Neutral Citation Number: [2024] UKUT 314 (LC)

Case No: LC-2024-363

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT Ref: HS/LON/OOBE/MNR/2024/0034

4 October 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – RENT DETERMINATION – tenant's application to FTT under s.13(4), Housing Act 1988 by e-mail not in the prescribed form – whether email substantially to the same effect as prescribed form – whether defective application capable of giving FTT jurisdiction to determine new rent – appeal allowed

BETWEEN:

ZDRAVKA IVANOVA ATESHEVA

Appellant

-and-

HALIFAX MANAGEMENT LIMITED

Respondent

34C Vicarage Grove, London SE5

Determination on written representations

Martin Rodger KC,
Deputy Chamber President

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The following cases are referred to in this decision:

A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd [2024] UKSC 27

Elim Court RTM Company Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89; [2018] QB 571]

Johnson v Richmond Housing Partnership Ltd [2022] UKUT 80 (LC)

Mooney v Whiteland [2023] EWCA Civ 67

Natt v Osman [2013] EWCA Civ 584

R v Soneji [2005] UKHL 49; [2006] 1 AC 340

Robertson v Webb [2018] UKUT 235 (LC)

Sabella Ltd v Montgomery [1998] 1 EGLR 65

Sun Alliance & London Assurance Co Ltd v Hayman [1975] 1 WLR 177

Tadema Holdings v Ferguson [1999] EWCA Civ 3045; (2000) 32 HLR 866

Tegerdine v Brookes (1977) 36 P&CR 261

Introduction

1. This appeal is about what an assured shorthold tenant must do to challenge an increase in rent proposed by her landlord under section 13, Housing Act 1988 (the 1988 Act).

2. On 21 March 2024 the First-tier Tribunal, Property Chamber (the FTT) struck out a reference under section 13(4)(a), 1988 Act submitted to it by the appellant, Ms Atesheva, by which she had challenged the new rent proposed by her landlord, Halifax Management Ltd (Halifax), for the flat she occupies at 34C Vicarage Grove, London SE5. The FTT considered that it did not have jurisdiction to determine the application because it had not been made before the date on which the proposed increase was due to take effect.

3. Ms Atesheva now appeals that decision, with the permission of this Tribunal.

4. The appeal has been conducted under the Tribunal's written representations procedure. Submissions have been made on behalf of Ms Atesheva in writing by Mr Rupert Cohen, acting through Advocate, the national charity which finds free legal help from barristers. I am grateful to Mr Cohen for his submissions. Halifax has not responded to the appeal.

The relevant legislation

5. The rent payable under an assured periodic tenancy is first agreed between the landlord and tenant at the commencement of the letting. If the landlord later wishes to secure an increase in the rent section 13(2), 1988 Act provides that it must serve a notice on the tenant in the prescribed form proposing a new rent and specifying the date from which it should take effect. That date must be the beginning of a new period of the tenancy.

6. Where a notice under section 13(2) is given to an assured tenant, the tenant has the right to refer the notice to the FTT. If she does so, the FTT is required to determine the new rent in the manner provided for by section 14, 1988 Act. The rent determined by the FTT then becomes payable from the date specified in the landlord's notice or a later date which the FTT may direct (section 14(7)).

7. The tenant's right to refer a notice proposing a rent increase to the FTT is provided for by section 13(4), 1988 Act, which is in these terms:

> "(4) Where a notice is served under subsection (2) above, a new rent specified in the notice shall take effect as mentioned in the notice unless, before the beginning of the new period specified in the notice, —
>
> (a) the tenant by an application in the prescribed form refers the notice to the appropriate tribunal; or
>
> (b) the landlord and the tenant agree on a variation of the rent which is different from that proposed in the notice or agree that the rent should not be varied."

8. The effect of section 13(4) is that the increase proposed by the landlord under section 13(2) takes effect unless the tenant refers it to the FTT or the parties agree a different

increase (or that there should be no increase). The subsection specifies that the tenant must refer the notice to the FTT "before the beginning of the new period specified in the notice" and that she must do so "by an application in the prescribed form".

9. Where the 1988 Act refers to something being "prescribed", it means prescribed by regulations made by the Secretary of State by statutory instrument (section 45(1), 1988 Act). The relevant regulations are the Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 2015 (as amended). For an application under section 13(4) referring a notice under section 13(2) to the FTT, the prescribed form is Form No. 6 in the Schedule to the Regulations (regulation 3(f)).

10. The information required by Form No. 6 includes the address of the premises, the name and address of the landlord or its agent, details of the premises and other particulars relevant to the assessment of a rent. The prescribed form ends with a statement, to be signed by the tenant, that a copy of the notice proposing a new rent is attached and that the tenant applies for it to be considered by the tribunal.

