FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AG/LRM/2025/0011**
Property	**:**	**Novel House, 29 New End, London, NW3 1JD**
Applicants	**:**	**Novel House RTM Company Limited**
Representative	**:**	**Mr. Upton (Counsel)**
Respondent	**:**	**New End LLP**
Representative	**:**	**Mr. Armstrong (Counsel)**
The Manager	**:**	**Application in relation to the denial of the Right to Manage under s.84(3) of the Commonhold and Leasehold Reform Act 2002**
Tribunal members	**:**	**Judge Sarah McKeown** **Mr. S. Mason BSc, FRICS**
Date of Decision	**:**	**29 September 2025**

DECISION

The applicant was entitled to acquire the right to manage the subject premises, Novel House, 29 New End, London, NW3 1JD, on the relevant date (18 November 2024) pursuant to s.84(5)(a).

In accordance with s.90(4) within three months after this determination becomes final, the Applicant will acquire the right to manage the premises. According to section 84(7):

"(7) A determination on an application under subsection (3) becomes final-

(a) If not appealed against, at the end of the period for bringing an appeal or

(b) If appealed against, at the time when the appeal (or any further appeal) is disposed of".

The application

1. This is an application (p.7) under section 84(3) of the Commonhold and Reform Act 2002 ("the 2002 Act") for a decision that, on the relevant date, the applicant RTM company was to acquire the Right to Manage ("RTM") premises known as Novel House, 29 New End, London, NW3 1JD.

2. By a Claim Notice (p.36) dated 18 November 2024, the applicant gave notice to the respondent that it intends to acquire the right to manage the subject property on 18 November 2024. The respondent served a counter-notice (p.45) dated 18 December 2024, which denied the applicant's right to acquire the RTM on the grounds that there had been a failure to properly abide by the requirements of s.78 and s.79 of Chapter 1 of Part 2 of the 2002 Act, so that on 18 November 2024 the applicant was not entitled to acquire the RTM.

Directions

3. The Tribunal gave directions on 28 April 2025 (p.376). The directions stated that the Tribunal had identified a single issue to be decided, i.e. whether on the date on which the notice of claim was given, the Applicant was entitled to acquire the RTM the Property. Directions were given for the progression of the application.

4. The directions were amended on 27 May 2025 (p.372).

Documents

5. The Applicants have provided a bundle of documents entitled "Statement of Case" comprising a total of 447 pages and page references are to that bundle.

6. The Applicant and the Respondent have also provided Skeleton Arguments.

The Issues

7. A number of issues were raised in the application, but, after the service of evidence, not all are pursued. The remaining issues are:

   (1) Whether, on the relevant date, the RTM Co's membership included a number of qualifying tenants ("QTs") which was not less than one half of the total number of QTs of flats contained in the Premises (s.79(5)).

   (2) Whether an NIP was given to the QT of Flat 13 (Mr Phillips, the executor of Mr Farkas (deceased)).

Respondent's Statement of Case – p.48

8. In summary, this states that the Respondent disputes the Applicant's RTM as follows (limited to the material issues before the Tribunal):

Membership of the Applicant

9. On the relevant date, the Applicant's membership did not include a number of qualifying tenants which was not less than one half of the total number of flats (i.e. 17 flats): s.79(5) 2002 Act.

10. The qualifying tenants of the 15 flats named in the claim notice (p.39) and register of members were not validly appointed members within the meaning of s.112 Companies Act 2006 and/or articles 26 of the Applicant's articles of association. In particular, there is no evidence that those members signed an agreement to become members and/or were subscribers to the Applicant's memorandum (within the meaning of s.8 Companies Act 2006).

Notices of invitation to participate (NIP)

11. The Applicant was only entitled to serve the claim notice if it had served all qualifying tenants who had not become, or agreed to become, members, not less than 14 days prior to service of the claim notice: ss.78(1) and 79(2) of the 2002 Act.

12. In respect of flat 13, Mr. Farkas had died at the time the NIP was served. On his death, the lease vested in his personal representatives pursuant to s.1(1) Administration of Estates Act 1925. His executor is Mr. Philips (probate was obtained on 14 March 2025). A NIP therefore had to be served on Mr. Philips.

13. Failure to comply with s.78 is fatal and renders the claim notice invalid.

Applicant's Statement of Case – p.80

14. The Applicant's response is as follows:

Membership of the Applicant

15. S.112(1) Companies Act 2006: A person may be a member of a company either by subscribing to its memorandum or by agreeing to become a member on the register of members. A subscriber will be a member of the company as and from incorporation, whether or not they are entered on the register of members. The qualifying tenants of 15 flats were subscribers to the Applicant's memorandum of association and were, on the relevant date, entered in the Applicant's register of members.

16. The register of members is *prima facie* evidence of the matters required to be entered on it: s.127(1) Companies Act 2006.

Notices of invitation to participate

17. A notice was sent to the executor by email on 24 October 2024 and receipt was acknowledged. A notice addressed to Mr. Farkas at Flat 13 is good notice for the purpose of communicating with the personal representatives: *Assethold Limited v 7 Sunny Gardens Road RTM Company Limited* [2013] UKUT 0509 (LC) at [34].

Respondent's Reply – p.120

Membership of the Applicant

18. It is not admitted that the qualifying tenants of the 15 flats named as subscribers were subscribers.

19. Section 8(1) Companies Act 2006 provides that a memorandum of association is "a memorandum stating that the subscribers-

    (a) Wish to form a company under this Act, and

    (b) Agree to become members of the company and, in the case of a company that is to have a share capital, to take at least one share each".

20. S.8(2) provides that the memorandum "must be in the prescribed form and must be authenticated by each subscriber". It is said that there is no satisfactory evidence that the leaseholders did authenticate. The fact that leaseholders provided evidence of identification, property information details, paid £500 and gave a signed authority to Lawrence Stephens to accept instructions from Tim Babich and Gerry Bichunsky does not constitute authentication of the Applicant's memorandum. Merely authorising solicitors to accept instruction from Mr. Babich and Mr. Bichunsky cannot be said to constitute authentication of the Applicant's memorandum. There is no evidence the leaseholders signed any form of acceptance of the memorandum or agreed/authenticated its contents or signed up to the contents.

21. The "statement of guarantee" does name each leaseholder but there is nothing to indicate that the leaseholders signed up to, or accepted, such a guarantee. There is a "statement of compliance" which names the leaseholders but there is no evidence how each of them is said to have "authenticated" the memorandum.

22. There is a page which states that each of the named leaseholders wishes to form a company and wishes to become a member. It states, in relation to each of them, that this has been "authenticated electronically" but the Applicant has produced no evidence to show that such authentication actually occurred. The granting of authority to Lawrence Stephens to accept instructions from Mr Babich and Mr Bichunsky is not authentication of the memorandum. The Respondent's concern is that documents were submitted to Companies House which allege that there has been appropriate authentication, but this is not in fact the case. It is accepted that the register of members is *prima facie* evidence of the matter required to be entered into it but the lack of evidence showing that the leaseholders did comply with s.8 of the 2006 Act is sufficient to rebut any presumption that the people named in the register are in fact subscribers and, therefore, members.

<u>Notices of invitation to participate</u>

23. Any notice had to be addressed to Mr. Phillips. He was simply emailed a copy of the notice addressed to Mr. Farkas and Mr. Philips, as the qualifying tenant, was not served. The notice (in order to comply with s.78(1) and (2) 2002 and the form prescribed under the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010) must be given to (and addressed to) the qualifying tenant and must invite the recipient to become a member. The notice did not invite Mr. Philips to become a member and so did not comply.

