Neutral Citation Number: [2025] EWCA Civ 1016

Case No: CA-2024-002828

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Upper Tribunal Judge Elizabeth Cooke
[2024] UKUT 335 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2025

Before:

LORD JUSTICE NEWEY
LORD JUSTICE JEREMY BAKER
and
SIR LAUNCELOT HENDERSON

- -

Between:

Avon Freeholds Limited	**Appellant**
- and -	
Cresta Court E RTM Company Ltd	**Respondent**

- -
- -

Justin Bates KC and Sophie Gibson (instructed by **Scott Cohen Solicitors Limited**) for the **Appellant**
Winston Jacob and Chelsea Sparks (instructed by **direct access**) for the **Respondent**

Hearing date: 19 June 2025

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Approved Judgment

This judgment was handed down remotely at 11.00 am on 30 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Launcelot Henderson:

Introduction

1. In the Commonhold and Leasehold Reform Act 2002 ("the CLRA" or "the 2002 Act") Parliament enacted a new and self-contained regime under which qualifying tenants may acquire the right to take over the management of their block of flats on a no-fault basis (that is to say, without needing to prove any mismanagement by the landlord) and without payment of any compensation. The right is exercisable through the formation of a right to manage ("RTM") company which gives a notice of its claim to acquire the right to manage the relevant premises (a "claim notice") to the landlord and other specified recipients. The detailed provisions which govern the procedure are set out in Chapter 1 of Part 2 of the CLRA, running from sections 71 to 113.

2. The respondent to this appeal is an RTM company which was formed to acquire the right to manage a self-contained part of a block of flats at Cresta Court, Hanger Lane, London W5, consisting of flats 7 to 26 ("the Property"). Five separate RTM companies were formed at the same time to acquire the right to manage other self-contained parts of Cresta Court and a neighbouring block of flats at Hill Court.

3. The appellant, Avon Freeholds Ltd ("Avon"), is the registered freehold owner of the Property.

4. Under section 79(2) of the CLRA, the claim notice "may not be given" by the RTM company "unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before". It is convenient to refer to such a notice as a "participation notice".

5. By virtue of section 78(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."

6. A participation notice given under section 78 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, [and] (c) invite the recipients of the notice to become members of the company …":

see subsection (2).

7. The question of who is the qualifying tenant of a flat, and therefore is a person to whom a participation notice must be given, is answered by reference to section 75 which in subsection (2) states the general rule that:

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

The basic definition of a "long lease" in section 76(2)(a) is that

> "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."

8. In the present case, the tenant of Flat 17 Cresta Court at the time when the respondent RTM company gave notice of its claim to the freeholder by a claim notice dated 21 January 2022 was Ms Beverley O'Connor. She held Flat 17 under a lease granted to her directly by Avon on 17 April 2020 for a term of 150 years from 1 January 2015. Her lease was undoubtedly a "long lease" as defined in section 76(2)(a) of the 2002 Act, but her leasehold title was not registered at HM Land Registry until after the claim notice was served. The registration of her title was then backdated to 15 July 2021, that being the date when her application for registration was evidently made. But at the date when the claim notice was given, Ms O'Connor's legal title had not yet been registered, and a search of the register would have revealed no more than a note on the freehold title of a pending application. Such notes do not say what is the application to which they refer, and it is common ground that the respondent did not make any enquiries about it.

9. It is also common ground that the respondent did not give a participation notice to Ms O'Connor at Flat 17, either within the period ending 14 days before the notice was given stipulated by section 79(2) or at any time thereafter. On the other hand, there can be no doubt what her reaction would have been had a participation notice been given to her. On 26 January 2022 she gave a written consent to become a member of the respondent, and if she had given that consent at least 14 days before the claim notice was served, there would then have been no requirement to give her a participation notice at all: see section 78(1)(b), quoted at [5] above.

10. The circumstances which I have briefly recounted explain the background to the present litigation, which began with an application by the respondent to the First-tier Tribunal (Property Chamber) ("the FTT") under section 84(3) of the 2002 Act, after Avon had given a counter-notice to the notice of claim alleging that the claim notice was invalid because the respondent had not given a participation notice to Ms O'Connor who was a qualifying tenant of Flat 17. In accordance with section 84(3), the respondent sought a "determination that it was on the relevant date entitled to acquire the right to manage the premises". The FTT also had before it five related applications, raising different points, brought by the other Cresta Court and Hill Court RTM companies.

11. The FTT (Judge P Korn and Mrs A Flynn MRICS) gave its written decision ("the FTT Decision") on 11 May 2023, following an oral hearing on 24 April 2023. At the hearing, the RTM companies (including the respondent) were represented by Mr D

Joiner, who was the sole director of RTMF Services Ltd, the company secretary of the RTM companies. Avon was represented, as it has been throughout, by Mr Justin Bates of counsel (now KC). The FTT dismissed all the challenges to the claim notices and upheld their validity.

12. In relation to Flat 17 of Cresta Court, the FTT began by rejecting any argument that the respondent could rely on Ms O'Connor's subsequent written consent to become a member of the respondent, on the (clearly correct) basis that the consent was given too late to satisfy the requirements of section 78: see para 30 of the FTT Decision. The FTT then recorded (at paragraph 31) that the main argument advanced by the respondent was that Ms O'Connor was not a qualifying tenant when the claim was made because her lease was not registered. The FTT considered this argument at paragraphs 32 to 37, and began by saying:

> "However, as noted by [Avon], section 112(2) of the Act defines 'lease' as including an agreement for lease and section 112(3) of the Act directs that the expression 'tenant' be construed accordingly. 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."

13. In the view of the FTT, however, this was not the end of the matter, as part of the RTM companies' argument was that they were not on notice as to the existence of the lease of Flat 17. Avon countered, in turn, that they were on notice because of the note on the freehold title that there were pending applications for registration against the freehold title, in answer to which the respondent submitted that the legislative scheme would not be workable if whenever an RTM company became aware of a pending application for registration it could not give the claim notice until it had ascertained whether that pending application related to a newly completed lease: see paragraph 33.

