

Consequences of non-compliance

Robert Barham reviews a case illustrating the dangers and pitfalls of the 1987 Act



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'An incoming landlord whose predecessor complied fully with Part 1 of the 1987 Act can still fall foul of s3A by failing to state in its formal notification to the tenant that the disposal was one pursuant to the 1987 Act. In doing so, the new landlord commits a criminal offence.'

Part 1 of the Landlord and Tenant Act 1987 is a rather obscure piece of legislation that is not as well known by residential landlords as it ought to be. Yet the consequences of non-compliance can be severe, as was illustrated in the recent case of *Maloney & ors v Gosal* [2011]. Landlords ignore this legislation at their peril.

Maloney & ors v Gosal

This case concerned the sale of a freehold of a small block of flats, which happened back in 1997. Although the residents of the building were aware of the change in their landlord they never received proper notices from the vendor before the sale, nor proper notice of the sale after it had been completed. As a consequence, their rights to enforce the provisions of the 1987 Act against the incoming landlord did not start to run until much later, in 2009. Once the residents became aware of their rights, they took action to enforce them and the court agreed that they could compel the sale of the freehold to them.

The question then arose as to what price the residents should pay to the landlord in order to acquire the freehold. Should it be the original price paid back in 1997, which was £100,000? Or, should it be the current market price, that the landlord now put at £475,000 taking into account inflation, changes in market value and the fact that one of the flats in the building had subsequently become vacant?

It fell to the LVT to determine the actual price payable. In this context, the key statutory provision is s12B(7) of the 1987 Act which states:

Where the property which the purchaser is required to dispose of in pursuance of the purchase notice has since the original disposal increased in monetary value

owing to any change in circumstances (other than a change to the value of money), the amount of the consideration payable to the purchaser for the disposal by him of the property in pursuance of the purchase notice shall be the amount that might reasonably have been obtained on a corresponding disposal made on the open market at the time of the original disposal if the change in circumstances had already taken place.

The argument centred on the expressions 'change in circumstances' and 'other than a change in the value of money'. The landlord relied on a passing comment by the president of the Lands Tribunal, George Bartlett QC, in the case of *Okonedo v Kirby & Davis* [2006] where he had said he could 'see no reason why an increase in market values should not be a change in circumstances to which the provision applies'. However, the tenants put forward the contrary argument that increases in property prices are not a relevant 'change in circumstances', which had been followed in the case of *160 Haverstock Hill (Property Management) Ltd v Galway-Cooper* [2006]. The tribunal decided to follow this approach and consequently ignored changes in property prices as well as inflationary changes between 1997 and 2009. They did, however, agree with the landlord that the fact that one of the flats had become vacant was a material 'change in circumstances', and allowed a modest increase in the price of £30,000 to £130,000.

The result was that the landlord was compelled to transfer the freehold of the property to the tenants at £130,000, nearly £350,000 less than he thought it was worth. On first consideration this would appear to be a harsh decision, particularly when one bears in mind

that the landlord was no longer the person who had acquired the property back in 1997, but his executors, and the loss fell to his estate and beneficiaries.

Failure to comply

The principal consequence for the landlord and, in *Maloney*, his estate, was a substantial financial loss. The deceased had made an investment in 1997 that was ultimately realised for less than the price paid, once one takes into account inflation. However, when you also take into account the increase in property prices in the Crouch Hill area, where the building was located, it is clear that the estate lost out on the benefits of a well-performing investment. The tenants, on the other hand, obtained something of a windfall. Against this, it can be argued that it is clear from the transcript of the case that the tenants always wanted to acquire the freehold and it is fairly certain that, had appropriate notices being served back in 1997, they would have exercised their rights at that time. So, the principal consequence for a landlord is likely to be the one of which most landlords will take note, namely a financial one.

Unusually for landlord and tenant legislation, the 1987 Act is also backed up by potential criminal sanctions. Section 10A of the Act, introduced in 1996 when the original provisions of the Act were considerably tightened up, states that:

... a landlord commits an offence if, without reasonable excuse, he makes a relevant disposal affecting the premises to which this Part applies –

- (a) without having first complied with the requirements of section 5 as regards the service of notices on the qualifying tenants of flats contained in the premises, or
- (b) in contravention of any prohibition or restriction imposed by section 6–10.

