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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0027/09/14

In the matter of numbers 1 to 46 Viceroy Court, Soudrey Way, Butetown, Cardiff, CF10 5FW

In the matter of an application under Section 84(3) of the Commonhold and Leasehold Reform Act 2002

TRIBUNAL	**Mr. Timothy Walsh (Chairman)** **Mr. Kerry Watkins (Surveyor)**
APPLICANT	**Viceroy Court (Soudrey Way) RTM Company Limited**
RESPONDENTS	**(1) Fairhold (Yorkshire) Limited** **(2) Peverel Property Management**

REASONS FOR THE DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

The Decision in Summary

1. For the reasons given below the Tribunal has reached the conclusion that the Applicant was not, on the relevant date (namely 6 August 2014), entitled to acquire the right to manage the material premises. Accordingly, this application is dismissed.
2. The Applicant shall pay the Respondents' reasonable costs of these proceedings which shall, in default of agreement, be the subject of further determination by the Leasehold Valuation Tribunal.

Representation

3. The hearing of this application was on 18 February 2015. At the hearing the Applicant was represented by Mr. Nick Rich of Warwick Estate Property Management.
4. The Respondents were represented by Ms. Annette Cafferkey of Counsel.

The Application

5. By an Application Form dated 15 September 2014 (received by this Tribunal on 16 September 2014 – "the Application") the Applicant, Viceroy Court (Soudrey Way) RTM Company Limited, applied to this Leasehold Valuation Tribunal under section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("the Act") as an RTM company seeking a determination that it was "*on the relevant date*" entitled to acquire the right to manage the material premises. For these purposes, the "relevant date" is defined in section 79(1) of the Act as the date on which notice of the claim to acquire the right to manage is given. Here the Claim Notices were dated 6 August 2014.

6. The material premises are defined in the Application as numbers 1 to 46 Viceroy Court, Soudrey Way, Butetown, Cardiff, CF10 5FW (hereafter collectively "the Premises").

7. The landlord and registered owner of the freehold reversion to the Premises is Fairhold (Yorkshire) Limited. The landlord is the First Respondent to this Application.

8. Peverel Property Management is named in the Application as the manager and it served a Counter-Notice (as to which see below) albeit on behalf of OM Property Management Limited. Peverel/OM Property Management are the Second Respondent. At the hearing we were supplied with a sample lease. The lease provided was for Plot 59 (which was apparently later renamed as number 1 Soudrey Way). Peverel OM Limited is named as the manager in that lease. No issue was taken by the parties as to the correct identity of the manager for the purposes of the Application.

The Statutory Scheme

9. The statutory scheme for acquisition of the Right to Manage is to be found in Chapter 1 of Part 2 to the 2002 Act and in sections 71 to 88 in particular. The jurisdiction of the LVT to make a determination under section 84(3) depends upon the status of the Applicant as an RTM company. Eligible "RTM companies" are defined in section 73 of the Act as including (a) a private company limited by guarantee where (b) its articles of association state that its object, or one of its objects, is the acquisition and exercise of the right to manage the material premises.

10. Only the salient parts of the Act relevant to the issues taken by the Respondents are set out here.

11. Section 72 of the Act defines the Premises to which Chapter 1 of Part 2 applies in the following terms:

72 Premises to which Chapter applies

(1) This Chapter applies to premises if—
(a) they consist of a self-contained building or part of a building, with or without appurtenant property,
(b) they contain two or more flats held by qualifying tenants, and
(c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.

(2) A building is a self-contained building if it is structurally detached.

(3) A part of a building is a self-contained part of the building if—
(a) it constitutes a vertical division of the building,
(b) the structure of the building is such that it could be redeveloped independently of the rest of the building, and
(c) subsection (4) applies in relation to it.

(4) This subsection applies in relation to a part of a building if the relevant services provided for occupiers of it—
(a) are provided independently of the relevant services provided for occupiers of the rest of the building, or
(b) could be so provided without involving the carrying out of works likely to result in a significant interruption in the provision of any relevant services for occupiers of the rest of the building.

(5) Relevant services are services provided by means of pipes, cables or other fixed installations.

(6) Schedule 6 (premises excepted from this Chapter) has effect.

12. In this case an issue was also taken in relation to the Applicant's Articles of Association. Section 74 of the Act provides as follows:

74 RTM companies: membership and regulations

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

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

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

(2) The appropriate national authority shall make regulations about the content and form of the [articles of association] of RTM companies.

(3) A RTM company may adopt provisions of the regulations for its articles.

(4) The regulations may include provision which is to have effect for a RTM company whether or not it is adopted by the company.

(5) A provision of the articles of a RTM company has no effect to the extent that it is inconsistent with the regulations.

(6) The regulations have effect in relation to articles—

(a) irrespective of the date of the [articles], but

(b) subject to any transitional provisions of the regulations.

(7) Section 20 of the Companies Act 2006 (default application of model articles) does not apply to a RTM company.

13. As will be apparent from the foregoing, section 74(2) provides that regulations may be made as to the content and form of articles of association of RTM companies. The RTM Companies (Model Articles) (Wales) Regulations 2011 were introduced on 30 November 2011 and apply to RTM companies which exercise the Right to Manage premises in Wales (see regulation 1(3)). Regulation 2 is in the following terms:

Form and content of articles of association of RTM companies

2.—(1) Subject to paragraph (3) the articles of association of an RTM company take the form, and include the provisions, set out in Schedule 1 to these Regulations.
(2) Subject to paragraph (3) the provisions referred to in paragraph (1) have effect for an RTM company whether or not they are adopted by the company.
(3) Where an RTM company wishes to have its articles of association in Welsh, its articles of association take the form and include the provisions set out in Schedule 2 to these Regulations.