14. This argument was in substance accepted by the FTT, for the reasons which it gave at paragraphs 34 to 36, but which I will not repeat as no argument based on absence of notice is now advanced on the respondent's behalf. It also emerged before the Upper Tribunal that the factual basis upon which the argument had been advanced before the FTT may have been unreliable: see [33] to [35] below. For present purposes, therefore, it is enough to record the FTT's conclusion at paragraph 37:

> "In conclusion … we do not accept that a failure by a RTM company to give a [participation notice] 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 lease – in the absence of its 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 a [participation notice] to the tenant of Flat 17 Cresta Court did not invalidate the claim notice."

The decision of the Upper Tribunal

15. The hearing before the Lands Chamber of the Upper Tribunal ("UT") (UT Judge Elizabeth Cooke, "the Judge") took place on 6 June 2024. The UT had before it the appeal of Avon from the FTT's finding that the failure to give a participation notice to Ms O'Connor did not invalidate the claim notice, and the cross-appeal of the respondent against the finding that the tenant of Flat 17 was a qualifying tenant. Mr Bates KC leading Ms Sophie Gibson appeared for Avon, and Mr Jacob again appeared for the respondent. With the agreement of the parties, the Judge delayed the publication of her decision until after the Supreme Court had delivered its decision in the case of *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co Ltd* [2024] UKSC 27, [2024] 3 WLR 601 ("*A1 Properties*"), in which the appeal had been heard on 8 February 2024 and judgment was pending. In the event, the Supreme Court gave its judgment on 16 August 2024, and the parties exchanged written submissions on its impact. The decision of the UT ("the UT Decision") was then promulgated on 28 October 2024: [2024] UKUT 335 (LC).

16. The UT Decision is conspicuously clear and well-written, reflecting the Judge's expertise in land law and her experience as a Law Commissioner. I will of course need to consider aspects of her reasoning in detail in this judgment, but this should not detract from the profit and pleasure to be derived from reading the UT Decision in its entirety. At [1] she correctly identified the two "interesting questions" raised by the appeals as:

> "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?"

17. In agreement with the FTT, the UT answered the first question in the affirmative; but the UT went on to answer the second question in the negative, albeit for reasons different from those given by the FTT and strongly influenced by the Judge's understanding of the analysis and conclusions of the Supreme Court in *A1 Properties*. The ultimate conclusion of the UT was, therefore, that the claim notice served by the respondent was valid. As the Judge said at [146]:

> "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."

18. Avon now appeals to this court on the second question, with permission for a second appeal given by the UT. In granting permission, the Judge said that she had no hesitation in doing so in light of the importance of the point in issue and the difficulty in interpreting paragraph 69 of the decision of the Supreme Court in *A1 Properties*.

19. By a respondent's notice, the first question is also before this court for determination. The respondent asks us to hold that "only a tenant with a legal (as opposed to equitable) tenancy can be a qualifying tenant".

The statutory framework

20. The main relevant statutory provisions are set out in the UT Decision at [4] to [13].

21. A fuller account of the policy background to the statutory regime in the CLRA, and of its key provisions, may be found in *A1 Properties* at [22] to [45] of the judgment of Lord Briggs and Lord Sales JJSC (with whom Lord Hamblen, Lord Leggatt and Lord Stephens JJSC agreed). As the Supreme Court there explained, the legislation had its origin in a consultation paper issued by the Government in November 1998 in relation to various possible reforms in respect of residential leaseholds. In the light of the responses received the Government formulated its policy and a draft bill to implement it, contained in a further consultation paper published in August 2000 (*Commonhold and Leasehold Reform, Draft Bill and Consultation Paper* (Cm 4853) ("the Consultation Paper"): see *A1 Properties* at [23] and [24].

22. The Consultation Paper described the "overall objective of the proposals" at paragraph 10 of Section 3:

> "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. The allocation of responsibilities should be clear-cut, and the body through which the leaseholders take on management responsibility should enjoy all necessary powers to properly discharge its functions. At the same time, the legitimate interest of the landlord in the property should be properly recognised and safeguarded."

The Supreme Court observed at [25] that it was "legitimate to have regard to this paragraph as a general statement of the purpose of the CLRA" because it was "functionally equivalent to a government white paper and other types of report proposing draft legislation, which are legitimate guides to the purpose of legislation adopted in the light of them", citing well-known authority to that effect.

23. Section 72 of the CLRA defines the premises to which Chapter 1 of Part 2 applies, helpfully summarised in *A1 Properties* at [27] as

> "a self-contained building or part of a building containing two or more flats held by qualifying tenants, where 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."

24. Section 112 sets out definitions, of which subsections (2) and (3) are important for consideration of the issue whether Ms O'Connor was a qualifying tenant of Flat 17 at the material time:

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

25. In relation to the role and membership of an RTM company, it is again convenient to quote the summary in *A1 Properties* at [29] and [30]:

> "29. Section 73 specifies that a RTM company has to be a private company limited by guarantee whose articles of association state that its objects include the acquisition and exercise of the right to manage the premises. There can only be one RTM company in relation to premises: section 73(4).
>
> 30. The persons entitled to be members of a RTM company are qualifying tenants of flats contained in the premises and, from the date when it acquires the right to manage, landlords under leases of the whole or any part of the premises: section 74(1). The basic rule is that a person is the qualifying tenant of a flat if he or she is tenant of the flat under a long lease: section 75(2). Sections 76 and 77 make detailed provision regarding which leases count as long leases for these purposes. The basic rule is that a lease is a long lease if it is granted for a term exceeding 21 years: section 76(2)(a)."

26. By virtue of section 75(5), "No flat has more than one qualifying tenant at any one time; and subsections (6) and (7) apply accordingly". Those subsections then deal, respectively, with cases where a flat is let under two or more long leases, or where it is let to joint tenants under a long lease.

