UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Number: LRX/61/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – Right to manage – giving of notice of invitation to participate – sections 78 and 111 of the Commonhold and Leasehold Reform Act 2002 – second claim notice – section 81(3)

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL FOR THE SOUTHERN RENT ASSESSMENT PANEL

BETWEEN **AVON FREEHOLDS LIMITED** **Appellant**

and

REGENT COURT RTM CO LIMITED **Respondent**

Re: Regent Court,
Regent Street,
Plymouth,
Devon
PL4 8BD

Before: The President, Sir Keith Lindblom

Sitting at 43-45 Bedford Square, London WC1B 3DN
on 17 April 2013

Mr Justin Bates, instructed by Conway & Co, solicitors for the appellant
Mrs Margarita Mossop, instructed by Mayfield Law Ltd, solicitors for the respondent

The following cases are referred to in this decision:

Plintal SA v 36-48A Edgwood Drive Co Ltd LRX/16/2007
Petch v Gurney [1994] 3 All E.R. 731
Howard v Bodington (1877) 2 P.D. 203
London and Clydeside Estates Ltd v Aberdeen DC [1980] 1 W.L.R. 182
R v Immigration Appeal Tribunal, ex parte Jeyeanthan [1999] 3 All E.R. 231
Brayhead (Ascot) Ltd v Berkshire CC [1964] 2 Q.B. 303
7 Strathray Gardens Ltd. v Pointstar Shipping & Finance Ltd. [2004] EWCA Civ 1669
R v Soneji [2006] 1 A.C. 340
Sinclair Gardens Investments (Kensington) Ltd v Oak Investments RTM Co. Ltd. (LRX/52/2004)
Sinclair Gardens Investments (Kensington) Ltd. v Poets Chase Freehold Co. Ltd. [2007] EWHC 1776 (Ch)
9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council [2006] 1 W.L.R. 1186
Alleyn Court RTM Co Ltd v Abou-Hamdan [2012] UKUT 74 (LC)

DECISION

Introduction

1. This is an appeal, by way of review, against the decision of the Leasehold Valuation Tribunal for the Southern Rent Assessment Panel ("the LVT"), issued on 13 February 2012, on applications made under sections 84 and 88 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). The building to which those applications related is a block of flats called Regent Court, in Regent Street, Plymouth. In the first application the respondent in the appeal, Regent Court RTM Co. Ltd., sought a determination under section 84(3) of the 2002 Act that on the relevant date it was entitled to acquire the right to manage the building. The second application was made by the appellant, Avon Freeholds Ltd, seeking a determination under section 88 of the costs to be paid to it. The LVT decided that the respondent was entitled to acquire the right to manage.

2. Permission to appeal has been granted on two grounds, which are:

> (1) that the LVT erred in its conclusion that the respondent's failure to serve all qualifying tenants with a notice of invitation to participate was not fatal to the right to manage claim because the requirement to serve a notice of invitation was directory, rather than mandatory, and the claim could survive if insufficient prejudice had been caused;
>
> and
>
> (2) that the LVT erred in concluding that the first claim notice served by the respondent was no bar to the service of the second claim notice.

3. The LVT itself granted permission on the first ground, on 6 March 2012. Permission on the second ground was refused by the LVT, but was granted, on 18 May 2012, by the Tribunal (George Bartlett Q.C., President). In granting permission the Tribunal observed that it was likely that the appeal would fail, but that in view of the observations made in *Plintal SA v 36-48A Edgwood Drive Co Ltd* (LRX/16/2007) and the fact that permission to appeal had been given on the other ground, it was appropriate that permission should be granted on this ground, too.

The facts

4. The parties agreed a statement of facts and issues for the hearing of the appeal. From that document I take the following history as the factual basis for my decision.

5. On 27 January 2011, the respondent gave notice inviting participation under section 78 of the 2002 Act to the non-participating qualifying tenants of the building. The respondent attempted to serve notices on all but three of the relevant registered owners of flats in the building. The three were Mr Bethell, Mr King and Mr Benoy. According to the proprietorship register shown on current office copy entries, each of them was the joint registered proprietor of his flat. However, all three had died by the time the notices were served. Their widows and joint owners were all members of the respondent as the RTM company when notice was given to the other tenants.

6. For the registered non-participating owners of two of the flats, Ms Phyllis Cornforth and The Capital Appreciation Trust Limited (the tenants of flat 14) and Mr Alan Chapman and Mr Colin Chapman (the tenants of flat 16), the notice inviting participation was not given at their flats in Regent Court. Instead it was served elsewhere, at the addresses recorded on the Proprietorship Register at the Land Registry. When notice was given, Ms Cornforth was a member of the respondent.

7. On 11 February 2011 the respondent issued a notice of claim, bearing that date, which stated at paragraph 5 that the landlord may respond to the notice by giving a counter-notice under section 84 of the 2002 Act "not later than 11 March 2011".

8. The appellant gave a counter-notice dated 9 March 2011, in which it denied that the respondent was entitled to acquire the right to manage because "the claim notice specified a date earlier than one month after the relevant date for response by counter-notice under section 84 …".

9. On 17 March 2011 the respondent served a second notice of claim. The covering letter to this notice had a date stamp recording the date on which the appellant received the notice as 18 March 2011. The covering letter stated:

> "… [We] acknowledge that the original Claim Notice is not a valid notice for reasons stated in the Counter-Notice. … As the previous Claim Notice was invalid please find enclosed a fresh Claim Notice addressing this issue. Given that no other objections were raised I await confirmation that RTM will be determined on 21st April 2011, with an Acquisition date of 21st July 2011."

10. On 18 March 2011 the respondent sent a letter to all leaseholders, in which it stated:

> "You may already be aware that on receipt of the original Claim Notice, the solicitors acting on behalf of Avon Freeholds issued a Counter-Notice, due to a typing error in the original Notice.
>
> The date for response to the claim with a Counter-Notice should have in fact been the 13th and not the 11th March 2011. We have therefore acknowledged that the original Claim Notice is not a valid notice and issued a fresh Claim Notice, as enclosed.
>
> …".

11. By a counter-notice dated 18 April 2011, the appellant denied that the respondent was entitled to acquire the right to manage, for two reasons: first, "because at the date the claim notice was given an earlier claim notice remained in force"; and secondly, "because at the date the claim notice was given each person required was not served with a notice of invitation to participate at least 14 days before".

