UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LEASEHOLD ENFRANCHISEMENT – RIGHT TO MANAGE – qualifying tenants – shared ownership long leases where tenants' share is less than 100% – whether such tenants and intermediate landlords who have sub-let flats on short leases are qualifying tenants – notices of invitation to participate in acquisition of right to manage – whether failure to give such notice to each qualifying tenant invalidates claim notice

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

BETWEEN:

AVON GROUND RENTS LIMITED **Appellant**

AND

CANARY GATEWAY (BLOCK A) RTM COMPANY LTD & CANARY GATEWAY (BLOCK B) RTM COMPANY LTD **Respondents**

Re: (1) Elite House, Edgemere House and Vale House, St Anne Street, London E14
(2) Birkdale House, Slate House, Langan House, Wessex House, St Anne Street, London E.14

Mr Justice Fancourt, Chamber President

26 November 2020 by Skype for Business

Justin Bates (instructed by Scott Cohen Solicitors Ltd) for the appellants
Mark Loveday (instructed by Jobsons Solicitors Ltd) for the respondent

The following cases are referred to in this decision:

Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General [1983] 1 All ER 288

R v Immigration Appeal Tribunal, ex parte Jeyeantham [1999] 3 All ER 231

Brick Farm Management Ltd v Richmond Housing Partnership Ltd [2005] EWHC 1650 (QB); [2005] 1 WLR 3934

R v Soneji [2006] 1 A.C. 340

Richardson v Midland Heart Ltd [2008] L & TR 31

Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd [2013] UKUT 81 (LC)

Avon Freeholds Ltd v Regent Court RTM Co Ltd [2013] UKUT 213 (LC)

Osman v Natt [2014] EWCA Civ 1520; [2015] 1 WLR 1536

Triplerose Ltd v Mill House RTM Co Ltd [2016] UKUT 80 (LC); [2016] L & TR 23

Elim Court RTM Co Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89; [2018] QB 571

Introduction

1. It its decision made on 30 January 2020, the First-tier Tribunal (Property Chamber) (Residential Property) ("the FTT") determined that the respondents ("Canary A" and "Canary B" respectively, and together "the RTM Companies") were entitled to acquire the right to manage various blocks of flats in St Anne Street, London E14 pursuant to two claim notices dated 6 April 2019. The right claimed is that conferred by Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

2. The FTT decision was made on the basis that the RTM Companies had correctly served notices of invitation to participate under section 78 of the 2002 Act on various tenants who occupied flats in the properties under shared ownership leases. The appellant freeholder ("Avon") had argued that notices of invitation to participate in respect of those flats should instead (or also) have been served on Metropolitan Housing Trust Limited ("MHT"), the landlord under the shared ownership leases, and that the RTM Companies' failure to do so invalidated the claim notices.

3. The FTT decided that MHT was not in any event a qualifying tenant within the meaning of the 2002 Act because it was a landlord; and that even if it were a qualifying tenant and so should have been given a notice of invitation to participate, the RTM Companies' failure to do so did not invalidate their notices of claim.

4. The FTT gave Avon permission to appeal on the issues described in paragraph 3 above but not on the issue of whether the tenants under shared ownership leases were qualifying tenants. It regarded that issue as having been conclusively decided by this Tribunal in its decision in *Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd* [2013] UKUT 81 (LC). Permission to appeal on that issue was granted by this Tribunal.

The relevant factual background

5. The relevant facts can be quite shortly stated.

6. The properties in issue are 7 different blocks of flats in a development on both sides of St Anne Street. On the left side are Elite House, Vale House and Edgemere House, comprising 97 flats in total. On the right side are Slate House, Birkdale House, Langan House and Wessex House, comprising 136 flats in total.

7. The properties are now agreed to be two self-contained buildings for the purposes of the 2002 Act, with the consequence that a claim notice had to be served in respect of each building separately. However, the buildings were developed and let as 7 separate blocks.

8. The flats in Elite House, Slate House, Birkdale House and Langan House were each let by Avon's predecessor in title to qualifying tenants on long leases. The 17 flats in Edgemere House are let to MHT on a single headlease and are underlet by MHT on individual shared ownership leases. The 23 flats in Vale House and the 33 flats in Wessex House are let to

MHT under two separate headleases and then each flat is underlet by MHT to a social rent tenant.

9. The notices of invitation to participate were served by the RTM Companies on those qualifying tenants who had not already become or agreed to become members of them on 19 March 2019, but were not served on MHT. There is no issue with the formal validity of the notices that were in fact served and no issue about the identity of the qualifying tenants in the flats in Elite House, Birkdale House, Langan House and Wessex House: the long lessee of each flat is the qualifying tenant of it.

10. Of the 17 shared ownership leases in Edgemere House, two were understood by the RTM Companies (and in these proceedings have been assumed) to have "staircased" to 100% tenant ownership, such that the tenant was treated to the exclusion of MHT as the beneficial owner of a long lease of those flats. The other 15 flats are understood to remain beneficially shared between MHT and the tenant, with the tenant's share being less than 100% of the equity in the long lease. The first issue raised by this appeal is whether those 15 tenants are qualifying tenants for the purposes of the 2002 Act.

11. As a result of the notices of invitation to participate, the RTM Companies each gained sufficient support from the qualifying tenants (at least 50% of the total number of flats in the self-contained building) and they proceeded to serve the claim notices, whose validity is in issue. On 21 May 2019, Avon served counternotices asserting that for seven different and disparate reasons the claim notices were not served in compliance with the requirements of the 2002 Act. Only one of these reasons is now live, namely that on the date of service of the notices of claim there was no entitlement to acquire the right to manage because the notice of invitation to participate was not given to each person required by s. 78(1) of the 2002 Act to be given such a notice.

The FTT's decision and the issues on the appeal

12. There are three separate issues:

    a. Is a shared ownership lessee with an interest of less than 100% under a long lease of a flat a qualifying tenant?

    b. Is an intermediate landlord of a tenant that is not a qualifying tenant itself a qualifying tenant, or is there no qualifying tenant of such a flat?

    c. If a notice of invitation to participate should have been served on MHT, does the RTM Companies' failure to do so render the claim notices invalid?

13. The FTT decided that it was bound by authority to decide the first issue against Avon. The question raised on this appeal is whether this Tribunal was wrong in the *Corscombe Close* case to hold that a tenant under a long, shared ownership lease with less than a 100% share is a qualifying tenant.

