Commercial Property Litigation

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PREFACE

The aim of this book is to provide busy practitioners with a practical and straightforward guide through the principal legal issues affecting commercial property law as well as answers to some of the more common questions and problems which arise in the field where litigation appears to be the next option. It is not intended as an authoritative work, there are a number of these in existence, but as a ready and accessible source of reference to the points and issues which must be taken into account when advising and acting for landlords and tenants and other parties involved in property disputes, or in matters which are likely to turn into disputes. Equally important are the precautions which can be taken to prevent or reduce the risk of litigation. Much of the case-law is fact-specific and commonly will turn on the construction of the material lease; as the 'factual matrix' is all-important phrases used in different documents executed by different parties but which appear similar will not always be given the same meaning. Nevertheless a review of the authorities often discloses policy considerations which enable the client to be advised of the consequences of his intended actions and as will be seen, the decisions reached by the courts generally reflect the underlying merits of the parties' respective positions. For example, the courts will not generally allow a party to escape contractual liability by exploiting the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 where to do so would result in injustice. A landlord who gives active consideration to a request for consent to assignment is unlikely to be found guilty of unreasonable delay even if it takes some time to reach a decision. A tenant who responds promptly to a schedule of dilapidations and appoints a surveyor, and carries out the works so advised, will attract the court's sympathy where the landlord has been unhelpful, particularly if the repairs are a condition precedent to the successful operation of a break clause. A tenant who complains of breach of landlord's covenants and withholds service charge would be better advised to pay something on account and enter into dialogue rather than withhold the payment altogether. A tenant who has breached the terms of their lease and is susceptible to forfeiture will be well advised to take steps to remedy the breach or take action to mitigate its effect on the landlord's reversionary interest. Where such action is taken the court will take some persuading that relief should not be granted.

Mistakes do occur. When things have to be done urgently or under pressure, or the client wants to keep costs down and cut corners, professional advisers are at risk of error. Perhaps the most fruitful source of error and omission is in the service of notice, whether it be a break notice or a statutory notice, and in the need to comply with time-limits arising from such service. Correction of the

mistake is not always possible if the time for service has passed and it is too late to serve a further notice. In these circumstances it is important to bear in mind that mistakes can be overlooked by the recipient, wittingly or unwittingly, or waived by his conduct or representations. Waiver often results from lack of communication between the recipient, whether it be the tenant or the landlord, and his agents and advisers, for example through failure to ensure that everyone is 'on message' if the decision is taken to challenge the validity of the notice or its service. The importance of communication can also been seen in the context of forfeiture when a decision is taken to place a 'stop' on a tenant's account so as to preserve a landlord's right to forfeit.

Failure to comply with the strict requirements of a break clause in a lease, for example giving less than the stipulated period of notice or giving notice to the wrong party, is fatal to the successful operation of the clause. But this is distinguishable from errors in the content of the notice which would not mislead a reasonable recipient with knowledge of the lease. In the case of statutory notices contextual errors and omissions will also be subject to the reasonable recipient test but where the notice fails to comply with the statutory requirements as to contents, where it omits particular items or details which the statute says it must contain, it is a question of what place in the statutory scheme that particular requirement occupies and whether it is essential to the working of the scheme. Ultimately, it is a question of construction of the statute to ascertain what Parliament intended and whether the failure or mistake in question frustrates that intention. In practice, it will often be a question of ascertaining or assessing the degree to which the recipient of the notice is prejudiced by the failure to comply. With this in mind, clients and their advisers should take care to balance the competing benefit of taking a 'notice point' against the commercial consequences should litigation on the issue prove unsuccessful.

The matters and issues discussed in this book are not inherently litigious. Serving a break notice, applying for consent to assign, agreeing to vary a deed, adding a guarantor, serving a schedule of dilapidations, are not of themselves the first steps in the process of bringing a claim. Indeed, many of the actions involved are transactional and non-contentious and carried out by practitioners in that domain; although the advice to be given to clients is often based on decided case-law. When things go wrong, however, the dispute which arises is likely to give rise to litigation and the topics contained in this book are those which commonly feature in the reports of property cases. The fact that there are not more of them is due, no doubt, in large part to the emphasis which is now placed by the courts on alternative dispute resolution (and the introduction of pre-action protocols) following the Woolf reforms of 1999 and the consequence that may follow should ADR be ignored. These are considered in the last chapter.

The authors wish to thank their colleagues in the profession for their help in the preparation of this book, particularly those whose articles are mentioned in the text. We have endeavoured to state the law as at 1 October 2011.

James Fieldsend and Paul McAndrews
October 2011

Chapter 1

NOTICES

1.1 Disputes and problems leading to litigation commonly arise when one party to a tenancy serves notice on the other and the counterparty challenges its validity. This chapter is intended as a guide to the content, timing and service of notices and the precautions which can be taken to reduce the risk of challenges. It will also consider ways in which errors and omissions can be cured, or invalidity waived, by the conduct of the counterparty.

1.2 Notices fall into two broad categories, contractual and statutory – those which arise under the lease or tenancy agreement and those arising under statute. There is also a subcategory, where a notice arising under the lease, for example a forfeiture notice, is subject to statutory control and conditions.

PART I CONTRACTUAL NOTICES

BREAK NOTICES

1.3 The parties to a lease who wish to reserve the right to terminate the tenancy before the term date will include a break clause in the lease allowing either or one of them to serve notice on the other to exercise the right. A break clause is a species of option and therefore time will be of the essence in the exercise of the right and the terms of the clause will be strictly construed.[1]

1.4 When considering a break clause, the other terms of the lease should be considered to see whether it interacts with any other clauses, particularly a rent review clause. In certain circumstances, the interplay between a break clause and a rent review clause can render time of the essence in the operation of the rent review clause[2] but, in each case, it is a matter of drafting of the document and construction of its terms.

1.5 In respect of old tenancies (under leases granted before 1 January 1996), a break clause touches and concerns the land and therefore the right to exercise it passes with the reversion and term on assignment, unless it is expressly stated to be personal to the grantee.[3] But where the right to break was operable by the

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1 *West Country Cleaners (Falmouth) Ltd v Saly* [1966] 3 All ER 210.

2 *Central Estates v Secretary of State for the Environment* (1995) 72 P & CR 482.

3 *Harbour Estates Ltd v HSBC Bank plc* [2005] Ch 194; *City of London Corporation v Fell* [1993] QB 194.

tenant 'as original tenant' it could not be exercised by him after assignment of the term as the law would not contemplate it being exercised by someone in whom the term was not vested at the time of service.[4] In the case of new tenancies (granted after 31 December 1995) a break clause will fall within the definition of a 'landlord' (or 'tenant') covenant[5] and the benefit and burden of a break clause will be transmitted on assignment unless, again, it is expressed to be personal.[6]

1.6 As it is in the nature of an option, notice exercising the break clause must be served on the other party to the agreement and not on their agent, unless expressly permitted[7] but it can be served by an agent, usually a solicitor. It is essential to ensure that the counterparty, to whom the notice is given, is correctly identified and named. The following steps are recommended to ensure that the notice is addressed to and served on the correct party.

Prior to service: establishing the identity of the landlord and tenant

1.7 The lease or tenancy agreement will be the first place to look. It will identify the landlord and tenant but not necessarily subsequent changes in their identity. It will be necessary to obtain all the deeds relating to the property to establish whether there is evidence of assignments, of term or reversion, or changes in the name of the counterparty. In *Standard Life Investment Property Holdings v W & J Limney*[8] the original landlord granted an overriding lease during the currency of the term and so interposed the lessee as the immediate landlord of the original tenant. When the tenant served the break notice (to be served on 'the landlord') he did so on the original landlord and its managing agent. It was held to be invalid as it did not constitute notice to the current reversioner to whom vacant possession would be given at the end of the term.

1.8 If the right to exercise the break clause is indeed personal to the tenant it cannot be exercised by an assignee unless there is unambiguous provision to the contrary.[9] The personal right to break can not be exercised after assignment.[10] Where it is not made personal it will be exercisable by the tenant at the time and not by a beneficiary or previous tenant.[11] A landlord can reasonably refuse consent to an assignment back to a former tenant who would be able to exercise a personal right to serve a break notice.[12]

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4 *Norwich Union Life and Pensions v Linpac Mouldings* [2010] EWCA Civ 395 (sub nom *Aviva Life & Pensions v Linpac*).

5 Landlord and Tenant (Covenants) Act 1995, s 28(1): *'"covenant" includes any term, condition and obligation'*.

6 Landlord and Tenant (Covenants) Act 1995, s 3(6).

7 *Right d Fisher v Cuthell* (1804) 5 East, 491.

8 [2010] EWHC 480.

9 *Aviva Life & Pensions v Linpac* at **1.5**.

10 *Equinox Industrial (GP2) Ltd and Anor v Sketchley Ltd* [2003] EWHC 2 (Ch).

11 *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd* [2001] Ch 733 and *Aviva Life & Pensions (Norwich Union) v Linpac* at **1.5**.

12 *Olympia & York Canary Wharf Ltd v Oil Property Investments Ltd* [1994] 29 EG 121.

1.9 Evidence should be obtained of the most recent demand for rent. This will commonly be from the landlord's agent. Unlike demands for rent in the residential sector, there is no statutory requirement to disclose the landlord's name and address. Nevertheless it is frequently done and provides a tenant, who relies on it, with justification if the notice is challenged on the grounds that it names the wrong party or is sent to the wrong address. The clause should also disclose whether the notice is specifically required to be served on the landlord. In *Peel Developments (South) Ltd v Siemens plc*[13] the notice was served on another company in the landlord's group which acted as managing agent. It was held to be good service as the clause did not specifically require service on the landlord and the agent had authority to accept service.

1.10 If the landlord's title is registered, a search should be made at the Land Registry. This will reveal the name and address of the registered proprietor but care should be taken to ensure it is up to date, particularly as regards the address in question. The address on the register is where the Registrar is to send notices to the registered proprietor[14] but it is not thereby, or necessarily, the address for service of other notices, including break notices, served by parties other than the Registrar.

1.11 The primary source for ascertaining the landlord's address for service will be the lease itself. Usually a lease will contain a notices clause, directing the parties as to the mode and place of service of notices. Care should be taken to comply with this. If it directs service at the landlord's registered office, a search should be made at Companies House for current details of this.

1.12 Equally, the notice giver should take care that the tenant is correctly stated. Where there are joint tenants the notice must be given by or on behalf of all and not just one. In a case where the joint tenants were two companies, one trading and the other dormant, and only the trading company gave notice, it was held that the landlord could not tell from the notice whether there had been an unlawful assignment, or if the trading company was seeking an advantage over the dormant company, and accordingly he could not rely on the notice and it was invalid.[15]

1.13 If the tenant is a company and member of a group, it may not be in business occupation if another group company is trading from the premises. In that event, while s 42 of the Landlord and Tenant Act 1954 allows the business occupation of the trading company to count as that of the tenant (so that the tenant does not lose the right of renewal under the Act), it does not follow that the notice can be given by the non-tenant company in the absence of an assignment in its favour.

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13 [1992] 47 EG 103.

14 Land Registration Rules 2003, SI 2003/1417, rr 8(1)(c), 198(1).

15 *Prudential Assurance Co Ltd v Excel UK Ltd* [2009] EWHC 1350 (Ch).

1.14 If there has been an unlawful assignment it will nevertheless vest the term in the assignee,[16] but any arrangement which does not pass the legal estate or create a subletting, will mean that the tenant's identity does not change. If this gives rise to a breach of the lease the landlord will have his remedies.

1.15 In *Hexstone Holdings v AHC Westlink Limited*[17] following the grant of an underlease, the tenant had become part of a group and a wholly-owned subsidiary. Prior to service of the break notice it was announced that it intended to change its name to that of another subsidiary company in the group. The break notice was served in the name of that other company (but before the change of name had taken place). It was held that the notice was invalid as:

- the notice had not been given by the tenant but by a separate legal entity, a third party, notwithstanding they were both members of the same group; and
- whilst it is possible for a general agent to give notice in his own name without disclosing the fact of his agency on the face of the notice[18] clear evidence of express authority to do so is required to support an inference of general agency (which was not the case here).

Advising the tenant

1.16 Before preparing or serving the notice:

- read the lease carefully and obtain the deeds to see if there have been any changes in the identity of landlord or tenant by assignment or otherwise;
- check the notices clause in the lease to establish the mode of service required and possibly the address for service. If the landlord is a limited company carry out a registered office search;
- if the landlord's title is registered carry out a search at the Land Registry;
- check the most recent rent demand. In most cases it will be from the managing agents and it is not required (in commercial leases) to contain the landlord's name and address but it often does;
- check the break date in the lease. Make sure plenty of time is allowed for service. The period of notice will be stipulated in the break clause and is discussed below.

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16 *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales & Hire Ltd (No 2)* [1979] 1 WLR 1397; *D'Silva v ListerHouse Developments Ltd* [1971] Ch 17.

17 [2010] EWHC 1280 (Ch).

18 *Lemmerbell Limited v Britannia LAS Direct Limited* [1998] 3 EGLR 67.

Acting for the landlord

1.17 The landlord should carry out similar enquiries to establish the correct identity of the tenant, whether he is in receipt of a tenant's notice or whether he is himself serving the notice, particularly where the tenant is a company or other entity such as a partnership and where changes in the name or make up of the tenant are liable to occur. A mere misnomer, where the name is incorrectly stated, is not fatal but that is not to be confused with naming the wrong entity altogether. In *Baker Tilly Management Ltd v Computer Associates UK Ltd*[19] a firm of accountants served notice to break on its landlord using the name under which it took the underlease but which had subsequently been changed. The landlord contended that the notice was invalid because it was not given in the current name of the tenant. The deputy judge held that as there had been no change in the legal entity which served the notice (it was still the same firm of accountants), the landlord was to be taken as knowing that and the notice was valid. But where there are joint tenants, a notice served by only one tenant will, if challenged, likely be held invalid.[20]

1.18 It is often the case that a landlord's managing agent will enquire of a tenant, particularly a company tenant, to whom rent demands should be addressed. Very often, in the case of group companies, the answer will be another company in the group, for administrative reasons. The result is that the demand for payment is sent to a company which is not the actual tenant and the payment of rent made by that company. As a result, neither the demand nor receipt of payment bears any direct reference to the tenant. Apart from the problems which can arise when rent is demanded and accepted from someone other than the tenant, the practice of sending demands for rent to another company in the group can raise issues over the right to challenge break notices if emanating from that company rather than the tenant itself.

1.19 A landlord who, through his agent, is prepared to demand and accept rent from someone who is not the tenant may well prejudice his right to object if that someone serves notice on him. To avoid, or at least reduce the risk of, such complications, the demand for rent should contain a statement to the effect that if the addressee is not the tenant then any payment is accepted as being made on behalf of the tenant. It is not sufficient to label the demand 'without prejudice'.

Advising the landlord

1.20 Where a landlord has been served with a break notice, or intends to serve such notice, similar steps should be taken:

- on receipt of a break notice, or before serving a break notice, carry out the same checks as recommended above to ensure the correct identification and address of the tenant;

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[19] (Unreported) 11 December 2009, Chancery Division.
[20] See *Prudential Assurance Co Ltd v Excel UK Ltd* at **1.12**.

- on the grant of a new tenancy or after an assignment ensure that rent demands are addressed to the correct party, particularly where the tenant is a member of a group of companies;
- if requested to demand payment from someone other than the tenant make sure the demand is qualified to reflect this, for example by referring to them as agent of the tenant.

Service of the notice

1.21 The need to effect proper service applies equally to both the landlord and the tenant and this section is addressed to whichever party is serving the notice.

Place or address for service

1.22 Most leases will contain a notices clause setting out directions for the service of notices under the lease. Sometimes it will specify the address for service, for example the registered office of the landlord or tenant. If it refers to the landlord/tenant as giver/recipient of the notice without specifying the address, and if the right to give notice is not stated to be personal and therefore passes with the term/reversion, enquiry should be made (see **1.9–1.11**) as to the current address/registered office of the counterparty.

1.23 In certain cases, the requirements as to place or address for service will be mandatory rather than directory. The language of the break clause or the notices clause should be examined to ascertain this. Further consideration of this is given below. But the important point is that the key to correct service is close examination of the provisions in the lease and complete obedience to the directions given.

Ensuring proper service of the notice

1.24 The notices clause in the lease, and the break clause itself, may invoke the provisions of s 196 of the Law of Property Act 1925 (as amended). This section states that service will be sufficient if any one of the stipulated methods is used. These include leaving the notice at the last known place of abode or business in the UK of the lessee or other person to be served or affixing it to the land or property demised. Sufficient service also occurs where the notice is sent by registered post (recorded delivery); provided it is not returned undelivered it is deemed to have been served in the ordinary course of post. These methods of service are not, however, exhaustive and the section does not preclude service by other means. It is open to the party serving the notice to adopt another means of service, if permitted, and to show or prove service has taken place by those means.