14. Section 75 defines "qualifying tenants":

75 Qualifying tenants

(1) This section specifies whether there is a qualifying tenant of a flat for the purposes of this Chapter and, if so, who it is.

(2) Subject as follows, a person is the qualifying tenant of a flat if he is tenant of the flat under a long lease.

(3) Subsection (2) does not apply where the lease is a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c 56) (business tenancies) applies.

(4) Subsection (2) does not apply where—

(a) the lease was granted by sub-demise out of a superior lease other than a long lease,

(b) the grant was made in breach of the terms of the superior lease, and

(c) there has been no waiver of the breach by the superior landlord.

(5) No flat has more than one qualifying tenant at any one time; and subsections (6) and (7) apply accordingly.

(6) Where a flat is being let under two or more long leases, a tenant under any of those leases which is superior to that held by another is not the qualifying tenant of the flat.

(7) Where a flat is being let to joint tenants under a long lease, the joint tenants shall (subject to subsection (6)) be regarded as jointly being the qualifying tenant of the flat.

15. The balance of the material statutory provisions are primarily to be found in sections 78 to 81 of the 2002 Act. Section 78 is in the following terms:

78 Notice inviting participation

(1) Before making a claim to acquire the right to manage any premises, a RTM company must give notice to each person who at the time when the notice is given—
(a) is the qualifying tenant of a flat contained in the premises, but
(b) neither is nor has agreed to become a member of the RTM company.

(2) A notice given under this section (referred to in this Chapter as a "notice of 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) A notice of invitation to participate must either—
(a) be accompanied by a copy of the [articles of association] of the RTM company, or
(b) include a statement about inspection and copying of the [articles of association] of the RTM company.

(5) A statement under subsection (4)(b) must—
(a) specify a place (in England or Wales) at which the [articles of association] may be inspected,
(b) specify as the times at which they may be inspected periods of at least two hours on each of at least three days (including a Saturday or Sunday or both) within the seven days beginning with the day following that on which the notice is given,
(c) specify a place (in England or Wales) at which, at any time within those seven days, a copy of the [articles of association] may be ordered, and
(d) specify a fee for the provision of an ordered copy, not exceeding the reasonable cost of providing it.

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

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

16. Sections 74(2)(d) and 74(3) provide that the notices required under section 78 must comply with any relevant regulations. Those regulations are the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations (SI 2011/2684) which came into force on 30 November 2011. Regulations 3 and 8 in particular prescribe the content and form of the notice.

17. Sections 79 to 81 add the following:

79 Notice of claim to acquire right

(1) A claim to acquire the right to manage any premises is made by giving notice of the claim (referred to in this Chapter as a "claim notice"); and in this Chapter the "relevant date", in relation to any claim to acquire the right to manage, means the date on which notice of the claim is given.

(2) The claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before.

(3) The claim notice must be given by a RTM company which complies with subsection (4) or (5).

(4) If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company.

(5) In any other case, the membership of the RTM company must on the relevant date include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained.

(6) The claim notice must be given to each person who on the relevant date is—
(a) landlord under a lease of the whole or any part of the premises,
(b) party to such a lease otherwise than as landlord or tenant, or

(c) a manager appointed under Part 2 of the Landlord and Tenant Act 1987 (c 31) (referred to in this Part as "the 1987 Act") to act in relation to the premises, or any premises containing or contained in the premises.

(7) Subsection (6) does not require the claim notice to be given to a person who cannot be found or whose identity cannot be ascertained; but if this subsection means that the claim notice is not required to be given to anyone at all, section 85 applies.

(8) A copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises.

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

80 Contents of claim notice

(1) The claim notice must comply with the following requirements.

(2) It must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies.

(3) It must state the full name of each person who is both—
(a) the qualifying tenant of a flat contained in the premises, and
(b) a member of the RTM company,
and the address of his flat.

(4) And it must contain, in relation to each such person, such particulars of his lease as are sufficient to identify it, including—
(a) the date on which it was entered into,
(b) the term for which it was granted, and
(c) the date of the commencement of the term.

(5) It must state the name and registered office of the RTM company.

(6) It must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice under section 79(6) may respond to it by giving a counter-notice under section 84.

(7) It must specify a date, at least three months after that specified under subsection (6), on which the RTM company intends to acquire the right to manage the premises.

(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.

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 the 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; and for this purpose a "sufficient number" is a number (greater than one) which is not less than one-half of the total number of flats contained in the premises on that date.

(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.

18. Section 84 deals with Counter-notices and applications:

84 Counter-notices

(1) A person who is given a claim notice by a RTM company under section 79(6) may give a notice (referred to in this Chapter as a "counter-notice") to the company no later than the date specified in the claim notice under section 80(6).

(2) 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,
and containing such other particulars (if any) as may be required to be contained in counter-notices, and complying with such requirements (if any) about the form of counter-notices, as may be prescribed by regulations made by the appropriate national authority.

(3) Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the company may apply to the appropriate tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises.

(4) An application under subsection (3) must be made not later than the end of the period of two months beginning with the day on which the counter-notice (or, where more than one, the last of the counter-notices) was given.

(5) Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in subsection (2)(b), the RTM company does not acquire the right to manage the premises unless—
(a) on an application under subsection (3) it is finally determined that the company was on the relevant date entitled to acquire the right to manage the premises, or
(b) the person by whom the counter-notice was given agrees, or the persons by whom the counter-notices were given agree, in writing that the company was so entitled.

