Case No: B2/2013/2797

Neutral Citation Number: [2014] EWCA 1520 Civ
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HIS HONOUR JUDGE DIGHT
1CL10510 and 2CL10040

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 November 2014

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE PATTEN
and
LADY JUSTICE GLOSTER

- -

Between :

(1) GURMEET KAUR NATT **(2) MALKIT SINGH NATT**	**Appellants**
- and -	
(1) ZULFIQAR ALI OSMAN **(2) SHAHIDA ALI**	**Respondents**

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- -

Mr Piers Harrison (instructed by **Layzells Solicitors**) for the **Appellants**
Mr Paul Letman (instructed by **Anthony Gold Solicitors**) for the **Respondents**

Hearing dates : 6th November 2014

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Judgment

The Chancellor:

1. This is an appeal about the validity of a notice dated 17 June 2010 ("the Notice") served by the appellants, Gurmeet Kaur Natt and Malkit Singh Natt, pursuant to section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"), claiming the right to acquire the freehold of 19 Coniston Road, Muswell Hill, London N10 2BL ("the Property") pursuant to the collective enfranchisement provisions of the 1993 Act.

2. The Notice failed to comply with section 13(3)(e) of the 1993 Act because it did not give the names of one of the qualifying tenants in the Property, the address of the flat of that qualifying tenant and the particulars of that qualifying tenant's lease as specified in section 13(3)(e)(i).

3. The appeal is from that part of the order dated 12 September 2013 of His Honour Judge Dight in the Central London County Court by which he declared that the Notice is invalid and a nullity because it failed to comply with section 13(3)(e).

The background

4. The respondents, Zulfiqar Ali Osman and Shahid Ali, are the freehold owners of the Property. The Property comprises four sets of premises, each of which was at the material time held on a lease granted for a term of 99 years from 25 March 1988. The four sets of premises are spread over three floors. Flats 1 and 2 are situated on the ground floor. Flat 3 is situated on the second floor. Flat 4 is on the third floor.

5. The first appellant, who is the daughter of the second appellant, is the leaseholder of Flat 1. The leaseholder of Flat 2 is a Ms Julia Lightle. The second appellant is the leaseholder of Flat 3.

6. The Property has an attic on the third floor. It is called Flat 4. The only access to it is by way of a staircase outside Flat 3. The leaseholder of the attic is Ms Sobia Ali, the respondents' daughter.

7. The Notice said that the Property contained three flats held by qualifying tenants. It said that the full names of all the qualifying tenants of flats in the Property, with the addresses of the flats and the particulars required by the 1993 Act were set out in schedules 1 and 2 to the Notice. Schedule 1 gave the details in respect of Flats 1 and 3 and described the appellants as participating qualifying tenants. Schedule 2 gave details in respect of Flat 3 and described Ms Lightle as a non-participating qualifying tenant. The Notice contained no reference at all to the attic or Ms Ali or her lease.

8. That omission was deliberate because the appellants took the view that the attic was not a flat for the purposes of the 1993 Act. That was because they considered that the landing outside the front door of Flat 3 - on which the staircase giving the only access to Flat 4 had been constructed – was, on the proper interpretation of the lease of Flat 3, within the demise of Flat 3 and so was a trespass and should be removed.

9. The respondents did not agree with that view. They commenced proceedings in the Central London County Court in which they alleged that the Notice was invalid and a nullity (save for giving rise to an obligation to pay certain costs pursuant to section 33 of the 1993 Act) because it failed to give details about Flat 4 in breach of the "mandatory requirements" of section 13(3)(e) of the 1993 Act.

10. The appellants served a defence, in which they alleged that Flat 4 was not a flat as defined in the 1993 Act because, among other things, there was no reasonable prospect of it being occupied as a dwelling since the only access to it was by means of the staircase constructed within the demise of Flat 3 and so a trespass. In the defence they also stated that their primary position was that the requirements of section 13(3)(e) are directory rather than mandatory and that any failure (which was denied) to comply with those requirements would not invalidate the Notice. They said that their secondary position was that Flat 4 was not a flat for the purposes of the 1993 Act, the tenant of Flat 4 was therefore not a qualifying tenant and the Notice was correctly drawn.

11. The respondents commenced separate proceedings in the Central London County Court as to the proper interpretation of the lease of Flat 3 (as to the extent of the demise) and, if necessary, rectification.

