UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – Landlord and Tenant Act 1985 section 20ZA - application to dispense with consultation requirements – whether LVT entitled to assume prejudice

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

BETWEEN **STENAU PROPERTIES LIMITED** **Applicants**

and

KARIN LEEK **Respondents**
KLAUS RECKLING
AND OTHERS

Re: Crystal View Court, Winlaton Road, Bromley, Kent, BR1 5PX

Before: His Honour Judge Mole QC

Sitting at 43-45 Bedford Square, London WC1B 3AS on 23 November 2011

Appearances:
Mr Christopher Carr of Counsel for the applicants
Mr Klaus Reckling with the permission of the Tribunal for the respondents.

The following cases are referred to in this decision:
Daejan Investments Ltd v Benson & Ors [2011] EWCA Civ 38
Camden LBC v The Leaseholders of 37 Flats at 30-40 Grafton Way LRX/185/2006 unreported ("Grafton")
Eltham Properties Limited v Kenny LRX/161/2006

DECISION

Facts

1. This matter concerns a block of flats known as Crystal View Court, Winlaton Road, Bromley, Kent. It is a three-storey, 'L' shaped, post-war block, faced in brick with a flat roof. It contains 18 flats.

2. The applicant, Stenau Properties Ltd is the landlord, and the respondents Ms Karin Leek and Mr Klaus Reckling are long leaseholders of flats 16 and 3 respectively and represent the remaining leaseholders. At the hearing before me the applicant was represented by Mr Christopher Carr of counsel. Mr Reckling represented the respondents, with the assistance of Ms Leek, and put before the Tribunal a skeleton argument on the law written on behalf of the respondents by Mr Michael Hyde of counsel, acting *pro bono publico*.

3. The respondents made an application to LVT under section 27A of the Landlord and Tenant Act 1985 for a determination of their liability to pay the service charge expenditure claimed or estimated. The decision of the LVT in that matter is dated 8th of March 2010. While the LVT found that the service charges were justified and reasonable, it noted that it was admitted by the landlord that it had not carried out the statutory consultation required by section 20 of the Act. The LVT felt that this left it bound to find that the maximum contribution it could recover from the leaseholders was £250, unless and until the landlord succeeded in an application seeking dispensation.

4. This decision prompted the landlord to make a further application to the LVT under section 20ZA for a determination that the consultation requirements could be dispensed with.

5. In their decision dated 26 of October 2010 on that application the LVT considered the consultation process in detail.

6. After recording the evidence of Mr Dulley for the applicants and Ms Leek and Mr Reckling for the respondents the LVT set out their submissions. In paragraph 43 it was noted that:

> "The Respondents in their submission comment on the failure to consult in great detail with reference to the legal cases. Whilst they do not set out the specific prejudice which was suffered by them as a result they state "*to trying to gauge or measure the extent of any prejudice is going to raise so many difficult questions as to make the job impossible and it is going too far. If Parliament had meant that to be done, it would have said so in clear terms."*

7. The LVT reproduced part of Mr Carr's written submissions on behalf of the applicants developing his submission that the Respondents were subjected to little if any prejudice. Mr Carr had said:

> *"It is possible for the LVT to speculate on what might have happened if the proper consultation procedure had been followed-and A invites the LVT to do so in order to determine whether Rs have suffered any prejudice by reason of the failure to comply with the consultation provisions. The obvious and primary sources of prejudice to the leaseholders are as follows:*
>
> *a. Rs could show that the works could have been carried out cheaper and better by an alternative contractor. Rs have failed to adduce any such evidence.*
>
> *b. If Rs could show that they would have obtained legal advice or the advice of a surveyor, they could suggest that they were prejudiced. As discussed above, Rs have failed to adduce any such evidence.*
>
> *c. Rs could show that they have been prejudiced by PD's failure to give them the full 60-day period prescribed by the consultation regulations to make representations. However, there is no evidence to suggest that they have been so prejudiced.*
>
> *It is submitted that no evidence has been produced whatsoever by Rs to demonstrate that they have been prejudiced and A contends that they shall inform the principal reason why the LVT should grant dispensation to A. Further, 10 out of 18 of the leaseholders attended the meeting on 15/6/07, representing a majority of the leaseholders. Conversely, the financial implications for A of the LVT not granting the dispensation would be very serious. A is a small landlord and simply does not have the resources to pay such a large sum of money."*

