UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 0581 (LC)
LT Case Number: LRX/87/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT -- service charges -- Service Charges (Consultation Requirements) (England) Regulations 2003 schedule 1 -- calculation of period to be specified for the sending of observations

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

BETWEEN **TRAFFORD HOUSING TRUST LIMITED** **Appellant**

and

(1) LOUISE RUBINSTEIN
(2) SAID FARID AHMED WARDAK
(3) WONG WAI TANG
(4) FAZIL AHMAD SEDIQI
(5) AMIN ULLAH KASHIFY
(6) EMMA CAIREEN NICOLA RICE
(7) KATHARINE SUSAN GREGORY
(8) RAFFAELA DI SIPIO **Respondents**

Re: Various properties at Bold Street,
Old Trafford,
Manchester
M15 4BA

Before: His Honour Judge Huskinson

Sitting at 45 Bedford Square, London, WC1B 3AS
on 7 November 2013

Robert Darbyshire, instructed by Devonshires Solicitors on behalf of the appellant

The respondents did not appear and were not represented

The following cases are referred to in this decision.
Birmingham City Council v Keddie [2012] UKUT 323(LC)
Moscovitz v 75 Worple Road RTM Company Limited [2010] UKUT 393 (LC); [2011] L&TR 4)
Chiswell v Griffon Land and Estates Ltd [1975] 1 WLR 1181
Daejan Investments Limited v Benson [2013] UKSC 14

DECISION

Introduction

1. This is an appeal from a decision of the Leasehold Valuation Tribunal for the Northern Rent Assessment Panel ("the LVT") dated 27 March 2012 whereby the LVT gave an interim determination upon the question of whether there had been compliance by the appellant with the consultation requirements contained in section 20 of the Landlord and Tenant Act 1985 as amended and in the Service Charges (Consultation Requirements) (England) Regulations 2003 in respect of the entry by the appellant into a qualifying long-term agreement ("QLTA") concerning extensive residential premises at Bold Street, Old Trafford.

2. The appellant is the owner of various properties at Bold Street. Most of the occupants hold their respective flats otherwise than on long leases. There were however, so I understand, eight properties held by long leaseholders, namely the above-mentioned eight respondents. The appellant wished to enter into a QLTA of such a type as would engage the consultation requirements in schedule 1 of the Regulations (i.e. a QLTA where public notice was not required). The appellant served (or purported to serve) on the respondents a consultation notice dated 16 March 2011 in accordance with schedule 1.

3. The following issues arose for the LVT:

(1) Were these notices served by the appellant on the long leaseholders (i.e. on the respondents)?

(2) If so, were these notices compliant with the requirements of the Regulations?

(3) If not, should dispensation be granted under section 20ZA of the Act in respect of the relevant requirements which had not been complied with?

4. In summary the decision of the LVT upon these points was as follows:

(1) The notices dated 16 March 2011 were served upon the long leaseholders who were resident in their flats, namely Mrs Rubinstein, Mr Wardak, Mr Tang and Mr Sediqi and also upon Mr Kashify who, although not resident in his flat, had returned at the relevant period such that service at the flat was good service upon him; however the notices were not served upon Ms Rice, Ms Gregory and Mr Di Sipio.

(2) These notices were not compliant with Regulations because they failed to allow a sufficient period of consultation. The notices were dated 16 March 2011; the LVT found that they would have arrived on 18 March 2011; the notices specified that the period for consultation ended on 15 April 2011; and therefore the period for consultation specified was less than the required 30 days.

(3) Dispensation should not be granted under section 20ZA.

