TANFIELD

Collective Enfranchisement: Validity of Notices

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1. Chapter I of Part I of the 1993 Act confers on certain tenants of flats held under long residential leases in certain premises the right to collective enfranchisement, that is to say the right to have the freehold of those premises acquired on their behalf by a person appointed by them for that purpose and at a price determined in accordance with Schedule 6 to the 1993 Act. Tenants entitled to participate in collective enfranchisement are called "qualifying tenants". The premises must comprise two or more flats held by qualifying tenants. The total number of flats held by such tenants must be not less than two thirds of the total number of flats contained in the premises.

2. The right to collective enfranchisement is exercised by a notice under section 13 of the 1993 Act. The notice must be served by qualifying tenants of flats which, at the date of the notice, constitute not less than half of the total number of flats in the premises. The notice must comply with the requirements specified in section 13(3), which provides:

> "(3) The initial notice must—
> (a) specify and be accompanied by a plan showing—
> (i) the premises of which the freehold is proposed to be acquired by virtue of section 1(1),
> (ii) any property of which the freehold is proposed to be acquired by virtue of section 1(2)(a), and
> (iii) any property over which it is proposed that rights (specified in the notice) should be granted in connection with the acquisition of

the freehold of the specified premises or of any such property so far as falling within section 1(3)(a);

(b) contain a statement of the grounds on which it is claimed that the specified premises are, on the relevant date, premises to which this Chapter applies;

(c) specify—

(i) any leasehold interest proposed to be acquired under or by virtue of section 2(1)(a) or (b), and

(ii) any flats or other units contained in the specified premises in relation to which it is considered that any of the requirements in Part II of Schedule 9 to this Act are applicable;

(d) specify the proposed purchase price for each of the following, namely—

(i) the freehold interest in the specified premises or, if the freehold of the whole of the specified premises is not owned by the same person, each of the freehold interests in those premises ,

(ii) the freehold interest in any property specified under paragraph (a)(ii), and

(iii) any leasehold interest specified under paragraph (c)(i);

(e) state the full names of all the qualifying tenants of flats contained in the specified premises and the addresses of their flats, and contain in relation to each of those tenants,—

(i) such particulars of his lease as are sufficient to identify it, including the date on which the lease was entered into, the term for which it was granted and the date of the commencement of the term,

(f) state the full name or names of the person or persons appointed as the nominee purchaser for the purposes of section 15, and an address in England and Wales at which notices may be given to that person or those persons under this Chapter; and

(g) specify the date by which the reversioner must respond to the notice by giving a counter-notice under section 21."

3. Section 13(5) provides:

> "The date specified in the initial notice in pursuance of subsection (3)(g) must be a date falling not less than two months after the relevant date."

4. Paragraph 15 of Schedule 3 to the 1993 Act deals with inaccuracies or misdescription in a notice under section 13. It provides:

> "**Inaccuracies or misdescription in initial notice**
>
> "(1) The initial notice shall not be invalidated by any inaccuracy in any of the particulars required by section 13(3) or by any misdescription of any of the property to which the claim extends.
>
> (2) Where the initial notice— (a) specifies any property or interest which was not liable to acquisition under or by virtue of section 1 or 2 , or (b) fails to specify any property or interest which is so liable to acquisition, the notice may, with the leave of the court and on such

terms as the court may think fit, be amended so as to exclude or include the property or interest in question.
(3) Where the initial notice is so amended as to exclude any property or interest, references to the property or interests specified in the notice under any provision of section 13(3) shall be construed accordingly; and, where it is so amended as to include any property or interest, the property or interest shall be treated as if it had been specified under the provision of that section under which it would have fallen to be specified if its acquisition had been proposed at the relevant date."

Mandatory v directory

5. Where a statute lays down a process or procedure for the exercise or acquisition by a person or body of some right conferred by the statute, and the statute does not expressly state what is the consequence of the failure to comply with that process or procedure, the consequence used to be said to depend on whether the requirement was mandatory or directory. If, on the proper interpretation of the statute, it was held to be mandatory, the failure to comply was said to invalidate everything which followed. If it was held, on the proper interpretation of the statute, to be directory, the failure to comply would not necessarily have invalidated what followed.

The modern approach

6. The modern approach, however, is to determine the consequence of non-compliance as an ordinary issue of statutory interpretation, applying all the usual principles of statutory interpretation. It invariably involves, therefore, among other things according to the context, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole. Examples of the application of the more recent interpretative approach, where the court has asked whether the statutory requirement can be fulfilled by substantial compliance and, if so, whether on the facts there has been substantial compliance even if not strict compliance, can be found in *R v Secretary of State for the Home*

Department, Ex p Jeyeanthan [2000] 1 WLR 354; *R v Soneji* [2006] 1 AC 340; *R (M) v Hackney London Borough Council* [2011] 1 WLR 2873; *R (Garland) v Secretary of State for Justice* [2012] 1 WLR 1879; and *Newbold v Coal Authority* [2014] 1 WLR 1288.

7. In *R v Soneji* [2006] 1 AC 340 Lord Steyn at [21] approved the following passage from the judgment of the Australian High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 the Australian High Court:

> "the Court of Appeal of New South Wales was correct … in criticising the continued use of the 'elusive distinction between directory and mandatory requirements' and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute."

8. Thus, "the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity" (per Lord Steyn at [23]).

9. Importantly, however, none of the aforementioned cases concerned statutory requirements to serve a notice as part of the process for a private person to acquire or resist the acquisition of property or similar rights conferred by the statute.

The approach in 'compulsory acquisition' cases

10. The most recent case on the validity of a notice served pursuant to s.13 is *Osman v Natt* [2014] EWCA 1520 Civ, [2015] 1 W.L.R. 1536. In that case, an initial notice failed to identify one of the qualifying tenants and give particulars of her lease, because it was disputed whether the lease was of a "flat". The qualifying tenant was the daughter of the landlord and therefore the landlord knew the information which should have been included and had suffered no prejudice by the omission to include the relevant information. The court had to determine whether the failure to identify the qualifying tenant and give particulars of her lease invalidated the notice. The Appellant tenant argued that it was permissible for the court to take into account the consequences of non-compliance. The judge at first instance (HHJ Dight) held that the provisions of s.13 had to be strictly complied with.

11. The Court of Appeal rejected the argument that the substantial compliance approach was correct in the case of statutory notices. The court distinguished two lines of authority as follows: ". . .[A] distinction may be made between two broad categories: (1) those cases in which the decision of a public body is challenged, often involving administrative or public law and judicial review, or which concern procedural requirements for challenging a decision whether by litigation or some other process, and (2) those cases in which the statute confers a property or similar right on a private person and the issue is whether non-compliance with the statutory requirement precludes that person from acquiring the right in question."

12. The following cases fall into the second category: *Cadogan v Morris* [1999] 1 EGLR 59 (right of tenant to an extended lease under the 1993 Act), *Keepers and Governors of John Lyon School v Secchi* [1999] 3 EGLR 49 (right of tenants to extended leases under the 1993 Act), *Speedwell Estates Ltd v Dalziel* [2002] 1 EGLR 55 (right of tenants to acquire freeholds under the Leasehold Reform Act 1967), *Burman v*

Mount Cook Land Ltd [2002] Ch 256 (acquisition of a new lease under the 1993 Act), *Tudor v M25 Group Ltd* [2004] 1 WLR 2319(right of tenants to acquire the freehold under the Landlord and Tenant Act 1987), *7 Strathray Gardens Ltd v Pointstar Shipping & Finance Ltd* [2005] 1 EGLR 53 (right to collective enfranchisement under the 1993 Act), *Cadogan v Strauss* [2004] HLR 544 (right of tenant to acquire the freehold under the Leasehold Reform Act 1967), *9, Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* [2006] 1 WLR 1186 (right to collective enfranchisement under the 1993 Act).

13. In relation to the second category the Chancellor said at [31]:

> "The Court of Appeal cases show a consistent approach in relation to statutory requirements to serve a notice as part of the process for a private person to acquire or resist the acquisition of property or similar rights conferred by the statute. In none of them has the court adopted the approach of "substantial compliance" as in the first category of cases. The court has interpreted the notice to see whether it actually complies with the strict requirements of the statute; if it does not, then the Court has, as a matter of statutory interpretation, held the notice to be wholly valid or wholly invalid: see, for example, *Burman, Newbold v The Coal Authority* [2013] EWCA Civ 584, [2014] 1 WLR 1288, *Keepers and Governors of John Lyon Grammar School v Secchi*."

14. He continued at [32]:

> "On that approach, the outcome does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by non-compliance on the particular facts of the case: Tudor's case, para 27, the Speedwell Estates case, para 24.

15. The Chancellor held that the statutory scheme in the 1993 Act, on its proper interpretation, points clearly in favour of the invalidity of the notice by virtue of the non-compliance with s.13(3)(e) in failing to identify all the

qualifying tenants and to state their addresses in the property. His reasoning was as follows. First, those matters go to the very heart of the right to collective enfranchisement since the information is intended to disclose on the face of the s.13 notice the number of qualifying tenants in the premises (s.3(1)(b)), whether the total number of flats held by the qualifying tenants is not less than two thirds of the total number of flats in the premises (s.3(1)(c)) and whether the s.13 notice has been given by qualifying tenants of not less than half of the number of flats contained in the premises (s.13(2)(b)). Second, Parliament specifically provided in paragraph 15 of Schedule 3 to the 1993 Act for the s.13 notice not to be invalidated by certain inaccuracies and for the notice to be capable of amendment in certain circumstances. The assumption must be that Parliament intended other errors in the s.13 notice to render it invalid: see *Keepers and Governors of John Lyon School v Secchi* [1999] 3 EGLR 49 in relation to the right to a new lease. Third, there is no restriction on the service of a new notice at any time after an invalid notice. The restriction in s.13(9) on the service of a new notice within the period of 12 months after the withdrawal or deemed withdrawal of a s.13 notice only applies to an original notice which was valid. If the landlord challenges the validity of a s.13 notice, as he did in the present case, there is nothing to prevent the immediate service of a fresh s.13 notice "without prejudice" to the tenants' contention that the original notice is valid: see *9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* [2006] 1 WLR 1186.

16. The Chancellor accepted that the participating tenants would not always be in a position to identify in advance who were the qualifying tenants, but found that this point did not outweigh the cumulative indicators of the legislative intention.

Conclusion

17. This is an important case which is relevant beyond the field of leasehold enfranchisement. There have been a slew of cases at first instance

where judges have approached non-compliance with the requirements of a statutory notice on the basis that the question is one of whether there has been substantial compliance (for example, *Avon Freeholds Ltd v Regent Court RTM Co Ltd* [2013] UKUT 213 (LC) [2013] L. & T.R. 23 - substantial compliance with statutory requirements to give notice inviting tenants to join a right to manage company pursuant to s.78 of the 2002 Act was sufficient because the consequences of non-compliance were not such as to justify denying the RTM Company the right to manage). That approach no longer represents the law.

18. Any mistake in a notice which is not caught by a statutory saving clause or by the *Mannai* approach will now call into question the validity of the notice. It is a harsh approach and a boon to pedants but it does afford a measure of certainty and it avoids the possibility that identically drafted notices could be held valid or invalid depending on the knowledge of the recipient.

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