8. The LVT's decision began by saying that they had noted the submissions made to it and the relevant law and continued:

> "48.The Tribunal noted that an initial proposal as set out in the latter dated May 2007, in the first paragraph stated *"I have, at last, all but one of the quotations I have sought for works to Crystal View Court..."* at the hearing the tribunal considered this correspondence with some surprise, as it appeared to the Tribunal that this was the middle of a dialogue concerning the major works rather than the beginning.
>
> 49.Mr Carr pointed out to the Tribunal at some length that there was evidence that Mr Dulley was aware of the need to consult and had a positive approach to consultation. He cited a letter sent in 2006, in which Mr Dulley had referred to the consultation requirements, and placed reliance upon the meeting held on 15th of July 2007. By contrast the Respondents referred to the fact that they only had 24 hours notice of the meeting, and the fact that the compliments slip notifying them of the meeting had the wrong date.
>
> 50.The Tribunal also noted with some concern the correspondence, some of which had only been partially disclosed which tended to support the leaseholders' assertions, that there had been no real attempt to consult with them as required by the consultation regulations.

51.TheTribunal noted that there is a letter dated the 4 July 2006, which was partially disclosed in the Applicant's bundle. The Tribunal were troubled to note that the second page of this letter had not been disclosed, in the penultimate paragraph of the letter Mr Dulley stated *"I am sending the text of this letter to those leaseholders who have paid all or part of the cost of redecoration to keep them advised as to the situation. If the project is abandoned I may well advise those leaseholders who have paid all or part of the sums demanded the flat number of the leaseholders who have not paid anything..."*

52.The Respondents stated that the manner in which the proposals were put them led them to believe that they had no choice. Whilst it is clear that even after consultation, leaseholders may not be free to choose to abandon the proposed scheme of work, consultation is by its very nature supposed to be open to the influence of the "Consultee", and should demonstrate a willingness to incorporate the suggestions and reasonable preferences of the leaseholders who are after all the paying parties.

53.The Tribunal also noted in a letter dated 21st of January 2008 written to Mr Scott Thornton of Architectural Decorators that amongst other matters Mr Dulley wrote-: *"As you know I have been reminded that you were to have a Foreman-in-Charge who shall remain on site for the duration of the works (some people have time on their hands and read Specifications)..."*

54.There were further remarks concerning the vigilance of one of the leaseholders, and whilst the Tribunal has not given these remarks undue weight they do tend to support the assertions of the leaseholders, that the Applicant's managing agent, although understanding that consultation was required by the law, did not willingly embrace the suggestions made by them as leaseholders, and in reality there was really little attempt to consult with them. This is perhaps best illustrated by the fact that the technical specification for the concrete repairs was forwarded to the leaseholders, without any analysis. Rather than assisting this hampered any efforts for meaningful understanding as to the requirements for and cost of the proposed work.

55.The Tribunal were assisted by the Land's Tribunal in the case of Grafton Way as helpfully set out in *Daejan Investment Ltd and Various Leaseholders LT/LRX/148/2007* at paragraph 40 of the decision which stated *"Having considered the arguments, however, we see no reason to depart from the approach taken in Grafton, which in our view is supported by the statutory language. 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, but we would have expected it to have been done in a way which avoided an 'all or nothing' result. … The potential effects -- draconian on one side and a windfall on the other -- are an intrinsic part of the legislative scheme. It is not open to the Tribunal to rewrite it."*

56.The Tribunal are also aware that the purpose of section 20 consultation is was not to create "an obstacle race... and that if non-compliance had not detracted significantly from the purpose of the regulations and has caused no significant prejudice, there will normally be no reason to refuse dispensation..." *Daejan* and that this was the position that Mr Carr urged the Tribunal to adopt. Having considered all of the evidence in this case, however, it is clear that although there was a meeting and letters that there was a

> substantial failure to engage in consultation as required by section 20 of the Landlord and Tenant Act. No good reason has been put forward to explain the failure to consult. Given this the Tribunal determines that the application ought to be refused."

9. Stenau properties Ltd applied for leave to appeal on various grounds, including,in effect, that the tribunal was not justified in reaching its conclusion on the evidence before it. The LVT briefly recited its view of the facts on the basis of the documents it had considered and refused leave on those grounds. However, the Tribunal went on to say in paragraph 1(v) of its decision dated 14th of December 2010 that -

> "the applicant in paragraph 13 stated that the LVT did not set out the prejudice to the Respondent by the failure to consult. This is correct. The Tribunal in paragraph 56 noted that "*... having considered all of the evidence in this case, however, it is clear that although there was a meeting and letters there was a substantial failure to engage in consultation as required by section 20 of the Landlord and Tenant act. No good reason has been put forward to explain the failure to consult..."*
>
> " 2.The Tribunal accordingly give leave on this narrow point --: that is whether the Tribunal were wrong in not considering the issue of prejudice and ought to have considered whether the failure to comply must have adversely affected the lessees in some way. *"... That is it must have prejudiced them..."*

I observe that although that last phrase is in quotation marks and italics in the grant of leave, it does not appear anywhere in the actual decision.

Submissions

10. Mr Carr's submissions began with an account of the relevant law and the limits upon the Tribunal's discretion. He drew attention to the judgment of Gross LJ in *Daejan Investments Ltd v Benson & Ors [2011]EWCA Civ 38* but stressed the differences between the facts of that case and the present case, which he said were significant to the issue of prejudice. Again Mr Carr acknowledged that Mr Dulley had not consulted in accordance with the regulations but focused upon the ways in which he had fallen short of the requirements and the ways in which, it was submitted, such breaches as there had been were repaired or put right. The extra-statutory process Mr Dulley adopted was, he submitted, just as good as that provided for in the regulations. He took me to a full skeleton which elaborated upon the process of consultation. Reminded that it was a finding of the LVT that there had been a substantial breach and that his clients had not been given leave to appeal that finding, he replied that the appellant's argument was more subtle than that. He was not seeking to reargue the facts. His point was that the LVT had needed to consider the degree to which there had been a breach of the prescribed consultation process and the degree to which such failings as there had been were repaired subsequently before it could conclude that a "substantial" failure inevitably meant that the leaseholders "must have been prejudiced". The LVT had not undertaken that exercise, or if they had they did not say so. Could it be said, asked Mr Carr rhetorically, that Mr Dulley did not conduct a proper, meaningful consultation with the leaseholders? Breach of the consultation regulations alone was not enough, as the decision of the Lands Tribunal in *Eltham v Kenny & Ors LRX/161/2006*, decided on 24th October 2007 and approved in *Daejan*, demonstrated. In that context the LVT were required to say whether or not they had found that there was significant

prejudice and they had not done so. Instead the LVT seemed to be basing its conclusion on the failure of Mr Dulley to explain his non-compliance adequately. That was wrong in law.

11. Mr Carr acknowledged that given the underlying statutory purpose, as spelt out in Daejan, that where there was a breach of the consultation regulations there would inevitably be a degree of prejudice but that prejudice would not necessarily be significant, even if the breach was substantial. The LVT had to address this issue and they had not done so. The gap could not be filled by this Tribunal drawing the inference that the LVT must have concluded that the prejudice was substantial.

12. Mr Reckling submitted that the *Daejan* case shows that the process itself is important and, where there is a substantial failure in the process, prejudice is inevitable and can be assumed. It should not be for the lessees, faced with a serious breach, to demonstrate how they had been prejudiced. Comparing what actually happened in this case with the account of the process given in *Daejan* it is clear that stage one was effectively omitted in its entirety. The opportunity to make observations in the right way at the proper time was never given. Stage two was then further curtailed without any clear reason given. The meeting was no substitute for proper consultation. Ms Leek gave evidence about it in the LVT. The leaseholders had many concerns and grievances to raise in a comparatively short time. The regulations were intended to ensure that the landlord engaged and consulted with the tenants. That did not happen and the leaseholders felt that it was all a *fait accompli*.

LAW

13. Sections 20 and 20ZA of the Landlord and Tenant Act 1985, as amended by the Commonhold and Leasehold Reform Act 2002, deal with consultation requirements in the following terms.

" 20. Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contribution of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either –

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

20ZA. Consultation requirements: supplementary

Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal

may make the determination if satisfied that it is reasonable to dispense with the requirements. "

14. As noted in Daejan the former provisions had less detailed consultation requirements and the court had the power to dispense with the requirements if satisfied the landlord had acted reasonably.

15. S.27A of the Act makes provision for applications to a leasehold valuation tribunal (*inter alia*) to determine the amount of a service charge which is payable; such determinations may be sought either in advance of the costs being incurred or subsequently thereto. Paragraph 6 of the Consultation Regulations, read with s.20 of the Act, provides that the limit of the amount which can be passed on by a landlord to a tenant if the consultation requirements have neither been complied with nor dispensed with is £250.

16. The consultation requirements are set out in Part 2 of Schedule 4 of the Consultation Regulations. The Court of Appeal in *Daejan* felt that it could not improve on the summary contained in the LT decision, itself drawing on a previous LT decision in *Camden LBC v The Leaseholders of 37 Flats at 30-40 Grafton Way* LRX/185/2006, unreported (*"Grafton"*) and I shall also gratefully rely upon it.

> *"*As the LT observed (at [4]), the "layout and drafting of the regulations leave something to be desired in terms of clarity". The LT, *ibid*, then followed the division of the requirements into "stages" adopted in *Grafton*:
>
> " *Stage 1*
>
> (1) **Notice of intention** Notice of intention to carry out qualifying works is given to each leaseholder and any recognised tenants' association ('RTA'). The notice must describe in general terms the proposed works, or specify a place and hours where the description may be inspected. The notice must state the reasons for the works, and invite written observations, specifying where they should be sent, over what period (30 days from the notice), and the end date. Further, the notice must contain an invitation for nominations of persons from whom the manager should obtain estimates. The landlord must have regard to written observations received during the consultation period.
>
> *Stage 2*
>
> (2) **Estimates** The landlord must seek estimates. (There are detailed rules as to seeking estimates from nominees of the tenants or RTA).
>
> (3) **The paragraph (b) statement** The landlord then issues a statement (free of charge) setting out the estimated cost from at least two of the estimates and a summary of the observations received during the stage 1 consultation period, and his responses to them. The statement is issued with a notice (see below). If any estimates have been received from the leaseholders' nominees, they must be included in the statement. (The term

'paragraph (b) statement' is used by the regulations themselves, by reference to sub-paragraph (5)(b) in which this requirement is found).

(4) **Notice accompanying paragraph (b) statement** The statement must be sent out with a notice….., detailing where and when all of the estimates may be inspected and inviting each leaseholder and any RTA to make written observations on any of the estimates, specifying an address where they should be sent, the consultation period (30 days from the notice) and the end date.

(5) **Regard to observations** The landlord must have regard to written observations received within this second 30-day consultation period.

Stage 3

(6) **Notification of reasons** Unless the chosen contractor is a leaseholder's or RTA nominee or submitted the lowest estimate, the landlord must give notice within 21 days of entering into the contract to each leaseholder and any RTA, stating his reasons for the selection, or specifying a place and hours for inspection of such a statement…. "

16. Matching these Stages with the relevant paragraphs of Schedule 4, Part 2 of the Consultation Regulations, Stage 1 corresponds with paras. 1 – 3; Stage 2 with paras. 4-5; and Stage 3 with paras. 6 *et seq.* As the LT observed, at [6]:

" The issues in the present case turn on the requirements of Stage 2: steps (3), (4) and (5) in the above sequence. They relate principally to the following paragraphs in Schedule 4 Part 2 of the Regulations: step (3) paras 4(5)(b) and 4(9); step (4) para 4(10); step (5) para. 5. "

Goss LJ turned to the issue of prejudice at paragraph 68 of *Daejan*.

68. *(1) The rival cases:* I focus here on the curtailing of consultation, the issue which most concerned the LT.