11. Although section 13(4), 1988 Act requires that a tenant's application referring a proposed new rent to the FTT must be "in the prescribed form", regulation 2 of the 2015 Regulations introduces a degree of flexibility by providing that any reference to a numbered form is a reference to the form bearing that number in the Schedule to the Regulations, "or to a form substantially to the same effect."

The Facts

12. Ms Atesheva has been tenant of 34C Vicarage Road since February 2017. She was granted successive assured shorthold tenancies in 2017 and 2018 by a Mr John Jacob, but her most recent tenancy, for a term of six months commencing on 1 March 2020, identified Halifax as her landlord. The monthly rent under that tenancy was £1,900 payable on the first day of each month.

13. On 20 December 2023 Halifax gave Ms Atesheva notice in the prescribed form under section 13(2), 1988 Act proposing a new rent of £2,400 a month to commence on 1 February 2024.

14. The prescribed form of notice which Ms Atesheva received (Form No. 4 in the Schedule to the 2015 Regulations), includes guidance notes telling the recipient that if they do not accept the proposed increase, they may refer the notice to the FTT and must do so using the prescribed form, Form No. 6, which they can obtain from the FTT or a legal stationer.

15. On 31 December 2023 Ms Atesheva contacted the FTT by e-mail. The FTT subsequently referred to this e-mail in its decision but did not consider what it said. The e-mail said this:

> "Dear First-tier Tribunal,
>
> I hope this letter finds you well. My name is Zdravka Atesheva, and I am writing to seek your assistance in reviewing the recent notice from my letting

> agency regarding a significant increase in rent, effective from February 1, 2024.
>
> I have been a tenant at 34c Vicarage Grove, SE5 7LY, since February 1, 2017. Over the course of my seven-year tenancy, I have faced numerous challenges with the property, including issues with water leakage, mould, faulty appliances, and structural problems. Despite my consistent efforts to communicate these concerns to both the landlord and the property management agency, the necessary repairs have been delayed or left unresolved.
>
> Recently, my letting agency, Halifax Management Ltd, issued a notice proposing a rent increase from £1,900 to £2,400 starting from February 1, 2024. I find this increase to be unjustified given the current condition of the property. Moreover, I believe it raises concerns of potential retaliation for my efforts in prompting much-needed repairs.
>
> [Further details of the condition of the property, Ms Atesheva's state of health and her record of rent payment were then provided]
>
> I am appealing to the First-tier Tribunal to conduct a fair review of the rent increase, taking into consideration the long-standing issues with the property, the recent repairs, and my current health condition. I am more than willing to provide medical records and any additional documentation to support my case.
>
> I kindly request your assistance in ensuring a just and reasonable resolution to this matter. I believe that a fair evaluation will lead to a more reasonable rent adjustment, considering the property's condition and my circumstances.
>
> Thank you for your time and attention to this matter. I look forward to your prompt response."

16. In response to her e-mail Ms Atesheva received an immediate automated reply informing her that the FTT aimed to respond to e-mails within 10 working days and asking for her co-operation in refraining from contacting it during that period. Amongst a number of informative messages at the foot of the automated reply was a link to the FTT's website at which it was said copies of tribunal forms and further information were available. Someone who assumed that the prescribed Form No. 6 referred to in the notice of increase was a "tribunal form" and who searched carefully through several layers of the website would eventually come to a form designated "Rents 1" which is a version of the correct form with some supplemental information.

17. Ms Atesheva respected the FTT's request not to contact it and waited until 22 January before following up her original message with a second e-mail expressing concern that she had not yet received a proper response as the proposed rent increase was due to take effect on 1 February. She asked whether she should send it again or wait and concluded with: "Please tell me what I should do in this case".

18. By return of e-mail Ms Atesheva received a further automated response informing her that the FTT was running a five week backlog due to high volumes of work and staff shortages, apologising for the delay and stating that the tribunal would contact her shortly with details of the next steps. That email did not include a link to the website or indicate that tribunal forms could be downloaded from it.

19. Ms Atesheva says that she then contacted the FTT by telephone but again received only an automated response.

20. A tribunal case officer finally responded to Ms Atesheva's enquiries on 7 February 2024 directing her to the prescribed form. Later the same day Ms Atesheva submitted her application using that form.

21. After preliminary consideration the FTT notified both parties that the application form had been received after the date on which the proposed rent increase was due to take effect and requested their comments. Neither party responded to that request.

