LRX/16/2008

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – whether a notice under Landlord and Tenant Act 1985 s.20 was either deemed to be served or actually served – whether notice "affixed or left on" the demised premises – failure by LVT to take into consideration relevant material – procedural defect causing injustice – LVT expressing a purported finding of fact on the basis of there being "a reasonable chance"

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE SOUTHERN RENT ASSESMSENT PANEL

BETWEEN	**RITA AKORITA**	**Appellant**
	and	
	36 GENSING ROAD LIMITED	**Respondent**

Re: Flat 3,
36 Gensing Road,
St Leonards-on-Sea,
East Sussex, TN38 0HE

Before: His Honour Judge Huskinson

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 12 February 2009

Sophie Weller instructed by Dodd Lewis for the Appellant
The Respondent did not appear and was not represented

The following cases are referred to in this decision:

E v Secretary of State for the Home Department [2004] EWCA Civ 49
Chiswell v Griffon Land and Estates Limited [1975] 2 All ER 665

DECISION

Introduction

1. The Appellant appeals to the Lands Tribunal, with permission, from the decision of the Leasehold Valuation Tribunal for the Southern Rent Assessment Panel ("the LVT") dated 30 November 2007. The application which was before the LVT was brought by the present Respondent for a determination of the liability of the Appellant to pay service charges in respect of the years 2005, 2006 and 2007 in respect of Flat 3, 36 Gensing Road. The Appellant is the freehold owner of 36 Gensing Road ("the Building") and the Appellant holds Flat 3 from the Respondent upon the terms of a lease dated 27 January 1989.

2. It should be noted at the outset, because this is central to what follows, that the Appellant does not live in Flat 3. Instead this is an investment property held by her and, so it seems, sublet. The Appellant herself lives at an address in Forest Hill, London. This fact was known to the Respondent's previous managing agents and they had on a number of occasions written to the Appellant at her address in London in relation to the Flat. However when, in about September 2004, the new managing agents took over management of the Building it appears that they were not made aware by their predecessors or by their client (the Respondent) that the Appellant resided not in the Flat but instead at this address in London.

3. In 2005 the Respondent was minded to carry out substantial repair works to the Building. It was common ground that these works constituted qualifying works within the meaning of sections 20 and 20ZA of the Landlord and Tenant Act 1985 and within the Service Charges (Consultation Requirements) (England) Regulations 2003. In consequence of this it was necessary, if the Respondent was to be entitled to include within the service charge to the Appellant more than merely an amount limited to £250, that either the Respondent complied with the consultation requirements or the Respondent obtained from the LVT a dispensation from complying with these consultation requirements in respect of the proposed works. In consequence of the foregoing a firm of Chartered Building Surveyors prepared a section 20 notice on behalf of the Respondent. No point has been raised in these proceedings as to the content of this section 20 notice. The only point which has been raised is whether this section 20 notice was ever served on the Appellant at all. A copy of the section 20 notice is not in the documentation before the Lands Tribunal, but nothing turns upon its precise terms. What occurred is that the building surveyors, on behalf of the Respondent, sent this section 20 notice addressed to the Appellant at Flat 3, 36 Gensing Road. The principal point considered by the LVT was whether this section 20 notice had been properly served upon the Appellant bearing in mind (a) the terms of the lease regarding service and (b) the facts as to what occurred to the section 20 notice.

4. Clause 9(1)(a) and (b) of the Appellant's lease is in the following terms:

> "9(1) (a) ANY notice in writing certificate or other document required or authorised to be given or served hereunder shall be sufficient although only addressed to the Lessees without his name or generally to the person interested without any name and

notwithstanding that any person to be affected thereby is absent under disability or unascertained and shall be sufficiently given or served if it is left at the last known place of abode or business of the Lessees or other person to or upon whom it is to be given or served or is affixed or left on the Demised Premises

(b) Any such notice in writing certificate or other document as aforesaid shall also be sufficiently given or served if it is sent by ordinary post in a prepaid letter addressed to the person to or upon whom it is to be given or served by name at the aforesaid place of abode or business and if the same is not returned through the Post Office within seven days of posting it shall be deemed to have been received or served at the time at which it would in the ordinary course have been delivered."

