Case reference: UKSC/2025/0170

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL

BETWEEN:

AVON FREEHOLDS LTD

Respondent

-and-

CRESTA COURT E RTM CO LTD

Appellant

APPELLANT'S WRITTEN CASE

Introduction

1. The statutory procedure for the acquisition of the right to manage was intended to be "as simple as possible to reduce the potential for challenge by an obstructive landlord" (see *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd* [2024] UKSC 27; [2025] A.C. 1075 ("*A1 Properties*"), para. 25[1]). However, since it came into force, RTM companies have frequently erred in complying with the procedure. As the Deputy President of the Upper Tribunal observed in *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC); [2016] L. & T.R. 23, at para. 25:

   "Small and apparently insignificant defects in notices, or failures of strict compliance, are relied on again and again by landlords seeking to stave off claims to acquire the right to manage and to avoid the resulting losses of control and of other benefits."

2. This case is another example. It raises the difficult question which the Supreme Court left unanswered in *A1 Properties*, para. 69. Can a landlord rely on a RTM company's failure to serve a notice of invitation to participate ("NIP") on a qualifying tenant to

[1] Citing the *Commonhold and Leasehold Reform, Draft Bill and Consultation Paper* (Cm 4843), Part II, Section 3, Chapter 1, para. 10.

defeat a right to manage claim, notwithstanding that the tenant herself supports the claim and takes no issue with the failure to serve notice upon her?

3. The Appellant's position is that the answer is no. It is for the tenant to uphold or waive her rights and an obstructive landlord cannot hijack them for its own purposes in circumstances where the procedural failure has caused it no prejudice. As such, the Upper Tribunal correctly answered the question in the Appellant's favour.

4. The answer to the question has implications far beyond the outcome of this case. A failure to serve NIPs on qualifying tenants is a regularly encountered procedural error in RTM claims. The success or failure of many future claims will depend upon the decision in this case.

5. The Court's attention is drawn to para. 79 below, as required by Practice Direction 5, para. 5.12.

6. The remainder of this written case is structured as follows:

   (1) Part 1 contains an overview of the right to manage legislation.

   (2) Part 2 considers authorities on the correct approach to ascertaining Parliament's intention as to the consequences of non-compliance with a statutory procedure.

   (3) Part 3 sets out the Appellant's submissions on the appeal.

Part 1: An overview of the statutory procedure

7. The genesis of the right to manage and its overall purpose are summarised in *A1 Properties*, paras 22-25. The right to manage is entirely a creature of statute. The statutory scheme came into force on 30.09.2003 and is set out in Ch. 1 of Part 2 to the Commonhold and Leasehold Reform Act 2002 ("CLRA 2002"). Sections 71-90 make provision relating to acquisition of the right to manage. Sections 91 to 94 make provision for the transfer to the RTM company of existing management contracts. Sections 96 to 103 apply where the right to manage premises has been acquired by a RTM company. Section 104 is omitted. Sections 105-111 address various miscellaneous matters. Sections 112 and 113 contain definitions and an index of defined

expressions respectively. All references to section numbers in this written case are to sections of CLRA 2002, unless otherwise stated.

8. The provisions relating to acquisition of the right to manage can conveniently be categorised as eligibility criteria and procedural requirements[2].

9. To be eligible to acquire the right to manage:

   (1) the premises must consist of a self-contained building or self-contained part of a building: s. 72(1)(a);

   (2) the premises must contain at least two flats held by qualifying tenants: s. 72(1)(b);

   (3) the total number of flats held by qualifying tenants must be not less than two-thirds of the total number of flats contained in the premises: s. 72(1)(c);

   (4) the premises must not be excluded from the right to manage by Schedule 6 (exclusions include premises where the non-residential parts exceed 50%[3] of the internal floor area, and premises with a resident landlord and less than four units);

   (5) the RTM company must satisfy the conditions in s. 73 (these include that it is a company limited by guarantee, it is not a commonhold association, and there is no pre-existing RTM company in relation to all or part of the premises); and

   (6) the RTM company must have a sufficient number of qualifying tenants as members (usually the qualifying tenants of at least half of the flats in the premises): s. 79(3)-(5).

10. The key procedural requirements are as follows:

   (1) section 78(1) requires the RTM company to serve NIPs on any qualifying tenant who, at the time when the notice is given—

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

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[2] See the Explanatory Notes to CLRA 2002, note 3.
[3] When CLRA 2002 was originally enacted, the non-residential limit was 25%. The Act was amended and the limit increased to 50% with effect from 03.03.2025 by the Leasehold and Freehold Reform Act 2024, s. 49.

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

(2) section 79(6) requires a claim notice to be given to landlords and other stakeholders;

(3) if the RTM company is unable to find, or ascertain the identity of, any of the persons to whom the claim notice should be given, it may apply to the appropriate tribunal for an order that it is to acquire the right to manage (s. 85(1)-(2));

(4) section 79(8) requires a copy of the claim notice to be given to all qualifying tenants (whether or not they are members of the RTM company) [4] and any manager appointed under Part II of the Landlord and Tenant Act 1987;

(5) section 84(1) enables a recipient of a claim notice (but not a recipient of a copy claim notice) to serve a counter-notice, which must either (a) admit that on the date the claim notice was given the RTM company is entitled to acquire the right to manage or (b) allege that the RTM company was not so entitled;

(6) where the RTM company has been given one or more counter-notices containing a statement alleging that it was not entitled to acquire the right to manage, it may apply to the appropriate tribunal for a determination that it was so entitled: s. 84(3).

11. All references to the "appropriate tribunal" are, in relation to premises in England, the First-tier Tribunal ("FTT") (or in certain instances, the Upper Tribunal) and, in relation to premises in Wales, the Leasehold Valuation Tribunal ("LVT"): s. 112(1).

Qualifying tenants

12. Qualifying tenants are entitled to become members of the RTM company and, if they have not agreed to become a member, to receive a NIP. Section 75(2) defines a "qualifying tenant". Subject to exceptions, a person is a qualifying tenant if he or she is a tenant of a flat under a "long lease".

[4] Where a manager has been appointed under Part 2 of the Landlord and Tenant Act 1987 in relation to the premises, a copy of the claim notice must also be given to the Court or Tribunal which appointed the manager: s. 79(9).

13. Sections 76-77 specify what is a "long lease" for these purposes. These include a lease if:

(1) it is granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by or to the tenant, by re-entry or forfeiture or otherwise (s. 76(2)(a));

(2) it is for a term fixed by law under a grant with a covenant or obligation for perpetual renewal (but is not a lease by sub-demise from one which is not a long lease) [5] (s. 76(2)(b))

(3) it takes effect under s. 149(6) of the Law of Property Act 1925 [6] (s. 76(2)(c));

(4) it was granted in pursuance of the right to buy conferred by Part 5 of the Housing Act 1985 or in pursuance of the right to acquire on rent to mortgage terms conferred by that Part of that Act (s. 76(2)(d));

(5) it is a shared ownership lease, whether granted in pursuance of that Part of that Act or otherwise, where the tenant's total share is 100% (s. 76(2)(e));

(6) it was granted in pursuance of that Part of that Act as it has effect by virtue of s. 17 of the Housing Act 1996 (the right to acquire) (s. 76(2)(f))

(7) it arises by express grant or implication of law on the coming to an end of a long lease, irrespective of its terms (s. 77(2));

(8) it was granted for a term of years certain not exceeding 21 years, but with a covenant or obligation for renewal without payment of a premium (but not for perpetual renewal), and renewed on one or more occasions so as to bring to more than 21 years the total of the terms granted (s. 77(3)).

14. Section 112(1) provides that, where the context permits, the term "lease" includes (a) a sub-lease or sub-tenancy, and (b) an agreement for a lease or tenancy (or for a sub-lease

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[5] Such a lease will take effect as a demise for a term of 2,000 thousand years or in the case of a sub-demise for a term less in duration by one day than the term out of which it is derived by virtue of s. 145 and Schedule 15, para. 5(1) of the Law of Property Act 1922.

[6] Section 149(6) provides that leases for life or lives as well as a number of determinable leases take effect as leases for 90 years.

or sub-tenancy). In the present proceedings, the Court of Appeal held that Ms O'Connor's tenancy was a long lease notwithstanding that it had not yet been registered and therefore took effect only in equity[7].

15. No flat may have more than one qualifying tenant: s. 75(5). Where a flat is being let under two or more long leases, a tenant under any of those leases which is superior to that held by another is not the qualifying tenant of the flat: s. 75(6).

16. As addressed in more detail below, many "long leases" as defined do not appear on the register kept by H.M. Land Registry. It may therefore be extremely difficult, and in some cases impossible, for a RTM company to ascertain their existence. In such cases, a RTM company may fail to serve a required NIP on a qualifying tenant. This can provide fertile ground for an obstructive landlord to seek to delay, or frustrate, the acquisition of the right to manage.

17. The difficulties faced by RTM companies in identifying all qualifying tenants is relevant to consideration of whether Parliament intended a failure to serve a NIP on such a tenant to invalidate a right to manage claim. This is addressed further below.

