Enfranchisement Notices.

When the Leasehold Reform Act was passed in 1967 the opportunity was taken to prescribe the forms of notice of claim and reply. This followed the precedent of the Landlord and Tenant Act 1954, where notices were prescribed for the statutory procedure for both residential and business tenancies.

Notwithstanding the relative simplicity of having to fill in a prescribed form, a good deal of litigation has taken place over the years over whether particular defects in 1967 Act notices invalidated them.

When the Leasehold Reform Housing and Urban Development Act 1993 was passed, giving long lessees of flats the right jointly to acquire the freehold, or individually to acquire a new lease, much of the statutory procedure was similar to that under the 1967 Act. However, although the power to prescribe forms of notice was included (s. 99(6)), it has not been exercised to date. Thus, the precedent of the Landlord and Tenant Act 1987, in not prescribing notices, was followed. Given the well-publicised criticisms of the 1987 Act, that was probably not a wise decision.

This has, as might have been expected, caused a considerable number of points to be taken in the courts. There can be particular advantages in challenging 1993 Act notices. Unlike the

procedure under the 1967 Act, once a claim is made a strict timetable must be followed if the claim is not to be deemed withdrawn (under ss. 29 or 53 concerning collective enfranchisement and new lease claims respectively). Moreover, if the landlord fails to serve a counter-notice the tenants can apply to the court to obtain the freehold or a new lease on the terms set out in their notice (ss. 25 and 49 respectively). In such an application, if the court is satisfied that the tenants' claim is a good one, there is no discretion as to the terms of acquisition: *Willingale v Globalgrange Ltd* [2000] 2 EGLR 55, C.A.

Before I look in more detail at 1993 Act notices, it is worth considering the cases that have considered the validity of notices under the 1967 Act. There have been a number of variations to the Regulations prescribing the form of notices, which have changed as the requirements of the Act have changed. The Act has always required the tenant to set out the basic particulars on which his claim is based e.g. details of his lease, when he became the tenant, if appropriate, why he says the low rent tests applies, what residence he relies upon. These are factual matters which are either within the tenant's knowledge or can be discovered by him. The notice is not invalidated by any inaccuracy in these particulars: 1967 Act, Sch. 3, para. 6(3). As with other prescribed Regulations prescribing forms of notice in landlord and tenant cases, a form which is substantially to the same effect as the prescribed form will suffice (the current provision is reg. 2, Leasehold Reform (Notices) Regulations 1997) Additionally, in an appropriate case the well-known rule in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 H.L. may apply to save a notice which contains an obvious error, but whose meaning would be clear enough to a reasonable recipient. This rule can, however, only be prayed in aid where the

essential statutory requirements of the notice are complied with: *Speedwell Estates Ltd v Dalziel* [2002] 1 EGLR 55 C.A.

What errors have invalidated 1967 Act notices of claim, or fallen on the right side of the line? There have been three decisions of the Court of Appeal striking down purported notices. A notice which does not state whether the tenant is seeking the freehold or an extended lease is invalid: *Byrnlea Property Investments Ltd v Ramsay* [1969] 2 QB 253. This was the case even though the landlord knew from correspondence with the tenant which alternative he was seeking. In *Dymond v Arundel-Timms* [1991] 1 EGLR 109, the tenant had failed to disclose a second residence. The judge found that this was intended to mislead, being deliberate concealment, and this could not be categorised as an inaccuracy in the particulars. In *Speedwell* (above), the failure to give any particulars of residence - the tenant simply put "N/A" in the approriate box - invalidated the notice; details of residence were crucial to the claim.

By contrast, there have been several cases where inaccuracies have not been fatal to the notice. In *Lewis v Harries* (1971) 22 P & CR 905, the failure to delete the inapplicable alternative, namely freehold or extended lease, was saved by construing the notice as a whole, where the tenant's intention was apparent. In *Cresswell v Duke of Westminster* [1985] 2 EGLR 151, an innocent failure to disclose a residence that made no difference to the claim was forgiven. This case was distinguished in *Dymond* (above) where the tenant had been found to have an intention to mislead. It may, however, be difficult to distinguish between notices on the ground of the subject intention of the giver, rather than construing it on its face.

