Managing Enfranchisement Claims during the Coronavirus Pandemic

Summary of Key Points

- **Neither the Coronavirus Act 2020 nor the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 include any provisions extending the time limits under leasehold enfranchisement legislation and parties must therefore adhere to existing deadlines;**
- **As the law stands, service of notices by email is not permitted other than with the consent of the other party. Parties should ensure that they leave additional time to ensure that notices are served within statutory deadlines.**
- **The First Tier Tribunal (Residential Property) has suspended face to face hearings until at 29 May 2020. All FTT directions in existing claims are stayed until that date.**

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Leasehold enfranchisement and right to manage practitioners are used to dealing with unexpected developments, tight deadlines and strict rules. They ought therefore to be well placed to manage the difficulties presented by the Coronavirus crisis. Nonetheless, the present circumstances are undoubtedly challenging for those acting for landlords or tenants in enfranchisement, lease extension and right to manage matters.

This article looks at the impact of the Coronavirus Act 2020 and the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ("the Regulations"), which are currently in force,[1] on four core parts of practice in these areas:

- Statutory deadlines for the service of notices and the commencement of applications
- Effective service of notices
- Dealing with the Courts and Tribunals
- Executing documents to give effect to the transaction

Deadlines

Neither the Coronavirus Act nor the Regulations extend any of the statutory deadlines in the Leasehold Reform Act 1967, the Leasehold Reform, Housing and Urban Development Act 1993 and the Commonhold and Leasehold Reform Act 2002. Indeed, they make no mention of these Acts at all. Further, as readers will be aware, the legislation does not allow for the statutory deadlines to be extended by agreement between the parties and the consequences of missing a deadline are often drastic, such as the tenant's notice being deemed withdrawn.

The Association of Leasehold Enfranchisement Practitioners (ALEP) wrote to the Lord Chancellor on 26 March 2020 requesting that the statutory deadlines for filing applications to determine the terms of collective enfranchisement claims, lease extensions and the right to manage be extended for a period of three-months.[2] At the time of writing, the Government has not responded and the deadlines remain unaltered.

It is imperative therefore that practitioners continue to meet those deadlines in the usual manner, notwithstanding the present circumstances. The most important deadlines are:

- A Notice of Claim served by personal representatives on behalf of deceased qualifying tenant under the 1967 Act must be served within two years of the grant of probate or letters of administration: s.6A(2).

[1] As of 9 April 2020, though subject to review every 21 days starting on 6 April 2020.

[2] https://www.alep.org.uk/article/825/covid-19-and-the-tribunal-system-ndash-alep-calls-on-government-to-extend-statutory-deadlines

- On a collective enfranchisement under the 1993 Act, a reversioner must serve its counter-notice by the date specified in the section 13 Notice of Claim (s.21(1)), failing which an application to the County Court by the nominee purchaser to determine terms of acquisition must be made within six months: s.25(4). Where a counter-notice is served, a nominee purchaser must make any application to court to determine the validity of the notice within two months from the date of service, and any application to the Tribunal to determine the terms of acquisition within six months of the date of service: ss.22(2), 24(2).

- Where the terms of acquisition are agreed or determined, an application for a vesting order must be made to the court within two months from the end of the specified period: s.24(4) or s.25(6) depending on the circumstances of the application.

- The time limits for the preparation of the contract under Paragraph 6 of Schedule 1 to the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993.

- On a lease extension under the 1993 Act, the relevant deadlines mirror those in respect of a collective enfranchisement: ss.45(1), 46(2), 48(2), 49(3) and Paragraph 7 of Schedule 2 to the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993.

- Under the 2002 Act, anyone served with a claim notice by the RTM company must give any counter-notice by the date specified in the notice. That can be as soon as one month after the date on which the notice is given: ss.80(6), 84(1). Any application to the Tribunal for a determination as to whether the RTM company is entitled to acquire the right to manage must be made within two months of receipt of the (last) counter-notice: s.84(4).

Service of notices

Due to the Coronavirus outbreak, many landlords, tenants and their respective legal representatives will not currently be residing or working at their usual addresses. Nor may the postal system be operating with its usual efficiency. It would therefore plainly be preferable for legally represented parties to accept service of notices under the enfranchisement legislation by email, rather than by post or personal service. The question arises whether that is possible.

Unsurprisingly given the date of their enactment, none of the Acts specify service by email as a permissible mode of service of notices. By way of reminder:

- Notices under the 1967 Act "*may*" be served in one of three ways: (i) personally; (ii) by leaving at the person's last known place of abode in England and Wales;[3] or (iii) by sending through the post in a registered letter addressed to the person at their last know place of abode or business: s.22(5), incorporating s.23(1) of the Landlord and Tenant Act 1927.[4]

- The 1993 and 2002 Acts are silent as to modes of service save that any notice *must* be in writing and "*may*" be sent by post (registered, first-class or otherwise): s.99(1) and s.111(1) respectively. These provisions, like s.23(1) of the LTA 1927, engage section 7 of the Interpretation Act 1978: service is deemed effective by properly addressing, pre-paying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

[3] Sending a letter through the ordinary post is equivalent to leaving it at the last known place of abode, provided that the letter is received: Stylo Shoes v Price Taylors [1060] Ch 396 at 405, per Wynn-Parry J. In the case of a corporate recipient, "place of abode" is equivalent to "place of business".

[4] Section 23(1) makes further provision in respect of service on a local or public authority or public utility company.

- In all cases, of course, service on an agent duly authorised to receive the notice by one of these means will be as effective as service on the landlord or tenant directly, provided that the recipient is correctly named on the face of the notice.[5]

None of the Acts prevent service by a method other than those specified: they are permissive but not exhaustive as to mode of service.[6] If a different method is used, the common law requirement for valid service will apply: the notice must actually be received by the required recipient in a complete and legible state, whether in hard copy *or in an electronic/digital format*.[7]

It nonetheless remains unclear whether a notice which is expressly required to be "*in writing*" may be sent as an email attachment. The 1993 and 2002 Acts require notices to be "*in writing*"; the 1967 Act does not, instead using prescribed forms. The non-binding decision of HHJ Dight in *Cowthorpe Road 1-1A Freehold v Wahedally*,[8] that a counter-notice under the 1993 Act cannot be sent by email as an email is neither "*in writing*" nor "*signed*", was distinguished by the Upper Tribunal in *Assethold v 110 Bouldevard RTM Co*[9] in relation to the 2002 Act on the basis that s.79(8) only required a *copy* of claim notice to be given to a qualifying tenant, not the original. In the authors' view the decision in *Cowthorpe* is unlikely to stand the test of time but should be taken by the prudent practitioner as accurately representing the law in relation to all notices served under the 1993 and 2002 Acts, other than where a "*copy*" of the notice is expressly referred to.

The Coronavirus epidemic has not changed the law; yet, despite acknowledging the underlying uncertainty as to the lawfulness of service by email, ALEP has nonetheless developed a voluntary "*Protocol for Service of Initial Notices and Counter-Notices During COVID-19 Pandemic*".[10] It provides that parties should endeavour to agree that service of an initial notice or counter-notice 1993 Act by electronic means (email with PDF of the signed notice) will be sufficient for the purposes of the 1993 Act.

Practitioners would be well-advised to adopt this protocol for the duration of the current restrictions on movement and business. There is also no reason why parties should not take the same approach to notices under the 1967 Act or 2002 Acts, though the Protocol does not expressly address them. In all cases, however, the serving parties' legal representative should seek confirmation by email from the receiving party that service of the notice by email will be accepted in accordance with the Protocol well in advance of the deadline so that alternative arrangements can be made for service in the case of a less co-operative party.

Dealing with the Courts and Tribunals

This is an evolving area. The London Region of the First-tier Tribunal (Property Chamber) issued Postponement Directions on 19 March 2020 postponing the hearing of all cases in the London Region until after 29 May 2020 and postponing all current directions in existing cases.

The FTT then issued Guidance on 19 March 2020 which applies nationwide and now governs all cases. The key points are that:

- No further face-to-face hearings or mediations are being conducted for the time being and so applications will be determined either at a remote hearing or on paper.

- The Tribunal intends to re-list currently listed cases for a remote hearing (or paper determination) but parties should not expect to hear from the Tribunal for at least six weeks i.e. until early May 2020.

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[5] Townsends Carriers Ltd v Pfizer (1977) 23 P&CR 361; see also s.99(2) of the 1993 Act.
[6] Stylo Shoes v Price Taylors (above) makes that clear in relation to the LTA 1927.
[7] UKI (Kingsway) v Westminster City Council [2018] UKSC 67 at [15], [21] and [44]-[46], per Lord Carnwath.
[8] [2017] L&TR 4
[9] [2017] 4 WLR 181
[10] https://www.alep.org.uk/article/826/alep-protocol-for-service-of-initial-notices-and-counter-notices-during-covid-19-pandemic.

- Where applications have not yet been listed for a hearing, parties should await to hear from the Tribunal regarding the issuing of directions or the convening of a remote case management hearing.

- As for new applications, of course the statutory deadlines set out above must be complied with. So those applications **must** continue to be sent to the Tribunal by the relevant date. All applications must now be sent by email, rather than on paper, to the addresses listed in the Annex to the Guidance. The same is true of correspondence once applications have been commenced. Fees must however still be paid by cheque or postal order and must reach the Tribunal office within 28 days.

In the County Court, the authors' experience is that the courts are struggling generally to list cases for remote hearings but that practice is variable. Sadly, but not unexpectedly, the civil court listing priorities issued by HMCTS on 6 April 2020 make no mention of applications which are required to be made to the County Court under the enfranchisement legislation and so such claims will not be given priority. Existing orders and directions are not automatically stayed, but Practice Direction 51ZA (in force from 2 April 2020) permits parties to agree an extension of up to 56 days in all cases without formally notifying the court, provided that a hearing date is not put at risk. Claims will need to be sent for issue in the usual manner, albeit with no expectation of them being dealt with in the short-term. In practice, it may become important to be able to prove the date upon which papers were sent to the court for issue; practitioners ought to be even more careful than usual to retain evidence of the sending of papers to the County Court.

All Coronavirus-related advice and guidance concerning the courts and tribunals can be found at judiciary.uk/coronavirus-covid-19-advice-and-guidance/ and this should be the first point of call for all practitioners looking for up-to-date guidance.

Execution of documents

Once an enfranchisement or lease extension claim has concluded, whether through the procedures envisaged by the 1967 or 1993 Act or outside of them, the need remains in all cases (other than where the court makes a vesting order in a missing landlord case) for a conveyance to be executed by deed. Signature of a deed must, of course, be undertaken "*in the presence of*" either one or two witnesses who must "*attest*" to the signature: Law of Property (Miscellaneous Provisions) Act 1989 s.1(3)(a). The current situation presents obvious difficulties in satisfying this requirement, as the Regulations do not expressly permit one to leave one's house for the purpose of executing a legal instrument.[11]

Tricia Hemans' comprehensive analysis of whether this difficulty can be overcome can be found here: https://www.falcon-chambers.com/publications/articles/witnessing-deeds-in-the-age-of-social-distancing. The key points for practitioners are that:

- A recent Law Commission consultation on electronic execution of documents (Law Com 386) concluded that it was "not clear" that s.1(3) can be satisfied by remote forms of witnessing, such as video-link.

- There has been no consideration of this point in any reported case law, although the High Court held, in Wood v Commercial First Business [2019] EWHC 2205 (Ch), that attestation need not be contemporaneous with the signature.

- The point arose in an FTT decision, Yuen v Wong (Ref 2016/1089) in which Ms Hemans acted. The purported witness had observed the signature via Skype and several days later had purported to attest to the witnessing by recording, on the deed itself, that she observed its execution. The FTT nonetheless did not determine the issue of whether witnessing by video-link was satisfactory.

- As the law stands, one cannot be sure that "*presence*" includes virtual presence.

[11] That being neither a "*legal obligation*" nor participation in "*legal proceedings*": Regs. 6(2)(h).

- The only safe basis to proceed in the current circumstances is to arrange for a member of the signatory's household to witness the signature from a safe distance.

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