Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0012/06/16

IN THE MATTER OF: Leasehold Properties in the Vale of Glamorgan

AND IN THE MATTER OF an application under sections 20ZA Landlord and Tenant Act 1985

B E T W E E N:

THE VALE OF GLAMORGAN COUNCIL

Applicant

-and-

ALL LEASEHOLD OWNERS OF VALE OF GLAMORGAN COUNCIL PROPERTIES

Respondent

Hearing: 6th September 2016, Cardiff Civil Justice Centre

Tribunal: Mr. E.W. Paton (Chair), Mr. R. Baynham (Surveyor). Dr. A. Ash (Lay Member)

ORDER

UPON the Applicant's application dated 3rd June 2016

IT IS ORDERED AS FOLLOWS:-

1. The Tribunal, on being satisfied that it is reasonable to do so, dispenses under section 20ZA Landlord and Tenant Act 1985 with the requirements of the Service Charges (Consultation Requirements)(Wales) Regulations 2004, Schedule 2, paragraph 1(2)(d), in relation to:-

   i) the Applicant's Notice of Intention to enter into a Qualifying Long Term Agreement, served by letter dated 28th September 2011; and

   ii) the Applicant's Notice of Intention to enter into a further Qualifying Long Term Agreement, served by letter dated 19th February 2015.

2. The particular respects in which the said Notices failed to comply with that paragraph, and therefore the respects in which dispensation is granted, are as follows:-

   i) in each case, the Notice did not state that public notice was "to be given", as in each case public notice by way of advertisement in the Official Journal of the European Union had already been given prior to the serving of the Notice of Intention; and

   ii) the reference in each Notice to public notice being given did not specifically refer to such public notice being given in the Official Journal of the European Union or specify the date of any advertisement in that Journal.

3. No further direction as to costs is required, upon the Applicant having stated that it will not seek to recover its costs of this application from leaseholders via service charge payable under the leaseholders' lease covenants.

DATED: 12TH September 2016

E.W. Paton

Chair, LVT (Wales)

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For the Applicant: Mr. Michael Paget (Counsel)

The Respondents: Mr. and Mrs. Gough, Ms. Ude, Mr. Ferrer, Mr. Gee, Ms.Taylor (in person)

DECISION

1. By this application dated 3rd June 2016 the Applicant, the Vale of Glamorgan Council, seeks dispensation under section 20ZA Landlord and Tenant Act 1985 from the consequences of non-compliance with Schedule 2 of the Service Charges (Consultation Requirements)(Wales) Regulations 2004 in respect of two separate processes by which it entered into "qualifying long term agreements" (QLTAs) relating to major works to properties of which it is the freehold owner. As well as still being a social landlord with a number of tenants occupying under Housing Act 1985 secure tenancies, the Council is also the owners of the freehold reversions to, and the landlord of, a number of long leasehold properties, mostly purchased under the 'right to buy' scheme. The above mentioned regulations, and sections 20 and 20ZA of the Landlord and Tenant Act 1985, apply in relation to those long leaseholders, as does (therefore) this application.

2. All of the Council's leasehold owners, as generically described in the heading of this application, have been given notice of the application and the opportunity formally to join as Respondents, be served with the papers and take part in the application. Some 22 such owners, or joint owners, availed themselves of that opportunity. The decision will nevertheless apply to, and be binding on, all leaseholders.

3. As stated, the application relates to two separate QLTA processes under the 1985 Act and 2004 Regulations, but with some minor differences, the essential issue is the same in each case.

The 2011 QLTA process

4. The first process was in 2011. By a letter dated 28th September 2011, addressed to all leaseholders, the Council purported to give notice of its intention to enter into a QLTA. The proposed works under this agreement were described as follows:

   "The Council's Housing Improvement Programme includes the refurbishment of Council homes to meet the Welsh Housing Quality Standard. Works will incorporate where required the following:

   Kitchens
   Bathrooms
   Boilers
   Heating Systems
   Rewiring
   Front and back doors
   Communal Doors/Block External Doors

Windows
Roofs
Medical Aids and Adaptations"

5. The letter continued:

"The Council is looking, following a tendering process, to appoint four partnering contractors across the Vale to supply the whole package of works.

