LRX/81/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – Landlord and Tenant Act 1985 sections 20 and 20ZA – Service Charges (Consultation Requirements) (England) Regulations 2003 – qualifying long term agreement (QLTA) – power to dispense with consultation requirements before QLTA entered into – whether consultation requirements should be dispensed with

IN THE MATTER OF AN APPEAL FROM THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **(1) DAVID AUGER**
(2) ASSOCIATION OF CAMDEN COUNCIL LEASEHOLDERS **Appellants**

and

LONDON BOROUGH OF CAMDEN **Respondent**

Re: Various addresses in the London Borough of Camden

Before: His Honour Judge Huskinson

Sitting at Procession House, 110 New Bridge Street on 18 and 21 February 2008

Mr Desmond Kilcoyne instructed by Cumberland Ellis, for the Appellants
Mr Stan Gallagher instructed by Camden Legal Services, for the Respondent

The following cases are referred to in this decision:

Forcelux v Sweetman [2001] EGLR 173
Tanfern Limited v Cameron McDonald [2000] 1 WLR 1311
AEI Limited v Phonographic Performance Limited [1999] 1 WLR 1507 at p1523
Pepper v Hart [1993] AC 593

DECISION

Introduction

1. The Appellants appeal to the Lands Tribunal, with permission, from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") dated 12 March 2007 whereby the LVT made an order under section 20ZA of the Landlord and Tenant Act 1985 as amended dispensing with certain of the relevant consultation requirements in respect of certain agreements which the Respondent (hereafter Camden) proposed to enter into.

2. Camden's application to the LVT was in respect of Partnering Agreement(s) and Framework Agreements the nature of which is briefly summarised below and is more fully described in the LVT's decision. The LVT refused to dispense with the provisions of Schedule 2 paragraph 1(2)(a) of the Service Charges (Consultation Requirements) (England) Regulations 2003 (hereinafter "the Regulations"). However the LVT did dispense with the consultation requirements in subparagraphs 4(4), (5), (6), and (7) of Schedule 2 of the Regulations in respect of both the Partnering Agreements and the Framework Agreements. It can be noted at this point that it is accepted by Camden that the LVT should not have dispensed with these subparagraphs in respect of the Framework Agreements, because no application for any such dispensation was made or intended to be made. To that extent at least Camden accepts that the present appeal must be allowed and the dispensation under subparagraphs 4(4) to (7) must be quashed in respect of the Framework Agreements. It follows from the foregoing that, as regards the Framework Agreements, the dispensation under paragraph 1(2)(a) of Schedule 2 was refused and it is accepted that the dispensations which were granted should not have been granted. Accordingly, the present appeal is not concerned any further with the LVT's order in respect of the Framework Agreements. It is necessary however to consider the Partnering Agreements and to consider the Framework Agreements insofar as they impinge on such Partnering Agreements.

3. Before coming to summarise the nature of the proposed Partnering Agreements and Framework Agreements the following points may be noted, namely that at the date of the application to the LVT and indeed at the date of the LVT decision:

(1) There existed no executed Partnering Agreements or Framework Agreements.

(2) There existed no draft Partnering Agreements or Framework Agreements nor any heads of terms.

(3) It was not known how many Partnering Agreements or Framework Agreements Camden intended to enter into.

(4) It was not known who would be the contracting parties under any such agreements. Such parties were to be selected by Camden pursuant to a four stage selection process, the final stage of which would be a tender assessment which would comply with the Public Contracts Regulations 2006 and the relevant EU Regulations.

(5) It was not known whether ultimately, once the selection process had been undertaken, any Partnering Agreements would in fact be entered into.

4. Accordingly, Camden sought dispensation from the relevant consultation requirements in respect of such Partnering Agreement or Partnering Agreements, if any, as Camden might ultimately wish to enter into after following through the proposed selection process.