5. It should also be noted that under the Appellant's lease the "Demised Premises" are defined as meaning

"the Flat referred to in the Particulars and more fully described in the First Schedule hereto"

The First Schedule made clear that the Flat was shown edged red on the relevant plan, which showed that the flat was a second floor flat (as was confirmed in the Particulars) and included an element of staircase at first floor level.

6. The LVT concluded that the section 20 notice had been served on the Appellant because (a) it had been served in accordance with the terms of the lease and also (b) because there was 'a reasonable chance' that the Appellant had received the letter enclosing the section 20 notice. In the light of this finding that the section 20 had been served the LVT did not give any consideration as to whether the consultation requirements should be dispensed with under section 20ZA, because this question did not arise (the Respondent had made an application for such dispensation insofar as it was needed). The LVT also decided that the relevant costs which the Respondent sought to have taken into account for the purposes of determining the amount of the Appellant's service charge were reasonable in amount.

7. The Respondent was duly notified that the President of the Lands Tribunal had granted permission to the Appellant to appeal against the LVT's decision. The Respondent did not lodge any notice of intention to respond to the Appellant's appeal and has not sought to submit any statement of case or to participate in the appeal. At the hearing the Respondent was neither present nor represented. The Tribunal made a telephone enquiry of the Respondent's solicitors the day before the hearing to enquire whether they were sending anyone as an observer but were informed that no one would be attending.

The proceedings before the LVT and the LVT's decision

8. In paragraph 5 of its decision the LVT records that the day before the hearing the Respondent's solicitors had sent to the LVT a bundle of papers including a skeleton argument as to law and an unsigned witness statement. The LVT noted that the Appellant was a lay

person who was representing herself at the hearing and the LVT was concerned that she should have an opportunity to read through these documents and reply to them. The question of a possible adjournment was raised. The LVT then recorded the following:

> "Both sides said they did not wish to have an adjournment but would like an opportunity to file written representations after the Hearing, but before the Tribunal made its determinations."

The LVT agreed to proceed upon that basis. It is further recorded at paragraph 20 that at the end of the hearing the Tribunal gave further directions for the submission of amended skeleton arguments.

9. I was told that the Appellant thought that the hearing before the LVT would only be concerned with the question of whether the sending of the section 20 Notice addressed to the Appellant at the Flat was good service within the terms of the lease. However, at the hearing the Appellant was cross-examined as to whether she had actually received the section 20 notice, the cross-examination being upon the following lines. It appears that a bundle of documents produced by the Appellant had included within it a copy of an original letter dated 14 September 2006 addressed to the Appellant at the Flat from the Respondent's solicitors. The advocate from the Respondent's solicitors put to the Appellant that she had in fact received the original of this letter of 14 September 2006 and that she had done so even though this letter was addressed to her at the Flat and that it could and should be inferred that letters sent to the Flat addressed to the Appellant got safely into her hands and that she had in fact received the section 20 notice even though it was addressed to her at the Flat rather than at her London address.

10. The Appellant denied having ever received the section 20 notice. The Appellant also denied she had ever received the original of this letter of 14 September 2006. She placed before the LVT a copy of a letter from Mr Lilley, the sole director or the Respondent, dated 14 June 2007 in which he said, inter alia:

> "I would only add that last year after Mr Bree told me that he had not heard from you, I let myself into the communal ground floor hall area at 36 and found one letter addressed to you from the Solicitors (which I sent to Mr Bree). However, not one of the previous letters from Havelock Estates addressed to you at 36 were still there! I wonder who would have moved them?"

Thus this letter showed that in 2006 Mr Lilley had found a letter from the Respondent's solicitors addressed to the Appellant waiting in the communal ground floor hall area and that he had removed it and given it to the managing agents.

