

# **THE INTERPRETATION OF NOTICES**

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1. Notices are very important in the day-to-day life of a property lawyer. A client's legal rights will frequently be exercisable by the service of a notice. Accordingly, the service of an invalid notice may have disastrous consequences: an invalid notice might result in the irrevocably loss of a client's legal rights and, perhaps, imply the negligence of a solicitor. It is therefore important for property lawyers to understand the radical reappraisal of the approach to the interpretation of notices that has taken place in recent years.
2. The trend is against literalism. In *Sirius Insurance Co v FAI General Insurance*<sup>2</sup> Lord Steyn said<sup>3</sup>: "What is literalism? It will depend on the context. But an example is given in *The Works of William Paley* (1938 ed), vol III, p.60. The moral philosophy of Paley influenced thinking on contract in the 19<sup>th</sup> century. The example is as follows: the tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. That is literalism. If possible it should be resisted in the interpretative process."
3. In the context of the interpretation of notices, literalism manifested itself in a highly artificial rule<sup>4</sup> that a notice should be interpreted "strictly" and *without reference the factual circumstances in which the notice had been served*. That approach sometimes compelled judges to interpret notices in ways that cannot have reflected what the server of the notice had intended.

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<sup>2</sup> [2004] UKHL 54, [2004] 1 WLR 3251.

<sup>3</sup> At page 3258.

<sup>4</sup> A rule that was also applied to the interpretation of conveyances.

4. The leading case was *Hankey v Clavering*<sup>5</sup>. A lease contained a break clause permitting the landlord to terminate the lease on 25 December 1941. The landlord duly served a break notice. But that notice was expressed to terminate the lease on 21 December 1941. The break notice was held to be invalid. Lord Greene MR said<sup>6</sup> that: “By the clear wording of the notice the plaintiff purported to bring the lease to an end on 21 December 1941. In so doing 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...”. In other words, the key did not fit the lock. A rigid and literal approach to interpretation of the notice had prevented the Court from interpreting the reference to “21 December 1941” *as being* a reference to the date on which the lease could, in fact, be brought to an end.
  
5. It is true that there was a (very narrow) exception to this rule. If a notice contained a “latent ambiguity” the factual circumstances in which the notice had been served could be considered when interpreting the notice. A “latent ambiguity” existed when there was nothing in the world to which a statement in a notice could refer. *Doe de Cox v Roe*<sup>7</sup> provides good example. A landlord of a pub in Limehouse gave notice to his tenant to quit “the premises which you hold of me...commonly known by the name of The Waterman’s Arms”. In fact, there was no pub called The Waterman’s Arms in Limehouse and the pub let by the landlord to the tenant was called The Bricklayer’s Arms. That “latent ambiguity” enabled the Court to *interpret* “The Waterman’s Arms” as being a reference to The Bricklayer’s Arms.
  
6. In *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd*<sup>8</sup> the House of Lords, by a majority<sup>9</sup>, changed all this. Their Lordships overturned the rule that evidence about the factual circumstances in which a notice had been served should, generally speaking, be ignored. Lord Steyn said<sup>10</sup> that: “The issue is how a reasonable recipient would have understood the notices. And in considering the

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<sup>5</sup> [1942] 2 KB 326.

<sup>6</sup> At page 330.

<sup>7</sup> (1803) 4 Esp 185.

<sup>8</sup> [1997] AC 749.

<sup>9</sup> Lords Steyn, Hoffman and Clyde (Lords Goff and Jauncey dissenting).

<sup>10</sup> At page 767.

question the notices must be construed taking into account the relevant objective contextual scene”. In other words, when interpreting a notice<sup>11</sup>, “the whole of the background available to the parties can be taken into account”<sup>12</sup>. It follows that the proper interpretation of a notice can be influenced by such things as the terms of the contractual or statutory provision under which the notice has purportedly been served<sup>13</sup>; by a covering letter enclosing the notice<sup>14</sup>; or by other notices<sup>15</sup>, correspondence or rent demands that server has previously sent to the recipient<sup>16</sup>.

7. The factual circumstances in which a notice has been served it may mean that it is obvious that an “error” in a notice is the result of a slip or some other mistake. It may then be possible to conclude that the “reasonable recipient” would have *interpreted* the mistaken wording in the notice as being a reference to whatever it is that will ensure that the notice complies with the contractual or statutory provision under which it has been served. In *ICS Ltd v West Bromwich BS*<sup>17</sup>, Lord Hoffman said<sup>18</sup>: “The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that...the wrong words or syntax [have been used].”
8. *Mannai Investments* itself provides an example of how the process of *interpretation* can result in a notice containing an inaccurate statement being held, nevertheless, to be valid. A break clause in a lease permitted the tenant to terminate that lease on 13 January 1995. The tenant served a break notice on the landlord. But that notice stated that: “Pursuant to Clause 7(13) of the lease we as tenant hereby give notice to you to determine the lease on 12 January 1995”. Their Lordships held that the notice had to be interpreted in light of the terms of

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<sup>11</sup> Whether a contractual notice or a statutory notice (see *York v Casey* [1998] 2 EGLR 25).

<sup>12</sup> See *Barclays Bank plc v Bee* [2001] EWCA Civ 1126, [2002] 1 WLR 332, per Arden LJ at p.343. The test is, however, objective. So it is irrelevant what the server or the recipient of the notice subjectively understood the notice to mean and, indeed, “to rely in any way upon the reaction of the actual recipient is unsound in principle, and could well lead to inconsistency and unfairness” (see *Lancecrest v Asiwaju* [2005] EWCA Civ 117, [2005] 1 EGLR 40, per Neuberger LJ at p.44).

<sup>13</sup> See *Mannai Investments* (supra).

<sup>14</sup> *York v Casey* [1998] 2 EGLR 25.

<sup>15</sup> *Barclays Bank v Bee* [2001] EWCA Civ 1126, [2002] 1 WLR 332.

<sup>16</sup> *Lay v Ackerman* [2004] EWCA Civ 184, [2005] 1 EGLR 139.

<sup>17</sup> [1998] 1 WLR 896.

<sup>18</sup> At page 913 (and albeit in the context of a case relating to the interpretation of contracts).

the break clause under which it had been served. It was too improbable that the tenant meant that, unless he could terminate the lease on 12 January, he did not want to terminate at all. Instead, the notice was properly interpreted as communicating an intention to exercise the right to determine the lease on the date permitted by the break clause (i.e. 13 January 1995), albeit that the tenant had misidentified that date.

9. Even more strikingly, in *Peer Freeholds Ltd v Clean Wash International Ltd*<sup>19</sup> a break notice served by a tenant was expressed to expire on 22 August 2004. That notice was held to be valid even though, in fact, the lease could be brought to an end only on 7 November 2004.
  
10. The factual circumstances in which a notice has been served can result in the notice being upheld even if the notice has misidentified the identity of the server of the notice. In *Lay v Ackerman*<sup>20</sup> leaseholders served an “initial notice” exercising an entitlement under section 42 of the *Leasehold Reform, Housing and Urban Development Act 1993* to collectively enfranchise. The landlord served a counter-notice under section 45. That counter-notice misidentified the landlord and named, as the server of the notice, the trustees of a non-existent trust. Nevertheless, the counter-notice was held to be valid. Section 45 did not require a counter-notice to name the landlord. But, by implication, that provision did require that a counter-notice should enable the leaseholders to appreciate that it had been given by the landlord. However, having regard to the factual circumstances in which the counter-notice had been served, the counter-notice had communicated that information to the leaseholders, notwithstanding the misidentification of the landlord. The “reasonable recipient”, being the reasonable person in the factual circumstances of the leaseholders, would have been in no doubt that the counter-notice had been served by the landlord: the counter-notice had been served in response to a notice served *on* the landlord and it referred to solicitors and an address which the tenant would have known, from rent demands and the like, to be the landlord’s solicitors and the landlord’s address.

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<sup>19</sup> [2005] EWHC 179, [2005] 1 EGLR 47.

<sup>20</sup> [2004] EWCA Civ 184, [2005] 1 EGLR 139.

11. This radical re-appraisal of the principles of the interpretation of notices has allowed Courts to ignore immaterial errors and uphold notices in circumstances where the notice has achieved its purpose. After all, as His Honour Judge Cooke said at first instance in *Tudor v M25 Group Ltd*<sup>21</sup> - in the context of a dispute about whether a leasehold enfranchisement notice was valid - “the object of the exercise [when serving a notice] is the giving of information and the defining of issues, not the prescription of steps in a ritual dance or complex game, one false step in which is intended to produce disaster.”
12. Nevertheless, there are limits to the extent to which it is possible to “cure” a defect in a notice by a process of *interpreting* the notice. Whilst the reasoning in *Mannai Investments* will frequently result in a notice being upheld where the “defect” relates to a contractual or statutory requirement that a notice convey some *information* to the recipient (without prescribing *how* that information is to be communicated), *Mannai Investments* is unlikely to rescue a notice that fails to comply with a contractual or statutory requirement that a notice *contain a particular statement or be in a prescribed form*. Compliance with that type of *formal requirement* has nothing whatsoever to do with the reasonable recipient’s understanding of the notice. In *Mannai Investments*, in which the break clause was interpreted merely as requiring that a break notice communicate an intention to exercise the right reserved by that clause, Lord Hoffman said<sup>22</sup> that: “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 determine the lease.”
13. The failure of a notice to comply with such a formal requirement was considered by the Court of Appeal in *Burman v Mount Cook*<sup>23</sup>. Section 45(2) of the *Leasehold Reform, Housing and Urban Development Act 1993* provides that a counter-notice served in response to an initial notice exercising a leaseholder’s right to a new lease “must...state that the landlord admits that the tenant had on the relevant date the right to acquire a new lease of his flat”. Alternatively, a

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<sup>21</sup> Referred to in the judgment of the Court of Appeal decision ([2003] EWCA Civ 1760, [2004] 1 WLR 23).

<sup>22</sup> At p.776.

<sup>23</sup> [2002] 1 EGLR 61.

counter-notice “must...state...that the landlord does not admit that the tenant had such a right on that date”. The trial judge had held that, even though the counter-notice contained neither of those statements, the notice was valid because it would have brought home to the “reasonable recipient” that the landlord did not dispute the tenant’s entitlement to a new lease. That applied the wrong test. Section 45 was properly interpreted as imposing, as an indispensable condition for the validity of a counter-notice, a requirement that such a notice contain a *statement* of whether or not the landlord admitted that the tenant had on the relevant date the right to acquire a new lease. Nothing less than such a statement would do.

14. Equally, in *Akici v LR Butlin Ltd*<sup>24</sup> the Court of Appeal has recently held that a notice served under section 146 of the *Law of Property Act 1925* was ineffective for the purposes of a purported forfeiture on the ground of an unlawful parting with possession of the demised premises on the ground that the notice failed to comply with the requirement that a notice under section 146 is a notice “specifying the particular breach complained of”. Neuberger LJ said<sup>25</sup> that: “Even applying *Mannai*, the notice has to comply with the requirements of s.146(1) of the 1925 Act, and if, as appears pretty plainly to be the case, it does not specify the right breach, then nothing in *Mannai* can save it.”

15. It is therefore always necessary to identify with precision exactly what is required by the contractual or statutory provision under which a notice has been served. As Peter Gibson LJ said at paragraph 22 of his judgment in *York v Casey*<sup>26</sup>: “The key question will always be: is the notice a valid one for the purposes of satisfying the relevant statutory [or contractual] provision”<sup>27</sup>.

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<sup>24</sup> [2005] EWCA Civ 1296, [2006] 2 All ER 872.

<sup>25</sup> At p.883.

<sup>26</sup> [1998] 2 EGLR 25.