5. A brief description of what is meant by a Partnering Agreement is contained in the report of the director of housing dated March 2006 which was part of the documentation submitted by Camden to the LVT. Here it is stated in paragraph 3.1:

> "Broadly Partnering contracts are agreements with one or more contractors for the delivery of programmes of capital works over an agreed period of years, generally for 5-10 years and occasionally for longer periods. They are designed to deliver capital programmes at agreed unit costs over the life of the Partnering period with an agreed formula for uplifting costs to take into account a degree of cost inflation. Typically this formula is based on the Retail Price index plus 1% and this formula is being used in the delivery of local authority/ALMO Decent Homes programmes across the country."

6. The nature and purpose of a Partnering Agreement is expanded upon in Camden's letter dated 24 November 2006 to the LVT, written by Joe Vicente, and also in the witness statement of Patrick O'Neill, Deputy Head of Capital Investment Group for the London Borough of Camden Housing Department. I give the following summary from those documents and from the LVT's decision:

(1) Partnering as a method of procurement was introduced to local authorities with the publication of the Egan Report in 1998. In response to the Egan Report the Office of the Deputy Prime Minister brought about the introduction of a requirement for local authorities and other public sector procurement clients to look at innovative forms of construction procurement including the use of Partnering contracts.

(2) Camden delivers a programme of capital works to a value of about £55m per year, this capital programme having two major priorities: external refurbishment schemes and mechanical and electrical schemes. There are concerns regarding the lack of capacity within the building industry to meet Camden needs, especially having regard to the pressure on the supply of building services over the forthcoming years. There is also concern regarding the consequent impact of building inflation.

(3) Camden therefore recognises a need to put processes in position now so as to ensure that in future Camden has appropriate resources available to call on for carrying out the necessary works to its housing stock. There are difficulties in procuring contracts on an individual basis. If Camden seeks to place such individual contracts there is the prospect that the most suitable and reliable contractors may be unavailable. Accordingly a Partnering Agreement is sought

in order to maintain the services of the more experienced contractors who may be prepared to work for Camden under such an agreement bearing in mind the economies of scale that a Partnering Agreement over a five year period could bring. What would be done under the Partnering Agreement is to put large parts of the capital programme out to tender, rather than tendering individual contracts.

(4) The Partnering Agreement can bring the following benefits as summarised in paragraph 6.2 of Mr O'Neill's witness statement: reduced capital costs and whole life costs; reduced supply and construction time; reduced level of defects eventually leading to zero defects; reduced accidents; increased predictability on time costs and quality; increased productivity; improved sustainability. Other benefits are described in Mr O'Neill's witness statement (see also page 15-16 of the bundle in Mr Vicente's letter).

(5) It is proposed that contractors would tender on work packages which would, for instance, be an external refurbishment contract. Within such work packages there would be set types of activity schedules, an example could be the renewal of a roof. The tendered prices to these given activity schedules would have to take into consideration the quality criteria set within them, which would control quality by setting out the type of materials that are necessary, the level of resources required, etc. By defining activity schedules to this level of detail Camden are seeking to minimise price fluctuations within a given work package and to provide contractors with information necessary to allow them to realise their risks and price for them accordingly (see page 16 of the bundle within Mr Vicente's letter).

(6) Contractors under Partnering Agreements would be involved in contract design and would thus take ownership of the project should any failure in execution occur during the contract – in other words the contractor would be expected to make good any problems that arose due to their own design.

(7) As regards the proposed Framework Agreements these would be with between 8 and 12 contractors who would carry out contracts not covered by the Partnering Agreements, for instance some external refurbishment works and some mechanical and engineering works and some minor external repairs and redecoration contracts. Contractors under Framework Agreements could, should the need arise, form part of a contingency plan supposing one or more of the contractors under Partnering Agreements were unavailable or unsuitable for any particular works.

(8) Contractors under a Framework Agreement would not be guaranteed a work profile, whereas it appears (see paragraph 12.2 Mr O'Neill's witness statement) that contractors under a Partnering Agreement would be guaranteed a work profile. See also paragraph 29 of the LVT's decision where it is stated:

> "Contractors would be awarded a set value of work every year related to the available capital budgets; and their annual workload would be adjusted dependent upon their ability to meet key performance targets".

Partnering Agreements would be awarded on the basis of the most economically advantageous tender.

(9) Camden stated that it was envisaged that Partnering Agreements would last for five years.

7. The LVT recognised and I equally recognise that neither the LVT nor the Lands Tribunal is concerned with the general wisdom of whether or not to enter into Partnering Agreements or Framework Agreements. That is for Camden to decide in accordance with the normal rules of Local Government law and in accordance with the relevant Public Contract Procurement Regulations and EU Regulations. What the LVT was concerned with was whether the consultation requirements under section 20 of the 1985 Act and under the relevant Regulations should be dispensed with in the manner sought by Camden in respect of the Partnering Agreements.

8. Camden was concerned that some of the consultation requirements would not be able to be met as the specific scope timing and costs of the individual schemes cannot be established at the outset of the Partnering regime (10.3 of Mr O'Neill's witness statement). Camden pointed out that if the requested dispensation was granted then Camden proposed to issue a notice of intention setting out the works that would form the basis of the specific capital works contract being a notice which was not a statutory obligation under Schedule 3 of the Regulations, see paragraphs 26 and 27 of the LVT's decision. In summary it was contended that bearing in mind the nature of the proposed Partnering Agreements it would not be practicable or perhaps not even possible to meet some of the consultation requirements and that it would be reasonable to dispense with these requirement bearing in mind among other matters the benefits which such Partnering Agreement(s) would bring to Camden tenants.

9. The Appellants put in objections to Camden's application to the LVT, see page 242 and following of the bundle. These objections were developed further in argument before the LVT and were set out in a skeleton argument before the LVT, see page 525 and following. The objections included an objection that the application was premature and the Partnering Agreements were defined with insufficient clarity and detail as regards what was proposed. It was submitted see page (245):

> "Without such clarity Camden's application boils down to an application for *carte blanche* to enter into any kind of agreement with contractors for any kind of work in the future at any rates that Camden chooses..."

Various other objections were taken including the fact that, if dispensation from requirements of Schedule 2 of the Regulations were granted, the protection granted to the tenants under section 19 of the 1985 Act and Schedule 3 of the Regulations would be weakened. Various further objections were taken which were repeated in argument before me.

The LVT's decision

10. Having declined to dispense with the requirements of paragraph 1(2)(a) of Schedule 2 the LVT granted dispensation with paragraphs 4(4) to (7) of the Regulations "in respect of the Partnering and Framework Agreements Camden intend to enter into with contractors to deliver its programme of housing capital works". It will be noted that there is no limitation in time in this dispensation and no identification of what these Partnering or Framework Agreements may be. I have already recorded that it is accepted that such dispensation should not in any event have been granted in respect of the Framework Agreements.

11. As regards the LVT's reasons for granting such dispensation these are contained in paragraphs 53-58 of the LVT's decision which are in the following terms:

> "53. The Tribunal accepted Camden's argument that it cannot in advance calculate the cost to an individual tenant, as the properties have not been surveyed and no programme of works in place. Works will be carried out as needed and the contractor paid accordingly. It is not yet possible to anticipate actual works and costs.
>
> 54. Camden's intention is to carry out surveys and prepare a programme of works after tenders have been accepted. It will then be in a position to give meaningful information on works and costs to individual leaseholders. This approach appears to be reasonable and the Tribunal does not wish to interfere with it by refusing the dispensation sought without evidence or real benefits to Camden and its leaseholders.
>
> 55. If Camden is forced to put forward estimated service charge contributions based on future indicative or budgetary figures, these are likely to be unrealiable and meaningless to leaseholders who may or may not have work done some time in the future under the agreements.
>
> 56. Camden's decision to deliver its housing capital works by way of long term agreements rather than piece-meal contracts is not an issue within the jurisdiction of the Tribunal; even though, some of the leaseholders may have thought so judging form remarks made in their written representations. This is a matter entirely within the discretion of Camden. The Tribunal only had to decide whether or not the application for partial dispensation was reasonable, given the consultation requirements for such QLTAs. It concluded that the grounds for the dispensation was made out and reasonable.
>
> 57. In granting this partial dispensation, the Tribunal also took into consideration (1) that the proposed agreements are subject to EU rules (2) the method of tendering, (3) the process for selection and (4) tenants' involvement. It is of the opinion that the leaseholders will not be significantly prejudiced by the dispensation.