11. After the hearing the Appellant did submit further material to the LVT under cover of a letter dated 26 August 2007. This referred to her having shown the LVT this letter of 20 June 2007 from Mr Lilley. She went on to refer to the fact that a copy of the letter of 14 September 2006 from the Respondent's solicitors had been sent to her at her London address under cover of a letter dated 29 November 2006 from those solicitors. She went on to draw attention to two further letters, namely a letter from her dated 21 August 2007 to the Respondent's solicitors

asking whether, apart from this letter of 14 September 2006, any other letter had been sent to her at the Flat by those solicitors, and also a reply from the Respondent's solicitors confirming that their firm personally did not send any other letters. The Appellant's point was therefore as follows, namely that the only letter the Respondent's solicitors had sent to her at the Flat was this letter of 14 September 2006, that Mr Lilley had removed from the communal area of the Building a letter from the Respondent's solicitors to her at the Flat, that therefore this letter which Mr Lilley removed was the original of this letter of 14 September 2006, that the foregoing explains why it was that the Respondent's solicitors wrote to her in November 2006 enclosing a copy of the letter of 14 September, and that in all the foregoing circumstances it was quite wrong to assume from the fact that her bundle of documents had contained a copy of the original of this letter of 14 September 2006 that this original had actually come into her hands in the normal course of post having been sent to her at the Flat. Her contention was that all the foregoing material demonstrated the letter of 14 September (being the only letter sent by the solicitors to her at the Flat) had been uncollected by her and had been removed by Mr Lilley and in consequence the solicitors had written a further letter sending her a copy of this letter of 14 September.

12. The LVT did not make reference to these additional submissions and material sent by the Respondent dated 26 August 2007. In the LVT's decision refusing permission to appeal it states that it concluded the Appellant's letter of 26 August 2007 "was not a skeleton argument, but merely a repeat of some of the oral and written evidence which had been produced at the hearing" and that the LVT did not consider it to be admissible and hence "did not take it into account in reaching its decision" and that for that reason the material was not referred to in the LVT's decision.

13. As regards the question of whether the section 20 notice had been served, the LVT regarded this as the critical point on which its decision was required. The LVT made the following findings:

(1) The LVT found that the sending of the section 20 notice by post addressed to the Appellant at the Flat constituted good service within the provisions of Clause 9 of the lease (ie good service whether or not the notice was in fact received by the Appellant). I will call this "the LVT's Finding (1)".

(2) The LVT also referred to the line of cross examination (see paragraph 9 above) which had been advanced on behalf of the Respondent and in paragraph 35 stated as follows:

> "This was a clear conflict of evidence and the Tribunal had to make up its mind which version of events it believed. On a balance of probabilities the Tribunal reached the conclusion that the Respondent had actually received the original of the letter and on that basis there was **a reasonable chance** that she had also received the letter enclosing the Section 20 Notice".
>
> (Emphasis added)

I will call this finding "the LVT's Finding (2)".

14. In consequence of its conclusion that the section 20 notice had been properly served on the Respondent the LVT concluded that all of the disputed items (listed in paragraph 14 of the decision) were payable by the Appellant and there was no need to consider the application for dispensation from the consultation requirements under section 20ZA. The LVT also concluded in paragraph 37 on the question of reasonableness of the amounts charged:

> "The Tribunal finds that all of the amounts of Service Charge that have been demanded are fair and reasonable and are payable by the Respondent".

This appears to be the totality of the reasoning of the LVT on the question of the reasonableness of the charges. The Appellant had advanced objection to the cost of the works (she had not objected to the quality or extent of the works) and had produced two estimates from builders, see paragraph 13 of the LVT's decision. However no reasons, beyond the text set out above, is given for the conclusion that the costs were reasonable.

15. The following passages in the LVT's decision may also be noted:

(1) In paragraph 9 the LVT records that while letters sent to the Appellant at the Flat address went unanswered, when the Respondent's solicitors wrote to the Appellant at her London address she replied by return of post.

(2) The Respondent's former managing agent had been aware that the Appellant did not live at the Flat and had written to her at her London address on a number of occasions, see paragraph 30.

(3) The present managing agents took over in September 2004 when very few papers were handed over by the previous managing agents. Between the time he took over to October 2006 the new managing agent had written about 13 letters to the Appellant at the Flat but none of these had been returned to him or replied to, see paragraph 6.

