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Case No: LC-2023-467

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: LON/00AJ/LRM/2022/0011

28 October 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007
AN APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

LANDLORD AND TENANT – RIGHT TO MANAGE – can a tenant under a long equitable lease be a qualifying tenant – construction of section 79(2) of the Commonhold and Leasehold Reform Act 2002 and the effect of procedural failings

BETWEEN:

AVON FREEHOLDS LIMITED

Applicant

-and-

CRESTA COURT E RTM COMPANY LTD

Respondents

7 – 26 Cresta Court,
Hanger Lane,
London W5

Upper Tribunal Judge Elizabeth Cooke
6 June 2024

Mr Justin Bates KC and Ms Sophie Gibson for the applicant, instructed by Scott Cohen Solicitors
Mr Winston Jacob instructed under the Public Access scheme for the respondents

The following cases are referred to in this decision:

A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd [2024] UKSC 27; [2018] QB 571 [2024] 3 WLR 601
Assethold Limited v 7 Sunny Gardens Road RTM Company Ltd [2013] UKUT 509
Avon Freeholds Limited v Regent Court RTM Co Ltd [2013] UKUT 213 (LC); [2013] L&TR 23
Avon Ground Rents Limited v Canary Gateway (Block A) RTM Company Limited [2020] UKUT 358 (LC)
Elim Court RTM Company Limited v Avon Freeholds Limited [2017] EWCA Civ 89; [2018] QB 571
Natt v Osman [2014] EWCA Civ 1520; [2015] 1 WLR 1536
Pearson v Alyo (1990) 60 P & CR 56
R v Soneji [2005] UKHL 49; [2006] 1 AC 340
RM Residential Ltd v Westacre Estates Ltd [2024] UKUT 56 (LC)
Sinclair Gardens Investments (Kensington) Limited v Oak Investments RTM Company Limited) [2005] RVR 426
Triplerose Limited v Mill House RTM Company Limited [2016] UKUT 80 (LC); [2016] L&TR 23
Walsh v Lonsdale (1882) LR 21 Ch D 9 CA

Introduction

1. This appeal raises two interesting questions about the acquisition of the right to manage under Part 2, Chapter 1, of the Commonhold and Leasehold Reform Act 2002. First, is the lessee under a newly granted long lease, not yet registered at HM Land Registry and therefore effective in equity but not at law, a qualifying tenant? Second, if so, does the failure to serve such a lessee with a notice of invitation to participate invalidate a claim notice served by the RTM company?

2. The appellant freeholder was represented by Mr Justin Bates KC and Ms Sophie Gibson, and the respondent by Mr Winston Jacob, and I am grateful to them all.

3. The appeal was heard in June 2024. After the hearing I suggested to counsel that it would be appropriate to wait for the Supreme Court's decision in an appeal that had been heard in February 2024 and was likely to be very pertinent to at least one of the issues in the appeal and to cast light on the authorities discussed. It was agreed that I would wait for that decision to be published, and that the parties would then have the opportunity to make written submissions about it. *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd* [2024] 3 WLR 601 UKSC 27 ("*A1 (Sunderland)*") was handed down on 16 August 2024, and the last of the parties' written representations was received by the Tribunal on 27 September. I am most grateful to counsel for agreeing to that process.

The legal background

The statutory provisions

4. Chapter 2, Part 1, of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") enables qualifying tenants of a self-contained building, or a self-contained part of a building, to acquire the right to manage it, through a nominee company known as an RTM company, on a no-fault basis; there is no need to prove that there was anything wrong with the landlord's management. All the company has to do is to follow the correct procedure. That is not so simple as it sounds; landlords are keen to find flaws in the procedure followed by an RTM company and to argue that such flaws make the whole process invalid so that the RTM company has to start again. The relevant provisions of the 2002 Act are as follows.

5. Section 72 provides:

> "(1) This Chapter applies to premises if—
> (a) they consist of a self-contained building or part of a building, with or without appurtenant property,
> (b) they contain two or more flats held by qualifying tenants, and
> (c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.
> (2) A building is a self-contained building if it is structurally detached.
> …."

6. Section 75 states:

> "(2) a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease.

…

(5) No flat has more than one qualifying tenant at any one time; and subsections (6) and (7) apply accordingly.
(6) Where a flat is being let under two or more long leases, a tenant under any of those leases which is superior to that held by another is not the qualifying tenant of the flat.
(7) Where a flat is being let to joint tenants under a long lease, the joint tenants shall (subject to subsection (6)) be regarded as jointly being the qualifying tenant of the flat."

and a "long lease" is defined in section 76:

"(2) Subject to section 77, a lease is a long lease if—
(a) it is granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by or to the tenant, by re-entry or forfeiture or otherwise,
(b) it is for a term fixed by law under a grant with a covenant or obligation for perpetual renewal (but is not a lease by sub-demise from one which is not a long lease),
(c) it takes effect under section 149(6) of the Law of Property Act 1925 (c. 20) (leases terminable after a death or marriage or the formation of a civil partnership),
(d) it was granted in pursuance of the right to buy conferred by Part 5 of the Housing Act 1985 (c. 68) or in pursuance of the right to acquire on rent to mortgage terms conferred by that Part of that Act,
(e) it is a shared ownership lease, whether granted in pursuance of that Part of that Act or otherwise, where the tenant's total share is 100 per cent., or
(f) it was granted in pursuance of that Part of that Act as it has effect by virtue of section 17 of the Housing Act 1996 (c. 52) (the right to acquire)."

7. Section 112(2) sets out the following definition:

"(2) In this Chapter *"lease"* and *"tenancy"* have the same meaning and both expressions include (where the context permits)—
(a) a sub-lease or sub-tenancy, and
(b) an agreement for a lease or tenancy (or for a sub-lease or sub-tenancy),
but do not include a tenancy at will or at sufferance."

8. Section 78 introduces the notice of invitation to participate:

"(1) Before making a claim to acquire the right to manage any premises, a RTM company must give notice to each person who at the time when the notice is given—
(a) is the qualifying tenant of a flat contained in the premises, but
(b) neither is nor has agreed to become a member of the RTM company.
(2) A notice given under this section (referred to in this Chapter as a *"notice of invitation to participate"*) must—
(a) state that the RTM company intends to acquire the right to manage the premises,

(b) state the names of the members of the RTM company,
(c) invite the recipients of the notice to become members of the company, …

(3) A notice of invitation to participate must also comply with such requirements (if any) about the form of notices of invitation to participate as may be prescribed by regulations so made."

9. The RTM company's claim to acquire the right to manage is communicated to the landlord and others by giving them a claim notice. Section 79 provides:

"(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.
(3) The claim notice must be given by a RTM company which complies with subsection (4) or (5).
(4) If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company.
(5) In any other case, the membership of the RTM company must on the relevant date include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained.
(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.
(7) Subsection (6) does not require the claim notice to be given to a person who cannot be found or whose identity cannot be ascertained; but if this subsection means that the claim notice is not required to be given to anyone at all, section 85 applies.
(8) A copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises."

10. Section 80 sets out the information that the claim notice must contain, including the following requirements:

"(2) It must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies.
(3) It must state the full name of each person who is both—
(a) the qualifying tenant of a flat contained in the premises, and
(b) a member of the RTM company,
and the address of his flat.
(4) And it must contain, in relation to each such person, such particulars of his lease as are sufficient to identify it, including—
(a) the date on which it was entered into,
(b) the term for which it was granted, and

(c) the date of the commencement of the term.
(5) It must state the name and registered office of the RTM company.
(6) It must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice under section 79(6) may respond to it by giving a counter-notice under section 84.
(7) It must specify a date, at least three months after that specified under subsection (6), on which the RTM company intends to acquire the right to manage the premises.
(8) It must also contain such other particulars (if any) as may be required to be contained in claim notices by regulations made by the appropriate national authority.
(9) And it must comply with such requirements (if any) about the form of claim notices as may be prescribed by regulations so made."

11. Section 82 enables the RTM company to ask for information that it needs in order to meet those requirements:

> "(1) A company which is a RTM company in relation to any premises may give to any person a notice requiring him to provide the company with any information—
> (a) which is in his possession or control, and
> (b) which the company reasonably requires for ascertaining the particulars required by or by virtue of section 80 to be included in a claim notice for claiming to acquire the right to manage the premises.

12. Section 84 makes provision for any of the recipients of a claim notice set out in section 79(6) to challenge it by serving a counter-notice, and in that event the notice is deemed withdrawn unless within a prescribed time-limit the RTM company makes an application to the FTT for a determination that it was on the relevant date entitled to acquire the right to manage (sections 84 and 85). Not all recipients of the claim notice can serve a counter-notice; a tenant, who is entitled to a copy of the claim notice under section 79(8), cannot do so.

13. Where there is no objection to the claim notice, either because no counter-notice is given or because the counter-notice admits that the RTM company is entitled to acquire the right to manage, then the right is acquired on the date specified in the claim notice

Policy and case law about the right to manage

14. It is well-established that the procedure for acquiring the right to manage under the 2002 Act was intended to be straightforward. In August 2000 the consultation paper *Commonhold and Leasehold Reform, Draft Bill and Consultation Paper* (CM 4843) set out the policy of the legislation. At paragraph 10 of section 3 it said:

> "The main objective is to grant residential long leaseholders of flats the right to take over the management of their building collectively without having either to prove fault on the part of the landlord or to pay any compensation. The procedures should be as simple as possible to reduce the potential for challenge by an obstructive landlord."

15. Sadly, the years since the enactment of the legislation have seen multiple challenges by landlords on the basis of procedural errors by RTM companies. A qualifying tenant has not been given a notice of invitation to participate; a claim notice has not been served upon all the persons within section 79(6); a notice of invitation to participate does not contain the notes in the prescribed form; and so on. As we shall see, the law has moved through a series of different positions as to the effect of getting the procedure wrong. The authoritative position now is found in the very recent decision of the Supreme Court in *A1 (Sunderland)* which I discuss at paragraph 92 and following.