(6) If on an application under subsection (3) it is finally determined that the company was not on the relevant date entitled to acquire the right to manage the premises, the claim notice ceases to have effect.

(7) A determination on an application under subsection (3) becomes final—
(a) if not appealed against, at the end of the period for bringing an appeal, or
(b) if appealed against, at the time when the appeal (or any further appeal) is disposed of.

(8) An appeal is disposed of—
(a) if it is determined and the period for bringing any further appeal has ended, or
(b) if it is abandoned or otherwise ceases to have effect.

19. Finally, section 111 is concerned with notices:

111 Notices

(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.

The Background

The Applicant and the Application

20. The Applicant was incorporated as a private company limited by guarantee on 25 February 2013. By mistake the Articles of Association used were not those contained in Schedule 1 to the RTM Companies (Model Articles) (Wales) Regulations 2011 but were, instead, the articles contained in the schedule to the sister provisions applicable in England under the RTM Companies (Model Articles) (England) Regulations 2009. The Respondents initially argued (in paragraph 43 of the Respondents' skeleton argument in particular) that this compromised the Applicant's standing to bring an application at all because, it was said, the Applicant was not a properly constituted company for the purposes of applying to manage the Premises.

21. The Applicant first issued Notices of Intention to Participate in the Right to Manage (hereafter a "NIP") on 27 March 2014. Copies of those NIPs appeared in our hearing bundle at page 140 onwards. Those NIPs were not in the form required by the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011. The Respondents argued that those notices were invalid.

22. Also, in the original bundle, however, were samples of NIPs served (or re-served) later on 18 July 2014 (at pages 61 onwards of the bundle). It was common ground that those notices were in the statutorily prescribed form but the Respondents initially took the point that they had not seen full copies of the July 2014 NIPs nor any proof of service. However, during the hearing the Respondents were supplied with a full bundle of the July NIPs under cover of an email from a Ms. Emma Claridge dated 18 February 2015 indicating that they were copies of the NIPs "*served on the lessees of Viceroy Court...on 18th July 2014"*.

23. In addition, we heard evidence from Mr. Rich about the service of those July notices. He confirmed that they had been sent by second class post on 18 July 2014 following his instructions to Ms. Claridge. Mr. Rich had not physically posted them but was certain they had been sent since he works with, and next to, Ms. Claridge and he had checked the position.

24. In view of Mr. Rich's evidence, and having reviewed the bundle of NIPs said to have been served in July 2014, Ms. Cafferkey abandoned arguments based on the form or service of the NIPs. We are in no doubt that she was correct to do so. Had the Respondents not abandoned those points we would, in any event, have concluded that NIPs in prescribed form had indeed been served (subject to the point concerning flat 29 below).

25. Claim Notices under section 79 of the Act were initially served by the Applicant on 28 April 2014 and opposed by the Respondents in May. The initial claim was seemingly withdrawn and the process recommenced with the service of the NIPs on 18 July 2014. Further Claim Notices followed on 6 August 2014. Those are the notices relied upon in the instant Application. A copy is to be found in the hearing bundle at page 76.

26. The Respondents initially took issue with service of the Claim Notices on the leaseholders of Flats 29 and 42. In respect of the latter, however, it was eventually conceded that the leaseholder had been properly served (albeit using her maiden name).

27. In respect of Flat 29, however, the NIP was served on "Alexandra Jane Ashley". The registered proprietor of that leasehold property at that date (under HM Land Registry Title Number CYM154192) was "Xintong Xu". This is common ground, and the HM Land Registry Official Copy of the Register with which we were provided (at page 135 of the bundle) was dated 2 October 2014 and indicated that Xintong Xu had been the registered leasehold proprietor since 9 September 2013. Mr. Rich, for the Applicant, was candid enough to indicate that this was simply a mistake and he could offer no explanation as to why it had happened.

28. Whilst the relevant documentation was sent to Flat 29, it is clear that Xintong Xu was served with neither the NIP nor the Claim Notice. The Applicant's Response to Statement of Case (included in the hearing bundle at page 335) confirmed that it was only after the Application had been issued (in September) that a letter was sent to Xintong Xu addressed to 29 Viceroy Court on 21 October 2014. That letter (at page 383 of the bundle) is stated to have contained the NIP and the Claim Notice and the body of the letter included an invitation for the leaseholder to become a member of the RTM Company. The letter also indicated that the matter was already proceeding "through the Tribunals". Paragraph 10 of the Applicant's Response (at page 337 thereof) adds that no correspondence has since been received from Xintong Xu with the result, says the Applicant, that he or she may be inferred not to have suffered any prejudice from their omission from the earlier stages of the process.

29. For their part, the Respondents' position is that the failure to serve the NIP or the Claim Notice on Xintong Xu before the Application was issued was fatal.

The Premises

30. A further point was taken about the claim notice. Understanding that point requires a more detailed description of the Premises and their occupation.

31. The Premises are a substantial detached purpose built block of self contained flats, having been constructed approximately 13 years ago; they occupy a level plot of land in the Cardiff Bay area. Off street parking is provided for the flats within the site. Local shops and amenities are close by with Cardiff City Centre being some two miles distant.

32. The Premises are of steel frame construction, being clad with a mixture of facing brickwork, painted render and painted panels, with the communal staircases being enclosed with glazed powder coated metal screens. The principal entrance doors are similarly of glazed white powder coated metal. The roofs are multi pitched, being of profiled metal sheet with both valley and external guttering.

33. We were informed that mains water and electricity supplies are provided to the site but no gas supply. There is a landlords' electrical supply for the communal areas whilst each flat is supplied with its own electricity meter. The main water supply enters the property in the ground floor tank room where it is stored and pumped to each flat.