27. The definition of what is a long lease for the purposes of Chapter 1 in section 76 includes a number of special cases set out in subsection (2)(b) to (f), in addition to the basic rule in section 76(2)(a). The special cases include, for example, shared ownership leases (of any duration) where the tenant's total share is 100 per cent and leases granted in pursuance of the right to buy conferred by Part 5 of the Housing Act 1985.

28. Section 79 lays down the procedure for the giving of a claim notice by an RTM company to the landlord and others. In any case where there are more than two qualifying tenants of flats contained in the premises, the membership of the RTM company must on the date when the notice is given (the "relevant date") include the

qualifying tenants of at least one-half of the total number of the flats: section 79(5). 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 … to act in relation to the premises": section 79(6). Section 79(7) deals with the position where the landlord or other person required to be served under subsection (6) cannot be found or his identity cannot be ascertained. Finally, section 79(8) provides that "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."

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

> "(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.
>
> …
>
> (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.
>
> …"

30. As the UT explained in [12] and [13]:

> "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."

The facts

31. There is little to add to the summary of the factual background I have already given.

32. The UT was willing to infer, at [18]: (a) that Ms O'Connor's application for registration of the lease of Flat 17 was made on 15 July 2021, because that was the date to which the registration was back-dated when it was eventually made; and (b) that it was to her application that the note of a pending application on the freehold title at the date of the claim notice referred. No challenge has been made before us to the drawing of either of these inferences. The UT added, at [19], that the reason for the delay in the registration of the lease of Flat 17 is not known, nor is the date on which the registration took place. But it had certainly not taken place by the crucial date, 14 days before the claim notice was given, and no participation notice was given to Ms O'Connor. Accordingly, on that crucial date, "Ms O'Connor held an equitable lease of flat 17 and there was no legal lease in existence": [21]. The effect of section 27 of the Land Registration Act 2002 ("LRA 2002") is that 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: [16] and LRA 2002 section 27(1) and (2)(b)(i).

33. At [28] the UT recorded that in the course of the appeal, and after the respondent had instructed counsel, "something of a wrinkle appeared" in relation to the facts that were before the FTT. Although Mr Joiner had told the FTT the position as he understood it, and he was personally unaware of the lease of Flat 17, it transpired that one of the directors of the respondent, Ms Hamida Bellenie, was aware of Ms O'Connor's presence in Flat 17. Ms O'Connor's mother had apparently rented the flat for many years, so she and her mother were known to Ms Bellenie; and when Ms O'Connor 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 she was supportive of the process but was waiting until after her lease was registered before becoming a member of the respondent.

34. The information summarised above was provided in a letter from Mr Joiner to Avon's solicitors dated 28 May 2024, some two weeks before the UT hearing. But no application was made to admit new evidence on the appeal, and there was no witness statement to verify it. The UT was concerned that the information "raises as many questions as it answers": [29]. For example, did Ms Bellenie share her knowledge with anyone else at the relevant time, and would she have appreciated that Ms O'Connor had an equitable lease because it had not yet been registered? In those circumstances, the Judge concluded at [30] that

> "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."

35. Neither side has submitted to us that the Judge was wrong to proceed in this way, and I am content to do likewise. Indeed, I think the Judge's decision on the point was inevitable in the absence of any application to admit fresh evidence or of any agreement by the parties to vary the facts found by the FTT.

Issue 1: was Ms O'Connor a qualifying tenant?

36. The Judge considered this issue at [31] to [70] of the UT Decision. She began by recording the arguments for Avon, presented for the most part by Mr Bates KC but on some points by Ms Gibson. Avon emphasised 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. They also have significant rights, such as to be a member of the RTM company (section 74), to receive a participation notice (section 78) and to receive a copy of the claim notice (section 79(8)). It would be inconsistent with the policy of the legislation to narrow down the availability of qualifying tenant status, submitted Avon, because that would deprive people of a potentially valuable right. If tenants in Ms O'Connor's position are not qualifying tenants, there is no obligation to inform them about an application to acquire the right to manage, which cannot have been Parliament's intention. Mr Bates KC instanced the example of a new block of 10 flats, where long leases have been granted but not registered, and some or all of the registrations are delayed by administrative problems at HM Land Registry, possibly for years. Meanwhile, all the tenants pay the same rent and service charges. This state of affairs, if the respondent's argument is correct, would initially prevent the block from being eligible for an RTM application under section 72, and later could exclude individual tenants from participation until enough flats are registered for the requirements of section 72 to be met.

37. Avon then pointed out that the definition of long leases in section 76 includes a number of categories of lease which are not required to be registered, for example a lease for life converted by section 149(6) of the Law of Property Act 1925 to a 90-year lease, and some categories which cannot be registered at all, such as a short shared-ownership lease under section 76(2)(e). Moreover, if an eligible "long lease" is either unregistered or unregistrable, its existence will not be disclosed on the register or discoverable by a search of HM Land Registry. This shows, submitted Avon, that equitable leases cannot be excluded simply because they are unregistered.

38. Avon's next point was that equitable leases are not excluded by anything in the wording of section 75, and the express inclusion of "an agreement for a lease or tenancy" in the definition section 112(2) shows that at least some common types of equitable lease are included: see *Walsh v Lonsdale* (1882) LR 21 Ch D 9 (CA). It is trite law that an agreement for a lease which is enforceable by specific performance takes effect as an equitable lease, and for most practical purposes an equitable lessee has the same rights as a legal lessee. This consideration applies with particular force where the lessee has applied to register his or her lease at HM Land Registry and is caught in the "registration gap": see *RM Residential Ltd v Westacre Estates Ltd* [2024] UKUT 56 (LC), [2024] L.&T.R. 19 where it was held that a landlord whose title is not yet registered is entitled to collect service charges and manage the property

as its owner. By parity of reasoning, said Avon, an equitable lessee of a flat is entitled to the status of qualifying tenant if the conditions in section 76 are met.

