343

HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of an application under sections 84(3) of the Commonhold and Leasehold Reform Act 2002 (Right to Manage)

Case Nos.	CHI/24UL/LRM/2012/0019 CHI/24UL/LRM/2012/0022
Properties:	**1-58 Calloway House** **Coombe Way** **Farnborough** **Hants** **GU14 7FT** **1-117 Brand House** **Coombe Way** **Farnborough** **Hants** **GU14 7GB**
Between:	**(1) Farnborough Road (Calloway House) RTM Co Ltd** **(2) Farnborough Road (Brand House) RTM Co Ltd** **(the Applicants)** and **Sinclair Garden Investments (Kensington) Ltd** **(the Respondent)**
Date of hearing:	4th April 2013
Date of the decision:	1st May 2013
Members of the Tribunal:	Mr D Dovar LLB (Hons) Mr K M Lyons FRICS Mr J Mills

INTRODUCTION

1. These are two separate applications under section 84(3) of the Commonhold and Leasehold Reform Act 2002 ('the Act'). The matters have been heard together as they arise out of predominantly the same facts and issues.

2. The issues arise out of the impact of the Applicants failing to state in their Notice of Invitation to Participate either a Saturday or Sunday or both as a day on which the recipient could inspect their articles of association

3. The Tribunal undertook a short inspection of the subject properties. At the hearing, the Applicants were represented by Ms Mossop and the Respondent by Mr Wijeyaratne.

FACTS

4. Both properties are residential blocks, Calloway House comprises some 58 flats, whilst Brand House comprises 117. They are part of a larger estate of flats and houses.

5. Notices of Invitation to Participate pursuant to s.78 of the Act were served on the non-participating qualifying tenants of Calloway House on or about 7th September 2012 and in respect of Brand House on or about 10th September 2012.

6. For Calloway House, at paragraph 2 of the notice inspection of the articles of association were permitted between *'10am and midday on Tuesday 11th September, Wednesday 12th September and Thursday 13th September 2012'.*

7. For Brand House paragraph 2 of the notice permitted inspection between *'10am and midday on Wednesday 12th September and Thursday 13th September and Friday 14th September'.*

8. Subsequently in respect of both properties a notice of claim was served on the Respondent claiming the right to manage (1st October 2012 for Calloway House and 26th October 2012 for Brand House). On or about 5th November, the Respondent served a Counter Notice in respect of Calloway House and one for Brand House on or about 30th November 2012.

9. For Calloway House the Counter Notice relied on 78(1) to (4), 79 (2), 79 (8) and 80 (7) in order to resist the claim to acquire the right to manage.

10. For Brand House sections 78(2) to (4) and 80 (3) of Chapter 1 of Part 2 of the Act were relied upon to resist the claim to acquire the right to manage.

11. In accordance with directions given on 29 July 2011, the Respondent served a statement of case dated 26 August 2011 and the Applicant served a statement of case dated 23 September 2011. In addition both parties provided further submissions on the morning of the hearing by way of skeleton arguments and the Respondents appeared to have filed additional representations on the day before the hearing. They did not reach the Tribunal, but they did reach the Applicants. The Respondent did not seek to rely on them before the Tribunal.

THE STATUTORY PROVISIONS

12. Prior to serving a notice of claim on the freeholder, section 78 of the Act needs to be complied with:

> **"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 under this section (referred to in this Chapter as a 'notice of invitation to participate') must-
> ...
> (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 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 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 ...

(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 of the particulars required by or by virtue of this section."

13. Under s.79(2) of the Act, the Notice Inviting Participation must be served at least 14 days before the Notice of Claim. The Notice of Claim must also be served on the qualifying tenants:

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.

...

14. There are three other sections which are worth setting out at this point.

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 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 ...

(8) It must also contain such other particulars (if any) as may be required to be contained in claim notices by regulations made by an appropriate national authority.