12. Both sets of proceedings came before Judge Dight and were heard together. He handed down a single detailed and comprehensive judgment on 12 September 2013 in respect of them both. He held that, on the proper interpretation of the lease of Flat 3, the obvious intention was that the area of the demise was confined to the premises behind the front door of Flat 3 and the area outside that door was retained by the landlord. He held that rectification did not apply. There is no challenge on the present appeal to that part of Judge Dight's judgment.

13. Judge Dight held that Flat 4 was configured as a flat, was being used and had for some time been used as a flat, and there was physical and lawful access to it, and, accordingly, it satisfied the definition of a "flat" for the purposes of the 1993 Act. There is no challenge on this appeal to that part of Judge Dight's judgment.

14. Finally, Judge Dight held that the omission from the Notice of the details relating to Flat 4 specified in section 13(3)(e) of the 1993 Act made the Notice invalid. He reached that decision after considering a large number of cases, with particular reliance on the reasoning and decision of Morgan J in *Poets Chase Freehold Co Ltd v Sinclair Gardens Investments (Kensington) Ltd v* [2007] EWHC 1776, [2008] 1 WLR 768. He said as follows, by way of a concluding summary:

> " It seems to me that the same reasoning [as that of Morgan J in the *Poets Chase* case] applies to the errors in this case in the construction of the notice against the statutory background, so that one starts as he [Morgan J] says, by having regard to the terms of the same statutory provision as was before him. The normal position being, particularly where the word "must" is used requiring a party to set out certain information, that a notice which fails to comply with such a requirement is an invalid notice. There is nothing in the [1993] Act which has been drawn to my attention which would save the notice and that compels me to the conclusion, for the same reasons that led Mr. Justice Morgan to his conclusion, that the notice was therefore ineffective and invalid. His reasoning and decision is, in my judgment, binding on me."

15. The present appeal is from Judge Dight's declaration of the invalidity of the Notice and its nullity which reflected that part of his judgment.

<u>The statutory scheme</u>

16. The following is a very brief summary of the statutory scheme so far as relevant to providing the context for this appeal.

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

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

> "(3) The initial notice must—
>
> . . .
>
> (e) state the full names of all the qualifying tenants of flats contained in the specified premises and the addresses of their flats, and contain in relation to each of those tenants,
>
> (i) such particulars of his lease as are sufficient to identify it, including the date on which the lease was entered into, the term for which it was granted and the date of the commencement of the term,"

19. Paragraph 15 of schedule 3 to the 1993 Act deals with inaccuracies or misdescription in a notice under section 13. It provides as follows:

> *Inaccuracies or misdescription in initial notice*
>
> 15(1) The initial notice shall not be invalidated by any inaccuracy in any of the particulars required by section 13(3) or by any misdescription of any of the property to which the claim extends.
>
> (2) Where the initial notice—
>
> (a) specifies any property or interest which was not liable to acquisition under or by virtue of section 1 or 2, or
>
> (b) fails to specify any property or interest which is so liable to acquisition, the notice may, with the leave of the court and on such terms as the court may think fit, be amended so as to exclude or include the property or interest in question.
>
> (3) Where the initial notice is so amended as to exclude any property or interest, references to the property or interests specified in the notice under any provision of section 13(3) shall be construed accordingly; and, where it is so amended

> as to include any property or interest, the property or interest shall be treated as if it had been specified under the provision of that section under which it would have fallen to be specified if its acquisition had been proposed at the relevant date."

20. Chapter II of Part 1 of the 1993 Act provides for the individual right of a tenant of a flat to acquire a new lease of that flat. The scheme of Chapter II is, in many respects, similar to the scheme of Chapter I.

The appeal

21. The appellants' case on the appeal, presented by their counsel, Mr. Piers Harrison, can be summarised quite briefly. He submitted that section 13(3)(e) of the 1993 Act is what he described as a "hybrid" provision. By that expression, he meant that whether or not non-compliance renders the notice invalid depends on the gravity of the non-compliance and its practical consequences in any particular case.

