UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 0284 (LC)
LT Case Number: LRX/149/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charge – consultation regulations – whether procedural irregularity due to LVT determining issue not raised by appellant – whether in any event 2009 notice of intention invalid – whether earlier notice of intention valid in respect of later works – whether dispensation from consultation requirements properly granted – appeal allowed in part but refused in respect of dispensation – cross appeal allowed – ss 19, 20 and 20ZA of Landlord and Tenant Act 1985

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN CHRISTOPHER KONSTANTY JASTRZEMBSKI Appellant

and

WESTMINSTER CITY COUNCIL Respondent

Re: 3 Turner Road,
Erasmus Street
London
SW1P 4DZ

Before: Her Honour Judge Karen Walden-Smith
and
Mr Andrew Trott FRICS

Sitting at:43-45 Bedford Square, London WC1B 3AS
on 21 May 2013

The appellant in person
Ms Nicola Muir, instructed by Judge & Priestley LLP, for the respondent

The following cases are referred to in this decision:

Regent Management Ltd v Jones [2010] UKUT 369 (LC)
Birmingham City Council v Keddie & Hill [2012] UKUT 323 (LC)
Arrowdale Ltd and Coniston Court (North) Hove Ltd [2007] RVR 39
Westbourne Ltd v Spink [2008] PCLCS 251
Beitov Properties Ltd v Martin [2012] UKUT 133 (LC)
Daejan Investments Limited v Benson & Ors (2010) P & CR 116 (CA); *Daejan Investments Ltd v Benson & Ors* [2013] 1 WLR 854 (SC)
Gateway Property Holdings Ltd v 6-10 Montrose Gardens RTM Company Ltd [2011] UKUT 349 (LC)

DECISION

Introduction

1. The appellant, Mr Christopher Jastrzembski, is the long leasehold owner of the property at Flat 3, Turner House, Erasmus Street, London SW1P 4DZ ("the property"). By virtue of the provisions of clause 3 and the Ninth Schedule to his Lease, the appellant covenanted to pay "a fair and reasonable proportion of the reasonably estimated amount" required to keep Turner House in good repair. The appellant issued an application to the Leasehold Valuation Tribunal pursuant to the provisions of section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") on 11 February 2011 seeking a determination as to the reasonableness of an estimated service charge of £9,199.15 for the cost of major works and his liability to pay that estimated service charge.

2. The LVT determined that the estimated service charge was reasonable and that the appellant was liable to pay the respondent landlord, Westminster City Council. The hearing took place on 20 June 2011 and the decision was issued on 27 July 2011.

3. The issue that is before this Tribunal is whether the respondent had complied with their consultation requirements pursuant to the provisions of section 20 of the 1985 Act ("the section 20 notice").

4. It was the appellant's contention before the LVT that the section 20 notice served by the respondent in 2009 with respect to works under contract reference Q102 had not been served upon him. The respondent's contention was that it had. That was a conflict of fact between the appellant and respondent which was not resolved by the LVT. Instead, the LVT took a point of its own motion by determining that the 2009 notice was invalid by reason of it "inviting observations to be sent to someone no longer involved" (paragraph 38 of the decision).

5. The LVT went on to determine that a section 20 notice that had been served upon the appellant by the respondent in 2007 with respect to works under contract reference M111 was a "perfectly good notice". Further, if wrong about that, the LVT held that they would have granted dispensation pursuant to the provisions of section 20ZA of the 1985 Act.

6. The appellant sought permission to appeal from the LVT on 10 August 2011. That application for permission was refused on the grounds that it was mere repetition of the appellant's case before the LVT and that the appellant simply did not agree with the LVT's decision.

7. The appellant renewed his application to the Upper Tribunal (Lands Chamber) pursuant to the provisions of section 175 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

8. Permission to appeal was granted by Her Honour Judge Alice Robinson on 30 January 2012, limiting the appeal to the following:

> "1. It is arguable that the LVT erred in law when concluding that a consultation notice (M111) sent two years before a later invalid notice (Q102) which related to a greater works contract and identified substantially lower estimated service charge costs was a valid notice for the purpose of section 20 of the LTA 1985 and the later works the subject of the invalid notice.
>
> 2. Further, when deciding to exercise its discretion to dispense with the consultation requirements of s.20 and concluding that the tenant had suffered no prejudice it is arguable that the LVT failed to have proper regard to the above facts or the tenant's arguments as to the reasonableness of the works the subject of the invalid notice."

