Valuable notice

The 80-year rule has produced a spate of litigation. Natasha Rees reviews the most recent case, which focused on the repercussions flowing from an invalid notice served by a tenant under the Leasehold Reform Act 1993

Natasha Rees is a property litigator at Forsters

'If a notice is properly given but falls foul of s13(3) of the 1993 Act and a landlord challenges the notice on this basis, a tenant will be able to accept that the notice is invalid and serve a fresh notice immediately, rather than having to wait a year.'

The Commonhold and Leasehold Reform Act 2002 introduced some significant changes to the enfranchisement legislation. Two of these changes, namely the 'fixed valuation date' and the '80-year rule', have resulted in a dramatic increase in litigation regarding the validity of notices and the enfranchisement process generally.

On all enfranchisement claims the valuation date, for the purposes of calculating the premium, is now fixed and is the date that the tenant or tenants serve on their landlord a claim to the freehold or a claim to a lease extension. There can often be significant advantages to a landlord in delaying the valuation date. This is particularly the case where the property market is rising or where the leases are getting shorter and may fall below the threshold of 80 years. The 80-year rule means that a lessee does not have to pay any marriage value (the notional profit) to its landlord if the unexpired lease term is more than 80 years. As a result, the cost of enfranchisement increases considerably the moment that the unexpired term drops below 80 years. This is obviously very important and applies both to collective and to lease extension claims.

In a situation where the leases are close to the 80-year threshold, it will clearly be in the landlord's interest to dispute the tenant's entitlement or to find fault with the initial notice of claim. If a landlord can establish that a notice is invalid or if the notice has to be withdrawn, the tenant or tenants will have to start the whole process again, the valuation date will be lost and the landlord will probably be able to argue a higher premium at a later date.

Once recent example of this was a dispute that arose regarding a section 13 notice served by a group of tenants of a block in Aylesbury, Buckinghamshire. The dispute was finally resolved by the Court of Appeal in July 2007, on an appeal known as *Sinclair Gardens Investments (Kensington) Ltd v Poets Chase Freehold Company Ltd*. This appeal illustrates the complex rules relating to notices and the dire consequences that can ensue if they are not followed.

The claim

The case involved nine blocks of flats at Poets Chase in Aylesbury. The qualifying tenants of each block sought collective enfranchisement. In 2005 nine notices were served under the Leasehold Reform, Housing and Urban Development Act 1993, each of which contained the same defect. The freeholder disputed the validity of each notice, leading to nine actions in the County Court. The Court decided that one of the actions should be the lead action, and it was this that was considered by the Court of Appeal. The lead action concerned Flat 1-25 Poets Chase.

The section 13 notice in the lead case had been served in December 2005. The landlord served a counter-notice in February 2006 stating that the section 13 notice did not comply with ss13(3)(d) and (f) of the 1993 Act. The landlord did not dispute the tenants' entitlement to enfranchise under s13(2), it was merely disputing the contents of the notice, which did not comply with the mandatory requirements of s13(3), namely the

The relevant provisions of the 1993 Act

Section 13 – Notice by qualifying tenants of claim to exercise right

(1) A claim to exercise the right to collective enfranchisement with respect to any premises is made by the giving of notice of the claim under this section.

(2) A notice given under this section ('the initial notice') –

(a) must be given to the reversioner in respect of those premises; and
(b) must be given by a number of qualifying tenants of flats contained in the premises as at the relevant date which –

(i) is not less than two-thirds of the total number of such tenants, and
(ii) is not less than one-half of the total number of flats so contained;

and not less than one-half of the qualifying tenants by whom the notice is given must satisfy the residence condition.