The registration of leases

16. Finally, we have to look briefly at the registration of title to land. The grant of a lease for a term of more than 7 years out of a registered estate is a registrable disposition and it does not take effect at law until the lease is registered (section 27 of the Land Registration Act 2002). That provision is directly relevant to this appeal because the freeholder's title is registered. The position is different when a term for more than seven years is granted out of an unregistered lease; such a lease does take effect immediately at law, despite not yet being registered. Nevertheless, if it is not registered within two months then the grant of the lease takes effect "as a contract for valuable consideration to grant or create the legal estate concerned" (section 7(2) of the Land Registration Act 2002). In other words, having been a legal lease for two months, the lease changes status if still unregistered after two months, and is thereafter an equitable lease until registered.

The factual background to the appeal

17. Numbers 7 to 26 Cresta Court ("the property") is a self-contained part of a building. By a claim notice dated 21 January 2022 the respondent gave notice to the appellant, the freeholder of the building, that it intended to acquire the right to manage the property. The appellant gave a counter-notice on 24 February 2022 contesting the respondent's entitlement, and on 16 March 2022 the respondent made an application to the FTT. In the FTT the appellant challenged the claim notice on the basis that no notice of invitation to participate had been given to the leaseholder of flat 17, Ms Beverley O'Connor, that she was a qualifying tenant and entitled to receive that notice, and that the failure to serve meant that the claim notice was invalid.

18. Ms O'Connor's lease was granted in April 2020 but her leasehold title was not registered until after the service of the claim notice (the registration being backdated to 15 July 2021). At the date of the claim notice there was a note on the freehold title of a pending application, but such notes do not say what is the application to which they refer, and the respondent did not make any enquiries about it. We can infer that Ms O'Connor's application for registration was made on 15 July 2021, because of the later backdating, and that it was to her application that the note of a pending application referred.

19. The reason for the delay in the registration of the lease of flat 17 is not known, nor the date on which registration took place – but certainly it had not taken place by the crucial date, 14 days before the claim notice was served, and no notice of invitation to participate was given to Ms O'Connor.

20. It may be helpful to set out the relevant dates out as follows:

a. 17 April 2020, Ms O'Connor's lease was granted for a term of 150 years from 1 January 2015.

b. 21 January 2022 claim notice served

c. 26 January 2022 Ms O'Connor gave written consent to become a member of the respondent.

d. 24 February 2022 appellant's counter notice.

21. Accordingly at the date of the claim notice, and crucially 14 days beforehand, Ms O'Connor held an equitable lease of flat 17 and there was no legal lease in existence.

The decision of the FTT

22. The FTT found that Ms O'Connor was a qualifying tenant, on the basis that section 112(2) of the 2002 Act defines "lease" as including an agreement for a lease; the FTT said:

> "32. … As a lease which has been completed but not yet registered takes effect as an agreement for lease (or an 'equitable lease') it follows that a "qualifying tenant" for the purposes of the right to manage legislation can include the holder of a completed but as yet unregistered lease."

23. The respondent was represented before the FTT by Mr Joiner. At the time, Mr Joiner was the sole director of RTMF Services Ltd, the company secretary of the respondent; he explained that when the notices of invitation to participate were served the respondent was unaware of the existence of the lease of flat 17. For the freeholder it was argued that the appellant was on notice of the lease because of the note of a pending application against the freehold title. The FTT agreed with the appellant that it was not expected to investigate such entries: "Parliament cannot have intended the RTM process to be so difficult that if there are pending applications against the freehold title the RTM company must investigate each and every application".

24. The FTT acknowledged that in the Tribunal's decision in *Avon Ground Rents Limited v Canary Gateway (Block A) RTM Company Limited* [2020] UKUT 358 (LC) (discussed at paragraph 87 below) the Chamber President, Fancourt J, held that the failure to serve a qualifying tenant invalidated the claim notice. He said, at his paragraph 87, that it is "very easy for the RTM company to serve every qualifying tenant and to identify them. Since, in virtually all cases, the qualifying tenants will be long lessees, their interests will be identifiable at the Land Registry." That, said the FTT, "does not fit the facts of the present case".

25. Accordingly it found that:

> "37 … we do not accept that a failure by a RTM company to give a NIP to a tenant whose lease is not registered will invalidate the claim notice if the RTM company has no actual knowledge of the existence of the lease and where the only way in which it would know about the leases – in the absence of having been informed about the existence of the lease – is by following up a note on the freehold title about pending applications. Therefore, on the basis of the facts before us, the failure to give NIP to the tenant of flat 17 Cresta Court did not invalidate the notice."

The appeal

The grounds of appeal

26. The appellant freeholder appeals the finding that the failure to give the notice of invitation to participate to Ms O'Connor did not invalidate the claim notice. There is a cross- appeal by the respondent against the finding that the tenant of flat 17 was a qualifying tenant.

27. Accordingly the Tribunal has to decide:

    a. Was Ms O'Connor a qualifying tenant (and therefore a person on whom a notice of intention to participate was required to be served)?

    b. If she was, did failure to serve a notice of invitation to participate on her invalidate the claim notice?

More about the factual basis of the appeal

28. In the course of the appeal, and after the respondent had instructed counsel, something of a wrinkle appeared in terms of the facts that were before the FTT. Although Mr Joiner told the FTT the position as he understood it, and was himself unaware of the lease of flat 17, it turns out that one of the directors of the respondent, Ms Bellenie, was aware of Ms O'Connor's presence in flat 17. Ms O'Connor's mother had rented the flat for many years, so that she and her mother were known to Ms Bellenie. When she came back to live there after her mother's death she contacted Ms Bellenie to ask if there was a residents' association and mentioned that she now owned the flat. She attended Zoom meetings held to assess support for the bid to acquire the right to manage, and was supportive of the process but was waiting until her lease was registered before becoming a member of the company.

29. I am grateful to the respondent for explaining what happened. However, the information now available raises as many questions as it answers. The information has been provided in the form of a copy of a letter from Mr Joiner to the appellant's solicitors. No application has been made to admit new evidence and so there is no witness statement. It is not known whether the director who knew Ms O'Connor told anyone else, at the relevant time, about the existence of a lease of flat 17. Nothing in the letter indicates that the director would have understood that Ms O'Connor had an equitable lease because it had not yet been registered. There has been no argument about whether what she knew was sufficient to alert her to the fact that Ms O'Connor was a qualifying tenant, nor whether the knowledge of one director, such as it was, can be imputed to the respondent company. Nor has there been any argument about whether notice is relevant to what I have to decide.

30. Accordingly, it appears that the factual basis presented to the FTT may have been wrong, but the evidential position is unchanged. I will therefore decide the appeal on the basis of the position as the FTT understood it, namely that the respondent did not know that a lease of flat 17 had been granted but had not yet been registered, because that is what the evidence (or its absence) shows.

(1) Was Ms O'Connor a qualifying tenant?

The appellant's arguments

31. Mr Bates KC prefaced his argument with a reminder of the importance of the status of qualifying tenant and of knowing how many there are. Their number has to be known in order to work out whether the right to manage is available under section 72; qualifying tenants have significant rights, such as to be a member of the RTM company (section 74), to receive a notice of invitation to participate (section 78), to receive a copy of the claim notice (section 79(8)) and so on. Therefore it would be inconsistent with the policy of the legislation to narrow down the availability of qualifying tenant status, because that would deprive people of a valuable right. If tenants in Ms O'Connor's position are not qualifying tenants then they can lawfully be kept in the dark about an application to acquire the right to manage, which was not Parliament's intention. It is possible to imagine a new block of, say, ten flats where leases have been granted but none have yet been registered, and administrative problems may delay some or all the registrations for years. All pay the same rent and service charges yet some or all the lessees, depending on timing, may not be qualifying tenants for a long time. That would initially prevent the block from being premises for which the right to manage is available under section 72 of the 2002 Act, and later could exclude individuals from participation once enough flats are registered for the requirements of section 72 to be met. Neither result furthers the purpose of the statute.

32. Mr Bates KC then turned to section 75 which provides that "a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease", and to section 76 which sets out a broad definition of that term by reference to a number of different kinds of lease (see paragraph 6 above). Importantly, not all of them are required to be registered (for example a lease for life, converted to a 90 year lease by section 149(6) of the Law of Property Act 1925, which is a long lease under section 76(2)(c)) and some cannot be registered (for example, a short shared ownership lease, section 76(2)(e)), and if unregistered they are not discoverable by a search of HM Land Registry. Accordingly, there is nothing in section 75 and the following sections to prevent a "long lease" from being unregistered, and section 76 expressly catches circumstances where there will not be registered. So equitable leases cannot be excluded simply because they are unregistered.

33. The next point in the appellant's argument was presented by Ms Gibson. She argued that lessees under equitable leases are clearly included, because that follows from section 75 where there is nothing to exclude an equitable lease. Section 112(2) puts it beyond doubt by adding that a "lease" includes "an agreement for a lease or tenancy (or for a sub-lease or sub-tenancy)". It is trite law, derived from *Walsh v Lonsdale* (1882) LR 21 Ch D 9 CA, that an agreement for a lease is an equitable lease and section 112(2) makes it clear that such leases are included. Ms Gibson acknowledged that – as argued for the respondent – the converse may not be the same: an equitable lease is not necessarily an agreement (or contract). Indeed, she agreed with the respondent that the lease in question here, which does not operate at law until registered, is simply an equitable lease rather than an agreement for a lease. Such leases are nevertheless within the meaning of a long lease in section 75.