.....The Council is required to enter into the agreement because it is a Welsh Government requirement that all Council homes are brought up to the Welsh Quality Housing Standard. Works may be required to the building/block of which your property forms part. The Council invites you to make written observations in relation to the proposed agreement by sending them to..

[a name and address of a Council officer was then given]"

"Observations must be received within the consultation period of 30 days from the date of this notice and the consultation period will end on Monday 31st October 2011.

The Council is required to advertise for the contractors via Public Procurement Regulations. As a result, you are not invited to propose a person from whom the Council should invite a tender because the proposed agreement requires public advertisement within the European Union."

6. The letter was expressed in that form because these were works exceeding the then threshold value of £3.9M, to which the Public Procurement Regulations 2006 applied, requiring advertisement and tender in the European Union, via an advertisement in the Official Journal of the European Union. As the Council accepts, these works included, as the description made clear, a large element of work to Council-tenanted social housing, but the words used also made clear that it might involve work to long leasehold properties falling within the landlord's covenants, the costs of which might be recoverable via service charge. At the very least works to doors, windows and roofs might fall into this category, and possibly some aspects of heating and wiring. In any event, to the extent that this was a QLTA which might include some such works, and given the total value of all the work and the application of the Procurement Regulations to them, it was a situation covered by Schedule 2 of the Service Charges (Consultation Requirements) (Wales) Regulations 2004 (hereafter "the 2004 Regulations"), namely the:

"Consultation requirements for qualifying long term agreements for which public notice is required"

7. The 28th September 2011 letter purported to be the first step in this process, under paragraph 1 of Schedule 2, referred to as the "Notice of Intention". Paragraph 1 provides as follows:

"1—(1) The landlord shall give notice in writing of intention to enter into the agreement—(a) to each tenant; and

(b)where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) describe, in general terms, the relevant matters or specify the place and hours at which a description of the relevant matters may be inspected;

(b) state the landlord's reasons for considering it necessary to enter into the agreement;

(c) where the relevant matters consist of or include qualifying works, state the landlord's reasons for considering it necessary to carry out those works;

(d) state that the reason why the landlord is not inviting recipients of the notice to nominate persons from whom the landlord should try to obtain an estimate for the relevant matters is that public notice of the relevant matters is to be given;

(e)invite the making, in writing, of observations in relation to the relevant matters; and

(f)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."

The admitted errors: the Official Journal advertisement

8. The Council now admit that the 28th September 2011 failed strictly to comply with that Regulation, in two respects, which we accept were only first drawn to their attention by one of the leaseholders (Mr. Gough) in January of this year. While it is not clear whether Mr. Gough had himself read this case (or a summary of it) prior to raising this point, a very similar defect arose in the case of London Borough of Newham v. Hannan and others [2011] UKUT 406 (LC), a decision of His Honour Judge Gerald in the Upper Tribunal.

9. We shall return to that decision further below in more detail, but in that case, as in this case, the Council had got the advertising and notice process the wrong way around. Regulation 1(2)(d) requires that the notice state that the recipients of the notice are not to propose contractors, and that the reason for this is "..that public notice of the relevant matters is to be given". It is clear from common practice, the requirements of EU-wide advertisement imposed by the Procurement Regulations, and also from the observations of Judge Gerald in the Hannan case that:-

i) the "public notice" is to be by way of an advertisement for tenders in the Official Journal of the European Union

ii) the notice must refer to a future advertisement in that Journal: the notice is "to be given"

iii) per Judge Gerald in Hannan at paragraph 37: "the OJ [Official Journal] must be expressly referred to so that the tenant is at least signposted to the right journal"

The Council further accepts that the reference should be to a specific future date of advertisement in that Journal, so that it would not be enough simply to refer to the Journal in general and expect the recipient regularly to read every issue.

10. In this case, as in Hannan, the Council advertised in the Journal first, then sent the Notice of Intention. The relevant tender advertisement here appeared in the Official Journal on 25th August 2011, describing the works in the same words as would later be used in the 28th September 2011 letter, and inviting tenders or requests to participate by 28th September 2011. So by the time the letter went out, the advertisement had already been placed and the tender period had expired. Further, and unlike Hannan, the Notice of Intention letter here did not specifically refer to the Official Journal of the European Union. But the more significant error was clearly that there would be no public notice "to be given" at all, because it had already been given.

Failure adequately to describe works?

