**UPPER TRIBUNAL (LANDS CHAMBER)**

**UT Neutral citation number: [2017] UKUT 60 (LC)**
**UTLC Case Number: LRA/97/2016**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***LEASEHOLD ENFRANCHISEMENT - PROCEDURE – Time for starting proceedings – Application for lease extension posted within statutory time limit but received by First Tier Tribunal after relevant date – whether time barred – held by the FTT time barred – appeal allowed.***

**IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE FIRST TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY) MADE ON 8 JUNE 2016**

**BETWEEN:**

**MAHTABAN SALEHABADY** **Appellant**

**and**

**TRUSTEES OF THE EYRE ESTATE** **Respondent**

**Re: 6 Walsingham, Queensmead,**
**St John's Wood Park,**
**London NW8 6RB**

**Before**: **His Honour John Behrens**

**Determination on Written Representations**

**James Fieldsend** (instructed by Barber Young Burton & Rind) for the Appellant.
**No representation** was made on behalf of the Respondent

The following cases are referred to in this decision:

*Barnes v St Helens* MDC [2007] 1 WLR 879
*Chiswell v Griffon Land and Estates Ltd* [1975] 1 WLR, 1181
*Webber Transport v Railtrack* [2004] 1 WLR 230

## DECISION

**1.** This is an appeal against a decision of the First Tier Tribunal (Property Chamber) ("the FTT") dated 8 June 2016 whereby it declared that it did not have jurisdiction to deal with Mr Salehaby's application for an extended lease because the application was made out of time.

**2.** Mr Salehaby is the tenant of 6 Walsingham Queensmead St John's Wood Park London NW8 6RB. It is not in dispute that, as such, he would be potentially entitled to an extended lease under the provisions of the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act"). Sections 42 – 48 of the 1993 Act set out the procedure which must be followed under the Act. In summary:

1. The tenant starts the procedure by serving a notice under section 42. The landlord responds by serving a counter-notice under section 45.
2. The parties then have a period of time to agree the terms of acquisition.
3. If after a period of two months from the date that the counter-notice was given any terms remain in dispute either party can apply to the FTT to determine the matters in dispute. However, any application to the FTT must be made within 6 months of the date when the counter-notice is given.

**3.** It is not in dispute that the relevant notice and counter-notice were given. It is equally not in dispute that the 6 month period expired on 21 April 2016.

**4.** Mr Salehaby has at all material times been represented by Mr Rind, a partner in the firm of Barber, Young, Burton & Rind ("BYBR"). In a witness statement prepared for the purpose of this appeal Mr Rind states that on 18 April 2016 he prepared the necessary application and posted it correctly addressed together with a number of supporting documents by first class post to the FTT at about 7.30 p.m the same day.

**5.** On 9 May 2016 Mr Rind sent a letter to the FTT in which he referred to a conversation with an officer of the FTT he had had that day. He pointed out that the original letter had been sent on 18April 2016. He attached a copy of the application and the covering letter.

**6.** On 13 May 2016 a case officer from the FTT wrote to BYBR acknowledging receipt of the application and stated that it had been referred to a procedural judge who noted that the envelope appeared not to have sufficient postage, that the application was received late and was thus out of time. She stated that the FTT would need to decide jurisdiction and invited representations by 27 May 2016.

**7.** On 23 May 2016 the landlord's solicitors sent a letter submitting that the application was deemed withdrawn as it was out of time. On 26 May 2016 Mr Rind sent a letter in which he pointed out that the postage on the letter was £1.92 which was more than sufficient as the weight did not exceed 500g. He also pointed out that the letter was posted on 18 April 2016 and that it

should have arrived before 21 April 2016. Any delay in delivery was outside his control. He submitted that the application should be deemed to have been delivered before 21 April 2016 and that the application was effective.

**8.** The matter was dealt with by the FTT on 8 June 2016 as a paper application. In paragraph 4 of its decision the FTT summarised the submissions contained in the letters from Mr Rind and the landlord's solicitor. The basis of the decision is contained in paragraphs 5 and 6:

> 5. The envelope relating to the only copy of the application and accompanying letter on the Tribunal file is stamped as having been received by the Tribunal on 9 May 2016 which is outside the time limit prescribed by s48 of the Act which, in this case, expired on 21 April 2016.
>
> 6. Without any evidence from the Applicant that the application had indeed been posted (e g a certificate of posting) within the prescribed time limits the tribunal concludes that it only received the Applicant's application after the expiry of the statutory time limit. It was therefore received too late and the Tribunal has no jurisdiction to deal with this matter.

