NOTICES: WHEN IS A DEFECT NOT A DEFECT?

by Jonathan Gaunt and Nicholas Cheffings

Part 1 of 2

Taking the technical point

The argument that a notice containing a defect that has not in fact misled, confused or in any way embarrassed the recipient is nevertheless invalid and of no effect in law is the sort of argument that gives lawyers a bad name. Such an argument can fairly be called technical in a pejorative sense.

Yet such points may be well worth taking. If a notice is bad, a tenant may have lost his only right to break a lease, a landlord may find himself saddled with a tenant with security of tenure that was never intended by either party, a tenant's claim for the freehold or an extended lease of his house or flat may fail (with the result that, if he tries again, the price will be higher), a business tenancy may continue at the old rent, a landlord may be stuck with the price proposed by the tenant for acquiring the freehold or a tenant may be stuck with the rent proposed by the landlord on review.

A possible approach to such situations would be to enquire whether, as matter of fact, the defect in question made any difference to the understanding or conduct of the recipient. Another would be to insist on strict compliance with the requirements of the statute or contract under which the notice was served. The Courts and the legislature, however, have adopted neither the subjective approach nor the strict approach but something in between.

In this article we seek to collect the recent authority on defects in notices and ask what it adds up to. We detect a certain schizophrenia in the approach of the Courts. They would like to adopt a "benevolent" and "commercial" approach, but find themselves as often as not requiring strict compliance with statutorily prescribed forms and statutory requirements in cases where the defect in question is most unlikely to have made the slightest difference, with quite disproportionately serious consequences for the party who got it wrong.

Defects in notices may be of many different kinds. Often it is a question of a mistake in the expiry date or in the party by whom or to whom the notice purports to be given. It may be a case of misdescription of the property. Less forgivably, it may be a failure to use a prescribed form or the omission of parts of the form or the notes that go with it or the use of a previous edition of the form. Alternatively, it may be a failure to complete the form correctly, as by omitting to delete

inconsistent alternatives, omitting required particulars or including inaccurate particulars. Occasionally the validity of a notice may be attacked on the ground that it was given, or a statement in it was made, in bad faith.

Grounds for Upholding Defective Notices

Defects in notices are of many different kinds. When the giver of the notice cannot deny the defect, he typically seeks to defend the notice in one of four ways:

(i) He argues that the intended effect of the notice would have been perfectly clear to any reasonable recipient ("the Mannai defence");

(ii) He argues that the defect is corrected elsewhere in the notice or by another document, often a covering letter ("the covering letter defence");

(iii) He argues that the notice is "substantially to the like effect" as the prescribed form ("the like effect defence"); or

(iv) He argues that the defect in question is a mere inaccuracy in the required particulars which does not invalidate the notice ("the mere inaccuracy defence").

If bad faith is alleged against him, he argues that there was no requirement of good faith. Over the course of two articles, we will look at each of these five situations.

The Mannai Defence

It will be recalled that in Mannai v Eagle Star [1997] 1 EGLR 57, the tenant had served break notices expiring one day too early. It was held by a majority of the House of Lords that the notices were valid because a *reasonable recipient* with knowledge of the terms of the leases would have been in no doubt that the tenant wished to determine the tenancy on the correct date. Lord Steyn's speech sets out the relevant legal approach, which may be summarised as follows:

(i) This was not a case where it was prescribed as an indispensable condition that the notice must contain specific information, in particular the expiry date;

(ii) The test of validity is objective; it is not a question of how the recipient understood the notice;

(iii) It is critical not to lose sight of the purpose of the notice;

(iv) All unilateral notices may be valid if they are clear enough to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate;

(v) The law favours a commercially sensible construction; the standard of the reasonable commercial person is hostile to technical interpretations.