Postal service

1.25 If the postal service is used, additional reliance can be placed on s 7 of the Interpretation Act 1978 which deems service to be effected at the time when the letter would be delivered in the ordinary course of post 'unless the contrary is proved'.Proof is on the balance of probabilities to be determind on a consideration of all the evidence and based on findings made by reference to the facts that are established.[21]

1.26 In the absence of stipulations to the contrary, delivery of the notice by hand or fax or e-mail will suffice but, in all cases, care should be taken to ensure compliance with the terms of the lease and where it contains express directions these should be strictly adhered to.

Express provisions for service

1.27 It cannot be overemphasised how important it is to read the requirements of the break clause and the notices clause in the lease and to adhere strictly to the express conditions relating to place, time and mode of service. The importance of this, and the consequences of failure to do so, is illustrated in *Orchard (Developments) Holdings plc v Reuters Ltd*[22] where:

- the lease granted the tenant a right to terminate by 6 months' written notice at the end of the fifth year. The break notice had to be served by hand or by registered post or recorded delivery at the landlord's registered office;
- service was treated as taking place on the third working day after posting (whether or not it was actually received) unless it was returned by the Post Office undelivered;
- service by any other means was only valid if the landlord or its agent acknowledged receipt;
- the tenant sent the notice by hand but the process server put it through the wrong letter box and service was ineffective;
- additionally the tenant faxed the notice but the landlord did not communicate acknowledgement of receipt (other than to challenge the validity of it some 16 months after the break date) even though evidence was obtained some 11 months after the break date that the fax had been received (when the landlord's office was closed);
- the Court of Appeal held that the landlord had not acknowledged receipt within the meaning of the break clause and service by fax was therefore ineffective. As a result the tenant had failed to exercise the break clause.

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21 *Calladine-Smith v Saveorder Ltd* [2011] EWCA 2501 (Ch).
22 [2009] EWCA Civ 6.

1.28 This case illustrates the necessity of reading carefully the requirements of service in each case and ensuring compliance. The courts will draw a distinction between requirements or conditions which are mandatory and those which are merely directory. In the former case strict compliance is necessary, in the latter case it will be sufficient if there is evidence that service was effected. But the decision is reached from the language of the clause itself and if it is clear that service (or any other condition attaching to the validity of the notice) is valid 'only if'[23] the condition is observed then that is a mandatory requirement and compliance with it is strict and cannot be dispensed with. A similar problem arose in *Hotgroup plc v Royal Bank of Scotland*[24] where the tenant was entitled to break the lease on not less than 9 months' notice but it was provided that '*no notice will be deemed to be validly served on the landlord unless a copy of the notice is also served on the property manager*' and it was held that late service of the copy notice (of less than 9 months) on the property manager invalidated the operation of the break clause.

Proof of service

1.29 The ultimate proof of service is the acknowledgement of receipt but this cannot be guaranteed. If it is requested, for example by sending a duplicate of the notice with space for signature by the recipient and return to the sender to denote receipt of service, the request is often unheeded, whether deliberately or by oversight. The absence of the receipt in these circumstances raises a doubt over service which is unnecessary. It can never be assumed that the counterparty will be co-operative.

1.30 To prove service reliance will most often have to be made on recorded delivery by the Post Office or its equivalent special delivery service, or by courier or by hand delivery. Reliance on the deemed delivery provisions of the Interpretation Act 1978 is open to challenge if non-receipt can be proved.[25]

OPTIONS TO RENEW

Requirement to register

1.31 Unlike a break clause, an option to renew a lease requires to be registered if it is to bind an assignee of the reversion who will otherwise take free of it. In the case of registered land it needs to be protected by entry on the register of the landlord's title or by a land charge in respect of unregistered land. In the case of new tenancies, granted after 31 December 1995, the benefit (and burden) of an option to renew will not be transmitted under s 3 of the Act if it has not been registered or made a land charge.[26]

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23 See also *MW Trustees Ltd v Telular Corporation* [2011] EWHC 104 (Ch) discussed at **1.211**.
24 [2010] All ER (D) 280.
25 *Calladine-Smith v Saveorder Ltd* at **1.25**.
26 Landlord and Tenant (Covenants) Act 1995, s 3(6).

1.32 A notice exercising an option to renew a lease is subject to the same tests as a break notice. The directions for service – place, manner and timing – will be found in the notices clause and option clause in the lease itself. It will therefore be necessary to make the same enquiries as to the identity and whereabouts of the landlord as are examined above in the case of break notices and to ensure that any directions as to service are strictly adhered to.

1.33 There are differences between the two options which do not need to be observed when it comes to exercising the right to serve notice but it is perhaps useful to note them:

- *Saving in costs*. A break clause is likely to be less costly to operate as it will not involve the costs of grant of the new lease and registration following exercise of an option to renew.

- *Need to protect by registration.* If the reversion is assigned, an option to renew will not be enforceable against the assignee unless it has been registered as a land charge C (iv) or protected by notice on the lessor's title. There is no need to register a break clause.

- *Stamp duty land tax (SDLT).* The calculation of SDLT is by reference to the length of term and a term of, say, 14 years with a break at 7 is likely to attract more SDLT than a term of 7 years with option to renew for a further 7.

- *Exercising the break/option to renew.* A tenant is more likely to know his mind (and to remember to exercise the right) in deciding whether to serve a break notice than an option to renew. The right to terminate the lease is perhaps of more benefit than the right to renew it where the economic outlook is uncertain.

CONDITIONS AFFECTING THE OPERATION OF BREAK CLAUSES AND OPTIONS TO RENEW

1.34 Apart from ensuring the accuracy and proper service of the notice, the successful operation of the break clause or option to renew will also depend on whether the party giving the notice satisfies the conditions, if any, of the clause as to performance of its terms. Clauses of this nature, enabling a party to terminate or renew a lease, commonly impose terms or conditions and failure to comply with these can invalidate the exercise of the right even where the notice itself is properly drawn and served. As most of these issues arise on the exercise of tenant break clauses the main focus of attention will be given to them.

Unconditional break clauses (tenant)

1.35 It is a matter of drafting and negotiation between the parties, but what is commonly meant by an unconditional break clause is one which permits the tenant to terminate the lease on the break date by serving notice of intention to do so without specifying any conditions to be complied with up to, or on, the break date itself for the effective operation of the clause (other than the period of notice which is discussed below).

1.36 In such a case, assuming the tenant has served a valid notice, the lease will terminate on the date specified and the tenancy will be at an end. In this event, the position is the same as if the lease had expired by effluxion of time on the term date. If the tenant fails to yield up possession he may be liable in damages but his breach will not invalidate the operation of the clause. The obligation to yield up vacant possession is a consequence, not a condition, of an unconditional break clause.

1.37 If he remains in possession he may become liable for double rent if the landlord serves notice under the Distress for Rent Act 1737. The landlord must however ensure that he treats the former tenant as a trespasser and not as occupying in some other capacity,[27] but even a subsequent act of trespass will not invalidate the break notice. Similarly, if he hands the property back in breach of the repairing covenants or other covenants, he may be liable in damages for any loss to the landlord's reversion but this will not invalidate the operation of an unconditional break clause and the effective termination of the lease on the break date.

Unconditional break clauses (landlord)

1.38 A landlord who reserves an unconditional right to terminate the lease before the term date must take care to ensure either that the tenancy is excluded from the effect of ss 24 to 28 of the Landlord and Tenant Act 1954 or, if not, that one of the grounds of opposition contained in s 30 of the Act is available, or will be available, when the break is exercised. Unlike a tenant's break notice, which is a permitted means of terminating a tenancy to which the Act applies (being a tenant's notice to quit[28]), a landlord's break notice is not a permitted means and whilst it will, if effective, terminate the lease it will not terminate the tenancy created by that lease. To do so, In addition to the contractual notice exercising the option to break, he must also serve a statutory notice under s 25 of the Act (if the Act applies) to terminate the tenancy and, if he has grounds for doing so, state in the notice on which statutory ground(s) he relies for opposing the grant of a new tenancy. If there are no such grounds he can only serve a notice under s 25 stating that he will not oppose the grant of a new tenancy in which event the exercise of the break option may well be frustrated should the tenant apply for a new tenancy.

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27 *Oliver Ashworth (Holdings) v Ballard (Kent)* [1999] 2 All ER 791, CA.

28 Landlord and Tenant Act 1954, ss 24(2) and 69(1).

Period of Notice

1.39 Even though the break clause may be free of the conditions which are discussed below it will stipulate the break date itself and the period of notice to be given. Commonly this is stated to be '*at least 6 months' notice*' or '*not less than 6 months*' or '*not more than 12 months*' or, more rarely, '*notice of 3 months*' or '*3 months*' *clear notice*' or some other specific period. Compliance with this requirement is essential as short notice will almost invariably invalidate the operation of the break clause given that time is of the essence in performance of the contractual obligations of such a clause and its language strictly construed (see **1.3**). Contrast this strict requirement with the latitude afforded by the courts when an incorrect date is stated as the termination date but a sufficient period of notice given.[29]

1.40 The measurement of time in respect of notice, and other, periods has been the subject of judicial attention, scrutiny and exegesis. In general terms it is a matter of construing the relevant statutory or contractual provision '*in the context in which it has to be applied*'.[30] Regard must also be had to the unit of measurement. Where the statute required '*not less than 15 days*' notice between service of the writ and the return day, it was held to mean 15 'clear days' and excluded both the day of service and the return day.[31]

1.41 In a different statutory context, (the Landlord and Tenant Act 1954), the period was measured in months and it was provided that the tenant's application for a new tenancy was to be made '*not less than two nor more than four months after the giving of the landlord's notice*'. In *Dodds v Walker*[32] the House of Lords had to consider the meaning of '*nor more than four months*' in the context of s 29(3) of the Landlord and Tenant Act 1954 in force at the time. Their lordships took the opportunity of also stating a number of propositions which help in the calculation of periods of time in other contexts. In that particular case, the period of 4 months began at midnight on 30 September 1978, (the day on which the landlord served a s 25 notice on the tenant) and terminated on the corresponding date 4 months later, namely at midnight on 30 January 1979. The tenant's court application on the 31 January was out of time. Lord Diplock, delivering the leading speech, put it thus:

> 'First, the word "month" means "calendar month". Secondly, the day on which notice is given must be disregarded. Thirdly, the period of notice expires on the corresponding date in the appropriate subsequent month (ie 30 January). Fourthly, and on the present facts, hypothetically, where there is no corresponding date, the period of notice ends on the last day of the month in which the notice expires.'

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29 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.

30 *Pacitti Jones v O'Brien* [2005] IRLR 888 per Lord Reed, para 8.

31 *Chambers v Smith* (1843) 12 M & W 2 applying the Uniformity of Process Act, 2 Will 4, c 39, s 3.

32 [1981] 1 WLR 1027.

1.42 In a later case[33] the Court of Appeal considered the first limb of the same section '*not less than two (months)*' and applied the corresponding date rule. Notice given on 23 March meant that the 2 months expired on 23 May, a date which was simply 2 months, '*no more and no less*' after 23 March and so the tenant's application for a new tenancy on that date was not premature. The court rejected measurement based on the 'clear day' rule.

1.43 In the case of a break clause the measurement derives from contractual provision. Where the termination date is, say, 31 January (and the period of notice required is '*not less than 6 months*') if the corresponding date rule is applied, a notice given to the landlord on 31 July will give the requisite period as the 6 months will expire on the 31 January. But a notice given on the 1 August will terminate the lease on 1 February and not 31 January. If the clause in the lease requires '*not less than*' or '*at least*' 6 months' notice or '6 months' *clear* notice' care should be taken in relying on the corresponding date rule. If the measurement does indeed exclude the date of service and is to be 6 months' clear notice, i e from the date notice is *given* to the date of expiry, computation of this period must exclude the date of service and, possibly, the date of expiration.[34] Thus a notice given (i e received) on 31 July will not give 6 months' clear notice for a termination date of 31 January if, excluding the date of service, time will only begin to run on 1 August. It will not have expired before 1 February (applying the corresponding date rule). It must therefore be given on the 30 July (or earlier).

1.44 But in *Dodds v Walker* their lordships expressly rejected any reliance on 'metaphysical arguments about attributing to the one day or the other the punctum temporis between 24.00 hours on September 30 and 0.00 hours on October 1 at which time began to run against the tenant'.[35] They stated that the corresponding date rule had been recognised for more than a century in reckoning periods of a month after the happening of a specified event. In practice, time is measured from the end of the date of the specified event, in that case midnight on 30 September/1 October and ends at midnight on 30 January/31 January.[36] On that interpretation, exclusion of the date of service does not preclude running time from the end of that date to the end of the corresponding date.

1.45 Where the notice period is fixed, the actual period itself, for example '*notice of 3 months to expire on* [*the termination date*]' the notice may be invalid if served too early.[37]

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33 *EJ Riley Investments Ltd v Eurostile Holdings Ltd* [1985] 1 WLR 1139.

34 *Chambers v Smith* (1843) 12 M & W 2 applied in *R v Turner* [1910] 1 KB 346, a case concerning 7 clear days' notice under the Prevention of Crime Act 1908.

35 Per Lord Diplock.

36 Per Lord Killowen.

37 *Biondi v Kirklington and Piccadilly Estates* [1947] 1 All ER 20; *Multon v Cordell* [1986] 1 EGLR 44.

Conditional break clauses (tenant)

1.46 Apart from the necessity of ensuring strict compliance with the notice service provisions of the lease and the need to address the notice to the correct party, the problems which afflict the operation of break clauses most commonly arise where the clause is expressed to be conditional on performance of the terms of the clause itself, often by reference to performance of the covenants in the lease. It is a matter of the drafting of the lease in each case but commonly the conditions which need to be complied with include: (1) delivery of vacant possession; (2) payment of rent up to the break date; (3) compliance with the covenants in the lease; and (4) payment of a lump sum on or before the break date.

Delivery of vacant possession

1.47 The obligation to deliver vacant possession entails three conditions being fulfilled by the tenant:

(a) he must hand back the premises free from any legal impediment to vacant possession, such as a subtenancy (unless the subtenant has a statutory right to remain) or other third party interest[38] or statutory restriction[39] unless, possibly, the landlord has consented to them and/or the tenant has done whatever is necessary to terminate them;

(b) he must have ceased to occupy the premises for his own purposes/business on the due date (and handed back or tendered the keys to the landlord); and

(c) he must have left the premises free of all his goods (including rubbish) so that there is no impediment to the landlord making immediate use of the property.

In the context of break clauses, the conditions which most commonly give rise to problems are (b) and (c). The former concerns the activities of the person who is required to give vacant possession. The latter concerns the physical condition of the property and whether the person to whom vacant possession is to be delivered is impeded from use of the property or a substantial part of it. Failure to remove items which are tenant's fixtures, chattels which have become affixed to the land but which are severable by agreement and removable at the election of the tenant, does not prevent vacant possession from being delivered.

1.48 A tenant who fails to comply with these requirements (other than for de minimis breaches) will not have delivered vacant possession and the break notice will be inoperative.

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[38] *Weir v Area Estates Ltd* [2009] All ER (D) 189 (Dec).
[39] *Topfell Ltd v Galley Properties Ltd* 1 WLR 446.

1.49 These are the conclusions to be drawn from the decision in *Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd*)[40] citing the leading case on the subject.[41] In the *Expeditors*' case the parties had entered into a settlement agreement regarding the terms of the break clause prior to the break date which waived the conditions in the break clause. Had this not been the case, the fact that the tenant was still in the process of cleaning and clearing out the property after the break date and did not hand back the keys on that date would have meant that the landlord could not have gone into occupation on that date and therefore the tenant would have failed to give vacant possession. Similar reasoning was applied in the case of *Ibrend Estates BV v NYK Logistics (UK) Ltd*[42] where the tenant remained on site after the break date to complete works of repair in compliance with the schedule of dilapidations thus continuing in occupation of the premises and using them in a way that was inconsistent with the second requirement (b) above. He also retained security staff and left a small quantity of goods. It was held that these were not inconsistent with delivery of vacant possession but his continued presence to carry out repairs, which were not a condition of the break clause and which could have been dealt with by a dilapidations claim in the normal way, was crucial. By continuing the works beyond the break date, when the only conditions of the break clause were to pay the rent and hand back vacant possession, the tenant had remained in possession for its own purposes and in its own interests, namely to complete works of repair to avoid a subsequent claim for damages. Rimer LJ stated that the requirement to give vacant possession in these circumstances meant the same as in every domestic and commercial sale in which there was an obligation to give 'vacant possession' on completion:

> 'It means that at the moment "vacant possession" is required to be given, the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it. It must also be empty of chattels, although the obligation in this respect is likely only to be breached if any chattels left in the property substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property.'

