UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2014] UKUT 0327(LC)
LT Case Number: LRX/126/2013

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – First-tier Tribunal finding works had been carried out to a reasonable standard on the assumption the lessor would fully comply with undertakings to carry out works to remedy defects – whether appropriate to accept such undertakings and to proceed on basis works in effect had been carried out to a reasonable standard - whether instead Tribunal should have made findings (on a global or individual basis) regarding deductions to be made from charges otherwise payable - terms for dispensation from consultation requirements

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

BETWEEN:

MR JOSE AND MRS ROSA NOGUEIRA AND OTHERS **Appellants**

and

THE LORD MAYOR AND CITIZENS OF WESTMINSTER **Respondents**

Re: Various flats on the Brindley and Warwick Estates, London W2

Before His Honour Judge Nicholas Huskinson

Sitting at: 43-45 Bedford Square, London WC1B 3DN
on
8 July 2014

Shomik Datta, acting on a direct public access instruction for the Appellants
Alastair Redpath-Stevens, instructed by Judge & Priestley LLP, for the Respondents

The following cases are referred to in this decision:

Westminster City Council v Allen [2013] UKUT 0460 (LC)

Daejan Investments Ltd v Benson [2013] UKSC 14

In re B (A minor) (Supervision Order: Parental Undertaking [1996] 1 WLR 716

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal (Property Chamber) dated 24 July 2013 whereby the F-tT decided certain matters regarding the recoverability by the respondents as lessor from the appellants as lessees of certain charges for major works which had been carried out at the relevant properties, being properties in which the appellants hold certain residential flats from the respondents upon long leases at low rents.

2. The respondents are the freehold owners of six blocks of residential accommodation comprising in total over 750 units. Three major works contracts have been entered into by the respondents in respect of these properties. The present appeal is concerned only with one of these major contracts, namely contract H127 which was completed in 2009. This contract dealt with, *inter alia*, works to the lifts, cladding, roof, balconies and windows at the properties. The original final account bill submitted to Mr and Mrs Nogueira (the first named appellants) in July 2011 in respect of this contract was almost £42,000. The other two major works contracts, namely P401 (dealing with the installation of a new door entry system to five of the six blocks) and P142 (dealing with the refurbishment of communal areas) are not the subject of the present appeal (although limited points may arise under contract P142 in consequence upon the decision on this appeal) and appear to have involved expenditure far less than that involved in contract H127. During the course of the proceedings before the LVT certain concessions were made and decisions were reached which resulted in the final bill for contract H127 being substantially reduced, but it remained a large sum.

3. There was at one stage before me some disagreement as to exactly what the F-tT decided. However in my judgment what was decided was that the full amount of the final bill for the works under H127 (but as reduced through concessions and certain points decided favourably to the appellants) was payable and that this was so despite there being present certain defects in the works which needed to be put right. The LVT concluded it was able so to find, despite the existence of these defects which had not yet been put right, because certain undertakings (as described more fully below) were given by the respondents to the LVT that these defects would be put right within a certain timeframe. Accordingly rather than decide upon a reduced amount to be payable in respect of each of the appellants' properties on a individual basis, or decide that some global percentage of the bill which each appellant had received was not payable until certain remedial works had been done, the LVT decided that the entire amount was payable but that the appellants had their rights to enforce the undertakings which were given to the F-tT. The appellants had objected to the F-tT that these defects should not be dealt with by way of undertakings in this manner.

4. During the course of the hearing before me it became clear that the respondents (correctly in my judgment) did not submit that the decision of the F-tT could be upheld in its entirety and that the respondents did not contend therefore that the appeal could simply be dismissed. It was agreed that the matter must be remitted to the F-tT for it to reach findings upon certain as yet undetermined

points. I explain more fully in due course the ambit of this agreed remittal. It appears the respondents had not indicated agreement to such an approach prior to the hearing before me.

5. Bearing in mind this agreed position between the parties it is appropriate for me to deal with this appeal somewhat more briefly than would have otherwise been necessary. In particular as will be seen below there were certain points raised which I do not consider it necessary or proper to decide.

6. However before turning to explain why there must be a remittal it is right that I should, in support of the F-tT, make clear that much of the F-tT's decision still stands. The F-tT gave considerable attention over a substantial period to this matter and decided numerous points. In respect of many of these points there is no appeal before the Upper Tribunal.

