5078

Leasehold Valuation Tribunal **LON/00AU/LSC/2009/0815**

London Rent Assessment Panel

Landlord and Tenant Act 1985 sections 27A and 20C

Address:	23 Northolme Road, London N5 2UZ
Applicants:	Mr. Ben Gibson and Miss Victoria Jeal (freeholders)
Represented by:	In person
Respondent:	Miss Yvette McGreavy (leaseholder)
Represented by:	In person, with Ms. C Matthews, a friend
Tribunal members:	Mr T J Powell LLB (Hons) Mr. J Power FRICS Mrs. R Turner JP
Application dated:	12 December 2009 (S.27A); and 17 February 2010 (S.20ZA)
Oral pre-trial review:	20 January 2010
Hearing:	10 May 2010
Decision:	27 May 2010

Decisions of the Tribunal

(1) The Applicants had failed to comply properly with their obligations to consult in respect of the installation of insulation and chimney cowls, but the Tribunal is not satisfied that it is reasonable to dispense with those requirements;

(2) Of the £799.94 charged, only the sum of £250 is payable by the Respondent, being the cap imposed by the consultation regulations; and

(3) The Tribunal determines that the Respondent shall pay the Applicants £72.50 within 28 days of this Decision, in respect of a partial reimbursement of the Tribunal fees paid by the Applicant.

Background to application

1. This was an application by the freeholders for a determination under s.27A of the Landlord and Tenant Act 1985 as to the payability of two sums in relation to the 2009 – 2010 service charge year, namely the tenant's obligation to contribute £200 towards the building insurance and her liability to pay £799.94 in connection with the insulation of the roofing and the placing of cowls onto the chimneys of the building.

2. This is the second application to the Tribunal. An earlier application under reference LON/00AU/LSC/2008/0335 was decided on 17 December 2008 relating to the roof works and various connected matters.

3. The property at 23 Northolme Road, Highbury, London N5 2UZ is divided into two flats numbered 23 and 23A respectively. The Applicants are the long leaseholders of and live in the upper flat and the Respondent is the long leaseholder of and lives in the lower flat. The Applicants acquired the freehold on 23 February 2006.

4. Under the terms of their respective leases the Applicants are responsible for 60% of the service charge contributions and the Respondent is responsible for 40%.

5. The parties identified the following issues:

   i) Whether the Respondent is liable to pay the sum of £200 as a part contribution towards buildings insurance, and the accounting treatment of past demands and payments made by her; and

ii) In relation to the sum of £799.94 whether the consultation procedures under s.20 of the Landlord and Tenant Act 1985 and related regulations had been properly carried out in relation to the insulation and chimney cowls to which this sum related and, secondly, whether the amount charged for the work was reasonable.

6. The parties agreed that there was no dispute as to the amount of or the recoverability in principle of the relevant proportion of the building insurance. Neither did the Respondent raise any issue as to the quality of the work.

7. Following the oral pre-trial review on 20 January 2010, which both parties attended, the Applicants issued a second application under s.20ZA of the Landlord and Tenant Act 1985, applying for dispensation from the consultation requirements under s.20 of the Act and related regulations, to be determined in the event that the Tribunal found that the consultation procedures were wanting.

The property

8. Neither party asked the Tribunal to carry out an inspection of the property; nor did the Tribunal consider that an inspection was necessary in this case.

The law

9. Service charges and relevant costs are defined in section 18 of the 1985 Act. The amount of service charges which can be claimed against lessees is limited by a test of reasonableness, which is set out in section 19 of the 1985 Act.

10. The Tribunal's jurisdiction is set out in s.27A(1) of the 1985 Act as follows:

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to

a) the person by whom it is payable;

b) the person to whom it is payable;

c) the amount which is payable;

d) the date at or by which it is payable; and

e) the manner in which it is payable.

(2) Sub-section (1) applies whether or not payment has been made.

11. By s.20ZA of the 1985 Act:

    (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.

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

The lease

13. The parties were agreed that ground rent and advance service charge of £200 per annum (by way of additional rent) was payable on 24th day of June in each year. No issues were taken in relation to those provisions.

14. The Fifth Schedule of the lease sets out the costs expenses outgoings and matters in respect of which the lessee is to contribute by way of service charge. These include: in paragraph 3 the repair and maintenance and decoration of the exterior of the building and common parts; in paragraph 4 the repair maintenance and replacement of the external walls structure roofs roof timbers of the building; and in paragraph 5 the insurance premium.

15. Again, no issue was raised by the parties in relation to the terms of the Fifth Schedule, save that the Respondent underlined the lease did not provide for improvements to be charged to lessees.