**9.** Mr Salehaby was granted permission to appeal by order of the Deputy President on 20 September 2016 who directed that the appeal would be by way of review on written representations. Written representations have been received from Mr James Fielsend on behalf of Mr Salehaby. No written representations have been received on behalf of the landlord. In that sense, therefore, the appeal is unopposed.

**Grounds of Appeal**

**10.** There are three grounds of appeal which may be summarised:

1. In so far as the FTT concentrated on the date when the application was received it applied the wrong test. The relevant date in accordance with The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules") is the date when the application was posted.

2. The FTT was wrong to hold that there was no evidence as to the date of posting. In particular it was wrong to reject the statement in Mr Rind's letter of 26 May 2016 that the application was posted on 18 April 2016.

3. It was procedurally unfair to reject Mr Rind's assertion as to the date of posting without giving him the opportunity to file a formal witness statement and (if necessary) be cross-examined on its contents.

Grounds 2 and 3 can in reality be taken together.

**The relevant date.**

**11.** The relevant provisions are section 48(1) and (2) of the 1993 Act and rule 26(1) of the Rules which provide:

48(1) Where the landlord has given the tenant—

(a) a counter-notice under section 45 which complies with the requirement set out in subsection (2)(a) of that section, or

(b) a further counter-notice required by or by virtue of section 46(4) or section 47(4) or (5),

but any of the terms of acquisition remain in dispute at the end of the period of two months beginning with the date when the counter-notice or further counter-notice was so given, [the FTT] may, on the application of either the tenant or the landlord, determine the matters in dispute.

48(2) Any application under subsection (1) must be made not later than the end of the period of six months beginning with the date on which the counter-notice or further counter-notice was given to the tenant.

26.(1) An applicant must start proceedings before the Tribunal by sending or delivering to the Tribunal a notice of application.

**12.** Thus it can be seen that the application must be "*made"* before the end of the 6 month period. Furthermore, the application can only be "*started"* in two ways – *"sending"* or *"delivering"* a notice of application to the FTT. Importantly, there is nothing in the rules which prescribes that the application is to be sent by recorded delivery or that any particular form of proof of posting is required. Equally, there is no deeming provision indicating the effect of *"sending"* the application.

**13.** In his written submissions Mr Fielsend has helpfully drawn my attention to two lines of authority.

**14.** The first is the decision of *Barnes v St Helens MDC [2007] 1 WLR 879* concerns the date when personal injury proceedings are "*brought*" for the purpose of the Limitation Act 1980. As is well-known under s 11(3) proceedings *"shall not be brought after the expiration of… (4)… three years from-(a) the date on which the cause of action accrued"*. Furthermore, under CPR 7.2 proceedings only start when the claim form is issued by the Court. In that case the claim form was delivered to the Court one day before the expiry of the limitation period but due to industrial action by Court staff the claim form was not issued until three days after its expiry. The Court of Appeal held that it was served in time. The claim form was *"brought"* when it was delivered to the Court office one day before the expiry of the period.

**15.** Mr Fielsend drew my attention to paragraph 16 of the judgment where Tuckey LJ said:

16 "I start simply by looking at the words used in the statute and the Rules. I approach them by expecting to find the expiry of a limitation period fixed by reference to something which the claimant has to do, rather than something which someone else such as the court has to do. The time at which a claimant "brings" his claim form to the court with a request that it be issued is something he has to do; the time at which his request is complied with is not because it is done by the court and is something over which he has no real control. Put another way one act is unilateral and the other is transactional. Looked at in this way I do not agree with the judge or Mr Norman that in this context the verb "to bring" has the same meaning as the verb "to start". The 1980 Act

> can perfectly properly be construed so that in the context of the CPR a claim is brought when the claimant's request for the issue of a claim form (together with the court fee) is delivered to the court office."

**16.** Mr Fielsend submits that s 48(2) of the 1993 Act should likewise be construed by reference to something that the applicant has to do.

