LRX/185/2006

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – consultation requirements for qualifying works – failure to serve notice – application for dispensation – financial consequences for landlord – whether relevant – prejudice to tenants – held failure fundamental – LVT's refusal of dispensation upheld – Landlord and Tenant Act 1985 ss 20, 20ZA, Service Charges (Consultation Requirements)(England) Regulations 2003

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **LONDON BOROUGH OF CAMDEN** **Appellant**

and

THE LEASEHOLDERS OF 37 FLATS AT 30-40 GRAFTON WAY **Respondents**

Re: 30-40 Grafton Way
London
WC1E 6DX

Before: The President and N J Rose FRICS

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL on 11 April 2008

Katharine Holland, instructed by Head of Legal Services, London Borough of Camden, for the Appellant
Daniel Gatty, instructed by Hogan Lisle, solicitors for the Respondents

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The following cases are referred to in this decision:

Auger and others v London Borough of Camden LRX/81/2007, unreported
Eltham Properties Ltd v Kenny and others LRX/16/2006, unreported
Wellcome Trust Ltd v Romines [1999] 3 EGLR 229

DECISION

Introduction

1. This is an appeal by the London Borough of Camden (LBC) against a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel refusing to determine that certain consultation requirements imposed by the Service Charges (Consultation Requirements)(England) Regulations 2003 should be dispensed with in relation to major works carried out by LBC at 30-40 Grafton Way, London, WC1E 6DX (the subject property). The respondents to the appeal are the leaseholders of 37 flats in the subject property.

2. The practical effect of the LVT's decision is that the total service charges which can be recovered from the respondents are limited to £9,250 (37 flats at £250 each), as compared with the figure of £504,200.71 which would be recoverable from them if the dispensation were granted. The shortfall between these two sums will have to be borne by LBC's housing revenue account.

3. Ms Katharine Holland of counsel appeared for LBC. She called three witnesses, namely Ms Karen Honey, the project manager for the works, Mr Joe Vicente, LBC's major works consultation manager and Ms Jane Botha, LBC's major works manager (works and consultation). Ms Honey described the systems LBC had developed to manage and consult on major works to its housing stock and explained how those systems had been applied to the programme of works at the subject property. Mr Vicente gave evidence about the information sent to leaseholders in advance of a meeting with residents of the subject property on 24 March 2004 and given at the meeting itself; LBC's failure to provide leaseholders with a "paragraph (b) statement", namely a statement setting out details of at least two of the estimates received for the proposed works and summarising the observations they had received in relation to those works; the further information which was sent to the leaseholders and the steps which LBC had subsequently taken in order to avoid further such errors in future. Ms Botha's evidence related to payments made by LBC for the works carried out to the subject property and the financial implications of the shortfall on LBC and their tenants.

4. Counsel for the respondent leaseholders, Mr Daniel Gatty called one witness, Mr H Petsas, the co-owner of the lease of flat 128 and the chairman of the leaseholders group at the subject property. Mr Petsas gave evidence about the meeting on 24 March 2004; the observations submitted by the leaseholders group during the first stage of the consultation process; LBC's failure to provide a paragraph (b) statement; other non-statutory consultation undertaken by LBC and others; LBC's evaluation of the tenders; the standard of the works; LBC's failure to undertake a second stage of consultation with the leaseholders despite having promised to do so; and a few detailed criticisms of sums which had been charged to the leaseholders.

Facts

5. In the light of an agreed statement of facts and the evidence we find the following facts. The subject property is a mixed use, twin residential block, with office and hospital accommodation and ancillary areas/plant rooms under a flat roof. It contains 135 flats, 40 of which are demised on long underleases, the remainder being occupied by LBC's secure tenants. LBC has a headlease of the residential parts of the building, together with the roofs and part of the basement and ground floors.

