UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 0080 (LC)
Case No: LRX/64/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – RIGHT TO MANAGE – failure to include prescribed notes in notices of invitation to participate – whether notices invalid -- failure to specify registered office of RTM Company in claim notice as address for service of counter-notice – whether claim notice invalid – non-qualifying tenants as members of RTM company – consequences – section 73, 74, 78 and 80, Commonhold and Leasehold Reform Act 2002 – appeal allowed

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

BETWEEN:

TRIPLEROSE LIMITED

Appellant

and

MILL HOUSE RTM COMPANY LIMITED

Respondent

Re: Mill House,
Hanover Street,
Newcastle NE1 3AG

Determination on written representations

Martin Rodger QC
Deputy President

The following cases are referred to in this decision:

Albion Residential Limited v Albion Riverside Residents RTM Company Limited [2014] UKUT 0006 (LC)

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

Avon Ground Rents Limited v 51 Earls Court Square RTM Company Limited [2016] UKUT 22 (LC)

Friends Life Limited v Siemens Hearing Instruments Limited [2014] EWCA Civ 382

Natt v Osman [2014] EWCA Civ 1520

Newbold v The Coal Authority [2013] EWCA Civ 584

Sinclair Gardens Investments (Kensington) Limited v Oak Investments RTM Company Limited LRX/52/2004

Introduction

1. On 13 April 2015 the First-tier Tribunal (Property Chamber) ("the F-tT") determined that Mill House RTM Company Limited ("the RTM Company") was entitled to acquire the statutory right to manage Mill House, a residential building at Hanover Street in Newcastle, despite what it considered to be two defects in compliance with the procedures for the acquisition of that right prescribed by the Commonhold and Leasehold Reforms Act 2002. Those defects were that notices of invitation to participate which had been served on the qualifying tenants of flats in the building had omitted all of the notes which ought to be included in such notices, and that the RTM Company's subsequent claim notice had been modified to invite service of a counter-notice at the address of its solicitors, rather than at its registered office as provided by the prescribed form.

2. This appeal, brought with the permission of the Tribunal, is by Triplerose Ltd, the intermediate landlord of Mill House, which contends that the defects identified by the F-tT ought to have caused it to determine that the right to manage had not successfully been acquired by the RTM Company. The appellant also says that the F-tT ought not to have been satisfied on the evidence that all of the members of the RTM Company were entitled to be members.

3. The Tribunal has determined this appeal on the basis of written representations provided by Mr Justin Bates of counsel, for the appellant and by Punch Robson, solicitors, for the RTM Company.

The statutory framework

4. The statutory right to manage conferred by Chapter 1 of Part 2 of the Commonhold and Leasehold Reforms Act 2002 is a no-fault scheme which entitles a company controlled by at least half of the qualifying tenants of flats in a building to acquire the right to manage that building. The right may only be exercised by a company which is an RTM company (section 71(1)). Until the right has been acquired only the qualifying tenant of flat contained in the premises may be members of an RTM company (section 74(1)).

5. The Act envisages that the opportunity to participate in the management of premises as a member of an RTM company will be available to every qualifying tenant of a flat comprised in those premises. To give effect to this objective, an RTM company is required to give a notice under section 78(1), referred to as a "notice of invitation to participate", to all qualifying tenants who are not already members (or who have not already agreed to become members) inviting them to become members before it takes the next step towards the acquisition of the right to manage, which is the service of a claim notice under section 79(1). Parliament's intention that membership should be readily available to all qualifying tenants is given further emphasis by section 79(2) which stipulates 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."

6. The form and content of notices of invitation to participate are regulated by section 78(2) of the Act which provides that:

"(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, and

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

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

(4) - (6) …….

(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."

7. In England the power to make regulations for the purpose of the 2002 Act is vested in the Secretary of State who has made further detailed provisions for notices of invitation to participate by The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 ("the 2010 Regulations"). Regulation 3 provides as follows:

"3. **Additional content and notice of invitation to participate**

(1) A notice of invitation to participate shall contain, in addition to the statements and information referred to in section 78(2)(a) – (c) of the 2002 Act (notice inviting participation), the particulars mentioned in paragraph (2).

(2) The particulars referred to in paragraph (1) are –

(a) - (i) ……

(j) the information provided in the notes to the form set out in Schedule 1 to these regulations."

The particulars referred to in regulation 3(2)(a)-(i) include details of the RTM company and the landlord, as well as statements about the effect of the acquisition of the right to manage and a suggestion that the reader might wish to seek professional advice if they do not understand the purpose or implications of the notice. Regulation 8(1) also requires that notices of invitation to participate "shall be in the form set out in Schedule 1 to these Regulations." The prescribed form comprises 12 paragraphs, some of which include cross-references to the 10 further paragraphs of notes which appear at the end of the notice. Broadly speaking the notes summarise the procedure for claiming the right to manage and explain the consequences of its acquisition.

