Neutral Citation Number: [2021] EWCA Civ 1658

Case No: C3/2020/1587

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL (LANDS CHAMBER)
JUDGE ELIZABETH COOKE
LRX/147/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/11/2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE COULSON
and
LORD JUSTICE BIRSS

- -

Between :

Eastern Pyramid Group Corporation SA	**Appellant**
- and -	
Spire House RTM Company Limited	**Respondent**

- -
- -

Jonathan Upton (instructed by **Watson Farley & Williams LLP**) for the **Appellant**
Philip Rainey QC & Nicola Muir (instructed by **Foot Anstey LLP**) for the **Respondant**

Hearing date: 7 October 2021

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Approved Judgment

Lord Justice Birss :

1. This appeal is about the procedure which tenants in a block of flats must use if they wish to exercise their right under s79 of the Commonhold and Leasehold Reform Act 2002 to take away from the landlord the right to manage the property. Under the procedure the right to manage (often referred to as the "RTM") is thereby acquired by a special company set up by the tenants. It is referred to as "the RTM company".

2. The appeal concerns a property called Spire House. It is an unusual building in three parts; a Victorian church tower and spire, a block of 23 flats on 6 floors accessed through the tower with a car park beneath, and an enclosed garden. The appellant is the landlord of the flats. The respondent is the RTM company set up by certain of the qualifying tenants to acquire the right to manage. I will refer to these parties as the landlord and the RTM company respectively.

3. The problem arose in the following way. On 18 March 2019 the RTM company served on the landlord a claim notice seeking to exercise the right to manage the building. On 29 April the landlord sent a counter-notice saying that the first notice did not comply with a number of provisions of the 2002 Act. After this the RTM company wrote two letters. The first one was dated 17 June and addressed to the landlord. The landlord received it on 18 June. By that letter the RTM company purported to withdraw the first claim notice and to serve a second claim notice in which the defects were corrected. The second letter was dated 18 June and addressed to the qualifying tenants. By that second letter the RTM company notified the qualifying tenants about the withdrawal of the first claim notice and gave them a copy of the second claim notice.

4. Later, in July, the landlord contended (by a counter-notice to the second claim notice) that the second claim notice was invalid on various grounds. These have all now fallen away, save for one. The landlord's remaining point is the submission that the purported withdrawal of the first claim notice on 18 June was ineffective to withdraw the first claim notice because notice of the withdrawal had not been given to the qualifying tenants. Therefore the first claim notice was still in effect on 18 June. That in turn means that the second claim notice was invalid because by s81(3) of the 2002 Act, no subsequent claim notice can be given while an earlier claim notice is in force.

5. The landlord's argument turns on this short point of law. The relevant legislation is set out fully below. Briefly put, the argument is as follows. On the face of section 86 of the 2002 Act a notice of withdrawal must be given both to the landlord and to the qualifying tenants. Hence it is said by the landlord that notice of withdrawal was indeed given, but only by 19 June, which would be too late to save the second claim notice. Alternatively if one analyses the situation as a case of non-compliance with a statute and applies the relevant authorities, ***Natt v Osman*** [2014] EWCA Civ 1520 and ***Elim Court RTM Co. Ltd v Avon Freeholds Ltd*** [2017] EWCA Civ 89, the same conclusion is reached. That is said to be because service of the withdrawal notice on the tenants is an important part of the statutory scheme and so the notice of withdrawal would not be effective until all qualifying tenants are served.

6. The landlord's argument failed before the FTT and failed on appeal before Judge Elizabeth Cooke sitting in the Upper Tribunal. In a clear and well-reasoned judgment, Judge Cooke rejected the landlord's case and held that the withdrawal took effect when the landlord was served with the notice of withdrawal and the failure to serve the

qualifying tenants on that date was a breach of the Act but not fatal. The landlord appeals to this court with the permission of Nugee LJ, given because the point is an important point of principle in the working of the statutory scheme as a whole.

The legislation

7. RTM companies are defined in s73 of the 2002 Act. They are private companies limited by guarantee. Prior to the acquisition of the right to manage, only qualifying tenants may be members of the RTM company (s74(1) 2002 Act). Qualifying tenants are defined in s75. The precise definition is not relevant.

