UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – variation of leases – Landlord and Tenant Act 1987 Part IV as amended – service charges – proportionate contributions totalling less than 100% of relevant costs – section 35(2)(f) and (4) – whether order under section 38 varying the leases can be effective from a date earlier than the date of application to the leasehold valuation tribunal.

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

BETWEEN **BRICKFIELD PROPERTIES LIMITED** **Appellant**

and

PAUL BOTTEN **Respondent**

Re: 17-64 Carlton Mansions
Holmleigh Road
London N16 5PX

Before: His Honour Judge Nicholas Huskinson

Sitting at: 45 Bedford Square, London WC1B 3DN
on 6 March 2013

Gary Cowan, instructed by Wallace LLP on behalf of appellant
The respondent did not appear and was not represented

The following case is referred to in this decision:

Daejan Investments Ltd v Benson [2009] UKUT 33

DECISION

Introduction

1. This is an appeal from the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") dated 27 July 2011 whereby the LVT made an order under section 38 of the Landlord and Tenant Act 1987 as amended varying certain long leases of flats at Carlton Mansions, Holmleigh Road, London N16 5PX. The variations made to the leases were as sought by the appellant, as landlord, save in one respect, namely the date as from which the variations of the leases were to take effect. The LVT ruled that the variations should take effect from the date of the LVT's order. It is from that decision that the appellant appeals, contending that the variations can and should take effect from a substantially earlier date.

2. Flats 1-64 Carlton Mansions are contained within eight blocks, there being eight flats in each block. I was told that in fact the block containing flats 9-16 was never owned by Daejan Properties Limited ("Daejan"), who was the appellant's predecessor in title. Daejan owned seven blocks comprising a total of 56 flats. Daejan granted long leases at low rents of many of these flats (but retained certain flats in hand) and in these leases Daejan included provisions for Daejan to undertake the repair and maintenance etc of the buildings and to recover the appropriate amount from the various lessees through the service charge provisions in the leases (with Daejan itself bearing the proportion of the costs properly attributable to the flats kept in hand by Daejan). The appropriate proportions in respect of the various flats was based upon the rateable values of those flats and was so framed so as to ensure that the proportion attributable to each flat (including the proportions attributed to the flats kept in hand by Daejan) when added together came to 100%. Thus Daejan maintained etc the buildings and recovered 100% of the costs of doing so from the lessees and from its own notional contribution of the due proportion in relation to the flats kept in hand by Daejan.

3. In 2006 certain qualifying tenants exercised their rights to collective enfranchisement under the Leasehold Reform Housing and Urban Development Act 1993 in respect of one of the blocks, namely that containing flats 1-8. Daejan transferred the freehold of this block to the nominee purchaser on 10 November 2006 ("the Transfer Date").

4. In consequence of this transfer away of the block containing flats 1-8, the total expenditure incurred by Daejan in maintaining etc the remaining six blocks of flats was less than it would have been if Daejan had been obliged to continue to maintain etc seven blocks rather than six. Thus the total expenditure by Daejan which was capable of being recovered through the service charge provisions decreased. A further consequence concerned the relevant proportions paid by each of the lessees in the remaining six blocks. If the proportions for each of these flats (including the proportions attributable to the flats kept in hand by Daejan) were added together they now added up to less than 100%. In fact they came to 85.55% - the missing 14.45% was the total of the proportions which had previously been attributable to flats 1-8, which were now no longer the concern of Daejan because of the enfranchisement. Thus if after the Transfer Date the provisions of the leases were operated in accordance with their existing terms Daejan would not be able to recover

100% of the costs of management etc of the remaining six blocks but instead would only be able to recover 85.55% thereof. This is just such a circumstance as is envisaged in section 35(2)(f) and (4) of the Landlord and Tenant Act 1987 as amended (as to which see below) as being circumstances in which an application can be made to the LVT to vary the leases so as to ensure that the aggregate of the amounts recoverable should equal the whole of the relevant expenditure rather than be less than this whole.

5. Daejan decided to seek the agreement of the lessees in the remaining six blocks to a variation of their leases so as to bring the total of the relevant proportionate contributions up to 100%. The details of the steps taken can be briefly summarised, because in paragraph 14 of its decision the LVT stated that it was satisfied that Daejan consulted with the relevant lessees (i.e. the respondents to the application before the LVT) and informed all of them of the steps they were taking, including informing assignees of any of flats that were assigned after the process started. In summary what Daejan did was as follows:

(1) By a letter dated 12 June 2007 to the various lessees Daejan pointed out the problem which had arisen, drew attention to the powers contained within the Landlord and Tenant Act 1987 Part IV whereby an LVT can order the variation of a lease, and asked for agreement to enter into deeds of variations so as to amend the proportions payable for each flat to a proportion based upon the original proportion but adjusted upwards so that the total became 100% (I understand this was done by taking the original proportion and dividing by 85.55 and multiplying by 100). A schedule of the old and proposed proportions was enclosed with the letter.

(2) Daejan received representations to the effect that these proportions, based upon the old rateable values of the flats, were no longer appropriate. In the result Daejan recalculated the percentages based upon the gross internal area of each flat. Daejan then sent a further letter of 8 August 2007 inviting a variation of the leases so as to amend the relevant proportions to a new proportion based upon gross internal area of the flat in question – with the intention once again that the total of all the proportions should add up to 100%. Once again a schedule of the existing and the proposed proportions was enclosed. Once again Daejan made reference to the fact that, if consent to a variation was not given, Daejan would have no alternative but to make an application to the LVT for a variation of the lease.

(3) Daejan received few responses to this proposal. By a letter dated 14 November 2008 to the various lessees Daejan pressed for a response and stated that if no such response was received by a certain date then Daejan would proceed with a reference to the LVT making the lessee in question a respondent.

(4) In fact only three lessees did actually enter into a deed of variation in the terms sought by Daejan. The last of these deeds was dated January 2011.

6. On 4 January 2010 Daejan granted 999 year headleases to the appellant in respect of the various buildings at 17-64 Carlton Mansions. In consequence the rights and obligations of the lessor under the various long leases of the flats became vested in the appellant.

7. On 27 April 2011 the appellant applied to the LVT under Part IV of the Landlord and Tenant Act 1987 for orders varying the leases of flats:18, 19, 21, 22, 23, 25, 28, 30, 33, 34, 35, 36, 37, 38, 39, 40, 42, 44, 45, 46, 49, 50, 52, 53, 57, 58, 60 and 64. The lessees of each of these flats were made respondents to the application. The application to the LVT sought a variation of the leases by reference to a draft deed of variation. This draft deed was framed so as to deal with a wholly separate point (not presently relevant) and also to deal with the various proportions to be contributed by each lessee such that the new proportions totalled 100%. The variation sought was stated to be a variation which was to take effect as follows:

> "From and including the date of the Transfer the Lease shall be read and construed as varied by the provisions set out in the Schedule hereto."

The lease referred to the transfer whereby the block containing 1-8 Carlton Mansions had been transferred pursuant to the provisions of the 1993 Act. The draft deed in fact gave the wrong date for this transfer, but the date in fact was, and was accepted by the LVT as in effect being, 10 November 2006.

8. Thus the application to the LVT dated 27 April 2011 sought variations of the relevant leases with effect from the Transfer Date (i.e. 10 November 2006) so as to re-establish the 100% total for the proportionate contributions to the service charge expenses.

Statutory provisions

9. Section 35 of the Landlord and Tenant Act 1987 as amended provides as follows:

> "35. – Application by party to lease for variation of lease.
>
> (1) Any party to a long lease of a flat may make an application to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application.
>
> (2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely –
>
> (a) – (e) ….
>
> (f) the computation of a service charge payable under the lease
>
> (g) ….
>
> (3) ….
>
> (3A) ….
>
> (4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if –
>
> (a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraph (a) and (b) would either exceed or be less than the whole of any such expenditure.

(5)- (8) ….

10. Section 38 makes provision for the orders that can be made. So far as presently relevant it is in the following terms:

"38 – Orders varying leases

(1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the tribunal, the tribunal may (subject to subsections (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order.

(2) ….

(3) ….

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the tribunal thinks fit.

(5) ….

(6) A tribunal shall not make an order under this section effecting any variation of a lease if it appears to the tribunal

(a) that the variation would be likely substantially to prejudice –

(i) any respondent to the application, or

(ii) any person who is not a party to the application,

and that an award under subsection (10) would not afford him adequate compensation, or

(b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected.

(7) ….

(8) A tribunal may, instead of making an order varying a lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified; and accordingly any reference in this Part (however expressed) to an order which effects any variation of a lease or to any variation effected by an order shall include a reference to an order which directs the parties to a lease to effect a variation of it or (as the case may be) a reference to any variation effected in pursuance of such an order.

(9) A tribunal may by order direct that a memorandum of any variation of a lease affected by an order under this section shall be endorsed on such documents as are specified in the order.

(10) Where a tribunal makes an order under this section varying a lease the tribunal may, if it thinks fit, make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the court considers he is likely to suffer as a result of the variation.

11. Section 39 provides as follows:

"39 – Effect of orders varying leases: applications by third parties.

(1) Any variation effected by an order under section 38 shall be binding not only on the parties to the lease for the time being but also on other persons (including any predecessors in title of those parties), whether or not they were parties to the proceedings in which the order was made or were served with a notice by virtue of section 35(5).

(2) Without prejudice to the generality of subsection (1), any variation effected by any such order shall be binding on any surety who has guaranteed the performance of any obligation varied by the order; and the surety shall accordingly be taken to have guaranteed the performance of that obligation as so varied.

(3) Where any such order has been made and a person was, by virtue of section 35(5), required to be served with a notice relating to the proceedings in which it was made, but he was not so served, he may –

(a) bring an action for damages for breach of statutory duty against the person by whom any such notice was so required to be served in respect of that person's failure to serve it;

(b) apply to a leasehold valuation tribunal for the cancellation or modification of the variation in question.

(4) A tribunal may, on an application under subsection (3)(b) with respect to any variation of a lease –

(a) by order cancel that variation or modify it in such manner as is specified in the order, or

(b) make such an order as is mentioned in section 38(10) in favour of the person making the application, as it thinks fit.

(5) Where a variation is cancelled or modified under paragraph (a) of subsection (4) –

(a) the cancellation or modification shall take effect as from the date of the making of the order under that paragraph or as from such later date as may be specified in the order, and

(b) the tribunal may by order direct that a memorandum of the cancellation or modification shall be endorsed on such documents as are specified in the order; and in a case where a variation is so modified, subsections (1) and (2) above shall, as from the date when the modification takes effect, apply to the variation as modified.

The LVT's decision

12. The presently relevant parts of the LVT's decision are contained in the following paragraphs:

"14. The Tribunal is satisfied that Daejan consulted with the Respondents and informed all of them of the steps they were taking, including assignees of any of the Flats that were assigned after the process started. After the grant of the underleases to the Applicant, these proceedings were started as only three of the long leaseholders had signed the proposed Deed of Variation.

15. Since the issue of the application there has been only one response from Triplerose Ltd (Flat 33). The Tribunal has considered both the submissions by Triplerose Ltd and the response from the Applicant in coming to its decision.

16. The Tribunal considers that the leases in their present form do not make satisfactory provision for the collection of 100% of the service charges and can therefore be varied in accordance with Section 35 of the Act. The Applicant's proposals of the Amended Percentages on the basis of GIA is a fair and reasonable way of assessing the contributions to be made by each of the Respondents. The Tribunal therefore accepts the terms of the Deed of Variation insofar as they deal with the individual proportions payable. The Tribunal accepts the reply to Triplerose Ltd by the Applicant in which they state that the Amended Percentages are not affected by the contributions to the upkeep of the communal gardens made by the freeholder of Flats 1-8 Carlton Mansions.

17. The Applicant has requested that the Amended Percentages apply with effect from 10 November 2006, being the date on which the freehold of the last building comprising Flats 1-8 Carlton Mansions was transferred. In the Tribunal's view the leases are contractual documents and the Respondents were only obliged to contribute the specified percentages. The Tribunal reminds itself that leases are to be construed against the landlord where there is a discrepancy in its terms. It has been open to the freeholder/head leaseholder to make an application to the Tribunal at any time during the last five years when the question of the appropriate proportion could have been determined. They chose not to do so and no evidence that there is any reason why the Respondents should be required to make backdated contributions in excess of their contractual obligations. Therefore the Tribunal determines that the amended percentages will apply with effect from the date of this decision.

18. ….

19. Although there were no submissions with the regard to compensation under Section 38(10) of the Act, the Tribunal considers that the Respondents will not suffer a loss or disadvantage by the variation. The effect of the variation is that all the long leaseholders will make contributions which together aggregate to 100%. This is as it should be and corrects an

anomaly in the leases. The Tribunal will make no order for compensation under Section 38(10) of the Act.

20. The Tribunal is empowered to make an order varying the Lease if the grounds upon which the application was made are established to the satisfaction of the Tribunal and the Tribunal is satisfied that the variation would be appropriate. A copy of the amended Order under Section 38 of the Act is attached as well as a copy of the amended Deed of Variation."

This appeal

13. The appellant sought permission to appeal to the Upper Tribunal on the basis that the LVT erred in determining that the variation should not be backdated. The Upper Tribunal granted permission to appeal upon this point. It ordered that the appeal would be dealt with by way of review.

14. Where an appeal is proceeding by way of review, the jurisdiction of the Upper Tribunal is conveniently stated by the Senior President Carnwath LJ (as he then was) in *Daejan Investments Ltd v Benson* [2009] UKUT 233 at paragraph 61:

> "However, we remind ourselves that we are reviewing their decision, not substituting our own judgment. 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 it to a result which was clearly wrong".

The decision in this case has subsequently been appealed to the Court of Appeal and to the Supreme Court, but nothing in the judgments in those courts indicate that this approach to an appeal by way of review is wrong.

15. Of the numerous lessees who were respondents to the application before the LVT, only one respondent, namely Mr Paul Botten who is the lessee of flat 52, has indicated an intention to be a respondent to this appeal to the Upper Tribunal. Mr Botten has served a respondent's notice and has made various representations in his letter dated 1 February 2012 (in fact dated 2011 but this must be a typographical slip). Mr Botten did not attend the hearing. I shall refer to Mr Botten's particular representations in due course. However it is appropriate to note here that the fact that most of the original respondents have not responded to the appeal does not mean that the appeal can therefore be allowed. The appeal can, of course, only be allowed if the appellant succeeds in showing that the LVT's decision can properly be interfered with in accordance with the approach set forth in the *Daejan* case, cited above.

The parties' submissions

16. On behalf of the appellant Mr Cowan submitted there were two questions:

(1) Whether the LVT had jurisdiction to order that the variation of the leases should take effect from a date prior to the LVT's decision and prior to the application to the LVT, namely from the Transfer Date (i.e. 10 November 2006); and

(2) If there was jurisdiction to order a variation from the Transfer Date, whether such jurisdiction should have been exercised by the LVT.

17. So far as concerns the question of whether the LVT had jurisdiction to order a variation from a past date, Mr Cowan drew attention to the various letters written by Daejan, to the fact that the lessees were warned at all stages that Daejan was seeking a variation and if it was not obtained there would be an application to the LVT, and that there were negotiations which resulted in three lessees entering into deeds of variation voluntarily. Mr Cowan drew attention to the LVT's finding in paragraph 14 which he relied upon as showing that Daejan kept the lessees properly and fully informed of their intentions. Mr Cowan then advanced the following arguments:

(1) He drew attention to the wide words of section 35(1) so far as concerns what a party is entitled to apply for, namely for an order varying the lease "in such manner as is specified in the application".

(2) He drew attention to the wide words in section 38(1) whereby the LVT is given power to make an order varying the lease "in such manner as is specified in the order".

(3) The width of this jurisdiction is further confirmed by section 38(4) which provides that the variation ordered by the LVT can either be the variation specified in the relevant application "or such other variation as the tribunal thinks fit".

(4) He drew attention to the fact that there is no provision in the Act limiting the nature of the variation which can be ordered so far as its effective date is concerned.

(5) This is in marked distinction to the provisions in section 39(5) which provide that where an order is made for cancellation or modification of a variation then any such cancellation or modification is to take effect from the date of the making of the order or from such later date as may be specified in the order. The presence of a limitation on the effective date for an order effecting a cancellation or modification and the absence of any such limitation on the effective date of an order making a variation to the lease indicates that no such limitation was intended for the effective date of an order varying a lease.

(6) It could be that the ordering of a variation of a lease from a past date could give rise to prejudice – but if this is so protection for a lessee is available under section 38(6) or compensation may be available under section 38(10).

(7) As regards section 38(6) and (10) Mr Cowan submitted that the form of substantial prejudice (contemplated in subsection (6)) cannot be engaged by the mere using of the jurisdiction to ensure that a lease is varied so that a 100% pick up of the service charge expenses is available. Similarly the loss to a lessee of a circumstance

whereby there is less than a 100% pick up of the service charge expenses cannot be the type of loss or disadvantage contemplated in subsection (10) – or if it is the LVT should not think it fit to make an order for payment of compensation. To hold that the very removal of the defect in the lease (i.e. the inability to pick up 100% of the service charge costs) caused a prejudice within subsection (6) or a loss or disadvantage within subsection 10 would remove substantially if not entirely the intended benefit of being able to remedy this defect in the lease.

(8) Section 35(2)(f) is intended to cure a defect in the lease (which could arise in circumstances where a landlord was recovering more than 100% of the service charge costs just as much as a case where the landlord was recovering less than 100%). There is no obvious reason why this cure should be applied from some arbitrary date subsequent to the date when the defect arose, e.g. from such date as a party actually applies to the LVT or such date as the LVT actually makes a decision. The appropriate date to cure the defect is as from the date on which the defect arose. Were it otherwise there would be an incentive for parties to go to the LVT as quickly as possible, rather than seeking to negotiate, and there could be an incentive for parties to try to drag out matters before the LVT so as to delay the date of a final decision.

18. Mr Cowan also drew attention to the protection afforded to the tenant by section 20B of the Landlord and Tenant Act 1985 as amended. He also referred to two decisions of leasehold valuation tribunals in which orders for variation of leases had been made effective from a past date – although no analysis of the jurisdiction or of the appropriate principles was contained in those decisions.

19. In summary Mr Cowan submitted there was jurisdiction for an order varying leases to be effective from the Transfer Date. Mr Cowan submitted that in fact a proper reading of the LVT's decision is to the effect that the LVT did not refuse to order the variation to be effective from the Transfer Date on the basis of there being a lack of jurisdiction, but instead the LVT declined to do so as a matter of discretion for the reasons set out in paragraph 17 of its decision.

20. Mr Cowan submitted that the LVT had erred in its approach to the question of whether it should, in its discretion, order the variation to be made from the Transfer Date. Three reasons were given in paragraph 17 for not so ordering, namely:

(1) leases are to be construed against the landlord where there is a discrepancy in terms;

(2) the freeholder/head leaseholder could have made an application to the LVT at any time during the last five years but chose not to do so; and

(3) there is no evidence that there is any reason why the lessees should be required to make backdated contributions in excess of their contractual obligations.

21. As regards these points Mr Cowan submitted:

(1) The contra proferentem principle has no application in the present case. The LVT was not being asked to construe the leases, nor (assuming the LVT concluded there was jurisdiction to back date the effective dates of the variation) was the LVT being asked to construe the statute. Instead the LVT was being asked to decide should be the effective date for the necessary variation.

(2) If there is jurisdiction to backdate the variation the mere fact that an application to the LVT could have been made earlier is not of itself (and absent any prejudice to the lessees) a reason for refusing to backdate the variation to a date earlier than the date of the application to the LVT.

(3) As regards the finding that there was no evidence why there should be a backdating, Mr Cowan submitted the LVT overlooked the existence of clear evidence why there should be a backdating. First, Daejan had asked all the lessees from an early stage to do something (namely to agree to the variation of the leases) which ultimately the LVT held should be done. Daejan had made clear from an early stage that if this was not agreed then an application to the LVT would be made. Also nobody here was at fault in causing to arise the circumstances in which section 35(2)(f) was engaged such that there was a shortfall in the service charge contributions. The situation arose because the lessees of one of the blocks exercised their rights under the 1993 Act. Also services have in fact been provided to the remaining lessees in the remaining six blocks and there would appear to be no reason why Daejan (and now the appellant) should be prevented from recovering part of the costs of doing so.

22. In summary Mr Cowan invited the Tribunal to allow the appeal and to substitute an order as contained on page 42 of the bundle (which was the draft order submitted to the LVT). Mr Cowan did not ask the Tribunal to order that the appellant and all of the lessees enter into deeds of variation. The matter could properly be dealt with by an order allowing the appeal and varying the leases in the manner ordered by the LVT, but with the substitution of 10 November 2006 as the effective date.

23. Mr Paul Botten, the respondent, in his written representations stated that he is the current leaseholder of flat 52, that he became the lessee of the flat shortly before (so it seems) the first letter of 12 June 2007, that he did not receive the June 2007 letter or the August 2007 letter because these were written to the previous lessee, that the letter of 14 November 2008 was the first contact he had had from Daejan regarding the proposed amendment (about eighteen months after his purchase of the property). He asked that the original LVT decision be upheld and he also stated (which is not the same thing) that any backdating should only apply to November 2008. I therefore treat his representations as inviting first a conclusion that the LVT's decision that there should be no backdating at all should be upheld and secondly a submission that, if the foregoing were not accepted, any backdating should in his case not be to a date earlier than 14 November 2008. Mr Botten points out that when he purchased the property he was not advised regarding the proposed variation. Mr Botten also made observations regarding lack of up keep and alleged dangerous structure at the building (but these are not points relevant to the present appeal).

24. In response to Mr Botten's representations Mr Cowan advanced the following points:

(1) If there was substance in these points Mr Botten could have raised them before the LVT. He did not do so. The LVT reached the conclusions it did in paragraph 14 of its decision and expressed itself satisfied with Daejan's consultation procedures.

(2) This is an appeal by way of review. The Tribunal cannot go behind the LVT's decision in paragraph 14. As regards the suggestion that so far as Mr Botten is concerned there should be backdating only to 14 November 2008, Mr Cowan submitted it would be unsatisfactory and potentially unworkable to have different effective dates for different lessees.

Conclusions

25. I conclude that this appeal must be allowed. My reasons for so concluding are substantially those advanced in argument by Mr Cowan. I express them in my own words as follows.

26. The purpose of section 35 is to enable a party to apply to the LVT for a variation of the lease in circumstances where the lease fails to make satisfactory provision with respect to certain matters. In other words the purpose is to cure a defect in the lease. It is possible that the drafting of a particular lease plus the circumstances which arise in that particular case combine together to produce a situation where it is foreseen that at some future date there will arise a defect in the lease, which is not presently apparent. However in my view it is much more likely that the relevant defect arises first and has existed for a time before a party recognises the existence of the defect and seeks to do something about it. Certain of the variations contemplated under section 35(2) are variations which it would not be helpful or effective to back date – the purpose is to deal with the future, such as to make satisfactory provision regarding the repair or maintenance of certain property. However as regards paragraph (f) of section 35(2), if a landlord is entitled from a certain date to recover less than (or perhaps more than) 100% of the expenses of providing the services etc, then this inappropriate level of recovery is the defect. The purpose of the statute is to cure the defect. There is nothing in the statute to indicate an intention to leave the defect in place for an indeterminate period until the date of an application to the LVT or perhaps until the date of the decision of the LVT – i.e. there is nothing in the statute indicating an intention only to cure the defect prospectively from one of these later dates rather than to deal with the defect from the time that it arises.

27. If parties to a lease agree to vary the lease, anyhow so far as concerns the proportion of the total service charge costs to be paid by the lessee, the parties could enter into a deed to the effect that it was agreed and declared that as from some stipulated past date the lease should be read and have effect as if it were worded in the amended fashion (i.e. with the altered proportion applicable to the calculation of the service charge). A deed expressed in this manner would have contractual effect as between the parties and would enable them to insist upon the calculation of service charge payments for past periods to be made in accordance with the terms of this amending deed. If such a variation can be effected by agreement through entering into a deed, then a variation ordered under the 1987 Act can in my view similarly have a retrospective effect unless a contrary indication is to be found in the statute.

28. I note the wide words of section 35(1) regarding the nature of the order varying the lease which a party can apply for, namely an order to vary the lease "in such manner as is specified in the application." There are also wide words in section 38(1) which grant the power to the LVT to make an order varying the lease, namely the power is to make an order varying the lease "in such manner as is specified in the order." Also section 38(4) provides that this variation may either be the variation specified in the relevant application "or such other variation as the tribunal thinks fit." There is nothing in the wording of these provisions to indicate that the order varying the lease can only be an order varying the lease prospectively from some particular date, such as the date of the application to the LVT or the date of the LVT's order.

29. Accordingly there is nothing in the statute to indicate that the order varying the lease (or the order that the parties vary it made under section 38(8)) can only have prospective effect from some particular date, e.g. the date of application to the LVT or the date of the LVT's order. Indeed far from there being some such limitation as to the nature of the variation that can be ordered, the statute expresses the nature of the variation which can be applied for and which can be ordered in wide words.

30. There is a further indication that there is no limitation upon the effective date from which a variation can be applied for under section 35(1) or can be ordered under section 38. This indication is to be found in section 39(5) which provides that where an order is made for the cancellation or modification of a variation, then the cancellation or modification is to take effect from the date of the making of the order for the cancellation or modification of from such later date as may be specified in the order. The presence of a constraint upon the effective date of an order under section 39(5) and the absence of any equivalent restriction upon the effective date of an order making a variation under section 38 serves to confirm that the statutory draftsman did not intend there be a date restriction upon the effective date of an order varying a lease made under section 38.