5. The LVT granted permission to the appellant to appeal in respect of point (2) above but refused permission in respect of points (1) and (3). The appellant applied to the Upper Tribunal for further permission to appeal. The Upper Tribunal granted permission on point (1) but refused it upon point (3) in the following terms:

> "Fundamental to the LVT's conclusion that Ms Gregory had not been served was its acceptance of her evidence that she had provided Mr Roache with a forwarding address but this had not been recorded by the Trust. Although it does not appear that the Trust suggested at the hearing that this evidence should not be accepted without it being given an opportunity to verify the assertion, the fact that the assertion had not been foreshadowed in Ms Gregory's witness statement in my view justifies permission to appeal being given so as to enable the Trust to call evidence from Mr Roache. Since the LVT's conclusion in relation to Ms Gregory affected its conclusions in relation to Ms Rice, permission should extend to the challenge in respect of her also.
>
> Permission is refused in relation to the contention that the LVT wrongly failed to grant dispensation under section 20ZA. There is nothing in my view to suggest that its decision in this respect was outside the scope of its discretion. In the event of the appeal being allowed on either of the grounds on which permission has been granted and the case being remitted, however, it would need to re-take its decision on this matter.
>
> Since evidence will be needed in relation to the ground on which I am now granting permission, the appeal, limited to the two grounds, will be by way of rehearing."

6. None of the respondents appeared or was represented at the hearing. Leaving aside Mr Sediqi the other respondents either did not serve a respondent's notice or did serve such a notice but subsequently withdrew from the proceedings. As regards Mr Sediqi he remained a respondent but he notified the Tribunal that he would not be attending the hearing. He made no representations to the Tribunal in respect of the merits of the appeal.

7. I was told that there have been negotiations between the appellant and various of the respondents which has led to the appellant having bought out the long leases of all of the respondents except for those of Mr Sediqi, Mr Di Sipio and Mr Kashify.

8. By a letter to the Tribunal dated 31 October 2013 the appellant's solicitors informed the Tribunal that the appellant did not seek to challenge the LVT's finding that the notice of 16 March 2011 was not served on Mr Di Sipio and that, bearing that fact in mind and bearing in mind also the settlements which the appellant had reached with various other of the respondents, there was no longer any dispute about the receipt of the notices. It was stated that the sole remaining dispute in the appeal concerned when the 30 day notice period commenced (and therefore whether the notice was compliant with the Regulations). The appellant indicated it did not intend to call any evidence.

9. Having regard to the terms in which permission to appeal was granted by the Upper Tribunal and to the fact that it was thereby indicated the appeal would proceed by way of rehearing, it was open to the appellant to call evidence at the appeal before me. In fact the appellant chose not to call any such evidence and the hearing proceeded solely by way of legal submissions. No submissions were advanced to me to the effect that I could or should reverse the findings of the LVT that the appellant had failed to serve the notice of 16 March 2011 on Ms Rice Ms Gregory and Mr Di Sipio. In the absence of any evidence and any submissions upon this point the only conclusion I can reach is that the appeal against the LVT's finding that these three lessees were not served with the notice must be dismissed. It follows that in any event, and quite apart from what may be decided upon whether the notice (which was served upon the other respondents) was compliant with Regulations, there was a failure to comply with the Regulations by reason of this failure to serve the relevant notice upon these three lessees.

10. It may be observed that the LVT in its decision made adverse comments in respect of certain other parts of the procedure adopted by the appellant, see paragraphs 33 to 36 of its decision. Mr Darbyshire told me at the hearing that the actions of the appellant which were the subject of these comments did not form part of the statutory consultation process and that therefore nothing contained within these passages in the LVT's decision revealed any failure by the appellant to comply with the statutory consultation requirements. There is no appeal against these parts of the LVT's decision. I make no finding one way or the other as to whether these passages reveal any further failure by the appellant to comply with the statutory consultation process.

11. I now turn to the issue which was the subject of argument at the appeal hearing, namely whether the LVT erred in concluding that the notice of 16 March 2011 failed to comply with the Regulations having regard to the period specified for the making of observations. Two points were raised by Mr Darbyshire in relation to this issue, first that the LVT was wrong in law in its conclusion and secondly that in any event the LVT was wrong to examine this point at all. As regards this latter point Mr Darbyshire submitted that the non-compliance point (i.e. the point based upon an alleged failure to give a full 30 days consultation period) was a point which had not been raised by any of the respondents in their applications to the LVT but was instead a point raised by the LVT of its own motion at the hearing. Mr Darbyshire submitted that it was beyond the jurisdiction of the LVT itself to raise this point. He referred to the decision of this Tribunal in *Birmingham City Council v Keddie* [2012] UKUT 323(LC).

12. As regards this argument based upon the decision in the *Keddie* case it is appropriate for me to say immediately that I cannot accept this argument. My reasons can be shortly stated and they are these. First the application to the LVT as made by the respondents expressly raised the issue of whether there had been proper consultation under section 20, see page 246 of the bundle before the LVT. Thus the question of whether the consultation requirements (which are contained in the Regulations) had been complied with was raised. In my view it was not necessary for the respondents specifically to complain that less than 30 days had been given for the making of observations -- instead it was sufficient for the respondents to put in issue the question of whether there had been compliance with the consultation requirements. Thereafter it was for the appellant to show that there had been such compliance (which included compliance with the requirement to give the relevant period for the making of observations). Secondly the issue of whether the full 30 day period had been given for the making of observations was expressly raised by the LVT at the hearing and the

appellant's representatives addressed the point (this was not a point taken by an LVT in its written decision without any prior warning to a party that this was alive point -- compare the *Keddie* case). Thirdly no objection to the point being raised appears to have been made at the hearing and no adjournment was sought to deal with the point. Fourthly there has not been any application for or grant of permission to appeal in respect of this point. I accept that the decision in the *Keddie* case was not published until 25 September 2012, but this decision did not change the law but instead merely recognised what the law already was. Fifthly no notice has been given to the respondents (and in particular to Mr Sediqi who remains a participating respondent) that the appellant seeks to raise this new point. In my judgement the facts of the present case are markedly different from those in the *Keddie* case. For all of the foregoing reasons I conclude that there is no merit in the argument based upon the *Keddie* case and that the point is in any event not open to the appellant.

Statutory Consultation Requirements

13. Schedule 1 of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides so far as presently material as follows in paragraph 1:

> "1(1) the landlord shall give notice in writing of his intention to enter into the agreement --
> (a) to each tenant; and
> (b)…….
>
> (2) The notice shall --
> (a) ……..
> (b) ……..
> (c) ……
> (d) invite the making, in writing, of observations in relation to the proposed agreement; and
> (e) 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."

14. Regulation 2 provides that "relevant period", in relation to a notice,

> "means the period of 30 days beginning with the date of the notice"

The LVT's decision on the 30 day notice point

15. The LVT dealt in paragraphs 29 to 32 of its decision with the question of whether the letter sent on 16 March 2011 constituted a notice which was compliant with Regulations:

> “29. Further we find that the letter dated 11 March 2011 and said to be sent on 16 March, does not comply with the Regulations.
>
> 30. The notice must state a “relevant period” within which any responses from tenants must be received. The relevant period is defined as “30 days beginning with the date of the

notice." This phrase is ambiguous. It could mean: (i) the date on the notice, (ii) the date it is posted; (iii) the date it is actually received; or (iv) the date it is deemed received (although there is no express provision for deeming service of such a notice). In other contexts (e.g. service of a notice under the Right to Manage provisions: *Muscovite v 75 Worple Road RTM Company Limited* [2010] UKUT 393 (LC); [2011] L&TR 4), it has been held that the time that a notice spends in the postal system must be taken into account (e.g. if a notice is posted by first class post, it will be deemed to arrive two days later, and this must be taken into account when setting the date for any response).

31. We have not been offered any explanation as to why a letter dated 11 March was not posted via TNT until 16 March, or why the date of the few letters (on our findings, no more than 10) was not altered to 16th to accurately reflect the true date of despatch. This is a fundamentally important letter in respect of a scheme to which the long leaseholders are to be required between them to contribute circa £300,000. Whatever the extent of the non statutory consultation/dissemination of information, this letter was the first step along the road of regulatory compliance.

