HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL

COMMONHOLD AND LEASEHOLD REFORM ACT 2002

In the matter of an Application under section 84(3) of the Commonhold and Leasehold Reform Act 2002 (No Fault Right to Manage)

Application to determine a Claim to the Right to Manage premises

Case No:	CH1/00HG/LRM/2012/0016
Property:	Elim Court Elim Terrace Plymouth Devon PL3 4QB
Applicant:	Elim Court RTM Co Ltd
Respondent:	Avon Freeholders Ltd
Application Date:	13 August 2012
Date of Hearing:	11 December 2012
Appearances:	Ms Margarita Madjirska-Mossop, Counsel for the Applicant Mr Justin Bates, Counsel for the Respondent
Venue:	Room 202 Rolle Building Plymouth University
Tribunal:	Mr Robert Batho MA BSc LLB FRICS FCIArb Chartered Surveyor (Chairman) Miss C Rai LLB Mr M C Woodrow MRICS Chartered Surveyor
Date of Decision:	19 September 2012
In Attendance:	Mr Dudley Joiner of Right to Manage Federation (RTMF) Mr Joe Gurvits and Ms Elena Andreadis of Y & Y Management Limited Keith Douglas, Keith Phillips OBE and Sallie Phillips, directors of the Applicant company, together with fourteen other leaseholders of the subject premises and four observers

DECISION AND REASONS

1. The Tribunal determines that the Application be dismissed as the notice of claim submitted by the Applicant is invalid, having failed to meet the requirements of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") and of The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 ("the Regulations").

BACKGROUND

2. On 3 July 2012 RTMF submitted a Claim Notice under the Act to Avon Freeholders Ltd and Y & Y Management Ltd, a previous Claim Notice (the second) having been withdrawn the previous day. That Claim Notice was rejected by Avon Freeholds Ltd on 8 August 2012, and on 13 August 2012 the Applicant submitted an application to the Tribunal for the determination of its claim.

3. Directions were issued by the Tribunal on 16 August 2012, requiring the Respondent to set out its reasons for disputing the Applicant's right to manage. Further directions were issued on 20 September 2012, requiring the Applicant to submit a Statement of Case in reply to that filed by the Respondent.

THE INSPECTION

4. Before the Hearing the Tribunal members inspected the common parts of Elim Court ("the property") accompanied by Ms Elena Andreadis.

THE HEARING

Preliminary Issue

5. Mrs Mossop advised the Tribunal that the Applicant had not previously been provided with copies of the statements submitted by Ms Andreadis or Mr Gurvits, and requested that those statements be disallowed. In light of the fact that both individuals were present and could give oral evidence if required, the

Tribunal determined that the written statements be admitted, but that Mrs Mossop would be given the opportunity to consider them.

The Grounds of Objection

6. For the Respondent, Mr Bates stated that he wished to focus on five points, and his arguments in respect of each of them are set out as follows.

The Signature Point

7. Paragraph 8(2) of the Regulations provides that

> Claim notices shall be in the form set out in Schedule 2 to these Regulations

and the form of notice set out in Schedule 2 concludes

> Signed by authority of the company,
> [Signature of authorised member or officer]
> [insert date]

The Claim Form dated 3 July 2012 is "signed by authority of the company," but had been signed by Mr Joiner, under whose signature were the words, "RTMF Secretarial, Company Secretary."

8. Mr Bates argued that this form of signature meant that the form was signed by a company acting on the applicant company's behalf, and that accordingly that signature should comply with the requirements of section 44 of the Companies Act 2006, which provides that:-

> Under the law of England and Wales or Northern Ireland a document is executed by a company—
> (a) by the affixing of its common seal, or
> (b) by signature in accordance with the following provisions.
> (2) A document is validly executed by a company if it is signed on behalf of the company—
> (a) by two authorised signatories, or
> (b) by a director of the company in the presence of a witness who attests the signature.

9. Failure to comply with these requirements meant that, in effect, the document in question was not validly signed. Section 80 of the 2002 Act sets out the mandatory requirements with respect to a claim notice that (amongst other things)

> (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.

The relevant regulations were those made in 2010, and the form of notice contained in Schedule 2 to the Regulations provided that the claim form should be signed, so that without signature the claim was not valid.