The reasonable recipient was welcomed onto the legal stage by the Court of Appeal in Garston v Scottish Widows [1998] 2 EGLR 73. In that case a tenant was entitled to break the lease at the expiration of the tenth year of the term. Incorrectly supposing the term to run from the date of the lease, he gave notice expiring on 9th July 1995, when the tenth year of the term in fact expired on 24th June. The Court of Appeal credited the reasonable recipient with greater skill in lease interpretation than the notice giver and held the notice to be valid.

In Claire's Accessories v Kensington High Street Associates [2001] PLSES 112, however, a landlord served a break notice on the tenant at the premises. The tenant claimed that, notwithstanding receipt of the notice, it was invalid because the lease required service upon its registered office. The trial Judge agreed. The Mannai defence was not available. As Lord Hoffman had said in that case:

> "If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease."[1]

Statutory Notices

The Mannai defence soon found itself being applied to statutory notices. In York v Casey [1998] 2 EGLR 25, the landlord's agents wrote a letter to the tenant stating that they had the landlord's instructions to offer an assured shorthold tenancy for 6 months from 28th September. They enclosed a section 20 notice which incorrectly stated the termination date as 6th September. The Court of Appeal held that the Mannai defence could be applied to statutory notices:

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[1] cf. Yates Building Company v R J Pulleyn & Sons (1975) 237 EG 183 where the expression "to be sent by registered or recorded delivery post" was directory, and not mandatory.

(i) where it was obvious that an error had been made; and

(ii) where the notice read in context was clear enough to leave the reasonable recipient in no reasonable doubt as to its terms[2].

Where, however, the defective notice gives rise to confusion and perplexity, it was held that Mannai will not apply. In Panayi v Roberts [1993] 2 EGLR 51, a section 20 notice stated that the tenancy would run to 6th May 1991 but the tenancy agreement actually expired on 6th November 1991. It was held that the notice was invalid because the words would be a source of "perplexity" to the recipient. Similarly, in Clickex v McCann (1999) 32 HLR 6324, a section 20 notice stated that a tenancy was to run from 21st December 1995 but the landlord then altered the tenancy agreement so as to commence on 8th January 1996. Again the two documents were in conflict and the Court of Appeal held that they were likely to create perplexity. In Barclays Bank v Bee (2001) 37 EG 153, two section 25 notices were served at the same time; one said the application would be opposed but did not say on what grounds and the other said that it would not be opposed; the tenant sought to rely on the latter, arguing that the former was invalid. It was held that the service of the two notices together created confusion. The situation was not saved by the Mannai defence.

In truth, in the latter two section 20 cases it is most unlikely that the tenant was in fact misled or confused. He could tell from the tenancy agreement what tenancy was being granted and it would have been apparent to him that the termination date in the section 20 notices was a mistake. The purpose of a section 20 notice is to warn the tenant that he will not have security of tenure when his term expires and that purpose will have been achieved in both cases. If a landlord receiving a break notice is supposed to read his lease and realise that an incorrect termination date has been specified, why can a tenant, on receiving his tenancy agreement, not do likewise?[3]

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[2] This fact has now been disapproved to some extent by the Court of Appeal in Ravenseft v.Hall [2001] 13EG 125: See later article.

[3] This paragraph was written before publication of the Court of Appeal's decision in Ravenseft v. Hall [2001] 13 EG 125, which supports what we say and casts doubt on the usefulness of the distinction between "obvious error" cases and "source of perplexity" cases. See later Article.

Leasehold Enfranchisement

Mannai has had even less success in the field of notices served under the Leasehold Reform Housing and Urban Development Act 1993. In John Lyon Grammar School v Secchi (1999) 32 HLR 820, a tenant served a section 42 notice under the Leasehold Reform Housing and Urban Development Act 1993 which specified too early a date for the landlord's counter-notice. This was not saved by the Mannai defence. The recipient is not supposed to read the Act and work out for himself what is the earliest date on which he can serve a counter-notice. This contrasts with the recipient of a contractual notice who is expected to read a lease and work out what date the notice was meant to specify.

