Y TRIBIWNLYS EIDDO PRESWYL
RESIDENTIAL PROPERTY TRIBUNAL
LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0043/01/16 – Llys Newydd

In the Matter of Llys Newydd, Llwynhendy, Llanelli, SA14 9DT

In the matter of an Application under Section 84(3) of the Commonhold and Leasehold Reform Act 2002

TRIBUNAL Mr S Povey
Mr H Lewis

APPLICANT Llys Newydd Property Management RTM Company Limited

RESPONDENT Drake Freeholds Limited

ORDER

Further to the Tribunal's decision of 27th May 2016, the following order is made in respect of the Respondent's costs:

1. By no later than 14th June 2016, the Respondent is to send to the Applicant written details of the costs it has incurred in relation to these proceedings, including what those costs relate to and how they have been calculated ('the claim for costs').

2. Within seven days of receipt of the claim for costs, the directors of the Applicant company must ensure that a copy is sent to every past and present member of the company.

3. If the parties cannot agree the claim for costs, either of them may apply to the Tribunal for it to determine the amount of costs which must be paid.

4. If no application is received from either party by 26th July 2016, it will be assumed that the claim for costs has been agreed and the file will be closed. Any application to determine the claim for costs received after that date will only be considered with the Tribunal's permission.

Dated this 27th day of May 2016

Chairman

Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0043/01/16 – Llys Newydd

In the Matter of of Llys Newydd, Llwynhendy, Llanelli, SA14 9DT

In the matter of an Application under Section 84(3) of the Commonhold and Leasehold Reform Act 2002

TRIBUNAL Mr S Povey
Mr H Lewis

APPLICANT Llys Newydd Property Management RTM Company Limited

RESPONDENT Drake Freeholds Limited

DECISION

1. As at the date on which it served the Claim Notice on the Respondent, the Applicant was not entitled to acquire the right to manage Llys Newydd.

2. The Applicant is liable for the costs incurred by the Respondent in relation to these proceedings.

3. Each person who is or was a member of the Applicant company is also liable for the costs incurred by the Respondent in relation to these proceedings (jointly and severally with the Applicant and each other).

4. Within seven days of receipt, the directors of the Applicant company must ensure that a copy of this determination is sent to every past and present member of the company.

5. Further directions will be issued by the Tribunal regarding the assessment and payment of those costs.

REASONS FOR THE DECISION

Background

1. The Applicant is a Right to Manage company incorporated on 2nd September 2015. Its directors are Russell Davies and Patricia Oram. The Respondent is the freehold owner of Llys Newydd, Llwynhendy, Llanelli SA14 9DT ('the property'), a self-contained block made up of 33 separate flats.

2. On or around 10th October 2015, the Applicant served a Claim Notice on the Respondent, claiming a right to manage the property. In response, on or around 9th November 2015, the Respondent served a Counter Notice on the Applicant denying the right to manage on the sole ground that the Applicant had failed to comply with the required statutory procedure.

3. On 4th January 2016, the Applicant applied to the Tribunal for a determination of its entitlement to manage the property. The application was received by the Tribunal on 5th January 2016. Case management directions were issued by the Tribunal on 8th January 2016, in pursuance of which both parties provided the Tribunal with evidence they wished to rely upon. Both parties also indicated that they wished to have the matter determined without an oral hearing. The Tribunal decided that it was not necessary to inspect the property, given the discrete basis upon which the Respondent was objecting to the Applicant's claim.

Relevant Law

4. Section 78 of the Commonhold and Leasehold Reform Act 2002 ('CLRA 2002') requires a right to manage company to serve notice on all the qualifying tenants in the property who are not existing members of the company (a 'notice inviting participation' or 'NIP'). The section goes on to detail the contents of the NIP. The purpose of the NIP includes informing the qualifying tenants that the company intends to acquire the right to manage the property and inviting each of them to become members of the said company.

5. Section 79 of CLRA 2002 sets out the procedure for notifying the freeholder of the claim to acquire the right to manage. It includes the procedure for giving a notice of claim ('the Claim Notice') to the freeholder and the details the required contents of that Claim Notice. The consequence of a failure to give a NIP to each person to whom it is required to be given (i.e. qualifying tenants who are not existing members of the company per s.78 CLRA 2002) is that the Claim Notice may not be given by the company to the freeholder (per section 79(2) CLRA 2002).

