UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 174 (LC) **UTLC Case Number: LC-2022-638**
via Remote Video Platform

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – SERVICE CHARGES - consultation requirements – dispensation – relevant prejudice to the leaseholders – appropriateness of conditions attached to dispensation

BETWEEN

HOLDING & MANAGEMENT (SOLITAIRE) LIMITED

Appellant

-and-

LEASEHOLDERS OF SOVEREIGN VIEW

Respondent

Re: Sovereign View,
St Paul Steps,
Rotherhithe,
London, SE16

Judge Elizabeth Cooke
25 July 2023
via Remote Video Platform
Decision Date: 27 July 2023

Mr Michael Mullin for the appellant, instructed by JB Leitch Limited
The respondents were not legally represented

The following case is referred to in this decision:

Daejan Investments Limited v Benson [2013] UKSC 14

Introduction

1. This is an appeal by Holding and Management (Solitaire) Limited. It is the freeholder of Sovereign View, a Thames riverside gated estate. The appeal is from a decision of the First-tier Tribunal ("the FTT"), which granted the appellant a dispensation from the consultation requirements in section 20 of the Landlord and Tenant Act 1985 in respect of the installation of a fire alarm system, subject to conditions. The appellant says the FTT was wrong to impose those conditions. The respondents all hold long leases at Sovereign View; their names are listed at the end of this decision.

2. The appellant was represented in the appeal by Mr Michael Mullin of counsel, and the respondents by two of their number, Ms Veena Sharma and Mr Chris Simmons. I am grateful to them all for their assistance.

3. Because this appeal is about fire safety works I asked the parties at the hearing if the provisions of the Building Safety Act 2002 apply to Sovereign View, and the answer was less precise than one might have wished. The position appears to be that most, if not all, of the development is not a "relevant building" under the Building Safety Act 2022, but that it is a possible that one block may be of the requisite height to be a "relevant building". It is important that the parties find out if that is the case. Nothing in this decision takes away any protection that may be conferred by the 2022 Act on any of the leaseholders.

The factual background

4. Sovereign View is an estate of 174 flats and houses grouped around five squares. The buildings are of brick with a concrete frame and pitched tile roofs, and are internally partitioned with block walls and plaster board. with solid, carpeted floors and stairs. The residential units are held on long leases which include standard provision for the lessees to pay a service charge.

5. In June 2020 a fire risk assessment commissioned by the appellant reported concerns about fire stopping, and recommended that a further survey be undertaken; the risk was identified as a level 4 risk meaning that action was recommended within three months.

6. In July 2021 a further fire risk assessment reported inadequate fire stopping in the risers and loft spaces. It recommended that either an immediate waking watch should be put in place as "a very short term measure" or simple battery linked smoke detectors should be installed in each flat. After that a fire alarm system should be installed across the estate. In response to that assessment the appellant put in place a waking watch at a cost of £10,000 per week, which has been paid for from the service charges reserve fund. It then obtained three tenders for the installation of a fire alarm system.

7. As is well known, section 20 of the Landlord and Tenant Act 1985 requires landlords to consult leaseholders before carrying out "qualifying works", being work that would cost each leaseholder more than £250 by way of service charges. The consultation requirements did not apply to the waking watch because that is a service, not "works". But the fire alarm installation was well within section 20 territory; the least expensive quotation for the alarm system was over £168,000. On 2 August 2021 the appellant began

the consultation process by sending initial notices to the leaseholders. But the consultation proceeded no further; on 20 August 2021 the appellant accepted the cheapest quotation for the alarm system. In a zoom meeting with the residents it explained that it was going to apply to the FTT for a dispensation from the consultation requirements, which it did. It argued that a dispensation should have been granted because the work had to be done urgently in order to bring the expenditure on the waking watch to an end.

8. Once the new alarm system was installed the waking watch was discontinued, having been in place for three months.

The decision of the FTT

9. The various responses submitted to the FTT by the leaseholders in response to the application reveal entirely understandable concerns; the leaseholders were troubled by the delay between the risk assessment carried out in 2020 and the next one a year later; they were very unhappy about the installation of the waking watch, when battery operated alarms would have been cheaper; they did not accept that a waking watch was the safest option; they were very unhappy that a waking watch had been set up without consultation and then relied upon as justifying the application for a dispensation.

