Residential Property
TRIBUNAL SERVICE

Leasehold Valuation Tribunal **LON/00AW/LSC/2007/0181**
London Rent Assessment Panel **& LON/00AW/LDC/2007/0056**

Landlord and Tenant Act 1985 sections 27A and 20C, and section 20ZA

Address:	Flats 1, 9 & 10, 71 Elm Park Gardens, London SW10 9QE
Applicants:	Mr K & Mrs W von Bismarck, Mr K & Mrs S von Schweinitz & Mr S Carter
Represented by:	in person
Respondent:	The Royal Borough of Kensington & Chelsea
Represented by:	Mr R Bhose, counsel
Also present:	Ms C Vachino, Mr P Holland, Ms R de Villiers (RBKC) & Mr B Smith (director, S & F Services Ltd)
Tribunal members:	Mr T J Powell LLB Mr C Kane FRICS Mrs G Barrett JP
Application:	22nd May 2007
Oral pre-trial review:	18th June 2007
Hearing:	4th October 2007
Written submissions:	Between 11th & 31st October 2007
Decision:	23rd November 2007

Decisions of the Tribunal

(1) The Tribunal determines that the section 20 consultation requirements had not been materially complied with but, for the reasons given below, the Tribunal is satisfied that it is reasonable to dispense with the consultation requirements under section 20ZA, in so far as an incorrect figure was inserted into the 'stage 2' notice;

(2) The Tribunal determines that the reasonable amount for the service charges in respect of boiler maintenance and call-outs are: for 2005/06, £403.40 and for 2006/07, £542.90;

(3) The Tribunal determines that the reasonable amount for the advance service charge for 2007/08 is £450;

(4) The Tribunal makes an order under section 20C of the 1985 Act, both in respect of the main application and the section 20ZA application;

(5) In the circumstances the Tribunal does not consider it appropriate for the Applicants to repay the Respondent's fees on the section 20ZA application, but the Tribunal orders that the Respondent shall reimburse the £350 fees paid by the Applicants in respect of the main application within 28 days of this decision

Application

1. The application concerned a 5-year maintenance contract dated 6 June 2005 between the Respondent and S & F Services Ltd, under which S & F was to provide planned maintenance and responsive repairs to communal heating systems in blocks and buildings within the south of the borough for a 5-year period from 1 April 2005. It was common ground between the parties that this contract was a qualifying long-term agreement ("QLTA"). The Applicants challenged the reasonableness of the charges apportioned to 71 Elm Park Gardens under the contract. There was an oral pre-trial review on 18 June 2007, at which in addition a question was raised about the validity of the consultation process under section 20 of the Landlord and Tenant Act 1985.

2. Two weeks before the hearing the Respondent submitted a new application under section 20ZA of the Landlord and Tenant Act 1985, seeking dispensation with the consultation requirements for an existing QLTA, and directions were given for that matter to be heard at the same time as the Applicants' case.

Attendance

3. The Applicants appeared in person but the case was presented principally by Mr Carter. The Respondent was represented by Mr Bhose of Counsel, assisted by officers from the Council, and Mr Smith, Director of S & F Services Ltd.

Property

4. 71 Elm Park Gardens (the "property") is a large Victorian house converted into 10 two-bedroom flats, half of which are occupied by leaseholders and half of which are tenanted. Each flat provides its own hot water but is supplied with communal heating from a common boiler within the building. Neither party requested an inspection and the Tribunal did not consider that one was necessary.

The Lease

5. The Tribunal considered a specimen lease in respect of Flat 1. This lease was dated 21 December 1979 and ran for 99 years from 25 December 1977. It contained the usual provisions for the payment of a service charge. By Clause 4(ii)(e) the landlord covenants to provide and maintain background central heating between the months of October to April in each year, and to carry out such repairs as may be necessary for the restoration and maintenance of such heating.