12. On 16 June 2011 the respondent began proceedings before the LVT seeking a determination that it was entitled to acquire the right to manage.

13. As to the alleged failure to serve a notice of invitation to participate, the LVT decided: first, that there was no requirement to serve a notice of invitation to participate on Mr Bethell, Mr King, or Mr Benoy (paragraphs 25 and 26 of the decision) and that in any event no prejudice had been caused by the failure to serve such a notice on them because in each case

the surviving spouse was already a member of the respondent as the RTM company (paragraph 27); secondly, that there had been no requirement to serve one of the two non-participating tenants (the tenant of flat 14) as it was not necessary to serve both joint tenants individually and she had, in fact, applied on behalf of herself and her joint tenant to become a participating tenant (paragraph 30); and thirdly, as to the other non-participating tenants (the tenants of flat 16), the respondent as the RTM company had not shown that the notice of invitation to participate had been served (paragraph 35) but this failure was not such as to vitiate the right to manage process (paragraphs 31 to 37).

14. As to the appellant's argument that the first claim notice was still in force when the second was served, the LVT decided that the first claim notice was invalid and did not prevent the second claim notice being given, as a valid notice (paragraph 48 of the LVT's decision).

The issues in the appeal

15. There are two main issues in the appeal. They are:

(1) whether, despite the respondent having failed to show that a notice of invitation to participate was received by the tenants of flat 16, the LVT was right to hold that the provisions for the service of notice were directory, rather than mandatory, that the crucial question was whether there was any significant prejudice as a result of this failure, and, if so, whether the LVT was right to find that there was not such prejudice as to invalidate the right to manage process; and

(2) whether the LVT was right to find that the existence of the first claim notice did not prevent the second claim notice being lawfully served, and did not render that notice invalid and ineffective.

The statutory provisions

16. Section 74(1) of the 2002 Act provides that the persons who are entitled to be members of a RTM company are "(a) qualifying tenants of flats contained in the premises" and "(b) from the date on which it acquires the right to manage (referred to in this Chapter as the "acquisition date"), landlords under leases of the whole or any other part of the premises".

17. A notice inviting participation is the first formal stage of a right to manage claim. Section 78 of the 2002 Act provides that all qualifying tenants who are not already members of the RTM company, or have not agreed to become members, must be given a notice inviting them to join the RTM company. Section 78(1) provides:

> "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."

Section 78(2) provides for the content of a notice of invitation to participate. A 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", "(c) invite the

recipients of the notice to become members of the company", and "(d) contain any other such particulars (if any) as may be required to be contained in notices of invitation to participate by regulations made by the appropriate national authority". Section 78(7) provides that 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".

18. Under section 78(3) the Secretary of State has prescribed the form and content of the notice of invitation in the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010/825. Regulation 3 provides for additional matters to be included in a notice of invitation to participate. Regulation 3(2) requires that a notice of invitation to participate is to contain, in addition to the statements and information referred to in section 78(2)(a) to (c), further particulars, including a statement as to the responsibilities of the RTM company, if it acquires the right to manage, for "(i) the discharge of the landlord's duties under the lease" and "(ii) the exercise of his powers under the lease, with respect to services, repairs, maintenance, improvements, insurance and management" (sub-paragraph (c)); a statement of the RTM company's intentions as to the appointment of a managing agent (sub-paragraph (g)); and "a statement that, where the RTM company gives a claim notice, a person who is or has been a member of the company may be liable for costs incurred by the landlord and others in consequence of the notice" (sub-paragraph (h)). Regulation 8 provides that notices of invitation to participate must be in the form set out in Schedule 1 to the regulations.

19. Section 79(1) provides that a claim to acquire the right to manage any premises is made "by giving notice of the claim (referred to in this Chapter as a "claim notice")", and that the "relevant date" for any claim to acquire the right to manage "means the date on which notice of the claim is given". Section 79(2) provides 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". Section 79(6) provides that 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" or a "party to such a lease otherwise than as landlord or tenant" or "a manager appointed under Part 2 of the Landlord and Tenant Act 1987 … to act in relation to the premises …". 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".

20. Section 80 stipulates the contents of the claim notice. Section 80(3) provides:

> "[The claim notice] 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."

Section 80(6) provides that the claim notice "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". Section 80(7) provides that the claim notice 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.

21. Section 81, under the heading "Claim notice: supplementary" provides:

> "…

(3) Where any premises have been specified in a claim notice, no subsequent claim notice which specifies –

(a) the premises, or

(b) any premises containing or contained in the premises,

may be given so long as the earlier claim notice continues in force.

(4) Where a claim notice is given by a RTM company it continues in force from the relevant date until the right to manage is acquired by the company unless it has previously –

(a) been withdrawn or deemed to be withdrawn by virtue of any provision of this Chapter, or

(b) ceased to have effect by reason of any other provision of this Chapter."

22. Section 84 under the heading "Counter-notices", provides, in subsection (1), that a person who is given a claim notice by a RTM company under section 79(6) may give a "counter-notice" to the RTM company "no later than the date specified in the claim notice under section 80(6)". Section 84(2) provides that a counter-notice is a notice containing a statement either "(a) admitting that the RTM company was on the relevant date entitled to acquire the right to manage the premises specified in the claim notice", or "(b) alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled".

23. Section 86 provides for the withdrawal of a claim notice by the giving of "notice of withdrawal". Section 87 provides for deemed withdrawal.

24. Section 88 provides that a RTM company is liable for "reasonable costs" incurred by the recipient of a claim notice. Section 89 provides for the liability of the RTM company and members of the RTM company for costs where a right to manage claim is withdrawn or ceases to have effect.

25. Section 90, under the heading "The acquisition date" provides, in subsection (2), that where there is "no dispute" about the RTM company's entitlement to acquire the right to manage, the acquisition date is the date specified in the claim notice under section 80(7). Subsection (3) provides that "there is no dispute about entitlement" if either "(a) no counter-notice is given under section 84" or "(b) the counter-notice given under that section … contains a statement such as is mentioned in subsection (2)(a) of that section".

26. Section 111 of the 2002 Act provides for the form and service of notices under Chapter 1. It states:

"(1) Any notice under this Chapter –

(a) must be in writing, and

(b) may be sent by post.