11. While dealing with this admittedly defective Notice of Intention, it is also convenient to deal with another ground of challenge to its validity, raised by the Respondents and articulated more fully by one of them (Mr. Ferrer) at the hearing. It was said that the description of the works was too broad, general and insufficiently clear, in that many leaseholders will have assumed that none of it applied to them and so have taken no interest in it, let alone responded with "observations" on it.

12. While the Council acknowledges that the notice was couched in wide terms, and includes a number of matters most likely to be the sole concern of Council secure tenants rather than service charge-paying long leaseholders, it still maintains that the notice complied with paragraph 1(2)(a) of Schedule 2. That requires only that the landlord/Council:

"describe, in general terms, the relevant matters".

The "relevant matters" are defined elsewhere in the Regulations simply (in a case of works to be carried out) as "..in relation to a proposed agreement... the works to be carried out (as the case may be) under the agreement." A QLTA is defined in section 20ZA(2) of the Landlord and Tenant Act 1985 simply as "an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months".

13. So in our view, the landlord/Council's obligation under regulation 1(2)(a) is fairly limited and basic. It is simply required to "describe in general terms" the works to be done under a proposed agreement. It is not required to break them down or explain them further, or explain to tenants which works might concern them and which might not, by breaking them down by street, block, building or otherwise. As set out below, there are further stages at which more detail of proposed works is to be provided, at which stages tenants are given further rights to make observations. At this initial stage, however, the only obligation is to "describe in general terms" the proposed works under the proposed agreement. We are satisfied that this notice of intention did that.

Events and steps subsequent to the 28th September 2011 notice of intention

14. The next stage of the process under Schedule 2 of the Regulations is that the landlord must give a "Notice of Proposal..in respect of the proposed agreement" to all leaseholders, under regulations 4 and 5 of Schedule 2. This will set out the names of the proposed contractors under the agreement, and a number of other prescribed particulars (including either estimates of the cost of the work, or a reason why such estimates are not available). It must also, amongst other things, state the intended duration of the proposed agreement [r.4(9)] and also summarise the observations received in response to the notice of intention [r. 4(10)].

15. The Council discharged these requirements by a notice letter sent to all leaseholders dated 27th April 2012. No issue is raised as to the validity and Regulations-compliance of this notice. It gave the names and addresses of the four proposed contractors, estimated start and completion dates for works, and a statement that detailed estimates of the costs of works were not yet available pending surveys of the properties prior to works commencing. This notice of proposal did refine the description of the proposed works further, to "rewiring and lighting...external communal doors and

windows..flooring..Internal painting", and also contained an explanation that leaseholders would only be liable under service charge provisions for works carried out to their building or estate, and that some leaseholders had received the notice "even though it is not likely that the Council will undertake works to their building under the agreement". That was correct: the Council was required to serve the notices "to each tenant" [Sch. 2 r. 1(1)(a)] without distinction.

16. The Notice of Proposal recorded that only one "observation" was received in relation to the September 2011 notice of intention, and that was from a leaseholder enquiring whether the works would include exterior painting (she was told that they would not). The Council's evidence was that no "observations" were received at all in response to the Notice of Proposal.

17. Thereafter, although we did not hear detailed evidence on the precise course and progress of the works, it is evident that a large quantity of works has now been carried out to leaseholders' properties. A further stage of the consultation process arises under Schedule 3 of the Regulations, when under the rubric of an existing QLTA, the landlord proposes carrying out "qualifying works" (i.e works where the leaseholders' individual service charge "relevant contribution" will exceed £250). Schedule 3 contains a fresh set of provisions on consultation, observations being made on proposals, and the landlord responding to those observations.

18. We mention this only because it is clear that such a process took place on a large scale in 2015. We are not, however, concerned with that process in this application. At a late stage in the history of this application, the Council was given permission by the Tribunal to file a further witness statement from its Mr. Mike Ingram. When filed, and read by the Tribunal, it became apparent that this statement raised a fresh issue, or fresh set of issues, in relation to potential non-compliance with those Schedule 3 requirements in relation to particular works in 2015; and a potential application under section 20ZA for dispensation from the consequences of non-compliance. The particular potential non-compliance raised was a potential failure in a number of cases (possibly as many as 19) to respond to leaseholders' "observations" within 21 days, for the purposes of Schedule 3 regulation 4.

