UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2014] UKUT 0397 (LC)
UTLC Case Numbers: LRX/25/2013
LRX/81/2013
LRX/87/2013

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Landlord and Tenant – right to manage – whether initial notice must specify that RTM Company's articles of association are available for inspection on a Saturday or Sunday –section 78(5)(b), Commonhold and Leasehold Reform Act 2002 – signature by a corporate secretary – whether notice invalid if section 44, Companies Act 2006 not complied with – whether RTM claim defeated by omission to serve claim notice on intermediate landlord

IN THE MATTER OF APPEALS AGAINST THREE DECISIONS OF THE LEASEHOLD TRIBUNAL

BETWEEN:

ELIM COURT RTM CO LTD **Appellant**

AND

AVON FREEHOLDS LTD **Respondent**
LRX/25/2013

ASSETHOLD LIMITED **Appellant**

AND

369 UPLAND ROAD RTM COMPANY LTD &
CANADIAN AVENUE RTM COMPANY LTD **Respondents**
LRX/81/2013

SINCLAIR GARDENS INVESTMENTS (KENSINGTON) LIMITED **Appellant**

AND

(1) FARNBOROUGH ROAD (CALLOWAY HOUSE) RTM COMPANY LIMITED
(2) FARNBOROUGH ROAD (BRAND HOUSE) RTM COMPANY LIMITED **Respondent**
LRX/87/2013

Re: Elim Court, Elim Terrace, Plymouth PL3
369 and 371 Upland Road, London SE22
65 Canadian Avenue, London SE6
1-58 Calloway House, Coombe Way, Farnborough, Hampshire GU14
1-117 Brand House, Coombe Way, Farnborough, Hampshire GU14

Before Martin Rodger QC, Deputy President

Sitting at: 45 Bedford Square, London WC1B 3AS
on
29-30 July 2014

LRX/25/2013
Mrs Margarita Madjriska-Mossop of Mayfield Law, solicitors, for the Appellant
Mr Justin Bates, instructed by Conway & Co, solicitors for the Respondent
LRX/81/2013
Mr Justin Bates, instructed by Conway & Co, solicitors for the Appellant
Mrs Margarita Madjriska-Mossop of Mayfield Law, solicitors for the Respondent
LRX/87/2013
Mr Oliver Radley-Gardner, instructed by W H Matthews & Co. solicitors for the Appellant
Mrs Margarita Madjriska-Mossop of Mayfield Law, solicitors for the Respondent

The following cases are referred to in this decision:

Assethold Limited v 14 Stansfield Road RTM Company Limited [2012] UKUT 262 (LC)

Gateway Property Holdings Limited v 6-10 Montrose Gardens RTM Company Limited [2011] UKUT 349(LC)

Assethold Limited v 15 Yonge Park RTM Company Ltd [2011] UKUT 379 (LC)

Hilmi & Associates Limited v 20 Penbridge Villas Freehold Limited [2010] 1 WLR 2750

London & Clydeside Estates Limited v Aberdeen District Council [1980] 1 WLR 182

R v Secretary of State for the Home Department ex-parte Jeyeanthan [2000] 1 WLR 354

Avon Freeholds Limited v Regent Court RTM Company Limited [2013] UKUT 0213 (LC)

7 Strathray Gardens Limited v Point Star Shipping & Finance Limited [2004] EWCA 1669

Speedwell Estates Limited v Dalziel [2002] 1 EGLR 55

Byrnlea Property Investments Limited v Ramsay [1969] 2QB 253

Sinclair Gardens Investments Ltd (Kensington) Limited v Poets Chase Freehold Company Limited [2007] EWHC 1775 (Ch)

Assethold Limited v 13-24 Romside Place RTM Company Limited [2013] UKUT 0603 (LC)

Petch v Gurney [1994] 3 ALL ER 371

Newbold v Coal Authority [2014] 1 WLR 1288

Assethold Ltd v 7 Sunny Gardens RTM Co Ltd [2013] UKUT 509 (LC)

Melanesian Mission Trust Board v Australian Mutual Providence Society [1997] 2 EGLR 128 PC

DECISION

Introduction

1. These appeals concern applications by five separate RTM companies seeking to acquire the right to manage conferred by Part 2 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act). As is well known, the 2002 Act created a "no-fault" right to manage by which, on satisfaction of certain preconditions, a qualifying majority of the tenants of a building containing leasehold flats are entitled, through the medium of an RTM company established by them, to take over the management of the building from their landlord. These appeals raise two important recurring issues (and some subsidiary issues) concerning the validity of the steps which an RTM company is required to take to initiate the acquisition of the right to manage.

2. The five RTM companies concerned with the various appeals share one common feature: in each case the company secretary is itself a company. In each of the appeals the RTM company has been represented before me by Mrs Margarita Madjriska-Mossop of Mayfield Law, solicitors. In LRX/87/2013 the appellant landlord, Sinclair Gardens Investments (Kensington) Limited has been represented by Mr Oliver-Radley Gardner of counsel while in the remaining appeals the landlords, Avon Freeholds Limited and Assethold Limited have been represented by Mr Justin Bates of counsel. I am extremely grateful to each of the advocates for their considerable assistance in these appeals.

The relevant statutory procedure in outline

3. The right to manage is acquired in accordance with Chapter 1 of Part 2 to the 2002 Act (section 71(2)). The procedure for its acquisition begins with the service of a notice of invitation to participate under section 78. At that stage the only persons who are entitled to be members of the RTM company are the qualifying tenants of flats in the premises over which the right to manage is claimed (section 74(1)(a)). Qualifying tenants are tenants holding a flat under a long lease (section 75(2)). The purpose of a notice of invitation to participate under section 78 is to extend the opportunity of membership of the RTM company to all of the qualifying tenants who are not yet members.

4. Section 78 of the 2002 Act is relevant to three of the appeals so I will set it out in full:

> "78. **Notice inviting participation**
>
> (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 the flat contained in the premises, but
>
> (b) neither is nor has agreed to become a member of the RTM company.

(2) A notice given under this section (referred to in this Chapter as a "notice of invitation to participate") must

(a) state that the RTM company intends to acquire the right to manage the premises,

(b) state the names of the members of the RTM company,

(c) invite the recipients of the notice to become members of the company,

(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 and 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.

(5) A statement under sub-section (4)(b) must –

(a) specify a place (in England or Wales) at which the articles of association may be inspected,

(b) specify as the times at which they may be inspected periods of at least two hours on each of at least three days (including a Saturday or Sunday or both) within the 7 days beginning with the day following that on which the notices given,

(c) specify a place (in England or Wales) at which, at any time within those 7 days, a copy of the articles of association may be ordered, and

(d) specify a fee for the provision of an ordered copy, not exceeding the reasonable cost of providing it.

(6) Where a notice given to a person includes a statement under section (4)(b), the notice is to be treated as not having been given to him if he is not allowed to undertake an inspection, or is not provided with a copy, in accordance with the statement.

(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."

5. The second stage in the acquisition of the right to manage is the giving by the RTM company of a claim notice under section 79 of the 2002 Act. Section 79(6) requires that a notice be given to

each person who is on the relevant day a landlord under a lease of the whole or any part of the premises. Section 79(2) lays down the following preconditions to the service of a claim notice, which emphasises the significance of the notice inviting participation:

> "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."

6. Three of the appeals also concern the form of the claim notice required to be given under section 79. Section 80(1) provides that a claim notice must comply with the requirements of that section; those requirements include the provision of details of the qualifying tenants who are members of the RTM company, particulars of their leases and a statement of the grounds on which it is claimed that the premises are premises to which the Chapter applies. Additional requirements may be introduced by regulations and section 80(8) and (9) provide as follows:

> "(8) It must also contain such other particulars (if any) as may be required to be contained in claim notices by regulations made by the appropriate national authority.
>
> (9) And it must comply with such requirements (if any) about the form of claim notices as may be prescribed by regulations so made."

7. Additional content for claim notices and the form which they must take have been prescribed by The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 ("the 2010 Regulations"). By regulation 8(2) claim notices "shall be in the form set out in Schedule 2 to these Regulations". Schedule 2 provides a form of claim notice which concludes with the following provisions for signature:

> "Signed by authority of the company.
>
> [Signature of authorised member or officer]
>
> [Insert date]"

8. A landlord who receives a notice of claim may challenge the claim by serving a counter-notice under section 84, on receipt of which the RTM company may apply to the appropriate tribunal for a determination of its entitlement to acquire the right to manage. If the identity of the landlord is unknown, or the landlord cannot be traced, no notice of claim need be served (section 79(7)) but an application must be made section 85 requires the RTM company to apply to the tribunal for an order that it is entitled to acquire the right to manage the premises.