22. Mr Harrison said that in the present case the consequences of non-compliance were of no significance and caused no prejudice of any kind to the respondents. It is not in dispute that the respondents were perfectly well aware of the configuration of the Property and, in particular, Flat 4, and that it was let on a long lease to Ms Ali, the respondents' daughter. The respondents were never under any doubt that, the validity of the Notice aside, the appellants were entitled to acquire the freehold of the Property under the provisions of the 1993 Act. They were able to serve a counter-notice pursuant to section 21 of the 1993 Act. Even if hypothetically they had not actually been aware of the details concerning Flat 4 required by section 13(3) to be given in the Notice, those were matters which any landlord could discover by inspection of the Land Register at the Land Registry.

23. The appellants contend that, bearing in mind the insignificant consequences in the present case, the failure to comply strictly with section 13(3)(e) did not make the Notice invalid because that could not have been the intention of Parliament.

Discussion

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

25. That approach is now regarded as unsatisfactory since the characterisation of the statutory provisions as either mandatory or directory really does no more than state a conclusion as to the consequence of non-compliance rather than assist in determining what consequence the legislature intended. The modern approach is to determine the consequence of non-compliance as an ordinary issue of statutory interpretation, applying all the usual principles of statutory interpretation. It invariably involves, therefore, among other things according to the context, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole. The modern approach is elegantly stated in the following passage in the joint judgment of McHugh, Gummow, Kirby and Hayne JJ in the Australian High Court in

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at paragraph 93 :

> "In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* [1978] 1 NSWLR 20, 23–24 in criticising the continued use of the 'elusive distinction between directory and mandatory requirements' and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute."

26. That passage was said by Lord Steyn (with whom the other members of the judicial committee agreed) in *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340, at paragraph [21] to contain an improved analytical framework for examining such questions.

27. Mr Harrison and counsel for the respondents, Mr Paul Letman, referred us to a great many reported cases both for statements of principle on the proper interpretative approach and as illustrations of the decisions of the courts on particular facts. I do not consider that it is profitable to state and analyse the facts, reasoning and conclusions of each of those many cases. It is sufficient to say the following about them.

28. The cases cover a very broad spectrum of legislative and factual situations. For the purposes of this appeal, a distinction may be made between two broad categories: (1) those cases in which the decision of a public body is challenged, often involving administrative or public law and judicial review, or which concern procedural requirements for challenging a decision whether by litigation or some other process, and (2) those cases in which the statute confers a property or similar right on a private person and the issue is whether non-compliance with the statutory requirement precludes that person from acquiring the right in question.

29. Into the first category fall such cases as *R v Secretary of State for the Home Department ex parte Jeyeanthan* [2000] 1 WLR 354, *Soneji*, *R(M) v Hackney London Borough Council* [2011] EWCA Civ 4, [2011] 1 WLR 2873, and *R (Garland) v Secretary of State for Justice* [2011] EWCA Civ 1335, [2012] 1 WLR 1879. In those cases, in accordance with the more recent interpretative approach, the courts have asked whether the statutory requirement can be fulfilled by substantial compliance and, if so, whether on the facts there has been substantial compliance even if not strict compliance. In the *Hackney London Borough Council* case at paragraphs [86] to [88]

Toulson LJ referred to the criticism made by Lord Hailsham LC in *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, at 189-190, of the traditional distinction between mandatory and directory procedural requirements in the exercise of a statutory jurisdiction. He went on to draw an analogy with developments in the law of contract, as follows:

> "87 The problem was similar to one which once bedevilled the law of contract. Clauses which imposed obligations on a party used to be categorised as either conditions, the slightest breach of which would entitle the other party to treat the contract as discharged, or warranties, breach of which did not affect the continuing validity of the contract. This meant that the scope of relief in the event of a breach was determined by an analysis of the clause in the abstract, without regard to the gravity or triviality of the breach or its consequences. The results were not always satisfactory. The courts broke out of this self-imposed straitjacket by developing the idea of innominate clauses (pioneered by Diplock LJ in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 70), which enabled the court to look at the gravity of the breach and its consequences in determining its legal effect. "