8. The process of acquiring the right to manage starts with a notice inviting participation which is given by the RTM company to all the qualifying tenants at the relevant time who are not already members (or have not already agreed to be members). This is provided for by s78 of the 2002 Act. That section includes a provision at s78(5)(b) which provides for copies of the articles of association to be available for inspection on at least three days, including a Saturday or Sunday. In ***Elim Court v Avon*** the court addressed a number of requirements in the Act concerning the notice of participation, including this one, and held that a failure to comply precisely with those requirements did not invalidate the notice of participation.

9. After the notice of participation to tenants, the next step is the service of a claim notice by the RTM company on the landlord. This is provided for by s79, which is in the following terms (so far as material):

> **79 Notice of claim to acquire right**
>
> (1) A claim to acquire the right to manage any premises is made by giving notice of the claim (referred to in this Chapter as a "claim notice"); and in this Chapter the "relevant date", in relation to any claim to acquire the right to manage, means the date on which notice of the claim is given.
>
> (2) The claim notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before.
>
> (3) The claim notice must be given by a RTM company which complies with subsection (4) or (5).
>
> (4) If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company.
>
> (5) In any other case, 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.
>
> (6) The claim notice must be given to each person who on the relevant date is—

> > (a) landlord under a lease of the whole or any part of the premises,
> >
> > (b) party to such a lease otherwise than as landlord or tenant, or
> >
> > (c) a manager appointed under Part 2 of the Landlord and Tenant Act 1987 (c. 31) (referred to in this Part as "the 1987 Act") to act in relation to the premises, or any premises containing or contained in the premises.
>
> (7) Subsection (6) does not require the claim notice to be given to a person who cannot be found or whose identity cannot be ascertained; but if this subsection means that the claim notice is not required to be given to anyone at all, section 85 applies.
>
> (8) A copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises.
>
> *[…]*

10. The scheme of s79 is clear. The claim to the right to acquire is made by giving notice (s79(1)). The persons to whom that notice must be given are set out in 79(6). The landlord under the lease is one of the classes (79(6)(a)). The other persons to whom notice must be given are those set out in (6)(b) and (c). Subsection (b) would cover a management company and subsection (c) covers managers appointed under the 1987 Act. I will call those three classes of person defined in (a), (b) and (c) "the Landlord and Managers".

11. Section 79(3) to (5) contains a substantive requirement about the nature of the RTM Company. In order to be able to acquire the right to manage this way, the RTM Company must have a majority of the qualifying tenants as members or if there are only two qualifying tenants, they must both be members. This test is applied at the relevant date which is defined (by s79(1) with s79(6)) as the date on which the Landlord and Managers were given the claim notice.

12. By contrast the qualifying tenants do not have to be given the claim notice itself. Instead what has to happen is that anyone who is a qualifying tenant on the relevant date must simply be given a copy of the claim notice (s79(8)). This reflects the absence of a role for the qualifying tenants in the procedure from now on. Of course a majority of the qualifying tenants will be members of the RTM company anyway.

13. Section 80 of the 2002 Act provides for the contents of the claim notice. There is no need to set out the section. In summary its relevant provisions are as follows. In addition to specifying the premises and the grounds on which the RTM Company contends the premises are within the scope of these provisions (s80(2)), the claim notice must also list all the qualifying tenants who are members of the company and give details of their lease (s80(3) and (4)). The claim notice must also specify a date "by which each person who was given notice under section 79(6)" may respond by counter-

notice. The persons who were given notice under s79(6) are what I have called the Landlord and Managers.

14. The claim notice also has to specify a date at least three months after the counter-notice date (s80(7)). This date will be the date on which the right to manage is acquired by operation of section 90, either if no counter-notice is served by the Landlord or Managers at all or if a counter-notice is served but it is one which admits the RTM Company's claim (under s84(2)(a)). On the other hand, jumping ahead, if there is a dispute then the RTM Company does not acquire the right to manage until that dispute has been determined in its favour (s84(5)), and in that case s90(4) provides that the date of acquisition of the right is three months after the determination becomes final (and see s84(7) for a definition of final).