39. Indeed, Mr Bates KC submitted to the UT 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: [36] and [37].

40. For the respondent, Mr Jacob argued that an equitable lessee is never a qualifying tenant, and that only legal lessees are within the meaning of a "long lease" in section 75: [38]. He submitted that this was the natural interpretation of section 75, and referred to the decision of Martin Rodger QC (Deputy President) in *Assethold Limited v 7 Sunny Gardens Road RTM Company Limited* [2013] UKUT 0509 (LC) where he held that upon the death of a qualifying tenant the legal estate in the lease devolved on her personal representatives who then became the qualifying tenant, although this would not be visible on the register. The Deputy President therefore held that section 78(1) of the 2002 Act was not complied with because no participation notice was given to the deceased tenant's personal representatives before the claim notice was served on the RTM company: see his decision at [33].

41. Mr Jacob also sought support from other statutory contexts where procedural steps must be taken by the legal lessee, unless there is an express provision including an equitable lessee. Thus, for example, under the Landlord and Tenant Act 1954 a notice terminating a business tenancy under section 25 must be served by the legal freeholder, not a beneficial owner of the freehold (*Pearson v Alyo* (1990) 60 P & CR 56), but contrast the Leasehold Reform Act 1967 where section 37(1)(f) states expressly that "tenancy" means "a tenancy at law or in equity".

42. Mr Jacob further submitted that section 112(2) of the CLRA is qualified by the words "where the context permits" to which the FTT did not refer, and which are 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. He relied on the principle of construction against absurdity, referring to *Bennion, Bailey and Norbury on Statutory Interpretation*, chapter 13, where it is said that 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 pointless, artificial, or productive of a disproportionate counter-mischief."

43. Mr Jacob argued that the statutory scheme would be unworkable if an RTM company were required to serve participation notices on unknown and unidentifiable individuals. Nor could a satisfactory answer to the difficulty be found in section 82, which confers a right to obtain relevant information on RTM companies where it is reasonably required for ascertaining the particulars to be included in a claim notice. It would be impracticable, said Mr Jacob, to address a section 82 enquiry to the freeholder and to every tenant in a substantial block.

44. Finally, in his written submissions on *A1 Properties,* Mr Jacob drew a contrast between the position of landlords, who the Supreme Court accepted may often be difficult or impossible to identify, and qualifying tenants, of whom the Supreme Court said at [69] that "There will ordinarily be no difficulty in finding or identifying qualifying tenants", adding "The absence of any saving or dispensing provisions of

the type found in section 79(7) suggests that this was well understood by Parliament." The Supreme Court must therefore have taken the view, submitted Mr Jacob, that qualifying tenants would be easily identifiable from the Land Register because their leases would ordinarily be registered. 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.

45. With the benefit of these submissions, the Judge began her discussion of the issue at [51] of the UT Decision. I would summarise the main steps in her reasoning as follows.

46. First, the Judge disagreed with Mr Jacob that the natural reading of section 75(2) of the 2002 Act ("a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease") is that it refers to legal not equitable leases: [54]. As the Judge said (*ibid*) "A long lease-holder is in terms of ordinary language the lessee of their flat, whether or not their lease is registered."

47. Secondly, the absence of an express provision including equitable leases (such as section 37(1)(f) of the Leasehold Reform Act 1967) was not a problem in the light of section 112(2) which expressly includes "an agreement for a lease or tenancy". Such an agreement is an equitable lease, on principles going back to *Walsh v Lonsdale*; and if that is so, then section 75(2) must *a fortiori* include equitable leases within its ambit: [55].

48. Thirdly, however, section 112(2) is qualified by the words "where the context permits". Since there can only be one qualifying tenant of a flat (section 75(5)), the context clearly cannot permit the "lease" in section 75(2) to mean both a legal and an equitable lease of the same flat where that is the position: [56]. In most cases, that is not the position because, as a matter of fact, there is only one lease of a flat, and it is a legal one; but in some circumstances there is more than one lessee. For example, if a long lessee contracts to sell his flat, from the moment of exchange of contracts the purchaser falls within the scope of section 112(2) but the assignment on completion of the sale operates only in equity until the purchaser is registered as the lessee. Accordingly, from exchange of contracts to registration of the purchase there are two lessees. The question then is which of them (the registered vendor or the unregistered purchaser) is the qualifying tenant? A choice must be made: [57].

49. Fourthly, Avon's proposed solution, namely that in such circumstances the equitable tenant is the qualifying tenant, is not an available construction of the statute, both as a matter of common sense and applying the principle of "construction against absurdity": [58]. The Judge thought Avon's construction would "make the acquisition of the right to manage well-nigh impossible". As she explained (*ibid*):

> "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 [Avon] 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."

50. The Judge therefore concluded at [59] that

> "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."

This conclusion was in her view consistent with the analysis of the Deputy President in the *7 Sunny Gardens* case (see [40] above) and also with the reasoning of the Supreme Court in *A1 Properties,* where it said at [69] that

> "There will ordinarily be no difficulty in finding or identifying qualifying tenants".

As the Judge put it at [61]:

> "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 to look at the freeholder's registered title, read the names of the lessees of each flat, and know that they are the qualifying tenants."

51. The Judge then considered the position where, as in the present case, there is no legal lease but only an equitable one: [62]. In such a case, as she said at [63], "either the equitable lessee is the qualifying tenant, or there is no qualifying tenant of the flat in question". She then asked herself whether the need to construe against absurdity ruled out a reading of section 75 that takes the qualifying tenant to be the equitable lessee where *there is no legal lessee* (my emphasis), and answered that question as follows at [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 … That legal lease is undiscoverable until registered, but there is no escape from the conclusion that the lessee is a qualifying tenant."

52. After some further discussion of the last of those examples, the Judge considered at [68] whether there was any reason why a lessee (such as Ms O'Connor) whose lease

was granted out of a registered estate, taking effect in equity until registered, should not be the qualifying tenant. The Judge continued:

> "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* …) 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."

53. The Judge then stated her final conclusion at [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."

54. It followed from this conclusion that Ms O'Connor was a qualifying tenant at the relevant time, and she was therefore a person on whom section 78 required a participation notice to be served: [70].