69. For *Daejan*, Mr. Dowding drew attention to the differences between this case and *Grafton.* In *Grafton,* Stage 2 had been omitted altogether; here it had not been. Moreover, in *Grafton* there had been a much larger number of tenants, so (as the LT itself observed) there could be no question of all the information having been made available in another form. In those circumstances, Mr. Dowding, as before, did not quarrel with the outcome in *Grafton*.

70. In the present case, however, Mr. Dowding contended that there was nothing further to be said or considered; in a letter dated 14th July, 2006, Ms Marks had said all that could be said based on the information in Mr. Harris's tender report. There was no basis for supposing that if the consultation had not been curtailed it would have made any difference. There were only five Respondents. Accordingly, Mr. Dowding submitted that the LVT (and LT) should have answered the "what if" question. If that question had been posed, it could not have been answered as the LT did at [62] (a conclusion in any event unsupported by any fact finding of the LVT). The only conclusion which could

reasonably have been reached was that the Respondents had not proved any prejudice flowing from Daejan's non-compliance with the consultation requirements. It was, however, for the Respondents not simply to assert but to prove prejudice: see, the decision of the LT in *Eltham Properties Limited v Kenny* LRX/161/2006 (unreported), at [29] – [30], together with the observations of LT in this case at [42]. In any event and whatever the incidence of the burden of proof, there had been no prejudice. If right thus far, then there was no proper basis for the LVT or LT refusing to grant dispensation; their decisions to refuse dispensation were either perverse (within the meaning of *Edwards v Bairstow, supra*) or disclosed an error of law.

71. For *the Respondents*, Mr. Rainey submitted that if this Issue turned on the burden of proof, then as Daejan was seeking dispensation, it was for Daejan to prove that its non-compliance had not cause any prejudice so that it was reasonable for dispensation to be granted; it was not for the Respondents to prove specific prejudice flowing from Daejan's non-compliance with the consultation requirements. In any event, the curtailment of the consultation process amounted to substantial prejudice; the Respondents had been deprived of the opportunity to make representations and to have them considered. It was unnecessary to speculate as to the outcome of such further consultation had it taken place; a landlord could always say that nothing further said by the tenants would have made any difference. So far as concerned other communications between Daejan and the Respondents (even assuming that they were capable of curing the position), these could not save the day for Daejan as the full facts had not been available until too late.

72. *(2) Discussion:* For my part, I readily accept Mr. Dowding's submission, as far as it goes, that significant prejudice to the tenants is a consideration of the first importance in exercising the dispensatory discretion under s.20ZA(1). I respectfully and entirely agree with the observations to this effect in *Eltham (supra),* at [29] – [30], *Grafton,* at [33] and the LT in this case, at [41] – [42].

73. I part company, however, with the Daejan case when it comes to determining whether the Respondents did suffer significant prejudice in consequence of Daejan's non-compliance with the consultation requirements. In my judgment, Daejan's non-compliance in curtailing consultation constituted a serious failing and did cause the Respondents serious prejudice.

i) As already emphasised, a proper consultation process is of the essence of this statutory scheme, devised as it is to protect the interests of tenants such as the Respondents.

ii) In my judgment, the LT and the LVT were entirely right to treat the curtailment of the consultation process as a serious failing. It is striking that the observation of the Daejan legal representative at the LVT hearing in early August 2006, that Mitre had already been awarded the contract for the works, was never corrected; to the contrary, it was confirmed in Mr. Shevlin's letter of the 10th August, 2006. Even assuming this failing to be the result of a lack of understanding or ineptitude rather than a flouting of the consultation requirements, it is impossible to view it as a technical, minor or excusable oversight.

iii) Against this background, I can detect no error of law or misdirection in the LVT's refusal to speculate (at [98] of its August decision) as to what might have been the outcome had the consultation been allowed to run its proper course. Indeed, given the seriousness of non-compliance in this case, I would endorse the LVT's approach of treating the Respondents' loss of opportunity (to make further representations and have them considered) as itself amounting to significant prejudice. On any view, as it seems to me, that was a conclusion to which the LVT was entitled to come.

