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Residential Property
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**RESIDENTIAL PROPERTY TRIBUNAL SERVICE**
**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL for the**
LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985 SECTION 20ZA

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LON/00AL/LDC/2010/0029

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| **Property:** | First and Second Floor Flats, 12 Bennett Park, London SE3 9RB |
| **Applicant:** | Mr Anthony Banks, landlord |
| **Respondents:** | James Brandrith; Mark and Carol Harrison, tenants |
| **The Tribunal:** | Adrian Jack, Chairman; Bryan Collins FRICS |

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**Procedural**

1. This is an application by the landlord for dispensation from the consultation requirements of section 20 of the Landlord and Tenant Act 1985 in respect of major works at the property in connection with works carried out as long ago as 2005-6.
2. The Tribunal held a hearing today. Mr Banks appeared on his own behalf; Mr Harrison appeared on his own behalf and on behalf of his wife and the other tenant, Mr Brandrith.
3. No party requested an inspection and the Tribunal did not consider that an inspection was required. In consequence no inspection was made.

**The facts**

4. The background of this matter is this. 12 Bennett Park is a nineteenth century house, divided (probably in the 1970's) into four flats with one on each of the basement, ground floor and first and second storeys. Mr Banks had been a long lessee of first the top floor flat and then the ground floor flat, but in the early 1980's he purchased the freehold and has since moved away. This was the only property he owned. He was not a professional landlord.
5. In 2005-06, the basement and ground floor flats were empty and Mr Banks had vacant possession of them. The current tenants were the holders of long leases on the first and second floor flats. It was common ground that the leases contained standard provisions for the raising of a service charge. The tenants' share was a quarter for each flat.
6. In 2005 Mr Banks started work on the vacant flats to refurbish them with a view to selling them on long leases. In his evidence to us he said that he had had some difficulty finding a firm of contractors, but was introduced to CGC Ltd by his niece, who was working for them. He did not employ a surveyor to supervise the work, but instead supervised works himself.
7. No specification was produced in evidence, but Mr Banks said that in any event because this was an old building the works changed as the building was opened up.
8. In the course of the works EdF, the electricity supplier inspected the electricity supply to the basement flat. EdF condemned the electrics to the basement and cut that flat off. On 20th September 2005 (page 43 of the bundle) EdF made a site survey which required new services to be brought in in 100mm ducting. There was subsequently a quotation from EdF dated 29th September 2005 for £1,367.98.
9. CGC provided a quote dated 9th October 2005 for £4,648.30 for digging a trench and bringing the new supply through the basement to a fire-proof housing on the ground floor.
10. On 12th October 2005 Mr Banks wrote to the tenants explaining that "the electricity supply board servicing the building is unsafe and requires replacement. EdF Energy have advised that they will not replace the board. They now require that the basement has its own supply and that the flats above have separate supplies that they each have access to, located in the communal area. I have received their quotation for the new supplies. In order to reduce costs I have suggested the two supplies be buried in the same trench. I am awaiting their reply. I will not be able to negotiate with EdF but I have requested that the building and electrical contractors I intend to use improve their quote. As a leaseholder you are liable for 25% of these costs and you will be invoiced prior to commencement of works."
11. There was an issue between the parties as to whether Mr Banks included copies of the quotations with this letter. Mr Banks' evidence was that he "would have sent copies". Mr Harrison said that the quotations were not included. The Tribunal considers that both men were doing their best to assist the Tribunal when giving evidence. However, Mr Banks was not giving evidence of his own recollection,

but rather of what he thought he would have done. In these circumstances the Tribunal prefers Mr Harrison's evidence that the quotations were not included with the letter.

12. Mr Banks said that he was aware of the need to obtain three quotations for works, but that he was otherwise unaware of the consultation requirements in section 20 of the Landlord and Tenant Act 1985. Mr Harrison said that the tenants were not aware either of the requirements of section 20, until the current dispute arose in 2006. We accept both men's evidence on this.

**The invoices**

13. EdF raised a number of invoices. The first is dated 1st December 2005 for "New Conn Domestic UG" in the sum of £1,556.99. Mr Banks demanded payment of one third of this from each tenant, and each flat owner paid £519.00. Mr Harrison said that there was no dispute about this and that the tenants did not seek repayment of this money or any part of it.
14. There is another EdF invoice also dated 1st December 2005 for "Service Alteration Domestic UG" for £658.96. This bill relates to the basement flat, whereas the other one referred to the other three flats. This is why Mr Banks demanded one third (rather than one quarter) of that invoice from the tenants.
15. There is an earlier invoice dated 9th September 2005 for £709.02 in respect of the survey and a later invoice dated 7th March 2006 for £423.00 in respect of an abandoned call. Mr Banks explained that CGC had installed a fire-proof box on the ground floor, but that it was too small for the junction boards EdF wanted to install so that the EdF visit on that occasion was abortive.
16. CGC raised an undated invoice for their work in respect of the electricity in the sum of £5,484.90.
17. The tenants dispute their liability to pay these invoices (save the first EdF invoice) on the basis that the landlord failed to carry out a consultation in accordance with section 20.

**The law**

18. The consultation requirements and the Tribunal's power to dispense with the requirements under section 20ZA of the 1985 Act have been recently considered by the Lands Tribunal in the case of *Queen's Mansions, 59 Queen's Avenue, London N10* LRX/148/2008 in its decision [2009] UKUT 233 (LC).
19. There the Lands Tribunal, comprising the senior president, Lord Justice Carnwath and Mr N J Rose FRICS, said:

> "2. The present scheme was introduced in October 2003 under the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), which amended the corresponding provisions of the Landlord and Tenant Act 1985 ("the 1985 Act"). Under the earlier provisions, the consultation requirements were less detailed, and the court had power to dispense with

compliance if satisfied "that the landlord acted reasonably". New sections 20 and 20ZA were introduced by the 2002 Act, and brought into force on 31 October 2003, on the same day that the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Consultation Regulations") came into force.

3. The relevant provisions have recently been considered by the Lands Tribunal in *Camden LBC v The Leaseholders of 37 Flats at 30-40 Grafton Way* LRX/185/2006, unreported, ("*Grafton*"), to which we shall need to return. In that case the tribunal summarised the effect of the provisions as follows (para 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."

4. The layout and drafting of the regulations leave something to be desired in terms of clarity. Furthermore, the numbering of the various versions referred to in the papers before us was not consistent. We find it appropriate to follow the same numbering of the paragraphs in Part 2 of Schedule 4 as was adopted in para 24 of *Grafton*, and which incorporated the amendments contained in a correction slip. We also note the three "stages" referred to in *Grafton*:

> *Stage 1*
>
> (1) **Notice of intention** Notice of intention to carry out qualifying works is given to each leaseholder and any recognised tenants' association ("RTA"). The notice must describe in general terms the proposed works, or specify a place and hours where the description may be inspected. The notice must state the reasons for the works, and invite written observations, specifying where they should be sent, over what period (30 days from the notice), and the end date. Further, the notice must contain an invitation for nominations of persons from whom the manager should obtain estimates. The landlord must have regard to written observations received during the consultation period.

*Stage 2*

(2) **Estimates** The landlord must seek estimates. (There are detailed rules as to seeking estimates from nominees of the tenants or RTA).

(3) **The paragraph (b) statement** The landlord then issues a statement (free of charge) setting out the estimated cost from at least two of the estimates and a summary of the observations received during the stage 1 consultation period, and his responses to them. The statement is issued with a notice (see below). If any estimates have been received from leaseholders' nominees, they must be included in the statement. (The term "paragraph (b) statement" is used by the regulations themselves, by reference to sub-paragraph (5)(b) in which this requirement is found).

(4) **Notice accompanying paragraph (b) statement** The statement must be sent out with a notice... , detailing where and when all of the estimates may be inspected and inviting each leaseholder and any RTA to make written observations on any of the estimates, specifying an address where they should be sent, the consultation period (30 days from the notice) and the end date.