1.50 Remarks made in the *Expeditors*' judgment at first instance (and not challenged on appeal) concerning the earlier case of *John Laing Construction Ltd v Amber Pass Ltd*,[43] make clear that earlier authorities on the subject of vacant possession in these circumstances[44] were not cited to the judge in the *John Laing* case (who held that the break clause had been successfully operated), suggesting that he may have come to a different conclusion had they been cited.

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40 [2006] L & TR 368.

41 *Cumberland Consolidated Holdings Ltd v Ireland* [1946] 1 KB 264.

42 [2010] PLSCS but appeal pending.

43 [2005] L & TR 12 (Ch D).

44 *Cumberland Consolidated Holdings Ltd v Ireland* above; *Norwich Union Life Assurance Society v Preston* [1957] 1 WLR 813; and *Hynes v Vaughan* (1985) 50 P & CR 444.

1.51 In the *John Laing* case there was no express obligation to deliver vacant possession (merely to yield up the premises '*in their entirety*'):

- the goods left behind were security barriers, including concrete blocks, but the tenant had ceased business occupation 2 years beforehand and the presence of security measures including security staff, who remained on site to deter trespassers, was unconnected with the tenant's business as such and did not constitute business occupation or occupation for the tenant's purposes;

- the keys were not returned, but in the later case of *Jones v Merton LBC*,[45] the Court of Appeal held that failure to return the keys in certain circumstances did not amount to failure to deliver vacant possession.

Removal of goods or chattels. Have they become fixtures?

1.52 It was made clear in the *Expeditors*' decision that leaving behind goods and chattels gave rise to a risk that vacant possession was not being delivered but that chattels which had become affixed to the premises (and thus tenant fixtures) became part of the premises of which vacant possession was to be delivered and, *ex hypothesi,* need not be removed:

> 'Secondly, in my judgment, the premises will include anything which in law has become part of the premises by annexation. A fixture installed by the tenant for the purposes of his trade becomes part of the premises as soon as it is installed, although the tenant retains a right to sever the fixture on termination of the tenancy. Whether something is a fixture depends on the degree and purpose of annexation; in each case looked at objectively. If something has become part of the premises by annexation then it is part of a thing of which vacant possession has to be given. Its presence does not amount to an impediment to vacant possession itself.' (per Lewison J at 32)

1.53 The problem for the practitioner is in deciding whether '*looked at objectively*' a particular item has been (a) sufficiently annexed and (b) whether the annexation is for a temporary purpose (and the more complete enjoyment of the chattel as a chattel) rather than as a permanent accretion to the premises. Guidance has been given in the substantial body of case-law which has evolved on the subject but in general terms, the annexation is complete where removal would damage both the item itself and the premises to which it is attached (other than de minimis damage) and the purpose of annexation is for the permanent improvement of the land[46] not merely the better enjoyment of the chattel.[47] In practice, most weight is given to the purpose of the annexation[48] particularly where an article is secured in such a way that it becomes a fixture

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45 [2009] 1 WLR 1269.
46 *Hellawell v Eastwood* (1851) 6 Ex 295, 312.
47 *Hamp v Bygrave* [1982] 266 EG 720.
48 *Berkley v Poulett* [1976] 241 EG 911.

but could easily be removed. In those circumstances the intention or purpose of the annexation, looked at objectively, will be the deciding factor.

1.54 But even so, the question still gives rise to problems. The extract from the judgment in the *Expeditors*' case, quoted above, affirms the long-established proposition of law that a chattel which is brought onto the land by the tenant and is annexed to the premises becomes a fixture, part of the premises, and ownership of it passes with the land subject to any right or obligation to remove it. It remains open to the parties to agree that the fixture can be removed by the tenant and it is quite common for landlords to require this on termination of the lease. Where the landlord can rely on a covenant in the lease, or in a licence for alterations, requiring the removal of tenant's fixtures (and reinstatement of alterations on the term date), the question arises whether failure to do so on the part of the tenant means that vacant possession has not been given. Certainly, if the tenant leaves behind goods and chattels so as to impede immediate use by the landlord it will not be vacant possession. But does the presence of unwanted fixtures have the same result or does it give rise merely to handing back the premises in breach of covenant, for example failure to reinstate in the case of alterations or to remove fixtures (which may not of itself necessarily be a breach of the break clause condition to give vacant possession)?

1.55 Part of the problem is that much of the case-law dates from the nineteenth century. A relatively recent case[49] dealt with the question in the context of whether items had been affixed so as to become part of the land as 'construction operations', ie operations involving the installation of fittings forming part of the land for the purposes of the Housing Grants, Construction and Regeneration Act 1996 and the dispute resolution procedure under related legislation. The items in question included fashion display gondolas and wall displays fixed by screws to timber fixing plates that were themselves either wall bolted or screw fixed to the structure/interior walls of the building or fixed to the floor by base plates. Corner protection plates made with 3mm steel and secured to the floor with 2mm diameter bolts were affixed to the gondolas after they had been correctly positioned. The court accepted that the purpose of such annexation was not to make permanent additions or accretions to the premises but merely to secure the items and make them stable. As a result they did not become part of the land. If this reasoning were applied to the installation of business equipment and furnishings, such as the widespread use of internal partitioning in open-plan offices, or the shopfitting and branding of retail units in the particular house style of the tenant, it would mean that they did not become fixtures as the purpose of annexation was not to effect permanent additions or improvement to the premises. But in the New Zealand case of *Short v Kirkpatrick*[50] partitioning which had been solidly affixed to

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[49] *Gibson Lea Retail Interiors Ltd v Makro Self Service Wholesalers Ltd* [2001] BLR 407.
[50] [1982] 2 NZLR 358.

floor and ceiling was held to be a tenant's fixture and in the nineteenth-century case of *Holland v Hodgson*[51] a shop counter affixed to the floor was so held.

1.56 If partitioning is installed by the tenant within the category of internal '*non-structural*' alterations permitted by the lease does it follow that it does not become part of the structure? If so, must it perforce remain a chattel and therefore be removed if vacant possession is to be given? But in that case, if it has been sufficiently affixed to the structure (so as to become a fixture) and removal would do more than de minimis damage to the structure or the item itself, does this mean that goods so affixed, without the authority of the landlord and in breach of covenant, become tenant's fixtures and, by annexation, part of the premises of which vacant possession is to be given? It is considered that unauthorised annexation in these circumstances would nevertheless result in ownership passing to the landlord[52] and failure to remove such fixtures, would not result in failure to deliver vacant possession.[53] But if, in addition to (or apart from) vacant possession, the break clause also required compliance with the tenant covenants, and which required removal of fixtures, then failure to remove such fixtures would be a subsisting breach and would render the break clause inoperable (in the absence of waiver or acquiescence on the part of the landlord). Indeed, treatment of these issues has largely been in the context of repairing covenants and delivery up in accordance with them rather than in the context of vacant possession.[54]

1.57 Further consideration of the difficult topic of tenant's fixtures is given in Chapter 9. In the context of vacant possession as a condition of a break clause, it is suggested that the safest course for a tenant who is in doubt about the status of items which he has brought onto the premises and affixed, whether they remain chattels or have become fixtures, is to remove them before the break date. The best solution, as ever, is to reach agreement with the landlord.

1.58 As a last resort, consideration should be given to whether, in the case of annexation (whether authorised or not), where the lease requires removal of tenant fixtures, there has been waiver or acquiescence on the part of the landlord in the face of breach.

1.59 Where the break clause specifies further terms or conditions with which the tenant must comply if the clause is to be operated successfully it is usually a requirement that he performs the covenants in the lease and hands back the

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[51] (1872) LR 7 CP 328 and see discussion at **9.6** et seq regarding tenant fixtures in the context of distress.

[52] By analogy with the transfer of the legal estate on an unlawful assignment (cf *Old Grovebury Manor Farm Ltd v Seymour Plant Hire Ltd (No 2)* [1979] 3 All ER 504 at **1.91**).

[53] See **9.7** and the statement of law in the House of Lords in *Melluish (I of T) v BMI (No 3)* [1996] AC 454 that what the parties agree is irrelevant in deciding whether annexation has occurred.

[54] Cf *Shortlands Investments Ltd v Cargill* [1995] 1 EGLR 51.

property in compliance with those covenants on the break date. The main covenants concerned here are to pay the rent and to comply with the repairing (and yield up) covenants.

Payment of rent

1.60 It is common to see a requirement to pay rent up to the break date. Care must be taken to read the lease definition of 'rent' as it often includes other sums, such as the insurance premium, service charge and other outgoings. If these are variable amounts the tenant should check the lease to see if they are only payable on demand and, if so, invite the landlord to submit a final demand, or a demand calculated to the break date, to avoid any risk of breach of this condition.

1.61 Rent payable in advance is not apportionable as the Apportionment Act 1870 applies only to rent payable in arrears. Most modern leases express the rent as an annual amount payable by equal quarterly payments in advance on the 'usual' quarter days. These are the 25 March (Lady Day), 24 June (Midsummer Day), 29 September (Michaelmas Day) and 25 December (Christmas Day). Tenants of Crown Estate properties should however note that in certain leases the Crown quarter days are in January, April, July and November.

1.62 If the break notice is to be effective and if the termination date is mid-quarter then an entire quarter's rent should be paid in advance on the quarter day preceding service of the notice. Any attempt to apportion this payment may result in the notice being invalidated by breach of condition of the break clause. In certain cases the break date itself is expressed to be a quarter day and thus a full quarter's rent in advance may fall to be paid on that day.[55] If, subsequently, the landlord pursues a dilapidations claim there seems to be no reason why the rent so paid (for a period when the reversion is in possession) should not be credited to, or set off against, any claim for loss of rent arising from the dilapidations claim.

Covenants to repair

1.63 The condition in a break clause requiring the tenant to comply with the covenants in the lease is perhaps most onerously applied in respect of the covenant to repair and to yield up in compliance with that covenant. Essentially it is a question of construction of the individual covenants in the lease itself and whether, on the facts of the specific case, the property is in a state of repair such as complies with the covenant. If the wording of the covenant is absolute and requires a specific thing to be done at a particular

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55 *Re a Company (no 0005945 of 2006)* [2006]; *Capital & City Holdings Ltd v Dean Warburg Ltd* [1989] 1 EGLR 90.

time, for example painting during the last year of the term, the court has no discretion to vary this requirement and failure to comply will invalidate the operation of the break clause.

1.64 The courts will, however, ask whether and to what extent the work required of the tenant is 'repair' and in each case it is one of fact and degree. The test of whether the tenant is in breach is therefore one of law and fact. In *Post Office v Aquarius Properties Limited*,[56] Hoffman J (as he then was) stated:

> 'In the end, however, the question is whether the ordinary speaker of English would consider that the word "repair" as used in the covenant was appropriate to describe the work which has to be done. The cases do no more than illustrate specific contexts in which judges, as ordinary speakers of English, have thought that it was or was not appropriate to do so.'

Further consideration of these issues is given in Chapter 3.

Compliance with absolute requirements (repairing)

1.65 If the break clause requires compliance with the tenant covenants and does not qualify this, it will be necessary to look at the wording of the repairing covenant and, as a matter of construction of the covenant, decide whether the facts of the case disclose a breach rendering the notice ineffective. In *Bairstow Eves (Security) Ltd v Ripley*[57] the repairing covenant required painting in the ultimate year of the term (ie. the year preceding the term date). Painting had been carried out during the year prior to that (the would be penultimate year of the term) but this did not amount to compliance with the strict requirement of the clause and the breach was fatal to the operation of the clause (in this case an option to renew). It mattered not that the breach was, or was not, relatively trivial.

Compliance with qualified requirements (repairing)

1.66 If the break clause does not require absolute or strict compliance with the covenants in the lease it may qualify compliance by reference to 'substantial' or 'material' or 'reasonable' performance or compliance with the lease covenants. The lease covenants themselves may be qualified in this way. In *Reed Personnel Services plc v American Express Ltd*,[58] the break clause required reasonable performance and observation of the covenants in the lease. As in the *Bairstow Eves* case, there was a specific requirement in the lease, this time to repair and redecorate during the last 6 months of the term. The tenant failed to carry out certain redecoration and replacement of carpeting but argued that the cost of doing so would have been relatively small and therefore, overall,

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[56] [1985] 2 EGLR 105.
[57] (1992) 65 P & CR 220.
[58] [1997] 1 EGLR 229.

there had been reasonable performance. The court held that reasonable performance had not been achieved and the relative cost involved was irrelevant.

1.67 A different outcome was seen where the break clause required 'material' compliance with the obligations in the lease down to the termination date. Whether the tenant had complied with the repairing covenants and yielded up in the required state of repair, was decided by an objective test – whether the landlord could immediately market the premises without having to spend significant amounts of time and money putting them into a marketable condition.[59] This test means that expert evidence is necessary to enable the court to decide (a) the value of any works that needed to be carried out, and (b) what effect they would have on a re-letting.

1.68 Consistent with this line of reasoning is the decision in the important case of *Bass Holdings v Morton Music*,[60] where it was held that the breach must be one which gives the landlord a subsisting right of action for more than nominal damages at the break date if it is to defeat the exercise of the break clause. A 'spent' breach was therefore not capable of doing so.

Payment of a premium

1.69 In addition to requiring payment of rent and compliance with the covenants in the lease up to the time of the break date, the break clause will sometimes stipulate payment of a lump sum on or before the break date. Unless expressly stated otherwise, strict compliance by payment of the amount stipulated within the time for payment is required and failure to observe this will invalidate the operation of the clause.[61]

Conditional break clauses (landlord)

1.70 The landlord's break notice is sometimes stated to be operable where he wishes to do something with the property at a future date. If it is for a specific purpose, he cannot rely on the break option for another purpose[62] and if the tenancy is one to which the Landlord and Tenant Act 1954 applies he must also be able to serve a s 25 notice to terminate the tenancy and oppose a new tenancy on one of the grounds contained in s 30 of the Act. Such a notice can operate as a break notice to determine the contract as well as determining the tenancy under the Act.[63] For the purposes of the Act, his intention must be established at the hearing,[64] but he must also consider whether the clause is worded in such a way as to require him to prove intention at the time of service

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59 *Fitzroy House Epworth Street (No 1) Ltd v Financial Times Ltd* [2006] 2 All ER 776.

60 [1988] Ch 493.

61 *Dun & Bradstreet Software Services (England) v Provident Mutual Life Assurance Association* [1998] 2 EGLR 175.

62 *Coates v Diment* [1951] 1 All ER 890.

63 *Scholl Mfg Co Ltd v Clifton (Slim-Line) Ltd* [1967] Ch 41, CA.

64 *Betty's Cafes v Phillips Furnishing Stores (No 2)* [1957] 1 WLR.

of the notice and/or at the date when the break notice is to terminate the lease so as to satisfy the contractual, as opposed to the statutory, requirement. These matters were considered in the case of *Aberdeen Steak Houses Group plc v The Crown Estate Commissioners*[65] where the break clause could be operated by the landlords if they had the 'desire' to demolish or reconstruct the premises. At the time of service of the break notice (which was accompanied by a s 25 notice specifying ground (f)) the court accepted that the landlords did not have to prove an existing specific scheme of demolition or reconstruction but only that they contemplated, in general terms, demolition or reconstruction of the premises and could produce evidence of the steps taken to further this (by way of a meeting with the planning authority and invitations to architects to submit presentations). But if the intention is impossible to fulfil he will be unlikely to achieve his object.[66]

1.71 An assignee of the reversion, who becomes landlord after service of the notice, will be able to rely on it if he can show intention to carry out the redevelopment,[67] the time for doing so being at the hearing of the case. But a landlord cannot rely merely on intention to sell to a developer.[68]

Precautions to be taken

Advising the tenant

1.72 A tenant who takes care and makes genuine efforts to comply with the conditions of the break clause will attract the sympathy of the court, particularly in respect of the repairing covenants where a landlord has been unco-operative in the course of dealings leading up to the termination date.

1.73 Ideally, the tenant should allow himself plenty of time to put in hand the arrangements necessary to comply with the conditions before the break notice is served.

- In the case of a repairing obligation he should instruct a building surveyor to prepare a schedule of disrepair, if the landlord has not done so, and try to agree what works are to be carried out. If there is a dispute, or if the landlord does not respond, the tenant will have to carry out the works and ensure that the property is lease compliant on the break date.

- In the *Fitzroy House* case, the tenant spent approximately £1m on the repairs and the landlord contended that the condition had not been complied with as further repairs, estimated at a cost of £211,000, were required. The judge at first instance ruled them to be valued at £20,000, a small fraction of the passing rent of £595,000 and immaterial to the landlord's ability to re-let.

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65 [1997] 2 EGLR 107.
66 *Craddock v Feldman* [1960] 175 EG 1149.
67 *Morris Marks v British Waterways Board* [1963] 1 WLR 1008, CA.
68 *Ahern (PF) v Hunt* [1988] 1 EGLR 74, CA.

