FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**MAN/00BR/LRM/2022/0009** **MAN/00BR/LRM/2022/0010**
Properties	**X1 The Edge 2 Seymour Street Liverpool L3 5PE** **X1 Chapel St 272 Chapel Street Salford M3 5JZ**
Applicants	**The Edge RTM Co Ltd** **X1 Chapel Street RTM Co Ltd**
Representative	**RTMF Services Limited**
Respondent	**Rockwell (FC103) limited**
Representative	**JB Leitch Limited**
Type of Application	**Application to acquire (No Fault) the Right to Manage pursuant to section 84(3) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**Judge R Watkin** **Regional Surveyor N Walsh FRICS**
Date and Venue of Hearing	**20 April 2023**
Date of Decision	**4 May 2023**

DECISION

DECISION

The Tribunal determines as follows:

1. the Applicants are not entitled to acquire the rights to manage X1 The Edge 2 Seymour Street Liverpool L3 5PE as none of the study rooms therein are flats for the purposes of s.112 of the Commonhold and Leasehold Reform Act 2002.

2. the Applicants are not entitled to acquire the rights to manage X1 Chapel St 272 Chapel Street Salford M3 5JX. As the study rooms are not flats, only 7 of the units within the property are flats for the purposes of s.112 of the Commonhold and Leasehold Reform Act 2002 and as fewer than 50% of the qualifying tenants are members of the RTM company the requirement set out in s.79(5) is not met.

3. If the study rooms in both properties had been flats for the purposes of the Act, the applications were not invalidated by any failure to comply with s.79(8).

The Applications

4. The Applicants are The Edge RTM Co Ltd and X1 Chapel Street RTM Co Ltd **(**the "Applicants").

5. In both cases, the Respondent is Rockwell (FC103) Ltd (the "Respondent").

6. By the applications dated 23 August 2022 ("the Applications") the Applicants seeks a determination that they have acquired rights to manage the properties known as X1 The Edge 2 Seymour Street Liverpool L3 5PE and (the "The Edge") and X1 Chapel St 272 Chapel Street Salford M3 5JX ("Chapel Street") (together "the Properties") pursuant to the Commonhold and Leasehold Reform Act 2002 (the "2002 Act").

Directions

7. The Application was reviewed by legal officer David Higham on 31 October 2022 when directions were given for the parties to exchange statements of case.

8. Thereafter, the Applicants provided a statement of case dated 9 December 2022 and the Respondent provided two undated documents entitled Respondents Statement of Case and Respondent's Reply.

The Documents

9. The Tribunal has received and considered an indexed bundle of documents (pages 1 – 487) together with the aforementioned statements of case from the parties and a skeleton argument from each party.

Background

10. The Applicants gave claim notices ("the Claim Notices") stating their intention to acquire the rights to manage the Properties pursuant to Section 79 Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") to the Respondent on 22 June 2022 for Chapel Street and 29 June 2022 for The Edge. The Claim Notices specify the relevant date for acquisition of the right to manage as 6 and 13 November 2022 respectively.

11. In response to the Claim Notices, on 27 July 2022 (Chapel Street) and 1 August 2022 (The Edge), the Respondents served counter notices ("the Counter Notices") denying that the Applicants were entitled to acquire the rights to manage the Properties.

12. The Counter Notices allege that Applicants were not entitled to acquire the rights to manage because:

    a. Contrary to Section 72 of 2002 Act, the Properties do not contain two or more flats held by qualifying tenants;

    b. Contrary to Section 78(1) of 2002 Act, before making the claim to acquire the right to manage the Properties, the Applicants did not give Notice of Invitation to Participate("NIP") to every person required;

    c. Contrary to Section 79(2) of 2002 Act, the Applicants served the Claim Notice without having given a NIP to every person required;

    d. Contrary to Section 79(5) of the 2002 Act, the membership of the Applicants did not include a number of qualifying tenants of flats contained in the premises which was not less than one-half of the total number of flats so contained.

    e. Contrary to section 79(8) of the 2002 Act, the Applicants failed to provide a copy of the Claim notice to every person required.

13. Following the Counter Notices, the Applicants submitted the Applications to the First-tier Tribunal (Property Chamber) ("the Tribunal"), for a determination that they were entitled to acquire the right to manage the Properties, in accordance with section 84(3) of the 2002 Act.