Subsection 2 goes on to say that a person committing the offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Subsection 3 goes on to deal with the liability of directors or other officers where an offence is committed by a body corporate, and subsection 4 states that

proceedings under section 10A may be brought by the local housing authority.

There have in fact been, to the author’s knowledge, no reported cases of convictions under this section but, nevertheless, the threat of conviction is a very potent weapon. Very few residential landlords will be willing to run the risk of being convicted of a criminal offence and its possible consequences, not least damage to their reputation.

Criminal sanctions also apply in respect of the notices that must be served following an acquisition by a landlord of a reversion to which the Act applies. This provision is contained in subsection 3 of s3A of the Landlord and Tenant Act 1985 which states that:

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A person who is required to give notice under this section and who fails, without reasonable excuse, to do so within the time allowed for giving notice under section 3(1) commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale.

This offence, and indeed the obligation to which it relates, is perhaps less well known than the main offence of failing to comply with Part 1 of the 1987 Act outlined above. The obligation itself is considered further below.

Getting your notices right

Much has been written previously on the obligation of landlords to serve correct notices prior to a disposal, in accordance with the provisions of Part I of the 1987 Act. In most cases, where a sale of a qualifying reversionary interest is to take place by way of a contract completed by a transfer, the relevant notice is one complying with s5A. Briefly, the landlord must give qualifying tenants in the building not less than two months’ notice of a proposed sale and the notice must outline the principal terms of the contract including, in particular, the deposit and consideration required. If no notice is

served, yet the disposal goes ahead, the tenants have various rights against the purchaser set out in ss11-18 of the 1987 Act. In passing, it should be noted that any disposal in breach of Part 1 of the Act is not void and remains valid in law.

The obligation that is less well known is that the new landlord must inform his tenants of the change in landlord. The general duty of an incoming landlord is contained in s3 of the Landlord and Tenant Act 1985 and requires the landlord to give notice in writing of the assignment with his name and address, not later than the next day on which rent is payable under the tenancy or, if that is within two months of the assignment, the end of the period of two months. This obligation is supplemented in the

case of a disposal caught by the 1987 Act by s3A of the 1985 Act that states:

- (1) Where a new landlord is required by section 3(1) to give notice to a tenant of an assignment to him, then if
 - (a) the tenant is a qualifying tenant within the meaning of Part I of the Landlord and Tenant Act 1987 (tenants’ rights of first refusal), and
 - (b) the assignment was a relevant disposal within the meaning of that Part affecting premises to which at the time of the disposal that Part applied, the landlord shall give also notice in writing to the tenant to the following effect.

(2) The notice shall state:

- (a) that the disposal to the landlord was one to which Part I of the Landlord and Tenant Act 1987 applied;
- (b) that the tenant (together with other qualifying tenants) may have the right under that Part

- (i) to obtain information about the disposal, and
- (ii) to acquire the landlord's interest in the whole or part of the premises in which the tenant's flat is situated; and
- (c) the time within which any such right must be exercised, and the fact that the time would run from the date of receipt of notice under this section by the requisite majority of qualifying tenants (within the meaning of that Part).

The important point to note about this section is that it applies in every case where the assignment was a relevant disposal within the meaning of Part I of the 1987 Act. This is sometimes overlooked by landlords on the basis that the outgoing landlord previously complied with the provisions of that Part and served the relevant section 5 notices and is thought to be an alternative to compliance itself. After all, if the outgoing landlord did everything correctly then why should the tenants need to be reminded of their rights again by the incoming landlord? Interestingly, the rights of tenants to take enforcement action against their new landlord, set out in s11(1) of the 1987 Act, only apply where either no notice was served by the landlord under section 5, or if the subsequent disposal was in contravention of the provisions of section 6-10. In other words, notification by the incoming landlord following a disposal which did not contravene s11(1) does not really achieve anything because there is nothing the tenants can do about it, following receipt of the s3A notice. This is logical but one wonders why, if the landlord has complied fully, such notice is necessary. The answer is, presumably, that it gives the tenants an opportunity to check that everything has been done properly so that they can exercise their rights if that is not the case.