8. Once a sufficient number of qualifying tenants has been attracted to become members the next step is for the RTM company to give notice under section 79(1) of its claim to acquire the right to manage. Section 80(1) expressly states that a claim notice "must comply" with the requirements which then follow and which include that:

> "(5) It must state the name and registered office of the RTM company.
>
> (6) It must specify a date, not earlier than 1 month after the relevant date, by which each person who was given the notice under section 79(6) may respond to it by giving a counter-notice under section 84.
>
> (7) …
>
> (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."

9. The 2010 Regulations prescribe the form of claim notice for use in England. By regulations 4(e) and 8(2) a claim notice must be in the form set out in Schedule 2 and must contain the information provided in the notes to that form. It is necessary to refer to only part of two paragraphs of that form. Paragraph 1 is required to contain the following statement:

> "1. [*Name of RTM company*] ("the company"), of [*address of registered office*], and of which the registered number is […] claims to acquire the right to manage [*name of premises to which notice relates*] ("the premises")."

Paragraph 5 of the prescribed form then informs certain categories of recipients, including landlords, that:

> "… you may respond to this claim notice by giving a counter-notice under section 84 of the 2002 Act. A counter-notice must be in the form set out in Schedule 3 to the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010. It must be given to the company, at the address in paragraph 1, …."

10. Further provisions concerning the effectiveness of claim notices are contained in section 81; so far as is relevant to this appeal these provide as follows:

> "81. **Claim notice: supplementary**
>
> (1) A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80.

> (2) Where any of the members of the RTM company whose names are stated in the claim notice was not a qualifying tenant of a flat contained in the premises on the relevant date, the claim notice is not invalidated on that account, so long as a sufficient number of qualifying tenants of flats contained in the premises were members of the company on that date …."

11. As paragraph 5 of the prescribed form explains, a person who is given a claim notice by an RTM company has the right to give a counter-notice under section 84 of the 2002 Act either admitting or disputing that the company is entitled to acquire the right to manage. If no counter-notice is received, or only one which does not dispute entitlement, section 90(2) has the effect that the RTM company automatically acquires the right to manage on the date specified in its claim notice. If a counter-notice disputing entitlement is received the RTM company must apply to the appropriate tribunal (in England, the F-tT) for a determination under section 84(5) that it was entitled to acquire the right to manage on the relevant date. If such a determination is obtained the right to manage is acquired three months after the determination becomes final. The role of the F-tT at this stage of the statutory scheme is to confirm whether the conditions qualifying an RTM company for entitlement to acquire the right have been satisfied or not. The scheme is fault-free and the F-tT is not required to be satisfied of any deficiency in the management of the premises by the current manager, nor has it any discretion to withhold the right to manage if it is satisfied that the statutory conditions have been complied with.

12. As the Tribunal has recently pointed out (*Avon Ground Rents Limited v 51 Earls Court Square RTM Company Limited* [2016] UKUT 0022 (LC)) the acquisition of the right to manage affects not only the members of the RTM company but also qualifying tenants who are not members, their immediate and superior landlords, managing agents and contractors engaged to undertake the management of the premises or to provide other services. On the acquisition of the right to manage each of these categories of interested party loses the benefit of contractual rights without compensation, and, in the case of tenants, agents and contractors, without the right to be informed of, or to be joined as a party to, the RTM company's claim before the tribunal for a determination of its entitlement to acquire the right. If the procedural requirements laid down by the 2002 Act are properly implemented the right to manage is acquired by operation of law, and the entitlement to custody of substantial sums of money and the responsibility for the performance of important obligations are transferred to the RTM company. It is therefore apparent that if there is any doubt or uncertainty about the procedural integrity of a right to manage claim, significant problems may arise in the management of premises.

The relevant facts

13. The premises with which this appeal is concerned are Mill House at Hanover Street in Newcastle. Mill House is a self-contained building comprising only 6 flats. The freehold is held by an investment company which granted a head lease to the appellant for a term of 125 years plus a few days on 27 November 2006. Each of the individual flats is held on a long underlease for a term of 125 years from the same date.

14. The RTM Company was formed in 2011 and gave notices of invitation to participate to each of the qualifying tenants of the 6 flats on 19 March 2013. It is common ground, and was so found by the F-tT, that the notices of invitation to participate wholly omitted the notes which should have been included as part of the prescribed form.