(3) The initial notice must –

(a) specify and be accompanied by a plan showing –

(i) the premises of which the freehold is proposed to be acquired by virtue of section 1(1),
(ii) any property of which the freehold is proposed to be acquired by virtue of section 1(2)(a), and
(iii) any property of the person who owns the freehold of the specified premises over which it is proposed that rights (specified in the notice) should be granted by him in connection with the acquisition of the freehold of the specified premises or of any such property so far as falling within section 1(3)(a);

(b) contain a statement of the grounds on which it is claimed that the specified premises are, on the relevant date, premises to which this Chapter applies;

(c) specify –

(i) any leasehold interest proposed to be acquired under or by virtue of section 2(1)(a) or (b), and
(ii) any flats or other units contained in the specified premises in relation to which it is considered that any of the requirements in Part II of Schedule 9 to this Act are applicable;

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

(i) the freehold interest in the specified premises,
(ii) the freehold interest in any property specified under paragraph (a)(ii), and
(iii) any leasehold interest specified under paragraph (c)(i);

(e) state the full names of all the qualifying tenants of flats contained in the specified premises and the addresses of their flats, and contain the following particulars in relation to each of those tenants, namely –

(i) such particulars of his lease as are sufficient to identify it, 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,
(ii) such further particulars as are necessary to show that the lease is a lease at a low rent, and
(iii) if it is claimed that he satisfies the residence condition, particulars of the period or periods falling within the preceding ten years for which he has occupied the whole or part of his flat as his only or principal home;

(f) state the full name or names of the person or persons appointed as the nominee purchaser for the purposes of section 15, and an address in England and Wales at which notices may be given to that person or those persons under this Chapter; and
(g) specify the date by which the reversioner must respond to the notice by giving a counter-notice under section 21.

(11) Where a notice is given in accordance with this section, then for the purposes of this Chapter the notice continues in force as from the relevant date –

(a) until a binding contract is entered into in pursuance of the notice, or an order is made under section 24(4)(a) or (b) or 25(6)(a) or (b) providing for the vesting of interests in the nominee purchaser;
(b) if the notice is withdrawn or deemed to have been withdrawn under or by virtue of any provision of this Chapter or under section 74(3), until the date of the withdrawal or deemed withdrawal, or
(c) until such other time as the notice ceases to have effect by virtue of any provision of this Chapter.

requirement to specify a purchase price for each and every interest (s13(3)(d)), and the requirement to state the full names of the person or persons to be appointed as the nominee purchaser for the purposes of s15 of the 1993 Act (s13(3)(f)). The notice had, in fact, given the name of a right to enfranchise (RTE) company. This mistake was made because the tenants had wrongly assumed that the new rules relating to RTE companies introduced by the 2002 Act had come into force.

The tenants accepted that their first notice was invalid and in April 2006 the same tenants served a further section 13 notice correcting the matters complained of. The landlord argued that this second notice was also invalid. Its reason this time was that it was not possible to serve a fresh section 13 notice until the first notice had been properly withdrawn. Under s13(8), once a section 13 notice is withdrawn no further notice can be served for a year. It argued that this meant that the second notice was also invalid.

It was at this point that the possible consequences became clear. Most of the tenants in the block had leases that only had 80 years left to run. Their leases were due to fall below 80 years by the end of 2006. If they had accepted the landlord's arguments regarding the first notice, ie that it had to be withdrawn before a second notice could be served, they would have had to wait a year before serving a fresh notice. By this time, the 80-year rule would have come into play and the premium would have increased considerably. Upon realising this, the tenants commenced proceedings in the County Court in order to

establish that the first notice was invalid and of no effect, and that the second notice was therefore valid.

The key statutory provisions

The provisions of the 1993 Act that are relevant to this claim are essentially ss13, 21 and 22. Section 13(2) sets out how the notice should be given and by whom. Section 13(3) sets out the mandatory requirements for the notice. Section 13(11) sets out the circumstances where the notice will no longer 'continue in force'. In particular, it provides that it will 'continue in force' until the notice ceases to have effect. Section 21 deals with the service of a counter notice in response to the claim, and s22 allows the nominee purchaser to apply to the court if the validity of the claim is questioned.

The County Court decision

The Court looked at both errors in the first notice separately. The judge decided that the failure to give the full name of the nominee purchaser was a defect, but that it could be saved by applying the rule in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997]. He concluded that a reasonable recipient would have understood the notice and would have realised that the RTE company was related to the nominee purchaser. He felt that he could not apply this rule to the other defect, namely the failure to specify separate prices for the property being acquired. In view of this, he held that the first notice served in December 2005 did not comply with the mandatory provisions of s13(3) and was therefore invalid, thus allowing the tenants to rely on their second notice.

