

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**

Section 20ZA of The Landlord and Tenant Act 1985 (as amended)

(Application to dispense with consultation requirements)

Case Number:	CHI/OML/LDC/2009/0018
Property:	Flat 24, Berriedale House 251-255 Kingsway Hove East Sussex
Applicant :	Berriedale House Limited
Respondent :	The Executors of the estate of A Kattell deceased
Appearances for the Applicant:	Mr M Bowles of Classic Property Management
Appearances for the Respondent:	Mr A Newey solicitor
Date of Application:	13th July 2009
Date of Hearing	23rd July 2009
Tribunal:	Mr R T A Wilson LLB (Lawyer Chairman) Mr A Mackay FRICS (Valuer Member) Ms J Dalal (Lay Member)
Date of the Tribunal's Decision:	11th August 2009

THE TRIBUNAL'S DECISION

1. BACKGROUND

- 1.1 This is an application made by the Applicant pursuant to section 20ZA of the Landlord and Tenant Act 1985 (as amended) ("the Act") to dispense with the consultation requirements contained in Section 20 of the Act.
- 1.2 The work covered by this application was a major programme of works of repair and decoration carried out to the property between the years 2001 to 2004 and involving the expenditure of approximately £173,000 "The Works"

2. INSPECTION

- 2.1 The Tribunal inspected the subject property on the day of the hearing in the presence of the parties. Berriedale House is a detached purpose built block of flats, originally built in the 1960's and arranged on ground and seven upper floors, with two electric passenger lifts and comprising 51 flats and an additional caretaker's flat. There are 8 separate garages. The building occupies a corner position at the junction of Kingsway and Berriedale Avenue. The flats on the upper floors and at the front of the building enjoy distant views towards the English Channel. The elevations are formed in load bearing brickwork with a flat roof system. The original window system to the individual flats has been replaced with plastic double glazed windows. Internally, the public ways are in good decorative repair and have been the subject of both modernisation and refurbishment.

3. LAW

- 3.1 Section 20 of the Act limits the service charge contribution that lessees have to make towards "qualifying works" if the relevant consultation requirements have not been complied with or dispensed with by a Leasehold Valuation Tribunal.
- 3.2 Section 20ZA (2) of the Act defines "qualifying works" as works on a building or any other premises.
- 3.3 Regulation 6 of the Service Charges (Consultation Requirements) (England) Regulations 2003 SI 1987 ("the Regulations") provide that if a lessee has to contribute more than £250 towards any qualifying works then if the landlord wishes to collect the entire costs of those works the landlord must either carry out consultation in accordance with Section 20 of the Act before those works are commenced or obtain an order from the Tribunal dispensing with the consultation requirements.
- 3.4 The consultation requirements are set out in the Regulations and it is not proposed to set these out here.

- 3.5 Under section 20ZA (1) of the Acts, the Tribunal is given discretion to dispense with the consultation requirements. This section provides:

Where an application is made to a Leasehold Valuation Tribunal for a determination to dispense with all or any consultation requirements in relation to any qualifying works or qualified long term agreement, the Tribunal may make the determination if satisfied that it is reasonable to dispense with those requirements.

- 3.6 The test is one of reasonableness. Is it reasonable in the circumstances of the case to dispense with all or any of the requirements? The decided cases have established that it is not necessarily the conduct of the landlord that has to be reasonable rather it is the outcome of making the order, which has to be reasonable taking into account all the circumstances of the case.

4. JURISDICTION

- 4.1 The Tribunal first considered whether it had jurisdiction to hear the application bearing in mind the start date of the works which was agreed to be in the early part of 2002.
- 4.2 Section 20ZA referred to above was introduced by virtue of the Commonhold and Leasehold Reform Act 2002 (commencement order no 2 and savings) (England) Order 2003 with effect from 31 October 2003.
- 4.3 Having regard to the above statutory legislation, the case under review requires the consideration of the old consultation regime set out in section 20 of the Landlord and Tenant act 1985 and under this legislation only the County Court can dispense with the consultation requirements and not the Tribunal.
- 4.4 The Tribunal explained this position to the parties and stated that it could only hear the application, under the new legislation in the event of the parties inviting the Tribunal to accept jurisdiction and on the basis that they were both prepared to submit to the irrevocable jurisdiction of the Tribunal.
- 4.5 The Applicant confirmed that it would like to proceed on this basis. Mr Newey for the Respondent stated that he would have to take instructions from his clients and it would be necessary for him to have regard to the position of the beneficiaries.
- 4.6 The Tribunal therefore adjourned the hearing to allow instructions to be taken. The Tribunal reconvened after a short period and heard from Mr Newey that his clients were prepared to proceed as stated in paragraph 4.4 above.