6. Of the 40 flats let on long underleases, 37 are held on right to buy (RTB) underleases granted by LBC on conventional RTB terms, albeit with a number of variations. Each of these underleases allows LBC, as lessor, to recharge a proportionate share of its costs of undertaking major works. The remaining 3 long underleases, relating to flats 122, 133 and 135, were not granted under LBC's RTB obligations. The underlessees' liability under these underleases does not vary by reference to the expenditure incurred by LBC in discharging its covenants under the headlease. Instead, the underlessees each pay a service charge of £40 per annum, uplifted every seven years by reference to a construction cost index. We shall refer to the underlessees holding under the 40 long underleases as "the leaseholders".

7. The relevant building works were undertaken as part of LBC's "Pride of Place" programme of investment in its housing stock, the purpose of which was to deal with the backlog of repairs and renewal throughout the estate. On 1 October 2003 Ms Honey was appointed project manager for the works. On 7 October 2003 she wrote to all residents in the building, both secure tenants and leaseholders. She said:

> "My name is Karen Honey and I am a Project Manager for the Capital Projects section of Camden Council. I manage Capital Schemes; these are schemes where repair and decoration is completed to maintain the structure of the building. The work incorporated is set out in the Pride of Place policy; I have enclosed a copy of the brief for your information.
>
> The work on Grafton Way is not expected to start for at least another six months. In this time I will be gathering information about your homes and the repair issues you have. This will be with the District Housing Office Technical Section and the Caretaking section, and you the resident. All this information is put together into a project brief that informs the commissioned consultant of the needs and requirements of each block/home in the scheme
>
> - It is very important that if you want to tell me about an issue that you do so now. Once the Consultants prepare the information so we can tender for a contractor, we cannot include any more work. This is put together very early on that is why I have given you the return date of 24 October 2003.
>
> The Council has produced a Pride of Place 'toolkit' to help you prepare for the building work over the coming months. A copy is enclosed.

It is really worth taking a little time to look at it and to read the various leaflets. Leaflet 1 'Having your say' includes a questionnaire that you can use to tell us your issues and what work you think should be included or you can write me a letter or drop me an e-mail. We will take your views on board and review them with the whole project and available budget.

We will organise at least one meeting with residents in each block, to discuss the work but unfortunately we cannot meet with you individually. Please use the questionnaire to tell us the times you would prefer a meeting to be held or if you would prefer us to consult you in another way..."

8. Baily Garner, an independent firm, was appointed as the external consultant to provide building consultancy services for the project. On 9 January 2004 Baily Garner prepared a Project Definition Report (Revised). This contained a detailed summary of the recommended works. The report referred to LBC's obligations under the statutory consultation regulations. In March 2004 Baily Garner produced a Feasibility Report (PFR) on the project. It described their findings following an inspection of the property and their recommendations as to the required remedial works. Under the heading "Other Consents – Leasehold Legislation" the report pointed out that the proposed works would require statutory consultation with LBC's leaseholders under section 151 of the Commonhold and Leasehold Reform Act 2002. Under the heading "Resident Consultation" it said:

"The extent of repair and improvement works proposed in the Feasibility Report will necessitate both extensive and disruptive working operations. Therefore, detailed resident consultation will need to be carried out both in the early design stages right through to the work being carried out and completed. With this in mind, we set out below an outline consultation plan that could be tailored to suit the needs, aspirations and commitments of the residents."

The outline programme for the project also included the various steps to be taken to comply with the consultation regulations.

9. A meeting and an exhibition about the project, to be attended by leaseholders and tenants, was planned for 24 March 2004 between 3 and 7 pm. A notice of intention to carry out works was sent out by Ms Justine Donnelly, the Capital Works Manager of LBC's Home Ownership Department, on 18 March 2004. It said:

"STATUTORY NOTICE UNDER SECTION 151 SCHEDULE 4 (PART II)
COMMONHOLD AND LEASEHOLD REFORM ACT 2002

NOTICE OF INTENTION TO CARRY OUT WORKS
Raising the standard

To all leaseholders residing in the estate known as: 30/40 Grafton Way estate number (E13022)

This includes the block known as: 30/40 Grafton Way block number (B13022)

1. It is the intention of London Borough of Camden to enter into an agreement to carry out works in respect of which we are required to consult leaseholders.