24. Failure to serve a notice of invitation to participate on all qualifying tenants is fatal: *Avon Freeholds Ltd v Cresta Court E RTM Co Ltd*.

25. In *Assethold Ltd v 7 Sunny Gardens Road RTM Company Ltd* the Upper Tribunal only stated that service of a copy of a claim notice addressed to the former (deceased) qualifying tenant would satisfy s.78(9).

The evidence

26. Mr. Babich (Flat 2 and 8 - p.128) and Mr. Bichunsky (Flat 15 - p.134) states, among other things, as follows:

    (a) In summer 2024, Mr. Babich and Mr. Bichunsky approached the tenants of each flat and the vast majority of them wished to acquire the right to manage;

    (b) In September 2024 Mr. Babich approach Ms. Allan and asked her to act on behalf of those who wished to acquire the right to manage. It was agreed that he and Mr. Bichunsky would be the "lead" clients and all the other participating leaseholders would authorise Lawrence Stephens to take instructions from them;

    (c) Each participating tenant was required to complete a Flat Owner Information Form and provide personal identification to Lawrence Stephens with a £500 per flat contribution;

    (d) Mr. Babich instructed Lawrence Stephens to incorporate the Applicant with all of the participating tenants and it was agreed that he and Mr. Bichunsky would be directors;

    (e) It was resolved at a board meeting to enter the names of the original subscribers to the Memorandum of Association in the Applicant's register of members and issue them with membership certificates;

    (f) Mr. Philips indicated that he and the beneficiaries of Mr. Farkas's estate supported the claim, but he was unable to participate prior to the Claim Notice being served as he had yet to obtain a grant of probate.

    (g) Mr. Babich and Mr. Bichunsky agreed to become members of the Applicant and they were a subscriber to the memorandum of association and registered as members in the Applicant's register of members when the Applicant was incorporated.

27. Each participating leaseholder authorised Lawrence Stephens to take instructions from him and Mr. Babich on their behalf. On 14 October 2024 Mr. Babich instructed Lawrence Stephens to proceed with incorporating the Applicant as an RTM company on the understanding that all of the participating leaseholders would become members. It was implicit in our instructions that Lawrence Stephens was to comply with all statutory and procedural requirements and in accordance with the authority provided to them by each participating leaseholder, including ensuring that the memorandum of association was properly

authenticated by each subscriber. He understands that the process of authentication is completed electronically and that Lawrence Stephens (or their company formation agents) was able to complete this process on behalf of each leaseholder client. Ms Allan confirmed by email on 14 October 2024 that leaseholders did not need to sign anything "in terms of the company incorporation and appointment of founding members/directors".

28. Mr. Babich also states (p.325) that the leaseholders authenticated the Applicant's memorandum of association as every participating leaseholder has made a witness statement (see below). He made clear to all leaseholders that participating in the RTM process meant that they would become a member of the company. He believes that in signing the Flat Owner Information Forms and providing the identity documents, each participating leaseholder was agreeing to be a member of the company and to retain Lawrence Stephens, jointly with other leaseholders, to achieve that objective. A copy of Lawrence Stephen's engagement letter he received dated 13 September 2024 is exhibited (p.335). He provided it to leaseholders under cover of an email dated 16 September 2025 and the letter makes clear that Lawrence Stephens were acting for all participating leaseholders in stating that "this is a group exercise and we are able to act for the group of participating leaseholders on the basis your objectives are aligned in acquiring the freehold". The reference to acquiring the freehold is an obvious error since it is clear from the scope of work set out in the letter that Lawrence Stephens was instructed in connection with acquiring the right to manage Novel House. Stage 2 of Lawrence Stephens' engagement included "Setting up the RTM company with the original members.

29. Ms. Allan (p.143) states, in summary, as follows:

(a) It was agreed that Mr. Babich and Mr. Bichunsky would be the lead clients and responsible for giving instructions on behalf of all the tenants;

(b) Each tenant was required to provide personal identification and proof of address and to complete a Flat Owner Information form (p.151-178), confirming that the firm was authorised to take instructions from Mr. Babich and Mr. Bichunsky. The participating tenants were also required to make a payment of £500 per flat;

(c) Her firm arranged for the Applicant to be incorporated using Vistra Incorporation platform. Each tenant was registered as a subscriber to the Memorandum of Association and became a member of the Applicant on incorporation;

(d) NIP's (p.267) were sent by first class post (p.266). Mr Corbally arranged for the NIP to be served on Mr. Philips by email sent on 24 October 2024 (p.291);

(e) By email dated 4 December 2024 Mr. Philips confirmed receipt of the NIP (p.292-3).

30. Mr. Hunt (Flat 11 – p.295), Mr. Aaronson (Flat 10 – p.297), Mrs. Bichunsky (Flat 15 – p.299), Ms. Barbaglio (Flat 1 – p.301), Mr. Marchetti (Flat 17 – p.303), Mr. Weitzman (Flat 4 – p.305), Rinat Salimov (Flat 16 – p.307), Mr. and Mrs. Peters (Flat 14 – p.309, p.311), Mr. Robson (Flat 7, p.313), Mr. Robson (Flat 7 – p.315), Mrs. Babich (Flats 2 and 8 – p.317), Mr. Coker (Flat 6 – p.319), Mr. Hanouka (Flat 5 – p.321), Mr. Saadat-Yazdi (Flat 3 – p.323) confirm:

(a) They agreed to become a member of the Applicant and they were subscribers to the memorandum of association and registered as a member in the Applicant's register of members when the Applicant was incorporated;

(b) They had submitted personal identification, proof of address and a completed Owner Forms as well as paying £500.

The Hearing

31. The Applicant was represented by Mr. Upon, Counsel. The Respondent was represented by Mr. Armstrong, Counsel. Also in attendance were: Ms. Allan (Applicant's former solicitor); Mr. Sherrard (Head of Property and Systems at Sterling Estates), Mr. and Mrs. Bichunsky (Flat 15), Mrs. Babich (Flats 2 and 8), Mr. and Mrs. Peters (Flat 14), Mr. Myers (Applicant's solicitor).

32. It was agreed at the outset that in terms of challenges to the evidence of the majority of the leaseholders, there would be some cross-examination of one which would stand as a "sample" for the rest.

33. Mr. Upton referred to his Skeleton Argument which set out the factual background. The subject Property has 17 flats and the Applicant's case is that the qualifying tenants agreed to become members and instructed Lawrence Stephens to pursue their claim including incorporating the company and authorising Mr. Babich and Mr. Bichunsky to give instructions on their behalf to Lawrence Stephens. The first relevant document was at p.151 (Flat Owner Information Form). In addition to completing and returning the forms and providing identification, each of the 15 flats paid £500 on account of costs. The RTM company was incorporated on 18 October 2024 (p.180). At p.192 was the Memorandum of Association. This was important as it lists the subscribers and it has a column as to authentication by each name and it says it was authenticated electronically. The issue was whether s.8(2) Companies Act 2006 was satisfied. On the same date the company was incorporated (18 October) Mr. Babich and Mr. Bichunsky resolved to enter the names of subscribers in the register of members. The

minutes of that meeting were at p.132-3. The register of members was at p.90-99.

34. There were two qualifying tenants who were not members of the company, and it was necessary to serve a NIP on them (Flats 12 and 13). There is no dispute that Flat 12 was given a NIP.

