Practice and Precedents Editor's Notes

More Section 8 Notices

The last Practice and Precedents Editor's Notes considered whether statutory notices of proceedings for possession served under the Housing Act 1988 s.8 containing an incorrect date for the commencement of proceedings had been validly served. Two other cases in the past year have also considered other issues regarding the validity of notices under the Housing Act 1988 s.8. When a corporate landlord signs a notice under the Housing Act 1988, must it execute that notice in accordance with the Companies Act 2006 s.44? If it does, then does that requirement also extend to a tenancy deposit protection certificate? These were the two issues which the court had to consider in *Northwood Solihull Ltd* v. *Fearn*.[1] A third issue, which was considered in *Prempeh* v. *Lakhany*,[2] was whether a s.8 notice has to contain the landlord's own name and address.

Northwood Solihull Ltd v. Fearn

The landlord in this case was a limited company which had let a residential property, 48 Gilliver Road, Shirley, West Midlands, B90 2DB, to Darren Fearn and Vicky Cooke under an assured shorthold tenancy dated 25 July 2014. The tenants paid a deposit which was protected by the landlord in an approved tenancy deposit protection scheme. Section 213 of the Housing Act requires a landlord to give the tenant certain prescribed information about the deposit. The landlord served a confirmatory certificate pursuant to the Housing (Tenancy Deposits) (Prescribed Information) Order 2007[3] (the 2007 Order). This certificate was signed by a single company director. Following non-payment of rent, the landlord served a notice seeking possession pursuant to the Housing Act 1988 s.8 on 27 March 2017. The s.8 notice was signed by the landlord's property manager, who was not a company director.

On 11 April 2017, the landlord issued a claim for possession, which was based upon alleged arrears of rent and was made pursuant to Grounds 8, 10 and 11 of Schedule 2 of the Housing Act 1988. The tenants opposed the making of a possession order, primarily on the basis that the s.8 notice was defective. In addition, they counterclaimed for payment of penalties as a result of the landlord's alleged failure to comply with the requirements to provide them with a valid confirmatory certificate.

The statutory requirements for the execution of documents by a company are set out in the Companies Act 2006 s.44. This requires a document to be executed by a company affixing its common seal, or by being signed by either two directors, a director and a company secretary, or a director in the presence of a witness who attests the signature of the director. However, it has never been clear how these requirements apply to a company signing a s.8 notice or a tenancy deposit protection certificate.

At first instance, the county court had held that the Companies Act 2006 s.44 did not apply to a s.8 notice but did apply to a confirmatory certificate. A possession order was therefore made, and penalties for breach under s.214(4) Housing Act 2004 awarded to the tenants. The landlord appealed and the tenants crossed appealed, with possession order and penalties stayed.

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[1] *Northwood Solihull Ltd* v. *Fearn* [2020] EWHC 3538 (QB).
[2] *Prempeh* v. *Lakhany* [2020] EWCA Civ 1422.
[3] Housing (Tenancy Deposits) (Prescribed Information) Order 2007 (SI 2007/797).

Signing notices as a corporate landlord or agent

The prescribed s.8 notice set out in the Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment No. 2) Regulations 2016[4] (the 2016 Regulations) provides that it can "*be signed and dated by the landlord or licensor or the landlord's or licensor's agent (someone acting for the landlord or licensor)*". Underneath the signature space the signatory must specify whether they are the "*landlord/licensor/joint landlords/landlord's agent*" by crossing out which of these are not relevant.

In this case, the landlord's property manager had signed the s.8 notice, but under her signature, had crossed out all the options except 'landlord'. It was common ground that the notice would have been valid if she instead had crossed out all the options except 'landlord's agent'. The tenants argued that in leaving 'landlord' the manager had taken on responsibility for the notice to comply with the Companies Act 2006 s.44.

The court considered that a s.8 notice is a preliminary warning to the tenant and a precondition for the landlord, which can be signed by someone other than the landlord. Saini J. said:

> "Purely as a matter of context and purpose of the Regulations and Section 8 of the 1988 Act, it is hard to identify a convincing reason why (when furthering these two purposes) the formality of execution complying with section 44 CA 2006 would be necessary as a condition of validity of a Notice. Why does it matter to a tenant that the corporate landlord has undertaken this technical step when serving this very preliminary (albeit important) notice? Although a Notice has important consequences it does share many characteristics with a letter before claim."[5]

In that context it appeared that the correct approach would be to allow for less formal methods of verifying the notice and that a corporate landlord did not need to comply with the Companies Act 2006 s.44. In addition, the fact that a s.8 notice can be signed by a landlord's agent indicates that less formal methods of verifying notification are acceptable under the 2016 Regulations.