6. A strict approach to the failure to comply with statutory requirements for the acquisition of rights in relation to property should be adopted: Natt v Osman

[2014] EWCA 1520 Civ; *Woodfall: Landlord & Tenant, Vol 4, Part 15, Section 4 at 31.022*

7. Where the right to manage company has been given a Counter-Notice (per section 84(1) CLRA 2002) by the freeholder, the company may apply to the Tribunal for a determination that on the date it gave the Claim Notice to the freeholder, it was entitled to acquire the said right to manage: ss. 79(1) & 84(3) CLRA 2002

8. A Claim Notice ceases to have effect if the Tribunal determine that the right to manage company was not entitled to acquire the right to manage as claimed: s.84(6) CLRA 2002

9. Costs incurred by a freeholder are payable by the right to manage company if the Tribunal dismisses an application of entitlement to acquire the right to manage: ss. 88(1) & 88(3) CLRA 2002

10. Where a Claim Notice ceases to have effect, each person who is (or has been) a member of the right to manage company is also liable for the freeholder's costs (jointly and severally with the company): s.89(3) CLRA 2002

The Matters in Dispute

11. The issues raised by the parties to be determined by the Tribunal were as follows:

    11.1. Had the Applicant complied with the requirements of section 78 of the Commonhold & Leasehold Reform Act 2002 ('CLRA 2002')?

    11.2. If it had not, was that failure to comply fatal to its application?

    11.3. Should the Applicant and the members of the Applicant company be ordered to pay the Respondent's costs?

The Tribunal's Decision

12. Having regard to the evidence we have seen, the Tribunal has reached the following conclusions on the issues before us.

Did the Applicant comply with s.78 CLRA 2002?

13. After service of the Claim Notice and prior to serving its Counter-Notice, the Respondent (through its solicitors) asked the Applicant for copies of the NIPs which were sent to all the non-participating qualifying tenants of the property, along with evidence that they had been received. That request was made in a letter dated 30th October 2015, with a deadline for receipt of 6th November 2015 (to protect the Respondent's position as to the service of a Counter-Notice).

14. The Applicant responded to the request by an email (from Mr Davies) dated 4th November 2015. Attached to the email was one NIP, dated 22nd September 2015 and sent to Ellen Nener of Flat 3. It was averred in the email that such a NIP had been sent to all qualifying tenants. The disclosed NIP recorded Ellen Nener as an existing member of the Applicant company. If correct, it was not necessary to invite her to become a member and the NIP served upon her was superfluous.

15. In the course of these proceedings, the Tribunal has seen of two further NIPs, both dated 21st September 2015. Confusingly, the first is also in the name of Ellen Nener of Flat 3 but dated 21st September 2015. That NIP only discloses Mr Davies and Mrs Oram as existing members of the Applicant company. The second was served upon Hafina Davies of Flat 12A. By the time of the 22nd September 2015 NIP disclosed to the Respondent, both Ms Davies and Ms Nener were recorded as being members of the Applicant company and both appeared as such in the subsequent Claim Notice.

16. In any event, the Respondent was not satisfied with the Applicant's response. By a letter dated 9th November 2015, the Respondent's solicitors again requested copies of all the NIPs sent to qualifying non-participating tenants and evidence that the same had been received. On the same day, the Respondent served its Counter-Notice (citing non-compliance with s.78 CLRA 2002).

17. An email response was received from Mrs Oram on 24th November 2015. She claimed that the Respondent's request had been complied with, since it had been provided with a copy of the NIP which had been sent to all qualifying tenants. She declined to provide details of those to whom the NIPs had been sent or details of their replies, citing privacy law (although not any specific legislation or provision).