Properties

14. The Edge is part of a seven-storey building. It is described as containing approximately 230 study rooms which are arranged into groups of 5 to 8 which each share kitchen and lounge facilities. A plan of The Edge is in the Bundle at [447-486]. On the ground floor there is a bicycle store and other limited communal facilities.

15. Chapel Street is a five-storey building containing 109 separate units, 107 of these are let on long leases. The units include 102 study rooms that are arranged into groups of four to 6 which each share a lounge and a kitchen. It is accepted that the other units are flats for the purposes of the 2002 Act. On the ground floor there is a residents' gym, a communal laundry, an accessible shower, a bicycle store and a retail unit. A plan of Chapel Street is in the Bundle at [287-291].

16. It is understood that the study rooms in neither property contain kitchens nor sitting areas.

Ground of Objection

17. The Respondents oppose the Applications. By the time of the hearing before the Tribunal, the grounds of the opposition were as follows:

    a. The study rooms within The Edge and Chapel Street are not flats for the purposes of s.112 of the 2002 Act; and

    b. As the Applicants had not complied with s.79(8) of the 2002 Act by giving copies of the Claim Notices to all qualifying tenants, the Applications were not valid and bound to fail.

18. The Tribunal will consider each of the grounds in turn.

Ground 1 - The Flats

The Law

19. Part 2 of the 2002 Act relates to leasehold reform. Chapter 1 within that part relates to the right to manage and contains sections 71 to 113.

20. The relevant sections of the 2002 Act are

    Section 71 - The right to manage

(1) This Chapter makes provision for the acquisition and exercise of rights in relation to the management of premises to which this Chapter applies by a company which, in accordance with this Chapter, may acquire and exercise those rights(referred to in this Chapter as a RTM company).

(2) The rights are to be acquired and exercised subject to and in accordance with this Chapter and are referred to in this Chapter as the right to manage.

Section 72 - Premises to which this 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.

Section 112(1) - Defines the following terms (amongst others):

"flat" means a separate set of premises (whether or not on the same floor)—

(a) which forms part of a building,

(b) which is constructed or adapted for use for the purposes of a dwelling, and

(c) either the whole or a material part of which lies above or below some other part of the building,

"dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling,

21. Thus, in order for the right to manage provisions within the 2002 Act to apply, the relevant premises must contain flats which are a "*separate set of premises*" which are "*constructed or adapted for use for the purposes of a dwelling"*. Therefore, the study rooms must be "*separate dwellings"* for the Applications to succeed.

Case Law on the Meaning of a "Separate Dwelling"

22. There is a large amount of case law in relation to the meaning of "separate dwelling".

23. The Tribunal has had regard to the following cases:

a. Cole v Harris [1945] 1 KB 474 ("*Cole*")

b. Neale v Del Soto [1945] 1 KB 144 *("Neale")*

c. Winters v Dance [1945] L.J.R. 165 *("Winters")*

d. Baker v Turner [1950] AC401 *("Baker v Turner")*

e. Goodrich v Paisner and Others [1956] W.L.R. 1053 ("*Goodrich")* (House of Lords Decision)

f. Uratemp Ventures Ltd v Collins [2002] 1 AC301 ("*Uratemp*")(House of Lords Decision)

g. R (N) v Lewisham London Borough Council [2014) UKSC 61 (Supreme Court) ("*Lewisham*")

h. JLK Ltd and others v Ezekwe [2017] UKUT 277 ("*Ezekwe*")

i. Q Studios (Stoke) RTM Co Ltd v Premier Ground Rents No. 6 Ltd [2020] UKUT 197 (LC) ("*Q Studios*")

24. Whilst these cases are not all focused on the 2002 Act, the principle is essentially the same.

25. In *Neale* [1945], the Court of Appeal considered that where the tenant occupied two rooms with shared use of a kitchen, bathroom and toilet, this was not a letting of a separate dwelling but the sharing of the house.

26. *Winters* [1945], is referred to in *Goodrich,* as follows:

> "*although the room shared was so small that there could only be successive and not simultaneous user, the rule in Neale v Del Soto was applied."*

Thus, where only successive user is possible, that is not sufficient for the shared room not to be part of the dwelling and the dwelling could not be considered a separate dwelling.