…

(5) A company which is a RTM company in relation to premises may give a notice under this Chapter to a person who is the qualifying tenant of a flat contained in the premises at the flat unless it has been notified by the qualifying tenant of a different address in England and Wales at which he wishes to be given any such notice."

Issue (1) – the notice inviting participation

Relevant jurisprudence

27. In *Petch v Gurney* [1994] 3 All E.R. 731 Millet L.J. (as he then was) considered the consequences of a failure to comply with a statutory requirement that something "shall" or "must" be done. He said (at p.736d-e) that "[the] question whether strict compliance with a statutory requirement is necessary … is not whether the requirement should be complied with; of course it should: the question is what consequence should attend a failure to comply". He referred (at p.736j to p.737a) to the guiding principle stated by Lord Penzance in *Howard v Bodington* (1877) 2 P.D. 203 (at p.211) that in each case one "must look at the subject matter; consider the importance of the provision that has been disregarded; and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory".

28. The modern jurisprudence is consistent with that principle. In *London and Clydeside Estates Ltd v Aberdeen D.C.* [1979] 3 All E.R. 876 Lord Hailsham of St Marylebone L.C. said (at pp.882 and 883) that what the court has to decide 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"; and that it "may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities … [at] one end … cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied … [at] the other end … the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action …".

29. In *R v Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All E.R. 231 (at p.237a-b) Lord Woolf M.R. emphasized the need to focus on the consequences of non-compliance. He said (at p.235c-e) that the approach of seeking to distinguish between requirements that are directory and those that are mandatory "distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance". This, he said (at p.235d-f), "has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance". In most cases, he said (ibid.), "it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory". And he went on to say this (at p.235h-p.236b):

> "Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is 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. In such a situation that tribunal's task will be to seek to do what is just in all the circumstances (see *Brayhead (Ascot) Ltd v Berkshire CC* [1964] 1 All ER 149, [1964] 2 QB 303 applied by the House of Lords in *London and Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876, [1980] 1 WLR 182)."

Having referred to the speech of Lord Hailsham in *London and Clydeside Estates Ltd.*, Lord Woolf said (at p.238h-p.239c):

> "Bearing in mind Lord Hailsham LC's helpful guidance 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: 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 though there has not been strict compliance? (The substantial compliance question.). 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.) … 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 focusing 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."

30. In *7 Strathray Gardens Ltd. v Pointstar Shipping & Finance Ltd.* [2004] EWCA Civ 1669 Arden L.J. said (at paragraph 42 of her judgment) that the "legal test for determining whether a statutory requirement is mandatory or directory" is "not one of the language that Parliament has used but of the substance of the requirement it has imposed". She referred (at paragraph 47) to the judgment of Lord Penzance in *Howard v Bodington* (at p.211):

> "Where statute requires an act to be done in a particular manner, it may be possible to regard the requirement that the act be done as mandatory but the requirement that it be done in a particular manner as merely directory. In such a case the statutory requirement can be treated as substantially complied with if the act is done in a manner which is not less satisfactory having regard to the purpose of the legislature in imposing the requirement."

Arden L.J. went on to say (at paragraph 51) that she had "no difficulty in principle that a statutory requirement can be in part directory and in part mandatory."

31. In *R. v Soneji* [2006] 1 A.C. 340 Lord Steyn acknowledged (at p.350C) the emergence of "a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity". From his review of relevant authority in several jurisdictions Lord Steyn drew the conclusion "that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness" (p.353E).

32. In *Sinclair Gardens Investments (Kensington) Ltd v Oak Investments RTM Co. Ltd.* (LRX/52/2004) it was argued that a failure to observe the requirements of sections 78(1) and 79(2) of the 2002 Act could not be overlooked if there was no prejudice to the landlord, and that prejudice is only a factor to be taken into account if it is expressly mentioned in a statutory requirement. In that case a notice of invitation to participate had not been served on one of two joint tenants of a flat. The other joint tenant was herself a member of the RTM

company. Her evidence was that the other joint tenant had been fully aware of the application and had subsequently applied to become a member of the RTM company. The LVT held that the failure to serve one joint tenant had not caused any prejudice to the landlord and that the RTM company was entitled to acquire the right to manage. In paragraph 7 of its decision on the appeal the Tribunal (George Bartlett Q.C., President) said that a failure to comply with a procedural requirement does not have the consequence of "nullifying all subsequent steps unless there is some saving provision in the statute enabling the question of prejudice to be taken into account." The President went on to say (in paragraph 10):

> "In my judgment, in the light of the considerations referred to by Lord Woolf in *Jeyeanthan*, the LVT was entirely correct in approaching the question of the effect of the failure to comply with the statutory requirements in the way that it did. 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 a 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 these 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. The LVT considered this question and expressed itself as satisfied that [the tenant] was fully aware of the proceedings and that his omission had been inadvertent. It also concluded that the landlord had not been prejudiced in any way by the failure to serve a notice inviting participation, and, given the purpose of the section 79(8) requirement, it was undoubtedly correct to do so. The appeal must be dismissed."

The LVT's conclusions on the notice inviting participation

33. In paragraph 6 of its decision the LVT noted that for the registered non-participating proprietors of flats 14 and 16 the notice inviting participation had been served not at their flat but at "the address found on the proprietorship register in the respective office copies". It also noted that at the date of notice the tenant of flat 14, Ms Cornforth, was a member of the respondent. In paragraph 27 the LVT said it did not consider that the failure to adhere to the requirements of section 78 "(in terms of a failure to give notice to all non-member qualifying tenants) is in all cases necessarily fatal". It said that "although the wording of section 78 appears mandatory, a failure to give the notice to all qualifying tenants would not be fatal if no prejudice had been caused as the purpose of the legislation would still have been met". It did not accept that a failure to serve by the method set out in section 111(5) was "necessarily fatal" (paragraph 31). It noted that section 111(5) does not provide the only way in which notice may be given. And it observed that this provision "uses the word "may" which suggests that it is permissive, not mandatory". Thus, if the respondent had given notice to the non-participating tenants at their flats, "service would have been deemed to have been given". The LVT went on to say (ibid.) that "the deeming provision provides a simple, cheap and reliable means of proving service on a non-participating tenant", but "that does not exclude other methods of service, provided that the Applicant can prove service on the relevant non-participating tenants."

