant of the roof lease operated to sever the reversion to the top floor flat leases. On the grant of the roof lease London became the landlord of the top floor lessees in respect of the roof whilst the Respondent remained the landlord of the flats. In support he referred to the court of Appeal decision in *Nevill Long & Co (Boards) Ltd and Another v Firmenich & Co* [1983] 2EGLR 76
11. The consequence of not complying with a statutory requirement was considered by the Court of Appeal in *Elim Court RTM Co Ltd v Avon Freeholds* [2017] 3 WLR 876. The consequence of non-compliance does not depend on the particular circumstances of the actual parties or the actual prejudice caused by the non-compliance but is to be ascertained in the light of the statutory scheme as a whole.
12. The Respondent submitted that the giving of a Claim Notice to a landlord will ordinarily be a fundamental part of the statutory scheme. A landlord who does not receive a Claim Notice is deprived of the right to serve a Counter Notice.
13. This case can be distinguished from *Elim Court* where failure to serve notice on the landlord of a single flat with no management responsibilities did not invalidate the claim.
 - London is the landlord of three occupational leases.
 - The demise of the intermediate landlord in *Elim Court* was no greater than the demise of the lease of the flat to which it was subject. In this case the demise includes both the surface of the roof and the structure below.
 - London has management responsibilities. On the grant to it of the roof lease it became responsible for complying with the landlord's obligations under the flat leases in respect of those areas demised to it.

The Applicant's submissions in reply

14. Miss Samuels on behalf of the applicant made the following submissions in the applicant's supplementary statement of case and at the hearing.
15. Miss Samuels said that there were 3 issues to be decided:
 - Was London a landlord of any part of the subject premises
 - Did the service of the Claim Notice satisfy section 79 (6)
 - Did London have any management responsibilities under the flat leases
16. Miss Samuels said that the roof was not demised to any of the flats in the subject premises but that rights to use and enjoy parts of the Premises were contained in the leases of flats 22, 23 and 24 on the fourth floor of the Building.
17. By a Deed of Rectification and Variation dated 30 July 2018 between the freeholder and London the Head lease was rectified by the removal of flat 21 from the definition of fourth floor rights.
18. The freeholder retained possession and control of the roof space under the flat leases. The wording of the leases creates an easement over the landlord's retained land for a term of years granted to the tenants of Flats 22, 23 and 24.
19. Miss Samuels asserted that when the Head Lease of the roof was granted to London on 16 September 2015, no leasehold interest was created between London and the tenants of Flats 22, 23 and 24. On that date the servient owner of the servient tenement changed from the Freeholder to London. Therefore, London was not a landlord under a lease of the whole or any part of the subject premises and consequently it was not necessary to serve the Claim Notice on London.
20. Although London was not the recipient of the Claim Notice as a landlord it was the recipient of the Claim Notice as a qualifying tenant of Flat 1 in the subject premises (the porter's flat).
21. Miss Samuels referred to paragraph 27 of the decision of the tribunal in the case of Apollo RTM Co Ltd & Others v Proxima GR Properties Ltd and Firstport Property Services Ltd 2017. This was concerned with whether not naming the second respondent meant the notice was not given to the second respondent. The tribunal held that the Second Respondent was not prejudiced by not being specifically named.

22. In this case, the Freeholder and London are under the same ownership and control. London was therefore aware of the application to acquire the right to manage the subject premises.
23. The lease to London was granted to facilitate the development of the subject premises by the addition of two, two-bedroom residential units. London applied for planning permission on 15 August 2017. On 26 March 2018 planning permission was granted subject to the condition that no development shall commence until full particulars had been submitted and approved by the planning authority. The conditions were discharged on 16 October 2018.
24. Clause 4.1 of the Head Lease provides that Schedule 3 of the Head Lease shall not apply whilst any of the fourth floor rights continue to subsist.
25. Clause 5.1 of the Head Lease provides that prior to the Development taking place the Premises shall be repaired by the Landlord in accordance with the covenants and obligations in the flat leases.
26. Clause 6.1 of the Head Lease provides that the Tenant covenants to pay to the landlord a reasonable proportion of the cost of providing the services referred to in paragraph 4 of Schedule 4 thereof such service charge contribution to be paid in accordance with the provisions of Clause 5 of the Flat leases mutatis mutandis. The clause further provides that the Building Contract must make adequate provision for the landlord to perform its obligations under the Flat leases during the construction period.
27. As at the relevant date, 20 July 2018, London had no responsibilities for the management of the subject property
28. Clause 6.2 of the Head lease provides that so long as the Tenant is making no material beneficial use of the Premises other than holding the premises available for carrying out the development and/or while any of the Fourth Floor Rights are still subsisting the reasonable proportion shall be nil.
29. Further, it is submitted that following the decision in *Elim Court RTM Co Ltd V Avon Freeholds Ltd* that a failure to serve a notice on an intermediate landlord with no management responsibilities does not invalidate the notice. *Elim Court* was concerned with the intermediate landlord of only one flat however the decision does not state that it should be restricted to cases involving only a single flat.
30. Miss Samuels in support of her contention that London was not a landlord noted that London had not served a notice under section 3 of the Landlord and Tenant Act 1975, notifying a change of landlord nor a

notice under section 48 of the Landlord and Tenant Act 1987 giving a new address for service of notices.

Reasons for the tribunal's decision

31. The Tribunal determines that London was at the relevant date the landlord of the roof surface and structure and despite not having any management responsibilities under the Head Lease at that date it was nevertheless the intermediate landlord of the roof above flats 22, 23 and 24. The facts here are different to those in Elim since the intermediate lessee's interest in Elim was the same as that of any other tenant in the block: its interest was contained within the walls of the flat and did not include any common parts of the premises.
32. Section 79(6) of the Act requires the Claim Notice to be served on the landlord of any part of the premises. The act does not mention management responsibilities as being a precursor to the application of the section.
33. The Tribunal accepts Mr Serota's submissions that the claim notice does not satisfy the requirements of section 79(6)(a), and his reasons for so submitting set out above.
34. The Tribunal finds that the Applicant is not entitled to acquire the Right to Manage the Property because the Claim Notice was invalid due to not having been served in accordance with section 79(6) of the Act.

Name: Evelyn Flint

Date: 4 December 2018

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.

APPENDIX

Commonhold and Leasehold Reform Act 2002

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.
- (2) The claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before.
- (3) The claim notice must be given by a RTM company which complies with subsection (4) or (5).
- (4) If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company.
- (5) In any other case, the membership of the RTM company must on the relevant date include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained.
- (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.
- (7) Subsection (6) does not require the claim notice to be given to a person who cannot be found or whose identity cannot be ascertained; but if this subsection means that the claim notice is not required to be given to anyone at all, section 85 applies.
- (8) A copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises.