Editorial

A New Act to Validate Inaccurate Break Notices?

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Break clauses; Notices; Validity

The Law Commission recently asked practitioners for their views on areas of law that could do with investigation as part of its 12th law reform programme.

Here is one suggestion that I did not make, as there are only a limited number of investigations the Law Commission can make each year, and this one—although superficially sensible—seemed highly unlikely to be taken up.

Far too many resources are taken up every year by disputes over the validity of break notices. Landlords and tenants, their solicitors and agents, the courts, the law reports, professional support lawyers and trainers—all spend time that (presumably, with the exception of the parties' litigation lawyers) they would much rather spend on something more useful. And for every winner there is a loser, often backed (one assumes) by a solicitors firm's insurance policy.

So here is an idea. Let us sweep this away at one stroke. I propose the Leases (Validation of Inaccurate Break Notices) Act. It has but one purpose, and the clue is in the name. It will validate inaccurate break notices. One might say that it is a statutory codification of the House of Lords' majority decision in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C. 749. (It is easy to forget that the House of Lords in *Mannai* decided in the tenant's favour by a majority of only three to two. Personally, I favoured the views of the two dissenting Law Lords but, apparently, my views are not relevant.)

But there are complications, of course. It would not be English (and Welsh) law without the complications. Let us look at some of them. How does one know what the inaccurate notice was meant to say, had it been accurate? That should not be too difficult, given that the notice was served in order to operate a specific provision in the lease. As in *Mannai*, it should be pretty clear what the correct date was meant to be, and the notice would be construed as if it contained the correct information (in *Mannai*, you remember, the break date was the third anniversary of the term commencement date but the tenant's break notice incorrectly referred to the end of the third year of the term—one day too early).

What about notices that the *Mannai* decision would not validate? This is a particularly difficult area. Lord Hoffmann said in *Mannai* that a notice would not be valid if it was required to be printed on blue paper but was, in fact, printed on pink paper. There is no question at all that this sort of pedantry needs to be swept away. A further example is the very recent case of *Siemens Hearing Instruments Ltd v Friends Life Ltd* [2013] EWHC B15 (Ch), in which a break notice was required to state that it was being given under s.24(2) of the Landlord and Tenant Act 1954. At first instance, a notice served without containing this phrase was (surprisingly) held to be valid. Under the *Mannai* doctrine, the notice should logically be invalid. (The case is being appealed, by the way—yet another example of the nonsense my Act is designed to stamp out.)

Then there is a separate area of notices that are served by (or on behalf of), or on, the incorrect party. For example, in *MW Trustees Ltd v Telular Corp* [2011] EWHC 104 (Ch); [2011] L. & T.R. 19, the break notice was served on the former landlord rather than the current landlord. The notice was invalid (although the landlord was, on the facts, estopped from denying that the break had been effective). Similarly, in both *Lemmerbell Ltd v Britannia LAS Direct Ltd* [1999] L. & T.R. 102 and *Procter & Gamble Technical Centres Ltd v Brixton Estates Ltd* [2002] EWHC 2835 (Ch); [2003] 2 E.G.L.R. 24, the break notice was served by a group company of the tenant rather than the tenant itself (and was, therefore, held invalid). Logically, in neither case was a notice served that complied with the requirements of the lease. But it was quite clear what was intended and it would be churlish not to include it in the type of notices that are validated by my new Act. (It should be noted that in *Havant International Holdings Ltd v Lionsgate (H) Investments Ltd* [2000] L. & T.R. 288, a break notice served by a company that was not the tenant *was* held to be valid under *Mannai* principles.) Obviously, there would have to be limits on the ambit of the new law. If a break clause requires six months' notice, and only three months' notice is given, that cannot trigger the break. That is not a problem with the notice, but with the date on which the notice was given.

Then we shall need some anti-avoidance provisions. Probably some wording similar to s.25 of the Landlord and Tenant (Covenants) Act 1995 should do the trick. If cunning lawyers start to circumvent my law by devising new hurdles for tenants to overcome, they will fall foul of the anti-avoidance provision. And just in case that does not do the trick, we need to be able to add to the list of errors that the Act corrects, so we will need powers to amend that list by statutory instrument, in the same way that HMRC can add new tax avoidance schemes into its anti-avoidance legislation.

That was simpler than I had expected. Now, having sorted out that problem, on to my next bugbear, namely, unreasonable conditions in tenants' break clauses. The Leases (Invalidation of Unreasonable Conditions in Tenants' Break Clauses) Bill, anyone?