The law

6. Section 20 of the Landlord and Tenant Act 1985 sets out requirements for consultation before costs are incurred in relation to qualifying works and qualifying long-term agreements. The requirements are set out in detail in the Service Charges (Consultation Requirements)(England) Regulations 2003 (the "consultation regulations"). By section 20ZA of the 1985 Act, a party may apply to the Tribunal for an order to dispense with the consultation requirements set out in section 20 and the above regulations.

7. Service charges and relevant costs are defined in Section 18 of the Landlord and Tenant Act 1985 (as amended). The amount of service charges which can be claimed against leaseholders is limited by a test of reasonableness which is set out in Section 19 of the Act. Under Section 27A an application may be made to a Leasehold Valuation Tribunal for a determination whether a service charge is payable, including an advance service charge.

8. Regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 allows a Tribunal to order a party to reimburse the whole or part of any fees paid by another party.

9. Section 20C of the Landlord and Tenant Act 1985 Act provides that a Tribunal can make an order preventing the Lessor recovering its costs of proceedings through the service charge, if the Tribunal considers it to be just and equitable.

Background to the Application

10. The boiler at 71 Elm Park Gardens was installed in November or December 1998. It provides heating only (not hot water) to the 10 flats in the building for 7

months in every year, being switched off for the other 5 months. Each flat pays one-tenth of the boiler maintenance charge.

11. Prior to 1 April 2005 a company called TMP (Northern) Ltd ("TMP") maintained the boiler at the property and the company also repaired radiator valves for leaseholders. The annual charges for leaseholders were an average of £242.83 for the previous 7 years since the boiler was installed. This contract was one of a large number of individual maintenance contracts run by the Respondent authority for the maintenance of its properties and estates. In order to achieve efficiency and costs savings the Respondent decided to consolidate the maintenance contracts by tendering for one or two companies to undertake all maintenance on behalf of the Respondent in the borough over a 5-year period under a QLTA. The Respondent therefore started a tender process for the proposed new contracts which, because of their size, were advertised in the Official Journal of the European Community. The Respondent then followed the consultation requirements in Schedule 2 of the consultation regulations.

12. At the end of the consultation and tender process the Respondent carried out an evaluation of the tenders according to criteria set out in the tender documents. On 21 February 2005 a decision was made by the Property Management Committee of the Tenants Management Organisation ("TMO") to award two QLTAs: one to S & F Services Ltd to maintain properties in the south of the borough (in which the property is situated) and the other with Utilicom Ltd for the north of the borough.

13. As a result of the QLTA being signed with S & F Services Ltd the costs of maintenance and therefore the service charges were apportioned between each of the Respondents' properties in accordance with the tender figures per property put forward by S & F as part of the procurement process. This meant a rude awakening for the leaseholders at this property who found that their maintenance charge for 2005/06 had risen to £682.80 per flat, rising to £722.53 for 2006/07, with a current estimate for the current year of £815.20. It was this substantial rise in the costs to leaseholders which gave rise to the current application.

14. Although still relatively new, the existing boiler at the property was replaced with a new boiler in September 2007, some 3 weeks before the Tribunal hearing. The Respondent indicated that the new boiler would be subject to a "new pricing arrangement" within the south of borough contract signed with S & F Services Ltd. The Tribunal was therefore concerned with the payability and reasonableness of the service charges relating to the boiler for the 2½ years between 1 April 2005 and the end of September 2007.

The hearing

15. The hearing lasted one day. The Tribunal's attention was drawn to three lever-arch files and one ring-binder of documents. At the end of the day all the oral evidence had been taken, but there was insufficient time for the parties to summarise their cases and make submissions. Counsel for the Respondent asked permission to make written submissions within 7 days, rather than wait

for a return hearing date. The Tribunal agreed to this request and allowed the Applicants a further 21 days thereafter to make written submissions in response. The parties were requested to address the issues of costs and the refund of fees in their submissions.

16. The parties' detailed submissions (which ran to 19 and 25 pages respectively) were received by the Tribunal and considered when reaching its decisions. Insofar as either party sought to introduce new evidence not received orally at the hearing, it was ignored.