- These measures should be taken in good time. Experienced surveyors, with knowledge of break clause requirements, should be instructed both for their expertise in preparing the schedule of works and their ability to negotiate terms.

- To put the matter beyond doubt, the tenant should try to agree a monetary settlement in lieu of carrying out the works. If this can be agreed it should be possible to reach an agreement for surrender to take effect on, or possibly before, the break date. In that event, the tenant may be prepared to pay a premium over and above the cost of the works to induce the landlord to grant a complete release. A small price to pay when compared with the continuing liability to pay rent for the remainder of the term should the break notice become inoperative.

- Even so, settlement agreements can themselves give rise to similar problems if they do not absolve the tenant from compliance with all conditions.[69]

Waiver or acceptance of the invalidity

1.74 There are cases where the counterparty, in the face of invalidity, whether as to contents or service (method or timing) of the break notice or other breach(es) of condition of the clause, acts in such a way as to waive his right to reject the notice. The act of waiver can occur in many different ways. In *Orchard (Developments) Holdings plc v Reuters Ltd* (above) service by fax was not expressly permitted but could have been validated if the landlord had acknowledged service. Detailed consideration of the requirements of waiver (knowledge of the breach or invalidity, knowledge of the legal consequences flowing from it giving rise to alternative and inconsistent rights or remedies and election to choose one to the exclusion of the other) are to be found in the decision of the Court of Appeal in the case of *Peyman v Lanjani*,[70] but in the context of landlord and tenant, particularly in forfeiture cases, more narrow consideration may be given, and as this applies also in the case of statutory notices, the question will be dealt with below.[71]

The effect of break notices

1.75 If effective notice has been served and the conditions of the clause performed, the effect of the notice is to bring the term of the lease to an end on the specified date (subject to any right of statutory continuation where the landlord has served the notice and the tenancy is one to which the Landlord and Tenant Act 1954 applies). Unless express provision is made to the contrary, the consequences will be as if the term had expired by effluxion of time. If, for example, the obligation to deliver vacant possession or to perform the repairing

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69 *Legal & General Assurance Society v Expeditors International (UK) Ltd* [2006] L & TR 368.

70 [1985] 2 WLR 154.

71 **1.206** et seq.

obligations was not a condition of the break clause, the fact that the tenant does not comply with these merely gives the landlord a right to claim possession and damages. But if they were obligations and have not been performed, the landlord will be put to his election, either to waive the breaches and treat the notice as operative or not to do so and affirm the continuation of the tenancy. A landlord must do one or the other.[72]

1.76 Unlike termination by surrender, the exercise by a tenant of a break clause to terminate a lease brings to an end both the tenancy and any sublease deriving from it[73] but whilst unilateral determination of the headlease by tenant's notice will determine both the lease and the head tenancy and any sublease, regard must be had to the prospect of statutory continuation of the subtenancy, if the subtenant is in business occupation and the subtenancy is one to which the 1954 Act applies.[74]

NOTICES ARISING FROM BREACH OF THE LEASE CONDITIONS AND COVENANTS

During the term; notice to repair

1.77 A lease of commercial premises will usually contain a clause permitting the landlord (on prior notice except in an emergency) to enter the premises and inspect the state and condition to enable him to establish any breach of the repairing covenant. It will mean that the landlord can prepare a schedule or specification of works needed to be carried out to put the property into a lease compliant state. This will normally be attached to the notice.

1.78 The notice should be addressed to the tenant at the address for service given in the lease. It should refer to the clause under which it is served and require the tenant to carry out the works specified in the schedule. Again, care should be taken to ensure the accuracy of these details particularly if the notices provision in the lease stipulates the place or method of service. Although failure to comply with these requirements may not have the drastic consequences associated with non-service of break notices (it would always be possible to re-serve the notice if necessary), it is nevertheless advisable to ensure delivery can be proved.

1.79 A tenant who disputes service, or delay in service, will be in a position to argue that insufficient time has been given to comply with the notice, or the clause under which it is served. In most cases, the clause will specify the amount of time allowed to the tenant to carry out the works failing which the landlord will have the right of entry, if so reserved, to the premises and the right to carry out the works and claim the cost of doing so from the tenant.

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72 *Ballard (Kent) Ltd v Oliver Ashworth Holdings Ltd* above.

73 *Pennell v Payne* [1995] QB 192; *Barrett v Morgan* [2000] 2 AC 264; *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142.

74 *PW & Co v Milton Gate Investments Ltd* ibid at 147.

1.80 Apart from challenging amount of time allowed such a notice is also open to challenge on other grounds more fully discussed in Chapter 3 to do with whether the disrepair alleged is indeed a breach of covenant, whether if remedial works are specified there are other less costly means of carrying them out, whether the cost of the works will exceed the damage to the reversion (if they are not done) so as to offend s 18(1) of the Landlord and Tenant Act 1927 (which applies to both interim and terminal dilapidations claims). It is always open to a tenant to challenge the validity of the notice itself, or at least the right of the landlord to enter to do the repairs, having regard to the residue of the term remaining, the likelihood of the lease being renewed and the measure of damage to the landlord's reversion (if any) in that event.[75]

1.81 Where the landlord enters and carries out the work, and if the clause so provides, he can claim the cost from the tenant. The question of whether the claim is in debt or damages, and therefore whether the Leasehold Property (Repairs) Act 1938 applies (thus allowing the tenant, on receipt of the notice, to put the landlord to proof on one or more of the five grounds which the Act requires to be established before a claim for damages can be pursued) was decided by the Court of Appeal in *Jervis v Harris*.[76] Here, the court held that the claim was for a debt, the cost incurred by the landlord in carrying out the works, and overruled the earlier decision of *Swallow Securities v Brand*[77] where it had been held to sound in damages.

The tenant's response

1.82 Where possible, the tenant should try to establish contact with the landlord and agree the works which the tenant will be required to carry out, assuming he accepts the reasonableness and validity of the notice. An experienced building surveyor should be appointed without delay and a site meeting held with the landlord's surveyor to establish the scope of the works.

1.83 Where the works are carried out in this manner it will be advisable to obtain the landlord's certificate of satisfaction to prevent any challenge at a later date. The advantage to the tenant (of doing the works himself) is control over the cost of the works and choice of contractor(s).

Forfeiture notices

1.84 A lease will normally include a proviso that if the tenant fails to pay the rent or commits a breach of any other covenant (or an act of insolvency) the term of the lease which is vested in him will absolutely cease and determine upon the landlord re-entering the premises (or part of the premises in the name of the whole). Where, however, the breach complained of is other than non-payment of rent, statute[78] requires the landlord to serve prior notice on the

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[75] *Hammersmith & Fulham London Borough Council v Creska (No 2)* [2000] L & TR 288.
[76] [1996] 2 WLR 220.
[77] (1983) 45 P & CR 328.
[78] Law of Property Act 1925, s 146.

tenant to remedy the breach (if it is capable of remedy) and to pay the landlord compensation. Only then, if the tenant fails to remedy the breach, can the landlord re-enter and so determine the lease.

1.85 Where there is no such proviso, the landlord will have to rely on his common law and equitable remedies for breach of contract. The subject of forfeiture is dealt with fully in Chapter 8. In this chapter the focus is on the requirements of the notice; reference should be had to what is set out in Chapter 8.

Form of notice – breach incapable of remedy

1.86 A landlord's notice must be addressed to the tenant and must state the lease details and the clause(s) of which the breach is alleged. It must give details of the alleged breach and call upon the tenant to pay compensation and the landlord's costs incurred in the preparation and service of the notice (if the lease so provides).[79]

1.87 If the breach is believed to be incapable of remedy, it must inform the tenant that the landlord intends to enforce his right of re-entry (and when) and to claim damages for the breach. In *Scala House and District Property Co Ltd v Forbes*[80] it was held that 14 days was sufficient notice of re-entry where the breach was incapable of remedy.

1.88 What is incapable of remedy is open to argument and the authorities do not set down any definite test whether a breach of covenant is 'capable of remedy' within the meaning of s 146(1) of the Law of Property Act 1925. Whether the tenant has committed some breach which is beyond his power to remedy is a matter for the court to decide on the facts of the case. But if this form is used it will be invalid if the breach is held to be capable of remedy as it will not have called upon the tenant to do so.[81] Breaches incapable of remedy have included:

- immoral user,[82] but not where the breach was by a subtenant and the tenant was unaware but took immediate action as soon as he became aware, including action to forfeit the sublease;[83]

- gambling on club premises in breach of a covenant to carry on and conduct a club 'in a proper and orderly manner and complying with all legal … regulations';[84]

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79 Law of Property Act 1925, s 146.
80 [1974] QB 575.
81 Law of Property Act 1925, s 146(1) and *Glass v Kencakes* [1964] 3 All ER 807. See also *Expert Clothing Service v Hillgate House Ltd* below.
82 *Rugby School v Tannahill* [1935] 1 KB 87, CA.
83 *Glass v Kencakes* [1966] 3 All ER 807.
84 *Hoffman v Fineberg* [1949] Ch 245.

- use for illegal purposes in breach of covenant;[85]
- insolvency of tenant in breach of covenant;[86]
- underletting in breach of covenant;[87] and
- assigning in breach of covenant.[88]

1.89 In *Akici v LR Butlin Ltd*[89] the Court of Appeal considered that the majority of breaches of covenant would be treated as remediable but the proper approach was to consider the matter on a practical basis. A breach of a continuing covenant, such as the user covenant, could be brought to an end and the lawful user resumed and whilst that would not undo the breach it would be '*unrealistically technical*' to argue that there was an irremediable breach; Neuberger LJ in *Akici* expressed the opinion that there were two principal types of 'irremediable' breach, subletting (para 67) and immoral user (para 68), to which might be added assignments (see paras 73–75). In similar vein, the Court of Appeal in *Expert Clothing Service and Sales Ltd v Hillgate House Ltd*[90] considered the matter in terms of whether, given a reasonable time to remedy the breach and to pay appropriate compensation to the landlord, the harm done would be effectively remedied. If not, only then would the breach be irremediable. In *Savva v Hussein*[91] the Court of Appeal applied this reasoning to positive and negative covenants.

1.90 As a precaution, the notice should include a request for the tenant to remedy the breach 'if it is capable of remedy' or 'in so far as the same may be capable of remedy'.

1.91 The notice must be served on the current tenant and, where the breach alleged is unlawful assignment, on the assignee himself as the term vests in him.[92] If in doubt as to the identity of the tenant it can be addressed to 'the lessee' or to persons interested without naming them.[93]

Form of notice – breach capable of remedy

1.92 It must refer to the lease and to the clause(s) of which breach is alleged. It must specify with as much particularity as possible the acts constituting the breach(es) alleged. It must require the breach(es) to be remedied and state the

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85 *Dunraven Securities Ltd v Holloway* [1982] 264 EG 709 (obscene articles kept on premises for publication).

86 *Civil Service Co-operative Society Ltd v McGrigor's Trustees* [1923] 2 Ch 347; *Fryer v Ewart* [1902] AC 187.

87 *Scala House v Forbes* above.

88 *Troop v Gibson* [1986] 1 EGLR 1 (agricultural tenancy).

89 [2006] 1 WLR 201.

90 [1986] Ch 340.

91 [1996] 2 EGLR 65.

92 *Old Grovebury Manor Farm Ltd v Seymour Plant Hire Ltd (No 2)* [1979] 3 All ER 504.

93 Law of Property Act 1925, s 196(2).

time for doing so. Section 146 does not require that a specific period of time be set out in the notice, only that reasonable time be given following service of the notice. What is reasonable will depend on the nature of the breach and the steps necessary to remedy it. The risk of specifying a particular period of time is that if that period is considered not to be reasonable the notice may be rendered invalid. An over-extended period specified in the notice will however (arguably) prevent the landlord from forfeiting until the expiry of the period notwithstanding the fact that a reasonable period expired long before. Generally landlords are advised not to tie themselves to a specified period in their notice; simply to record that the breaches, in so far as they are capable of remedy, must be remedied within a reasonable period. It is open to the landlord to indicate in a covering letter what he (the landlord) would consider to be a reasonable period. It is considered that the identification of an 'unreasonably' short period in a covering letter but not in the notice itself will not invalidate the notice. However, a landlord who proceeds with and effects the forfeiture before the expiry of a reasonable period will commit a trespass. Landlords are therefore well advised to err on the side of caution when considering what is a 'reasonable' period.

Breach of repairing covenant

1.93 The notice, if it relates to more than one instance of disrepair, should be accompanied by a schedule of the items of disrepair which are alleged to be breaches of the covenant. It is important to allow the tenant sufficient time to remedy the breach and what is a reasonable time will, ultimately, be what the court considers to be reasonable taking into account the circumstances of the case. If such a notice is given at or towards the end of the term of the lease regard will be had to the time remaining for the tenant to carry out the works if, that is, he does not intend to renew the lease. In these circumstances the landlord would be better advised to serve a terminal schedule of dilapidations and, if necessary pursue a claim for damages.

Lease of more than 7 years with more than 3 remaining

1.94 Where the forfeiture notice for disrepair is given during the term of the lease and the lease was granted for a term of more than 7 years of which more than 3 remain, the Leasehold Property (Repairs) Act 1938 applies to the notice which must contain a statement, in characters no less conspicuous than those used in any other part of the notice, that the tenant is entitled to serve a counter-notice on the landlord claiming the benefit of the Act and specifying the time within which and the manner in which the counter-notice is to be served as well as specifying the name and address of the landlord where service is to be effected. Failure on the part of the landlord to provide this statement will render the notice invalid as will failure to omit any detail, for example the manner in which counter-notice might be served.[94]

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[94] *BL Holdings Ltd v Marcolt Investments Ltd* [1978] 249 Estates Gazette 849, CA.

1.95 Where the tenant serves counter-notice claiming the benefit of the Act within time (the tenant has 28 days from service of the notice), the landlord cannot take action to forfeit the lease or to claim damages for the breach without first obtaining the leave of the court. To do so, he must prove or establish one or more of the five grounds contained in s 1(5) of the Act and not merely an arguable case.[95]

Service of forfeiture notices (other than repairing breaches)

1.96 Section 196 of the Law of Property Act 1925 applies in these circumstances. A landlord would be well advised to affix the notice and accompanying schedule to the front door of the premises as well as inserting it through the letter box. Good service was effected where it was pushed under the door even though the tenant did not find it for several months.[96] Service by recorded delivery is also good service even if one of two joint tenants does not receive it[97] and service is good under s 196(3) at the last known place of abode even if it does not come to the intended recipient's attention.[98]

Service of forfeiture notices (repairing breaches)

1.97 Special rules apply to service of s 146 notices where breach of repairing covenants is alleged. They are contained in s 18(2) of the Landlord and Tenant Act 1927 which provides that:

- no right of entry or forfeiture for breach of a covenant to keep or put premises in repair during the currency of the lease or to leave or put premises in repair at the end of a lease shall be enforceable unless the lessor proves that such notice as may be necessary under s 146 of the Law of Property Act 1925 has been served on the lessee and was known to the lessee, or to an underlessee holding under an underlease where the lessee held only a nominal reversion or to the person who last paid rent due under the lease (either on his own behalf or as agent for the lessee or underlessee);

- a reasonable time must have elapsed to enable the repairs to be carried out after the fact that service has taken place has come to the knowledge of such person(s); and

- where the notice is sent by registered post (includes recorded delivery) addressed to such person at his last known place of abode in the United Kingdom, he shall be deemed, unless the contrary is proved, to have had knowledge of the fact of service from the time when the letter would have been delivered in the ordinary course of post.

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95 *Associated British Ports v Bailey* [1990] 2 AC 703.
96 *National Westminster Bank Ltd v Betchworth Investments Ltd* [1975] 234 EG 675, CA.
97 *Chiswell v Griffin Land and Estates Ltd* [1975] 2 All ER 665.
98 *Kinch v Bullard* [1998] 4 All ER 650.

1.98 In view of these requirements and the need to prove service it is recommended that service be effected by personal service at the premises, by affixing the notice to the door, inserting a further copy through the letter box or under the door and obtaining from the process server a certificate of service exhibiting a copy of the notice so served endorsed with the date and time when service took place.