The RTM company

18. The RTM company must be a private company limited by guarantee and have as its object, or one of its objects, the acquisition and exercise of the right to manage the premises: s. 73(2). The content and form of its articles of association are prescribed by the RTM Companies (Model Articles) (England) Regulations 2009, reg. 2(1); Sch., for premises in England, and the RTM Companies (Model Articles) (Wales) Regulations 2011, reg. 2; Sch. 1 and 2, for premises in Wales.

Membership of the RTM company

19. Prior to acquisition of the right to manage, only qualifying tenants are entitled to become members of a RTM company (s. 74(1)). If a qualifying tenant wishes to become a member, they must deliver to the RTM company an application for membership,

[7] Due to the Land Registration Act 2002, s. 27(1)).

which may be in such form as the directors may approve[8]. After acquisition, landlords may also become members of the RTM company (s. 74(1)(b)).

Notices of invitation to participate (NIPs)

20. Before making its claim, the RTM company must serve NIPs on any qualifying tenant who neither is, nor has agreed to become, a member of the company: s. 78(1). Since members will have agreed to become members, the required recipients may be more simply stated as qualifying tenants who have not agreed to become members.

21. The RTM company must use a prescribed form of NIP[9], which must contain prescribed information[10]. Among other matters, it must inform the recipient that the RTM company intends to acquire the right to manage the premises, state the names of the members of the company, and invite the recipient to become a member (s. 78(2)(a)-(c)).

22. The purpose of requiring a NIP to be served on a qualifying tenant who has not agreed to become a member of the RTM company is to ensure that every qualifying tenant has the opportunity to participate in the RTM company and is informed that it intends to claim the right to manage; it is therefore to ensure that the interests of that tenant are protected (*Sinclair Gardens Investments (Kensington) Ltd v Oak Investments RTM Co Ltd* [2005] RVR 426, para. 10; cited in *Avon Freeholds Ltd v Regent Court RTM Co Ltd* [2013] UKUT 0213 (LC); [2013] L&TR 23, para. 32).

23. However, as the Law Commission has observed: "… case law indicates that the notice inviting participation has largely been used as a vehicle for landlords' objections rather than as a means of empowering leaseholders to join the RTM company" (Law Commission Consultation Paper 243: Leasehold home ownership: exercising the right to manage (January 2019) ("Law Comm 243"), para. 6.21). Due to its exploitation by obstructive landlords, the Law Commission has recommended that requirement to serve

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[8] Article 26(1) of the articles of association.

[9] CLRA 2002, s. 78(3); the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010, reg. 8(1); Sch. 1; the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011, reg. 8(1); Sch. 1.

[10] CLRA 2002, s. 78(2)(a)-(d); the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010, reg. 3; the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011, reg. 3.

NIPs be abolished (Law Commission Report 393 (June 2020) ("Law Comm 393"), paras 8.19 and 8.25).

Claim notice

24. The claim to acquire the right to manage is made by giving a claim notice to landlords of all or part of the premises and other stakeholders, in accordance with s. 79. The RTM company must use a prescribed form of claim notice[11], which must contain prescribed information[12].

25. The claim notice must:

    (1) specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which the right to manage applies (s. 80(2));

    (2) state the full name of each qualifying tenant who is a member of the RTM company, the address of his flat, and particulars of his lease (s. 80(3)-(4));

    (3) state the name and registered office of the RTM company (s. 80(5));

    (4) specify a date, not earlier than one month after giving the claim notice, by which the recipient may give a counter-notice (s. 80(6));

    (5) specify a date, at least three months after the date for giving a counter-notice, on which the RTM company intends to acquire the right to manage (s. 80(7));

    (6) contain various statements and notes providing information about the statutory scheme to the recipient (s. 80(8); the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010, reg. 4; Sch. 2).

26. The purpose of the claim notice is to demonstrate that the qualifying conditions for acquisition of the right to manage have been met (see the Commonhold and Leasehold Reform, Draft Bill and Consultation Paper (CM 4843) ("the Consultation Paper"), Part

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[11] CLRA 2002, s. 80(9); the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010, reg. 8(2); Sch. 2; the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011, reg. 8(2); Sch. 2.

[12] CLRA 2002, s. 80(1)-(8); the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010, reg. 4; the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011, reg. 4.

II, Section 3, Chapter 1, para. 47, which is a legitimate guide to the purpose of the legislation: *A1 Properties*, para. 25; see also Explanatory Note 141 to CLRA 2002).

27. The claim notice therefore enables a landlord or other stakeholder to consider the validity of the claim and to (a) serve a counter-notice admitting that the RTM company is entitled to acquire the right to manage, (b) serve a counter-notice alleging that it is not so entitled, or (c) do nothing, in which case the right to manage might be acquired by default (s. 90(1)-(3)).

28. Section 79(2), at the heart of this appeal, states:

> "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."

29. As explained in the Consultation Paper, Part II, Section 3, Chapter 1, para. 46, "in order to give leaseholders a proper opportunity to consider the information set out in the invitation to participate before deciding whether to support RTM, the company would be required to wait for at least two weeks following the service of the invitation before the claim notice could be served."

Counter-notice

30. Only the recipients of a claim notice are entitled to give a counter-notice (s. 84(1)). Therefore, qualifying tenants, who receive a <u>copy</u> of the claim notice (s. 79(8)) are not entitled to give a counter-notice. Nor is a landlord who should have been, but was not, given a claim notice: *A1 Properties*, paras 81-82.

31. If a recipient of a claim notice wishes to oppose acquisition, the counter-notice must contain a statement "alleging that, by reason of a specified provision of this Chapter" the RTM company was not entitled to acquire the right to manage on the date of giving the claim notice (s. 84(2)(b)). Despite the broad words used in s. 84(2)(b), it is clear that not all breaches of the statutory provisions can be relied on by a recipient of a claim notice to oppose acquisition. In *A1 Properties*, the Supreme Court held that a recipient of a claim notice cannot rely on a RTM company's failure to give a claim notice to another required recipient (in breach of s. 79(6)) to object to acquisition (para. 92).

32. Unless at least one counter-notice is served objecting to acquisition, the right to manage will be acquired on the date specified in the claim notice without any need for approval by the appropriate tribunal (referred to hereafter as "deemed acquisition") : s. 90(2)-(3); *A1 Properties*, para. 71. A potential benefit to an obstructive landlord of serving a counter-notice (even if it relies on baseless, speculative, or tenuous, grounds of opposition) is that the acquisition date will be delayed from the date specified in the claim notice (s. 90(2)) until three months after the tribunal's determination becomes final (s. 90(4)).

Application to the appropriate tribunal

33. The tribunal is a statutory body. So far as relevant for present purposes, its jurisdiction can only be invoked by an application to it under s. 84(3) (upon receipt of a counter-notice objecting to acquisition) or under s. 85(2) (if no required recipients of a claim notice can be traced): *A1 Properties*, para. 82.

34. A person with a valid basis to object to acquisition, and who should have received a claim notice but did not (and was therefore deprived of the right to serve a counter-notice) is not deprived of a remedy. If the tribunal determines that the right to manage has been acquired, that person may apply to the High Court for judicial review of the tribunal's decision and a declaration; alternatively, if there was deemed acquisition of the right to manage, he may apply to the High Court for a declaration of rights: *A1 Properties*, para. 88.

Acquisition of the right to manage

35. The right to manage is only acquired in four sets of circumstances:

(1) Where there is no dispute about entitlement (i.e., where no counter-notice is given, or where any counter-notice given admits that the RTM company was entitled to acquire the right to manage (s. 90(1)-(3)));

(2) where the RTM company is given one or more counter-notices alleging that it is not entitled to acquire the right to manage and all persons who gave such a counter-notice agree in writing that the company was so entitled (s. 84(5)(b));

(3) where the RTM company is given one or more counter-notices alleging that it is not entitled to acquire the right to manage and, on an application the tribunal under s. 84(3), it is finally determined that it was so entitled (s. 84(5)(a)); or

(4) where an order is made by the appropriate tribunal under s. 85 (landlords, etc., untraceable).

36. In the first two of the above sets of circumstances, the right to manage will be acquired without recourse to the tribunal. Importantly, the scheme enables the right to manage to be acquired even in circumstances where the qualifying criteria are not satisfied. As explained by the Supreme Court in *A1 Properties*, para. 80, a landlord recipient of a claim notice may be "bought off" by a RTM company and agree to acquisition notwithstanding that there is a legitimate objection to the validity of the claim. As such, the reasoning of the Upper Tribunal in *Albion Residential Ltd v Albion Riverside Residents RTM Company Ltd* [2014] UKUT 6 (LC), paras 43-44, may be doubted.

37. The acquisition date for each of the sets of circumstances set out in para. 35 above is:

(1) on the acquisition date stated in the claim notice (s.90(2));

(2) three months after the day on which the last person gives their written agreement (s. 90(5));

(3) three months after the tribunal's determination becomes final (s. 90(4)); or

(4) subject to any appeal, the date specified in the order (s. 90(6)).