The FTT's decision

22. By its decision issued on 21 March 2024 the FTT declined to proceed with the application because it considered that it had no jurisdiction to do so. That was because the prescribed form had not been received until after 1 February 2024, the date from which the proposed new rent would become payable. The FTT said that the correspondence received from Ms Atesheva on 31 December and 22 January did not constitute applications in the prescribed form. Finally, it said that a copy of the landlord's notice proposing the increase in rent had not been received until 8 February, which once again was after the date of the proposed increase.

23. Having reached the conclusion that it had no jurisdiction to consider the application, the FTT made an order striking it out under rule 9(2) of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013.

The appeal

24. In her application for permission to appeal Ms Atesheva challenged the FTT's determination that it did not have jurisdiction by referring to the facts and asserting that the delay in submitting her application in the prescribed form was not her fault. At that stage she was without professional representation, and I read her grounds of appeal as a broad challenge to the FTT's conclusion that it could not determine her application.

25. The point which I identified as raising an arguable ground of appeal was whether Ms Atesheva's e-mail to the FTT on 31 December 2023 (whether alone or together with her e-mail of 22 January 2024) was sufficient to confer jurisdiction on the FTT to determine the rent payable under her tenancy. On consideration, that issue divides into two separate questions. The first is whether the information supplied by Ms Atesheva in her e-mail of 31 December was substantially to the same effect as the information required by prescribed Form No. 6, such that the application was valid on its face. The second is whether, assuming the e-mail of 31 December was not substantially to the same effect as Form No. 6, the consequence was that the FTT could not determine the new rent.

26. Before considering either of those questions, I begin with a preliminary matter.

Can the FTT rule on the validity of a section 13(4) application?

27. As the Court of Appeal pointed out in *Mooney v Whiteland* [2023] EWCA Civ 67, jurisdiction to determine questions which arise under the 1988 Act is divided between the County Court and the appropriate tribunal (which in England is the FTT). By section 40(1), 1988 Act the Court has sole jurisdiction to determine any question which is not within the jurisdiction of the tribunal by virtue of a provision of the Act. *Mooney* concerned the validity of a landlord's notice under section 13(2) proposing an increase in rent; the premises were in Wales, so the appropriate tribunal was the rent assessment committee rather than the FTT.

28. The Court of Appeal held that, as far as rent is concerned, the jurisdiction of the FTT is to determine an appropriate rent, having regard to market conditions and disregarding the various matters specified in section 14(2). No provision in the 1988 Act confers jurisdiction on the FTT to determine whether a section 13(2) notice is valid. As a result, only the Court could make a determination on that question which would bind the parties. The same must be true of a tenant's application to the FTT under section 13(4); only the County Court can make a binding determination on the validity of such an application.

29. Where does that leave the FTT where it has received an application under section 13(2) the validity of which is in doubt? Is it required to tell the applicant to start proceedings in the County Court to resolve that question, or is it entitled to take a view of its own? In *Mooney* the answer was given by Males LJ (with whom Snowden and Thirwall LLJ agreed) at [48], as follows:

> "That is not to say that a rent assessment committee may not sometimes need to take a view whether a notice is valid. If it considers that a notice is invalid, it may decline to proceed until the question has been determined by the court. Conversely, if it considers that a notice is valid and that objections are without substance, it may proceed to determine the appropriate rent, but its determination will not prevent a tenant from disputing the validity of the notice."

30. Any court or tribunal is entitled to satisfy itself that it has jurisdiction in a matter brought before it. In a case under the 1988 Act, the FTT may therefore decide for itself whether a notice is valid and whether it has jurisdiction to determine a rent; and its decision may be the subject of an appeal to this Tribunal. But a decision by the FTT (or by this Tribunal) that the FTT does or does not have jurisdiction will not bind the parties and the same question could be raised again in the County Court.

Was the e-mail of 31 December 2023 substantially to the same effect as prescribed Form No. 6?

31. Although section 13(4) requires an application to the FTT to be in a prescribed form, and although Form No. 6 is prescribed, the effect of regulation 2 of the 2015 Regulations is that any form which is "substantially to the same effect" will confer jurisdiction on the FTT just as completely as if the prescribed form had been used. Such a form of application is entirely compliant with section 13(4) and is not defective, so there is no need to consider the consequences of non-compliance with the statutory procedure.

32. Mr Cohen submitted that Ms Atesheva's email of 31 December 2023 included all of the material information required by the prescribed form and was substantially to the same effect. Specifically it set out: (i) her name; (ii) the property in question; (iii) the date the new rent was to take effect; (iv) the name and address of Halifax (which she understood to be the managing agent but which the tenancy agreement identifies as her landlord); (v) the new rent; and specifically (vi) appealed to the First-tier Tribunal to undertake a review of the rent increase.

