Collective Enfranchisement: Nuts & Bolts

Notices and Counter-notices

In this paper we address the contents of initial notices and counter-notices under sections 13 and 21 of the Leasehold Reform Urban Housing and Development Act 1993 ("the 1993 Act"). We also consider when a notice will be considered to be defective, saving provisions, service and the effect of registration.

What has to be stated – Initial Notice

Once the tenants have decided to proceed and have set up the nominee purchaser company, if one is being used, the next step in the enfranchisement process is to serve an initial notice. The notice must be served on the reversioner and contain the information prescribed by section 13 of the 1993 Act. Forms are available from legal stationers. It is important to remember that the date of the notice is important for 2 reasons. Firstly a strict timetable begins on the date of service, and secondly, it sets the valuation date for determining the price.

The notice must:

a) Specify or provide a plan showing the premises (and any other appurtenant property or common parts, and any of the freeholder's property over which it is proposed rights should be granted) of which the freehold is proposed to be acquired;
b) State the grounds on which it is claimed that the specified premises are, on the relevant dates, premises to which the right to enfranchise applies;
c) Specify any leasehold interests which are proposed to be acquired;
d) Specify any flats or other units subject to a mandatory leaseback;
e) Specify the proposed purchase price of
    i. The freehold of the specified premises
    ii. The freehold of the appurtenant property
f) Give details of all the qualifying tenants in the premises;
g) State the details, including address for service, of the purchaser;
h) Specify the date by which the reversioner must respond (this date should be at least two months from the date upon which the notice is given);
i) If copies are being given to any other relevant landlord, and name them.

Until recently (May 2014), the initial notice had to be signed personally by each of the tenants. This remains the case in Wales, but not in England. In England the notice must be signed by or on behalf of each participating tenant, so a solicitor can sign the notice on their behalf.

What has to be stated – Counter Notice

Once the reversioner has been served with a notice, it must give a counter notice by the date specified in the initial notice (section 21(1)).

The counter notice must comply with one of three requirements:

a) Admit that the participating tenants are entitled to collectively enfranchise the specified premises;
b) Deny that they are entitled to enfranchise and set out the reasons for that denial;
c) Admit or deny the entitlement but say that an appropriate landlord intends to apply under section 23 for an order that the right to enfranchise shall not be exercisable by virtue of the landlord's intention to redevelop the premises.

If the counter notice does not specify one of those options, then it will be invalid *Burman v Mount Cook Land* [2001] 48 EG 128. In addition, every counter notice must (i) state an address in England and Wales at which notices may be given to the reversioner and (ii) contain a statement as to whether or not the specified premises are within the area of an estate management scheme under s.70 of the Act.

Having said that, (ii) above has been held to be directory as opposed to mandatory, and in *7 Strathray Gardens Ltd v Pointstar Shipping and Finance Ltd* [2005] 1 EGLR 53, the Court of Appeal held that the failure to state that the premises were not within an area of estate management did not invalidate the counter notice.

Where the counter notice admits the right, the reversioner must set out:

a) which of the proposals contained in the initial notice are accepted and which (if any) are not accepted. If any proposals are not accepted, then a counter proposal must be specified;
b) If the reversioner wishes to grant rights over property as opposed to grant the freehold, or offer alternative property over which rights are to be granted, this must be specified;
c) The nominee purchaser may also be required to acquire interests in certain other property, and the counter notice must state those interests;
d) If any rights are sought to be retained by the reversioner, those must be set out;
e) Any provisions that the landlord considers should be included in the conveyance, including easements and restrictive covenants, should be set out;
f) Any information about claims by other tenants for new leases must be set out;
g) Any notices served on the reversioner should also be annexed to the counter notice or given to the purchaser as soon as practical.

