The right to manage—when procedural slips are non-fatal (Lexham House RTM Company Ltd v European Investments & Development (Properties) Ltd)

07/01/2020

Property disputes analysis: Tricia Hemans, barrister at Falcon Chambers, examines an Upper Tribunal (UT) decision that when the appellant served the respondent freeholder of a block of flats with notice of its intention to acquire the right to manage the property it did not need, in order to comply with section 79(6) of the Commonhold and Leasehold Reform Act 2002 (CLRA 2002), to also serve notice on a second landlord of part of the property, which would not be affected by the appellant's acquisition of the right.

Lexham House RTM Company Ltd v European Investments & Development (Properties) Ltd [2019] UKUT 390 (LC)

What are the practical implications of the case?

The case demonstrates that a right-to-manage (RTM) company's failure to serve a claim notice on a landlord of part of the premises will not amount to non-compliance with CLRA 2002, s 79(6) capable of invalidating the notice where, for all practical purposes, that landlord will not be affected by the RTM company's assumption of the right to manage.

The decision highlights the purposive approach which the UT will take to questions of compliance with the right-to-manage procedure under CLRA 2002. It underlines the legislative aim of the right-to-manage scheme in enabling private persons to acquire property or similar rights simply and cheaply, as discussed by the Court of Appeal in *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89 at para [73].

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 *Natt and another v Osman and another* [2014] EWCA Civ 1520, [2014] All ER (D) 279 (Nov)). However, the court must still consider the intention of the legislature in prescribing a particular procedure in the light of the statutory scheme as a whole (*Elim Court* at para [52]).

Practitioners might be able to breathe a sigh of relief in cases where the reality of the situation is that a more or less irrelevant landlord of an insignificant part of the premises has not been given a claim notice in circumstances where the acquisition of the right to manage will have very little impact on it. The case might also suggest that a similar approach will be taken to other procedural slips which in reality are of no consequence. That said, a belt-and-braces approach to the giving of notices and the other steps required by CLRA 2002 is to be commended, thus avoiding any unnecessary argument about compliance and potentially expensive litigation to decide the question.

What was the background?

The appellant is an RTM company set up under the provisions of CLRA 2002 to acquire the right to manage a block of 24 flats. The members of the appellant are the qualifying tenants (under CLRA 2002, s 75) of the flats, each holding long leases. The respondent is the freeholder of the property.

The leases of three flats on the top floor granted the respective lessees the exclusive right to use the roof space above their flat. This amounted to an easement to make use of the roof space, and not a demise of the roof.

In 2015, the respondent granted a 999-year lease of the roof of the property, including the roof space over which the lessees of the top-floor flats held easements, to an associated company with the same directors as the respondent.

The appellant served notice of its intention to acquire the right to manage on the respondent alone. The issue before the UT was whether the appellant's notice of claim complied with CLRA 2002, s 79(6)(a) which provides that 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.

The First-tier Tribunal (FTT) held that the appellant was not entitled to acquire the right to manage the property because it had not served the claim notice on the associated company, which was in the FTT's judgment a landlord of part of the premises. Therefore, the appellant had not complied with the requirements of CLRA 2002, s 79(6).

What did the Upper Tribunal decide?

Two key issues were before the UT:

- whether the appellant had failed to give the claim notice to each person who on the relevant date was a landlord under a lease of the whole or any part of the premises
- if there had been such a failing, whether the consequences were such that the claim notice was invalid

On the first issue, the UT noted that it was unclear whether the rooftop demise to the associated company overlapped with what was demised by the leases of the top-floor flats. It went on to state that the FTT had not made a decision on that point and had not recorded any argument about it. As such, the UT did not find that the associated company was the landlord of part of the premises on that basis. However, it found that the associated company was a landlord in respect of the top-floor flats as it held the reversion to the easements appurtenant to the three top-floor flats. On that basis and applying the reasoning of the Court of Appeal in *Nevill Long & Co (Boards) Ltd v Firmenich & Co* [1983] 2 EGLR 76, the UT held that the associated company should have been served with the claim notice.

On the second issue, the UT departed from the decision of the FTT below. The FTT, having considered the decision of the Court of Appeal in *Elim Court* that the failure to serve an intermediate landlord with no management responsibilities does not invalidate the notice, decided that the interest held by the associated company was more significant than that held by the intermediate landlord in *Elim Court* as it was the landlord of three occupational leases, the demise included the surface of the roof and structure below, and it was responsible for complying with the landlord's responsibilities under the leases in respect of those areas demised to it. The FTT, therefore, held that the appellant's failure to serve a claim notice upon the associated meant that CLRA 2002, s 79(6) had not been complied with.

The UT, however, held that the FTT had ignored the reality of the situation. The associated company had no practical involvement in the property. The demise to it had been with a view to it constructing two additional flats at roof level. However, under the lease, its obligation to develop would not apply while the top-floor flats' easements subsisted and, until development took place, the respondent would be responsible for the repair of the rooftop demise. As such, 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. In practical terms, and whether or not the associated company, in fact, held the reversion to a thin slice of the demised premises, it was not affected at all by the appellant's assumption of the right to manage. The UT concluded that the associated company did not

even need to be informed of the appellant's existence and intentions because it was in common ownership and control with the respondent and its officers therefore had that information (see para [27]).

On this basis, the UT held that the appellant had complied with the requirements of CLRA 2002, s 79(6) notwithstanding its failure to give its claim notice to all landlords.

Case details

- Court: Upper Tribunal, Lands Chamber
- Judge: Elizabeth Cooke
- Date: 17 December 2019

Interviewed by Robert Matthews.

The views expressed by our legal analysis interviewees are not necessarily those of the proprietor.