14. On the second issue, the FTT decided that a tenant that was also a "landlord" within the meaning of Chapter 1 of Part 2 of the 2002 Act could not be a qualifying tenant, since the two statuses were inherently opposed under the scheme of the right to manage provisions: a qualifying tenant receives a notice of invitation to participate and may become a member of an RTM company at the stage of seeking to acquire the right; a landlord receives instead a copy of the claim notice and may oppose the claim, but cannot become a member of the RTM company until after the right to manage has been acquired. The FTT said:

> "50. Having regard to the statutory scheme we consider that the two categories of membership were intended to be mutually exclusive. That is, the same person cannot be both a qualifying tenant member and a landlord member of the RTM Company. Equally a leaseholder may only be served with either a notice inviting participation or a claim notice: it cannot be served with both.
>
> 51. Although the term "*part of the premises*" is not defined it must apply to each of the seven self-contained houses. Consequently, Metropolitan was only entitled to be admitted as a landlord member of the applicants and not as a qualifying tenant member. Equally the applicants were only obliged to give the claim notices to Metropolitan and they were not obliged to give notices inviting participation to Metropolitan."

15. Since MHT was a landlord of the social rent tenants and of the non-100% shared ownership lessees, it was therefore not a qualifying tenant of those flats and should not have been given a notice of invitation to participate in any event.

16. In case it was wrong on that conclusion, the FTT considered whether a failure to give MHT a notice of invitation to participate was such a failure that required the claim notices to be treated as invalid. It referred to the leading decision of *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89; [2018] QB 571 and concluded that a qualifying tenant who was also a landlord was not prejudiced in a generic or any sense by a failure to give it a notice of invitation to participate:

> "55. The rights granted to a landlord upon receipt of a claim notice are at least equal to and arguably exceed the rights granted to qualifying tenants. It has the right to object to the claim, which a qualifying tenant does not. Once admitted as a member it will have a block vote in respect of each residential unit within its demise let to a rental tenant at the time of the vote. If it applies for membership it will have considerably more influence over the running of the RTM Company and the management of the premises than it would have as a single qualifying tenant."

17. Accordingly, the FTT held that, if it arose, it would have decided that the failure to give MHT a notice of invitation to participate did not invalidate the notice of claim.

The relevant legislation

18. References in the following paragraphs to section numbers are to sections of the 2002 Act so numbered.

19. Section 72 specifies the type of premises to which the right to manage provisions apply. They must contain two or more flats held by qualifying tenants.

20. Section 75 specifies whether there is a qualifying tenant of a flat for these purposes and who it is:

> "(2) Subject as follows, a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease.
>
> (3) Subsection (2) does not apply where the lease is a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c.56) (business tenancies) applies.
>
> (4) Subsection (2) does not apply where –
>
> > (a) the lease was granted by sub-demise out of a superior lease other than a long lease,
> >
> > (b) the grant was made in breach of the terms of the superior lease, and
> >
> > (c) there has been no waiver of the breach by the superior landlord.
>
> (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 tenant shall (subject to subsection (6)) be regarded as jointly being the qualifying tenant of the flat."

21. Section 76, as amended, specifies what counts as a long lease for the purposes of the right to manage provisions of the 2002 Act:

> "(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 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 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).

(3) "Shared ownership lease" means a lease –

(a) granted on payment of a premium calculated by reference to a percentage of the value of the demised premises or the cost of providing, or

(b) under which the tenant (or his personal representatives) will or may be entitled to a sum calculated by reference, directly or indirectly, to the value of those premises.

(4) "Total share", in relation to the interest of a tenant under a shared ownership lease, means his initial share plus any additional share or shares in the demised premises which he has acquired."

These provisions are qualified in various respects in section 77, but none is material to the issues in this appeal.

22. Section 74, as amended, contains a material provision about membership of an RTM company:

"(1) The persons who are entitled to be members of a company which is a RTM company in relation to premises are –

(a) qualifying tenants of flats contained in the premises, and

(b) from the date on which it acquires the right to manage (referred to in this Chapter as the "*acquisition date*"), landlords underleases of the whole or any part of the premises."

The remainder of the section makes provision for the content and form of articles of association of RTM companies.

23. Section 112 contains interpretation provisions. The following subsections are material:

"(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.

(3) The expressions "landlord" and "tenant", and references to letting, to the grant of the lease or to covenants or the terms of a lease, shall be construed accordingly.

(4) In this Chapter any reference (however expressed) to the lease held by the qualifying tenant of a flat is a reference to a lease held by him under which the demised premises consist of or include the flat (whether with or without one or more other flats)."

24. The provisions concerning notices of invitation to participate are contained in section 78 (as amended) and include the following subsections:

"(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 intention 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, and

(d) contain such other particulars (if any) as may be required to be contained in notices of invitation to participate by regulations made by the appropriate national authority.

(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.

(4) A notice of invitation to participate must either –

(a) be accompanied by a copy of the articles of association of the RTM company, or

(b) include a statement about inspection and copying of the articles of association of the RTM company.

…..

(7) A notice of invitation to participate is not invalidated by any inaccuracy in any of the particulars required by or by virtue of this section."

25. Section 79 (as amended) prescribes how a claim to acquire the right to manage is to be made:

"(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 the 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.

(9) Where a manager has been appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises, a copy of the claim notice must also be given to the tribunal or court by which he was appointed."

The first issue: shared ownership leases

26. Section 76(2)(e) of the 2002 Act makes express provision for "shared ownership leases". It is important to note the language used does not limit these to leases granted under Part 5 of the Housing Act 1985: they may be leases granted in any other circumstances, as long as they are of one or other type identified. These types are: a lease where the lessee pays a premium for a percentage share, and a lease under which the tenant or his personal representatives may become entitled to a capital sum, calculated by reference to the value of the premises. The former is typified by shared ownership leases under the Housing Act 1985, where the tenant buys an initial share and pays rent for the landlord's share, with the ability to "staircase" up to a 100% share by buying further tranches of ownership during the term of the lease. An example of the latter is a commercial or charitable arrangement whereby a tenant buys a share of a property on the basis that it can later be terminated in defined circumstances, subject to a payment back to the tenant or his personal representatives (PRs).

27. The fact that shared ownership leases had life outside the statutory provisions of the Housing Acts 1980 and 1985 is demonstrated by the case of *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 All ER 288. In that case, a charitable trust wished to provide sheltered accommodation on lease to the tenant, who would pay for a 70% share of the property. If the tenant could no longer occupy or his surviving relatives were not entitled to occupy the accommodation, the lease would be terminated with a payment of 70% of value to the tenant or his PRs.