The decision in *Bolton v Godwin-Austen* [2014] EWCA 27 dealt with a situation where the counter notice failed to explicitly address an issue, in an application for a lease extension, and proved a difficult lesson for the landlord. The issue can be paraphrased as follows. The flats were held on long underleases. Each of the flat underleases included the usual service charge obligation to pay a percentage of the immediate landlord's costs of maintenance etc. as service charge. But unusually the "service charge" included as a "cost" the head rent payable by the head lessee to the freeholder – referred to as a "rent-as-service-charge-clause" or "RASC" in the judgment. The head rent was substantial, reviewable and stood at £161,000 per annum. The initial notice proposed the principle terms be as specified by section 56(1) of the Act, which specifies a peppercorn rent. As such, in the notice the tenant expressly proposed that the RASC clause be deleted insofar as it contained an obligation to contribute to the head rent.

The counter notice simply stated that "the new lease terms should contain such modifications and amendments as the Landlord is entitled to under and/or as may be necessary to give effect to the requirements of Chapter II of Part I of the Act and without prejudice to the generality of the above such further reasonable modifications to be agreed".

Satisfied with those counter-proposals, the tenants accepted in writing unequivocally all the terms of the counter-notices. It was the tenants' case that all terms of acquisition were thereby agreed, but that if the counter-proposals were not capable of being accepted, the counter-notice was invalid.

The Court of Appeal held that terms of the proposal in the counter-notice were capable of acceptance, and were agreed, notwithstanding the vague and formulaic nature of the wording. The case if of more relevance to lease extensions than collective claims, but is nonetheless relevant to the way counter-proposals can be phrased, for example in relation to the proposed terms of the transfer, or rights offered under s1(4). It is nonetheless best practice to be clear what counter-proposals are being made.

The other important point to take away is that proposals in a s13 Notice or Counter-Notice are capable of acceptance. They will be more about how agreement is reached in a later talk.

Does the price have to be realistic?

In relation to the initial notice, it has been held that it is not a fulfilment of the requirement to state a purchase price by including a notional figure of £1, where it is clear that the eventual price will be many thousands of pounds: *Cadogan v Morris* [1999] 1 EGLR 59. The purchase price must be a realistic proposal.

A string of authorities between 2003 and 2008 set the wheels in motion for much litigation as to whether the price included in the initial notice was realistic, based on the (now) spurious idea that the proposed premium must be one that could be supported by valuation evidence. The position has finally been clarified by Mann J's decision in *Westbrook Dolphin Square Limited v Friends Life Limited & Others* [2015] 1 WLR 1713.

In that case, the nominee purchaser argued that the proposed price need only be a genuine opening offer which was not purely nominal. The reversioner argued that it should be based either on an objectively justifiable price in valuation terms or on the subjective views of the tenant as to its justifiability in valuation terms.

The Judge drew the following conclusions:

- An offer must not be nominal
- It must not be so low that the tenant cannot intend to pay it or not bona fide such that any tenant would know it would be regarded objectively as ridiculous.
- It must be an offer that would be taken to be serious, indicating good faith and presaging a sensible negotiation
- It does not need to be one which the tenant believes is likely to be accepted. Any reasonable tenant is likely to anticipate a counter-offer as that is what happens in reality
- Good faith is the central test rather than an objective one noting that an offer can be made in good faith even if it is outside the range of acceptable values.

The figure proposed by Westbrook satisfied those tests, and the idea that valuation evidence should be considered in detail is now fully dismissed.

The position is different with regard to a counter notice. In *9 Cornwall Crescent London Ltd v Royal Borough of Kensington and Chelsea* [2006] 1 WLR 1186, the Court of Appeal held

- There was no requirement that the figure in a counter notice should be realistic or subject to any other qualification;
- The reason for this was that, unlike in the case of a tenants' notice, the figure specified could never become the price by default.

Invalidity

If there are errors in the initial notice then these may invalidate the notice. There are, however, two ways that the initial notice may be saved:

- By the operation of paragraph 15(1) of Schedule 3 of the 1993 Act
- By the application of the principles in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749

Paragraph 15(1) of Schedule 3

Paragraph 15(1) provides that:

> *"(1) The initial notice shall not be invalidated by any inaccuracy in any of the particulars required by section 13(3) or by any misdescription of any of the property to which the claim extends."*

It is important to note that paragraph 15(1) applies to two types of errors (i) inaccuracy in the section 13(3) particulars and (ii) misdescriptions of the property.

