

Butterworths Property Law Newsletter

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NEWS UPDATE FOR PROPERTY LAW PROFESSIONALS

Price rises to be wiped out

New sellers have dropped the asking price for their properties for the first time this year, a survey by the properly website Rightmove has found. The monthly survey found that new sellers had dropped prices by an average of 6%, or £1,435. The groups said that there are 30,000 new properties coming onto the market on average, an increase of 45% on July 2009. It also stated that the number of unsold homes per agent had increased by almost a quarter in the first half of this year as new sales outnumber new mortgage approvals by a ratio of 5:2.

Mike Shipside, commercial director of Rightmove, said the group had forecast a return to aggressive pricing and indicated that the second half of 2010 would be a "strong buyers' market". "This is likely to see the average price gains of 7% for the first half of the year wiped out by year-end," he added.

Retail checklist

The British Retail Consortium (BRC) has launched a booklet to help retailers make significant property cost savings through better engagement with landlords. The *Property Management Checklist* outlines the steps that should be taken by retailers to ensure that they receive value for money in the property services and covers rent, service charges and energy use. Elizabeth Hinde, BRC head of property, said that it is essential that retailers and their landlords make savings in order to help the economic recovery. "Property bills can account for up to 40% of retailers costs, but for many smaller retailers this figure could be even higher, with property being their biggest expense," she said.

Tolerated trespasser "an oxymoron"

The Supreme Court has ruled that a "tolerated trespasser" who dies can pass on the right to apply for secured tenancies. In *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, the appellant had moved into his brother's council flat to care for him until he died.

Normally, he would have been able to take over the tenancy of the flat. It was discovered, however, that the brother had an old possession order against him and was, at the time of his death, a tolerated trespasser. This meant there was no tenancy in existence to succeed to and therefore the appellant faced eviction.

The Supreme Court held that the appellant can succeed the tenancy because it was a statutory, not personal right, and was capable of being passed to the estate. In making its decision, the court has overruled all previous court judgments. In her judgment, Lady Hale said, "A tolerated trespasser is an oxymoron. A trespasser is someone who should not be there. But tolerated trespassers were allowed to be there."

Indeed, in some cases the local authority had no right to evict them ... these were not people whom the local authority were reluctant to have there and were waiting for the machinery of eviction to take its course."

She continued, "These were people whom the authority wanted to have there, provided that they could be persuaded to pay most, if not all, of their rent."

Lady Hale also stated that the Housing and Regeneration Act 2008, Sch 11 "abolished the problem" of tolerated trespassers by granting them new tenancies similar to the ones they would otherwise have had when it came into force last May.

Mortgage reform concern

Reforms announced by the Financial Services Authority (FSA) could further depress the recovery of house prices, experts have warned. The FSA has proposed that lenders return to the "basics of responsible lending" by imposing affordability tests for all mortgages, requiring verification of income in every case and providing protection for vulnerable customers with credit-impaired history. Lesley Titcomb, FSA director responsible for the mortgage market, said that there is a clear link between consumers overstressing themselves to afford homes and mortgage arrears and repossession. "While it is clear that the mortgage market has worked well for many, we need to build a strong new framework to protect customers and ensure that the problems we have seen in the past do not happen again," she said.

According to the Building Societies Association (BSA), the proposed rule could result in some homeowners being unable to remortgage. Paul Broadhead, head of mortgage policy at the BSA, said, "To ensure borrowers are not adversely affected, it will be important that when the rules are implemented they provide clarity for lenders and are enforced consistently across the market."

The BSA has also expressed concern the FSA is conducting its review of the mortgage market against a backdrop of significant savings and supervisory change – something that the BSA says needs careful consideration before firm decisions are made.

"Decisions and implementation should not be rushed. We have seen several changes at a prudential and supervisory level, and the impact of these should be fully assessed before conduct of business rules are changed," Broadhead added.

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Editor:

Nicholas Crinnion
nicholas.crinnion@lexisnexis.co.uk

Designer & Typesetter:

Mike Stuart

Customer Services:

0845 370 1234
customerservices@lexisnexis.co.uk

Head of Marketing:

Charles Barber
charles.barber@lexisnexis.co.uk

Publishing Director:

Simon Collin

Published by LexisNexis, Halsbury House, 35 Chancery Lane, London WC2A 1EL

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In Practice

Planning law, bats, badgers and habitats

Protection from disturbance of protected species applies at population level. Indirect disturbance can constitute an offence

The policy objective of the Habitats Directive, transposed into domestic law by the Habitats Regulations, was to ensure that the population of a protected species is maintained at a level which would ensure conservation so as to protect their distribution and abundance in the long-term. For small-scale projects, where protected species are known to be present, demolition or redevelopment works are likely to be caught by:

- Article 12(1)(a) – killing a “specimen” or individual member of the species;
- Article 12(1)(b) – “deliberate disturbance”; or
- Article 12(1)(d) – deterioration or destruction of habitat, with particular focus on known (rather than prospective) breeding or resting places.