7. The application before the F-tT was made by leaseholders of 37 flats out of the total of over 750. It is right that I should at this stage observe that only the leaseholders of 14 of these 37 flats are party to the present appeal to the Upper Tribunal, namely the lead appellants Mr and Mrs Nogueira and the other appellants listed on page 143 of the bundle in respect of 13 other flats. By agreement between the parties I was asked to make clear, and I do so, that the present decision is in respect only of those appellants in respect of these 14 flats.

8. I have already explained the broad extent of the works comprised in H127. At paragraph 12 of its decision the F-tT recorded that by the conclusion of the hearing the total costs of the works to all blocks under contract H127 were reduced to £31,756,056.08 of which £24,035,979.83 were chargeable, this reduced figure coming about largely as a result of the queries raised by Ms Nogueira and Mr Byers and concessions made by the respondents.

9. Numerous points were raised before the F-tT for its decision. I summarise the principal points below. The F-tT received extensive evidence including evidence on behalf of the respondents from a quantity surveyor, a leasehold policy officer, a technical manager, and from the respondents' expert witness Mr J G Flowers FRICS, a chartered building surveyor. On behalf of the appellants the F-tT received evidence from Mr J Byers BSc MRICS AClArb, a chartered surveyor, and also from certain of the appellants themselves.

The F-tT's decision

10. The issues which were raised before the F-tT and decided by it included the following:

(1) Whether the works were all carried out in accordance with the terms of the lease so as to be properly chargeable under the terms of the lease. The F-tT found they were so chargeable (paragraph 40 of the decision).

(2) Whether the accounts were mathematically correct – the F-tT found that they were (paragraph 41).

(3) Whether in accordance with section 20 and following of the Landlord and Tenant Act 1985 as amended there had been proper consultation and, if not, whether dispensation should be granted having regard to the Supreme Court decision in *Daejan Investments Ltd v Benson* [2013] UKSC 14.

(4) The F-tT decided that there had been omissions in the consultation process under contract H127; that therefore dispensation was required; that no prejudice to the appellants had been proved; and that in accordance with the *Daejan* decision dispensation should be granted (paragraphs 42-49).

(5) The F-tT considered an argument raised by the appellants under section 20B of the Landlord and Tenant Act 1985 as amended and rejected that argument (paragraph 50).

(6) The LVT considered the question as to whether all the costs were reasonably incurred and whether the works were of a reasonable standard. As regards the disagreement between the expert evidence provided by Mr Flowers for the respondents and by Mr Byers for the appellant the F-tT stated that as a matter of principle it preferred the evidence of Mr Flowers to that of Mr Byers. Upon this question of whether the costs were reasonably incurred and whether the works were of a reasonable standard the F-tT made the following decisions.

(7) The F-tT decided that the concrete to the blocks was in urgent need of repair and protection and that the installation of the cladding with insulation was a reasonable way of providing protection and enhancing the appearance of the blocks and improving heat retention. The F-tT decided that in installing the cladding it was necessary to replace the balcony balustrading and that it was not possible to re-fit the old balustrading. The F-tT observed in paragraph 52b that:

> "There are issues with regard to the balustrading which are referred to in the undertaking given by the Council to which we will return in due course."

(8) The F-tT decided as regards the windows that these were in need of replacement rather than capable of being satisfactorily dealt with by merely repair. The F-tT expressed itself satisfied that, both on a financial basis and as an aesthetic improvement to the individual leaseholders' properties, the replacement of the windows was a reasonable cost. The F-tT then observed: "There have been issues as to the standard of works but again the Council has undertaken to carry out such works as may be necessary."

(9) As regards the works carried out to the roof, the F-tT concluded that there was no evidence produced by the appellants to show that unnecessary repairs had been carried out. There were issues concerning the walk-ways and the handrail which the F-tT decided in favour of the respondents. In relation to these matters the F-tT stated: "we are satisfied that all works carried out in respect of the roof, subject to the undertaking, was work carried out reasonably and at a fair price."

(10) The F-tT made or approved certain allowances in respect of certain other matters that had been raised in a Scott schedule.

11. In paragraph 53 of its decision the F-tT stated:

> "We are therefore of the view and find that the works carried out under contract H127 were carried out properly and at a reasonable price and to a reasonable standard. In so far as the reasonable standard element is concerned it is on the assumption that the Respondents will return to fully comply with the terms of the undertaking which is attached to this Decision. In those circumstances, therefore, we see no reason to make any reductions to the costs of the contract H127 other than those conceded by the Applicants" [presumably this last word is a misprint for Respondents].

Also in paragraph 54 the F-tT includes the following statement:

> "In any event having found that the costs and the standard of works subject to the undertaking are reasonable …"

12. The suggestion that defects in the works should be dealt with by undertakings given by the respondents to the F-tT was opposed by the appellants. The F-tT's decision upon this matter is contained in paragraphs 61 and 64 which are in the following terms:

> "61. Finally we were asked whether the Applicants should be "forced to accept the Respondents undertakings." It seems to us this is a matter for our determination as to whether or not the undertakings offered by the Respondents coupled with the findings that we have made lead to a resolution of the dispute within the provisions of Sections 18, 19 and 27A of the Act. From a practical basis it seems to us it would be incredibly difficult, if not impossible, to determine which leaseholder should have what reduction made to their service charge bill. There are differing allegations made as to wants of repair and deficiencies in the works carried out under the three contracts for individual leaseholders. One only has to look at the initial schedule of leaseholders who were being represented by Miss Nogueira and their complaints to see that whilst there is some common ground there are also a number of issues that are relative to individual flats. This was a contract dealing with a large number of leasehold properties and tenanted properties for which there have been only a limited number of leaseholders who have sought to challenge the costs. The evidence we had before us was that the main contract (H127) was well run, came in under budget and under time. The third contract P142 has yet to be formally concluded and final accounts issued. It is our finding that the appropriate way of resolving this matter is to accept as part of the settlement the undertakings given by the Respondents to deal with outstanding issues within a reasonable period of time. The Applicants have already had considerable success in the reductions that have been made to the overall costs which we have referred to and of course the Respondents are not seeking to claim the costs of these proceedings."

> "64. The undertaking attached is now approved by us and forms part of the order. In the letter dated 3 July 2013, Judge & Priestly, on behalf of the Council, indicate that they will not undertake to box in or paint the internal pipework and refers us to the Respondent's reply dated 30 August 2012. We have noted what is said and accept the reasons for proceeding as they did. However, the standard of installation was not good in the flats we internally inspected. Provided the Council complies with the making good of the works as provided for in the final paragraph of page one of the Judge & Priestly letter of 3 July 2013 that should resolve matters. Further, if problems remain the leaseholder affected should contact the

> Council direct to resolve any outstanding difficulties. Non-compliance with the undertakings can therefore be enforced by the Applicants if they so wish in the normal manner in which an order made by the Tribunal can be enforced."

The F-tT attached to its decision a document headed "Proposed Undertakings of the Respondent" which appears (so far as concerns the copy before me) not to have been signed or dated on behalf of the respondents. A copy of the undertakings contained in this document is attached to the present decision so that the reader can see the nature of the undertakings which the F-tT accepted.

13. It will be seen from a reading of paragraph 64 of the F-tT's decision (set out above) that the undertakings in the document which is attached to this decision did not cover the full extent of the necessary undertakings and that a further promise to carry out works was contained in the final paragraph of page 1 of Judge & Priestly's letter of 3 July 2013 which was in the following terms:

> "To the extent that the Tribunal in its letter 10 June may refer to the Appellant's assertion that in some flats workmen left large holes, exposed concrete or cracked plaster (see paragraph 41 of the Applicant's Statement of Case), the Respondent confirmed that it will undertake to make good such item on request by a Lessee upon the terms set out in the draft undertaking already submitted to the Tribunal."

14. The need for this additional undertaking had apparently arisen in the following manner. Various new pipework had been introduced into the blocks because it had been impossible to replace or repair existing pipework which was set into the concrete. It was said by the respondents that the painting and boxing-in of such pipework was not in fact within contract H127 at all and therefore the costs of such were not part of the costs which the F-tT needed to consider. However there was evidence that in attaching this new pipework certain holes had been caused in the concrete of (in particular) the walls of certain flats and it was argued by the appellants that this and other making good should also be remedied. The F-tT decided to achieve such remedy by accepting the undertaking.

The permission to appeal

15. Permission to appeal was granted by the Upper Tribunal on 5 December 2013 upon the following issues:

> "1. Whether the F-tT was entitled to accept the undertaking offered by Westminster. Whether the undertaking would "lead to the resolution of the dispute within the provisions of sections 18, 19 and 27A of the Act." Whether despite the undertaking it was necessary for the F-tT to make specific findings as to the standard of the work carried out and the impact which any defects to which the undertakings were intended to relate had on the extent to which the cost of the works was recoverable through the service charge.
>
> 2. Whether the F-tT dealt sufficiently in its reasons with issues relating to individual flats, having regard to the evidence adduced in respect of those flats and the opportunity available to the Tribunal to inspect individual flats.

3. Whether the F-tT was correct to conclude in paragraph 49 of its decision that the dispensation which it proposed to grant in relation to failures of consultation could not be made conditional on reimbursement of costs incurred by the applicant's representative, Miss Nogueira, in dealing with the dispensation application.

4. The appeal will be by way of a review of the F-tT's decision, at which no further evidence will be received."

The need for a remittal

16. Although the F-tT does not expressly state in its decision the points it was being asked to decide, it was agreed before me that what the F-tT was being asked to decide so far as concerns contract H127 (which is the only contract which is the subject of the present appeal) is how much of the costs of this major works contract could properly be recovered from each of the appellants through the service charge.

17. Section 19 of the 1985 Act provides:

"(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly."

18. The appellants had raised complaints regarding the quality of the works to the main structure of the building (defects which could potentially affect all of the appellants) and also complaints regarding defects they contended were present in their individual flats. As regards this latter point there was before the F-tT a schedule entitled "specific defects (in addition to general defects) identified during visits in May 2012" (see page 78 and following of the bundle). It was therefore the appellants' contention that, in order to assess how much of their respective final bill for contract H127 works each of them had to pay, it was necessary for the F-tT to reach a decision upon the extent of any general defects in the works to what in effect could be described as the common parts (i.e. defects which could affect all of the appellants) and also the extent of the defects in the relevant individual flats (principally concerning windows) which could affect each appellant differently depending upon the extent of the defects in their particular flat.

19. The F-tT found that the main contract H127 was well run and came in under budget and under time. The F-tT found that the works carried out under contract H127 "were carried out properly and at a reasonable price and to a reasonable standard." If the matter rested there then there would of course be no proper justification for contending that the amount (subject to agreed adjustments)

charged through the service charge provisions of respect of contract H127 to each appellant was unreasonable or should not be paid. However the F-tT was only able to find that the works were carried out to a reasonable standard on the assumption that the respondents would return to comply fully with the terms of the undertaking attached to the decision. In other words the F-tT in fact did not find that the works were carried out to a reasonable standard – instead the F-tT found that the works were not carried out to a reasonable standard but would become works to a reasonable standard if and when the undertakings had been fully complied with. It will also be seen that the F-tT made no specific finding about the extent of the alleged defects in each of the appellant's flats.

20. The F-tT explained why it proceeded in this manner namely by accepting the undertakings. It concluded from a practical basis it would be incredibly difficult if not impossible to determine which leaseholder should have what reduction made to the service charge bill because there were differing allegations made as to wants of repair and deficiencies in the works. Also there were a number of issues that were relevant to individual flats.

21. It is proper to sympathise with the F-tT in its recognition of the difficulty which the present case posed for it. There happened to be the lessees of 35 flats involved in the application before it – although of course in theory there could have been an application by every lessee in the six blocks which would have made over 750 applicants, each with an individual flat. In such a case it can become impractical and disproportionate to expect an F-tT to examine each and every individual defect alleged in each flat and in effect to come up with some form of priced defects schedule for each flat such that the cost of that individual defects schedule shall be deducted from that individual's bill.