Section 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

Section 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 –

...

b) alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled [to acquire the right to manage the premises specified in the claim notice]

(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 a leasehold valuation tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises.

15. Finally, the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 (2010/825) ('the 2010 Regulations') set out the prescribed forms for the notice of invitation to participate. Regulation 3 sets out further particulars which must be provided and regulation 8 states that '(1) Notices of

invitation to participate shall be in the form set out in Schedule 1 to these Regulations.'

Issues in dispute

16. At the heart of this dispute was the contention by the Respondent that section 78 (5) (b) required at least one day of the weekend to be provided as a day upon which the articles of association of the RTM company could be inspected and that the failure to make such provision in either notice, rendered that notice invalid and consequently the subsequently served claim notice was of no effect.

17. That gave rise to the following issues:

    a. Whether the Respondent was precluded from relying on any failure to adhere to section 78(5)(b) by reason of the fact that it had not specified that breach in its counter notice;

    b. Whether section 78 (5) (b) required at least one of the three days provided for inspection to be either Saturday or Sunday;

    c. If so, whether the failure to provide such a day, was a defect that could be cured by section 78 (7);

    d. If not, whether the Tribunal was entitled to consider that despite there being a failure to adhere to that requirement, the notice was nevertheless valid or did not invalidate the Claim Notice.

Failure to specify the particular breach relied upon in the counter-notice

18. The counter-notices did not make specific reference to section 78(5) or section 78 (5) (b). They did however both refer to sections 78(2) to (4) and in respect of Calloway House, additionally to section 78 (1), 79 (2), (8) and 80 (7) and in respect of Brand House additionally to section 80 (3).

19. The Applicant claims that because the counter notice did not make specific reference to section 78(5) (b) this Tribunal has no jurisdiction to deal with that issue and that as all the other sections referred to are not now relied upon by the Respondent, the application should be granted. It asserts that specifying

the precise grounds upon which the claim was resisted was important as it enabled the Applicant to decide at an early stage whether or not to make application or not. It also prevented abuse by a landlord in taking a scatter gun approach to the counter notice by raising many grounds even if it did not intend to rely on them and had no basis for raising them.

20. The Tribunal disagrees with the Applicant for two reasons. The first is that whilst the Respondent's case is that 78 (5) (b) has not been adhered to, it also says that as a result of that section 78 (4) has not been adhered in that the required statement has not been given. The Tribunal agrees with that contention in that if section 78(5) has not been followed, the Applicant cannot have given the statement needed under section 78(4). So a breach of section 78(5) is also a breach of section 78(4).

21. More fundamentally, the Tribunal is of the view that once a counter notice is served (relying on any ground) it then falls to the Applicant to make application for a determination that it was on the relevant date entitled to acquire the right to manage (see section 84 (3)). There is no limitation within this sub section which restricts the issues on such an application to the points raised in the counter notice. We agree with the Tribunal's decision in *Cove RTM Company Limited v. Residential Services Management Ltd* (undated) (LVT) in which it was stated that the counter notice was not a pleading in proceedings and that the legislation does not state that the Tribunal will be confined to matters raised in the counter notice.

22. Therefore, whilst the Tribunal appreciates the concern of the Applicant that there is some scope for abuse by Respondents in RTM cases to serve counter notices when they do not have grounds for doing so (or are not aware at that point in time of any specific grounds), the Tribunal considers that the legislation is not as limiting as the Applicant suggests. In any event, in this case, the Tribunal considers that the specific issue under scrutiny in this case was sufficiently flagged up by reference to section 78 (4).

SECTION 78 (5) (b) - Statutory Interpretation -The Ambiguity Point

Section 78 (5) '*A statement under subsection (4) (b)* ***must*** *- ... (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*,' (emphasis added)

23. The Applicant claimed that the wording of this sub section was ambiguous in that it was not clear whether or not the 'must' at the beginning of the section applied directly to the wording in parenthesis in s79 (5) (b), being '(including Saturday or Sunday or both)'.