In Dalziel v Speedwell Estates Limited [2002] 02 EG 104, the Court of Appeal held that there was nothing optional about the information required to be contained in a tenant's notice under Part 1 of the Leasehold Reform Act 1967. It was irrelevant that the landlord already knew the information which the tenants had omitted to include in their notices

In Burman v Mount Cook [2001] EWCA Civ 1712, the landlord's section 45 counter-notice did not state whether the landlord admitted that the tenant had the right to acquire a new lease. It did state that the landlord did not accept the premium proposed and made a counter-proposal. The trial Judge adopted a pragmatic Mannai approach. He held that it was clear that the landlord was admitting the right, otherwise his counter-proposal would be irrelevant. The Court of Appeal, however, took the same approach as they (differently constituted) had taken in Dalziel. They held that the requirements of the section are mandatory. The Mannai defence only applies where it is not an indispensable condition for the effective exercise of a right that the notice must contain specific information. The Judge had asked himself the wrong question. Mannai was irrelevant. The correct approach is to ask:

(i) what does the statute require to be stated; and

(ii) whether the notice properly constued states that as a matter of construction.

In St Ermin's Property Company Limited v Patel [2001] L&TR 537, a landlord served two notices under section 4 of the Landlord and Tenant Act 1954 because he believed incorrectly that two maisonettes in the same building were separately occupied. The trial Judge held that the tenants, who knew the true position, were not misled and knew that the landlords were seeking (a) to determine their continuation tenancy and (b) to propose a statutory tenancy. The Court of Appeal disagreed and held that the Mannai defence was inapplicable because the landlord intended to serve two notices and not one.

The wrong addressee

The Mannai defence has also been invoked in attempts to cure defects in the addressee of a notice. In R v London Rent Assessment Committee, ex parte David Morris [2001] 31 EG 104, the attempt failed. The landlord had served a notice under Part 1 of the Landlord and Tenant Act 1954 on the person he mistakenly believed to be the tenant. The "reasonable recipient" test was irrelevant. In Lemmerbell Limited v Britannia LAS Direct Limited [1998] 3 EGLR 67, a break notice was given by a company which thought it was the tenant when it was not. The Court of Appeal held that the notice had not been given as an agent and that the Mannai defence was not available because the recipient could not know whether the giver of the notice was in fact the tenant (having taken an unlawful assignment).

By contrast, in Havant International Holdings Limited v Lionsgate Investments Limited [2000] L&TR 288, a break notice was again given by the wrong company in a group. The trial Judge considered Lemmerbell but held that a reasonable recipient would have assumed that there had been a simple mistake in the description of the lessee company rather than, as in Lemmerbell, that the company purportedly giving the notice might have taken an unlawful assignment. The key difference here was that the right to break was personal and could not possibly have been exercised by the party giving the notice even if it had taken as assignment. The reasonable recipient would have concluded that the signatory of the notice had been authorised to sign by the tenant company. The Mannai defence applied.

In the second part of this article, we will consider the other defences deployed to uphold defective notices and the most recent authorities.

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In the previous part of this article we discussed situations where defective notices have and have not been covered by the "Mannai" Defecne, namely that a reseonable recipient would have been in no doubt as to what was intended. In this part we consider the other grounds for upholding defective notices.

The covering letter defence

Omissions in notices have often been cured by reference to a statement elsewhere in the notice or in a covering letter. So the failure of a landlord of business premises to state in a section 25 notice whether he would or would not oppose an application for the grant of a new tenancy has been cured by the inclusion in the notice of grounds of opposition[4]. The omission of a signature has been cured by a signature on an accompanying letter.[5] The insertion of an incorrect date of termination has been cured by the terms of a covering letter.[6]

In the York v. Lacey the prescribed notice specified a termination date of 6 September. This was incorrect but a covering letter correctly referred to a term of 6 months from 28 September. The Court of Appeal held that the reference to 6 September was obviously a mistake, which was cured by the covering letter.