The facts

9. The relevant facts in each of the appeals and the conclusions reached by the LVTs which considered the various claims were as follows.

The Assethold appeal

10. Assethold Limited is the freehold owner of two buildings at 65 Canadian Avenue, London SE6 and 369-371 Upland Road, London SE22. Two RTM companies, the respondents in the Assethold appeal, were formed to exercise the right to manage the relevant building from which they respectively derive their names. The company secretary of each of the RTM companies is The Right to Manage Federation Limited ("Federation Ltd"). Mr Dudley Joyner is a director of Federation Ltd. Each of the RTM companies served a claim notice on Assethold (in November and December 2012) in the form provided for by the 2010 regulations.

11. The Upland Road claim notice was signed as follows:

> "Signed by authority of the company.
>
> [Manuscript signature of Mr Joyner]
>
> Dudley Joyner, Director, The Right to Manage Federation Limited, Company Secretary for and on behalf of 369 Upland Road RTM Company Limited"

12. The Canadian Avenue claim notice was signed in a slightly different form, as follows:

> "Signed by authority of the company –
>
> [Manuscript signature of Mr Joyner]
>
> Dudley Joyner, Director, RTMF Services Limited, Company Secretary for and on behalf of Canadian Avenue RTM Company Limited."

13. In each case Assethold, by its solicitors, gave a counter-notice disputing the RTM company's entitlement to acquire the right to manage, citing a failure to comply with sections 80(8) and (9) of the 2002 Act as the basis of its challenge. In each case Assethold argued that the claim notices were invalid and of no effect because they were signed on behalf of the RTM Company by another company whose mode of execution failed to comply with section 44 of the Companies Act 2006; for that reason, it was said, the claim notices were effectively unsigned and did not accord with the requirements of section 80(9) and regulation 8(2) of 2010 regulations.

14. Each of the RTM companies applied to the leasehold valuation tribunal under section 84(3) for the determination that it was entitled to acquire the right to manage the premises. On 2 May 2013 the LVT considered both applications at a single hearing and directed itself that the issue for determination was whether the claim notices were validly signed by the RTM companies. At paragraph 17 of its decision the LVT recorded the case on behalf of the RTM company as follows:

> "It was contended that the claim notice had been validly signed by Mr Joyner, director of RTMF, which is the corporate secretary of each of the applicant companies, and RTMF had authority of the respective directors of each applicant company."

15. The LVT decided that the facts of the case were indistinguishable from those of *Assethold Limited v 14 Stansfield Road RTM Company Limited* [2012] UKUT 262 (LC). In that case a claim notice had been signed by a person who was authorised to do so by all three directors of an RTM company although she was not herself a member or an officer of the company. The Tribunal (George Bartlett QC, President) held that the claim notice need not be signed by a member or officer and that it was sufficient that it be signed by someone having authority to do so. The LVT found, at paragraph 24 of its decision, that "RTMF, the Corporate Secretary of both Applicant companies and its staff had the full authority to act on behalf of both companies" and referred to evidence from directors of each of the RTM companies and from Mr Joyner to that effect. On that basis the LVT held that the claim notices had been validly signed and, therefore, that the RTM companies were each entitled to acquire the right to manage.

The Elim Court appeal

16. Elim Court is a block of flats at Elim Terrace, Plymouth. Elim Court RTM Company Limited is an RTM company established to acquire the right to manage Elim Court. Federation Limited is its company secretary, although it was explained to me that when acting in that capacity it employs the trading name "RTMF Secretarial". Avon Freeholds Limited owns the freehold interest in Elim Court.

17. On 23 May 2012 the RTM company served notices of invitation to participate on those qualifying tenants of Elim Court who were not already members. Paragraph 2 of the notice was in the following terms:

> "The Company's Article of Association may be inspected at RTMF Secretarial, Eden House, Riverway, Upfield, East Sussex, TN22 1SL between 10am and midday on Monday 28 May, Tuesday 29 May and Wednesday 30 May 2012 (see note 2 below). At any time within the period of 7 days beginning with the day after this notice is given, a copy of the Articles of Association may be ordered from RTMF Secretarial, on payment of a fee of £5 (see note 3 below)."

Note 2 recited the substance of section 78(5)(b) by stating that the times specified for inspection must be periods of at least 2 hours on each of at least 3 days (including a Saturday or Sunday or both).

18. The notices of invitation to participate were served on the tenants of all 40 flats at Elim Court. The certificate of posting relied on by the RTM company to prove service records that the material sent to flat 37 was addressed to "Simmons & ReAssure". The reference to "ReAssure" was to a life assurance company, formerly known as Windsor Life Assurance Company Limited, which holds an intermediate long lease of flat 37 granted on 2 July 2009.

19. On 3 June 2012 the RTM company served a claim notice on Avon Freeholds Limited in the form required by the 2010 regulations. It was signed by Mr Joyner in the following form:

> "Signed by authority of the company -

[manuscript signature of Mr Joyner]

RTMF Secretarial, Company Secretary."

20. Avon Freeholds Limited served a counter-notice disputing the RTM company's entitlement to acquire the right to manage on a number of different grounds. These included:

(a) That the notices of invitation to participate failed to comply with section 78(5)(b) of the 2002 Act because the company's Articles of Association were not said to be available for inspection on a Saturday, a Sunday or both.

(b) Secondly, that the claim notice was invalid because the signature by RTMF Secretarial did not comply with section 44 of the Companies Act 2006.

(c) Thirdly, that the claim was invalid because no claim notice had been given to ReAssure, which was a landlord of flat 37 and therefore, by virtue of section 79(6)of the 2002 Act, was a party to whom the claim notice ought also to have been served.

21. By a decision given on 19 September 2012 a leasehold valuation tribunal of the Southern Rent Assessment Panel determined that the RTM company had not acquired the right to manage. The LVT agreed that the notice of invitation to participate had failed to comply with section 78(5)(b) which it took to be mandatory. That provision not having been complied with, and for that reason alone, the procedure adopted by the RTM Company did not follow the statutory requirements and its claim failed.

22. The LVT did not accept that the claim notice had been inadequately signed. It was satisfied that Mr Joyner had had the authority of the RTM company to sign the notice and it considered that to be sufficient. At paragraph 57 of its decision it said this:

> "The standard claim form does not require the person signing it to state their capacity, and the fact that Mr Joyner had identified himself as being associated with RTMF Secretarial, the company secretary, was unnecessary. Had he signed the form without noting his position then there would have been no question about the adequacy of his signature, and it seems unreasonable to conclude that the addition of that information should render the signature, and so the form, invalid."

23. As to the service of the claim notice on the intermediate landlord the LVT was satisfied that the notice had not been received by ReAssure but held in paragraph 63 of its decision that:

> "Whilst it would undoubtedly have been better to have sent such a notice to the company's address as shown on the Land Registry Title Certificate, it is reasonable to assume that there would have been some obligation on the occupiers under the occupational lease to forward a copy to the company, and any failure to do so would not have been the responsibility of the applicant."

24. On that basis the LVT held that the claim to acquire the right to manage had not been invalidated by a failure to serve the intermediate landlord.

The Sinclair Gardens Investments appeal

25. Sinclair Gardens Investments (Kensington) Ltd is the owner of the freehold interest in two buildings in Coombe Way, Farnborough, Hampshire known as Calloway House and Brand House. The respondents to its appeal are two RTM companies, Farnborough Road, (Calloway House) RTM Company Ltd and Farnborough Road (Brand House) RTM Company Ltd which were established to acquire the right to manage the premises bearing their respective names.

26. Calloway House comprises 58 flats while Brand House contains 117 flats.

27. The right to manage procedure in respect of Calloway House was commenced on 7 September 2012 by the RTM Company giving a notice of invitation to participate to the tenants of all of the flats in the building. 30 of those tenants were already members of the RTM Company. Paragraph 2 of the notice specified 3 days within the following 7 days on which the company's articles of association could be inspected at the premises of RTMF Secretarial in Uckfield. None of those days was a Saturday or Sunday.