32. The resident long leaseholders do not, indeed cannot, challenge that the letter was sent on 16 March. There is no evidence of the actual date of receipt. Ms Rubinstein emailed a response on Sunday 20. It is reasonable to assume that the letters arrived on the 2nd day after posting i.e. Friday 18 March. The 'relevant period' is expressed as ending on 15 April 2011. That is only 28 days after the notice was 'given'. The relevant period in relation to a notice is defined in the Regulations as 'the period of 30 days beginning with the date of the notice."

Submissions on behalf of the appellant

16. Mr Darbyshire provided a skeleton argument which he developed further in oral submissions. In summary he advanced the following arguments.

17. He submitted that the LVT was correct in identifying four possible meanings for the expression: "the period of 30 days beginning with the date of the notice". He submitted that as regards three of these possible meanings these could be ruled out in the following way:

(1) The expression "the date of the notice" could not mean the date that happened to be printed on the notice, because otherwise the tenants could have their consultation period much abridged by an incorrect date being printed on the notice or by the correct date being printed on the notice but the notice then being placed in the bottom drawer of the landlord's desk for a substantial period. To adopt such a construction would (as Mr Darbyshire put it) drive a coach and horses through the consultation requirements.

(2) The expression "the date of the notice" could not mean the day on which the notice was actually received, because it is not necessary for a landlord, in order to prove that a notice has been given, to prove actual receipt of the notice. Also to adopt such a construction would again drive a coach and horses through the consultation requirements because it would open the door to tenants to dispute actual receipt of the notice.

(3) The expression "the date of the notice" could not be taken to be a reference to a date upon which the notice was deemed to be received because there is no such deeming provision in the Act.

18. Accordingly Mr Darbyshire submitted that the remaining possibility identified by the LVT, namely the date of posting of the notice, represented the true meaning of the expression "the date of the notice".

19. As regards the case of *Muscovite v 75 Worple Road RTM Co Limited* [2010] UKUT 393 (LC) to which the LVT referred, he submitted that this was plainly distinguishable because it deals with a distinct description of the date from which time is calculated.

20. He submitted that section 7 of the Interpretation Act 1978 did not assist, because that was dealing with the service of a notice and the date on which it was to be taken to be served, whereas under the Regulations we are concerned with "the date of the notice". He emphasised that it was "the date of **the** notice" not "the date of notice". It is necessary therefore to look at the notice and ask what is its date.

21. A further point (but one upon which he accepted he could not attach much weight) was that the period of consultation given was 30 days, not the more standard 28 days (being a whole number of weeks). The extra two days could be notionally allowed for the notice to arrive. Thus if the date of the notice was taken as the date it was posted and two days was allowed for service by post, then a notice which gave 30 days from the date on which it was posted would allow the recipient 28 days from the date of receipt. He suggested that this supported the argument that one should count the 30 days starting with the date of posting so as to allow this "normal" period of 28 days from receipt.

22. He submitted that the LVT must be taken to have found that the notice was actually sent on 16 March 2011, see the first sentence of paragraph 32 of its decision. It is true that there was no evidence before the LVT as to the delivery standards of the postal carrier (namely TNT) used by the appellant, see paragraph 22 of the decision. However the LVT concluded that it was reasonable to assume that the notice (i.e. the letter of 16 March 2011) arrived on the second day after posting, ie Friday, 18 March 2011.

23. He submitted that the date of the notice was the date it was actually sent, namely 16 March 2011. Calculating a period of 30 days beginning with 16 March 2011 gives a period which ends on 14 April 2011. Accordingly by specifying that the consultation period would end on 15 April 2011 the appellant had in fact given one day too long, but it could not be suggested that there was a failure to comply with the consultation provisions by giving one day too long for the relevant period. In consequence, he argued, this Tribunal should conclude that the notice had complied with the Regulations and should allow the appeal on this point and should remit the matter to the LVT so that the LVT could reconsider the question of dispensation based upon the facts as established by this appeal, namely that a sufficient relevant period for consultation was in fact given (such that any failure to comply with the Regulations did not include a failure to give the full relevant period for the making of observations).