15. The RTM Company served its first claim notice on 14 May 2013 but this was defective and was swiftly withdrawn. A second claim notice was given on 29 July 2013 and a counter-notice was served identifying various alleged defects in that claim notice. In due course an application for a determination of entitlement was refused by the F-tT which was satisfied that the second claim notice was also defective.

16. On 29 July 2014 the RTM Company served its third and (so far) final claim notice, with which this appeal is concerned. The claim notice gave the RTM Company's name and the address of its registered office in paragraph 1, but in paragraph 5 it departed in one small respect from the prescribed form. Rather than stipulating that any counter-notice which the appellant wished to serve "must be given to the company, at the address in paragraph 1 ….." the claim notice said that any counter-notice "must be given to the company, c/o Quality Solicitors, Punch Robson, 35 Albert Road, Middlesbrough …". Punch Robson were the RTM Company's solicitors.

17. The appellant responded to the third claim notice by serving a counter-notice on 29 August (one copy was addressed to the company's registered office and another to Punch Robson). An application was then made by the RTM Company to the F-tT which dealt with the claim on the basis of written representations received from both parties.

18. So far as they remain relevant, the appellant disputed the entitlement of the RTM Company to acquire the right to manage on three grounds. First, it was said that the notice of invitation to participate was invalid because it omitted all of the notes from the prescribed form. Secondly, the claim notice was alleged to be defective because it directed that any counter-notice should be served at the solicitor's address rather than at the registered office of the RTM Company. Finally, it was said that two of the members of the RTM Company were not qualifying tenants of flats in the building, contrary to section 74 of the 2002 Act. The appellant had been provided with two different versions of the RTM's Company's register of members, on one of which appeared the names of the two original members although these had been removed from the later register.

The F-tT's decision

19. In its decision given on 13 April 2015 the F-tT rejected each of the appellant's challenges and determined that the RTM Company was entitled to acquire the right to manage Mill House. It accepted that the omission of the notes from the notice of invitation to participate meant that the notice did not comply with the prescribed form. It also found that inclusion of the name and address of the solicitors as the address for service of any counter-notice made it "clear that the notice does not comply in all respects with the prescribed requirements." Nevertheless, having directed itself by reference to the decision of the Court of Appeal in *Friends Life Limited v Siemens Hearing Instruments Limited* [2014] EWCA Civ 382, the F-tT went on:

> "18. [The 2002 Act] does not make any provision for the consequences of any failure to comply with the provisions relating to notices, save that section 81 expressly provides that a claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80 or where any of the members of the RTM company whose names are stated in the claim notice was not the qualifying tenant of a flat contained in the premises on the relevant date.
>
> 19. The Tribunal finds that the provisions relating to the content of notices are directory rather than mandatory because they are generally silent as to the consequences of non- compliance. The Tribunal has assessed the effect of the defect in the claim notice and finds as a matter of fact that none of the parties, and in particular [the appellant], has been prejudice by the defects. Neither the claim notice nor the notices inviting participation is invalidated by the defects."

The F-tT also concluded on the evidence that the two individuals to whom the appellant objected were not members of the RTM Company at the material time.

The appeal

20. In his written submissions Mr Justin Bates, counsel for the appellant, argued that neither of the defects identified by the F-tT could be regarded as inconsequential. The notes which should have accompanied the notice of invitation to participate were an essential component of the prescribed form required to be used by section 78(3). This was not a case in which section 78(7) could assist as there had not been any "inaccuracy in any of the particulars" required by section 78, rather there had been a wholesale omission of a prescribed element of the notice. Mr Bates submitted that it was clear from the Court of Appeal's decision in *Natt v Osman* [2014] EWCA Civ 1520 that where Parliament prescribed a procedure for the acquisition of a property right, a failure to comply with that procedure was fatal.

21. Mr Bates made similar submissions in relation to the modified form of the claim notice and suggested that the F-tT had been wrong to regard precise compliance with the prescribed form as inessential or merely "directory." There was no cross appeal against the F-tT's finding that the claim notice had not complied with the statutory scheme and, in those circumstances, the appeal ought to be allowed. It was of critical importance, Mr Bates suggested, that the prescribed form of the claim notice be adopted without modification so that a recipient of the notice would be furnished with the correct address for service. If no counter-notice is served an RTM company acquires management of the premises without further investigation, so it is essential that there be no doubt about the address at which a counter-notice may be given. An RTM company was not entitled to introduce confusion into the process by nominating an alternative address.