35. In terms of Flat 13, Mr. Farkas was the registered proprietor. He had died. It was common ground that the qualifying tenant was Mr. Philips, his executor. The NIP was sent to Flat 13 (p.267, p.268) and was addressed to Mr. Farkas. It was sent by Special Delivery and first class post and also emailed to Mr. Philips on same day (p.291). The Respondent's case was that it was not given as it was addressed to Mr. Farkas (not Mr. Philips) and also as what was given to Mr. Philips was copy, not a notice. At p.292 there is an email from Mr. Philips to Ms. Allan confirming he had received the email.

36. The Claim Notice (p.34) was served on the Respondent on about 19-20 November. Copies were sent to qualifying tenants. There is no dispute about that. A Counter-Notice is dated 18 December (p.46). It was thought that Mr. Bichunsky said that he had not receive a Counter-Notice but no point was taken on this as the Applicant cannot make an application unless a Counter-Notice had been served. The Counter-Notice denied that the company was entitled to acquire the RTM for non-compliance with s.78-79. Mr. Armstrong agreed with this position.

37. The relevant statutory provision are contained in s.78 of the 2002 Act.

38. Ms. Allan then gave evidence. She confirmed her name, professional address and that she was a qualified solicitor at Lawrence Stephens at the time and had been qualified for 20 years. She confirmed her witness statement at p.143 and her signature at p.145. She confirmed she had read it recently and that the contents were true.

39. She was then asked questions by Mr. Armstrong as follows:

40. She confirmed that p.151 was a form prepared by her firm and was a standard form. Its purpose was to get the necessary identification details as to the owner and to ensure she had the authority to take instructions from Mr. Babich and Mr. Bichunsky. She confirmed that she regarded the signed forms as sufficient instructions to not have to liaise with other tenants further, just Mr. Babich and Mr. Bichunsky. The client care letter stated that they would take instructions from one or two lead individuals on behalf of the remainder of the group. That had been sent to all qualifying tenants, members of the company and

they signed these forms to confirm Lawrence Stephens had authority to take instructions from Mr. Babich and Mr. Bichunsky.

41. She confirmed that at the time the forms were sent, the tenants would not be members of the company as it had not been incorporated. It was put to her that she did not ask each tenant, each potential member, to subscribe to the Memorandum of Association. She said that they were instructed to acquire the right to manage through a RTM company. Mr. Babich and Mr. Bichunsky provided instructions as per the client care letter and the Flat Owner Information form that company could be incorporated. Lawrence Stephen had waited until October to incorporate the company as Mr. Babich and Mr. Bichunsky wanted to give all tenants at Novel House the opportunity to become a member of the company. That was why they got such co-operation. Only 2 flats did not engage for their individual reasons. It was put to her that she therefore had not asked each member to subscribe and she said that it was implicit by the client care letter as the leaseholders were instructing her to acquire the right to manage with an RTM Co with founding members. That was number one in the client care letter. She checked they were qualified and then incorporated the company with all members on board. She could not do that until she had the form and identification and money on account. She was satisfied that they were all to be member of the company.

42. She was asked if, to the best of her knowledge, none of the tenant listed as members actually signed the Memorandum of Incorporation. She said that it was done electronically, she used an incorporation agent (Vistra Incorporating) and they did everything electronically after she had confirmed they may do so. It was put to her that she had not personally (or her firm had not) submitted the relevant documents to Companies House or the Company Registrar. She confirmed that she had authorised Vistra to do that.

43. She was asked about the Registrar Requirements Doc Rules 2022 and whether Vistra had a personal authorisation code to be able to file documents. She said that her firm was a customer of Vistra and they had confirmed to them that, on behalf of the subscribers, they could form the company. Lawrence Stephens had confirmed that they could do that as Lawrence Stephens were retained by their client to do precisely that. She confirmed she did know what documents, forms and applications were actually submitted by Vistra but that she had not produced them. She said that on the standard electronic form they would complete, it would include details of all members, personal information (the last 3 digits of their passport number, telephone number). They had obtained the information from the flat owner form. If the form was not properly completed, her assistant would email the tenant and ask for confirmation for the purpose of incorporating the company and would ask for the last three digits as above and the first

three letters of the town of their birth. This was how she had done it since she qualified.

44. She was asked if it was necessary to file a certificate of compliance or statement of compliance (s.9 Companies Act) and she did not know. She said that they authorised Vistra to incorporate the company, said who the subscribers were, who the directors were, and Vistra were authorised to deliver a statement to the Registrar of Companies on behalf of subscribers. She was asked if she assumed that the people who signed the form and gave you authority to take instructions from Mr. Babich and Mr. Bichunsky were subscribers to the Memorandum. She said that she had not assumed, it was in the client care letter and she had instructions from Mr. Babich and Mr. Bichunsky.

45. She was taken to the client care letter at p.335, was referred to "Stage 2" on p.336 and then taken to p.337 and the paragraph which starts "We are required to ask all new clients…". It was put to her that nowhere was there a reference to taking any steps to ensure that the intended members were going to be subscribed to the company, it did not say you would arrange for them to subscribe to the company. She said that she had instructions to acquire the RTM through a RTM Company, all 15 flats were members of the company and Mr. Babich and Mr. Bichunsky gave her the go ahead to incorporate the company. They had 15 out of the 17 flats, this was not a hostile RTM, and she knew that flats 12 and 13 would not participate. She had instructions to incorporate the company with 15 members. It was put to her that she relied on having authority from individual tenants, the Flat Owner Information form and the fact they had paid £500, and she did not have an instruction that they wanted to subscribe. She said that by signing the form, the leaseholders confirmed the client care letter which allowed her to take instructions from Mr. Babich and Mr. Bichunsky which is what they did.

46. She was taken to the NIP to Mr. Farkas (p.267) and the letter at p.266. Ms. Allan said that the letter was sent to Mr. Farkas by special delivery, first class post. It was sent by email to Mr. Philips. It was confirmed that the first acknowledgment from Mr. Philips was on 3 December, that he did not receive the special delivery as that was returned to Lawrence Stephens but he would have received the first-class post and email. She was taken to p.292-293 and it was said that Mr. Philips confirmed he had the email on 24 October 2024. Ms. Allan said that she did not contact him to prompt those emails, but that maybe Mr. Babich and Mr. Bichunsky did.

47. Mr. Bichunsky (Flat 15) confirmed his witness statement at p.134, his signature at p.134, he had read it recently and the contents were true. He confirmed his second witness statement at p.325, his signature at p.328, he had read that recently and that it was true.

48. He was asked questions as follows:

49. He was taken to the Memorandum of Association (p.88), which stated that it had been authenticated electronically. He confirmed that he had not personally signed the Memorandum, nor had he personally signed a document confirming that he wished to authenticate the document. He said he was not aware of what documents Vistra sent to Companies House to register the RTM Co. He was taken to the Articles of Association (p.19). Article 26(1) (p.27) was read out. It was put to him that neither he nor any of the original subscribers signed such a declaration. He said that he signed the Flat Owner Information Form which contained this information (p.173). It was confirmed that he and his wife had signed the form. He said that he referred to that as providing the information required by Article 26(1). It was put to him that the form did not contain a statement or declaration or anything like Art. 26, it was just him giving personal details and a signed declaration that Lawrence Stephens was authorised to take instructions from Mr. Babich and Mr. Bichunsky in relation to the right to manage application. It was put to him that there was nothing like the statement or declaration in Article 26. Mr. Bichunsky said that he followed Ms. Allan's instructions or requests and that is what he did.