It has been held that the omission of the required plan is not an inaccuracy or a misdescription but invalidates the notice: *Mutual Place Property Management Ltd v Blaquiere* [1996] 2 EGLR 78 (Central London County Court).

The section 13(3) particulars are those contained in section 13(3)(e): i.e. the names and addresses of the qualifying tenants, and particulars of their leases (including the date on which the lease was entered into, the term for which it was granted, and the date of the commencement of the term): *Cadogan v Morris* [1999] 1 EGLR 59 (Court of Appeal); *Free Grammar School of John Lyon v Secchi* [1999] 3 EG:R 49 (Court of Appeal).

It can therefore be noted that the "particulars" are specifically those matters which are referred to as "particulars" in section 13(3). The saving provision therefore does not apply to other errors in the matters to be included in the initial notice.

Further, it has been considered that there must be an attempt to provide the "particulars". If there were an omission of the required "particulars" the initial notice could not be saved by paragraph 15(1).

In *Osman v Natt* [2014] EWCA Civ 1520 the Court of Appeal held that a section 13 notice which did not comply with the requirement in section 13(3)(e) to identify all the qualifying tenants and state their addresses in the property would be invalid. Where a statute confers a property or similar right on a person the issue is whether non-compliance with the statutory requirements precludes that person from acquiring the right in question.

It should be noted that there has been judicial movement away from the mandatory/discretionary distinction, especially in the recent case of *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, a case where Lewison LJ surmised pithily "it is a melancholy fact that whenever Parliament lays down a detailed procedure for exercising a statutory right, people get the procedure wrong", with no more of than a hint of a suggestion that the issue lays with the Parliamentary drafting. .

This was a case where Elim Court wished to exercise the right to manage. They served a notice that (on the face of it) contained 3 errors

(i) Contrary to s.78(5)(b), the time specified in the notice of invitation to participate for inspection of the articles of inspection gave 3 weekdays and did not include a Saturday or Sunday;
(ii) The signature, which is required to be "signed by authority of the company" and by "an authorised member or officer" was instead signed by the secretarial company for the RTM company; and
(iii) Contrary to s.79(6) a company with an intermediate long lease of a flat was not served.

The Court of Appeal took the rationale in Osman and extended it surprisingly widely. The question they considered was, what purpose does the statutory requirement serve in the scheme as a whole?

Thus, in *Osman*, the matters of identity of the qualifying tenants that were absent went to the very heart of the right to enfranchise that they were seeking to exercise. That rationale is applied to other sources of invalidity in property notices, such failure by the landlord to state whether or not he admitted the right using one of the statements in s.45(2), on a lease extension under the 1993 Act; failure to specify periods of occupation, values, and valuation basis in a notice to acquire the freehold under the Leasehold Reform Act 1967; and failure to state a realistic premium in a s.42 notice under the 1993 Act.

In *Elim* however, it was held that articles of association are available from Companies House, and the intermediate landlord did not have the management functions of the kind that could be acquired under the Act. Further, the Court held it was hard to see what relevant compliance with s.78(5)(b) had to a landlord. Thus the notice was not invalid on any of the grounds.

This approach requires a determination of the legislator's intention as to the consequences of non-compliance, and an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole. It may be said that such reasoning could be taken further, after all, there is no reason why an inspection of HM Land Registry could not give the names of the qualifying tenants in Osman. Certainly it is now more difficult to know when to advise landlords to risk taking technical points on notices.

Reasonable recipient test

As with other notices an initial notice will be construed objectively. If there is an obvious mistake but a reasonable recipient would understand the notice then it is not treated as invalid: *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.