10. The FTT said this:

> "23. It is obviously the correct thing to do for a landlord to seek to upgrade the fire safety of buildings. … Obviously if works are urgent it is not feasible to go through the consultation process in full. In the present case the consultation was started but not completed. The Applicants decided unilaterally to appoint a waking watch at considerable expense to the leaseholders. The tribunal is concerned that this decision was made unilaterally and without considering potential alternative options. The waking watch was in place for a period of three months at a cost of 10,000 pounds a week. The alternative measure of battery operated alarms would patently have been a lot cheaper.
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> 24. Waking Watch has been the "go to" solution for many landlords concerned about the immediate risk of fire. Usually this is in buildings similar to Grenfell Tower where the risk of fire is caused by inappropriate and dangerous cladding. This was not the case here. The blocks in the scheme are of varying sizes. None of them were the height of Grenfell Tower or other larger social housing blocks. The issue was compartmentation rather than cladding. This should have been evident as an issue much earlier. The Respondents were advised to investigate it within 3 months and did not do so. Indeed, the identification of service access as a means of spread of fire is not a new concept and arguably the Respondents should have investigated the issue much earlier. If the investigation works had been carried out within the three months as advised the remainder of the year could have been used to carry out a proper consultation exercise. If the resultant report had recommended a Waking Watch then a short consultation on this issue would have been appropriate. …
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> 25. [Counsel for the landlord] was anxious to distinguish the waking watch from the rest of the works but they were part and parcel of the works to deal with the

> potential fire risk. The cost of waking watch does constitute a significant financial prejudice to the leaseholders. If matters had been properly dealt with by the Applicants they would have carried out some consultation in relation to the use of waking watch. This is not a case in which the leaseholders could be criticised for failing to put up cheaper suppliers of waking watch because in this case it was questionable whether a waking watch was required at all when there were much cheaper alternatives.
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> 26. Accordingly whilst recognising that the fire safety works had to be carried out notwithstanding the failure to properly consult the Tribunal considers that the dispensation must be made conditional on the waking watch scheme being funded by the Applicants and not through the service charge and on the costs of the current proceedings not being recovered from the service charges."

11. So the appellant got its dispensation but on two conditions, and it appeals the imposition of those conditions. I discuss them in turn.

The waking watch condition

12. Section 20ZA of the 1985 Act gives the FTT power to dispense with the consultation requirements, and the Supreme Court in *Daejan Investments Limited v Benson* [2013] UKSC 14 is authority for the way in which the FTT's discretion is to be exercised. At paragraph 44 Lord Neuberger said this:

> "44. Given that the purpose of the [consultation requirements] is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.
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> 46. I do not accept the view that a dispensation should be refused in such a case solely because the landlord seriously breached, or departed from, the Requirements. That view could only be justified on the grounds that adherence to the Requirements was an end in itself, or that the dispensing jurisdiction was a punitive or exemplary exercise. …
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> 50. In their respective judgments, the LVT, the Upper Tribunal and the Court of Appeal also emphasised the importance of real prejudice to the tenants flowing from the landlord's breach of the [consultation requirements], and in that they were right. That is the main, indeed normally, the sole question for the LVT when considering how to exercise its jurisdiction in accordance with section 20ZA(1).

13. The question for the FTT, then, in deciding whether to grant a dispensation was whether the leaseholders would suffer any prejudice *as a result of* the failure to consult. I emphasise those words; as Lord Neuberger pointed out at paragraph 65, that is the relevant prejudice and no other:

> "The tenants can always contend that they will suffer a disadvantage if a dispensation is accorded; however, as explained above, the only disadvantage of which they could legitimately complain is one which they would not have suffered if the [consultation requirements] had been fully complied with, but which they will suffer if an unconditional dispensation were granted."

14. It was also made clear in *Daejan* – and the parties agree – that the FTT is entitled to impose a condition on the grant of a dispensation. At paragraph 54 of the Supreme Court's judgement Lord Neuberger said that the FTT:

> "has power to grant a dispensation on such terms as it thinks fit – provided, of course, that any such terms are appropriate in their nature and their effect."

