DID ANYONE NOTICE? CHALLENGES TO THE VALIDITY OF PROPERTY NOTICES

Introduction

- Those involved in mixed-use developments will come across just about every type of property notice:
  - contractual break notices;
  - contractual rent-review trigger notices;
  - section 146 notices under the Law of Property Act 1925;
  - section 25 notices and section 26 requests under Part II of the Landlord and Tenant Act 1954;
  - the various enfranchisement notices under the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993.

- Just as there are many different types of property notice, there are many issues which can arise as to their validity, *e.g.*:
  - does a break notice specify the correct termination date?
  - has a rent review trigger notice been served on time?
  - does an enfranchisement notice specify a realistic premium?

- My focus is on an issue common to every type of property notice served in respect of registered land. Who is the proper party to serve a property notice in respect of the land during the registration gap, between completion of the transfer and its registration at HM Land Registry? Is it the transferor or the transferee?

The registration gap

- In the case of transfers of registered land, the registration gap arises from the provisions of section 27 of the Land Registration Act 2002:

> '(1) If a disposition of a registered estate… is required to be completed by registration, it does not operate at law until the relevant registration requirements are met.
>
> (2) In the case of a registered estate, the following are the dispositions which are required to be completed by registration–
>
> (a) a transfer;…'

- During the registration gap between a transfer and its registration, the transferor retains legal title and the transferee has only an equitable interest.

Service of a valid notice to quit

- How does the registration gap apply in the following scenario?
    - L1 is registered freehold proprietor of reversion let on a periodic tenancy to T
    - L1 transfers part of freehold reversion to L2, retaining the remainder
    - before the transfer of part is registered, L1 and L2 each serve a separate notice to quit on T

- If a valid notice to quit can only be served by the legal, registered proprietor, then
    - L2's notice to quit is invalid, as it is not yet registered proprietor of the transferred part
    - L1's notice to quit is invalid for breaching the common law rule that a notice to quit must relate to the whole of the landlord's reversion

Notices to quit invalid

Smith v Express Dairy Co Limited [1954] JPL 45

- In *Smith v Express Dairy Co Limited*, the Defendant let a shop to the Plaintiff. The Defendant transferred the freehold reversion to a subsidiary company, but the transfer was not registered. The subsidiary company served a notice to quit on the tenant. Harman J held that the notice was invalid, the report recording his decision that:

    > '…as the transfer of the property had not been registered the legal estate remained in the defendants and therefore unless the subsidiary company had given the notice as agent of the defendants, the notice to quit was bad.'

Brown & Root v Sun Alliance [2001] Ch 733

- In *Brown & Root v Sun Alliance*, a 25-year lease included a tenant's break clause, exercisable at the end of the seventh year. The lease provided that the break was:
    - personal and of benefit only to the original tenant;
    - was not assignable; and
    - would cease to have effect upon assignment of the lease.

- The original tenant assigned the lease to its parent company. Following the assignment, but before registration, the original tenant served a break notice on the landlord. The original tenant then sought a declaration that the notice was valid. The judge at first instance held that it was not, but the tenant succeeded on appeal where it was held to be valid.

- Mummery LJ held that the 'assignment' which would terminate the original tenant's right to break the lease must be a legal assignment, which could only take effect on registration, saying at 742:

> 'This case is not a matter of beneficial ownership between parties to the transfer of the lease: the issue of assignment or no assignment affects the legal position of a third party, the lessors, who have given their licence to assign but are not a party to the transfer… Transfer of the beneficial title is not, in this context, relevant to the legal relationship between the lessees and the lessors. The issue is not what rights [assignor lessee] and [assignee lessee] have against each other, but what rights [assignor lessee] and [landlord] have against each other. That is a question of legal, not equitable, rights.'

Renshaw v Magnet Properties South East LLP [2008] 1 EGLR 42

- On 19 September 2006, the Claimant tenants served an initial notice to purchase the freehold of their block on their then landlord under the collective enfranchisement provisions of the Leasehold Reform, Housing and Urban Development Act 1993. On 8 November 2006, the landlord transferred its freehold reversion to the Defendant, although the transfer was not registered until 12 January 2007. In the meantime, on 20 November 2006, only six days before the period for serving a counter-notice under the Act expired, the Defendant served its counter-notice.

- The tenant sought a determination that the counter-notice was invalid, as it was not served by the legal, registered landlord.