58. In coming to this decision the Tribunal also took into account Camden's statutory obligations to consult with its leaseholders under Schedule 3 of the Regulations. The parties should be aware that this partial dispensation does not indicate that cost when incurred is reasonable or that works done are of a reasonable standard. The tenants may, if they wish, make applications at the appropriate time to the tribunal for determinations of their liability to pay and reasonableness of service charge under section 27A of the Act. The Tribunal does not accept that Schedule 2 consultation, with or without partial dispensation, in any way diminishes the reasonableness test in section 19 of the Act.

Statutory provisions

12. Section 19 of the Landlord and Tenant Act 1985 provides:

> "(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –
>
> (a) only to the extent that they are reasonably incurred, and
>
> (b) where they are carried out on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
>
> and the amount payable shall be limited accordingly."

13. Section 20 of the Act provides in subsections (1) and (2):-

> "(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either –
>
> (a) complied with in relation to the works or agreement, or
>
> (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.
>
> (2) In this section "relevant contribution" in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement."

Section 20 (4) enables the Secretary of State to make regulations providing that section 20 applies to certain qualifying long terms agreements. Subsections 5 to 7 make provision in relation to the appropriate amount, whereby the tenant's relevant contribution is limited.

14. Section 20ZA of the Act 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.

(2) In section 20 and this section –

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) ...

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord –

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) ....

(7) ...."

15. Consultation requirements have been made by regulations pursuant to section 20ZA(4). Regulation 4 provides that section 20 is to apply to a qualifying long term agreement if relevant costs incurred under the agreement in any accounting period exceed an amount which result in the relevant contribution of any tenant in respect of that period being more than £100. Regulation 5 provides that where public notice is required to be given of the relevant matters to which a qualifying long terms agreement relates (which is the position in the present case) the consultation requirements are those specified in Schedule 2. Where qualifying works are the subject of a qualifying long term agreement then the consultation requirements as regards those works are the requirements specified in schedule 3. Accordingly the Regulations contemplate that, for a Partnering Agreement which is the subject of public notice, the consultation requirements are in Schedule 2. As regards any qualifying works performed under the Partnering Agreement there are then further consultation requirements under Schedule 3. Schedule 4 contains separate consultation requirements for qualifying works which are not works done under a qualifying long term agreement.

16. Schedule 2 requires in paragraph 1 the giving of a notice of intention to enter into a qualifying agreement. There is provision for the making of observations by any tenant or recognised tenant's association to which the landlord is to have regard. Paragraphs 4 and 5 make provision for the preparation of the landlord's proposal in respect of a proposed agreement. The proposal must contain a statement of the name and address of every party to the proposed agreement (other than the landlord) and any connection (apart from the proposed agreement) between the landlord and any other party. Subparagraphs 4(4) to (7) are central to the present case and make the following provisions in respect of the landlord's proposal:

> "(4) Where, as regards each tenant's unit of occupation, it is reasonably practicable for the landlord to estimate the relevant contribution to be incurred by the tenant attributable to the relevant matters to which the proposed agreement relates, the proposal shall contained a statement of that contribution.
>
> (5) Where –
>
> (a) It is not reasonably practicable for the landlord to make the estimate mentioned in subparagraph (4); and
>
> (b) It is reasonably practicable for the landlord to estimate, as regards the building or other premises to which the proposed agreement relates, the total amount of his expenditure under the proposed agreement,
>
> the proposal shall contain a statement of the amount of that estimated expenditure.
>
> (6) Where –
>
> (a) It is not reasonably practicable for the landlord to make the estimate mentioned in subparagraph (4) or (5)(b); and
>
> (b) It is reasonably practicable for the landlord to ascertain the current unit costs or hourly or daily rate applicable to the relevant matters to which the proposed agreement relates,
>
> the proposal shall contain a statement of that cost or rate.
>
> (7) Where it is not reasonably practicable for the landlord to make the estimate mentioned in subparagraph (6)(b) the proposal shall contain a statement of the reasons why he cannot comply and the date by which he expects to be able to provide an estimate, cost or rate."

17. The proposal must contain a statement of the intended duration of the proposed agreement. Notice in writing of the proposal must be given to each tenant and to a recognised tenant's association and must be accompanied by a copy of the proposal or must specify the place and hours at which the proposal may be inspected. The notice must invite the making in writing of observations in relation to the proposal. Where within the relevant period observations are made in relation to the landlord's proposal by any tenant or recognised tenant's association, the landlord shall have regard to those observations (paragraph 6). The landlord is required to respond to such observations (paragraph 7). Where a proposal prepared under paragraph 4 contains such a statement as is mentioned in subparagraph 4(7) the landlord is required, within 21 days of receiving sufficient information to enable him to estimate the

amount, cost or rate referred to in subparagraph 4(5) or (6) of that paragraph, to give notice in writing of the estimated amount cost or rate as the case may be to each tenant and relevant tenant's association.

18. So far as concerns the consultation requirements under Schedule 3 the landlord is required to give notice in writing of his intention to carry out any qualifying works to each tenant and recognised tenant's association. The notice must, inter alia, describe the proposed works in general terms and state why it is considered necessary to carry them out and state the total amount of estimated expenditure likely to be incurred on the proposed works and invite the making in writing of observations in relation to the proposed works or the estimated expenditure. Where within the relevant period observations are made in respect of the proposed works or the landlord's estimated expenditure the landlord shall have regard to those observations and shall within 21 days of their receipt state in writing his response to the observations.

The Appellants' submissions

19. On behalf of the Appellants Mr Kilcoyne advanced the following arguments.

20. Assuming for the moment in favour of Camden (which is a point to which he returns) that there is jurisdiction in an LVT to make an order dispensing with the consultation requirements in respect of a proposed agreement rather than an executed agreement, Mr Kilcoyne submitted that in any event the application is premature. He drew attention to the lack of information regarding the matters mentioned in paragraph 3 above. He submitted that in effect Camden was seeking to obtain a rubber stamp dispensation in respect of such agreement or agreements (if any) as it may be minded in the future to enter into by way of Partnering Agreements. He submitted that this cannot be what is contemplated by the Act and that the absence of such detail disabled the LVT from properly concluding that it was reasonable to grant dispensation in respect of such uncertain future agreement(s). In this connection the breadth of the dispensation granted in paragraph 52 of the LVT's decision is to be noted.

21. Mr Kilcoyne drew attention to the important provisions of section 19 and to the extent of and limitations on the protection it provided for tenants. Paragraph (b) of section 19(1) is concerned with the standard of the works. So far as concerns the costs of the works these are limited in that relevant costs are to be taken into account "only to the extent that they are reasonably incurred". In circumstances where there is not in place any qualifying long term agreement, such that a landlord has the ability to put out the proposed works for estimates from various separate and reliable contractors, and where the tenants may themselves be able to put forward an estimate or tender from a contractor selected by them, then the tenants have important protection against the works being placed with a contractor who charges an unreasonably high amount. Mr Kilcoyne pointed out however that the protection is not phrased as being that the relevant costs can only be taken into account to the extent that the costs are reasonable for the works done, but that the costs are to be taken into account only to the extent that they are "reasonably incurred". Having regard to these words and to the