30. Into the second of the two categories I have mentioned in paragraph 28 above fall such cases as *Cadogan v Morris* [1999] 1 EGLR 59 (right of tenant to an extended lease under the 1993 Act), *Keepers and Governors of John Lyon Grammar School v Secchi* (2000) 32 HLR 820 (right of tenants to extended leases under the 1993 Act), *Speedwell Estates Ltd v Dalziel* [2001] EWCA Civ 1277, [2002] HLR 43 (right of tenants to acquire freeholds under the Leasehold Reform Act 1967), *Burman v Mount Cook Land Ltd* [2001] EWCA Civ 1712, [2002] Ch 256 (acquisition of a new lease under the 1993 Act), *Tudor v M25 Group Ltd* [2003] EWCA Civ 1760 (right of tenants to acquire the freehold under the Landlord and Tenant Act 1987), *Seven Strathay Gardens Ltd v Pointstar Shipping & Finance Ltd* [2004] EWCA Civ 1669, [2005] HLR 20 (right to collective enfranchisement under the 1993 Act), *Cadogan v Strauss* [2004] EWCA Civ 211, [2004] HLR 33 (right of tenant to acquire the freehold under the Leasehold Reform Act 1967), *9 Cornwall Cresent London Ltd v Kensington and Chelsea Royal LBC* [2005] EWCA Civ 324, [2006] 1 WLR 1186 (right to collective enfranchisement under the 1993 Act).

31. Those cases I have mentioned are decisions of the Court of Appeal. There are numerous other cases decided by lower courts and tribunals but I do not consider that any of those provide more helpful guidance than those at the Court of Appeal level. The Court of Appeal cases show a consistent approach in relation to statutory requirements to serve a notice as part of the process for a private person to acquire or resist the acquisition of property or similar rights conferred by the statute. In none of them has the court adopted the approach of "substantial compliance" as in the first category of cases. The court has interpreted the notice to see whether it actually complies with the strict requirements of the statute; if it does not, then the Court has, as a matter of statutory interpretation, held the notice to be wholly valid or wholly invalid: see, for example, *Burman, Newbold v The Coal Authority* [2013] EWCA Civ 584, [2014] 1 WLR 1288, *Keepers and Governors of John Lyon Grammar School v Secchi*.

32. On that approach, the outcome does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by non-compliance on the particular facts of the case: *Tudor* at [27],

Speedwell Estates at [24]. Insofar as Chadwick LJ may have thought otherwise in *obiter* remarks in *Cadogan v Strauss* at [48], I respectfully do not agree. This is consistent with the policy of providing certainty in relation to the existence, acquisition and transfer of property interests. It is to be borne in mind in that connection that service of a section 13 notice has important property consequences. The effect of service of such a notice is to restrict a right to terminate the lease of a flat held by a participating tenant and to restrict termination of any such lease by other means (see schedule 3 to the 1993 Act). Further, the section 13 notice may be registered as an estate contract under the Land Charges Act 1972 or may be protected by notice under the Land Registration Act 2002 (by virtue of section 97 of the 1993 Act), and in such a case the ability of the landlord to deal with the property is restricted (see section 19 of the 1993 Act).

33. In cases such as the present, that is to say the acquisition of property rights by private persons pursuant to statute, the intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole. In some cases, for example, the court has held in favour of invalidity where the notice or the information which is missing from it is of critical importance in the context of the scheme: see, for example, *Burman* (the landlord's counter-notice under the 1993 Act was described as "integral to the proper working of the statutory scheme); *Speedwell* (the omissions in tenant's notices under the LRA 1967 to supply information required by para. 6(1) of schedule 3 were said by Rimer J (with whom the other judges agreed) not to be "mere inaccuracies in the particulars as a whole"); and *Cadogan v Morris* (failure of tenant to state in a notice under section 42 of the 1993 Act the premium which he actually intended to pay as opposed to the one which was stated but was unrealistically low and he did not in reality intend to pay).

34. By contrast, the court has held in favour of validity where the information missing from the statutory notice is of secondary importance or merely ancillary. In both *Newbold* and *Seven Strathray Gardens Ltd v Pointstar Shipping & Finance Ltd* [2004] EWCA Civ 1669, [2005] HLR 20 295, for example, the missing particulars in the notice were not prescribed by the statute itself but by regulations made under it and were not of a kind which Parliament could have intended should result in the invalidity of the notice. A broadly comparable situation was that in *Tudor*, where the omitted particulars (the addresses of the tenants signing the notice) were not specified in the relevant statutory provision in the Landlord and Tenant Act 1987 authorising the service of the notice but in the general provision in section 54(2) of that Act which required any notice served under any provision of Part I or Part III by the requisite majority to specify the names of all the persons by whom it is served and the addresses of their flats. Carnwarth LJ, who gave the only reasoned judgment, said (at para. [33]) that "section 54 is not a substantive provision, but is ancillary to the various notice provisions" and (at para [34]) that the requirement to state addresses in the notice was "merely supportive".