Discussion of Issue 1

55. In his written and oral submissions to us on this issue, Mr Jacob in substance repeated the arguments which he had unsuccessfully advanced to the UT, while Avon supported the Judge's analysis and conclusion. Avon wisely did not attempt to resurrect the argument, rejected by the UT, that in all cases where both a legal lease and an equitable lease are in existence, the equitable lessee must be the qualifying tenant.

56. In my judgment, the UT came to the right conclusion on this issue, and I would respectfully endorse most aspects of the Judge's reasoning. Her solution seems to me to strike an appropriate balance between the starting point that qualifying tenancies should normally be ascertainable by a simple search of the Land Register, which implies that they will normally be legal tenancies registered as such, and the need to cater for at least some categories of equitable tenancies if an unreasonable result is to be avoided. Section 112(2) is important, because the express inclusion of agreements for a lease shows that one of the commonest types of equitable tenancy (an agreement for a lease which is capable of specific performance) may in principle qualify. And if that is right, it would in my view be irrational to exclude another common type of equitable tenancy exemplified by Ms O'Connor's case, where a long lease is granted for the first time to a purchaser and it will take effect at law when it is registered, but

it can only take effect in equity during the "registration gap". By any normal metric, a tenant under such a lease who has taken possession of the flat on completion and lives there, or perhaps sub-lets it if authorised to do so, is for most practical and economic purposes the owner of the flat and would naturally so describe himself of herself. Equally, such a tenant is clearly within the class of residential long-leaseholders whom the RTM regime enacted in 2002 was intended by Parliament to benefit. If, however, such tenants are excluded from qualifying for a period of arbitrary, and perhaps considerable, length until the formalities of registration are completed by HM Land Registry, the statutory scheme is at risk of being frustrated (as the example given by Mr Bates KC well shows: see [36] above).

57. The absurdity of such a result may be further illustrated by assuming that, in the present case, the grant of Ms O'Connor's lease had been preceded by a contract between her and Avon for the grant of the lease. We do not know whether this is what in fact happened, but in principle it could well have done. In that situation, she would have had the benefit of an agreement for a lease within section 112(2), and thus would have been a qualifying tenant, between the date of contract and the date of completion; but if the respondent's construction of the legislation is correct, she would then have lost that status upon completion of the contract, and would only have regained it when registration of her lease was finally effected.

58. Nor is there any risk, in my view, of the Judge's construction of section 75 causing confusion, precisely because during the pre-registration period there is no legal lease of the flat in existence. The Judge rightly went out of her way to emphasise this point when rejecting Avon's argument that the equitable tenancy should always prevail in cases where both a legal and an equitable tenancy co-exist, and she reiterated it when stating her final conclusion at [69].

59. I would add that the suggestion by Mr Jacob that the existence of Ms O'Connor's unregistered tenancy would cause significant practical difficulties for the respondent in making its application is in my view far-fetched. It is common ground that there was a note on the register of a pending application at the critical time, 14 days before the claim notice was given. The total number of flats contained in the Property was only 20, and in order to comply with section 79(5) at least 10 of the qualifying tenants (other than Ms O'Connor) must by then have become members of the respondent. Moreover, a simple search of the register would have revealed the identity of any other registered long leases of the flats then in existence, and it may well be the case that it would then have been apparent that the pending application related to Flat 17, or at least that the number of flats to which it might relate was very small. In those circumstances, it should not have been difficult for the respondent to use its information gathering powers under section 82 and/or to make a few simple enquiries on the ground in order to ascertain the true position. After all, Ms O'Connor was living in Flat 17, and there is nothing to suggest that she would not have responded to a simple enquiry, not least because we know that she supported the application. Yet the respondent did nothing, and thereby ran the risk that it might fail to comply with section 78 if there was a qualifying tenant of Flat 17 in existence upon whom a participation notice had to be served.

60. Accordingly, there is nothing in the facts of the present case which to my mind casts any doubt on the view expressed by the Supreme Court in *A1 Properties* at [69] that there will "ordinarily be no difficulty in finding or identifying qualifying tenants".

61. The one aspect of the Judge's reasoning about which I have some reservations is her apparent readiness to accept in [58] that the construction of section 75 then advanced by Avon "would make the acquisition of the right to manage well-nigh impossible". I think there may be an element of exaggeration here, although I would not wish to differ from the view of an expert tribunal on a matter of this nature. But for present purposes the point is immaterial, because Avon no longer relies on the construction which elicited the Judge's comment, and there was in my opinion ample other justification for her rejection of Avon's then submission.

62. Before I leave this part of the case, there is one recent authority in this court to which I need to refer, and which post-dated the hearing in the UT. The case in question is *159-167 Prince of Wales Road RTM Company Ltd v Assethold Ltd* [2024] EWCA Civ 1544, in which judgment was handed down on 13 December 2024 following an oral hearing on 19 and 20 November 2024. The lead judgment was given by Falk LJ, with whom King and Nugee LJJ agreed. The case concerned an application for costs made under section 88 of the CLRA which, as in force at the material time (the section has since been repealed), provided by subsection (1) that:

> "A RTM company is liable for reasonable costs incurred by a person who is –
>
> (a) landlord under a lease of the whole or any part of the premises,
>
> …
>
> in consequence of a claim notice given by the company in relation to the premises."

63. The point in issue was whether the respondent, Assethold, was a landlord within the meaning of section 88(1), and thus entitled to seek its reasonable costs of an aborted RTM application by the appellant RTM company, at a time when Assethold had no legal interest in the property. The FTT accepted the RTM company's argument that Assethold was not a "landlord" and that the RTM company therefore had no liability for its costs. This decision was reversed by the UT (Judge Elizabeth Cooke), who held that the RTM company was estopped from denying that Assethold was the landlord for the purposes of section 88; but this decision was in turn reversed by this court, which reinstated the decision of the FTT.