10. In support of his argument. Mr Bates referred the Tribunal to the Court of Appeal decision in the case of *Hilmi and Associates Ltd and 20 Pembridge Villas Freehold Ltd [2010] EWCA Civ 314*, that decision being that a single signature was insufficient. Whilst that decision had been made in relation to section 36(a) of the Companies Act 1985, the provision (although it is renumbered) was unchanged in the 2006 Act.

11. The claim notice was a formal document and, that being the case, RTMF and the Applicant had to comply with section 44 of the 2006 Companies Act. It had not done that, which was a fatal flaw which could not be redeemed by the saving provision of section 81 of the 2002 Act, which is that

> (1) A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of section 80.

It was not saved because there was no error but a complete omission and failure to meet a statutory requirement. It was not an inaccuracy or a typographical error, but a failure to follow the law, and that meant that the application failed.

12. Mr Bates noted that It might be said that the Upper Tribunal (Lands Chamber) decision in *Assethold Ltd and 14 Stansfield Road RTM Company Ltd [2012]*

UKUT 262 (LC) argued against this conclusion, but the facts and the issues were very different. Whereas an individual can sign as it will, companies are constrained by law, and so this case was not relevant here.

Notice Given too Early

13. Mr Bates second point was that the Claim Notice had been served too early. On 8 May 2012 Mr Gurvits had written to the Applicant at Elim Court, enclosing notices of withdrawal from membership of the Applicant company on behalf of eight of the qualifying tenants, that letter having been copied to RTMF. The background to that letter and the withdrawals was set out in Mr Gurvits's statement. Mr Bates, whilst acknowledging that it was claimed that those notices had not been received, nonetheless considered that that was not the case.

14. If it were assumed that those notices of withdrawal had been received, then that was fatal to the claim, since section 78(1) of the 2002 Act provided that

> 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

and section 79(2) provided that

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

15. It was common ground that no invitations to participate had been served on these eight qualifying tenants, but if such invitations should have been served, the claim was invalid.

16. Various counter arguments were raised by the Applicant. The first was that the notices of withdrawal had not been sent to its registered office but that, said Mr Bates, was irrelevant: all that mattered was whether those notices had been received. It was then said that the letters and notices had not been received,

but they had been sent to two addresses, and whilst it was possible that one might go missing, Mr Bates suggested that it was unlikely that both would have gone astray.

17. The third argument put forward by the Applicant was that the notices were ineffective as they were not given in compliance with the requirements contained in the company's Memorandum and Articles of Association. In saying that, Mr Bates argued, the Applicant was being inconsistent: comparison between the requirements with regard to the form of application for membership of the company with the wording of the form actually accepted from Mr and Mrs Yandell for that purpose showed that the Applicant had not previously applied its own rules strictly, and it was therefore unreasonable to rely on a technicality to invalidate the notices of withdrawal.

18. Section 27(3) of the Memorandum and Articles provided that

> A member may withdraw from the company and thereby cease to be a member by giving at least seven clear days' notice in writing to the company. Any such notice shall not be effective if given in the period beginning with the date on which the company gives notice of its claim to acquire the right to manage the Premises and ending with the date which is either
> (a) the acquisition date in accordance with section 90 of the 2002 Act; or
> (b) the date of withdrawal or deemed withdrawal of that notice in accordance with sections 86 or 87 of the Act.

19. Limiting when notice of withdrawal could be given was a reasonable provision, but in this case the claim under consideration was made the day after the previous (second) claim had been withdrawn. According to the Applicant, that meant that the seven day notice period for withdrawal had not elapsed, but if that were so then the implication was that a member could never withdraw from the Applicant company, which was both unfair and absurd.

20. The only reasonable interpretation would be to read section 27 as meaning that a notice of withdrawal served whilst there was a "live" claim notice in existence became effective when the application was withdrawn or determined. A notice of withdrawal served during the prohibited period would be held in abeyance, and so when the claim was withdrawn the notice was still

valid and became effective. The result of that was that at the date of service of the present claim notice the eight qualifying tenants were not members of the company and so should have been given invitations to participate. The fact that they had not rendered the claim invalid.

The Intermediate Landlord Point

21. The property register of the Land Registry title of the flat 37 shows that it is held on a long lease from Windsor Life Assurance Company Ltd, (which is the tenant of the freeholder). Windsor Life is an intermediate landlord, and as section 79(6) of the Act provides that

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

that meant that Windsor Life should have been given notice. It was clear, however, that no such notice had been served.