(5) **Regard to observations** The landlord must have regard to written observations received within this second 30-day consultation period.

*Stage 3*

(6) **Notification of reasons** Unless the chosen contractor is a leaseholder's or RTA nominee or submitted the lowest estimate, the landlord must give notice within 21 days of entering into the contract to each leaseholder and any RTA, stating his reasons for the selection, or specifying a place and hours for inspection of such a statement..."

5. A guidance note issued by the Leasehold Advisory Service ("LEASE") contains helpful precedents for the various notices required under this procedure. The experience of this case suggests that landlords would be well-advised to pay close regard to them, rather than attempting to devise their own versions."

The Tribunal then considered the case of *Grafton Way*.

"35. Before considering further the present facts, it is necessary to return to the decision in *Grafton*. In that case, the landlord was the housing authority, and there were 40 leaseholders, of whom 21 had formed a committee to represent them in discussions with the landlord (paras 6 and 12). There was no material problem at stage 1, but stage 2 was omitted altogether through an administrative error. The correct notice had been prepared, but the council by mistake sent another notice relating to different works (paras 18-19). In these circumstances the

Lands Tribunal upheld the LVT's decision not to dispense with compliance.

36. The tribunal commented on the scheme of the provisions which are "designed to protect the interests of tenants" and continued:

> "...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."

37. They considered but rejected the argument that the disproportionate cost to the landlord should be taken into account:

> "34. It was urged on us by (counsel for Camden) 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."

38. Finally they commented on the significance of the landlord's failure to provide the estimates and the opportunity to comment on them:

"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."

39. Mr Jourdan [counsel for the landlord] submitted that the tribunal had been wrong in *Grafton* to hold that financial effects of granting or refusing dispensation were irrelevant. The LVT, he said, should be able, as part of a "broad based discretion", to balance the financial effects with other factors including the relative seriousness of the non-compliance. As he put it -

"Prejudice does not come in only two varieties – serious and trivial; it is on a sliding scale from none to very serious. Similarly, the effects of refusing dispensation may be anything from trivial to very serious."

Both counsel sought to draw assistance from cases on provisions using similar language in other statutory contexts. However, we did not find such analogies helpful in interpreting the present scheme. There was no dispute that it was open to us to depart from the reasoning of *Daejan* if we felt it right to do so, although we should naturally treat it as persuasive.

40. Having considered the arguments, however, we see no reason to depart from the approach taken in *Grafton*, which in our view is supported by the statutory language. The power given to the LVT is to dispense with the consultation requirements, not with the statutory consequences of non-compliance. The principal focus, therefore, must, be on the scheme and purpose of the regulations themselves. If parliament had intended to give a power to remove or mitigate the financial consequences, it could easily have done so, but we would have expected it to have been done in a way which avoided an "all or nothing" result. For the same reason, we are unable to accept Mr Jourdan's alternative submission that the tribunal should, instead of refusing dispensation, accept the landlord's offer to reduce the amount of the charge to reflect its view of the prejudice suffered (whether by reference to the general requirement of reasonableness under section 19 of the 1985 Act, or otherwise). Parliament might have enacted a scheme with such an alternative, but it did not do so. The potential effects – draconian on one side and a windfall on the other – are an intrinsic part of the legislative scheme. It is not open to the tribunal to rewrite it. Nor do we think that section 19 can be used to achieve the same effect. Given the specific scheme in relation to consultation, the general provision that charges are allowed only so far as "reasonably incurred" is not apt to allow a reduction.

41. We agree, however, with the *Grafton* tribunal that the potential consequences for the parties are relevant as part of the context in which the matter is to be considered. Although we do not think it helpful or accurate to describe the provisions as "penal" (as Mr Jourdan suggested), the tribunal should keep in mind that their purpose is to encourage practical cooperation between the parties on matters of substance, not to create an obstacle race. If the noncompliance has not detracted significantly from the purpose of the regulations and has caused no significant prejudice, there will normally be no reason to refuse dispensation. Thus, in *Eltham Properties Ltd v Kenny and others* (LRX/161/2006, unreported) the Member (A J Trott FRICS) granted dispensation in a case, having found -

> "that the defective section 20 notice represents ... such a minor breach of procedure and that there is no evidence that the respondents were prejudiced or disadvantaged as a result" (para 30).

42. Furthermore, having regard to that context the tribunal will be conscious that both landlord and tenant may have considerable financial incentives to play down or (conversely) play up the significance of non-compliance. It needs to examine critically such claims, using its own experience and common sense, rather than giving undue weight to the unsupported protestations of the parties.

43. Finally, we emphasise the need to consider these issues having regard to the particular facts of each case, including the nature of the parties and their relationship. For example, the tribunal may reasonably take a more rigorous approach to non-compliance by a local authority or commercial landlord, than to a case where the landlord is simply a group of lessees in another form. On the other side, we can readily understand why the *Grafton* tribunal, in a case where there were 40 lessees, only some of whom were represented by the negotiating group, was unwilling to "speculate" as to the likely response to a stage 2 consultation. The same approach may not always be appropriate to a much smaller group of tenants, jointly represented by an active association, and closely involved in the discussions from the start. On the other hand, given the carefully constructed sequence laid down by the regulations, it would rarely be "reasonable" to dispense completely with a whole stage of the consultation process, as happened in *Grafton*."

**Our decision**

20. In the current case, there was no consultation at all. The letter of 12th October 2005 taken at its highest merely informs the tenants of the landlord's decided intention to carry out work. Accordingly in our judgment none of the three stages of a section 20 consultation identified by the Lands Tribunal in *Queen's Mansions* and *Grafton Way* were carried out.
21. The Tribunal takes into account the fact that Mr Banks is an amateur landlord. However, he accepted in evidence that he was aware of the requirement of obtaining three quotations. We conclude that he deliberately decided not to obtain quotations, because it was more convenient for him to use the contractors he had decided to use for the refurbishment works to the flats of which he had vacant possession.
22. Mr Banks sought to justify his approach by the fact that there was urgency. We do not accept this. The works carried on into 2006 with the electricity still not sorted out in March 2006.
23. In our judgment the tenants are prejudiced by their inability to comment on the works and to nominate contractors. It is clear that the tenants take a significant interest in the building and would have wished to have input into the works if they had been consulted.
24. In our judgment, carrying out the balancing exercise as required by *Queen's Mansions*, it is right to refuse a general dispensation under section 20ZA.
25. However, the tenants accepted that they should be liable for £519.00 in respect of each of flat. In the light of that statesmanlike concession, we consider it appropriate to grant a dispensation, but limited to that sum.

**Costs**

26. The landlord has paid a £100 issue fee and a hearing fee of £150. We have a discretion as to who should pay those fees. In our judgment, the landlord has substantially lost, so he should bear those fees.

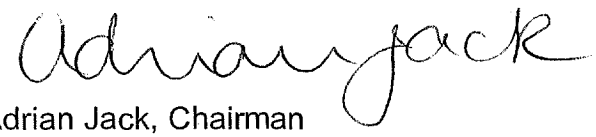
27. The tenants made an application under section 20C of the 1985 Act for an order that the landlord was unable to recover his costs of the current proceedings under the service charge. Mr Banks indicated that there were no costs which he would seek to put on the service charge, so there is no need for us to make any determination of the section 20C application.

## DECISION

(1) **The Tribunal refuses to grant the landlord a general dispensation under section 20ZA of the Landlord and Tenant Act 1985 from the requirements of section 20 of the said Act in respect of the works the subject of this application.**

(2) **The Tribunal, however, allows the landlord to recover £519.00 from each flat in respect of those works.**

(3) **The Tribunal makes no order for costs.**



Adrian Jack, Chairman
10th May 2010