64. Assethold's case, as recorded by Falk LJ at [27], was that a buyer of property in the "registration gap" between completion of a purchase and its registration at HM Land Registry is a landlord for the purposes of section 79(6) and 88 of the CLRA. Mr Bates KC, appearing for Assethold, submitted that equitable ownership of the freehold and headlease interests in the property had passed to Assethold in October 2019 when it had purchased them from two related entities called "Millcastle", and that this was enough to make Assethold a landlord at the date of the claim notice even though Millcastle had remained the registered, and therefore the legal, owner of both interests at that date.

65. This submission was rejected by Falk LJ, who said at [28]:

> "I do not agree that an equitable landlord can be a 'landlord' for the purposes of ss. 79(6) and 88 of the CLRA. In its ordinary and natural meaning, a 'landlord under a lease' means the landlord as a matter of law. Both the freehold and headlease interest were existing registered estates. Their legal owners at the relevant time were the two Millcastle entities, not Assethold, because under s.27(1) of the Land Registration Act 2002 the transfers did not operate at law unless and until they were completed by registration. Until Assethold became the registered owner the legal estate remained vested in Millcastle. It could not therefore be said that Assethold was a landlord under any lease of the premises."

66. Falk LJ then reviewed the case law and the legislative scheme of the CLRA, including at [41] to [43] the then "very recent" decision of the UT in the present case. After explaining that Ms O'Connor had been in a registration gap, but following the grant of a new lease rather than a sale of an existing interest, Falk LJ continued:

> "41. … The freeholder challenged the proposed acquisition of RTM on the basis that Ms O'Connor had not been served with an invitation to participate in the RTM company.
>
> 42. As the UT held, at the relevant time no legal lease was in existence. Rather, Ms O'Connor held an equitable lease. The UT concluded that this was sufficient to require notice to Ms O'Connor, albeit that the effect of *A1 Properties* was that the claim notice was not invalid on the facts.
>
> 43. *Cresta Court* is clearly distinguishable. The UT relied on the specific inclusion of agreements for lease in s. 112(2)(b), and reasoned that because agreements for lease are equitable leases (if specific performance would be available) it would be incomprehensible if other forms of equitable lease were not also included ([55]). The UT's conclusion therefore related (a) to an interest in land which existed only in equity, and (b) in the context of the specific provision for agreements for lease. In contrast, in this case there are existing legal interests that were vested in Millcastle and there is no equivalent to s. 112(2)(b) that applies to an agreement to transfer them."

67. I agree with Falk LJ that the present case is clearly distinguishable from the *Prince of Wales Road* case for the reasons which she gave at [43]. Accordingly, her reasoning on the meaning of "landlord" in sections 79(6) and 88 of the CLRA is not directly applicable to the different question of the meaning of "qualifying tenant" in relation to an equitable lessee in the position of Ms O'Connor. And to the extent that the respondent may seek to rely on paragraph [28] of Falk LJ's judgment to argue by analogy that in its ordinary and natural meaning a tenant under a lease means the tenant as a matter of law, I would observe that the solution adopted by the Judge in our case does indeed give primacy to the legal lessee in any case where there are both legal and equitable leases of a flat in existence at the same time.

68. I therefore find nothing in the *Prince of Wales Road* case which requires me to change or modify the reasons which I have given for upholding the decision of the Judge on the first issue.

Issue 2: Did the failure to give a participation notice to Ms O'Connor invalidate the claim notice served by the respondent on 21 January 2022?

69. On the footing that Ms O'Connor was the qualifying tenant of Flat 17, the respondent RTM company was obliged by section 78(1) of the CLRA to give a participation notice to her before making a claim to acquire the right to manage the Property. The language of section 78(1) is framed in mandatory terms ("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 …)". Further, although section 79(7) contains a limited dispensation from invalidity of a participation notice occasioned "by any inaccuracy in any of the particulars required by or by virtue of this section", there is no dispensing provision from the basic obligation under subsection (1) to give a participation notice to each qualifying tenant of a relevant flat who " (b) neither is nor has agreed to become a member of the RTM company". Ms O'Connor did not give her written consent to become a member of the respondent until 26 January 2022, five days after the date of service of the claim notice and 19 days after the last date for service on her by the respondent of a participation notice under section 79(2).

70. In view of the critical importance of section 79(2), I will repeat its clear and simple terms:

> "(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."

71. It is no longer disputed by the respondent that section 79(2) contains a statement by Parliament of the consequence of failure by the RTM company to give each participation notice required by section 78(1) before expiry of the 14-day deadline stipulated by section 79(2), namely that the claim notice "may not be given". On the face of it, that is a clear and unqualified prohibition such that a failure to comply with it will have the effect that the claim notice is invalid, and it therefore cannot set in motion a valid claim to acquire the right to manage. It is simply something that the RTM company must get right as a pre-condition to making a valid claim; and if for any reason the condition is not satisfied, the clear implication in my view is that the RTM company will be obliged to start again. In the present case, that would presumably have meant a delay of less than a week until after Ms O'Connor had given her written consent to become a member of the respondent, because the obligation to give her a participation notice would then have lapsed by virtue of section 79(1)(b). But instead of taking that simple and obvious course, the respondent has persisted in arguing that the effect of section 79(2) was not to invalidate the claim notice, or at any rate not to do so on the facts of the present case.

72. That argument is in my judgment impossible to reconcile with the reasoning of the Supreme Court in *A1 Properties*, where the issue was whether a claim notice was invalidated by the failure of the RTM company to serve it on one of the three landlords upon whom it ought to have been served under section 79(6)(a) as a "landlord under a lease of the whole or any part of the premises". The overlooked

landlord in question was the intermediate landlord of the communal areas of the block; the other two landlords, upon whom the claim notice was duly served, were the freeholder of the block and a management company. Crucially, however, the issue arose in a context where the consequence of failure to comply with this procedural requirement was not expressly stated by Parliament. In those circumstances, the Supreme Court held that the correct approach was to apply the principles formulated by the House of Lords in *R v Soneji* [2006] 1 AC 340 and to ask "whether it was a purpose of the legislature that an act done in breach of [the relevant] provision should be invalid": see [58], and [59] where the Supreme Court quoted the observation of Lord Steyn in *Soneji* at [14] that "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". In that context, said the Supreme Court at [59]:

> "The courts had evolved a distinction between mandatory requirements, breach of which would invalidate the procedure, and directory requirements, breach of which would not. But this distinction was conclusory rather than explanatory and did not provide helpful guidance."