9. The respondent submitted a respondent's notice seeking to cross-appeal with respect to the validity of the 2009 consultation notice and seeking, in the alternative, that there should be an order dispensing with that notice.

10. On 4 May 2012, George Bartlett QC, the former President, gave permission to cross appeal on whether:

> (1) there was a procedural irregularity that substantially prejudiced the respondent council through their having no opportunity to call evidence in relation to the arrangements made for the collation of observations and the forwarding of such observations to the respondent;
>
> (2) the LVT erred in determining that the 2009 notice was invalid because it invited observations to be sent to someone no longer involved in the project.

The former President made it clear, in granting permission, that the hearing before the Tribunal would be way of review and that any issues of fact would need to be remitted to the LVT.

The Issues

11. The matters subject to review on this appeal, and the order in which they need to be dealt with, are as follows:

> (i) Whether there was a procedural irregularity by the LVT raising the issue that the 2009 section 20 notice was invalid by reason of it including an address on the notice of a party no longer involved: an issue not raised by the appellant but by the LVT of its own motion;

(ii) Whether, in any event, the LVT erred in determining that by inviting observations to be sent to a party no longer involved, that made the 2009 notice invalid;

(iii) If the 2009 notice is invalid, did the LVT err in determining that the 2007 notice was valid;

(iv) Did the LVT err in determining that the notice requirements under section 20 should be dispensed with in any event under section 20ZA.

12. It was urged upon us by counsel for the respondent that if we determined that the requirements of section 20 of the 1985 Act should be dispensed with, then all other issues would fall away. We have come to the conclusion that it is necessary to first determine the other matters, in the order set out above.

Procedural Irregularity

13. The LVT determined that the 2009 notice was invalid as it had invited observations to be sent to someone who was no longer involved in the project, namely "The Project Manager at Fredricks, Hearl & Gray, 10 Penrhyn House, St Marks Hill, Surbiton, Surrey KT6 4PW".

14. The appellant had not raised that alleged irregularity in his application to the LVT and it was an issue that was raised for the first time at the hearing on 20 June 2011 by the LVT itself.

15. The respondent had, consequently, not been prepared for that issue and was thereby denied the opportunity to call any evidence with respect to any arrangements that were in place, or could have been put in place, to ensure that any observations sent to the address included on the notice were sent on to the respondent.

16. The Lands Chamber of the Upper Tribunal has recently had to deal with a number of cases where the LVT have taken issues which were not between the parties and made determinations where the parties have not been given the opportunity to deal with the issues raised, and have thereby been denied a fair hearing.

17. The difficulty was succinctly set out by His Honour Judge Mole QC in *Regent Management Ltd v Jones* [2010] UKUT 369 (LC) where he said (at paragraph 29):

> "The LVT is perfectly entitled, as an expert Tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much. But it must do so fairly, so that if it

> is a new point which the Tribunal raise, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it."

It is a matter of natural justice to give both parties an opportunity of making submissions and, if necessary, producing evidence necessary in order that the LVT can properly deal with a decision.

In *Birmingham City Council v Keddie & Hill* [2012] UKUT 323 (LC) His Honour Judge Nigel Gerald said (at paragraph 15):

> "Applications are commenced by the landlord or tenant issuing a *pro-forma* application form prescribed by the Residential Tribunal Property Service which requires that details of the questions relating to service charge expenditure requiring resolution by the LVT be set out. If they are not sufficiently set out, as is often the case, the LVT will at the pre-trial review order that the applicant serve a statement of case giving full particulars of precisely what it is in issue and why. The respondent will be ordered to serve a statement of case setting out its case to which the applicant will usually be given an opportunity to respond if he so wishes by serving a statement of case in reply.
>
> Those documents … set out the nature and scope of the issues in dispute. They operate to limit the issues in respect of which the parties must produce evidence in support of their respective cases. They also operate to define the issues in respect of which they seek resolution by the LVT. They therefore serve five functions. First, to identify the issues. Secondly, to enable to parties to know what issues they must address their evidence to. Thirdly, to vest the LVT with jurisdiction, and focus the LVT's attention on what needs to be resolved. Fourthly, setting the parameters of, and providing the tools within which, the LVT may case manage the application. Fifthly, by confining the issues requiring resolution to what is actually (as distinct from what might theoretically be) in dispute between the parties they will be assured economical and expeditious disposal of their dispute whilst also promoting efficient and economical use of judicial resources at the first instance and appellate levels."

18. In *Arrowdale Ltd and Coniston Court (North) Hove Ltd* [2007] RVR 39, the Lands Tribunal, the former President and Mr N J Rose FRICS, said (at paragraph 23):

> "It is entirely appropriate that, as an expert tribunal, a leasehold valuation tribunal should use its knowledge and experience to test, and if necessary to reject, evidence that is before it. But there are three inescapable requirements. Firstly, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly it must give reasons for its decision."

To that statement of law, His Honour Judge Reid QC added in *Westbourne Ltd v Spink* [2008] PCLCS 251 (at paragraph 12) that:

> "…an LVT must not reach a conclusion on the basis of a point or argument which has never been raised by the parties or put to the parties by the Tribunal."

19. The LVT had raised a point during the course of the hearing that had not troubled the appellant and was, therefore, not something that the respondent had opportunity to argue fully as a matter of law, and was given no opportunity to call evidence on the point. There was, therefore, a breach of natural justice and the decision is, for that reason, procedurally irregular. Further, to echo the former President in *Beitov Properties Ltd v Martin* [2012] UKUT 133 (LC) (at paragraph 13):

> "… it is in my view generally inappropriate for a tribunal to take on behalf of one side in what is a party and party dispute a purely technical point, by which I mean a point that does not go to the merits or justice of the case. …"

20. If this were the only issue before the Tribunal then we would be remitting the case to the LVT to determine this issue: giving the respondent the opportunity to call evidence and the appellant the opportunity to call evidence in rebuttal (if appropriate). However, it is not the only issue and it is also necessary to determine whether, the LVT was in any event in error by determining the notice was invalid because it invited observations to be sent to a party no longer involved.

Was the 2009 Notice Invalid?

21. The proposed major works were qualifying works for which a public notice was not required under the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the regulations"). Therefore Part 2 of Schedule 4 to the regulations applied. Regulation 1 of Part 2 provides:

> 1.(1) The landlord shall give notice in writing of his intention to carry out qualifying works –
>
> (a) to each tenant; and
>
> (b) where a recognised tenants' association represents some or all of the tenants, to the association.
>
> (2) The notice shall –
>
> (a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
>
> (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
>
> (c) invite the making, in writing, of observations in relation to the proposed works; and
>
> (d) specify –
>
> (i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

22. The notice therefore requires the respondent to set out, in general terms, the works to be carried out and the reasons for those works; to invite comments, specifying the address to which observations may be sent; and to specify that there is a relevant period for sending those observations and to identify when that period ends.

23. If no address for observations were included on the notice then that would be an error in the notice. However, there is no requirement as to what the address must be (for example it does not specify that it must be the address of the landlord; the landlord's managing agent; or landlord's project manager). It is simply an address for service of the observations and such an address was provided.

24. It was, in our judgment, wrong for the LVT to determine that the provision of an address of a party no longer involved in the works made the notice invalid. Construction of the regulations does not permit such an interpretation, and the LVT did not have any evidence before it to suggest that any observations made by the appellant, or other consultees, would not reach the respondent.

25. The LVT was in error in concluding that the notice was invalid because it invited observations to be sent to someone no longer involved in the project.

26. The LVT ought to have determined the issue of fact raised before it – namely whether the 2009 notice had been served upon the appellant. We will deal below with the issue of whether there ought to have been a dispensation of the necessity to serve a notice pursuant to the provisions of section 20ZA of the 1985 Act.

Was the 2007 notice valid for the purpose of the 2009 works?

27. Having (wrongly) determined that the 2009 notice was invalid by reason of giving the address of a party no longer involved in the proposed works for the purpose of making observations, the LVT then proceeded to determine that the notice served upon the appellant on 25 July 2007 with respect to "the redecoration and repair of the exterior and common parts of Maclise, Millais, Mulready, Rossetti, Ruskin, Stubbs and Turner Houses" for Major Works Contract M111 was a valid notice for the purpose of the "Redecoration and repair of the exterior and the common parts of Rossetti, Ruskin, Stubbs and Turner Houses" for Major Works Contract Q102.

28. The appellant informed us in the course of oral submissions that the validity of the 2007 notice for the purpose of the 2009 works was not a matter that had been raised prior to the hearing on 20 June 2011. That submission was not something contradicted in the oral hearing before us, although it is a point mentioned in the skeleton argument of the respondent.

29. The issue of the validity of the 2007 notice was plainly not something that the appellant was going to raise either in his application or his statement of case: he was simply arguing that, as a matter of fact, the 2009 notice had not been served on him.

30. The respondent, in its statement of case to the LVT dated 6 May 2011, simply says as follows on the service of the notice of intention:

> "**Was the section 20 Notice of Intention dated 8 May 2008 (sic) served upon the Applicant?**
>
> 4. The Notice of Intention dated 8 May 2008 (sic) was hand delivered to the Applicant's premises and posted through his letterbox. A copy of the Notice is attached to this Statement of Case together with a delivery report prepared by the Respondent's Housing Officer, Shabana Begum which shows in respect of the Applicant's property at 3 Turner House a tick identifying that the Notice was delivered."

31. It does not seem to us surprising that the respondent did not set out in the respondent's notice that the 2007 notice was valid for the purpose of the 2009 works as it does not appear to be something the respondent was arguing for. In the statement of Annelie Sernevell, the Estate Director of the Millbank Estate Management Organisation, ("MEMO") dated 31 May 2010, put before the LVT, she says as follows:

> "I recall that in May 2009 major works consultation took place in respect of proposed works to the Estate. I am the principal officer managing the major works and oversee all aspects of the consultation, procurement, tendering and contract management of the works. I was aware following my review of the files that there had been a proposed major works scheme under Contract M111 and that a Section 20 Notice of Intention dated 25 July 2007 had been served upon leaseholders. At that stage the major works consisted of redecoration and repair of the exterior and common parts of seven blocks on the Estate including Turner House. I understand that such scheme did not proceed although subsequently it was reduced in scope by limiting the proposed works to only three blocks. I am aware that Section 20 Notice of Intention dated 25 July 2007 was served and I attach a copy to this witness statement together with a copy letter from Mr Jastrzembski to me dated 24 April 2010 in which he confirms in the second paragraph that he received the Notice dated 25 July 2007.
>
> I remember considering this matter and the reduced scope of works and asking whether a new Notice was to be served. I was informed that a new Notice was to be served although in my mind it need not have been served because the actual works to the blocks remain the same…"

This indicates that, while she considered the 2007 notice to be sufficient, she was directed to serve a further notice by an unspecified other person. Ms Muir, on behalf of the respondent, contended that the respondent was serving the 2009 notice as a "belt and braces" measure. We do not take that to be the effect of what is set out in Ms Sernevell's statement. It is clear that those directing Ms Sernevell did consider it to be a necessary step as we must assume that the respondent council would not unnecessarily expend resources in this way.

32. It does not appear that the respondent was seeking to contend, when going into the hearing before the LVT, that it did not matter whether the 2009 notice had been served or not, as the 2007 notice was valid for the purpose of the 2009 works. The remainder of the statement of Ms Sernevell (paragraphs 6 to 9) deal with service of the 2009 notice.

33. The validity of the 2007 notice for the purpose of the 2009 works only arose because the LVT took the point that the 2009 notice was invalid. We have already found that the LVT had erred in reaching that finding, and that the LVT thereby denied the respondent the right to deal properly with that point as it had been raised of the LVT's own motion without the respondent having the opportunity to either provide evidence or make full legal submissions on the matter. That was a breach of the respondent's right to natural justice, as we have set out above.

34. In the same way, the appellant could not have been expected to deal with the argument that the 2007 notice was a valid notice for the purpose of the 2009 works as that was not something being contended for by the respondent but raised by the LVT at the hearing. While the appellant acknowledged service of the 2007 notice, and there was evidence before the LVT that he confirmed receipt of the 2007 notice in his letter to the respondent dated 24 April 2010, he was not given the opportunity to call any other evidence with respect to why he would contend that the 2007 notice was not valid for the purpose of the 2009 works.

35. We have formed a clear impression from the submissions of the appellant before us that, had the appellant been aware that he needed to counter an argument that the 2007 notice was valid for the 2009 works, he would have been calling evidence to show how, as secretary of the Millbank Estates Residents' Association ("MERA"), he campaigned against the 2007 notice and that, according to him, it was his campaigning that led to the removal of Rossetti, Ruskin, Stubbs and Turner Houses from the original major works. We cannot judge whether the appellant is justified in the submissions he had made, as we are reviewing the decision of the LVT and not rehearing the matter. It does seem to us that the appellant's right to contest these points was removed and, as with the respondent, his right to natural justice interfered with.