The effect of acquisition of the right to manage

38. The key effect of the acquisition of the right to manage is that management functions which a landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company: s. 96(2). "Management functions" are "functions with respect to services, repairs, maintenance, improvements, insurance and management": s. 96(5).

39. Following acquisition, no landlord or other stakeholder is entitled to do anything which the RTM company is entitled or empowered to do under s. 96, except with the agreement of the RTM company: s. 97(2).

40. The RTM company also gains functions relating to approvals under leases of flats in the premises (ss. 98-99) and the ability to enforce certain tenant covenants alongside the landlord or other covenantee (s. 100). Under s. 102 and Sch. 7, various statutory functions become functions of the RTM company.

Claim notice ceasing to have effect

41. The statutory scheme provides for various sets of circumstances in which a claim notice will be withdrawn or otherwise cease to have effect prior to acquisition of the right to manage, some of which are within the RTM company's control and some of which are not:

(1) at any time, the RTM company may withdraw the claim notice by giving notice of withdrawal to landlords, other stakeholders, and qualifying tenants: s. 86;

(2) if the RTM company is given at least one counter-notice objecting to acquisition and it does not make an application to the tribunal under s. 84(3) within two months of receipt of the last counter-notice to be received by it: s. 87(1)(a);

(3) if a RTM company withdraws an application that it has made to the tribunal under s. 84(3): s. 87(1)(b);

(4) if, on an application under s. 84(3) it is finally determined that the RTM company is not entitled to acquire the right to manage: s. 84(6); and

(5) if any of a number of things happen to, or in relation to, the RTM company itself: s. 87(4) (for instance, if it is subject to a winding up order).

Costs

42. Acquisition of the right to manage can be a costly process for the tenants. The costs position has changed with effect from 03.03.2025.

The costs position prior to 03.03.2025

43. Section 88(1) provided that a RTM company was liable for reasonable costs incurred by all the persons who were entitled to receive a claim notice under s. 79(6) in consequence of a claim notice given by it. If a RTM company applied to the tribunal

under s. 84(3) for a determination that it was, on the relevant date, entitled to acquire the right to manage and its application was dismissed, its liability for costs under s. 88 would extend to any costs which such a person incurred as party to any proceedings before the tribunal: s. 88(3).

44. Subject to exceptions, each person who is or has been a member of the RTM company was also jointly and severally liable for those costs: s. 89(3).

45. There was no equivalent provision for payment of the RTM company's costs of proceedings if its application under s. 84(3) was successful. As the authors of *Service Charges and Management*, 5th Ed. (2022) note, at para. **26-13**, this is one of the few instances of "one-way costs shifting" in the law of England and Wales.

46. If the RTM company was successful, the tribunal's power to award it costs was heavily restricted. When the statutory scheme came into force, the LVT could only award costs if the stakeholder opposing acquisition had "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings": CLRA 2002, Sch. 12, para. 10(2)(b) and in any event of no more than £500: Sch. 12, para. 10(3).

47. In Wales, the costs position remains the same (although fees paid to the LVT can also be reimbursed[13]). In England, since 01.07.2013, the FTT has been able to award costs only:

    (1) for wasted costs under s. 29(4) of the Tribunals, Courts and Enforcement Act 2007;

    (2) if a person has acted unreasonably in bringing, defending or conducting proceedings; and

    (3) for reimbursement of the whole or part of any fee paid which has not been remitted by the Lord Chancellor[14].

[13] Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, reg. 9.
[14] Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, rr. 13(1)(a), 13(1)(b)(iii), 13(2).

48. The costs' position remained the same on an appeal to the Upper Tribunal[15].

49. The above costs provisions applied to this case throughout proceedings in the FTT and Upper Tribunal.

The costs position since 03.03.2025

50. The Leasehold Reform Act 2024, s. 50(4), repealed ss. 88-89 and inserted new ss. 87A-87B into CLRA 2002. The default position is now that the RTM company and its members have no liability for any costs incurred by any other person in consequence of a claim notice given by the company in relation to any premises: s. 87A(1).

    However, the tribunal has the power to order a RTM company to pay such costs if various conditions are made out: s. 87B(1). Those conditions include that there has been relevant unreasonable conduct by the RTM company: s. 87B(2).

Part 2: The consequences of a failure to follow the statutory procedure

51. In *A1 Properties*, the Supreme Court considered the effect of a failure to serve a claim notice on a required recipient in breach of s. 79(6). In doing so, it gave general guidance as to the proper approach to ascertaining the effect of procedural non-compliance.

52. In cases where a statute specifies that something should be done but fails to specify the consequences of a failure to comply, the analytical approach set out in *R. v Soneji* [2005] UKHL 49; [2006] 1 A.C. 340 should be followed to ascertain Parliament's intention as to the consequences of non-compliance: *A1 Properties*, para. 61.

53. In *Soneji*, the House of Lords rejected as unhelpful the previous distinction adopted by the courts between mandatory and directory requirements and adopted a new approach. As explained by Lord Steyn, at para. 23, "the emphasis ought to be on the consequences of noncompliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity."

54. As explained by the Supreme Court in *A1 Properties*, at para. 61:

[15] Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, r. 10; *Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd* [2014] UKUT 6 (LC) at [54]-[56].

"The point of adoption of the revised analytical framework in *Soneji* 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. … [in each case] … it is appropriate to go back to the basic principled approach as explained in *Soneji*, as applied in light of the particular statutory context and the specific facts of the case."

55. At para. 68, the Supreme Court stated:

"… the correct approach in a case where there is no express statement of the consequences of non-compliance with a statutory requirement is first to look carefully at the whole of the structure within which the requirement arises and ask what consequence of non-compliance best fits the structure as a whole."

56. In considering the effect of a failure to serve a claim notice on a required recipient, the Supreme Court said, at para. 92:

"… the focus is on the position of the party directly affected by the procedural omission. The omission does not give other persons who are not so affected (for example, other landlords who have been properly served with a claim notice) a right to object to the making of a transfer order if the party who is so affected has not sought to complain about this. There is no good reason to suppose that Parliament intended that a person which has not itself been affected by a procedural omission in relation to another should acquire, by a windfall, a power to thwart the operation of the statutory process which it would not otherwise have enjoyed."

57. The *Soneji* approach to ascertaining the consequences of non-compliance can be traced back to the legal analysis of Lord Hailsham in *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, at 189-190 (*Soneji*, para. 15). *London & Clydeside* was also considered by the Court of Appeal in *R. v Secretary of State for the Home Department, ex p Jeyeanthan* [2000] 1 W.L.R. 354. Lord Woolf M.R. observed, at 359B-C:

"Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises."

58. The *Soneji* approach applies where the statute does not expressly set out the consequences of non-compliance. In cases where a statute sets out the consequences of non-compliance, the Court/tribunal will not engage in the analysis set out in *Soneji*: *R (Trail Riders Fellowship) v Dorset County Council* [2015] UKSC 18; [2015] 1 WLR 1406 , para. 99. The starting point is to ascertain whether the statute expressly states a consequence of non-compliance and, if so, what exactly is the nature of that consequence. If it does not set out a consequence, the court/tribunal will engage in the *Soneji* analysis.

The effect of a failure to serve a NIP on a qualifying tenant

59. Applications before the tribunals show that a failure to serve a NIP on one or more recipients is a commonly occurring procedural error, which landlords seeking to avoid acquisition of the right to manage regularly attempt to exploit. A schedule of examples of such cases decided by the Upper Tribunal and the FTT is appended to this written case. Until this case, the Court of Appeal and the Supreme Court have not addressed the consequences of a failure to comply with s. 78(1). However, the Upper Tribunal (and the Lands Tribunal before it[16]) have considered the issue on numerous occasions (including the Upper Tribunal decision in this case).

60. In *Sinclair Gardens Investments (Kensington) Ltd v Oak Investments RTM Co Ltd* [2005] RVR 426, the President of the Lands Tribunal rejected a landlord's argument that a failure to serve a NIP on one of two joint tenants, who together constituted one of the two qualifying tenants in the premises invalidated the claim notice. He held that, in determining the effect of a failure to comply with s. 78(1), the principle question for

[16] The Upper Tribunal (Lands Chamber) replaced the Lands Tribunal on 01.06.2009.

the tribunal would be whether the qualifying tenant has in practice such awareness of the statutory procedure as the statute intended him to have (para. 10). Since the omission was inadvertent, the tenant had been fully aware of the proceedings, and there was no prejudice to the landlord, the LVT's determination that the RTM company was entitled to acquire the right to manage was upheld (para. 10).