34. The LVT then considered the respondent's failure to serve the tenants of flat 16 at their flat (in paragraphs 32 to 35 of its decision):

> "32. In this case, the Applicant served notice at the address given on the Official Copy of register of title. Those addresses were not therefore given "at the flat[s]" under s.111(5). Further, in some late evidence submitted by the Applicant it was stated that Flat 16 had stood empty for some time, with no forwarding address being given. The Applicant queried why it should be penalised for not serving the notice at premises which are known to be empty and where it took steps to find an alternative address for service.
>
> 33. Whilst the Tribunal has some sympathy with the approach taken by the Applicant and can understand why it adopted that approach, it has in fact made life more difficult for itself. The legislation has made service quite simple, in that the Applicant need only give notice at the flat (in the absence of notification of an alternative address). If the tenant fails to provide an alternative address, then that may cause difficulties for the tenant, but the Applicant would be able to rely on s.111.
>
> 34. The Applicant argued that it satisfied the proviso to s.111(5) in that the address given by the Land Registry entry is a notification by the respective tenants "of a different address". The requirement of the proviso is for the tenant to notify the landlord of an alternative address for service of a notice "in accordance with the section". The Land Registry entry does not (of course) refer to service of Notices Inviting Participation under the Act. In the Tribunal's view, when s.111(5) refers to the RTM company being notified of an address by the non-participating tenant, that requires some direct form of communication between RTM company and tenant specifying notices under the Act. That did not happen in this case.
>
> 35. Not having complied with section 111(5), the burden remains on the Applicant to prove that the Notice Inviting Participation was given to each of the non-participating tenants by some other proper means. The certificate of posting is not evidence of that. It simply proves that the notices were posted to certain addresses where the tenant had at some stage in the past had a connection (it is of course possible that since registration the actual address for the tenant had changed). Evidence that this non-participating tenant had actually received the Notices Inviting Participation would have sufficed, but there was no such evidence before the Tribunal. The Tribunal noted that the list of members of the Applicant at the date of the claim notice did not suggest that this lessee had received the notice and decided to become a member. Accordingly the Tribunal does not consider that the Applicant has discharged the burden of establishing that the notice was given to the lessee of Flat [16 – as corrected by the LVT in its correction certificate of 27 April 2012]."

35. Having described the position in that way, the LVT proceeded to consider the question of prejudice (in paragraphs 36 and 37 of its decision):

> "36. As stated above, the Tribunal considers that the requirements for the giving of Notices Inviting Participation are directive and not mandatory. Consideration must be given the question of prejudice. In this case, it is only in respect of one out of 41 qualifying tenants that there is no evidence of service. There cannot be

any prejudice to the respondent in that regard. If anything, it would work to the respondent's advantage if the tenant of Flat [16 – as corrected by the LVT in its correction certificate of 27 April 2012] decided to become a member after acquisition, since it would pro tem have greater voting rights. However, there is obvious prejudice to the qualifying tenant in that [the Chapman brothers] have been deprived of the opportunity to become members.

37. The Tribunal was referred to its earlier decision of 5 December 2011 in relation to another block at Elim Court, Plymouth …, where the RTM Company failed to prove that it had served a Notice Inviting Participation on 3 flats out of 40. This Tribunal considered that this was sufficient prejudice to find that the Applicant in that case was not entitled to acquire the Right to Manage. Here, the significant difference is that only one lessee was affected. Whilst the prejudice to this single lessee was not insignificant, the unchallenged evidence was that the flat has been left empty with no forwarding address for some time. It is also correct that … a qualifying tenant can of course become a member of the Applicant at any time: see s.74(1)(a). Although it is a borderline case, the Tribunal does not consider that failure to serve the Notice Inviting Participation on a single tenant in these circumstances is sufficient prejudice to prevent the Applicant acquiring the Right to Manage."

Submissions for the appellant

36. Mr Bates submitted:

(1) The failure to serve the notice of invitation to participate on the tenants of flat 16 invalidated the entire right to manage process.

(2) The requirement to serve the notice on all non-participating tenants serves at least three purposes: (i) it ensures that no tenant is excluded from the right to manage process; (ii) it enables a tenant to judge the level of support for the process among his fellow tenants, which is a significant benefit for him because members of the RTM company will be responsible for the costs of the process and the costs of running the RTM company itself; and (iii) the non-qualifying tenants are fully informed of their right to join the RTM company and of all the legal and practical consequences that will ensue if the right to manage claim succeeds.

(3) In this case the LVT erred in its approach to prejudice – both prejudice to the tenants of flat 16 and to the appellant as landlord.

(4) This case is distinguishable on its facts from *Sinclair Gardens Investments v Oak Investments RTM Co. Ltd*. The Chapmans, as tenants of flat 16, have never had notice of the right to manage process. They have suffered significant prejudice. They have been denied the opportunity to join the respondent as the RTM company at the earliest stage. They have thus lost the opportunity to influence the running of the RTM claim and this litigation; to persuade the RTM company to open negotiations with the landlord as to what – if any – functions to contract back to the landlord; to decide who to appoint as managing agent. This prejudice is decisive. Those lost opportunities can never be restored. The Chapmans' disadvantage as tenants is of a different kind to the prejudice suffered by the

respondent as the RTM company. If its claim is invalid, a RTM company can simply begin the process afresh by serving a new notice of invitation to participate.

(5) There was also prejudice to the appellant as landlord as a result of the tenants of flat 16 not being served. All members of a RTM company are jointly and severally liable for the landlord's costs of the right to manage process (under sections 88 and 89(3) of the 2002 Act). The more qualifying tenants there are in the RTM company, the better it is for the landlord when seeking to recover his costs.

(6) The approach adopted by the LVT creates uncertainty, and a licence to exclude leaseholders from the RTM process, contrary to the purpose of the statutory scheme. If a failure to serve a single qualifying tenant does not give rise to prejudice enough to invalidate the process, how many tenants would have to be affected in this way for the conclusion to be different? Would it be two, three, or what number?

Submissions for the respondent

37. Mrs Mossop submitted:

(1) It would be quite wrong for the Tribunal to hold that the entire right to manage process should be undone in these circumstances.