33. In considering the effect of Ms Atesheva's communication with the FTT I do not think that weight should be given to the fact that the information supplied was contained in an e-mail, rather than on a printed form. What matters is the information conveyed to the recipient, not the way in which it is presented. If support for that approach is required, it can be found in *Tadema Holdings v Ferguson* [1999] EWCA Civ 3045, which concerned the validity of a landlord's notice under section 13(2), 1988 Act. The landlord had used a previous edition of the prescribed form. Part of the tenant's argument focused on differences in the layout and presentation of the notes included in the new form, which were different from the old, although it was not suggested that the information itself was substantially different. In the Court of Appeal Peter Gibson LJ (with whom Ward LJ agreed) rejected the submission that the old and new forms were not "substantially to the same effect", saying this:

> "The fact that information is provided in a different format does not seem to me to amount to a difference of significance. Indeed, in my view, that is precisely the sort of difference which Regulation 2 was aimed at making immaterial."

34. It is also important to remember that the form is an application to the FTT. It is not addressed to the landlord (nor is the tenant required to send a copy to the landlord). The few explanatory notes which it contains are intended to assist the tenant in filling in the form, not to convey information to the recipient; in my judgment the omission of the introductory notes did not by itself prevent Ms Atesheva's e-mail from being substantially to the same effect as Form No. 6.

35. The important question for the purpose of this appeal is therefore whether the information contained in the e-mail was substantially to the same effect as the information required by Form No. 6.

36. Statutes often require notices to be served in a prescribed form and, when they do, they often allow a form "substantially to the same effect" to be used instead. Guidance on how the relevant comparison is to be undertaken is available from a number of cases under the Landlord and Tenant Act 1954.

37. In *Sun Alliance & London Assurance Co Ltd v Hayman* [1975] 1 WLR 177 an old form of notice under the 1954 Act had been used. The Court of Appeal decided that whether a notice is substantially to the same effect depends on a comparison between the words used and the corresponding words of the prescribed form to see whether the words used "mean substantially the same" as the words which should have been used. The fact that the recipient was not misled was irrelevant.

38. In *Tegerdine v Brookes* (1977) 36 P&CR 261, another case under the 1954 Act in which certain notes included in the prescribed form had been omitted, Bridge LJ posed the question: if the omitted notes had been included, would they have formed part of the substance of the notice? The same question was posed by Aldous LJ in *Sabella Ltd v Montgomery* [1998] 1 EGLR 65, where he said that whether two notices were substantially to the same effect depended on the importance of the differences between them, not on their number. In the same case Sir Richard Scott V-C said that *Tegerdine* was authority that a valid notice may omit parts of the prescribed form that are simply irrelevant to the rights and obligations of the recipient.

39. In *Johnson v Richmond Housing Partnership Ltd* [2022] UKUT 80 (LC) the Tribunal (Judge Cooke) determined that an application to the FTT under section 13(4), 1988, made using Form No. 6 but omitting to include the correct notice of increase (and including one from a previous year), was nevertheless made in a form "substantially to the same effect" as the prescribed form.

40. I accept Mr Cohen's submission that the information he identified was all required by the prescribed form and included in the e-mail. But it is also necessary to consider whether any information requested by Form No. 6 was missing from the e-mail and why it might have been requested in the prescribed form. There were a number of such pieces of information.

41. Question 3 of the prescribed form contains five questions about the premises themselves, to be answered by ticking one of a series of multiple choice answers: "What type of accommodation do your rent?" "If it is a flat or room(s) what floor(s) is it on?" "The number and type of rooms, e.g. living room, bathroom etc". "Does the tenancy include any other facilities, e.g. garden, garage or other separate building or land?" "Does the tenant share any of the accommodation with either the landlord or another tenant or tenants?" The purpose of requesting this information is clearly to provide the FTT with some basic facts about the nature, size and characteristics of the dwelling it is being asked to value.

42. Question 4 of the prescribed form then asks when the present tenancy began. The purpose of that information is to assist the FTT in ascertaining whether the landlord's notice of increase under section 13(2) was given prematurely (section 13(2) restricts the time at which a landlord may propose a rent increase so that, generally in the case of an assured tenancy, it must not be earlier than 52 weeks after the tenancy began).

43. Question 5 asks whether the tenant paid a premium in addition to rent. This information is relevant because, ordinarily, it is an implied term of an assured periodic tenancy that the tenant may not assign the tenancy or sublet the premises (section 15(1), 1988 Act) but that statutory prohibition will not apply if a premium is paid (section 15(3)(b)).

