UPPER TRIBUNAL (LANDS CHAMBER)

Neutral citation number [2017] UKUT 316 (LC)
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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – right to manage – service of copy claim notice under s79(8) by email – whether valid – held valid – alternatively (if not) not fatal to subsequent steps taken by the RTM Company – appeal dismissed.

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER) MADE ON 26 OCTOBER 2016

BETWEEN:

ASSETHOLD LIMITED **Appellant**

and

110 BOULEVARD RTM COMPANY LIMITED **Respondent**

Re: 110 Boulevard, Hull, HU3 2UE

Before: His Honour John Behrens

Determination on written representations

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The following cases are referred to in this decision:

Cowthorpe Road 1-1A Freehold Ltd v Wahedally [2017] L & T R 4
Avon Freeholds Ltd v Regent Court RTM Co Ltd [2013] L & T R 23
Natt v Osman [2015] 1 WLR 1516
Avon Freeholds Ltd v Regent Court RTM Co Ltd [2013] L & T R 23

DECISION

Introduction

1. This is a challenge by the landlord to the procedure adopted by the tenants in their attempt to invoke the right to manage provisions in Part 2 Chapter 1 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

2. The challenge concerned the obligation under s 79(8) of the 2002 Act to give a copy of the claim notice to each of the qualifying tenants of a flat in the premises. The challenge failed before the First-tier Tribunal ("the Ft-T") who held that there was compliance with s 79(8) and went on to hold that none of the parties would have been prejudiced and that a failure to comply would not have been fatal. Permission to appeal was granted by the Deputy President on 27 February 2017 who considered that

> the appeal raises a short point of law which is arguable and which if not determined by the tribunal is likely to be encountered again.

3. The appeal is being dealt with under the written representations procedure. Detailed grounds of appeal have been received from the landlord settled by Justin Bates of Counsel who was recently described by Lewison LJ as a seasoned warrior in the trench warfare over the right to manage. No written representations have been received on behalf of the tenants.

The Facts

4. The application concerns a property known as 110 Boulevard Hull HU3 2UE. The property comprises 5 flats each of which are held by qualifying tenants. Flats 1 and 5 are owned by the same leaseholder – Mr Blackett; Flat 2 by Mr Kaszas; Flat 3 by Mr Stacey and Flat 4 by Mr and Mrs O'Donnell. Each of the four qualifying tenants were members of 110 Boulevard RTM Company Ltd ("the RTM Company") so that there was no need for the RTM Company to give a notice of invitation to participate under s78(1) of the 2002 Act.

5. There is no dispute that the claim notice was given to the landlord Assethold Ltd ("Assethold"), and there is no challenge to the contents of the claim notice.

6. As noted above the challenge relates to the service a copy of the claim notice on the qualifying tenants. In para 9 of its decision refusing permission to appeal (in a review under r55(1) of the First-tier Tribunal (Property Chamber) Rules 2013) the Ft-T found on balance of probabilities that a copy of the claim notice was sent to each of the qualifying tenants by email. There is no basis upon which that finding of fact can be challenged.

7. Mr Bates contends that that method of service is impermissible and that the failure by the RTM Company to comply with the service obligation is fatal to the validity of the procedure.

The statutory provisions

8. The statutory provisions of the 2002 Act relevant to this appeal are ss 79, 84 and 111 which, so far as relevant provide:

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.
…
(3) The claim notice must be given by a RTM company which complies with subsection (4) or (5). …
(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, …
(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.…

84 Counter-notices

(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.
(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.…

111 Notices

(1) Any notice under this Chapter--
(a) must be in writing, and
(b) may be sent by post.…
(5) A company which is a RTM company in relation to premises may give a notice under this Chapter to a person who is the qualifying tenant of a flat contained in the premises at the flat unless it has been notified by the qualifying tenant of a different address in England and Wales at which he wishes to be given any such notice.

9. A number of points can be made about these provisions:

1. The obligations under and s79(6) and s79(8) are different. The RTM Company must give the actual claim notice to the landlord but only a copy of the claim notice to the qualifying tenants.

2. Whereas the landlord is given the right to serve a counternotice under s80(1), no such right is given to the qualifying tenants. The service of the copy of the claim notice on the qualifying tenants does not appear to confer any additional rights on them.

3. S111(1)(b) permits service by post; it does not require it. Similarly, s111(5) permits service at the flat of the qualifying tenant. It does not require it.

Service by email

10. In his grounds of appeal Mr Bates submits that service of a copy notice by email does not comply with s 79(8). He relies on a decision of HH Judge Dight sitting in the Central London County Court - *Cowthorpe Road 1-1A Freehold Ltd v Wahedally* [2017] L & T R 4.

11. That case concerned the service of a counternotice by a landlord under s.21 of the Leasehold Reform, Housing and Urban Development Act 1993 which was served by email. The sole question before Judge Dight was whether the notice was served in time. If not the landlord lost the right to challenge the price specified by the tenant. S 99(1) of the Act was in similar (but not identical) terms to s 111(1) of the 2002 Act.

12. Judge Dight dealt with the question of service by email at paras 48 to 58 of his judgment. I shall not lengthen this decision by setting it out extensively. His reasoning may be summarised:

1. He accepted that an email was capable of being writing within the definition in Schedule 1 of the Interpretation Act 1978 – [para 49].

2. He thought that there was an inference from s 99 that the document was a hard copy document – [para 52].

3. He noted the requirement that the document had to be signed[1]. He thought it made no sense for an electronic document with an electronic signature to satisfy the requirements of the Act – [paras 53 and 54].

4. The consequences of service or non-service were crucial to the operation of the Act – [para 55].

5. In his judgment, an email did not amount to writing for the purpose of the Act. Furthermore, the service of a copy document rather than the original did not comply with the Act – [paras 56 – 58].