50. Mr. Bichunsky confirmed that p.132 was a copy of the minutes of the board meeting attended by him and Mr. Babich. He said that he and Mr. Babich resolved, in their capacity as directors, that the stated people would be entered into the Register of Members of the Company and as far as he was concerned, as soon as the company was incorporated, all the people named in the Memorandum of Association were subscribers. He was taken to p.133 and where it stated that it was noted that such persons were entitled to be members of the Company in accordance with Article 26 of the Articles of Association of the Company. It was put to him that this stated that the people would be entitled to become members but that he was not suggesting that they had made a declaration in terms of Art. 26. He said that, not being a lawyer, it was his understanding that they had paid £500, filed the information, the matter was discussed with each individual over weeks, each person was intending to become a member of the RTM Co. He knew each of the leaseholders would pay £500 with a single intention, to become a member of the RTM Company.

51. He was taken to p.327, para. 11. He confirmed the email he was referring to was p.292. He was asked if he had received any other email or confirmation from Mr. Philips prior to 3 December saying he had received the NIP which was served on 24 October. He said he did not recall but it was possible that he had spoken to Mr. Farkas's son and got Mr. Philips's name from him and that the connection was made by Jack Farkas but he did not know. He said he had never spoken to Mr.

Philips. He didn't recall if he had emailed him. It was put to him that he would have had Mr. Philip's email address from Mr. Farkas's son and he would have sent an email saying he waiting to hear from him and to contact him. He said he did not recall. He confirmed that by 3 December 2024, the Notice of Claim had already been served.

52. He was taken to p.330 and it was put to him that when he talked about the recipients being involved in the RTM process, he didn't make any reference to them subscribing to the Memorandum of Association. He said no, but for him it was an implicit issue and there were discussions in the building by the tenants over weeks. They lived in the building and had discussions. There may have been progress report discussions but he could not confirm the date or time. He was taken to p.331 and it was put to him that there was no mention of subscribing or becoming members of the RTM Co. He said it was implicit in establishing the co for benefit of the tenants of Novel House and discussions had begun in December 2023 with the freeholder. He was asked if the discussions were in terms of talking about setting up a RTM Company and supporting a RTM Company or specifically referring to people subscribing to the company and becoming members. He said it was implicit in the discussions about the RTM Company that they would become members or shareholders of the RTM Company.

53. Mrs. Babich (Flats 2 and 8) confirmed her witness statement (p.317), her signature (p.318), that she had read it recently and it was true. She was asked questions as follows:

54. She was taken to paragraph 4 of her witness statement and she confirmed it was prepared for her by solicitors and they were not words she had come up with. She agreed that all the witness statements by the leaseholders adopted the same wording. She was taken to p.88 and she was asked if she had seen a copy of it before the company was incorporated. She said that she didn't think she had seen this exact copy but she knew everyone in the building wanted to do it, for the most part. It was put to her that she hadn't signed that document. She said it was her understanding that she was subscribing to the RTM Company when she paid money, authorised Mr. Bichunsky and Mr. Babich to find Lawrence Stephens and begin the process and filled in the form. There was all sorts of "legal verbiage", but she was subscribing and she would be a member after it was executed. She was asked if she had signed anything that was called a Memorandum of Association Novel House RTM Co Ltd. She said it was her understanding, they had asked Mr. Bichunsky and Mr. Babich to be their representatives and as representatives they were signing on their behalf and she agreed to that. She was asked to confirm that she had not signed anything saying she wanted to be a subscriber or to authenticate the Memorandum of Association. She said no, she had read this originally, the RTM process could be started by two leaseholders, they authorised them and did what needed to be done to

become a part of this. She was asked if she was saying that signing the form and making payment was enough. She said yes, as well as authorising Mr. Bichunsky and Mr. Babich.

55. Mr. Armstrong then made submissions as follows:

56. On the "members" argument: He referred to paragraphs 6-16 of the Reply (p.120-22) which responded to the Applicant's Statement of Case. There were two ways people could become members of a company. Subscribers don't need to be entered as members on the register. Unlike someone who subsequently applies to be member, they are a member. If the 15 are subscribers, that is an end to it. He said that the tenants of the 15 flats were not subscribers. Para. 8 of the Reply referred to s.8(1), but he would refer first to s.7(1). The Act did not define subscriber etc. but as a matter of English and in the context of this Act, it clearly means to sign. Whether it has to be done physically or electronically, it must involve a person signing up to, one way or other, the document in question, the Memorandum of Association. In the absence of a definition of what subscriber means, it was a matter of common sense. He relied on a few extracts, two from legal dictionaries and one from Miriam Webster online dictionary. He referred to Mirima Webster and said (c) did not apply. Stroud reinforced that in different contexts, different cases were relevant to context, and it may have different meanings in different statutes. He also referred to Jowitt's. He said that on a strict view it meant not merely to sign but signing underneath a particular document. Whether a strict approach was adopted or a looser one, it was clear, it had to be signed. The reality was that no one, none of members had signed up. Nothing had been produced which gave a basis to support that they signed the Memorandum, there was nothing to indicate they even authorised someone else to sign on their behalf or that they approved the Memorandum or that they authenticated the Memorandum, which took us to s.8(2). What happened is that there had been an assumption that signing the form (p.151), giving their details and signing the authority to Lawrence Stephens to accept instructions from Mr. Bichunsky and Mr. Babich was sufficient and that was not the case. The authority to give instructions was general and the fact that they had authority to give instructions could not constitute a subscription by various leaseholders to the Memorandum of Association. The belief that it could be done was insufficient. He had taken the witnesses to the client care letter – it talked about the steps to be taken, about the RTM process, which would involve setting up a RTM company, but this was very different to complying with s.7 and subscribing to the Memorandum of Association. Section 7(1) had not been complied with and there had been no subscribing of the names to the Memorandum.

57. Section 8(2) said what the Memorandum had to be. Section 8(1) was satisfied but s.8(2) was not. It was clear that each needed to subscribe

and each needed to authenticate the Memorandum of Association. There was no evidence anyone had done that. What the Applicant relied on was a copy of the Memorandum (p.88). It states it was authenticated electronically. It was filed, by Vistra, not Lawrence Stephens, who were agents for Lawrence Stephens who acted on behalf of leaseholders. The question was what authenticated electronically meant? There had been no disclosure of the documents filed by Vistra, we did not know what they say they relied on as evidence that each subscriber had authenticated this Memorandum. Authenticated was only one point. There was no evidence as to why they believed they had a subscription. It came back to the fact that there was an assumption, based on the signing of an authority from Mr. Bichunsky and Mr. Babich, paying £500, and returning the form, that that constituted subscription. That was unfounded. We did not know what Vistra filed but they were given the information by Lawrence Stephens. Lawrence Stephens assumed as this was how they always did it but it was not good enough. The Applicant could not show the leaseholders were subscribers or that they had authenticated the Memorandum of Association. So, the leaseholders were not subscribers.