In *Speedwell* (above) other errors were not fatal to the validity of the notice; there was substantial compliance even though, for instance, complete and accurate details of the tenant's lease were not provided. Very recently, in *Cadogan v Strauss* [2004] 19 EG 166 C.A., it was held that failure to refer to an earlier lease that would be regarded as continuous with the current lease, by virtue of s. 3(3) of the Act, was an inaccuracy. Even though the prescribed form notes require reference to be made to such an earlier lease, the tenant had not known of the earlier lease when completing the form, and the information was contained in the landlord's records.

If there is a misdescription of the property to which the claim extends, the notice may be amended with the court's leave: Sch. 3, para. 6(3). The court may impose such terms as it thinks fit. An application to the court needs to be made: *Malekshad v Howard de Walden Estates Ltd (No. 2)* [2004] 1 WLR 862, where onerous terms were not imposed on the tenant who had claimed two houses in one notice, when he was only entitled to claim one (as the House of Lords had previously held [2003] 1 AC 1013).

There are major differences in the case of 1993 Act notices. As I have already touched on, there are no prescribed forms. Instead, ss. 13 (collective enfranchisement) and 42 (new lease) set out the basic requirements for claim notices, supplemented by other provisions as to signature and service on other landlords. The other main difference is that 1993 Act notices must, as well as giving particulars of the tenants' entitlement to claim, set out the tenants' proposals for acquiring the landlord's interest, both as to price and as to other terms. The 1967 Act contains no such requirement, though recently it has become necessary to specify the valuation basis that the

tenant contends is applicable. It is not clear what will happen if the tenant proposes a particular valuation basis, which is agreed by the landlord, but which he then wishes to alter later.

The requirements for an initial notice for collective enfranchisement are set out in s. 13. The notice must be accompanied by a plan, showing three things: first, the premises of which the freehold is to be acquired under s. 1(1). This is simply the building containing the flats: s. 3(1). Secondly, any property of which the freehold is claimed under s. 1(2)(a). This includes (a) appurtenant property demised by a qualifying tenant's lease e.g. a private garden garage or parking space, and (b) property used in common, such as a communal garden. Thirdly, it must show any property over which it is claimed rights such as easements should be granted. The failure to include a plan invalidates the notice: *Mutual Place Property Management v Blaquiere* [1996] 2 EGLR 78 C.C. It is desirable that the plan follows precisely the statutory requirement. Very often a plan is served which shows simply a red line around both the block of flats and the surrounding gardens, which is incorrect. The plan should ideally identify each area with a different colour.

The notice must state the grounds on which the specified premises are premises to which the Act apples (s. 13(3)(b) i.e. how many flats there are, and how many let to qualifying tenants. It must specify any leasehold interest to be acquired. This is important. Many blocks of flats are demised under one or more headleases, with the qualifying tenants' flats being carved out of them. The tenants will acquire the head leasehold interest, and must pay a separate price for it. The notice must specify any flats which are subject to mandatory leaseback.

The next requirement is particularly important. The proposed purchase price for the interests to be acquired must be specified. Up to three figures may be required. The first is the price for the freehold interest in the specified premises (or, if there is a split freehold, a figure for each interest). The price for this interest is dealt with in Part II of Schedule 6 to the 1993 Act. As mentioned above, the specified premises is simply the building containing the flats, not any additional grounds. This price includes the landlord's 50% share of the marriage value. As you probably know, if there is an intermediate landlord, he takes a proportionate share of the landlords' 50% marriage value. However, the proposed figure in the s. 13 notice is not concerned with that division, and includes the whole of the 50% share. The second proposal is the price for any additional freehold property. This is valued in accordance with Part IV of Schedule 6. Again the whole of the landlord's 50% share of marriage value in any appurtenant property is included. The third proposal is a price for any leasehold interest to be acquired (as to which see Part III of Schedule 6). The leasehold interest may be a single headlease of the specified premises and the communal grounds, in which case a single price is to be paid.