2. The works to be carried out under the agreement are summarised on the attached table with our reasons for proposing such works. London borough of Camden are not the freeholder of this property, therefore the works summarised are subject to the freeholders consent.

3. Your are invited to inspect our full proposals for these works on Wednesday 31st March 2004 at: The lobby at entrance of 30 Grafton Way, London W1 6DY between the hours of 6:00pm – 8:00pm.

4. Observations – We invite you to make written observations in relation to the proposed works by sending them to:

   Justine Donnelly
   London Borough of Camden
   Home Ownership Services
   Theobalds Road
   London
   WC1X 8NX

5. Observations must be made within the consultation period of 30 days from the date of this notice. The consultation period will end on Monday 19 April 2004 and all observations should be received by this date.

6. Nominate a Contractor – We also invite you to propose, within 30 days from the date of this notice, the name of a contractor/person from whom we should try to obtain an estimate for the carrying out of the proposed works described in paragraph 2 above."

The four page table that was appended described the proposed works and set out the reasons for the proposals. The works included the renewal of flat roof coverings, works to the external wall and structure, the replacement of all communal area windows, a new entry system for the communal entrances, extensive external and internal repairs and refurbishments and the repair and renewal of parts of the communal heating, the electrics and the fire alarm system.

10. The notice wrongly stated that the meeting was scheduled for 31 March 2004. A covering letter, however, correctly stated that the meeting would take place on 24 March. In addition, both the notice of intention and the accompanying letter stated wrongly that the meeting would take place between 6 pm and 8 pm. The correct date and time were given on posters displayed in the building and also on flyers distributed to the flats 24 hours before the meeting. The flyers were not sent to leaseholders who had notified LBC of an alternative address for service.

11. The meeting and exhibition were held on 24 March 2004 in the lobby of the subject property. Residents who attended discussed the detailed work proposals with members of LBC's project group and Baily Garner. The meeting lasted from 3 pm to 7 pm and

representatives of LBC left shortly afterwards. Subsequently Ms Honey attended a one to one meeting with the one leaseholder who attended on 31 March 2004.

12. The period for submitting observations on LBC's proposals expired on 19 April 2004. 21 leaseholders met to discuss the matter on 29 March. They appointed a committee to represent them, including Mr Petsas. This leaseholders' group wrote to LBC with their observations on 29 March and Ms Donnelly replied on 21 April. The leaseholders wrote a further letter to LBC on 15 April, to which LBC replied on 21 and 26 April. The leaseholders wrote again on 13 May, seeking clarification of LBC's replies. LBC responded by letter on 4 June 2004. In connection with a query concerning the extension of the lobby areas, the leaseholders were informed that they would have the opportunity to return to this and other matters in the next stage of consultation. The leaseholders again wrote to LBC on 22 July 2004. In a letter dated 6 August 2004 LBC assured them that they would be given a further opportunity to consult. They were never given this opportunity.

13. The leaseholders did not seek to put forward their own preferred contractor to tender the works. In their letter dated 15 April 2004, however, they said that they did not

> "believe that value for money can be obtained if tender invitations are restricted to the companies the Council normally does business with. This contract is large enough to merit tender invitation far beyond the Council's contractor register."

14. After considering the comments made by the leaseholders' group, the questionnaires and the other feedback and observations that had been received, LBC instructed Baily Garner to prepare a detailed specification of works and to put it out to tender. The specification as drawn largely reflected the recommendations made in the PFR, which in turn were based on Baily Garners' inspection of the property. The residents' feedback and observations were also reflected. For example, the internal communal hall lighting as specified was superior to the standard bulk head fitting originally proposed.