In reaching his decision, Saini J considered the decision of the Court of Appeal in *Hilmi & Associates Ltd* v. *20 Pembridge Villas Freehold Ltd*[6] where a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s.13 was a document to which the Companies Act 1985 s.36A[7] applied. Therefore, a company signing such a notice had to do so either by its seal or by the signature of two directors or a director and the secretary, in accordance with the Companies Act 1985 s.36A. Saini J concluded that this decision was authority for the proposition that a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s.13 when given by a corporate tenant is a document which must now be executed in accordance with the Companies Act 2006 s.44. He went on to say that:

> "if the legislation in issue and context expressly requires a signature by the relevant person itself, there is no other way of a corporate person satisfying this requirement

[4] Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment No. 2) Regulations 2016 SI 2016/1118.
[5] *Northwood Solihull Ltd* v. *Fearn* [2020] EWHC 3538 (QB) at [48].
[6] *Hilmi & Associates Ltd* v. *20 Pembridge Villas Freehold Ltd* [2010] EWCA Civ 314.
[7] Companies Act 1985 s.36A was repealed by Companies Act 2006 Sch.16 para.1.

other than by way of the general law (which requires execution under section 36A or its successor)"[8]

The judge at first instance was correct to identify that a signature by the landlord was not statutorily required on a s.8 notice, as an agent could sign it. On that basis, the s.8 notice did not fall under what was taken to be the import of *Hilmi & Associates Ltd* v. *20 Pembridge Villas Freehold Ltd*[9], even though the statutory formalities of Housing Act 1988 s.8 had to be met.

It is important that the correct parties are crossed out under the signature in paragraph 6 of the s.8 notice to indicate who is signing the notice and in what capacity. It seems that if a company director signs without full compliance with the Companies Act 2006 s.44, then they are signing as the landlord's agent rather than as the landlord. If they wish to sign as the landlord, i.e. on behalf of the company, then they need to comply with the Companies Act 2006 s.44. This would seem to also apply to corporate letting agents signing notices on behalf of the landlord.

Even if the signature block has the signing party incorrectly stated, this may make little difference in practice. In *Northwood Solihull Ltd* v. *Fearn*[10] the landlord's agent had signed and crossed out everything else but "landlord" below the signature field, whereas they should have left "landlord's agent". The court accepted the s.8 notice as a valid notice as it considered that "this was not a determinative matter":

> "In short, in the absence of any express statutory requirement that the Notice be signed "by" the landlord, it could be (and was) validly signed on behalf of the landlord by an authorised signatory without the need to comply with s. 44 of the 2006 Act. There was no other feature of the statutory context which persuaded me that this was not a determinative matter."[11]

So, the s.8 notice was valid. However, not all documents are so simple.

Signing certificates as a corporate landlord or agent

In *Northwood Solihull Ltd* v. *Fearn*[12], the prescribed information had been given to the tenants in July 2014. This was before the Deregulation Act 2015 had made amendments to the 2007 Order. Before these amendments article 2(1)(g) provided that the prescribed information to be contained in the certificate included:

> (vii) confirmation (in the form of a certificate signed by the landlord) that -
>
> (aa) the information he provides under this sub-paragraph is accurate to the best of his knowledge and belief; and
>
> (bb) he has given the tenant the opportunity to sign any document containing the information provided by the landlord under this article by way of confirmation that the information is accurate to the best of his knowledge and belief.

[8] *Northwood Solihull Ltd* v. *Fearn* [2020] EWHC 3538 (QB) at [60].
[9] *Hilmi & Associates Ltd* v. *20 Pembridge Villas Freehold Ltd* [2010] EWCA Civ 314.
[10] *Northwood Solihull Ltd* v. *Fearn* [2020] EWHC 3538 (QB).
[11] *Northwood Solihull Ltd* v. *Fearn* [2020] EWHC 3538 (QB) at [71].
[12] *Northwood Solihull Ltd* v. *Fearn* [2020] EWHC 3538 (QB).

As these requirements required that the certificate be signed by the landlord, it fell under the requirements of *Hilmi & Associates Ltd* v. *20 Pembridge Villas Freehold Ltd*[13] and therefore the corporate landlord should have signed the prescribed information certificate in accordance with the Companies Act 2006 s.44.