31. Accordingly in my view the LVT had jurisdiction to order that the variation sought by the appellant (i.e. varying the proportions to be contributed by each lessee towards the service charge cost) should take effect from 10 November 2006, which is the date as from which the total of the contribution proportions became less than 100%.

32. The LVT in its decision did not expressly consider whether it had jurisdiction to order that the variation was to be effective from the Transfer Date, but the LVT appears to have concluded (correctly) that it did have jurisdiction to do so and the LVT appears then to have gone on to consider whether it should exercise this jurisdiction. The LVT decided it should not do so for the reasons given in paragraph 17 of its decision.

33. On the question of whether the LVT erred in principle in omitting to backdate the variation to the Transfer Date I accept Mr Cowan's criticisms of paragraph 17 of the LVT's decision:

(1) The LVT made reference to the fact that leases are to be construed against a landlord where there is a discrepancy in their terms. However this case did not raise any relevant question to which the contra proferentem principle could properly be

applied. The LVT was not being asked to construe the leases. Further, upon this aspect of the case (i.e. once it has been decided that there is jurisdiction to backdate the effective date of this variation such that the relevant question is whether that power should be exercised) there is no question of statutory construction to which any contra proferentem or equivalent principle can be applied against a landlord. Accordingly I conclude the LVT misdirected itself and took into account an irrelevant consideration in finding of any significance upon this question (namely whether the variation should be backdated or not) the principle that leases are to be construed against a landlord where there is a discrepancy in the terms.

(2) The LVT also found as a reason for not backdating the variation the fact that it had been open to Daejan or the appellant to make an application to the LVT at any time during the last five years, but they chose not to do so. Once the question is whether to exercise a jurisdiction to backdate a variation to a date prior to the application to the LVT, it cannot be a self-standing reason for refusing to exercise this jurisdiction that the application could have been made earlier. Were it otherwise then either the application to the LVT would be made on Day 1 (the very day when the defect in the lease arises – when there would be no need for any backdating) or the application would be made on a later date (when the request for backdating could be met with the argument that as the application could have been made earlier therefore there should not be any backdating).

(3) The LVT observed that there was no evidence of any reason why the lessees should be required to make backdated contributions in excess of their contractual obligations. However with respect to the LVT there was in my view clear evidence why the lessees should be required to do so. The lessees had enjoyed the services etc during the relevant period. The lessees would obtain an unintended windfall if the variation was not backdated. The lessees had been properly notified from an early date (June 2007) of the defect in the lease and of the prospective application to the LVT if they did not agree a variation. The lessees did not agree a variation, being a variation which the LVT concluded (in favour of the appellant) should be made. In effect the lessees resisted (through inaction) a legitimate request from Daejan and the appellant to vary the leases, thereby forcing the appellant ultimately to go to the LVT to get an order for this justified variation.

34. A question arises as to whether an order making a variation which is backdated to the Transfer Date is an order which should not be made having regard to section 38(6) on the basis that (a) the variation would be likely substantially to prejudice the lessees and that an award of compensation under section 38(10) would not afford them adequate compensation, or (b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected. In my view it is clear point (b) does not apply. As regards point (a) it is true that the lessees will, by virtue of the variation, be in a worse position than they would be if for the remainder of their leases they each continued only to be responsible to contribute the original proportion of the costs of the services etc, such that the appellant or its successors had itself to fund out of its own monies the shortfall (here 14.45%). However in my judgment the substantial prejudice contemplated in section 38(6) cannot include the removal of an unintended and undeserved windfall flowing from the inability (because of an enfranchisement of one of the blocks) to recover 100% of the cost of the services etc to the

remaining blocks. Similarly the loss to the lessees of this unintended windfall cannot in my view constitute the type of "loss or disadvantage" which is contemplated in section 38(10) and in respect of which compensation should be paid – or if it does fall within such "loss or disadvantage" the Tribunal should not think fit to order compensation in respect of this loss of the windfall. Were it otherwise the power to vary the lease so as to deal with the defect contemplated in section 35(4) would be of little or no value, because the party applying for the variation (which could be the landlord, but also be the tenants in a case where a landlord was entitled to more than 100% of the costs of the services etc) could only obtain the necessary amendment, so as to bring the recovery to 100% of the relevant costs, on payment of a sum by way of compensation which would in effect wipe out the benefit of curing the defect.