**17.** The second line of authority relates to the construction of s 23 Landlord & Tenant Act 1927. This is a section dealing with service and which was incorporated by reference into Part II of the Landord and Tenant Act 1954 which deals with the renewal of business tenancies. As is well known there is a strict timetable for the service of notices under the Act. It provides:

> "Any notice, request, demand or other instrument under this Act shall be in writing and may be served on the person on whom it is to be served either personally, or by leaving it for him at his last known place of abode in England or Wales, or by sending it through the post in a registered letter addressed to him there …"[1]

**18.** Between 1975 and 2003 there was a series of cases starting with *Chiswell v Griffon Land and Estates Ltd [1975] 1 WLR, 1181* and ending with *Webber Transport v Railtrack [2004] 1 WLR 230* where s 23 was considered. In *Webber* Peter Gibson LJ pointed out that the section provides for 3 primary methods of service – personal, leaving at the last place of abode, and sending by registered (or recorded delivery) post. He went on to cite passages from Megaw LJ and Roskill LJ's judgment in *Chiswell*

> "If any of those methods are adopted, they being the primary methods laid down, and, in the event of dispute, it is proved that one of those methods has been adopted, then sufficient service is proved. Thus, if it is proved, in the event of dispute, that a notice was sent by recorded delivery, it does not matter that that recorded delivery letter may not have been received by the intended recipient. It does not matter, even if it were to be clearly established that it had gone astray in the post." (at 1188 - 1189)

> "The consequences of it having been lost in the post (since the tenant's solicitors failed to take advantage of the provisions incorporated in the 1954 Act from the 1927 Act about posting by recorded delivery) must fall upon the tenant. It is his misfortune, which he has to bear." (at 1188)

**19.** It was thus held that where one of the primary methods was used s 7 of the Interpretation Act 1978 has no application and the notice was duly served when (in the case of the third method) the letter was duly posted by recorded delivery.

**20.** I accept Mr Fielsend's submissions. I agree that the word "*made"* in s 48(2) looks to a unilateral act by the applicant. In my view the applicant makes the application by starting the proceedings. I also agree that rule 26(1) provides two methods for starting proceedings – by sending or delivering a notice of application to the FTT. It follows in my view that either of those acts is effective to start the proceedings. Thus the posting of a correctly addressed (and

[1] The Recorded Delivery Service Act 1962 effectively extends any statutory provision such as section 23 of the 1927 Act, which deals with delivery by a registered letter to delivery by recorded delivery

sufficiently stamped) notice of application to the FTT is sufficient to start the proceedings. Thus I agree that the relevant date is the date of posting. This is so even if the application notice is delayed in the post or does not arrive. Provided it is posted to the FTT proceedings have been started.

**Procedural Irregularity**

**21.** The basis upon which the FTT decided it had no jurisdiction is not entirely clear from paragraphs 5 and 6 of the Decision. Paragraph 5 suggests that the FTT considered that the date of receipt of the application notice was the relevant date. If that is so, for the reasons I have given, the FTT applied the wrong test.

**22.** Paragraph 6, on the other hand, suggests that there is no evidence that the application notice was posted within the relevant time limits. This suggests that it applied the correct test but ruled that Mr Rind had failed to establish that the application notice had been posted in time. If that is so, then in my view the ruling was procedurally unfair to Mr Salehaby.

**23.** There are a number of ways in which the date when a document is posted can be established. No doubt a certificate of posting is the best method but it is not the only method. Mr Rind stated in the letter of 26 May 2016 that he had posed the application notice on 18 April 2016. If that statement is accepted the application was started in time. It was, of course, open to the FTT to test that statement by requiring a witness statement and requiring Mr Rind to attend a hearing for cross-examination. It was not, however, open to it simply to reject the statement and assert that it was not posted in time.

**24.** Thus the ruling cannot stand and must be set aside. I do not feel able to remake the decision because it is not clear whether there is any challenge to Mr Rind's statement that he posted the application on 18 April 2016.

**25.** I accordingly remit the matter to the FTT for a determination on jurisdiction in accordance with this decision. If the landlord accepts that Mr Rind posted the notice of application on 18 April 2016 then it is clear that the FTT does have jurisdiction and the application can proceed on its merits. If the landlord wishes to test Mr Rind's statement there will have to be a hearing at which he can be cross-examined on his witness statement of 4 July 2016. The FTT will then have to determine whether on balance of probabilities it has been proved that the application notice was posted before 21 April 2016.

Dated 16 February 2017

John Behrens

Judge Behrens