27. In *Baker v Turner* [1950], the above principles were met with approval and it was stated that:

> *"(1) a proportion of the house which is let by a landlord to a tenant, even if in itself separate, ceases to be a separate dwelling or to be protected by the Acts if the terms of the letting contain a provision that the tenant shall have the right of using a living room belonging to the landlord: Neale v Del Soto(2) to take away the protection of the Acts, the room over which rights are given must be a living room: a bathroom, lavatory or cupboard will not avail, but for this purpose a kitchen is a living room:*

see Cole v Harris [1945] 1 KB 474"

28. In *Neale* and *Baker v Turner,* the tenancies were stated not to be of a "*separate dwelling*" where they contained provisions allowing the tenant to use "*living room(s)*" belonging to the landlord. However, the same will apply if the communal areas are shared by other tenants – in the words of Lord Reid in *Baker v Turner*:

> *"If a tenant has to share with another person a living room which is not let to him, it is in my view impossible to find anything which is let to him as a separate dwelling … his having to share another room shows that the let rooms are only a part of his dwelling place."*

29. In *Goodrich* [1956], the House of Lords considered all the principles in detail in deciding whether the right to use a back bedroom could prevent the dwelling from being a *"separate dwelling"*. The case was highly fact specific but contained useful analysis of the law, particularly in relation to the meaning of a "living room". The following part of the decision of Lord Moreton of Henryton is of note:

> *….both Lord Porter and Lord Reid used the phrase "a living room" without the adjective "essential," and I do not think that adjective is particularly appropriate. Some people find it possible to cook, eat, sleep and spend their leisure time in one and the same room. If there is a sharing in any* living room*, prima facie the letting is outside the Acts. But sharings may differ widely in kind and degree; the test must be applied with due regard to the facts of each case and, in particular, to the nature and extent of the rights of user granted to the tenant over the* living room. *A recent instance of a case where a letting was held to be "separate," although the tenant was given a limited right of user of the kitchen, is Hayward v. Marshall. [100] One tenant of unfurnished rooms had the right to draw water in the kitchen, and to use the gas stove in the kitchen once a week for the purpose of boiling her washing, but had no other right to use the kitchen. Another tenant had only the right to draw water in the kitchen. I agree with the reasoning which led the Court of Appeal to decide that in each case there was a separate letting, and I also agree with the reasoning which led the Court of Appeal to reach the opposite conclusion in Winters. Dance, [101] where the right granted was to use what was called a kitchenette "in common with the landlord," with no restriction as to the nature of the user. In the former case the position was similar to the position when a tenant is granted the right to use a bathroom. The latter case was, in my view, indistinguishable from Neale v Del Soto, [102] the so-called kitchenette was merely a small kitchen.*

30. In *Uratemp* and *Lewisham* the meaning of the word "*dwelling*" was considered. It was

concluded that the word generally connotes "*a place where a person lives, regarding and treating it as home*" (*Uratemp, per Lord Irvine of Lairg LC at [3]).* The decision clearly set out that there was no requirement for a "dwelling" to comprise any particular living space.

> *"4. Decisions on the infinite factual variety of cases are for judges of trial and their decisions on the facts of individual cases should neither be treated nor cited as propositions of law. I would not myself, for example, regard a bed, any more than cooking facilities, as an essential prerequisite of a "dwelling": every case is for the judge of trial but I would have no difficulty with a conclusion that one could live in a room, which is regarded and treated as home, although taking one's sleep, without the luxury of a bed, in an armchair, or in blankets on the floor.*

31. *Uratemp* was a decision that considered the meaning of the word *"dwelling"* but also revisited a large amount of the case law in relation to the meaning of *"separate dwelling"*. Lord Millet considers the position in relation to sharing in detail and the previous cases. He compared the fact that in *Winters* a small kitchen of seven by six feet had been held to be a living room but that in *Marsh Ltd v Cooper [1969] 1 WLR 803,* an alcove in which there was not space to do anything other than cook was not. Therefore, the ability to cook in an area is not key to whether the room is classed as a living space – even though a kitchen is classed as living space (*Cole* and *Baker v Turner).* He also dealt with the question of whether the shared rooms need to "*essential living accommodation*" for them to prevent the dwelling being separate. He states at paragraph 50:

> *"….The cases did not decide that a kitchen is an essential part of a dwelling, so that premises which lack cooking facilities are not a dwelling. What they decided was that the essential feature of a dwelling is that it contains living accommodation, and that every room which forms part of the tenant's living accommodation, including the kitchen if there is one, forms part of his dwelling."*

32. *Ezekwe* is a decision of the UK Upper Tribunal in relation to whether cluster type units (where the occupiers each had an individual unit, but each also shared a kitchen, lounge, shower and toilet with the occupiers of the other units) were separate dwellings. The Upper Tribunal determined that they were not and, therefore, that it did not have jurisdiction to consider applications under the Landlord and Tenant Act 1985.

33. It was held that the units were not "*occupied or intended to be occupied as a separate dwelling*" as the bed-sitting room "*is not occupied as the tenant's dwelling, but only as part of it*" and "*the bed-sitting room plus the right to use the communal space will not satisfy the requirement because the tenant is not the tenant of the whole of that accommodation, but only part of it*".

34. The position was considered further in the case of *Q Studios* in which the President endorsed the position set out in the previous cases and considered that:

> *"76.....If the separate set of premises lacks living accommodation that one would expect to see in a dwelling and this living accommodation is provided as common space for use by the occupier of the premises and others, then the premises are not constructed or adapted for use for the purposes of a separate dwelling. If no such shared accommodation is provided then, as long as the premises are a dwelling in the ordinary meaning of that word (as to which, see Uratemp), they are likely to be constructed or adapted for use for the purposes of a separate dwelling."*

35. The President then proceeds to find that the Studystudios in that case were of ample size in terms of living space and also had a small kitchen. Therefore, based on this reasoning in paragraph 76 (quoted above), there was no reason for him to consider the matter further. However he then continues to consider the communal space but finds it doesn't contain living accommodation that "*one would expect to see in a dwelling*". There were 292 studios in the one building, no common kitchen or bathroom areas and no living space on any floors except the ground floor where there was a lounge /cinema room of reasonable size but not large enough to provide for 292 occupants of the studios, or even a significant fraction of them (paragraph 81). The president concluded that:

> "82. *... The studios were doubtless constructed so that the student occupier could take advantage of the intended communal facilities on the ground floor, but each of the studios has ample living accommodation for occupation as a separate dwelling. Significantly, there is no space in the building that was created to be used by the occupiers as part of their dwelling space. The lounge/cinema, gym and laundry are in the nature of social and recreational facilities(and a laundry) that they could make use of.*

Witness Evidence

36. The tribunal heard witness evidence from Mr Anthony Bennett. Mr Bennett is the development manager at X1 Property Management Limited which managed the Edge and Chapel Street on behalf of the former freeholder.

37. Mr Bennett came across as open and honest but the evidence that he could give was limited. He stated that the occupiers are not prohibited from using cooking equipment in the rooms and that he believes that many of them do not require use of the communal areas. However, it was apparent that he had not been present in the communal areas during usual mealtimes or evenings and that he would not be able to speak on behalf of all,

or even the majority, of the occupiers.

38. He confirmed that he and his team had managed the buildings and that during lockdown the occupiers had been able to live independently. He also confirmed that the kitchen / seating area was large enough to seat all the occupiers of the study rooms service within their allocated communal area and that each cluster or group of rooms has an outside door that is lockable.

Applicant's Position

39. It is the Applicants' contention that the question of whether the study rooms are separate dwellings should be looked at objectively in accordance with the current use of them by the occupiers. Mr Jacob avers that based on the use by the current occupiers, the common areas are not essential.

40. He refers to paragraph 65 of *Q Studios:*

> "It is clearly an objective test, not a question of what, subjectively, the developer or builder intended when carrying out the works, or how an owner for the time being intends to make use of the premises."

The President states that regard should not be had to the intention of the developer but fails to appreciate that the use by the current occupiers is also not objective but is subjective, albeit to those occupiers and not the developer. In any event, it is not accepted that Mr Bennett's evidence (or other documents within the bundle – pages 131 to 141) shows on the balance of probabilities that the occupiers do not need the communal areas or that the study rooms contain sufficient living space given that they contained no kitchen or sitting area.

