Landmark CHAMBERS

Enfranchisement Notices: *Validity and Amendment*

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Overview

Four major cases in last year:

- Consequences of non-compliance with s.13(3)(e) (Not specifying all of the qualifying tenants)- **Natt v Osman [2014] EWCA 1520 Civ**
- When is a premium proposal invalid? **Westbrook Dolphin Square Ltd v Friends Life Ltd [2014] L. & T.R. 28**
- What is a sufficient proposal of lease terms? **Bolton v Godwin-Austen [2014] H.L.R. 15**
- Can the amendment provisions be used to add interests not existing at the time of the initial notice? **Regent Wealth Ltd v Wiggins [2014] HLR 45**

Case 1: Consequences of non-compliance with statutory provisions

Natt v Osman

Factual background

- Dispute as to whether an upstairs flat ("Flat 4") was a flat for purposes of 1993 Act; and therefore whether it contained a qualifying tenant.
- Notice given did not specify Flat 4 or QT within it (LL's daughter)
- Declaration was obtained that Flat 4 was a flat for purposes of the 1993 Act.

Issue at stake:

- Was the notice invalid for non-compliance with 13(3)(e)?

Court of Appeal held

- Not appropriate to apply "mandatory/directory" distinction; not appropriate to apply "substantial compliance approach in relation to statutes distributing private rights between citizens.
- Each provision needs to be interpreted to ascertain parliamentary intention as to effect of non-compliance.
- Non-compliance with section 13(3)(e) leads to invalidity – even where there is no prejudice to LL.

Reasoning:

Three key factors [36]-[38]:

1. Identification of QTs essential to stat scheme.
2. Amendment provision in paragraph 15 of schedule 3 suggests the Parliament had intended errors falling outside of it to render notice invalid.
3. No restriction on service of new notice (an invalid notice does not attract limitation in s.13(9)).

They dismissed arguments that:

- The word "must" in s.13(3) had any particular significance [39];
- The lack of prejudice to the LL was relevant to validity;
- It was significant that Ts might not be able to know who the QTs were. [40]

What will the consequences be?

- Two views:
  1. This decision signals hardening of the line. Although it does not overrule previous authorities it expressly abandons the mandatory/directionary distinction, and the factors it cites as indicating the proper interpretation of non-compliance with s.13(3)(e) would apply almost across the board (esp. Factor 2: existence of amending provision).
  2. CoA did not overrule previous authorities. Therefore scope for argument may still exist in respect of other provisions and/or the interaction of those other authorities with this one.

Case 2: Westbrook Dolphin Square: valid premium proposals, or What does an elephant look like?

Section 13(3)(d)

"(3) The initial notice must—

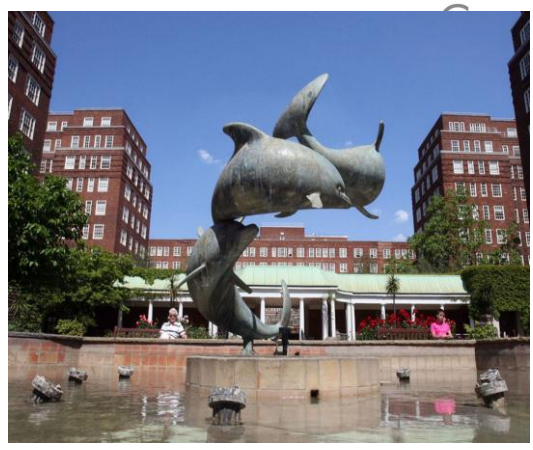
(d) specify the **proposed purchase price** for each of the following, namely—

(i) the freehold interest in the specified premises [or, if the freehold of the whole of the specified premises is not owned by the same person, each of the freehold interests in those premises],

(ii) the freehold interest in any property specified under paragraph (a)(ii), and

(iii) any leasehold interest specified under paragraph (c)(i);

Westbrook Dolphin Square Ltd v Friends Life Ltd [2014] L. & T.R. 28



- Background was an enormous enfranchisement of Dolphin Square, SW1. (potentially the largest ever)
- LL sought to argue that premium proposed was not genuine proposal and rendered notice invalid.
- Premium was £111 million!

Overview of the decision

- First, Mann J found that there was a relevant standard for the premium proposal. [287]-[297].
- He then turned to question of what that standard/test was, identifying that "*the nature of the test does not emerge in a clear way in the leading Court of Appeal authorities*" (in particular **Cadogan v Morris [1999] L. & T.R. 154** and **9 Cornwall Crescent Ltd v RBKC [2005] L.&T.R. 19**)
- See for example this dictum from Stuart-Smith LJ in **Cadogan**:

"This seems to me to be an application of the well-known elephant test. It is difficult to describe, but you know it when you see it. I think we can trust to the good sense of landlords not to make frivolous applications and County court judges to take a robust line and not get enmeshed in hearing detailed evidence. A brief enquiry, if necessary with limited evidence from tenant and landlord, should suffice."

- Mann J considered three proposals from counsel as to what that test might be:

1. Objective test that figure must be a "*genuine opening offer as opposed to a nominal figure*"
2. Objective test that figure must be "*within the range of figures which is capable of being the 'purchase price' for the relevant interest under the Act"*
3. Subjective test: "*are the Ts proposing a figure which they genuinely believe could be a 'purchase price' calculated in conformity with Sch 6"?*

- He endorsed the test proposed by the Ts: is it a "*genuine opening offer as opposed to a nominal figure*" [325]
- He provided the extra gloss that:

  "*In order to be genuine it must be bona fide in the sense that it will be seen by any reasonable landlord as a real offer and not merely the insertion of numbers in a form"*

  "The fact that [the Ts] *do not really expect their first offer to be accepted does not make it any less genuine or bona fide as an offer (or as a proposal)."*
- In doing so he gave specific consideration to the potential prejudice to LLs if they fail to respond to the notice but held that LLs would be adequately protected from having to sell at a stupid test by the "genuine opening offer" test.

How did he get there?

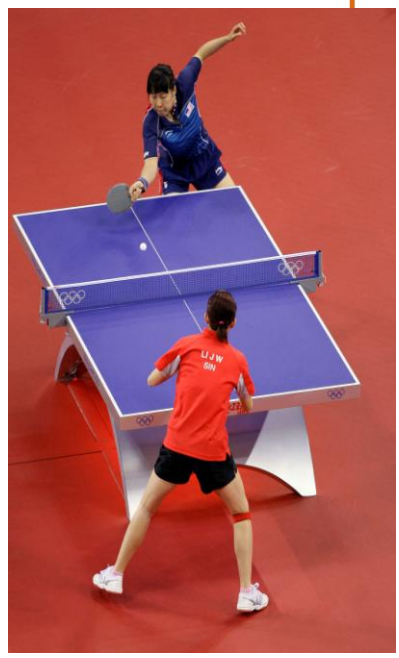
- Mann J was persuaded by a detailed analysis of reasoning in two CoA authorities. In particular he thought that Stuart-Smith L.J.'s judgment in **Cadogan** indicated that:
  a) The offer must not be nominal;
  b) The offer must be in good faith (objectively) in that it will not be regarded as ridiculous/will presage a sensible negotiation.
  c) T does not have to think (or be deemed to have thought) that there is any significant likelihood it would be accepted.
- And that the reasoning in **9 Cornwall Crescent** supported this by indicating (1) that a test by reference to valuation evidence is inappropriate and (2) that "Good faith is the central test".
- He therefore concluded that the word "proposed" is overburdened by any requirement that the figure is one which could be tested by valuation evidence, and that it would be inimical to supposed Parliamentary intention to endorse an approach which involved canvassing valuation issues of this kind in Court prior to it being considered in earnest in the Tribunal.

Comment

- Still unclear how a "genuine opening offer" is to be identified. Are we still on the elephant test?
- Court appears to be clear that it is not appropriate to use valuation evidence, but how else can the validity of even an opening offer be determined?
- Case likely to provide a considerable shield for Ts wishing to make a low-ball premium proposal but, given the uncertainty still inherent in the test it may not be wise to rely on it with too much confidence!

Case 3: Lease term proposals

Bolton v Goodwin-Austen



Factual background

1. Ts served initial notices seeking new leases under s.42. It was specified that new leases should be on same terms as old, save for modification of a single clause to remove Ts' liability for rent under the head-lease.
2. LL served counter-notice. Specified higher premiums and stated in relation to lease terms:

   "*The new leases* (sic) *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*."

3. Ts replied accepting counter-proposals.
4. Ts wrote again noting that LL had failed to provide draft leases in relevant time period.
5. After further correspondence LL provided draft leases (on WP basis) which matched the original leases (no amendment re Headlease rent)
6. Ts returned drafts, having amended to remove Headlease rent.
7. Claim issued in CC, Ts seeking orders for LL to grant new lease including amended Headlease clause.

- CC judge held that no terms of acquisition had been agreed

Held (McCombe LJ lead judgment)

- The counter-proposal was capable of being accepted; and its terms left it to the court to decide it under s.48 of the 1993 Act.
- As the terms had been agreed, then the failure of LLs to respond to amendments meant that they were deemed to have approved the amendments.

Obiter:

- If he was wrong in holding that the counter-proposals were capable of acceptance then they were invalid for lack of precision: **Burman v Mount Cook Land Ltd [2002] Ch. 256**.

Comment

- A very odd decision that the counter-proposals were valid – how can they be said to meet the requirement in **Burman:**

  "the proper working of the statutory scheme requires that the tenant is left in no doubt as to what the landlords admits, how far the tenant's proposals are accepted, and what (if any) are the landlord's counter-proposals"

- Appears to confuse contractual principles of acceptance with the demands of the statutory scheme – something of a contrast to approach taken in **Natt**.

CASE 4: Amendment provision

Regent Wealth Ltd v Wiggins [2014] HLR 45

Facts

- 22 Dec 2010 – Notices given for collective enfranchisement of block of flats in Mayfair (45-47 South Street)
- The Notices was not registered under s.97; therefore s.19 of 1993 Act did not prevent grant of new interests.
- New underleases were then granted.

- At first instance the Judge held that he had jurisdiction to amend the notices to include the new underleases and exercised his discretion to do so.

- The LLs appealed.

Saving provision

Inaccuracies or misdescription in initial notice

(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.

Argument for Ts:

- Use of past tense and present tense in para 15(2) of Schedule 3 indicated that the court had to reconsider what interests were liable to acquisition at the time when an application for amendment was made.

This was rejected on the basis that both qualifying conditions were in fact framed in the present tense ("specifies" and "fails"). Gloster LJ considered that this indicated that in 15(2)(b) the use of the present tense was "*liable to acquisition and remains so liable*"

Comment

- A salutary lesson for Ts.
- The registration powers are important in protecting the clients position and the amendment powers will not come to your aid in these circumstances.