Adequacy of the consultation procedure

17. By letter dated 5 March 2004 the Respondent gave due notice of intention to enter into a 5-year QLTA, describing in general terms details of the proposal and inviting observations. There was no objection by the Applicants to the form and content of this 'stage 1' section 20 notice.

18. The Respondent received tenders from 5 companies for all of the maintenance contracts in the south of the borough: S & F Services Ltd was the lowest at £234,162, followed by TMP at £235,925 and then Utilicom Ltd at £274,600.

19. The same companies had quoted different costs for the maintenance contract at the subject property. Of the 3 "best value" companies, S & F Services Ltd quoted the highest cost at £6,828.00, followed by Utilicom Ltd at £2,215.99, with TMP quoting the lowest cost at £1,600. The evidence was that TMP was the existing maintenance contractor for the property and the Applicants asserted that that company was therefore best placed to know the actual likely maintenance charges in future years. However, the Utilicom price was closer to the actual charges raised in previous 7 years (which averaged £2,428.30 per year in that period).

20. On the basis of these tender figures, each flat could anticipate paying one-tenth of the property charge, i.e. £682.80, £221.60 or £160.00 respectively, depending on which company was awarded the contract (compared with the previous average annual cost of £242.83 per flat).

21. The 'stage 2' section 20 notice was sent by letter dated 15 December 2004 to the leaseholders and confirmed that the successful tenderer to whom the QLTA had been awarded was S & F Services Ltd. In accordance with the requirements of Schedule 2 the Respondent had estimated the relevant contribution to be incurred by each leaseholder. The estimate was in bold lettering and suggested that the charge for each leaseholder would be £221.60 per year.

22. It was accepted by both parties that this estimate was a mistake which had occurred when the Respondent had inserted Utilicom's lower tender figure for the property into the 'stage 2' notice, rather than the tender figure put forward by S & F Services Ltd, which was £682.80 per flat. The Respondent, in its written submissions, laid great emphasis on the mistake being a "genuine operating error" with no intention to mislead leaseholders, and this was accepted by the Applicants.

23. The Tribunal accepts the Applicants' evidence that they had been content with the proposed £221.60 individual contribution per flat, and had therefore not made any observations themselves about the proposal to award the contract to S & F Services Ltd. The Tribunal also accepts their evidence that had the correct figure been inserted on the 'stage 2' notice, the Applicants would certainly have made vehement representations against the threefold increase in their charges.

24. The consultation regulations impose a duty on the Respondent to "have regard to" any observations that may be made. The Respondent's evidence was that even if the correct charges had been inserted in the 'stage 2' notice and observations had been received from the leaseholders it would not have made any difference to the Respondent's decision to award the QLTA to S & F Services Ltd. It was put forward on behalf of the Respondent that despite the mistake the overall consultation process did materially comply with Schedule 2 of the consultation regulations. In the alternative, if a mistake did invalidate the procedure it was reasonable in the circumstances to dispense with the consultation requirement, to the extent that an estimate of the relevant contributions to be incurred by the leaseholders was not accurately stated.

25. It was further said on behalf of the Respondent that by having entered into the QLTA the borough had saved significant costs for the benefit of all residents in the borough, although it was accepted that the Applicants themselves had had to pay considerably more under the agreement. To this end the evidence was that the overall costs to the Respondent had decreased by 14.44% whereas the costs of the change to these Applicants had increased by more than 300%.

The Tribunal's decision

26. The consultation requirements under Schedule 2 of the regulations are much less onerous that under other schedules. Regulation 4(4) makes it clear that where it is reasonably practicable for the landlord to estimate the relevant contribution to be incurred by the tenant, the proposal "shall contain a statement of that contribution."

27. In the present instance it was clearly practicable for an accurate contribution figure to have been put in the notice - and in its written submission the Respondent accepts this - and it was only because of a mistake that this did not happen.

28. Since the Schedule 2 consultation requirements are so much less onerous than other schedules, the Tribunal considers that it is all the more important for the landlord to comply with such requirements as there are.

29. The Tribunal also finds it surprising that the Respondent maintains that, despite a duty to have regard to observations made by leaseholders, it would have made "no difference" to the overall decision to award the contract, even though the change of contracts would result in a threefold increase in charges for the Applicants.

30. It was part of the Respondent's case that it could not make any adjustments to the tender figures supplied by the various companies taking part in the competitive tendering process. However, there was clear evidence that the Respondents did request and obtained an adjustment to the tender figures quoted for maintenance in the north part of the borough which, in two cases, had included equipment not actually present on site in a particular block.

31. The Tribunal's view is that the Respondent could have gone back to S & F Services Ltd and pointed out anomalies in costs within the Elm Park Gardens estate and, without affecting the overall tender price, could have asked S & F Services to re-balance individual block tenders within the estate to ensure that there were no extreme anomalies or excessive charges.

32. However, the crucial point was that the Respondent had provided inaccurate figures as part of the consultation process and had not given the Applicants an opportunity to make representations, which they would undoubtedly have done had the correct figures been used.

33. Overall, therefore, the Tribunal determined that the consultation requirements had not been materially complied with.

Application to dispense with consultation

34. The vast majority of applications for dispensation of consultation requirements are made where there is some urgency in the making of a decision or the carrying out of works. However, section 20ZA is not so limited and there is discretion for the Tribunal to consider every application on its merits.

35. The Respondent characterised the mistake in the 'stage 2' Section 20 notice as a simple error, honestly made with no intention to mislead. As such, it "properly merited dispensation."

36. In its written submissions, the Respondent re-emphasised that the giving of the incorrect figure "did not make any difference to the outcome of the process" but did accept that one (or more) of the Applicants would have made observations to the Respondent about cost, if the correct figure had been used. The Respondent relied on the fact that S & F Services Ltd had offered a tender which was the lowest of the tenders received, and was the best evaluated under Best Value principles.

37. Mr Holland, a mechanical engineer employed by the TMO with principal responsibility for the maintenance and repair of mechanical building services for residential properties, gave evidence that he had prepared the report to the Property Management Committee which made the decision on 21 February 2005 to award the contract to S & F Services Ltd. He said that there had been other observations and representations against the award of the contract considered by the Committee, albeit not from this property. In his view, the Committee would have come to the same decision even if the cost anomaly identified by the Applicants had been reported to the Committee, because of the

overall savings in cost to the borough and because of the moving of risk under the contract onto the shoulders of the contractor.

38. The Applicants opposed the application to dispense with the consultation requirements, saying that it would be unfair to the Applicants to suffer a three-fold increase in charges without an opportunity to make representations.

39. The effect of refusing to grant dispensation would be to limit the leaseholder's costs of maintenance to £100 per flat, when the contracted tender price for that maintenance was £682.80 per flat in the first year of the contract, an estimated £705 in the second year and an estimated £815.20 per flat in the current year.

40. Although these figures were the tendered cost, Mr Smith on behalf of S & F Services Ltd produced figures which showed that the actual costs incurred were lower: £437.12 in 2005/06 and £602.20 in 2006/07.

The Tribunal's decision

41. The Respondent's application under section 20ZA was for dispensation with the consultation process (or part of it), as it related to the granting of the entire contract for the south of the borough. The insertion of the incorrect figure in the 'stage 2' notice was a genuine mistake affecting this particular property. There was no evidence that any other property had been so affected. The tender price quoted for this property was £6,828 in a total contract for the south of the borough of £234,162, which represents a mere 2.9% of the total cost of the entire contract.

42. The Tribunal considers that if the anomaly as to cost in relation to this property had been before the Property Management Committee of the TMO, that committee would still have gone ahead with the awarding of the contract to S & F Services Ltd, though for reasons given above the Tribunal rejects the suggestion that no changes could have been made to investigate anomalies, especially since there had been adjustments downwards in the north of the borough. In the evidence given by Mr Smith, a director of S & F Services Ltd, he accepted that the tendered cost for this property was disproportionate and that while one would need a crystal ball to estimate the number of call-outs to a particular property, if he was quoting again now he would do so more cheaply.

43. The Tribunal considers that there could have been adjustments between the blocks within this estate, without affecting the overall tender price. In addition, the Tribunal noted that the challenge to the consultation procedure had not been raised by the Applicants in their original application, but it had only been raised at the pre-trial review stage.

44. Having heard the evidence and having considered the written submissions of the parties very carefully, the Tribunal therefore determines that it is satisfied that it is reasonable to dispense with the consultation requirements, in so far as the incorrect figure was inserted into the 'stage 2' notice.

Reasonableness of charges

45. It follows from the above decision that the Tribunal now needs to consider the reasonableness of the service charges incurred in so far as they relate to the boiler at the property.

46. The Applicants contended that the annual charges since 1 April 2005 were not reasonably incurred and were not reasonable in amount. S & F Services Ltd had quoted £6,828 to maintain the heating boiler serving the 10 flats at 71 Elm Park Gardens, which equated to £682.80 per flat. This was nearly a 300% increase on the average charge for the previous 7-year period, at £242.83 per flat. However, the last year in that 7-year period (2004/05) incurred the highest charge of £348.51 per flat, although this also included replacement of radiator valves.

47. Evidence was given of the breakdown of the £6,828 tender figure. It represented an estimated maintenance cost of £2,348 and an allowance of £4,480 to cover all reactive works, emergency call-outs for 24-hours, 365 days per year, repairs up to a value of £500, quality assurance, overheads and profit.

48. The allowance for reactive works included leaks to radiators in the individual flats in the property. The evidence was that the actual call-out charges for 2005/06 and 2006/07 included call-outs to deal with radiators, mostly in tenanted flats in the building. Mr Smith accepted this in evidence.

49. The really surprising evidence is that the total £6,828 which included call-out charges to 10 flats at this property, was the very same figure quoted by S & F Services Ltd to maintain the boiler and undertake call-out charges to the 50 flats at 22 Elm Park Gardens and the 189 flats at 5 Elm Park Gardens.

50. On the basis of this evidence alone the £6,828 cannot be considered to be a reasonable amount for the maintenance and call-out charges for this property. In the Tribunal's view it is an arbitrary tender figure, which S & F Services Ltd had applied across the board for at least three blocks on the estate. In evidence Mr Smith said that the maintenance charge was more expensive because the equipment at the property was more sophisticated than in other blocks (something hotly disputed by the Applicants and their expert witness Mr Walsh). If that had been the case then the Tribunal would have expected to see a higher maintenance figure for the boiler and a lower figure for call-out charges. However, there was no evidence on this point.

51. Mr Smith also said in evidence that the tender figure for this property had arisen from consideration of the assets register, a site visit and a "crystal ball element" as to what would happen in the future. When pressed by the Tribunal he admitted that £682.80 per flat was "disproportionate" even though the quote had been made in good faith at the time.

52. The Tribunal went on to consider what would be a reasonable amount for the boiler maintenance and call-out charges. Bearing in mind that the charge had been £348.51 per flat for 2004/05 (which included maintenance and call-outs),

the Tribunal considers that the cost would have continued to rise partly because the boiler would require more maintenance as it became older and partly because costs would have risen generally.

53. In his witness statement Mr Smith gave evidence that the actual costs for this property in 2005/06 were £4,034, and for 2006/07, £5,429, i.e. £403.40 per flat and £542.90 per flat for the two years respectively.

54. In written submissions Counsel for the Respondent contended that Mr Smith's figures represented the net cost and sought to add 20% to the response repairs figure to arrive at costs of £437.12 and £602.22 per flat for the first two years of this contract.

55. For his part, the Applicant's expert Mr Walsh contended for an annual maintenance charge of £722 for the building and call-out charges of £2000 per annum for the building, representing a charge of £272.20 per flat, which figure he contended would be a reasonable amount for the lessees to pay.