The appeal

On appeal it was accepted by both the tenants and the landlord that the first notice had not complied with s13(3)(d). This rendered the first notice invalid. Where they parted company was the consequence of this failure. The tenants argued that the first notice was of no effect, which meant that they could rely on the second notice. The landlord argued that the first notice, although invalid, remained in force and consequently had to be withdrawn before a second notice could be validly served, thus resulting in a delay of a year before a further claim could be made.

The landlord relied on the wording of the statute and argued that a section 13 notice that was given in accordance with s13(2), ie served correctly and given by the requisite number of qualifying tenants, was a 'notice given in accordance with s13', whether or not it complied with the mandatory requirements set out in s13(3). It felt that this was even clearer where a counter-notice was served under s21. At this point the nominee purchaser could apply to the court under s22 to determine whether the notice complied with s13(3), and until it did so, it remained 'in force'. The landlord in the alternative relied on an argument that the tenants were estopped from denying that the original notice was valid.

The tenants argued that there was a distinction between the two sections. Section 13(2) dealt with the entitlement of the tenants to exercise the right to collective enfranchisement. Section 13(3) set out the requirements as to the form and the contents of the notice by which the tenants sought to exercise that right. They suggested that the question of entitlement was more properly the subject of ss21 and 22. A counter-notice served under s21 could challenge the tenant's entitlement. An application under s22 could be used to ask the court to determine a tenant's entitlement. On the other hand, if a notice did not comply with the mandatory requirements of s13(3), this was subject to the usual rules relating to the validity of notices. Where a notice is invalid, it has no force and cannot be said to 'continue in force'.

The decision

Since it was accepted by both parties that the first notice had not complied with s13(3)(d), the only issue that had to be decided was the consequence of that failure. Morgan J referred to the case of *Speedwell Estates Ltd v Dalziel* [2001], where it was held that if a notice does not comply with mandatory statutory requirements, and if the notice is not saved either by a saving provision (such as para 15 of Schedule 3 to the 1993 Act, which provides that a notice will not be invalidated by inaccuracy or misdescription) or by the *Mannai* test, it will be invalid. He felt that since the 1993 Act contained particular provisions that would give effect to an otherwise invalid notice, and that these provisions had a defined and limited effect, in other respects, the normal rule should apply.

He rejected the landlord's interpretation of ss21 and 22, and stated that if a landlord received a notice that did not comply with the mandatory requirements of s13(3), the correct course was to respond stating that the notice was of no effect. If there was any question over the compliance with s13(3), the landlord was at liberty to serve a 'without prejudice' counter-notice. If a nominee purchaser was faced with a letter saying that its notice was invalid and of no effect and a 'without prejudice' counter-notice accepting its entitlement, it could apply to the court under its general jurisdiction to determine whether the mandatory requirements had been complied with. It was not necessary to invoke s22. On the question of estoppel the judge dismissed any suggestion that the tenants were estopped from denying the validity of their original notice because he felt that the landlord could not show the necessary reliance.

Conclusion

This claim illustrates how important it is to comply with the mandatory requirements set out in s13(3) of the Act. It does, however, give some comfort to tenants. If a notice is properly given but falls foul of s13(3) and a landlord challenges the notice on this basis, a tenant will be able to accept that the notice is invalid and serve a fresh notice immediately, rather than having to wait a year. Tenants should also consider the notice carefully to see if they can rely on the saving provisions under Schedule 3 to the 1993 Act or the *Mannai* test to save what otherwise might be considered to be an invalid notice.

Landlords should also take note. If a claim is received that properly complies with s13(2) but fails to comply with one of the mandatory provisions under s13(3), the correct course is to inform the tenants in writing that the notice is of no effect and to set out clear reasons for this. It would also be prudent to serve a counter-notice without prejudice to this contention in case a court finds at a later date that the notice is in fact valid. ■

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd
[1997] AC 749

Sinclair Gardens Investments (Kensington) Ltd v Poets Chase Freehold Company Ltd
[2007] WLR (D) 219

Speedwell Estates Ltd v Dalziel
[2001] EWCA Civ 277