28. A claim notice served by the RTM Company on the appellant on 2 October 2012 precipitated a counter notice asserting that the company was not entitled to acquire the right to manage. The RTM Company applied to the LVT for that question to be determined. By 4 April 2013 the only issues between the parties were, first, whether the notice of invitation to participate was invalid because, in breach of section 78(5)(b) of the 2002 Act, it had not specified a Saturday or Sunday as one of the 3 days on which inspection of the articles of association could take place, and, secondly, assuming the notice had been defective, whether the LVT was nonetheless entitled to make a declaration that the RTM Company had acquired the right to manage.

29. The facts in relation to Brand House are substantially the same, and the same issues were considered by the LVT.

30. The LVT considered both applications together and issued a single decision on 1 May 2013. In relation to the issue of compliance with section 78(5)(b) the LVT said at paragraph 26 of its decision that it considered that the subsection was ambiguous and could be read either as being "instructive" or "for clarification" by pointing out that the 7 days within which the period for inspection must fall may include a Saturday or Sunday or both, or as stating that the same period must include at least one of those days. Having decided that the provision was ambiguous the LVT went on in paragraph 29 of its decision to consider "competing interests of convenience". At paragraph 29 of its decision it said this:

> "The section may be ensuring that a qualifying tenant is given an opportunity to view the articles of association of the RTM Company in which they are being invited to participate; so that it is acknowledged that it might be difficult to those who work to be able to view the

articles during the week. Alternatively, it could be that it is to assist the RTM Company (which by its nature would be formed of qualifying tenants) so that it is being made clear that it is not limited to Monday - Friday to make inspection available but can, if it desires, also include a Saturday or Sunday or both... The Tribunal considers that in that context, it is more likely that Parliament intended to provide clarification to the RTM company rather than convenience to the qualifying tenant.. Finally, there is of course the alternative which is the requirement to provide a copy on request. This belt and braces approach, confirms the Tribunal's view that the provision was not mandatory in that it was envisaged that the inspection time and location may not be convenient to the qualifying tenant, in which case they could obtain a copy by post."

31. On that basis the LVT decided that the notice inviting participation was compliant with the requirements of section 78.

32. The LVT went on to consider the alternative arguments it had heard. It decided that, if it was wrong in regarding the notice inviting participation as compliant, the omission to specify a Saturday or Sunday on which inspection could take place was not an "inaccuracy" which could be cured by section 78(7), but was rather a total failure to provide the necessary information. If the notice had been non-compliant on that ground, the LVT went on to consider the consequences of that failure. In paragraph 49 of its decision the LVT expressed the view that the failure to specify a weekend day was "of limited prejudice to a tenant" but, nonetheless, the requirements about inspection of the articles of association were not peripheral to the statutory scheme (as section 78(6) seems to make clear). Compliance with the provisions was therefore mandatory, and non-compliance could not be cured by considering the extent of any prejudice. Substantial compliance with the requirements regarding the content of a notice inviting participation would not, in the LVT's view, be sufficient. The LVT drew a distinction between defects in compliance with section 78 which related to the service of a notice inviting participation and defects relating to the content of the notice. If a defect in content could not be brought within section 78(6) (which allows inaccuracy to be overlooked) the notice would be invalid.

The issues

33. The issues which the Tribunal must therefore consider are as follows:

(a) The Saturday/Sunday issue, namely, whether a notice inviting participation is required by section 78(5)(b) of the 2002 Act to inform non-participating tenants that the RTM company's articles of association are available for inspection on 3 days at least one of which must be a Saturday or Sunday, and, if that question is answered affirmatively, whether the consequence of non-compliance with the requirement is fatal to the whole right to manage procedure or may be overlooked.

(b) The signature issue, namely whether the disputed claim notices purported to be signed by a company and, if they did, whether that signature was ineffective for failing to comply with section 44, Companies Act 2006; if the signature was ineffective, whether the notice

was nonetheless a good notice for the purpose of section 79 of the 2002 Act and, if it was not, whether its deficiencies are fatal to the whole procedure or may be overlooked.

(c) The intermediate landlord issue, namely whether the claim notice at Elim Court was served on the intermediate landlord and, if it was not, whether service on the intermediate landlord was required and, if it was, whether the failure to serve the intermediate landlord was fatal to the whole right to manage procedure or whether the deficiencies in service could be overlooked.

34. The Saturday/Sunday issue arises in Sinclair Gardens' appeal and in the Elim Court appeal. The signature issue arises in the Assethold appeal and in the landlord's cross appeal in Elim Court. The intermediate landlord issue arises only in the Elim Court appeal. Common to all three issues is the consequences issue, namely whether a deficiency in compliance with the statutory scheme is fatal to the whole process for the acquisition of the right to manage or whether a particular deficiency may be overlooked. I will consider the consequences issue after I have first reached a conclusion on the other issues.

35. I would add that, in the Elim Court appeal permission to appeal was granted by the Tribunal in relation to an allegation of procedural unfairness in the conduct of the hearing before the LVT. That issue was not pursued at the hearing of the appeals (as it had become academic in view of the Tribunal's re-consideration of all of the issues). The preliminary view which I had formed after consideration of the material relating to the allegation of procedural unfairness is that it was unsubstantiated.

The Saturday/Sunday issue

36. Section 78(5)(b) of the 2002 Act requires that the notice of invitation to participate must specify "at least 2 hours on each of at least 3 days (including a Saturday or Sunday or both) within the 7 days following that on which the notice is given" as the times at which the articles of association of the RTM company may be inspected. In her appeal in the Elim Court case Mrs Mossop sought to persuade me that this stipulation is permissive and is intended to clarify that an RTM Company is entitled to include a Saturday or Sunday or both as days on which inspection may be made available but that it was not required to include one of those days. She contended that the LVT in the Sinclair Gardens Investments case had been correct in its conclusion on this issue while the LVT in the Elim Court case had been wrong.

37. Mrs Mossop supported her argument by reference to *Bennion on Statutory Interpretation*, stressing that the Tribunal's duty was to arrive at the "legal meaning" of the relevant statutory provision which may not necessarily be the same as its grammatical meaning. She counselled against over reliance on any immediate impression which the statutory language might create and urged that it be considered only after contemplation of the general statutory purpose of Chapter 1 of Part 2 of the 2002 Act which was to facilitate the acquisition of the right to manage by tenants of flats. Section 78 (5)(b) was ambiguous in that it could either mean that the 3 days may include a Saturday or Sunday, or that they must include a Saturday or Sunday. That ambiguity ought to be resolved in

favour of the RTM Company to allow it greater flexibility because, Mrs Mossop submitted, the object of the statute was to provide the qualifying tenants with a simple route to the acquisition of the right to manage. A non-technical approach was therefore appropriate, similar to the approach taken by Her Honour Judge Walden-Smith in the Tribunal's decision in *Gateway Property Holdings Limited v 6-10 Montrose Gardens RTM Company Limited* [2011] UKUT 349(LC) at paragraph 26.

38. I am unable to accept Mrs Mossop's submissions on this aspect of the appeal. In my judgment there is no ambiguity in the meaning of section 78(5)(b). It requires that a notice inviting participation must inform the recipient of the times at which the articles of association may be inspected; those times must comprise periods of at least two hours on at least 3 days falling within the period of 7 days beginning with the date following that on which the notice is given; those 3 days must include a Saturday or a Sunday or both.

39. The task of a court or tribunal in a case of alleged ambiguity in the meaning of a contract or statute was described by Lord Hope in *Melanesian Mission Trust Board v Australian Mutual Providence Society* [1997] 2 EGLR 128 PC, as follows:

> "But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words is not there. So the starting point is to examine the words used to see whether there are clear and ambiguous."

To my mind Mrs Mossop and the LVT in the Sinclair Gardens case were too quick to identify an ambiguity, where, in reality, none exists.

40. On examination of the words of section 78(5) I note in particular that any 7 day period starting with the date on which a notice is given will necessarily contain both a Saturday and a Sunday. If the words "including a Saturday or Sunday or both" were omitted, there would be no possibility of doubt that the opportunity for inspection could be made available on any of those 7 days, including both working days and days at the weekend. The words cannot therefore have been included to provide "clarification" that inspection at the weekend was permissible and their only purpose can have been to restrict the freedom of the RTM company to make inspection available on days of its choosing.

41. The reason for that restriction is obvious: it is to ensure that all tenants have a realistic opportunity to inform themselves concerning the constitution of the RTM company in which they are being invited to participate. The inclusion of a Saturday or a Sunday promotes that objective by making it more likely that tenants who work on the usual working days will be able to inspect the documents personally. The statutory language is inept if its purpose was to make clear that the days selected for inspection may include non-working days. Had that been the intention the draftsman would surely have said so specifically or, at the very least have included the reference to Saturday's or Sunday's in a different place i.e. "on each of at least 3 days within the 7 days (including the Saturday and Sunday) beginning with a day following that on which the notice is given."

