LEASEHOLD REFORM ETC ACT 1993

WILL THE NOTICE CRAMP MY STYLE?

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1. The purpose of this talk is to look at the extent to which a notice served under the 1993 Act commits one or other party to what is proposed, and how changing circumstances are dealt with. These are not topics which are discussed in any detail in the textbooks, but are important and common in practice.

2. A section 13 notice is required to deal with a number of different matters
    a. Specify which appurtenant and common land is proposed to be acquired;
    b. Specify which leases of common parts are proposed to be acquired;
    c. Propose a price for each interest.

3. A counter notice is required by s21 to
    a. State whether the right of enfranchisement is admitted, and if not, for what reasons.
    b. State which proposals are accepted.
    c. In respect of those not accepted, make counter proposals.
    d. Specify leaseback proposals.
    e. Specify what rights are proposed under s1(4) in lieu of acquisition.
    f. Specify what useless interests the tenants are required to acquire.

4. In each case, except the last, what is required is a proposal. We now know, from *Bolton v Godwin-Austen* [2014] EWCA Civ 27, that for the notice to be valid the proposal has to be capable of acceptance. But if it is not accepted, what is its status?

What if it is not made? What if the party making the proposal wants to change the proposal? What is the effect of subsequent events?

PROPOSE IT OR LOSE IT – CONDITIONS PRECEDENT

5. In *Natt v Osman* [2014] EWCA Civ 1520, the issue was whether a notice was invalid because it failed to identify the lease of one flat as a qualifying tenancy. The Chancellor held that

> 33 In cases such as the present, that is to say the acquisition of property rights by private persons pursuant to statute, 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.
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> ….

6. It is thus necessary to try to identify the consequences of failing to make a proposal in the light of the statutory scheme as a whole. In most cases the courts have held that unless the proposal is made in the notice it cannot be made at all.

Appurtenant areas and common parts

7. The first example is where the tenants have a right, but not the obligation, to propose the acquisition of freehold and leasehold interests of appurtenant land and common parts. The tenants have a choice, which must be made when the notice is served. If they do not claim, say, the freehold of the garden it is too late. See *Regent Wealth Ltd v Wiggins* [2014] EWCA Civ 1078 at [72]:

> "In other words, the statute is making clear, both in relation to the freehold to be acquired (i.e. "the specified premises") and in relation to leasehold interests to be acquired, that, in relation to claims made under Chapter I (and not merely for the purposes of the initial notice) the relevant property or interest is that which is specified in the initial notice, necessarily as at the relevant date, or less extensive property or interests, as may be agreed or determined. For

present purposes, however, what is important is that there is no suggestion whatsoever that such property or interests can be more extensive than that which is specified in the initial notice, let alone that an existing claim made under Chapter I can subsequently be extended to include additional premises or interests, not in existence as at the relevant date."

Leasebacks

8. Section 21 provides that counter-notice admitting the claim must specify "any additional leaseback proposals by the reversioner".

9. Schedule 9 paragraph 5, however, provides that where any unit is not a flat let to a qualifying tenant immediately before the time when the freehold of the specified premises is acquired by the nominee purchaser:

> (2)..the nominee purchaser shall, if the freeholder by notice requires him to do so, grant to the freeholder a lease of the unit in accordance with section 36 and paragraph 7 below."

10. In *Cawthorne v Hamdan* [2007] EWCA Civ 6; [2007] Ch. 187 the landlord served a counter-notice which admitted the right to collective enfranchisement and indicated he had no proposals for leaseback in respect of a flat subject only to an AST. The LVT determined the price payable as £182,190, a major element of that figure being that the reversioner could obtain possession of the flat with the shorthold tenancy and sell it on a long lease at a premium. Just prior to the tenants' appeal in February 2006 to the Lands Tribunal, the reversioner purported to serve a leaseback notice, under section 36 and paragraph 5 of Schedule 9 , claiming he required a leaseback of the flat.

11. The Court of Appeal held that a leaseback had to be requested in the counter-notice, at least where there was no qualifying tenant at the date of that notice. The requirement to propose a leaseback in the counter-notice was a condition precedent. The wording of schedule 9 paragraph 5 imposes a condition subsequent on the entitlement of the reversioner to a leaseback if he has said he wants one in the counter-notice, such that

he cannot have it if immediately before the acquisition by the nominee purchaser the relevant flat does have a qualifying tenant.

12. The main reason for this decision appears to have been practical: if a request for a leaseback could be served at any time, there might need to be a further hearing to deal with terms, and a revised valuation.

13. The same pragmatism was relied on in *Bin Mahfouz v Barrie House (Freehold) Limited* [2014] UKUT 0390 by the Upper Tribunal to conclude that a leaseback could not be claimed of a unit which was not constructed until after the relevant date. Among other things the Tribunal relied on the fact that the valuation is to take place at the relevant date.