iv) This view is reinforced by reflection on the rival contention advanced by Daejan. In many cases, a landlord could readily assert that further consultation would have made no difference. Disproving such assertions would inevitably give rise to an invidious exercise in speculation, quite apart from difficulties of proof (if and insofar as a burden rests on the tenants in this regard – see below). While there will no doubt be some instances where a landlord may demonstrate that a failure to comply with the consultation requirements was, on the facts, such as to make no difference and to give rise to no prejudice to the tenants, arguments of this nature need careful scrutiny; there would otherwise be a risk of undermining the purpose of the statutory scheme or, as Pitchford LJ remarked in argument, a "premium on recalcitrance". Suffice to say that on the facts of this case, involving a serious failing on Daejan's part, I am not at all attracted to the argument.

v) With respect to Mr. Dowding's argument, I do not see a tension between the LVT's conclusion (that the curtailment of the consultation itself amounted to significant prejudice) and the observations of the LT, already referred to, as to the importance of prejudice to the tenants, in *Eltham*, *Grafton* and in this case. The conclusion of the LVT involves a finding that there has been significant prejudice. Moreover, given that the LVT found as a fact that the extra-statutory consultation had not made good Daejan's failure to comply with the Consultation Regulations, nothing turns on the difference between the number of tenants in this case as compared with the much larger number in *Grafton*.

vi) Accordingly, the LVT was amply justified in refusing dispensation in this case. Its conclusion betrays neither any error of law nor perversity.

74. Having reached this view (which is sufficient to decide Issue (III)), it is strictly unnecessary to decide whether the LT was correct to say (at [62]) that further representations might have influenced the Daejan decision as to the award of the contract for the works. For the avoidance of doubt, however, I am not at all persuaded that the LT fell into error. I acknowledge the difficulty of pointing in terms to a finding of fact by the LVT supporting the LT's observation. That said, I am satisfied that the LT's conclusion involved no more than the drawing of a permissible inference from the LVT's findings.

75. Accordingly and whether by the route followed by the LVT or that taken by the LT at [62] (if and insofar as it differed), I entertain no doubt of the correctness of the LT's conclusion – namely that it was unable to say that the LVT had erred in principle on the question of prejudice, or that its decision was clearly wrong.

76. For completeness, it remains simply to mention a number of additional matters:

i) First, in agreement with both the LT (at [40]) and the LVT (at [101]), I do not think that Daejan's offer of a £50,000 "discount" off the price of the works, provides a ground for the grant of dispensation. I incline to the view that, as the LT reasoned, the statutory scheme does not provide for such an alternative; however, even if it was open to Daejan to avert the refusal of dispensation by making a suitable offer of this nature, I agree with the LVT that the only offer on the table did not suffice.

ii) Secondly, there was some debate as to the burden of proof with regard to prejudice suffered by the Respondents. As will be apparent, it did not seem to me that the outcome in this appeal turned on the incidence of the burden of proof. Insofar as it rested on the Respondents and as already discussed, they have satisfied the burden. I am accordingly reluctant to express a concluded view on a point, not without complexity, which does not require resolution in this case.

17. I am told that leave has been granted for an appeal to the Supreme Court.

Consideration and Conclusion

18. The LVT's formulation of the question of law on which it granted leave does raise one or two difficulties. It is correct to say, as the LVT acknowledges, that it did not set out explicitly what the prejudice to the respondent was. The words used in the grant of leave "..whether the Tribunal were wrong in not considering the issue of prejudice and ought to have considered whether the failure to comply must have adversely affected the lessees in some way.." might be taken to suggest that the tribunal did not actually consider the issue of prejudice at all. But that would be a misreading: in my view the issue of prejudice was plainly considered by the LVT. In the concluding paragraph of the decision (Paragraph 56) the LVT accurately quotes from LJ Carnwath, giving the judgement of the Lands Tribunal in *Daejan* (above, at Paragraph 41) where he said the purpose of the consultation provisions was not to create

> "an obstacle race... and that if 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..."

19. If the LVT had actually said, which it did not, that the failure to comply "must have prejudiced" the respondents, then the twin issues would be firstly whether or not it is open to the LVT as a matter of law, in the light of *Daejan* in the Court of Appeal, to find that the breach was so substantial that prejudice must be taken to flow from it even though there is no evidence of anything that the leaseholders would or might have done differently if a consultation had been carried out properly. Secondly whether such a decision is open to it on the facts it found.