42. I am therefore satisfied that the LVT in the Elim Court case came to the correct conclusion on the construction of section 78(5)(b) and that the LVT in the Sinclair Gardens case reached the wrong conclusion on this issue.

43. I am also satisfied that the statute requires compliance with section 78(5)(b) and that a notice inviting participation which does not specify a Saturday or Sunday as one of the days on which inspection will be available is not compliant with the requirements of section 78(5). That is clear from the repeated use of the word "must". Additionally, section 78(6) emphasises the significance of the inspection provisions by stipulating that if, a notice includes a statement about inspection in accordance with sub-section (4)(b) the notice is to be treated as not having been given if the non-participating tenant is not allowed to undertake the inspection. Finally and significantly, it is provided by section 78(7) that a particular category of defect is not to be taken to invalidate a notice of invitation to participate. That category is described as "any inaccuracy in any of the particulars required by or by virtue of this section." It was not argued by Mrs Mossop that a failure to specify a Saturday or Sunday as one of the days for inspection could be regarded as an inaccuracy in the particulars required to be given. That concession was consistent with the Tribunal's decision in *Assethold Limited v 15 Yonge Park RTM Company Ltd* [2011] UKUT 379 (LC) (Her Honour Judge Walden-Smith).

44. The consequences of the failure of the notices of invitation to participate to comply with section 78(5)(b) remain to be considered.

The signature issue

45. In opening his appeal on the signature issue Mr Bates emphasised that his case was not based on the suggestion that Mr Joyner, whose signature appeared on all the claims forms, did not have authority from the RTM company to sign on its behalf. Mr Bates contention was that in each case Mr Joyner's signature appeared on the claim notice as the signature of a company (namely, the company which was itself the company secretary of the RTM company). The formalities for a company to sign a document (whether on its own behalf or on behalf of another legal or corporate person) were contained in section 44 of the Companies Act 2006 but were not complied with in the case of any of the claim notices. As a result the claim notices were, in effect, unsigned and did not comply with section 80(9) of the 2002 Act which required a claim notice to be in the prescribed form, since the form prescribed by the 2010 Regulations requires that the notice be signed.

46. The first point taken by Mrs Mossop in her response to the appeal on the signature issue was that each of the claim notices had been signed by Mr Joyner in his personal capacity on behalf of the RTM company. The formalities for the signature of a document by a company were therefore simply not relevant. Alternatively, Mrs Mossop relied on section 44(7) of the Companies Act 2006 in support of an argument that if compliance with section 44 was required, the single signature of Mr Joyner satisfied the statutory requirements for signature by a company which was itself the secretary of another company, and that the claim notices had accordingly been validly signed by the secretarial company on behalf of the RTM company.

47. Section 44 of the Companies Act 2006 altered the law concerning the execution of documents by companies. So far as it is relevant to the issues in these appeals, section 44 provides as follows:

> "44. Execution of documents
>
> (1) Under the law of England and Wales and Northern Ireland a document is executed by a company -
>
> (a) by the affixing of its common seal, or
>
> (b) by signature in accordance with the following provisions.
>
> (2) A document is validly executed by a company if it is signed on behalf of the company -
>
> (a) by two authorised signatories or
>
> (b) by a director of the company in the presence of a witness who attests the signature.
>
> (3) The following are "authorised signatories" for the purposes of sub section (2) -
>
> (a) every director of the company, and
>
> (b) in the case of a private company with a secretary or a public company, the secretary (or any joint secretary) of the company.
>
> (4) A document signed in accordance with sub-section (2) and expressed in whatever words to be executed by the company has the same effect as if executed under the common seal of the company.
>
> ...
>
> (7) References in this section to a document being (or purporting to be) signed by a director or secretary are to be read in a case where that office is held by a firm, as references to its being (or purporting to be) signed by an individual authorised by the firm to sign on its behalf.
>
> (8) This section applies to a document that is (or purports to be) executed by a company in the name of or on behalf of another person whether or not that person is also a company."

48. In *Hilmi & Associates Limited v 20 Penbridge Villas Freehold Limited* [2010] 1 WLR 2750 the Court of Appeal considered whether a notice given by a company under section 13 of the Leasehold Reform Housing and Urban Development Act 1993 which had been signed by one director of the company whose signature was not witnessed, was invalid as falling to comply with section 36A of the Company's Act 1985 (the statutory predecessor of section 44 of the 2006 Act). The Court of Appeal considered whether the signature of a notice was the "execution of a document" at all, so as to engage the statutory formalities. It was submitted on behalf of the company that those formalities apply only to documents which can fairly be said to be executed, and that one would not naturally speak of a simple notice requiring no more than a signature, however important its effect, as being executed. That submission had been the subject of inconsistent decisions in the county court but Lloyd LJ (who gave the only reasoned judgment) rejected it for the following reasons (at paragraph 28):

> "I would accept the submission of Mr Heather that, at any rate in the context where some degree of formality is required to make a document valid and effective for some particular

> legal purpose (and the points can only arise in such a context), it is appropriate and natural to speak of the execution of the document, as a matter of ordinary language. That is so even for a document to be made under hand rather than by deed."

49. Lloyd LJ went on at paragraph 31, to state that section 36A of the 1985 Act prescribed how a company should sign a document which was required for some formal legal purpose and that a claim notice under the 1993 Act was such a document. I can see no reason not to apply the same approach to a claim notice under the 2002 Act.

50. Each of the claim notices given by the RTM companies in respect of Elim Court, Upland Road and Canadian Avenue, was signed once by Mr Joyner, who is a director of Federation Limited, which is the relevant RTM company's secretary. None of the RTM Companies has a common seal and Mr Joyner's signatures were not witnessed. Neither of the modes of signature provided for by section 44(2) was therefore satisfied, because the document was not signed by two authorised signatories or by a director in the presence of a witness who attested the signature.

51. Section 44(7) does not assist in these circumstances. As Mr Bates pointed out, it is always necessary for a document signed by a company to bear two signatures. On the assumption that Mr Joyner was authorised by Federation Limited to sign documents, his unwitnessed signature on its behalf could provide only one of the two authorised signatories required by section 44(2)(a); if his signature was witnessed it would satisfy section 44(2)(b). Had the RTM Company itself purported to sign the claim form, section 44(7) would have enabled Mr Joyner, with the authority of the secretarial company, to provide a signature which would furnish one of the two required signatures by authorised signatories referred to in section 44(2)(a).

52. I am therefore satisfied that the single signature of Mr Joyner on the claim notices could not amount to signature of the notice by the secretarial company. It is therefore necessary to consider Mrs Mossop's first contention that Mr Joyner's signature, where it appeared on the claim notices, was his personal signature and not that of the secretarial company of which he was a director.

53. The claim notice given on behalf of the Upland Road RTM company contained the following statement which appeared immediately after Mr Joyner's personal signature:

> "Dudley Joyner, Director, The Right to Manage Federation Limited, company's secretary for and on behalf of 369 Upland Road RTM Company Limited."

54. The claim notice given on behalf of the Canadian Avenue RTM Company contained a similar statement although Mr Joyner was described as a director of "RTMF Services Limited." Mrs Mossop explained that the Rights to Manage Federation Limited and RTMF Services Limited were separate companies. It is not clear whether this distinction was appreciated by the LVT but, as I am satisfied for the reasons already given that Mr Joyner's signature was not the signature of either secretarial company, so it is not necessary to consider that wrinkle any further.

55. Mr Bates argued that it was clear that Mr Joyner had signed in his capacity as a director of the secretarial company intending his signature to stand as that of the secretarial company. I do not accept that argument. Mr Joyner signed using his own name, and it is not disputed that he personally had authority to sign claim notices on behalf of the RTM companies (he is a director of each of them). The question is whether the signature is to be treated as Mr Joyner's own signature or not. The statement after the signature provides four separate pieces of information: Mr Joyner's name; the fact that he is a director of the named company; the fact that that company is the company secretary; and the fact that the signatory was acting for and on behalf of the RTM company. All of that information is to a greater or lesser extent descriptive of Mr Joyner himself. I do not consider that, simply by the provision of such additional information, Mr Joyner's signature was prevented from being an effective signature by a person with authority to sign the claim notice on behalf of the RTM Company and became instead an ineffective, purported signature by the secretarial company.