22. The Tribunal had also granted permission to appeal on a third issue, to enable it to consider the consequences for the RTM process if persons who are not qualifying tenants remain members of an RTM company when the statutory procedures are invoked, but Mr Bates made no submissions on that issue. He argued only that the F-tT had failed to explain why it was satisfied that the two original directors and members of the RTM Company, whose names appeared on one copy of the registers of member provided by the Company's solicitors, were not still members, and submitted that the matter should be remitted to the F-tT for further consideration of that issue.

23. In their written submissions the RTM Company's solicitors, Punch Robson, took a preliminary point. They said that the defect in the notice of invitation to participate could have been pointed out by the appellant in response to the first claim notice served in May 2013 or the second claim notice served in July 2013, but no mention was made of it. The sufficiency of the notice of invitation to participate had not been relied on in response to the second claim notice which had failed before the F-tT for entirely different reasons. It was, Punch Robson suggested, an abuse of process for that issue to be raised for the first time in answer to the third claim notice. If the issue could be raised at all it was submitted that the notice of invitation to participate gave the recipient sufficient information about the right to manage procedure and its consequences and the F-tT had been right to conclude that the omission of the notes was not fatal to the claim.

24. As for the alleged defect in the claim notice it was submitted by Punch Robson that the identification of its registered office as the address for service of a counter-notice was not of critical importance to the function which the claim notice was intended to perform. The address at which the counter-notice could be served was clear and the solicitors had been authorised to receive service.

The proper approach to non-compliance with the statutory procedures for the acquisition of the right to manage

25. Two of the issues in this appeal raise once again the proper approach which should be taken by tribunals to any departure from the statutory procedure for the acquisition of the right to manage. Small and apparently insignificant defects in notices, or failures of strict compliance, are relied on again and again by landlords seeking to stave off claims to acquire the right to manage and to avoid the resulting losses of control and of other benefits. First-tier tribunals are often naturally sympathetic to RTM companies whose claims are met by highly technical points of no practical significance, but for the reason identified in paragraph 12 above, tribunals should be slow relax the need for full compliance. The statutory procedures are not difficult to comply with, and can easily be repeated if not properly implemented. It is preferable for tribunals to reject defective claims at an early stage rather than to see them rejected at an appeal or for some interested third party later to dispute that the right to manage has ever successfully been acquired.

26. The F-tT reached its conclusion in this case after considering the decision of the Court of Appeal in *Friends Life Limited v Siemens Hearing Instruments Limited* [2014] EWCA Civ 382. *Friends Life* was not a case about compliance with statutory procedure, but concerned a contractual break clause in a lease. The Court of Appeal held that a failure to comply precisely with the agreed machinery for unilateral termination was fatal to the effectiveness of the break notice served by the tenant, despite the fact that the only defect in the notice was of no practical consequence whatsoever. Lewison LJ explained that in the field of options and other unilateral contracts there was no room for the notion of permitted non-compliance with formal requirements. In paragraph 55 of his judgment Lewison LJ made it clear that notices given under statutes were not subject to the same rules as notices exercising unilateral rights of termination. In the light of those observations I do not think *Friends Life* provides assistance in this appeal.

27. Of greater relevance in identifying the proper approach to defects in compliance with procedures for the exercise or acquisition of statutory rights are two further decisions of the Court of Appeal.

28. *Newbold v The Coal Authority* [2013] EWCA Civ 584 concerned the validity of a preliminary notice given under section 3 of the Coal Mining Subsidence Act 1991 which was said to be defective by failing correctly to identify the owner of the relevant land. Sir Stanley Burnton explained how the consequences of a defect in the procedure for claiming compensation ought to be assessed:

> "In all cases, one must first construe the statutory or contractual requirement in question. It may require strict compliance with the requirement as a condition of its validity. In *Mannai* at 776B Lord Hoffmann gave the example of the lease requiring notice to be given on blue paper; a notice given on pink paper would be ineffective. 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 a 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 requirement, 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."

Applying that test to the statutory scheme of the 1991 Act Sir Stanley Burnton concluded that a notice under section 3 was valid if "it adequately provides the information provided by the regulations" (paragraph 72) which in the case of the damaged notices in that case he was satisfied it did.

29. Longmore LJ agreed, saying this at paragraph 88:

> "… I consider that on the true construction of the 1991 Act an inaccurate particular will not invalidate the notice. A question could arise where the particulars, purportedly given in a damage notice, were so inadequate that in effect the relevant particulars (or a single particular) was not provided at all. Even then it would be a matter of construction whether such inadequacy meant that the entire notice was invalid."