34. Omitted from the bundle were any structural or service plans. We were informed by the Respondents that they could be supplied and the Chairman made a direction for the Respondents to file any such plans by 4 March 2015. A site plan was filed but no structural plans.

35. This Tribunal had the benefit of a site inspection and also heard evidence from a Mr. Robert Jones, a Regional Manager employed by the Second Respondent. His qualifications include a Masters in Housing and he is an Associate Member of RICS.

36. The Premises are a single self-contained building and are an "L" shaped block comprising what were described as three "cores":

    (I) The first core ("Core One") is at the western end of the Premises nearest to the public road known as Dumballs Road and contains sixteen flats. There are two access doors (north and south) at ground floor level and there are four floors, each of which contains four flats (necessarily numbering flats 1 through to 16) occupying identical footprints. Access to the flats on the first to third floors is achieved from a single staircase; there is no lift. Each floor contains a cupboard accessed from the communal landing which contains electricity meters for each flat. At ground floor level there is also a bin storage area. Also located in this block and accessed via a north facing door at ground level is a pump room with a holding tank and service pumps which supplies the clean water to all of the Premises. There is no interconnection between the flats in this core and the adjacent attached core.

    (II) The second core ("Core Two") within the Premises is east of the first and contains the twelve flats numbered 17 to 28. There are four floors and three flats per floor. Again, there is one staircase and no lift, with maintenance cupboards on each floor. There is also no interconnection between the flats in this block and the adjacent cores. The flats occupy the same layout on each floor.

(III) The third and final core to the east of the second core (being the base of the "L" – "Core Three") contains the eighteen flats numbered 29 to 46. There is one staircase but also a lift. This core rises two levels higher than the attached cores so that the accommodation is spread over six floors with three flats per floor and a service cupboard on each floor accessed from the communal landings. It follows from the preceding paragraph that there is no access to Core Two from within Core Three.

37. When one considers the Claim Notice, the leaseholders of 24 of the 46 flats are listed although inevitably some of the flats have more than one registered leaseholder. Part one of Schedule 1 to the Claim Notice particularises the names and addresses of the persons who are both qualifying tenants and members of the RTM company. That notice reveals that:

(I) nine of the sixteen flats in Core One are listed;
(II) five of the twelve flats in Core Two are listed;
(III) ten of the eighteen flats in Core Three are included.

38. The Respondents' contention prior to the hearing was that it was not clear from the Claim Notice that the qualifying conditions have been met for all three cores if this is a case in which one Claim Notice has been served when three could have been. In fact, however, as the point developed at the hearing the submission instead became, in effect, that it was clear that the qualifying conditions for Core Two had not been met. This, it was said, affected the validity of the entire Application in respect of all three Cores.

Discussion and Determination

39. In view of the foregoing, broadly the Respondents' contentions were (or had been) that:

(I) the failure to use the correct articles of association meant that the Applicant had no locus to bring the Application;
(II) the NIPs were initially in the wrong form and there was inadequate evidence as to service of the re-issued NIPs so that there was inadequate evidence that the application had been validly brought;
(III) it was contended that the Claim Notice was insufficiently particularised or, in the alternative, that it in fact showed that that the statutory pre-conditions for securing a Right to Manage the whole Premises had not been made out (this was characterised in the Respondents' skeleton argument as "the Building Point" and is addressed as such below).
(IV) The failure to name the correct leaseholder of Flat 29 in the NIP or Claim Notice was said to be fatal ("the Flat 29 issue").

40. The Respondents' contention that the use of the incorrect Articles of Association meant that the Applicant was not a properly constituted RTM company for the purposes of bringing this application lacked any merit. Ms. Cafferkey abandoned the point on the afternoon of the hearing but for sake of completeness we would add that she was right, and indeed bound, to do so.

41. The combined effect of sections 74(4) and 74(5) of the 2002 Act taken together with regulation 2 of the RTM Companies (Model Articles) (Wales) Regulations 2011 is that, if a company is an RTM company as defined in section 73(2) of the Act, its articles of association are those prescribed in schedule 1 to those 2011 Regulations whether or not they have been adopted as such. Any omission to adopt or include a prescribed article is cured by regulation

2 which spells out that the articles of association "*take the form, and include the provisions, set out in Schedule 1 to these Regulations"*. The articles in Schedule 1 are accordingly incorporated. Where different articles are adopted they may also form part of the articles of association provided that they are not inconsistent with the prescribed articles. There is no sanction or consequence for a failure to comply with the 2011 Regulations and sections 74(4) and (5) and regulation 2(1) make it clear that, to the extent that the adopted articles of an RTM company are inconsistent with the prescribed articles, they are ineffective. The Deputy President reached the same conclusion in *Fairhold Mercury Limited v. HQ (Block 1) Action Management Compnay Limited* [2013] UKUT 0487 (LC) in relation to the materially identical provisions of the RTM Companies (Model Articles) (England) Regulations 2009.

42. As already noted above, the Respondents also abandoned their argument that the July 2014 NIPs may not have been sent and we would in any event have found that NIPs in the prescribed form were in fact served (subject to the flat 29 issue). That left two arguments.

The Building Point

43. As the statutory provisions set out above make plain, the members of the RTM company on 6 August 2014 had to include a number of qualifying tenants of flats contained in the premises which was not less than one half of the total number so contained (per section 79(5)).