56. If the signature was that of the secretarial company there would have been no need for Mr Joyner to give his own name or to state that he was a director of that company. An informed reader of the claim notice would also know that Mr Joyner's signature alone could not be the signature of the secretarial company and would understand it to be the signature of Mr Joyner himself. Section 44 not having been complied with the claim notices must either be treated as valid, by virtue of Mr Joyner's signature and the authority he held to sign on behalf of the RTM companies, or they must be treated as waste paper. I am satisfied that the requirement that a claim notice must be signed by someone who in fact had the authority of the company and was an authorised member or officer was satisfied in these circumstances.

57. In the Elim Court case the position is a little more complicated because the words which appear after Mr Joyner's name are "RTMF Secretarial, Secretary". It is less easy to regard those words as a description of Mr Joyner himself and they suggest that he was signing as a representative of RTMF Secretarial. No indication is given in the claim notice as to who or what RTMF Secretarial is and in particular it is not obvious that it is a limited company. In fact RTMF Secretarial is a trading name of Federation Limited which was the company secretary of the Elim Court RTM Company. As Mr Joyner's signature neither purported to be that of a company, nor could as a matter of law be that of a company, I accept Mrs Mossop's argument that the claim notice was in fact signed by an individual, Mr Joyner, who was an authorised member or officer of the RTM Company, authorised to give the claim notice on its behalf.

58. I am therefore satisfied that all three claim notices were valid as a matter of form and I would dismiss the appeals on the signature issue in the *Elim Court* and *Assethold* cases.

The intermediate landlord issue

59. This issue arises in the Elim Court case as it will be recalled that Flat 37 at Elim Court was the subject of an intermediate long lease granted to ReAssure Limited. The intermediate lease, no copy of which is available, is understood to have been granted with the benefit of and subject to the

occupational long lease of Flat 37 and was for a term of a further 89 years after the expiry of the occupational lease. It is apparent from the official copy of the land certificate that the lease included no other property than was included in the occupational lease. There was no evidence about the lease other than a copy of the land certificate and a letter from ReAssure written in the context of the appeal, but it seems likely, as the LVT found, that the lease was intended as an equity-release vehicle.

60. Section 79(6) of the 2002 Act requires that:

> "The claim notice must be given to each person who on the relevant day is -
>
> (a) landlord under a lease of the whole or any part of the premises ..."

The premises for this purpose are, of course, the self-contained building or part of the building referred to in section 72(1) which is the subject of the proposed acquisition of the right to manage.

61. Mrs Mossop submitted that it was not necessary that a claim notice be given to an intermediate landlord which, like ReAssure, had no management functions in relation to the premises. Although there was no evidence concerning the content of the intermediate lease it could be assumed, as the demised premises comprised the flat alone, that it imposed no obligations on the intermediate landlord in relation to insurance, repairs of common parts etc. Given that the whole purpose of the statutory scheme was to effect a transfer of management responsibility from a landlord to the RTM company, the service of a claim notice on an intermediate landlord such as ReAssure which lacks any management responsibility was not required in these circumstances because it would not make any difference to the performance of management functions. Mrs Mossop emphasised that she was not submitting that an intermediate landlord, as such, was not a landlord for the purposes of service to the claim notice, but only that an "equity release landlord" with no management responsibilities was not a landlord for this purpose.

62. I do not accept Mrs Mossop's submissions on this aspect of the intermediate landlord issue. Mrs Mossop accepted that it had always been necessary to serve a claim notice on an owner of the freehold, even where it had demised the whole of the premises and retained no management functions. It would also be necessary to serve any intermediate landlord with management functions. Section 79(6)(a) is perfectly general and does not allow of any distinction between a landlord of part of the premises (including even a single flat) which has no management functions, and a landlord with management functions.

63. As Mr Bates pointed out, acquisition of the right to manage does not simply involve a transfer of obligations to provide services and carry out repairs and insurance. Sections 98 and 99 of the 2002 Act also transfer to the RTM company any functions in relation to the grant of approvals to a tenant under a long lease of the whole or any part of the premises. Even if ReAssure's intermediate lease placed no obligations on it, it was inevitable, Mr Bates submitted, that the lease would give ReAssure the right to grant or withhold its approval to alterations, underlettings, further charges or other dispositions which the occupational tenant might wish to make during the term. The function of granting such approvals would pass to the RTM company on the acquisition date. It was therefore a necessary part of the statutory scheme that the intermediate landlord should be made

aware of the claim and of the prospect that its legal entitlements in relation to the premises would be altered on the acquisition of the right to manage. The Act makes no provision for any further communication between the RTM company and intermediate landlords by which they might be informed that the right has been acquired and I therefore accept Mr Bates submission that it is essential that an intermediate landlord, even one with the very limited rights assumed to be enjoyed by ReAssure, be served with the claim notice.

64. Mrs Mossop also sought to uphold the LVT's conclusion that the claim notice had been served on the intermediate landlord. A copy of the notice given to Avon Freeholds was sent to all of the non-participating tenants (as required by section 79(8)). The copy sent to Flat 37 was addressed to the occupational tenants and to ReAssure. A single envelop was sent and it is not known whether it contained only a single copy of the claim notice or whether copies were provided for each addressee. It is known, as the LVT found, that the notice was not in fact brought to the attention of ReAssure at the time it was given. It now appears that a copy was first sent to ReAssure by Avon Freehold's managing agents in November 2012, three months after the LVT's decision.

65. Mrs Mossop suggested that it should be assumed that the intermediate lease included a covenant by the occupational tenants that they would send copies of any notices which they received to the intermediate landlord. Such a covenant was a standard covenant in all leases. The occupational tenants were therefore under an obligation to forward the copy of the claim notice which they received to the intermediate landlord. The fact that they appear not to have done so was not the fault of the RTM company and so it should be taken to have had served a copy of the notice on the intermediate landlord.

66. I do not accept these submissions. While there may be circumstances in which the receipt of a notice by an agent whose agency obliges him to transmit the notice to his principal, there is no justification in this case for treating the occupational tenants as the agents of the intermediate landlord. There is no statutory provision which deems service of a notice at demised premises as good service on the landlord of those premises and section 111(3) of the 2002 Act has no application in this context. There is therefore simply no basis for the LVT's conclusion that the claim notice should be assumed to have been served.

67. I am also satisfied, for the reasons already given, that service of a claim notice on every landlord of any part of the premises, including intermediate landlords, is a necessary step to achieve compliance with the requirements of section 79(1). The consequences of non-compliance with that requirement, and with the Saturday/Sunday requirement of section 78(5)(b) will be considered next.

The consequences of non-compliance

68. Pausing to take stock, I have concluded that the notices inviting participation given by the RTM companies to the tenants of Calloway House and Brand House, and those given to the tenants of Elim Court were defective because they failed to comply with the requirements of section 78(5)(b). I have also concluded that no claim notice was served on the intermediate landlord of flat

37 at Elim Court, when it was required by section 79(6). Those conclusions bring me to the final issue in these appeals, namely the legal consequences of these deficiencies.

Submissions on behalf of the RTM companies

69. Mrs Mossop cited extensively from authority in support of her submission that where a procedural provision in a statute is not observed the consequence is not that the particular procedural step and all that follows it must be treated as a nullity, but is rather that the court or tribunal should consider the consequences of procedural non-compliance in the particular circumstances of the case and should decide whether the steps actually taken amounted to substantial compliance with the procedural requirement so that the default in full compliance may be overlooked. She suggested that in the Sinclair Gardens and Elim Court cases the LVT had a discretion to waive or forgive the non-compliance with section 78(5)(b).

70. Mrs Mossop submitted that there had been substantial compliance with the statutory requirements and that the omission to specify a Saturday or Sunday for inspection could not seriously be said to have caused prejudice to anyone. Inspection was made available on three days in Sussex (although Brand House and Calloway House were in Plymouth) so it would have been much more convenient for anyone who wished to read the articles of association to request a copy rather than to attend for personal inspection on one of the weekdays stipulated let alone at the weekend. There was no evidence that any qualifying tenant of any of the three blocks wished to inspect the documents at all and it should not be assumed that prejudice had been caused. In the Elim Court case she argued that the failure to serve a claim notice on the intermediate landlord could also be overlooked because of the insubstantial nature of the intermediate landlord's interest and the absence of any management functions for it to perform.