15. He went on to give examples of appropriate conditions, for example that the landlord carry out a limited version of the consultation process, or that where consultation would have led to a reduction in the cost of the work by, say £25,000 (because an observation that a leaseholder would have made would have saved the landlord some money) the FTT might impose a condition that that £25,000 would be irrecoverable from the leaseholders. He went on:

> "I also consider that the LVT would have power to impose a condition as to costs – eg that the landlord pays the tenants' reasonable costs incurred in connection with the landlord's application under section 20ZA(1)."

16. I come back to the point about costs later. But was the condition that the landlord pay for the costs of a waking watch an appropriate condition in the present case?

17. Mr Mullin for the landlord argued that it was not. He pointed to the FTT's words in its paragraph 25: "The cost of waking watch does constitute a significant financial prejudice to the leaseholders." That is not a relevant prejudice; it was not caused by the failure to consult.

18. Ms Sharma and Mr Simmons in response reiterated the respondents' view that the waking watch was part and parcel of the one set of works, as the FTT said. They stressed their concerns about the delay in getting the second fire risk assessment, and then the rush to put a waking watch in place without any consultation – which they said if not legally required is good practice – and then the use of the waking watch as a justification for the landlord's failure to consult. Had the landlord taken action when advised to do so in June 2020 there would have been ample time to consult. The installation of the waking watch immediately after the risk assessment was premature and unnecessary. In any event, consultation on the fire alarm would not have taken more than a month or two and so could still have been completed in the summer of 2021. As it was, the landlord selected the cheapest option without regard for maintenance costs and a proper analysis should have been carried out.

19. As to that latter point, Mr Mullin pointed out in response that the works were commissioned almost immediately after the tenders were obtained and on the basis that the chosen contractor could complete the work much sooner than the others. The work

was commissioned on 21 August 2021; to delay that point until completion of the consultation would have cost £10,000 per week, and the consultation has to take at least 60 days because of the time that has to elapse between the stages. Any saving in choosing a different contract would have wiped out by the waking watch cost, and so it was in the leaseholders' interests for the fire alarm work to proceed as fast as possible. I accept Mr Mullin'' arguments about that point.

20. Nevertheless, the respondents' indignation is understandable. From their point of view, a waking watch was put in place which in their opinion was unnecessary, and then it was relied upon by the appellant as justification for the urgency of the fire alarm works.

21. But even if it were true – and the FTT made no finding to that effect – that the waking watch was unnecessary, that would not have been a justification for refusing a dispensation from consultation about the fire alarm. As the Supreme Court made clear in *Daejan*, the consultation requirements are not an end in themselves; they can be dispensed with if there is no relevant prejudice to the leaseholders, meaning prejudice that arose because of the lack of consultation rather than for any other reason. The FTT can impose conditions upon the dispensation; but those conditions must be relevant and appropriate. Relevant conditions would address the relevant prejudice to the leaseholders.

22. I agree with the respondents that paragraph 50 of the Supreme Court's decision in *Daejan* indicates that other considerations might be relevant to the grant or refusal of a dispensation. But even if the waking watch was unnecessary, that is not relevant to the question whether or not the dispensation should be granted; it is not the role of the FTT in considering a dispensation application to penalise the appellant for other aspects of its conduct. The claim that the waking watch was unnecessary would of course be highly relevant to a challenge to service charges on the basis that the costs incurred by the landlord in setting the waking watch were unreasonable, pursuant to the FTT's jurisdiction under section 27A of the Landlord and Tenant Act 1985.[1] But if (which has not been decided) the waking watch was unnecessary that was irrelevant to the application for a dispensation; equally therefore a condition relating to payment for the waking watch was an irrelevant condition.

23. The leaseholders' concern about the delay in getting the second fire risk assessment is also understandable, but it is difficult to see that matters would have turned out differently if the second assessment had been obtained within three months of the first. The recommendation would no doubt have been the same even if the assessment had been carried out sooner, and the action taken by the appellant might well have been the same. Even if that is not the case, the delay is irrelevant because the issue for the FTT was whether the leaseholders had suffered relevant prejudice as a result of the failure to consult about the fire alarm.