41. The Applicants contention that the communal area is not essential also fails to properly address the test set out in case law which is that one must first consider whether the separate part of the dwelling, the study room, lacks any key area of living space (that is, a kitchen, seating or sleeping area) and, if any of those are missing, then regard needs to be had to whether that living space is provided elsewhere. The Tribunal does not accept that the question to be considered is whether the separate part of the accommodation is sufficient for the needs of any occupant.

42. In considering whether the living space that is lacking is provided elsewhere, Mr Jacob contends that the communal areas are not sufficient, as they are not of sufficient size to

enable all of the occupiers of the group of study rooms to occupy the area together, as they would not all be able to cook at the same time. He refers to the decision in *Q Studios* in which it was held that the communal areas were not sufficient. However, in that case, the importance of the communal areas was only considered in the context of the Studystudios which were of ample size with all key living areas present (including a kitchen area and a space for an armchair or small sofa (paragraph 13)). In any event, the communal areas were described as amounting to no more than social/recreational areas. They were described as not being large enough to provide a living for "even a significant fraction" (paragraph 81) of the occupants and were on the ground floor and not adjacent to the majority, if any, of the Studystudios.

43. Mr Jacob emphasised the President's words in Q Studios:

"(following a discussion of other types of accommodation) I prefer not to express any view on how the Acts may apply to these potentially different cases, save to say that decisions will inevitably be fact specific." (paragraph 85)

"What is in any given case living accommodation for shared use by more than one occupier, as compared with communal facilities of a building provided for all occupiers to use, will be a question of fact and degree." (paragraph 86)

44. Mr Jacob is correct, each case must be decided on its facts. However, those facts need to be considered in light of the existing case law.

The Respondent's Submissions

45. Mr Grundy on behalf of the Respondent referred to the balance between the size of the communal areas available to the occupants of the study rooms and also to the size of the study rooms. He drew the Tribunal's attention to the plans which showed that the study rooms must be less than 15m^2 and, therefore, plainly not "ample", contained no kitchen but only space for kettles, microwaves and fridges and no area to sit separately from the desk or the bed on either a sofa or chair.

46. Mr Grundy accepted that the study rooms were sufficient to amount to a dwelling as described in *Uratemps* but expressed that where the living space extends into communal areas, those communal areas are also part of the dwelling. Thereby preventing the dwelling form being a "*separate dwelling"*.

47. Mr Grundy also referred to the case of *Rowe v LB Haringey [2023] HLR 5 (Rowe).* However, *Rowe* considered the use of a House in Multiple Occupation. Therefore, the more applicable case does appear to *Q Studios* to which Mr Grundy also refers and emphasises

that, in that case, "Fancourt J had regard to the fact that there was no space in the building that was created to be used by occupiers as part of their dwelling space." (paragraph 19 of the Respodent's Skeleton Argument).

Determination

48. Considering the analysis set out in *Q Studios* and earlier case law, and particularly the point that "*decisions will inevitably be fact specific",* the Tribunal notes that the evidence shows that the study rooms were less than 15m², do not contain kitchens or sitting areas and kitchens and sitting areas were provided elsewhere.

49. As such, following the test set out by the President at paragraph 76 of *Q Studios,* the dwelling itself, when viewed objectively, must include both the study room and the kitchen and sitting areas. As not all of those parts of the dwelling are separately occupied by the occupiers of the study rooms, it cannot be that the demise of the study rooms is a demise of a separate dwelling but is the demise of a separate area and use of the communal area, which together form the dwelling.

50. The fact that the kitchen area cannot be used by each of the occupants of the study rooms at once is not considered to be material. In the case of *Winters* (referred to above), it was stated that the kitchen was so small that there could only be successive user but, nonetheless, the rule in *Neale* was applied. It is not considered that the President in *Q Studios* strayed from this position. *Q Studios* was a case where the Studystudios were of ample size, with all key living areas present and, therefore, only minimal regard to the communal areas was necessary and, in any event, the President did not find the communal areas to be suitable living areas but only social/recreational space. Furthermore, the communal space in *Q Studios* was not only not large enough to accommodate even a significant fraction of the occupants it was not an area where successive user would be appropriate. With a kitchen, one would cook and then move on but, with a social space, one may spend the whole of the evening occupying the room. Thus, where only successive user is possible and appropriate, that may still be sufficient for the shared room not to be part of the dwelling.