NOTICE TO QUIT

1.99 A periodic tenancy is terminable by notice to quit at the end of a period of the tenancy next following service of the notice. It can be given by either the landlord or the tenant and a provision that only one party can determine it is repugnant to the nature of such a tenancy[99] and is void. But a landlord who gives notice to quit to determine the tenancy where the tenancy is one to which the Landlord and Tenant Act 1954 applies must, in addition, serve a notice in accordance with the Act under s 25, as the notice to quit merely determines the contract and not the tenancy itself. A tenant however can serve such notice[100] to determine both contract and tenancy. Where the tenancy is periodic, the tenant cannot serve a s 26 request under the Act unless the tenancy was granted for a term of years certain and thereafter from year to year.[101]

1.100 The date of determination given in the notice must coincide with the expiry of the period of the tenancy next following service of the notice. If the tenancy does not specify this, for example a periodic tenancy which has been entered into orally, the periodicity of the tenancy will be established by reference to the payment of the rent. So where a periodic tenancy arose after the expiry of a tenancy for one year, where the rent was payable weekly, and the tenant held over paying a weekly rent, the tenancy to be inferred was a weekly tenancy.[102]

1.101 In these circumstances, where a tenant remains in occupation after expiry of the tenancy, or is allowed into occupation pending the grant of the tenancy, whether payment of rent is referable to a periodic tenancy is a matter of intention and examination of all the circumstances.[103] Mere payment is not enough, it is a question of *quo animo* the rent is received and the old presumption that a yearly periodic tenancy arises where the tenant holds over after the expiry of a term of years no longer applies. Evidence of intention to create a tenancy is required[104] and in the modern era, where statutory rights of continuation and renewal exist, the courts will be less ready to infer the creation of a tenancy where payment is referable to such a right.[105]

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[99] *Centaploy v Matlodge* [1973] 2 WLR 832.
[100] Landlord and Tenant Act 1954, ss 24(2) and 69.
[101] Landlord and Tenant Act 1954, s 26(1) and see *Mann Aviation Group (Engineering) Ltd v Longmint Aviation Ltd and another* [2011] EWHC 2238(Ch) for a review of the authorities.
[102] *Adler v Blackman* [1953] 1 QB 146.
[103] *Javad v Aqil* [1991] 1 WLR 1007.
[104] *Javad v Aqil* [1991] 1 WLR 1007.
[105] *Longrigg, Burrough & Trounson v Smith* [1979] 251 EG 847.

1.102 If the tenant who gives notice is unsure of the exact date of expiry of the next period of the tenancy, and even if he is sure but wishes to avoid a dispute, he should state that he will quit and deliver up possession of the premises on the date in question '*or, if later, at the end of the next complete period, ie quarter, month, week, that will expire after the end of one [quarter, month, week] from the service of this notice*'.

RENT REVIEW NOTICES

1.103 Along with break notices and s 146 notices, rent review notices have perhaps attracted more judicial scrutiny than any other contractual notices served under the provisions of a lease. The reason is not hard to understand. If the lease provides for a review of the rent at stated intervals and if the conditions for operating the review are specified to include service of notice by the landlord, a 'trigger' notice, it is very much in the tenant's interest to challenge the validity of that notice if to do so successfully will deprive the landlord of an increase in the rent.

Form of notice

1.104 The notice should be drafted according to the requirements of the rent review clause. If the lease is silent on the form and contents of the notice it should be drafted to refer to the details of the lease, its date and the parties to it. It should refer to the clause in the lease which provides for the review and state that the landlord wishes to review the rent in accordance with that clause and, for the avoidance of doubt, state what rent the landlord is seeking.

The rent review clause

1.105 It can not be overstated how carefully the clause must be studied to ensure that the notice complies with its provisions. If the rent review clause requires the landlord to initiate the review by service of notice on the tenant that is what he must do. If it requires the notice to state what rent the landlord is seeking he must provide a figure in the notice. If it requires the notice to be served before the review date and if it specifies a minimum period, for example '*not less than 6 months*' before, there must be compliance with these conditions unless it can be shown that time is not of the essence in the operation of the review and the implementation of its procedural steps.

1.106 Following the fusion of law and equity (Supreme Court of Judicature Act 1873 and 1875) and the decision of the House of Lords in the case of *United Scientific Holdings Ltd v Burnley Borough Council* and *Cheapside Land Development Co Ltd v Messels Service Co*,[106] it is to be presumed that strict adherence to the time-limits for performance of contractual rights and

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[106] [1978] AC 904.

obligations (and the timetable for service of notices in rent review clauses) is not of the essence of the contract unless it is expressly stated to be so or there are contra-indications to that effect.

1.107 Whether time is of the essence is to be ascertained from the language of the clause and the stated consequences of failure to adhere to the timetable set out. If time is expressly stated to be of the essence then that is the end of the matter. If no such provision is made it becomes a question of construction of the clause, and possibly of the lease itself, to determine whether time is of the essence. If the rent review clause is linked to a break clause, where for example the tenant has the right to serve a break notice consequent upon the landlord's service of a rent review notice, time will be of the essence in the service of the rent review notice[107] but not always (see, for example, *Metrolands Investments v JH Dewhurst*[108] where the tenant could have initiated the review).

Service of the notice

1.108 The lease itself should provide directions for service of notices and commonly does so by reference to s 196 of the Law of Property Act 1925 (as amended). The section merely states that service by one of the permitted means, for example leaving it at the landlord's place of business or posting by recorded delivery, will be sufficient. It does not preclude service by other means.

1.109 Again, care should be taken to ensure that the details of the counterparty, name and address, are correctly stated and, in this case by the landlord, enquiries made to establish this. There is no reason why service of a rent review notice should be expressed to be 'without prejudice' and, indeed, risks being inadmissible if held to be privileged from disclosure.[109]

PART II STATUTORY NOTICES

NOTICES UNDER THE LANDLORD AND TENANT ACT 1954

1.110 The Act applies to tenancies where the tenant is occupying the demised premises for the purpose (wholly or partly) of his business and the tenancy is not excluded from the Act. It can be excluded under the notice procedure in s 38 and it will be excluded if it is for a term of 6 months or less. The Act does not apply to business occupation under a licence or tenancy at will but it will apply where the occupation is under an agreement for lease which is specifically enforceable, and if it is conditional, when the conditions have been met.[110]

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[107] *Central Estates v Secretary of State for the Environment* (1995) 72 P & CR 482.
[108] [1986] 3 All ER 659.
[109] *South Shropshire District Council v Amos* [1986] 1 WLR 1271, CA disapproving *Norwich Union Life Insurance Society v Waller (Tony)* [1984] 270 EG 42.
[110] *Cornish v Brook Green Laundry* [1959] 1 QB 394, CA.

1.111 The amendments to Part II of the Landlord and Tenant Act 1954 (the Act) introduced by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003[111] apply to notices served under the Act from 1 June 2004. The text below assumes this to be the case.

The notice procedure under the Act

1.112 The landlord's means of terminating the tenancy are in s 25 of the Act. Regulations introduced in 2003 contain changes to the prescribed forms (set out in the Landlord and Tenant Act 1954, Part 2 (Notices) (England and Wales) Regulations 2004[112] and the new forms are listed in Sch 1 and set out in Sch 2 of these regulations. Although they contain a number of forms to cover different situations, the most relevant are the two forms for use by the landlord – where he does not oppose a new tenancy (Form 1) – and where he does oppose a new tenancy (Form 2).

Landlord not opposing a new tenancy

1.113 The prescribed form must be used (or a form 'substantially to the same effect'). As such it must contain the notes on the back of the form which explain the statutory rights of the parties. Failure to incorporate these notes was held to invalidate the notice under the previous regulations[113] and it is submitted that this will be the case under the new regime.

The notice must be given by the landlord to the tenant

1.114 Ascertaining the correct identity of the parties has been discussed above in connection with break notices and, as with all notices, care must be taken to ensure the accuracy of these details. The landlord who serves the notice may not be the immediate landlord if there is (are) intermediate interest(s). Only the competent landlord can give notice.

The competent landlord

1.115 The competent landlord is defined as the person whose reversion is either the freehold or of not less than 14 months unexpired at the term date of the relevant tenancy (s 44 of the Act). If that person is also a tenant but whose tenancy has not been determined by notice and is continuing under the Act (and he is therefore in business occupation, for example where he has sublet part) he will be treated as competent landlord until notice is served on him under s 25 of the Act or he serves a s 26 request.

1.116 If he wishes to serve a s 25 notice to terminate the subtenancy he can do so but if his lease has less than 16 months remaining he must inform his

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[111] SI 2003/3096.
[112] SI 2004/1005.
[113] *Sabella Ltd v Montgomery* (1999) 77 P & CR 431.

immediate landlord that he has done so (or if he receives a s 26 request from the subtenant) (Sch 6, para 7). In that event, if the superior landlord then serves a s 25 notice on him (or if he serves a s 26 request on the superior landlord) and he ceases to be the competent landlord, the superior landlord can, then within 2 months, withdraw the s 25 notice served by the tenant on the subtenant and serve his own (Sch 6, para 6) thus availing himself of the right to oppose renewal of the (sub) tenancy if not previously claimed.

1.117 Where a competent landlord first served a s 25 notice on his tenant and then served a s 26 request on his own landlord, thus ceasing to be the competent landlord, his s 25 notice was held to be a continuing representation that he remained the competent landlord and when he ceased to be so he had a duty to correct what had become a misrepresentation. If he did not do so he could not rely on it to defeat the tenant's right to renewal.[114]

1.118 If the immediate landlord has sublet the entire premises he will not be in business occupation and not entitled to renew his tenancy which will expire by effluxion of time unless he resumes possession and business occupation when the reversion falls in, even if this is for fitting out for future use.[115]

1.119 Where the reversion has become split after the grant of the tenancy both (or all) reversioners must give the notice as the severance does not create separate tenancies.[116] This requirement may give rise to problems where a tenant becomes one of its own landlords and refuses to join in the service of a s 25 notice. *Eastern Power Networks plc (formerly EDF Energy Networks (EPN plc)) v BOH Ltd*[117] concerned a tenancy of part of land adjoining Wembley Stadium. The Eastern Electricity Board was granted a 42-year lease in 1953 of three contiguous plots of land (1, 2 and 3). It built a substation on plot 2 and laid cables through plots 3 and a neighbouring plot, 4. Later, the freehold title was sold to separate buyers and the reversion expectant on the term of the lease became severed. In 1993 the tenant successor to the Board acquired the freehold of plot 2 and the freehold of the other plots was sold to BOH Ltd. The land subject to the lease was therefore held by different reversioners who were thus jointly the landlord of the demised plots. The successor to the Board, having acquired the freehold interest of plot 2 thus became one of the joint landlords. On the expiry of its lease in 1994 the Board's successor, as tenant of the plots, claimed that the tenancy of the entire demise continued with the benefit of the 1954 Act and that there had been no merger with the freehold in respect of plot 2. The Court of Appeal applied the rule that in equity there was no merger of interests where it was not intended and was not in the interest of the tenant, (the Board's successor). Merger of the lease in respect of plot 2 with the freehold would have had a prejudicial effect on its right to run and use the underground cables under the other parts of the land

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[114] *Shelley v United Artists Corporation Ltd* [1990] 16 EG 73.

[115] *Pointon York Group v Poulton* [2006] EWCA Civ 1001.

[116] *Dodson Bull Carpet Co Ltd v City of London Corporation* [1974] 236 EG 484 and *Neville Long & Co (Boards) Ltd v Firmenich & Co* [1984] 47 P & CR 59.

[117] [2011] EWCA Civ 19.

as these rights pertained to the tenancy but not to the freehold. As a result its tenancy continued and could not be determined by a s 25 notice to which it was not a party and which it refused to sign.[118] By implication, a tenant in these circumstances must serve a s 26 request on all the landlords.

The insolvent competent landlord

1.120 If the landlord's interest is mortgaged and the mortgagee is in possession or a receiver has been appointed by the mortgagee or by the court, whether an LPA receiver or an administrative receiver, anything authorised or required to be done by or to the landlord is to be done by or to the receiver or mortgagee in possession so that notices which would otherwise be served by or on the landlord will be served by or on the mortgagee (s 67 of the Act) and the mortgagee must be party to any proceedings for a new tenancy.

1.121 Different considerations apply where the landlord is in administration and an administrator has been appointed. Service of notices is not affected but proceedings cannot be issued by the tenant for a new tenancy without the consent of the administrator or the leave of the court, nor can such proceedings be continued without such consent or leave. Where a landlord who was opposing a new tenancy on the ground of redevelopment went into administration during the course of the proceedings the court granted the tenant leave to continue on the basis that it had a right to have its claim for a new tenancy heard without delay (*Somerfield Stores Limited v Spring (Sutton Coldfield) Limited*),[119] but the date for ascertaining whether the landlord had the necessary intention was at the substantive hearing and not at the summary judgment hearing.[120]

The property to which it relates

1.122 The notice must state the property to which it relates. It is advisable to refer to the lease for this and to reproduce the description contained in the lease or at least to add the words 'more particularly described in the lease'. Omission of part is not necessarily fatal (*Safeway Food Stores v Morris*[121] – failure to mention a garage) but a notice was invalidated where it omitted to mention a basement car park in a two-storey office building (*Herongrove Limited v Wates City of London Properties plc*).[122] If there has been a subsequent change it must state this.

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[118] But see *Centaploy v Matlodge* [1973] 2 WLR 832 at **1.99**. In the case of a periodic tenancy , it was held that a provision that only one party (the tenant)could determine it was void, being repugnant to the nature of such a tenancy.
[119] [2010] 33 EG 71.
[120] [2010] 33 EG 71.
[121] [1980] 254 EG 1091.
[122] [1988] 24 EG 108.

It must specify the date of termination of the tenancy

1.123 This can be the term date of the lease in the case of a fixed-term tenancy or the anniversary/expiry of a period in the case of a periodic tenancy or a later date. In neither case can it be earlier than 6 months from the service of the notice nor later than 12 months. The corresponding date rule applies in calculating this.[123] So a notice served on 29 September which is to expire on 29 March is good but not if it expires on 28 March. To specify a date before the term date/anniversary date may invalidate the notice. Such a mistake will not be excused under the doctrine in *Mannai* if it also involves short service (of less than 6 months).[124]

The notice must state the landlord's proposals for the new tenancy

1.124 In fact, s 25(8) of the Act goes further and says that a notice '*will be of no effect*' if it does not contain the following proposals:

(a) whether the property to be comprised in the new tenancy is to be the whole or only part of the property currently demised;

(b) the rent to be payable under the new tenancy;

(c) the other terms of the new tenancy. Common practice sees phrases such as 'as on the terms of the current tenancy' used to cover the last requirement but a landlord should ideally be as specific as he can be, particularly where he wishes to depart from the terms of the current tenancy, for example introducing a break clause or other variation.

The proposed duration of the new tenancy is not specifically required by the subsection but as it is an '*other term*' it should be stated. The court can order a maximum term of 15 years in the absence of agreement but the length of term of the lease being renewed is the starting point.

1.125 These proposals are not capable of acceptance in the manner of an offer. The information contained in the prescribed form makes it clear that they are merely for the purpose of negotiation.

Part residential premises

1.126 If the property comprised in the tenancy includes residential premises and the lease is a long lease of more than 35 years, a landlord serving a s 25 notice who wishes to oppose a new tenancy must use Form 7 which includes printed notes and information relating to the right to enfranchise under the Leasehold Reform Act 1967. In certain cases a business tenancy can give rise to enfranchisement under the Act and failure to serve notice containing the

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[123] *Dodds v Walker* [1981] 1 WLR 1027.

[124] *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 and see discussion at **1.196**.

statutory information will invalidate the notice (see *Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon v Mayhew*).[125]

The tenant's response: no need to serve a counter-notice.

1.127 Under the new regime introduced by the 2003 Regulations, a tenant does not need to serve a counter-notice in reply to the s 25 notice. If he wishes to renew his tenancy he must do two things:

(1) *remain in business occupation*. If he ceases to do so at any time during the term of a fixed-term tenancy, such that the thread of continuity of business occupation is broken, he will lose at least the statutory right to a new tenancy. A tenancy for a fixed term can only be continued under the Act if it is a tenancy to which the Act applies (i e the tenant is in business occupation) immediately before the term date.[126] If he goes out of occupation after the term date or after the term date but before the date specified in the s 25 notice (if later) he will likewise lose the right to claim a new tenancy under the Act; and

(2) *apply to the court for a new tenancy*. He can make the application at any time after service of the s 25 notice but he must do so before the date specified in the notice as the termination date of the tenancy otherwise he will lose his right and the tenancy will terminate on that date. Extension of time for making the application can be agreed in writing with the landlord and repeated as necessary (s 29A).

The landlord's notice opposing a new tenancy

1.128 The grounds on which the landlord can oppose a new tenancy are set out in the Act at s 30(1). If he intends to rely on one or more of these grounds he must specify the ground(s) relied on in his notice. He cannot rely on a ground which is not specified in his notice.[127]

1.129 Grounds (a), (b) and (c) are to do with tenant default under the current tenancy, Ground (d) is suitable alternative accommodation, Ground (e) is based on the more profitable letting of the whole as opposed to subletting in parts and Grounds (f) and (g) are redevelopment and owner occupation. The grounds of opposition and the intention, where necessary, to establish them, will be considered in the next chapter.

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[125] [1997] 1 EGLR 88, CA.

[126] *Bagettes v Gp Estates* [1956] Ch 290; *Cheryl Investments v Saldanha* [1958] 1 WLR 1329 CA; *Esselte AB v Pearl Assurance plc* [1997] 1 WLR 891.

