UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT - service charges – consultation requirements for qualifying works – failure to serve "public notice" requirement in time – application for dispensation – prejudice to tenants – appeal against LVT's refusal of dispensation allowed – Landlord and Tenant* Act 1985 *s20, 20ZA - The Service Charge (Consultation Requirements) (England) Regulations 2003 paragraph 1(2)(d) of Schedule 2

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE LONDON LEASEHOLD VALUATION TRIBUNAL

BETWEEN

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF NEWHAM — **Appellant**

and

MR H HANNAN, MRS A NESSA AND OTHERS — **Respondents**

Re: Various tall blocks in the London Borough of Newham

Before: His Honour Judge Gerald

Sitting at: 43-45 Bedford Square, London WC1B 3AS on 28 September 2011

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The following cases are referred to in this decision:
Daejan Investments Limited v Jack Benson and others (LT) LRX/148/2008
Daejan Investments Limited v Jack Benson and others (CA) [2011] EWCA Civ 38
Eltham Properties Limited v Kenny and others LRX/161/2006
LB of Camden v The Leaseholders of 37 flats at 30-40 Grafton Way LRX/185/2006

DECISION

Introduction

1. This is an appeal against the decision ("the Decision") of the Leasehold Valuation Tribunal ("LVT") made on 15th September 2009 refusing the Appellant's application dated 21st July 2007 ("the Application") for dispensation of with the consultation requirements of paragraph 1(2)(d) of Schedule 2 to The Service Charge (Consultation Requirements) (England) Regulations 2003 ("the Regulations") pursuant to section 20ZA of the 1985 Landlord and Tenant Act ("the 1985 Act").

2. The determination took place without an oral hearing and was based solely upon the various written Statements of Case and exhibited documentary evidence. Neither the Appellant nor the Respondents submitted any skeleton arguments or authorities to the LVT.

3. Before this Tribunal, the Appellant was represented by Counsel. The Respondents, who had filed a Statement of Case settled by Counsel, had hoped to be represented by Counsel under the *pro bono* scheme but, unfortunately, he was unavailable on the day of the hearing. Instead the Respondents were ably represented, with the leave of the Tribunal, by Mr Beville who is a resident of the City of Westminster but plainly well-versed in these sort of matters. No application was made to the Tribunal on the day of the hearing to adjourn.

Facts before the LVT

4. The Application was to dispense with the consultation requirement imposed by section 20 of the 1985 Act and paragraph 1(2)(d) of Schedule 2 to the Regulations in relation to three qualifying long term agreements ("QLTAs") to carry out various buildings works to 71 tall buildings within the London Borough of Newham.

5. The factual background to the Application is brief. On 21st June 2006, the Appellant advertised three proposed contracts for building works in the Official Journal of the European Union ("OJ"). The deadline for submission by contractors of a Pre-Qualification Questionnaire was 1st August 2006.

6. On 21st September 2006 a Notice of Intention to enter into QLTAs in respect of the building works was served on all relevant tenants in the borough. This allowed the tenants a 30 day period within which to make observations on "the relevant works." There were only two responses: one asking "what does the Notice of Intention mean", the other observing "this is a general notice covering all works but does not address specific works and cost to my property".

7. The short listing of contractors and the issue of Invitation to Tender documentation was completed in April 2007. The Invitation to Tender documentation was therefore only finalised *after* expiry of the 30 day consultation period following service of the Notice of Intention. 25 contractors responded to the OJ advertisements. 10 were invited to tender in April 2007. Nine responded.

8. On 6th September 2007, a Notification of Landlord's Proposal to enter into QLTAs in respect of the building works was served on all tenants, which identified the three contractors to whom it was intended to let the contracts. This allowed the tenants a 30 day period within which to make observations on the proposal – by 6th October 2007. The Application states that QLTAs were entered into with those three contractors "with effect from" 30th September 2007.

9. At some stage, the Appellant realised that the Regulations had been breached because the Notice of Intention had been served *after* notice of the contract had been published in the OJ whereas it should have been the other way around as required by paragraph 1(2)(d) of Schedule 2 to the Regulations.