The like effect defence

Regulations which prescribe forms of notices typically provide that the notice must be in the prescribed form or a form "substantially to the like effect". It has long been the law that, to rely on

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[4] Lewis v MTC Cars Limited [1974] 1 WLR 1499.
[5] Stidolph v American School (1969) 20 P&CR 802.
[6] Germax Securities Limited v Speigal [1999] 1 EGLR 84; York v Casey [1998] 2 EGLR 25.

this defence, it is necessary to show that the words used mean substantially the same as the prescribed words which should have been used; if not, the notice is bad and cannot be validated[7].

In Sabella v Montgomery [1998] 1 EGLR 65, the landlord of business premises served section 25 notices which did not contain the “Act Quick” warning, omitted reference to grounds (f) and (g), omitted paragraphs 5 to 9 and did not put the time warning in a rectangle. It was held that the notices were invalid because they were not substantially to the like effect as the prescribed form. The Court stated that the comparison to be made is between the notice served and the Form and it is immaterial that any addition or omission had no material effect upon the actual recipient. A difference can only be disregarded when the information given as to the particular recipient's rights and obligations is in substance as effective as that set out in the form. It is irrelevant that the tenant is not misled. It appears, however, that an error that is immaterial to the circumstances of the case does not matter - thus, it will not invalidate the notice if all the grounds of opposition are not referred to in the notes to a notice which states that the landlord will not oppose an application for the grant of a new tenancy.[8]

A quite different approach, however, seems to have been taken by the Court of Appeal to the construction of notices under section 20 of the Housing Act 1988 in Ravenseft Properties Limited v. Hall [2001] 13 EG 125. The Court were concerned with the cases[9] involving defective notices: in one case the notice stated too early a commencement date for the tenancy; in the second it stated too late an expiry date; in the third it adapted the prescribed form so as to misstate the powers of the Rent Assessment Committee and the law as to the security of existing tenants. The Court of Appeal upheld all three notices on the footing that, notwithstanding their errors and omissions, they were "substantially to the same effect" as the prescribed form - they accomplished the statutory purpose of telling the proposed tenant of the special nature of an assured shorthold tenancy. Mummery LJ said of the notice in the second case:

> "[The tenant] would know from reading the notice the premises to which the proposed tenancy related and the name and address of the landlord. He would also know that he

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[7] Sun Alliance v Hayman [1975] 1 WLR 177.
[8] Tegerdine v Brookes (1977) 36 P&CR 261.

had at least 6 months security; that the notice did not commit him to take the tenancy and that he could seek advice before he entered into the tenancy".

Lord Phillips MR went further. He pointed out that the object of inserting the particulars of the tenancy in the prescribed form is simply to identify the tenancy to which the notice relates and that errors which do not cast doubt on which tenancy that is are immaterial. The Sabella and Sun Alliance cases are not mentioned in the judgments and appear to contain a much stricter test.

In Manel v Memon [2000] 2 EGLR 40 a notice under section 20 of the Housing Act 1988 omitted the four bullet points of advice to the tenant at the beginning of the notice. It was held that it was not substantially to the like effect as the prescribed form. The Court of Appeal reiterated that a defective notice is defective irrespective of whether the defect has caused the tenant prejudice or not. In this case, the notice was "incurably bad".

In Tadema Holdings Limited v Ferguson [1999] EGCS 138, a landlord served a notice of increase of rent under section 13 of the Housing Act 1988, using an old version of the prescribed form. The landlord also gave an annualised figure for rent rather than a monthly one and stipulated the wrong date for the start of each new period of the tenancy. The Court of Appeal held that the form used was not materially different from the current form, that the use of an annualised figure created no basis for confusion and that the commencement date had been varied.