44. Question 6 asks a further series of questions about services: are any provided under the tenancy; is a separate charge made, and if so, how much; does the charge vary according to the relevant cost? These questions are relevant to the FTT's task because the rent it is required to determine does not include any variable service charge but does include any other sum payable on account of services or furniture (section 14(4)). For the same reason, section 7 asks whether any furniture is provided under the tenancy.

45. Section 14(2), 1988 Act requires that tenant's improvements be disregarded in determining a new rent. Question 8 therefore asks whether the tenant or a predecessor has carried out any improvements to the premises or replaced fixtures, fittings or furniture which were not her responsibility under the tenancy agreement.

46. Question 9 asks the tenant to state what repairs are the responsibility of the landlord and of the tenant. The question must be concerned with the terms of the tenancy agreement, rather than with specific items of disrepair, since the FTT is required by section 14(2)(c) to disregard any reduction in the value of the premises attributable to a failure by the tenant to comply with any terms of the tenancy.

47. Question 10 asks whether there is a written tenancy agreement. If there is, the tenant is asked to attach it to the application. The reassuring note that it will be returned as soon as possible suggests that the document required is the original agreement, not a copy.

48. Question 11 then asks if the tenant has an assured agricultural occupancy before the form ends with space for the tenant to sign a statement confirming that she has attached a copy of the notice proposing a new rent and applies for it to be considered by the FTT.

49. None of the information requested in questions 3 to 11 of the prescribed form was supplied by Ms Atesheva in her e-mail of 31 December and her second e-mail of 22 January added nothing to the first. It might be argued that it was implicit in her complaints about the condition of the property that responsibility for repairs fell on the Landlord rather than the tenant, but with that possible exception none of the other information was included. Nor did Ms Atesheva include a copy of her tenancy agreement or of the notice of increase (although she did provide details of the amount of the increase and the date of commencement which might be said to be the purpose of including a copy).

50. It might also be suggested that the omission of some of the information should be disregarded as irrelevant, as the approach taken by the Court of Appeal in *Tegerdine* would allow. One example might be the answers to question 5 (was a premium paid) or question 11 (is the tenancy an assured agricultural occupancy). But caution is required before dividing the prescribed form into relevant and irrelevant parts. The answer to both questions, whether it is positive or negative, has a bearing on the FTT's task in determining a new rent. Whether a premium was paid affects the terms of the tenancy concerning alienation, which are likely to have an impact on value. Whether the tenancy is or is not an agricultural occupancy affects the earliest date from which a new rent can be requested. The fact that premiums are very unusual, and that South London is not an area where agricultural occupancy is likely to be encountered does not make it less important to know the answers to these questions. The same is true of the other matters to be addressed in the prescribed form; it is all information which may affect the rental value of the premises.

51. Making a comparison between the e-mail of 31 December and the prescribed form, it does not seem to me to be possible to conclude that they are "substantially to the same effect". The e-mail does not impart substantially the same information as a properly completed version of Form No. 6 would. The missing information is relevant and without receiving it from someone, the FTT could not at that stage know with confidence whether the time for a determination had arrived, or the extent of the

property or the terms of the tenancy which it was being asked to value. Since the provision of the information is part of the purpose of an application under section 13(4), without it the effect of the e-mail is not substantially the same as the effect of the prescribed form.

52. Of course, the information requested in the prescribed form cannot have been intended to be the last word on any of the matters concerned. Like the rent assessment committees which preceded it, the FTT is a judicial body. It is therefore required to establish the relevant facts for itself on the basis of evidence or admissions and it will necessarily give the landlord the opportunity to agree or disagree with the information provided by the tenant in her application. To facilitate that fact finding the FTT is also given power under section 41(2), 1988 Act, to require the landlord or the tenant to provide such information as it may reasonably require for the purposes of its functions. Nevertheless, the tenant's application is intended to be the starting point of the fact finding exercise, and Ms Atesheva's e-mail did not do the job sufficiently to comply with section 13(4).

53. I therefore conclude that Ms Atesheva did not apply to the FTT using the prescribed form or a form to substantially the same effect before 1 February 2024, the date specified by the landlord's notice for the increased rent to commence.

Did the FTT have jurisdiction despite the reference not being in the prescribed form?

54. My conclusion so far gives rise to a second question, the answer to which was assumed by the FTT without separate consideration. That is whether the consequence of Ms Atesheva's failure to make an application to the FTT in the prescribed form or a form substantially to the same effect before 1 February 2024 is that the FTT had no jurisdiction to determine the rent payable under her tenancy with effect from that date.