28. The terms of section 76 of the 2002 Act derive from earlier leasehold reform statutes. As a consequence of the right to buy legislation, shared ownership leases granted under the Housing Acts were excluded from the enfranchisement provisions of the Leasehold Reform Act 1967 ("the 1967 Act"), first by regulations made under the Housing Act 1980, in 1982 (S.I. 1982 No. 62), and then in the form of Schedule 4A to the 1967 Act, inserted by the Housing and Planning Act 1986 ("the 1986 Act").

29. Under Chapter 1 of Part I of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"), which originally conferred rights of collective enfranchisement on tenants of long leases at a low rent, a "long lease" was described in section 7 in terms substantially identical to the definition of a "long lease" under the 2002 Act. It therefore specifically included a shared ownership lease, whether granted under statutory provisions or otherwise, but only if the tenant's share was 100%.

30. The effect of the enfranchisement provisions of the 1993 Act in that regard was considered by Stanley Burnton J in *Brick Farm Management Ltd v Richmond Housing Partnership Ltd* [2005] EWHC 1650 (QB); [2005] 1 WLR 3934. The issue in that case was whether long lessees were not qualifying tenants because their landlord was a charitable housing trust and their flats formed part of its accommodation provision for charitable purposes. The issue therefore turned on the section of the 1993 Act relating to qualifying tenants (s. 5), but the landlord's argument required the Judge to consider the provisions relating to long leases (s. 7).

31. It was argued that since all shared ownership leases are leases for a term exceeding 21 years, the provision for inclusion of only some shared ownership leases as long leases was apparently otiose, and that to avoid that conclusion it was necessary to read the provision for leases for a term exceeding 21 years as meaning such leases other than shared ownership leases. That would have the effect that only 100% tenant share shared ownership leases would count as long leases, even if the term of years was very long. Stanley Burnton J rejected that argument, on the basis that Parliament cannot have included the provision for shared ownership leases, in the form of a widening of the classes of long leases, for the purpose of restricting the class of leases granted for a term exceeding 21 years. In seeking to attribute some purpose to the inclusion of some shared ownership leases only, he said:

> "23. It is less surprising that section 5(2)(b) of the 1993 Act should have little if any practical effect when one sees that other provisions of this part of the 1993 Act have no or little effect. Paragraph (c) of section 7(1) [right to buy leases], as has been seen, adds nothing to paragraph (a) [leases for terms exceeding 21 years]. Paragraph (d) [shared ownership leases] is probably a left-over from the unamended Act, which as originally enacted excluded long leases let otherwise than at a low rent. Shared ownership leases are seldom at a low rent, since a rent must be paid in respect of the landlord's retained share. Paragraph (d) made the tenant a qualifying tenant once he had bought out his landlord's share. It became otiose when the exclusion of long leases let otherwise than at a low rent was removed by the 2002 Act, but Parliament omitted to delete it from the remaining provisions of the 1993 Act."

The Judge therefore did not accept that s. 7(1)(d) (the equivalent of s.76(2)(e) of the 2002 Act) was a specific and exclusive provision for shared ownership leases, though his conclusion on that issue was *obiter* and not part of the *ratio* of the case.

32. The issue of whether a shared ownership lease was a long lease under the provisions of the 2002 Act arose directly in *Richardson v Midland Heart Ltd* [2008] L & TR 31, a decision of Jonathan Gaunt QC sitting as a Deputy High Court Judge.

33. The claimant held a 50% shared ownership lease for a term of 99 years, under which a rent of £1,456 p.a. was payable for the landlord's share. The rent was not paid and the landlord sought and obtained an order for possession under Case 8 in Schedule 2 to the Housing Act 1988, on the basis that the tenancy was an assured tenancy. The claimant started new proceedings for a declaration that she was a long lessee, that the possession order was accordingly invalid and that she was entitled to one half of the capital value of the property. In seeking to establish that the claimant had the benefit of procedural protection conferred on long lessees of flats by ss. 166 and 167 of the 2002 Act, it was argued that she was a long lessee notwithstanding the terms of s.76(2)(e), which appeared to extend long lease status only to 100% tenant share shared ownership leases.

34. The Deputy Judge held that the claimant was not a lessee under a long lease and was not entitled to the statutory protection sought; she was an assured tenant by reason of the substantial rent payable under her tenancy. He said:

> "In this case Miss Richardson's initial share was 50 per cent. She had not acquired any additional shares and so her share remained 50 per cent and so her total share is not 100 per cent but only 50 per cent and so she does not fulfil the condition in s.76(2)(e) and her lease is, therefore, not a long lease as defined.
>
> There is a second reason why ss. 166 and 167 do not help Miss Richardson; namely, that the arrears were too large. They exceeded the prescribed amount under s.167 and, therefore, the fetter, the prohibition in s.167 against forfeiture did not apply anyway, even if the lease had been a long lease."

35. The Deputy Judge did not refer to s.76(2)(a) of the 2002 Act, nor did he refer to the decision in the *Brick Farm Management* case. It appears not to have been cited to him. I cannot conceive that he would have omitted to refer to *Brick Farm Management* in his judgment if he had been aware of the material parts of the judgment in that case.

36. The final authority to which I must refer on this first issue is the *Corscombe Close* decision, a decision of H.H. Judge Mole QC, sitting as a judge of this Tribunal. The issue that Judge Mole had to decide was whether long shared ownership leases were "long leases" for the purposes of the 2002 Act when the tenant's share was less than 100%. He held that they were because they fell within the language of section 76(2)(a) of the 2002 Act, being leases granted for a term exceeding 21 years. The leasehold valuation tribunal had reached the

contrary conclusion; for whatever reason, the successful landlord, Roseleb Limited, was not represented on the appeal.

