RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

REFERENCE NUMBER: LON/OOAF/LCP/2006/0002

COMMONHOLD AND LEASEHOLD REFORM ACT 2002 SECTION 88(4)

IN THE MATTER OF 36-38A & 50-62A EDGEWOOD DRIVE ORPINGTON KENT BR6 6LHJ

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| Parties | : | Plintal SA (1)<br>Palvetto Properties Inc (2) Applicants |
| | | 36-38a Edgewood Drive RTM Company Limited<br>50-62a Edgewood Drive RTM Company Limited<br>Respondents |
| Representation | : | Mr N Duckworth – Counsel<br>Mr H Gold – Solicitor<br>For the Applicants |
| | | Mr S Gallagher – Counsel<br>Mr A Raby – Solicitor/Thackray Williams<br>Mrs K Chapman<br>For the Respondents |
| Hearing Date | : | 17th January 2006 |
| Tribunal Members | : | Mr A A Dutton<br>Mrs E Flint DMS FRICS IRRV<br>Mrs RTurner JPBA |
| Date of Application: | | 7 August 2006 |
| Date of Hearing | : | 29 November 2006 |
| Date of Decision | : | 19th December 2006 |

## REASONS

**A BACKGROUND**

1. This matter came before us on the 29 November 2006 as a result of a hearing on 30 January 2006 before a Tribunal when concessions were made by the Respondent RTM Companies that the original Notices served under s79 of the Commonhold and Leasehold Reform Act ("the Act") had not in fact been served.

2. In the Decision of the Tribunal which is dated 10 February 2006 the history of the matter is recorded and we do not propose to repeat same in this Decision. It is right to record however that the only issue that appeared to remain in dispute as agreed by both Counsel at that time was the question of costs, if any, payable by virtue of s88 and s89 of the Act. At that time Mr Gallagher on behalf of the then Applicants, now Respondents, submitted that as the claim notices had not been served there was no jurisdiction to invoke the cost provisions. The applications were a nullity and could be neither withdrawn nor dismissed. Mr Summers, Counsel for the Respondent, now Applicant, contended that the Tribunal should adopt a purposive construction and read the Act to enable the Landlord to be compensated in costs so that it was not "out of pocket".

3. The Decision goes on to record the agreement by both parties that the Claim Notices had not been served and an indication was given by the Tribunal at paragraph 13 that the relevant provisions of the Act were not engaged. However that Tribunal did not make a final ruling and invited the Respondents, now the Applicants, to pursue the application for costs under s88(4) of the Act.

**B EVIDENCE:**

4. We believe that we can take the submissions made by both Mr Gallagher and Mr Duckworth quite shortly. Both had submitted written Skeleton Arguments which were of great assistance to us. The Skeleton Argument by Mr Duckworth, dated 13 October 2006 set out the history submitting that Parliament plainly intended where a Landlord was put to the expense of dealing with and ultimately defending a Notice then the Landlord should be compensated. As was said by Mr Duckworth "it is surprising that the legislature has adopted this policy as justice dictates that a Landlord should not be left out of pocket as a result of dealing with and defending unmeritorious claims". Reference was made to Scottish Widows Fund and Life Assurance Society v. ABBAS (LON/ENF/259/ 98) which was a Tribunal case dealing with the provisions of costs under Leasehold Reform Housing and Urban

Development Act 1993 ("the 1993 Act"). It was submitted that if a distinction was drawn between this case, where it was conceded that service had not taken place and in the case where the Notice was fatally defective for some other reason that any distinction as to how costs should be dealt with would be arbitrary and produce unjust results. Mr Duckworth went on to submit that if s88 were construed as contended for by the Respondents it would prevent the Landlord from taking a point on service and by extension override the requirements of s111 of the Act and Part 6 of the CPR.

5. Mr Duckworth referred to the case of 23 Albert Road RTM Company v. Oasis Properties Limited (CHI/00ML/2004/0004) another Tribunal case where costs had been awarded because the Claim Notice did not comply with a number of mandatory requirements under s80 of the Act.

6. Mr Duckworth went on to consider the meaning of the word "given" within the Act. He submitted there was more than one meaning. "Given" could mean served, as is the case in s79, but it could also mean "given" as in the normal sense of the word, namely received. He went on to submit that the Respondents were estopped from denying the Applicants entitlement to costs and relied on a passage from Hague dealing with enfranchisement claims under the 1993 Act. The submission then went on to deal with the basis upon which the costs could be recovered.

8. Mr Gallagher in his Skeleton Argument repeated the submissions made at the first hearing that as it had been accepted that the Claim Notice had never been served, a position from which he said the Applicants could not resile by reason of the Court of Appeal case of Benedictus and others v. Jalaram Ltd ([1989] 1 EGLR 251), the provisions of s88 do not bite. He relied on the strict interpretation of s88. In the absence of service he says that this means that the statutory scheme has not been invoked. As to the 1993 Act he referred to the similar commentary in Hague and drew to the Tribunal's attention that the critical ingredient was the fact of service of the initiating Notice.

9. As an alternative submission he proposed that if the Applicants were entitled to any costs they would be moderate only and his submission when on to deal with those issues.