22. It is recognised in this Tribunal's decision in *Westminster City Council v Allen* [2013] UKUT 0460 (LC) that in such circumstances it is permissible, not merely with the parties' consent but also even in circumstances where the parties do not consent, for the F-tT to deal with the matter on a global basis. I respectfully agree. Thus rather than making an individually priced reduction in respect of each separate lease the F-tT could make a global deduction of a certain percentage of the service charge bill to reflect outstanding defects. It was accepted by the parties before me that there may be other methods of dealing with the matter on a global basis, for instance perhaps (if the facts justified this) dividing the leaseholders' flats into three categories where a particular outstanding defect affected one category seriously, one category moderately and one category slightly and then making different deductions, whether by way of a percentage reduction or, perhaps, a deduction of a specified sum, so as to reflect the extent of the outstanding defects.

23. What however both parties in the present appeal agreed (and I too agree) is that it was not acceptable for the F-tT to make no reduction of any kind (whether by way of a percentage reduction or a round sum) from a service charge bill for major works in the circumstances where it was accepted by the F-tT that there were significant defects in the standard of the works. This is what the F-tT has in effect done here, having directed itself it could properly do so because undertakings to carry out the outstanding works to remedy the defects were being given and because:

"Non-compliance with the undertakings can therefore be enforced by the [appellants] if they so wish in the normal manner in which an order made by this Tribunal can be enforced."

24. In consequence I order that this case be remitted to the F-tT for the F-tT to make the following decisions in respect of the service charge accounts for the major works comprised in contract H127, as submitted to the appellants in respect of each of the 14 flats which are the subject of the present appeal:

(1) The extent of the deduction to be made from the amount payable by each appellant in respect of their flat to reflect such failure to carry out works to a reasonable standard as occurred in relation to the various matters covered by the undertakings in the document attached to the F-tT's decision and in the further undertaking referred to in paragraph 13 above. It is for the F-tT to decide whether to make individually calculated deductions in respect of each flat separately or whether this is a case in which it is appropriate to make such deduction on a global basis as contemplated in *Westminster City Council v Allen* [2010] UKUT 0460 (LC).

(2) The question of whether major works contract H127 included works for the painting of pipework and/or the boxing in of pipework and whether any cost in respect of such works has been included in the calculation of the final accounts for this contract and, if so, what if any deduction should be made from the final service charge account in respect of works contract H127 to reflect any want of reasonable standard in such works, it being for the F-tT to decide (if some deduction does require to be made) whether to make an individually calculated deduction in respect of each relevant flat or whether to deal with the matter on a global basis as in paragraph (1) above.

The constitution of the F-tT for this remitted hearing is a matter for the F-tT. I do not direct that the F-tT needs to be constituted by the same members who sat on the original decision. If either party wishes to make any submissions to the F-tT regarding whether for the purpose of the remitted hearing the F-tT should or should not be constituted by the same (or any of the same) members as sat on the original decision, the parties can do so and it will be for the F-tT to rule upon any such application.

Arguments regarding undertakings

25. The parties had prepared argument, including skeleton arguments, upon the question of whether the F-tT had power to accept an undertaking in the way it purported to do in the present case and, if so, whether such an undertaking was enforceable. Mr Redpath-Stevens for the respondents questioned whether it was useful or appropriate for the Upper Tribunal to consider these matters in the present case bearing in mind the agreed position namely that in any event the matter must be remitted to the F-tT for further consideration. In respect of the undertakings accepted by the F-tT Mr Datta submitted in summary:

(1) that it was wrong as a matter of principle for the F-tT to have accepted these undertakings;

(2) that procedurally undertakings to do works cannot be enforced under the relevant Regulations or Rules;

(3) that in any event the wording of the undertakings was such that there was no sufficient definition of the works to be done and that such undertakings would be unenforceable.

26. The argument presented upon these points was wide-ranging and included:

(1) Argument as to whether Tribunals in general could ever accept undertakings, with reference being made to matters such as the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 Article 4(2)(b) (involving an undertaking to pay a fee). Reference was made to the common practice of an LVT or F-tT accepting from a landlord an undertaking that certain expenses would not be included within a service charge account.

(2) Argument regarding enforceability. This in turn gave rise to an argument as to whether the present case before the F-tT was covered by the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 or by the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, it being common ground between the parties that an undertaking such as given in the present case could not in any event be enforced under the 2013 Rules, but it being the argument on behalf of the respondents that such undertakings could have been enforced under the 2003 Regulations. The question of whether the 2003 Regulations or the 2013 Rules applied turned upon the proper interpretation of schedule 3 of the Transfer of Tribunal Functions Order 2013 because the hearing took place prior to 1 July 2013 but the decision was not given until after that date.