R (Morge) v Hampshire CC [2010] All ER (D) 61 (Jun) concerned a large-scale project, to create a bus-way to relieve congestion on existing routes. The bus-way would follow the route of a rail line closed during the 1960s which had since become overgrown with vegetation, and habitat for protected species. Planning permission was granted on the basis of a planning officer’s report, stating that the adverse effect on protected species (mainly bats and badgers) would not be significant, and that adequate mitigation measures would be in place (eg, the provision of new bat boxes to replace felled trees that might be used as roosting places). Natural England, the licensing authority for works that would otherwise constitute an offence under the legislation, had withdrawn its initial objection.

The appeal

The key issues which arose on the appeal included consideration of:

- (i) the scope of art 12(1)(b) of the Directive and the meaning of “deliberate disturbance” of a protected species; and

- (ii) the scope of art 12(1)(d) of the Directive and in particular whether it was necessary to consider indirect as well as direct impact on the deterioration or destruction of the bats’ breeding sites or resting places.

Ward LJ found that unless expressly stated (eg, the prohibition under art 12(1)(a) on killing a “specimen”), the measures were aimed at the conservation of the species as a whole, not necessarily the protection of an individual member of the species.

The general policy and purpose of the Directive was the conservation of wild fauna, achieved by taking such measures as were necessary to maintain the population of the species at “a favourable conservation status”.

The measures required were “those which would maintain the distribution and abundance of the population of an endangered species on a long-term basis as a viable component of its natural habitat”.

When is disturbance “deliberate”?

Disturbance is “deliberate” where it results from the actions of a person who knows, in the light of the relevant legislation and general information delivered to the public that his action will most likely lead to an offence against a species, but:

- intends to commit the offence; or
- consciously accepts the foreseeable results of his action.

What is “disturbance”?

A disturbance may be direct or indirect (eg, by light, noise or vibration). To be actionable under art 12(1)(b) it must “have a detrimental impact so as to affect the conservation status of a species at population level”.

Ward LJ drew support for this conclusion from Defra guidance, which states that:

“In most cases it is not expected that an action which disturbed a single animal or a small number of animals would have sufficient impact to be caught by the offence, although if any of our European protected species become particularly rare, disturbing very few animals could potentially have serious effects.”

Deterioration or destruction of habitats

Unlike disturbance, deterioration or destruction of habitat need not be “deliberate”.

Article 12(1)(b) protects specific elements of a species’ habitat, focusing on those parts most important to its conservation status (eg, breeding and resting places). Their strict protection is merited because of their “ecological functionality”.

Breeding sites and resting places also need to be protected when they are not being used, but where there is a reasonably high probability that the species concerned will return to these sites and places. If for example a certain cave is used every year by a number of bats for hibernation (because the species has the habit of returning to the same winter roost every year), the functionality of this cave as a hibernating site should be protected in summer as well so that the bats can reuse it in winter. On the other hand, if a certain cave is used only occasionally for breeding or resting purposes, it is very likely that the site does not qualify as a breeding site or resting place.

Article 12(1)(d) does not cover the loss of a potential site if the ecological functionality of an area is safeguarded. In *Morge* there would be plenty of other trees in which bats could roost plus the provision of bat boxes. Ward LJ held that it would go too far to suggest that there would be a breach of art 12(1)(d) if a development affected a potential breeding site or resting place.

In *Morge* there was no evidence which would allow the planning committee to conclude that the long-term distribution and abundance of the bat population was at risk. There was no evidence that they would lose so much energy (as they might when disturbed during hibernation) that the habitat would not still provide enough sustenance for their survival, or their survival would be in jeopardy. There was no evidence that the population of the species would not maintain itself on a long-term basis. Accordingly, there was no evidence of any activity which would, as a matter of law, constitute a disturbance.



Role of the planning committee

Under reg 4(3) the planning committee must “have regard” to the requirements of the Habitats Directive so far as they may be affected by the proposed development. The planning committee must grant or refuse planning permission in such a way that will establish a system of strict protection, in their natural range, for the animal species listed in Annex IV(a) to the Directive.

The planning committee may grant permission if satisfied that the development will not offend art 12(1)(b), which prohibits deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration, or 12(1)(d), which prohibits the deterioration or destruction of breeding sites or resting places.

