

Validity of notices

Natasha Rees considers the outcome of a recent case concerning whether a company tenant had validly signed a notice served on its landlord



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'The right test for validity of signature is not the reasonable recipient test but the actual requirements of the Leasehold Reform, Housing and Urban Development Act 1993. The correct question is whether the company has correctly signed the notice, not what the freeholder might reasonably have thought about the notice.'

Landlords are always looking for ways to dispute the validity of notices of claim. In the past there have been a number of cases concerning the premium inserted in a notice and whether or not this can invalidate it. More recently, there have been cases concerning the signature of notices. In *St Ermins Property Company Ltd v Tingay* [2002] it was held that the signature by an agent appointed under a power of attorney did not satisfy the statutory requirement of signature by the tenant. Further, the Court of Appeal held in *Cascades and Quayside Ltd v Cascades Freehold Ltd* [2007] that signature by an agent who had been appointed less formally did not suffice. In 2007 Judge Reid QC decided that a limited company tenant can only sign a notice by executing it in accordance with the requirements of the relevant Companies Act. In March of this year the Court of Appeal had to consider this question again in *Hilmi & Associates Ltd v 20 Pembridge Villas Freehold Ltd* [2010].

Background

The appeal concerned a collective enfranchisement claim made by tenants of a building in West London. The building comprised seven flats, and in 2007 the requisite number of four tenants completed and served their landlord with a notice pursuant to s13 of the Leasehold Reform, Housing and Urban Development Act 1993. Three of the qualifying tenants were individuals, who signed the notice. The fourth was a company called Datamust Company Ltd. Mr Hickey, who was a director of the company, signed the section 13 notice with his name and the word 'Director' underneath. The Court of Appeal had to consider whether

Mr Hickey's signature amounted to signature of the notice by the company tenant in accordance with the 1993 Act.

The law

Section 99(5) of the 1993 Act requires that any notice given under s13 or s42 must 'be signed by each of the tenants, or (as the case may be) by the tenant, by whom it is given'. The 1993 Act distinguishes between these two notices, which must be signed personally, and any other notices under the 1993 Act, which can be signed by or on behalf of the tenant. The Court of Appeal therefore had to decide whether the company tenant had validly 'signed' the section 13 notice.

Since neither party sought to rely on the company's articles of association, which might have provided how documents could be executed, the Court of Appeal had to consider this question in the light of the general law as it stood in 2007, when the notice was served. By 2007 the Companies Act (CA) 1989 had come into force. It introduced a number of amendments to CA 1985, one of which concerned the execution of documents by companies. The relevant provision, a new s36A, provided that a document signed by a director and secretary of a company, or by two directors, has the same effect as if executed under the common seal of the company.

The position is now governed by s44 CA 2006, which came into force on 6 April 2008 (see box, on p7). This section, which is essentially the same as s36A, is therefore relevant for s13 or s42 notices served after this date.

County court decision

At first instance Judge Dight decided that the notice was valid.

He distinguished between executing a document under s36A CA 1989 and signing a document, as required by s99(5) of the 1993 Act. He felt that the purpose of s99(5) was to ensure that the tenant signed the notice personally, so that the tenant really knew what they were doing. Since a company was an artificial person he felt that, whether it signed a document via a single officer or executed a document in accordance with CA 1989, it did so through agents. He felt that Mr Hickey had validly signed the notice as an agent of the company.

Court of Appeal decision

The Court of Appeal felt that the point was technical. Lloyd LJ, who gave the leading judgment, commented that although the wording of s99(5) of the 1993 Act suggested that the notice had to be signed personally, it did not actually use the word 'personally'. He felt this had sidetracked the first instance judge from the statutory question, which was whether the notice was signed by the company or whether it was signed on behalf of the company.

The judge referred to the Court of Appeal decision in *Burman v Mount Cook Land Ltd* [2001], which concerned the validity of a counter-notice under the 1993 Act. This case showed that the right test was not the reasonable recipient test, as laid down by *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997], but the actual requirements of the 1993 Act. On this basis he considered that the correct question was whether the company had correctly signed the notice by the steps that were taken, not what the freeholder might reasonably have thought about the notice.

As stated above, to answer this question the judge felt it was necessary to consider the general law, since neither party had sought to rely on the memorandum or articles of association

of the company. Mr Heather, counsel for the landlord, submitted that the only relevant provision of the general law was s36A CA 1985. He argued that s36A applied to the signature of a notice just as it would apply to any other document apart from a contract, which is governed by s36, and except to the extent that s36AA adds a further requirement in relation to a document to be executed as a deed. Mr Van Tonder, counsel for the tenant, argued that s36A only applied to the 'execution' of documents, and that one didn't speak of a simple notice which required a signature as being 'executed'.

The judge considered the definition of 'execute' as set out in the *Oxford English Dictionary*, which is as follows:

There should be no distinction between documents which require a degree of formality and other, less formal, documents, since this could pose serious difficulties.

To go through the formalities necessary to the validity of (a legal act, eg a bequest, agreement, mortgage etc). Hence to complete and give validity to (the instrument by which such act is affected) by performing what the law requires to be done, as by signing, sealing etc.

He felt that, contrary to the tenant's argument, there should be no distinction between documents which require a degree of formality and other, less formal, documents, since this could pose serious difficulties. It would result in four different categories of document under s36A CA 1989 and would give rise to confusion and uncertainty.

He accepted Mr Heather's submissions that where some degree of formality is required to make a document valid and effective for a legal

Burman v Mount Cook Land Ltd
[2001] EWCA Civ 1712
Cascades and Quayside Ltd v Cascades Freehold Ltd
[2007] EWCA Civ 1555
Hilmi & Associates Ltd v 20 Pembridge Villas Freehold Ltd
[2010] EWCA Civ 314
Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd
[1997] PLSCS 150
St Ermins Property Co v Tingay
[2002] EWHC 1673 (Ch)

purpose, it is appropriate and natural to speak of the execution of the document, as a matter of ordinary language. He also agreed that this was particularly the

case for a document that is to be signed by, as distinct from on behalf of, a legal entity such as a limited company.

He stated that, in his judgement, s36A prescribed how a company registered under CA 1989 could itself sign a document which was required for a legal purpose. A notice under s13 or s42 of the 1993 Act fell within this definition of a document. He therefore concluded that the notice, which was signed by one director and which did not have a company seal, was not signed by the company.

Conclusion

As a result of this decision practitioners should ensure that, where a company is signing a section 13 notice or a section 42 notice under the 1993 Act, it has completed the relevant notice in accordance with s44 CA 2006. Failure to do so will invalidate the notice. The court in *Hilmi & Associates* was not required to consider what the position would be if the company's memorandum and articles permitted the company to execute documents in a different way. If a tenant does fall foul of this decision then it seems that the only means of escape will be a helpful provision in the company's own constitutional documents. ■

Section 44 of the Companies Act 2006

Under s44 CA 2006 a company can execute a deed in the following ways:

- Affixing its common seal.
- Signature of the document as a deed by two authorised signatories.
- Signature of the document as a deed by one director whose signature is witnessed.

Section 44(2)(a) states that every director of a company and company secretary is an authorised signatory.