58. Mr. Upon then made submissions. He relied on *JDK Construction Ltd (in liquidation)* [2024] EWCA Civ 934 and said there were two ways someone could become a member: either by being an original subscriber or by being entered onto the Register of Members. If they were an original subscriber, they did not need to be on the register, but that did not matter in this case. There were two ways the Applicant could discharge the burden of showing who the members were. They could either adduce evidence of who subscribed to the Memorandum or produce the Register of Members at the relevant date. In this case, they had done both. We had the Memorandum of Association and the Register of Members (p.90). Either of those documents, by themselves, is sufficient for the RTM company to establish membership at the relevant date. The Memorandum of Association (p.192) stated the name of each subscriber and the method by which the subscriber was authenticated for the purpose of s.8(2) and it says they were authenticated electronically. That was evidence that the subscribers have authenticated as it states as much. He accepted the legal burden was on the RTM Company to prove who the members of the company were at relevant time. The evidential burden started with the RTM Company and it has adduced evidence of who the subscribers are by the Memorandum of Association. The burden then shifts to the Respondent to prove that the leaseholders have not authenticated in some way. The Respondent had adduced no evidence at all that the Memorandum of Association was incorrect. At the highest, it simply asked questions about whether the incorporation agent was authorised to authenticate on behalf of the subscribers. There was no obligation for RTM Company to give disclosure or to produce evidence of what instructions were given and what documents were signed in order to discharge the evidential burden in terms of proving who the members

were. It was absurd to suggest that in every case, the RTM Company had to go to those lengths to show who the company was. The Tribunal was not the forum for disputes under the Companies Act. The Tribunal was entitled to accept it at face value, and the subscribers have authenticated the Memorandum.

59. The second point was that the normal principles of agency applied. It was very clear on the evidence that Lawrence Stephens were taking instructions from Mr. Bichunsky and Mr. Babich on behalf of the other subscribers. It was clear that they were authorised to do so, the subscribers all signed the form, they all paid £500. The Tribunal had witness statements from Mr. Bichunsky and Mr. Babich. Para. 7 of Babich's statement (p.129) meant that there was a specific instruction he gave to the solicitors on behalf of all those he was authorised to give instructions on behalf of. That is what happened. Lawrence Stephens instructed an incorporation agent to do all the things necessary to incorporate the RTM Company with the subscribers. Lawrence Stephens were authorised to authenticate the Memorandum on behalf of the subscribers. There was no requirement for each subscriber to personally authenticate the Memorandum or that a personal signature is required. Lawrence Stephens provided no authority in support of such a proposition. It flies in face of what we know how companies are formed through incorporation agents – authority was given. He had produced the registration requirements and the rules. He referred to s.1068 of the Companies Act. Section 8 fell within that. He read s.1068(3) and then s.1117. He referred to the Registrar's (Requirements Applicable to Electronic Form Documents) Rules 2022. As to authentication generally he referred to rule 5 and sub rules (1)-(4). Sch. 9 includes an incorporation agent. It was very clear from rule 5 that a document could be filed electronically and documents which were required to be authenticated could be done so digitally by a code. We could go through the provisions depending on whether it was web-filing or software filing. It was clear from the rules, it did not have to be a personal signature. The general rules of agency apply. All of the subscribers had made witness statements confirming that they agreed to become a member of the company. No one suggested, apart from the Respondent, that an incorporation agent did not have the authority to incorporate the company. Everyone listed as subscriber accepted that accurately reflected the position and accepts the incorporation agent had authority. It was verging on absurd that one person who was not a party to it was challenging it.

60. The third reason is s.127 Companies Act. This would include s.112. What does *prima facie* evidence mean? He had provided the entry for *prima facie* evidence in Jowitt's. He referred to that and said that this was being used in its strict sense, as proof of the matters in the register. The register itself was evidence that the people named as members are members unless there is evidence showing that it is wrong in some way, that the register is incorrect. No evidence had been adduced to show it

was incorrect. The Tribunal had witness statements from all of the members who confirmed they had agreed to become a member of the company. Mr. Armstrong had not said this but if the suggestion was that it was necessary to sign an application form pursuant to Art. 26 in order to be member, Mr. Upton did not accept that. All that was required was to have agreed to be a member and be entered on the register. The kind of evidence necessary to rebut the presumption would be a statement from someone whose name was on the register challenging or disputing whether s/he was a member. The Respondent would need to lead evidence that a name was on the register of someone who had never agreed to it, evidence of fraud or misrepresentation. There was nothing like that. Section 79(5) was satisfied.

61. Mr. Armstrong said that Mr. Upton had focused on the issue of authenticating the Memorandum and s.8(2), but there was a prior hurdle and that was to show the people named were actually subscribers. Mr. Upton talked of the principles of agency but there was no authority that assisted. Mr. Armstrong had not provided any authority but he had shown that the plain meaning of subscriber meant to sign up to. There was nothing which suggested that the Tribunal should adopt a different interpretation. If they were not subscribed, that was an end to it. They did not sign anything and they were not subscribers. Even if they did not need to sign personally, they needed more than just authorising Lawrence Stephens to accept instructions before authority could be given to authorise Vistra to say they have subscribed to the Memorandum, apart from whether they had authority to say they had authenticated the document. Mr. Upton had referred to the 2022 Rules. Mr. Armstrong read rule 5(4). He was willing to assume Vistra had authority to file documents and register documents, but that was not enough, looking at the rules. The Rules drew a clear distinction between documents which could be authorised by an agent and what needed to be specifically authorised by an individual. This was in various places but, e.g. rule 26. There is a distinction. For a statement of compliance, an agent can do that and give a personal code. For actual authentication of a Memorandum of Association (s.8(2)), this needed to be by each subscriber. There was no suggestion that had happened in this case. That distinction was also in rules 34 and 45 with differences between what an agent can do and what a subscriber has to do. We are dealing with subscribers (s.8(2)) and it had not been done.

62. Turning to the fact that the members are named in the register, Mr. Upton had relied on s.127. There was a distinction between how to become a member, between original subscribers (s.112(1)) and people subsequently. It was clear in this case, all the leaseholders purporting to be members, purported to be subscribers. No one had signed the normal application form one would expect to see, which was a declaration in accordance with Art. 26. Mr. Upton had said it did not

need to be signed. Art. 26 says has to be in this wording or similar and need to be signed and dated. It has to be signed, but even if not, there has to be something. If that is what the Applicant relied on, that they were subscriber members, they need to confirm what was set out in Art. 26. What the Applicant relied on was an agreement to be member, and the Memorandum of Association. The point is, they were not subscribers, they had not been validly signed up or authenticated the Memorandum, so this did not help them. There was nothing to show they had applied to be members. The Register did not help as to the application. As for reliance on s.127, it is accepted that it is only *prima facie* evidence and it can be rebutted. Jowitt's referred to evidence which may be subject to rebuttal. *Prima facie* is not yet conclusive, but it may become so if uncontradicted. It was always a decision for the court or Tribunal. It was a finding of fact, whether the *prima facie* evidence had been rebutted. *Prima facie* evidence could be contradicted by means other than by evidence, especially in a case where all the relevant documents where in the possession of one party. If the Applicant had documents which might show the *prima facie* evidence should be rebutted but don't disclose it, it cannot frustrate the other party rebutting it. What would serve to rebut? If, when questioned the members accept that they did not sign the documents, that is evidence which rebuts. The fact that it comes from them does not undermine it and does not mean it cannot rebut. When questions are raised in a Statement of Case and Reply, they were aware of the challenge, they filed their own Statement of Case, provided evidence after the Reply but they had failed to provide evidence that they did sign up and that was clearly relevant and enabled the Tribunal to find the presumption had been rebutted. There was evidence from the witnesses that they had not signed up, had not subscribed, they had not signed the Memorandum and had not given authority to anyone else to subscribe. They had paid £500, completed the form and given authority that they could accept instructions. In most cases this is not raised as an issue. If it came up at a final hearing, there would be no time for it to be dealt with, but here it has been raised in advance.