24. If, contrary to his main submission, the date of the notice was taken as the date of service of the notice rather than the date of sending of the notice, then the period of 30 days beginning with the date of service (namely 18 March 2011 -- see paragraph 32 of the decision) was a period ending on 16 April 2011, such that the period given for the making of observations was one day too short (not two days too short as found by the LVT). If this was the correct analysis then, while this would not allow the Upper Tribunal to reverse the LVT's finding that too short a period had been specified for the making of observations, it would justify the Upper Tribunal in remitting the matter to the LVT for it to reconsider the question of dispensation upon a correct basis, namely that the period specified was only one day too short rather than two days too short.

Discussion

25. In my view the fundamental purpose of a notice is to inform (i.e. to notify) the recipient of certain matters. The wording of paragraph 1 of schedule 1 to the Regulations provides that:

> "The landlord shall give notice in writing of his intention to enter into the agreement --
> (a) to each tenant;"

A piece of paper headed "notice" is of no value to a recipient before it is given to the recipient.

26. I therefore agree with Mr Darbyshire that the expression "the date of the notice" cannot be taken as a reference to the date which the piece of paper (i.e. the written notice document) happens to have printed on it.

27. Mr Darbyshire argues that "the date of the notice" should be taken to be the date of posting. There are various difficulties with this proposition. First, unless there is evidence that the postal service achieves a same-day delivery to the recipient, the date of posting is necessarily earlier than the date on which the vital function of a written notice is performed, namely the notifying of the recipient of certain information. A further difficulty with Mr Darbyshire's argument is this. If the date of the notice was taken to be the date of posting, then this would involve the date of the notice being the same in each of the following cases despite the fact that the date that the recipient was notified of the relevant information could be quite different:

> (1) a case where the notice was sent by a guaranteed next day delivery postal service;
>
> (2) a case where the notice was sent by first class post;
>
> (3) a case where the notice was sent by second class post;
>
> (4) a case where the notice was sent by a commercial postal carrier other than the Royal Mail where there was evidence that the standard delivery took x days; and
>
> (5) a case where (as here) the notice was sent by a commercial postal carrier other than the Royal Mail where there is no evidence as to the time taken for a standard delivery to be made.

I cannot accept that the adoption of a notice period of 30 days can be taken as some indication that the date of the notice is to be the date of posting, so as to allow a "standard" 28 days (i.e. four weeks) once the notice has been received. The period of 30 days, i.e. the length of many calendar months, is just as "standard" a period as 28 days.

28. In my judgement the reference in the Regulations to the date of the notice is a reference to the date on which the notice performs its crucial function, namely notifies the recipient of the contents of the notice, i.e. the date on which the notice is given to the recipient -- by which I mean the date of service (whether deemed or actual) or receipt, not the date of posting. I consider this conclusion is consistent with the analysis of this Tribunal (George Bartlett QC, President) in *Moscovitz v 75 Worple Road RTM Company Limited* [2010] UKUT 393 (LC); [2011] L&TR 4).

29. Mr Darbyshire says that in the present case there exists no provision dealing with the deemed date of service. Certainly my attention was not drawn to any provision in the leases dealing with deemed date of service and my own researches have not revealed any such deeming provision in the lease contained in the appellant's bundle before the LVT. It may however be noted that section 196 of the Law of Property Act 1925 provides in subsection (5) that the provisions of that section shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of that Act unless a contrary intention appears. Assuming (but without deciding) that section 196 therefore applies in the present case to the notice required to be served under the Regulations, I note that section 196 (4) as amended provides as follows:

> "Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to……. and if that letter is not returned by the postal operator…… undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered."