34. Mr Bates KC then presented the next of the appellant's points, which is that to deprive Ms O'Connor of the status of qualifying tenant is to fail to appreciate the status of the holder of an estate in land during the "registration gap". The Tribunal had to consider the effect of the registration gap in its decision in *RM Residential Ltd v Westacre Estates Ltd* [2024] UKUT 56 (LC), and pointed out that a landlord whose title is not yet registered is entitled to collect service charges and manage the property as its owner.

35. Consistent with that, an equitable lessee of a flat is entitled to the status of qualified tenant if the conditions in section 76 are met.

36. The difficulty with regarding equitable lessees as qualifying tenants is that they are not obvious on inspection of the register; if equitable lessees are qualifying tenants then an RTM company's task in identifying them and serving them with notices of intention to participate is difficult and may in some cases be impossible. Nevertheless Mr Bates KC insisted not only that Ms O'Connor is a qualifying tenant but that in all cases where there is both a legal lessee and an equitable lessee it is the equitable lessee who is the qualifying tenant. That means that whenever the owner of a flat contracts to sell it, the purchaser is the qualifying tenant from the point when contracts are exchanged, despite being undiscoverable by anyone else; the assignee is the one who is going to live there and pay the service charges so it makes sense for him or her to be the one to have the opportunity to participate in the process of acquiring the right to manage.

37. Mr Bates KC was undismayed by the difficulty of discovering equitable lessees. He pointed out that section 82 enables the RTM company to get all the information it needs. The consequence of the appellant's position is that in every case before serving a claim notice an RTM company must make a section 82 request of the landlord (in case any new leases have been granted and are not yet registered) and of all the leaseholders (in case any have contracted to sell their flat and are therefore no longer the qualifying tenant, or hold their flat on express or implied trust so that the beneficiary is the qualifying tenant). If any of the recipients failed to reply Mr Bates KC suggested that they would be estopped from challenging the RTM company on the basis of information that they should have provided but did not do so.

The respondent's arguments

38. For the respondent Mr Jacob argued that an equitable lessee is never a qualifying tenant; only legal leases are within the meaning of a "long lease" in section 75.

39. His starting point was the proposition that that is the natural interpretation of section 75. He referred to the decision of the Tribunal (the Deputy President, Martin Rodger QC) in *Assethold Limited v 7 Sunny Gardens Road RTM Company Ltd* [2013] UKUT 509 where the issue was what was to happen when the lessee of a flat died. Did she remain the qualifying tenant, despite being dead, since she remained the registered proprietor, or were her personal representatives the qualifying tenant? The Tribunal held that the personal representatives, to whom the legal estate in the lease passed despite not being visible on the register, were the qualifying tenant. At paragraph 29 the Deputy President said:

> "The "tenant" referred to in section 75(1) of the 2002 Act is the person in whom, for the time being, the legal estate created by the lease is vested. As the LVT correctly observe, the 2002 Act is not concerned with beneficial interests. At the relevant time the qualifying tenants of flat 7A were therefore [the lessee's] personal representatives (her executors or administrators of her estate) or, in the event of her intestacy, the Public Trustee."

40. Mr Jacob pointed out that the Tribunal in *7 Sunny Gardens* had no information about whether the tenant's estate had been administered at the time the claim notice was served; it was possible, he said, that there was an equitable lessee because an assent had been made and not yet registered. So he took the view that the decision supported the

respondent's position even though (as Mr Bates KC pointed out) the Tribunal did not have to make a decision about any equitable interest and heard no argument about one.

41. Mr Jacob argued that the position mirrored that under other statutes, for example under the Landlord and Tenant Act 1954 where a notice terminating a tenancy under section 25 has to be served be the legal freeholder, not a beneficial owner of the freehold (*Pearson v Alyo* (1990) 60 P & CR 56). Where it is intended that a "lease" includes an equitable lease the statute says so expressly; thus section 37(1)(f) of the Leasehold Reform Act 1967 provides:

> "(f) "tenancy" means a tenancy at law or in equity".

42. As to section 112(2), Mr Jacob did not accept the FTT's reasoning. An agreement for a lease may take effect as an equitable lease; but a lease which is equitable because it has not yet been registered is not an agreement for a lease. As I said above, Ms Gibson did not take issue with that point, and so where the parties differ is in their reading of section 75 itself; Mr Jacob's position is that had Parliament intended a "long lease" to include equitable as well as legal leases it would have said so expressly.

43. Moreover, section 112(2) is qualified by the words "where the context permits", to which the FTT did not refer and which is absent from otherwise identical provisions at section 36 of the Landlord and Tenant Act 1985, section 229 of the Housing Act 1996 and section 59 of the Landlord and Tenant Act 1987. The words cannot be ignored, and the present context does not permit the inclusion of the beneficiary of an agreement for a lease as a qualifying tenant because that would be impracticable; Mr Jacob relied upon the principle of construction against absurdity, discussed in *Bennion on Statutory Interpretation* chapter 13 where it is said at paragraph 13.1:

> > "13.1(1) the court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature. Here, the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pintless, artificial, or productive of a disproportionate counter-mischief."

44. Mr Jacob argued that the statutory scheme would be unworkable if an RTM company were required to serve notices of invitation to participate on unknown and unidentifiable individuals. He was unimpressed by the suggestion that section 82 is the answer to that potential difficulty, since it would be impracticable to address a section 82 enquiry to the freeholder and every tenant in a substantial block. And the idea that a person who failed to provide information would be estopped from putting it forward later does not help; whether or not anyone was estopped, the failure to serve would – on the present state of the authorities – go to jurisdiction and the claim notice would be invalidated. The remedy for a failure to reply to such an enquiry is to apply to the County Court for an order requiring an answer to the enquiry (section 107 of the 2002 Act), which is costly and likely to set the process back by months or years.

45. Accordingly, Mr Jacob concluded, a "long lease" in section 75 can only be a legal lease. That is consistent with the position in other statutes, and the context does not permit the extension to include equitable leases or agreements for leases, so that section 112(2) is inapplicable. He acknowledged that there will be cases where legal leases are

undiscoverable but they are outliers. A far greater mischief is created by the inclusion of equitable leases within the ambit of section 75.

46. Mr Jacob pointed out that the consequences of failing to serve a qualifying tenant are serious; there is a long history of landlords seeking to show that the claim notice is invalid as a result of failure to serve a qualifying tenant (a tactic that succeeded in *Canary Gateway*). It is no answer to the problem to say that if the RTM company misses someone it can start again; that is expensive and the RTM company may not have the funds to do so – particularly if there have been proceedings in the FTT so that the RTM company is liable for the landlord's costs under section 88 of the 2002 Act. Accordingly the restriction of qualifying tenant status to legal lessees is in the interests of tenants generally; yes, some will be excluded, but that is the lesser of the two evils, of which the greater is to include equitable leases and frustrate the ability of the majority to acquire the right to manage.

Further submissions about A1 (Sunderland)

47. As I mentioned above, counsel for both parties made further written submissions in the light of the Supreme Court's decision in *A1 (Sunderland)*, as it had been agreed that that decision was likely to be important in the context of the second issue in the appeal, namely the consequences of failure to serve a qualifying tenant. The submissions made on behalf of the appellant did indeed touch only on the second issue. But Mr Jacob argued that the Supreme Court's decision was also relevant to the first issue and supported the respondent's analysis.

48. He referred in particular to the contrast drawn by the Supreme Court between landlords, and other "stakeholders" who are entitled to receive the claim notice, and qualifying tenants, in terms of visibility. Landlords (etc) may not be able to be found; landlords who are entitled to a claim notice may have granted short leases which are necessarily unregistered, and "there is no register of all leases covered by this provision nor any simple and conclusive way of checking who every such landlord might be" (paragraph 2). That is why section 79(7) provides that the RTM company is not required by section 79(6) to give the claim notice to "a person who cannot be found or whose identity cannot be ascertained." There is no such saving or dispensing provision for qualifying tenants:

> "69. …There will ordinarily be no difficulty in finding or identifying qualifying tenants. The absence of any saving or dispensing provisions of the type found in section 79(7) suggests that this was well understood by Parliament ."

49. So the Supreme Court took the view that qualifying tenants will be easily identifiable from the Land Register because their leases will ordinarily be registered. The Supreme Court set out, and therefore was aware of, section 112(2) and referred to it in the context of landlords but not of qualifying tenants. The Supreme Court's reasoning, leaning heavily as it did upon the discoverability of qualifying tenants and the contrast with landlords who may be undiscoverable, would break down, said Mr Jacob, if tenants under long equitable leases were included in the definition of qualifying tenants; they would be as difficult to find as landlords, yet the statute makes no provision for dispensation when they cannot be found. The Supreme Court's reasoning only works if section 75(2) is read so that only a person with a legal lease can be a qualifying tenant.

50. Mr Bates KC in response stressed that the Supreme Court in *A1 (Sunderland)* was not making a decision about qualifying tenants, and anything it said about them is *obiter*.

However, its reference to section 112(2) makes it clear that the Supreme Court was aware that a lease in section 75 includes an equitable lease.

Discussion

51. To re-cap: the respondent's case is that only legal lessees can be qualifying tenants; the appellant's case is that the term "lease" in section 75 includes both legal and equitable leases and that in all cases where there is a legal lease and an equitable lease in different hands it is the equitable lessee who is the qualifying tenant.

52. There is an irony here: the appellant freeholder is arguing for more tenants to have the status of qualifying tenant, whereas the respondent RTM company is arguing for a narrow interpretation of that status so that fewer tenants qualify. That is a direct result of the fact that the freeholder is seeking to take advantage of a procedural defect that affects not the freeholder itself but another party (Ms O'Connor), so that it is in the landlord's interest to widen the class of qualifying tenant so as to increase the likelihood of a procedural defect on which it can itself rely.