19. We indicated at the outset that we were not prepared, or able, to deal with such a separate and potentially detailed dispensation issue 'on the hoof' in this matter, by way of tagging it on to this present application with no fresh application being made. The issue of compliance or otherwise with Schedule 3, in a potentially large number of separate cases, raises quite separate and distinct issues from those arising in this application in relation to Schedule 2 and the initial QLTA. We would need to hear evidence on the alleged non-compliance in each case, and evidence and argument on any prejudice

caused by it. We stated at the hearing that if the Council wished to make such an application, it should do so on the proper form in the normal way, and the Tribunal will then give directions and deal with it accordingly.

20. We also mention for completeness's sake, and just to re-iterate what we said to the leaseholders present at the hearing, that we are likewise not dealing with any issues which might arise under section 27 Landlord and Tenant Act 1985 as to the reasonableness of the amounts claimed for any works done, or of the decision to carry out such works, or whether the costs of particular works were recoverable via service charge. Those are matters for individual applications, if made. We are concerned solely with the application actually made by the Council, under section 20ZA, for dispensation from the consequences of its admitted errors in its Schedule 2 notices of intention.

The 2015 QLTA process: roofs

21. As stated above, the Council seeks section 20ZA dispensation in relation to not one but two separate QLTA processes commenced by a Schedule 2 Notice of Intention. We have set out above the details of the process commenced in 2011. In 2015, the Council decided to initiate another QLTA process, this time in relation to work to roofs of properties. This too would exceed, in total, the Procurement Regulations threshold and so would fall within Schedule 2 of the 2004 Regulations i.e. a QLTA for which public notice would be required.

22. To avoid repetition in full of the above background, the short point is that the Council now realises that it made the same mistakes in this 2015 process as it did in 2011. This time, the Notice of Intention was dated 19th February 2015. Without quoting the description of works in full, this time it was very much focussed on roofs, chimney stacks, lead, fascias and the like. It again invited observations by a specified date to a named officer.

23. Once again, Schedule 2 paragraph 1(2)(d) was breached. The letter ended with the words:

"The Council is required to advertise these contracts via Public Procurement Regulations. As a result, you are not able to propose a person from whom the Council should invite a tender because the proposed agreement requires public advertisement within the European Union."

Here, as in 2011, the advertisement in the Official Journal had already been made, this time as long ago as 24th October 2014. Again, the words used in the letter did not refer to the Official Journal by name.

24. In this process, the Council's evidence was that no "observations" at all were received in response to the Notice of Intention, or to the later Notice of Proposal sent on 7th April 2015 in relation to this roof-related QLTA. Again, the earlier error and defect in the Notice of Intention only came to light, and was acknowledged, following correspondence with Mr. Gough in January 2016.

25. Recognising the errors - the same errors - in both of these QLTA Notices of Intention - the Council therefore applies under section 20ZA for "a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement" in relation to both of them. On such an application "the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements". It is clear from the case law, in particular Daejan Investments v. Benson [2013] UKSC 14, that such dispensation may be granted in advance or (as sought here) retrospectively, in which latter case it is akin to a form of relief from sanction from the consequences of non-compliance (which would be the limitation of the amount of recovery from each leaseholder to the statutory sum of £250).

The approach to section 20ZA applications: Daejan Investments and Hannan

26. Counsel for Vale of Glamorgan Council, Mr. Paget, took us to the relevant passages of Daejan Investments, in particular the judgment of Lord Neuberger P, with which we are very familiar. The key points and passages are these:-

i) the focus for the Tribunal "must be on the extent to which, if any, the tenants were prejudiced in either respect [i.e. paying for inappropriate works, or paying more than would be appropriate] by the failure of the landlord to comply with the requirements" (paragraph 44)

ii) adherence to the requirements is not an end in itself, and the dispensing jurisdiction is not a "punitive or exemplary exercise" (paragraph 46)

iii) since the focus is on what if any "real prejudice" has been suffered, no purpose is served by ranking breaches according to whether they are "serious" or "minor" (paragraphs 46 and following)

iv) while the determination of "prejudice" may be a "difficult exercise", that is not a reason not to carry it out. The overall legal burden is on the landlord seeking dispensation, but the tenants bear "the factual burden of identifying some relevant prejudice that they would or might have suffered.." (paragraph 67), and if they do so a Tribunal is likely to approach their evidence sympathetically, giving them the benefit of any doubt over whether (for

example) their inability to make some relevant point during consultation would have affected the outcome.