24. The Respondent contended that it was unambiguous, the language used was mandatory and the plain and ordinary meaning is that the notice must specify times including a Saturday or a Sunday. The Respondent referred to the words in brackets in S78 (5) (a) which it could not be argued were ambiguous. The use of parenthesis was akin to a comma. It relied on the construction of the section arrived at by the two previous LVT decisions of *Elim Court RTM Co Ltd v Avon Freeholders Ltd* (CHI/00HG/LRM/2002/0016) and *9-12A Mayfield RTM Company Ltd v Sinclair Garden Investments (Kensington) Ltd* (CHI/00HY/LRM/2011/0007). The Respondent accepted that this Tribunal was not bound by either decision, their import being persuasive and although it was suggested that the Tribunal should strive for consistency in decisions, it was rightly accepted by the Respondent that ultimately, that laudable aim could not override this Tribunal's approach to the matter and conclusion if different.

Tribunal's Consideration of the Ambiguity Point

25. The Tribunal considers that the wording is ambiguous. It is not apparent from the sub section whether the *must* applies to each detail provided about inspection or simply more generally that it must specify times for inspection. The sub section has a number of details, being:

    a. The specification of times for inspection;

    b. 'at least' two hours at a time;

c. 'at least' three days;

d. Within the period of seven days following the day on which the notice was given;

e. (including a Saturday or Sunday or both)

26. The Tribunal does not consider that the parenthesis indicates that the inclusion was an after-thought as contended by the Applicant, but it does consider that the sub section can be read either:

a. as being instructive (or as the Applicant put it, for clarification), in that it points out that the seven days can include a Saturday or Sunday or both; or

b. as stating that it must include a Saturday or Sunday or both.

27. The prefacing of the hours and the number of days with the words 'at least' would seem to be unnecessary if 'must' applied to each detail. As if that was the case then it would be sufficient to simply say 'two hours' or 'three days'. The right to manage company could of course provide greater facility if it desired. There was no such prefacing of the weekend parenthesis. If it was intended that at a minimum one day of the weekend needed to be provided, the draftsman could have included the words 'at least one day of the weekend'. This would have made it clear that the requirement was mandatory.

28. It is also suggested that the words in parenthesis must be mandatory given that it is clear that other words in the sub section are; in particular the words '(in England or Wales)'. Alternatively, to say that words in parenthesis are not mandatory is absurd given the other use of parenthesis in the sub section. The Tribunal does not agree with this approach. Firstly, each must be read in their own context. It is not simply because the words are in brackets that mean that they may not contain a mandatory requirement, it is because of their context within the sub section. Further, the fact that there may be an ambiguity is only the first step in the construction of the clause. Once it is accepted that there is an ambiguity, it is then open to the Tribunal to look further afield in order to

ascertain what the meaning of the words is. In this case, if '(in England and Wales)' were ambiguous the construction of those words could be resolved differently to the present wording by reference to different considerations, namely that in the context of UK legislation, Parliament must have intended to limit the geographical location.

29. Given that the Tribunal considers it is ambiguous whether at least one day of the weekend must be included or not, it is then entitled to consider the context of the sub section. The Tribunal considers that there are competing interests of convenience. The section may be ensuring that a qualifying tenant is given an opportunity to view the articles of association of the RTM Company to which they are being invited to participate; so that it is acknowledged that it might be difficult for those who work to be able to view the articles during the week. Alternatively, it could be that it is to assist the RTM Company (which by its nature will be formed of qualifying tenants) so that it is being made clear that it is not limited to Monday to Friday to make inspection available, but can, if it desires, also include a Saturday or Sunday or both. This seems particularly relevant where, as here, the RTM company is given a very narrow window of time within which to permit inspection; it has to be 'within the seven days beginning with the day following that on which the notice is given.' The Tribunal considers that in that context, it is more likely that Parliament intended to provide clarification to the RTM Company rather than convenience to the Qualifying Tenant. Further, it is noted that the address has to be in England and Wales, but there is no further limiting factor as to location so that it would be possible for the articles to be made available for inspection in Newcastle for a block in Plymouth. The section is not all for the convenience of the qualifying tenant. Finally, there is of course the alternative, which is the requirement to provide a copy on request. This belt and braces approach, confirms the Tribunal's view that the provision was not mandatory in that it was envisaged that the inspection time and location may not be convenient to the qualifying tenant, in which case they could obtain a copy by post.

