**Elim Court RTM Company Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89**

- New Court of Appeal Decision on compliance with Right to Manage statutory provisions under the Commonhold and Leasehold Reform Act 2002
- Non-compliance with the notice provisions is not fatal to the claim: not every defect, however trivial, invalidates a statutory notice

The Court of Appeal has handed down its highly anticipated decision in *Elim Court v Avon Freeholds*. This follows an appeal from a decision of the Upper Tribunal ([2014] UKUT 397 (LC)) which considered three conjoined appeals relating to applications made by right to manage companies under the provisions of Part 2 Commonhold and Leasehold Reform Act 2002.

The Upper Tribunal considered three issues:

> i) Whether a notice inviting participation is required by section 78(5)(b) of the 2002 Act to inform non-participating tenants that the RTM company's articles of association are available for inspection on 3 days at least one of which *must* be a Saturday or Sunday, and, if that question is answered affirmatively, whether the consequence of non-compliance with the requirement is fatal to the whole right to manage procedure or may be overlooked ("the Saturday/Sunday issue").
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> ii) Whether the disputed claim notices purported to be signed by a company and, if they did, whether that signature was ineffective for failing to comply with section 44, Companies Act 2006; if the signature was ineffective, whether the notice was nonetheless a good notice for the purpose of section 79 of the 2002 Act and, if it was not, whether its deficiencies were fatal to the whole procedure or might be overlooked ("the signature issue").
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> iii) Whether the claim notice at Elim Court was served on the intermediate landlord and, if it was not, whether service on the intermediate landlord was required and, if it was, whether the failure to serve the intermediate landlord was fatal to the whole right to manage procedure or whether the deficiencies in service could be overlooked ("the intermediate landlord issue").

The Upper Tribunal concluded:

> i) On the Saturday/Sunday issue that the notice inviting participation was required to offer facilities for inspection on a Saturday or Sunday.
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> ii) On the signature issue that the claim notice was validly signed by Mr Joiner.
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> iii) On the intermediate landlord issue that service of the claim notice on the intermediate landlord was a necessary step; and that it had not been served.

The Upper Tribunal went on to consider the consequences of non-compliance. It held:

i) The failure to offer facilities for inspection on a Saturday or Sunday was fatal to the validity of the notice inviting participation and that failure alone precluded the RTM company from claiming the right to manage.

ii) The failure to serve the claim notice on the intermediate landlord was likewise fatal to the validity of the claim.

Accordingly, the RTM company had not been entitled to acquire the right to manage. The Appellant appealed the decision on the grounds that the words "including a Saturday or Sunday or both" were permissive rather than imperative and that the failure to serve the claim notice on the intermediate landlord did not invalidate the process as a whole. The Respondent sought to argue that the claim notice had not been validly signed and therefore the Appellant was not entitled to acquire the right to manage.

The Court of Appeal rejected the Appellant's submission on the Saturday/Sunday issue. It was held that the words of the statute were clear in this regard. The whole of section 78(5) is governed by the word "must" and therefore the notice inviting participation was required to offer facilities for inspection on a Saturday or Sunday.

On the signature issue the Court of Appeal rejected the technical argument that the notice was not validly signed because the signatory of the notice was the director of the officer of the RTM company and not the officer itself. The reasoning of the Upper Tribunal was affirmed.

The appeal was allowed however, on the basis that the consequences of non-compliance were not fatal to the claim. In moving away from the traditional mandatory/directory distinction, the Court of Appeal considered *Natt v Osman* [2014] EWCA Civ 1520; [2015] 1 WLR 1536, in which Etherton C identified [at 25], two categories of cases, i.e. those involving decisions of a public body and those involving statutory requirements relating to property, or similar rights affecting individuals. It was accepted that the acquisition of the right to manage fell within the second category in which the "substantial compliance approach" was not to be adopted. However, Lewison LJ held that it did not follow that if a case falls within the second category every defect in a notice or in the procedure, however trivial, invalidates the notice. The court must nevertheless decide as a matter of statutory construction whether the notice is "wholly valid or wholly invalid".

It was held that in the instant case, the failure of the RTM Company to comply precisely with the requirements for a notice of intention did not automatically invalidate all subsequent steps. The failure to specify a Saturday or Sunday for inspection of the company's articles of association and the failure to serve a claim notice on the intermediate landlord of a single flat with no management responsibilities were both held not to invalidate the notice. In addition, the Court held that if it was wrong on the signature issue, the failure would not be fatal as the notice of claim was signed by someone who is actually authorised by the RTM company to sign it.

The appeal was therefore allowed.