10. The Appellant therefore applied on 21st July 2010 for dispensation of this requirement. The Application concludes by submitting "that it would be reasonable in all of the circumstances to [dispense with the paragraph 1(2)(d) requirement] as no prejudice will occur to the Respondent by such dispensation."

11. Twenty tenants replied objecting to the Application on various grounds. Many were *pro forma* objections, some made general assertions of prejudice but none descended into any particularity relating to the "public notice" point or explained why they had been prejudiced by the fact that the notice had already been published in the OJ at the time of the Notice of Intention.

Post-Decision developments

12. At the time of the Decision, works had been completed or started in relation to 13 of the 71 tall buildings. As a result of the Decision, I was informed that the Appellant effectively abandoned the QLTAs in relation to the other 58 tall buildings and has since gone through the whole statutory consultation procedure again.

13. The practical position, therefore, is that this Appeal will only affect those 13 tall buildings and will affect only one of the 20 Respondents as it is only Mrs Buksh whose home is within one of those buildings. All other objectors are tenants of the other 58 tall buildings. The Appellant has also stated that it will not be seeking recovery of any of the costs related to the Application or this appeal *via* the service charges provisions of the leases.

14. The other point relates to the Notification of Landlord's Proposal. Counsel for the Appellant accepted that, on the basis of the information before the LVT, it would appear that the 30 day consultation period had been curtailed by six days as the QLTAs were entered into "with effect from" 30th September 2007 which, if correct, would require a further application for dispensation under section 20ZA of the 1985 Act.

15. However, without objection from the Respondents, the Appellant adduced evidence which indicated that what that somewhat Delphic phrase "with effect from" meant was that the QLTAs were signed sometime *after* the 6th October 2007 but had a contractual provision that they take effect from 30th September 2007 so that there had in fact been no further breach of the Regulations.

16. This is not relevant to the Decision because the LVT proceeded on the footing that there was no other breach of the Regulations. It would therefore only be relevant if I were to allow the appeal, in which case I could take this into account if relevant.

The Decision

17. The substance of the Decision is set out in two paragraphs:

> "8. Section 20ZA gives a Tribunal the discretion to grant an application to dispense with the statutory consultation requirements under s20 of the Act where it is reasonable to do so. There is no statutory definition of what amounts to reasonableness. However, it is incumbent on a Tribunal to have regard to all the circumstances of a case in the exercise of this discretion.
>
> "9. Having regard to the respective statements of case and other evidence before it, the Tribunal refuses to grant this application for the following reasons:
>
>> "(a) Even though the Applicant submits that the (admitted) failure to comply with paragraph 1(2)(d) of Schedule 2 of the Regulations is minor, the Regulations are highly prescriptive and do not allow for any breaches minor or otherwise.
>>
>> "(b) The Applicant is a large public landlord and has the benefit of professional expertise. It has a duty of care to ensure that it (*sic*) tenants are properly consulted in accordance with the relevant statutory requirements and it failed to do so.
>>
>> "(c) That only a small number of tall blocks have had works carried out and there is nothing to prevent the Applicant from carrying out the correct consultation procedure in relation to the QLTA's (*sic*).
>>
>> "(d) No explanation was given by the Applicant for the delay of approximately two years before making this application. Any such application has, in the Tribunal's view, to be made promptly and the delay in this instance was inordinate."

Grounds of appeal

18. Although the LVT in broad terms identified the appropriate test, the Appellant submitted that it had erred in principle by not considering the question of prejudice to the tenants alternatively had omitted material circumstances (prejudice) and taken irrelevant factors out of account (the four stated reasons) such that its Decision was clearly wrong.

The regulatory framework

19. Where local authorities intend to enter into QLTAs exceeding certain thresholds, presently £3.9 million but somewhat lower in 2006, they must publish a notice in the OJ and comply with the relevant statutory regime which is directed at ensuring transparency and competitive quotes ("Public Procurement Regulations").

20. Where the works fall within the consultation requirements of section 20 of the 1985 Act, a slightly different consultation regime is imposed by Schedule 2 to the Regulations which takes into account the fact that a separate regulatory procurement framework is engaged, which only applies to public bodies not private landlords. The main differences are that the authority is not to invite tenants to nominate contractors and only one proposal needs to be presented to the tenants.

21. There is a four stage process under Schedule 2. In stage one, the authority must give written notice of intention ("the Notice of Intention") to enter into the QLTA which must set out in general terms the goods or services to be provided or the works to be carried out under the QLTA ("the relevant matters"). The tenants have 30 days within which to make observations only on "the relevant matters". To address the fact that tenants are not invited to nominate contractors, paragraph 1(2)(d) provides that the Notice of Intention must

> "state that the reason why the landlord is not inviting recipients of the notice to nominate persons from whom he should try to obtain an estimate for the relevant matters is that public notice of the relevant matters *is to be* given". (Emphasis supplied.

"Public notice" as being "notice published in the Official Journal of the European Union pursuant to the Public Works Contracts Regulations 1991, the Public Services Contracts Regulations 1993 or the public Supply of Contracts Regulations 1995, which I have collectively referred to as the Public Procurement Regulations.

22. The 21st September 2006 Notice of Intention apparently complies with these provisions as it sets out the relevant works and also explains:

> "Reasons why the landlord is not inviting nomination from leaseholders"

"The value of the proposed Agreements is above the specified financial threshold and therefore the law requires us to issue a public notice in the Official Journal of the European Union to advertise the Agreements."

"For this reason the landlord is not inviting you to nominate persons from whom the landlord should try to obtain estimates for the carrying out of the Works/Services under the Agreement."

23. As already explained, it was not in fact compliant because the OJ advert had already been published whereas paragraph 1(2)(d) requires it 'to be' given subsequent to the Notice of Intention.

24. In stage two, the authority must prepare a proposal in respect of a proposed QLTA which identifies the name(s) of the contracting parties, the relevant works, their duration and a summary of any observations received from tenants in response to the Notice of Intention.

25. In the third stage, the authority must give Notification of Landlord's Proposal to the tenants and invite them to make any written observations within 30 days in relation to the proposal – which is slightly wider in ambit than the stage one consultation as observations are permitted in relation to the proposed contractor(s) as well as the relevant matters. As I have said, there was no response from any tenant to the 6th November 2007 this Notification.

26. There is then the fourth stage in which the authority must consider any observations made in relation to the Notification of Landlord's Proposal and having done so may let the contract. Self-evidently, contracts can not be let until at least after expiry of the 30 days consultation period allowed by the Notification of Landlord's Proposal.

Appellant's principle argument

27. The Appellant's principle submission is that the LVT failed to consider and take into account whether non-compliance had caused any prejudice to the tenants, that being one of the most important factors to take into account. Reliance was placed on the following passages from *LB of Camden v The Leaseholders of 37 flats at 30-40 Grafton Way* LRX/185/2006:

"32. Any process of consultation consists of giving information, inviting observations and taking those observations into account, and this is what paragraphs 1 to 6 make provision for. Information has to be given to tenants at three stages – when there is an intention to carry out works, when estimates have been obtained and when a contract has been entered into. Observations from tenants are to be invited at the first two stages. Those observations must be taken into account and the landlord's response to them must be given. This is the scheme of the provisions, which are designed to protect the interests of tenants;

> and whether it is reasonable to dispense with any particular requirements in an individual case must be considered in relation to the scheme of the provisions and their purpose.
>
> "33. The principal consideration for the purpose of any decision on retrospective dispensation must …. be whether any significant prejudice has been suffered by a tenant as a consequence of the landlord's failure to comply with the requirement or requirements in question. An omission may not prejudice a tenant if it is small, or if, through material made available in another context and the opportunity to comment upon it, it is rendered insignificant. Whether an omission does cause significant prejudice needs to be considered in all the circumstances. If significant prejudice has been caused we cannot see that it could ever be appropriate to grant dispensation.

