IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 390 (LC)
Case No: LRX/64/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – RIGHT TO MANAGE – requirements of section 79(6) of the Commonhold and Leasehold Reform Act 2002 - whether each landlord had been served with the claim notice – whether despite failure to serve on landlord there had been compliance with the statutory procedure

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

LEXHAM HOUSE RTM COMPANY LIMITED

Appellant

- and -

EUROPEAN INVESTMENTS & DEVELOPMENT (PROPERTIES) LIMITED **Respondent**

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

Elizabeth Cooke, Upper Tribunal Judge

Determination on written representations

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The following cases are referred to in this decision:

Elim Court RTM Co Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89

Nevill Long & Co (Boards) Ltd v Firmenich & Co [21983] 2 EGLR 76

Introduction

1. On 19 July 2018 the appellant served on the respondent notice of its intention to acquire the right to manage Lexham House, 45-53 Lexham Gardens, London W8 5JT ("the property"), pursuant to section 79 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). The respondent is the freeholder of the property. The respondent served a counter-notice on 20 August 2018. On 30 January 2019 the First-tier Tribunal ("the FTT") decided that the appellant was not entitled to acquire the right to manage the property because it had not served the claim notice on European Investments and Development (London) Limited ("EID London") which holds a lease of part of the roof of the property; the FTT held that EID London was a landlord of part of the premises and that therefore the appellant had not complied with the requirements of section 79(6) of the 2002 Act. This is an appeal from that decision.

2. The appeal has been decided on the basis of written representations made for the appellant by Jacqueline Samuels of Samuel & Co, Solicitors and for the respondent by Simon Serota of Wallace LLP, Solicitors; I am grateful to them both.

3. In the paragraphs that follow I set out the applicable law, and then the factual background, before explaining the grounds of appeal and my decision.

The relevant law

4. Chapter 1 of Part 2 of the 2002 Act, comprising sections 71 to 113, makes provision for a company known as an RTM company to acquire the right to manage premises, defined in section 72(1) as a self-contained building or part of a building that includes two or more flats held by qualifying tenants. Sections 73 and 74 prescribe the nature and membership of an RTM company, whose members must be qualifying tenants of flats in the premises. Section 75 defines qualifying tenants, and section 78 provides that qualifying tenants who are not members of the RTM company must be given an invitation to participate, that is, an invitation to become a member of the RTM company. Section 79 of the 2002 Act sets out what an RTM company must do next in order to acquire the right to manage:

> "(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.
>
> ...
>
> (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.

5. The issue in this appeal is whether the requirements of section 79(6) have been complied with. The leading authority is therefore the decision of the Court of Appeal in *Elim Court RTM Company Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, about which I shall have more to say later.

The factual background

6. The property is a block of 24 flats. The leases of flats 22, 23 and 24, on the top floor, grant the respective lessees the exclusive right to use the roof space above their flat. It is not in dispute that this amounts to an easement to make use of the roof space, and not a demise of the roof.

7. The Tribunal has been provided with a copy of the lease of flat 22, which was granted in 1982 for a term of 125 years, and it is assumed that the other leases are of similar date and term. The lease of flat 22 does not contain a precise description of the demised premises; but the Tribunal has also been provided with an extract from the lease of flat 23, which describes the premises as:

> "… Flat No 23 Lexham House including without prejudice to the generality of the foregoing all window furniture and the window frames and glass therein any window blinds and one half part in depth of the structure between the floors and the walls of the said flat and the adjoining flat and the ceilings of the flat below it."

That is not an entirely clear description. Flat 23 encompasses half of the structure and space between its floor and the ceiling below, and therefore it may be that it also includes half of the structure and space between its ceiling and the outer surface of the roof above. It certainly includes no more than that, and clearly does not include the roof itself.

8. The tenant of flat 22 covenants at clause 3(3(a)) to repair etc the inside of the demised premises, the heating installations and the internal walls but not the external walls nor the floors or ceilings. The landlord at clause 4(5) covenants to keep the main structure of the property, "including the roof all ceilings floors and external and internal walls" in good order and condition.

9. In 2015 the respondent granted to EID London a 999-year lease ("the rooftop lease") of the roof of the property, including the roof space over which the lessees of the top floor flats held easements. The demised premises under the 2015 lease ("the rooftop demise") is defined as follows:

> "the surface of the flat roof of the building … and the structure beneath the surface comprising everything above the ceiling joists of the flat or flats on the floor of the building immediately beneath the same and the airspace above the said flat roof."

10. I drew attention in paragraph 5 to the lack of clarity in the extent of the premises demised by the top floor leases. It is possible that the rooftop demise, extending downwards to encompass everything above the ceiling of the flats on the top floor, may overlap to that limited extent with the premises demised by the top floor leases.

11. The rooftop lease is said at paragraph 3 to be granted "subject to the Fourth Floor rights", namely the easements contained in the leases of Flats 22, 23 and 24.

12. The rooftop lease was granted with a view to the construction by EID London of two additional flats at roof level; schedule 3 to the lease sets out the lessee's obligations to carry out that development. The rooftop lease provides, at clause 4.1, that schedule 3 shall not apply while the Fourth Floor rights subsist and, at clause 5.1, that until development takes place the respondent will be responsible for the repair of the rooftop demise "in accordance with the covenants and obligations contained in the Flat Leases".

13. It is not in dispute that the appellant company was incorporated in order to acquire the right to manage the property, nor that it did not serve a claim notice on EID London. However, EID London as the lessee of the porter's flat received the invitation to participate (given under section 78 of the 2002 Act), and is under the same ownership and control as the respondent, so it was aware of what was happening (paragraph 22 of the FTT's decision, recording the argument made by the appellant rather than a finding of the FTT; but the point does not appear to be in dispute).