Appellant's submissions

16. On behalf of the Appellant Ms Weller advanced the following submissions.

17. As regards the LVT's Finding (1) she submitted that the LVT had made an error of law in the construction of the terms of the lease regarding the service of documents. She advanced the following arguments:

(1) As regards section 7 of the Interpretation Act 1978 (to which I had drawn attention as being of potential relevance) she referred to the wording of that section which is as follows:

> "Where an Act authorises or requires any document to be served by post (whether the expression 'served' 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, prepaying 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."

She submitted that the crucial words here were "properly addressing" and that these words cannot permit any wider tolerance of what the address should be than an address which is either the last known place of abode or business of the addressee or is such other place as the addressee has agreed can be used for postal service. In the present case the last known place of abode or business was the London address and this was not used by the Respondent. Further, the terms of the lease did not agree the use of the Flat address as being an address for postal service.

(2) She submitted that if the Respondent wants to avoid the risk that a notice does not come into the Appellant's hands the Respondent can utilise one or other of the primary methods of service which are set out in paragraphs (a) and (b) of Clause 9(1) of the lease and which have the effect of deeming there to be service, provided one or other such primary method of service is followed, irrespective of whether or not the document in fact is received by the Appellant.

(3) As regards the primary method of service set forth in Clause 9(1)(b), the Respondent did not follow this method because it did not send the section 20 notice by post addressed to the Appellant at her last known place of abode or business.

(4) As regards the primary method of service set forth in clause 9(1)(a), this contemplates a document being actually affixed to the Demised Premises or left on the Demised Premises by the Respondent or the Respondent's agent and does not contemplate service by post (which is dealt with in paragraph (b)). Ms Weller submitted that it is not possible to blend together paragraphs (a) and (b) of Clause 9(1) so as to allow service under paragraph (a) by the posting to the Appellant at the Demised Premises of a document and by then claiming that it must be assumed that the document was "left on" the demised premises through the agency of the postal service. She submitted that if it were possible to blend together paragraphs (a) and (b) in this manner then paragraph (b) would in effect need to be read as though some additional words appeared in it, namely as though postal service was sufficient if sent in a pre-paid letter addressed to the person to be served at the last known place of abode or business "or at the Demised Premises". She submitted that the omission of these words from paragraph (b) was deliberate and that paragraphs (a) and (b) could not be read together so as to bring about a result which involved them operating as though these words were present in paragraph (b).

(5) Separately she submitted that, even if the foregoing were wrong and the Respondent was entitled to rely upon the postal service as having caused the envelope containing the section 20 notice to be "left" at 36 Gensing Road, this was still insufficient for the Respondent for the following reason. Paragraph (a) of Clause 9(1) required a document to be "left on the Demised Premises", but

the Demised Premises did not start until a staircase on the first floor level – the Demised Premises did not include the front door of No.36 or the communal hallway area. Accordingly a letter sent by post could not be said to have been "affixed or left on the Demised Premises".

18. As regards the LVT's Finding (2) Ms Weller advanced the following arguments:

(1) She contended that the refusal by the LVT to take into consideration the additional material contained within the Appellant's letter of 26 August 2007 and enclosures therewith constituted a substantial procedural defect resulting in unfairness to the Appellant. Further the omission to take into consideration this material was a failure to take into consideration relevant material. Ms Weller submitted that if this additional material was taken into consideration then the entire reasoning by the LVT in paragraph 35 of its decision disappears. The only reason given by the LVT that there was "a reasonable chance" that the Appellant had received the letter enclosing the section 20 notice was because the LVT had decided that on a balance of probabilities the Appellant had actually received the original of the letter of 14 September 2006. However from the material produced by the Appellant (but not taken into consideration by the LVT) the fate of the original of the letter of 14 September 2006 from the Respondent's solicitors to the Appellant was known and involved the original having been sent to the Appellant at the Flat and having been uncollected by her there and having been removed by Mr Lilley, who informed the managing agents of this fact with the result that the solicitors sent a copy of this letter of 14 September to the Appellant in London. Miss Weller submitted that the solicitor's letter which was removed by Mr Lilley from the communal areas of the flat must have been this self same letter of 14 September 2006 because the Respondent's solicitors expressly confirmed that this was the only letter which they had sent addressed to the Appellant at the Flat.