73. For present purposes, the key passage in *A1 Properties* is at [67] to [69] from which I quote the following (with my emphasis in italics):

> "67. … Where the right to manage is transferred to a RTM company, the effect is that an existing sophisticated contractual regime with multiple aspects and ramifications is subject to significant disruption (hence the complexity and comprehensiveness of the statutory regime, outlined above). The ordinary expectation must be that persons whose property or contractual rights are to be taken away or subject to significant qualification should have a fair opportunity in the course of the procedure to be followed before that occurs to raise any arguments of substance they may have to oppose that outcome …
>
> 68. In our view the correct approach *in a case where there is no express statement of the consequences of non-compliance with a statutory requirement* is first to look carefully at the whole of the structure within which the requirement arises and ask what consequence of non-compliance best fits the structure as a whole. Here the provisions of sections 78 and 79 call for a two-stage process of notification of the RTM proposal to persons with an interest in the building to which the right to manage is (if validly exercised) to be applied.
>
> 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*."

74. The parts of the above passage which I have italicised show beyond doubt: (a) that the Supreme Court was confining its formulation of the correct approach to cases where the legislation contains no express statement of the consequences of non-compliance; (b) that it considered section 79(2) to be an example of such an express statement; and (c) that it understood the consequence of non-compliance laid down by Parliament to be that "a claim notice may not be served at all". It follows, in my view, that if a claim notice may not be served at all, any claim notice purportedly served before the non-compliance is remedied must be invalid, or in other words a nullity.

75. There was some debate before us whether the passage which I have set out formed part of the *ratio decidendi* of *A1 Properties,* or was merely *obiter*. If it matters, I consider that the passage forms part of the *ratio* of the case, because it was an integral and necessary part of the court's very full and careful reasoning which ultimately led it to conclude that the failure to serve the intermediate landlord, in circumstances where Parliament had *not* laid down the consequences of non-compliance, was not to invalidate the claim notice, but rather to render it "voidable at the instance of the relevant landlord or other stakeholder who was entitled to, but not given, a claim notice, but not void": see [87] and *R (Youngsam) v Parole Board* [2019] EWCA Civ 229, [2020] QB 387 at [21-22] (Nicola Davies LJ) and [40-59] (Leggatt LJ). I would only add that, even if the passage is properly to be classified as *obiter*, I would have no hesitation in following it as constituting, in my respectful opinion, a correct statement of the law in this area.

76. The importance of the key principle that there is no room for a *Soneji* analysis where Parliament has expressly stipulated the consequences of non-compliance is a theme to which the Supreme Court returned in *A1 Properties* when considering some subsidiary arguments advanced by Mr Bates KC for the intermediate landlord at [101] to [104]: see in particular [103] ("Parliament has not expressly stipulated what the consequence of non-compliance with those obligations should be, so the *Soneji* analysis is applicable"); and [104] where the court said:

> "The same analysis applies. These are simply examples of provisions where Parliament has stated in terms what the outcome of a failure of compliance with certain of the procedural rules should be, thereby making it unnecessary and inappropriate to conduct a *Soneji* analysis. But where Parliament has not so stipulated, an analysis according to the approach in *Soneji* is required."

77. At the risk of stating the obvious, it is worth spelling out why the distinction drawn in *A1 Properties* must in my judgment be correct. When construing a statutory scheme, the task of the court or tribunal is to seek the meaning of the words used by Parliament in accordance with the principles of interpretation laid down in the case law. Those principles were authoritatively restated by the Supreme Court in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at [29]

to [31] per Lord Hodge (with whom Lord Briggs, Lord Stephens, Lady Rose JJSC and Lady Arden agreed). That guidance emphasises that "the words which Parliament has chosen to enact as an expression of the purpose of the legislation" are "the primary source by which meaning is ascertained" ([29]), and although external aids to interpretation play a secondary role, "none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity" [30]. Further, the "intention of Parliament" is an objective concept, not subjective, and "is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used" ([31], citing the speech of Lord Nicholls in the *Spath Holme* case [2001] 2 AC 349, 396). It follows that where the language used by Parliament to state the consequence of non-compliance with a procedural requirement is clear, unambiguous and does not produce absurdity, it is the duty of the court or tribunal to interpret and apply that language accordingly. That is what the rule of law requires, and the court or tribunal would be overstepping its constitutional boundaries if it attempted to substitute for the language of Parliament an interpretation which in its view would produce a more reasonable result on the facts of the individual case before it.

78. By the same token, it is only where Parliament has *not* expressly stated the consequences of non-compliance that there can be any room for a *Soneji* analysis designed to determine objectively what intention should be imputed to Parliament to fill the gap left by its silence on the point.

79. As I have already said, I consider the language used by Parliament in section 79(2) to be clear and unambiguous, and the Supreme Court was evidently of the same opinion when it said in *A1 Properties* at [69], quoted above, that 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." It is equally clear to me that this construction does not, objectively, produce any absurdity, however widely the concept of absurdity should be interpreted. In my judgment there is nothing remotely absurd about a rule which in effect requires strict compliance with the procedural requirements for service of participation notices before a valid claim notice may be given. It is relevant here to have in mind the very significant disruption of complex private contractual arrangements that a successful claim under the RTM legislation entails; the early stage in the procedure at which the failure to comply with the relevant requirements occurs; and the comparative ease and speed with which the position can in principle be rectified by the RTM company. It is also relevant that the Supreme Court could not have said what they did in [69] if they thought that the consequence stipulated by Parliament led to an absurd or unjust outcome. To the contrary, the Supreme Court expressly recognised in [62] that:

> "Examination of the purpose served by a particular procedural rule may indicate that Parliament intended that it should operate strictly as a bright line rule, so that any failure to comply with it invalidates the procedure which follows."