The prime example of where the rule in *Mannai* can assist is where there has been a typographical error; e.g. where a date is clearly wrong by a single digit.

It should, however, be remembered that this will not assist where on a true construction the notice does not comply with mandatory statutory requirements: *Burman v Mount Cook Land Ltd* [2002] Ch 256 (Court of Appeal).

Effect of invalidity

Once any premises have been specified in an initial notice no subsequent notice which specifies the whole or part of those premises may be given whilst the first notice continues in force: section 13(8)

of the 1993 Act. There is a prohibition on serving any subsequent notice within 12 months of any withdrawal or deemed withdrawal of a notice: section 13(9) of the 1993 Act.

However, these restrictions only apply to valid notices. If an invalid notice is served then there has been no notice, and therefore a further section 13 notice can be served: *Poets Chase Freehold Co Ltd v Sinclair Gardens Investments (Kensington) Ltd* [2007] EWHC 1776 (Chancery Division).

If a landlord wishes to dispute the validity of an initial notice is it recommended that a counter-notice be served without prejudice to the argument that the initial notice is invalid. This protects the landlord's position.

Counter-notices

The absence of a valid counter-notice will enable the nominee purchaser to apply for an order determining the terms on which it is to acquire, in accordance with the proposals contained in the initial notice, the interests and rights claimed: section 25(1) of the 1993 Act.

It has been held by the Court of Appeal that the court has no jurisdiction to refuse to make such an order and that there is no discretion as to the terms: *Willingale v Globalgrange Ltd* [2000] 2 EGLR 55. It is therefore important that a valid counter-notice is served.

Amendment

Where there is an error in the initial notice, in some limited circumstances the initial notice can be amended. This is pursuant to paragraph 15(2) and (3) of Schedule 3.

> *(2) Where the initial notice—*
> *(a) specifies any property or interest which was not liable to acquisition under or by virtue of section 1 or 2, or*
> *(b) fails to specify any property or interest which is so liable to acquisition, the notice may, with the leave of the court and on such terms as the court may think fit, be amended so as to exclude or include the property or interest in question.*
>
> *(3) Where the initial notice is so amended as to exclude any property or interest, references to the property or interests specified in the notice under any provision of section 13(3) shall be construed accordingly; and, where it is so amended as to include any property or interest, the property or interest shall be treated as if it had been specified under the provision of that section under which it would have fallen to be specified if its acquisition had been proposed at the relevant date.*

Any proceedings seeking an amendment are brought in the County Court. There is a discretion, but the Court will normally grant leave to amend unconditionally unless there would be prejudice caused to the landlord.

In *Wiggins v Regent Wealth Ltd* [2015] 1 WLR 1188 (discussed further below) the Court of Appeal held that the power conferred by paragraph 15(2)(b) to amend an initial notice to include a leasehold interest which was not specified in the initial notice does not include a power to amend the notice to specify a leasehold interest which was not inexistence at the relevant date.

Service

All notices required or authorised to be given under the 1993 Act must be in writing: section 99(1)(a) of the 1993 Act.

Notices may be sent by post, i.e. ordinary pre-paid post, or registered post or recorded delivery. As notices can be served by post section 7 of the Interpretation Act 1978 will have effect.

Section 7 of the 1978 Act provides:

> *Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post*

It should be noted that while the section therefore creates a presumption of service (or deemed service) this can be rebutted by evidence to the contrary.

In ***Calladine-Smith v Saveorder Ltd*** [2011] EWHC 2501 (Chancery Division) a landlord sent a counter-notice under section 45, which was placed in an enveloped, correctly addressed, pre-paid and posted. However, the tenant gave evidence that it was never received. It was held that the tenant had established evidence to the contrary.

It is therefore important, in our view, to make sure that there is evidence of service of notices in a collective enfranchisement claim. For example, signed for or registered post can ensure that there is evidence that the relevant notice was received.