55. Whether an application to the FTT is in substantially the same form as the prescribed form so as to comply with section 13(4) is a different question from whether an application which is neither in the prescribed form nor in a form substantially to the same effect(and so does not comply), nevertheless complies sufficiently with the requirements of the section so that, in law, it has the same effect as if there had been full compliance. The first question called for a comparison between the form and the information supplied; the second question requires a wider focus, on the purpose of the requirement and its function in the statutory scheme as a whole.

56. There is no doubt that a reference of a notice of increase received by the FTT on or after the date on which the proposed increase is due to take effect is not valid and does not give the FTT jurisdiction to determine a new rent. The decision of the Court of Appeal in *R (Lester) v London Rent Assessment Committee* [2003] 1 WLR 1449 puts that beyond argument. In *Lester* the tenant posted her application in the prescribed form two days before the new rent was due to commence, but it took two days to arrive and was received by the rent assessment committee on the date of the increase. The issue for the Court of Appeal was whether the notice was "referred" to the committee on the date it was posted or on the date it was received. The Court decided that the date of receipt was the critical date and it followed that the tenant's reference had not been received in time and the increase had already taken effect.

57. The strictness of the requirement that a notice of increase must be referred to the FTT before the increase takes effect was reiterated by the Tribunal (Sir David Holgate, Chamber President) in *Robertson v Webb* [2018] UKUT 235 (LC), a case in which the tenant submitted his application in the prescribed form, but six weeks after the new rent had taken effect, having been unaware of it as he had been unwell and it was assumed to have been disposed of by a carer.

58. But the non-compliance with section 13(4) in this case is different from the non-compliance in *Lester* or in *Robertson.* In this case Ms Atesheva did refer the notice of increase to the FTT within the time limit set by section 13(4). She did so by her e-mail on 31 December, a month before the deadline, in which she asked the FTT to review the increase proposed by her landlord and provided details of the property, the increase, and the date from which it was due to take effect. What she failed to do, as I have already found, was to make her application in the prescribed form or in a form substantially to the same effect. The question which now arises is whether the consequence of that failure is the same as the consequence of making no application at all until after the deadline had passed.

59. I have previously mentioned the Tribunal's decision in *Johnson v Richmond Housing Partnership* in which the tenant referred a notice of increase to the FTT but, instead of sending a copy of the notice for the current year, he sent a notice relating to a previous year. The Tribunal determined, at paragraph [12], that the prescribed form required that a copy of the correct notice of increase be provided. Despite that finding the Tribunal was satisfied that the FTT had jurisdiction to consider the referral and to determine the new rent. It gave two separate reasons. First, because the notice given was substantially to the same effect as the prescribed form and so was compliant with section 13(4). But alternatively, because the tenant had achieved "substantial compliance" with the statutory requirement, so that his application was valid but defective. Support for the proposition that substantial compliance with a statutory procedure can have the same effect as full compliance was found in the decision of the Court of Appeal in *Natt v Osman* [2013] EWCA Civ 584.

60. Since the Tribunal's decision in *Johnson v Richmond Housing Partnership* the consequences of failing to comply fully with statutory procedures concerning property rights have been considered by the Supreme Court in *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd* [2024] UKSC 27, which is now the leading authority on that subject.

61. *A1 Sunderland* concerned a claim by residential leaseholders to acquire the right to manage a block of flats under the Commonhold and Leasehold Reform Act 2002. The main issue was whether a failure to serve a claim notice on an intermediate landlord as required by section 79(6)(a) would always have the effect of invalidating a right to manage claim. A second issue was whether, on the facts of the case, the failure to serve the claim notice on one of the relevant landlords had invalidated the claim.

62. The decision of the Supreme Court was given by Lord Briggs and Lord Sales (with whom Lord Hamblen, Lord Leggatt and Lord Stephens agreed). They held that the leaseholders' failure to serve a claim notice on the intermediate landlord did not invalidate the transfer of the right to manage. They explained by reference to the decision of the House of Lords in *R v Soneji* [2005] UKHL 49 that the correct approach

to a failure to comply with a statutory provision requiring that some act be done before a power was exercised was to ask whether it was a purpose of the legislature that an act done in breach of that provision should be invalid. At paragraph [61] of their judgment they explained that the effect of earlier authorities had been:

> "[…] 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."

63. The Court went on, at paragraph [62], to place limits on this approach:

> "This does not mean that application of procedural rules in every statutory context turns on detailed examination of the consequences arising from the particular facts of the case, nor that a test of substantial compliance is properly to be applied in relation to every procedural rule. Examination of the purpose served by a particular statutory procedural rule may indicate that Parliament intended that it should operate strictly, as a bright line rule, so that any failure to comply with it invalidates the procedure which follows."