13. The decision of Judge Dight is not, of course, binding on this Tribunal. However, it is not in fact necessary to consider whether it is correct because it is distinguishable. There is no requirement in s 79(8) of the 2002 Act to give an original claim notice to each qualifying tenant. The requirement is to a give a copy of the claim notice. To my mind this is a crucial distinction and none of Judge Dight's reasoning applies to the giving of a copy. The original notice is

[1] There is no requirement for signature in s 111of the 2002 Act but the prescribed form does require a signature.

signed. There is no requirement for any further signature by the RTM Company on the copy or otherwise; thus the question of electronic signature does not arise. There is nothing in the Act which requires the copy to be a hard copy; furthermore, the 2002 Act clearly contemplates that a notice can be given other than by post.

14. In all the circumstances, I have come to the conclusion that the sending of an email containing either as an attachment or otherwise a copy of the claim notice to the email address of the qualifying tenant complies with the RTM Company's obligation under s79(8) of the 2002 Act.

15. It follows that I agree with the Ft-T and would dismiss the appeal.

Prejudice

16. In the light of my views on s 79(8) it is strictly unnecessary to deal with this aspect of the case. However, in the light of Mr Bates's careful submissions in the grounds of appeal I propose to deal with it.

17. In its decision the Ft-T referred to the decision of the President of this Tribunal (Sir Keith Lindlom as he then was) in *Avon Freeholds Ltd v Regent Court RTM Co Ltd* [2013] L & T R 23. At paras 47 to 48 of his decision the President said:

> 47 What one ought to do, I believe, is to ascertain—so far as one can—the true effects of the failure to give notice in accordance with the statutory provisions on all those affected by that failure. The question here is not whether a significant number of tenants have been prejudiced, but whether any or all of the tenants not given notice in accordance with s.111 has been caused such prejudice through the RTM company's default as to justify denying the RTM company the right to manage. It is necessary to look at the nature and extent of the prejudice to each of those tenants. There may be cases in which only one tenant in a very large block has not had notice and significant prejudice to that person can be shown. There may be others in which the tenants of several flats are not served but there is, nevertheless, no such prejudice, and the integrity of the process has not been impaired. Each case will turn on its own particular facts.
>
> 48 The consequences of a failure to comply with the statutory provisions must be considered in the context of what Parliament plainly sought to achieve by those provisions. …

18. The F-tT purported to follow that guidance in its decision and held that there was no prejudice to Assethold as a result of any failure by the RTM Company to comply with s 79(8). Mr Bates criticises this approach and has referred me to the decision of the Court of Appeal in *Natt v Osman* [2015] 1 WLR 1516. In that case Etherton C considered in some detail the consequences of non-compliance. He said at para 25:

> … The modern approach is to determine the consequence of non-compliance as an ordinary issue of statutory interpretation, applying all the usual principles of statutory interpretation. It invariably involves, therefore, among other things according to the context, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole.

19. In para 28 he divided the cases between cases in which a public body is involved and cases in which statute confers a property or similar right on a person. In the second type of case at para 31 he said:

> In none of them has the court adopted the approach of "substantial compliance" as in the first category of cases. The court has interpreted the notice to see whether it actually complies with the strict requirements of the statute; if it does not, then the Court has, as a matter of statutory interpretation, held the notice to be wholly valid or wholly invalid:

20. In paras 33 and 34 he gave examples where the courts had held notices valid or invalid. He contrasted cases where the notice or information missing was of critical importance and cases where it was of secondary importance or merely ancillary.

21. The most recent decision in this area is the decision of the Court of Appeal in *Elim Court RTM Company Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89 where the leading judgment was given by Lewison LJ. In his judgment Lewison LJ held that the acquisition of a right to manage fell within the second category of the cases considered by Etherton C in *Osman.* At para 56 he said:

> However, it does not follow that if a case falls within the second category every defect in a notice or in the procedure, however, trivial, invalidates the notice. As Etherton C pointed out even if there is no principle of substantial compliance the court must nevertheless decide as a matter of statutory construction whether the notice is "wholly valid or wholly invalid". In considering the question of validity, although the court should not inquire into the question whether prejudice had been caused on the particular facts of the actual case (*Osman* at [32]) that does not mean that prejudice in a generic sense is irrelevant.

22. In para 57 and 58 he approved the following passage:

> Finally, it may be that even non-compliance with a requirement is not fatal. In all such cases, it is necessary to consider the words of the statute or contract, in the light of its subject matter, the background, the purpose of the requirement, if that is known or determined, and the actual or possible effect of non-compliance on the parties."

23. In para 59 he said that the only people entitled to object are those referred to in s 79(6) and concluded that the focus must be on whether Parliament intended that *a landlord* (or other person entitled to serve a counter-notice) could successfully contend that the defect in the relevant notice was fatal to its validity.

24. He went on to hold that a failure by the RTM company to comply precisely with the requirements for a notice of intention to participate does not automatically invalidate all subsequent steps; and the particular failure would not have done so in the case he was considering.

25. In my view that approach leads to the same result in this case. If (contrary to my view) service of the copy notice by email is not a valid method of service, then service by email on the

qualifying tenants would not automatically invalidate all subsequent steps and would not have done so in this case. The requirement to serve copies of the claim notice is in my view ancillary and of secondary importance. All of the qualifying tenants were members of the RTM Company and were participating in the application to manage. S79(8) is for the protection of the qualifying tenants and Parliament cannot in my view have intended that the landlord could successfully contend that a breach of s79(8) invalidated all subsequent steps by the RTM Company.

26. It follows that I would also have dismissed the appeal on this ground.

Judge John Behrens

27 July 2017