30. Accordingly, the Tribunal determines that the notice of invitation to participate was valid and that on the relevant date the Applicant was entitled to acquire the right to manage.

31. Whilst that is determinative of this matter, the Tribunal heard detailed submissions on the parties' alternative cases and so will deal with them.

Not in the prescribed form

32. The Respondent stated that the failure to adhere to s78(5) was also a failure to give notice in the prescribed form as required by s78(3) and regulation 8 of the 2010 Regulations.

33. The Tribunal does not consider that there is merit in this argument. The prescribed forms are set out as a schedule to the 2010 Regulations. They are distinct from any particulars which must be added. A failure to include a relevant particular cannot also amount to a failure to use the prescribed form.

Section 78 (7) – saving provision

34. If the Tribunal is wrong on the construction of section 78 (5) , then the question arises as to whether the saving provision applies in these circumstances.

35. There are two issues for consideration under s78. The first is whether a failure to provide at least one day of the weekend for inspection is a 'particular' for the purpose of s78 (7) and the second is whether, if it is, that this was an inaccuracy or an omission.

36. On the first point, the Respondent argued that the failure could not be cured by the saving provision. Section 78(2) (d) refers to particulars and therefore should be limited to those matters expressly referred to as 'particulars' in Regulation 3(2).

37. The Respondent asserted that they were not particulars as they were not so described in the section. It relied on the Lands Tribunal decision in *Moskovitz* v. 75 Worple Road RTM Ltd [2010] UKUT 393 (LC). That case concerned the meaning of 'particulars' for the purpose of sections 80 and 81 of the Act. The

President confined the meaning to those details which were specifically referred to as 'particulars' in s80 (being only those matter specified in section 80 (4)). In doing so, the President was following the Court of Appeal in *Cadogan v. Morris* [1999] 1 EGLR 59, CA, which was a case dealing with similar saving provisions under the Leasehold Reform, Housing and Urban Development Act 1993.

38. However, in *Assethold Limited v. 14 Stansfield Road RTM Company Ltd* [2012] UKUT 262 (LC), the President had cause to reconsider his decision in *Moskovitz*, especially given the fact that although s80(4) is the only subsection to use the word 'particulars', regulation 4 refers to the 'particulars required by s80 (2) to (7). He stated

> *"12. ... I reached the conclusion in Moskovitz that section 81(1) only applied to such particulars as might be required under subsections (4) and (8) of section 80 . ... That conclusion was clearly inconsistent with the statement that regulation 4(c) of the 2010 Regulations requires each claim notice to contain. Although the Regulations could not confer on the statute a meaning that it would not otherwise bear and could not, in my view, legitimately be used as an aid to its construction, it is manifestly undesirable that section 81(1) should be construed in a way that is in conflict with what the Regulations require to be stated. They are clearly sufficient to prompt a reconsideration of my conclusion in Moskovitz*
>
> *13 Three points appear to me to be relevant in this context. Firstly, the approach adopted by the Court of Appeal in relation to paragraph 9(1) of Schedule 12 to the 1993 Act is obviously not binding in relation to section 81(1) of the 2002 Act. Secondly the two provisions, although very similar, are not in identical terms. And thirdly, and most importantly, there is section 80(8) , which provides that the claim notice must "contain such other particulars (if any) as may be required" by regulations. If one asks, "Other than what?" the answer must, I think, be, "Other than those required by subsections (2) to (7) ," rather than, "Other than those required by subsection (4) ." That is the apparent implication of the words used in the context of the section as a whole.*