(2) The LVT adopted the right approach in considering what prejudice had arisen as a result of the respondent's failure to serve a notice inviting participation at a qualifying tenant's flat. Its understanding and application of the relevant statutory provisions were in line with the approach endorsed by the Tribunal in *Sinclair Gardens Investments v Oak Investments RTM Co. Ltd*. Its conclusions in paragraphs 31 to 37 of its decision are well founded. It analysed the statutory provisions correctly. It was right to conclude that it did not have to find that a failure to give a notice of invitation to participate to all non-participating tenants would be fatal if no prejudice was caused. It was right to regard the provisions of section 111(5) as permissive, not mandatory. And it was right to exercise its judgment on the question of prejudice in the way that it did. The conclusion it expressed in paragraph 37 of its decision – that failure to serve the notice inviting participation on a single tenant in these circumstances did not negate the whole right to manage process – is unimpeachable.

(3) Had the LVT gone on to ask the questions recommended by Lord Woolf in *Jeyeanthan*, it would clearly have concluded that there was substantial compliance with section 78. Though the respondent had failed to serve the tenants of flat 16 by the method permitted in section 111, it did send notices to them and the other non-participating tenants at addresses elsewhere. The consequences of this were not significant. There was no outrageous or flagrant defiance of the law. This was near the "nugatory or trivial" end of Lord Hailsham's spectrum in *London & Clydeside Estates*. The Chapmans did not suffer any substantial prejudice by the failure to send the notice to their flat. To deny the respondent the right to manage in these circumstances would be disproportionate and draconian. Parliament cannot have intended that a failure of this kind would invalidate a claim to acquire the right to manage if enough tenants were members of the RTM company when the claim notice was served.

(4) The purpose of section 78 is to provide information to tenants who are not members of the RTM company and to invite their participation; it is not to protect the landlord. Here, however, it is the appellant as landlord who has taken the point about service as a means of obstructing the right to manage process, contrary to the will of a clear majority of tenants in the building who support it.

Discussion

38. I cannot accept the appellant's argument on the issue, attractively presented though it was by Mr Bates.

39. That conclusion does not depend on the statutory provisions for inviting tenants to participate in a right to manage process being categorized as directory rather than mandatory. 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. But in any case the right approach here, I believe, is 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.

40. The relevant jurisprudence is clear.

41. In the light of that jurisprudence I agree entirely with the observations made by the Tribunal in *Sinclair Gardens Investments v Oak Investments RTM Co. Ltd.*, rejecting (at paragraph 7) the submission that prejudice may only be taken into account if it is referred to in a statutory requirement. In that case the Tribunal concentrated on the practical purpose of the statutory provisions. The purpose, as the Tribunal said (at paragraph 10), is to ensure that the interests of the tenant are protected. The Tribunal must ask itself "whether the qualifying tenant has in practice [had] such awareness of the procedures as the statute intended him to have". I would add that the provisions of sections 78 and 111 of the 2002 Act are framed in terms of notice being given, rather than its being served or actually received.

42. In this case the LVT concluded (in paragraph 36 of its decision) that the statutory provisions were "directive and not mandatory". It thought that a failure to give notice to all qualifying tenants under section 78 would not be fatal if there was no prejudice to those who had not been given notice (paragraph 27). It also recognized that a failure to give notice by the means provided for in section 111(5) would not necessarily be fatal (paragraph 31). It construed section 111(5) as permissive rather than imperative (ibid.). It was right to do so. Subsection (5) provides that the right to manage company "may" give notice to a qualifying tenant at his flat in the premises if he has not notified the RTM company of another address at which he wishes to be given notice. But it does not say that this is how notice must be given, or that notice may not be given in some other way. As the LVT acknowledged (ibid.), the provision for the deemed giving of notice provides a RTM company with a means of achieving valid service on a non-participating tenant. This will be so even if the tenant is not living in his flat in the premises and the RTM company does not know where he is. The LVT accepted that service at the address given on the Proprietorship Register at the Land Registry does not constitute service at a different address notified to the RTM company by the tenant (paragraph 34). As it said, notification of an alternative address would have required "some direct form of communication" between the RTM company and the tenant, specific to the service of notices under the 2002 Act, and in this case that was not done (ibid.). The LVT

noted, again correctly, that a certificate of posting to an alternative address is not evidence of a valid form of service for the purposes of section 111(5) (paragraph 35).

43. The LVT considered the consequences of non-compliance with the statutory provisions both from the perspective of the tenants and from that of the appellant as landlord.

44. As to prejudice to the tenants, the basic facts are clear. The Chapmans were not personally served with the relevant notices. Nor were notices sent or delivered to their flat in Regent Court (flat 16). Instead, notice was sent to the addresses recorded for them on the Proprietorship Register at the Land Registry. In its evidence to the LVT the respondent said that flat 16 had been empty for some time, and that the Chapmans had not provided any forwarding address (paragraph 32 of the LVT's decision). That evidence seems not to have been challenged (paragraph 37). It appears that flat 16 was not the Chapmans' home. And there seems to have been no evidence before the LVT that they wanted to become a member of the RTM company or to participate in the arrangements proposed**.**

45. The LVT said there was "obvious prejudice" to the tenants in the sense that they would not, at least at this stage, have the opportunity to become a member of the respondent as the RTM company, and would therefore not have the chance to take part in the right to manage arrangements (at paragraph 36). Against that prejudice the LVT weighed the fact that the failure to give notice of invitation to participate in the manner permitted by section 111(5) concerned only the absentee tenants of a single flat in a building in which there were, in total, 41 qualifying tenants. The LVT gave significant weight to this. It had taken a similar approach in the case of Elim Court in Plymouth (paragraph 37). In that case the number of flats whose tenants the RTM company had failed to serve was three, in a total of 40, and the LVT had seen this as amounting to "sufficient prejudice" to disentitle the applicant from acquiring the right to manage (ibid.).

46. The number of tenants who have not had notice in accordance with the statutory provisions may be relevant when considering the question of prejudice, both to landlord and to tenant. But in my view it is unlikely to be a decisive factor when prejudice to tenants is being assessed. Nor could I accept that the degree of prejudice to individual tenants can be established simply by striking a balance between the interests of those who were given notice in accordance with section 111 and who clearly did want to participate in the management arrangements, and the interests of those who were not given notice in that way and who may or may not have wished to take part.