The appeal

14. The FTT decided that EID London was a landlord of part of the property, and that failure to serve a claim notice upon it was fatal to the validity of the procedure. The appellant argues the FTT was in error, first because EID London was not a landlord of the roof surface and structure of the property; and second that even if it was, failure to serve in these circumstances did not invalidate the procedure. I take those two points in turn.

Was EID London a landlord of part of the premises

15. What section 79(6) requires is service of the claim notice on each landlord under a lease of the whole or any part of the premises. The "premises" in this case is the property.

16. I have pointed out above that it is not clear whether the rooftop demise overlaps with what is demised by the leases of the top floor flats. The FTT did not make a decision on this point and

did not record any argument about it. The respondent in its statement of case in the appeal appears to accept that the demises do not overlap and that EID London is a landlord in respect of the top floor flats on two bases: first, that it holds the reversion to the easements appurtenant to the three top floor flats, and second that as lessee of the roof it is liable to the tenants of all the flats to perform the landlord's covenant to repair the roof.

17. I find that the respondent is correct, and the FTT's decision on this point was correct, at least on that first basis. EID London holds the reversion to the easement granted for a term to each of the top floor lessees. I am persuaded that that makes it a landlord within the meaning of section 79(6). Similarly in *Nevill Long & Co (Boards) Ltd v Firmenich & Co* [1983] 2 EGLR 76 the Court of Appeal held that where a landlord had sold a parcel of land over which its two business tenants held a right of way, there had been a severance of the reversion, and that the original landlord and the owner of the severed part were jointly the landlord for the purposes of the Landlord and Tenant Act 1954.

18. That being the case I do not need to make a decision on the second of the respondent's arguments, and I do not do so since it does not appear to have been part of the respondent's case in the FTT and I would hesitate to decide the point without more detailed argument.

Did failure to serve the claim notice on EID London mean that the requirements of section 79(6) have not been complied with?

19. EID London was the landlord of part of the premises, and was not served with a claim notice. Does that invalidate the notice?

20. In *Elim Court* the Court of Appeal had to consider the consequences of the failure to serve the claim notice on the intermediate landlord of a single flat in a block of 40 flats. That intermediate landlord appeared (although findings of fact were not made) to have acquired an intermediate lease as part of an equity release scheme, whereby the tenant in possession under a long lease had sold his interest in return for a lump sum and the right to remain in residence for his lifetime. The intermediate lessee/landlord had no management responsibilities for the block.

21. The Court of Appeal pointed out that the right to manage scheme established by the 2002 Act enabled private persons to acquire property or similar rights. In assessing whether the requirements of the statutory scheme have been complied with, "substantial compliance" will not do (in accordance with the reasoning of the Court of Appeal in *Osman v Natt* [2014] EWCA Civ 1520). But the court must consider the intention of the legislature in prescribing a particular procedure, in the light of the statutory scheme as a whole (*Elim Court* paragraph 52). Where critical information, for example, is missing from a notice, it will generally be invalid; where what is missing is of secondary importance then it may be valid.

22. The Court of Appeal went on to consider the effect of failure to serve the notice on the intermediate landlord of one flat, in the context of a scheme designed to enable RTM companies

to acquire the right to manage simply and cheaply. It considered the purpose of service and concluded at paragraph 74 that the failure to serve an intermediate landlord with no management responsibilities does not invalidate the notice.

23. The FTT distinguished *Elim Court* on the basis (paragraph 33) that the intermediate landlord in *Elim Court* held an interest just in a flat and not in the common parts of the building, whereas here EID London held an interest in the roof which was a common part, and (paragraph 37) for the reasons argued by Mr Serota for the respondent.

24. Mr Serota's reasons were set out as follows at paragraph 13 of the FTT's decision:

a. "London is the landlord of three occupational leases."

b. "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."

c. "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."

25. Taking these points together with its observations about the common parts, it seems that the FTT took the view that the interest held by EID London was more significant than that held by the intermediate landlord in *Elim Court* and that therefore failure to serve a claim notice upon it meant that section 79(6) had not been complied with.

26. In my judgment this is to ignore the reality of the situation. EID London held a lease of the roof over the surface of which the three top floor flats had an easement. It may or may not have also held the reversion to a thin slice of the premises demised by the leases of those flats. But it had no practical involvement in the property at all; as between EID London and the respondent only the respondent was responsible for the repair of the roof and for compliance with the covenants in the leases of the flats.

27. True, had the tenants needed to enforce the landlord's covenant to repair the structure they would have been entitled to pursue EID London, but had they done so it would have been the respondent that would have done what was required. The reality was that at the date of the service of the claim notice and for the foreseeable future the respondent took responsibility for the structure and fulfilled the landlord's obligations to the tenant in respect of the roof. That is going to be the case for some decades unless the respondent is able to buy out the easements attached to the top floor flats. In practical terms, and whether or not it in fact holds the reversion to a thin slice of the demised premises, EID London is quite simply not affected at all by the appellant's assumption of the right to manage. It does not even need to be informed of the appellant's existence and intentions, because it is in common ownership and control with the respondent and its officers therefore have that information.

28. This is a case where the intermediate lessee had far less involvement with the property as a whole than had the intermediate landlord/lessee in *Elim Court*. I take the view that the FTT reached an unsustainable conclusion about compliance with section 79(6) because it did not take into account the relevant information about the reality of EID London's responsibilities to the lessees of the flats.

29. Accordingly the appeal is allowed. The Tribunal substitutes its own decision that the appellant has complied with the requirements of section 79(6) of the 202 Act.

30. This decision is final on all matters other than the costs of the appeal. The parties may now make submissions on such costs and a letter giving directions for the exchange and service of submissions accompanies this decision.

Upper Tribunal Judge Elizabeth Cooke

17 December 2019