28. When considering the issue of prejudice, the first question to consider is the purpose of the statutory provision, or the opportunity it was intended to afford the tenants, and then to ask whether the tenants have been deprived of that opportunity by the error. Reliance was also placed on *Daejan Investments Limited v Jack Benson* (LT) LRX/148/2008:

> "40. …..The power given to the LVT is to dispense with the consultation requirements, not with the statutory consequences of non-compliance. The principal focus, therefore, must be on the scheme and purpose of the regulations themselves. If Parliament had intended to give a power to remove or mitigate the financial consequences, it could easily have done so……The potential effects – draconian on one side and windfall on the other – are an intrinsic part of the legislative scheme. It is not open to the tribunal to rewrite it……
>
> "41. ….the tribunal should keep in mind that their purpose is to encourage practical co-operation between the parties on matters of substance, not to create an obstacle race. If the non-compliance has not detracted significantly from the purpose of the regulations and has caused no significant prejudice, there will normally be no reason to refuse dispensation….."

29. In short, "significant prejudice to the tenants is a consideration of the first importance in exercising the dispensatory discretion under s.20ZA(1)": *per* Lord Justice Gross *Daejan Investments Limited v Jack Benson and others* [2011] EWCA Civ 38 at para 72 where the citations were approved together with the following passages from *Eltham Properties Limited v Kenny and others* LRX/161/2006.

> "29. The LVT did not refer in its decision to the fact that at no time had the respondents identified the procedural defect referred to, despite having been asked to do so in a letter from the appellant dated 2 March 2006 to the RPTS. No evidence was produced by the respondents to show how they had been prejudiced by the defect. They merely asserted that they had been. The LVT did not make such a finding… The LVT concluded that it was unlikely that compliance with the Regulations would have alerted at least one of the respondents to the desirability of another quotation being obtained… Although

the respondents made observations on the proposed works in accordance with the invitation included in the section 20 notice none of them raised the defect in that notice.

> "30. It is reasonable to give dispensation from the consultation requirements where there has been a minor breach of procedure that has not prejudiced the tenants. I consider that the defective section 20 notice represents, in all the circumstances of this appeal, such a minor breach of procedure and that there is no evidence that the respondents were prejudiced or disadvantaged as a result.."

30. The purpose of paragraph 1(2)(d), it was submitted, was simply to explain why the tenants can not nominate a contractor. It was a simple statement of fact, and nothing more. It was not even necessary to expressly refer to notice being published in the OJ: it was permissible for the authority to simply repeat the paragraph 1(2)(d) wording and say "public notice is to be given" . I pause to observe that if that latter point is right, it would mean even less to a recipient unless armed with the Regulation's definition of "public notice", but fortunately the Appellant did not in fact adopt such a restricted interpretation as its Notice of Intention did expressly refer to the OJ so that the tenants were at least pointed in the right direction.

31. The Appellant went on to submit that no prejudice had been caused because not only had no tenant raised any query in relation to the publication in the OJ, neither of the two objections related to nomination of contractors and no tenant made any observation on the Notification of Proposal or have identified any relevant prejudice. Furthermore, the tenants were not intended to be involved in the tendering process because the Public Procurement Regulations operated which were intended to promote competition and transparency.

Discussion, and decision

32. In light of authority cited above, it is clear that an important consideration is the degree of prejudice caused by the breach: what opportunity has the tenant lost, and has its loss caused the tenant significant prejudice? Whilst neither *Grafton* nor *Daejan* nor *Eltham* concern the Schedule 2 "public notice" consultation procedure, in my view the same principles apply to consideration of what factors should be taken into account when exercising a discretion to dispense with any part of that Schedule.

33. Where an LVT has not (as here) even addressed its mind to the issue of prejudice, it must follow that it has not taken considered it at all and has therefore erred in principle. As already noted, it should be borne in mind that the Application expressly submitted that there had been no prejudice to the tenants by the breach. Even absent such a submission, it was still incumbent upon the LVT to consider and take into account relevant principles and key factors, most notably, the issue of prejudice.

34. The Decision should therefore be set aside, and the question considered afresh by this Tribunal, it of course not necessarily following that this Tribunal will reach a different conclusion.

35. In considering the issue of prejudice, the first question to consider is what opportunity (if any) the provision of the information prescribed by paragraph 1(2)(d) was intended to convey. I am unable to accept the Appellant's submission that it was merely to convey the factual reason why tenants were not being invited to nominate contractors. Had Parliament intended that tenants be wholly excluded from the tendering process (by which I mean proposing contractors), the Schedule would have been drawn differently.