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

48. The consequences of a failure to comply with the statutory provisions must be considered in the context of what Parliament plainly sought to achieve by those provisions. In section

111(5) of the 2002 Act Parliament embraced the concept of a deemed giving of notice. A qualifying tenant can be treated as having been validly given a notice of invitation to participate even when he has not had actual notice of it. Inherent in the statutory provisions for giving such notices is the possibility that one or more of the qualifying tenants will not know that a right to manage process has begun. Even if notice is given at another address notified by the tenant, this in itself is no guarantee of his becoming aware of the process.

49. On the facts before the LVT I think it could reasonably conclude that no substantial or lasting prejudice to the Chapmans as tenants of flat 16 flowed from the respondent's failure to comply with the statutory requirements as to the giving of a notice of invitation to participate.

50. There is no complaint about the form or content of the respondent's notice of invitation to participate. The appellant does not say that the notice itself was invalid because it lacked any of the particulars required by the relevant statutory provisions. Nor is this a case of the RTM company simply neglecting to give notice to a particular tenant. The respondent did give notice to the Chapmans, not at their flat in the premises, but at the only other addresses it had for them. This plainly did not comply with the method of giving notice provided for in section 111(5), and there was no evidence that the attempt at service was effective. Equally, however, there is nothing to show that the Chapmans were any more likely to have received the notice had it been left at their flat in Regent Court than they were at the places to which it was in fact sent. In reality, the prejudice they suffered was no greater than is accepted in the statutory provisions themselves. If they did not receive the notices sent to the addresses given in the Proprietorship Register at the Land Registry they would have been no worse off than any absentee tenant to whom notice was given, in accordance with section 111(5), at his "flat contained in the premises". In either situation the risk that the tenant will not actually get the notice hangs on any forwarding arrangements he has chosen to put in place. Besides, the Chapmans did not lose, once and for all, their chance to take part in the management arrangements. As the LVT said (in paragraph 37 of its decision), a qualifying tenant is entitled to become a member of a RTM company at any time, in accordance with section 74(1)(a).

51. Mr Bates submitted that there was irremediable prejudice to the Chapmans because they were not included in the right to manage process, and that the prejudice they suffered was quite different from any prejudice suffered by the respondent as the RTM company.

52. I see no force in those submissions. The consequences for the Chapmans cannot be gauged in the abstract. They were non-resident tenants, who had, it seems, shown no interest in the management of Regent Court. Because they were absentee tenants the giving of notice at their flat, in accordance with the statutory provisions, would probably have been ineffective. And I see nothing to indicate that they sustained any significant prejudice as a result of the notice being given elsewhere.

53. As to prejudice to the appellant as landlord, one must remember, as Mrs Mossop submitted, that the statutory provisions for the giving of notice to tenants were not designed to protect landlords, nor to aid them in opposing a right to manage process – whether or not that process is supported by a clear majority of qualifying tenants.

54. The LVT concluded (at paragraph 36) that the effect of non-compliance with the notice requirements might actually be a benefit to the appellant, because "[if] anything, it would work to the [appellant's] advantage if the tenants of Flat [16] decided to become a member after acquisition, since it would *pro tem* have greater voting rights". The fact that it was only the tenants of a single flat in the block who were not given notice in accordance with the

statutory provisions was, I accept, relevant to the question of prejudice to the appellant as landlord. But I think the notional advantage to the landlord could hardly be seen as significant.

55. Mr Bates submitted that there was prejudice to the appellant as landlord because all members of a RTM company are jointly and severally liable for the landlord's costs of the right to manage process (under sections 88 and 89 of the 2002 Act). The more qualifying tenants there are in the RTM company, the better it is for the landlord when seeking to recover his costs. I do not think there is anything in that submission. After all, as I have said, there is no evidence that the tenants of flat 16 would have wished to become members of the respondent. So Mr Bates' point is really no more than conjecture.

56. As Mrs Mossop submitted, Parliament cannot have intended that in circumstances such as these the whole of the right to manage process will be defeated by the RTM company failing to comply fully with the provisions for giving notice of invitation to participate. On different facts a different conclusion might be right. But in this case the respondent's omission to give the Chapmans notice at their flat in the premises was not, in my view, fatal to the process. To hold otherwise would, I think, offend the jurisprudence to which I have referred. I cannot fully endorse the reasoning in paragraphs 36 and 37 of the LVT's decision, but I am in no doubt that its conclusion on this issue was correct. I do not think this was, as the LVT described it, "a borderline case" (paragraph 37). In my view Mrs Mossop was right to submit that there has been – to adopt the expression used by Lord Woolf in *Jeyeanthan* – "substantial compliance" with the statutory requirements, and the consequences of non-compliance in this case were not such as to justify denying the respondent the right to manage the premises.

57. I therefore reject this ground of the appeal.

Issue (2) – the two claim notices

Relevant jurisprudence

58. In *Sinclair Gardens Investments (Kensington) Ltd. v Poets Chase Freehold Co. Ltd.* [2007] EWHC 1776 (Ch) Morgan J. referred (at paragraph 53) to the general principle that if a mandatory statutory provision requires the giving of notice in a particular form and if a purported notice fails to comply with that provision, the notice will normally have no legal effect. In that case a notice that ought to have complied with section 13(3) of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") was not valid. There was nothing to prevent the tenants accepting that they had failed to serve a valid notice. The prohibition on a subsequent notice contained in section 13(8) did not apply since the first notice was not a notice under section 13 and therefore was not in force. Because the notice was not effective and was not in force it did not have to be withdrawn. Section 13(9) did not preclude the tenants from serving a second and valid notice when they did. This analysis reflected Auld L.J.'s in *9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* [2006] 1 W.L.R. 1186 (at pp.1189 and 1190).

59. The same approach was followed by the Tribunal (H.H.J. Walden-Smith) in *Alleyn Court RTM Co. Ltd. v Abou-Hamdan* [2012] UKUT 74 (LC). Before coming to the issues in the appeal, the Tribunal dealt with a matter it did not have to decide:

> "8. The Respondent's Counsel contends that if the Respondent is found not to be competent to serve a counter-notice then the LVT (and by extension the Tribunal) could not declare that the Appellant had acquired the right to manage under the 2002 Act as the LVT's jurisdiction is dependent upon the service of a negative counter-notice by virtue of the provisions of section 84(3) of the 2002 Act. In which case, he argues, the issue of entitlement to acquire the right to manage under the 2002 Act would fall to be adjudicated by the High Court under its inherent jurisdiction.
>
> 9. I cannot say that I agree with this proposition as section 90 of the 2002 Act provides the date which is the acquisition date where a RTM company acquires the right to manage any premises. It provides that where there is no dispute about entitlement, the acquisition date is the date specified in the claim notice under section 80 (7) and that there is no dispute about entitlement if no counter-notice is given under section 84 (see section 90(3)(b) and section 84(2)(a)).
>
> 10. In any event, I was informed by both Counsel at the commencement of the hearing that it was not a matter that I need concern myself with."