37. Judge Mole said that s. 76 was confusing and that it could be difficult to see what the purpose of the express provision for shared ownership leases was unless it imposed an exclusive rule for such leases. He then considered Stanley Burnton J's decision in the *Brick Farm Management* case, and explained his conclusion as follows:

> "The starting point is always to consider what the most natural meaning of the section is. The definitions in section 76(2)(a) to (f) can either be read as a series of gateways; so it is enough to pass through any gate to qualify as a "long lease". Or it can be read as a stack of sieves; so a lease can fall through (a) but then be caught by the specific mesh of (e). In my judgment s.76 makes much more sense if it is read in the former way. The definitions of a long lease in s.76(2)(a)--(f) are additive: a lease qualifies as a "long lease" if it falls under any one of those definitions. Thus if a lease that is a shared ownership lease is granted for a term of years certain exceeding 21 years and comes under (a), it is a "long lease". It does not also have to qualify under (e), so it does not matter if it does not do so. The draughtsman did not intend (e) to operate to exclude a shared ownership lease that would otherwise have qualified under (a). As Burnton J. put it in [15] of the *Brick Farm* case:
>
> > 'Parliament cannot be taken to have intended to restrict the unqualified ambit of paragraph (a) of section 7(1) by adding a paragraph purporting to widen rather than to narrow the definition of 'long lease'.'
>
> He preferred to concentrate on the natural meaning of the relevant sections, as do I. Certainly Burnton J's comments were obiter and about a different statute. However the wording of the definition of "long lease" and "shared ownership lease" is almost identical, the purposes of the legislation similar and I find Burnton J's analysis very persuasive. I have some sympathy for the LVT which dealt with the case on written submissions and was not referred to the *Brick Farm* case, which would probably have led it to a different conclusion."

38. Mr Justin Bates on behalf of Avon submits that I should not follow the decision of Judge Mole. He submits that the natural reading of s.76(2)(e) is that only shared ownership leases where the tenant's interest has "staircased" to 100% are long leases for the purposes of the 2002 Act. He argues that it is in practical terms unheard of (even if not legally impossible) to have a shared ownership lease of 21 years or less duration and that Parliament cannot be taken to have legislated specifically for such a case. Rather, s.76(2)(e) deals exclusively with shared ownership leases, which are therefore excluded by implication from s.76(2)(a). He argued that there was no presumption against Parliament making separate provision for overlapping cases and that the six classes of long leases specified in s.76(2)(a)-(f) had to be treated as mutually exclusive categories.

39. Apart from the difficulties with that construction explained by Stanley Burnton J and Judge Mole, which would attribute to the Parliamentary draughtsman a curious change in drafting

style, so that what appears to be an additional class of qualifying interests operates by implication to cut down the width of a previous class, I cannot accept the premise of Mr Bates's argument. Shared ownership leases as defined in the 1993 and 2002 Acts include bespoke agreements made by landlords and tenants, with no restriction on length of term, under which a tenant (or their PRs) may become entitled to a sum calculated as a share of the value of the demised premises. Parliament was legislating for a broader class of shared ownership lease, not a limited statutory model that uses a much longer term of years.

40. In any event, it is an outside possibility that at some stage a right to buy lease or a shared ownership lease could be granted for a term of 21 years or less. There is express provision for such eventuality in the Housing Act 1985, as regards enfranchisement under the 1967 Act. Section 174 of the 1985 Act as enacted provided:

> "For the purposes of Part I of the Leasehold Reform Act 1967 (enfranchisement and extension of long leaseholders) –
>
> > (a) a tenancy created by the grant of a lease in pursuance of this part of a dwelling-house which is a house shall be treated as being a long tenancy notwithstanding that it is granted for a term of 21 years or less, and
> >
> > (b) a tenancy created by the grant of such a lease in pursuance of the right to be granted a shared ownership lease shall be treated as being a tenancy at a low rent notwithstanding that rent is payable under the tenancy at a yearly rate equal to or more than two-thirds of the rateable value of the dwelling-house on the first day of the term."

Under the 1985 Act as originally granted, right to buy leases and shared ownership leases were alternative models, which the tenant could choose between, and they both operated in the same way to grant a lease of specified duration. That duration could be affected (and reduced) by the length of other such leases of other flats in the same building granted since 8 August 1980: Housing Act 1985, Schedule 6, Part III, para 12. Para (b) of section 174 was repealed on 19 November 1998 under the Statute Law (Repeals) Act 1998, but that does not affect the point that Parliament recognised the possibility of shorter terms for such leases.

41. The shared ownership provisions of the 1985 Act were abolished for the future and replaced by a rent to mortgage scheme, introduced by Part II of the 1993 Act. Substantially the same provisions in Schedule 6 to the 1985 Act for the determination of the lease to be granted apply in the case of rent to mortgage leases. The same provisions also apply to right to acquire leases (for certain tenants of housing associations), originally provided for in sections 16, 17 of the Housing Act 1996 and now in sections 180-184 of the Housing and Regeneration Act 2008.

42. The reality is therefore that, however unusual it might be in practice, Parliament did recognise the possibility of leases for 21 years or less being granted pursuant to the 1985 Act. That, and the fact that shared ownership leases can include non-statutory models of any duration, explains why Parliament provided for such cases in s. 76(2)(d)-(f) of the 2002

Act: such leases would not fall within s. 76(2)(a) even though the vast majority of right to buy, shared ownership, rent to mortgage and right to acquire leases would fall within it.

43. For these reasons, I consider that Avon's suggested interpretation of section 76 is untenable. The observations of Stanley Burnton J in *Brick House Management* on statutory interpretation were, with respect, clearly right, even if the particular reason why s. 7(1)(d) of the 1993 Act was not otiose was incorrectly identified (an exception to the low rent requirement would be needed in the case of shares of less than 100%, not for 100% shares where no rent would be paid in respect of the landlord's share). *Corscombe Close* is in my judgment correctly decided. The Deputy Judge in the *Richardson* case did not have the relevant statutory material and previous authority referred to him and his reasoning on shared ownership leases should not be followed.

44. Each of the shared ownership lessees of Edgemere House was therefore a qualifying tenant, since their interests were granted for a term exceeding 21 years. As they were the qualifying tenants of their flats, it follows that MHT, as the owner of a long lease in reversion on inferior long leases, cannot be the qualifying tenant of any of those flats: s.75(6).

The second issue: is MHT a qualifying tenant of the socially rented flats?

45. The decision on the first issue means that the claim notices were not invalid because notices of invitation to participate were not served on MHT in respect of flats in Edgemere House. But Avon contends that they were invalid because notices of invitation to participate were not served on MHT as qualifying tenant of each of the flats in Vale House and Wessex House, which are socially rented to occupiers who are not long lessees.

46. There is no doubt that MHT is a tenant of each of those flats under a long lease. The fact that each long lease is of more than one such flat is irrelevant: s.112(4). None of the disqualifications in s. 75 applies and so, according to that section, which specifies whether there is a qualifying tenant of a flat and who it is, MHT is the qualifying tenant.

47. That does not strike me as a surprising conclusion to reach. The purpose of the right to manage provisions of the 2002 Act was to give those with the largest capital stake in a building the right (subject to sufficient support from their peers) to control its management, through a vehicle in which the landlords too can have an interest. An owner of a long lease of a flat that is rented to short-term occupiers is clearly the person who has the largest capital stake in that part of the building. One would therefore expect such a person to be the qualifying tenant, regardless of the fact that they are receiving rent from a tenant who occupies the flat.