36. In my view, one must stand back and consider Schedule 2 in the broader context of the Regulations and consultation provisions of section 20 of the 1985 Act. One of the purposes of the consultation provisions is to give tenants the opportunity to be engaged not only in the nature and scope of the proposed works to the buildings in which their homes are situated and which they must pay for but also in the process of selection of the contractor by nominating their own contractor(s) whom the landlord must then try and obtain estimates from.

37. Viewed in that context, in my view the intent of Schedule 2 is to preserve the consultation process and the tenants' involvement so far as permitted by Public Procurement Regulations. The purpose of the paragraph 1(2)(d) is to convey information to the tenant not only as to the reason why nominations are not being invited but also as to where the tenants can, should they be so minded, view the notice to be published, namely, the OJ. In that respect, I reject the Appellant's submission that it was sufficient merely to refer to "public notice" as that would be meaningless to the recipient tenant. What is required is that the OJ be expressly referred to so that the tenant is at least signposted to the right journal.

38. Why then would a tenant be directed to the OJ? Two reasons, it seems to me. First, so he can look at the advert and satisfy himself that it is consistent with the ambit of the relevant works summarised in the Notice of Intention he has received from the authority. Secondly, to encourage a suitable contractor (who would have to be Public Procurement-compliant) to respond to the advert. Whilst tenants may not nominate contractors to the authority because the authority itself may not do so because it must advertise in the OJ and follow the Public Procurement Regulations, there is nothing to suppose that tenants may not encourage a suitable contractor to respond to an advert and in that way remain engage to an albeit limited and removed extent in the selection and procurement process.

39. That said, it must be borne firmly in mind that this is quite different from the usual tenant's right to nominate a contractor: it is no such right, but a mere ability to identify and then encourage a Public Procurement-compliant contractor to respond to an OJ advert which, in reality, a tenant will rarely if ever utilise. Even if utilised, it would not follow that such a contractor would respond to the advert and if it did so that it would ultimately be invited to tender on the contract itself and, if it was, that it would be

awarded the contract. The Public procurement Regulations are there to promote transparency and competition so provide tenants with a form of protection which is not usually available to them.

40. The second question is what opportunity did the Respondents lose by the OJ advert having pre-dated that Notice of Intention? The simple answer, in this case, is nothing: not one tenant raised any question relating to the OJ advert or at any time made any observation on or expressed any desire in being involved in selection of the contractors. Although represented by Mr Beville, Mrs Buksh read out a statement and, when asked, very frankly accepted that she had suffered no prejudice at all from this error. Mr Mclean, who also spoke, also accepted that he had suffered no prejudice.

41. Mr Beville was of course constrained by those answers and also by the fact that at no stage had any tenant stated that they had lost any opportunity from the fact that the OJ advert pre-dated the Notice of Intention. This is an unusual case in that the correct notice had been given, just in the wrong order. Whilst it is sometimes a matter of speculation as to what the tenants might have done had they been given the proper notice (see for example *Grafton* at paragraph 98 referred to in *Daejan* (CA) at paragraph 34 and also at 47 and 82), this is not one of those cases because it is known that they did nothing.

42. It is quite impossible to suppose, and was not suggested, that the tenants would have done anything differently had the advert been published after the Notice of Intention. Had there been evidence that one or more of the tenants had in fact been galvanised into action by the Notice of Intention but was mislead as the OJ advert was long since past he might, then, depending on the facts, it might have been possible to show some sort of prejudice – always bearing in mind that the opportunity afforded by paragraph 1(2)(d) is of a very narrow and perhaps nebulous nature. But that is not the case here.

43. Mr Beville, and also Mr Mclean, submitted that the law was there to be observed and even though no prejudice had been suffered by the OJ advert pre-dating the Notice of Intention dispensation should nonetheless be refused. Whilst it is of course right that the law is there to be observed, where the law provides the court with a discretion to dispense with a breach the relevant question is not whether there has been a breach but what if any adverse consequences flow from that breach to these tenants.