(2) She further submitted that, having regarding to the foregoing, the LVT's decision proceeded upon a mistake of fact which constituted an error of law having regard to the principles in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, as analysed in the Judicial Review Handbook (5th Edition) at paragraph 49.2 which indicates:

> "First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established" in the sense that it was uncontentious and objectively verifiable. Thirdly, the Appellant, (or his advisors) must not have been responsible for the mistake. Fourthly the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning".

Ms Weller submitted that the mistake of fact made by the LVT was to conclude that the letter of 14 September 2006 arrived as an original document in the Appellant's hands through the normal course of post (having been posted

addressed to her at the Flat) whereas the true fact was that the original had been collected by Mr Lilley from the communal area and returned to the managing agents. She submitted that bearing in mind the material laid before the LVT (but not taken into consideration by them) this fact was uncontentious and objectively verifiable. She further submitted that the fault for this error was not the Appellant's but was the responsibility of the Respondent's solicitors. She further submitted that this mistake played a material (indeed crucial) part in leading the LVT to make the LVT's Finding (2).

Conclusions on whether the section 20 notice was served

19. I consider first the question of whether the LVT was in error in deciding that the provisions of Clause 9 of the lease had the result of deeming the section 20 notice to be served upon the Appellant whether or not she had actually received it.

20. The Court of Appeal decision in *Chiswell v Griffon Land and Estates Limited* [1975] 2 All ER 665 dealt with the service of a notice under the Landlord and Tenant Act 1954 Part II as to which the provisions regarding service of section 23 of the Landlord and Tenant Act 1927 were made applicable. The precise terms of that section do not matter for present purposes. However what is instructive is that the Court (and see in particular per Megaw LJ) indicated that section 23 was providing what could properly be described as the primary means of effecting service, namely either by personal service or by leaving the notice at the last-known place of abode or by sending it through the post in a registered (or recorded delivery) letter. If any of those primary methods were adopted then, in the event of dispute, if it was proved that one of those methods had been adopted, sufficient service was proved even if in fact the document had not been received by the addressee. Megaw LJ then added the following:

> "There is the obvious, simple way of dealing with a notice of this sort. But, as may be assumed for the purposes of this appeal, if the person who gives the notice sees fit not to use one of those primary methods, but sends the notice through the post, not registered and not by recorded delivery, that will nevertheless be good notice, if in fact the letter is received by the person to whom the notice has to be given."

21. There would appear to be two separate provisions which are relevant in the present case regarding the service of notices, one of them statutory and the other one contractual. As regards the statutory provision I conclude that the Interpretation Act 1978 applies. As regards the contractual provisions, these are to be found in Clause 9(1) of the lease.

22. So far as concerns section 7 of the Interpretation Act I accept that in order for this to operate it is necessary that the letter is "properly addressed". I accept Ms Weller's submission that this cannot allow any wider choice of postal addresses than the last known place of abode or business of the addressee or an address which the addressee has contractually agreed shall be treated as an address at which documents can be served upon her by post. In the present case the section 20 notice was sent addressed to the Appellant at the Flat, which was neither her last known place of abode or business nor was it a place which she had agreed could be

used as a postal address for service of documents upon her. Accordingly I conclude that the Respondent is unable to show service by reliance upon the Interpretation Act.

23. As regards the provisions of paragraphs (a) and (b) of Clause 9(1) of the lease, I conclude that paragraph (b) is plainly not satisfied, because the letter was not sent to the Appellant addressed to her at her last known place of abode or business.