v) "once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it" (paragraph 68)

vi) the tenants, however, have to come up with something, and some evidence of prejudice. In the case of a lost opportunity of consultation:

"..it does not appear onerous to suggest that the tenants have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it. Indeed in most cases, they will be better off, as, knowing how the works have progressed, they will have the added benefit of wisdom of hindsight to assist them before the LVT, and they are likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord" (paragraph 69)

vii) on the facts of that case, it was highly questionable whether any prejudice had been suffered. The most they could say was that they lost the opportunity to put forward their own preferred contractor (Rosewood) over the one who was eventually chosen (Mitre) - see paragraph 77. There was no evidence before the Tribunal of any prejudice in financial terms, certainly not in excess of the £50,000 the landlord had already offered to pay as compensation.

27. The Hannan case is even more instructive, because:-

i) it is on the same part of the Regulations, and almost exactly the same error as occurred in this case; and

ii) it pre-dates the decision of the Supreme Court in Daejan Investments - indeed, at the time Hannan was decided it was the stricter Court of Appeal decision which was in place - yet it clearly anticipates and applies what would later be confirmed as the correct approach, in focussing on the issue of prejudice to the tenants.

28. In Hannan, as stated, the relevant Council landlord likewise put the 'cart before the horse', as it advertised the tender process in the Official Journal of the EU before serving the Notice of Intention. In considering the issue of prejudice, HHJ Gerald considered the purpose of paragraph 1(2)(d) of Schedule 2, and what opportunity that was supposed to give the tenant. He noted that under this Schedule, the tenant does not even have the right to put forward a contractor for consideration. They are merely to be directed to the public notice in Official Journal. Why? he asked, and answered:

"Two reasons, it seems to me. First, so he can look at the advert and satisfy himself that it is consistent with the ambit of the relevant works summarised in the Notice of Intention he has received from the authority. Secondly, to encourage a suitable contractor (who would have to be Public Procurement-compliant) to respond to the advert....and in that way remain engage[d] to an albeit limited and removed extent in the selection and procurement process" (paragraph 38)

29. The evidence in that case was that there was no evidence - no evidence that the tenants had lost any opportunity to "encourage" a contractor or do anything similar, since "not one tenant raised any question relating to the OJ advert or at any time made any observation on or expressed any desire in being involved in the selection of the contractors" (paragraph 40). It was "quite impossible" to suppose that the tenants would have done anything differently had the advert been published after the Notice of Intention" (paragraph 42).

Discussion and decision

30. It seems to us that the combination of i) the approach of the Supreme Court in Daejan Investments ii) the approach and decision of the then Upper Tribunal in Hannan (anticipating the focus on "prejudice" in Daejan) iii) the very limited right and opportunity conferred by Schedule 2, and iv) the very nature of the EU-wide public notice mandated by the Public Procurement Regulations, and of the procurement process in general; must make it difficult, in a Schedule 2 case such as this, for a tenant even to mount a credible factual case for prejudice having been suffered.

31. The underlying premises and steps in such an argument would have to be along the following lines:-

i) as is admitted, the failure to advertise in the Official Journal of the EU after (rather than before) the Notice of Intention deprived the tenant of the opportunity to look at that advertisement when it came out

ii) had there been compliance in this respect, that tenant, or tenants, would have looked up (perhaps online) the Official Journal of the EU to see the advertisement, and would have read it carefully.