61. In *Avon Freeholds Ltd v Regent Court RTM Co Ltd* [2013] UKUT 0213 (LC); [2013] L&TR 23, the President of the Upper Tribunal had to consider a failure to serve a single qualifying tenant with a NIP in a building in which there were 41 qualifying tenants. Having considered various authorities, including *Soneji* and *Sinclair Gardens*, he concluded that the right approach was "to consider whether the statutory provisions have been substantially complied with, and whether such prejudice has been caused as to undermine the right to manage process as a whole" (para. 39). At para. 47, he added that the correct approach was:

"… to ascertain—so far as one can—the true effects of the failure to give notice in accordance with the statutory provisions on all those affected by that failure. … each case will turn on its own particular facts."

62. He concluded that, on the facts, the LVT had been reasonable to conclude that there had been no substantial and lasting prejudice to the omitted tenant. As such, "Parliament cannot have intended that in circumstances such as these the whole of the right to manage process will be defeated by the RTM company failing to comply fully with the provisions for giving notice of invitation to participate."

63. In *Assethold Ltd v 7 Sunny Gardens Road RTM Company Ltd* [2013] UKUT 509 (LC), in approaching the issue of the consequences of non-compliance with s. 78(1), the Deputy President of the Upper Tribunal followed the above two decisions (paras 36-37). However, the following month, in *Assethold Ltd v 13-24 Romside Place RTM Co Ltd* [2013] UKUT 603 (LC), a different Judge of the Upper Tribunal held that s. 79(2) invalidated a claim notice due to a failure to serve a valid NIP (para. 15) (although it appears that none of the above authorities were cited to the Judge).

64. In *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC); [2016] L. & T.R. 23, the Deputy President of the Upper Tribunal took a different approach to the issue to that which he had taken in *7 Sunny Gardens*. A landlord objected to acquisition on

the basis that the purported NIPs given to qualifying tenants failed to include the notes in the prescribed form. The Deputy President concluded that the documents given to the tenants were therefore not NIPs compliant with s. 78(1) (para. 47).

65. He further held that, as a result, the claim had to be dismissed. He concluded that s. 79(2) was an express provision identifying the consequences of a failure to comply with s. 78(1); the consequence being that the RTM company was prohibited from serving a claim notice (paras 40 and 47). He rejected the approach of *Sinclair Gardens* that anything less than full compliance with s. 78 could be sufficient (para. 40).

66. In *Avon Ground Rents Ltd v Canary Gateway (Block A) RTM Co Ltd* [2020] UKUT 358 (LC), the President of the Upper Tribunal considered the effect of a failure to serve a NIP on a social landlord which was found to be a qualifying tenant of 56 flats under two headleases. He decided to follow the decision of the Deputy President in *Triplerose*, but provided his own analysis of the position.

67. He identified the purpose of s. 79(2) as "… either to specify the consequence of non-compliance with s. 78, or to specify the time that must elapse before a claim notice may be given, or both" (para. 83). Which of these was correct, was an issue of interpretation that required "the context and implications of the provision to be taken into account in construing it." (para. 83). He went on to say that (para. 84):

"It is therefore material to consider, as part of the exercise of statutory interpretation, the objective importance to the statutory scheme of notices of invitation to participate being given to every qualifying tenant; the relative ease or difficulty of compliance; the risk of non-receipt in any event, and the likely consequences of invalidity resulting from noncompliance. The reason for that is that if such notices were unimportant, full compliance would be difficult to achieve, or would have no effect anyway, and failure to comply could prejudice the substantive rights of the RTM company, there would be real reason to doubt that Parliament meant to specify that a valid claim notice required the prior service on each and every qualifying tenant of a notice of invitation to participate."

68. As part of his analysis of the above considerations, the President concluded that it "is … very easy for the RTM company to serve each qualifying tenant and to identify them. Since, in virtually all cases, the qualifying tenants will be long lessees, their interests

will be identifiable at the Land Registry." (para. 87). After considering all the factors that he had identified, he concluded that "Parliament did intend failure to give s.78 notices as required to invalidate a claim notice and that s.79(2) should not be interpreted as merely a stipulation as to when a claim notice may be served" (para. 90).

69. In *Baron Estate Management Ltd v Wick Hall (Hove) RTM Co Ltd* [2023] UKUT 62 (LC), the Deputy President of the Upper Tribunal took the view that the issue was now settled at its level by the decision in *Canary Gateway* (para. 25).

70. In the present case, Judge Cooke declined to follow *Canary Gateway* (para. 130) on the basis of her analysis of the Supreme Court's judgment in *A1 Properties*. She held that a claim notice served in breach of s. 79(2) was voidable at the instance of the qualifying tenant who had not been served with a NIP but that a landlord could not rely on the procedural failure to defeat a claim if the tenant took no objection (para. 139). Her full reasons are at paras 124-144 of her decision and are summarised at para. 27 of the Statement of Facts and Issues.

71. With the current decision of the Court of Appeal on this issue, the pendulum has swung from favouring RTM companies, to landlords, to RTM companies, and back again. The Supreme Court must now provide the definitive answer to the difficult question.

The effect of a failure to serve a claim notice on a landlord or other stakeholder

72. The effect of a failure to serve a claim notice in breach of s. 79(6) has been authoritatively decided by the Supreme Court in *A1 Properties*. The statute does not state the consequences of such a failure. Applying the *Soneji* approach, the Supreme Court concluded (para. 87) that:

"… the simplest way to provide a legal formula to give effect to Parliament's intention as to the consequences of the failure to give a claim notice to a visible landlord or other stakeholder under section 79(6) … is that the failure renders the transfer of the right to manage voidable, at the instance of the relevant landlord or other stakeholder who was entitled to, but not given, a claim notice, but not void. It is voidable unless, or until, the tribunal approves the transfer scheme, as the outcome of the resolution of the dispute as to entitlement caused by a counter-notice by a person actually given a claim notice, or as the result of an application by the RTM company under section 85."

73. The Supreme Court made two further points of relevance for present purposes:

"… a consequence that the scheme is only rendered voidable is that the person with the right to seek avoidance can disclaim or otherwise abandon that right" (para. 88); and

"… in evaluating whether a procedural failure under the regime has the effect of invalidating the process … the focus is on the position of the party directly affected by the procedural omission. The omission does not give other persons who are not so affected (for example, other landlords who have been properly served with a claim notice) a right to object to the making of a transfer order if the party who is so affected has not sought to complain about this. There is no good reason to suppose that Parliament intended that a person which has not itself been affected by a procedural omission in relation to another should acquire, by a windfall, a power to thwart the operation of the statutory process which it would not otherwise have enjoyed." (paras 91-92).

The effect of a failure to serve copy claim notice on qualifying tenants

74. In *Alleyn Court RTM Co Ltd v Abou-Hamdan* [2012] UKUT 74 (LC), paras 47-48, the Upper Tribunal held that a failure to serve a copy of the claim notice upon a qualifying tenant in breach of s. 79(8) did not render the claim notice invalid. The Upper Tribunal took the same view, in obiter comments, in *Assethold Ltd v 110 Boulevard RTM Co Ltd* [2017] UKUT 316 (LC); [2017] 4 W.L.R. 181, para. 25.

The effect of a failure to serve notice of withdrawal on qualifying tenants

75. In *Spire House RTM Co Ltd v Eastern Pyramid Group Corpn SA* [2021] EWCA Civ 1658; [2022] 1 W.L.R. 503, the Court of Appeal held that a notice of withdrawal served on a landlord was not rendered invalid by the RTM company's failure to serve the notice on qualifying tenants in breach of s. 86(2)(d) (paras 4-5; 41-52).

<u>Part 3: Appellant's submissions on the appeal</u>

76. The Respondent's success in the Court of Appeal relies on the starting point that s. 79(2) states the consequence of a RTM company's failure to comply with s. 78(1). Further, that the consequence is that the claim notice is a nullity (Court of Appeal judgment, para. 74). For these purposes, the Respondent relied on the first four

sentences of para. 69 of the Supreme Court's judgment in *A1 Properties*, which it argued were part of the ratio of the decision. The Court of Appeal appears to have agreed that those four sentences were part of the ratio (see paras 75 and 85).

77. The ratio of a previous decision has been held to constitute "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": *R. (Youngsam) v Parole Board* [2019] EWCA Civ 229; [2020] QB 387, at paras 21-22 and 39 (per Nichola Davies and Haddon-Cave LLJ), adopting the statement of Professor Cross in *Cross & Harris, Precedent in English Law*, 4th Ed. (1991), p. 72. However, see also the more detailed analysis undertaken by Leggatt LJ, as he then was (paras 48-59).

78. The Appellant submits that, as the Upper Tribunal correctly concluded (paras 95-96; 114), the whole of para. 69 of *A1 Properties* is obiter dicta. The Supreme Court's task in that case was to construe s. 79(6) relating to the service of a claim notice and ascertain Parliament's intention as to the consequences of non-compliance with that section. It was not required to construe s. 78(1) or s. 79(2) or the consequences of failure to serve a NIP on a qualifying tenant, nor did it hear any argument on the topic. Its observations on s. 79(2) were not a necessary step in its reasoning.