48. Further, if a long lessee in that position is not a qualifying tenant, there is no qualifying tenant of such flats. The freeholder is not a tenant and the occupier does not have a long lease and so is not a qualifying tenant. In many blocks, there would therefore be a paucity of qualifying tenants, with the consequence that the 50% threshold for the right to serve a claim notice could not be achieved. As Mr Bates put it in argument, to deny the long lessee the rights of a qualifying tenant is in practice to introduce a condition of residence for the

right to manage to be exercised; yet it was the 2002 Act that abolished the requirement of residence for exercise of the enfranchisement rights in the 1967 and 1993 Acts. I find these points persuasive.

49. The argument that is advanced by Mr Loveday in support of the FTT's decision that MHT is not a qualifying tenant is that the overall scheme of the right to manage provisions cannot work if a person who is a landlord is also a qualifying tenant. It is therefore implicit, he says, that anyone who is a landlord within the wide meaning of this part of the 2002 Act cannot be a qualifying tenant.

50. "Landlord" is very widely defined: it is not restricted to a landlord who has management functions in the building or an interest in more than one flat, or someone who is a landlord under a long lease. It includes a landlord under a tenancy or a sub-tenancy. A landlord under a short oral sub-tenancy is therefore a landlord, as indeed would be a long lessee who sub-let a room in their flat.

51. Apart from qualifying tenants, "landlords under leases of the whole or any part of the premises" are entitled to be members of the RTM company, but not before the acquisition date. There is accordingly no requirement to serve a notice of invitation to participate on a landlord, but a claim notice must be given to each person who is "landlord under a lease of the whole or any part of the premises". The "premises" here referred to are the building or part of a building to which the right to manage provisions apply, so in this case Canary A's building and Canary B's building separately.

52. The reasons advanced by Mr Loveday (either in writing or orally) why someone in MHT's position as a landlord cannot be a qualifying tenant are the following.

    a. First, it would enable a landlord to become a member of an RTM company before the acquisition date, contrary to s.74(1), and enable it to have a vote on whether to serve a claim notice on persons including itself.

    b. Second, it makes no sense that a person will receive both an invitation to participate in acquiring the right to manage and a claim notice that entitles them to serve a counternotice opposing the acquisition.

    c. Third, the voting provisions of the articles of association of Canary A and Canary B would be subverted if a landlord could become a member of the RTM company as a qualifying tenant.

    d. A landlord under a short tenancy would be hard for the RTM company to identify, since such leases would not be registered.

    e. MHT is not a qualifying tenant in right of one property interest and a landlord in right of another, but has a single interest in each of the blocks of flats, which therefore cannot be both the interest of a tenant and of a landlord.

53. I agree that if a long lessee who has sub-let his flat is a qualifying tenant, they will be entitled to become a member of an RTM company before the acquisition date and so in a position to influence the steps taken to acquire the right to manage. They will also be potentially liable for the reasonable costs of a landlord or other party to a lease incurred in response to a claim notice: s. 89(3). But the reason that they are in that position is because they are a qualifying tenant: they have a substantial capital stake in the building as a long lessee of a flat and are entitled to a say in how the building is managed. If they are also a landlord they may or may not have an interest in that capacity in resisting acquisition of the right to manage, depending on whether the long lease carries management rights or responsibilities. A long lessee of one or more individual flats will not be in that position, but a headlessee whose head lease carries with it management functions may be.

54. The reality, however, is that most long lessees of flats pay for management services rather than providing them. A long lessee will either be in favour of acquisition or against it. They will therefore wish either to become a qualifying tenant member of the RTM company in support or not to do so and seek to oppose at a later stage, if they can. It is inconceivable in practice that they would do both, though, theoretically, a long lessee who had sub-let on a rack rent could seek to join the RTM company at an early stage and exercise influence against serving a claim notice.

55. Although the draughtsman of the Act may not have had headleases principally in mind, the Act does make provision in that regard: s. 75(6) deals with the case of multiple long leases. There is no doubt that the language of the 2002 Act also accommodates the case of a long headlessee who underlets flats on shorter tenancies.

56. Mr Loveday seeks to read into the Act a prohibition on a landlord of any kind being a qualifying tenant. I am unable to see any reason in principle why a long lessee who has sub-let a flat or many flats should be unable to join the RTM company as a qualifying tenant. Similarly, I do not see why the RTM company should not have to serve a notice of invitation to participate on a qualifying tenant of that type because, at a later stage, if a claim notice is to be served, it will have to be served on the same person, as a landlord. The Act specifies that a claim notice must be given to each person who, on the relevant date, is landlord under a lease of the whole *or any part of* the building, not only on landlords who have management functions. It is true that service of a claim notice will entitle the recipient to give a counternotice, but the process of challenge is not akin to a vote on whether the acquisition should proceed. The claim notice can only be challenged if the RTM company has not satisfied a requirement of the right to manage provisions of the Act.

57. It would follow that a landlord who joined the RTM company as a qualifying tenant but failed to persuade other members not to serve a claim notice could then serve a counternotice in their landlord capacity. I accept that is something of an oddity in that someone who is a member of the RTM company will then be opposing its democratically chosen course, but it is not the case that they have stolen a march in some way by becoming a member before the acquisition date. They had a vote on the RTM company's proposal to serve a claim notice but have no better right, as a result of membership, to serve a counternotice and oppose acquisition than if they had not become a member.

58. To my mind, it would be an even odder outcome that someone who had the proper interests of a service charge-paying qualifying tenant of one or more flats should be prevented from becoming a member to support acquisition of the right to manage because of a possibility that it might serve a counternotice, which in fact it had no desire (and may have no ground) to do. Any qualifying tenant would lose their status by granting a sub-tenancy of their flat. In a case where many flats in a building are owned as investments, the FTT's interpretation of the 2002 Act will effectively prevent acquisition of the right to manage for lack of supporting members. The need for a qualifying tenant to be served with a claim notice as landlord is of no significance because it would have to be given a copy of the claim notice as a qualifying tenant in any event: s. 79(8).

59. I do not see why the fact that MHT has only one property interest in each block means that it cannot be a qualifying tenant of each flat comprised in its headlease. S. 110(4) expressly contemplates that it can be. It is always the case that an intermediate landlord is both a landlord and a tenant and the 2002 Act in that respect only reflects reality.