51. In this case, the study rooms are small with no kitchen and no sitting area and with a kitchen/living area provided elsewhere. Therefore, the study rooms are not separate premises as the kitchen/living area is part of the demise. The occupants live in the room to which they have exclusive possession as well as in the common areas, both parts are part of their dwelling. In those circumstances the dwellings are not separate premises. Therefore, the Applicants are not entitled to acquire the right to manage The Edge as none of the study rooms are flats for the purpose of s.112 of the 2002 Act and they are not entitled to acquire the right to manage Chapel Street as there are only 7 units therein which are flats

for the purposes of the 2002 Act and fewer than 50% of the qualifying tenants of those flats are members of the RTM company (s.79(5)).

52. It is therefore not necessary for the Tribunal to consider the second ground of objection to the Applications. However, for completeness, these are set out below.

Ground 2 – Service of Claim Notice

53. The second issue is described in the Respondents' skeleton argument as follows:

> *"Does the fact that the Applicant in each case did not serve copies of the Notice of Claim on some of the 'qualifying tenants' until after the Applications was issued invalidate the claim?"*

54. In accordance with Section 79(8) of the 2002 Act: *"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."*

55. In both claims, the Applicants accept they failed to give copies of the Claim Notice to one or more of the qualifying tenants prior to the commencement of these proceedings.

56. In the Edge case, one of the joint registered lease holders of flat A9E was not provided with a copy of the notice until after the application to the Tribunal had been made and in respect of Chapel Street four of the qualifying tenants were not given a copy of the notice until after the application to the Tribunal had been made.

The Law

57. Section 79 of the 2002 Act sets out provisions in relation to the claim notices. The following subsections are of relevance:

> (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.

Applicant's Position

58. The Applicants' position in relation to the question of compliance with section 79(8) is that there is no time stipulation within the subsection. Therefore, whilst the notices were not served upon the qualifying tenants until after the date of the Applications, service has now been effective and the subsection complied with.

59. In any event, Mr Jacobs contends that noncompliance with section 79(8) is not fatal to either the validity of the claim notices or the applications. He states that there is no sanction or consequences for non-compliance set out at within the act

60. Mr Jacobs points out that there is no reference to any requirement for compliance with s.79(8) (either by a certain time or at all) in s.84(3) and, if compliance was a prerequisite to a successful claim, he states that it would be there.

61. Mr Jacob relies on the case of *Elim Court RTM Co Ltd v Avondale Freehold Ltd* [2017] QB EWCA Civ 89(*Elim)* at page 50. In *Elim,* it was asserted that the RTM company was not entitled to succeed as there had not been compliance with section 79(6). At paragraph 71, Lord Justice Lewison concludes:

> *"We must take it, therefore, that the mere fact that a Claim Notices were not given to all those entitled to receive one would not invalidate the claim notice without more. … Parliament has specifically considered the case in which, at least in some circumstances, a claim notice has been given to some landlords but not all of them and has decided that that does not invalidate the claim. It cannot therefore be said that giving a claim notice to everyone entitled to receive it is necessarily an essential feature of the statutory scheme."*

And At paragraph 74:

> *"I would hold that a failure to serve a claim notice on the intermediate landlord of a single flat with no management responsibilities … does not invalidate the notice."*

62. Mr Jacob also considers *Assethold Ltd v 110 Boulevard RTM Co Ltd [2017]* 4 WLR 181 in which judge John Behrans states:

> *"9 The requirement to serve copies of the claim notice is in my view ancillary and of secondary importance. All of the qualifying tenants were members of the RTM Company and were participating in the application to manage. Section 79(8) is for the protection of the qualifying tenants and Parliament cannot in my view have intended that the landlord could*

successfully contend that a breach of section 79(8) invalidated all subsequent steps by the RTM Company."

63. Mr Jacobs acknowledges that, at the time the Applications were issued at the Tribunal, the qualifying tenants who had not been given the claim notice were not members of the RTM company.