53. Section 75(2) provides:

> "a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease."

54. I do not agree with Mr Jacob that the natural reading of that provision is that it refers to legal not equitable leases. To a lawyer a lease may be legal or equitable. A long lease-holder is in terms of ordinary language the lessee of their flat, whether or not their lease is registered. A person who has just purchased a long lease is the owner of their flat (as indeed Ms O'Connor is said to have described herself (see paragraph 28 above)).

55. I do not regard the absence of an express provision, such as the one in section 37(1)(f) of the Leasehold Reform Act 1967, for the inclusion of "equitable leases" or a "tenancy in equity" as problematic in view of the presence of section 112(2), which expressly includes "an agreement for a lease or tenancy". Such an agreement is an equitable lease, on principle going back to *Walsh v Lonsdale*. The idea that certain equitable leases, namely the ones that cannot readily be regarded as agreements, are excluded from the ambit of section 75(2) would make that section incomprehensible to all but the most specialist of property lawyers and would open up vast areas of sterile debate about the precise analysis of certain arrangements. And it would be impossible to understand the reason for such a distinction. Put another way, if a "lease" in section 75(2) includes an agreement for a lease or tenancy then *a fortiori* it must include equitable leases.

56. So I regard a "long lease" in section 75(2) as capable of including both legal and equitable leases. However, section 112(2) is qualified by the words "where the context permits". And clearly the context does not permit section 75(2) to mean both, where there is both a legal and an equitable lease of the same flat, because there has to be one qualifying tenant (see section 75(5) at paragraph 6 above). In most cases, that problem does not arise: as a matter of fact in respect of most flats there is one lease, and it is a legal one.

57. But in some circumstances there is more than one lessee. When a long lessee has contracted to sell their flat, from the moment of exchange of contracts the purchaser falls within the words of section 112(2). And the assignment operates only in equity until after

completion of the sale when the assignment is registered, so that from exchange of contracts all the way to registration of the purchase there are two lessees. Likewise if the legal lease is held on trust, express or implied, there are two candidates for qualifying tenant status. A choice has to be made. Can the appellant be right that in those circumstances the equitable lessee is the qualifying tenant?

58. In my judgment that is not an available construction of the statute, as a matter of plain commonsense let alone the principle of "construction against absurdity". It would make the acquisition of the right to manage well-nigh impossible. Unregistered purchasers of flats are pretty much undiscoverable unless the legal lessee chooses to disclose their existence. So are equitable owners of flats under express or implied trusts. If the position is as the appellant argues then an RTM company must in every case as a matter of routine make a section 82 enquiry of every one of the flats, and cannot safely proceed without an answer from each of them. That is unworkable and obviously not what Parliament intended.

59. So where there is both a legal lease and an equitable lease (whether in the sense of an agreement for a lease, or of a granted lease that is registrable and has not yet been registered), the context does not permit that the equitable lessee is the qualifying tenant. In those circumstances the qualifying tenant is the legal lessee.

60. That is consistent with the analysis in *7 Sunny Gardens*, where there was a legal lessee and therefore there was no need and no opportunity for the Tribunal to consider the position of an equitable owner of the lease nor to enquire whether there was one. In such a case, as the Deputy President said, "the 2002 Act is not concerned with beneficial interests".

61. It is also consistent with the Supreme Court's reasoning in *A1 Properties* because in the vast majority of cases (therefore "ordinarily", as the Supreme Court put it) most of the "long leases" within section 75 will be legal leases and will be registered and easily discoverable – making the process of acquisition of the right to manage a straightforward process. In the paradigm case where all the flats in a building are let on long leases which are registered, the RTM company will be able look at the freeholder's registered title, read the names of the lessees of each flat, and know that they are the qualifying tenants.

62. But what of the case where there is no legal lease, only an equitable one? That was the position in the present appeal.

63. In that situation either the equitable lessee is the qualifying tenant, or there is no qualifying tenant of the flat in question. The need to construe against absurdity rules out a reading of section 75 that takes the qualifying tenant to be the equitable lessee where a legal and equitable lease co-exist in different hands. But does it rule out the equitable lessee where there is no legal lessee?

64. I do not think it does. The fact that such leases are not visible on the Land Register is not fatal to their inclusion, because some of the legal leases within the definition in section 76 are equally hard to discover. Some are set out in section 76(2). Another is the case – not so unusual - where the qualifying tenant has died and the legal estate passes to her personal representatives despite their not being registered as proprietors (*7 Sunny Gardens*). Yet another is the case where a legal lease has been granted out of an unregistered estate, which takes immediate effect at law despite being initially unregistered (see paragraph 16

above). That legal lease is undiscoverable until registered, but there is no escape from the conclusion that the lessee is a qualifying tenant.

65. Accordingly the existence of a few cases where the legal estate is not readily discoverable does not, as things stand, either wreck the Supreme Court's reasoning in *A1 (Sunderland)* (where it was said that "*ordinarily",* not "invariably" there would be no difficulty in identifying qualifying tenants) or have the effect that the RTM company has to make section 82 enquiries of all leaseholders in every case. Therefore the addition of one further category of unregistered lessees, namely equitable leases where there is no legal lease, will not be inconsistent with that reasoning either.

66. I can think of two cases where that situation is going to arise. One is the present case where a lease is granted out of a registered freehold and has not yet been registered. The other is the (nowadays) more unusual case, mentioned above, where a legal lease has been granted out of an unregistered freehold. That lease takes effect at law, but if it is not registered within two months of completion then "the grant or creation has effect as a contract made for valuable consideration to grant or create the legal estate concerned" (section 7(2)(b) of the Land Registration Act 2002). Section 112(2) expressly retains the status of qualifying tenant for the lessee in that case, unless the context does not permit it. The context might make that inconvenient, because such an equitable lease is hard to discover, but it cannot be said that the context does not permit it because the equitable lease is no more undiscoverable than was the legal lease in the first two months after completion.

67. Therefore in one case where there is an equitable lease and no legal lease, the statute actually provides that the equitable lessee is the qualifying tenant.

68. Is there any reason therefore why a lessee whose lease was granted out of a registered estate, taking effect in equity until registered, should not be the qualifying tenant? I think not. The mischief avoided by excluding such tenants is insignificant, first because there are already and necessarily a small number of qualifying tenants who are not visible on the Land Register, and second because such tenants will in many cases be readily discoverable because they live at the property (as does Ms O'Connor) and may even be in touch with the RTM company (as Ms O'Connor was in this case). The counter-mischief (to use the language of Bennion, see paragraph 43 above) of excluding them is as Mr Bates KC describes; for some time, possibly quite a long time depending on the state of business at HM Land Registry, some or all of the lessees in a new building, whose leases are newly granted, will not be qualifying tenants when clearly they should be.

69. Accordingly I find that where a flat is let on an equitable lease, and there is no legal lease of the flat, the lessee is a qualifying tenant if the statutory definition of a "long lease" is met. For the avoidance of doubt I repeat: where there is both a legal and an equitable long lease, the legal lessee is the qualifying tenant.

70. Therefore I find that Ms O'Connor was a qualifying tenant at the relevant time in the present appeal, and therefore was a person on whom section 78 required a notice of intention to participate to be served.

(2) If Ms O'Connor was a qualifying tenant, did failure to serve a notice of invitation to participate invalidate the claim notice?

71. As we have seen, section 78 states that an RTM company "must give" a notice of invitation to participate to all qualify tenants. Section 79(2) then says:

> "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."

72. The second issue in the appeal is whether section 79(2) is the end of the matter. Is it as the appellant says a clear statement of Parliament's intention, so that failure to serve on any qualifying tenant a notice of invitation to participate will invalidate the notice as the Tribunal held in *Avon Ground Rents Limited v Canary Gateway (Block A) RTM Company Limited* [2020] UKUT 358 (LC) so that the RTM company cannot acquire the right to manage without starting the process again? Could *Canary Gateway* be distinguished or might it have been wrongly decided, as the respondent argued at the hearing? Or might the position now have changed in the light of *A1 (Sunderland)* as the respondent argued after the hearing?

73. I take the view that the second question in the appeal is to be determined in the light of the Supreme Court's decision in *A1 (Sunderland)*. In order to explain that I have to go through the history of the caselaw relating to procedural defects in the acquisition of the right to manage, and in particular to failure to give notices to those to whom the statute says they are to be given; in other words, failure to comply with section 79(2) and failure to give claim notices to all those within section 79(6).

The evolution of the law relating to procedural defects in the process of acquiring the right to manage

From R v Soneji *to* Elim Court: *the decisions before A1 (Sunderland)*

74. The House of Lords' decision in *R v Soneji* [2006] 1 AC 340 was about the effect of a procedural defect in the process leading to a confiscation order made by the Crown Court pursuant to the proceeds of crime legislation. Remote, one might think, from the acquisition of the right to manage a block of flats, but Lord Steyn's observation at paragraph 14 points to the common ground:

> "a recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply."

75. Their lordships agreed that in such a case the correct approach was to examine the legislation in order to ascertain whether Parliament intended that the non-compliance in question was intended to invalidate the confiscation proceedings. The problem in *R v Soneji* was that a time limit had been missed. Lord Carswell said at paragraph 67 that the court must ask whether there had been "substantial observance of the time limit", and that that would:

> "depend on the facts of each case, and it will always be necessary to consider whether any prejudice has been caused or injustice done by regarding the act done out of time as valid."