44. The submission that the Claim Notice was too ambiguous appeared to turn on an assertion that it was unclear how many qualifying tenants lived in each flat but as section 75(5) expressly provides that *"No flat has more than one qualifying tenant at any one time",* it is clear that 24 of the 46 flats, and so 24 out of 46 qualifying tenants for the whole Premises are members of the Applicant RTM company. It necessarily follows that there is no material ambiguity in the Claim Notice and that more than half of the qualifying tenants of the Premises comprising all three cores are members as required by section 79(5).

45. The matter does not, however, end there because it is the Respondents' case that three Claim Notices could have been served in relation to the three cores rather than one in relation to the entire building.

46. At the hearing it was not argued that one notice could not serve as a Claim Notice for all three parts. Instead it was said that all three self contained blocks or cores must satisfy the eligibility criteria. This, it was said, resulted from paragraph 94 of the judgment in *Ninety Broomfield Road RTM Company Ltd. v Triplerose Limited* [2013] UKUT 0606 (LC). There it had been held that a single RTM company could exercise the Right to Manage in respect of more than one set of premises and that a single notice will suffice but it was added that:

"[94] ...I consider that each set of premises must fulfil all of the section 72 conditions. Therefore in addition to being self-contained, they must also contain two or more flats held by qualifying tenants and the total number of flats held by such tenants must be not less than two-thirds of the total number of flats contained in the premises. Initially I had taken the view that it was necessary for an RTM company to serve a separate notice in respect of each set of premises. However, on reflection, I consider that Mr Woolf is correct and a single notice will suffice in respect of a number of properties. If a single notice is served, then its content must be sufficiently clear to establish eligibility in respect of each set of premises and must comply with section 80. For that reason, the RTM company may prefer to serve separate notices simply for the sake of clarity." [emphasis added]

47. In relation to Core Two these requirements would not be satisfied because on 6 August 2014 less than one half of the qualifying tenants from that Core were members of the RTM company contrary to the requirement in section 79(5).

48. The Respondents' concession that a single RTM company could serve a single notice in relation to all three cores or blocks was based on the Upper Tribunal decision in *Ninety Broomfield Road RTM Company Ltd. v Triplerose Limited*. On 27 March 2015, however, the Court of Appeal handed down judgment in the successful appeal from that decision. The Court of Appeal held that: "*it is not open for an RTM company to acquire the right to manage more than one self-contained building or part of a building...*" (Per Gloster LJ at paragraph 62). If the three cores are three self contained parts of a building the issue accordingly goes to the heart of the Application.

49. The Right to Manage provisions of the 2002 Act apply to premises if, inter alia, they consist of a self-contained building. A building is self-contained if it is structurally detached. It is incontrovertibly the case that the 46 flat block that is Viceroy Court is a self-contained structurally detached building. As section 72(1)(a) makes plain, however, the Act applies to premises which form only part of a building. A part of a building is a self-contained part of a building to which the Right to Manage provisions apply if it satisfies the three conditions set out in sections 72(3) and 72(4).

50. The first two requirements are that (a) the part of the building must constitute a vertical division of the building and (b) the structure of the building must be such that it could be redeveloped independently of the rest of the building.

51. As the editors of Hague: Leasehold Enfranchisement (6th Ed.) observe at paragraph 21-03, in relation to the comparable provisions in section 3(2) of the Leasehold Reform, Housing & Urban Development Act 1993, there is no guidance as to what is meant by independent redevelopment although they add: *"It is considered that an appropriate test is that it must be capable of being demolished and/or rebuilt without causing damage to the structure of the remaining part"*. Hill & Redman's Law of Landlord and Tenant at footnote 4 to paragraph E[235.4] is somewhat more equivocal: "*The notion of 'redevelopment' is not further defined. There is no guidance within the Act whether it is limited to 'operational development' or may extend to material changes of use which may constitute development for the purposes of the Town and Country Planning Act 1990"*. In Butterworth's Property Law Service at paragraph [926] reference is made to the LVT decision in *Leaseholders of Flat at 9 and 11 Byng Street v Canary South (Ground Rents) Ltd & Avonbraid Ltd* LON/00BG/LRM/2010/0015 as authority that it was not enough to simply rely on the ordinary definition of the word "developed" such that there needs to be a broader consideration of the likely impact of building construction (in the light of planning issues that might arise) on the remainder of the building.

52. From our inspection and the lease plans we are satisfied that the section 72(3)(a) criterion is met and that the three cores are capable of being divided by a vertical plane. What is less clear is that they could be "redeveloped independently" without causing damage to the structure of the contiguous cores. It was to address this issue that the Tribunal Chairman ordered the Respondents to file and serve copies of "*structural and service plans*" by 4 March 2015. Regrettably they failed, or were unable, to do this and supplied only a site plan. No expert evidence in the form of a proper report addressing this issue has been supplied or relied upon by either party. In most cases evidence of that nature is generally necessary if a point of this type is taken.

53. In our view, the suggested test in Hague appears to be a broadly reasonable interpretation of the requirements of the statute. The character of the redevelopment must extend beyond basic acts because if it were otherwise the requirement in section 72(3)(b) would add nothing to the requirement for mere vertical division in section 72(3)(a). The necessary implication in the test posited in Hague is that the vertical division of the blocks must be sufficiently structurally robust to allow one block to remain independently of another in the event of redevelopment although it may overstate the requirement to suggest that demolition of the attached block must be possible.

54. Whilst it is for the Applicant to make out its case, this is an issue raised by the Respondents, it is they who assert that the Application should fail on the ground that there are three self contained parts and it was they who were well placed to lead evidence in the form of structural plans. They did not do so. This paucity of evidence causes real difficulties. In the circumstances, in view of the Respondents' failure to comply with our previous order we would have given further directions permitting the parties to file expert evidence on the issues raised by section 72(3)(b). In view of our conclusions below, however, that is not necessary.