64. At paragraph 47, the Judge accepts that the Claim Notice was valid and properly served under s.79(6) and that failure to serve under s.79(8) does not make the notice invalid as it was open to the Appellants to give those copies at a later date. Whilst it is noted that the Claim Notice was subsequently withdrawn, this does not alter the clear indications given in the case. However, the case does not appear to address the point which is not whether the notices were invalid but whether the Applications to the Tribunal can succeed in the absence of compliance. Nonetheless, Mr Jacobs position is that if there were fatal consequences arising from noncompliance then not only would they be stated but a clear time period for compliance would be set out.

The Respondents' Case

65. Whilst Mr Grundy accepts, in his skeleton argument, that the failure to give the notices to the qualifying tenants in accordance with s.79(6) does not retrospectively invalidate the notices (*Alleyn Court RTM Co. Ltd. v Abou-Hamdan [2012]* UKUT 74 (LC)), he contends that the Applicants cannot succeed in a claim for a RTM determination where it has not given copies of the notices to the qualifying tenants in accordance with s.79(8).

66. Mr Grundy emphasises that the requirement to serve the qualifying tenants is crucial as it affects their contractual rights under the lease and that there is no exception as appears in s.79(7) in relation to any persons who cannot be traced or whose identity cannot be ascertained. Therefore, he states that the obligation is strict.

67. Paragraph 81(1) states that a claim notice is not invalidated by any inaccuracy of the details provides in the notice. Mr Grundy states that there is no similar saving in relation to the failure to give copies. However, if he is suggesting that this means that the claim notice could be invalidated by the failure to give copies, his assertion would be contrary to position outlined in *Alleyn*. In any event, a stipulation that an omission or step would not invalidate a notice would only be necessary where there is a likelihood that any such omission or step would invalidate a notice.

68. Mr Grundy questions what the purpose of s.79(8) is if the claim can be pursued notwithstanding non-compliance. However, he does not refer to any other provision that specifies that a claim cannot succeed without complying and, given his own contention that the process is critical to the qualifying tenants, even though it may be outside of their

control, it must be appropriate that qualifying tenants are able to demand a copy of the notice.

69. Whilst s.79(8) clearly stipulates that copies of the claim notices should be given to the qualifying tenants, where there has been a failure to do so, there is a clear necessity for those qualifying tenants to be able to demand copies of the notice. This alone could be the purpose of s.79(8) without any need for noncompliance to obstruct any application to the Tribunal.

70. During his oral submissions, Mr Grundy relied upon the case of *Gateway Housing Association v Ali [2020] EWCA Civ 1339 ("Gateway")*. This was a case under s.18 Law of Property (Miscellaneous Provisions) Act 1994 ("*1994 Act")* which requires that, where a notice affecting land is to be served prior to a grant of representation having been filed, notices must be sent addressed to the Personal Representative at the last known address of the deceased with a copy being set to the Public Trustee. Mr Grundy states that *Gateway* is analogous to the present case as it also concerns copies of notices being given in circumstances where those copies are of little effect.

71. In the *Gateway*, it was held that the original notices were invalid if the copies were not given to the Public Trustee prior to the expiry of the original notices. Mr Grundy states that the position is similar due to the fact that the given of copies of the notices in circumstances where there is no requirement for the recipient to take action makes the situation analogous to that in s.79(8).

Tribunal Decision

72. In relation to the question of the whether the application can succeed in the absence of compliance with section 79(8), consideration has been given to *Gateway*. In that case, the notices had been held to be invalid at first instance due to inconsistences between the notices. On analysis by the Court of Appeal this was rejected and the notices declared valid. However, it was held that service was not effective as the second stage of the two-fold service methodology (the sending of copies to the Public Trustee) had not been completed prior to the expiry date of the original notices.

73. The position in Gateway was distinctly different to that in 79(8) as s.18 Law of the 1994 Act set out a twofold service methodology. It clearly states that the two stages must be completed for service to be effective. S.18(1) states: *"a notice affecting land… shall be sufficiently served… if(a) …. and…(b)"*. Therefore, in *Gateway*, the original notice had not been effectively served until the second stage had been carried out. There is nothing in the 2002 Act to stipulate that service of the claim notice is not effective without compliance with section 79(8). There is no two-stage methodology relation to a right to manage claim notice.