30. The same primary focus on the construction of the relevant statute is apparent from the decision of the Court of Appeal in *Natt v Osman* [2014] EWCA Civ 1520 which concerned the validity of a notice given under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 purporting to exercise the right of collective enfranchisement. The notice failed to comply with the requirement to give the names and addresses of all of the qualifying tenants together with particulars of their leasehold interests, as the details of one tenant had been omitted. The Chancellor, Sir Terence Etherton, considered the utility of the distinction between mandatory or directory procedural steps and explained that it was no longer regarded as sound:

> "24. Where a statute lays down a process or procedure for the exercise or acquisition by a person or body of some right conferred by the statute, and the statute does not expressly state what is the consequence of the failure to comply with that process or procedure, the

consequence used to be said to depend on whether the requirement was mandatory or directory. If, on the proper interpretation of the statute, it was held to be mandatory, the failure to comply was said to invalidate everything which followed. If it was held, on the proper interpretation of the statute, to be directory, the failure to comply would not necessarily have invalidated what followed.

25. That approach is now regarded as unsatisfactory since the characterisation of the statutory provisions as either mandatory or directory really does no more than state a conclusion as to the consequence of non-compliance rather than assist in determining what consequence the legislature intended. The modern approach is to determine the consequence of non-compliance as an ordinary issue of statutory interpretation, applying all the usual principles of statutory interpretation. It invariably involves, therefore, among other things according to the context, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole.

31. The Chancellor then identified two broad categories of reported cases in which the effect of failures of compliance with contractual or statutory procedures had been considered. He explained that the cases fell into two groups: first, those which concerned the procedural requirements for challenging a decision of a public body; and secondly those in which a statute conferred a property or similar right on a private person and the issue was whether non-compliance with the statutory requirement precluded that person from acquiring the right in question. Having referred to a number of decisions of the Court of Appeal in each category he went on, at paragraph 31:

"The Court of Appeal cases showed a consistent approach in relation to statutory requirements to serve a notice as part of the process for a private person to acquire or resist the acquisition of property or similar rights conferred by the statute. In none of them has the court adopted the approach of "substantial compliance" as in the first category of cases. The court has interpreted the notice to see whether it actually complies with the strict requirements of the statute; if it does not, then the court has, as a matter of statutory interpretation, held the notice to be wholly valid or wholly invalid….

32. On that approach, the outcome does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by non-compliance on the particular facts of the case … This is consistent with the policy of providing certainty in relation to the existence, acquisition and transfer of property interests. It is to be borne in mind in that connection that service of a section 13 notice has important property consequences."

32. The correct approach to defects in compliance with statutory schemes for the acquisition of property rights is therefore to ascertain the intention of Parliament concerning the consequences of non-compliance in the light of the statutory scheme as a whole. That is question of construction of the statute which does not depend on the circumstances of an individual case. In some schemes certain defects will be inconsequential, as in *Newbold* where the information missing from the statutory notice was held to be "of secondary importance or merely ancillary." In other cases the service of a notice or the provision of missing information may be of critical importance to the integrity of the statutory scheme with the consequence of non-compliance being that the statutory procedure has not validly been invoked. In *Natt v Osman* the failure to identify all of the qualifying

tenants and to state their addresses and interest in the property meant that no valid notice had been served at all. That conclusion did not turn on the use of the word "must" in section 13(3), which was said to give no independent indication of the consequences of non-compliance, but on three distinct considerations: first, the importance in the statutory scheme of ascertaining that a sufficient number of qualifying tenants was participating in the proposed acquisition; secondly, the fact that Parliament had included a saving provision in paragraph 15 of Schedule 3 to the 1993 Act that certain inaccuracies were not to invalidate a notice, which led to the conclusion that other errors not capable of being described as inaccuracies were intended to invalidate the notice; and thirdly, the ease with which a new notice could subsequently be served.

33. It seems to me to be quite clear that the acquisition of the right to manage under the 2002 Act falls into the second category of procedures considered by the Chancellor in *Natt v Osman* i.e. those which confer a property or similar right on a private person, for which compliance with the strict requirements of the statutory scheme is essential and substantial compliance is simply not good enough. Although it is true that no interest in land is created or transferred by the acquisition of the right to manage, the same policy of providing certainty in relation to the existence, acquisition and transfer of property interests is fully engaged in the circumstances I have described in paragraph 12 above.

34. Specific consideration has been given to the proper approach to defects in compliance with the requirements of the 2002 Act in a number of decisions of the Tribunal. Some of these merit brief consideration to test their consistency with the more recent general guidance from the Court of Appeal.