18. The Respondent's solicitors forwarded Mrs Oram's email to the Applicant and once again requested copies of all the NIPs and evidence that the same had been received the appropriate persons. In a letter dated 15th December 2015, Mr Davies (on behalf of the Applicant) claimed that the Respondent's "*request for correspondence private to the RTM and the lessees is not a reasonable request, unless we have misunderstood your request, we cannot reasonably supply this information.*"

19. In the Tribunal's judgment, the Applicant has manifestly failed to demonstrate compliance with the requirements of s.78 CLRA 2002. The request made by the Respondent (on three separate occasions) was both reasonable and appropriate. The statutory regime is clear. It is a fundamental precursor to any claim that NIPs must be served on qualifying non-participating tenants. The Applicant is proposing to take over the management of the property. Those directly affected by that course of action (the qualifying tenants) have the statutory right to be notified of the proposal and, importantly, have the right to become members of

the management company (and play a direct role in the management of the property within which they reside). These are rights properly recognised by Parliament as being fundamental to the right to manage process.

20. Against that legislative backdrop, it is no answer to a request for evidence that s.78 has been complied with to either cite privacy law or suggest that the process is somehow private to the Applicant and the qualifying tenants. It can be no part of the statutory scheme that the Applicant is able to simply state that it has complied with s.78 CLRA 2002 and the Respondent must accept that assertion without question. Such an interpretation would fundamentally undermine the procedural safeguards built into the right to manage process. Those safeguards require candour and transparency on the part of the Applicant.

21. In addition, the Respondent's request is one which could easily and simply be adhered to by the Applicant. It claims to have sent NIPs to every qualifying tenant. Even in the face of the Counter-Notice and these proceedings, the Applicant has failed to evidence that it complied with s.78 CLRA 2002 at the time it served the Claim Form or at all.

22. In the circumstances, and on the evidence before it, the Tribunal finds that the Applicant did not, on balance, serve NIPs on all the qualifying non-participating tenants of the property, contrary to the requirements of s.78 CLRA 2002.

Is the failure to comply with s.78 CLRA 2002 fatal to the application?

23. We have recited the relevant law pertaining to right to manage applications above. Parliament has clearly indicated, in our judgment, the importance of compliance with the s.78 requirements. A failure to so comply prohibits the serve of a Claim Notice (by reason of s.79(2) CLRA 2002).

24. If any of the particulars required by s.78 are inaccurate on its face, the NIP will not be invalidated (per s.78(7) CLRA 2002). It is clear from this that Parliament applied it mind to circumstances in which a failure to comply with the requirements of s.78 will not invalidate the NIP. Not included in that amnesty is a failure to serve the NIP at all. Nothing in the statutory scheme forgives such an omission.

25. The Tribunal has also had regard to the policy intention behind s.78 (to inform non-participants of the Applicant's intentions and afford them an opportunity to take an active role) and the general requirement to adopt a strict approach to statutory non-compliance when considering property rights.

26. Considering all these factors, we conclude that the manner of the Applicant's failure to comply with the requirements of s.78 is fatal to its application to acquire the right to manage the property.

27. It is of course open to the Applicant to make good its omissions, evidence the same to the Respondent and serve a fresh Claim Notice. Whilst that may resolve matters in the future, it does nothing to save the current application.

28. For all these reasons, the Tribunal finds that at the date of the Claim Form (10th October 2015), the Applicant was not entitled to acquire the right to manage the property. Its application is therefore dismissed.

The Respondent's application for costs

29. The Respondent seeks its costs under ss. 88(3) and 89(3) of CLRA 2002.

30. Given the mandatory effect of both of those statutory provisions, the Tribunal is compelled to order that the following are jointly and severally liable for the Respondent's costs incurred as a result of being party to these proceedings:

    30.1. The Applicant, by reason of s.88(3) CLRA 2002, as we have dismissed its application; and

    30.2. The members of the Applicant company (both past and present), by reason of s.89(3) CLRA 2002, as the Claim Notice ceases to have effect by reason of the Tribunal's determination of the application (and the effect of s.84(6) CLRA 2002).

31. Given the liability which now sits with each member of the Applicant company, the Tribunal orders that the directors of the company (Mr Davies and Mrs Oram) ensure that a copy of this determination is sent to every past and present member of the Applicant company within seven days of receiving it themselves.

32. The Tribunal intends, in the first instance, to allow the parties an opportunity to agree the amount of the said costs themselves. However, we make provision (in a separate order) for the issue of costs to be remitted back to the Tribunal for determination in the absence of agreement.

Dated this 27th day of May 2016

Chairman