15. Section 81 contains supplementary provisions. The important one for present purposes is s81(3), as follows:

> 81 (3) Where any premises have been specified in a claim notice, no subsequent claim notice which specifies—
>
> (a) the premises, or
>
> (b) any premises containing or contained in the premises,
>
> may be given so long as the earlier claim notice continues in force.

16. This is the provision which would bite on the second claim notice here if the first notice was not withdrawn on 18 June 2019. The purpose of the provision is clear enough. One does not want to allow two claim notices to be running at the same time. One reason why not is because the scheme in the Act can, in some circumstances, automatically vest the right to manage in the RTM Company on a date determined by the contents of the claim notice.

17. Counter-notices are addressed in section 84. They can be served by a person who is given a claim notice under s79(6), in other words the Landlord or Managers. Qualifying tenants, even those who are not members of the RTM Company, have no right to serve a counter-notice of their own. Moreover there is no provision analogous to s79(8) requiring a copy of the counter-notice to be given to the qualifying tenants. The section provides that the counter-notice can admit the claim (s84(2)(a)) or can allege, with reasons, that the RTM Company was not entitled to the right to manage on the appropriate date (s84(2)(b)). If a counter-notice disputing the RTM Company's entitlement is given then the RTM Company may apply to the appropriate tribunal (the FTT) for a determination of its entitlement (s84(3)). The effect of ss84(4) and (5) have been addressed above already.

18. Section 85 is about untraceable landlords and is irrelevant.

19. Section 86 concerns withdrawal of claim notices and is central to this appeal. It provides:

> **86 Withdrawal of claim notice**

> (1) A RTM company which has given a claim notice in relation to any premises may, at any time before it acquires the right to manage the premises, withdraw the claim notice by giving a notice to that effect (referred to in this Chapter as a "notice of withdrawal").
>
> (2) A notice of withdrawal must be given to each person who is—
>
> > (a) landlord under a lease of the whole or any part of the premises,
> >
> > (b) party to such a lease otherwise than as landlord or tenant,
> >
> > (c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises, or
> >
> > (d) the qualifying tenant of a flat contained in the premises.

20. Thus by s86(1) the RTM company may withdraw a claim notice at any time and does so "by giving a notice to that effect". By s86(2) a notice of withdrawal must be given to each person listed in (a) to (d). Sub-sections 86(2)(a) to (c) are the Landlord and Managers. Sub-section 86(2)(d) is the qualifying tenants. The appellant contends that this language is clear and mandatory, requiring a notice of withdrawal to be given to the qualifying tenants for that notice to be effective. The respondent supports the conclusions of the tribunals below that, looking at the matter on the date the landlord was given the withdrawal notice, the failure to give notice to the qualifying tenants was a breach but was not one which rendered the withdrawal ineffective. That is the issue we have to decide, but it is worth finishing the review of the Act before addressing the point.

21. Section 87 is concerned with deemed withdrawal. By s87(1), if an RTM Company which received a counter-notice challenging its entitlement does not apply to the tribunal for a determination of the matter, within the allotted time, then the claim notice is deemed withdrawn. There is no need to set out s87.

22. Sections 88 and 89 concern costs. Section 88(1) provides that the RTM Company is liable for the reasonable costs in consequence of a claim notice, of a defined set of persons. That defined set is, again, the Landlord and Managers. Sub-section 88(3) provides that the RTM Company is liable for the costs of such a person in any proceedings before the tribunal but only if the tribunal dismisses the RTM Company's claim for entitlement. By s89(2) the RTM Company's liability for costs under s88 when a claim notice is withdrawn is for those costs incurred down to the time of withdrawal.

23. Section 90 deals with the acquisition date and has been addressed already. The only other relevant sections are s111, which deals with how notices must be given (in writing and sent by post), and s112 which contains definitions.