35. In *Sinclair Gardens Investments (Kensington) Limited v Oak Investments RTM Company Limited* LRX/52/2004 the Lands Tribunal (George Bartlett QC, President), determined that a failure to serve a notice of invitation to participate on one of the two joint tenants of a flat in a building with only two flats was not fatal. The Tribunal directed itself by reference to the decision of the Court of Appeal in *R v Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All ER 231 (a decision of the Court of Appeal falling into the first of the Chancellor's categories in *Natt v Osman*). At paragraph 10 of his decision the President said that:

> "The provisions are thus designed to ensure that every qualifying tenant has the opportunity to participate in the RTM company and is informed that the 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 principle question for the Tribunal will be whether the qualifying tenant has in practice had such an awareness of the procedures as the statute intended him to have."

The Tribunal's approach to non-compliance does not seem to me to be consistent with the guidance subsequently given by the Court of Appeal in *Newbold* and in *Natt v Osman*. It would only be possible to regard whether the qualifying tenant had in practice had such awareness of the procedures as the statute intended him to have as the principle question requiring to be answered if one was first satisfied that, as a matter of construction of the statute, strict compliance with the requirement to serve a notice of invitation to participate on every qualifying tenant who was not already a member of the RTM company was of only secondary importance. The importance of any procedural provision must be assessed before considering the practical consequences of non-compliance on the facts of a

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

36. In *Avon Freeholds Limited v Regent Court RTM Co Ltd* [2013] UKUT 0213 (LC) the Tribunal (Sir Keith Lindblom, President) considered the consequences of a failure to serve all qualifying tenants with a notice of invitation to participate in circumstances where the qualifying tenant of one of the flats could not be shown to have received a notice and service could not be deemed under section 111(5) because the notice had not been addressed to the tenant at the flat in question but at an alternative address. The Tribunal took the view that service at an address other than the flat was not fatal to the validity of the statutory procedure if service had been effected at the tenant's last known address, even if it could not be proved that the notice had come to the tenant's attention. That conclusion was reached on consideration of the statutory scheme as a whole and did not depend on the statutory provisions for inviting tenants to participate being categorised as directory rather than mandatory (paragraph 39).

37. Finally, in *Elim Court RTM Company Ltd v Avon Freeholds Limited* [2014] UKUT 379 the Tribunal considered the consequences of two defects in compliance with the statutory scheme. *Newbold* was cited and, as a matter of construction of the statute, I concluded that a failure to specify at least one day at the weekend on which the RTM company's articles of association could be inspected in accordance with the requirements of section 78(5)(b) of the 2002 Act was a substantial failure in compliance which rendered all subsequent steps ineffective. I also took the view that a failure to serve a claim notice on an intermediate landlord of one of the flats in the premises (which was a breach of section 79(6) requiring that a claim notice must be given to each landlord) was necessarily fatal to the whole acquisition.

Issue 1: The omission of the prescribed notes from the notice of invitation to participate

38. The preliminary submission that it is an abuse of process for the appellant now to take a point about the sufficiency of the notices of invitation to participate cannot be accepted for three reasons. The first is that each of the three claim notices served by the RTM Company was procedurally distinct and gave rise to a separate dispute, so there was no reason why the appellant could not take new points in relation to later claim notices. Secondly, the abuse of process point was not relied on by the RTM Company before the F-tT but is taken for the first time on this appeal. The appeal is proceeding as a review of the decision of the F-tT and it is not appropriate in those circumstances to permit a new point to be taken without the appellant having had the opportunity to adduce potentially relevant evidence to explain why no objection was taken to the notice of invitation to participate when the second claim notice was considered by the F-tT. Thirdly, and more generally, the right to manage is only capable of being acquired by correctly implementing the statutory procedures. If those procedures are not followed the right cannot be acquired, and it is therefore necessary for any tribunal which is aware of a defect in the acquisition procedure to consider the consequences of that defect for the entitlement of the RTM Company and the rights of third parties.

39. The purpose of a notice of invitation to participate under section 78 is to afford to all qualifying tenants of flats in the premises the opportunity to become members of the RTM company. Membership is an entitlement of qualifying tenants (section 74(1)(a)) and in order to give effect to that entitlement Parliament has required that the RTM company inform all qualifying tenants who are not already members of its existence, current membership and intentions.

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

41. In this case each of the qualifying tenants received a notice of invitation to participate, but it omitted the notes in the form prescribed by the 2010 Regulations. The question is therefore whether a notice which wholly omits the notes is effective as a notice of invitation to participate at all.

42. As the F-tT found, there was clearly a failure in compliance with section 78(3). I would not regard that failure as one relating to the "particulars" required to be contained in notices of invitation to participate by section 78(2)d); the particulars comprise the information to be added to the prescribed form of notice by the RTM company. The failure in this case was a failure to comply with the requirements as to the form of the notice.