A practice grew up of tenants putting a nominal figure as the proposal in the notice. The figure proposed in the notice is important. If no valid counter-notice is served in time the tenants will obtain the property on the terms proposed: see the *Willingale* case. Moreover, in a new lease claim, the deposit the landlord is entitled to is 10% of the figure proposed in the s. 42 notice, or ,250 whichever is the greater (Leasehold Reform etc. Regulations 1993, Sch.2, para. 2(2)). In *Cadogan v Morris* [1999] 1 EGLR 59, a nominal £100 premium was proposed in a s. 42 notice. The contractual term of the lease had come to an end. The likely actual premium was agreed to

be more than £100,000. The Court of Appeal held that the notice was invalid. The figure was not a realistic proposal; it was not what the tenant proposed to pay. The Court did not spell out the parameters of its decision, leaving it to the good sense of county court judges to apply the elephant test – it's difficult to describe, but you know it when you see it.

Although in that case valuation evidence was not needed, in subsequent county court cases, valuation evidence has been put forward to show that the proposed figure was, or was not, realistic. In *Mount Cook Land Ltd v Rosen* [2003] 1 EGLR 75, the s. 42 notice proposed a premium of £100,000, although the tenant had been advised that a realistic figure was around £200,000. Figures at trial showed a range of between £229,000 and £290,000. The tenant did not argue that £100,000 could be justified, and the Judge held that the notice was invalid. The present rule of thumb appears to be whether or not the tenants proposal can be justified by valuation evidence. The figure does not have to be the "correct" one; there is always a range of figures which valuers can genuinely disagree about, and one would expect the tenant's proposal to be low. At the end of the day, it is for the leasehold valuation tribunal and not the county court to determine a dispute on figures. What remains to be clarified is the situation where a proposal is very close to the lowest end of the realistic range, but outside it. What if a tenant takes advice, and is given a figure on good faith, which turns out to be too low because the valuer was unaware of some important comparable evidence? It may be difficult to contend that that is not a proposal within the meaning of the 1993 Act, particularly since there is no wording in the statute to qualify the requirement to propose a price. I suspect that the Court of Appeal will be troubled again by this question. The fact that a realistic figure is required gives some protection

to a landlord who fails, for whatever reason, to serve a counter-notice.

Going back to s. 13, the notice must state the full names of all the qualifying tenants of flats contained in the specified premises and the addresses of their flats, and give details of each lease. A not uncommon error is to give particulars only of the participating tenants. Since no attempt is made to give details of the non-participating qualifying tenants, it is certainly arguable that the saving provision for inaccuracy in the particulars will not apply (Sch. 3, para. 15), since there has been an omission to give any particulars of those tenants. That is a point that remains to be decided. In a recent case under the Landlord and Tenant Act 1987, *M25 Group Ltd v Tudor* [2004] 2 All ER 80 C.A., it was held that a requirement to give the addresses of the tenants' flats was directory only, so that a failure did not invalidate a notice given under s. 11A of that Act. It may be that a similar argument would apply here if some of the required information was omitted.

A s. 13 and a s. 42 notice must specify a date, not less than 2 months after the notice is given, for service of the landlord's counter-notice. In the case of a s. 42 notice, the notice must be given to the landlord and to any third party to the tenant's lease. One frequent error is not to allow enough time to serve the notice; so a notice will be dated say 16 June and specify 16 August as the date for serving a counter-notice, not allowing any time for it to be delivered in the course of the post. A failure to give sufficient time will invalidate the notice: eg *Free Grammar School of John Lyon v Secchi* [1999] 3 EGLR 49, C.A.