71. The authorities relied on by Mrs Mossop begin with the decision of the House of Lords in *London & Clydeside Estates Limited v Aberdeen District Council* [1980] 1 WLR 182 in which it was decided that a local planning authority's certificate of alternative development given under section 25 of the Land Compensation (Scotland) Act 1963 was vitiated by its omission to comply with a mandatory requirement that the certificate should include information concerning rights of appeal. The speech of Lord Hailsham of St Marylebone LC includes a passage (at pages 189C - 190D) concerning "the effect of non-compliance by a statutory authority with the statutory requirements affecting the discharge of one of its functions." At page 189F he said this:

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself.... At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the

> authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in the majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary..."

72. The speech of Lord Woolf MR in *R v Secretary of State for the Home Department ex-parte Jeyeanthan* [2000] 1 WLR 354 provided the foundation of Mrs Mossop's argument. The Secretary of State had applied for permission to appeal against a decision by an adjudicator to grant asylum. The application was made by letter, rather than by using the form prescribed by the Asylum Appeals (Procedure) Rules 1993. The letter contained all of the information required by the prescribed form except for a declaration of truth. The question for the Court of Appeal was whether the failure to use the prescribed form rendered the appeal invalid and required that the decision obtained in the Secretary of State's favour be quashed.

73. Lord Woolf considered the proper approach to procedural irregularities, which he described at page 358E as an issue of general importance which had "implications for the failure to observe procedural requirements outside the field of immigration." The position was more complex than the conventional approach of categorising some procedural requirements as mandatory and some as directory, a distinction which distracted attention from the more important question which was "what the legislator should be judged to have intended should be the consequence of the non-compliance." In the majority of cases, whether a requirement was categorised as directory or mandatory the tribunal before whom a procedural defect was properly raised "has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises." Having referred to the speech of Lord Halisham in *London Clydeside Estates*, and bearing his guidance in mind, Lord Woolf went on (at page 362C) as follows:

> "I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows:
>
> (1) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even thought there has not been strict compliance? (The substantial compliance question.)
>
> (2) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.
>
> (3) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)
>
> Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focussing on these questions is that they should avoid the

> unjust and unintended consequences which can flow from an approach solely dependant on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

74. The approach suggested by Lord Woolf MR in *Jeyeanthan* was applied by the Lands Tribunal (George Bartlett QC, President) in the context of a claim by an RTM company to have acquired the right to manage under the 2002 Act in *Sinclair Gardens Investments (Kensington) Limited v Oak Investments RTM Company Limited* LR/52/2004. The premises in respect of which the right was asserted comprised a house divided into three flats each of which was let on a long lease. The tenant of two of the flats was a member of the RTM company, as was one of the two joint tenants of the third flat. It was common ground that the effect of section 78(1) and section 112(5) of the 2002 Act was to create a requirement to serve a notice of invitation to participate on the remaining joint tenant of the third flat who was not already a member of the RTM Company. No such notice had been served.

75. The landlord contended before the LVT that failure to serve the required notice invalidated the claim notice because section 79(2) provided that a 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. The LVT rejected that submission and found that the joint tenant had been aware of the application at all times, that the landlord had not been prejudiced in any way by the failure to serve the notice and that the joint tenant had already applied to become a member of the RTM company notwithstanding the failure to extend the required invitation to him. The Lands Tribunal dismissed the landlord's appeal from the LVT's decision, relying on *Jeyeanthan* and *London & Clydeside Estates*. At paragraph 10 of his decision the President said this:

> "The purpose of requiring notice of invitation to participate to be served on a qualifying tenant who neither is nor has agreed to become a member of the RTM company is clearly to ensure that the interest of that tenant is protected. Under section 79(8) a copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of the flat contained in the premises. The provisions are thus designed to ensure that every qualifying tenant has the opportunity to participate in the RTM Company and is informed that a claim notice has been made by the RTM Company. In determining the effect of the failure to comply with one or other of those requirements the principal question for the Tribunal will be whether the qualifying tenant has in practice had such awareness of the procedures as the statute intended him to have."

76. The LVT having concluded that the joint tenant was fully aware of the proceedings and that no prejudice had been caused to the landlord, it had been correct to find that the failure to give the notice of invitation to participate did not invalidate the acquisition of the right to manage.

77. The Lands Tribunal also considered three decisions of the Court of Appeal under the enfranchisement provisions of the Leasehold Reform, Housing and Urban Development Act 1993 in each of which the service of a defective notice had been held to be fatal to the whole procedure, but

concluded that each case concerned a defect which was capable of causing prejudice to the recipient of the notice.

78. A similar conclusion was reached by the Tribunal (Sir Keith Lindblom, President) in *Avon Freeholds Limited v Regent Court RTM Company Limited* [2013] UKUT 0213 (LC). In that case the right to manage was claimed in relation to a block of flats. The tenant of one of the flats, flat 16, had died by the time the notices of invitation to participate were served and the lease had become vested in his personal representatives. The RTM company had not served a notice at the flat (which would have been sufficient service by reason of section 111(5) of the 2002 Act) but had attempted service at the address of the personal representatives recorded in the proprietorship register at the land registry. The RTM company was unable to show that a notice of invitation to participate had been received by the personal representatives who had not responded in any way. The LVT had held that the failure to serve the personal representatives did not vitiate the right to manage process.

79. The Tribunal considered whether the LVT had been right to hold that the provisions for the service of a notice of invitation to participate were directory, rather than mandatory, and that the crucial factor was whether there was any significant prejudice as a result of this failure, and, if so, whether the LVT had been right to find that there was not such prejudice as to invalidate the right to manage process (paragraph 15(1)). The RTM company (represented by Mr Bates) argued that the failure to serve the notice of invitation to participate invalidated the entire right to manage process. His argument was based on the existence of prejudice to the tenants of flat 16 and to the appellant as landlord. The approach of the LVT was also said to create uncertainty over the number of tenants who would have to be affected by a defective notice before the process would be invalidated (paragraph 36(6)). Mr Bates had sought to distinguish the Lands Tribunal decision in *Sinclair Gardens v Oak Investments* on its facts: the joint tenant who had not been served in that case had been fully aware of the RTM process and so had not lost the opportunity to become a member and to influence the decisions of the company (paragraph 36(4)). At paragraph 39 the President referred to the scope of the argument addressed to him when he said this:

> "I understood Mr Bates to concede that, at least in part, those provisions are directory, since they allow some latitude in the giving of notice. That concession seems to me to be correct."

80. The President did not accept the appellant's arguments, saying at paragraph 39 that the right approach was "to consider 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." The effect of a failure to comply must be considered "in the context of what Parliament plainly sought o achieve by those provisions" (paragraph 48). The statute allowed for deemed service of notice and so contemplated a situation in which one or more of the qualifying tenants might not be aware that the right to manage process had begun.

81. Guidance on the issue of prejudice was given at paragraph 47; the number of tenants who had not received a notice was unlikely to be a decisive factor when prejudice to tenants was being assessed:

> "What one ought to do, I believe is to ascertain - so far as one can - the true effects of the failure to give notice in accordance with the statutory provisions on all those affected by that failure. The question here is not whether a significant number of tenants have been prejudiced, but whether any or all of the tenants not given notice in accordance with section 111 has been caused such prejudice through the RTM company's default as to justify denying the RTM company the right to manage. It is necessary to look at the nature and extent of the prejudice to each of those tenants. There may be cases in which only one tenant in a very large block has not had notice and significant prejudice to that person can be shown. There may be others in which the tenants of several flats are not served but there is, nevertheless, no such prejudice, and the integrity of the process has not been impaired. Each case will turn on his own particular facts."

82. There was no suggestion in *Avon Freeholds* (in contrast to the appeals raising the Saturday/Sunday issue) that the notice of invitation to participate itself was invalid because it lacked any of the particulars required by the relevant statutory provisions. Nor was it a case of the RTM company simply neglecting to give notice to a particular tenant; an attempt had been made to serve the tenants at the address given for them in the proprietorship register but this notice could not be shown to have been received. In all these circumstances the President was satisfied that, as far as prejudice was concerned, no greater prejudice had been caused to the tenants of flat 16 than would have been the case if they had been served at the flat itself (where neither they nor anyone else resided). Such service would have been in accordance with section 111(5) and therefore sufficient, although there would have been a substantial risk that the notice would not in fact have come to the attention of the tenants. Parliament could not have intended that in those circumstances the whole of the right to manage process would be defeated by the RTM company failing to comply fully with the provisions for giving notice of invitation to participate. There had been substantial compliance with the statutory requirements and the consequences of non-compliance in that case were not such as to justify denying the RTM company the right to manage.