63. Mr. Upton then made a correction on the law. He said it was wrong to say this is not what normally happens, but this did not assist in determining the issue. He referred to *Assethold Limited v 7 Sunny Gardens Road RTM Company Limited* [2013] UKUT 0509 (LC). He referred to the Registrar's Rules, Rule 26 and Part 3 which dealt with software filing. Part 4 dealt with web filing. Rule 26 had two defined terms and he referred to Sch. 2. Company incorporation package (in Schedule 2) would include a Memorandum of Association. Personal Authentication Code meant to generate, and it was necessary to provide identification of the relevant individual. That is the information Ms. Allan said she gave to Vistra. It was wrong to suggest that because a personal authentication code was required the normal principles of agency don't apply. The agent has to provide certain information to get the code for the principal. There is no answer to the fact that the

Incorporation Agent was authorised. As a general point, the qualifying tenants give general authority to Mr. Bichunsky and Mr. Babich to give instructions to Lawrence Stephens. Mr. Bichunsky and Mr. Babich gave instructions to Lawrence Stephens that subscribers wanted to become members of the company and they could do all the necessary things, including authenticating the Memorandum of Association on their behalf to make it happen.

64. The Tribunal then heard submissions on the issue of the NIP to Mr. Farkas and Mr. Philips.

65. Mr. Armstrong referred to the Reply (p.123, para. 21). It was common ground that Mr. Philips was the qualifying tenant and there is no dispute the NIP was addressed to Mr. Farkas and not Mr. Philips (p.266-7). He referred to p.268. In the circumstances where a notice was addressed to one person and where a hard copy was sent addressed to Mr. Farkas and sent to the flat that belonged to him, that is the original doc and sending a copy, which is what was sent to Mr. Philips, is not enough. Even if the Tribunal took the view the version of the notice which was emailed to Mr. Philips was itself an original version, not a copy, that was still not good enough. In deciding whether the notice was valid, the Tribunal had to look at the purpose of the notice and the circumstances in which it was delivered. In some circumstances a notice in respect a property is to give information, e.g. a notice to quit, a notice to exercise a break clause. The fact that there is an error in the person it is addressed to does not change the fact that the intended recipient is given information. This was very different as it was a Noice of Invitation to Participate. It is giving information, but it is also inviting the recipient to become member. Where we have a notice addressed to Mr. Farkas giving him the right to be member, it is not good enough to say Mr. Philips had the same information. It was still inviting Mr. Farkas not Mr. Philips. The fact that Mr. Philips received it does not mean it was valid as it was addressed to the wrong person. To say that the email of 3 December (p.292) means he was clearly aware he had the right to participate would read too much into it. Mr. Bichunsky's evidence was that he was not in contact with Mr. Philips, but he would have been although we do not have the email. It would be going too far to infer that at the time the notice was received, Mr. Philips was aware that he personally had the right to participate, that he understood he would have right. This is in the email sent on 3 December but this was well over month after it was sent. There is no acknowledgement by Mr. Philips at that time, which would be expected if he understood he had the right to participate. By the time he does respond, weeks later, the Claim Notice had been served. The Applicant cannot show that he was aware at the material time, at least 14 days before the Claim Notice was served. The Applicant could have got a witness statement from Mr. Philips. It may be that after the NIP he realised he was entitled to participate. He may be indicating in more general terms that he would have been willing to participate. It is

important that this was not unsolicited, it was prompted by contact from Mr. Bichunsky. Something prompted this. If a valid NIP was not served on Mr. Philips that is fatal to claim.

66. Mr. Upton agreed that the last point was right. The decision in *Avon Freeholds Ltd v Cresta Court E RTM Co Ltd* [2024] UKUT 335 (LC) changed the law from what the Upper Tribunal had said. The starting point is s.78(1) which requires the RTM Company to give notice to each person who is a qualifying tenant. It does not say it must be addressed to the qualifying tenant or that the recipient must be named. It is clear from the email (p.291) which was sent on 24 October, Mr. Philips understood the notice was being given to him in his capacity as executor. It was clear from the contents of email that the reason he is being given the notice is because Mr. Farkas was the registered proprietor of flat 13, he had died, and Mr. Philips was his executor. It was obvious the notice was intended to be given to the executor. It was clear from p.292 that Mr. Philips understood the notice was being given to him and he was entitled to participate and that it why he says he was applying for probate etc. As the grant of probate was pending, he could not participate but apart from that, he understood he was entitled to participate. What Mr. Philips subjectively thinks is not the question. Construction is an objective test, which is why there is no witness statement. It was clear enough from the email and it is evidence that in all the circumstances that a reasonable recipient would have understood that the notice had been given to him and he was entitled to participate. It does not matter that the notice was misaddressed to Mr. Farkas. He relied on *Townsend Carriers Ltd v Pfizer Ltd* (1977) 33 P & CR 361. "This last case…" (p.365) was *obiter* but was a statement of principle from a highly respected chancellor and property lawyer and it was right in principle. In this case, Mr. Philips understood the notice was being given to him, and emailed to him in his capacity as executor and he understood that he had a right to participate. *Hawtrey v Beaufront Ltd* was authority that some cases where a matter of construction. *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89 para. 48 was binding authority. A notice addressed to a deceased tenant was good notice for communicating with the Personal Representatives. He referred to the *Sunny Gardens* case, para. 7-11, which set out the facts and para. 28. In that case, Mrs. Foskett had died and her estate had passed to his executor. She had passed away at date of incorporation so she could not be member of the company. At para. 31, there was *prima facie* evidence of registration. At para. 33 it was stated that she was not a member of the company and her personal representative was the qualifying tenant, so it was necessary for the NIP to be given to the personal representative but it was not. Para. 34 was key. It applies equally and there was good service. It is an essential part of the decision and was a necessary step in reaching the ultimate conclusion which was that the failure to serve a NIP on the Personal Representatives was not fatal. That would now be decided differently in light of *Cresta Court*, but it was part of the ratio and was

binding for what it decided. It was accepted that this concerned a Claim Notice rather than a NIP, but there was no difference in principle.

67. Turning to the final argument, that the notice was a copy: there was no dispute that the notice could be served by email – s.111 is permissive and nothing in the Act says it cannot be. He referred to the *Townsend* case. Its purpose was to communicate information which included the recipient's right to participate. There was no good reason it could not be given by attachment to an email, rather than a hard copy. So there was no good reason why a notice printed out and scanned as an email would not be a valid notice. It is a copy of the original but that was a distinction without a difference as the information had been given to recipient. It is a good notice.

68. Mr. Armstrong said that he agreed with the point that it was an objective test. He did challenge Mr. Philips's understanding of the NIP and said there was no justification for the inferences drawn (i.e. that he was being invited to participate). The Tribunal had to look at the notice, not the subjective belief. The letter sent with the NIP was addressed solely to Mr. Farkas and the NIP was addressed to Mr. Farkas. There was no reference to Mr. Philips or then executor or personal representative. Mr. Upton said there was no requirement to name a person but that could not be right. Section 78 does not talk about names, but it does say the notice must be given to invite the recipient There had to be compliance with the prescribed form, the 2010 regulations attached a prescribed form and this includes a section "To…". Mr. Armstrong was asked if the form had to be used or whether it could be "substantially to the same effect". He said he would have to check but, in any event, if there was no name, it was not substantially to the same effect. The NIP had the wrong name and address.