27. This is not the case to examine the question of the extent to which undertakings can properly be given to a F-tT or an LVT. There is in any event a substantial distinction between the type of undertaking purportedly accepted here on the one hand and an undertaking to pay a fee or not to include certain costs within a service charge on the other hand. There are wholly different problems of enforcement as regards the latter type of undertakings as compared with an undertaking to carry out works. In the latter type of undertaking there could well be a finding of an estoppel (apart from any other method of enforcement) precluding a landlord from going back on a promise not to include certain costs within a service charge. As regards a failure to pay a fee a Tribunal may have express or implied powers as to how to proceed (it appears to be contemplated under the 2011 Fees Order referred to in paragraph 26(1) above that the undertaking to pay the fee would be accompanied by a requirement that the person acknowledge that if they break their promise to pay the fee their case might be stopped struck out or the order obtained revoked, see page 268 of the bundle). All that is very different from an undertaking to carry out substantial works to a building.

28. As I am satisfied that the F-tT should not have accepted these undertakings to carry out certain works, it is not necessary for me to make any finding as to whether the 2003 Regulations or the 2013 Rules applied or whether, supposing the 2003 Regulations applied, there was some wider power of enforcement thereunder as compared with the 2013 Rules.

29. The reason I conclude these undertakings should not have been accepted are as follows:

(1) An undertaking to a court is a promise to the court which is capable of being enforced by the court by way of proceedings for contempt if the undertaking is broken. An undertaking to the court is solemn, binding and as effective as an order of the court in the like terms. See *In re B (A minor) (Supervision Order: Parental Undertaking)* [1996] 1WLR 716 at 723-4. That case also shows that a county court has no inherent jurisdiction to grant injunctions and therefore has no inherent jurisdiction to accept undertakings in care proceedings.

(2) An F-tT has no inherent jurisdiction to grant an injunction e.g. a mandatory injunction that certain works be carried out. I conclude that an F-tT can equally have no inherent jurisdiction to accept an undertaking (using that expression as an undertaking in the nature of something akin to an injunction) that certain works will be carried out.

(3) The F-tT would have no power to enforce an undertaking, even if such an undertaking were given, that certain works should be carried out – i.e. no power to compel the giver of the undertaking actually to carry out the works.

(4) Quite apart from all the foregoing, even if the F-tT did have power to accept an undertaking that certain works should be carried out, the terms in which the present undertakings are phrased are much too imprecise to be the proper subject of such an undertaking.

30. I can see that certain arrangements might loosely be described as the giving of an undertaking when in fact they are not. Suppose for instance there were five elements of disputed work that made up the costs on which a service charge was calculated. Suppose on an application under section 27A of the Landlord and Tenant Act 1985 for a decision as to how much was payable an F-tT decided that the tenants' challenges to the first four categories of work (totalling a cost of £X) failed but as regards the fifth category (the cost of which was £Y) there existed substantial defects. In such circumstances I see no reason why, if this was the F-tT's view, the F-tT could not conclude that £X was recoverable in full and that £Y was a reasonable sum for the final category of works once they were done properly and to conclude that therefore this additional £Y would be recoverable once the outstanding defects had been cured. In such circumstances a landlord might, using loose language, undertake to the F-tT to remedy the defects in the fifth category of work and the F-tT might in its decision conclude that £X was recoverable immediately through the service charges and that the further sum of £Y would be recoverable once the landlord had honoured its undertaking. However that would not in my view be an undertaking strictly so-called. All that would in effect be happening is that the F-tT would be deciding, as regards the £Y, that this was not payable immediately but would become payable at a future date, namely the date by which the landlord made good its promise to carry out the remedial works.

Whether dispensation should have been granted on terms

31. Before the F-tT the appellants were not professionally represented. Instead Ms Nogueira, the daughter of the lead appellants, represented her parents and the other appellants. It is clear that she put much work into the case. This was recognised and appreciated by the F-tT.