60. Mr Loveday's main argument was based on the way that the voting provisions of the articles of association of an RTM company would fail to operate properly (he said) if landlords who have long leases of numerous flats are qualifying tenants and members of the RTM company. The FTT mentioned in its decision that the distinction between qualifying tenant members and landlord members of an RTM company is "followed through both in the 2009 regulations and in subsequent sections of the Act" but did not refer to any of the regulations. It did however describe its understanding of the way that voting rights of members of the RTM company would operate before and after the acquisition date.

61. The 2009 regulations alluded to by the FTT are The RTM Companies (Model Articles) (England) Regulations 2009 (S.I. 2009/2767) ("the 2009 Regulations"). These prescribe mandatory articles of association for RTM companies. Of the articles, Mr Loveday referred to a number in his skeleton argument, but only one seems to me to be of any real relevance to the issue. That is article 33, which governs voting by members of an RTM company and was the focus of Mr Loveday's oral argument. The relevant parts of article 33 are:

> "(2) If there are no landlords under leases of the whole or any part of the Premises who are members of the company, then one vote shall be available to be case in respect of each flat in the Premises. The vote shall be cast by the member who is the qualifying tenant of the flat.
>
> (3) At any time at which there are any landlords under leases of the whole or any part of the Premises who are members of the company, the votes available to be case shall be determined as follows –
>
> > (a) there shall first be allocated to each residential flat in the Premises the same number of votes as equals the total number of members of the company who are landlords underleases of the whole or any part of the

> Premises. Landlords under a lease who are regarded as jointly being a member of the company shall be counted as one member this purpose;
>
> ……..
>
> (c) the votes allocated to each residential unit shall be entitled to be cast by the member who is the qualifying tenant of that unit, or if there is no qualifying tenant of the unit, by the member who is the immediate landlord. The immediate landlord will not be entitled to the vote of a residential unit held by a qualifying tenant who is not a member of the RTM company;
>
> ……
>
> (e) if a residential unit is not subject to any lease, no vote shall be entitled to be cast in respect of it;
>
> (f) any person who is a landlord under a lease or leases of the whole or any part of the Premises and who is a member of the company but is not otherwise entitled to any votes, shall be entitled to one vote."

The terms "landlord" and "tenant" are not defined in the articles, but "immediate landlord" is defined in relation to a unit in the building as being the landlord under a lease of the unit or, where there is more than one lease, under whichever lease is inferior to any other lease(s).

62. Article 33(2) will apply whenever there are no landlord members: this might be before or after the acquisition date. In those circumstances, the voting structure is simple: each flat with a qualifying tenant member has one vote. If a flat has no qualifying tenant member it has no vote.

63. Article 33(3) applies at any time when there are landlord members. Under it, each unit has a number of votes that is equal to the total number of landlord members. Thus, if there are three landlords who have become members, each unit has 3 votes. The votes allocated to each unit are cast by its qualifying tenant member, if there is one. If there is no qualifying tenant of that unit, the votes are cast by the member who is the immediate landlord of the unit. If there is a qualifying tenant of a unit but he is not a member, the immediate landlord of that unit does not have its votes. In addition, each landlord member who is not otherwise entitled to any votes has one vote.

64. These provisions may well have been drafted on the assumption that landlords only become members after the acquisition date, and that qualifying tenant members are treated as such and not as landlords for these purposes. (On the other hand, the definition of "immediate landlord" recognises that there may be an intermediate landlord, and article 33(3)(c) recognises that there may be a tenant of a flat who is not a qualifying tenant.) Article 33(3) appears designed to ensure that, however many landlord members there are,

the qualifying tenant members have the majority of votes; they also ensure that each landlord has at least one vote.

65. If qualifying tenants who are also landlords count as landlord members for the purpose of article 33(a), the effect is that each unit will have a significant number of votes allocated to it and that the votes will be cast by the qualifying tenant member of each flat, where there is one. If the qualifying tenant members are in the majority (which they will be in most if not all cases), this will tend to increase their majority in number of votes, if they all vote the same way. There is no obvious need for that, except in providing for a case in which a building has few flats but several landlords, but it does not subvert the purpose of article 33 or upset the intended balance of voting rights. The effect will be that article 33(3) then applies instead of article 33(2) before the acquisition date, but at that stage there can be no landlord members of the RTM company who are not also qualifying tenants.

66. The argument that the voting provisions would be subverted if landlords could become RTM company members before the acquisition date therefore depends on the assumption that article 33(2) alone must apply before the acquisition date. The articles do not say that and it is not necessary to interpret them as doing so. In any event, the 2009 Regulations cannot properly be used as an aid to interpret the 2002 Act, let alone determine its meaning.

67. As for the point that landlords under short tenancies will be hard to identify, this seems to me to be a point against the RTM Companies rather than in their favour. If their argument is right, there will be prevailing uncertainty about who is a qualifying tenant because the position will change every time that a qualifying tenant grants an unregistered sub-tenancy of a flat. On the other hand, if qualifying tenants are such in right of their own interests (invariably long leases) the position will be clear from the titles at the Land Registry.

68. A further reason why, in my judgment, Mr Loveday's interpretation of the 2002 Act is implausible is that the question of who are qualifying tenants and whether the necessary number of them are members of the RTM company logically and chronologically precede any question of the identity of landlords to be served with a claim notice. To conclude, as the FTT did, that MHT cannot be a qualifying tenant because it is a landlord is to allow the tail to wag the dog. If anything had to be implied into the statute to make it work, it would surely be that a qualifying tenant who is a member of the RTM company cannot also be a "landlord", rather than the other way round. But in my judgment it is not necessary to read anything into the Act's provisions because they work satisfactorily without doing so, on their ordinary and natural meaning.

69. Accordingly, I conclude that MHT was the qualifying tenant of each of the flats that were sub-let to social rented tenants. It should therefore have been given by each of Canary A and Canary B a notice of invitation to participate at least 14 days before the claim notices were served.

Issue 3: Effect of non-service of notice of invitation to participate

70. The FTT decided, applying *Elim Court RTM Co Ltd v Avon Freeholds Ltd*, that any failure of the RTM Companies to comply with the requirement in s. 78(1) to give notices of invitation to participate to all qualifying tenants did not invalidate the claim notices.

71. Avon contends that that is wrong, and that, objectively, the service of a notice of invitation to participate gives each qualifying tenant something important, namely the opportunity to get involved in the RTM company and influence the proposed acquisition, as well as information about what is proposed (e.g. whether the company will engage a professional manager or has the necessary time and skill itself). Further, service or non-service of such notices can affect satisfaction of the threshold condition that requires the company to have qualifying tenant members of at least half of the flats in the building.