79. **The Appellant invites the Supreme Court to depart from its reasoning in *A1 Properties*, para. 69, and hold that s. 79(2) does not state the consequence of a failure to comply with s. 78(1). Even if that part of its reasoning was ratio, it was not the subject of argument and, given the short period of time since it was made, it is unlikely to have affected many right to manage claims.**

80. Alternatively, if s. 79(2) does state a consequence of non-compliance, the Appellant invites the Supreme Court to conclude that the consequence so stated does not include the "further consequence that, if a document purporting to be a claim notice is nonetheless given to another stakeholder, such as a landlord, the landlord could rely upon the failure to give a participation notice to a qualifying tenant in order to object to the validity of the purported transfer of the right to manage which followed, even though that tenant might not in fact have any objection to the scheme which is being promoted which they wish to maintain" (*A1 Properties*, para. 69).

81. In summary, the Appellant's reasons for inviting the Supreme Court to depart from its previous statement as to the effect of s. 79(2) are as follows:

(1) detailed consideration of the statutory scheme demonstrates that Parliament did not intend that non-compliance with s. 78(1) should be a valid ground of opposition by a landlord or other stakeholder;

(2) there is no reason to suppose Parliament would intend a failure to serve a NIP as having such extreme consequences when a failure to serve a claim notice would not;

(3) if s. 79(2) is interpreted as specifying the consequence of a failure to serve a NIP, with the result that the claim notice is a nullity (as held by the Court of Appeal at para. 74), it would render the statutory scheme unworkable;

(4) s. 79(2) should be interpreted as instead specifying the time that must elapse before a claim notice may be given;

(5) to the extent necessary, the Supreme Court may adopt a strained construction of s. 79(2) to avoid the unreasonable consequences that follow from the Court of Appeal's construction.

Parliament did not intend non-compliance with s. 78(1) to be a ground of opposition

82. The purpose of a claim notice is to enable the recipient to ascertain whether the qualifying criteria for acquisition of the right to manage are satisfied (Consultation Paper, Part II, Section 3, Chapter 1, para. 47; CLRA 2002, Explanatory Note 141). For these purposes, this must mean the eligibility criteria alone (not the procedural requirements) (see paras 8-10 above). (see also, the Consultation Paper, Part II, Section 3, Chapter 1, paras 13-21 and 52; Explanatory Note 149).

83. None of the information that the statutory scheme requires to be provided in the claim notice (s. 80; Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010, reg. 4; reg. 8(2); Sch. 2; Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011, reg. 4; reg. 8(2); Sch. 2) enables a recipient to ascertain if the RTM company has:

(1) served any NIPs on qualifying tenants, if required by s. 78(1);

(2) served any other claim notices on other stakeholders, if required by s. 79(6); and/or

(3) served copy claim notices on qualifying tenants, as required by s. 79(8).

84. If Parliament had intended non-compliance with ss. 78(1), s. 79(6) or s. 79(8) to be a valid ground for a landlord or other stakeholder to object to acquisition, the statutory scheme would have obliged the RTM company to provide them with the requisite information to ascertain whether compliance had occurred. The Supreme Court was correct to observe in *A1 Properties*, paras 71 and 90, that the grounds of opposition are "very limited".

85. Furthermore, the purpose of the requirement to serve NIPs under s. 78(1) is to benefit the qualifying tenants, not the landlords and other stakeholders who receive a claim notice. It is implausible that Parliament intended landlords and other stakeholders to be guardian angels protecting the rights of the qualifying tenants (see the observations of Lewison LJ in *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89; [2018] QB 571, para. 63, and of the Upper Tribunal in this case, para. 138).

Parliament did not intend a failure to serve a NIP as having such extreme consequences when a failure to serve a claim notice does not

86. A failure to serve a claim notice on a required recipient in breach of s. 79(6) does not invalidate the claim; it merely renders the transfer of the right to manage voidable at the instance of the omitted stakeholder: *A1 Properties*, para. 87. Further, only the omitted stakeholder may take the point: *A1 Properties*, para. 92.

87. This is despite the fact that the failure to serve a claim notice deprives the omitted stakeholder of the right to object to the claim via service of a counter-notice. That right is permanently lost. Their only recourse is to engage the inherent jurisdiction of the High Court to address their wrongful exclusion from the statutory process: *A1 Properties*, para. 88.

88. A failure to serve a NIP on a qualifying tenant does not result in any substantive loss of rights. While (assuming the tenant is not otherwise aware of the proposed claim), a failure to serve a NIP may deprive them of an opportunity to apply to join the RTM

company at an early stage, the qualifying tenant retains the right to join the company at any stage of the process (s. 74(1)(a)). In the present case, despite no service of a NIP upon her, Ms O'Connor applied to join the Appellant on 26.01.2022 more than 4½ months before the acquisition date set out in the claim notice and more than 4 weeks before the Respondent served its counter-notice.

89. There is no reason why Parliament would intend that a failure to serve a NIP on a single qualifying tenant would invalidate the process in all circumstances and yet intend that a failure to serve a claim notice on a stakeholder would not. It is also inconceivable that Parliament would intend that landlords and other stakeholders should be entitled to object to acquisition in a counter-notice based on a qualifying tenant's right to receive a NIP when the qualifying tenant themself is given no entitlement to serve a counter-notice.

90. Judge Cooke's interpretation of the statutory scheme provides an outcome which is consistent with the Supreme Court's analysis in *A1 Properties* and ascribes to Parliament a credible intention.

The Court of Appeal's construction of s. 79(2) renders the statutory scheme unworkable

91. If the Court of Appeal is correct and a claim notice served in breach of s. 79(2) is a nullity (para. 74), then the recipient(s) cannot serve a counter-notice (since only the recipient of a claim notice may serve a counter-notice: s. 84(1); *A1 Properties*, para. 80). On the Court of Appeal's analysis, it should not have been able to hear this case. If the claim notice was a nullity, the Respondent cannot have served a counter-notice. Without service of a counter-notice, the Appellant cannot have applied to the FTT under s. 84(3) for a determination that it was entitled to acquire the right to manage. These proceedings could not have come into existence. Another way of looking at the matter is that a counter-notice that alleges that the claim notice is invalid is, on its own terms, not a counter-notice.

92. Further problems arise from the Court of Appeal's analysis. The statutory scheme enables the right to manage to be acquired without recourse to the tribunal in three situations: where no counter-notice is given (s. 90(3)(a)), where the only counter-notice(s) given admit entitlement (s. 90(3)9b)), and where one or more counter-notices

are given denying entitlement but the relevant stakeholders then agree in writing that the RTM is entitled to acquire the right to manage (s. 90(5)).

93. If the claim notice is a nullity, as held by the Court of Appeal, it cannot engage the statutory scheme and the right to manage cannot be acquired. However, in some cases, no one will identify that a required recipient of a NIP has been omitted. What happens in such circumstances? So far as the tenants and stakeholders are concerned, the right to manage may have been acquired without the tribunal's involvement in one of the three ways identified above. They will order their affairs on that basis: with the RTM company performing services and receiving payment of service charges in place of the usual party(ies) under the lease(s). However, because the claim notice was a nullity, none of this has any legal validity.

94. This is markedly different from a failure to serve a claim notice on a stakeholder. Provided a claim notice has been served on at least one stakeholder (to engage the statutory machinery), the right to manage can be acquired by deemed acquisition and would be rendered voidable, not void, at the instance of the omitted stakeholder: *A1 Properties*, para. 87.

95. The Appellant invites this Court to hold that a claim notice is a valid claim notice provided it appears so on its face; in other words, provided that it satisfies the requirements as to form and content of a claim notice in s. 80 and the relevant Regulations (see para. 83 above). However, if a challenge to the validity of a claim notice were made, reliance on s. 81(1)-(2), the *Mannai* principle[17], and/or the principles in *Soneji* may also be possible to save it from invalidity.

96. Judge Cooke's approach: that a claim notice valid on its face but served in breach of s. 79(2) is voidable at the instance of the omitted qualifying tenant is the correct solution. As Lord Millet said in *R (Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209 (HL); [2003] UKHL 20, at para. 116:

[17] The reasonable recipient test, as explained in *Mannai Investments v Eagle Star Life* [1997] UKHL 19; [1997] AC 749.

"The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless."

Section 79(2) should be interpreted as specifying the time that must elapse before a claim notice may be given

97. Section 79(2) states that the claim notice "may not be given unless each person required to be given a … [NIP] has been given such a notice at least 14 days before". Since the purpose of this provision is to give qualifying tenants a proper opportunity to consider the information set out in the NIP before deciding whether to support the claim (Consultation Paper, Part II, Section 3, Chapter 1, para. 46), it is legitimate to interpret s. 79(2) as merely specifying the time that must elapse before a claim notice is given and not to specify a consequence of a failure to serve a NIP (see *Canary Gateway*, para. 83).