[127] *Nursey v P Currie (Dartford) Ltd* [1959] 1 WLR 273; *Smith v Draper* [1990] 2 EGLR 69.

The tenant's request under s 26

1.130 Apart from a new prescribed form, the new Regulations have made no change in the operation of s 26 which is the tenant's means of terminating the tenancy by requesting a new tenancy.

- The notice of request is given by the tenant to the landlord. It cannot be served until the last 12 months of the term and, again, care must taken to name and identify the correct parties, both in respect of the tenant serving the request and the landlord to whom it is addressed. This means that the tenant must not only get the details right but must also ensure that the landlord on whom the request is served is the competent landlord. If there is doubt about this a s 40 notice should be served prior to the s 26 request (see below).

- It must state the property to which it relates (as in a s 25 notice).

- Unlike a s 25 notice, the date specified in the request is not the termination date of the current tenancy but the date on which the new tenancy requested by the tenant is to commence.

- The earliest date is therefore the day after the term date of the current tenancy or a later date. In any event it cannot be a date earlier than 6 months from service of the notice nor later than 12 months. Again the corresponding date rule applies.[128] Failure to ensure this will invalidate the notice.

The tenant's proposals

1.131 As with a s 25 notice which does not oppose a new tenancy, the s 26 request must contain the tenant's proposals for the new tenancy.

- Section 26(3) requires these to include a description of the property to be comprised in the new tenancy, the rent and other terms.

- Section 26(3) also provides that failure to state whether the new tenancy is to be of the entire property currently demised, or part only, *will render the notice of no effect.*

It is suggested that a tenant who wishes to vary the terms of the current tenancy, for example by introducing a break clause or changing the user clause should specify the changes he wishes to make. The advantage of doing so may be that if the matter becomes contentious and is decided by the court then the award of costs may be influenced by the fact that the tenant made his position clear at the earliest possible moment.

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[128] See *Dodds v Walker* at **1.40–1.44** and **1.123**.

The landlord's response

1.132 Here, the landlord must serve a counter-notice if he wishes to oppose the request for a new tenancy and he must do so within 2 months of service of the s 26 notice stating his ground(s) of opposition.

- Failure to do so will deprive him of the right to oppose the new tenancy but it will not necessarily prevent him from bringing before the court the evidence on which he would have relied to oppose the request had he done so timeously. It is considered that if, for example, he can show intention to redevelop he will be able to argue for a short term or a break clause to be inserted in the new lease.

- If his opposition would have been based on tenant default, for example persistent delay in payment of rent or other breaches of covenant, he will be able to argue for a short or shorter term because of the break down in the landlord and tenant relationship. He will still have his other remedies available, forfeiture, distress, and claims for damages and injunctive relief.

The tenant's notice of desire under s 27

1.133 The permanent cessation of business occupation before the term date will normally result in the tenancy ceasing to be one to which the Act applies (where the thread of continuity is broken)[129] and hence there will be no need to serve a s 27 notice. But it may still be advisable to do so to ensure that the tenancy does indeed come to an end on the term date particularly where there is a risk that the planned vacation and departure may be delayed (and so give rise to continuation of the tenancy under s 24 if no s 27 notice has been served).

- A tenant who is in business occupation can serve written notice on his landlord that he does not wish the tenancy to be continued. If there is a fixed-term tenancy he can give the notice not less than 3 months before the term date and the tenancy will terminate on that date. If the term date is approaching and has less than 3 months to run, or has passed, the notice can be given at any time before or after the term date but it must be for at least 3 months. It can expire on any date on or after 3 months from service.

- If the tenant ceases to occupy for his business during the term and prior to the term date itself, the tenancy will terminate whether or not he has served the notice (s 27A giving statutory effect to the decision in *Esselte AB v Pearl Assurance*).[130] As a result, service of a s 27 notice to terminate the tenancy is rendered otiose where the tenant ceases business occupation before the term date. However, a tenant should take care not to leave this open to challenge. If he stays in business occupation beyond the term date, possibly for only a short time, his tenancy will nevertheless continue

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129 *Esselte AB v Pearl Assurance plc* at **1.127**.
130 [1997] 2 EG 124.

until determined by notice and he will be exposed to continuing liability for rent. If, on the other hand, he has served a s 27 notice and then stays beyond it, he can either negotiate a period of continued occupation or, at worst, face a claim for double rent limited to the actual time spent on the premises as a trespasser (but more likely a claim for mesne profits, damages for use and occupation, during the period of the overstay).

- If the tenant holds over after the term date so that the business tenancy continues, he must serve a s 27 notice to bring it to an end. He cannot achieve this merely by going out of business occupation as cesser of occupation in these circumstances does not bring the tenancy to an end.[131]

- A s 27 notice can be served after a landlord has served a s 25 notice to curtail the period of the landlord's notice. Where the landlord has served a 'long' s 25 notice to expire, say, 6 months after the term date of the lease, the tenant can serve a 3-month s 27 notice to bring the tenancy to an earlier end (provided it gives an expiry date on or after the term date). Again, the function of the s 27 notice is rendered otiose by the tenant ceasing to occupy prior to the term date. It cannot be served after the tenant has served a s 26 request.

- If the tenant remains in possession and fails to vacate on the due date the tenancy will terminate and he will be a trespasser, prima facie (unless the landlord allows otherwise). Unlike the obligation to deliver vacant possession on termination by a break notice (if it is so provided) the obligation to deliver vacant possession is not a condition but a consequence of a s 27 notice rendering the (former) tenant liable in damages if he fails to do so. The landlord would be entitled to serve notice under the Distress for Rent Act 1737 for double rent in those circumstances.

Notice under s 40; duties of tenants and landlords of business premises to give information to each other

1.134 As with other statutes which regulate the landlord and tenant relationship through the service of notices (for example the acquisition of extended leases or collective acquisition of the freehold under the notice procedures contained in the Leasehold Reform, Housing and Urban Development Act 1993) the Act provides a safety mechanism to enable either landlord or tenant to obtain not only the correct name and identity of the other parties with an interest in the property (such as a mortgagee or superior landlord or subtenant) but also to establish which party is competent to receive or be served with notice under the Act. These provisions are contained in s 40

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[131] Landlord and Tenant Act 1954, s 24(3)(a) and see *Caplan (I and H) v Caplan (No 2)* [1963] 1 WLR 1247.

and have been revised by the 2003 Regulations. In brief, either the landlord or the tenant can serve notice on the other requesting such information under the provisions of the section which:

- apply to service of notice requesting information at any time during the last 2 years of the tenancy (but not otherwise);
- require the recipient to reply within one month stating the identity of the parties concerned and what interest they hold and, in the case of the tenant, whether he is in business occupation wholly or in part and details of any subtenancy;
- require the recipient to notify any changes in the information of which he becomes aware and which occur within 6 months of service of the notice and to do so within one month of so becoming aware;
- release the recipient who transfers his interest to another party from further obligations under the section provided he notifies the transfer to the person serving notice;
- provide that if the server of the notice transfers his interest and gives notice of the transfer to the recipient, the transferee will become the party to be supplied with the information. In the absence of notice of transfer, the recipient can serve the information on either transferor or transferee;
- declare that a person in breach of the duties imposed by the section is liable to a civil claim for breach of statutory duty and an order of the court requiring compliance with the requirements of the section and/or damages.

1.135 If a party follows the procedure under s 40 and serves the requisite notice and subsequently makes a mistake in his s 25 notice, s 26 request or s 27 notice through failure of the counterparty to supply the information requested (or to supply accurate information, or to notify changes in the information), it is difficult to envisage a successful challenge to the validity of the s 25, or other, notice, or any proceedings arising therefrom, on grounds of mistake as to identity or status. To this extent the revisions to s 40 contained in the 2003 Regulations give statutory effect to the principle enunciated in *Shelley v United Artists*,[132] that service of a notice under the Act amounts to a representation by the person giving the notice that it accurately states the identity and status of that person. Where that state of affairs comes to an end so that the representation no longer holds true there is a duty to correct it and any failure to do so will not be prejudicial to the rights of the recipient.

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[132] [1990] 16 EG 73.

Failure to rely on s 40

1.136 For tactical reasons, usually to forestall pre-emptive action by the counterparty or because of time constraints, the service of a s 40 notice is sometimes omitted and the landlord/tenant proceeds straight to the termination notice. The professional adviser is often entrusted with the task of identifying the correct party to be served and the enquiries and assembly of information discussed above (in connection with the preparation and service of break notices) should be followed. In this connection, it is not unknown for things to go wrong. It is suggested that a professional adviser in these circumstances should warn his client that the correct approach is service of a s 40 notice in order to obtain the necessary information and as insurance against mistakes being made arising from information supplied in response (or in the absence of response within the period of one month or at all). If this warning is given and the professional adviser carries out the recommended searches and inquiries to get the information without serving a s 40 notice (at his client's insistence) he will have at least have the basis of a defence to a charge of negligence.

Timing of service of s 25 notices and s 26 requests – interim rent issues

1.137 After the amendments to the Act introduced by the regulations to the interim rent scheme, the importance of timing has been somewhat diminished. Interim rent will be discussed in the next chapter.

1.138 Whether the landlord serves a (not more than) 12-month or a (not less than) 6-month s 25 notice and whether the tenant pre-empts this by serving a s 26 request it makes no difference to the timing of the interim rent. It will be payable from the earliest date which could have been specified in whichever notice is served, i e 6 months from service of the s 25 notice or s 26 request or, if later, from the term date of the lease.

1.139 It remains the case, however, that the timing of the notice will be influenced by the level of interim rent likely to be payable. If the market rent is likely to be higher than the passing rent payable under the tenancy, the landlord will want to serve notice as soon as possible to ensure that interim rent is payable from the term date. The tenant will delay service of his s 26 notice for this reason in the hope that the tenancy will continue undetermined for as long as possible.

1.140 If the opposite conditions apply, and the market rent is likely to be less than the passing rent, the tenant will want to hasten the advent of the interim rent while the landlord will wish to leave the tenancy in place and undisturbed.

1.141 There will be other tactical considerations affecting the timing of notices. A tenant may be uncertain as to his future plans for the property as

may the landlord. Delay in service will prolong the tenancy indefinitely until either party takes the step of serving notice.

Method of service of statutory notices

1.142 The Act provides for service of statutory notices by incorporating the provisions of s 23 of the Landlord and Tenant Act 1927. These result in the helpful decision of Neuberger J (as he then was) in *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd*[133] approved by the Court of Appeal in *CA Webber (Transport) Ltd v Railtrack plc*,[134] that service of a statutory notice under the Act takes place on the day of posting if it is sent by recorded delivery. As long as posting can be proved, it matters not that it is returned undelivered[135] as the phrase used in s 23 of the 1927 Act, 'sent by post', does not mean 'sent *and delivered* by post'.

1.143 Although this removes uncertainty, it means that the time-limit for the service of counter-notice by a landlord to a s 26 request is measured from the date of posting and not the date of receipt. As the corresponding date rule applies[136] the counter-notice will have to be served on or before the same day in the second month after posting otherwise it will be out of time (see Chapter 2).

1.144 Other means of service are permitted, including personal service, leaving it at the place of business of the tenant in England and Wales[137] and, if the tenant is a company, at its registered office.[138] As long as the party to be served actually receives the notice its manner of service is immaterial.[139]

When in doubt as to the need to serve notice

1.145 A s 25 notice can be served *without prejudice* to the landlord's contention that the occupation of the 'tenant' is not in right of a tenancy. The question can then be addressed if necessary through proceedings for a declaration as to the true status of the occupancy. A notice which is served without this qualification could give rise to an estoppel (see, for example, consideration of estoppel in *Wroe (t/a Telepower) v Exmos Cover Ltd*).[140]

1.146 The landlord must nevertheless serve notice in the prescribed form and so indicate whether or not he will oppose a new tenancy. If he has no grounds

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133 [2003] 1 WLR 2064.
134 [2004] 1 WLR 320.
135 *Blunden v Frogmore Investments Ltd* [2003] 2 P & CR 6.
136 *Dodds v Walker* [1981] 1 WLR 1027.
137 *Price v West London Investment Building Society* [1964] 1 WLR 616; 'place of abode' includes 'place of business'.
138 Companies Act 2006, s 86.
139 *Stylo Shoes Ltd v Price Tailors Ltd* [1960] 2 WLR 8 (notice addressed to previous registered office was re-directed by the Post Office to the current registered office).
140 (2000) 80 P & CR D1.

of opposition available he will be faced with a tenant who is entitled to renew the tenancy under the Act if the occupation is held to be in the nature of a tenancy.

1.147 A tenant can similarly serve notice (under s 26) but would do so without the qualification that it is 'without prejudice'. In such a case, the landlord would seek declaratory relief as to the true status of the occupation and would, if grounds of opposition were available under the Act, serve a counter-notice under s 26(4) within 2 months of receipt of the tenant's notice, making sure that the counter-notice was served without prejudice to his contention as to the true nature of the occupancy, again to avoid issues of estoppel.

NOTICES UNDER THE LANDLORD AND TENANT (COVENANTS) ACT 1995

1.148 This Act represents a '*sea change*' in the law relating to the liability of a tenant after he assigns the lease.[141] Under s 5, a tenant who assigns the lease of the whole of the demise is released from the tenant covenants of the tenancy. He is absolved from further performance and future liability but not from liability for any breaches which occurred during his watch. A guarantor of the tenant is also released (s 24).

1.149 The landlord can however require the assigning tenant to enter into an authorised guarantee agreement (AGA) if it is lawful to do so (s 16) under which he assumes liability 'as a sole or principal debtor' in respect of any obligation owed by the assignee under a tenant covenant. The landlord cannot require the assignee's guarantor to do so (at least by way of giving a direct covenant to guarantee the assignee's liability under the tenant covenants) and if such guarantor purports to do so by joining in the AGA at least as principal debtor it will be void against him under s 25 as infringing the anti-avoidance provisions of the Act.[142] He can, however, be required to join in the authorised guarantee agreement by way of sub-guaranteeing the former tenant's liability.[143]

Notices under s 17 to former tenant or guarantor to recover fixed charge

1.150 Where the landlord wishes to enforce his rights to collect a fixed charge against the former tenant under the AGA, most commonly for payment of rent due from the assignee, he must serve notice on the former tenant within 6 months of the charge falling due.

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141 *Wallis Fashion Group Ltd v CGU Life Insurance* (2000) 81 P & CR 393 per Neuberger J.

142 *Good Harvest Partnership LLP v Centaur Services Limited* [2010] EWHC 330, Ch approved by *K/S Victoria Street v House of Fraser (Stores Management)* Ltd [2011] EWCA Civ 904. This issue and the 'sub-guarantee' is also considered in Chapter 5.

143 *K/S Victoria Street v House of Fraser (Stores Management)* Ltd [2011] EWCA Civ 904 and see further at **1.155** and **5.41**.

1.151 The notice requirements are contained in s 17 of the Act and there is a prescribed form. They require a statement of the amount due at the date of service of the notice and whether further amounts will be become due necessitating service of a further notice. If interest is to be claimed, it should be stated at what rate.

1.152 Where there are outstanding rent reviews which may result in an uplift of the rent or where other backdated amounts are to be claimed (such as service charge yet to be computed) the landlord can wait until the amount of the charge has been ascertained before serving a further s 17 notice for payment of these additional sums.[144]

1.153 Section 17 applies both to 'new' tenancies (made after 31 December 1995) and to former tenants and their guarantors under 'old' tenancies, created by leases which were granted before 1 January 1996 (when the Act took effect and before when the doctrine of privity of contract was in full force and effect).

1.154 Such tenants and their guarantors remain liable under privity of contract but their obligations are restricted by the rule that demand for payment of a fixed charge under a s 17 notice is restricted to amounts falling due during the period of 6 months prior to service of the notice. (A distinct improvement from the position they were in before the Act, where the limitation period under the Limitation Act 1980 permits arrears to be claimed for a 6-year period prior to demand.)

1.155 In the case of new tenancies, the liability of a former tenant (and his guarantor) depends on whether an authorised guarantee agreement has been entered into on assignment of the lease and, in the case of the guarantor, in what capacity. In the absence of such agreement as is lawful, the former tenant and his guarantor are released from further liability once the assignment takes place. Where there is such an agreement and the former tenant guarantees the liability of the assignee, the liability of the former tenant's guarantor, if he is a party to such an agreement, has been considered by the Court of Appeal in *K/S Victoria Street v House of Fraser (Stores Management) Ltd*.[145] In essence, a landlord cannot require the former tenant's guarantor to guarantee performance by the assignee of the tenant covenants, following assignment and any agreement to do will be void. But he can be required, if it is reasonable to do so, to guarantee the former tenant's liability under such an agreement, by way of sub-guarantee. If reasonable to do so, the landlord can require the former tenant to provide a new guarantor to join in the authorised guarantee agreement.[146]

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[144] *Scottish & Newcastle plc v Raguz* [2008] 1 WLR 2994.
[145] [2011] EWCA Civ 904.
[146] See further discussion at **5.41**.