Submissions for the landlords

83. Mr Radley-Gardner submitted that the LVT had been right in the Sinclair Gardens case to hold that the failure to give notice of arrangements for inspection on a Saturday or Sunday, rendered the notice of invitation to participate invalid and that substantial compliance (even if there had been such, which he said there had not) was not good enough. Mr Bates made similar submissions on the cross appeal in Elim Court in which he contended that the failure to serve the intermediate landlord with a claim notice and the defect in the notice of invitation to participate were each fatal to the whole acquisition of the right to manage.

84. Mr Radley-Gardner mounted a sustained challenge to the assumption underlining the Tribunal's decision in *Avon Freeholds*, namely, that compliance with the requirement to give a notice inviting participation in the form prescribed by the 2010 Regulations to all non-participants was not an essential precondition to the acquisition of the right to manage which must in all cases be fully satisfied. Mr Radley-Gardner noted, as had the President in paragraph 39 of *Avon Freeholds*, that the appellant had not there sought to argue that *Sinclair Gardens Investments v Oak Investments* was wrongly decided and ought not to be followed. Mr Bates confirmed that to have been the case.

85. Mr Radley-Gardner referred to a line of authority in which defects in notices had been treated as fatal to the subsequent procedures. These demonstrated, as the Court of Appeal in *7 Strathray Gardens Limited v Point Star Shipping & Finance Limited* [2004] EWCA 1669 had said, that the effect of non-compliance depends on the particular statutory scheme in point. Where a particular notice was "integral" to the proper working of a statutory scheme, a failure to comply with the statutory requirements would be fatal to its validity. Thus in *Speedwell Estates Limited v Dalziel* [2002] 1 EGLR 55 the Court of Appeal had held that the failure to provide details of the periods of residential occupation by tenants seeking to enfranchise under the Leasehold Reform Act 1967 (when residence was a qualifying condition) was a failure to provide core information, which landlords would not necessarily have known, and which was crucial to the claim to enfranchise. It had been argued that the landlord already had means of knowing most of the information which the prescribed form required to be given to it. Rimer LJ rejected that approach as follows:

> "In my judgment, that approach to the present problem is unsound. First of all, I do not accept that the sufficiency or otherwise of the particulars required to be provided by the prescribed form of notice used in cases such as the present can, or should be assessed by reference to the extent of the landlords' actual knowledge of the facts. It is likely that in many cases the landlords will already know some of the information required to be provided ... and that the provision of information about this in the prescribed form may well tell them little they do not already know. The point, however, is that there is nothing optional about the information required to be contained in the tenant's notice under Part 1 of the 1967 Act. Schedule 3 provides that it "shall be in the prescribed form, and shall contain the following particulars...." Those are mandatory requirements, and if the tenants wants his notice to be a valid one, he must comply with them. If he does not, then he runs the risk that his notice will not do the statutory work he requires of it. "

86. Rimer LJ also referred to *Byrnlea Property Investments Limited v Ramsay* [1969] 2QB 253, a case concerning a notice served under the 1967 Act which had not followed the prescribed form. Both Edmund Davies and Phillimore LJJ had considered that it was significant that the Act provided that a notice was not to be invalidated by any inaccuracy in the particulars provided or by any mis-description of the property to which the claim extended, whereas "no such indulgence relaxes the insistence … that the tenant's notice "shall be in the prescribed form", and that "the clear inference is that some other error may invalidate the form."

87. Mr Radley-Gardner gave other examples of cases in which strict compliance had been insisted upon. *Sinclair Gardens Investments Ltd (Kensington) Limited v Poets Chase Freehold Company Limited* [2007] EWHC 1775 (Ch) concerned a notice initiating a collective enfranchisement under the 1993 Act. Morgan J said this (at paragraph 54):

> "Speaking generally, if a mandatory contractual or statutory provision requires a party to give a notice in a particular form in order to achieve a result identified in the contract or statute and if a purported notice given by that party fails to comply with the mandatory contractual or statutory provision, then the normal position is that the notice has no legal effect."

88. Mr Radley-Gardner emphasised the importance of the language and structure of the Act. Section 78(1) imposed a clear condition that before making a claim an RTM company "must" give a

notice of invitation to participate to every qualifying tenant who is not yet a member. That bar to the making of a claim was emphasised by the requirement of section 79(2) that "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." Without a valid notice inviting participation there could be no valid claim. The position was as stated by the Tribunal (His Honour Judge Huskinson) in *Assethold Limited v 13-24 Romside Place RTM Company Limited* [2013] UKUT 0603 (LC), at paragraph 15:

> "If a claim notice is given in circumstances where there has not been service of a valid NIP as contemplated by section 79(2) then the claim notice is invalid. The claim notice cannot be saved by section 81(1) because a failure to comply with section 79(2) cannot be said to constitute an "inaccuracy in any of the particulars required by or by virtue of section 80."

89. Mr Radley-Gardner submitted that the steps prescribed by the 2002 Act were of a different kind to the procedural provisions for the exercise by public authorities of their statutory functions which had been considered by the Court of Appeal in *Jeyeanthan* or in other administrative law contexts. They were substantive provisions, compliance with which altered the contractual and fiduciary relationships between a number of parties. Moreover, those alterations in legal rights and obligations were brought about solely by the force of compliance with the statutory scheme and did not depend on any judicial determination. If the scheme was properly operated the right to manage was acquired by the RTM Company and the only role given to the tribunal was to make a determination that that the right had been successfully acquired because the necessary steps had been taken. Nothing in the Act contemplated a discretion on the part of the Tribunal to waive defects in the taking of those steps. There was therefore no room for considerations of substantial compliance or prejudice; if there had been a failure to comply with the statutory pre-requisites, the result was that the notice of invitation to participate and everything which followed it was ineffective.

90. Mr Radley-Gardener submitted that, in any event, the Court of Appeal in *Jeyeanthan* had not created a general principle that defects in the operation of statutory requirements could be overlooked if prejudice could not be demonstrated, nor was that the ratio of the Tribunal's decision in *Avon Freeholds*. Lord Woolf had recognised at page 361F that there would be statutory contexts in which procedural defects would be fatal "if the result of non-compliance goes to jurisdiction". The decision of the Court of Appeal in *Petch v Gurney* [1994] 3 All ER 371 was an example of such a case.

91. Mr Radley-Gardner submitted that in these cases the first question posed by Lord Woolf in *Jeyeanthan* ("Is the statutory requirement fulfilled if there has been substantial compliance?") must be answered in the negative. The statutory scheme automatically conferred the right to manage if the appropriate steps, beginning with service of a compliant notice of invitation to participate, were taken. No lesser steps could have the same effect.

92. Alternatively there could not have said to be substantial compliance with section 78(5)(a) because a failure to specify a weekend day as one of the three days required to be specified was substantial non-compliance. Finally Mr Radley-Gardener argued that even if it came to a consideration of the extent of the prejudice caused to non-participating tenants there was simply no evidence before the Tribunal from any of those non-participants which would enable the necessary

assessment to be made. In *Assethold Limited v 7 Sunny Gardens Road RTM Company Limited* [2013] UKUT 509 (LC) the Tribunal had made clear where the burden of proof on the issue of prejudice lay at paragraph 40:

> "The burden of satisfying the LVT that a defect in compliance with the statutory procedure laid down by the 2002 Act has not caused prejudice falls on the party asserting that the right to manage has successfully been acquired. ... Where an RTM company leads no evidence and presents no argument which would enable a first-tier tribunal, or the Tribunal on appeal, to conclude that no relevant prejudice had been suffered, the appropriate course of action will usually be for the request for a determination of entitlement to acquire the right to manage under section 84(3) to be dismissed.

93. In reply to these submissions Mrs Mossop referred to the decision of the Court of Appeal in *Newbold v Coal Authority* [2014] 1 WLR 1288. That case concerned the validity of a landowners' notice under the Coal Mining Subsidence Act 1991 initiating a claim for compensation. The court had been shown the two lines of authority to which I have referred (exemplified by *Jeyeanthan* on the one hand and *Speedwell Estates* on the other) and it had been suggested that they were not very consistent. Sir Stanley Burton disagreed, saying this at paragraph 70:

> "I do not consider there is any such conflict. In all cases, one must first construe the statutory or contractual requirement in question. It may require strict compliance with requirement as a condition of its validity... against that, on its true construction a statutory requirement may be satisfied by what is referred to as adequate compliance. Finally, it may be that even non-compliance with the requirement is not fatal. In all such cases, it is necessary to consider the words of the statute or contract, in the light of its subject matter, the background, the purpose of the requirements, if that is known or determined, and the actual or possible effect of non-compliance on the parties. We assume that Parliament in the case of legislation, and the parties in the case of a contractual requirement, would have intended a sensible, and in the case of a contract, commercial result."