55. For completeness, we do address here the issue of sections 72(3)(c) and 73(4). Whilst the absence of adequate plans again affects this Tribunal's capacity to address this issue satisfactorily, it was clear that the water supply passed through the pump room with a holding tank and service pumps which supply the clean water to the entirety of the Premises. In *St. Stephens Mansions RTM Company Limited v. Fairhold NW Management Limited* [2014] UKUT 0541 (LC) it was held that the accumulation of water in shared tanks and its distribution through a shared set of pumps meant that the water provided to one building was not provided independently of the water provided to the remainder of the building so that section 72(4)(a) was not satisfied. That is the position here.

56. The issue is whether section 72(4)(b) applies. Namely, could the relevant services be provided without the carrying out of works likely to result in "*significant disruption in the provision of any relevant services for occupiers of the rest of the building"*. On this issue, we heard evidence from Mr. Jones who had, coincidentally, also been involved in the case of *St. Stephens Mansions RTM Company Limited v. Fairhold NW Management Limited*. However, one only needs to read the judgment of Martin Rodger QC to appreciate that the quality of the evidence placed before the LVT in that case was markedly more detailed than the evidence provided in this case.

57. In that case there was a self-contained pump house. A single mains water supply pipe ran to the pump house from the public highway. The pipe divided to supply two holding tanks from which water was pumped by a pump set comprising three separate pumps used in rotation. The pumps sent pressurised water into a single outflow pipe which divided into two branches with one each serving two blocks. In that case expert evidence was adduced which identified two possible approaches to the separation of the water supply. For present purposes, the relevant proposal was to provide separate tanks and pumps for each block. The expert stated that the plant room was large enough to accommodate that additional equipment. It was common ground that the preparatory work could be done without disconnecting the existing supply to either building and that the final connection to the new tanks, pumps and pipes could be completed without significant disruption to the water service.

58. Here the pump room configuration is not dissimilar to that in *St. Stephens Mansions RTM Company Limited v. Fairhold NW Management Limited*. It involves a holding tank and two service pumps and a pipe to each block. Mr. Jones's evidence was that any disruption to the services would be minimal although the works themselves might cause general inconvenience or disruption to the residents (as distinct from disruption to the water supply).

59. The factual distinction at Viceroy Court is that Mr. Jones does not consider that the existing pump room could accommodate the alterations required to create three independent supplies. The necessary implication in this is that the present pump room would need to the extended or augmented. However, as was observed at paragraph 88 in *St. Stephens Mansions RTM Company Limited v. Fairhold NW Management Limited*: *"In order to give the statute a sensible effect it is...necessary to disregard the question of entitlement to carry out the necessary work"*. Here the necessary work may be more substantial but that does not, in our view, serve to distinguish the conclusion reached in that case that the water supply could be provided independently without significant interruption to services of the kind identified in section 72(5). Following Mr. Jones' evidence, Mr. Rich conceded this point and in our view he was correct to do so.

60. For completeness, we would add that the blocks have no gas supply and are, on the basis of Mr. Jones' unchallenged evidence on the issue, each independently supplied with mains electricity.

61. It follows from the foregoing that we are satisfied that the three cores/blocks are each self-contained parts of the building such that a single RTM company cannot serve one notice (and certainly not one notice which did not satisfy the eligibility requirements for all three blocks) if the structure of the building is such that each block could be redeveloped independently of the others. We make no determination, however, on that outstanding issue.

The Flat 29 Issue

62. Section 78(1) requires that an RTM company "must" give a NIP to each person who was, at the time when the notice is given, a qualifying tenant of a flat contained in the premises but who neither is nor has agreed to become a member of the RTM company. For the succeeding stage, section 79(2) provides that the claim notice may not be given unless each person required to be given a NIP has been given such a notice at least 14 days before whilst section 79(8) also requires that a claim notice must be given to each person who was, on the relevant date, the qualifying tenant of a flat contained in the premises. There is no dispute that Xintong Xu was a qualifying tenant under section 75 who should have been given notice under section 78(1) but was not. The Applicant, however, points to the decision in *Avon Freeholds Ltd. v. Regent Court RTM Co. Ltd.* [2013] UKUT 0213 (LC) to assert that this error does not invalidate the whole RTM process.

63. The starting point is arguably the decision in *Sinclair Garden Investments (Kensington) Ltd. v. Oak Investments RTM Co. Ltd.* (LRX/52/2004). There it was argued that failure to serve a NIP under section 78(1) was always fatal to the RTM application even if no prejudice resulted. The Tribunal (George Bartlett QC, President) rejected that approach:

"[10] ...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..."

64. That passage was cited by the Upper Tribunal (Sir. Keith Lindblom) in the *Avon Freeholds Ltd. v. Regent Court RTM Co. Ltd.* case. In that case it was conceded that the requirements of the 2002 Act were directory rather than mandatory and that concession was stated by the Tribunal to be correct. The right approach was said to be *"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"* (see paragraph 39 of the judgment). At paragraph 41 the approach in *Sinclair Garden Investments (Kensington) Ltd. v. Oak Investments RTM Co. Ltd.* was reaffirmed. *Viz.* The Tribunal must ask itself whether the qualifying tenant has in practice had such awareness of the procedures as the statute intended him or her to have.