35. So far as concerns the representations made by Mr Botten, there is nothing in these capable of justifying a decision other than that the effective date of the variations should in respect of all lessees (including Mr Botten) be the Transfer Date. My reasons for so concluding are as follows:

(1) This is an appeal by way of review. The points raised by Mr Botten could have been made to the LVT, but it appears they were not so made. The LVT on the basis of the evidence before it reached the conclusions it did in paragraph 14 to the effect that it was satisfied that Daejan had consulted with the respondents and informed all of them of the steps they were taking, including assignees of any of the flats that were assigned after the process was started. Mr Botten was one of the respondents. Upon this appeal by way of review I cannot go behind that finding of fact.

(2) In any event I can see no justification for limiting the extent to which the variation is backdated so as to make it only effective, in Mr Botten's case, from 14 November 2008. The nature of the variation ordered in the present case is a variation which could give rise to substantial practical difficulties if a different date for its coming into effect were selected for each lessee depending on the particular circumstances of that lessee. In any event there was no material before the LVT to justify the selection of a different date in respect of Mr Botten's flat.

(3) Further, Mr Botten and his predecessors have enjoyed the provision of the services. There is no reason why the appellant (and previously Daejan) should be prevented from recovering proportions from the various lessees which (when including their own contributions in respect of flats held in hand) add up to 100%.

(4) Further, as pointed out by Mr Cowan, Mr Botten's lease is dated 25 September 1998 and is therefore a "new" lease for the purposes of the Landlord and Tenant (Covenants) Act 1995. It would not therefore be open to the landlord to seek to enforce a lease covenant against Mr Botten in respect of a liability falling due prior to his taking an assignment of his lease, see section 23(1) of the 1995 Act. The fact that the variation would take effect from the Transfer Date (and therefore prior to Mr Botten taking an assignment) would not affect Mr Botten's liability for any period earlier than his taking the assignment.

36. In the result therefore I allow the appeal. I order that the relevant leases all be varied in the terms of the draft order at page 42 of the bundle (together with the manuscript addition by the chairman of the LVT). A further copy of the operative part of this order and manuscript addition is set out in the appendix to this decision (slightly amended so as to make reference to the Upper Tribunal's decision). Appendix 2 referred to in that order is not also set out in the appendix to this decision, but is as attached to the LVT's decision namely as at pages 43-44 of the bundle.

37. Mr Cowan confirmed to the Tribunal that the appellant did not seek to pass through the service charge the appellant's costs in connection with these proceedings before the Upper Tribunal. Accordingly I order under section 20C of the Landlord and Tenant Act 1985 as amended that all the costs of the appellant in connection with these proceedings before the Upper Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the original respondents to the LVT's application or their successors in title.

Dated: 14 March 2013

His Honour Judge Nicholas Huskinson

APPENDIX

IN THE MATTER OF PART IV, SECTION 35 OF THE LANDLORD AND TENANT ACT 1987

IN THE MATTER OF 17-64 CARLTON MANSIONS, HOLMLEIGH ROAD, LONDON N16 5PX

BETWEEN

BRICKFIELD PROPERTIES LIMITED Applicant

-and-

VARIOUS LESSEES Respondents

ORDER

UPON considering the Applicants' Application dated 26 April 2011

IT IS ORDERED that the Respondents' leases be varied in such a way as to provide that the service charge proportion payable by each of the Respondents be as set out in Appendix 2 to the Application

IT IS FURTHER ORDERED that the Respondents' leases be varied in the manner set out below:

1. The reference in the Lease to "the Buildings" shall mean 17-64 Carlton Mansions.

2. Clause 2(2)(a) of the Lease shall be deleted and replaced with the following "To pay and contribute to the Lessor by way of further rent without deduction or legal or equitable set off [relevant percentage set out in Appendix 2] of the expenses of:-"

3. The Landlord shall be entitled to include as an additional head of expenditure within the service charge payable by the Tenant under the Lease the expenses of maintaining cleansing constructing repairing rebuilding and renewing all walls roofs fences conduits passageways stairways entranceways roads pavements and other structures or conveniences the use of which is common both to 17-64 Carlton Mansions and to other premises (including without limitation 1-8 Carlton Mansions).

IT IS FURTHER ORDERED that the amended service charge proportions set out in Appendix 2 of the Application have effect from the date of completion of the freehold acquisition of 1-8 Carlton Mansions being 10 November 2006.

The APPLICANT shall ensure that this order is registered at HM Land Registry together with a certified copy of the Upper Tribunal's written decision.