32. On behalf of the appellants Mr Datta submits that, having regard to the analysis in the Supreme Court in *Daejan*, if dispensation is to be granted it should ordinarily be made conditional upon payment of the tenant's reasonable costs in relation to the dispensation issue. The benefit of the doubt as to whether costs were reasonably incurred should be given to the tenant.

33. Mr Datta pointed out that the reason given by the F-tT for not allowing any part of Mr Byers' costs as a condition of dispensation was that Mr Byers had not given evidence upon the question of the consultation matters. However Mr Datta pointed out that there was material before the F-tT to show that Mr Byers' instructions were extended to consider the consultation and dispensation point and that as a result the appellants did incur some extra costs to Mr Byers in respect of the consultation and dispensation point, even though he did not give evidence to the F-tT upon the topic. Mr Datta also submitted that, although the appellants had not incurred any professional costs and indeed other costs directly payable to Ms Nogueira, they had indirectly sustained costs because Ms Nogueira had had to give up substantial time in dealing with this case and her parents had had to accommodate her and support her during the time she did so.

34. Mr Redpath-Stevens in relation to this question of whether dispensation should only have been granted upon payment of certain costs advanced the following arguments:

(1) The grant of permission to appeal (see paragraph 15 above) was limited to costs incurred by Ms Nogueira in dealing with the dispensation application – it did not extend to any costs of work done by Mr Byers in relation to this matter.

(2) There was no evidence before the F-tT that the appellants (or more particularly Mr and Ms Nogueira) had incurred any costs in relation to Ms Nogueira representing them. As regards the suggestion that they had indirectly incurred costs from having to support and accommodate Mrs Nogueira for a period, it would theoretically have been possible for the F-tT to have asked for further submissions and, perhaps, to have reconvened for a further hearing in relation to costs and whether dispensation should be granted on the payment of some costs (and if so what costs). He submitted, however, that there must be finality in litigation and that the F-tT was entitled to decline to reopen matters in this manner and instead to proceed to reach the conclusions it did.

35. This is an appeal by way of review. It is not suggested that there was evidence before the F-tT regarding the incurring of costs by the appellants in general or Mr and Ms Nogueira in particular in relation to the assistance provided by Ms Nogueira. I conclude the F-tT was entitled to find that dispensation should be granted without a requirement to pay costs in respect of some indirect costs incurred by Mr and Ms Nogueira in supporting and accommodating their daughter while she assisted them with this case. However having reached this finding I should record that it seems clear Ms

Nogueira did substantial work and was of substantial assistance to the appellants in general and to her parents in particular in the presentation of the case before the F-tT.

36. However as regards Mr Byers' costs relating to the consultation and dispensation issue, I have reached the conclusion that the F-tT was in error in finding that the appellants had not incurred any costs to Mr Byers in respect of this issue merely because he did not give evidence upon the topic before the F-tT. Accordingly upon this issue I direct that, when the case comes again before the F-tT pursuant to the remittal referred to above, the F-tT should also consider whether the dispensation from the consultation provisions should be made conditional upon the payment to the appellants of some costs (and if so what costs) incurred by the appellants to Mr Byers in relation to the consultation and dispensation issue.

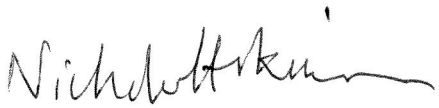
Conclusion

37. For the reasons set out above the appeal is allowed to the extent that the case is remitted to the F-tT (to be heard before a Tribunal which does not need to be constituted by the same members who sat on the original decision) for the F-tT:

(1) to make the decisions referred to in paragraph 24 above; and

(2) to make the decision referred to in paragraph 36 above.