65. The substance of the issue in *Avon Freeholds* was whether service of the notices on the tenants of one flat (including a Mr. and Mrs. Chapman) at addresses recorded in the HM Land Registry Proprietorship Register, rather than at the material flat or another address permitted under section 111(5), was fatal. It was held that it was not. The appropriate approach was explained at paragraphs 47 to 50:

"[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)." [emphasis added]

66. Ms. Cafferkey placed particular reliance upon paragraph 50 and the fact that the Tribunal had singled out that that was not a case, like this one, in which the RTM company had simply neglected to give any notice to a particular tenant. In the preceding paragraph 47, however, the Tribunal appeared to identify that there may be cases in which the process is not invalidated by the failure to serve several tenants, with each case turning on its own facts.

67. In its "Response to Statement of Case" document, the Applicant, at paragraph 11, further contended that the tenant of Flat 29 is not prejudiced as they can apply to join the RTM company whenever they wish to do so. Moreover, in broad terms, it is asserted that their omission will not have affected the process generally because of the number of participating tenants.

68. In a detailed skeleton argument, augmented by oral submissions, Ms. Cafferkey forcefully contended that *Avon Freeholds Ltd. v. Regent Court RTM Co. Ltd.* was no answer for the Applicant and that the failure to give notice to Xingtong Xu did invalidate this application. We have carefully considered those arguments and all of the authority cited to us.

69. Our attention was drawn to the decision of HHJ Huskinson in *Assethold Ltd. v. 13-24 Romside Place RTM Company* [2013] UKUT 0603 (LC), a case which concerned the validity of a NIP in that it failed to state the name of the landlord. It was successfully argued that the NIP was invalid because section 78(1) and (2) are in mandatory terms and if no NIP specifying the name of the landlord had been served as required then the requirement in section 79(2) could not be satisfied. At paragraph 15 the following conclusion was reached:

"[15] It is a prerequisite under section 79(2) before a claim notice can be given that "each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before". Thus a valid NIP must be served as contemplated by this subsection prior to any claim notice being given. If a claim notice is given in circumstances where there has not been service of a valid NIP as contemplated by section 79(2) then the claim notice is invalid. The claim notice cannot be saved by section 81(1) because a failure to comply with section 79(2) cannot be said to constitute an "inaccuracy in any of the particulars required by or by virtue of section 80"

70. It is difficult to satisfactorily rationalise the decision in *Assethold Ltd. v. 13-24 Romside Place RTM Company* (decided in November 2013) with that in *Avon Freeholds Ltd. v. Regent Court RTM Co. Ltd.* (decided in July 2013) although we note that the same counsel appeared for the landlords in both. At paragraph 50 of *Avon Freeholds Ltd. v. Regent Court RTM Co. Ltd.* it was specifically observed that that was not a case in which it was said that the notice itself was invalid because it lacked some of the particulars required by the relevant statutory requirements. The significance of *Assethold Ltd. v. 13-24 Romside Place RTM Company* may rest on that very issue and on the relevance of using an ostensibly invalid notice generally in the RTM process. Given that the appeal in that case was not fully argued it should be treated with caution in any event.

71. Ms. Cafferkey also relied, however, upon *Elim Court RTM Co. Ltd. v. Avon Freehold* [2014] UKUT 0397 in which there was a "sustained attack" on *Avon Freeholds* with specific reliance placed on paragraph 15 of *Assethold Ltd. v. 13-24 Romside Place RTM Company*. A detailed review of the various authorities (including the decision of Morgan J in *Sinclair Gardens Investments (Kensington) Ltd. v. Poets Chase Freehold Company Ltd.* [2007] EWHC 1775 to which we were also referred) is to be found in the *Elim Court* judgment at paragraph 83 and onwards. The argument, in part, involved an attack on the assumption underlining the Tribunal's decision in *Avon Freeholds*. Namely, the assumption that compliance with the requirement to give a notice inviting participation in the form prescribed by the Regulations to all non-participants was not an essential precondition to the acquisition of the right to manage which must in all cases be fully satisfied.

72. The issues in the *Elim Court* case were not the same as those here. For the purposes of understanding the quoted passage that follows, it suffices to relate that one of the issues was whether a NIP was required by section 78(5)(b) to inform non-participating tenants that the RTM company's articles of association are available for inspection on at least 3 days at least one of which must be a Saturday or Sunday and, if so, whether the consequence of non-compliance was that it was fatal to the RTM procedure. Martin Rodger QC, the Deputy President, dealt with the issue at paragraphs 94 to 103:

    "Discussion and conclusion

    [94] The long list of authorities relied on by both sides on this issue establish clearly that Mr Radley-Gardner is right in his submission that the consequences of non-compliance with the statutory machinery for the acquisition of the right to manage cannot be determined simply by considering whether prejudice has been caused. The first task is to construe the statutory requirements in their relevant setting, as described by Sir Stanley Burnton in [Newbold v. Coal Authority [2014] 1 WLR 1288], and to consider whether substantial compliance can have been intended by Parliament to suffice. If substantial compliance is capable of having the same legal effect as full compliance with the relevant provision, it then falls to consider whether the steps which have been taken have substantially achieved the statutory objective. In addressing that question it is necessary for the Tribunal to consider whether it is satisfied that no such prejudice has been caused as would impair the integrity of the statutory process, with the burden of so satisfying it falling on the RTM company.

    [95] In both Sinclair Gardens v Oak Investments and Avon Freeholds Limited v Regent Court RTM Company the Tribunal was satisfied that the steps which had been taken had achieved the objective of the statutory scheme even though they had fallen short of complete compliance. In neither case was there any suggestion that the form of the notice of invitation to participate which was served was defective. The non-participating tenant in Oak Investments was fully aware of the process and at least one tenant of all three flats was

already a participant. The mode of service adopted in Avon Freeholds had not succeeded in bringing the notice to the attention of the personal representatives of the deceased tenant, but that was a risk inherent in the statutory scheme.