98. It may also be observed that s. 79(2) does not in terms state that a claim notice served in breach of its provisions is "invalid" or "of no effect". Compare the references to a tenant's notice claiming the right to acquire a new lease under s. 42 of the Leasehold Reform, Housing and Urban Development Act 1993 ("LRHUDA 1993") being "of no effect" if given in specified circumstances: LRHUDA 1993, s. 55(1) and Sch. 12, paras 1, 2(1) and 3(1); see also s. 4B(8), as inserted by CLRA 2002, s. 122, and ss. 30(1) and 31(1). See also the Landlord and Tenant Act 1954, ss. 4(2), 25(6)-(8) and 26(3); CLRA 2002, ss. 20(5), 21(3), 22(2), 28(2) and 74(5). Parliament's failure to say a thing in terms may be taken into account in construing legislation: *R (Forge Care Homes Ltd) v Cardiff and Vale University Health Board* [2017] UKSC 56; [2018] 1 All E.R. 449, at paras 36-37.

99. The Appellant's suggested interpretation of s. 79(2) is supported by the difficulty with obtaining absolute compliance with s. 78(1) in all cases. To comply, a RTM company must identify all the qualifying tenants in the premises. RTM companies can face particular difficulties identifying qualifying tenants in the following circumstances (in none of which the tenant will be identifiable on a search at the Land Registry):

(1) where a former qualifying tenant has died and their tenancy vests in their personal representatives or the Public Trustee by operation of law and without registration.

From the moment of their death, the executors or the Public Trustee, as the case may be, become the qualifying tenant: *Assethold Ltd v 7 Sunny Gardens Road RTM Company Ltd* [2013] UKUT 509 (LC), paras 28-29[18];

(2) where a qualifying tenant is made bankrupt and their tenancy vests in their trustee in bankruptcy by operation of law and without registration [19];

(3) where a corporate qualifying tenant is dissolved and the tenancy vests in the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall, as the case may be, as bona vacantia without registration[20];

(4) where, as here, the qualifying tenant has an equitable tenancy pending registration and there is no legal tenant of the flat in question (the Supreme Court refused permission to appeal the Court of Appeal's decision to this effect[21]);

(5) where the qualifying tenant has a mere contract for a lease pending completion of a long lease, and there is no legal tenant of the flat in question (see the Court of Appeal's decision, para. 57);

(6) where the qualifying tenant holds a shared ownership lease with a total share of 100% and a term of less than 7 years. A shared ownership lease where the tenant's share is 100% will be a "long lease" under s. 76(2)(e) irrespective of the length of its term: *Avon Ground Rents Ltd v Canary Gateway (Block A) RTM Co Ltd* [2020] UKUT 358 (LC), para. 39. [22];

(7) where the qualifying tenant holds a lease for life[23];

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[18] Administration of Estates Act 1925, ss. 1(1) and 9(1); Land Registration Act 2002, s. 27(5)(a).
[19] Insolvency Act 1986, s. 306; Land Registration Act 2002, s. 27(5)(a). Although, if the tenancy is held jointly with another, the legal estate will not vest in the trustee.
[20] Companies Act 2006, s. 1012(1); Land Registration Act 2002, s. 27(5)(b). Although, this will not apply if the tenancy was held by the company on trust for another: Companies Act 2006, s. 1012(1).
[21] Decision of Lord Briggs, Lord Hamblen and Lord Richards made on 27.11.2025.
[22] However, it will not require registration: Land Registration Act 2002, s. 27(2)(b)(i).
[23] Such a lease will be converted to a 90-year lease by s. 149(6) of the Law of Property Act 1925 and will constitute a long lease under s. 76(2)(c); see the Upper Tribunal's decision, para. 32.

(8) where the qualifying tenant holds a long lease under s. 77(3) created by repeated renewal of a lease with a term of less than 7 years;

(9) where the qualifying tenant becomes a tenant under a subsequent tenancy (s. 77(2)) which is not registrable; and

(10) where a long lease is granted out of unregistered land (addressed by the Upper Tribunal, at paras 16, 64 and 66)[24].

100. Innocent omissions occur even in small blocks of flats (this case and *Sinclair Gardens* being examples; see also the Annex). However, problems are more likely to occur in:

(1) larger blocks, where the risk of missing a qualifying tenant increase (see for instance the LVT decision in *Metro Central Heights RTM Co Ltd v Proxima GR Properties Ltd* (LON/00BE/LRM/2012/0008), unreported, where the RTM company was presumably required to serve NIPs on the qualifying tenants of 178 flats out of 422 (para. 11) and where the landlord took the point that one NIP had not been served (para. 29)[25] and *Chelsea Bridge Wharf RTM Co Ltd v Berkeley Homes (Central London) Ltd* (LON/00BJ/LRM/2024/0018; LON/00BJ/LRM/2024/0020), unreported, where the right to manage was acquired over premises containing 1,200 flats (para. 3)); and

(2) new blocks of flats, where the first leases of flats are still being granted and/or have not yet been registered and tenants are therefore hard to identify (considered by the Upper Tribunal, paras 31 and 68; although the difficulties in identifying the qualifying tenants were not recognised);

(3) blocks with large numbers of foreign investors, who sub-let their flats on short leases (i.e. the non-resident foreign investor remains the qualifying tenant). CLRA 2002 contains no residence requirement. Consequently, flats are often sold as

[24] Such a lease will constitute a tenancy at law without registration for two months or such other period as the registrar by order permits; thereafter it will take effect "as a contract for valuable consideration to grant or create the legal estate concerned": Land Registration Act 2002, s. 4(1)(c) and (e); s. 6(1), (4) and (5); s. 7(1) and (2)(b)).

[25] In that case, the LVT determined that the RTM company was entitled to acquire the right to manage. However, following the Court of Appeal's decision in this case, that was the wrong decision.

investments (as in *A1 Properties*, where 237 flats were let on long leases to non-resident investor tenants (see pars 7-9)). The occupational tenants often have no direct contact with the investor tenant, instead dealing with a local letting agent, or even renting from an intermediate landlord which itself was not a qualifying tenant (as in *A1 Properties* (see para. 9)). Identifying the existence and identity of non-resident foreign investors may be particularly difficult for RTM companies; and

(4) cases where there is a chain of equitable tenants/sub-tenants. In such cases, the equitable sub-tenant will constitute the qualifying tenant upon whom notice must be served (s. 75(6)). The likelihood of the RTM company ascertaining that there is an equitable sub-tenancy is remote, and even more remote in larger blocks.

101. RTM companies may fail to give a NIP to a required recipient in breach of s. 78(1) while having no knowledge or the existence and/or identity of the tenant in question. Parliament intended the statutory scheme to be as simple as possible. It cannot have intended it to flounder on the basis of an innocent omission to give a NIP to an unidentified qualifying tenant. The statutory scheme would be unworkable if a RTM company were required to serve NIPs on unknown and unidentifiable individuals. The observations of the Supreme Court in *A1 Properties*, paras 97-100, are equally applicable to these circumstances as they are to the failure to serve a claim notice on a stakeholder of whom the RTM company was unaware. Further, as Millett LJ said in *Cadogan v McGirk* [1996] 4 All ER 643, 648 : "It would … be wrong to disregard the fact that, while the [Leasehold Reform, Housing and Urban Development Act 1993] may to some extent be regarded as expropriatory of the landlord's interest, nevertheless it was passed for the benefit of tenants. It is the duty of the court to construe the 1993 Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy." A similar approach should be taken to the right to manage in CLRA 2002.

102. The Court of Appeal's approach is likely to encourage speculative objections by obstructive landlords. As the Law Commission explained (Law Comm 243, para. 6.16), "landlords frequently seek to put the RTM company to proof that the notice inviting participation has been properly served." Objections based on alleged non-service of NIPs are a frequent occurrence. The non-exhaustive examples of cases

before the Upper Tribunal and the FTT in the Annex give an idea of the extent of the problem.

103. It may also be prohibitively complex and costly for RTM companies to engage in the requisite procedure to address the possibility of unregistered (but registrable) long leases and (because the Court of Appeal's reasoning requires them also to be investigated) mere contracts for leases:

(1) The RTM company would be required to engage the s. 82 procedure to make enquiry of the freeholder. The freeholder may not have this information in its possession or control. Off-plan sales are often undertaken by an independent sales agency.

(2) If the freeholder is obstructive, it may simply fail to answer. The RTM company would have to engage the s. 107 default notice procedure followed by tribunal proceedings.

(3) If an obstructive freeholder fails to comply with a tribunal order, the RTM company would have to apply to the County Court for permission to enforce under s. 176C.

(4) If and when the freeholder provides the requisite information, the RTM company would have to arrange for preparation and service of the NIPs. In blocks of 100s and 1,000s of flats, this task alone can take several days to administer. During this period of preparation, further contracts for leases could be granted before the RTM company is able to send out the notices. In such circumstances, it can never know whether it is serving all qualifying tenants on the date of service.

104. As to Supreme Court observed in *A1 Properties*, para. 98:

"The procedural requirements have not been included to create traps for the unwary, nor to afford unwarranted opportunities for obstruction on the part of objecting landlords who have not themselves been significantly affected by any particular omission to comply with them."