22. Ms Andreadis's statement had exhibited with it a letter from ReAssure (the name by which Windsor Life is now known) stating that they had received no such notice. Furthermore, the bulk certificate of posting produced by the Applicant referred to notice as having been sent to "Symons and Symons and ReAssure" at 37 Elim Court, and to seven other tenants, but the fact that only eight letters had been dispatched suggested that no separate notice had been given to ReAssure.

23. Sending a notice to ReAssure at the flat 37 Elim Court would have been inadequate in any event, as section 111 of the Act provides that

> (1) Any notice under this Chapter—
> (a) must be in writing, and
> (b) may be sent by post.
> (2) A company which is a RTM company in relation to premises may give a notice under this Chapter to a person who is landlord under a lease of the whole or any part of the premises at the address specified in subsection (3) (but subject to subsection (4)).
> (3) That address is—
> (a) the address last furnished to a member of the RTM company as the landlord's address for service in accordance with section 48 of the 1987 Act (notification of address for service of notices on landlord), or
> (b) if no such address has been so furnished, the address last furnished to such a member as the landlord's address in accordance with section 47 of the 1987Act (landlord's name and address to be contained in demands for rent).

24. By definition the landlord's address could not be the flat of which it was landlord. The fact that notice had not been given to ReAssure meant that the statutory requirements had not been fulfilled, which rendered the claim notice invalid.

The Fundamental Inaccuracy Point.

25. Mr Bates noted that the claim form as submitted listed the persons who were both qualifying tenants and members of the Applicant company, as it was required to do, but included the eight tenants who had already given notice to withdraw from the company. Contrary to what was stated on the claim form, therefore, they were not members.

26. Furthermore, the claim form listed as a qualifying tenant and member of the company a Mrs Olive Beatrice Yandell of 26 Elim Court, but Mrs Yandell died on 4 September 2011, and so had ceased to be a member of the Applicant company from that date. Paragraph 27(2) of the company's Memorandum and Articles of Association provides that

> If a member (or joint member) dies or becomes bankrupt,. his personal representatives or trustee in bankruptcy will be entitled to be registered as a member (or joint member as the case may be) upon notice in writing to the company.

27. Whilst Mrs Yandell's personal representatives could have applied for membership, therefore, it was wrong to say that she was either a qualifying

tenant or a member of the applicant company at the date of claim. That was wrong as a matter of fact, and so could not be covered by the saving provision of section 81 of the Act. On this basis the claim was fundamentally inaccurate on its face, and so invalid.

The Notice of Invitation to Participate

28. Finally, Mr Bates argued that the notice of invitation to participate had been invalid because it included, as members of the company, the eight qualifying tenants who had given notice of withdrawal; because it failed to refer to Windsor Life; because it incorrectly named RTMF Secretarial as the company secretary; and because it had not been validly signed, in the same way that the notice of claim itself had not been validly signed.

29. Furthermore, there was the issue that it made no provision for inspection of the Memorandum and Articles of Association at a weekend, even though this was a mandatory requirement of section 78 of the Act, which provides that

> (4) A notice of invitation to participate must either—
> (a) be accompanied by a copy of the memorandum of association and articles of association of the RTM company, or
> (b) include a statement about inspection and copying of the memorandum of association and 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 memorandum of association and 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 memorandum of association and 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.

30. That failure was not the form of error covered by the saving provisions of section 81 of the Act, but a straightforward failure to provide the required information, and that made the notice invalid. The procedure laid down by statute was that a notice of claim had to be preceded by notice of invitation to

participate, and if there was no valid notice of invitation to participate there could be no valid claim. Accordingly, the application should be dismissed.

The Applicant's Response

31. For the Applicant, Mrs Mossop addressed each of the Respondent's objections in turn, as follows.

The Signature Point

32. Mr Bates was alleging a failure to comply with sections 80(8) and 80(9) of the Act. Those subsections allow for the making of regulations and the relevant regulations were those made in 2010. The form adopted in this case followed those regulations and concluded with the words "signed by authority of the company," not "signed by the company," and on that basis, Mrs Mossop argued the Respondent's arguments were flawed, and failed.

33. She went on to say that section 44 of the Companies Act applied only to a document which was to be signed by the company, and then only if it had to be executed, but signing and execution were different. Execution implied some special formality and did not apply to letters or many other documents: it was accepted that it applied to signature under the provisions of the Leasehold Reform and Urban Development Act 1993, but it did not apply here.