14. It seems to follow from this approach that making a proposal is a condition precedent in other cases, such as the offer of rights in lieu of acquisition of common parts under s1(4).

Statutory provision for amendment.

15. A notice can only be amended in one case. Schedule 3 paragraph 15 provides that

> "(2) Where the initial notice--
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> (a) specifies any property or interest which was not liable to acquisition under or by virtue of section 1 or 2, or
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> (b) fails to specify any property or interest which is so liable to acquisition,
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> 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.
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> (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."

16. Otherwise there is no power to amend a notice, or the proposals in it.

ARE THE PROPOSALS A CONSTRAINT?

17. There are some dicta on the general approach in *9 Cornwall Crescent London Ltd v Kensington & Chelsea* [2006] 1 W.L.R. 1186. The reversioner had served a notice admitting the entitlement of the tenants to enfranchise (s.21(2)(a)), which meant that under s.21(3)(a)(i) it was to state which of the tenants' proposals were not accepted and give counter-proposals. The reversioner challenged the premium proposed, and proposed its own. The tenants alleged that that counter notice was invalid because the proposed premium was unreasonably high. In dealing with the point that arose in that case Auld L.J. made some observations on how the exchanges of notices worked. At [6] he said:

> "… The Act provides a mechanism for resolution of that matter and satisfaction of other requirements of exercise of the right, consisting broadly of two stages. The first is that of an exchange of notices between the tenants, or their nominee, and the landlord, which serves to identify at an early stage whether and broadly what issue or issues there are between them as to the tenants' right to exercise the power and/or as to the terms, including price, of its acquisition. It does not serve, as the judge appears to have considered at para 25 of his judgment, as a means of securing a final definition of, or constraint on, the issue or issues for determination by the court or a leasehold valuation tribunal, if the matter goes that far. Rather, it serves as a useful negotiating stage during which any issues may be resolved so as to avoid, if possible, recourse to the second stage, namely application to the court to determine the tenants' entitlement to enfranchisement and/or, as the case may be, to a leasehold enfranchisement tribunal to determine the price and/or other terms."

18. This approach has been followed in several different cases.

The price payable

19. If one party proposes a price, the other can accept it. If, however, there is no agreement, neither party is prevented from arguing from a higher or lower price than that proposed in the notice or counter-notice.

20. There has been continued discussion in the cases as to whether the FTT, or the Upper Tribunal, can determine a price higher or lower than that contended for by the valuers.

21. In *Arrowdell Ltd v Coniston Court (North) Hove Ltd* [2007] RVR 39 the President said (10.2006) at paragraph 23 as follows:

> "23. It is entirely appropriate that, as an expert tribunal, an LVT should use its knowledge and experience to test, and if necessary to reject evidence that is before it. But there are three inescapable requirements. First, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion of the basis of evidence that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision….to support a valid decision the reasons must enable the parties to understand why it was that the tribunal reached the conclusion that it did rather than some other conclusion, so as to show that the conclusion was one to which the tribunal was entitled to come on the basis of the evidence before it."

22. In *Pitts v Cadogan* LRA/79/2006 (27.3.2007) the President said at paragraph 9

> "9. I cannot accept the contention that the respondent is entitled, or alternatively should be allowed, to contend for a price that is higher than that determined by the LVT. The Lands Tribunal has power under section 175(4) to exercise any power that was available to the LVT. However, in determining the price under section 21 of the 1967 Act an LVT does not, in my judgment, have power to determine a price that is higher than that contended for by the landlord. It is deciding an inter partes dispute, and it must necessarily be limited in its determination by the extent to which either party has placed a limit on the price that it is seeking. For this reason it is not open to the landlord

to contend before the Lands Tribunal for a price that is higher than the one he was seeking before the LVT. Arrowdell does not assist him.

23. This position was reconfirmed in *Cadogan v Erkman* [2009] 1 EGLR 87 at [9] to [16]. It explained that on an appeal neither party can contend for a price higher or lower than they contended for at the FTT, but they can with permission, contend for a component part that is higher or lower.

24. It is stated in Hague at 16-10 that "There is nothing in the legislation which restricts their determination to the limits indicated by the amounts considered appropriate by the parties." This is inconsistent with the decisions in *Erkman* and *Pitts*, neither of which is cited, and probably wrong.