The judgments below

24. The proceedings came before the FTT (Judge Nicol and Mr CP Gowman MCIEH MCMI) on an application by the RTM Company under s84(3) following the counter-notice to the second claim notice. On what is now the sole remaining issue, the FTT rejected the landlord's case that the withdrawal of the first claim notice had not been effective on 17 June 2019 because of the failure to give notice to the qualifying tenants. The FTT did so in fairly brief terms as follows:

> "15. The Tribunal has no hesitation in rejecting [*counsel for the landlord's*] submission. Section 86 does not contain such a limitation. What matters is that his client received notice of withdrawal. There is no doubt the other Respondents and the qualifying tenants know of the attempt to acquire the right to manage but none have sought to express any dissatisfaction with the process. It is not open to the First Respondent in this case to rely on alleged failures of procedure in relation to other parties who have no wish to raise them. The Tribunal is satisfied that, as at 17th June 2019, the Applicant had sufficiently conveyed the withdrawal of their first notice to the First Respondent and the fact that the First Respondent learned of possible flaws in how others were notified considerably later (well after service of the Counter-Notice) is not relevant.
>
> 16. [*Counsel for the applicant*] made the well-founded point that it cannot have been Parliament's intention that the right to manage could be thwarted by the failure to find and serve every single possible person within section 86(2) such as, for example, sureties or guarantors that have long since passed out of the picture.
>
> 17. Therefore, looked at as a whole and in context, the Tribunal is satisfied that the Applicants' solicitors' letter of 17th June 2019 operated as notification that the first claim notice was withdrawn in accordance with section 86 of the Act. Therefore, the First Respondent's sole ground of challenge falls away and the Applicant may acquire the right to manage."

25. In the Upper Tribunal Judge Cooke dealt with the matter more fully, in paragraphs 51 to 65 of the decision. At paragraph 52 the judge noted the submission of counsel for the landlord that the use of the word "must" in s86(2) indicates that the requirement to give notice of withdrawal to all the persons defined in that provision was mandatory.

26. Paragraph 52 also noted counsel for the landlord's reliance on the judgment of the Deputy President (Martin Rodger QC) in ***Triplerose v Mill House*** [2016] UKUT 80 (LC) at paragraph 35. In this paragraph the Deputy President interpreted the notice provisions in s79(2) of the Act as showing the essentiality of provisions designed to ensure that every qualifying tenant has the opportunity to participate, and held that those provisions cannot be substituted by an alternative means of giving notice. It is convenient to deal with that point now. I do not doubt that paragraph 35 of ***Triplerose*** is right, however it is not germane. The issue in that case was about the essential nature

of the provisions in s79, which relate back to s78, and concern the participation of the qualifying tenants in the RTM Company itself. That is an important aspect of the scheme as a whole as I have sought to explain above, but it does not tell you anything useful about the importance or otherwise of different provisions in issue on this appeal.

27. Turning back to the UT, at paragraphs 53 and 54 Judge Cooke summarised a submission of the RTM company and (at 54) posed the question to be answered:

> "53 The respondent [*RTM Company*] points out that section 86 does not say that withdrawal does not take effect until everyone specified has been served. That is true; but what it says is that withdrawal is effected by service. It is not the case that withdrawal takes effect by, say, burning the notice but that that cannot be done until – or has no effect until – notice of withdrawal has been served. The only action that effects withdrawal is service. If no-one is served, there is no withdrawal. And it would be absurd to suggest that withdrawal would have taken place if, say, one qualifying tenant were served but the landlord was not. Section 86 enables the withdrawal of the notice and sets out how that is to be done, namely by service on all those specified in subsection (2) (a) to (d).
>
> 54. What, then, if a person, or a category of persons, has been omitted as was the case here on the date when the respondent says it withdrew the first notice?"

28. The judgment goes on to take on board the authorities on non-compliance, i.e. ***Natt v Osman*** and ***Elim Court*** and then addresses the substance of the present case as follows:

> "58. So [*counsel for the landlord's*] starting point, that the word "must" indicates that the requirement is mandatory, reflects a form of analysis of statutory procedural requirements that is no longer appropriate. Instead the purpose and importance of the requirement of service on qualifying tenants, in section 86(2)(d), must be assessed in the context of the statutory scheme in order to determine what is the consequence of the failure to comply with it.
>
> 59. It will be clear from what has been said already that the main practical purpose of the notice of withdrawal is to alert the landlord to the fact that the claim to a right to manage has been, so far as the withdrawn notice is concerned, abandoned and also to alert the landlord to the end point of his potential claim for costs. The landlord does not have to do anything in response to the notice of withdrawal; but if the landlord receives a later notice, as in this case, it is vital that it knows whether the earlier notice was withdrawn.
>
> 60. Accordingly, if the appellant had not been served the notice would not have been withdrawn; the purpose and importance of

the requirement is such that non-compliance with that particular requirement must be fatal.