76. The first decision we have to look at in the context of the right to manage itself was made by the President of the Lands Tribunal (George Bartlett QC) in *Sinclair Gardens Investments (Kensington) Limited v Oak Investments RTM Company Limited)* [2005] RVR 426 ("*Sinclair Gardens (2005)"*), an appeal from the Leasehold Valuation Tribunal. The issue was as in the present appeal: a landlord sought to resist the acquisition of the right to manage because a qualifying tenant had not been given a notice of intention to participate. The President said that the purpose of the service of that notice was to ensure that all qualifying tenants have the opportunity to participate in the process. Where that has not been done::

> "… the principal question for the Tribunal will be whether the qualifying tenant has in practice such awareness of the procedures as the statute intended him to have."

77. The tenant in question had, by the time of the proceedings, become a member of the RTM company so there was no question of his being prejudiced or of any failure in the purpose of the requirement that he be given a notice; and there was no question of the landlord's having been prejudiced. The LVT's decision that the claim notice was valid was upheld.

78. In 2014 the Tribunal (the President, Sir Keith Lindblom) had to consider the same question; he referred to *Soneji* and to *Sinclair Gardens (2005),* and followed the same approach:

> "47. What one ought to do, I believe, is to ascertain – so far as one can – the true effects of the failure to give notice in accordance with the statutory provisions on all those affected by that failure. The question here is not whether a significant number of tenants have been prejudiced, but whether any or all of the tenants not given notice in accordance with section 111 has been caused such prejudice through the RTM company's default as to justify denying the RTM company the right to manage. … Each case will turn on its own particular facts."

The President concluded that the tenants who had not been given the notice had not been prejudiced and that the procedure was not invalidated.

79. So far, then the focus is on the purpose of the statutory provision and on whether any prejudice was actually caused to the person directly affected by a procedural failure.

80. In 2014 the Court of Appeal's decision in *Natt v Osman* [2014] EWCA Civ 1520 [2015] 1 WLR 1536 took a new approach to cases of procedural failure. The Chancellor, Sir Terence Etherton, took the view that they fell into two groups; challenges to the decision of a public body, and cases where a property right is being acquired. In the former case, substantial compliance with the statutory procedure may well be sufficient. In the latter case, it will not:

> "31. … The Court of Appeal cases show a consistent approach in relation to statutory requirements to serve a notice as part of the process for a private person to acquire or resist the acquisition of property or similar rights conferred by the statute. In none of them has the court adopted the approach of "substantial compliance" as in the first category of cases. The court has interpreted the notice to see whether it actually complies with the strict requirements of the statute; if it

> does not, then the Court has, as a matter of statutory interpretation, held the notice to be wholly valid or wholly invalid…
>
> 32. On that approach, the outcome does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by non-compliance on the particular facts of the case."

81. However, that did not mean that non-compliance with any and all stipulations in the statute means invalidity. Instead, further analysis is needed to discover what are the "strict requirements" such that if they are not complied with the notice is invalid:

> "33. … the intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole."

82. *Natt v Osman* was concerned with the validity of a notice claiming the right to acquire the freehold of property, pursuant to section 13 of the Leasehold Reform, Housing and Urban Development Act 1993. The notice did not give the name of one of the qualifying tenants, as required by the statute. This was a procedure for the acquisition of property rights so substantial compliance would not do; and in light of the importance of the notice (going "to the very heart of the right to collective enfranchisement", paragraph 36), and of the fact that the tenants could start again and serve a fresh notice, the notice was invalid.

83. The words in parenthesis in paragraph 33 of *Natt v Osman* alert us to the possibility that sometimes the consequences of non-compliance may be set out in the statute. In *Triplerose Limited v Mill House RTM Company Limited* [2016] UKUT 80 (LC) ("*Triplerose (2016)*") the Tribunal had to consider the implications of *Natt v Osman*, not on the failure to serve a notice of invitation to participation, but the failure to include in the notice all the notes from the prescribed form. So the following observation by the Deputy President was *obiter*, but important:

> "35. In light of the specific prohibition in section 79(2) on the service of a claim notice until 14 days after a notice of invitation to participate has been given to everyone required to be given one, I do not think it can be suggested that the provisions designed to ensure that every qualifying tenant has the opportunity to participate are inessential, or can be substituted by some alternative means of knowledge."

84. The next milestone is the Court of Appeal's decision in *Elim Court RTM Company Limited v Avon Freeholds Limited* [2017] EWCA Civ 89. Lewison LJ, with whom Proudman J and Arden LJ agreed, applied the principles in *Natt v Osman* to the failure by the RTM company to give a claim notice to an intermediate landlord with no management responsibilities. He explained that this was a procedure for the acquisition of a property right, and therefore substantial compliance would not do. The RTM company in the present case had failed to comply with the requirement of section 79(6)(a). At paragraph 52 he said:

> "The outcome in such cases does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by non-compliance on the particular facts of the case….

> The intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole …. Where the notice or the information which is missing from it is of critical importance in the context of the scheme the non-compliance with the statute will generally result in the invalidity of the notice. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely ancillary, the notice may be held to have been valid …. One useful pointer is whether the information required is particularised in the statute as opposed to being required by general provisions of the statute. In the latter case the information is also likely to be viewed as of secondary importance. Another is whether the information is required by the statute itself or by subordinate legislation. In the latter case the information is likely to be viewed as of secondary importance. In this connection it must not be forgotten that while the substantive provisions of a bill may be debated clause by clause, a draft statutory instrument is not subject to any detailed Parliamentary scrutiny. It is either accepted or rejected as a whole. A third is whether the server of the notice may immediately serve another one if the impugned notice is invalid. If he can, that is a pointer towards invalidity.

85. On that basis he concluded that the notice was not invalidated.

86. Thus so far as service of the claim notice under section 79(6) is concerned, despite the fact that substantial compliance is not acceptable, it may still – if I may put it colloquially – be ok to get it wrong. But whether or not that is the case depends upon the construction of the statute, and not upon the circumstances in a particular case. Moreover, that exercise in construction is only required where the consequences of non-compliance are not expressly stated in the statute (see the words in parenthesis in paragraph 52 of *Elim Court*, echoing those in paragraph 33 in *Natt v Osman*, which as we saw were applied by the Tribunal in *Triplerose 2016* in the context of a failure to serve a notice of invitation to participate).

87. The failure to serve a notice of invitation to participate was considered in the Tribunal's decision in *Avon Ground Rents Limited v Canary Gateway (Block A) RTM Company Limited* [2020] UKUT 358 (LC). The President (Fancourt J) considered the meaning of section 79(2) (set out at paragraph 71 above):

> "83. The purpose of s. 79(2) is not to require a notice of invitation to participate to be given, or to specify to whom it must be given or what it must say. That is done by s.78. The purpose served by s.79(2) is either to specify the consequence of non-compliance with s. 78, or to specify the time that must elapse before a claim notice may be given, or both. On the face of it, s. 79(2) does both, but that is an issue of interpretation that requires the context and implications of the provision to be taken into account in construing it.
>
> 84. It is therefore material to consider, as part of the exercise of statutory interpretation, the objective importance to the statutory scheme of notices of invitation to participate being given to every qualifying tenant; the relative ease or difficulty of compliance; the risk of non-receipt in any event, and the likely consequences of invalidity resulting from non-compliance. The reason for that is that if such notices were unimportant, full compliance would be difficult to achieve, or would have no effect anyway, and failure to comply could prejudice the substantive rights of the RTM company, there would be real reason to doubt

> that Parliament meant to specify that a valid claim notice required the prior service on each and every qualifying tenant of a notice of invitation to participate."

88. The President went through that analysis (some of which we have already looked at in the context of the first issue in this appeal, namely the fact that the qualifying tenants will normally be easy to identify (see paragraphs 45 and 46 above)), focusing in particular on the importance of the notices in the statutory scheme, and he concluded:

> "90. Bearing all these points in mind, it appears to me that Parliament did intend failure to give s.78 notices as required to invalidate a claim notice and that s.79(2) should not be interpreted as merely a stipulation as to when a claim notice may be served. The natural and ordinary reading of s. 79(2) is that a purported claim notice that is served otherwise than in accordance with its terms will be invalid."

89. It is interesting that in *Canary Gateway* the President applied the reasoning in *Elim Court* (set out by the Chancellor in paragraph 52 of his decision, set out above at paragraph 84) in order to determine whether the statute specified the consequences of non-compliance, whereas that reasoning was intended to determine the consequences of non-compliance "where not expressly stated in the statute". Be that as it may, the Tribunal's conclusion was clear: section 79(2) provides that a purported claim notice served when section 79(2) has not been complied with will be invalid (and although his decision was appealed, the appeal was not on this point. The President went on to say that the Tribunal's decision in *Regent Court* should no longer be regarded as an authority in this context.

90. That was the state of the authorities when this appeal was heard, and the appellant's argument relied upon *Canary Gateway*; Mr Bates KC argued that "this is not an *Elim Court* case … where one must hunt for signs of Parliamentary intent in order to ascertain the consequences of failure. For the reasons given in the two previous Upper Tribunal decisions, a failure to serve a notice of invitation to participate is always fatal."

91. And so the stage is set for the most recent authority, which trumps all the decisions since *R v Soneji*, namely the Supreme Court's decision in *A1 (Sunderland).* As I said above, it was handed down after the hearing in the present appeal, and I have delayed my decision in order to wait for it and for the parties' observations on it.

The Supreme Court's decision in A1 (Sunderland)

92. The procedural failure in issue in *A1 (Sunderland)* was the same as that in *Elim Court:* the RTM company had failed to give a claim notice to an intermediate landlord with no management responsibilities. A joint judgment was given by Lord Briggs and Lord Sales, with whom Lord Hamblen, Lord Leggatt and Lord Stephens agreed. Their lordships discussed the factual background and the statutory regime in the 2002 Act and summarised the Court of Appeal's decision in *Elim Court.* At paragraph 57 they stated that the appropriate starting point for analysis is the guidance give in *R v Soneji*; and, at paragraph 61, that the virtue of the analysis in *Soneji* was in its move away from a rigid, category-based approach and its focus, instead, on both the purpose of the statutory requirement and on the specific facts of the case. Accordingly, (paragraph 61):

> "We therefore consider that in the present statutory context *Osman v Natt* needs to be considered and applied with some caution, particularly in its suggestion that cases where it becomes necessary to infer the intended consequences of non-compliance can for that purpose be divided into distinct and watertight categories and its apparent suggestion (para 31) that in the second category the possibility of a middle position as identified in *Soneji* between outright validity or outright invalidity is excluded. Instead, it is appropriate to go back to the basic principled approach as explained in *Soneji*, as applied in light of the particular statutory context and the specific facts of the case".