60. In that case the RTM company had recognized that its claim notice was invalid because copies had not been given to any of the qualifying tenants in accordance with the provisions of section 79(8) of the 2002 Act (paragraph 35 of the Tribunal's decision). Six days after the service of the first notice a second was issued, in identical form. Copies of this second claim notice were served on the qualifying tenants in the manner required by section 79(8) (paragraph 36). Thus, if the first claim notice had been valid and continued in force, the second claim notice would have been of no effect (paragraph 37). There was nothing that could be interpreted as a withdrawal of the first claim notice under the provisions of section 79 until an e-mail was sent by the RTM company's solicitors some three weeks after the second notice was served, confirming that the second notice "supersedes the first" (paragraph 39). In the decisions of the court in *9 Cornwall Crescent* and *Sinclair Gardens Investments v Poets Chase* the Tribunal found support for the proposition that an invalid notice does not need to be withdrawn. The relevant provisions of the 1993 Act differed from those of the 2002 Act, in that, under the 1993 Act, if a notice is withdrawn a year had to pass before another notice could be served, whereas under the 2002 Act there was no such prohibition against the service of a further notice once the first is withdrawn (paragraph 40). In the Tribunal's view, however, the same basic principle applied. It held (in paragraph 44):

> "Consequently, if the First Claim Notice was invalid it would have no legal effect and would not need to be withdrawn prior to the Second Claim Notice being effective. However, if the First Claim Notice was not invalid then it would have been extant at the time of the Second Claim Notice which could not, by virtue of the provisions of the 2002 Act, have effect. Two claim notices could not be valid at the same time."

The critical question, therefore, was whether the first claim notice was valid. The Tribunal held, on the facts, that it was.

61. In *Plintal SA*, the Tribunal (George Bartlett Q.C., President) held that a claim notice which failed to comply with section 80 was not invalid and a nullity, but, rather, had a continuing validity unless and until the LVT held otherwise. The Tribunal said (at paragraph 14):

"I do not think that a claim notice, given as required by section 79(4), ceases to be a claim notice for all purposes under the Act if it is later found to be invalid (most obviously, for example, if it fails to comply with the requirements of section 80). It is to be noted that section 81(1) provides: "A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80". This implies that a claim notice could be invalidated for other reasons, but as a matter of language it would not be inappropriate still to refer to it as a claim notice. The LVT would say that it found the claim notice to be invalid, not that it found that the notice [given] to party X purporting to be a claim notice was not a claim notice at all. Thus I see no difficulty in reading section 88(1), where it refers to "a claim notice" as including a claim notice that has been found to be invalid."

The LVT's conclusions on the two claim notices

62. In paragraph 42 of its decision, the LVT said that it had to consider whether the first claim notice, "although agreed between the parties to be invalid, nevertheless had sufficient life to prevent a subsequent notice from being served". In paragraph 43 it recorded the appellant's case that "despite being invalid [the first claim notice] remained effective for some purposes, namely in respect of section 88". The LVT referred to the Tribunal's decision in *Plintal SA*.

63. In paragraphs 44 to 48 of its decision the LVT said:

"44. Section 81(3) refers to a claim notice being in force. Section 81(4) refers to a claim notice being in force until it ceases to have effect. The Respondent relies on this wording in order to assert that the claim notice despite being invalid, has effect for the purposes of costs under section 88 according to *Plintal*. As it has effect, it was therefore in force. They submitted that there was no limitation under section 81(4) as to what the notice had to be in effect in relation to.

45. The Applicant seeks to distinguish *Plintal* on the basis that that was a claim based on estoppel and the quote referred to above was *obiter*. Instead it relies on *Sinclair Gardens v Poets Chase* … in which Morgan J determined that in the case of a notice under the Leasehold Reform[,] Housing and Urban Development Act 1993, a finding that it was invalid meant that a second notice could be served. …

46. The Tribunal notes that Section 13(8) and (11) of the 1993 Act are virtually identical to sections 81(3) and (4) of the 2002 Act.

47. The Respondents sought to distinguish this case on the basis that there are material differences between the two pieces of legislation and the effect of the notices in each. It was said that the notice under the 2002 Act has effect in the absence of any counter notice, whilst the 1993 Act requires further intervention before being effective. The Tribunal was not persuaded that there was any material difference in this respect and was more persuaded by the closeness in language between the two sections.

48. The Tribunal considers that the first notice was no bar to the [second] under section 81(3). Firstly it finds the decision in *Sinclair Gardens* to be more persuasive and more directly on point. Secondly, it considers that although it might be said that an invalid claim notice has an effect, in that it can trigger costs

> under section 88, that effect is only temporal in time and does not continue. For example if a notice was given and then withdrawn it would not continue to have force, but would still entitle a landlord [to] costs under section 88. The fact that there is an outstanding costs issue because of what has happened in the past, it does not mean that the notice continues in force. The Tribunal considers that the term 'in force' must mean that it has a present impact (or the potential to have one) on events."

In paragraphs 49 and 50 of its decision the LVT rejected the respondent's alternative argument that the first claim notice was withdrawn under section 86 by its letter of 17 March 2011. There is no cross-appeal against that part of the LVT's decision.

Submissions for the appellant

64. Mr Bates submitted:

(1) A claim notice must be withdrawn before a second notice is served. In this case the first notice was not withdrawn. Therefore, the second notice served by the respondent was of no effect.