69. He referred to *Townsend* and said that whether a notice was valid depended on its purpose and context. It was clear from the headnote this was a different notice and different facts. That was a notice under the lease. The decision did not assist. The *ratio* was decided on the basis that the parties giving and receiving notice were agents. It cannot be said that Mr. Philips was the agent of Mr. Farkas. Page 365 of the decision ("These cases…") was still talking about the principle of agency. Reading on ("This last case…") showed that this was not explored at any length. It was *obiter* but it was not considered in detail. Reading on ("The purpose… lease"), the Court was looking at whether the notice was valid for the lease, but it was *obiter*. The NIP was giving information but not merely that, it was a notice of invitation and that is the problem. It invited the wrong person. *Hawtrey v Beaufront Limited* did not assist. The recipient was the defendant company and the plaintiff sent the notice to directors, a notice to quit. It was held to be valid. Those circumstances are completely different. The Court acknowledged the company, by definition, has to deal through agents,

normally directors or employees. Reading from p.289 ("A limited company must act…") the case made the point that it would have to act through agents, and agents are directors, but this does not make a difference as they would have to have looked at it anyway. Para. 44 of Mr. Upton's Skeleton Argument referred to *OG Thomas Amaethyddiaeth CYF v Turner* [2023] 2 P&CR 15 in which a notice to quit was served on the original tenants who had assigned. It was accepted in that case that a notice addressed to A cannot be treated as notice to B and that applies here. It was addressed to Mr. Farkas and a hard copy was sent to his address. Whether it was a copy of a notice sent by email, it was addressed to Mr. Farkas.

70. *Sunny Gardens* was only obiter as the relevant part was not part of the essential reasoning and different considerations apply to a claim notice as opposed to NIP here. Para. 34 say "inclined to think" and so it was not decided. Despite the fact that the Judge expressed the view that it would be a good notice, what he actually held was that there was a failure to serve a NIP, so he allowed the appeal and found the RTM company was not entitled to acquire the RTM (para. 41). The fact that he expressed a view, *obiter*, that he thought serving a copy of the claim notice etc would probably be good enough for s.79(8) was clearly not part of his reasoning, which had nothing to do with the claim notice. We have to look at the notice in question. There was no issue with the fact that it was sent by email, but he did take point that it was addressed to the wrong person. In the *Assethold* case, the reasoning was different. The Court of Appeal had to distinguish from the Supreme Court case holding a failure to serve a Claim notice was not fatal. A NIP is essential, so the obiter comments in *Sunny Gardens*, carry even less weight.

Law

71. Section 78 of the Commonhold and Leasehold Reform Act 2002 provides:

(1) Before making a claim to acquire the right to manage any premises, a RTM company must give notice to each person who at the time when the notice is given—

(a) is the qualifying tenant of a flat contained in the premises, but

(b) neither is nor has agreed to become a member of the RTM company.

(2) A notice given under this section (referred to in this Chapter as a "notice of invitation to participate") must—

(a) state that the RTM company intends to acquire the right to manage the premises,

(b) state the names of the members of the RTM company,

(c) invite the recipients of the notice to become members of the company, and

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

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

...

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

72. Para. 8 of the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010/825 ("the Regulations") provides that NIPs shall be in the form set out in Schedule 1 to the Regulations.

73. Section 79(2) of the 2002 Act provides as follows: "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".

74. Section 79(5) states, in relation to a notice of claim to acquire right, that the membership of the RTM company must, on the relevant date, include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained.

75. Section 7(1) Companies Act 2006 provides:

A company is formed under this Act by one or more persons-

(a) Subscribing their names to a memorandum of association (see section 8), and

(b) Complying with the requirements of this Act as to registration (see sections 9 to 13).

76. Section 8 provides:

(1) A memorandum of association is a memorandum stating that the subscribers—

(a)wish to form a company under this Act, and

(b)agree to become members of the company and, in the case of a company that is to have a share capital, to take at least one share each.

(2) The memorandum must be in the prescribed form and must be authenticated by each subscriber.

77. Section 112 of the Companies Act 2005 states as follows:

(1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.
(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, if a member of the company.

78. Subsections 84(3) and (4) of the 2002 Act provide as follows:

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

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

79. In *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, the RTM company failed to serve a claim notice on an intermediate landlord of one of the flats. The Court of Appeal held that, given that the landlord was an intermediate landlord which did not have any management functions as defined in s.96 2002 Act, failure to serve it did not affect the validity of the claim.

80. In *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co Ltd* [2024] UKSC 27 it was said that the point of *R v Soneji* [2005] UKHL 49 was to move away from a rigid category-based approach to evaluating the consequences of a failure to comply with a statutory procedural requirement and to focus instead on (a) the purpose served by the requirement as assessed in light of a detailed analysis of the particular statute and (b) the specific facts of the case, having regard to whether any (and what) prejudice might be caused or whether any injustice might arise if the validity of the statutory process is affirmed notwithstanding the breach of the procedural requirement; it was appropriate to go back to the basic principled approach as explained in *Soneji* [61]. In evaluating whether a procedural failure under the 2002 Act has the effect of invalidating the process, the question to be addressed is whether a relevant party has been deprived of a significant opportunity to have their opposition to the making of an order considered, having regard to (a) what objections they could have raised and would have wished to raise and (b) whether, despite the procedural omission, they in fact had the opportunity to have their objections considered in the course of the process leading to the making of the

First-tier Tribunal's order; if there was no substantive objection which they could have raised or would have wished to raise, they have lost nothing of significance so far as the regime is concerned and the inference is that Parliament intended that the transfer of the right to manage should be effective notwithstanding the omission; if their objection has in fact been considered in the process, even though the claim notice was not served at the proper time, again they have lost nothing of significance so far as the regime is concerned and the inference as to Parliament's intention is the same; in the present case, as the respondent company had been joined in the application to the tribunal and its objections considered, the claim was valid [91].

The Tribunal's decision

81. It is for the Applicant to prove that it is entitled to acquire the right to manage.

Membership of the Applicant

82. The material question is whether s.79(5) 2002 Act complied with?

83. It is acknowledged that the register of members is *prima facie* evidence of matters which are by the Companies Act 2006 directed or authorised to be inserted into it. The Respondent asserts, however, that the presumption is rebutted because there is evidence that there was no compliance with s.112 of the Companies Act 2006 as the leaseholders were not subscribers of the company's memorandum (so there was no deemed agreement to become members of the company). It is also said that there was no compliance with s.7(1) and s.8(2) Companies Act 2006 as the memorandum of association was not authenticated by each subscriber and the leaseholders were not, therefore, members of the company. These issues turn on whether there is evidence that the leaseholders were not subscribers.

84. Miriam Webster states that subscribe means, among other things, to sign something, such as a document, in token of consent or obligation, or "to assent to: support". Stroud says that it means to write under something and was a method of signing. Jowitt's states that it is "to write under" and is sometimes opposed to "sign" because a signature if not necessarily placed at the end or bottom of an instrument. It says for "judicial and statutory constructions and definitions see Stroud Judicial Dictionary".

85. It is not suggested that if the Memorandum of Association (p.88) had been validly authenticated electronically, there would be any lack of

compliance. In any event, the Tribunal finds that, a valid electronic authentication would constitute a "signing up" to the Memorandum of Association. The issue is whether there was valid electronic authentication. It is also not disputed that Vistra did electronically authenticate the Memorandum, nor that they were authorised to do so by Lawrence Stephens. The issue is whether Lawrence Stephens were authorised by the leaseholders to give that authority.