Moreover if the second of these alternatives had been what was intended one would have expected the content of subsection (8) to be included within subsection (4) or to be inserted immediately after it since subsection (8) makes provision for further particulars to be required by regulations. Section 42(3) by contrast contains no provision equivalent to section 81(8) . My conclusion, therefore, is that the statement that regulation 4(c) requires to be included in a claim notice does correctly state the effect of section 81(1) .

39. Applying that reasoning to the present section, whilst s78(5) is not in terms described as 'particulars', that does not mean that the information required is not a particular. Section 78 (5) contains the details that need to be put in a 'statement' required by s78 (4). Regulation 3 sets out particulars to be included in the notice. A number of those particulars are 'statements'. In the Tribunal's view, the particulars referred to in s78 (7) include the statement required by s78(4) and therefore includes s78(5).

40. On the second point the Respondent stated that this was an omission rather than an inaccuracy. The omission of Saturday or Sunday was not a typing error, it was a failure to provide an important part of a tenant's right to information. If it is an omission, then the notice is invalid. It again referred to the definition of an inaccuracy in the Moskovitz case in para 12.

41. In *14 Stansfield Park*, the President stated,

"14 ... Under section 81(1) a distinction falls to be drawn between the failure to provide the required particulars and an inaccuracy in the statement of the particulars. A claim notice is saved from invalidity only in the case of the latter. That was the basis of Judge Walden-Smith's decision in Assethold Ltd v 15 Yonge Park RTM , and I respectfully agree with her approach. The application of it to the facts in Moskovitz , it should be noted, would produce the same result as the result that was in the event produced: the specification of a date that is earlier than one month after the relevant date is not an inaccuracy but is a failure to specify what section 80(6) requires to be specified.

42. In *Assethold Ltd v. 15 Yonge Park RTM Company Ltd* [2011] UKUT 379 (LC), HHJ Walden-Smith set out clearly the distinction between an inaccuracy and an omission when she stated

> *" 17 ... In my judgment, section 81(1) could save a claim notice from being invalid if there is an "inaccuracy" in any of the particulars set out in any of the subsections 80(2) to 80(8) .*
>
> *18 However, section 80 sets out mandatory requirements of what must be included in the claim form. A failure to provide those details would clearly prevent the claim form from being valid, otherwise there would be no purpose in the statute providing that those inclusion of those details is a mandatory requirement. If, for example, the claim form did not include the name and registered office of the RTM Company it would be invalid. All that section 81(1) does is save the claim notice from invalidity if there is an "inaccuracy" in those mandatory details. So, for example, if there was a spelling or typing error in the name or registered office of the RTM company then that would be, in my judgment, an "inaccuracy" that section 81(1) would bite upon so that the claim notice would be saved from invalidity.*
>
> *19 Providing the wrong name or the wrong registered office of the RTM company is not, in my judgment, an "inaccuracy". It is a failure to provide the mandatory information required by section 80 . As Stuart-Smith LJ said in Cadogan v Morris : "the expression inaccuracy is hardly appropriate to be used in what must be specified or stated [in subparagraph (c-f) of section 43(3)]".*
>
> *20 In my judgment, a failure to provide the information required in paragraphs 80(2) to 80(8) results in the claim notice being invalid. Section 81(1) cannot save it from invalidity. All that section 81(1) does is save from invalidity a claim notice that has an "inaccuracy" or "lack of exactness" in those particulars. This interpretation is consistent with the reasoning of the House of Lords in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 .*

21 In this matter, the failure of the claim notice to include the registered office of the RTM company cannot be saved by section 81(1) . It is not an "inaccuracy" in a particular. By giving the wrong registered office, the information has not been provided and the notice is therefore invalid.