34. The *Hilmi* case to which Mr Bates had referred related to different legislation, and so was, in Mrs Mossop's view, of no relevance or assistance. The 1993 Act was also different in that it required signature personally by the claimant, whereas the applicable legislation in this case made specific provision for a claim form to be signed by authority. In paragraph 17 of the *Hilmi* judgement it was said that

> "Despite their researches, neither Counsel before us was able to put forward any case in which a court has had to consider how a company can and does sign a document personally, other than contractual documents which are governed by other legislation....."

The research which preceded this statement included consideration of the 2002 Act, but that was not cited as an example.

35. In paragraph 8 of the same judgement a distinction was made between execution and signature, the distinction which Mrs Mossop relied upon, and paragraph 32 of the judgement made it clear that the judgement related to that specific legislation which is different from the 2002 Act.

36. Mr Bates had referred to section 44 of the Companies Act 2006, but section 43 provided that a company could sign a contract by a person acting with express or implied authority, and on that basis the distinction which Mr Bates sought to make was not valid.

37. The Upper Tribunal's decision in the case of *Assethold Limited* had in part turned upon who is authorised to sign under the 2010 regulations, and concluded that there was no limitation. The President of the Lands Chamber concluded

> "My conclusion is that it is sufficient that the person signing 'by authority of the company' does in fact have that authority."

In this case it was clear from the statements of Mr Joiner and Mr Douglas, a director of the Applicant company, that RTMF did have that authority. The claim notice was therefore validly signed by Mr Joiner as a director of RTMF with authority from the Applicant company, and there was no need for execution, following the *Assethold* decision. The only question was whether Dudley Joiner did have authority. If he did then there could be no question that the form was validly signed.

Notice Given too Early

38. In dealing with the allegation that the claim notice had been served too early, Mrs Mossop said that the purported notices of withdrawal by eight members of the company had not been addressed to the Applicant as they should have been, and they did not specify the notice period, despite the fact that

paragraph 27(3) of the Memorandum and Articles of Association required that anybody wishing to withdraw should give "seven clear days notice." Furthermore, notice of withdrawal had to be given to the company, but none of the notices was so addressed.

39. What was most significant, however, was the provision of paragraph 27(3) which said

> A member may withdraw from the company and thereby cease to be a member by giving at least seven clear days notice in writing to the company. Any such notice shall not be effective if given in the period beginning with the date on which the company gives notice of its claim to acquire the right to manage the premises and ending with the date which is either
> (a) the acquisition date in accordance with section 90 of the 2002 Act; or
> (b) the date of withdrawal or deemed withdrawal of that notice in accordance with sections 86 or 87 of that Act."

This was a clear statement that notice of withdrawal was not effective during the claim notice period: there were clear words to that effect, and if notice of withdrawal had in fact been served as alleged then those notices were of no effect.

40. The second claim notice had been dated 3 February 2012, so the relevant period had commenced, and it had not ended, as the application was only withdrawn on 2 July 2012. The rules did not suggest that the application would be held in abeyance or suspended during such a period, but that it would be of no effect. "Of no effect" meant that that the notices were a nullity and could not later become effective. On that basis, the eight members who purported to withdraw from the company were still members at the time when the third claim notice was served, and that notice was therefore valid.

The Intermediate Landlord Point

41. Dealing with the alleged failure to give notice to Windsor Life in respect of flat 37, Mrs Mossop rejected the claim that section 79(6) required the Applicant to have served any such notice. She argued that the provision did not expressly

include intermediate landlords and, further, the section should be read in the light of section 72, which provides that

> (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.

42. Section 79(6) gives a choice, as indicated by the use of the word "or", she argued: there was a requirement to serve notice on the landlord of the whole of the building, or on the landlord of a part, but not both. The provisions were there to protect the tenant or notify the landlord, and the suggestion that notice had to be served on every intermediate landlord could not be correct. Furthermore, the title in this case referred to the flat only, so notice to Windsor Life was not required.

43. Even if she was wrong on this point, the fact the matter was that the claim notice had been served on ReAssure, as Windsor life are now known, as was evidenced by the certificate of bulk posting. The fact that only eight addresses were given simply meant that the notice to Windsor Life had been served on it at the flat.

The Fundamental Inaccuracy Point

44. The allegation that the claim notice was fundamentally defective failed because, as already argued, the notices of withdrawal, if served by the eight

members, had been of no effect; they were still members of the company and so correctly referred to as such in the notice.