36. We should state at this stage that, subsequent to hearing oral submissions on 21 May 2013, a satellite issue has arisen with respect to whether MERA was a recognised tenants' association. At the hearing, Ms Muir submitted that MERA was not a recognised tenants' association as the Millbank Estate, including Turner House, is managed on behalf of Westminster City Council by a Tenants' Management

Organisation (MEMO): a recognised tenants' association for the purposes of section 29 of the 1985 Act. The appellant failed to counter that submission at the hearing, but did so by way of a written communication after the hearing. That communication was referred to the respondent by the Tribunal and we have now had reasonably detailed written submissions by both the appellant and the respondent, and counter-submissions by the appellant.

37. In our judgment, whether MERA was a recognised tenants' association or not is not relevant to our determination. We are reviewing the decision of the LVT; we are not conducting a rehearing. It is not for us to determine these issues of fact. If it is necessary for a factual determination to be made as to whether MERA was or was not a recognised tenants' association (and we are not convinced that it is necessary), it will be necessary for evidence to be called and for there to be cross-examination of witnesses as there is a clear conflict of evidence of between the parties. That is not a matter for this Tribunal.

38. The only relevance of MERA is that the appellant contends that, as secretary of MERA, he was campaigning against the major works that were contained within the 2007 notice and that he was successful in that campaign. The respondent contends that the appellant had ample opportunity to produce evidence of representations or observations he made, whether as an individual or as secretary of MERA, both at the LVT and before this Tribunal, and he failed to do so.

39. Again, this Tribunal is reviewing the decision of the LVT; it is not rehearing the case. This is not the appropriate forum for an analysis of the evidence. In any event, it appears to us that the appellant has produced sufficient documentary evidence, and put forward sufficiently compelling submissions, to indicate that he did object to the works set out in the 2007 notice under the guise of being the secretary of MERA. Further, we find that by reason of the LVT raising the invalidity of the 2009 notice of its own motion in breach of the respondent's right to natural justice, the LVT also raised the issue of the validity of the 2007 notice of its own motion and thereby breached the appellant's right to natural justice as he was not, contrary to what is said in the letter dated 29 May 2013 from Judge & Priestley LLP on behalf of the respondent, given "ample opportunity to produce any evidence he had of any representations or observations he made" in relation to the 2007 works.

40. The principal finding of the LVT subject to appeal is that the 2007 notice was a valid notice for the purpose of the 2009 works. The respondent contends that the LVT was correct to come to that conclusion. The appellant contends that the 2007 notice was not valid for the 2009 works: it referred to the wrong contract, for the wrong properties and was two years out of date.

41. The respondent contends that the fact that the works were proposed for Turner House under contract Q102 rather than M111 did not affect the effectiveness of the notice of intention in any way as any observations made in respect of contract M111 would be relevant to contract Q102. We accept that the fact that the identification of the

contract is altered does not, in itself, invalidate the notice. In our judgment, whether the 2007 notice remains valid for the 2009 works is dependent upon a number of factors. What needs to be determined is whether regulation 1 of Part 2 of Schedule 4 to the regulations is satisfied by virtue of the 2007 notice.

42. The regulations only require the works to be described in general terms. It is contended by the respondent that the 2007 notice complies with this requirement as it describes the works as "Redecoration and repair of the exterior and the common parts". The difference between the two contracts is that the 2007 contract was for seven blocks, while the 2009 contract was for four blocks and while the general description of works to those four blocks is the same, it seems to us that the reduction of the extent of the works to be carried out (given the reduced number of blocks) means that the contract Q102 works were not described in the 2007 notice.

43. The respondent contends that any contractor nominated for contract M111 would have been invited for contract Q102. There is no evidence before us to support that contention. Given the time that passed between the two notices, and particularly in light of the change in the economic situation between 2007 and 2009, we cannot accept that the same contractors would necessarily have been asked to tender.

44. We are mindful of the fact that we are reviewing the decision of the LVT and not substituting our own decision. In *Daejan Investments Limited v Benson & Ors* (2010) P & CR 116, Carnwarth LJ (as he then was), sitting as a member of the Upper Tribunal (Lands Chamber), said (at paragraph 61):

> "… It is common ground that we can only interfere if the LVT has gone wrong in principle, or left material factors out of account, or its balancing of the material factors led to a result which was clearly wrong."

The failure of the 2007 notice to correctly describe the extent of the works, by not accurately describing the property, has to be viewed in the context that two years passed between the serving of that notice and the proposal to carry out the 2009 works to the four blocks, including Turner House.

45. The respondent contends there is no time limit specified in the regulations between the date of the service of the notice of intention and the commencement of the works. The respondent places reliance upon *Gateway Property Holdings Ltd v 6-10 Montrose Gardens RTM Company Ltd* [2011] UKUT 349 (LC) for support for the proposition that the passage of time of two years did not invalidate the notice. We did not find any assistance in that case which was considering the relevant provisions of the Commonhold and Leasehold Reform Act 2002 and Leasehold Valuation Tribunals (Procedure) Regulations 2003 with respect to the right to manage.

46. While we accept that there is no specified time limit for the service of the notice, there needs to be some consideration as to what is an appropriate time. If the respondent was correct in its contention that there is no time limit and, so long as a notice of intention was served at some point before the works commenced, the

provisions of the regulations would be satisfied, then a notice could (in principle) be served 10 or 20 years before the works were due to be carried out. One indication of the appropriate time period between service of the notice of intention and the works is the time specified for providing observations or suggestions for contractors. That is specified on the notice as being 30 days. While we do not suggest that the next step must be taken immediately after the expiry of those 30 days, it does give a useful indication of the relevant time periods for the work to be undertaken: months rather than years. It is obvious that the longer the period between the service of the notice of intention and the works, the more changes could have taken place which will impact the way in which a tenant will view the works. For example, there were considerable global economic changes in the two years between 2007 and 2009. Those global changes could have had an impact upon the individual's economic situation and the considerations that an individual might have could change significantly in that two year period.

47. In our judgment, the passage of time between 2007 and 2009, combined with the change in the works caused by the removal of three of the blocks from the contract, means that the LVT failed to properly balance the material factors and that its determination that the 2007 notice was valid for the purpose of the 2009 works was wrong.

Dispensation

48. Having determined that the LVT erred in allowing the respondent to rely upon the 2007 notice and had failed to determine the issue of fact between the parties (namely whether the 2009 notice had been served) while determining an issue that was not between the parties (namely whether the 2009 notice was invalid), it is necessary to consider whether the requirement to serve a notice of intention can properly be dispensed with by virtue of the provisions of section 20ZA of the 1985 Act.

49. Section 20ZA provides that:

> "(1) 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."

Consequently, it is necessary to determine whether it was "reasonable" to dispense with the requirement to serve a notice. If so, then the respondent would not need to establish that the 2009 notice was served on 8 May 2009 as it suggests.

50. The LVT found (at paragraph 38 of the decision) that they would have granted dispensation because:

> "the whole scheme operated by the respondent including tenant consultation meetings, invitations to join the contract evaluation panel etc is open and transparent and fully in keeping with the intention and spirit of the legislation and

should not be defeated by failure to clear all technical hurdles. We are also satisfied the applicant suffered no prejudice as he has never said he wished to nominate a contractor and while he has questioned the extent of the works he has not challenged the need for the respondent to carry out the works in accordance with its obligations under the lease."

51. In determining whether there should be dispensation of the consultation requirements, the principles that an LVT needs to take into account following the decision of the United Kingdom Supreme Court in *Daejan Investments Ltd v Benson & Ors* [2013] 1 WLR 854 are:

(1) whether, and if so to what extent, the tenant would relevantly suffer if an unconditional dispensation was granted. The word relevantly in this context refers to a disadvantage that the tenant would not have suffered if the consultation requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted;

(2) the factual burden is on the tenant to identify any relevant prejudice which he claims he would or might have suffered;

(3) once the tenant has shown a credible case for prejudice, the LVT should look to the landlord to rebut it, failing which it should, in the absence of good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice;

(4) that it is not sensible or convenient to distinguish between a serious failing and a technical, minor or excusable oversight, save in relation to the prejudice it causes. The gravity of the landlord's failure to comply, the degree of its culpability, the nature of the landlord and the financial consequences of its failure to comply are not relevant considerations for the tribunal per se; their relevance will depend upon the prejudice which each such factor causes.

(5) that the tribunal could grant dispensation on such terms as it thought fit, providing that they were appropriate in their nature and effect, including terms as to costs.