Form of notice

1.156 The notice is in prescribed form or in a form substantially to the like effect.[147]

1.157 The question then becomes one of whether any errors, omissions or departures from the prescribed form will invalidate the notice. Given that its effect is limited to collection of a fixed charge for a period of 6 months' prior to service this question may assume some importance. It is submitted that the cases above referred to in connection with the validity of contractual and statutory notices and the principle of construction enunciated in *Mannai* will apply in this instance. Further discussion of mistakes and invalidity is found below in Part III.[148]

The party and counterparty

1.158 In common with the Landlord and Tenant Act 1954, this Act refers to notice being served by the landlord. If the landlord assigns the reversion, he can ask the tenant to release him from further performance of the landlord covenants (see s 8). The Regulations to the Act[149] prescribe the form of notice (Form 3) and provide that it can be served on the tenant 'either before the transfer or within the period of four weeks beginning with the date of the transfer'.

1.159 It is well established that transfer of the legal estate, where the title is registered, does not take place until registration.[150] Until the transfer is registered the assignor is deemed to remain the proprietor of the registered estate.[151] In these circumstances, the transfer or assignment is regarded as taking place in equity so that the assignee is the beneficial owner of the registered estate until registration takes place when the legal estate vests in him.

1.160 In respect of 'old' tenancies both the beneficial and legal owners appear to have the right to serve a s 17 notice. An assignment of such a tenancy is still governed by s 141 of the Law of Property Act 1925 where the right to collect rent was held to be annexed to the reversionary estate and exercisable by both equitable and legal owners.[152]

1.161 The position is less clear in respect of 'new' tenancies. The Act also provides, at s 3, that the rights which are '*annexed and incident to*' the reversion '*shall pass on assignment*' but does not stipulate whether this is the equitable or

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147 Landlord and Tenant (Covenants) Act 1995 (Notices) Regulations 1995, SI 1995/2964, reg 2.
148 **1.171** et seq.
149 The Landlord and Tenant (Covenants) Act 1995 (Notices) Regulations 1995, SI 1995/2964, reg 2.
150 See *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd* [2001] Ch 733.
151 The Land Registration Act 2002, s 22(1).
152 *Scribes West Ltd v Relsa Anstalt (No 3)* [2005] 1 WLR 1847.

legal assignment. It is suggested[153] that the date of transfer and not the date of registration is the operative date. There seems to be no reason why both 'landlords' should not join in giving notice.[154]

1.162 Similar issues arise in respect of assignments of the term. It appears that under 'old' tenancies, the assignor does not become the 'former' tenant until registration takes place and there exists a dual tenancy, in equity and in law, until that happens. Under 'new' tenancies there is no conclusive indication of when liability passes and so the assignor could remain liable as tenant in law until registration, in which case no s 17 notice would be necessary, alternatively as 'former' tenant in equity from the date of the assignment itself. As a precaution, a landlord should serve a s 17 notice on him.[155]

Service of notice

1.163 As in the case of statutory notices under the Landlord and Tenant Act 1954, the Covenants Act incorporates the service provisions of s 23 of the Landlord and Tenant Act 1927. This means that it can be served personally by leaving it at the last known place of abode/place of business of the person to be served in England and Wales or by post. Service by registered (recorded) delivery is effected on the day of posting.[156] Where it was sent by recorded delivery to the last known residential address and not called for and returned undelivered by the Post Office it was nevertheless validly served.[157]

Notice requiring an overriding lease under s 19

1.164 A former tenant, or his guarantor, who has discharged payment of the fixed charge following service of the s 17 notice can require the landlord to grant an overriding lease. There is no prescribed form but the notice must be in writing and must specify the payment that qualifies him to claim the overriding lease (s 19(5)(a)). The claim for the overriding lease must be made on payment of the fixed charge or within 12 months of payment (s 19(5)(b)).

1.165 It can be registered as an estate contract under the Land Charges Act 1972 in the case of unregistered land or by a notice under the Land Registration Act 2002 in the case of registered land.

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153 T Fancourt QC *Enforceability of Landlord and Tenant Covenants* (Sweet & Maxwell, 2nd edn, 2006) para 14.03.

154 See N Taggart and L Nye 'Mind the Gap' (Landmark Chambers, 2 September 2009) available on the PLA website at www.pla.org.uk.

155 See N Taggart and L Nye 'Mind the Gap' (Landmark Chambers, 2 September 2009) available on the PLA website at www.pla.org.uk.

156 See *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd and CA Webber (Transport) Ltd v Network Rail Infrastructure Ltd* [2003] 1 WLR 2064.

157 *Commercial Union Life Assurance v Moustafa* [1999] L & TR 489.

1.166 The advantage of the overriding lease is to give the former tenant or guarantor control over the property. He can forfeit the original lease and either resume possession himself or grant an underlease or an assignment.

Notice by landlord seeking release from covenants on assignment of reversion

1.167 Whilst a tenant who assigns the term is automatically released from further performance of the tenant covenants (s 5) unless the landlord can lawfully require him to enter into an AGA, the landlord who lawfully assigns the reversion must apply for release from further performance of the landlord covenants (ss 6 and 8). The notice requesting release is addressed to the tenant and is in a prescribed form. It can be served before or after the assignment takes place. If after, it must be served within 4 weeks of the date of the transfer otherwise it will be invalid.

1.168 The tenant is given 4 weeks from service to object to the release. If he does not do so the release will be automatic. If he does object within the 4 weeks allowed, the landlord must apply to the court for his release unless the tenant withdraws his objection by notice in writing.

Tenant tactics

1.169 A tenant would have to have grounds for opposing the release if he is to avoid or reduce the risk of a costs order against him should he put the landlord to proof. Where the landlord assigns he remains liable for any breaches occurring during his period of tenure of the reversion and a tenant who objects to his release from future performance would need to demonstrate that the assignee was in some way a less substantial covenant than the assignor or there was some other reason why the assignment and release would prejudice him.

1.170 It is submitted that in deciding these issues the courts will adopt the reasoning and tests which are applied in the cases dealing with a landlord's refusal to consent to assignment of the term and whether it is reasonable to do so. By analogy, a tenant could not seek to gain a collateral or uncovenanted benefit from such objection and would have to provide evidence of damage or potential damage to his interest in the holding arising, or likely to arise, from the release.

PART III INVALIDITY OF NOTICES

Mistakes in notices

1.171 The high point of judicial intolerance of mistakes in notices is to be found in the decision of the Court of Appeal in *Hankey v Clavering*[158] where

[158] [1942] 2 KB 326.

Lord Greene MR in considering a break notice served under a lease (where the break date was 25 December 1941), said the following:

> 'Notices of this kind are documents of a technical nature, technical because they are not consensual documents, but, if they are in proper form, they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They must on their face and on a fair and reasonable construction do what the lease provides that they are to do. It is perfectly true that in construing such a document, as in construing all documents, the court in a case of ambiguity will lean in favour of reading the document in such a way as to give it validity, but I dissent entirely from the proposition that, where a document is clear and specific, but inaccurate on some matter, such as that of the date, it is possible to ignore the inaccuracy and substitute the correct date or other particular because it appears that the error was inserted by a slip. By the clear wording of this notice the plaintiff purported to bring the lease to an end on December 21, 1941. In doing so he was attempting to do something which he had no power to do, and, however much the recipient might guess, or however certain he might be, that it was a mere slip, that would not cure the defect because the document was never capable on its face of producing the necessary legal consequence.'

1.172 A more exacting test is difficult to imagine. Fortunately for practitioners this judgment has been overruled and a more flexible approach has been applied by the House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*[159] where a similar mistake was made in a break notice. The break date was 13 January 1995 and the break notice gave it as 12 January 1995. In considering the validity of the notice Lord Steyn stated as follows:

> 'This is not a case of a contractual right to determine which prescribes as an indispensable condition for its effective exercise that the notice must contain specific information. After providing for the form of the notice ("in writing"), its duration ("not less than six months") and service ("on the landlord or its solicitors"), the only words in clause 7(13) relevant to the context of the notice are the words "notice to expire on the third anniversary of the term of commencement date (may) determine this lease". Those words do not have any customary meaning in a technical sense … The language of clause 7(13) must be given its ordinary meaning. A notice simply expressed to determine the lease on the third anniversary of the commencement date would therefore have been effective. The principle is that that is certain which the context renders certain: *Sunrose Ltd v Gould* [1962] 1 WLR 20.
>
> The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices, and in considering this question the notices must be construed taking into account the relevant objective contextual scene.'

1.173 As a result, no customary meaning, in a technical sense, can be attributed to the content of break notices and they are to be construed in an objective fashion. Even where they contain errors and inaccuracies they will be valid if they are sufficiently clear and unambiguous so as to leave a reasonable

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159 [1997] 2 WLR 945.

recipient (with knowledge of the context, i e the lease terms and the date of the anniversary) in no reasonable doubt over how they were intended to operate.

1.174 The test established by *Mannai* (whether the notice is sufficiently clear and unambiguous for the reasonable recipient to be left in no reasonable doubt as to how and when it is intended to operate), has been held to apply to statutory notices as well as to contractual notices. In considering the validity of a notice given under statutory provisions the court should adopt the principles which the House of Lords applied to contractual notices in the *Mannai* case.[160]

1.175 Nevertheless, this does not absolve the notice giver from taking care to avoid inaccuracies and there are still mistakes which will invalidate a notice in spite of the tolerance to be found in judicial treatment after *Mannai*. Indeed it was stated in that case that the reasonable recipient test did not absolve the person serving such a notice from complying with the formal requirements as set out in the relevant clause in the lease:[161]

> '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 …'

1.176 The distinction, between defects which can and cannot be tolerated was explained by Neuberger J (as he then was) in *Proctor & Gamble Technical Centres Limited v Brixton plc*[162] concerning a break notice.

- It is important to distinguish between two different aspects of validity. The first concerns the formal requirements for the notice as set out in the relevant clause in the lease, such as the requirement that the notice is to be of not less than a given period, or the requirement of payment of the rent and performance of other covenants as conditions of the clause. These are to be strictly complied with and failure to do so will invalidate the notice.

- But the contents of the notice insofar as they are not prescribed by the clause concerned are not to be strictly assessed. The issue is whether 'the notice clearly and unambiguously communicated the required message'.[163]

The invalid contractual notice

Failure to give the minimum period of notice

1.177 If the clause requires prior notice of '*not less than*' the specified period, a notice will be invalid if it is served a day late. If the clause provides for '*not*

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[160] *York v Casey* (1998) 31 HLR 209, CA.
[161] Per Lord Hoffman at 776B.
[162] [2003] 2 EGLR 24.
[163] Per Lord Hoffmann in *Mannai*.

more than' a specified period, or if it stipulates the length of the period, for example 6 months' notice, it may be invalid if served before then.[164]

1.178 Ambiguities in the break clause often touch on the actual break date, for example where the clause says something like '*If the parties wish to terminate on or after the [date] and shall give at least two previous quarters' notice*'. In this case the operative date is the expiry of two quarters from the specified date, this being the earliest date on which notice could be given.[165]

Failure to name or serve the correct party/counterparty

1.179 A break notice is a notice exercising an option. In common with such notices it must be given or served on the other party to the option agreement. Unless expressly permitted, it is not a valid exercise of the option to serve it on an agent but service by an agent, commonly the solicitors for the party giving the notice, is permitted.[166]

1.180 Where the clause (in this case requiring notice to be served if breach of warranty was claimed) stipulated that service was to be effected on the counterparty's solicitors – and named them – it was not good service if sent instead to solicitors who were in fact also acting at the time of service but on a different matter[167] and where a break notice was required to be served on both the landlord and on the property management company failure to serve on the management company was fatal to the successful operation of the break clause.[168]

1.181 So if the lease requires one party to give notice to the other, a notice which fails to identify the correct counterparty, or indeed the correct party giving notice, will be invalid. A notice given by only one of two joint tenants was invalid[169] and a notice which specified the wrong party as server was invalid.[170]

1.182 A right to break which was operable by the tenant 'as original tenant' could not be exercised by him after assignment of the term as the law would not contemplate anyone other than the landlord or tenant at the relevant time exercising the right unless there was clear express provision to the contrary.[171]

1.183 It is a question of fact, whether the notice has been given by the correct party and not one of construction of the document.[172] Where the tenant was a

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[164] *Biondi v Kirklington and Piccadilly Estates Ltd* [1947] 2 All ER 59. See discussion at **1.39** et seq regarding period of notice.
[165] *Associated London Properties v Sheridan* [1946] 1 All ER 20.
[166] *Right d Fisher v Cuthell* (1804) 5 East, 491.
[167] *Vaughan v Von Essen Hotels 5 Ltd* [2007] EWCA Civ 1349.
[168] *Hotgroup plc v Royal Bank of Scotland* [2010] EWHC 1241, Ch.
[169] *Prudential v Excel UK Limited* [2009] EWHC 1350.
[170] *Lemmerbell v Britannia LAS Direct* [1999] L &TR 102.
[171] *Norwich Union Life and Pensions v Linpac Mouldings* [2010] EWCA Civ 395.
[172] *Prudential Assurance Co Ltd v Excel UK Ltd* [2009] EWHC 1350, Ch.

group company and had assigned to another company in the group followed by a further assignment to another group company, a break notice served by the parent company was invalid because the reasonable recipient would believe the notice was being served by that company and not the true tenant.[173] But where the notice was signed by a director of a subsidiary company which was not the tenant, and nor was he a director of the tenant company, the reasonable recipient would have assumed otherwise and that he had authority to sign for the tenant.[174]

The invalid statutory notice

1.184 In view of the Court of Appeal decision in *York v Casey* similar considerations apply to mistakes in statutory notices. Even before the *Mannai* decision a number of cases were decided which presaged the reasoning in that case.

Mistakes and omissions which have not invalidated the notice

Failure to date the notice

1.185 In *Falcon Pipes Ltd v Stanhope Gate Property Co Ltd*,[175] the undated notice was held to be substantially to the like effect as the prescribed form.

Failure to sign the notice

1.186 In *Stidolph v American School in London Educational Trust*,[176] the notice was unsigned but with a covering letter stating it was served on behalf of the landlord.

Failure to print marginal notes or to print advice

1.187 This was acceptable in *Morris v Patel*,[177] but in cases where such omissions are of important information or depart substantially from the prescribed form the notice will be invalid and it is immaterial that the tenant was not prejudiced (see *Sabella Ltd v Montgomery*).[178]

Failure to state the full date of termination

1.188 In *Sunrose v Gould*,[179] where a notice dated 12 January 1961 specified 15 July 196... as the termination date. It could be ascertained by reference to the printed note on the back of the form stating that a minimum period of 6 months was required.

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173 *Proctor & Gamble Technical Centres Ltd v Brixton Estates plc* [2003] 2 EGLR 24.
174 *Havant International Holdings Ltd v Lionsgate (H) Investment Ltd* [2000] L & TR 297.
175 [1967] 204 EG 1243.
176 (1969)] 20 P & CR 802.
177 [1987] 1 EGLR 75.
178 (1999) 77 P & CR 431, CA.
179 [1962] 1 WLR 20.

Failure to state the correct date at all

1.189 *Carradine Properties v Aslam*[180] was a case involving a break notice served in September 1974, intended to break the lease in September 1975, but stipulated the break date as September 1973. This was held as a permissible error because it was clear from the terms of the lease what the notice intended. This case was applied in *Germax Securities Ltd v Spiegal*,[181] where a s 25 notice incorrectly gave the year of termination as 1976 instead of 1977 but the covering letter gave the correct date.

1.190 Although all of these cases pre-date the *Mannai* decision they presage the reasoning in *Mannai* by applying the reasonable recipient test in circumstances where the true meaning and intent of the notice could be ascertained from information or other communication served with it or by the context in which it was served or, in the break notice case, from the clause in the lease under which it was served.

Mistakes and omissions which will invalidate the notice

Failure to state the correct name of the landlord or identity

1.191 The s 25 notice must be given by the landlord who is competent to do so. If there is more than one landlord, the competent landlord is the holder of the superior interest in reversion with more than 14 months remaining (and has not been determined by notice) or, if none, the freeholder.

1.192 The competent landlord must give the correct name disclosing its true identity (see *Morrow v Nadeem*)[182] as this is an important piece of information whose omission will invalidate the notice. But a misnomer or misspelling of the landlord's name will not invalidate the notice (see *Sun life Assurance v Thales Tracs Ltd*).[183]

1.193 But even where the *Mannai* principle is of no help in cases of mistaken identity help may still be at hand after proceedings have been issued.[184]

Failure to state the correct name of the tenant or identity

1.194 Equally, the notice must be given by the tenant whose identity must be stated correctly. See, for example, *Prudential Assurance Co Ltd v Excel UK Ltd.*[185]

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180 [1976] 1 WLR 442.
181 (1979) 37 P & CR 204.
182 [1986] 1 WLR 1381.
183 [2001] 1 WLR 1562.
184 See Chapter 2.
185 Above at **1.12**.