- HHJ Collins CBE held at [10]-[11]:

> 'For a variety of practical reasons, it seems to me that the principle underlying that decision [*Smith v Express Dairy*] must operate in the present context… It is easy to imagine situations in which the tenant could have no real idea of the

> state of play regarding ownership of the property apart from reliance upon the register. There is no evidence in this case before the court that the tenants were aware that the property had been transferred, although [it was] indicated that such evidence was available had it been sought to be introduced. However, it does not seem to me that the Act can be operated sensibly by relying upon a distinction between those cases in which the tenant knows that the landlord has sold the reversion and those cases in which the tenant does not know that the landlord has sold the reversion. After all, the basic principle underlying land registration is that a purchaser, even with actual notice of an encumbrance that needs to be registered, takes free of that encumbrance unless it is registered, and it seems to me that basic principle runs through the law of land registration and must apply equally in the present case. The tenant has to know who it is to serve notices on and it has to know who is serving notices on it, and it seems to me that the argument that that has to be the registered owner is irresistible.
>
> … it does not seem to me that that creates any injustice or difficulty for a purchaser, which is always entitled to protect itself, either by express contract or stipulations or by drawing upon the obligations that remain upon vendor as a result of whatever remains of the equitable relationship after a transfer has been executed but before it has been registered…'

Notices to quit valid

Section 96(1) of the Agricultural Holdings Act 1986

- Section 96(1) of the AHA 1986 provides:

> '(1) In this Act, unless the context otherwise requires:
>
> …
>
> "landlord" means any person for the time being entitled to receive the rents and profits of any land…'.

Practical considerations

- Land Registry data in February 2016 confirmed that times for applications to be completed were:

- updates to the register (dealings): 6.71 working days
- first registrations: 36.96 days;
- new leases 49.67 working days;
- transfers of part: 48.09 working days

- The Law Commission, in its 2016 consultation paper *Updating the Land Registration Act 2002: Consultation Paper No. 227* expressly acknowledged the difficulties caused by registration gap, but concluded at 5.84:

> 'We therefore consider that the proposed legal responses to the registration gap are inappropriate. They are also unnecessary because practitioners have devised practical responses. One is for the seller to grant a power of attorney in favour of the buyer, so that the buyer can serve notices and take other steps in the seller's name. A buyer can also seek obligations from the seller not to exercise rights under occupation leases, to pass on any notices that are received to the buyer and to take action at the direction of the buyer.'

Section 141 of the Law of Property Act 1925

- Section 141 of the LPA 1925 provides:

> '(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and without prejudice to any liability affecting a covenantor or his estate.
>
> (2) Any such rent, covenant or provision shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.
>
> (3) Where that person becomes entitled by conveyance or otherwise, such rent, covenant or provision may be recovered, received, enforced or

> taken advantage of by him notwithstanding that he becomes so entitled after the condition of re-entry or forfeiture has become enforceable, but this subsection does not render enforceable any condition of re-entry or other condition waived or released before such person becomes entitled as aforesaid.'

Scribes West Limited v Relsa Anstalt (No. 3) [2005] 1 EGLR 22

- In *Scribes West*, a landlord assigned its reversionary interest in commercial property on 28 February 2001, but the transfer was not registered until 3 January 2002. On 16 July 2001, the assignee landlord forfeited by peaceable re-entry, having previously given notice that rent should be paid to it. The Claimant challenged the validity of the forfeiture on the ground that the assignee was not the legal, or registered, owner of the reversion, but this failed at first instance and on appeal where it was held, by virtue of section 141(2), that the forfeiture was valid.

- Carnwath LJ held at [12]:

> '… The word "entitled" [in section 141(2)] does not of itself import a distinction between legal and equitable interests. It connotes simply an enforceable right to the relevant income. An equitable assignee of the right to rent has such an enforceable right as against the assignor and, at least following notice, against the lessee (whether or not, as [the tenant's Counsel] suggests, the assignor procedurally has to be a party). Thus, in the present case, [the assignee] is for the time being "the person ... entitled to the income ... of the land leased". Nor does it seem to me to matter if this in theory results in [the assignee] having that right concurrently with [the assignor], as legal owner. The section is designed to extend rights to enforce, without taking away existing rights; and in any event anything done by [the assignor] could only be done as trustee for [the assignee].'

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