105. It should also not be overlooked that attempting to acquire the right to manage can be a costly process (see, for instance, Law Comm 393, para. 8.15). RTM companies may have insufficient funds to make multiple applications. To impose on a RTM company

an obligation to re-start the process if it happens to omit to serve a single NIP would tend to undermine to an unwarranted degree the ability of tenants and RTM companies to pursue the remedy Parliament intended to be available to them (see *A1 Properties*, at para. 100, addressing the position in the context of a failure to serve a claim notice).

The Court may adopt a strained construction of s. 79(2) to avoid the unreasonable consequences that follow from the Court of Appeal's construction

106. A strained construction may be given to a statute where that is necessary to avoid an unreasonable consequence which Parliament cannot have intended: *R. (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20; [2003] 4 All ER 209, para. 25; *Inland Revenue Commissioners v Hinchy* [1960] AC 748, at p. 768.

107. In deciding whether s. 79(2) was intended by Parliament to state the consequence of a failure to comply with s. 78(1) and to exclude a *Soneji* analysis of Parliament's intention, if it is necessary to do so, the Appellant invites the Supreme Court to adopt a strained construction to enable the statutory scheme to remain workable and to retain some semblance of a simple procedure. The purpose of s. 79(2) should be interpreted as being merely to specify the time that must elapse before a claim notice is given.

Consequences issue

108. If the Supreme Court accepts that, properly interpreted, s. 79(2) does not have the effect that the consequence of a failure to serve a NIP on a qualifying tenant is to invalidate the claim notice, it must be appropriate to conduct the *Soneji* analysis to ascertain what Parliament would intend to be the consequence of the failure to serve Ms O'Connor on the facts of this case.

109. If that analysis is conducted, the outcome is straightforward. Ms O'Connor was aware of the right to manage claim despite not receiving a NIP. She applied for membership of the Appellant a mere five days after the claim notice was given and around one month before the Respondent served its counter-notice. She supports the claim. Since she agreed to become a member of the Appellant, were the Appellant to start again, there would be no obligation to serve a NIP on her. The Respondent has suffered no prejudice due to the failure to serve a NIP on Ms O'Connor, which obligation was in any event for her benefit and not that of the Respondent. Parliament would not intend

the procedural breach in this case to invalidate the right to manage claim. Restarting the procedure because of a failure to comply with an obligation that no longer exists is an exercise in futility.

Ms O'Connor has waived her right

110. Judge Cooke concluded that Ms O'Connor had waived the Appellant's failure to serve a NIP on her as required by s. 78(1) (para. 145). The Appellant submits that she was correct to do so.

111. The principle of waiver derives from the Latin maxim "quilibet potest renunciare juri pro se introducto"; translated in Broom's Legal Maxims (10th Ed., p. 477) as: "anyone may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour." In accordance with this principle, a person with the benefit of a statutory right may waive that right if she thinks fit provided that the right was for her sole benefit and not for the public: see *Graham v Ingleby* 154 E.R. 277; (1848) 1 Exch. 651; the application of the principle was considered by the House of Lords in *Johnson v Morton* [1980] A.C. 37.

112. The obligation to serve a NIP on a qualifying tenant who has not agreed to become a member of the RTM company under s. 78(1) is clearly for the benefit of the tenant concerned. It is not for the benefit of the public at large. Ms O'Connor was entitled to waive that entitlement if she wished. One cannot fault the Upper Tribunal's conclusion that she had done so on the facts of this case.

113. If the Supreme Court is not with the Appellant on the arguments above as to the correct interpretation of s. 79(2), the submission that Ms O'Connor waived her rights provides an alternative, narrower, basis for allowing the appeal against the Court of Appeal's decision.

Winston Jacob

Christian Fox

Lamb Chambers
Temple
EC4Y 7AS

12 May 2026

Counsel for the Appellant (Public Access)

Annex – examples of cases before the Upper Tribunal and the FTT in which a stakeholder objected to acquisition based on an alleged failure to serve a NIP

No.	Case	Alleged breach of s. 78(1)	Outcome
		Upper Tribunal decisions	
1	*Sinclair Gardens Investments (Kensington) Ltd v Oak Investments RTM Co Ltd* [2005] RVR 426	Failure to serve NIP on one of two joint tenants, who together constituted a qualifying tenant. Other joint tenant was a member of RTM company.	RTM acquired. Since omission inadvertent, tenant fully aware of proceedings, and no prejudice to landlord, it did not invalidate the claim.
2	*Avon Freeholds Ltd v Regent Court RTM Co Ltd* [2013] UKUT 0213 (LC); [2013] L&TR 23	Failure to serve NIP on one qualifying tenant in building containing 41 qualifying tenants	RTM acquired. The LVT had been reasonable to conclude that there had been no substantial or lasting prejudice to the omitted tenant.
3	*Fairhold (Yorkshire) Ltd v Trinity Wharf (SE16) RTM Co Ltd* [2013] UKUT 502 (LC)	RTM claimed over 5 blocks. In one block, NIPs had been served on two lessees. The freehold owner alleged that they were not qualifying tenants as they held shared ownership leases and their landlord, a housing trust, was the qualifying tenant of all nine flats in the block, which had not been served with a NIP.	Remitted to FTT for redetermination.
4	*Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd* [2013] UKUT 81 (LC); [2013] L. & T.R. 16	RTM claimed over block of 15 flats. Long leases of 4 flats were granted to a housing association, which in turn granted shared ownership leases. Freeholder alleged NIPs should have been served on housing association and not shared ownership tenants	RTM not acquired. Upper Tribunal disagreed with the FTT and held that the shared ownership tenants were the qualifying tenants, who had correctly been served with NIPs. However, claim failed for other reasons.
5	*Assethold Ltd v 7 Sunny Gardens Road RTM Company Ltd* [2013] UKUT 509 (LC)	Tenants of all three flats in premises agreed to incorporate a RTM company and acquire the right to manage. One tenant died before incorporation. The freehold alleged that the failure to serve a	RTM not acquired. The RTM company was required to serve a NIP on the personal representatives. The

		NIP on the personal representatives of the deceased tenant invalidated the claim.	RTM company had failed to adduce evidence to prove that its procedural failure had caused no prejudice.
6	*Assethold Ltd v 13-24 Romside Place RTM Co Ltd* [2013] UKUT 603 (LC), [2014] L. & T.R. 6	NIPs were served which incorrectly stated the name of the previous freehold owner. The new freehold owner argued the NIPs were invalid.	RTM not acquired. The NIPs were invalid. Absent service of NIPs, no valid claim notice could be given.
7	*Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC); [2016] L. & T.R. 23	NIPs served failed to include notes in the prescribed form.	RTM not acquired. The documents were not NIPs compliant with s. 78(1). The RTM company was therefore prohibited from serving a claim notice.
8	*Avon Ground Rents Ltd v Canary Gateway (Block A) RTM Co Ltd and Canary Gateway (Block B) RTM Co Ltd* [2020] UKUT 358 (LC)	Failure to serve NIP on social landlord which found to be qualifying tenant of 56 flats under two headleases.	RTM not acquired. Failure to serve NIPs held to be fatal to claim.
9	*Baron Estate Management Ltd v Wick Hall (Hove) RTM Co Ltd* [2023] UKUT 62 (LC)	Premises consisted of 168 flats. Acquisition opposed on basis that RTM company failed to serve NIPs on qualifying tenants of two flats and served only one of two joint tenants of a third flat.	RTM not acquired. Failure to serve NIPs on qualifying tenants of two flats fatal. No decision made on third flat.
		First-tier Tribunal decisions	
10	*90 Markhouse Road RTM Co Ltd v Assethold Ltd* (LON/00BH/LRM/2022/0015)	The freeholder objected to acquisition arguing that a NIP had been served on the wrong individuals, as those joint tenants had sold their long leasehold interest to new tenants who should have been served.	RTM acquired. The registered owners at the dates of giving the NIP and the claim notice were the original tenants, who remained the registered owners on those dates.
11	*Regent Street RTM Co Ltd v Assethold Ltd*	The freeholder objected to acquisition arguing that a NIP had been served on the	RTM acquired. The registered owner at the