Failure to comply with statutory requirement as to termination date

1.195 In the case of a periodic tenancy the date specified in the notice must not be earlier than the date on which the tenancy could have been terminated by a common law notice to quit given on the same date as the s 25 notice (s 25(3)).

1.196 In the case of a fixed-term tenancy the date of termination in the s 25 notice cannot be earlier than the term date on which the tenancy will expire by effluxion of time (s 25(4) of the Landlord and Tenant Act 1954). The term date itself can be given but not the day before. In *Central Estates (Belgravia) v Webster*[186] the s 25 notice gave 24 March 1967 as the date of termination when the correct date was 25 March 1967 and was ascertainable from the language of the lease. The notice was held to be invalid. If that case were decided again, after *Mannai,* it would raise the question of whether the reasonable recipient would have been misled. In *Mannai* the reasonable recipient would not have been misled by a break notice purporting to terminate the lease a day early, 12 January 1995 instead of 13 January 1995 (the correct date). But it is clear that such a notice must comply strictly with the specific requirements of the clause (the pink paper/blue paper test) and will be invalid if it does not.

1.197 Does this mean that a s 25 notice which fails to comply with the statutory requirement, not to terminate before the term date of the lease, will be valid nonetheless and that if decided now, the outcome in *Central Estates (Belgravia) v Webster* would be different? Equally, if the notice fails to comply with any other statutory requirement will this render it ineffective? As seen above,[187] s 25(8) of the Act states that a s 25 notice which does not oppose a new tenancy '*shall not have effect unless*' it sets out the landlord's specific proposals as to the property to be comprised in the new tenancy (whether whole or part of the current demise), the rent to be payable and the other terms. Section 26(3) contains a similar stricture in respect of s 26 requests. Will a notice which is defective in this respect really be of no effect?

What did Parliament intend?

1.198 The question of defects in procedure so as to fail to comply with statutory requirements was considered by the House of Lords in *R v Soneji*,[188] a case concerning time-limits for making confiscation orders. Under the Criminal Justice Act 1988 a court has power to postpone a confiscation hearing for a period not exceeding 6 months from the date of conviction unless there are exceptional circumstances. Where the court heard the matter and made such an order after the expiry of the postponement period fixed by statute the question arose as to the validity of the order and whether the court had exceeded its jurisdiction.

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[186] [1969] 209 EG 1319.
[187] At **1.124**.
[188] [2006] 1 AC 340.

1.199 In deciding the question, the House of Lords stated that the correct test was to ask whether it was a purpose of the legislature that an act done in breach of a particular statutory provision should be invalid. Where the failure caused no prejudice and/or where any such prejudice would be outweighed by the public interest (in not allowing convicted criminals to escape confiscation for bona fide errors in the judicial process) it could not have been intended by Parliament that such failure was to invalidate the confiscation proceedings and the resulting order.

1.200 The question was not whether the provision under consideration was 'mandatory' or merely 'directory', a test which had been applied in earlier cases. The question was whether it was a purpose of the legislation that an act done in breach of the provision should be invalid and the answer was to be found by weighing the consequences of non-compliance against the gravity of the inconvenience and injustice likely to be caused, including the frustration of the purposes of the legislation, if the act were invalidated.

1.201 This purposive approach does not necessarily exclude reliance on the traditional 'mandatory/directory' dichotomy. In *Belvedere Court v Frogmore Ltd*,[189] (concerning the Landlord and Tenant Act 1987) Hobhouse LJ stated as follows:

> 'I am strongly attracted to the view that legislation of the present kind should be evaluated and construed on an analytical basis. It should be considered which of the provisions are substantive and which are secondary, that is, simply part of the machinery of the legislation. Further, the provisions which fall into the latter category should be examined to assess whether they are essential parts of the mechanics or are merely supportive of the other provisions so that they need not be insisted on regardless of the circumstances.'

1.202 In *Proctor & Gamble Technical Centres Limited v Brixton plc*[190] the court observed the distinction between strict compliance which is required where there is a specific stipulation (in that case contractual) and the question of how the notice would be interpreted by a reasonable recipient and stated that the difference was illustrated in the treatment of defective statutory notices under the Leasehold Reform, Housing and Urban Development Act 1993 to be found in *Burman v Mount Cook Land Limited.*[191] Here, the Court of Appeal considered the issue in terms of whether the particular statutory requirement was essential to the proper working of the statutory scheme. In *Burman* the counter-notice served by the landlord omitted to state whether the tenant's right to claim a new lease was admitted or not admitted. The language of the relevant section in the Act, s 45, was clearly mandatory, stating that the landlord '*shall give*' a counter-notice which '*must comply*' with its requirements and state that the landlord did (or did not) admit the right. The requirement of the landlord's admission or non-admission of the right was considered to be

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[189] [1997] QB 858.
[190] At **1.176**.
[191] [2002] 1 EGLR 61.

substantive, on it depended the fate of the tenant's claim. If the landlord did not serve a valid counter-notice within the time stipulated in the tenant's notice then he would be obliged to accept the terms proposed by the tenant. The defects in the counter-notice were in breach of a substantive provision; Chadwick LJ stated as follows:[192]

> 'It can be seen that the landlord's counter-notice is integral to the proper working of the statutory scheme … The importance of the landlord's counter-notice to the proper working of the statutory scheme is reflected in the language of section 45(2) and (3) of the Act. The counter-notice *must comply* with the requirements (of the section) … The words which I have emphasised are mandatory and specific. There is good reason why they should be. The proper working of the statutory scheme requires that the tenant is left in no doubt as to what the landlord admits, how far the tenant's proposals are accepted, and what (if any) are the landlord's counter-proposals.'

1.203 In a later case under the same Act[193] the Court of Appeal applied the same test in respect of a counter-notice (to a collective enfranchisement claim) which failed to state whether the premises were within an area where an estate management scheme was in force. In considering whether this omission, in breach of a statutory requirement, invalidated the counter-notice the court noted that the requirement was not within the body of the Act but in the regulations, and held that it was not a mandatory requirement in spite of wording which was mandatory ('*4. A counter-notice given under section 21(reversioner's counter-notice) of the 1993 Act shall contain … a statement as to whether or not the specified premises are within the area of a scheme approved as an estate management scheme under section 70*').[194]

1.204 In determining whether breach of, or failure to comply with, a statutory requirement invalidates the act or notice:[195]

> 'The test is not one of the language that Parliament has used but of the substance of the requirement it has imposed.'

Reference was made to the decision in *Howard v Boddington*:[196]

> 'I believe, as far as any rule is concerned, you cannot safely go further than in each case you must look at the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.' (per Lord Penzance at 211)

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[192] [2002] 1 EGLR 61, paras 16 and 17.

[193] *7 Strathray Gardens Limited v Pointstar Shipping and Finance Limited* [2004] EWCA Civ 1669.

[194] Leasehold Reform (Collective Enfranchisement) (Counter-Notices) (England) Regulations 2002.

[195] Per Arden LJ at 42, *7 Strathray Gardens Limited* above.

[196] (1877) 2 PD 203.

1.205 In light of the House of Lords decision in *R v Soneji* and the statement of Hobhouse LJ in *Belvedere Court* it is suggested that the test to be applied is to consider whether the defect or omission in a statutory notice is in respect of a requirement which is substantive, an essential part of the mechanics of the Act, where failure to comply would defeat the purpose of the legislation intended by Parliament, or whether the requirement, whatever the language used, is merely supportive of that purpose where failure to comply would not, if validated, give rise to serious prejudice or injustice. The principle was applied in *Dharmaraj v London Borough of Hounslow*[197] where, in considering the validity of notice served on his solicitors instead of on the applicant in person, the Court of Appeal stated (Toulson LJ):

> 'The modern approach towards breach of a statutory procedural requirement is to consider the underlying purpose of the requirement and whether it follows from consideration of that legislative purpose that any departure from the precise letter of the statute, however minor, should amount to the document being regarded as a nullity.'

For further discussion of this topic see the paper prepared for the Property Litigation Association by Tiffany Scott of counsel.[198]

PART IV WAIVER AND ESTOPPEL AFTER INVALID NOTICES

1.206 The examples given below are not exhaustive. Any act of recognition of the validity of the notice will amount to a waiver or give rise to an estoppel. A detailed consideration of the issues is to be found in specialist texts but in general the landlord is the most likely to be at risk after service of a break notice and he does some act which amounts to an acceptance of the notice in spite of it being defective, or the terms of the break clause not being met. He will also be at risk after service of an invalid statutory notice if he takes any steps under the statute arising from the service of the notice.

Break notices

1.207 It has been suggested above that one means of removing any uncertainty over compliance with repairing conditions in a break clause is to agree terms in lieu and for the tenant to pay a sum of money to the landlord. The parties in *Legal & General Assurance Society v Expeditors International (UK) Ltd*[199] entered into such an agreement but the landlord asserted that, in breach of the settlement agreement, the tenant failed to hand back vacant possession on the break date. The Court of Appeal applied a purposive approach to this and ruled that the agreement served to terminate the lease on

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197 [2011] EWCA Civ 312.

198 Tiffany Scott *1954 Act: Validity of Notices*: Wilberforce Chambers Case Study, 19 January 2009.

199 [2006] L & TR 368.

the break date but any failure on the part of the tenant to deliver possession sounded in damages (in trespass) and implied a term to that effect. By entering the agreement, the landlord had waived his right to enforce the other terms of the break clause.

1.208 One reason why landlords remain silent after service of a break notice is to avoid any risk of waiver of their right to object to its validity by conduct or representation which could give rise to an estoppel. If a landlord enters into negotiation, for example regarding the scope and detail of the repairs, whether as a condition of the break clause or by way of terminal dilapidations, and arranges inspection or a meeting between surveyors, it could easily be taken as signifying acceptance of the notice. In practice, landlords commonly declare on receipt of such a notice that its validity is not accepted and that any action on their part is without prejudice to such contention.

1.209 In *Dun & Bradstreet*[200] the tenant failed to pay the required lump sum on the break date and did not tender it until some weeks later. He gave as his reason the fact that there was to be an interim occupation of the premises after the break date while new short leases were drawn up. But the Court of Appeal could find no assurance or representation given by the landlords that they had agreed to waive payment on the break date even though the tenant had formed that belief. As there was no promissory estoppel and as the tenant had not communicated his belief to the landlord (that the interim agreement waived compliance with the break clause conditions) the question of whether it was unconscionable to allow the landlord to rely on it did not arise.

1.210 In *Prudential Assurance Company v Excel UK Ltd*[201] the tenancy was held by joint tenants only one of whom gave the break notice. Prior to service the landlord had been told (by the tenant's solicitors who gave the notice) of the presence of squatters and the landlord's solicitors replied that this would not prejudice the notice '*should your client seek to break the lease*'. There was also correspondence to the like effect referring to '*your client*'. The court rejected the argument that these statements on behalf of the landlord amounted to representations sustaining a promissory estoppel nor did the exchange of correspondence, when both parties used the singular to refer to the tenant, amount to an estoppel by convention. The mistake arose from the tenant's solicitors own belief as to the identity of the tenant, not from anything the landlord had said or done.

1.211 In *MW Trustees Ltd v Telular Corporation*[202] the lease provided that the tenant could determine a 10 year lease after 5 years by break notice given to the landlord. The notice had to be in writing and would be valid only if served in the manner set out in the lease, inter alia by special delivery at the landlord's registered office (if a company) or such address as may be notified (but e-mail was not included). The landlord assigned the reversion and the tenant was

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[200] [1998] 2 EGLR 175.
[201] [2009] EWHC 1350, Ch.
[202] [2011] EWHC 104, Ch.

informed of the transfer. The new landlord's agent sent out a rent demand. By oversight, the tenant served the break notice on the former landlord. It was acknowledged that this was invalid because it had not been served on the landlord. But the tenant was then informed by the recipient that the property had been transferred and an e-mail was sent to the landlord with a copy of the break notice attached. The landlord duly sent this to its agent who sent an e-mail to the tenant stating '*we accept the attached letter and can confirm we are happy for you to break the lease, however please would you re-address this letter to the following address …*' (and gave the landlord's name and address). It was held that the defects arising from the incorrect naming of the landlord and the invalid method of service (by e-mail) were waived by the agent's acceptance which went beyond mere acknowledgement of receipt and amounted to a representation that the landlord accepted the documentation as terminating the lease. The subsequent failure of the tenant to comply with the request to re-address the notice was of no consequence.

Statutory notices

1.212 Waiver and estoppel can arise after service of a defective statutory notice through conduct or representations to the giver of the notice that its legal effect is not being challenged.

- Full consideration of these matters was given by the Court of Appeal in the case of *Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon v Mayhew*[203] in circumstances where a tenant served a counter-notice indicating that he would not be willing to give up possession in response to a defective s 25 notice. Such an unqualified response could only have been explained by reference to a valid s 25 notice and the choice of the recipient to treat it as such thereby amounted to a waiver of his right to reject it by reason of the defect.

- Similar reasoning would apply where a landlord serves a counter-notice under s 26(6) opposing a new tenancy without expressing it to be without prejudice to his contention that the s 26 notice is invalid.

- Making and serving an interim rent application, again without qualifying it to be without prejudice, in the face of a defective s 26 notice (giving the wrong termination date) amounted to waiver of the right to reject the notice (see *British Railways Board v Smith (AJA) Transport*).[204]

- Serving a terminal schedule of dilapidations or any other act denoting acceptance of the impending termination of the tenancy may constitute an act of waiver unless it is expressly stated to be without prejudice to the contention that the notice, in this case given by the tenant, is invalid.

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203 [1997] 1 EGLR 88, CA.
204 [1981] 2 EGLR 69.

- Where a tenant serves a s 27 notice that expires after the term date of the lease, rent payable in advance, for example on the usual quarter days, can be apportioned to the date of termination contained in the s 27 notice. As such notice is no longer required to expire on a quarter day and needs only to be for not less than 3 months, it can take effect to end the tenancy during a quarter at any time. The rent payable in advance for that quarter will be apportioned to the date of expiry of the notice and a demand for payment in that amount will, it is submitted, signify acceptance by the landlord of the validity of the notice.

Tactics

1.213 Whilst the recipient of a defective notice is under no duty to the person serving such a notice and can challenge its validity at any time, the longer such challenge is delayed the greater the risk of doing something which amounts to waiver or acquiescence or something which amounts to a representation giving rise to an estoppel. For this reason alone, a challenge to a defective notice should not be delayed and, if made promptly, it can be made clear that henceforth any communication or action is made or done without prejudice to the contention that the notice is invalid.

1.214 The dangers of delay are illustrated in obiter statements in the House of Lords decision in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd (No 1)*[205] to the effect that delay in lodging a challenge, if it is designed to gain an advantage, may in certain circumstances defeat the object of the exercise. Lord Diplock, in his judgment, referred to the difference between waiver by election, where the innocent party has knowledge of the facts and that they give rise to alternative (and inconsistent) rights and waiver by agreement or representation giving rise to estoppel.

1.215 In that case, the landlord was faced with a tenant's application for a new tenancy under the 1954 Act which had been made prematurely, before the time for doing so arose under the statute (as it was) and was therefore in contravention of the statutory requirements. It was held that such a breach was of a procedural nature only and the landlord could either ignore it or object to it and thus waive his right to do the one or the other, these being alternative and inconsistent rights. The landlord remained silent on the point and did not raise his objection until after the date had passed (2 December 1968) when the tenant could have made a fresh application and so rescue the position and preserve his right to claim a new tenancy under the Act. As the tenant could not prove when the necessary knowledge (giving rise to the election) was acquired by the landlord and as the landlord had made no representations to the contrary, he could not rely on waiver by the landlord of his right to object.

1.216 In view of the willingness of the landlord to agree to delay and adjourn the proceedings, it was made clear that if the landlord had acquired the

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[205] [1970] 3 WLR 287.

knowledge of the legal effect of the tenant's breach before time had expired for the tenant to make a fresh application and had deliberately withheld his objection until afterwards, and if this could have been established in evidence (it was not), the court would have found an estoppel.

> 'In view of the active part which the landlords played in arranging for the date of the hearing to be postponed until after December 2, 1968 I am in no doubt that their failure to inform the tenant with reasonable promptitude that their existing application was invalid would have constituted passive encouragement of the tenant's reliance on its validity and have provided the necessary element for the quasi-estoppel of acquiescence.' (per Lord Diplock)

1.217 The lesson is that challenges and objections to the validity of a notice, contractual or statutory, if not made promptly, may become tainted by words or deeds which give rise to '*passive encouragement*' of the belief that the validity of the notice is not being challenged or, as seen in the case of *MW Trustees Ltd v Telular Corporation*,[206] to representations which estop the landlord from subsequently raising objections.

[206] At **1.211**.