In Andrews v Brewer [1997] EGCS 19, a landlord gave notice to a tenant but failed to include part of the information prescribed by the Assured Tenancy and Agricultural Occupancies (Forms) Regulations 1998 to the effect that the rent determined would be inclusive of Council tax. The Court of Appeal held that the omission was immaterial. The notice was still substantially to the same effect as the one in the prescribed form.

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[9] see also [2001] 13 EG 126 and 13 EG 127

The mere inaccuracy defence

Where statute requires a notice to contain certain specified particulars, it is often stipulated that the notice is not to be invalidated by any inaccuracy in the particulars required or any misdescription of the property to which the claim extends.[10] In Speedwell Estates Limited v Dalziel [2001] 35 EG 104 (CS) the tenant's notices to enfranchise failed to (i) identify the instruments creating their tenancies, (ii) provide any information as to the rateable values of the houses sufficient to show that the rent was a low rent; and (iii) provide particulars as to the tenant's occupation of the houses. The Court of Appeal held that to omit the core information required to establish the tenant's entitlement to enfranchise was not an "inaccuracy" and that the notices were bad. In John Lyon Grammar School v Secchi (1999) 32 HLR 830, the Court of Appeal held that a statement in a tenant's notice under section 42 of the Leasehold Reform Housing and Urban Development Act 1993 as to the date for service of a counter-notice was not a "particular" which could be saved by the mere inaccuracy defence.

Is there a Requirement of Good faith?

When can a notice be impugned on the grounds that it contains incorrect statements or was given in bad faith? It is trite law that a landlord who states in a section 25 notice that he intends to demolish or reconstruct business premises does not have to establish that he had such an intention at the date he gave the notice. He only needs to establish that intention at the date of a subsequent hearing. Furthermore, it has recently been held by the Court of Appeal in Sun Life v Thales Tracs Limited [2001] 34 EG 100 that a business tenant who serves a section 26 request for a new tenancy does not need to have had a genuine intention to take up the new tenancy when he served his request. This is because requesting something does not contain or imply any statement of existing fact. It is just that: a request. If, on the other hand, a notice contains a fraudulent or recklessly untrue statement of fact, it will be invalid.

A challenge to the validity of the notice on this ground is likely to be made where the recipient has failed to make use of a procedure prescribed for challenge. For example, in Lazarus Estates

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[10] See e.g. Leasehold Reform Act 1967 Sched 3, para 6(3).

Limited v. Beasley [1956] 1 QB 702, a tenancy was served with a notice of increase of rent supported by a declaration that £566 of repair work had been carried out; statute provided an opportunity to challenge the declared value of the work within 28 days, but the tenant did not do so. When sued for the increased rent, the tenant contended that the declaration had been fraudulent in that £300 worth of the alleged work had not been done. The Court of Appeal declared the declaration and notice a nullity, Lord Denning observing: "Fraud unravels everything".

Similarly, in Rous v. Mitchell [1991] 1 WLR 469, the landlord served a notice to quit on the tenant of an agricultural holding on the stated ground of breach of a covenant not to sublet except to farm workers. In fact the landlord had given permission to the tenant to let the cottages as holiday lets. The tenant could have challenged this ground by requiring within one month that the question be determined by arbitration; he did not do so but served an inapplicable counter-notice instead. When sued for a declaration that the tenancy would terminate on the expiry date of the notice, he argued that the notice was bad because it contained representations that were not only untrue but fraudulent. The landlord was held to have acted recklessly to the point of dishonesty in instructing his solicitors to serve notice to quit on that ground. The notice was held to be invalid.