5. HEARING

The hearing took place at the Brighton Racecourse on the 23rd July 2009. Mr Bowles represented the Applicant and Mr Newey a solicitor appeared on behalf of the Respondent. No other lessee attended to give evidence, as it appeared that every other lessee had paid the full amount of the service charge even though the statutory consultation had not been carried out.

6. THE EVIDENCE PRESENTED AT THE HEARING

6.1 The Applicant's Evidence

- 6.1.1 Mr. Bowles commenced his evidence by stating that in his opinion there was a significant difference between an external freeholder and Berriedale House Limited, which was a company collectively owned by all the lessees.
- 6.1.2 He explained to the Tribunal that the shares in the company were entirely owed by the lessees. There were a varying number of shares for each flat, but in the final analysis, the lessees held 100% of those shares.
- 6.1.3 He confirmed that there was a restriction in the company's articles of association whereby only flat owners could hold shares in the company.
- 6.1.4 In 2001, at the AGM, the board consisted of eight directors, one of whom was the late Mr. Kattell.
- 6.1.5 At the AGM held in the 2001 it was put to a vote, and the decision was taken to proceed with a program of works which would involve a substantial refurbishment of the interior common ways and also redecoration and repair to the outside of the building. There was not a single contract to carry out the work rather a series of contracts involving a large number of small contractors.
- 6.1.6 Mr. Bowles was not able to show documents relating to how the tender process had been conducted but maintained that the lessees at the time must have been happy with the price and scope of the works of patent, otherwise they would not have approved the taking out of a loan to fund the works.
- 6.1.7 It was not until 2009 that any objections were raised, and these objections were not raised by Mr. Kattell, who had died in 2002, but by his executors.
- 6.1.8 Not one of the lessees had alleged any failure to properly consult and indeed every other lessee had paid his or her proportion of the cost of the work.
- 6.1.9 Mr. Bowles confirmed that the company was in regular communication with all the lessees with regard to progress of the works. Communication had taken the form of newsletters, which were usually hand delivered. At the relevant time the board met regularly and they were a strong board.
- 6.1.10 Mr. Bowles told the Tribunal that the then managing agents APA Management had given a presentation at the AGM when the scope and cost of all the works had been explained at some length. The comments of the lessees at the meeting had been taken on board and the proposal to take up the loan had been carried by a majority of those present and entitled to vote.
- 6.1.11 In cross examination, Mr. Bowles accepted that formal consultation had not taken place and he further accepted that they were only 18 attendees at the AGM which represented less than 50% of all shareholders.

6.2 The Respondent's Evidence

- 6.2.1 Mr Newey commenced his evidence by informing the Tribunal that his firm had only obtained probate of the estate in April 2008. Accordingly it was only at this point did his firm have a standing.
- 6.2.2 He reminded the Tribunal that a distinction had been made between an external freeholder and the Applicant Company, which was collectively owned by the lessees but however correct this analysis might be, the law did not recognise this distinction. The requirement to consult was present whenever the statutory threshold was exceeded.
- 6.2.3 He drew the Tribunal's attention to a letter contained in the hearing bundle dated 12 April 2008 from the Applicants' managing agents. In his opinion, this letter clearly purported to be a section 20-procedure letter, even though it failed to include the statutory information. Because of the existence of this letter, the Applicants should be taken as having known about the need to consult.
- 6.2.4 Mr. Newey contended that the program of works was clearly not of an urgent nature and therefore there was plenty of time for the Applicants to carry out the procedure of consultation.
- 6.2.5 Mr Newey called into question the mandate to carry out the work obtained by the Applicants at the AGM. If it were the case that every lessee had agreed to the works then in might properly be said that they had waived their right to statutory consultation. However in this case there were only 18 attendees at the AGM when the decision to carry out the work had been made. Even allowing for a small number of proxy votes, less than 50% of all shareholders had been involved in the decision.
- 6.2.6 It was his contention and that one could not take absence or abstention as agreement or the endorsement of a proposal. Agreement must involve some positive step. In these circumstances therefore it could not be said that the need to consult had been waived.
- 6.2.7 For these reasons he invited the Tribunal not to dispense with the consultation requirements.

7. CONSIDERATION

- 7.1 In the opinion of the Tribunal "the Works" do constitute "qualifying" works within the meaning of the Act. As the contribution required from each of the lessees pursuant to the service charge provisions of their leases exceeded the threshold of £250 there was an obligation on the Applicant under Regulation 6 to consult the lessees in accordance with the procedures set out in the Regulations.
- 7.2 The evidence put before us establishes: -
- (i) The works were carried out between 2002 and 2004 at a cost of approximately £173,000.

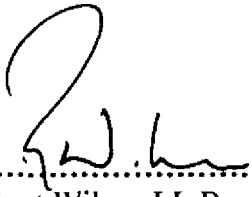
- (ii) Statutory consultation under the old Section 20 procedure did not take place.
- (iii) Approval of the works by the Applicant was taken and the decision to take up the bank loan to fund the works was recorded at the AGM held on the 25th November 2001.
- (iv) All the lessees other than the Respondent have paid their contribution.
- (v) No other lessee had objected to the works or the cost.

- 7.3 The Respondent's predecessor Mr Kattell was on the board of the Applicant at the time and as a consequence is likely to have been aware of the works and the likely cost. It is not contended that he had raised any objection to the scope of the works or the cost. Neither do the Respondents, who are executors of the estate, raise any objection other than the contention that statutory consultation was not carried out.
- 7.4 The case of the Respondents is simply that the consultation procedure was not complied with and they have a duty to the beneficiaries of the estate to raise this issue.
- 7.5 The Tribunal was not presented with any evidence establishing that the Respondent or any other lessee suffered prejudice as a result of the statutory procedure not being complied with.
- 7.6 If the application is not granted then the consequences will be stark. The Applicants, who are a non profit making company owned by the lessees, might become insolvent and be forced into liquidation. This is not a result, which will benefit any party including the Respondent. The flats in the building are likely to become unmarketable. The Respondents accept that service charge is owed and it was made clear to the Tribunal that the only asset of the estate is the flat, which is on the market.
- 7.7 Evidence was presented to the Tribunal that the Applicants board at the time had an eye for obtaining value for money and saving costs wherever possible.
- 7.8 Evidence was presented to the Tribunal that although statutory consultation did not take place there was nonetheless informal consultation in that the lessees were kept informed as to the progress of the works and the cost.
- 7.9 The Tribunal reminded itself that the test of reasonableness did not apply to the conduct of the Applicant, as under the new legislation Parliament envisage that an order can be made even if it is found that the conduct of the landlord is unreasonable. The Tribunal emphasises this point because we are critical of the Applicant's failure to correctly apply the statutory procedure to what was after all a substantial programme of non urgent works which could and should have been subject to consultation. The Tribunal records its dissatisfaction at the conduct of the Applicant in this respect. If this had been a commercial landlord not collectively owned by the lessees, then the Tribunal it is unlikely to have granted the order. However the Tribunal concluded that notwithstanding the unsatisfactory conduct of the Applicant it would be reasonable to dispense with the requirements in this case

because the consequences of not making the order were manifestly not in the interests of the body of lessees as a whole.

8. THE DECISION

Having considered the arguments put forward by both sides and taking into account all the evidence presented, and for the reasons stated above and in particular the reasons stated at paragraph 7.5 above the Tribunal determines that this is a case where it would be reasonable to dispense with the consultation requirements. The application is therefore granted.

CHAIRMAN..........
Mr Robert Wilson LL.B

Date.....11th August 2009.....