74. Therefore, it is not accepted that the approach taken in *Gateway case* relevant to the question of the consequences of any failure to comply with s.79(8). However, where the *Gateway* does assist in that it sets out a reminder at paragraph 38, as follows:

> *"… they also provide a reminder that, where a statutory provision is capable of more than one interpretation, the court will favour that which, consistently with the object of the legislation and consistent with its other provisions, will have the most reasonable consequences."*

75. Therefore, insofar as it could be suggested that section 79(8) lends itself to an alternative interpretation, it would be necessary to consider which of the two possible interpretations has the most reasonable consequences consistent with the object of the legislation and its other provisions.

76. The two interpretations are as follows:

    a. that compliance with section 79(8) is a prerequisite to a successful application to the Tribunal;

    b. that s.79(8) is a standalone requirement.

77. In considering which of the above is the most reasonable, the Tribunal considers:

    a. There is no time period for compliance set out in s.79(8) nor any mechanism for calculating such a time period.

    b. There is no sanction or consequence set out in s.79(8)

    c. There is no requirement for the Applicants to confirm compliance with s.79(8) prior to issue of a right to manage claim notice.

    d. S.79(7) does not apply to s.79(8) in circumstances where it is likely to do so if s.79(8) were to have fatal consequences to any application.

    e. There is no requirement for a qualifying tenant to take steps in the proceedings.

    f. the likely purpose of s.79(8) is to ensure that qualifying tenants are made aware of the process and enables them to demand a copy of the claim notice if it has not otherwise been served upon them.

    g. S.79(8) has no effect on the parties to the application and, therefore, there is no clear reason why failure to comply should be fatal to the application.

h. There is no indication that Parliament intended that failure to comply with s.79(8) would be fatal to any application to the tribunal (paragraph 58 *Elim).*

78. Furthermore, in this matter, the Applicants had substantially complied with s.79(8). Therefore, and for the reasons set out above, the Tribunal does not consider that there has been any failure to comply with s.79(8) nor that any delay in compliance in invalidates the claim.

79. However, as the Tribunal has already concluded that the Applications cannot succeed for the reasons set out at paragraph 52 above.

Costs

80. Within it's Statements of Case, in the event of the application being dismissed, the Respondent seeks its costs from the Applicants and the members of the Applicants pursuant to section 88 (3) and 89 (3).

81. Pursuant to section 88 of the 200 listening2 Act:

(1) A RTM company is liable for reasonable costs incurred by a person who is—

(a) landlord under a lease of the whole or any part of any premises,

(b) party to such a lease otherwise than as landlord or tenant, or

(c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,

in consequence of a claim notice given by the company in relation to the premises.

(2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter **before (the tribunal) only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.**

(4) Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by (the Tribunal) .

82. Section 89 states:

"Costs where claim ceases

(1) This section applies where a claim notice given by a RTM company—

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

(b) at any time ceases to have effect by reason of any other provision of this Chapter.

(2) The liability of the RTM company under section 88 for costs incurred by any person is a liability for costs incurred by him down to that time.

(3) Each person who is or has been a member of the RTM company is also liable for those costs (jointly and severally with the RTM company and each other person who is so liable).

83. The determination of the issue in relation to costs will be consider separately following further directions.

84. In the event that the Respondent seeks to recover its reasonable costs from the Applicant.

85. Pursuant to s. 88 of the 2002 Act, the Tribunal finds that the Respondent is entitled to recover costs to be assessed by the Tribunal, if not agreed. In the event that the amount of costs payable has not been agreed, and the Respondent must send to the Applicant and the Tribunal, by 4pm on (21 days) a Statement of Costs outlining all time spent on the matter, the grades of fee earners and any hourly rates charged by the representatives. The parties are permitted to use Form N260, if convenient.

86. The Applicant may, if so advised, provide any submissions in response to the amount of the costs claimed to the Respondent and to the Tribunal by 4pm on (28 days).

87. The amount of costs to be paid by the Applicant to the Respondent will be assessed and determined by the Court in the absence of the parties on (date after 28 days).

Appeal

88. This paragraph shall apply upon the decision being formally pronounced. If either party is dissatisfied with this decision an application may be made to this Tribunal for permission to appeal to the Upper Tribunal, Property Chamber (Residential Property) on a point of law only. Any such application must be received within 28 days after these reasons have been sent to the parties under Rule 52 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Judge R Watkin

04 May 2023