93. Their lordships went on to explain that a detailed analysis of the consequences of failure to comply with the statute will not always be necessary, because on looking at the purposes of the statute it may be clear that Parliament intended a bright-line rule, regardless of the individual facts. An example is the notice requirements for extending business tenancies under the Landlord and Tenant Act 1954 (paragraph 62). In other cases, there may be more than one statutory purpose: the facilitation of a particular outcome (in *Soneji* the confiscation of the proceeds of crime) versus the protection of individuals (in *Soneji*, procedural protection for persons being deprived of property), and in such cases (paragraph 63):

> "a more nuanced analysis may be called for. …A test of substantial compliance with a procedural rule may be an appropriate way to allow for such a balance to be struck between competing purposes. If there has been substantial compliance with the rule, so that the purpose served by it has largely (if not completely) been fulfilled, it may more readily be concluded that fulfilment of the competing substantive purpose of the legislation should be given priority."

94. Therefore in paragraph 66 their lordships said that "the approach of the Court of Appeal in *Elim Court* should not be endorsed in full"; the difficulty to which it gave rise was that landlords without management responsibilities would have their right to raise objections to the scheme ignored (paragraph 67). Instead, where the consequences of non-compliance are not set out in the statute – as in *Elim* Court and as in *A1 (Sunderland)* itself – the statutory structure had to be carefully analysed to assess what consequence of non-compliance would best fit it (paragraph 68).

95. Their lordships went on to consider the provisions of sections 78 and 79. They were alive to the fact that while the obligation to give claim notices to all landlords in the building is what Mr Bates KC would call a "true *Elim Court* case" where the statute does not spell out the consequences of non-compliance, the failure to serve a notice of invitation to participate is not:

> "69. Section 78 requires the RTM company as promoter of the scheme to give a participation notice to all qualifying tenants who have not agreed already to become, or not actually become, members of the RTM company. Section 79(2) provides that until 14 days after that has been done, a claim notice may not be served at all. There will ordinarily be no difficulty in finding or identifying qualifying tenants. The absence of any saving or dispensing provisions of the type found in section 79(7) suggests that this was well understood by Parliament. **Section 79(2) imposes a clear consequence of failure in good time to give participation notices: no valid claim notice can be given to anyone**. For present purposes we leave aside the difficult question whether this has the further

> consequence that, if a document purporting to be a claim notice is nonetheless given to another stakeholder, such as a landlord, the landlord could rely upon the failure to give a participation notice to a qualifying tenant in order to object to the validity of the purported transfer of the right to manage which followed, even though that tenant might not in fact have any objection to the scheme which is being promoted which they wish to maintain. We were referred to a decision of the Lands Tribunal in *Sinclair Gardens Investments (Kensington) Limited v Oak Investments RTM Co Ltd* [2005] RVR 426 and a decision of the Upper Tribunal in *Avon Freeholds Limited v Regent Court RTM Co Ltd* [2013] UKUT 213 (LC); [2013] L&TR 23 which discussed the consequences of a breach of the procedural requirement in section 79(2) and held in each case that such a breach did not in the circumstances invalidate the transfer of the right to manage which followed, and it was not suggested that they should be overruled; but this was a peripheral part of the debate before us and we prefer to reserve our opinion on whether they were correctly decided."

96. That paragraph is *obiter* (which means that it is not part of the reasoning that led to the Supreme Court's decision, and so it is not a binding authority) but its relevance to what the Tribunal has to decide in this appeal is obvious and I shall be coming back to it. The emphasis is mine.

97. Their lordships then set out a detailed analysis of the provisions of the 2002 Act beginning, at paragraph 71, with section 90: where there is no dispute in response to the claim notice the right to manage is transferred automatically without any judicial intervention. It is said that this was expected by Parliament to be the normal outcome, because the substantive (rather than procedural) grounds on which a landlord (or other stakeholder within section 79(6)) can object to the acquisition of the right to manage are very limited indeed: namely, that the RTM company is not properly constituted, that the building does not comply with the requirements of section 72, or that the membership of the RTM company does not comprise at least 50% of the building.

98. Focusing then on landlords, their right to receive claim notices, and the consequences of their not receiving one, the Supreme Court observed that some landlords cannot be found.

99. This is a point I touched on when looking at the first issue in the appeal, and the Supreme Court's comment that "ordinarily" qualifying tenants are easy to identify, by contrast with landlords who may well not be. It is worth pausing to note that it is commonplace for persons who hold long leases of flats to let them on assured shorthold tenancies, having purchased them as an investment. Such tenancies are not registrable and may not be discoverable by the RTM company, and a large number of flats in a block may be so let.

100. The statute in section 79(7) has provided that "invisible" landlords who really cannot be discovered have no right to receive a claim notice. That means that they cannot challenge the right to manage scheme in the FTT, because only a recipient of a claim notice can serve a counter-notice, and only the service of a counter-notice triggers an application to the FTT (section 84(3)). The Supreme Court took the view that Parliament was content to leave the interests of the "invisible" landlords to be protected by those who are visible and entitled to receive a notice, because the available grounds of objection (being so limited) are not specific to individuals (paragraph 75).

101. Their lordships considered three hypothetical situations. In case A (paragraph 80) there is a real substantive objection to the scheme, for example the RTM company is not properly constituted. An invisible landlord has no right to challenge the scheme in the FTT because it has no right to receive a claim notice and therefore no right to serve a counter-notice. That is the price of invisibility.

102. In case B (paragraph 81) a landlord who was not invisible and was entitled to receive a claim notice had not been given one. Yet he had a valid objection to the scheme exactly as in case A. Yet unless another landlord gives a counter notice his objection will go unheard.

103. Case C, at paragraph 83, was the present case. Again a landlord entitled to receive a claim notice has not been given one; but this time he does not have a substantive ground of objection. His only quarrel with the scheme is that he has not been given a claim notice.

104. The Supreme Court pointed out that if the failure to comply with section 79(6) is never fatal to the validity of the scheme then B does not have his objection heard, which cannot have been Parliament's intention (paragraph 85). Yet if the failure to comply is always fatal then in case C, where there is no substantive objection beyond the failure to serve the claim notice, then an equally unacceptable consequence follows:

> "85. … a scheme would founder for the purely procedural reason that a landlord was deprived of the valueless opportunity to make a hopeless objection to the validity of a scheme which has in fact been tested by the tribunal and found to be compliant. That would be contrary to the approach laid down in *Soneji*."

105. Therefore:

> "87. We consider that the simplest way to provide a legal formula to give effect to Parliament's intention as to the consequences of the failure to give a claim notice to a visible landlord or other stakeholder under section 79(6) flowing from analysis in accordance with the approach in *Soneji* is that the failure renders the transfer of the right to manage voidable, at the instance of the relevant landlord or other stakeholder who was entitled to, but not given, a claim notice, but not void. It is voidable unless, or until, the tribunal approves the transfer scheme, as the outcome of the resolution of the dispute as to entitlement caused by a counter-notice by a person actually given a claim notice, or as the result of an application by the RTM company under section 85. If the scheme is disapproved by the tribunal, the RTM company will have to start again in any event.
>
> 88. Of course, a consequence that the scheme is only rendered voidable is that the person with the right to seek avoidance can disclaim or otherwise abandon that right whereas, if it rendered the scheme void, the subsequent conduct of the relevant landlord or stakeholder would be irrelevant. There are numerous indications in this part of the CLRA that persons with a right to object should be able to waive that right. There is no jurisdiction in the tribunal to revisit and undo a transfer of the right to manage which has purportedly occurred as a result of the operation of section 90 or a determination of the tribunal, so the way in which a challenge would be brought would be by proceedings in the High Court simply seeking a declaration of rights (in the former situation) or seeking judicial review of the order of the tribunal and a declaration (in the latter). Since the exercise of a right to avoid is generally subject to equitable considerations, delay or other

> unconscionable conduct of the relevant landlord or other stakeholder could lead to the right to avoid being lost, or refused as a matter of discretion."

106. To summarise: where a person ("P") entitled to be given a claim notice is not given one, P and only P may challenge the acquisition of the right to manage. Not having been given a claim notice it has no right to serve a counter-notice so as to prompt an application to the FTT, but it can apply to the court for a declaration that the right to manage has not been validly acquired under section 90. Where there have been proceedings in the FTT and an order has already been made in favour of the RTM company then P can seek judicial review of the order (subject to the strict time limits applicable to judicial review).

107. A further possibility is that where another landlord has served a counter-notice and there are proceedings in the FTT then P could be joined as an interested party. How the FTT would approach P's case, and what the High Court might do on an application to have the acquisition of the right to manage avoided, is (if I have understood correctly) set out in paragraphs 91 and 92:

> "91. In our view, in evaluating whether a procedural failure under the regime has the effect of invalidating the process, the question to be addressed is whether a relevant party has been deprived of a significant opportunity to have their opposition to the making of an order to transfer the right to manage considered, having regard to (a) what objections they could have raised and would have wished to raise and (b) whether, despite the procedural omission, they in fact had the opportunity to have their objections considered in the course of the process leading to the making of the order to transfer the right to manage. If there was no substantive objection which they could have raised or would have wished to raise, they have lost nothing of significance so far as the regime is concerned and the inference is that Parliament intended that the transfer of the right to manage should be effective notwithstanding the omission. If their objection has in fact been considered in the process, even though the claim notice was not served at the proper time, again they have lost nothing of significance so far as the regime is concerned and the inference as to Parliament's intention is the same.