24. As regards paragraph (a) of Clause 9(1) the notice was not left at the last known place of abode or business of the Appellant nor was it affixed onto the Demised Premises. I accept Ms Weller's argument that it is not possible to blend together paragraphs (a) and (b) so as to conclude that if the letter was sent addressed to the Appellant at the Flat then, even though paragraph (b) was not satisfied, it has nonetheless been served because it has been "left on the Demised Premises". If this were intended to be good service words would have to be read into Clause 9(1)(b). I also note that the wording of Clause 9(1) has marked similarity to the wording of section 196(3) and (4) of the Law of Property Act 1925. If the interpretation adopted by the LVT in the present case upon the wording of Clause 9(1) of the lease was correct then it would equally be correct in a case where section 196 (3) and (4) applied which would involve reading words into section 196(4) so as to allow service by post not merely at the last known place of abode or business (or office or counting house) of the addressee but also if it were addressed to the lessee at the land or any house or building comprised in the lease. In my judgment that would do violence to the wording of section 196. The interpretation adopted by the LVT does violence to the wording of Clause 9.

25. There is also a further point. Even if it is permissible to blend together paragraphs (a) and (b) of Clause 9 and to conclude that a letter addressed to the Appellant at the Flat must be deemed to have arrived safely at the Building, this does not amount to a document being affixed to or left on "the Demised Premises" – instead it merely involves the document being left in the common parts of the Building which comprises the Demised Premises. In this connection it may be noted from Mr Lilley's letter that he found the solicitors' letter addressed to the Appellant in the communal ground floor hall area. This distinction between a document arriving in the communal ground floor hall area on the one hand and being affixed to or left on the Demised Premises on the other is in my judgment not a technical distinction but is a point of substance. I consider there is a real difference in providing (1) that a letter affixed to the Demised Premises (eg to the entrance door to the flat) or put into the Demised Premises is to be treated as received by a tenant (here a tenant may be expected to have made arrangement with the occupants to forward such items) and (2) that a letter arriving in the communal area of a building addressed to a tenant together with all the other post for occupants of that building is to be treated as received by the tenant (a tenant in these circumstances may well not have arranged for such items to be forwarded).

26. I now turn to the LVT Finding (2). For the moment I leave on one side the puzzling phraseology adopted by the LVT in paragraph 35 where it concluded that there was "a reasonable chance" that the Appellant had also received the letter enclosing the section 20 notice.

27. I conclude that Miss Weller's submissions based upon (i) a substantial procedural defect causing injustice to the Appellant, and (ii) a failure to take into account material considerations are both well founded. Bearing in mind the manner in which the hearing had proceeded, with both parties having agreed to proceed provided that they had the opportunity to file written representations after the hearing (paragraph 5 of the LVT decision) and bearing also in mind that the Appellant was a lay person representing herself, I conclude that the LVT was in error in not taking into account the contents of the Appellant's submissions dated 26 August 2007 and the documents enclosed therewith. It is noted that the LVT, in its document giving its reasons for refusing permission to appeal, has expressly stated that the LVT decided that as the letter of 26 August 2007 was not a skeleton argument the LVT did not consider it to be admissible "and hence did not take it into account in reaching its Decision". This was clearly relevant material and in my judgment the LVT should have taken it into account.

28. It is notable that the only reason given for its conclusion in paragraph 35, namely that there was a reasonable chance that the Appellant had received the section 20 notice, was because the LVT had decided on a balance of probabilities that the Appellant had actually received the original of the letter of 14 September 2006 from the Respondent's solicitors. A consideration of the material which the LVT omitted to take into consideration reveals that the LVT did indeed make a mistake of fact which can properly be described as an error of law in accordance with the analysis in the case of *E v Secretary of State for the Home Department* as cited by Ms Weller. The material submitted under cover of the letter of 26 August 2007, when taken together with the earlier evidence and with the letter which was already before the LVT from Mr Lilley dated 14 June 2007, can only lead to the conclusion that on the balance of probabilities (to put it at its lowest) the original of the letter of 14 September 2006 from the Respondent's solicitors was not safely received by the Appellant after being posted to her addressed to her at the Flat, but was instead waiting uncollected in the common parts and removed by Mr Lilley. Thus the LVT's decision proceeded upon the basis of a mistake as to an existing fact; this fact is in my judgment established in that, on the material which the LVT should have taken into account, the fact was uncontentious and objectively verifiable; neither the Appellant nor any advisors on her behalf were responsible for this mistake; and the mistake (ie the mistake identified by Ms Weller as recorded in paragraph 18(2) above) did play a material, indeed virtually decisive, part in the LVT's reasoning which led it to conclude that there was a reasonable chance that the Appellant had received the section 20 notice.