(2) The Tribunal's decision in *Alleyn Court* was given on 7 March 2012. That decision is directly relevant to this ground of this appeal. The Tribunal is not bound by its own previous decision and can depart from it if satisfied that it is wrong. The decision in *Alleyn Court* is wrong. The court's decision in *Sinclair Gardens Investments v Poets Chase* concerned a different statutory scheme, relating to collective enfranchisement. If no counter-notice is served under the 1993 Act there will still be a hearing before a judge to determine whether the nominee purchaser is entitled to acquire the freehold. Under the 2002 Act, there is no such safeguard. Unless a counter-notice is served, the RTM company automatically acquires the right to manage the premises. There is no scope for either the LVT or the High Court to hear an argument that the claim notice was invalid (see *Alleyn Court* at paragraphs 8 and 9). In *Plintal SA*, the Tribunal held that a claim notice that did not comply with section 80 of the 2002 Act was not invalid and a nullity, but, had a continuing validity until the LVT determined otherwise. Unlike *Sinclair Gardens Investments v Poets Chase*, the decision in *Plintal SA* is concerned with the 2002 Act and should be followed here. That decision does not appear to have been referred to in argument in *Alleyn Court*.

Submissions for the respondent

65. Mrs Mossop submitted:

(1) The LVT correctly construed the relevant statutory provisions in the light of the relevant jurisprudence, including *Sinclair Gardens Investments v Poets Chase*, and applied those provisions properly to the facts of this case.

(2) There is no inconsistency between the decision in *Plintal SA* and Morgan J.'s decision in *Sinclair Gardens Investments v Poets Chase*. Although a notice is invalid, and no longer in force or effective as a notice, its existence cannot be denied as though it had never existed at all.

(3) In this case the invalidity of the first claim notice was not in dispute. It could still be referred to as a claim notice, albeit an ineffective one – for example, for the purpose of costs. The LVT acknowledged this in paragraph 48 of its decision.

(4) This ground of the appeal is therefore misconceived.

Discussion

66. In my view Mrs Mossop's submissions on this issue are sound.

67. The situation in this case seems analogous to the circumstances in *Alleyn Court*. In my view that case was correctly decided, and the Tribunal's reasoning in it is relevant here.

68. Before the LVT the parties agreed that the first claim notice in this case was invalid (paragraphs 9 and 10 of the LVT's decision). So, as the LVT observed (in paragraph 42), the question here was whether, despite its invalidity, the first claim notice "had sufficient life to prevent a subsequent notice from being served".

69. The LVT was aware of and considered both the Tribunal's decision in *Plintal SA* (in paragraph 43) and Morgan J.'s judgment in *Sinclair Gardens Investments v Poets Chase* (in paragraph 45). And in my view, as Mrs Mossop submitted, the LVT was clearly right to tackle the question of the validity of the second claim notice in the way it did, applying the approach indicated by Morgan J. It saw the close similarity between the provisions of section 13(8) and (11) of the 1993 Act and those of section 81(3) and (4) of the 2002 Act. Indeed, it noted – rightly – that those provisions are in "virtually identical" terms (paragraph 46).

70. There is, I think, nothing in the Tribunal's decision in *Plintal SA* to undermine the LVT's conclusions in this case. In *Plintal SA* the Tribunal held that, even if a notice was invalid and therefore no longer effective as a notice, its continuing existence as a matter of fact could not be denied. It could not be treated as if it had never been given. Despite its being invalid and ineffective, it could still be referred to as a claim notice – for example, when an application for costs was being considered. The LVT clearly understood this concept. In paragraph 48 of its decision it said that although an invalid claim notice could be seen as having effect in that it could trigger an award of costs under section 88, this effect was "only temporal … and does not continue". By this I take the LVT to have meant that such a notice is not, in substance, effective. It has no continuing force as a notice. As the LVT said (ibid.), if a notice was given and then withdrawn it would not have continuing force, though it could generate an entitlement to costs under section 88. The idea of a notice being "in force", it said (ibid.), must mean that it has a "present impact" on events, or at least the potential to have such an impact. I agree.

71. I cannot accept Mr Bates' argument that the first claim notice in this case continued "in force" in the sense contemplated by section 81(3), and that it would have had to have been withdrawn before a second notice could be served. That submission cannot, in my view, be reconciled with the Tribunal's decision in *Alleyn Court*.

72. Mr Bates argued that that decision was wrong, stressing the differences between the statutory scheme under the 1993 Act and the provisions of the 2002 Act with which this case is concerned, and suggesting that *Plintal SA* demonstrates an approach that ought to be

followed here, in preference to that taken by the court in *Sinclair Gardens Investments v Poets Chase*.

73. In my view, those submissions are not cogent. I see no inconsistency between the decisions in *Plintal SA* and *Sinclair Gardens Investments v Poets Chase*. Those two cases raised different questions. And the decisions in them are not inconsistent with each other in the essential reasoning on which the outcome was based. In *Plintal SA* the Tribunal was not concerned with a question of the kind it had to grapple with in *Alleyn Court*. The reasoning in *Alleyn Court*, in my view, does not conflict with the jurisprudence in, and referred to in, *Sinclair Gardens Investments v Poets Chase*, or with the Tribunal's decision in *Plintal SA*.

74. In this case the first claim notice clearly was invalid. Given that invalidity – which neither party to the appeal denied – there was no bar to the second claim notice being served when it was. The provisions of section 81(3) did not prevent the service of a second claim notice on 17 March 2011. In my view, therefore, the LVT's conclusion in paragraph 48 of its decision is unassailable.

75. The observations made by the Tribunal in paragraphs 8 and 9 of its decision in *Alleyn Court* do not help Mr Bates' argument. In those paragraphs the Tribunal doubted the proposition that, when a counter-notice under section 84 of the 2002 Act has not been served, the issue of entitlement to acquire a right to manage might fall to be determined by the High Court under its inherent jurisdiction. The Tribunal's uncertainty was engendered by the provisions of section 90 as to the acquisition date, which prescribe the circumstances in which there is a "dispute" as to entitlement, with the effect that if there is no such dispute the acquisition date is automatic. The Tribunal did not decide that point in *Alleyn Court*. It did not have to – as it said in paragraph 10 of its decision. Nor is it a question that I have to resolve. In my view, however, one must read section 90 of the 2002 Act as assuming a valid claim notice under section 80 and, in the circumstances envisaged in section 90(3)(b), a valid counter-notice under section 84. Parliament cannot have intended that a right to manage could be acquired on the basis of notices that were inherently unlawful, or that there should be no remedy to prevent that result.

76. This second ground of the appeal therefore fails.

Conclusion

77. For the reasons I have given this appeal must be dismissed.

Dated: 5 July 2013

Sir Keith Lindblom, President