It can be seen from this that an incoming landlord whose predecessor complied fully with Part 1 of the 1987 Act can still fall foul of s3A by failing to state in his formal notification to the tenant that the disposal was one pursuant to the 1987 Act. In doing so, the new landlord commits a criminal offence as set out above. The lesson is clear; the incoming landlord must ensure that his solicitors

or agents give proper notices to tenants that comply with s3A.

Where tenants consider that there might have been a disposal in breach of the provisions of Part I of the 1987 Act, they are entitled to serve notice on the landlord, requiring information on the terms of the disposal. This right is set out in s11A of the 1987 Act and subsection 3 sets out a time limit by which such notice must be served. Where there was a disposal under Part I of the 1987 Act, the notice must be served within four months of receipt of the landlord's notice complying with s3A of the 1985 Act.

What happens if the landlord never in fact serves a proper notice complying with s3A? This point was considered in some detail in *Maloney*.

In *Maloney*, various communications were sent to the tenants following the disposal in 1997. There seems to have been some confusion by the solicitors as to who they should have been writing to but, even so, the various attempts at communication with the tenants did not amount to proper notice in accordance with s3A. Consequently, the time limit set out in s11A(3) never started to run which was why the tenants were still in a position to complain about the breach nearly 12 years later. The Act contains no outside time limit so it would appear that time will run indefinitely in these circumstances.

This raises the interesting question of what happens if time has not yet started to run in respect of a previous transaction when a further transaction takes place? Often it is only when there is a subsequent 'event' under the 1987 Act that residents become aware of a previous event which might have been a breach of the 1987 Act. These circumstances arose in the case of *Kensington Heights Commercial Company Ltd v Campden Hill Developments Ltd* [2007]. In that case the landlord's proposal to grant a lease of part of the roof space for a telephone aerial triggered an investigation by the tenants into a transaction that had happened some seven years before. That transaction involved the surrender of the original headlease and the grant of a new headlease by the freeholder of slightly different land for a longer term. Potentially the tenants could have compelled the grant of the headlease to themselves on the same terms as the headlease that had been surrendered,

but subject to the new headlease that had been created. In fact, their solicitors served notice under ss12B (the right of qualifying tenants to compel the sale of the reversionary interest to themselves) rather than under 12C (the right of qualifying tenants to compel the grant of a new lease to themselves) of the 1987 Act and therefore the right was lost.

Conclusions

Maloney confirms, once again, that landlords cannot afford to ignore the provisions of the 1987 Act. The consequences of ignoring it could be a criminal conviction, professional embarrassment and, not least, substantial financial loss. The principal way this can be avoided is to ensure not only compliance with the s5 procedure prior to a sale but also the provision of notices in accordance with s3A after completion of the transaction.

It follows that any subsequent purchaser of a qualifying residential reversion, and their advisers, must make appropriate pre-contract enquiries about previous transactions. Not only do they need to know that the s5 procedure was complied with properly, but also that proper notices were given under s3A. Although there is no consequence, at least for the incoming landlord, for a failure by the seller to give proper s3A notices, they will want to know that s3A notices were given at least four months previously in order to be sure that the deadline for the tenants to raise the issue has passed. They can then be confident that when s5 notices are served in connection with the proposed transaction (assuming they are necessary) there should be no skeletons in the cupboard in relation to previous history. ■

160 Haverstock Hill (*Property Management) Ltd v Galway-Cooper* (2006), unreported
http://www.lease-advice.org/decisions/8587pdf/2001-3000/2208_dir/2208_page1.htm
Kensington Heights Commercial Company Ltd v Campden Hill Developments Ltd [2007] EWCA Civ 245
Maloney & ors v Gosal [2011] PLSCS 233
Okonedo v Kirby and Davis (2006), unreported
<http://www.landstribunal.gov.uk/judgmentfiles/j364/LRX-15-2006.pdf>