61. But the service of the notice of withdrawal on qualifying tenants does not have any such purpose. It is simply a matter of information. It does not have any effect upon decisions they must make or actions they must take. It is important for them to know that the notice has been withdrawn, and they are entitled to have the notice sent to them; but the consequence of not sending it is not that the withdrawal is ineffective. Service one day late, as in this case, does not make any practical difference to anyone.

62. I would add that one difficulty with the appellant's argument, as the respondent points out, is that in some circumstances it will be impossible to withdraw a claim notice, for example if any of the potentially large group of prescribed recipients is a company that has gone into liquidation and cannot be served. The appellants' answer to that is that in those circumstances the RTM company can simply wait for a deemed withdrawal to take effect under section 87, by doing nothing until the expiry of the time limit for application to the FTT. I do not think that Parliament could have intended that outcome, because in some cases it will be important to withdraw a notice quickly and serve another one. If the RTM company realises the day after service that it has made an error in a claim notice, and it cannot serve all the prescribed recipients with a notice of withdrawal, it makes no sense that it should have to sit back and do nothing, potentially for some three months (at least a month for the counternotice (section 80(6)) and then two months for the deemed withdrawal), before serving a fresh notice. The procedure is intended to be straightforward for tenants.

63. More seriously, the appellant's argument, if correct, would mean that it was not possible for a landlord to know whether a claim notice had been withdrawn on the date that he or she received notice of withdrawal. As the respondent says, normally the landlord would have no information about service on others. One of the purposes of serving a notice of withdrawal is to draw a line under the RTM company's liability for costs; another is to enable the service of a replacement notice. It cannot be right that in every case a landlord can assert, potentially months after service of the notice of withdrawal, that in fact not all the prescribed recipients were served and that therefore the RTM company's liability for the landlord's costs continued beyond the date of the notice until deemed withdrawal took effect, or that therefore a subsequent notice already accepted as valid was in fact invalid.

64. As [*counsel for the RTM Company*] succinctly puts it: "It cannot have been Parliament's intention that the Appellant is

> entitled to rely on an alleged defect which it did not know about and does not affect it."
>
> 65. I conclude that it cannot be the case that a notice of withdrawal is ineffective until the qualifying tenants specified in section 86(2)(d) have been served. Withdrawal in this case took effect when the appellant was served with the notice of withdrawal."

29. In summary therefore the judge identified the main purpose of the notice of withdrawal as being to alert the landlord whereas the purpose of s86(2)(d) in particular, giving notice of withdrawal to the tenants, was simply a matter of information. Two practical difficulties caused by the landlord's submission were identified in paragraphs 62 and 63 and then the conclusion followed.

The submissions before this court

30. The landlord's case before this court can be summarised as two submissions. The first submission is that the analysis based on non-compliance with the statute is wrong. The correct way to look at this is that the RTM Company did not breach the provisions at all, it served the withdrawal notice on the qualifying tenants on 18 June and so that is the date of withdrawal. Therefore the second claim notice, given on 17 June is invalid pursuant to s81(3).

31. The second submission is that if, contrary to the first submission, the analysis based on breach of the Act is appropriate then the UT erred in the construction of the statute. The landlord argues that paragraph 53 is a key paragraph and here the judge was rightly rejecting the RTM Company's case and holding that withdrawal was not effective until all the persons in s86(2) were served. That is what the Act requires. It is not correct to hold that the purpose of s86(2) is only to notify the landlord, it is clear on its terms that the qualifying tenants must be notified too. That will be particularly important for qualifying tenants who are not members of the RTM Company. They may want to take action and they are entitled to certainty about what is going on. In terms of statutory construction, relevant factors identified in ***Elim Court*** by Lewison LJ at paragraph 52 assist the landlord – the provision is in primary rather than subordinate legislation, it is generally applicable, and the server can always serve another notice later if the impugned notice is invalid.

