RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Property	:	**The Metropole, The Leas, Folkestone, Kent CT20 2LU**
Applicant	:	**Metropole (Folkestone) Ltd.**
Respondents	:	**The tenants whose names are annexed to the application**
Case number	:	**CAM/29UL/LDC/2008/0005**
Date of Application	:	**13th May 2008**
Type of Application	:	**Application to dispense with consultation requirements in respect of qualifying works (Section 20ZA Landlord and Tenant Act 1985 as amended ("the 1985 Act"))**
The Tribunal	:	**Bruce Edgington (Lawyer Chair) David Brown FRICS MCI Arb**

DECISION

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1. The applicant is refused dispensation from the consultation requirements in Section 20ZA of the 1985 Act and **The Service Charges (Consultation Requirements) (England) Regulations 2003** as amended ("the Regulations") in respect of rebuilding or renovation works to the south east annex to the property.

Reasons

Introduction

2. On the 13th May 2008, the Applicant appears to have sent this application to the Southern Panel office of the Tribunal. It was received by them on

the 19th May. Because of a potential conflict arising because a former partner in the Applicant's solicitors' firm is a Vice President of the Southern Panel, that Tribunal sent the case to the Eastern Panel to deal with.

3. The Applicant stated that it felt that this application could be dealt with by a paper determination i.e. without an oral hearing. The Tribunal agreed and directions were issued on the 29th May 2008 advising the tenants of this and making directions as to the filing of evidence. This included a direction that if anyone wanted an oral hearing, one would be arranged. No decision would be taken before 30th June 2008 i.e. the parties were given the 28 days notice contained in the Regulations. No request for an oral hearing was received.

4. The application said that very urgent repairs were required to be carried out to the south east annex "*to render it safe, it being currently unsafe owing to deterioration of steelworks and cladding*". This was one reason given for the urgency. The other reason was "*risk of losing preferred competitive contractor*".

5. The Tribunal chair arranged for the Applicant's solicitors to be asked some more information about the state of the property so that the case could be discussed by the Tribunal members on the 29th May. Clearly the Tribunal wanted to know whether the building was actually in a dangerous state. If it was, then discretion could have been exercised to arrange a very urgent hearing.

6. There then followed an exchange of e-mails when at one point the Applicant indicated that it wanted to withdraw its application and then it wanted to proceed again. In an e-mail message of the 29th May, information was given by the Applicant's solicitors that "*the property has been in this state for more than 5 years but temporary measures were taken (support steelwork) in 2003 to ensure that there was no immediate danger of collapse*".

7. There was no evidence to suggest immediate danger or physical harm to any person and the Tribunal therefore decided to issue standard directions for the parties to file and serve evidence and representations as stated above.

The Applicant's case

8. The Applicant has filed a statement from Keith Nock setting out the history of this matter. He is a leaseholder and director of the Applicant freehold management company. It seems that there has been some contention in the past about what should happen to this annex. There has been a feasibility study and proposals to demolish and rebuild which went out to

consultation but were turned down by the leaseholders. In December 2006, 3 directors of the Applicant resigned. The reasons are not given but the inference is that it was something to do with the annex.

9. It is also said that during 2007, structural engineers and architects were consulted. The building company Barwicks provided an estimate of £460,000 including VAT to refurbish the annex. A meeting of leaseholders in December 2007 is said to have approved the company's proposal to refurbish which was presumably - although it does not say so specifically - based on Barwicks' estimate.

10. The statement then gives the reasons why the Applicant's board of directors does not wish to go through the formal consultation process i.e.

> *"The Board considers that it does have the authority of the majority of leaseholders to carry out its proposal notwithstanding that the consultation procedure was not formally carried out again. The Board is concerned to minimise unnecessary expenditure and is concerned not to incur the costs of obtaining further quotes which would be required of the consultation process, and which it is confident would not approve upon the existing proposal. In addition the Board is concerned that valuable time would be lost delaying both the urgent works and effectively losing the summer months. Further delays might also mean that the chosen contractor would also not be available which would compromise the quote achieved."*

11. In their further submissions, the Applicant gives seven reasons why the directors do not wish to deal with the matter by way of competitive tendering i.e.