Where an address for service is specified (for example in an initial notice) further notices can be served at that address: section 99(2)(a) of the 1993 Act. Further, on the general approach to a person's obligation to make reasonable inquiries as to the address for service see ***Oldham Metropolitan BC v Tanna*** [2017] EWCA Civ 50. This case involved a different statutory context, but the principles therein are transferable, particularly as to the conclusiveness of the address of the registered proprietor at HM Land Registy.

A tenant may serve notices on his immediate landlord at an address given to him pursuant to sections 47 or 48 of the Landlord and Tenant Act 1987.

Registration

It is incredibly important that the initial notice is registered by the entering of a notice against the freeholder's registered title and any intermediate titles. This is for two reasons: first the registration of the initial notice has consequences under section 19 of the 1993 Act; and second, to protect the priority of the enfranchisement claim under the Land Registration Act 2002. This should be done as soon as to the initial notice is served.

Section 97(1) of the 1993 Act provides that a notice under section 13 shall be registrable under the Land Charges Act 1972 (in the case of unregistered land) or may by the subject of a notice under the Land Registration Act 2002 as if it were an estate contract.

Under section 19(1)-(3):

> *(1)* ***Where the initial notice has been registered*** *in accordance with section 97(1), then so long as it continues in force—*
> *(a)* ***any person who owns the freehold*** *of the whole or any part of the specified premises or the freehold of any property specified in the notice under section 13(3)(a)(ii)* ***shall not****—*
> *(i)* ***make any disposal severing his interest*** *in those premises or in that property*
> *(ii)* ***grant out of that interest any lease*** *under* ***which, if it had been granted before the relevant date,*** *the interest of the tenant* ***would to any extent have been liable*** *on that date* ***to acquisition by virtue of section 2(1)(a) or (b)****; and*
> *(b) no other relevant landlord shall grant out of his interest in the specified premises or in any property so specified any such lease as is mentioned in paragraph (a)(ii);*
> ***and any transaction shall be void*** *to the extent that it purports to effect any such disposal or any such grant of a lease as is mentioned in paragraph (a) or (b).*
>
> *(2)* ***Where the initial notice has been so registered*** *and at any time when it continues in force—*
> *(a)* ***any person who owns the freehold*** *of the whole or any part of the specified premises or the freehold of any property specified in the notice under section 13(3)(a)(ii)* ***disposes of his interest*** *in those premises or that property,*
> *(b) any other relevant landlord disposes of any interest of his specified in the notice under section 13(3)(c)(i),* ***subsection (3) below shall apply*** *in relation to that disposal.*
>
> *(3) Where this subsection applies in relation to any such disposal as is mentioned in subsection (2)(a) or (b),* ***all parties shall for the purposes of this Chapter be in the same position as if the person acquiring the interest under the disposal****—*
> *(a)* ***had become its owner before the initial notice was given*** *(and was accordingly a relevant landlord in place of the person making the disposal), and*
> *(b)* ***had been given any notice*** *or copy of a notice given under this Chapter to that person, and*
> *(c)* ***had taken all steps which that person had taken****;*
> *and, if any subsequent disposal of that interest takes place at any time when the initial notice continues in force, this subsection shall apply in relation to that disposal as if any reference to the person making the disposal included any predecessor in title of his.*

Section 19(1) prevents the severing of the landlord's interest or the grant of any further lease after the relevant date. This therefore "freezes" the interests in the property so that the scheme of the 1993 Act can have proper effect.

Section 19(2)-(3) ensures that on any disposal of the freehold or other relevant interest the new owner or assignee will be bound by the initial notice and any other steps that have been taken in the collective enfranchisement process. This protects the tenant's claim against any subsequent dispositions of the landlord's property.

The later effect is also supported by the Land Registration Act 2002. Where there is a notice on the registered title, that notice ensures that the priority of the enfranchisement claim is protected even if

there is a registered disposition of the registered estate made for valuable consideration: section 29(1) and (2)(a)(i) of the Land Registration Act 2002.