25. Most recently Siobhan McGrath sought to summarise the powers of the FTT in *Red Kite Housing v Robertson* [2014] UKUT 0134. She referred to *Arrowdell*, but not to *Pitts* or *Erkman*, and said, at 21 to 22:

> 21…Therefore if a Tribunal is making a decision on the basis of either factual or expert evidence, it must make its determination on the basis of the evidence given by the parties. If the Tribunal is aware of other specific evidence which conflicts with what has been put to it by the parties, then the Tribunal must tell the parties about that evidence and ask for their comments. This is a different matter from the application of the Tribunal's knowledge and experience to the task of weighing the evidence before it.
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> 22. If the Tribunal receives evidence but decides to reject that evidence because in its knowledge and experience, the evidence is out of line from the norm, then it must decide whether, as a matter of fairness and natural justice, the parties are entitled to be informed of its view and to be given an opportunity to comment or to provide further evidence. This is so whether the Tribunal has evidence from both of the parties or just one of the parties.

26. I would suggest that the answer is as follows

    a. The Tribunal can only reach a decision within the limits of the prices contended for by the parties;

b. If the Tribunal considers one or other valuer to have made a mistake, it can and should raise the issue, and give both valuers a chance to change their opinion;
c. If they do so, and seek a higher price, the Tribunal can reach a decision within the limits of what is now contended for
d. If they do not, the Tribunal cannot go outside those limits.

Grounds for disputing entitlement to enfranchise

27. In *Westbrook Dolphin Square Limited v Friends Life Limited* [2014] EWHC 2433 Ch the Landlord had served a counter notice disputing the right to claim the freehold, but had not specified as a reason that more than 25% was non-residential. Section 21(1) provides:

> "(2) The counter-notice must comply with one of the following requirements, namely— (b) … state that, <u>for such reasons as are specified in the counternotice</u>, the reversioner does not admit that the participating tenants were so entitled;"

28. The question was whether it was open to the landlord to take the 25% point, not having specified this reason in the counter-notice. Mann J held that it was, preferring the approach of Auld LJ in the *9 Cornwall Crescent* case.

29. The Judge was influenced by s.25. If a landlord serves no notice at all, all the tenant can do is apply to the court for a declaration as to entitlement. Subsection (3) provides that:

> "The court shall not make any order on an application made by virtue of [the failure of the landlord to serve a notice] unless it is satisfied -
> (a) 'that the participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement in relation to the specified premises;
> …'"

30. Thus if no counter notice were served, the landlord could take the 25% point. It seems very odd that the reversioner can do that where it serves no notice, but not do it where there is a notice objecting to enfranchisement.

31. Mann J concluded that

> " I accept that this leaves the words requiring reasons in the notice as having uncertain effect. I also acknowledge that the wording of s.21 seems to impose a statutory obligation on the landlord to serve a notice, which strengthens the notion that there ought to be some teeth behind the apparent obligation to give reasons for opposition. However, Parliament did not prescribe the sanction, and I think that the anomalies that would arise if the sanction were that which the claimant claims are too great to justify the implication required."

Offer of rights

32. In *Cutter v Pry* [2014] UKUT 215 the lessees claimed the whole of the gardens, the driveway, and all the parking spaces. In the counter notice the landlord offered a demise of 6 car parking spaces for £10,000 each, but no right over the roadway. Subsequently it offered a right of way over the communal roadway.

33. The issue was whether the landlord could rely on an offer of rights made after the counter notice. The UT (Edward Cousins) held that it could, and that the terms of the counter notice did not limit what could be offered subsequently. It is arguable that this part of the decision is wrong because:

    a. The Judge relied on an analysis of the principles applicable to non-compliant notices set out in the first instance decision of Nicholas Strauss QC in *Siemens v Friends Life* [2011] UKUT 285. That decision has since been reversed by the Court of Appeal [2014] EWCA Civ 382;

    b. The Judge sought to rely on the previous decisions in *Fluss v Queensbridge Terrace Residents Ltd* [2011] UKUT 285 In that case it was accepted that the counter notices did offer rights which satisfied s1(4), and the only issue was what the precise form of those rights should be;

c. He also sought to rely on *Shortdean Place (Eastbourne) Limited* [2003] 3 EGLR 25. Likewise it was accepted that the counter notices did offer rights which satisfied s1(4). In that case it was the rights offered in the counter-notice which were under consideration. It was held that any objection to the scope of the rights was to be decided at the contract stage by the County Court if agreement could not be reached. [64]

d. He was not referred to any of the "condition precedent" authorities discussed above.

Leaseback proposals

34. In *Tibber v Wilcox* [2014] UKUT 0074 (19.2.2014) the issue was whether the landlord could rely upon the "departures" from the original terms of the Counter-Notice as to the extent of the unit comprised in a leaseback, or whether she was constrained by its original phraseology. The counter-notice proposed that the Leaseback should include:—

> "the second and third floors of 32 Petherton Road aforesaid shown edged red on the attached plans marked "A" and "B" (including all roofs and windows therein) and the staircase leading thereto from the first floor on the attached plan marked "C"..".

35. At the hearing counsel for the landlord submitted that the relevant "unit", of which the Appellant was entitled to a leaseback under paragraph 5(2) of Schedule 9 of the 1993 Act, extended beyond Flat C itself so as also to include the front garden, the Mezzanine Landing and indeed all the stairs and landings in the Building.