35. So far as concerns the present case, it is not in dispute that there was a failure to comply with section 13(3)(e). This is not a case in which it is possible to interpret the Notice so as to hold that there was compliance. The statutory scheme in the 1993 Act, on its proper interpretation, points clearly in favour of the invalidity of the Notice by virtue of the non-compliance with section 13(3)(e) in failing to identify all the qualifying tenants and to state their addresses in the Property. I reach that conclusion for the following reasons.

36. First, those matters go to the very heart of the right to collective enfranchisement since the information is intended to disclose on the face of the section 13 notice the

number of qualifying tenants in the premises (section 3(1)(b)), whether the total number of flats held by the qualifying tenants is not less than two-thirds of the total number of flats in the premises (section 3(1)(c)) and whether the section 13 notice has been given by qualifying tenants of not less than half of the number of flats contained in the premises (section 13(2)(b)).

37. Second, Parliament specifically provided in paragraph 15 of schedule 3 to the 1993 Act for the section 13 notice not to be invalidated by certain inaccuracies and for the notice to be capable of amendment in certain circumstances. The assumption must be that Parliament intended other errors in the section 13 notice to render it invalid. That appears to have been the approach taken by the Court of Appeal in *Keepers and Governors of John Lyon Grammar School v Secchi* in relation to analogous provisions of the 1993 Act conferring on certain tenants of flats the right to acquire a 90 year extension of their leases.

38. Third, there is no restriction on the service of a new notice at any time after an invalid notice. The restriction in section 13(9) on the service of a new notice within the period of 12 months after the withdrawal or deemed withdrawal of a section 13 notice only applies to an original notice which was valid. If the landlord challenges the validity of a section 13 notice, as in the present case, there is nothing to prevent the immediate service of a fresh section 13 notice "without prejudice" to the tenants' contention that the original notice is valid: *9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* [2005] EWCA Civ 324, [2006] 1 WLR 1186, at [8].

39. On the other hand, contrary to Mr Letman's submission, I do not consider that the legislature's use of the word "must" at the beginning of section 13(3) gives any independent indication of the consequences of non-compliance. As Lord Woolf MR observed in *Ex parte Jeyeantham* at p. 358H, the words "shall" and "must" are both synonymous as denoting something which is required to be done as opposed to something which is intended to be merely optional. Both words impose an obligation but, detached from the statutory scheme as a whole, they throw no particular light on whether the legislature intended non-compliance to result in invalidity and nullity.

40. Mr Harrison made the powerful point that the qualifying tenants serving a section 13 notice might not always be in a position to know who all the qualifying tenants are. He gave as examples situations where the landlord has very recently granted a lease or taken a surrender of a lease or a non-residential lease has been changed into a residential lease or where the circumstances are as specified in section 5(5) and (6) of the 1993 Act. I do not consider, however, that this point outweighs the cumulative indicators of the legislative intention which I have mentioned above.

41. Mr Harrison relied upon several cases but they are all clearly distinguishable from the present case. I have already addressed *Soneji*, *the Hackney London Borough Council* case, *Newbold*, *7 Strathray Gardens*, and *Tudor* above. He also relied on *Cadogan v Strauss* but that was a straightforward case in which the inaccuracies were held to fall within the express exonerating provisions of paragraph 6(3) of schedule 3 to the 1967 Act (to the same effect as paragraph 15 of schedule 3 to the 1993 Act).

42. Mr Harrison relied on the summary of principles of interpretation set out in the first instance judgment of Mr Nicholas Strauss QC, sitting as a deputy High Court judge, and quoted by Lewison LJ on appeal in *Siemens Hearing Instruments Ltd v Friends Life Ltd* [2014] EWCA Civ 382, [2014] 2 P&CR 5. That case, however, concerned the proper interpretation of a tenant's break clause. The appeal was allowed on the basis that the deputy judge had failed to appreciate the need for strict compliance with

the conditions of a unilateral (or "if") contract. I do not think it throws any light at all on the resolution of the present appeal.

Conclusion

43. For the reasons set out above I would dismiss this appeal.

Lord Justice Patten

44. I agree.

Lady Justice Gloster

45. I also agree.