45. Listing Mrs Yandell was not an issue either. She and her husband had agreed to become members of the company in March 2011, as was evidenced by the document produced, and she was not a single qualifying tenant, but a joint qualifying tenant with her husband. On her death there would only have been the one qualifying tenant, as the title to the flat passed to her husband so he was the qualifying tenant, and the inclusion of her name was a simple inaccuracy saved by section 81(2) of the Act, which provides that

> 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.

The Notice of Invitation to Participate

46. Mrs Mossop had already explained her position with regard to the alleged withdrawal of the eight members from the company, and the fact that they had not withdrawn meant that notices of invitation to participate need not be served on them.

47. The other issue in relation to the notice related to the failure to refer to a Saturday or Sunday as days when the Memorandum and Articles of Association could be inspected. Mrs Mossop drew attention to the fact that the words "Saturday and Sunday or both" were in brackets, both at section 78(5)(b) of the Act and in the notes to the standard form contained in the Regulations, and are preceded by the word "including." In her view this meant that the reference to Saturday or Sunday was neither mandatory nor restricting.

48. The words could mean that the period allowed for inspection must include a Saturday Sunday, or that they may include a Saturday or Sunday, so which

was correct? A distinction needed to be made from mandatory requirements: the word "must" was used elsewhere, but it was not used here. The brackets around the words Saturday and Sunday carried the significance that they were not restrictive, and only provided additional information, meaning that one may include Saturday or Sunday, and they showed that the seven days were consecutive and not simply "working" days.

49. On both points, therefore, of the Respondent's arguments failed.

The Respondent's Reply

The Signature Point

50. Mr Banks was of the view that Mrs Mossop had misunderstood his argument. He fully accepted that it was possible for an agent to sign if it was properly authorised, but that addressed the question of how individuals signed. A company could only sign in accordance with section 44, and the claimed distinction between signing and executing was wrong. The *Hilmi* judgement made it clear that signature and execution were the same thing, and on this basis the company had to comply with section 44 of the Companies Act 2006, and not section 43, which related only to contracts. Whilst it might be suggested that the claim form had been signed by Mr Joiner personally, or in his capacity as a director of the Applicant company, it was Mr Banks's view that his signature could not be accepted as a "personal" signature.

Notice Given too Early

51. With regard to the withdrawal notice, one needed to look not only at the notices themselves but also the letter which accompanied them to understand their meaning. Mrs Mossop had not addressed the point that, on her interpretation, it was impossible for a member to resign from the company.

The Intermediate Landlord Point

52. In relation to the need to give notice to an intermediate landlord, section 79 clearly stated that it was necessary to serve notice on anyone who was a landlord of a whole or part of the building, and section 112 of the Act defined a landlord in that context. The evidence of a bulk certificate of posting had been rejected in a previous case and should be rejected here.

The Fundamental Inaccuracy Point

53. The fact remained that Mrs Yandell had died on 4 September 2011, so she had not been a member of the company as stated in the claim notice.

The Notice of Invitation to Participate

54. To suggest that putting Saturday and Sunday in brackets made them optional was an untenable argument. By comparison, one could on this basis read the section 78(5) provision that

> A statement under subsection (4)(b) must—
> (a) specify a place (in England or Wales) at which the memorandum of association and articles of association may be inspected

as giving the option of inspection in England or Wales, so in effect allowing service anywhere, even in a foreign country. The requirement to include a Saturday or Sunday was mandatory: it was not discretionary.

THE DETERMINATION

55. The Tribunal has considered each of the points raised by the parties in turn, and determines as follows.

1 The Signature Point

56. The Tribunal rejects the Respondent's contention with regards to signature. The form of claim notice set out in the Regulations specifically provides that

the form is to be signed by authority of the right to manage company and may be signed either by an authorised officer or by a member. The evidence is that Mr Joiner had that authority.

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

Notice Given too Early

58. The Tribunal does not accept the argument that the claim notice was given too early, in the sense that it was given before notice of invitation to participate was served on the eight qualifying tenants who were said to have given notice to withdraw as members of the company. The Tribunal notes that on the one hand it is claimed that notices of withdrawal were given, and that on the other it is alleged that those notices were not received or, if they had been received, that they were invalidly given.