72. The right test to apply in this context to decide whether failure to comply with a procedural requirement invalidates the step taken was authoritatively decided in *Elim Court*, by reference to the case of *Osman v Natt* [2014] EWCA Civ 1520; [2015] 1 WLR 1536. In that case, which concerned a notice of claim under the collective enfranchisement provisions of the 1993 Act, the Court of Appeal held that the right approach, where a statute confers a property or similar right, is to identify Parliament's intention as to the consequences of non-compliance, as an exercise of statutory interpretation; and that this involves, among other things, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole, and does not turn on the particular circumstances of the parties, such as whether any prejudice was actually caused. In *Elim Court* Lewison LJ concluded that the right to manage provisions of the 2002 Act did confer a property or similar right within the principles stated in *Osman v Natt* and that accordingly the approach explained in that case was applicable. That decision is binding on this Tribunal.

73. Lewison LJ elaborated on the principles as follows, at [52]:

> "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: see para 32. The intention of the legislature as to the consequences of non-compliance with the statutory procedures with the statutory procedure is (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole: see para 33. 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: see para 34. 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… 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."

Clearly, those observations were tailored to a case in which prescribed information has been omitted, but the interpretative approach is of general relevance.

74. Having referred to *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC); [2016] L & TR 23, a decision of Martin Rodger QC, the Deputy President of this Tribunal, in which it was held that a notice of invitation to participate that omitted prescribed notes was invalid, Lewison LJ said that it did not follow that every defect in a notice or in the procedure, however trivial, invalidated the notice:

> "As Sir Terence Etherton C pointed out, even if there is no principle of substantial compliance the court must nevertheless decide as a matter of statutory construction whether the notice is 'wholly valid or wholly invalid'. In considering the question of validity, although the court should not inquire into the question whether prejudice had been caused on the particular facts of the actual case (*Osman v Natt* [2015] 1 WLR 1536, para 32), that does not mean that prejudice in a generic sense is irrelevant."

At [58], he said:

> "In this case it must also be recalled that the persons (and the only persons) entitled to object to the exercise of the right to manage our the landlord (or landlords), a party to a lease who is neither landlord nor tenant, or a court appointed manager. As Mr Jacob submitted, in the majority of cases these are persons who are likely to have management responsibilities in the sense defined in section 96(5). In the light of the general policy described in the consultation paper, the focus must be on whether Parliament intended that a landlord (or other person entitled to serve a counternotice) could successfully contend that the defect in the relevant notice was fatal to its validity."

75. The conclusion on the failure to specify a Saturday or Sunday for inspection was that this was trivial non-compliance that, objectively, could occasion little if any prejudice. Lewison LJ commented on the significance of failure to serve a compliant notice of invitation to participate:

> "It might also be questioned what difference it makes to the landlord (who is the only person objecting) whether or not a potential member of the RTM company has or has not had the opportunity to inspect the articles of association provided that, when the claim notice was served, there were in fact sufficient qualifying tenants who were members of the RTM company to make it eligible to claim the right to manage. Section 81(2) of the Act [notice not invalidated by inclusion of name of non-qualifying tenant] gives a steer in that direction. It is quite unrealistic to view a landlord who fiercely resists the acquisition of the right to manage as being in some way the guardian angel of the qualifying tenants."

That observation serves to emphasise that it is potential prejudice to the qualifying tenants that is relevant.

76. In that case, the Court of Appeal also had to consider whether failure to serve a claim notice on a landlord invalidated the claim notice. In that regard, Lewison LJ identified at [71] that the statutory scheme presupposed that inability to serve some but not all of the landlords did not render a claim notice invalid. It was further significant that the intermediate landlord that had not been served had no management responsibilities. The court concluded that failure to serve a claim notice on such a landlord does not invalidate the notice.

77. There was, therefore, no consideration in *Elim Court* of a case where a notice of invitation to participate is not served on a qualifying tenant. Nor did it arise in the *Triplerose* case, where notices were served but were not accompanied by all the prescribed information. Although he referred to s. 79(2) in describing the statutory scheme, Lewison LJ did not have to construe it.

78. In *Triplerose*, the Deputy President said at [40]:

> "The critical importance of the notice of invitation to participate in the statutory scheme is apparent from s. 79(2) which prevents the service of a claim notice unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before. Section 79(2) is an express provision identifying the consequences of a failure to comply with s.78(1). That consequence is a prohibition on the service of a claim notice. The giving of a valid notice of invitation to participate to each person who at the time when the notice is given is the qualifying tenant of a flat in the premises and is neither a member nor has agreed to become a member of the RTM company is therefore an essential pre-condition to any further progress towards the acquisition of the right to manage. The implication from *Sinclair Gardens Investments (Kensington) Ltd v Oak investments RTM Co Ltd* that something less than full compliance might be good enough ought not to be relied on."

He continued and expressed his conclusion at [46]-[47]:

> "The F-tT took the view that the 2002 Act does not make any provision for the consequences of a failure to comply with the provisions relating to notices, but it did not appreciate that s.79(2) is such a provision. It based its decision on its view that those requirements were "directory rather than mandatory", but as the Chancellor explained in *Natt v Osman* , that is now regarded as an unsatisfactory approach…
>
> I am satisfied that as a matter of construction of the statutory scheme the inclusion of the notes in the prescribed form is essential to the validity of a notice of invitation to participate. It follows that the document served on the qualifying tenants which omitted the notes in their entirety were not notices of invitation to participate compliant with s.78. As a result the RTM company was prohibited by s.79(2) from giving a claim notice seeking to acquire the right to manage. The claim for a

determination that the RTM Company had acquired a right to manage must therefore be dismissed."

79. It was therefore the Deputy President's conclusion that notices of invitation to participate within the meaning of s. 78 were not given to the qualifying tenants, since they lacked essential information that such a notice provides, and that the Act itself prescribed the consequence of non-compliance in that regard. His decision (with which the Court of Appeal in *Elim Court* did not disagree) can be reconciled with that decision on the basis that failure to specify a weekend date was trivial non-compliance that did not lead to the conclusion that notices of invitation to participate were not given. They were given, but in an immaterially defective form. The Court of Appeal for that reason did not have to address whether the Deputy President's interpretation of s. 79(2) was correct.

80. I consider that it is correct and, in any event, I would have followed it as a reasoned decision of this Tribunal unless persuaded that it was wrong. My reasons follow.