In Mrs Mossop's submission these observations provided a conclusive answer to the suggestion that the *Jeyeanthan* approach to the consequences of non-compliance was inapplicable to the steps which had to be taken to achieve the right to manage.

Discussion and conclusion

94. The long list of authorities relied on by both sides on this issue establish clearly that Mr Radley-Gardner is right in his submission that the consequences of non-compliance with the statutory machinery for the acquisition of the right to manage cannot be determined simply by considering whether prejudice has been caused. The first task is to construe the statutory requirements in their relevant setting, as described by Sir Stanley Burnton in *Newbold,* and to consider whether substantial compliance can have been intended by Parliament to suffice. If substantial compliance is capable of having the same legal effect as full compliance with the relevant provision, it then falls to consider whether the steps which have been taken have substantially achieved the statutory objective. In addressing that question it is necessary for the Tribunal to consider whether it is satisfied that no such

prejudice has been caused as would impair the integrity of the statutory process, with the burden of so satisfying it falling on the RTM company.

95. In both *Sinclair Gardens v Oak Investments* and *Avon Freeholds Limited v Regent Court RTM Company* the Tribunal was satisfied that the steps which had been taken had achieved the objective of the statutory scheme even though they had fallen short of complete compliance. In neither case was there any suggestion that the form of the notice of invitation to participate which was served was defective. The non-participating tenant in *Oak Investments* was fully aware of the process and at least one tenant of all three flats was already a participant. The mode of service adopted in *Avon Freeholds* had not succeeded in bringing the notice to the attention of the personal representatives of the deceased tenant, but that was a risk inherent in the statutory scheme.

Saturday/Sunday - consequences

96. In the *Sinclair Gardens* appeal and the *Elim Court* appeal the notices inviting participation given by the RTM companies were defective because they failed to specify a Saturday or a Sunday as days on which inspection would be available and so did not comply with the requirements of section 78(5)(b).

97. The purpose of the requirement that inspection of the articles of association of the RTM company be made available at the weekend is obviously to maximise the opportunities available to qualifying tenants to familiarise themselves with the company while considering whether to accept the invitation to become members. The minimum period for which inspection is to be made available is six hours in total, spread over three days in the period of seven days beginning with the day after the date on which the notice is given. It is likely that in very many cases so short a period, and such short notice of the opportunity to inspect, would not be convenient for many qualifying tenants, especially those who work during normal hours.

98. The opportunity for personal inspection is one of the two methods by which the Act contemplates qualifying tenants may obtain access to the articles of association, and the notice is also required to specify a place at which a copy may be ordered at the qualifying tenants' expense. The fact that one method might be more convenient than the other for some recipients of the notice does not detract from the fact that Parliament intended that they should each have a choice. Neither method is particularly onerous or difficult for an RTM company to comply with

99. In section 78(6) Parliament indicated the consequences of a qualifying tenant not being allowed to undertake an inspection or not being provided with a copy of the articles of association. In any such case the notice inviting participation is to be treated as not having been given. That sanction indicates the importance of the opportunity to inspect the articles of association, whether or not an alternative method of viewing them is also available. It might also be said to beg the question of what was intended to be the consequence of a failure or deemed failure to serve a notice inviting participation. Section 79(2) directs that a 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. The statutory scheme would therefore seem to contemplate that the consequence of not allowing a

person to undertake an inspection is that no claim notice may be served. If that is right it would tend to support the construction placed on section 78(5) by Mr Radley-Gardner that the opportunity to inspect at the weekend is not to be regarded as an optional arrangement which can be ignored with impunity by an RTM company.

100. It was not suggested by Mrs Mossop that the omission to specify a day at the weekend was an inaccuracy in the particulars required to be included such as is referred to in section 78(7). Although an inaccuracy in particulars will not invalidate a notice of invitation to participate, the notices given in these cases accurately stated the days on which inspection was available, all of which were week days. The saving provision in section 78(7) provides relief against the consequences of inaccuracy but by doing so it implicitly suggests that other more substantial defects should be taken to invalidate the notice (as was suggested by the Court of Appeal in *Byrnlea Property Investments Limited v Ramsay* [1969] 2 QB 253).

101. These considerations all seem to me to point to the conclusion that a failure to make inspection available on at least one day at the weekend is a substantial failure in compliance with the statutory scheme which renders the subsequent steps ineffective.

102. If, contrary to the view I take, that conclusion is too drastic, it would be necessary to consider whether the steps which were taken amounted to substantial compliance and had achieved the statutory objective of providing access to the articles of association of the RTM companies. In neither of the cases in which this issue arises has there been any attempt by the RTM companies to demonstrate that no prejudice has been caused to the non-participating tenants by the limitation of the opportunities given to them to inspect. It was said by Mrs Mossop that it was obvious that no prejudice was caused but to accept that submission would, in effect, place the burden of establishing prejudice on the landlords. That would be close to treating the requirement of section 78(5)(b) as optional, which cannot be appropriate.

103. I am therefore satisfied that the LVT reached the right conclusion on this issue in the *Elim Court* decision and I therefore dismiss the RTM company's appeal. In the *Sinclair Gardens* case the LVT was also right in its conclusion on this issue and I dismiss the RTM companies' cross appeals.

The intermediate landlord issue - consequences

104. In the *Elim Court* appeal the omission to serve a claim notice on the intermediate landlord seems to me to be a failure of compliance of a different order and to be fatal to the integrity of the statutory process. Section 79(6) requires that a claim notice must be given to each person who on the relevant date is a landlord. The purpose of that requirement is clear. It is to inform the landlord of the claim which is being made by the RTM company to acquire rights which currently belong to that landlord, and to give the landlord the opportunity to serve a counter-notice and raise any objection to the claim which may be open to it.

105. It might be said that a landlord's entitlement to receive a claim notice before being deprived of the right to manage is so obviously of fundamental importance as not to require further comment but two features of the statutory scheme seem to me to be worth drawing attention to briefly.

106. The first is the fact that, in the absence of service of a counter-notice under section 84, the right to manage will be acquired automatically without further investigation of the validity of the claim. Section 90(2) provides that where there is no dispute about entitlement the acquisition date of the right to manage is the date specified in the claim notice. The only opportunity which the landlord has to raise a dispute is by giving a counter-notice in response to the notice of claim served under section 79(6). The service of a claim notice on all of those landlords entitled to receive one is therefore integral to the statutory scheme and cannot be dispensed with, no matter how insubstantial the management functions of a particular landlord.

107. The second important feature of the scheme, in this regard, is the provision which has been included in section 79(7) and section 85 for protecting the interests of landlords who cannot be found or whose identity cannot be ascertained. No notice of claim is required to be served on such a landlord, but an application must be made to the first-tier tribunal which will consider the procedure which has been adopted and satisfy itself of the integrity of the claim. Parliament clearly did not intend that a claim should succeed without any external scrutiny. It would be inconsistent with that approach for a claim to succeed in circumstances where a landlord of part of the premises, whose identity and interest are apparent from information publicly available at the Land Registry, has no knowledge of the making of the claim.

108. I am satisfied that the intermediate landlord issue can be determined without consideration of any question of prejudice, on the basis that a failure to comply with section 79(6)(a) is necessarily fatal to the whole acquisition. In any event the prejudice to any person who is deprived of the opportunity to consider the consequences of a notice of claim and, if appropriate, seek to resist those consequences is obvious.

109. For these reasons I allow Avon Freeholds' appeal in the *Elim Court* case.

110. The effect of my decisions in all three appeals is therefore that:

(a) The Saturday/Sunday issue is determined in favour of the landlords.

(b) The signature issue is determined in favour of the RTM companies.

(c) The intermediate landlord issue is determined in favour of the landlord.

(d) 369 Upland Road RTM Company Ltd and Canadian Avenue RTM Company Ltd are entitled to exercise the right to manage.

(e) The other RTM companies are not entitled to exercise the right to manage.

Martin Rodger QC,
Deputy President

10 September 2014