Section 213(6) of the Housing Act 2004 provides that the prescribed information may be given either in the prescribed form or in a form substantially to the same effect. Saini considered that this point had been addressed thoroughly by Her Honour Judge Hand in the decision of *Bali v Manaquel Company Limited* in the County Court at Central London.[14] Saini J quoted as follows from that case:

> "It seems to me that the information required is about the compliance of the landlord with the initial requirements of the scheme in relation to the deposit, the authorised scheme, and the operation of the provisions of this Chapter in relation to the deposit by means of the information as has been prescribed. What has been prescribed is that there should be a certificate signed by the landlord. It seems to me very difficult to say that if there is not a certificate signed by the landlord then there has been the provision of information in a form substantially to the same effect. Either it is a certificate signed by the landlord or it is not."[15]

Saini J went on to say:

> "(1) The confirmatory certificate signed by the landlord (under Article 2(1)(g)(vii)), is not, in the context of this Article, something in the nature of "information" which must be given in the "prescribed form or in a form substantially to the same effect" (Section 213(6)(b) of the 2004 Act).
> (2) The language of Article 2(1)(g)(vvi) strongly suggests that such a certificate is a freestanding document which confirms the accuracy of the actual "information" set out in the sub-paragraphs above. That actual "information" is matters such as details of the deposit and names and addresses of parties such as the landlord."[16]

The landlord's signature requirement therefore fell outside "substantially to the same effect" and the confirmatory certificate had to be signed in accordance with the Companies Act 2006 s.44, i.e. by two company directors, a director and a secretary, or a director and a witness. Where this has not been done, a landlord may be subject to a financial penalty under Housing Act 2004 s.214. Furthermore, any notice under Housing Act 1988 served prior to rectification of the defective prescribed information certificate would be invalid.

However, it appears that the court did not properly consider the effect of the amendments made by the Deregulation Act 2015 to the 2007 Order. Whilst Saini J noted that the 2007 Order had been amended by the Deregulation Act 2015 so that either a landlord or relevant agents can sign a certificate and that this had not influenced his conclusion as to the construction of the 2007 Order in its original form, he failed to take into account that the amendments were retrospective. The decision should have been made on the amended version that was in force.

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[13] *Hilmi & Associates Ltd* v. *20 Pembridge Villas Freehold Ltd* [2010] EWCA Civ 314.
[14] *Bali v Manaquel Company Limited* (Central London County Court, 15 April 2016). The Practice and Precedents Editor is grateful to Nicholas Taggart and Justin Bates, both of Landmark Chambers and Nick Bano of Garden Court Chambers for their combined efforts in providing him with a copy of the judgment.
[15] *Bali v Manaquel Company Limited* (Central London County Court, 15 April 2016) at [38].
[16] *Northwood Solihull Ltd* v. *Fearn* [2020] EWHC 3538 (QB) at [107].

Section 30 of the Deregulation Act 2015 amended article 2 of the 2007 Order by inserting a new article 2(3) as follows:

> (3) In a case where the initial requirements of an authorised scheme have been complied with in relation to the deposit by a person ("the initial agent") acting on the landlord's behalf in relation to the tenancy-
> (a) references in paragraph (1)(b), (g)(iii) and (vii) to the landlord are to be read as references to either the landlord or the initial agent;
> (b) references in paragraphs (1)(d), (e), (g)(iv) and (vi) and (2) to the landlord are to be read as references to either the landlord or a person who acts on the landlord's behalf in relation to the tenancy.

It also added a new article 3(1) which provides that paragraphs (3) to (5) of article 2 are treated as having had effect since 6th April 2007.

The whole point of amending the prescribed information regulations by way of the Deregulation Act 2015 instead of just changing the 2007 Order by statutory instrument was that the change was backdated until 2007, the start of the deposit protection regime.

The effect of these amendments is that the certificate in this case should have complied with the amended version of the 2007 Order and that is the version which the court should have considered. Ultimately on the facts this did not matter as a sole director signed on behalf of the landlord and as such it had not been executed in accordance with the Companies Act 2006 s.44. But the decision has created some uncertainty and it is suggested that the safest approach is that corporate landlord (or a corporate agent) should comply with the Companies Act 2006 s.44.

Whether or not an employee of a landlord or an agent can sign a certificate is also unclear. The amendments made by the Deregulation Act 2015 only allow for signing by someone acting on the landlord's behalf in relation to a deposit. It is arguable that a landlord could agree with its letting agent that an employee of the letting agent can do this. This may provide some protection until either the Court of Appeal are able to consider the issue or the 2007 Order is amended.

Prempeh v. Lakhany

In *Prempeh* v. *Lakhany*[17] the Court of Appeal considered whether a s.8 notice which had been signed by the landlord's agent and contained the agent's details must also include the landlord's name and address.

On 12 December 2016 the landlord, Ferakh Lakhany, let Flat 16, Amelia House, London NW9 to two tenants, Rita Appiah-Baker and Cynthia Prempeh, on an assured shorthold tenancy for a term of one year from 17 December 2016 to 16 December 2017, and thereafter on a monthly periodic basis. The tenancy agreement gave the name of the landlord as Mrs Lakhany and her contact address as "C/O O'Sullivan Property Consultants Ltd". There was a dispute between the parties as to whether a second assured shorthold tenancy was granted to Ms Prempeh alone

[17] *Prempeh* v. *Lakhany* [2020] EWCA Civ 1422.

on 17 December 2017 in which Mrs Lakhany was no longer the landlord but that was not a matter for determination by the Court of Appeal.