43. The Tribunal considers that there is no reason why the same approach should not be taken to applying the saving provision at s78(7). Further, this is not a case where there was an error akin to a typing error or misspelling, this was a failure to state a weekend day, which if it was a mandatory requirement to do so, was an omission. The saving provision would not therefore have assisted the Applicant.

Whether a failure invalidates the claim notice

44. As a separate strand of legislative construction, the Applicant contended that even if 'must' did apply to the parenthesis, on a proper construction of the statute, their failure would not invalidate the RTM process.

45. The Applicant at first relied on *Seven Strathray Gardens Ltd v. Pointstar Shipping & Finance Ltd* [2005] HLR 20, CA, a case on the 1993 Act where the statutory language was mandatory, but a failure to comply was held not to invalidate the process. There was a mandatory requirement to state in the counter notice whether the property was within an estate management scheme. The landlord failed to address that point in the notice. At paragraph 39, Arden LJ stated '*Neither the 1993 Act nor the 2002 regulations expressly state that a notice is not valid unless it complies with the 1993 Act or the 2002 regulations (as the case may be). They are silent on this point. The position is left to the courts to determine as a matter of the interpretation of those enactments.*' It would follow that even if this Tribunal considered that 'must' applied to the parenthesis, in the absence of an express provision for default, the question remained open to the Tribunal to determine what the consequences of that default were. It is here that a more refined meaning to the word mandatory must be adopted as the distinction is as to whether in substance a statutory requirement is mandatory or directory. As Arden LJ put it at paragraph 42, '*The*

test is not one of the language that Parliament has used but of the substance of the requirement it has imposed.' In making that determination, '*the effect of non-compliance with a particular statutory requirement must depend on the particular statutory scheme in point.'* (per Arden LJ, paragraph 44).

46. In *Petch v. Gurney* [1994] 3 All ER 731, CA, Millett LJ stated:

> *"The question whether strict compliance with a statutory requirement is necessary has arisen again and again in the cases. The question is not whether the requirement should be complied with; of course it should: the question is what consequences should attend a failure to comply. The difficulty arises from the common practice of the legislature of stating that something 'shall' be done (which means that it 'must' be done) without stating what are to be the consequences if it is not done. The court has dealt with the problem by devising a distinction between those requirements which are said to be 'mandatory' (or 'imperative' or 'obligatory') and those which are said to be merely 'directory' (a curious use of the word which in this context is taken as equivalent to 'permissive'). Where the requirement is mandatory, it must be strictly complied with; failure to comply invalidates everything that follows. Where it is merely directory, it should still be complied with, and there may be sanctions for disobedience; but failure to comply does not invalidate what follows.*
>
> *...*
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> *In a well-known passage of his judgment in Howard v Bodington (1877) 2 PD 203 at 211 Lord Penzance said:—*
>
> *'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.'*

...

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

47. In *Strathray*, the Court of Appeal found that where the property was not subject to an estate management scheme, the requirement of the legislation was directory only. Arden LJ found that '*[t]here can be no possible prejudice to the tenants of their nominee purchaser if that information is excluded.*' Therefore the landlord's failure to make any reference to a scheme in the notice, where there was none, was not fatal to the notice.

48. The Respondent argued that there was no scope for prejudice in section 78(7). Alternatively, if a breach was established, the burden of proving prejudice should be on the Applicant. As no evidence of prejudice had been adduced, there could not be a finding that there had been any.