The hearing

16. At the start of the hearing the Respondent presented her written submissions in relation to the two issues in dispute, together with a printout of the Lands Tribunal decision in the case of *London Borough of Camden v The leaseholders of 37 flats at 30-40 Grafton Way* (LRX/185/2006) (Westlaw ref: 2008 WL2595998).

17. The Applicants supplied the Tribunal with a lever arch file of documents. While the Tribunal can only praise the clarity of the bundle, which must have taken the Applicants many hours to put together, and in particular the comprehensive

pagination, it was somewhat surprised that a dispute of such relatively modest value should have generated so much paperwork.

18. As indicated above, the Applicants had acquired the freehold on 23 February 2006, which coincided with the renewal of the annual insurance, but which was several weeks before the start of the next accounting period on 1 April 2006. Mr. Gibson said that on the date that they acquired the freehold, there were no service charge arrears owed by the Respondent.

19. The Respondent's 40% proportion of the insurance premium for 2006-2007 was £411.21, which she paid in full on 23 May 2006. Although the Respondent did not pay her £200 on account of service charges on 24 June 2006, when the next year's insurance premium of £436.16 became due, she paid it once again in full on 1 July 2007. The following year's insurance premium of £507.61 was paid in full on 15 July 2008; and the following year's demand for £580.80 was paid on 21 September 2009 (but the Applicants had returned that particular cheque to the Respondent uncashed, because they did not accept the full total tendered by the Respondent).

20. The Applicants' issue was that in each of the service charge years since 2006 the Respondent had failed to pay her £200 on account of service charge. They had chosen to represent that failure as meaning that the Respondent had been "in arrears" to the tune of £200 since 24 June 2006.

21. The Respondent disputed strongly that she was "in arrears" of any service charges. She said that the insurance premium had always been billed in arrears and she had always paid it. She said that the Applicants had failed to account properly for the payments that she had made and had wrongly asserted that she was in arrears to the tune of £200, or at all. She said that all that she had ever wanted was for it not to be said that she was in arrears: she did not want it on her leasehold record that she had ever been in arrears.

22. After discussion between the parties, a compromise was reached between the parties, which resolved the £200 issue. It was agreed that the Respondent would pay to the Applicants the sum of £855.80 within seven days, such sum comprising:

	£
Ground Rent 24/6/09 – 23/6/10	75.00
Service Charge Adjustment for 40% contribution to the buildings insurance 23/2/09 – 22/2/10	580.80
On account payment due 24/6/09	200.00
Total:	£855.80

23. In addition, the Respondent will agree to pay further sums of money to the Applicants on 24th June 2010, which will be in the approximate sum of £775 - £800, to represent the following:

	£
Ground Rent due 24/6/10 – 23/6/11	75.00
Balance of the insurance premium for the period from 23/2/10 (c. £600 - £200)	c.400.00
Sundries (e.g. keys) incurred before 1/1/10	c.100.00
On account payment due 24/6/10	200.00
Total:	c.£775.00

24. In return for the above payments the Applicants agreed that the Respondent is not and has not been in arrears with her service charges and there is no history of service charge arrears since they acquired the freehold on 23 February 2006.

25. The parties having agreed this issue, it is resolved and there is no need for a Tribunal determination in relation to the £200 in advance payment.

Cost of roof insulation and chimney cowls

26. Having considered the documents in the trial bundle, heard evidence from both parties and listened to their submissions, the Tribunal has found the following facts.

27. By letter dated 10 July 2007 the Applicants served the Respondent with a notice of intention to carry out work pursuant to s.20 of the 1985 Act. Works related to

re-roofing works and repairs, including ancillary works to masonry above roof levels, rainwater goods, roof timbers etc. and details were set out in Appendix 1: a Proposed Scope of Works. Item 7 in the Scope of Works included covering chimney pots to redundant flues with cowls, and item 8 included the provision and fitting of 150mm rolled insulation to the roof voids where possible.

28. By letter dated 6 August 2007 the Respondent wrote to the Applicants complaining that the roof was not in actual disrepair and that the proposed scope of works contained measures which went beyond and were in addition to her obligations as leaseholder. In particular she complained about the proposal of cowl coverings for the pots to redundant flues and to roof insulation. She also proposed the names of three alternative contractors to quote for the work.

29. The Applicants obtained estimates for the works from four companies, two of which had been nominated by the Respondent. Statements of estimates were served by the Applicants by letters dated 11 October 2007 and 29 May 2008. The earlier letter confirmed to the Respondent that roof insulation and cowl coverings for the pots to redundant flues would be removed from the proposed scope of works (reflecting the Respondent's objections).

30. The above letters comprised the stage 2 notice referred to as "the paragraph (b) statement" in paragraph 4(5) of Part 2 to Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003.

31. By letter dated 13 July 2008 the Applicants indicated their intention to appoint Harding Roofing (one of the Respondent's nominated contractors) to undertake the roof repairs, because their quote was the cheapest of the four obtained. The Respondent's share of the costs was stated to be £6,387 (calculated when VAT was at 17.5%).

32. The Applicants then made an application to the LVT for a determination whether the service charge in respect of the roof repairs to be undertaken at the property were reasonable and payable by the Respondent. The overall conclusion of the previous Tribunal (under reference LON/00AU/LSC/2008/0335) was stated in paragraph 18 of its decision dated 17 December 2008, as follows:

> "The Applicants have undertaken the appropriate consultation process and have acted reasonably in obtaining estimates for the repair of the roof. The estimated

> costs of the roof repairs are reasonable and the work proposed is repair and not improvements. The appropriate proportion is due from the Respondent in accordance with her obligations for payment in the lease."

33. However, the previous Tribunal's decision also included the following comment in paragraph 10, to which both parties referred at the subsequent hearing:

> "The original proposal for insulation and fixing of chimney cowls has now been dropped at the Respondent's request. In the Tribunal's view this is short-sighted, as insulation will reduce heat loss and chimney cowls will prevent debris dropping down the chimney. Neither of these items is costly and it would be prudent management for these matters to be dealt with when the scaffolding is in situ to prevent any problems arising in the future from their omission – but this is a matter for the parties."

34. Mr. Gibson gave evidence that as a consequence of these comments by the LVT, the Applicants reinstated both the installation of chimney cowls and roof insulation into the proposed scope of works. The insulation was to the crown roof, to a dormer roof and to the roof above the Respondent's bathroom. There were seven chimney pots to be cowled. The estimate from Harding Roofing Limited had provided for a total cost of £1,480 plus VAT for the insulation and £259 plus VAT for the chimney cowls. With the addition of VAT at 15% the total came to £1,999.85 extra cost, of which the Respondent's 40% was £799.94 – the amount in dispute before this Tribunal.

35. In the event, the Applicants decided not to use Harding Roofing Limited, but appointed another one of the four contractors, Lee Greenwood Roofing, to carry out the works. By notice dated 24 May 2009 the Applicants gave reasons for awarding the contract to Lee Greenwood Roofing. The reasons given in the notice were that the scope of works are reasonable and are reasonably priced. However, at the hearing the reason given was that Lee Greenwood Roofing was a zinc specialist and the Applicants thought that that company would carry out a better job replacing the zinc roofs than Harding Roofing Limited.

36. The Applicants continued to pay 60% of the costs of the roof works but, in addition, they absorbed any increased costs that would otherwise have accrued to the Respondent by reason of having used a more expensive contractor.

Therefore, they only sought to charge the Respondent the costs which would have been incurred had the work been carried out by Harding Roofing Limited.

37. By notice also dated 24 May 2009, the Applicants gave the Respondent advance notice of the anticipated costs relating to roof repairs. This indicated that her 40% contribution had increased to £6,931.74 (a figure arrived at by adding back in the cost of roof insulation and chimney cowls, reducing the cost of the roof coverings due to a fall in the price of zinc, and reducing VAT from 17.5% to 15%). The Respondent has refused to pay the additional cost of £799.94, with the result that the present application to the Tribunal has been made.

The Tribunal's decision

38. The Tribunal determines that the installation of insulation and chimney cowls both fall within the Applicants' obligations to maintain the building, and do not constitute improvements. However, by withdrawing these items from the scope of works before the stage 2 "paragraph (b) statement" the Applicants have not completed the statutory consultation requirements properly in respect of these items. The Tribunal is not satisfied that it is reasonable to dispense with the requirements, and refuses the Applicants' application under s.20ZA of the 1985 Act. As a result, the amount which the Respondent is liable to pay in respect of the insulation and chimney cowls is capped at £250, which sum is now payable by the Respondent.

Reasons for the Tribunal's decision

39. Although neither party produced evidence on this point, Mr. Gibson suggested that it is a requirement of the building regulations to insulate roofs when they are being replaced or recovered, wherever it is practicable to do so. The Tribunal, from its own knowledge and experience confirms that to be the case and to this extent determines that the addition of insulation is not an "improvement", but falls within the ordinary maintenance obligations under the lease. Equally, the provision of chimney cowls on redundant flues (about which there was dispute from the Respondent) does not provide the leaseholder with something that is completely different in nature to that which existed before; on the contrary the provision of cowls falls squarely within the ordinary maintenance obligations under the lease.

40. The consultation regulations envisage a two-stage procedure. The second stage involves a "paragraph (b) statement" which sets out the estimates obtained and which invites observations in relation to those estimates. The Applicants complied with the consultation requirements in respect of all of the roof works, bar the insulation works and chimney cowls, which were removed from the paragraph (b) statements by agreement with the Respondent. The Respondent received three written assurances from the Applicants that the insulation and chimney cowls would not be part of the scope of works by letters dated 11 October 2007, 29 May 2008 and 13 July 2008.

41. When considering the Applicants' application under s.20ZA of the 1984 Act for dispensation of the consultation requirements in relation to the insulation and chimney cowls, the Tribunal rejected the Applicants' reasons for not re-consulting about these works. Mr. Gibson said that the Applicants had wanted to avoid confrontation with the Respondent and argued that the previous LVT decision meant that the Applicants did not have to re-consult. He relied upon the finding that the contents of the proposed scope of works considered by the previous Tribunal constituted "prudent management". In paragraph 10 the previous LVT had urged the parties to think again about including the insulation and chimney cowls, stating that the works were not costly and that their re-inclusion would avoid future damage.

42. Mr. Gibson also referred to paragraph 33 of the *Grafton Way* decision produced by the Respondent (referred to above), which stated:

> "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 circumstances. If significant prejudice has been caused, we cannot see that it could ever be appropriate to grant a dispensation."

43. Mr. Gibson said that there was no "significant prejudice" in the present case. Any prejudice was small and it should be viewed in the context of the LVT's earlier

decision and its scrutiny of the cost of works. Mr. Gibson complained that had he re-consulted, it would have been foreseeable that the Respondent would have objected again, he would have then had to return to the LVT for approval as to those two particulars items, only for the LVT most likely to approve the cost of works in the light of paragraph 10 of its earlier decision. In essence, there was no prejudice and the result would have been the same.

44. This Tribunal did not accept the Applicants' interpretation of the previous Tribunal's decision. For a start, the previous Tribunal was considering a proposed scope of work which expressly excluded the roof insulation and chimney cowls. Any comments that it made about the reasonableness of the remaining costs by definition could not and did not apply to the excluded items. Although it is correct that the excluded works were "not costly", it could not be said that the previous Tribunal found the costs to be "reasonable". This is because the previous Tribunal heard no argument as to those costs.

45. By stating that "it was a matter for the parties" whether to re-include the excluded items, the previous Tribunal must have envisaged that at the very least there would be some discussion between the parties before the items were re-included but further, in this Tribunal's opinion, there should have been re-consultation at the second stage before this happened. It is not possible to stretch the previous LVT's decision to say that the Applicants could simply re-include the insulation and chimney cowls, without any comment to the Respondent.

46. The *Grafton Way* decision was a case where "significant prejudice" had been found where Camden Council, in that case, had omitted the stage 2 consultation process altogether. In the present instance, the Applicants had excluded the stage 2 consultation procedure altogether in respect of the insulation and chimney cowls.

47. The Respondent was not made aware that these works were being done or the costs which would be incurred as a result. She was denied the opportunity of making observations about those works. It cannot be said, as the Applicants maintained, that re-consulting would have made no difference: it is possible that as a result of her observations a different type of insulation might have been used and/or perhaps at a lower cost.

48. The principle, as enshrined in the *Grafton Way* decision, is that leaseholders, in this case the Respondent, are entitled to be consulted; here, the Respondent was not consulted about the additional items and she was not given an opportunity to make observations which conceivably could have made a difference to the cost.

49. The Applicants did not tell the Respondent that they were re-including these works, but left it to a demand notice after the works were completed to advise her that the additional work had been done. A simple letter prior to the works notifying the Respondent of their re-inclusion might have persuaded this Tribunal that it was reasonable to grant dispensation, but a complete absence of advance notice means that the Tribunal cannot be satisfied that it is reasonable to do so. Accordingly, the application for dispensation is refused.

Application under s.20C and refund of fees

50. The Applicants indicated that they had no intention of passing any of their costs through the service charge. Accordingly, the Tribunal made no order under s.20C of the 1985 Act.

51. With regard to the fees, the Applicants had paid £70 for the s.27A application, £80 for the s.20ZA application and £150 for the hearing fee. For the purpose of considering reimbursement of the fees, the Tribunal allocates half of the hearing fee to the s.27A application and half to the s.20ZA application. It follows that the fees that relate to the s.27A application come to £145 (£70 plus £75).

52. In the light of the compromise of the £200 issue at the start of the hearing and of the Tribunal's decisions in relation to the other matters, the Tribunal considers that the parties should share the fees relating to the s.27A application. The Tribunal therefore requires the Respondent to reimburse the Applicants one half of the fees relating to the s.27A application, namely the sum of £72.50, within 28 days of the date of this decision.

Chairman:

Timothy Powell

Date: 27 May 2010