15. The specification was put out to tender in August 2004. Each of the contractors who were approached submitted a tender. No notice was served informing leaseholders that the tenders were available for inspection. The leaseholders were sent a summary of the tender submitted by Mansells, the successful tenderer, although the summary contained certain errors. Baily Garner evaluated the tenders and submitted a tender report to LBC on 27 September 2004. The highest scoring contractor was Mansells, who also submitted the lowest price, £1,817,777. The ratio applied by Baily Garner in evaluating the tender returns was 65% to price and 35% to quality. This was different from the guideline ratios set out in LBC's evaluation toolkit of 50:50 for straightforward projects and 40:60 for repeat projects. LBC's procedures provided that the ratio be discussed by the project manager and the consultant and the final decision on ratio was the responsibility of the project manager. It was decided to apply a 65% price and 35% quality split because the scheme had a substantial contract value encompassing mechanical and electrical as well as door entry and the basic works of repair and improvement. LBC considered that, although this was a substantial scheme, none of the elements was particularly complex and the building was neither listed nor in a conservation area.

16. If the ratio applied had been 40% to quality and 60% to price another contractor, Eugena, would have had the highest score by a margin of 0.04%. However, the Eugena tender was qualified. It assumed they would be able to use light fittings of their own choice. This would have been unacceptable, as the lighting scheme on this project was particularly important to residents and to LBC. Eugena also stated that they had allowed for an alternative suspended ceiling layout, which would have been cheaper.

17. Before deciding to act on the recommendation of Baily Garner, LBC's policy on major works required leaseholders to be consulted on the recommendation in accordance with the consultation requirements – that is to say, by the service of what is called a paragraph (b) statement relating to the estimates and a notice inviting observations on them. On 8 October 2004 Ms Donnelly wrote to each of the leaseholders a letter under the heading "Re: 30/40 Grafton Way – Raising The Standard Works Contract". It included the following:

> "You will be aware from various resident meetings and previous statutory notices sent that the Council intends to carry out environmental works to your estate. As a leaseholder, you will be liable to contribute towards these costs.
>
> We hereby give you notice of our intentions to carry out environmental works to the estate known as 30/40 Grafton Way.
>
> Your formal notice is enclosed with this letter and we ask that you take a little time to read this letter together with the enclosures, as they contain important information for you…
>
> A brief summary of the range of repair and replacement works include;
>
> Estate Works (the estimated costs are shared by all dwellings within the estate boundaries):
>
> - Estate Lighting
> - Provision of dog parks
> - Provision of new play area
> - Relandscaping inc paving and roadways…
> - Demolition of sheds, stores and provision of garage doors
>
> We have tendered the works and have set out on our notice the results of this tender and your contribution towards the estimated costs…
>
> You have the right to make any comments regarding these proposals and have enclosed for your use an observation/comment form. We would ask that you take time to complete the observation form. This will enable us to deal fully with your queries prior to the work commencing. We will pay due regard to the comments that are made and, where necessary make changes to the specified items of work. Valid comments are of course welcome throughout the term of the contract…"

18. As is obvious the letter was sent in error. It did not relate to the proposed works but to some quite different environmental works. Nor did the letter contain the paragraph (b) statement. The notice containing the paragraph (b) statement had in fact been prepared. It gave the names of the five companies that had tendered for the works and the amount of their tenders. It said that the estimated total contract sum was £1,817,777, the tender of Mansells. It

contained an invitation to inspect the full proposals and the estimates within the observations period, and it gave the address and the times for this. It set out a summary of the stage 1 observations. It invited written observations in relation to the proposed works and said that these had to be sent within 30 days. The notice containing the paragraph (b) statement that had been prepared thus contained the information required by the Regulations. But the leaseholders never received it.

19. Following the lapse of what would have been the consultation period if the notice had been served, LBC awarded the contract to Mansells on 12 November 2004. All residents were notified of the appointment and a "meet the contractors evening" was held on 8 December 2004.

20. In August 2004 Baily Garner provided LBC with a number of cards, with the request that they be used to bring any problems, as well any examples of outstanding service by a member of staff, to the attention of their senior partner. LBC circulated Grafton Way Newsletters – dealing with the progress of works – to residents in May 2004, July 2004, December 2004, January 2005 and October 2005. During the course of the works Ms Honey attended a number of meetings which had been arranged for secure tenants, but which were also attended by some leaseholders. She also commissioned a Grafton Way website for the use of all residents in the block, which went live in July 2005. Mansells circulated newsletters, together with various leaflets and information sheets to the residents in March, April, and July 2005. Two "meet the contractor" meetings were convened which were open to all residents.

21. In April 2006, following completion of the works, LBC sent a work satisfaction questionnaire to all residents in the building. A total of 55 questionnaires were returned. 95% of these stated that the levels of service, communication, quality and management were either good or very good.

22. The project has changed the look of the block. Essential repairs to the building and major mechanical engineering works to the lifts have been carried out, and new security doors and renewed entrances provided. The finishes are an improvement, being easy to clean and hard wearing.

Statutory provisions

23. Under section 18(1) of the Landlord and Tenant Act 1985, a service charge is an amount payable by a tenant of a dwelling as part of or in addition to the rent, which is payable for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and the whole or part of which varies or may vary according to the costs incurred by the landlord. Section 20 provides for the limitation of service charges in the event that the statutory consultation requirements are not met. The consultation requirements apply where the works are qualifying works (as they are in this case) and only £250 can be recovered from a tenant in respect of such works unless the consultation requirements have been either complied

with or dispensed with. Dispensation is dealt with by section 20ZA(1) of the Act, which provides:

> "(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

24. Under section 20ZA(4) the consultation requirements are those prescribed in regulations made by the Secretary of State. Prescription has been made by the Service Charges (Consultation Requirements) (England) Regulations 2003. The relevant requirements for present purposes are those contained in Part 2 of Schedule 4 to the Regulations, which need to be set out in full (the numbering of the paragraphs in Part 2 of Schedule 4, as amended by Correction Slip, begins at 1):

> "Notice of intention
>
> 1 (1) The landlord shall give notice in writing of his intention to carry out qualifying works –
>
> (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 works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
>
> (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
>
> (c) invite the making, in writing, of observations in relation to the proposed works; and
>
> (d) 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.
>
> (3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.
>
> Inspection of description of proposed works
>
> 2 (1) Where a notice under paragraph 1 specifies a place and hours for inspection –

(a) the place and hours so specified must be reasonable; and

(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

3. Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Estimates and response to observations

4 (1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate –

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate –

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9) –

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out –

  (i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and

  (ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

(c) make all of the estimates available for inspection.

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.

(7) For the purpose of paragraph (6), it shall be assumed that there is a connection between a person and the landlord –

(a) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.

(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by –

(a) each tenant; and

(b) the secretary of the recognised tenants' association (if any).

(10) The landlord shall, by notice in writing to each tenant and the association (if any) –

(a) specify the place and hours at which the estimates may be inspected;

(b) invite the making, in writing, of observations in relation to those estimates;

(c) 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.

(11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Duty to have regard to observations in relation to estimates

5. Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

Duty on entering into contract

6 (1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any) –

(a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and

(b) where he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph."

The LVT's decision

25. The LVT gave its reasons for refusing to dispense with the consultation requirements as follows:

"The Tribunal considered the two issues, firstly, whether the Applicant complied with the requirements, in respect of the service of the Section 20 Notice? And secondly, whether to grant retrospective dispensation of the consultation requirements?

Insofar as the first application is concerned, the Applicants in their submissions accepted that they had not complied with the requirements in respect of serving the notice, as no notice was served and information such as the estimates which had been received from the contractors were not attached, neither was a summary of

observations, and no date and time were specified where the estimates could be viewed.

Although the Applicants considered that there were omissions, they did not consider them to be fatal in that the Applicants considered that they had given the Respondents sufficient information and opportunities to consult with them, and this was the basis on which they invited the Tribunal to make an order dispensing with the requirements to consult under Section 20ZA of the Landlord and Tenant Act 1985.

However, for the reasons set out below the Tribunal have declined to dispense with this requirement.

In considering whether it was reasonable to dispense with the requirement to consult as set out Section 20ZA of the Landlord and Tenant Act 1985, the Tribunal considered the reasons given as to why the Applicant failed to comply with this requirement. The Tribunal considered that the Applicant failed to comply as a result of errors which arose when the letter dated 8th October was sent out, which resulted in no actual notice being included (although a number of important attachments which provided the respondent relevant information were included). However the letter dated 8th October 2004 was itself defective, in that the items of major work described in the letter were incorrect, and did not in fact relate to the subject premises. The Tribunal considered that this would have been misleading. These errors together with the errors in respect of the date of the consultation meeting to inspect the specification for the works would have made meaningful consultation difficult. This combined with the later errors, meant that the Applicant, was in effect requiring the Respondents to piece together a number of different documents, in order to arrive at the proper conclusion, before they could make meaningful observations.

Section 20ZA(5) sets out the relevant provisions, including the duty on the applicant to have regard to the observations of the tenants in relation to proposed works and estimates. As the Respondents did not have all of the relevant information, the Respondents would have been hampered in their attempts to make proper observations.

Also significantly, when the Respondents raised issues about, items of work, they were advised in letters, dated 4th June 2004, and 6th August 2004 sent by the Applicant, that there would be further opportunities to make representations concerning these works after the Section 20 Notice was served as a further meeting would be held. Given this the Respondents were, in the view of the Tribunal, entitled to place some reliance on this assurance, and to await this further opportunity to consult with the Applicants on items of work which the respondents considered unnecessary.

In failing to comply with the requirements, or carry out the further consultation which was implied in the two letters referred to, the Applicants deprived the Respondent's of the further opportunity to be consulted. As the Applicants' failure to serve the notice arose as a result of errors which were avoidable, the Tribunal does not consider it reasonable to dispense with the requirement to consult, and accordingly refuses the Applicant's request set out in their letter dated 3rd August 2006. As the Applicant's

failed to serve the Section 20 Notice, the Tribunal determines that the Applicant failed to comply with the requirements under the Commonhold and Leasehold Reform Act 2002.

The application is therefore refused"

Case for the appellants

26. For the appellants Ms Katharine Holland accepted that the requirements at the stage of the second round consultation were not complied with. In particular there was a failure to comply with the requirement that the landlord provide the leaseholders with a paragraph (b) statement. No paragraph (b) statement was sent to the respondents. She submitted that the LVT had been wrong to refuse to grant dispensation in relation to this failure, and she advanced four principal reasons. Firstly, she said, the LVT failed to take any account of the fact that the exercise of the dispensing power would not prejudice the respondents but that, if it was not exercised, the loss suffered by the taxpayer would be out of all proportion to the benefit gained by insisting on strict compliance with the consultation procedures. It was, as she put it, of overwhelming relevance that the refusal to exercise the dispensing power would result in a very substantial and undeserved windfall to the respondents and a commensurate loss to the council taxpayers, since the amount over £½ m, would have to be borne by the council's housing revenue account. Secondly the LVT had failed to have regard to the fact that the purpose and scheme of the consultation requirements was respected by the council and the council had applied its own extra-statutory consultation procedure, which in many respects was superior to the statutory one. In any event the council, as a local authority and social landlord was fixed with a duty to ensure that it achieved best value, and its mandatory internal tendering standard orders were designed to ensure adherence to a competitive and transparent tendering process.