The right of a tenant arising out of the initial notice is not an overriding interest under paragraphs 2 of Schedules 1 and 3 of the Land Registration Act 2002. However, the effect of section 97(1) of the 1993 Act is to enable a notice to be entered in relation to the initial notice as if it were an estate contract.

If the initial notice is not registered and there is a disposition of the landlord's interest, the new owner will not be bound by the initial notice

There have been two recent cases where landlords/freehold reversioners have utilised the absence of registration to try and evade a collective enfranchisement claim.

In ***Curzon v Wolstenholme*** [2015] UKUT 0173 (Lands Chamber) an initial notice was not protected by registration. The owner of the freehold sold his interest to his wife for £1. It was accepted by all parties that the initial notice did not bind the wife because of the want of registration. However, the wife then transferred the freehold back to her husband by way of a gift. The Upper Tribunal had to determine whether the first transfer resulted in the initial notice having no effect whatsoever, or whether it could still bind the original freehold owner (the husband).

The Deputy President of the Upper Tribunal (Lands Chamber), Martin Rodger QC, held that while it was correct that the absence of registration meant that the initial notice did not bind the wife, it did still affect the original freeholder. Section 97 does not provide for the cessation of rights but rather a mechanism by which rights initially enforceable against one freeholder may be enforceable against a successor in title (paragraph 34). It was held that:

> *"[the initial notice conferred] a personal entitlement on the nominee purchaser to acquire all of the interest in the specified premises belonging to the recipient of the notice. They are enforceable by the giver of the notice only against the original recipient unless protected by registration."*

This therefore meant that when the property was transferred back to the original recipient during the currency of the application for determination of the terms of acquisition, the initial notice still had effect.

The initial notice is effective while it "continues in force". An initial notice will continue in force from the relevant date until either (i) a binding contract is entered into, or (ii) a vesting order is made, or (iii) until it is withdrawn or deemed withdrawn, or ceases to have effect.

In ***Wiggins v Regent Wealth Ltd*** [2015] 1 WLR 1188 the landlords did manage to use the absence of registration to their benefit. The claimant, Mr Wiggins, and two companies controlled by him were the underlessees of 4 out of 7 flats in a building. They served an initial notice under section 13. They failed to register that notice.

In the initial notice the leasehold interests proposed to be acquired by virtue of sections 2(1)(a) and (2) were the overriding leases granted in respect of the other 3 flats to the defendants. After service of the initial notice, the defendants, as landlords under the overriding leases, granted further long underleases in respect of the 3 flats to one of the other defendants. As the initial notice had not been

registered the granting of those leasehold interests was not rendered void by section 19(1)(b). The defendants claimed that the new leases were not liable to acquisition, and that the claimant could not amend their initial notice to include a claim in respect of those leases.

The Court of Appeal held (as set out above) that section 2 does not on its true construction permit a right to collective enfranchisement to be exercised in relation to leasehold interests which are not in existence at the relevant date. It follows that the power conferred by paragraph 15(2)(b) of Schedule 3 (to amend the initial notice) does not include a power to amend the notice to specify a leasehold interest which was not in existence at the relevant date.

Further, in the absence of registration of the initial notice the defendant companies, as registered disponees for valuable consideration under the new leases, took free of Mr Wiggin's claim made in the initial notice, which was not registered against the superior interests. The fact that the companies had actual notice as relevant landlords under the old overriding leases was clearly irrelevant. In the absence of registration a disponee takes free of an unregistered interest, irrespective of his actual notice: *Midland Bank Trust Co Ltd v Green* [1981] AC 513.

Concluding remarks

A prime area of professional negligence litigation relates to errors that are made when drafting and serving notices and counter-notices. It is important to check that you are complying with the statutory provisions, and take the appropriate steps to protect an initial notice by registration.

As the case law shows, it is common for landlords who wish to avoid enfranchisement to take points in relation to notices and to attempt to evade the effect of those notices. In our view a carefully drafted, served and registered initial notice closes off these arguments and prevents otherwise costly litigation.

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