20. Goss LJ endorsed the approach of treating a loss of opportunity to make further representations and to have them considered as itself amounting to significant prejudice, at least where the non-compliance with the consultation regulations has been substantial. (*Daejan*, Paragraph 73 iii)) He noted that in many cases the landlord could readily assert that further

consultation would have made no difference and it would be difficult to prove the contrary, at least without much speculation.(*Daejan,* paragraph 73 iv)) He did not see any tension between the conclusion that the curtailment of the consultation itself amounted to significant prejudice and the observations in *Eltham* and *Grafton* that it was important to find that there should have been prejudice to the tenants. (Paragraph 73 v)). I respectfully agree.

21. In the case of *Eltham Properties* it should not be forgotten that it appears that the respondents did not identify the procedural defect in the section 20 notice that they were complaining about, despite having been asked to do so. They did not produce any evidence that they had been prejudiced by the defect, whatever it was, and the LVT did not make any such finding. (See paragraphs 27 - 29) In paragraph 30 of its decision the Lands Tribunal observed that

> "It is reasonable to give dispensation from the 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."

22. Where there has been a minor breach of procedure it will be important for a tribunal to find evidence that respondents were prejudiced or disadvantaged. Where the breach has been substantial it may be reasonable to assume prejudice. I add that even if it were possible to prove that further consultation would have made no difference to the end result, it still does not follow that therefore there has been no prejudice if the breach has been substantial. The effect of a properly conducted consultation process should be to give the tenants confidence in the decisions that are reached and leave them feeling as comfortable as they can be with the service charges that are likely to flow from those decisions. The opportunity to participate in a meaningful way in the decision-making process is of real value. Even if the end result would probably have been the same without their participation, it seems to me very arguable that tenants who are substantially deprived of their right to be included in the decision-making process are genuinely prejudiced.

23. In my judgement, as a matter of law, the LVT in this case was entitled to find that the breach was so substantial that prejudice must be taken to have flowed from it, even though there was no evidence of any work that would have been done differently if the consultation had been carried out properly. As a matter of interpretation I find that is what they did, reading the decision in context and through the eyes of a reasonable and informed party to the proceedings, rather than the eyes of an external examiner.

24. Further, it seems to me that such a decision was open to it on the facts. The LVT found as a fact that there had been a substantial failure to engage in consultation. That was not enough, Mr Carr argued. Mr Dulley's "non-statutory consultation" was a proper and meaningful consultation that was as good as following the statutory procedures. Mr Carr stressed the opportunities provided by the meeting on 15 June 2007. He submitted that the LVT had erred in not considering whether or not this had meant that no significant prejudice had been suffered. In answer Mr Reckling reminded me of the reality of that meeting, as recorded in Ms Leek's evidence (paragraphs 32 to 34 of the LVT decision). It seems to me that in the light of that

evidence the LVT was perfectly entitled to conclude that the meeting fell far short of providing the same opportunities that would have been given by a proper consultation. There may well be a great difference between having the opportunity to give calm and careful consideration to a proposition, make a thoughtful written response to it and have that response considered before decisions have started to take concrete form on one hand, and the chance to compete with others for a say at tenants' meeting when a set of proposals are presented for comment. In my judgement the LVT did not err in law in not spelling out why Mr Dulley's non-statutory consultation failed to prevent the tenants being prejudiced by a breach that the LVT found to be substantial.

25. In my opinion the LVT would have been entitled both in law and on the facts before it to conclude that the breach in the consultation process "must have prejudiced" the tenants. It is true that the LVT did not use those words in its conclusion. However it seems to me perfectly plain from paragraph 56 of the decision that the LVT had the importance of prejudice well in mind. In the next sentence it made express reference to the meeting and the letters that had been relied upon as minimising or removing the prejudice and said that nonetheless there had been a substantial failure to engage in consultation. In my judgement the inescapable inference is that the LVT actually concluded that the failure to comply must have prejudiced the tenants, even though it did not say so explicitly. As I have said that was a conclusion it was entitled to reach on the law and the facts.

26. The appeal therefore fails.

Dated 12 December 2011

His Honour Judge Mole QC