If satisfied that it will breach any part of art 12(1) the planning committee must consider whether the appropriate authority (Natural England) will permit derogation and grant a licence under reg 44. Natural England can only grant that licence if it concludes that:

- despite the breach of reg 39 (and so of art 12) there is no satisfactory alternative;
- the development will not be

detrimental to the maintenance of the population of bats at favourable conservation status; and

- the development should be permitted for imperative reasons of overriding public importance. If the planning committee concludes that Natural England will not grant a licence it must refuse planning permission. If, on the other hand, it is likely that it will grant the licence then the planning committee may grant conditional planning permission.

If it is uncertain whether or not a licence will be granted, then the planning committee must refuse planning permission.

Role of the planning officer

The planning committee is assumed to have substantial background and local knowledge, but is otherwise dependent on the planning officer whose duty is to provide enough information and give sufficient advice to the planning committee to put it in possession of the critical facts relevant to their decision and the crucial directions that will enable it to know how to discharge its statutory and regulatory responsibility.

Role of the court

The court will not zealously scrutinize every word of the report as if construing a statute. It must consider the overall fairness of the report in the context of the relevant legislative and policy requirements, assessing whether its overall effect significantly misled or failed properly to inform the planning committee.

An application for judicial review will not normally merit consideration unless the overall effect of the report significantly misleads the committee about material matters.

Further appeal?

Ward LJ acknowledged the difficulty of the issues raised in *Morge*. Refusing leave to appeal “with a degree of hesitation”, the court concluded that it would be for the Justices of the Supreme Court to decide whether this would be a suitable case for their consideration.

Related legislation

Conservation (Natural Habitats etc) Regulations 1994, SI 1994/2716;
Conservation of Habitats and Species Regulations 2010, SI 2010/490

Legislation update

<p>Mortgage Repossessions (Protection of Tenants etc) Act 2010 (Commencement) Order 2010</p>	<p>Enactment Citation SI 2010/1705 Commencement date Commencement order Enabling Power Mortgage Repossessions (Protection of Tenants etc) Act 2010, s 4(1) SI 2010/1705: Possession order provisions come into force on 30 June 2010</p>	<p>Brings into force the Mortgage Repossessions (Protection of Tenants etc) Act 2010. The Act (apart from s 4, which came into force on royal assent) is brought into force on 30 June 2010 for the purpose of enabling the secretary of state to make regulations under s 2. The remainder of the Act is brought into force for all purposes on 1 October 2010.</p>
<p>Land Registration (Proper Office) Order 2010</p>	<p>Enactment Citation SI 2010/1635 Commencement date 1 October 2010 Legislation Affected SI 2009/2727 revoked Enabling Power Land Registration Act 2002, s 100(3) SI 2010/1635: Portsmouth, Stevenage and Tunbridge Wells offices no longer designated as proper land registry offices from 1 October 2010</p>	<p>Designates particular offices of Land Registry as the proper office for the receipt of specified descriptions of application under the Land Registration Act 2002. Revokes the Land Registration (Proper Office) (No 2) Order 2009, SI 2009/2727.</p> <p>From 1 October 2010, the Land Registry’s Portsmouth, Stevenage and Tunbridge Wells offices will cease to be proper offices.</p>



■ Serving notices

Leaving the notice at the premises

This is the first in a regular column written by contributors to *Hill & Redman*, the leading practitioner work on landlord and tenant law published by LexisNexis. The comprehensive reference source, it covers everything from general common law rules to business tenancies. This issue, Wayne Clark, barrister at Falcon Chambers, discusses serving s 25 notices under the Landlord and Tenant Act 1954.

The provisions of s 23 of the Landlord and Tenant Act 1927 (LTA 1927) apply to service of notices under Pt II of the Landlord and Tenant Act 1954 (LTA 1954). That section provides for a number of methods of effecting service. Those provisions deem good service to be effected if, *inter alia*, the s 25 notice is left "at [the tenant's] last known place of abode". The "last known place of abode" has been held to include the tenant's business address (*Price v West London Investment BS* [1964] 1 WLR 616, CA).

Where there is service in accordance with s 23, there is deemed service regardless of whether the notice did in fact reach the tenant (*Webber (Transport) v Railtrack* [2004] 1 WLR 320, CA). The risk of non-receipt where one of the statutory methods of service is effected is placed firmly upon the recipient. If service is not effected in accordance with s 23 the court will need to be satisfied that the notice actually came to the attention of the tenant (*Stylo Shoes v Prices Tailors* [1960] Ch 396).

A recent decision on an application for permission to appeal, (*Catalyst Communities Housing Ltd v Katana* [2010] EWCA Civ 370; [2010] 26 EG 92), highlights the interesting questions which may arise in seeking to effect service by leaving the notice at the tenant's business address. The case concerned two separate tenancies of different parts of a former petrol filling station.

Mr Katana's premises, used as a car wash, were at the front of the site. There was an office on the forecourt forming part of the demise which

contained a letterbox. The landlord served the s 25 notice on Mr Katana by attaching them to the exterior of a kiosk and also putting them through a letterbox within the kiosk rather than through the letterbox in the office. The kiosk formed part of the demised premises.

Patten LJ said that the LTA 1954 did not make a distinction for the purposes of deemed service between one part of the premises and another. As the s 25 notice had been attached to the windows of the kiosk and copies were put through the letter box of the kiosk there was effective service for the purposes of s 23 of LTA 1927.

The second tenant was a Mr Abrahams. He occupied premises to the rear of the site. Access to his premises was through a gate which was only open during business hours. His s 25 notice was also left at the kiosk. As the kiosk did not form part of his demise but that of Mr Katana, the notice had not been served on him unless it could be shown that it had actually been received by him. If Mr Katana had in fact handed the notice placed at the kiosk to Mr Abrahams, this would have been effective service (*Stylo Shoes v Price Tailors, ibid*) (where service was originally effected at the tenant's previous place of business but was passed on to the tenant at the tenant's new premises).

Receipt by an agent of Mr Abraham, whose duty it was to pass the notice on to the tenant, would also have been good enough to show that the notice had actually been received by the tenant albeit it may not have in fact been received by Mr Abrahams himself,

eg, because the employee had mislaid the notice (*Price v West London Investments BS, ibid*).

It would appear that the landlord did not attach the notice addressed to Mr Abrahams to the gate which provided access to the building occupied by him. If the landlord had attempted to effect service by recorded delivery it would have been necessary to show that receipt was signed for. If no one was available to sign, or was willing to sign a receipt for the recorded delivery post, eg, because the door was locked and access to the premises could not be obtained, service would not have been effected (*Stephenson & Sons v Ocra Properties Limited* [1989] 2 EGLR 129). However, if the notice had been attached to the gate service, it would have been effected for the purposes of s 23. If the gate formed part of the demised premises; the notice would then have been left at the tenant's last known place of abode. It seems reasonably arguable that even if the tenant had only a right of access through the gate leaving it at the gate (if the only means of access to the demise) would equally have been sufficient. The Court of Appeal has held that a right of way forms part of the tenant's property protected by the 1954 Act (*Nevill Long & Co v Firmenich & Co* [1983] 1 EGLR 76, CA) (itself an interesting case dealing with a severed reversion). If Mr Abrahams was known to be out of occupation (albeit for a temporary period) service by leaving it at the gate may also have been good enough (*Blunden v Frogmore Investments Ltd* [2002] 2 EGLR 29, CA) where at least one Court of Appeal judge thought that attaching a s 25 notice to a hoarding erected around the demised premises which had been damaged by a terrorist bomb, the landlord knowing that the tenant was not in occupation (because it was physically impossible to do so), was nevertheless good service at the tenant's last known place of abode.

The decision in *Catalyst Communities Housing Ltd v Katana* is actually not an authority for any proposition of law. Under the Practice Direction (CA: *Citation of Authorities*) [2001] 1 WLR 1001, a judgment on an application for permission to appeal cannot be cited unless it contains an express statement to the effect that it is intended to establish a new principle or to extend the present law.



They think it's all over...

In *QFS Scaffolding Ltd v (1) Richard Douglas John Sable (2) Ann Christine Sable* [2010] EWCA Civ 682, the Court of Appeal recently reviewed and provided clarification on the law in relation to surrender.

The landlords, Mr and Mrs Sable, had granted a lease of premises to a tenant company, LDC. LDC had conducted two businesses from the premises: a demolition business and a scaffolding business. In January 2006 administrative receivers were appointed in relation to LDC. Prior to that appointment, two new companies were formed, one to take over the demolition business and the other to take over the scaffolding business. QFS Scaffolding Ltd was formed to take over the scaffolding business of LDC.

Throughout 2006 there were negotiations between the landlords and QFS in relation to the possible grant of a new lease of the premises to QFS. Those negotiations ran into difficulty and ultimately, no new lease was granted to QFS. However, QFS approached the administrative receiver of the tenant company, LDC, who purportedly assigned the lease of the premises to QFS in September 2008.

The landlords brought possession proceedings against QFS, arguing that the lease to LDC had been surrendered by operation of law and that QFS was in occupation of the premises during the negotiations as a tenant at will, which tenancy had been determined by the landlords.

At first instance the judge found for the landlords. He held that the tenant, LDC, was a party to the creation of the new tenancy at will in favour of QFS, which tenancy at will could not be valid in the event that LDC's interest under its lease with the landlords continued to exist. The trial judge held that this amounted unequivocally to an acceptance by LDC that its lease had ended. QFS appealed.

Giving the leading judgment of the Court of Appeal, Morgan J reviewed the law in relation to surrender and at para 10 set out the following propositions:

- (a) there is no legal distinction between a surrender by operation of law and an implied surrender;
- (b) the term "surrender by operation of law" is applied to cases where a landlord or a tenant has been a party to some act, the validity of which he is afterwards

estopped from disputing, and which would not be valid if the tenancy had continued to exist;

- (c) the principle does not depend upon the subjective intentions of the parties but upon estoppel;
- (d) in this context, there is no estoppel by mere verbal agreement – there must in addition be some act which is inconsistent with the continuance of the tenancy;
- (e) in point of time, the surrender is treated as having taken place immediately before the act to which the landlord or the tenant is a party;
- (f) the conduct of the parties must unequivocally amount to an acceptance that the tenancy has ended; there must be either a relinquishment of possession and its acceptance by the landlord, or other conduct consistent only with the cesser of the tenancy;
- (g) it has been said that the circumstances must be such as to render it inequitable for the landlord or the tenant to dispute that the tenancy has ended;
- (h) an agreement by the landlord and the tenant that the tenancy shall be put an end to, acted upon by the tenant's quitting the premises and the landlord by some unequivocal act taking possession, amounts to a surrender by operation of law; the giving and taking of possession must be unequivocal;
- (i) where the tenant requests the landlord to let the property to a third party, and the landlord does so, the lease is surrendered at the time of the new letting; the surrender does not take place before the time of the new letting; it is essential that the new letting is effected with the consent of the original tenant; if the original tenant does not consent or know of the new tenancy, there is no surrender; the original tenant's consent may be inferred from conduct or from long acquiescence in the new arrangement; and
- (j) a surrender by operation of law may take place where the landlord, with the original tenant's consent, accepts a new tenant as his direct tenant – the consent of the landlord and the original tenant is needed.

Morgan J then made some further comments on these propositions:

- The requirement that the conduct of the parties must be inconsistent with the continuation of the lease has been

described as "a high threshold" – see, *Bellcourt Estates Limited v Adesina* [2005] 2 EGLR 33.

- A number of cases have stated that the circumstances must be such as to render it inequitable for the landlord or the tenant to dispute that the tenancy has ended. In *Artworld Financial Corporation v Safaryan* [2009] EWCA Civ 303, it was said that this way of putting the proposition does not involve any separate inquiry into the equity of the matter; instead, if there is an unequivocal offering and taking of possession, then it will be inequitable (without more) for one party to deny that the tenancy has ended by surrender.
- The authorities in this area all say that the underlying principle is one of estoppel. Where the conduct of a party is inconsistent with the continuation of the tenancy, that party is estopped from contending that the tenancy subsists. In general, the case law in this area has not involved a separate examination of questions such as reliance, or detriment, or change of position, or unconscionability, or whether the effect of the estoppel is temporary or permanent. It may be that the principles as to surrender by operation of law have evolved along their own path. The result which has been produced is that where both parties act on the basis that the tenancy has ended, the result will be that the tenancy has ended.

The Court of Appeal found for QFS. It held that the starting point was whether LDC had surrendered its lease. If there had not been a surrender, it would not be right to imply the existence of a direct tenancy at will or licence between the landlords and QFS.

The circumstances of the case indicated that LDC had not surrendered its lease and that its lease continued to exist. Consequently, LDC and not the landlords, was entitled to possession.

Further, the Court of Appeal held that no new tenancy was granted to QFS by the landlords and the parties had only ever been in a state of negotiation. In standing by and allowing the landlords and QFS to negotiate, LDC had not surrendered its lease because there was no evidence of conduct on the part of LDC which was unequivocally inconsistent with the continuation of its lease.

Adrian Carr
Barrister



Collective enfranchisements and lease extensions

Avoiding the pitfalls

Enfranchisement is complex and full of potential pitfalls. This article provides guidance on how they can be avoided.

Getting started

At the outset, obtain all the relevant information from your client and the Land Registry, such as up-to-date office copy entries of all relevant titles, copy leases and deeds of variation. These will be needed to draft notices and later when deducing title.

You should check that the tenants are qualifying tenants for the purposes of the Leasehold Reform Act 1967 (LRA 1967) or the Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA 1993). Note that owning more than two flats precludes a tenant from qualifying under the 1993 Act to collectively enfranchise. Instruct a specialist enfranchisement valuer who is prepared to represent the client at the Leasehold Valuation Tribunal (LVT).

Make sure that you note key deadlines. For example, if a notice has been served on your freeholder client and they have delayed in instructing you, it will be necessary to act quickly.

Collective enfranchisement

You should encourage lessees to appoint a representative in a collective enfranchisement that will coordinate matters on behalf of the qualifying tenants and will be your main point of contact. You should get monies on account to cover initial costs of a valuer and disbursements such as obtaining copy titles, setting up a company to act as the nominee purchaser and initial legal fees.

Compile a questionnaire to be sent to all lessees asking for contact details and whether they would be interested in participating in an investment consortium (if relevant) or investing in the reversion of non-participating flats.

Where there are not enough qualifying participating lessees, ascertain whether there are lessees who would be willing to be dummy "participants" who sign the notice but do not incur any liability for costs. Further, consider whether a participation agreement is necessary. Ascertain how costs are to be shared. Legal and valuation costs can either be shared equally or in the same proportions as set out in the valuation report.

Lease extensions

Conveyancing colleagues should be made aware of the implications of a short lease and

bring this to the attention of the seller and buyer. An assignment of the benefit of a s 42 notice will enable the buyer of a short lease to take over the lease extension process without having to wait two years from the date they became the registered proprietor. Note that if acting for a buyer where the term will reduce below 80 years before the purchaser has owned for two years, it is negligent not to inform the client of this option.

Some clients may seek to negotiate terms outside of the statutory provisions and in such cases, it is worth bearing in mind whether a client is better placed to serve a s 42 notice as the terms of a voluntary deal proposed by a landlord are often unfavourable. Conversely, if acting for a landlord, it may be advisable to tell your client that to save the expense of the statutory route (where only approximately 60% of costs can be recovered), a negotiated deal may be cheaper and quicker, with the landlord possibly being able to retain a ground rent and having legal and valuation fees met in full.

The initial notice

LRA 1967 Notices

Drafting notices under the LRA 1967 is tricky. You need a valuer who can advise on the relevant rateable value(s) of the property concerned as well as the section under which the valuation falls. It is advisable for all but the most straightforward 1967 Act notices to be sent to counsel for approval. Note that the notice (and counter notice) does not specify the price at which the freehold is to be acquired and you are, on behalf of your client, able to sign the notice.

Section 13 notices

Ensure that the plan accompanying the s 13 notice (which will initiate the process by which a freehold will be acquired) is accurate with the correct shading/edging to reflect the property being claimed and any appurtenant property. In complex situations, it is advisable for a surveyor to draft the plan.

Section 42 notices

In a s 42 notice, check the existing lease as it may not be CML compliant and may require modification. A mutual enforceability covenant is essential. You must ensure that

any additional clauses you require are clearly stated in the notice.

If the benefit of a s 42 notice is being assigned, ensure that the required assignment has been drafted, that the additional clauses are incorporated into the sales contract and that the s 42 notice is served between exchange and completion.

General guidance

Make sure that you check the notice before it is served to ensure that it has been signed by all qualifying tenant(s) and has been dated correctly with an adequate period for responding, which should be at least two months. Remember that an initial notice cannot be signed under a power of attorney and if a qualifying tenant is a company, it must be signed in accordance with the company's articles with the appropriate attestation clause.

Serve the notice on the registered office of the freeholder (if a company) and if an individual, ensure that it is served on the address where the tenant(s) pay ground rent. Check the registered office on the day of service as it may have changed recently. Obtain an up-to-date office copy of the lessee's title(s), freehold and any intermediate landlord's title on the day you serve.

Make sure that a copy of the notice is served on all intermediate landlords, management companies and guarantors and also any other to the original lease. Serve the notice by courier so that a receipt can be obtained in case valid service is queried.

The figure for insertion into the initial notice must be reasonable and guidance from the *9 Cornwall Crescent London Ltd v Kensington & Chelsea RLBC* [2005] HLR 40 decision states that the tenants offer must be one made in "good faith".

Lodge a unilateral notice at the Land Registry to protect your client(s) position. Currently the fee is £50. This should be lodged against the freehold and any intermediate leasehold titles in respect of all initial notices served under LRA 1967 or LRHUDA 1993.

Acting for the landlord – receiving the initial notice

The tenant's solicitor will request acknowledgement of the notice. Upon receipt of the notice, ask the tenant's solicitor to deduce title and pay the statutory deposit (this is 10% of the premium offered in a s 42 notice or three times the ground rent if the freehold is being claimed under LRA 1967). The request should (in the first instance) be served without admitting the validity of the claim.





Collective enfranchisements and lease extensions

Instruct a specialist enfranchisement valuer who would be prepared to proceed to the LVT. They will want access to the property for the purposes of a valuation and arrangements should be obtained through enquiry of the tenant's solicitor or the tenant directly.

Check that the response date is valid and the figure(s) inserted into the initial notice are reasonable. Check that the notice has been executed in the correct way.

The counter notice

General guidance

Serve the counter notice by the response date or else run the risk of having the freehold or lease extension granted on the terms set out in the initial notice.

Serve the counter notice on the nominee purchaser or lessee (usually care of their solicitor) and ensure that a copy is served on any other relevant landlord. The counter notice should also be served by courier.

Section 45 notice – lease extensions

The freeholder is able to serve a counter notice either: (1) admitting the claim and agreeing all terms and prices; (2) admitting the claim but disputing the terms; or (3) stating that the qualifying tenants are not entitled to enfranchise (eg, a lessee has not owed a property for two years when serving a s 42 notice) or that the notice is invalid. A specific reason for denying a tenant's claim must be stated.

Section 21 notice – collective enfranchisement

If the freeholder wishes to claim a leaseback over certain flats or other property to be retained, this should be claimed in the counter notice otherwise the freeholder's right to receive a leaseback is lost. The reversioner's right to claim a leaseback is contained in Sch 9 of LRHUDA 1993.

Not responding or getting it wrong

An application to the LVT for a determination as to the price payable or the terms of the acquisition must be made not less than two months and not more than six months from the date of the counter notice. Do not leave it until the last minute to apply.

The implication of an invalid notice is that a qualifying tenant has to wait another year before serving a fresh notice. This can be costly if, for example, a lease drops below 80 years and marriage value becomes payable.

A deemed withdrawal of a notice means that your notice will be treated as if it were not served and the tenant will be unable to complete their lease extension or collective

enfranchisement claim. This is a waste of time, effort and money. Your client(s) will be liable to pay costs incurred in accordance with LRHUDA 1993 (refer to s 33 of LRHUDA 1993 for a freehold and s 60 of LRHUDA 1993 Act for a lease extension) and precluded from serving another initial notice for 12 months from the date of the deemed withdrawal.

If the benefit of a s 42 notice is not validly assigned, then the buyer will be unable to extend their lease until they have been the registered proprietor for two years which will possibly mean an increase in premium and a potential negligence claim.

Completing the process

Completion must take place within four months from the date that the price and all terms of acquisition (not including statutory costs or the lease plan) are agreed.

Ask for statutory costs and challenge if they are not reasonable. The Act clearly defines the freeholder's recoverable costs which are limited to the cost of a valuation and legal costs incurred in considering the initial notice (including the deduction of title) and the conveyancing aspects of the collective enfranchisement or lease extension. If agreement cannot be reached, consider whether an application should be made to the LVT for a determination as to reasonableness. It is sometimes advisable to complete a transaction on the basis that the disputed sums are retained in the landlord's solicitors' client account pending a determination or agreement.

Ensure the consent of the mortgagee to the granting of the new lease (if there is a mortgage on either the freehold or leasehold title) is obtained as the Land Registry will need to see evidence of the consent to dealing or a deed of substituted security before registration.

Note that a deed of substituted security is not required for a statutory lease extension by virtue of s 58 of LRHUDA 1993 and it is sufficient for a copy of the lease to be sent to the mortgagee requesting their consent to the registration of the new lease. If a mortgage is being discharged, make sure that the END1 or DS1 is lodged. Lodge an OS1 before completion to protect your client's purchase of the freehold. Some practitioners also carry out an OS1 when they extend client's leases. Remember to lodge a UN2 after completion so that the unilateral notice is removed. No fee is currently payable.

Protecting the client's position

An application for a vesting order is to be lodged with the county court within four

months from the date that all the terms of acquisition are agreed. Either side can apply. Make sure that the date is put in writing and confirmed by the other side to avoid ambiguity. This does not include costs and any plans.

No counter notice is served

An application for a vesting order must be lodged with the county court within six months of the response date specified in the initial notice. Before making an application, write to the freeholder or their solicitor letting them know that the qualifying tenant(s) has the right to acquire the lease extension or freehold on the terms set out in the initial notice without the freeholder having the ability to serve a counter notice. The costs recoverable from the tenant are limited to conveyancing aspects of the transaction.

Hints and tips

The numerous pitfalls can be avoided:

- Ensure conveyancing colleagues know the implications of a short lease in either a purchase or a sale.
- The implications for getting it wrong can be costly.
- Instruct a specialist enfranchisement valuer.
- Make sure that a plan accompanies a s 13 notice accurately identifying the extent of the specified premises and any curtilage.
- Apply to the LVT in good time as the act of lodging an application can encourage settlement.
- When an application is made to the LVT and acknowledged, think about whether you would be willing to place the matter in abeyance for three months to allow time for the parties to negotiate.
- Take note of the directions issued by the LVT and the time limits and ensure that you comply.
- Compliance with the relevant time limits is of utmost importance and you must diarise every relevant date.
- In a s 13 notice, ensure that all lessees are sent a copy of the notice.

If in doubt, take specialist advice.

This article formed the basis of a webinar for LexisNexis shown in May 2010.

Graham Jaffe

Partner, Jaffe Porter Crossick LLP

Katie Cohen

Solicitor, Jaffe Porter Crossick LLP





Rate demands

Unenforceable demands

In *North Somerset District Council v Honda Motor Europe* [2010] All ER (D) 13 (Jul), a council's claim for unpaid non-domestic national rates was dismissed because enforcement of rates demand notices which were served late would cause substantial prejudice to the ratepayer and this is not what Parliament intended.

Having surveyed the relevant case law, the court emphasised that late service was not, in itself, fatal. The determinative issue is whether the delay results in substantial prejudice.

Honda occupied business premises. The council contended that Honda was liable to pay non-domestic national rates (business rates) on the premises that it occupied between 2002 and 2007. The relevant demand notices were issued in 2007 because the system of inspections operated by the council broke down and, as a result, the authority had been unaware that the sites were in rateable occupation, or they had failed to identify who the occupier was.

Properties were being noted as "void" when they were not. The council brought proceedings for unpaid business rates against Honda.

Honda submitted that the notices were invalid and that no business rates were payable for that year because the notices were not served in accordance with the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989, SI 1989/1058 (the Regulations), reg 5 which required that a notice "shall be served on or as soon as

practicable ... after 1 April in the relevant year" (the relevant year was the chargeable financial year to which the notices related). The council contended that failure to serve a notice as soon as practicable had no legal impact on the ability of the council to enforce recovery of outstanding business rates unless the ratepayer could demonstrate that it would be unconscionable to allow the authority to do so, or demonstrate some other public law basis for defeating recovery.

The court noted that:

- *Encon Insulation Limited v Nottingham City Council* [1999] All ER (D) 588, suggests that failure to comply with reg 5(1) by serving a notice as soon as practicable extinguishes any liability for the rates in respect of which it was served.
- *Regentford v Thanet District Council* [2004] All ER (D) 285 (Feb) which dealt with the similar but not identical council tax recovery legislation, suggests that such failure is not fatal to recovery but that procedural or substantive prejudice to the taxpayer would relieve him of liability to pay.
- *JJB Sports v Telford and Wrekin BC* [2008] All ER (D) 42 (Nov) endorsed the *Regentford* approach in so far as it related to the question whether a failure to serve a notice as soon as practicable was fatal to recovery. It was not. Prejudice did not arise in *JJB Sports*. The deputy judge noted that

the point in *Encon* had not been the subject of argument; indeed it was in effect the restatement of a concession. In coming to his conclusion, the deputy judge had regard to *R v Soneji* [2005] 4 All ER 321.

- *R (Waltham Forest LBC) v Waltham Forest Magistrates Court and Yem Yom Ventures* [2008] EWHC (Admin) 3579 endorsed the proposition that the *Encon* approach should not be followed. The deputy judge concluded that a failure to serve a notice as soon as practicable was not fatal to the recovery of rates and concluded that each case should be looked at by reference to a combination of whether there had been substantial compliance with the provision and its objectives, including whether there had been prejudice to the ratepayer. By putting it in that way, the deputy judge recognised that one of the objectives of reg 5 was to avoid a ratepayer being prejudiced by late service of a notice. The citation of authority in *Yem Yom* was far from complete, particularly as there was no consideration of *R v Soneji* [2006] 1 AC 340 which qualified the approach by reference to "substantial compliance" as providing the correct analytical route to determining the outcome in similar cases.

In *Honda*, due to the substantial prejudice caused by late service of notices under reg 5, and viewed in the light of the intention to be imputed to Parliament that such notices should be served as soon as was practicable on or after 1 April each year, the claims against Honda failed and there would be judgment for Honda.

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