27. Thirdly, Ms Holland said, the LVT had erred in focussing upon the fact that the errors made were avoidable. The fact that an error had been made was the very reason that the question of exercising the discretion came into play. The legislation was not to be treated as imposing a sanction upon landlords. Its purpose was to provide protection for tenants and the statutory discretion was not directed towards the conduct of the landlord. Fourthly the LVT failed to have regard to the fact that compliance with the consultation requirements would not have produced a different situation from the one that occurred. Given the scale and complexity of the works and the consequent inevitability of awarding the contract to one of a limited pool of contractors, there was never any question of the respondents putting forward a suitable contractor that might have been unknown to the council. The works had been awarded to the contractor who submitted the lowest priced tender return, Mansell Construction Services Ltd, a well known contractor with a great deal of experience in undertaking large scale social housing contracts. The choice resulted from the detailed and professional tender evaluation by Garner. Mansells had not only submitted the lowest price tender sum but their tender return had scored highest under the agreed tender evaluation criteria, namely a weighting of 65% price to 35% quality. Moreover no serious argument had been advanced that the scheme of works was either unnecessary or unreasonably expensive.

Case for the respondents

28. For the respondents Mr Daniel Gatty submitted that the tests for dispensation should be whether the omission was a minor or technical one and whether it might have disadvantaged or adversely affected the leaseholders' interests. The omission of a whole stage in the consultation process could not, he said, be described as minor or technical. Faced with likely service charge demands of the order of £20,000 arising out of the proposed works the leaseholders would have wanted to avail themselves of any opportunity to ensure value for money and avoid unnecessary expenditure. Had the required consultation taken place they could have examined the estimates, if necessary with an expert surveyor, to identify areas where quality might be improved. Even if Mansells were cheapest overall, the leaseholders might have been able to identify areas where their estimate was more expensive than those of others and sought to have LBC negotiate on this. They might have identified works for which the leaseholders should not be asked to pay. They could have queried the quality/price ratio used in the assessment, which was outside LBC's normal range. Had a summary of the observations on the stage 1 consultation and the responses to these been sent the leaseholders could have made further observations on these, such as the entrance and lobby areas.

29. The disadvantage suffered by the leaseholders through the failure to serve a paragraph (b) statement was not offset, said Mr Gatty by the extra-statutory consultation procedure on which LBC relied. The provision of information, some of which had been incorrect, did not make good the particular statutory consultation requirements. Nor was it relevant that LBC would have to bear the cost that it would be unable to pass on to the leaseholders if dispensation were to be refused. The default position produced by the Act was that a failure to consult properly resulted in the landlord having to bear all but £250 per tenant of the cost of the works. That result must have been contemplated as a reasonable inducement to consult and a reasonable sanction for not consulting. It could not have been Parliament's intention that the operation of the very sanction that it considered reasonable for non-compliance should be treated as a reason to dispense with compliance.

Conclusions

30. The requirements that LBC failed to comply with were those in paragraph 4(5)(b) and (9) of Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003, which requires the paragraph (b) statement to be supplied to each tenant and in paragraph 4(10), which requires the service of a notice specifying where and when the estimates may be inspected and inviting observations on them. (There was in fact no failure to comply with paragraph 1 at stage 1 since, although the notice wrongly stated the date when the proposals could be inspected, it had described in general terms the proposed works, and this, in our view, was sufficient to satisfy the requirements.)

31. The consultation requirements of Part 2 of Schedule 4 are in two stages. At stage 1 (dealt with in paragraphs 1 to 3) the landlord is required to give notice in writing of his intention to carry out qualifying works to every tenant and, if there is one, to a tenants association, describing the works in general terms (or saying where and when a description of the works

