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Sit up and take notice

In its last judgement of 2018, the Supreme Court in *UKI (Kingsway) Limited v Westminster City Council*[1] considered, in the context of business rates, the electronic service of notices together with the effect of serving notices via a third party. The Court allowed an appeal by the billing authority, Westminster City Council, by deciding that a completion notice handed to a receptionist, who then scanned and emailed the notice to the intended recipient, was properly served, even though the receptionist was not employed by the recipient and the method of service did not comply with the statutory procedure, which is set out below.

Liability for non-domestic rates depends on the property being entered as an hereditament in the rating list. For an unoccupied building to be brought into that list, a completion notice must be served by the billing authority. A validly served completion notice has the effect that the building to which it relates is deemed to have been completed on the date specified in the notice. It is then shown in the rating list as a separate hereditament and is valued, for rating purposes, as if it were complete. Once the building is shown in the rating list, its owner (or, if it becomes occupied, its occupier) is then liable to an assessment for non-domestic rates.

The statutory procedure for serving a completion notice is contained in para 8 to Schedule 4A of the Local Government Finance Act 1988. This provides that, without prejudice to any other mode of service, a completion notice may be served on a person -

(a) by sending it in a prepaid registered letter, or by the recorded delivery service, addressed to that person at his usual or last known place of abode or, in a case where an address for service has been given by that person, at that address;

(b) in the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at their registered or principal office or sending it in a prepaid registered letter or by the recorded delivery service addressed to the secretary or clerk of the company or body at that office; or

(c) where the name or address of that person cannot be ascertained after reasonable inquiry, by addressing it to him by the description of “owner” of the building (describing it) to which the notice relates and by affixing it to some conspicuous part of the building.

In January 2009, UKI began the redevelopment of 1 Kingsway, London to provide 130,000 sq ft of office space. In February 2012, Westminster City Council informed UKI's agents that it intended to serve a completion notice specifying a completion date of 1 June 2012. It asked the agents to confirm the identity of the owner of the building, but the agents declined to do so without obtaining instructions from their client which were not forthcoming. At that time, the building was managed by Eco FM under a contract with UKI, but Eco had no authority to accept service of documents on its behalf. In March 2012 the Council delivered a completion notice by hand to the building, specifying 1 June 2012 as the completion date. It was addressed to “Owner, 1 Kingsway, London WC2B 6AN” and given to a receptionist employed by Eco. The receptionist scanned and emailed a copy of the notice to UKI.

[1] [2018] UKSC 67; [2018] 12 WLUK 267.

UKI and Westminster City Council disagreed over whether this constituted valid service. The Court was asked to consider whether it mattered that the notice reached the intended recipient, not directly or through an agent authorised for that purposes, but by the action of a third party. The Court said that the real issue was whether the Council had caused the notice to be received by UKI, and that, in the circumstances of this case, it had.

The other main issue that the Court was asked to consider was whether it mattered that the notice was received by UKI by way of email. The Court referred to previous case authorities where service of legible copies of documents by fax had been accepted as valid.[2] The Court confirmed that there was no good reason for distinguishing transmission by fax from transmission by email, as had occurred here.

Although the decision related to a statutory notice, the Supreme Court's decision may also have relevance to the drafting of notice provisions in legal documents, such as a lease, and this has prompted me to look at some of the aspects of drafting such notice provisions for this article.

It should be remembered that in the absence of an express notice provision in a lease the parties must rely on statutory provisions on governing the service of notices contained in the Companies Act 2006, Law of Property Act 1925 or Landlord and Tenant Act 1927. However, these provisions have their limitations and so service should be dealt with expressly in the lease.[3]

So, what should a notice provision in a lease include? It is suggested that as a minimum it should:

- provide that notices are to be in writing;
- specify the addresses to which notices should be sent, and to whom they should be addressed;
- set out the ways in which notices are, or are not, to be given; and
- deem when a notice is received.

Notices should be in writing

A typical notice clause will provide for notices to be in writing. But what does 'in writing' actually mean? Schedule 1 of the Interpretation Act 1978 provides that unless the contrary intention appears writing 'includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.' Whilst this definition only applies to statutory interpretation, it has value when interpretating a contractual provision. But there is no mention of fax or email, presumably because these were not in common use at the time of the Act. It would seem that both fax and email would now likely be classed as being 'in writing'.[4] In *Bernuth Lines Ltd v High Seas Shipping Ltd*[5] Christopher Clarke J, in the relation to the service of a notice of arbitration by email, said at paragraph 28 that "There is

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[2] *Hastie & Jenkerson v McMahon* [1990] 1 W.L.R. 1575; [1990] 3 WLUK 425; *PNC Telecom Plc v Thomas* [2002] EWHC 2848 (Ch); [2002] 12 WLUK 537.

[3] For a discussion of their limitations, see P. Clark "Notice notices" [2016] 6 Conv. 427.

[4] See, for example, *AET Inc Ltd v Arcadia Petroleum Ltd* [2010] EWCA Civ 713; [2010] 6 WLUK 544; *Jet2.com Ltd v SC Compania Nationala de Transporturi Aeriene Romane Tarom SA* [2012] EWHC 622 (QB); [2012] 3 WLUK 452.

[5] [2005] EWHC 3020 (Comm); [2005] 12 WLUK 681.

no reason why, in this context, delivery of a document by e-mail — a method habitually used by businessmen, lawyers and civil servants — should be regarded as essentially different from communication by post, fax or telex."

Despite this it is suggested that a notice provision should state expressly whether or not email or fax amount to writing. Having said that, where email is expressly excluded, this may still not be sufficient to prevent a party from using email. In *MW Trustees Ltd v Telular Corp*[6] the tenant served a notice by email despite the lease not providing for this method of service. The landlord was subsequently estopped from challenging the validity of the notice or alternatively it had waived the requirement for the notice to be served in the way provided for by the lease.

Addresses and addressees

The clause should set out both the addresses to which notices are to be sent to and to whom they should be addressed. Usually this will be a physical address, for example, the registered office where the relevant party is a company. However, it may be that the parties wish to use an email address instead. The difficulty with this is that email addresses can change more often that postal addresses and so their use is not to be recommended, especially in long leases. This will considered further below.

Consideration should be given as to whether there should be provision for change of address and how this is to be communicated. Where this requirement is optional and one of the parties does not notify the other of a change of address, a notice served in accordance with the clause at the original address may still be valid.[7]

The draftsman should consider whether the address for service is to be mandatory and if it is then they should provide for a change of address to be notified to the other party. Where the clause provides that the address for service is mandatory, service at a different address will be invalid. The issue was considered in the Scottish case of *Capital Land Holdings Ltd v Secretary of State for the Environment*.[8] The lease provided that any notice to the landlord "shall be sent to its registered office". Despite this, the tenant sent a notice to the landlord at one of its places of business which was not its registered office. Whilst it was accepted that the landlord had actually received the notice, the Court of Session held that the notice had not been served in accordance with the lease. The lease provisions were intended to be mandatory and so service at a different address was ineffective.

Methods of giving notices

A notice may be served in a number of ways, such as:

- personally;
- by post;
- by DX;
- by email;
- by fax; or

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[6] [2011] EWHC 104 (Ch); [2011] 1 WLUK 587.
[7] *Zayo Group International Ltd v Ainger* [2017] EWHC 2542 (Comm); [2017] 10 WLUK 335.
[8] 1997 S.C. 109; [1995] 11 WLUK 35.

- by telex.

When drafting a notice clause, the parties should carefully consider the most appropriate means of giving a notice. The method can be either mandatory or permissive. As seen above, if it is mandatory and the requirements are not followed, the notice may be invalid.[9] The *Mannai* principle may however save a notice which has been incorrectly served. In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*[10] Lord Hoffman said:

"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."

On the facts though the House of Lords found that the notices were valid despite containing errors as they were sufficiently clear and unambiguous that a reasonable recipient would be in no reasonable doubt as to how they were intended to operate. This principle has since been considered by the courts in relation to notices served under provisions in a lease.[11] The question of whether the *Mannai* principle will save a notice will depend on the particular facts. It is suggested that if, having sent a notice, the sender becomes aware of an error, they should serve a second notice without prejudice to the argument that the original notice is valid. If it is then decided that the first notice is valid, the second one will be ineffective, and vice versa.

If the method is permissive, then any method of service may suffice provided the notice is received by the recipient. An analogy can be drawn here with *UKI (Kingsway) Limited v Westminster City Council* where the statutory notice was left with a third party who was not authorised to accept receipt and who then scanned and sent it by email to the intended recipient. To avoid being caught by this decision, it is suggested that if the draftsman intends that a particular method of delivery is not to be used, for example email, they should state this expressly in the notice clause.