29. Accordingly I conclude that the LVT's decision that there was a reasonable chance that the Appellant had received the section 20 cannot stand because the only reason given for reaching this conclusion has been shown to be flawed in the manner described above. The question arises as to whether it is proper for the Lands Tribunal to reverse this finding of fact or whether the matter should be remitted for further consideration by the LVT. In my judgment the Lands Tribunal can and should reverse the decision and conclude that on the balance of probabilities the section 20 notice was not served on the Appellant. I consider that this is the proper course bearing in mind that the burden was upon the Respondent to prove on the balance of probabilities that a valid section 20 notice was served on the Appellant, that the LVT was wrong in concluding that the notice should be treated as properly served by virtue of the provisions Clause 9(1) (a) or (b) of the lease, that the Interpretation Act 1978 section 7 (not considered by the LVT) does not lead to a conclusion that the notice was served, that the only basis upon which the LVT found that there was a reasonable chance that the notice had been

received by the Appellant is shown to be erroneous, that there were no general reasoned credibility findings against the Appellant made by the LVT, and there was evidence that when the Appellant was written to at her correct address (which was known to the Respondent through the previous managing agent) she replied by return of post.

30. The matter however does not stop there. It is now necessary to return to the puzzling phraseology adopted by the LVT in paragraph 35. The expression "a reasonable chance", especially where used in the same sentence as the expression "a balance of probabilities" and used in apparent distinction to this latter expression, cannot in my judgment properly be taken as a finding on the balance of probabilities that the section 20 notice was received. A probability which is substantially less than 50% can still properly be described as a reasonable chance. Accordingly even on the basis of the erroneous approach adopted by the LVT to the factual question of whether the section 20 notice was received by the Appellant the LVT has not in my judgment made any finding on the balance of probabilities that the section 20 notice was received by the Appellant – the LVT has merely decided there was a reasonable chance she had received it which is not the same thing at all. The foregoing confirms me in the conclusion that I should reverse the LVT's decision regarding service (rather than remit the matter for further consideration to the LVT) and that I should find that the section 20 notice was not properly served on the Appellant. I do so find.

Consequential matters

31. At one stage Ms Weller was minded to submit that if I concluded that the section 20 notice had not been served then I should then go on, as part of the present appeal, to consider and (so she submitted) to dismiss the Respondent's section 20ZA application for dispensation from the consultation provisions, which the Respondent made to the LVT but which the LVT did not consider because the question of dispensation did not arise bearing in mind its finding that the section 20 notice had been served. Miss Weller pointed out that the Appellant's statement of case to the Lands Tribunal made clear that this was relief which the Appellant was seeking. However when it was pointed that the statement of case had not been served upon the Respondent, because the Respondent had indicated it was not responding to the appeal, Ms Weller realistically retreated from this submission and accepted that the section 20ZA application for dispensation would have to be remitted for consideration by the LVT. For avoidance of doubt I should make clear that, quite apart from this realistic concession by Ms Weller, I would in any event have decided that the matter must be remitted to the LVT.

32. A further point is raised by the Appellant which would become relevant if dispensation was granted, namely the Appellant contends that she laid before the LVT reasoned criticism of the amount of the costs of the major works to the Building but that the LVT gave no reasoned decision upon this point but instead merely dealt with the point summarily as recorded in paragraph 13 above. In my judgment the LVT's treatment of this point is flawed by reason of its failure to give any (or at least any sufficient) reasons which are intelligible and which adequately meet the substance of the arguments advanced. Accordingly the LVT's decision on this point must also be quashed and the question of the reasonableness of the costs must be reconsidered by the LVT.

33. In the result therefore I allow the Appellant's appeal and I make the following findings and orders:

(1) I find that no section 20 notice relevant to the qualifying works which the LVT was considering (for the purpose of including the costs thereof within the service charge) was served upon the Appellant.

(2) I find that in consequence section 20(1) of the Landlord and Tenant Act 1985 as amended applies in respect of the qualifying works such that the relevant contributions are limited as provided within section 20 and the 2003 Regulations unless the consultation requirements are dispensed with in relation to the works by the LVT.