32. Counsel for the landlord also referred to the recent judgment of Chamber President Fancourt J in ***Avon Ground Rents Ltd v Canary Gateway (Block A) RTM Co. Ltd*** [2020] UKUT 358 (LC), which was given after the decision of the UT in this case. In particular counsel referred to paragraphs 81-84 on the issue of the importance of the service of notices to participate on every qualifying tenant under s78 and 79. Counsel also relied on paragraph 87 in which Fancourt J noted that it was easy for the RTM Company to serve each qualifying tenant and drew our attention to paragraphs 71 and 92, the last sentence of which emphasises the need for RTM Companies to be scrupulous in serving all qualifying tenants who are not members of the RTM Company with notice in the right form.

33. Finally counsel did not accept paragraph 63 of the UT's decision was correct in relation to the landlord's costs liability.

34. Counsel for the RTM company made three points. First he took the court systematically through the scheme of the Act itself. The section of this judgment above is based on that exercise. Second he contended that the landlord's first submission, that there was no breach, was wrong because it necessarily led to the result that the validity of an act on one date was capable of being undermined by an act later in time. The effect of the giving of notice of withdrawal to the landlord on 17 June, whatever it was, ought not to be affected by the later act of giving notice to the qualifying tenants on 18 June, not least because there was no mechanism in the Act which provided for a means whereby the landlord would be informed about the later notice to the qualifying tenants. Third he supported the judge's analysis based on a breach and argued it was right for the reasons given.

Assessment

35. I reject the landlord's first submission that there is no breach in this case at all, essentially for the reasons given by counsel for the RTM Company. It is appropriate and legitimate to ask what the effect was of the giving of the notice of withdrawal to the landlord on the date it was given. That was 17 June 2019. For the notice on 17 June to be effective on that date, it can only be effective taking into account the state of affairs on that date, i.e. the failure to serve the qualifying tenants in breach of the terms of the Act. Thus if the tribunals below are right and the notice on 17 June, albeit in breach of the Act, was effective, it cannot be rendered ineffective by what happened afterwards. Conversely (for example) the RTM Company's case about what the position was on 17 June cannot be improved by what happened afterwards either. So in the present case the fact that the notice to the qualifying tenants was, on one view, only one day late, does not make the RTM Company's position better than a case in which the withdrawal notice was never given to the qualifying tenants at all.

36. Accordingly the right way to analyse this case is by reference to the principles concerning failures to comply with statutory requirements, following ***Natt v Osman*** and ***Elim Court***.

37. The key passages in those cases are paragraphs 24-34 of the judgment of the Chancellor, Sir Terence Etherton in ***Natt v Osman*** and paragraphs 49-63 of the judgment of Lewison LJ in ***Elim Court***. They establish the following: First, the old idea of distinguishing between directory and mandatory requirements is no longer the law (***Elim Court*** paragraph 49 citing ***Natt v Osman*** paragraph 25). Second, there are two categories of case, one category concerning public bodies and public law in which substantial compliance could be sufficient, and another category concerning the acquisition of private rights, where there is no such concept (***Elim Court*** paragraph 50,51 citing ***Natt v Osman*** paragraphs 28 and 31). Third, in the private rights category the question is whether a step, such as a notice, is wholly valid or wholly invalid. The right approach in answering that question is one of statutory construction, determining the legislative intention as to the consequences of non-compliance in the light of the statutory scheme as a whole (***Elim Court*** paragraph 52 citing ***Natt v Osman*** paragraph 33). Fourth, the category into which the scheme for the acquisition of the right to manage under the 2002 Act falls is the second, private rights, category (***Elim Court*** paragraphs 53 and 54, approving Deputy President, Martin Rodger QC in ***Triplerose v Mill House***). Fifth, however it does not follow that if a case falls into the second category then every defect, however trivial, invalidates the step in question. The court still has to decide the issue of statutory construction whether the step is wholly valid or

wholly invalid. While prejudice on the particular facts is irrelevant, prejudice in a generic sense is capable of being relevant (***Elim Court*** paragraph 55).

38. In summarising the principles above I have referred to the validity or invalidity of a "step" in general terms rather than focussing on the particular step in issue in ***Elim Court***, which was about a notice to invite participation. I believe Lewison LJ was speaking generally (see e.g. the reference to a step or procedure in paragraph 59) but in any case I would hold that the principles are applicable to any step in the statutory scheme.