49. Whilst in this case the Tribunal considered that the failure to specify a weekend day is of limited prejudice to a tenant, there were significant indications in the statute that compliance with the requirements to give inspection of the articles of association was not peripheral to the statutory scheme. Most significantly was s78(6). This deemed that the notice had not been given if inspection was not allowed in accordance with the statement. The Applicant relied on this as a basis for contending that Parliament had chosen to provide an express sanction where inspection was not allowed, but had made no similar sanction where a weekend had not been included in the days for inspection. Although that is the case, s78(6) gives a very good indication of the importance of allowing inspection and of allowing inspection during the periods stipulated. If inspection is not permitted, the notice is effectively invalid and no claim notice can be served. In the Tribunal's view there is little difference between physically not

allowing inspection on the days mandated by the statute and not stipulating the correct days in the notice in the first place. It follows that when construing this section in the scheme of the Act, it is clear that these provisions were intended to be an essential part of the machinery and therefore should be considered mandatory.

50. The Applicant sought to widen the consideration of the section by reference to *R v. Secretary of State for the Home Department, ex parte Jeyeanthan* [2000] 1 WLR 354, CA. There it was held that consideration of mandatory and directory requirements was not in all cases the only consideration, and that the legislation should be approached on the basis of:

    a. Whether the requirement was capable of being fulfilled by substantial compliance;

    b. If so, whether there had been substantial compliance; and

    c. If so, whether the non-compliance was capable of being waived;

51. Although the Respondent stated that this case was not applicable to the present situation in that *Jeyeanthan* concerned an immigration appeal, whereas this case was in the different realm of landlord and tenant legislation, the Tribunal noted the statement of Lord Wolf MR at page 358 that '*the issue is of general importance and has implications for the failure to observe procedural requirements outside the field of immigration.*' This is not to say that the legislation in the two matters should not be approached in a different manner given their very different contexts. Therefore the Tribunal considers that this case is potentially relevant to the general approach it takes to construing the section.

52. Again the Tribunal takes significant assistance in interpretation from s78(6), in particular the significance with which Parliament held the requirement to give qualifying tenants the right to inspect the articles of association. It follows that the Tribunal does not consider that substantial compliance would be sufficient in that a failure to give inspection when the qualifying tenant was entitled to inspection would effectively invalidate the notice. The Tribunal also considered

that the present situation can be distinguished from that in *Sinclair Gardens Investments (Kensington) Limited v. Oak Investments RTM Company Limited* (LRX/52/2004) in that that case concerned a failure to adhere to the requirement to serve a notice on the qualifying tenants of the property under s78(1). In that case one of the qualifying tenants had not been served. However, that was held not to be fatal when that tenant was already aware of the contents of the notice. As the President stated at paragraph 10 *'the principal question for the Tribunal will be whether the qualifying tenant has in practice has such awareness of the procedures as the statute intended him to have. The LVT considered this question and expressed itself as satisfied that Mr Mallon was fully aware of the proceedings and that his omission had been inadvertent.'*

53. The situation is different here in that the default is not in service, but in content. Further, even if *Oak Investments* were applicable there should have been evidence before the Tribunal that all the qualifying tenants were aware of the contents of the articles of association or would not have wished to have inspected them on a day at the weekend. There was no such evidence before the Tribunal.

COSTS

54. The Applicant applied for a costs order under paragraph 10 of Schedule 12 of the Act. As referred to above the day before the hearing the Respondent served further submissions which counsel for the Respondent said were not being relied upon at this hearing. However, the Applicant stated that as a result of those further submissions, they spent a number of hours dealing with new points and reference to that is clear from their skeleton argument which was provided today. The Tribunal was informed that the Applicant's legal representative charges £190 per hour. They appear to be novel points and the Tribunal considers that the Respondent's conduct in serving those submissions and then effectively withdrawing them the next day is conduct in the course of proceedings which is unreasonable and therefore the Tribunal awards costs in favour of the Applicant in the sum of £380.

CONCLUSION

55. The Tribunal finds that on the relevant date, being 1st October 2012 in respect of Calloway House and 26th October 2012 in respect of Brand House, the Applicant was entitled to acquire the Right to Manage.

56. The Respondent to pay the Applicant the sum of £380 by 4pm on 28th May 2013.

Daniel Dovar
Chairman
1st May 2013