108. In other words, the FTT or the court in considering the effect of the failure to serve P would ask whether P actually had a substantive objection to the scheme (such as the RTM company being properly constituted) and consider that objection.

109. Central to the Supreme Court's approach is that only P can object to a failure to give a notice to P:

> 92. … the focus is on the position of the party directly affected by the procedural omission. The omission does not give other persons who are not so affected (for example, other landlords who have been properly served with a claim notice) a right to object to the making of a transfer order if the party who is so affected has not sought to complain about this. There is no good reason to suppose that Parliament intended that a person which has not itself been affected by a procedural omission in relation to another should acquire, by a windfall, a power to thwart the operation of the statutory process which it would not otherwise have enjoyed. If a party with a potentially valid substantive objection has not been properly served and has been left out of the process, they have a right to

> apply to the High Court, as explained above. Hence a RTM company cannot simply ignore them with impunity."

110. And at paragraph 98:

> "the purpose of the legislative scheme as explained in the Consultation Paper -- includes the objective that opportunities for obstructive landlords to thwart the transfer of the right to manage should be kept to a minimum. The procedural requirements have not been included to create traps for the unwary, nor to afford unwarranted opportunities for obstruction on the part of objecting landlords who have not themselves been significantly affected by any particular omission to comply with them."

111. Their lordships also commented on the argument that failure to comply with section 79(6) should invalidate the claim notice on the basis that it is easy for the RTM company to start again:

> "There is no guarantee that a RTM company will be in funds to be able to afford to make multiple applications. A RTM company might be formed by just two tenants, or a small group of tenants, with limited resources. The company may be counting on being put in funds to carry out the management functions only once the right to manage is transferred to it. Therefore, to impose on a RTM company an obligation to re-start the process if it happens to omit to comply with any procedural requirement would tend to undermine to an unwarranted degree the ability of tenants and RTM companies to pursue the remedy in respect of problems regarding the management of their building which Parliament intended should be available to them. It is only where a landlord or other stakeholder can show that it has lost a right to assert an objection which has substantive force in the context of the legislative scheme that it may be inferred that the transfer of the right to manage should be voidable and capable of being set aside by the person affected."

112. Following the Supreme Court's decision, failure to comply with section 79(6) is not necessarily fatal to the acquisition of the right to manage. The person who should have been served, and no-one else, can apply to the court to have the acquisition set aside; alternatively if there are proceedings before the FTT it may be joined as an interested party and raise its objection there. A final option if the FTT has already made an order is for P to seek judicial review of the order.

113. This is a big change in the law, because it not only takes us back to the reasoning in *Soneji* in terms of the law's response to procedural failures, but also means that only a person directly affected by a procedural failure can complain of it.

114. The approach taken in *A1 (Sunderland)* is readily applicable to other procedural failings of which the consequences are not specified in the statute (whether the 2002 Act and its provisions relating to the right to manage, or other statutes providing for other processes). But the Supreme Court expressly left unresolved the "difficult question" of a failure to comply with section 79(2) which it said (*obiter*) specifies the consequences of non-compliance. And that is the difficult question I now have to resolve.

The arguments about the second issue in the appeal

The arguments at the hearing

115. The landscape has been changed so radically by *A1 (Sunderland)* that I need say very little about the parties' arguments at the hearing before moving on to consider the implications of *A1 (Sunderland)* for what the Tribunal now has to decide. As I said above, the argument for the appellant at the hearing was that the outcome of this aspect is determined by the fact that section 79(2) sets out the consequences of failure to give all the qualifying tenants a notice of invitation to participate, as the Tribunal held in *Canary Gateway*. There is no discretion. And the position is perfectly workable; people tend to know who is living in their block and it should not be difficult to give notice to all the qualifying tenants.

116. For the respondent, Mr Jacob did not really press his suggestion that *Canary Gateway* could be distinguished on the basis that in the present case the RTM company did not know about Ms O'Connor, in light of the revelation that in fact she was known to one of the directors. But he suggested – more with a view to a further appeal than in the expectation of persuading the Tribunal – that *Canary Gateway* was wrongly decided. "Parliament cannot have intended that a failure to serve one qualifying tenant, whose interest was not yet registered, and who gave written consent to become a member of the RTM company before the acquisition date would invalidate the claim to acquire the right to manage."

117. I pause to observe that that strikes a note very much in tune with what the Supreme Court said in *A1 (Sunderland)* at its paragraph 92.

The written representations after A1 (Sunderland)

118. In their written representations for the appellant, Mr Bates KC and Ms Gibson essentially reiterated their earlier argument. *A1 (Sunderland)* concerns a case where the consequences of non-compliance are not spelt out in the statute. But crucially paragraph 69 of the decision confirms that that is what section 79(2) does. The Supreme Court thereby approved, without citing them, *Canary Gateway* and also *Triplerose (2016).*

119. As Mr Jacob observed, counsel for the appellants thus engaged only with the first four sentences of paragraph 69 (up to an including the words I emboldened in the quotation at paragraph 95 above), and so have given me no assistance in terms of what I should make of the rest of the paragraph.

120. Mr Jacob in his written submissions began by acknowledging that in light of the first part of paragraph 69 of *A1 (Sunderland)* it is no longer possible to doubt that section 79(2) sets out the consequences of non-compliance with section 78. But he maintained that the outcome in *Canary Gateway* was wrong, and argued that the rest of paragraph 69 indicates that the Supreme Court did not endorse that outcome. This appeal presents, he said, precisely the difficult question that their lordships identified and left unsolved. Far from endorsing the outcome in *Canary Gateway*, Mr Jacob argued, their remarks re-open the possibility that *Sinclair Gardens (2005)* and *Regent Court* were correctly decided; and the Supreme Court's analysis shows that the correct answer is that a landlord should not be able to rely on a failure to serve a notice of invitation to participate on a qualifying tenant to defeat the purpose of the statute in facilitating the acquisition of the right to manage. To allow them to do so would be yet another example of an obstructive landlord attempting the thwart the process in the way that the Supreme Court so clearly disapproved (at paragraphs 92 and 98, set out above); the tenant, on the other hand, could

apply to the court for a declaration that the claim notice was invalid, just as a landlord who had not been served with a claim notice could challenge the validity of the scheme.

121. Mr Jacob pointed out that Ms O'Connor has lost nothing of value, since she is now a member of the RTM company. Moreover, it is not an easy matter for an RTM company, having missed a qualifying tenant, to start again. Exactly as the Supreme Court said at its paragraph 100, the RTM company may not have the resources to do so. Moreover to do so in the present case would be pointless because Ms O'Connor as a member of the RTM company is no longer entitled to a notice of invitation to participate.

122. Mr Jacob suggested that another way to look at the situation is to say that Ms O'Connor has now waived any right to challenge the respondent and therefore the failure to give her a notice of invitation should not be taken as a breach of section 78(1), and section 79(2) does not come into operation.

123. Mr Bates KC and Ms Gibson in response reiterated their position that section 79(2) sets out the consequences of non-compliance and that is the end of the matter. They regarded the respondent as having admitted that by conceding that it cannot argue against the Supreme Court's construction in the fourth sentence of its paragraph 69. They made no comment on the discussion of the "difficult question" that followed, and did not explain why Mr Jacob's proposed solutions might be wrong.

Discussion and conclusion about the second issue in the appeal

124. The FTT in its decision on this point distinguished the Tribunal's decision in *Canary Gateway,* which was binding on it, on the basis that Ms O'Connor's lease was not one that could readily have been discovered. But the Tribunal in *Canary Gateway* decided what section 79(2) means, and the section does not appear to set out any exceptions on the basis of individual circumstances. So it is difficult to see how the FTT's decision could have been upheld on the authorities as they stood at the time of its decision.

125. However, the outcome of the appeal obviously cannot turn on that point in light of the way the authorities have now moved on. I have to decide what is the effect of *A1 (Sunderland)* on this issue. Does *Canary Gateway* remain definitive of the position, in which case although I am not bound by it I should follow it unless I am persuaded that it is wrong? Or has the law changed?

126. A number of general points are abundantly clear from the Supreme Court's decision. One is that their lordships endorsed the continuing authority of *Soneji,* with its twin focus in cases of procedural failure on both an examination of the statute and a consideration of the individual circumstances of a case. They were therefore unhappy with the reasoning in *Natt v Osman* and in *Elim Court* with their focus on statutory construction to the exclusion of consideration of the facts of the individual case.

127. Another is that Parliament did not intend landlords and other persons to be able to thwart the acquisition of the right to manage on the basis of procedural objections that had not done them any harm, for example where the person potentially offended by that failure (for example an intermediate landlord who had not been given a claim notice) had no objection to the RTM company's proposal. That does not sit happily with the outcome in *Canary Gateway* (which was cited to the Supreme Court, but to which its decision did not refer).