52. The respondent contends that the appellant accepts that he received the 2007 notice and yet he did not make any observations with respect to the contents of that notice, that he did not nominate a contractor for the works and did not, therefore, suffer any prejudice as the 2007 notice referred to "Redecoration and repair of the exterior and the common parts" of Turner House and others. The appellant does not accept that he failed to make any comment. He has submitted to us that he did make comment with respect to the proposed 2007 works, as secretary of MERA. He says that he was very successful in that campaign against the 2007 works and that three of the blocks were, as a consequence, omitted from the M111 contract.

53. The appellant contends that had he received the 2009 notice then he would have done what he had done when he received the 2007 notice and that he would have called a meeting of MERA and organised a campaign of objection. He says that he would have

objected to any works being done at all until the council had discussed their proposals with MERA. He says that he would have sought guarantees about the costs of the works under the contract Q102 and would have distinguished between those works which were necessary to Turner House and those that were merely desirable.

54. The issue for us to determine is whether, on the basis that the appellant was not served with 2009 notice, that failure prejudiced him in a relevant way. *Daejan* made it clear that it is not appropriate to make a distinction between technical oversights and serious failings: the issue is whether the failure to serve the notice (a technical oversight) caused relevant prejudice to the appellant.

55. After careful consideration of all the matters in this case, we have come to the conclusion that the appellant did not suffer any relevant prejudice by reason of the failure to serve the initial 2009 notice.

56. The appellant was aware that major works were planned to be carried out on Turner House and he attended a consultation meeting on 23 July 2009 at which meeting he made observations with respect to the proposed works. The appellant says that he would have made other, and further, observations had he been in receipt of the 2009 notice but we do consider there is any evidence to support that contention. By letter dated 19 May 2010, when he finally received the notice of intention, the appellant set out the "observations which I would have made by 7/6/09 had the Notice been served or within a month of service (but prior to the Estimate)." He raised a number of issues with regard to the service of the notice; whether there was a reserve fund; the calculation based upon bed spaces; and why the estimated costs for Turner House exceeded more than one-quarter of the whole estimated costs. There was a response to his queries in a letter from the respondent dated 23 June 2010.

57. The appellant did not seek to raise any query with regard to the scope of the works or set out that the works were not necessary in his letter of May 2010. He could have raised such concerns, and nominated an alternative contractor, at any time and he attended the Consultation Meeting on 23 July 2009 at which he was given (together with the other residents) an opportunity to sit on the contract evaluation panel to consider which contractor should be chosen.

58. Even without the service of the 2009 notice, the respondents did consult with the appellant and he did have the opportunity to make observations on the proposed works and nominate a contractor – the very matters that the initial notice is designed to deal with. In the circumstances, we cannot find that the appellant suffered relevant prejudice as is set out in *Daejan* as he was not under a disadvantage that he would not have suffered had the consultation requirements been fully complied with. The appellant was, in our judgment, in the same position he would have been in had the consultation requirements been fully complied with.

Conclusion

59. Our conclusions are, therefore, that:

(i) there was a procedural irregularity by reason of the LVT raising a point about the validity of the 2009 notice which had not been raised by either party;

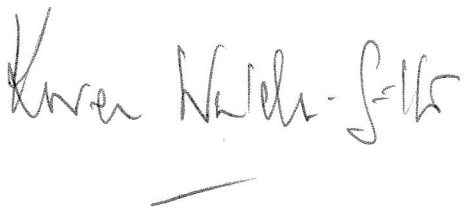
(ii) that the 2009 notice was not, in any event, invalid, as a result of it including a name for observations to be passed to who was someone no longer involved in the contract;

(iii) that the 2007 notice was not a valid notice for the purpose of the 2009 contract; but that

(iv) in all the circumstances of this matter, there was no relevant prejudice to the appellant so that the LVT did not err in determining that that 2009 notice be dispensed with pursuant to the provisions of section 20ZA of the 1985 Act.

60. The appeal is allowed in part (conclusion (iii)) but is refused in respect of the LVT's decision to make a dispensation under section 20ZA of the 1985 Act (conclusion (iv)). The cross-appeal is allowed (conclusions (i) and (ii)).

Dated: 20 June 2013



Her Honour Judge Walden-Smith

A J Trott FRICS
Member

Corrigendum
In line 5 of paragraph 56 of this decision the words "but we do consider" should read "but we do not consider."