Personal service

A notice clause may require that a notice is to be served personally. This means service on the recipient personally, not service by the server personally.[12] The notice should be served by a person who can then confirm that they served the notice in accordance with the clause. In *Bottin (International) Investments Ltd v Venson Group Plc*[13] the notice clause required any notice to be 'delivered personally or sent by prepaid recorded delivery to [specified addresses]'. The appellant served a notice by leaving it with the receptionist at the respondent's offices (as had also happened in *UKI (Kingsway) Limited v Westminster City Council*). This was held to be valid service. Personal delivery had to be effected at the address as set out in the agreement. Personal delivery was met by handing the notice had to someone at those offices and so service on the receptionist was sufficient as the receptionist's role was to receive post and other items on behalf of their employer. This decision was later

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[9] *Capital Land Holdings Ltd v Secretary of State for the Environment* 1997 S.C. 109 ; [1995] 11 WLUK 35.
[10] [1997] A.C. 749; [1997] 5 WLUK 402.
[11] See for example *Lancecrest Ltd v Asiwaju* [2005] EWCA Civ 117; [2005] 2 WLUK 268.
[12] Per Lord Bridge and Lord Goff in *Kenneth Allison Ltd (In Liquidation) v AE Limehouse & Co* [1992] A.C. 105; [1991] 10 WLUK 222 at 113 and 124 respectively.
[13] [2004] EWCA Civ 1368; [2004] 10 WLUK 585.

followed in *Ener-G Holdings Plc v Hormell*[14] where the clause provided that a notice "may be served by delivering it personally or by sending it by pre-paid recorded delivery post to each party". A process server delivered a notice to the recipient's home address. He rang the doorbell but no one answered, so he left the notice in the front porch on a table, where the recipient later found it. It was held that the notice had to be served on the recipient personally and so leaving it on the table was not sufficient for it to be served personally.

Postal service

This is probably the most common method of serving notices. The notice clause should specify which of the various postal services are to be used, such as recorded delivery, registered post, first class post and special delivery. These are defined in Schedule 8 of the Postal Services Act 2000 in relation to statutory provisions and whilst these definitions therefore do not specifically apply to lease clauses, in the absence of any other definitions in the lease, it is suggested that they would be applied.

'Recorded delivery' is defined in paragraph 3 to Schedule 8 of the Postal Services Act 2000 as "a postal service which provides for the delivery of the document or other thing by post to be recorded". The current postal service which meets this definition is Royal Mail Signed For. 'Registered post' no longer exists as a separate postal service. However, paragraph 2 to Schedule 8 of the Postal Services Act 2000 provides that a reference to registered post "shall be construed as if it required or (as the case may be) authorised that thing to be sent by a registered post service". A registered post service is a postal service which provides for the registration of postal packets in connection with their transmission by post and for the payment of compensation for any loss or damage.[15] The Royal Mail's Special Delivery Guaranteed service meets this definition as it involves both registration and compensation. Recorded delivery can also satisfy the requirement for registered post.[16]

Document exchange

The Document Exchange (more commonly referred to as the DX) is a private mail network of over 25,000 members across the UK and Republic of Ireland. Each member is given a box number at a local delivery and collection point. If the document being sent is handed in to the sender's local delivery and collection point before 5.00pm, it will be delivered to the addressee's local delivery and collection point by 9.00am the next working day. The DX is therefore a useful and reliable way of sending notices between members but would not assist with delivery to non-members.

E-mail

The risks of email are well known. Sending a document via email is almost like writing it on the back of a postcard and popping it into the mailbox, to be read by every single person who handles it on its journey to its destination. When you click "send" on an email it gets sent through firewalls, ISPs, servers, virus checkers and even data harvesting bots.[17] It is stored, saved, copied and forwarded multiple times without any form of encryption. This means that

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[14] [2012] EWCA Civ 1059; [2012] 7 WLUK 995.

[15] Section 125, Postal Services Act 2000.

[16] Section 1(1), Recorded delivery Service Act 1962.

[17] Data harvesting is a process where data is automatically collected from websites, emails, etc. and is usually carried out by a 'bot' which is just another name for software that runs automated tasks.

email can very easily become compromised and the important data within it can be read and downloaded by unscrupulous third parties. Other issues with email include the email arriving but being unintelligible, or it not arriving or being late because of problems with servers, spam filters or having an incorrect address. It is therefore suggested that the parties should not rely on email as a method of sending notices and it should be expressly excluded.

Fax

Whilst the use of fax has reduced since the introduction of emails, it is a much more secure method of serving a document than email since it involves sending the document through the telephone network. Hacking this would require direct access to the telephone line being used, and even if this were possible, the fax would appear as nothing but noise. Notwithstanding this, there are risks in using fax, for example, the fax may not be sent to the correct number, it may not be printed out by the recipient, or it may be collected by the wrong person despite being sent to the correct number.

A fax is deemed to have been received when the last page of the fax is received by the recipient's fax machine, whether or not the fax has been printed out, delivered to the relevant person or stored in the fax machine's memory.[18] The notice clause should therefore set out when the document is deemed to have been received and also what evidence of sending it is required.

Like email, the parties should consider whether to expressly exclude delivery by fax.

Telex

Telex was a teleprinter service which had the advantage that it allowed the sending of a message and its receipt to be confirmed with a high degree of certainty. Despite this, telex was superseded by fax and email and was finally discontinued by British Telecom in 2008.[19] It should therefore no longer be referred to in notice clauses. Interestingly though, on a slightly different topic, the Law Society's formulae for exchanging contracts by telephone still refers to telex as a method for sending notifications when exchanging.

Deeming provision

The clause should specify when a notice is received, and may specify different times of receipt for different methods of service. If the clause is silent on this point then it would seem that a notice is served on receipt.[20] The other issue where the lease is silent is that the sender will have to prove that the recipient actually received the notice. It appears that there is no rule at common law that service takes place when a notice is delivered.[21]

Where a notice is served personally then delivery occurs when the notice is handed over. The deliverer can confirm that delivery took place and so there is not real need for a deeming provision. Delivery will take place at the time of delivery and so may occur before the notice is seen by the person who needs to see it. If the notice clause includes a deeming provision

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[18] *Anson v Trump* [1998] 3 All ER 331; [1998] 4 WLUK 153.

[19] Though users were able to transfer to Swiss Telex if they wished to continue to use telex.

[20] See, for example, *Hogg v Brooks* (1885) 15 Q.B.D. 256; [1885] 6 WLUK 68; *Wilderbrook Ltd v Olowu* [2005] EWCA Civ 1361; [2005] 11 WLUK 459.

[21] *Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood* [2018] UKSC 22; [2018] 4 WLUK 425.

for personal delivery then it should not require a signature by the recipient, as for example, there would be no-one to sign if the notice is put through a letter box.

If a notice is posted, then the clause should specify when the notice is received. It is usual to state that delivery will only take place on a working day during business hours. Where a statute authorises or requires a notice to be served by post and contains no deeming provision, the Interpretation Act 1978, s.7 will apply. However this does not apply where a notice is served under a contractual provision.

If the parties choose to allow notice to be sent by email then the question of when the email is delivered can be problematic. Does this occur when the email reaches the recipient's email provider, when it arrives in the recipient's inbox or when it is read? When sending an email many of us request a delivery receipt or a read receipt or both. But these do not mean that a recipient has actually read the email, and can in practice be blocked by the recipient. This reinforces the argument against using email as method of service.

Suggested form of notice clause

The following is a suggested form of notice clause which can be adapted for inclusion in a lease:

X.1 Any notice given under or in connection with this lease must be in writing and sent by pre-paid first class post or special delivery to or otherwise delivered to or left at the address of the recipient under clause X.2 or to any other address in the United Kingdom that the recipient has specified as its address for service by giving not less than ten working days'[22] notice under this clause X.
X.2.1 A notice served on a company or limited liability partnership or limited partnership registered in the United Kingdom must be served at its registered office.
X.2.2 Anyone else must be served:
X.2.2.1 in the case of the landlord, at the address shown in this lease or at any address specified in a notice given by the landlord to the tenant;
X.2.2.2 in the case of the tenant, at the premises;
X.2.2.3 in the case of a guarantor, at the address of that party set out in this lease or in the deed or document under which they gave the guarantee; and
X.2.2.4 in respect of any other party, at their last known address in the United Kingdom.
X.2.3 A notice given will be treated as served on the second working day after the date of posting if sent by pre-paid first class post or special delivery or at the time the notice is delivered to or left at the recipient's address if delivered to or left at that address.
X.2.4 If a notice is treated as served on a day that is not a working day or after 5.00pm on a working day it will be treated as served at 9.00am on the immediately following working day.
X.2.5 Service of a notice by fax or e-mail is not a valid form of service under this lease.

[22] The lease should contain a definition of working day, for example "A working day is any day which is not a Saturday, a Sunday, a bank holiday or a public holiday in England and Wales".