59. The Tribunal rejects the argument that the notices, if received, should have been read in conjunction with the covering letter, for a notice must be a self-contained document. On this basis it concludes that the notices as produced in evidence would have been insufficient.

60. What seems important, however, is that the procedure for withdrawal which is set out in the Applicant company's Memorandum and Articles of Association specifies that notice given during what may be described as the "closed period" "shall not be effective." That, in the Tribunal's view, does not allow for the interpretation that such a notice is suspended so as to come into operation when the closed period ends: rather, it means that the notice is of no effect and a new notice would be required for withdrawal to be valid. On this basis,

the eight qualifying tenants were members of the Applicant company at the date when the claim notice was served and the notice was, in those terms, valid.

The Intermediate Landlord Point

61. The tribunal accepts that notice of the claim should have been served on ReAssure and rejects the Applicant's contention that the provisions of section 79(6) can be read as providing alternatives. The Tribunal's reading of that provision is that notice has to be served on any individual who comes into any of the specified categories.

62. On the other hand, the Tribunal does not accept that the service of notice on ReAssure would have been covered by the section 111 provisions referred to by the Respondent. Whilst ReAssure clearly have an interest in the flat in question, they are not landlords in the conventional sense but an equity release company which does not issue rent demands in a way that a landlord might normally be expected to do.

63. The evidence is that notice was served on ReAssure but addressed to them at the flat. Whilst it would undoubtedly have been better to have sent such a notice to the company's address as shown on the Land Registry title certificate, it is reasonable to assume that there would have been some obligation on the occupiers under the occupational lease to forward a copy to the company, and any failure to do so would not have been the responsibility of the Applicant. Whilst the Tribunal accepts the evidence of the company that no notice was received, it is not satisfied that no notice was served, and is not prepared to determine the claim should be invalidated on that ground.

The Fundamental Inaccuracy Point

64. The allegation of fundamental inaccuracy rests in part upon the contention that eight qualifying tenants were named as members of the applicant company

when they had resigned. The Tribunal concludes that they had not resigned, and the claim of inaccuracy on that account is therefore rejected.

65. The second aspect of the inaccuracy claim relates to the inclusion of Mrs Yandell as a member of the company when she had died some months before the claim notice was served. Section 75 of the 2002 Act as defines qualifying tenants in the following terms

> (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.

66. On this basis, Mr and Mrs Yandell would together have been a qualifying tenant and Mr Yandell would have continued as the qualifying tenant when his wife died. The Applicant's evidence is that it did not know that Mrs Yandell had died, but had relied on the application to join the company which had been signed by both her and her husband.

67. The Tribunal conclude that, on this basis, the inclusion of her name is an error covered by the section 81 provision and that is the claim is not invalidated on this ground.

The Notice of Invitation to Participate

68. Given that the Tribunal concludes that the eight qualifying tenants were members of the Applicant company when the claim notice was served, it

follows that they were not required to be served with notices of invitation to participate, and the claim cannot be challenged on the ground that they were not.

69. Nevertheless, that leaves the issue of the provision for inspection of the applicant company's Memorandum and Articles of Association. In the Tribunal's view, the provisions of section 78(5) are clear and unequivocal, and not open to the Applicant's bizarre approach to interpretation. Mrs Mossop sought to argue that the words were not mandatory, but the Tribunal is at a loss to understand how the words "a statement under subsection (4)(b) must" include certain matters can possibly be interpreted as offering any kind of discretion, or how the suggestion that words enclosed in brackets can be ignored the impunity. On the contrary, the Tribunal accepts the Respondent's argument that such an approach would lead to the absurd conclusion that the requirement to "specify a place (in England or Wales)" really meant that the place specified could be anywhere one chose to mention, whether within the United Kingdom or not.

70. The requirement relating to this inspection provision is clearly mandatory and, equally clearly, it was not complied with, and for that reason alone the procedure adopted by the Applicant did not follow the statutory requirements. Accordingly, the Applicant's claim must necessarily fail.

71. Any party to this decision may appeal against it with the permission of the Tribunal. The provisions relating to appeals are set out in Regulation 38 of the Regulations (referred to in paragraph 1 above). A request to the Tribunal for permission to appeal must be made within 21 days of the date specified in the decision notice as the date the decision was given and state the grounds on which the Appellant intends to rely.

Robert Batho MA BSc LLB FRICS FCIArb
A Member of the Tribunal appointed by the Lord Chancellor
Chairman
8 January 2013