86. The evidence in this respect is that the leaseholders had received the Client Care letter, had completed the Flat Owner Information Form and provided personal identification (and paid £500). Mr. Babich states (p.129, para. 7) that he instructed Lawrence Stephens to incorporate the Applicant with all of the participating tenants as members. Further (p.129, para. 8) that upon incorporation, Mr. Bichunsky and Mr. Babich had a board meeting (p.132) at which they resolved to enter the names of the leaseholders to the Memorandum of Association in the Applicant's register of members and to issue them with membership certificates. Ms. Allan (p.143, para. 4-5) confirms what Mr. Bichunsky (p.135, para. 6) and Mr. Babich (p.129, para. 5) say, which is that it was agreed by the leaseholders that they would be the lead clients and would give instructions on behalf of the participating leaseholders. The Flat Owner Information Forms (p.151, p.153, p.155, p.157, p.159, p.161, p.163, p.165, p.167, p.169, p.171, p.173, p.175, p.177) state that Lawrence Stephens was authorised to take instructions from Mr. Babich and Mr. Bichunsky. Mr. Bichunsky (p.326, para. 5) states that he was in contact with all of the leaseholders prior to incorporation and it was made clear to them that participating in the RTM process meant that they would become a member of the company. He also states (para. 7) that it was implicit in his instructions to Lawrence Stephens was to comply with all statutory and procedural requirements and in accordance with the authority provide to them by each participating leaseholder, including ensuring that the memorandum of association was properly authenticated electronically by each subscriber. He states that he understands that the process of authentication was completed electronically and that Lawrence Stephens (or their company formation agents) was able to complete this process on behalf of each leaseholder client. On 14 October 2024 (p.356) Mr. Babich told Ms. Allan to "move forward" which, in light of the email from Ms. Allan of 11 October 2024 (p.357) referring to incorporating the company. On the same date (p.355, Mr. Babich and Mr. Bichunsky were informed that Lawrence Stephens had instructed Vistra to incorporate the company. This was acknowledged by an email of the same date from Mr. Babich (p.335).

87. It is clear from the email of 16 September 2024 (p.330) and the subsequent completion of the Flat Owner Information forms that the participating leaseholders were instructing Lawrence Stephens to complete the RTM process including (as set out in the letter of 20 June 2024 – p.331 and the Client Care letter – p.335) creating a RTM company.

88. Lawrence Stephens was, therefore, told by one of the people authorised to give instructions, to incorporate the Applicant company and to make the participating leaseholders members. This is sufficient authority for Lawrence Stephens to have then authorised Vistra to incorporate the company and to electronically authenticate the Memorandum of Association.

89. On the basis of that authority, the participating leaseholders were "signed up" to the Statement of Guarantee (p.185) which, among other things, refers to those leaseholders as members of the company. The "Lawful Purpose Statement" confirms that the company had been formed (for lawful purposes). They also confirmed that the requirements of Companies Act 2006 as to registration had been complied with (p.190). The "Authoriser Designation" was given as "subscriber" and it states that it had been authenticated.

90. The Tribunal is therefore satisfied that there is no evidence to rebut the *prima facie* evidence of the register of members, that the participating leaseholders were members of the Applicant company as they were subscribers, that s.112 of the Companies Act 2006 and s.7(1) and s.8(2) Companies Act 2006 were complied with. Section s.79(5) of the 2002 Act was therefore complied with.

NIP to Mr. Philips

91. The Tribunal finds that Mr. Philips did receive the email (p.291) with the NIP and that it was "given" on 24 October 2024 (p.292 states that Mr. Philips received the email on 24 October).

92. Was a notice (rather than a copy) sent to Mr. Philips? It is acknowledged by Mr. Upton (para. 19 of his Skeleton Argument and submissions as set out above) that the notice sent to Mr. Philips was a copy. Is this sufficient? It was a copy of the original, but it still complied with the requirements for a NIP and the Tribunal finds that it was a notice for the purpose of s.78(1). The Tribunal therefore finds that there was compliance with the statutory requirements. If, however, we are wrong about that the Tribunal would have considered that, in light of *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co Ltd* the sending of a copy notice rather than the original version cannot have intended to be fatal to the whole process.

93. The next issue is whether the notice was "given" (s.78(1)) to Mr. Philips given that it had the name and address of Mr. Farkas?

94. It is correct that there is no requirement in s.78 2002 Act that the NIP must state who it is to. There is, however, a requirement to use the prescribed form (reg. 8 The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010. The form starts with stating who the form is "To". The notice must therefore state who it is being given to.

95. The issue here is not that the notice did not state who it was being given to, but that it stated it was being given to Mr. Farkas, but the person it should have been given to is Mr. Philips.

96. In *Sunny Gardens*, it was said [34] that a notice addressed to the deceased tenant at the subject premises would be good notice for the purpose of communicating with her personal representatives even though they were not named in the notice. That was concerned with a claim notice pursuant to s.79, not a NIP pursuant to s.78, but they are both sections concerned with the acquisition of the right to manage, they are part of the same process and the same statutory scheme. The purpose NIP is to invite the recipient to participate, but equally, the claim notice is not just to provide information, but it is also the "trigger" for any counter-notice.

97. In *Hawtrey v Beaufront Ltd* it was said that a limited company must act through agents and if the notice had been addressed to the company, it would still have had to be delivered to an agent or sent to the registered office of the company, where it would have been dealt with by an agent. Here, if the notice had been correctly addressed, it would still have been sent to Mr. Philips (and sent to him as a result of him being the personal representative of Mr. Farkas, to whom the notice was addressed and it clearly related to Mr. Farkas's flat, the interest in which have devolved to Mr. Philips as he was the personal representative). Citing the rule that in a case of ambiguity, the court will favour the reading of a document in such a way to give it validity, Croom-Johnson J said that he ought to construe the notice as a notice to terminate the tenancy of the limited company under the agreement. In a similar way, we construe the NIP as a notice inviting Mr. Philips to participate in the RTM.

98. In *OG Thomas* the Court of Appeal did consider whether a notice had been "given to the tenant" where it was addressed to the wrong tenant (the lease had been assigned). It was held that the notice could not be treated as referring to a company of which the landlord knew nothing and the reasonable recipient would not have understood the notice as referring to the company. The situation in the instant case is different as the Tribunal finds that the reasonable recipient would have understood the NIP to refer to Mr. Philips (particularly where Mr. Philips was emailed with the notice – p.291).

99. At para. 36 of *OG Thomas*, Lewison LJ referred to the case of *R (Morris) v London Rent Assessment Committee* [2002] EWCA Civ 276 and that in that case, it was not difficult to understand why Mr. Fry, receiving an envelope addressed to Mr. Barnby would not think it was meant for him. In the instant case, Mr. Philips, receiving a notice addressed to Mr. Farkas, for whom he was the personal representative, would have understood it was meant for him. In para. 47, LJ Lewison states that a "notice addressed to A and received by A cannot be regarded as being a notice given to B, even if A knows that B would have been the correct recipient of it". This situation is slightly different in that the notice was addressed to A but received by B.

100. In *Townsends Carriers Ltd v Pfizer Ltd*, what was said at the bottom of p.365 was *obiter* (in *R (Younsam) v Parole Board* [2019] EWCA Civ 229, [21] cited Cross & Harris, Precedent in English Law (4th ed) that: "The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him…"). It is also noted that Megarry V-C prefaced his comments by saying that he did not propose to explore it at any length, but he did go on to say:

"… If the notice was addressed to the wrong person but was nevertheless delivered to the right person, the question would be whether the misaddressing prevented the notice from being 'given' to the right person. The purpose of a notice is, of course, to convey information; and if the notice, despite it being mis-addressed, suffices to convey the requisite information to the right person, I would have thought that it would satisfy the terms of the lease:

101. The instant case is not concerned with a notice under a lease, but it was to convey information (which included the right to participate). The Tribunal finds that the notice did convey that information to Mr. Philips. The notice was therefore given to Mr. Philips and s.78(1) 2002 Act was therefore complied with.

Name: Judge McKeown **Date: 29 September 2025**

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber)