

Time to take notice

Leasehold enfranchisement is a minefield, and practitioners should tread warily, says Damian Greenish

There has been no better time to make an enfranchisement claim. For the owners of leasehold properties who want to acquire their freeholds or extend their leases under the Leasehold Reform Act 1967 or the Leasehold Reform, Housing and Urban Development Act 1993, the Government has provided considerable assistance by modifying and easing the qualifying criteria. So why is it that so many claims still seem to go wrong and in consequence provide so much litigation?

Time limits

One reason (at least under the 1993 Act) is a favourite of professional negligence claims – time limits. There are strict procedural time limits when making a collective claim or a claim for a new lease under the 1993 Act and missing those time limits can result in dire consequences for the offending party. However, another area where the solicitor's profession seems to have particular difficulties is the preparation and service of notices. Everyone hates to complete a form but it is extraordinary the extent to which highly qualified and well-paid professionals can get it wrong quite so often.

By way of background, both the 1967 Act and the 1993 Act set out a procedure for a tenant to follow if he wishes to claim the freehold of his house or an extended lease of his flat. The procedure starts with the tenant serving a claim notice. There is then a period for the landlord to investigate that claim which culminates in service by the landlord of a counter-notice. Generally, that counter-notice needs to be served within a specified period, so already it can be seen that solicitors are facing the lethal combination of not only having to fill in a notice correctly but also ensuring that

it is given to the right people within the prescribed period.

Of course, the Government does not necessarily make it easy. The 1967 Act has prescribed forms for both the claim notice and the landlord's response, whereas the 1993 Act does not.

The 1993 Act requires the claimant to state an offer price both for a new lease and for a freehold claim and for the counter-notice to give the landlord's counter-offer. There is no such requirement under the 1967 Act.

The 1993 Act requires the claim notice (whether for the freehold or a new lease) to be signed by the tenant personally. There is no such requirement for a claim notice under the 1967 Act.

Failure by the landlord to serve a counter-notice within the prescribed time limit under the 1967 Act has no particular consequence despite being in a prescribed form. Such a failure has potentially very severe consequences for the landlord in a new lease or collective claim.

Time limits generally under the 1993 Act are strict whereas under the 1967 Act they are not.

Prescribed form of notice

The 1967 Act claim notice and notice in reply are prescribed by regulations (Leasehold Reform (Notices) Regulations 1997, as amended). Why then, do so many solicitors decide not to use the prescribed claim form but think it more challenging to make one up themselves? Are they perhaps drawn to the body of the regulations which state that the claim notice only needs to be to 'like effect of the prescribed form'; perhaps



the challenge lies in seeing just how 'unlike' you can make the form before you get into trouble.

Even when the prescribed form is being used, why is it so difficult to fill in the various boxes? They do little more than ask a number of basic questions to support the claim. At least if the tenant has a stab at answering them, he might be saved by the statutory life-line that a claim notice shall not be invalidated 'by an inaccuracy in the particulars' but that is hardly worth the risk. After all, the purpose behind the provision of the particulars required by the prescribed form is to inform the landlord of the nature and basis of the tenant's claim (*Speedwell Estates Ltd v Dalziel* [2002] 1 EGLR 55).

The 1993 Act does not prescribe forms of claim notice or counter-notice but does prescribe the particulars to be contained in them. Potentially that makes it more testing, but law stationers do produce forms of notice which set out the particulars that are required. Why not use them?

Damian Greenish is senior partner of Pemberton Greenish and author of the third and fourth editions of *Hague on Leasehold Enfranchisement* (Sweet & Maxwell)

landlord & tenant

Practice points

None of us is perfect and mistakes and errors happen. If they do, then how can a defective notice be defended?

- It is said that the best form of defence is attack. It follows that if the landlord seeks to attack the tenant's notice, the tenant is well advised to attack the landlord's counter-notice. After all the consequences of a landlord serving an invalid counter-notice are potentially disastrous.
- If a prescribed form of notice is under attack, then the tenant may be able to argue that the form of notice he has used is substantially to like effect.
- If the particulars in the claim notice are under attack, both the 1967 Act and the 1993 Act contain a saving provision for any 'inaccuracy'.
- It is also worth bearing in mind the reasonable recipient test (as formulated in *Mannai Investment Co. Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749). However, it cannot be used to save a notice that does not adhere to statutory requirements.
- As a last resort, consider whether there is an argument based on waiver or estoppel (*Latifi v Colherne Court Freehold Ltd* [2003] 1 ECLR 78).

What are the most common faults in notices?

In the case of a collective claim, the Act requires that the extent of the property being claimed must be shown by reference to a plan to be attached to the notice. On far too many occasions, notices are given without any plan attached. This makes it an invalid claim notice (*Mutual Place Property Management Ltd v Blaquiére* [1996] 2 EGLR 78). Also, the notice must give particulars of all the qualifying tenants in the building, not just those who are participating; a very common error.

A claim for a new lease under the 1993 Act must be served not only on the landlord but also on any third party to the lease. This is frequently overlooked and the notice will be invalid if it is not given to that third party (*Free Grammar School of John Lyon v Secchi* [1999] 2 EGLR 49).

In the case of both a collective claim and a new lease claim, the Act provides that the notice must be signed by the tenant (or tenants) personally. This has been strictly construed so that even an attorney for the tenant cannot sign a notice (*St Ermins Property Co Ltd v Tingay* [2002] 2 EGLR 53). If the notice is not signed personally, it will not be effective.

The claim notice must specify a date for service of the landlord's counter-notice which must be a date falling not less than two months after the date of

the claim notice. Specification of this date is frequently overlooked altogether. If no date is given, the claim notice is invalid. To allow for delays in service, give a week or so extra over the two months.

Under the 1993 Act a claim notice must state the price that the tenant is prepared to pay for the freehold or new lease. That offer price must be a genuine and realistic figure and not merely nominal (*Cadogan v Morris* [1999] 1 EGLR 59). Indeed it must be capable of being supported by expert valuation advice (*Mount Cook Land Ltd v Rosen* [2003] 1 EGLR 75). It is not sensible therefore to suggest an offer that cannot be supported by valuation evidence.

Service of an invalid claim notice may not have any serious long-term consequences, because generally the tenant can simply start again. However, since the notice has to be signed personally by the tenant and, in a collective claim, there may be many signatures, it has to be explained to the client who is not likely to be impressed. The situation may be rather more serious where the tenant has made his claim and has then assigned the benefit of it to a third party. If the claim notice is invalid in those circumstances then the purchaser (or more likely his solicitor) will have a problem because he will have to fulfil the qualifying criteria before making a new claim. If there is a significant gap between service of the first notice and service of the second notice, this might have an effect on the valuation particularly if the unexpired term of the lease is short.

Service of an invalid counter-notice by a landlord under the 1967 Act is of no consequence. This is because there are no strict time limits under the 1967 Act and the notices do not incorporate any offers and counter-offers.

Under the 1993 Act the position could not be more different. Service of an invalid counter-notice by a landlord under the 1993 Act has very severe consequences indeed. Those consequences are that the landlord will be required to sell his freehold or grant the new lease on the terms specified in the tenant's claim notice (*Willingale v Globalgrange Ltd* [2002] 2 EGLR 55). These are not likely to be terms favourable to the landlord, notwithstanding that the tenant's offer on the price must be genuine and realistic.

Landlord's counter-notice

So what are the pitfalls for the landlord in preparing and serving his counter-notice under the 1993 Act? There is no prescribed form but the Act does specify what the counter-notice must say.

First, it must say whether or not the claim is admitted. If there is any ambiguity about this, then the counter-notice is likely to be invalid (*Burman v Mount Cook Land Ltd* [2002] Ch 256 CA).

Secondly, if the counter-notice admits the claim, it must also state which of the tenant's proposals are acceptable and, to the extent that any of them are not, then it must put forward counter-proposals. The most obvious proposal that is not likely to be acceptable to the landlord is the offer that the tenant has made on price. The landlord must therefore put forward a counter-proposal and, applying the same principles that arise from a claim notice, the price must be genuine and realistic and thereby capable of being supported by valuation evidence. If it is not, then the counter-notice will be held to be invalid with the dire consequences that flow from that.

A counter-notice in a collective claim is also now required to state whether or not the property which is the subject of the claim is within the area of an estate scheme of management under Chapter 4 of the 1993 Act. This requirement has been added by regulations (Leasehold Reform (Collective Enfranchisement) (Counter-notices) (England) Regulations 2002; Leasehold Reform (Collective Enfranchisement) (Counter-notices) (Wales) Regulations 2003) and does not appear in the Act itself. That is tough on the landlord, and it seems a number of counter-notices have already been given which omit this particular requirement.

Conclusion

Although enfranchisement has been with us for over 35 years, it is in the last 10 years that there has been a significant increase in the number of cases because of the new rights given to flat owners in the 1993 Act and the continuing relaxation of the qualifying criteria. The problem is that the procedural requirements are no easier and the Government appears intent on trying to make them more difficult. This area of the law is a minefield and nobody should touch it without having acquired the necessary expertise.