81. The starting point is to ask whether it is a purpose of this legislation that an act done in breach of a provision should render a step taken invalid. If on its true interpretation the statute specifies the consequence of non-compliance, then effect must be given to that provision: see *Osman v Natt* at [33] and *Elim Court* at [52]. It is only where (as is common) the consequence of non-compliance with an apparently mandatory requirement is not specified that the exercise described by the Court of Appeal in *Osman v Natt* must be performed, namely seeking to infer the legislative intention as to validity or non-validity in the event of non-compliance.

82. S. 78 states that a notice of invitation to participate "must" be given to each person who is a qualifying tenant and prescribes certain form and content for such a notice. As with the apparently obligatory requirement in s. 79 to give a claim notice to each landlord, that mandatory language is not determinative of whether failure to comply has the consequence of invalidating the RTM company's claim, although the indication in s. 78(7) that inaccuracy in the particulars required to be included in a notice of invitation to participate does not invalidate it is an indication that other failures in connection with such notices may do so. Section 79(2) however goes further and states that a claim notice *may not be given* unless each person required to be given a notice of invitation to participate has been given one at least 14 days before a claim notice is given.

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.

85. The purpose of the notice of invitation to participate is to notify those qualifying tenants (i.e. persons with a significant capital stake in the building) not already members or intending to become members of the RTM company of the proposal to claim the right to manage the building. The notices will be in the interests of existing members, if they are not already in number 50% of the flats in the building and in sharing the costs of acquisition as widely as possible, and in the interests of those who are entitled to become members but may be unaware of what is proposed, or unaware that a claim notice is imminent. The notices give such qualifying tenants information about what is proposed, the opportunity to join the company at that stage and have a voice in what is to be done and how it is carried out, and indeed the democratic opportunity to object or disagree before a claim notice is served. A qualifying tenant may become a member of the RTM company at any stage, so failure to give them a notice before the claim notice is served will not exclude them from future involvement, but it will prevent them from having a voice at the preliminary stage. The notices are therefore of some significance to those on whom they must be served by providing information about what is to happen and allowing each qualifying tenant to participate (or object), so that the RTM company that acquires the right to manage has, if possible, and is seen as having, a broad democratic mandate, rather than as representing the will of only a part (albeit a majority) of the flat owners.

86. By s. 111 of the 2002 Act, a notice must be in writing and may be sent by post. An RTM company may serve a notice on a qualifying tenant at the flat, unless it has been notified by the qualifying tenant of a different address for receipt of such notices. The RTM company may therefore generally deliver notices of invitation to participate by hand at the flats in the building, or post them to that address. If it posts the notice, whether to the flat or to another given address, there is a presumption of service by correctly addressing, pre-paying and posting a letter with the notice: s.7 Interpretation Act 1978.

87. It is therefore very easy for the RTM company to serve each 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. It is not necessary to investigate whether a long lessee has sub-let their flat in order to know that they are a qualifying tenant; only whether there is an inferior long lessee.

88. There is, admittedly, a risk of non-receipt by qualifying tenants who have sub-let and not provided an alternative address for service. Receipt of the notice of invitation to participate will then depend on forwarding arrangements made between the qualifying tenant and the occupier of the flat. In my view, Parliament can be taken to have been willing to allocate that risk to the qualifying tenant and not to the RTM company.

89. Invalid claim notices do have consequences, if they are challenged by timely service of a counternotice. The RTM company and the qualifying tenant members are liable for the

costs reasonably incurred by landlords in dealing with a claim notice, and if a claim for a determination of entitlement by the FTT fails, for the reasonable costs of defending that claim. But the RTM company's entitlement to manage – if it has one – is not lost or prejudiced by the invalidity of a claim notice. It can simply give further notices of invitation to participate, allow 14 days to elapse and serve a new claim notice. As Lewison LJ observed in the *Elim Court* case, that is a pointer towards invalidity.

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. If all that Parliament had meant to do was require notices of invitation to participate to be given at least 14 days before a claim notice is served, that could have been achieved by placing the words "At least 14 days .." before the start of s. 78(1). That point may not be conclusive on its own, but it is of some force because the Parliamentary draughtsman can be assumed to know that the language of s. 79(2) is apt to be construed as specifying the consequence of non-compliance. In the context of the statutory scheme as a whole, and giving the provision its ordinary and natural meaning, it appears to me to be wrong to construe it as only performing a more limited function.

91. In a case called *Avon Freeholds Ltd v Regent Court RTM Co Ltd* [2013] UKUT 213 (LC), the then President, Sir Keith Lindblom, held that failure to serve a notice of invitation to participate on one qualifying tenant did not invalidate the claim notice in that case. However, the test that the President applied was "whether the statutory provisions have been substantially complied with and whether such prejudice has been caused as to undermine the right to manage process as a whole" (para [39]). With the benefit of hindsight it is clear that that was the wrong test – it is the test applicable to a different category of statutory requirements, described by Sir Terence Etherton as "cases in which the decision of a public body is challenged … or which concern procedural requirements for challenging a decision whether by litigation or some other process" (*Osman v Natt*, para [28]). To that category of case the well-known public law authorities of *R v Immigration Appeal Tribunal, ex parte Jeyeantham* [1999] 3 All ER 231 and *R v Soneji* [2006] 1 A.C. 340 cited by the President apply, but they do not apply in the category of case where statute confers property or similar rights subject to compliance with specified requirements. His decision should therefore not be followed as an authority on the right to manage provisions.

92. It is a matter of some regret that, once again, non-compliance in this case, which does not appear to have prejudiced any of the qualifying tenants, has provided an opportunity for Avon to delay the acquisition of the right to manage at the expense of the members of Canary A and Canary B. There can have been no prejudice to Avon, nor is Avon purporting to act in the best interests of MHT. However, the conclusion that I have reached is a consequence of the way that the legislation is drafted. In a consultation paper *Leasehold home ownership: exercising the right to manage* (January 2019), the Law Commission proposed abolition of the requirement for notices of invitation to participate on the grounds that they generally served little purpose and only increased costs and the opportunity for landlords to defeat claims. In its Report *Leasehold home ownership: exercising the right*

to manage (July 2020), the Law Commission confirmed its proposal. It may therefore be the case that the problem disappears, but in the meantime RTM companies need to be scrupulous to serve all qualifying tenants who are not already members of the RTM company and have not agreed to become a member with a notice in the right form.

93. For the reasons that I have given, I must allow this appeal.

Mr Justice Fancourt

Chamber President

Dated: 16 December 2020