43. Section 78(7) is a saving provision with the effect that a notice of invitation to participate is not invalidated by any "inaccuracy in any of the particulars" required to be given. It is implicit in the limited scope of that saving provision that a defect which is not capable of being regarded as an inaccuracy in any of the particulars will have the consequence of invalidating the notice. In *Natt v Osman*, at paragraph 37, the Chancellor regarded a similar limited saving provision as an indication that, other than for such inaccuracies in particulars, full compliance was required.

44. It is apparent from reading the notes to the prescribed form of notice of invitation to participate that they are intended to inform the recipient of the notice of the basic structure of the statutory scheme. Many of the notes provide an explanation or further elaboration of information contained in the body of the notice itself. For example, the notice of invitation to participate informs the recipient (at paragraph 10) that if the RTM company gives a claim notice any person who is or has been a member of the company will be liable for costs incurred by the landlord and others in consequence of that notice. The recipient is then referred to note 6 which explains that if a claim notice is withdrawn each member is liable for reasonable costs incurred in consequence of the claim notice by three specified categories of recipient (landlords, parties to leases of the whole or part of the premises other

than landlords or tenants, and tribunal-appointed managers). The note also explains the circumstances in which a former member will cease to be liable. All of that is important information which might influence the mind of a person considering whether to become a member of an RTM company. Without the notes a reader of the notice would have an incomplete understanding of the statutory scheme and, more importantly, would be less well informed when deciding whether to become a member than Parliament intended they should be.

45. It does not seem to me to be appropriate in this case to seek to assess the significance of individual pieces of information contained in the notes. Parliament intended that a notice should be in the prescribed form, including all of the notes, and it is not for the Tribunal to categorise some as more important than others. It might be arguable that the omission of a particular note which had no possible application to the circumstances of an individual case might not be fatal, but that question does not arise for consideration in this appeal. More significantly in the circumstances of this case, it is not permissible to consider whether in fact any recipient of the notices of invitation to participate was misled or would have acted differently had they been more fully informed.

46. The F-tT took the view that the 2002 Act does not make any provision for the consequences of a failure to comply with the provisions relating to notices, but it did not appreciate that section 79(2) is such a provision. It based its decision on its view that those requirements were "directory rather than mandatory", but as the Chancellor explained in *Natt v Osman,* that is now regarded as an unsatisfactory approach. In regarding the mandatory/directory classification as sufficient to permit it to assess the practical consequences of the omission of the notes, and in basing its conclusion on the absence of prejudice, the F-tT's approach was wrong in principle.

47. I am satisfied that as a matter of construction of the statutory scheme the inclusion of the notes in the prescribed form is essential to the validity of a notice of invitation to participate. It follows that the documents served on the qualifying tenants which omitted the notes in their entirety were not notices of invitation to participate compliant with section 78. As a result the RTM company was prohibited by section 79(2) from giving a claim notice seeking to acquire the right to manage. The claim for a determination that the RTM Company had acquired a right to manage must therefore be dismissed.

Issue 2: The claim notice

48. The F-tT said in paragraph 13 of its decision that the substitution of the RTM Company's solicitor's address for the words "at the address in paragraph 1" in the claim notice was a clear failure to comply with the requirement to serve a notice in the prescribed form. I do not agree. Section 80(5) requires that a claim notice must state the name and registered office of the RTM Company. Nowhere in section 80 is it required that a claim notice must inform the recipient that any counter-notice must be served at the registered office of the RTM Company. Section 84, which deals with the content of counter-notices does not require that a counter-notice be given to the RTM Company at any particular address. By section 84(2) the counter-notice must contain such other particulars and comply with such requirements (if any) about the form of counter-notices as may be prescribed by regulations. The 2010 Regulations prescribe a form of counter-notice. One of the notes to that form states that the counter-notice is to be given to the Company that gave the claim notice whose

name and address are given in the claim notice. No mention is made of any separate requirement to serve the counter-notice at the registered office of the RTM Company.

49. The sole basis on which it is suggested that a claim notice is wholly ineffective if it suggests that a counter-notice must be given to the company at the address of its solicitors is the statement in paragraph 5 of the prescribed form of claim notice that "it must be given to the company, *at the address in paragraph 1*" where paragraph 1 requires the company to state the address of its registered office.