39. In terms of guidance on the application of these principles to particular cases, I extract the following from paragraphs 52 and 59 of ***Elim Court***:

    i) The fundamental question is the role and importance of the relevant step in the context of the procedure as a whole. Thus if the scheme requires information, there is a difference between missing information of critical importance, and missing ancillary information. It also explains why, as Lewison LJ held in paragraph 59, there may be a distinction between jurisdictional requirements on the one hand and purely procedural requirements on the other.

    ii) Useful pointers are:

        a) whether the step is provided for in particular terms in the statute or only in general terms;

        b) whether the requirement is in the primary legislation or in subordinate legislation; and

        c) whether the person taking the step can immediately do it again if the impugned attempt is invalid.

    iii) While there is force in the point that landlords need certainty, this cannot be carried too far because that would mean any deviation from what was prescribed would invalidate the whole procedure, and that is not the law.

40. To these principles I would add only two further points. First, the legislator can be taken to have assumed that the courts would take a realistic and pragmatic approach in determining the significance of different steps in a procedural scheme laid down by statute. A result which is impractical or unrealistic is unlikely to be what was intended. In fact this principle too can be found in ***Elim Court***, at paragraph 63 when one of the landlord's submissions was rejected as unrealistic. Second, the pointers referred to are just that, and cannot be put too high. Taken to the extreme the first and second pointers could be taken to imply that if the relevant provision is clearly and specifically set out in the primary legislation then breach of it must lead to invalidity. However that is not right, as the result of ***Elim Court*** shows. The landlord's reliance on these two pointers in this case is a fair point to make but in the end it is not determinative.

41. Applying these principles in the present case, the starting point is s86. The landlord challenged paragraph 53 of Judge Cooke's judgment (quoted above), however in my judgment Judge Cooke was right in that paragraph. The key to it is the observation that section 86 enables withdrawal of a claim notice and sets out how it is to be done. The

section provides that withdrawal is to be effected by service and also provides that that means service on all those specified in subsection (2) (a) to (d). Therefore a failure to give notice to one of the persons in subsection (2) (a) to (d) (assuming they exist) is a breach of the terms of the Act. However the fact that failure to serve the persons in (2)(d) is a breach of the provisions is not the end of the analysis, it is the beginning, as the judge clearly understood. The court's task is then to assess the importance of requirement which has been breached.

42. In assessing the significance of who is to be given the notice of withdrawal, the landlord can point to the word "must" in s86(2) as requiring the giving of notice to the four classes of person listed in sub-sections (a) to (d), including the qualifying tenants at (d). However when the scheme as a whole is examined as a matter of substance, it is plain that there is a difference in importance between giving notice of withdrawal to the Landlord and Managers, in other words persons in the first three classes in s86(2)(a) to (c), as compared to the qualifying tenants in class 86(2)(d). Looking at the scheme as a whole the qualifying tenants are in a different category.

43. In my judgment Judge Cooke was correct at paragraph 59 to hold that the main practical purpose of the notice of withdrawal is to alert the landlord to the fact that the claim to which the notice applies has been abandoned. The landlord is the person who needs to know. In that sense this notification of withdrawal has a kind of jurisdictional significance since it is supposed to bring the relevant claim to an end. If the landlord receives a later second claim notice, they will know that the earlier notice was withdrawn. Therefore having regard to its importance and purpose, non-compliance with that aspect of s86 would be fatal, as Judge Cooke held (paragraph 60).

44. By contrast, as Judge Cooke held at paragraph 61, the service of notice on the qualifying tenants is simply a matter of information. It has no other purpose. They are entitled to have the withdrawal notice sent to them and to know that the claim notice has been withdrawn but the consequence of not sending it is not that the withdrawal is ineffective.

45. The landlord argued there was a need to give notice to qualifying tenants who are not members of the RTM Company in case they might wish to take action. However that overstates the significance of the role of qualifying tenants at this stage in the procedure, whether they are members of the RTM Company or not. By this stage the parties which really matter are the landlord and the RTM Company. By s79(3) to (5) the RTM Company must have had a majority of qualifying tenants as members. There is nothing within the procedure which qualifying tenants can do on being given notice of the withdrawal – whether they are members of the RTM Company or not.