56. The Tribunal considered that Mr Walsh's calculations were logical, but they were based upon the assertion by the boiler manufacturer, Hamworthy, that only two visits per year were needed. While it would be possible to have only two visits per year, the Tribunal considered that the likelihood of boiler breakdown would be much higher as time went by. In this case the Respondent had gone for a higher specification and monthly inspections, which was obviously more expensive, but possibly too much for this particular boiler. Overall, the Tribunal considered that Mr Walsh's figure of £272.20 per flat is too low: it was based on a very basic maintenance regime and, given the number of call-outs which actually took place over the first two years of the contract, maintenance and call-outs would have cost much more than the costs catered for in Mr Walsh's figures.

57. When considering the reasonable amount of service charges the Tribunal felt it was unable to ignore the actual costs incurred by S & F Services Ltd during the period in question. Mr Bhose on behalf of the Respondent argued that there should be an additional 20% added on to the stated figures for response repairs to allow for overheads, contract management, on-site supervision, quality assurance and a profit element.

58. However, the tender document completed by S & F Services Ltd does not specify any additional sums for preliminaries or profit and indeed the day-work labour costs are said to be "all inclusive", and therefore the rates appear already to include an amount for overheads and do not justify an additional percentage increase. In his witness statement Mr Smith, when discussing the actual costs for the first two years of the contract, does not mention any uplift but, equally, nor does he say that it is included in the figures he gives. However, the Tribunal notes that the maintenance cost of £2,348 referred to by Mr Smith for 2005/06 is the same amount as in the tender document. Since that document makes no provision for additional sums, the Tribunal must assume that the actual costs referred to by Mr Smith include overheads and profit and they have already been taken into account. Therefore the suggestion by Mr Bhose that there should be an extra 20% on top of the response repairs figures is rejected.

The Tribunal's decision

59. The Tribunal therefore determines that the reasonable amount for the service charges in respect of boiler maintenance and call-outs are: for 2005/06, £403.40 and for 2006/07, £542.90.

60. For the current service charge year 2007/08 the current estimated service charge is £815 per flat, but it follows from the above that the Tribunal considers this to be an unreasonable advance service charge. When deciding a reasonable amount for the advance service charge the Tribunal starting point is a 10% increase on the allowable charge for 2006/07, so that a reasonable advance charge would be in the region of £597.19, say £600 for each flat for the year. However, since the boiler was removed and replaced in September 2007, six months into the service charge year, the Respondent admitted that the contract with S & F Services Ltd would have to be re-negotiated.

61. The Tribunal expects that the maintenance of the new boiler will be covered by warranty at least for the first year and this would go to reduce the advance service charge, although the call-outs to the individual flats might be broadly similar. The Tribunal would therefore reduce the advance service charge further for 2007/08 to £450, which it considers to be a reasonable amount in the circumstances.

Refund of fees and section 20C application

62. The Applicants sought an order under section 20C of the 1985 Act to prevent the Respondent charging its costs of defending the application to leaseholders through the service charge. The Applicants also sought an order that the Respondent should refund the fees that they had paid to the Tribunal.

63. Neither party made written representations leaving this matter to the discretion of the Tribunal in the light of any findings made.

64. The Tribunal has found in favour of the Applicants. The original mistake in the 'stage 2' section 20 notice was made by the Respondent. The Respondent had not been helpful in providing information to the Applicants. The Tribunal did not investigate the Applicants' claims that information had been withheld from their expert, but was satisfied that co-operation could have been better. The Applicants were told to raise their concerns with the Ombudsman and were then later told by Ms De Villiers, the leasehold manager for the TMO "to go to the Tribunal".

65. The Tribunal has no hesitation in making an order under section 20C of the 1985 Act both in respect of the main application and the section 20ZA application.

66. In the circumstances the Tribunal does not consider it appropriate for the Applicants to repay the Respondent's fees on the section 20ZA application, but the Tribunal orders that the Respondent shall reimburse the £350 fees paid by the Applicants in respect of the main application within 28 days of this decision.

Chairman: T. Powell

Timothy Powell

Date: 23rd November 2007