64. The correct approach was explained, at paragraph [68]:

> "In our view 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."

65. The Court had earlier cautioned against simplistic shortcuts, at paragraph [63]:

> "But we would observe that reference to "substantial compliance" begs the question of what purpose was supposed to be served by the rule and expresses a conclusion arising from the relevant analysis, rather than stating a test in itself. Statutory regimes involving procedural obligations are many and are highly varied, and there is no simple shortcut which avoids the need to undertake the analysis referred to in *Soneji* having regard to the particular provisions, scheme and purposes served by the statute in question."

66. Applying the approach explained by the Supreme Court in *A1 Sunderland* to the provisions of the 1988 Act concerning increases in rent, and to the specific facts of this case, it is necessary to begin by bearing two points in mind. The first is that the statutory regime of rent control under the 1988 Act is concerned with private property rights, where certainty is of general importance. The second is that the particular provision with which this appeal is concerned, section 13(4), is concerned with dispute resolution and access to justice. In *A1 Sunderland* the Supreme Court pointed out that a statutory

regime “may reflect, and balance, a number of intersecting purposes” and said that “In that situation, a more nuanced analysis may be called for” (paragraph [63]). This may be an example of such a regime.

67. The 1988 Act interferes with the relationship between residential landlords and tenants to a limited extent. Since the assured shorthold tenancy became the default form of tenure following amendments made by the Housing Act 1996, in practice tenants have very limited security of tenure, the principal limitation on a landlord’s entitlement to recover possession being that they must first obtain an order of the court. Rent control is also relatively weak. Rents are determined by the market and in practice there is no restriction on the rent which parties may agree when entering into a tenancy (a tenant has the right under section 22, 1988 Act to refer an excessive rent to the FTT for consideration within the first six months of the letting but the absence of security of tenure means the right is very unlikely to be exercised).

68. The main limitations on increasing rent during the continuance of the tenancy are procedural. The parties are free to agree any increase in rent but unless they reach agreement informally, a landlord who wishes to secure an increase is required to serve notice under section 13(2) proposing a new rent and specifying the date from which it should take effect. The rent proposed by the landlord will then become the new rent, payable from the specified date unless, before that date, the tenant applies to the FTT under section 13(4). The effect of a tenant’s application to the FTT is to “freeze[..] the legal right generated by service of the landlord’s notice to recover the increased rent” (as it was put by Sedley LJ in *Lester*, at paragraph [40]). The amount of the increase is then in the hands of the FTT which will determine the rent at which the property would reasonably be expected to be let in the open market on certain limited assumptions directed in section 14.

69. I find it difficult to separate the question whether the statute contains an express statement of the consequences of non-compliance with the direction that an application to the FTT must be in the prescribed form, from the question whether it was the purpose of section 13(4) that an application to the FTT which was not in the prescribed form should be of no effect. The answer to both questions is to be found in section 13(4) itself, read in the context of the statute as a whole, and there seems to me to be a substantial overlap between them.

70. Section 13(4) specifies the consequence of making no application before the new rent takes effect, and it is readily understandable why that requirement should be interpreted strictly. The time at which the tenant’s notice is, or is not, served, is of significance in the way the statutory machinery operates. Unless a notice is served in time the statutory machinery for obtaining an increase comes to an end on the date specified in the landlord’s notice and the rights of the parties are changed. The Act does not provide any route back from that change.

71. But section 13(4) also requires the application to be made in the prescribed form. It is much more difficult to see that requirement as being of equivalent significance to the requirement of a timely application, or to imagine that Parliament intended that any departure from the prescribed form would be fatal to an application made in good time which achieved the stated object of referring the notice to the tribunal. A number of factors contribute to that conclusion.

72. First, the substance of the requirement for an application is that the landlord's notice must be referred to the tribunal for consideration. It is obviously necessary that the notice be identified, since it is the notice which has to be referred to the tribunal. It is therefore likely to be essential that the tenant either provide a copy of the notice itself or, as in *Johnson v Richmond Housing Partnership*, sufficient information to enable the notice to be clearly identified. But it is difficult to see why any additional information might be necessary in order to achieve the objective of referring the notice to the tribunal. No information is required to be given to the landlord, who may not know whether the proposed increase has taken effect for some time (when they are contacted by the FTT which, as the automated messages received by Ms Atesheva indicate, may not be for many weeks).

73. Secondly, the statutory procedure interferes with the parties' original contractual agreement; unless she makes her application, the tenant is assumed to agree to the proposed increase and the legal relationship between the parties is varied, whether she in fact agrees to it or not. In a statute which interferes with freedom of contract to only a limited extent, it seems likely that Parliament would not have intended to make it more difficult than necessary for a tenant to avoid a unilateral change to the rent they are required to pay.