Theoretically a landlord's notice under section 25 of the 1954 Act could be challenged on the same basis (which might be necessary if the tenant had failed to serve a counter-notice or apply to the Court for a new tenancy in time). In the Betty's Café case, [1959] AC 20, Lord Denning said that if a landlord got possession by serving a notice stating falsely that he intended to redevelop the premises and promptly relet them without doing so, then the notice would be voidable.[11]

No term, however, is implied into rent review clauses that the rent specified in the landlord's rent review notice must be a bona fide and genuine pre-estimate of the open market value[12]. There may be a distinction, however, between a rent review notice which simply states what figure the

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[11] There are dicta to the same effect in Marks v. BWB [1963] 1 WLR 1008.

landlord is seeking and one which states fraudulently that the open market value is, or has been determined to be, a certain figure. That this was so was suggested, but not decided, by Mr Simon Berry QC in Rey v Ordnance Estates Limited (11th June 2001) referring to Tudor Evans (Swansea) Limited v Long Acre Securities Limited (31st July 1997).

In the case of statutory notices, it is a question of what the statute requires. Section 42 of the Leasehold Reform Housing and Urban Development Act 1993 Act requires a tenant's notice seeking an extended lease to specify the amount which the tenant proposes to pay. In Cadogan v Morris [1999] 1 EGLR 59, the tenant put the nominal figure of £100 in his notice. The Court of Appeal held that the notice was invalid because the tenant had not specified a realistic figure which he proposed to pay but a figure which he knew he did not propose to pay. Stuart-Smith LJ did not think that the tenant was required to offer his final figure but, even if it was the tenant's opening bid, it should be a realistic one. Nevertheless, he declined to lay down any more precise guidelines noting that:

> "This seems to me to be an application of the well known elephant test. It is difficult to describe, but you know it when you see it."

The recent Court of Appeal decisions

On 19 December 2001, the Court of Appeal gave judgment in three cases involving defective notices under section 20 of the Housing Act 1988 - see Ravenseft Properties Limited v. Hall [2001] 13 EG 125. It seems to us that in these cases the Court of Appeal adopted a much more benevolent approach to the giver of the notice than in many other recent cases. In particular:

- they confirmed that Mannai applies to statutory notices;
- they disapproved of "pigeon-holing" cases as cases of "obvious" mistake or "perplexity";
- they disapproved the two stage test for the application of Mannai suggested in York v. Casey (see Part 1 of this Article) and said that the question was simply whether the notice

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[12] Amalgamated Estates Limited v Joystretch Manufacturing Limited [1981] 1 EGLR 96; Fox and Wildey v Guram [1998] 1 EGLR 91.

is "substantially to the like effect" as the prescribed form in accomplishing the statutory purpose of telling the proposed tenant of the special nature of an assured tenancy;

- they treated the substance of the notice as being to fulfil a broad function and made no reference to the test laid down in the Sun Alliance and Sabella cases, which requires a comparison of the wording of the notice and the form.

It seems to us that this approach might well have led to a different result in some of the cases we have discussed in the earlier part of this Article, in particular Panayi, Clickex, and perhaps Burman v. Mount Cook and St. Ermins v. Patel. At first sight, this represents a confusing change of approach. We hope the following analysis may be helpful:

1. Mannai is not a "cure all". It is only a principle of construction of the notice, which allows errors which would not have misled a reasonable recipient to be ignored;

2. Where a notice has to be in a prescribed form or one substantially to the like effect, it is necessary to identify what elements of the form are critical to its statutory function and which perform incidental functions, such as identifying the premises or tenancy to which the form relates;

3. Errors in parts of the form which are irrelevant to the circumstances do not matter;

4. But the notice must set out fully and accurately those matters which are necessary for it to perform its statutory function.

Conclusion

The pre-Mannai law that any mistake in a notice, however trivial, renders it invalid, was certainly simple. However, that rule was never a general one and only applied to options. The law has now assimilated its approach to all notices, whether under options or contracts or the requirements of statute. This is to be welcomed. It cannot be right that a very trivial mistake in a notice has disproportionately serious consequences, even though the error was of no practical significance. The Courts have not, however, gone so far as to permit enquiry into the state of

mind and knowledge of the actual recipient. The test of validity is objective and requires an answer to two questions:

1. What would the reasonable recipient have understood by the notice?

2. Did the notice, as understood by the reasonable recipient, fulfil its statutory or contractual function?

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