36. The Tribunal Judge (Edward Cousins) decided that the landlord could not depart from her proposals in the counter-notice:

> "The statutory language is mandatory in its effect, and I find that the Appellant should have clearly specified in detail her leaseback proposals in the Counter-

> Notice. This she did not do. Subsequently during the First and Second Stages of the hearing she has attempted to rely upon a number of departures from the standard terms. In my judgment that this was too late and the opportunity was missed. Thus in this review I consider that she is in principle bound by the terms of what has been specified in the Counter-Notice and her claim is limited to the proposals therein set out."

37. It is hard to reconcile this approach with the decision of the same Judge (now retired) in *Cutter v Pry*. This was not a case where a leaseback had not been claimed. The debate was over the terms of the leaseback, which might be thought to be unconstrained by the precise proposals in the counter notice.

Are other landlords bound?

38. The counter notice is served by the reversioner on behalf of all other landlords. What if he proposed a price which they consider too low?

39. There is a risk that the proposal will be agreed, which Katie will discuss.

40. In collective claims where the intermediate landlord has served notice of independent representation, it has the power to agree the price or terms. If it does not agree with the proposals made by the reversioner, it should make revised proposals as soon as it can.

41. If a proposal is a condition precedent, the intermediate landlord will be stuck with the counter-notice. In other cases, it will be free to make revised proposals within the principles discussed above.

SUBSEQUENT EVENTS

42. The notice and counter- notice address the situation as at the relevant date, the date of the notice. However, things can change, and the question arises whether and how they can affect the proposals in the notices.

43. The possibility of some changes of circumstances are recognised in the statutory provisions.

44. Section 24(4) allows a modification of terms previously agreed or determined to take such changes into account.

> "(4) The court may under this subsection make an order–
> (a) providing for the interests to be acquired by the nominee purchaser to be vested in him on the terms referred to in subsection (3);
> (b) providing for those interests to be vested in him on those terms, but subject to such modifications as–
>
> (i) may have been determined by a leasehold valuation tribunal, on the application of either the nominee purchaser or the reversioner, to be required by reason of any change in circumstances since the time when the terms were agreed or determined as mentioned in that subsection"

45. This is rarely invoked. It is however an example of how changes can prevail over the proposals in the notices.

46. The more common case is where a change occurs before terms of acquisition are agreed or determined.

47. Section 19 prohibits some transactions but permits others. It does not, for example, prevent the grant of a lease of a flat which is not subject to a qualifying tenancy. The landlord took advantage of this in *Queensbridge Investment Ltd v 61 Queens Gate Freehold Ltd* [2014] UKUT 437 (LC). In that case the freeholder requested leasebacks of 3 flats which were were either vacant, occupied by statutory tenants protected by the Rent Act 1977, or let under an assured shorthold tenancy. The parties could not agree the terms of the leasebacks, and the LVT made a determination which the freeholder did not like. It appealed. Before the appeal was heard, Q granted long leases of the three flats on the terms which it had previously proposed but which had been rejected by the LVT and asserted that the effect of s.36 and sch.9 para.5 was that it was under no obligation to enter into leasebacks on the terms determined by the LVT.

48. The nominee purchaser argued that the freeholder could not resile from its claim for leasebacks, especially since the parties had proceeded on the basis that leasebacks were to be granted. The Upper Tribunal disagreed. Neither section 19 nor any other provision prevents the grant of a lease by the freeholder at any time before contracts are agreed.

49. Schedule 6 paragraph 3 requires the valuation to take place assuming a sale on the relevant date but "*subject to any leases subject to which the freeholders interest is to be acquired*". The effect of this is that the valuation must reflect subsequent changes, which necessarily were not reflected in the notices:

    a. Where, at the date of the initial notice there exists a lease which is superior to an underlease held by a qualifying tenant of a flat, it will be liable to acquisition by the nominee purchaser under s.2(1)(b) and 2(2) ; if the underlease terminates, and the superior lease is held by a qualifying tenant, it will no longer be liable to acquisition and any terms previously agreed or determined will have to change to reflect that. See *Regent Wealth Ltd v Wiggins* [2014] EWCA Civ 1078 at [85];

    b. For the same reasons, if an intermediate lease was liable to acquisition but expired before completion, it could not and would not be acquired, and the price should reflect this;

    c. Likewise, if a new lease is granted after the relevant date, subject to which the freehold or an intermediate lease is being acquired, the valuation must reflect that as well. *Wiggins v Regent Wealth Ltd* LON/OOBKJOCE/2011/0187.

CONCLUSIONS

50. The cases are not easy to reconcile. Some are inconsistent and some probably wrong. I have attempted to suggest a way of rationalising them, but there remains plenty of scope for argument.