Saturday/Sunday - consequences

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

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

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

[99] In section 78(6) Parliament indicated the consequences of a qualifying tenant not being allowed to undertake an inspection or not being provided with a copy of the articles of association. In any such case the notice inviting participation is to be treated as not having been given. That sanction indicates the importance of the opportunity to inspect the articles of association, whether or not an alternative method of viewing them is also available. It might also be said to beg the question of what was intended to be the consequence of a failure or deemed failure to serve a notice inviting participation. Section 79(2) directs that a claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before. The statutory scheme would therefore seem to contemplate that the consequence of not allowing a person to undertake an inspection is that no claim notice may be served. If that is right it would tend to support the construction placed on section 78(5) by Mr Radley-Gardner that the opportunity to inspect at the weekend is not to be regarded as an optional arrangement which can be ignored with impunity by an RTM company.

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

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

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

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

73. These passages are crucial to the determination of this issue.

74. The *Avon Freeholds* case is not, in our view, authority for the proposition that failure to give any notice inviting participation in the form prescribed by the Regulations to all non-participating qualifying tenants is not necessarily fatal to the acquisition of the right to manage.

75. Here, the qualifying tenant of flat 29 was Xintong Xu. A NIP was sent to flat 29 but it was addressed to Alexandra Ashley. It was not enough to give notice at/on the flat. The scheme of the Act specifically requires that notice is given to each person who is a qualifying tenant (section 78(1)) and the provisions of section 111(5) allow that person to be given notice at the flat. Notice given to the wrong person at the flat is no notice at all.

76. Moreover, this is not a factually comparable case with *Avon Freeholds*. There the non-participating tenants were served at an address belonging to them (albeit the wrong address) which allowed the Tribunal to conclude that they were just as likely to have received the notice at the address used as they would have been if it was served at the material flat. That was the risk inherent in the statutory scheme. Here, however, a letter addressed to a Ms. Ashley at flat 29 would have had a markedly reduced likelihood of coming to the attention of the qualifying tenant. It is not unreasonable to infer that if Xintong Xu received the letter containing the NIP at all he or she would never have opened it nor thereby become aware of the RTM process or his or her rights in respect of the same. Mr. Rich did not demur from that as a likely outcome.

77. When one considers the seminal observations in *Sinclair Garden Investments (Kensington) Ltd. v. Oak Investments RTM Co. Ltd.* (quoted above) it was said that there that the principal question is whether the tenant has in practice had such awareness of the procedures as the statute intended him to have. If he or she was given no notice at all, or no real opportunity to receive notice, the answer follows that they cannot have had the notice intended by the statute.

78. In *Elim Court* it was stated that the first question is whether substantial compliance can have been intended to suffice. If it does, the next question is whether the steps taken have substantially achieved the statutory objective. Controversially, *Avon Freeholds* is authority that substantial compliance may suffice. In our view, however, a complete failure to give notice to one qualifying tenant is not substantial compliance apt to achieve the statutory objectives inherent in the 2002 Act. Unlike *Avon Freeholds* that tenant had no reasonable prospect of receiving the NIP or, rather, becoming aware of the RTM process at all. We are endorsed in this view by the statutory sanction in section 78(6). That provides that where a notice given to a qualifying tenant includes a statement about inspection and copying of the articles of association of the RTM company, the notice is to be treated as not having been given to him if he is not allowed to undertake an inspection or is not provided with a copy in accordance with the statement. If a failure to make inspection available is a substantial failure in part because of this sanction (as *Elim Court* holds that it is), surely the failure to give notice at all must also be a substantial failure.

79. We do not consider that the subsequent correspondence directed to the qualifying tenant at flat 29 cures the ill. By then the Tribunal process was already afoot. One cannot infer, simply from the fact of "radio silence" from the tenant that they were not significantly prejudiced.

80. To the extent that the counter-notices may have failed to raise these issues, it was established by *Fairhold v. Trinity Wharf* [2013] UKUT 0502 that the Tribunal was not confined to issues raised in the counter-notices. Moreover, it has been clear that the issue of service on the tenant of flat 29 has been central to this Application since the Autumn of 2014.

81. In the circumstances we conclude that the Applicant had not acquired the Right to Manage the material premises on the relevant date. No valid claim notice was given under section 79(2) because each person required to be given a NIP had not been given such a notice before the claim notice was given by the Applicant.

Post-script

82. For the avoidance of confusion should any future application be made by this, or any other RTM company or companies, we would wish to make it clear that the application has been rejected on the basis of the immediately preceding paragraph only. If we had been satisfied that the three blocks or cores could each be redeveloped independently of the other the Application would also have failed on the basis that a single RTM company was seeking to acquire the right to manage three self-contained parts of a building. However, in light of the Respondents' failure to comply with our order for the filing of structural plans we would have convened a case management hearing to consider directions for expert evidence and a further hearing to address that issue in accordance with our powers under regulations 14 and 15 of the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004.

Costs

83. Sections 88 and 89 of the 2002 Act address the question of liability for costs. An RTM company is responsible for "reasonable costs" incurred by a landlord or another party to the lease in consequence of a claim notice. Having dismissed the Application, the Applicant is accordingly liable for the costs of the Respondents incurred in these proceedings (see section 88(3)). Any question arising in relation to the amount of those costs shall, in default of agreement, be determined by the LVT.

ORDER

1. The Application is dismissed.

2. The Applicant shall pay the Respondents' reasonable costs of these proceedings which shall, in default of agreement, be the subject of further determination by the Leasehold Valuation Tribunal.

DATED this 21st day of April 2015

CHAIRMAN