24. All that said, the FTT imposed the condition not because of any judgment about the merits of the landlord's decision to impose a waking watch, nor because of the delay, but because it regarded the waking watch as "part and parcel of the works to deal with the potential fire risk" (paragraphs 23 to 26 of its decision, quoted above) and took the view that "if

[1] The fact that the waking watch has, I am told, been paid for out of the reserve fund makes no different to the leaseholders' ability to challenge the reasonableness of the cost: *Eshraghi and others v 7/9 Avenue Road (Londhon House) Limited* [2020] UKUT 208 (LC).

matters had been properly dealt with" the landlord would have consulted about the waking watch, despite the fact that there was no legal obligation for it to do so. That erroneous consideration led the FTT to impose an irrelevant condition on the dispensation, namely that the landlord was to fund the waking watch. In effect the FTT punished the landlord for failing to carry out a consultation which it was not obliged to carry out.

25. I set aside the FTT's decision insofar as it imposed a condition on the dispensation that the landlord was to pay for the waking watch.

The costs condition

26. The FTT also required, as a condition of dispensation, that the landlord would not seek to recover its legal costs in the dispensation from the leaseholders by way of service charge. The reasons FTT gave for imposing the costs condition (in its paragraphs 23 to 26, quoted above) were the same as those given for the inappropriate condition about the waking watch and the condition appears therefore to have been intended as a further expression of disapproval of the landlord's failure to consult about the waking watch. On that basis the costs condition was inappropriate and is set aside.

27. I have to consider whether the Tribunal should substitute its own decision that a similar costs condition should be imposed, in circumstances where it is clear that the respondents have not suffered any relevant prejudice as a result of the failure to consult.

28. In *Daejan*, as we saw, the Supreme Court contemplated that a relevant condition for dispensation might be that the landlord would pay the leaseholders' costs of the dispensation application. Some further explanation was added at paragraph 61:

> "The condition would be a term on which the LVT granted the statutory indulgence of a dispensation to the landlord, not a free-standing order for costs, which is what para 10 of Schedule 12 to the 2002 Act is concerned with. To put it another way, the LVT would require the landlord to pay the tenants' costs on the ground that it would not consider it "reasonable" to dispense with the Requirements unless such a term was imposed.

29. In the present case the condition imposed was not that the appellant pay the leaseholders' costs but that it should be unable to recover its own as a service charge under the lease. The appellant argues that that would be inappropriate since the landlord was not seeking an indulgence. The haste to get the fire alarm in, without consulting, was in order to stop the cost of the waking watch, which was accruing at the alarming rate of £10,000 a week. It was in the leaseholders' interest that the landlord obtain the dispensation, and the costs incurred in getting the dispensation (despite their opposition) were for their benefit. So, said Mr Mullin, the landlord should not be penalised by being prevented from recovering its costs as a service charge.

30. There is some force in that submission. Another way of looking at it is to bear in mind that this was a case where the leaseholders suffered no relevant prejudice from the absence of consultation. In that circumstance, would it be right to impose a condition that took away the landlord's contractual right to recover its costs from the leaseholders, whether only in

favour of the 17 respondents or (as the FTT seems to have decided) in favour of all 174 leaseholders in the development? I am not convinced that it would be appropriate in circumstances where, whoever in the end pays for the waking watch, it was clearly sensible and in everyone's interests to get the fire alarm system installed; in that sense this was not a petition for an indulgence but a matter of practical importance for all concerned.

31. Accordingly, I decline to impose any condition upon the dispensation about the payment of costs.

Conclusion

32. I have set aside the two conditions imposed by the FTT, and have declined to impose any condition in their place. The dispensation is therefore unconditional.

Judge Elizabeth Cooke

27 July 2023

List of Respondents

1. Benjamin Chang
2. Chris Simmons
3. Constantin Bounas
4. David Lawrence
5. Jean Baptiste Faure
6. John Pereira
7. Julie Cleeveley
8. Kate Hatfield
9. Oliver McTernan
10. Paul Gallegos
11. Pratima Washan
12. Surita Photay
13. Tara Farrell
14. Tiago Vasconcelos
15. Veena Sharma
16. William Gallegos
17. Nicolae Raulet

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.