	(CAM/36UF/LRM/2022/0001)	wrong individual, as the tenant had sold his long leasehold interest to a new tenant who should have been served.	date of giving the NIP and the claim notice was the original tenant, who remained the registered owner on those dates.
12	*Canary Gateway Block A RTM Co Ltd & Canary Gateway Block B RTM Co Ltd v Avon Ground Rents* (LON/00BG/LRM/2021/0018)	On second applications for a determination that the RTM companies were entitled to acquire the right to manage (previous applications having been dismissed due to failure to serve NIPs), the freeholder opposed, among other grounds, on an alleged failure to serve NIPs.	RTM acquired. The FTT admitted late evidence from the RTM company which proved compliance with s. 78(1).
13	*St James' and Craven Court (London) RTM Co Ltd v SEP Properties Ltd* (LON/00BK/LRM/2021/0021)	A RTM company with one qualifying tenant as its member served NIPs on qualifying tenants of only 8 flats in a block of 28 flats. The remaining qualifying tenants became members of the RTM company before it served its claim notice. The freeholder opposed the claim arguing that the claim must fail as the RTM company had failed to serve NIPs on 17 qualifying tenants who had subsequently become members of the company.	RTM acquired. The FTT rejected the freeholder's argument on the basis that, at the date the claim notice was given, there was no longer any obligation to serve NIPs on any qualifying tenant.
14	*55 Penge Road RTM Co Ltd v Assethold Ltd* (LON/00AH/LRM/2020/0023)	The RTM company served a NIP on an owner of a flat. However, the owner had sold their long leasehold interest a few months before. The freeholder objected on the basis that no NIP had been served on the new owner.	RTM not acquired. The NIP had been served on the wrong person and the RTM company was therefore not entitled to acquire the right to manage.
15	*Lowbridge Walk (conversion) RTM Co Ltd v Claremont Bilston (Management Company) Ltd* (BIR/00CW/LRM/2023/0002)	The freeholder objected to acquisition alleging, among other matters, that the RTM company had not served NIPs on all qualifying tenants.	RTM acquired. The FTT was satisfied on the RTM company's evidence that it had served all required NIPs.
16	*46 Belsize Rd TRM Co Ltd v Assethold Ltd*	The freeholder objected to acquisition on the basis that the RTM company had failed to serve a NIP on one of three	RTM acquired. The RTM company had served the correct tenant

	(LON/00AG/LRM/2022/0014)	qualifying tenants. The RTM company had served a tenant of one flat who had sold his long leasehold interest.	with a NIP as the new owner had not yet been registered as owner.
17	*58 Mitcham Road (Croydon) RTM Co Ltd v Assethold Ltd* (LON/00AH/LRM/2019/0014)	The freeholder objected to acquisition on the basis that the qualifying tenant of one of the two flats in the premises had not been served a NIP. The tenant had agreed to become a member of the RTM company 4 days before the claim notice was given.	RTM acquired. The FTT concluded that, since the qualifying tenant had agreed to become a member of the RTM company, that dealt with the issue regarding NIPs.
18	*1-12 Romside Place (Romford) RTM Co Ltd, 13-24 Romside Place (Romford) RTM Co Ltd, 25-33 Romside Place (Romford) RTM Co Ltd v Assethold Ltd* (LON/00AR/LRM/2024/0012 LON/00AR/LRM/2024/0029 LON/00AR/LRM/2024/0030)	Among other matters, the freeholder argued that a qualifying tenant had not been given a NIP.	RTM acquired. The FTT held that the qualifying tenant had become a member before service of the claim notice and therefore did not need to receive a NIP.
19	*Wickham House RTM Co Ltd v Assethold Ltd* (CAM/22UG/LRM/2025/0002)	The RTM company served a NIP on the registered owner of a flat. The freeholder argued that the NIP had been served on the wrong person, as the owner had sold their long leasehold interest.	RTM acquired. The RTM company had served a NIP on the individual who was the registered owner at the time, which was the correct person.
20	*48 Sandylands Promenade RTM Co Ltd v Brigante Properties Ltd* (MAN/30UH/LRM/2019/0001)	A flat was registered in the names of joint tenants, one of whom had died many years earlier. The living tenant was a member of the RTM company. The RTM company did not serve a NIP on the deceased tenant or her personal representatives.	RTM acquired. The FTT sought to follow *Sinclair Gardens* and *Elim Court* and held that no prejudice had been caused by the failure to serve the deceased tenant.
21	*Hampton House Management RTM Co Ltd v RG Securities (No. 2) Ltd*	The premises contained five qualifying tenants. A NIP was served on a person whom the members of the RTM company	RTM acquired. The FTT concluded that the failure to serve the NIP

	(BIR/00GG/LRM/2019/0002)	believed was the qualifying tenant of one flat but whom they had been unable to locate. However, he had sold his flat and the new owner was registered as owner prior to serve of the NIP. The freeholder objected on the basis that no NIP had been served on the qualifying tenant of that flat.	on the qualifying tenant would have been fatal to the RTM claim except for the fact that she had waived her right to receive a NIP ex post facto.
22	*Cubix Apartments RTM Co Ltd v Avon Freeholds Ltd* (LON/00BG/LRM/2024/0605)	The premises contained 50 flats. The freeholder objected to acquisition, among other matters, on the basis that it argued the RTM company had failed to serve NIPs on three qualifying tenants.	RTM acquired. The FTT followed the Upper Tribunal decision in *Avon Freeholds Ltd v Cresta Court E RTM Co Ltd* [2024] UKUT 335 (LC). Since the omitted qualifying tenants had not objected to the failure to serve them, that failure did not invalidate the claim.
23	*Carlton Gate (Putney) RTM Co Ltd v Carlton Gate Ltd* (LON/00BJ/LRM/2023/0009)	The premises consisted of 27 flats. One flat was held by joint tenants, who together constituted the qualifying tenant. One had agreed to become a member of the RTM company. The RTM company served a NIP on the other joint tenant. The freeholder argued that the NIP should have been served on both joint tenants and the failure to do so invalidated the claim.	RTM acquired. The FTT concluded that no requirement to serve NIP on joint tenants, as one could only become a member of the RTM company with consent of the other; alternatively, the NIP addressed to the non-member joint tenant was sufficient to give notice to the "qualifying tenant" of the flat. If that was wrong, the FTT would have held that the defect did not invalidate the procedure, following *Elim Court*.
24	*80 High Street RTM Co Ltd v Assethold Ltd* (CAM/22UE/LRM/2023/0007)	The premises consisted of three flats. One flat was registered in the names of joint tenants, one of whom had died around nine months before the RTM company was incorporated. The freeholder objected to acquisition as no NIP was	RTM acquired. The FTT held that, by right of survivorship, the surviving joint tenant held the legal estate in the long lease alone and

		served on the personal representatives of the deceased joint tenant.	was the qualifying tenant. The RTM company was therefore not required to serve a NIP on the personal representatives of the deceased joint tenant.
25	*White Lion Close RTM Co Ltd v Avon Ground Rents Ltd* (HAV/45UG/LRM/2025/0605)	The RTM company gave a NIP to two joint tenants of one flat (A and B). The freeholder argued that the leasehold interest had been transferred from A and B to B and C and that the failure to serve a NIP on C was fatal. The RTM company argued that A and B were the registered owners at the time of service, as shown on an official copy of the register of title; alternatively, service on B alone was good enough.	RTM not acquired. The FTT concluded that the Land Registry must have given the RTM company backdated official copies which failed to show the up-to-date position. The RTM company was therefore required to serve B and C. Service on B only was insufficient.
26	*Novel House RTM Co Ltd v New End LLP* (LON/00AG/LRM/2025/0011)	The premises consisted of 17 flats. One qualifying tenant had died. The RTM company sent a NIP to the deceased tenant's personal representative. However, the NIP was addressed to the deceased. The freeholder opposed acquisition on the basis that no NIP had been served on the personal representative.	RTM acquired. The FTT held that the NIP conveyed the required information to the personal representative and that a NIP had been given to the personal representative in compliance with s. 78(1) notwithstanding that the NIP stated that it was addressed to the deceased.
27	*Medina House (Milton Keynes) RTM Co Ltd v Assethold Ltd* (CAM/00MG/LRM/2024/0001)	The freeholder had granted a 125-year lease of one flat in the premises. At the date of service of the NIPs, the lease had not yet been registered. The RTM company served a NIP on the freeholder in relation to that flat. The freeholder argued the unregistered equitable tenant should have been given a NIP.	RTM acquired. The FTT held that equitable tenants cannot be qualifying tenants under CLRA 2002. Therefore, the RTM company had not failed to comply with s. 78(1).
28	*N1 RTM Co Ltd v Cedarcrest Ltd* (LON/00AM/LRM/2023/0027)	The premises contained 135 flats. One qualifying tenant, who was a member of the RTM company, died. However, at the date of service of NIPs, he remained the registered proprietor. The freeholder	RTM acquired. The FTT rejected this ground of opposition on the basis that the deceased was a member

		objected to acquisition, among other matters, on the basis that the RTM company had failed to serve a NIP on the personal representatives of the deceased.	of the company and remained the registered proprietor.
29	*171 Tower Bridge Road RTM v Assethold Ltd* (LON/00BE/LRM/2020/0029)	The RTM company served a NIP on a qualifying tenant at its correspondence address in the register of title. The freeholder argued that the NIP had not been given as it should have been sent to the flat address.	RTM not acquired. The RTM company had failed to prove that the NIP was validly served. The failure to serve the NIP invalidated the claim.
30	*Norwich House (Streatham) RTM Co Ltd v Sunbel Development Ltd* (LON/00AY/LRM/2020/0019)	The freeholder opposed on the basis that the RTM company failed to serve on it all the NIPs and evidence that it had complied with ss. 78(1)-(6). The RTM company replied that it was not obliged to but eventually provided evidence to the FTT.	RTM acquired. The RTM company had proved service of NIPs.