Dated: 4 September 2014



His Honour Judge Nicholas Huskinson

Proposed Undertakings of the Respondent

Further to the hearing of the Applicants' application on 22-26 April 2013 in which the Applicants made assertions as to defects as set out in the experts' Scott Schedule dated 21 March 2013 and further to the Tribunal's order of 26 April 2013 requiring the Respondent to file and serve proposed undertakings in respect of proposed remedial works to the Brindley & Warwick estates under

contracts H127, P401 and P142, the Respondent will undertake to carry out the works set out below at no additional cost to the Applicants, subject to the Applicants providing access to the Respondent, their workers, contractors, agents and professional advisors (after having given reasonable practice in writing to the Applicants) in connection with the works:

(1) **Leaseholder Windows**: The Respondent undertakes to carry out an inspection of the flats of any Applicant or other residents who has notified the Respondent in writing of any of the following:

- Misalignment of the casements
- Missing weep hole covers
- Missing/faulty gaskets
- Faulty/loose handles
- Missing seal around frame

Any Applicant or other resident requiring an inspection is to notify the Respondent in writing on or before the expiry of 4 weeks from the date of this undertaking ("Notification Date"). The Respondent undertakes to carry out all inspections within 28 days of the Notification Date and to carry out any required remedial works within 3 months from the date of inspection, subject to access being provided to the Respondent or their agents. If access is not provided within 3 months of the date of the request for access, the Respondent's obligations under these undertakings will cease.

(2) **Roofs**: The Respondent undertakes to carry out any required remedial works to the roofs that were identified in the experts' Scott Schedule referred to above and the defects identified in the IKO Roof Inspection Report dated 26 April 2013 in accordance with the manufacturer's guidelines within 6 months from the date of this undertaking. The Respondent also undertakes to install walkways on the roofs in accordance with Permanite's specification.

(3) **Water Egress**: The Respondent undertakes to investigate the cause of the water egress from the first floor corners of Polesworth House within 28 days of the date of this undertaking and the Respondent shall carry out any required remedial works as soon as reasonably practicable thereafter.

(4) **Balcony Brackets and Fixings**: The Respondent undertakes to carry out inspections to all flats on the estate within 28 days of the date of this undertaking and to carry out any required remedial works to the brackets and fixings to the glass panels (including privacy screens) affixed to the balconies within 3 months from the date of inspection, subject to access being provided to the Respondent or their agents for inspection and to carry out the works. If access is not provided within 3 months of the date of the request, the Respondent's obligations under these undertakings will cease.

(5) **Balcony Decking**: The Respondent undertakes to install an access hatch for cleaning in the existing decking to the balconies of those Applicants or other residents who provide a written request to the Respondent on or before the expiry of 4 weeks from the date of this undertaking ("Notification Date"). The Respondent undertakes to complete the

work within 3 months from the Notification Date. Subject to access being provided to the Respondent or their agents. If access is not provided within 3 months of the date of the request for access, the Respondent's obligations under these undertakings will cease.

(6) **Pigeon Spikes**: The Respondent undertakes to inspect the properties of any Applicant or other resident who has notified the Respondent of missing pigeon spikes. Any Applicant or other resident requiring an inspection is to notify the Respondent in writing on or before the expiry of 4 weeks from the date of this undertaking ("Notification Date"). The Respondent undertakes to carry out all inspections within 28 days of the Notification Date and to carry out any required remedial works within 3 months from the date of inspection, subject to access being provided to the Respondent or their agents. If access is not provided within 3 months of the date of the request for access, the Respondent's obligations under these undertakings will cease.

(7) **Kitchen Ventilation**: The Respondent undertakes to inspect the properties of any Applicant or other resident who has notified the Respondent of missing vents in their kitchen windows or (where there are no working gas appliances within the kitchens) vents that do not close. If any Applicant or other resident has gas appliances in their kitchen, the vents should remain open at all times. Any Applicants or other residents requiring an inspection are to notify the Respondents in writing on or before the expiry of 4 weeks of the date of this undertaking ("Notification Date"). The Respondent undertakes to complete the work within 3 months from the Notification Date, subject to access being provided to the Respondent or their agents. If access is not provided within 3 months of the date of the request for access, the Respondent's obligations under these undertakings will cease.

(8) **P142 Electric Works**: The issues identified with the communal lighting are being inspected under the end of defects process. The Respondent undertakes to carry out any required remedial works by 31 May 2013.

(9) **P142 Decorations**: The inspections to the internal decorations are taking place under the end of defects liability process and the Respondent undertakes to carry out any required remedial works by 31 July 2013.

The Applicants are to send their notifications and inspection requests to Kanita Uscuplic of City West Homes in writing or by email to kuscuplic@cwh.org.uk or by post to 155 Westbourne Terrace, London W2 6JX.