Recorded delivery would do equally as well as a registered letter, but neither the recorded delivery service nor a registered service was used in the present case. Accordingly the deemed service provided for by this section is not available to the appellant. Proper service can still be effected even though the document is sent by post without either the registered or recorded delivery service being used, see *Chiswell v Griffon Land and Estates Ltd* [1975] 1 WLR 1181. Section 7 of the Interpretation Act 1978 provides:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Assuming (but without deciding) that the Landlord and Tenant Act 1985 section 20 as amended is and the Regulations can be taken to authorise or require the notice to be served by post and that the use of a commercial postal carrier such as TNT constitutes posting the document, the difficulty for the appellant in seeking any assistance from section 7 is that no evidence was provided to the LVT as to TNT's service standards regarding delivery times, nor was any such evidence produced to the

Upper Tribunal upon this appeal notwithstanding that this appeal was proceeding by way of a rehearing.

30. I have rejected Mr Darbyshire's argument that the date of the notice can be taken as the date on which the notice was posted (or, as here, given into the hands of a commercial postal carrier). There is nothing to which my attention has been drawn in the lease to assist with any deemed date for the giving of the notice. Neither section 196 of the Law of Property Act 1925 nor section 7 of the Interpretation Act 1978 assist with any deemed date for the giving of the notice because there was no evidence before the LVT and there is no evidence before me as to the time at which the notice would be delivered in the ordinary course of TNT's postal service.

31. In these circumstances I can see no reason for disagreeing with the LVT's finding in paragraph 32 of its decision that it is reasonable to assume (in the light of the other facts found by the LVT) that the letters arrived on the second day after posting, ie Friday, 18 March 2011. Doing the best I can on the material before me, I myself find that the letters did arrive on that date in the ordinary course of TNT's postal service. I therefore find that the date of the notice was Friday, 18 March 2011.

32. The period of 30 days beginning with 18 March 2011 is a period which ends on 16 April 2011. The notice specified that the consultation period ended on 15 April 2011. Accordingly the notice failed to comply with the Regulations because it gave one day too short a period for the making of observations.

33. The grant of permission to appeal to the Upper Tribunal as given by the President (see paragraph 5 above) refused permission to appeal in relation to the contention that the LVT wrongly failed to grant a dispensation under section 20ZA, but the grant of permission contemplated that if the appeal was allowed on either of the grounds on which permission had been granted and if the case was remitted, the LVT would then need to retake its decision on the matter of dispensation. The two grounds on which permission to appeal was granted were (i) the factual question as to whether certain of the respondents (namely two of the respondents who were not resident at the demised properties) had been served with a notice and (ii) the legal question as to the meaning of "the period of 30 days beginning with the date of the notice" and the related factual question of whether therefore those respondents as had been served with a notice had been served with a notice which was compliant with the Regulations. The appeal on ground (i) has not been pursued and must therefore be dismissed. The appeal on ground (ii) has failed and must be dismissed. There is therefore no basis upon which this Tribunal can properly remit this case to the LVT for the LVT to reconsider the question of dispensation under section 20ZA.

34. Since the date of the LVT's decision the Supreme Court has given its decision in the important case of *Daejan Investments Limited v Benson* [2013] UKSC 14. No argument was advanced to me that the Upper Tribunal in this appeal could or should examine the question of whether dispensation under section 20ZA should be granted. Bearing in mind the refusal of permission to appeal upon this point it was not open to the appellant to advance this argument. I understood from what was said at the hearing that the appellant may seek to make a further application for dispensation to the LVT and to ask the LVT to reconsider dispensation in the light of the Supreme Court's decision and in the light of any finding that the Upper Tribunal may have made as to the extent of any failure by the appellant

to comply with the consultation requirements (in the event I have concluded that the LVT was wrong in finding that two days too short a period was specified for the making of observations -- the period was short by only one day). If the appellant does make any such application it will be for the LVT to consider whether such an application can be entertained and, if so, what decision should be reached upon it. It would be wrong for me to say anything in this decision upon these topics.

Conclusion

35. In the result is the appellant's appeal is dismissed.

36. An application has been made for an order under section 20C of the Landlord and Tenant Act 1985 as amended. Mr Darbyshire indicated that the appellant did not seek to resist the making of such an order. I therefore order that all of the costs incurred by 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 respondents.

His Honour Judge Huskinson

Dated: 22 November 2013