74. Thirdly, as *Lester* demonstrates, the Act puts the risk of non-delivery of the landlord's notice, or a delay in receipt by the tribunal of the tenant's application, firmly on the tenant. Parliament is unlikely to have intended to multiply the risk of an inadvertent increase in rent by insisting on every detail of the prescribed form being completed before independent scrutiny of the landlord's proposal becomes possible.

75. Fourthly, the consequences for the landlord of an application being accepted by the FTT are not harsh or unpalatable. The FTT will determine the open market rent, which will become payable (other than in cases of undue hardship) as from the date specified in the landlord's notice. In contrast, the consequence for the tenant of failing to bring the proposed increase before the FTT are that it will take effect without scrutiny, leaving the tenant to pay whatever rent the landlord had proposed, whether it was at a market level or not.

76. Fifthly, the 1988 Act itself does not lay down the detail of the required application. That is left to the Secretary of State in making order prescribing the form. In other words, the statute requires a prescribed form but not necessarily this prescribed form, which suggests that the contents of the form are of lesser significance. Although the Supreme Court in *A1 Sunderland* did not agree entirely with the approach taken by the Court of Appeal in *Elim Court RTM Company Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, it quoted extensively from the judgment of Lewison LJ and did not express any disagreement with the following passage, at paragraph [52]:

> "The intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole: […]. Where the notice or the information which is missing from it is of critical importance in the context of the scheme the non-compliance with the statute will generally result in the invalidity of the notice. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely

> ancillary, the notice may be held to have been valid: […]. One useful pointer is whether the information required is particularised in the statute as opposed to being required by general provisions of the statute. In the latter case the information is also likely to be viewed as of secondary importance. Another is whether the information is required by the statute itself or by subordinate legislation. In the latter case the information is likely to be viewed as of secondary importance. In this connection it must not be forgotten that while the substantive provisions of a bill may be debated clause by clause, a draft statutory instrument is not subject to any detailed Parliamentary scrutiny. It is either accepted or rejected as a whole. A third is whether the server of the notice may immediately serve another one if the impugned notice is invalid. If he can, that is a pointer towards invalidity."

77. Sixthly, the 1988 Act gives the tribunal power to require that information be supplied by the tenant (or the landlord) and exposes them to the risk of a fine if they do not comply (section 41(2), 1988 Act). That is a different procedure, and a different form of sanction, to the provision of detailed information as a condition of referring the matter to the tribunal. It also suggests that Parliament did not envisage that the information contained in the tenant's application would be all that the tribunal would have to rely on but would be introductory only.

78. As far as the facts of this case are concerned no prejudice was caused to the landlord by the fact that the prescribed form was not submitted until 7 February. It did not know whether an application had been made or not until it received its first communication from the FTT which, as far as I can tell from the FTT's decision, was after the file had been reviewed by a judge on 15 February 2024.

79. There will be no injustice to the landlord if Ms Atesheva's e-mail of 31 December 2023 is accepted as having validly invoked the assistance of the FTT; the result, as I have said, will simply be that the increase in rent will be no more than necessary to reflect the open market value of the property on 1 February 2024. If the figure proposed in the landlord's notice of increase was greater than the open market value of the property, I do not consider that having to forego the difference can be regarded as an injustice.

80. There would be injustice, or at least the risk of injustice, to Ms Atesheva, if the FTT's decision that it has no jurisdiction in this case were to be affirmed. The prescribed form of notice of increase which she received from her landlord directed her to the FTT to obtain the necessary form of application. Whilst the FTT's automated "do not disturb" response of 31 December did include a link to a website at which a version of the form could be found, that information was not conveyed in a way which would necessarily cause a tenant to attempt to follow the link, especially when they were told they could expect to receive a response within 10 working days. Had that indication proved accurate there would still have been at least 2 weeks for Ms Atesheva to submit a completed version of the form. Having waited until 22 January she tried again and was told that there was a five week backlog; she was not directed by that response to the FTT's website. She telephoned but got no response. It might be thought that Ms Atesheva did all that could reasonably be expected of a lay person to comply with the statutory procedure and that it would be unjust if, despite that, she was now at risk of being required to pay more than the open market rent for her home.

Disposal

81. For these reasons I am satisfied that the email of 31 December 2023 was sufficient to refer the notice of increase to the FTT and to give it jurisdiction to determine the open market rent payable from 1 February. Ms Atesheva's appeal is therefore allowed and the reference of the notice of increase is remitted to the FTT for determination.

Martin Rodger KC,
Deputy Chamber President

4 October 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.