80. In reaching this conclusion, I have not overlooked the reasons given by the Supreme Court at [97] to [100] for rejecting a submission by Mr Bates KC that the ease with which an RTM company may serve a new claim notice shows that "Parliament intended that there should be strict compliance with the procedural requirements in the

statutory regime". The first reason given for rejecting this submission was that one of the objectives of the statutory scheme, as explained in the Consultation Paper, was that "opportunities for obstructive landlords to thwart the transfer of the right to manage should be kept to a minimum" ([98]). The second reason was that there is "no guarantee that a RTM company will be in funds to make multiple applications" and the company "might be formed by just two tenants, or a small group of tenants, with limited resources" ([100]).

81. While I accept that there may at first sight appear to be an element of tension between the reasoning of the Supreme Court in these paragraphs and some of the other passages in their judgment upon which I have relied, I do not consider that these paragraphs can or should be read as casting any doubt on the central proposition endorsed by the Supreme Court that there can be no room for a *Soneji* analysis where Parliament has stipulated what the outcome of a failure to comply with a procedural rule should be, especially as the Supreme Court went on to reiterate that principle at [102] to [104]: see [76] above. It therefore seems to me that the reasons given by the Supreme Court for rejecting Mr Bates' submission should be confined to cases where a *Soneji* analysis is required, and should be read as having no application in cases where Parliament has expressly stated what the consequence of non-compliance is to be. I also note that, in [98], the Supreme Court said only that opportunities for obstructive landlords to thwart the operation of the scheme should be "kept to a minimum", not that they can or should be eliminated.

The decision of the UT on Issue 2

82. The UT reached a different conclusion on Issue 2, after conducting a valuable review of the case law preceding *A1 Properties* relating to procedural defects in the process of acquiring the right to manage at [74] to [91], and a detailed consideration of *A1 Properties* itself at [92] to [114]. At [95], the Judge set out paragraph [69] of *A1 Properties* in its entirety, including the final part after the words "no valid claim notice can be given to anyone" which reads as follows:

> "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 on 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) Ltd v Oak Investments RTM Co Ltd* [2005] RVR 426 and a decision of the Upper Tribunal in *Avon Freeholds Ltd v Regent Court RTM Co Ltd* [2012] 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."

83. In contrast with the first part of paragraph [69], which I have already set out at [73] above, the second part is obviously *obiter*, but it will be noted that the "difficult question" to which the Supreme Court referred at the beginning of the *obiter* passage is in substance Issue 2 in the present case. Evidently with that in mind, the Judge said at [114] that "that is the difficult question I now have to resolve".

84. The Judge then summarised the rival arguments presented to her by the parties in their written submissions on *A1 Properties* at [118] to [123]. The arguments of Mr Bates KC and Ms Gibson for Avon were essentially the arguments which I have already indicated seem to me to be part of the *ratio* of *A1 Properties*, depending on the sharp distinction to be drawn between cases where Parliament has expressly spelled out the consequences of non-compliance with a procedural requirement on the one hand, and the confinement of a two-stage *Soneji* analysis to cases where no such express consequence has been stated on the other hand. For his part, Mr Jacob for the respondent emphasised that Ms O'Connor had lost nothing of value, since she was now a member of the RTM company, and that it was not always an easy matter for an RTM company, having missed a qualifying tenant, to start again. Moreover, to allow Avon to rely on the procedural objection "would be yet another example of an obstructive landlord attempting [to] thwart the process in the way that the Supreme Court so clearly disapproved".

85. In the section of the UT Decision headed "Discussion and conclusion about the second issue in the appeal", from [124] to [144], the Judge clearly took the view, at [129], that the entirety of paragraph [69] of *A1 Properties* was *obiter*, and not just the second part of the paragraph after the words "no valid claim notice can be given to anyone". As I have already said, I respectfully disagree and I consider that this court, like the UT, is bound by the reasoning in the first part of [69]; and even if that is wrong, I would in any event adopt that reasoning as correct: see [75] above. In my view, this error led the Judge to suppose that she had more room for manoeuvre than was the case, and encouraged her to adopt as her preferred solution to the "difficult question" one that cannot be reconciled with the reasoning of the Supreme Court in *A1 Properties*, namely that when the Supreme Court said "not valid" (or, more accurately, "no valid claim notice can be given") it meant "that it is neither wholly valid nor wholly invalid, but voidable at the instance of the tenant": see [139]. Further, the Judge regarded the (clearly *obiter*) second part of [69] as "an invitation to adopt this solution", saying at [141]:

> "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".

86. The Judge went on to say in [142]:

> "That this is an appropriate solution is indicated first by its consistency with the Supreme Court's decision in [*A1*

> *Properties*]. It is also indicated by the purposes of the statute in requiring 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."

87. It seems to me, with the greatest respect to the Judge, that her reasoning might be persuasive and appropriate if the case were one where a two-stage *Soneji* analysis had to be undertaken, but her approach overlooks the fundamental point that this is a case where the consequence of non-compliance with the requirement to give a participation notice to Ms O'Connor is prescribed by section 79(2) of the CLRA, namely that "The claim notice may not be given", or as the Supreme Court put it in *A1 Properties* at [69] "no valid claim notice can be given to anyone". That simple language means what it says, and gives rise (objectively) to no absurdity, so it was the duty of the UT, as it is the duty of this court, to apply it accordingly.

88. For these reasons, I would allow Avon's appeal and determine the second issue in favour of Avon. Because of the failure to give a participation notice to Ms O'Connor, the position remains (so far as I am aware) that no valid claim notice has yet been given to transfer the management of the Property to the respondent.

Overall conclusion

89. If the other members of the court agree, I would make a declaration that Ms O'Connor was at the material time a qualifying tenant of Flat 17 at the Property, but I would allow Avon's appeal on the basis that the failure to give a participation notice to her within the period stipulated by section 79(2) of the 2002 Act invalidated the claim notice served by the respondent on 21 January 2022.

Lord Justice Jeremy Baker:

90. I agree.

Lord Justice Newey:

91. I also agree.