50. The purpose of identifying an address at which a counter-notice may be given is to facilitate the receipt by the RTM Company of that counter-notice. It is an absolute requirement that the claim notice identify the company's registered office as it is essential that the recipient of the claim notice should know that address. There seems to me, however, to be nothing in the statutory scheme to prohibit an RTM company from specifying an alternative address for service of the counter-notice. The address is a matter of machinery and is of ancillary importance. In my judgment it would require some specific derogation from the routine practice of identifying a solicitor as the person on whom formal documents ought to be served before it could be inferred that the substitution of a duly authorised solicitor as the addressee of a counter-notice would render a claim notice modified to that extent a nullity.

51. Had the third claim notice been preceded by valid notices of invitation to participate, I would not have regarded the inconsequential modification of paragraph 5 of the claim notice as sufficient to disentitle the RTM Company from acquiring the right to manage.

Issue 3: The identity of the members

52. The third issue in the appeal raises a very short point which is no longer of consequence because of the conclusion I have reached on issue 1. That is whether the presence on the register of members of an RTM Company of one or more persons who are not qualifying tenants of flats in the building is an impediment to the acquisition of the right to manage. The appellant, in its written submissions, has sought to avoid that issue and to frame its complaint against the decision of the F-tT on the grounds that it failed adequately to explain why it was satisfied that all of the members of the RTM Company were entitled to be members at the relevant time, but that approach begs the question of whether rogue members would have made any difference. Because disputes about the identity of members feature regularly in right to manage cases I make the following brief observations.

53. It is common for the original members of an RTM company not to be qualifying tenants of flats in the premises which the company eventually aspires to manage; it will often be the case that, on formation, the company's objects do not identify any premises at all. At that point section 70(3) is not satisfied and the company will not be an RTM Company in relation to any premises. Once a company's articles of association are amended to identify specific premises as its object it will be an RTM company in relation to those premises because it will satisfy both of the requirements of section 73(2) (assuming neither of the prohibitions in section 73(3)-(4) is engaged). Section 73 does not make it a condition of a company's status as an RTM company that its membership should be

restricted exclusively to qualifying tenants of flats. It is true that section 74(1) provides that only persons who are qualifying tenants of flats may be members of an RTM company before the right to manage is acquired, but it does not follow from that, where the register of members identify someone who is not a qualifying tenant as a member, that the company is not an RTM company. Where section 73(2) is satisfied in relation to a company a person who is not a qualifying tenant is not entitled to be a member of that company and no doubt steps could be taken to have their name removed from the register of members. As currently advised, and without the benefit of fuller argument, it does not seem to me that the entitlement of such an RTM company to seek to acquire the right to manage is impaired in any way.

54. In this case the F-tT was satisfied on the evidence that the founding members who had not been qualifying tenants of flats on the premises were not members at the relevant time (i.e. when the claim notice was given). The reason for that was obvious to anyone who had considered the parties respective statements of case and supporting documents and was that the register of members showed that the two directors had ceased their membership more than a year before the service of the third claim notice. The F-tT was entitled to come to that conclusion which was sufficiently explained in the context of these proceedings and I dismiss the third ground of appeal.

Disposal

55. I am satisfied that the appeal must be allowed on the first ground and that the determination by the F-tT that the RTM Company is entitled to acquire the right to manage Mill House must be set aside. I am satisfied that the RTM Company was not entitled to acquire the right to manage Mill House.

56. In their written submissions the RTM Company's solicitors submitted that if the appeal were to be allowed the company should nevertheless not be liable for costs which have arisen as a result of the appellant's omission properly to particularise its grounds of objection "at the appropriate time". I take that to be a further reference to the appellant's previous omission to take the point on which it has now succeeded concerning the sufficiency of the notices of invitation to participate. An RTM Company's liability for costs arises under section 88 of the 2002 Act and in this case extends to the reasonable costs incurred by the appellant in consequence of the third claim notice in relation to Mill House. Because the Tribunal has dismissed the RTM Company's application for a determination that it is entitled to acquire the right to manage those costs will include the costs incurred in the proceedings before the F-tT.

57. In *Albion Residential Limited v Albion Riverside Residents RTM Company Limited* [2014] UKUT 0006 (LC) the Tribunal explained that the costs recoverable by a landlord under section 88(1) include the reasonable costs of a successful appeal to the Tribunal and that, in those circumstances, section 88(3) is not an impediment to the recovery of costs incurred before the F-tT. As the Tribunal pointed out in paragraph 59 of its decision, if any question arises in relation to the amount of the costs payable, whether incurred in proceedings before the F-tT, or on appeal to the Tribunal, or in connection with any other consequence of the claim notice, that question must first be determined by

the F-tT on an application made to it. It follows that it is not for this Tribunal to make any decision in relation to the costs incurred in consequence of the third claim notice.

Martin Rodger QC,
Deputy President

22 February 2016