(3) I remit to the LVT the consideration of the Respondent's application under section 20ZA for dispensation.

(4) I quash the LVT's finding that the amount of the costs of the qualifying works was reasonable. This matter must be reconsidered by the LVT.

(5) I quash the LVT's finding that all the amounts of service charge set out in the "Not Agreed" column in paragraph 14 of the LVT's decision are payable – this finding was made as a consequence of the LVT's finding that the section 20 notice had been served and that the amount of the relevant costs was reasonable. It will be necessary for the LVT to consider in relation to all of these items:

   (i) whether the item of charge in question is properly recoverable under the terms of the lease (I understand the Appellant does not accept that there is any power to levy a charge for payment into a "General Reserve"), and

   (ii) whether in any event the amount charged in respect of the various items is reasonable.

(6) The principal reason given by the LVT for refusing an order under section 20C of the 1985 Act was that the Appellant had failed in her contention that she had not been served with the section 20 notice. Accordingly I conclude that the LVT's refusal to make a section 20C order cannot stand and must be quashed. However the discretion of whether to make an order under section 20C in relation to proceedings before the LVT is a discretion vested in the LVT. It is one thing for the Lands Tribunal to conclude that such discretion has been exercised on a flawed basis, but it is another thing for the Lands Tribunal actually to reverse such a decision especially in a case where the matter remains live before the LVT. Accordingly I order that the refusal of the section 20C order is quashed and that the question of what (if any) order under section 20C should be made in respect of all (or any) part of the proceedings before the LVT is remitted for further consideration by the LVT as part of the consideration mentioned above.

(7) The consideration of the matters mentioned above should be before a differently constituted LVT.

34. So far as concerns the proceedings before the Lands Tribunal, the Appellant made an oral application for a section 20C order through Ms Weller at the hearing. Ms Weller asked me to record (which I do) that by seeking such an order the Appellant is not to be taken as conceding that there is any power within the terms of the lease for the costs of the present proceedings before the Lands Tribunal (or indeed the costs of the proceedings before the LVT) to be included within the overall costs which are then levied (as to one-third) from the Appellant. I note that little costs should have been incurred by the Respondent in relation to this appeal to the Lands Tribunal bearing in mind that the Respondent has not responded to the appeal or in any way participated therein. However I consider that bearing in mind the Appellant has succeeded in her appeal it is just and equitable for me to order (and I do so order) that all of the costs of the Respondent in connection with this appeal before the Lands Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Appellant.

35. At the end of the hearing Ms Weller made an application for costs against the Respondent. She recognised the provisions of section 175 of the Commonhold and Leasehold Reform Act 2002 restricted an order for costs in that such an order could only be made if the Respondent had in the opinion of the Lands Tribunal

> "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the appeal"

Also even if the foregoing were established the costs awarded could not exceed £500. Ms Weller submitted that the Respondent had demonstrated what she described as a cavalier attitude in that it had not reconsulted in relation to the major works (ie reconsulted after the Appellant had indicated she had not received the section 20 notice) and that the Respondent was to be criticised by reason of there having been a change of managing agents with the Appellant's London address not being passed on. Even if there is any basis for criticism of the Respondent in relation to these matters this cannot, however, be considered unreasonable behaviour "in connection with the appeal" to the Lands Tribunal. Ms Weller further submitted that the Respondent could have conceded that the section 20 notice had not been received such that the appeal to the Lands Tribunal would have been restricted merely to the construction point under Clause 9 of the lease. However I see no unreasonableness in the Respondent's behaviour in declining to make such a concession. Further, and in any event, even if such a concession had been made it would still have been necessary for the Appellant to satisfy the Lands Tribunal in this appeal that the LVT's decision was wrong. The Lands Tribunal would not merely have proceeded automatically on the basis of some concession by the Respondent. Accordingly I conclude that the Respondent has not acted in any of the manners set out above which could potentially give rise to jurisdiction to make an order for costs and I do not make any such order.

Dated 25 February 2009

His Honour Judge Huskinson