After the end of 2017 the rent fell into arrears and Mrs Lakhany served a s.8 notice on Ms Prempeh which was signed by Mrs Lakhany's solicitors as her agent and it gave their name, address and telephone number. Nowhere in the s.8 notice did it refer to Mrs Lakhany by name or give her address.

Mrs Lakhany subsequently issued a claim for possession. At the first hearing, Ms Prempeh was represented by the duty solicitor who put forward three points in defence which were all rejected by the deputy district judge. One of these points was that the s.8 notice was a demand for rent and so must comply with the Landlord and Tenant Act 1987 s.47 and contain the name and address of the landlord, not just that of her agent.

Ms Prempeh then appealed to the County Court at Central London. The judge, whilst allowing the appeal on different grounds, rejected the argument that a s.8 notice which relies on arrears of rent is a demand for rent. This point was then appealed to the Court of Appeal.

At the appeal, counsel on behalf of Ms Prempeh put forward two grounds of appeal. First, the s.8 notice was a demand for rent within the Landlord and Tenant Act 1987 s.47 and so the failure to include the landlord's own name and address rendered the notice invalid. Secondly, the failure to include these details meant that the s.8 notice was not in the prescribed form and so was invalid. Both grounds of appeal were rejected.

In relation to the first ground, the court rejected the argument that a s.8 notice that relies on arrears of rent is a demand for that rent. Lord Justice Nugee considered that "demand":

> "is an ordinary English word, not one with a technical legal meaning, and on general principles should be given its ordinary meaning."[18]

and is:

> "easier to recognise than define, and whatever its precise scope there must be some communication from the landlord to the tenant requiring payment before it can be said that the landlord has made a demand for rent".[19]

In reaching this conclusion, the court rejected a contention that the Statement of Rates Act 1919 was applicable. Under this Act a 'demand for rent' could include any document used for the notification of rent. This had been argued:

> "on the principle that Acts *in pari materia* (ie dealing with the same subject-matter) can be construed together and that where a term is used without definition in one such Act, but is defined in another Act *in pari materia* with the first Act, the definition may be treated as applicable to the use of the term in the first Act"[20]

Based on this assessment, the court concluded that a s.8 notice is not a demand for rent. As Nugee LJ said:

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[18] *Prempeh* v. *Lakhany* [2020] EWCA Civ 1422 at [31].
[19] *Prempeh* v. *Lakhany* [2020] EWCA Civ 1422 at [32].
[20] *Prempeh* v. *Lakhany* [2020] EWCA Civ 1422 at [28].

> "..... the purpose of the notice is to give the tenant information, and an opportunity to address the particular matters complained of in the s.8 notice. In a rent case that no doubt includes doing what the tenant can to pay off the arrears and get the rent account up to date. But none of that means that the notice requires or demands that the tenant do anything."[21]

Accordingly, the Landlord and Tenant Act 1987 s.47 did not apply, though the court left open the question of whether a failure to comply with the Landlord and Tenant Act 1987 s.47 would invalidate a demand for rent.

On second ground, the court's decision was based on the appearance of the prescribed s.8 notice set out in 2016 Regulations. Paragraph 6 of the notice is headed 'Name and address of landlord/licensor' and this is followed immediately by "*To be be signed and dated by the landlord or licensor or the landlord's or licensor's agent (someone acting for the landlord or licensor)*". There are then designated spaces for the entry of the name and contact details of the signatory. Nugee LJ considered that a s.8 notice does not require the landlord's own name where it was signed by an agent. Nugee LJ also considered that if:

> ".... the form requires the landlord's own name and address to be given, even where an agent (who need not of course be a professional agent) has signed for the landlord, then it seems to me that the form would be a trap for the unwary. If we read the form as requiring this, then those who are professionally advised will no doubt usually get it right, but those who are not may easily make the mistake of thinking that they need only give their agent's name and address and then find that they lose perfectly sound claims for possession against defaulting tenants for want of something that may very well in the particular case be a purely formal defect that has not in fact caused the tenant any prejudice at all. In my view we should be slow to do that."[22]

The result is that it is now no longer open to a tenant to argue that a s.8 notice signed by the landlord's agent, which can include the landlord's solicitor, is invalid only because it was signed by the agent.

Russell Hewitson

[21] *Prempeh* v. *Lakhany* [2020] EWCA Civ 1422 at [42].
[22] *Prempeh* v. *Lakhany* [2020] EWCA Civ 1422 at [56].