(a) the works could begin immediately and the benefit of the works being carried out over the summer months would not be lost
(b) the current estimate would be jeopardised
(c) the current estimate for repair as opposed to demolition is much simpler, saves leaseholders £500,000 and bears reduced risk of cost overruns
(d) delay means deterioration in steelwork on site and increased safety risk
(e) the time and effort involved in a tendering exercise would outweigh any benefit
(f) the companies asked to tender would each be involved in investigation costs and the applicant would therefore be involved in extra cost

(g) fees for monitoring the "pre-tender situation and associated administrative costs" would be about £10,000 plus VAT

The Respondents' cases

12. A number of Respondents made submissions including David Norfolk of no. 48, Peter Lowe, a chartered engineer, of no. 43 and a combined submission from nos. 44, 200, 202 and 602. All these Respondents' submissions urge the Tribunal to refuse the application because it is felt that this project is large and should go out for consultation. The submissions are detailed and have been fully considered by the Tribunal but this is, in essence, what is being said. Mr. Norfolk, in particular, makes the point that every potential contractor does not have to undertake the same exploratory investigate if the tender documents are prepared properly before they go to the companies. Mr. Lowe says that "*...it is a nonsense that urgency is needed in solving this matter after such a long time*".

13. There has also been much correspondence following the Directions order and this has included copies of minutes of a meeting, documents concerning the earlier consultation process and a 2006 report from Mr. McMillan etc. none of which really took the matter any further, in this Tribunal's view.

The Statutory Framework

14. The purpose of Section 20 of the 1985 Act as now amended by the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") and the Regulations is to provide a curb on landlords incurring large amounts of service charges and, now, entering into long term agreements, which would involve tenants paying large amounts of money.

15. The original regime meant that if service charges were over a certain limit, then the landlord had to either (a) provide estimates and consult with tenants before incurring such charges (b) have such service charges 'capped' at a very low level or (c) try to persuade a judge to waive the consultation requirements.

16. The 2002 Act which came into effect on the 31st October 2003 tightened up these provisions considerably and extended them to qualifying long term agreements i.e. agreements involving a tenant in an annual expenditure of more than £100 and which will last for more than 12 months.

17. The consultation requirements in the Regulations are extensive and include:-

(a) The service of a notice on each tenant of an intention to undertake works. The notice shall set out what the works are and why they

are needed or where particulars can be examined. It shall invite comments and the name of anyone from whom the landlord or the landlord's agent should obtain an estimate within a period of not less than 30 days.

(b) The landlord or landlord's agent shall then attempt to obtain estimates including from anyone proposed by a tenant.

(c) At least 2 detailed proposals or estimates must then be sent to the tenants, one of which is from a contractor unconnected with the landlord, and comments should be invited within a further period of 30 days

(d) A landlord or landlord's agent must take notice of any observations from tenants, award the contract and then write within 21 days telling everyone why the contract was awarded to the particular contractor.

18. The 2002 Act transferred jurisdiction for the waiving of these requirements from the courts to Leasehold Valuation Tribunals.

Conclusions

19. It was clear from the Tribunal's consideration of the evidence that the structure of the annex was defective but that measures had been taken to stabilise the problem to avoid danger to anyone. Indeed, the joint submission from nos. 44, 200, 202 and 602 refers to the 2007 earthquake in Folkestone which did not affect the annex but did involve, so it is alleged, a claim by the landlord against insurers for damage to other parts of the Metropole site. It was also clear that evidence of the defects was either known by the landlord or should have been obvious to the landlord for some considerable time. In view of this evidence, the Tribunal decided that there was no need for an inspection. The Directions order said this and invited representations from anyone who wanted an inspection. No-one did.

20. The statutory framework and its purpose are clear. The reasons for proceeding without consultation may have very sound administrative advantages but the Applicant's perceived financial and administrative benefits are not good reasons for dispensing with the requirement to consult. The fact of the matter is that proper tendering may produce savings.

21. Indeed, in dealing with a slightly different point, the Lands Tribunal said, in the case of **Islington London Borough Council v Shehata Abdel-Malek (LRX/90/2006 - 7th August 2007)**, that the purpose of the Section 20 consultations "*is to give a tenant sufficient information by way of copy estimates to be able to compare, and make observations on, the estimates for those works for which he is liable to contribute by way of a service charge .... it is not relevant that to do this may cause*

administrative difficulty".

22. If, as the Applicant suggests, this causes expense and delay, then this is the risk which Parliament decided to take when creating this legislation.

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Bruce Edgington
Chair
4th July 2008