46. One aspect of the landlord's case was to draw a contrast about an entitlement to copies. Under s79(8) the qualifying tenants were not entitled to the claim notice itself in the first place but only a copy; whereas the provisions in s86 about the notice of withdrawal draw no such distinction. In my judgment this does not assist the landlord's case. It is true that one can say that the legislator did not go to the trouble of expressly drawing the same distinction in s86 between originals and copies of withdrawal notices, but once the scheme of the Act is read as a whole, one can see there was no need to do so.

47. At the initial stage of serving notices of participation on qualifying tenants, those tenants have an important position in the procedural scheme and that explains why

service of that notice on them is important (see paragraphs 81-84 of ***Avon Ground Rents v Canary Gateway*** per Fancourt J). However once the process has got to the stage of service of a claim notice, the distinction drawn between original claim notices (served on the Landlord and Managers) and copies of the claim notice (served on qualifying tenants) in s79 reflects the subordinate position of qualifying tenants in the process from now on as compared to the position of the landlord. The Act maintains that difference in position in the remainder of the procedural scheme and this shows that one would be reading far too much into s86 if one put weight on the absence there of the distinction between original notices and copies. The provision simply means that qualifying tenants ought to be served with the withdrawal notices, but it does not mean that failure to do that would invalidate the withdrawal itself which is effected by service on the landlord.

48. At this point in the argument counsel for the RTM Company drew an analogy with the decision of the Upper Tribunal (Judge Cooke) in ***Lexham House RTM Co v European Investment & Development (Properties) Ltd*** [2019] UKUT 390 in which the UT held that failure to serve the claim notice on an intermediate landlord with no management responsibilities did not invalidate the notice. However that case concerns a different step in the procedure under the Act and does not assist in the resolution of the issue on this appeal.

49. A factor which is relevant is that there is no provision in the Act whereby the date on which the qualifying tenants are given the notice of withdrawal is to be communicated to the landlord. As the RTM Company pointed out, had it not been for the Tribunal proceedings in this case (which arose for other reasons) the landlord would not even have known the date on which the qualifying tenants received the withdrawal notice. That supports the view that in the procedure the timing of the notice of withdrawal to the qualifying tenants is not meant to be important to the landlord. Indeed, going further, there is no reason why compliance with s86(2)(d) at all should be of concern to the landlord and so I agree with the first sentence of Judge Cooke's paragraph 63 (that if the landlord's argument was right that makes it impossible for the landlord to know if the claim notice is withdrawn on the date they receive the withdrawal notice) and I also agree with paragraph 64 which rejected the idea that Parliament's intention can have been that the landlord is entitled to rely on an alleged defect which it did not know about and did not affect it. Generally one might expect landlords to argue in favour of certainty for landlords, whereas the landlord's argument in this case opportunistically relies on a construction designed to achieve the opposite.

50. There was a debate about whether Judge Cooke was correct in the remainder of paragraph 63 (quoted above) about the particular costs consequences if the landlord's argument was accepted, because there may be good reasons why a landlord should be entitled to costs incurred after a notice of withdrawal. I will say that I see the force in Judge Cooke's point but I do not believe it is necessary to resolve the issue on this appeal.

51. Another issue was about the effect of the deemed withdrawal provisions and the possibility that notices of withdrawal may be impossible to withdraw by giving notice. These were considered in paragraph 62. Again I believe it is not necessary to address this in depth. A case in which compliance with s86(2) was impossible in some way is a different case from the present one and I am not sure reasoning from that situation can be applied to this one.

Conclusion

52. I would like to pay tribute to both counsel appearing on this appeal, who each presented their client's case with flair and economy. Despite the able submissions of counsel for the appellant in particular, I would dismiss this appeal. There is no reason to consider the Respondent's Notice.

Lord Justice Coulson:

53. I agree that, for the reasons given by Lord Justice Birss, this appeal should be dismissed. I would wish only to add an express acknowledgment of the excellence of the judgment of Judge Cooke in the Upper Tribunal.

Lord Justice Peter Jackson:

54. I also agree.