In the present case, dealing with HHJ Gerald's first purpose of the paragraph 1(2)(d), it should be noted that the wording and description of the works in the OJ advert and the Notice of Intention were identical in this case, so no "discrepancy" would have been identified.

iii) the only remaining argument would therefore have to be that the tenant/s, on seeing and reading the advert, would have approached and "encouraged" a contractor to look at it and consider making a tender

iv) that contractor would have to be a Public Procurement Regulations-compliant contractor, capable of tendering for multi-million pound local authority contracts, with a high level of insurance cover in place and the capacity to take on such a large contract.

v) as a matter of causation, the tenant/s would also have to establish that, but for them "encouraging" this contractor by drawing its attention to the OJ advertisement, this contractor would not otherwise have known about it. In other words, despite being a substantial contractor equipped for and accustomed to tender for multi-million pound public works contracts, its evidence would have to be that it neither scanned public notices of such tenders in the OJ and other publications, nor employed or paid someone to search and scan such advertisements. The contractor would effectively be saying that it relied on individual leaseholders to draw its attention to the OJ and to borough or Council-wide tenders on this scale.

vi) that contractor, having been thus alerted, would then have put together a tender within the specified period (around 28 days) and despatched it to the Council in time

vii) the tender it would thus have put in would have been a credible and competitive one, by comparison with the other tenders the Council received and in particular with the ones the Council eventually selected

viii) there was therefore a significant possibility or chance that the Council might have selected that contractor instead, and (if the figures support this) that this might have saved the Council - and eventually, via the service charge, the leaseholders - some money.

32. We have set these hypothetical steps out to emphasise both how difficult and speculative such an exercise is, but also, in this case, just how far the leaseholders have fallen short of even establishing a minimal factual basis for a case of prejudice. We have to say, in particular, that there is a real difficulty inherent in such an argument for any leaseholder, particularly at stage (v) above. How likely is it that major contractors actually exists, who are Public Procurement-compliant, competent and experienced in performing multi-million pound Council-wide construction contracts, but who nevertheless rely on members of the public to alert them to such opportunities by drawing their attention to advertisements in the Official Journal? And if such a contractor existed, how likely is it that once so alerted, they would have swung into action and produced a realistic, competitive and persuasive tender in such a

time scale? It may be possible, but if it is, we would need to have some evidence about it.

33. This application was made on 3rd June 2016. The Council wrote to all leaseholders on 24th May 2016, explaining the errors made in the Notice of Intention, that it would be applying for dispensation to the Tribunal, and stating that, while it did not consider any prejudice had been suffered:

"We are inviting you as leaseholders to make any observations you have with regards to the identified breach outlined above and how, if at all, this breach has negatively affected you."

34. Various responses were sent, but none of these, nor either of the witness statements later provided for the hearing - from Mr. Gough and Ms Ude :-

i) suggested even the name of any alternative contractor who might have been encouraged to put in a tender

ii) made any observations, or requested any information, about the overall contract price under the two QLTAs, perhaps for the purpose of comparison with the tender which another contractor might have submitted

iii) gave any concrete or specific instance of prejudice resulting from such a lost opportunity.

35. Some of the responses by letter raised other points. For example, Mr. Gough made it clear that he had views about the distinction between improvements, renewals and repairs; and also on "many aspects of the charges levied on leaseholders"; and that "much of the work was unnecessary" (letter 30/5/2016). Those are all matters which he could pursue, if he so chose, by way of challenge to service charges under section 27 LTA 1985. They do not go to the initial award of the QLTAs. Another responder (a Ms. Harvey) had only purchased her property in December 2015, and appeared to be making a point about the uncertainty at the time of her purchase caused by the impending works. That too was irrelevant to this issue. One responder (a Ms. Millar) said that she felt "aggrieved" that she did not have the opportunity to put forward someone else to tender, but did not say who they might have been. The rest of her grievances were really about the progress and nature of the works.

36. As for witness statements, and the two witnesses who provided such statements and gave oral evidence to the Tribunal - Mr. Gough and Ms. Ude - there was really no advance on the mere assertion that they had lost an opportunity to put someone forward. Mr. Gough simply said that:

"I feel by the council failing to follow correct consultation process I have suffered prejudice in two forms

a. Inability to make observations

b. Inability to nominate contractor"

In oral evidence, when pressed by counsel, he said that he had lots of "contacts" in the construction trade, and that he could have told them about the notice and asked them to tender, but he gave no further details or even names, saying "what's the point?", since the work had been done.

37. Ms. Ude did not go any further. In her statement, she actually referred to Hannan and gave the correct citation for it, but merely stated that:

"I can state that I was prejudiced because I lost the opportunity to submit a contractor to do the work..."

, then went on to argue that the Council had further "duties" to inform her of various further matters. She sought to distinguish Hannan on its facts, but as stated, had nothing further to say about what she would actually have done and who she would have approached to submit a tender (remembering that leaseholders only had this, more indirect right; not the right to "submit a contractor" themselves).