Both s. 13 notices and s. 42 notices must be signed personally by the tenants giving them: s. 99(5)(a). Signature by the tenant's solicitor or even someone holding a power of attorney will not do: *St Ermin's Property Co Ltd v Tingay* [2002] 3 EGLR 53. This can cause practical difficulties if there are many participating tenants, some of whom live elsewhere, or are foreign registered companies, or the like. No express provision is made for signature by companies, so presumably a person duly authorised to do so can sign. An interesting question, as yet undecided, arises where an initial notice under s. 13 is not signed by all the persons named as participating tenants, but a sufficient number do sign to participate in a valid claim. The saving provision (in Schedule 3, paragraph 16) which allows a claim to proceed if there are a sufficient number of qualifying tenants, even though some of the participants are not qualifying tenants or are prohibited from doing so, does not deal with this situation. On one view, the notice is defective; all the participants must sign; on the other view, those that do not sign must simply be regarded as non-participants. The latter view causes a problem, however. Marriage value is only payable in respect of participating tenants' flats: Sch. 6, para. 4. If there are a number of intended participants, but they are deemed not to be participating because they have not signed the notice, is marriage value payable in respect of their flats? Presumably the proposal in the tenants'notice includes marriage value for all of them. How is the landlord meant to respond?

The service of a valid and timely counter-notice by the landlord is a crucial step under the 1993 Act (though not in the case of the 1967 Act). If no counter-notice is served in time, the nominee purchaser or individual tenant, as the case may be, can apply to the court for an order for the freehold or a new lease on the terms set out in their notice. As already mentioned, there is no

discretion as to terms in such a case.

A counter-notice must state whether or not the right to enfranchise is admitted or not admitted. It must give any grounds for disputing the claim, and put forward the landlord's counter-proposals if the right is admitted. If a purported counter-notice does not do so, it will be held invalid: *Burman v Mount Cook Land Ltd* [2002] Ch. 256. In that case, the document called itself a counter-notice, gave no grounds for disputing the right to a new lease, and disputed the premium and proposed a higher figure. The Court of Appeal, reversing the trial Judge, rejected the argument that it should be construed as a counter-notice admitting the right on *Mannai* principles. Apart from failing to state whether or not the right to a new lease was admitted, the other proposed terms of the new lease were not dealt with; another defect.

In *Cadogan v Morris*, it was said *obiter* that the landlord's counter-proposal had to be a realistic figure as well. There is an important difference, however, between the tenants' proposals and the landlord's. In the absence of a counter-notice, the tenants' figure governs the enfranchisement by default. In a new lease claim, it also determines the maximum deposit that can be demanded. However, the landlord's counter-proposal has no such consequences. It can never become the sale price by default, and is irrelevant to the deposit. There may be a case, therefore, for regarding it less harshly.

In the case of a collective enfranchisement claim, there is an additional requirement which was introduced by Regulations coming into force in April 2003: The Leasehold Reform (Counter-

Notices)(England) Regulations 2002. A counter-notice must state whether or not the specified premises are within the area of an estate management scheme under s. 70 of the 1993 Act (but not a scheme under s. 19 of the 1967 Act). This requirement has been overlooked by several landlords, possibly because it was not effected by an amendment to s.21 itself, and so does not appear in the Act. The Regulations were made under s. 99(6) of the Act. In the first case to decide whether or not the omission is fatal, the county court held that it was: *7 Strathray Gardens Ltd v Pointstar Shipping and Finance Ltd* (2004, unreported, Judge Roger Cooke). Rather like the *M25* case, which was distinguished, the issue was whether the failure to comply with a mandatory requirement invalidated the notice. The landlord was granted permission to appeal and the appeal is due to be heard this October.

In another recent counter-notice case, *Lay v Ackerman* The Times 24 March 2004, [2004] EWCA Civ 184, the Court of Appeal had to consider the validity of a s. 45 counter-notice served by the wrong landlord. The actual landlord was a group of trustees on the Portman Estate. The counter-notice was mistakenly served naming a different group of trustees as landlords, which owned the freehold of the next door property, in respect of which a similar claim was being made under the 1993 Act. The Court of Appeal held that a reasonable recipient would have realised that a mistake had been made, and that the counter-notice was valid, having been authorised by the true landlords. It may be noted that the counter-notice does not have to be signed by the landlord personally, unlike a claim notice.

Happily for us litigation lawyers, there is no proposal to prescribe forms of claim and counter-notice under the 1993 Act in the foreseeable future.