may be inspected), stating the reasons for the works and inviting observations on them; and paragraph 3 imposes a duty on the landlord to have regard to observations made by any tenant or tenants' association in relation to the proposed works. Stage 2 is dealt with in paragraphs 4 and 5. Paragraph 4 contains, at subparagraphs (1) to (4), provisions requiring the landlord to try to obtain an estimate from a person nominated by a tenant or tenants' association. Subparagraph (5) requires the landlord to obtain estimates for carrying out the proposed works, to supply free of charge the paragraph (b) statement (giving for at least two of the estimates their amounts and summarising any comments received from the stage 1 consultation and the responses to them) and to make all the estimates available for inspection. Subparagraph (10) requires notice to be given to each tenant specifying where and when the estimates may be inspected and inviting observations on them. Paragraph 5 requires the landlord to have regard to observations received pursuant to paragraph 4. Finally, under paragraph 6, when the landlord enters into the contract he must give notice stating his reasons for entering into the contract and summarising any stage 2 observations and his response to them.

32. Any process of consultation consists of giving information, inviting observations and taking those observations into account, and this is what paragraphs 1 to 6 make provision for. Information has to be given to tenants at three stages – when there is an intention to carry out works, when estimates have been obtained and when a contract has been entered into. Observations from tenants are to be invited at the first two stages. Those observations must be taken into account, and the landlord's response to them must be given. This is the scheme of the provisions, which are designed to protect the interests of tenants; and whether it is reasonable to dispense with any particular requirements in an individual case must be considered in relation to the scheme of the provisions and their purpose.

33. The principal consideration for the purpose of any decision on retrospective dispensation must, in our judgment, be whether any significant prejudice has been suffered by a tenant as a consequence of the landlord's failure to comply with the requirement or requirements in question. An omission may not prejudice a tenant if it is small, or if, through material made available in another context and the opportunity to comment on it, it is rendered insignificant. Whether an omission does cause significant prejudice needs to be considered in all the circumstances. If significant prejudice has been caused we cannot see that it could ever be appropriate to grant dispensation.

34. It was urged on us by Miss Holland that the consequences, for LBC and their tenants, was a material consideration, and indeed an important one. Also material, she suggested, was the unjustified benefit that the leaseholders here would receive in the event that dispensation was not granted. We can accept that the general nature of the provisions, with the £250 limit imposed as the consequence of section 20(1) and section 20ZA, forms part of the background to the consideration of reasonableness. We cannot accept, however, that the particular effects on the landlord or the tenant in the case in question are properly to be taken into account. It is in the very nature of the provisions that the landlord will suffer financially and the tenant will gain financially in the event that dispensation is not given. If it were material to take into account the degree to which the landlord might suffer or the tenant might gain, this would mean that a failure might achieve dispensation if the contract was a very large one but might not do so if the contract was small. We do not think that this could be the effect of the

provisions. There would in any event be real practical difficulties for an LVT in dealing with a contention relating to the consequences for the landlord or other persons affected since the evidence relevant to these could be very far-reaching, time-consuming and costly to pursue and potentially inconclusive.

35. The requirements relating to estimates are clearly fundamental in the scheme of requirements. The landlord must obtain estimates (in the plural), must include in the paragraph (b) statement the overall estimate of at least two of them and must make all of the estimates available for inspection. The purpose is to provide the tenants with the opportunity to see both the overall amount specified in two or more estimates and all the estimates themselves and to make on them observations, which the landlord is then required to take into account. In the present case stage 2 was completely omitted. It was a gross error, which manifestly prejudiced the leaseholders in a fundamental way. The fact that LBC went through a tendering process that employed the services of Baily Garner and at various times provided information about the project and its progress does not, in our view, even begin to make good the omission. What the leaseholders were not provided with was the basic information about the tenders, the opportunity to inspect the tenders and the opportunity to make observations on them, with the council being obliged to take those observations into account and publish them later together with their response to them. The extent to which, had they been told of the estimates, the leaseholders would have wished to examine them and make observations upon them, can only be a matter of speculation. The fact is that they did not have the opportunity and this amounted to significant prejudice.

36. In our judgment, therefore, the LVT in refusing to grant dispensation came to the right decision. The appeal is dismissed.

Dated 30 June 2008

George Bartlett QC, President

N J Rose FRICS