44. Mr Beville also submitted that the fact that the OJ advert had pre-dated the Notice of Intention meant that the whole process was flawed as the Appellant could only have finalised the scope of the relevant works and advertised in the OJ after expiry of the 30 day consultation process after the Notice of Intention. This argument had not previously been deployed. It misunderstands the purpose of the OJ advert: it was to elicit responses to Pre-Qualification Questionnaire. They, or only some of them, were only invited to tender in April 2007, after the 30 day period had expired. Furthermore, no tenant had made any relevant observations in response to the Notice of Intention so again even if Mr Beville was right not prejudice flows from it.

45. In conclusion, in my view and in the circumstances of this case, whilst the breach was not a mere technicality the opportunity it afforded to the tenants was very narrow in scope and, as a matter of fact, caused no prejudice to any of the Respondents. It follows that I allow the appeal and dispensation should be granted.

46. That is sufficient to dispose of this appeal. However, I will briefly deal with the other three reasons for the Decision which are also attacked by the Appellant.

47. The Appellant submitted that the LVT applied a higher standard because the Appellant is a large public landlord and has the benefit of professional expertise and owed a duty of care to its tenants. Mr Beville submitted that this was quite right, and local authorities should be tested by a higher standard and should not make mistakes even though, he accepted in this case there had been simple human error. In my judgment, this is wrong in principle: see in particular paragraph 66 and 67 of *Daejan* (CA).

48. The Appellant submitted that whilst it was a relevant factor that the correct procedure could be carried in respect of the 58 tall blocks who had had no work carried out to them, that was not a reason for refusing dispensation for a minor breach where there was no prejudice. As a general proposition, I do not find this to be an attractive argument because it runs perilously close to undermining the consultation process where the breach can be cured in respect of unexecuted works even where in the context of this case the breach has caused no prejudice.

49. Rather, in my view, the better approach is that the applicant authority should either confine its application for dispensation to those blocks where works have already started or been completed or should provide clear evidence as to why it would be costly or impractical or cause undue delay or any other factors to justify why essentially prospective dispensation should be granted in respect of the other 58 blocks, as distinct from retrospective dispensation for the 13 blocks.

50. Faced with the Application in its original (and present) form, it would have been appropriate for the LVT to enquire whether the authority was proposing to re-consult tenants in respect of the remaining 58 blocks; if so would it be seeking to amend the Application to confine it to the 13 blocks; if not so, why not. The Respondents should then be given an opportunity to make observations on the Applicant's response. The LVT would then be furnished with sufficient information to conclude whether dispensation.

51. In making those comments, I have in mind the observations made elsewhere that the Regulations are not intended as an obstacle course in which one of the rules is "one strike and you're out" with "winner takes (or avoids) all" consequences. Rather, they are intended to facilitate and promote co-operation on the matters which really are in issue between the parties by providing a framework for consultation.

52. This is not to suggest that the LVT descends into the arena as it must not do so and must deal with applications in the form in which they are made. However, the LVT must equip itself with information pertinent to the exercise of its discretion which, when paper applications and determinations are being made, may sometime call for additional enquiries to be made to do justice to the case.

53. Without that information it is in my judgment difficult for the LVT to have reached the decision it did. Having said that, I can well see why the LVT took into account the extant works but it may well be that it reached the wrong decision because it again did not take into account the issue of prejudice. Even in respect of the other 58 blocks, it is difficult to see that there was any prejudice because the tenants had not reacted to or made any observations on the Notices which they were served.

54. If they had not responded in the past, albeit in ignorance of the fact that the OJ advert had already been placed, it is difficult to see why they would be likely to in the future – especially given the fairly hypothetical nature of the opportunity made available by being told that notice would be published in the OJ. Given the conclusion I have reached and the post-Decision developments, it is not necessary for me to reach a concluded view on this aspect of the appeal.

55. Finally, the Appellant submits that the LVT was wrong to find that there had been any material delay in the making of the Application and in any event any culpable delay was irrelevant because it caused no prejudice to the Respondents. I agree. Not only was the LVT wrong to conclude that it had taken two years *from the time of discovery of the breach* (that being the relevant starting point), the evidence indicates that it was made promptly, within a few months of discovery, and fundamentally no prejudice was caused by it.

56. For those reasons I allow the appeal and grant the dispensation sought.

Dated 7 October 2011

His Honour Judge Gerald