38. We recognise and appreciate that both the processes under the 2004 Regulations, and applications before this Tribunal which relate to those Regulations, can be complex and difficult matters for non-legally qualified leaseholders. We do, however, deal with very many leaseholders representing themselves. Indeed, in this case, as the Council acknowledged, it was Mr. Gough's own persistence and legal research which revealed the Council's error, forcing it to make this application. As stated above, both he and Ms. Ude cited statutory provisions and case law.

39. That said, there has simply been no real effort made or evidence produced, in the months leading up to the Tribunal hearing, to develop any sort of case of "prejudice" of the sort considered in Daejan Investments. It is not enough just to say that "the Regulations were breached and we lost an opportunity to be consulted/submit a tender/alert a contractor to a public notice (depending on the nature of the breach involved)". That is a 'given' in such applications. There has been a breach, so the relevant opportunity or right which the relevant provision conferred has not been able to be utilised. The Supreme Court in Daejan Investments made clear that this is not a penal or exemplary jurisdiction, and so it is not enough just to point to the breach and the resulting lost opportunity.

40. "Prejudice" cannot just be asserted in general terms. The leaseholder has to say something about what they would actually have done, why, and what difference that would or might have made. They might start with the name of a contractor whom they might have alerted. A representative of that contractor, call them X Limited, might give a statement saying "If only I had known of this - and I did not - I would have put in a tender of £x million, and I might have got the contract." That might then be compared to what the Council actually paid to the winning contractors. Indeed, Lord Neuberger in Daejan Investments envisaged that the leaseholders might adduce evidence from surveyors and the like, comparing the relative costs of contractors. The tenor of his judgment was that if some credible evidential basis was put forward, the Tribunal would look sympathetically towards it, and require the Council to rebut it with evidence of its own - for example, arguing that in fact they awarded the contracts reasonably to the best overall tendering contractors, and that having a tender from X Limited would not have made any difference to their decision. If that became a lengthy and costly process, Lord Neuberger also indicated that the Tribunal could take a generous view on the issue of costs when granting dispensation - while not having a power directly to make a costs order, it could order payment of leaseholders' costs and other sums as a condition of the grant of section 20ZA dispensation.

41. We have simply had nothing of that sort in this application. We have to deal with the application in time allotted for it, and on the evidence put forward. We have no evidence of actual prejudice at all. The Council makes the additional point that in fact, there was very little interest in or response to the Notices of Intentions or Notices of Proposal in either case (2011/2012 and 2015) - there were virtually no "observations" offered at that stage of the process, in either case, so it can be inferred that there would have been a similar lack of interest in the even more indirect opportunity of looking up an advertisement in the Official Journal of the European Union then telling a contractor about it. The leaseholders' main interest in the process came later, perhaps unsurprisingly, when specific works were proposed then commenced under the QLTAs, and when estimates in pounds and pence for their own liabilities were sent to them. We do not have to decide whether that argument is correct - the Council is not required to prove a negative, in the absence of any initial evidence of actual prejudice from the leaseholders.

42. As stated, those later matters are not the subject of this application. We are concerned only with the very first stage of those processes - the award of the QLTAs. The Council seeks dispensation from strict compliance with paragraph 1(2)(d) of Schedule 2 of the 2004 Regulations in relation to the Notices of Intention for those processes, dated (respectively) 28th September 2011 and 19th February 2015, having accepted that those Notices failed to comply in that (i) the "public notice" required was not "to be given" but had

already been given and (ii) they did not refer to the Official Journal of the EU when mentioning the requirement of "public notice".

43. We grant dispensation under section 20ZA from compliance with those requirements in these respects, being satisfied that it is reasonable so to dispense with them in this case. There is no evidence of any actual prejudice caused by the breaches, and as in the Hannan case, it would be "quite impossible" on the evidence (or lack of evidence) before us to find otherwise.

44. We therefore grant the dispensation sought in the form of the attached order. As made clear in its application, the Council will not be seeking to recover its costs of this application via service charge, so there will be no need for any application by leaseholders under section 20C Landlord and Tenant Act 1985 to disallow such recovery.

Dated this 12th day of September 2016

E.W. Paton

Chair, LVT (Wales)