## C THE LAW

9. It is appropriate to set out the provisions of s88 and s89 in this Decision.

*88 Costs: General:*

*(1)* *A RTM company is liable for reasonable costs incurred by a person who is*

*(a)* *landlord under a lease of the whole or any part of any premises,*

*(b)* *party to such a lease otherwise than as landlord or tenant, or*

*(c)* *a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises.*

*In consequence of a claim notice given by the company in relation to the premises.*

*(2)* *Any cost incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.*

*(3)* *A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before a leasehold valuation tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.*

*(4)* *Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by a leasehold valuation tribunal.*

*89 Costs where claim ceases:*

*(1)* *This section applies where a claim notice given by a RTM company –*

*(a)* *is at any time withdrawn or deemed to be withdrawn by virtue of any provision of this Chapter, or*

*(b)* *at any time ceases to have effect by reason of any other provision of this Chapter.*

*(2)* *The liability of the RTM company under s88 for costs incurred by any person is a liability for costs incurred by him down to that time.*

*(3)* *Each person who is or has been a member of the RTM company is also liable for those costs (jointly and severally with the RTM company and each other person who is so liable).*

Sub- sections (4) and (5) are not relevant to these proceedings

D **DECISION:**

10. It is common ground between the parties that the Claim Notices were never served. It seems to us that the relevant part of s88 is sub-section (3) where it states that an RTM company is only liable for costs if the Tribunal dismisses an application for a determination that it is entitled to acquire the right to manage the premises. In this case no such dismissal has taken place. Rather the parties agreed the service had not been effective and that the proceedings had therefore never technically started.

11. Section 89(1)(a) specifically relates to the liability for costs where at any time the Claim Notice is withdrawn or deemed to be withdrawn by virtue of any provisions of this chapter or at sub-section (1)(b) at any time ceases to have effect by reason of any other provisions of this chapter.

12. The right to manage procedure is commenced by the giving of a Notice complying with s79 and s80 of the Act. We are satisfied that the giving of a Notice under s79 means the service of same, indeed we believe that must be correct when one considers the terms of the Counter-notice, set out in the Right to Manage (Prescribed Particulars and Forms)(England) Regulations 2003. The Counter-notice in Schedule 3 requires the date upon which the Claim Notice was given to be inserted. We do not suggest that the Counter-notice would be fatally flawed if the wrong date were inserted but there is no doubt that for the Counter-notice procedures to take place a Claim Notice must be given. In this case, as is agreed between the parties, no such Claim Notice has been given.

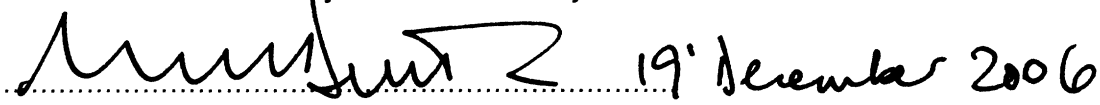
13. We have considered the provisions of the 1993 Act. The provisions for costs of enfranchisement are contained at s33 of that Act and for a lease extension at s60. They are in similar terms to each other but not in similar terms it seems to us to the provision for costs in these proceedings. The only similarity in wording relates to the basis upon which the costs would be determined which is contained at s82(2) (see above) and in similar terms at s33(2) and s60(2) of the 1993 Act. The difference however between the 1993 Act and this Act are the steps that can be taken for which there is a liability for costs. Those are clearly set out in both sections. In addition it specifically states that costs before a Leasehold Tribunal are not recoverable. Accordingly we do not find any particular assistance in the provisions of the 1993 Act in determining this case. We must, it seems to us, fully consider the terms of the 2002 Act and although we are urged to avoid any arbitrary or unjust result we cannot ignore the wordings of the Act. Section 88(1) clearly states that the RTM company is liable

for reasonable costs in consequence of a Claim Notice given by the company in relation to the premises. Further, and not we believe in isolation, an RTM company's liability for costs only arises if the Tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises (see 88 (3)). Section 89 covers the position where the Claim Notice is withdrawn or deemed to be withdrawn and provides for costs to be recovered down to that time. We do not think that there is any need for us to attempt to second guess what Parliament might have intended. The Act, we find is clear on its face.

14. In this case it seems to us that the Applicants, who have been represented by solicitors from the very outset, should have taken the point on service at a much earlier time. That they did not do so until much later in the year is a matter for them. Indeed as was pointed out in the previous Tribunal Decision they need not have taken that point and could instead have relied upon other issues which may have resulted in a dismissal and thus the ability to recover costs. They chose not to do so. We do find the case of Benedictus v Jalaram Ltd of some assistance setting out the principles of approbation and reprobation. The Applicant does seek to have its cake and eat it. In going for the certainty of agreeing non-service, it must in our finding accept the repercussions.

15. We remind ourselves that the whole basis of the Right to Manage Provisions is no fault management. It is accepted that the Landlord would as a matter of good legal practice respond to the Notice to ensure its position was reserved but at that time should also have raised the question of non-service which presumably would have enabled the RTM company to have put its house in order and re-served correctly.

16. In the circumstances and having considered carefully the submissions made by Counsel on both sides, and the law, we have come to the conclusion that the Respondents' arguments are correct and that as the procedures under the Act were never instigated there is no liability on the Respondent companies to pay the costs to the Landlords in this matter. It is not therefore necessary for us to consider the level of costs which the landlords sought to recover although in passing we would comment that they did seem to be excessively high and had we considered the matter in detail would certainly have been the subject of substantial reduction.



Chairman and date