128. With an apology for making a long decision even longer, I set out paragraph 69 of the Supreme Court's decision again for ease of reference, again with the added emphasis:

> "69. Section 78 requires the RTM company as promoter of the scheme to give a participation notice to all qualifying tenants who have not agreed already to become, or not actually become, members of the RTM company. Section 79(2) provides that until 14 days after that has been done, a claim notice may not be served at all. There will ordinarily be no difficulty in finding or identifying qualifying tenants. The absence of any saving or dispensing provisions of the type found in section 79(7) suggests that this was well understood by Parliament. **Section 79(2) imposes a clear consequence of failure in good time to give participation notices: no valid claim notice can be given to anyone**. For present purposes we leave aside the difficult question whether this has the further consequence that, if a document purporting to be a claim notice is nonetheless given to another stakeholder, such as a landlord, the landlord could rely upon the failure to give a participation notice to a qualifying tenant in order to object to the validity of the purported transfer of the right to manage which followed, even though that tenant might not in fact have any objection to the scheme which is being promoted which they wish to maintain. We were referred to a decision of the Lands Tribunal in *Sinclair Gardens Investments (Kensington) Limited v Oak Investments RTM Co Ltd* [2005] RVR 426 and a decision of the Upper Tribunal in *Avon Freeholds Limited v Regent Court RTM Co Ltd* [2013] UKUT 213 (LC); [2013] L&TR 23 which discussed the consequences of a breach of the procedural requirement in section 79(2) and held in each case that such a breach did not in the circumstances invalidate the transfer of the right to manage which followed, and it was not suggested that they should be overruled; but this was a peripheral part of the debate before us and we prefer to reserve our opinion on whether they were correctly decided."

129. I take the view that in light of these *obiter dicta* the Tribunal has three options. None of them is prevented by authority, because the Tribunal is bound neither by its own decisions nor by the *obiter dicta* of the Supreme Court; but if the two conflict I prefer to go with the Supreme Court.

130. One option is to stop at the emboldened words and follow *Canary Gateway*, not only as to the meaning of section 79(2) but also as to its consequences, namely that the claim notice is totally invalid and that anyone can assert its invalidity. I regard that as untenable in light of the discussion that follows those words in paragraph 69. The Supreme Court clearly did not regard that consequence as inevitable, because it described as "difficult" the question whether a landlord would be able to challenge the acquisition of the right to manage on the basis of failure to give a notice of invitation to a qualifying tenant. And there is ample indication in the judgment that it was not the intention of Parliament for a landlord to be able to thwart a right to manage scheme on the basis of the windfall presented by a procedural failure that did not directly affect it. My decision should be consistent with the Supreme Court's thinking, even though that means that I will not follow *Canary Gateway* as to the consequences of section 79(2).

131. A second way forward is to follow the decisions in *Sinclair Gardens 2005* and in *Regent Court.* There is at least a heavy hint in paragraph 69 that the decisions in *Sinclair Gardens (2005)* and in Regent Court were regarded by their lordships as correct. That would be consistent with the Supreme Court's preference for the reasoning in *Soneji*, but would

require me to ignore what it said about the meaning of section 79(2). I would have to regard section 79(2) as merely a stipulation about time, and then undertake the same sort of analysis as did the Tribunal in those earlier decisions, asking whether there had been substantial compliance with the procedure required by the statute in circumstances where the failure complained of had in the circumstances of the case caused no prejudice.

132. I regard that as untenable too. *Obiter* though it be, the Supreme Court has said "Section 79(2) imposes a clear consequence of failure in good time to give participation notices: no valid claim notice can be given to anyone." Both parties accepted the authority of that statement, and therefore the Tribunal should make a decision that is consistent with that construction of section 79(2). The Tribunal in *Sinclair Gardens 2005* and in *Regent Court* analysed the statute and the facts of the case in order to determine what is the consequence of failure to comply with section 79(2) in that case, which is not consistent with the Supreme Court's view that section 79(2) itself sets out the consequence of failure.

133. Is that the end of the road? Mr Bates KC says that it is; the claim notice is invalid and the respondent must start again. But that would give rise to all the consequences that the Supreme Court deplored, and said were not Parliament's intention, in the context of section 79(6). As I said above, I am not prepared to regard the rest of paragraph 69 as futile.

134. So the third way is to seek for a solution that is consistent with the principles expressed in *A1 Properties*. That is what Mr Jacob sought to do in his written submissions, and the analysis that follows is a development of his suggestions.

135. The starting point is therefore to look in detail at the statutory scheme, and ascertain the purpose of the scheme as a whole and of the procedural requirement complained of. The requirements of section 78 are obviously intended to protect qualifying tenants, to ensure that they cannot be ignored or side-lined, and to give them the opportunity to become members of the RTM company at the earliest possible stage so that they can take part in its decision-making before the claim notice is served.

136. There is an important difference in function between section 78 and section 79(6). The latter requires the claim notice to be served on landlords and other stakeholders and is tightly linked to section 84: only those required to be served with a claim notice under section 79(6) can serve a counter-notice. But a qualifying tenant who is not a member of the RTM company, who is entitled to a notice of invitation to participate, nevertheless cannot give a counter-notice. That is at first sight rather odd. It means that however flawed the scheme – perhaps the RTM company is improperly constituted, or it does not have enough qualifying tenants, or the premises are not self-contained as required by section 72 – a qualifying tenant cannot raise the problem before the FTT because it cannot serve a counter-notice. If all the landlords within section 79(6) are content with the RTM company's proposal, and do not serve a counter-notice, then the scheme takes effect pursuant to section 90 even if there are substantive objections to the scheme that a qualifying tenant would have liked to raise.

137. Therefore the situation is not directly comparable to that of a landlord who is entitled to be given a claim notice and is not given one. There is no question of the over-riding of a right to have a substantive objection heard by the FTT. Equally there is no way for a qualifying tenant who has not had a notice of invitation to participate, and therefore has a procedural objection, to bring that to the attention of the FTT.

138. I do not think that it can have been Parliament's intention that the landlords and other stakeholders within section 79(6) should be relied upon to raise the matter on behalf of a tenant who cannot do so. That would be a perverse and ineffective way to protect tenants, since landlords will only raise points in their own interest. If they are content for the right to manage to go ahead there is no reason for them to serve a counter-notice on the basis of failure to serve a tenant; by contrast, a landlord who objected to the RTM company's proposal would raise this point despite the fact that the qualifying tenant in Ms O'Connor's position did not want him to. The Supreme Court's objections to the landlord taking advantage of a windfall are as applicable here as they are to the failure to comply with section 79(6) and I infer that that cannot have been Parliament's intention.

139. Yet section 79(2) sets out a consequence of non-compliance: the claim notice, according to the Supreme Court, is not valid. I adopt the Supreme Court's solution as one that does not thwart Parliament's purpose; I take "not valid" to mean that it is neither wholly valid nor wholly invalid, but voidable at the instance of the tenant. She can ask the court for a declaration that the notice is invalid; if she is in communication with a landlord who has served a counter-notice she may be able to be joined in proceedings before the FTT so that she can raise the problem. Or she can seek judicial review of an FTT decision in the RTM company's favour. But unless she takes one of those courses of action, no-one else can take advantage of the procedural failure; only the tenant directly affected by it can do so.

140. I do not need to decide what happens if the tenant applies for a declaration, or raises her challenge as an interested party in the FTT. It may be that the difference between sections 79(6) and 79(2) is that in the latter case there is no room for argument as to whether substantial compliance is acceptable in light of the absence of prejudice (as described in paragraph 91), because the statute has set out the consequences of non-compliance. If so, then if the tenant takes the point section 79(2) is indeed the end of the road and the notice is invalid. But that argument is not available to anyone else.

141. I regard paragraph 69 as an invitation to adopt this solution (which is essentially the solution for which Mr Jacob argued). It means that although no valid claim notice can be served if the qualifying tenants have not all been given the notice of invitation 14 days beforehand, the notice if served in spite of the requirement is not wholly invalid. Instead it is voidable. And the person entitled to have been served with the notice is the one who can have it declared void, and no-one else.

142. That that is an appropriate solution is indicated first by its consistency with the Supreme Court's decision on the different but undeniably analogous point in *A1 (Sunderland)*. It is also indicated by the purposes of the statute in requiring the notice to be given; the notice is overwhelmingly for the tenant's benefit and the purposes of the statute in facilitating the acquisition of the right to manage will be frustrated if anyone else complains of the procedural failure. True, there may be an advantage for other tenants in ensuring that all entitled tenants are included, and perhaps too for the landlord in potentially increasing the number of tenants who will bear his costs under section 88 if an application to the FTT fails. But those are insignificant points in the face of the fact that the primary and predominant purpose of the requirement is to benefit a qualifying tenant.

143. Nothing is achieved by allowing landlords to challenge the right to manage on the basis of failure to comply with section 79(2), and much would be lost in terms of the time and resources of the tenants which should be employed in the management of the building rather than in paying the landlord's costs and starting the procedure all over again. To do

so would be especially futile in the present case where the very procedural requirement complained of would no longer be a requirement if the RTM company had to start again, because Ms O'Connor is now a member of the RTM company and so there is no need for her to be given a notice of invitation to participate.

144. It is to be hoped that such windfall challenges will, if mounted in the future despite the change in the law heralded by *A1 (Sunderland),* be disposed of at an early stage.

Conclusion on the second issue in the appeal

145. The claim notice served by the respondent did not comply with section 79(2) because Ms O'Connor had not been given a notice of invitation to participate. It was therefore voidable, but only at Ms O'Connor's instance. She has not sought to challenge the claim notice; in fact she has waived the RTM company's failure, and indeed is content with its acquisition of the right to manage. The claim notice cannot be challenged by anyone else. The FTT's reasoning cannot stand, but the outcome was correct: the failure to give a notice to Ms O'Connor has not invalidated the claim notice and the right to manage is not prevented.

Outcome of the appeal

146. The appeal only raised the second issue, on which the appellant failed. The first issue was raised by the respondent's cross-appeal against the FTT's finding that Ms O'Connor was a qualifying tenant. The appellant succeeded on the first issue, but could not thereby change the outcome. Ms O'Connor was a qualifying tenant, but the acquisition of the right to manage was not prevented by the failure to give her a notice of invitation to participate.

Upper Tribunal Judge Elizabeth Cooke

28 October 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.