decision in *Forcelux v Sweetman* [2001] EGLR 173 Mr Kilcoyne argued that the protection provided by section 19 is substantially weakened where there is in place a qualifying long term agreement such as the contemplated Partnering Agreements. This is because there is no ability for the tenants to put forward an estimate from their own suggested contractor and also Camden is already tied contractually to the contractor under the Partnering Agreement, such that the works will (or may depending upon the terms of the Partnering Agreement) have to be done by the partner under the Partnering Agreement at the rates provided for by the Partnering Agreement, whether or not such works could be competently done for substantially less by some other contractor. It will be difficult if not impossible for the tenants to argue that the costs are not reasonably incurred in circumstances where Camden would be (or might be) in breach of contract if it placed the works with anyone other than the partner under Partnering Agreement at the rates of charge provided for that agreement. Mr Kilcoyne pointed out that this was an anxiety raised by the tenants before the LVT, but that the LVT failed to deal properly with the point and indeed appeared in the closing words of paragraph 58 to consider that the entry into a Partnering Agreement and the absence of the Schedule 2 consultation requirements would not in anyway diminish the protection given to a tenant regarding the reasonableness of costs by section 19.

22. Mr Kilcoyne drew attention to the fact that the consultation requirements in subparagraph 4(4), (5) and (6) were all subject to the qualification that "it is reasonably practicable" for the landlord to carry out the steps there required. Accordingly if it is not reasonably practicable to do so Camden will not be required to comply with the provision in question. Mr Kilcoyne argued that the LVT erred in failing to recognise that the effect of dispensing with consultation requirements such as these is not to spare Camden from providing information which it is not reasonably practicable to provide (Camden do not have to do that anyway) but is instead to excuse Camden from having to provide the information supposing that it is reasonably practicable to do so.

23. Mr Kilcoyne argued that the LVT gave no reasoning and made no findings of fact as to whether it was in fact reasonably practicable (supposing that that was a relevant test) to comply with the provisions of subparagraphs 4(6) and (7). He submitted that the information contemplated in subparagraph 4(6) would surely be available by the date that a preferred tenderer was selected and prior to the entry into contract with that tenderer. He submitted that in any event no justification was given by the LVT for dispensing with the final consultation provisions in subparagraph 4(7) (which apply if it is not reasonably practicable to comply with subparagraphs (4), (5) or (6)).

24. He submitted that the burden was on Camden to establish that it was reasonable to dispense with the consultation requirements and that the fact that any Partnering Agreement would be subject to EU tendering was not a reason to dispense with the requirements. He pointed out that the consultation requirements did not exclude local authorities and did not exclude agreements which were subject to public notice or EU tendering.

25. He questioned what was meant by the expression "tenants' involvement" which was the fourth matter said to have been taken into consideration by the LVT in paragraph 57 of its decision.

26. As regards the provisions of subparagraphs 4(4) and (5) Mr Kilcoyne accepted that as regards most tenants it may very well be not reasonably practicable for Camden to provide the information there contemplated. However, he argued that there must be some tenants occupying premises in respect of which Camden already has identified specific works to take effect over, say, the next twelve months and which may be the first works to be done under a proposed Partnering Agreement. He argued that as regards some tenants it may well be reasonably practicable to give the information required and, if it is reasonably practicable, the consultation requirement should not be dispensed with.

27. So far as concerns prejudice to the tenants, Mr Kilcoyne pointed out that the consultation requirements were contemplated by Parliament as a protection which should be available to tenants unless dispensed with. Bearing in mind the matters mentioned in paragraph 21 above, tenants would indeed be prejudiced if, despite it being reasonably practicable to make certain information available to them under subparagraphs 4(4) to 4(6), the requirement to do so was dispensed with.

28. Mr Kilcoyne pointed out that the requirement under the Regulations for the giving of notice of the landlord's proposal takes effect after the name and address of the proposed contracting party is known – ie once the successful tenderer has in principle been selected. He argued that the fact that as at the date of the LVT decision (or indeed at present) it may be unknown whether there will in the future, once the tenderer has been selected, be sufficient information for it to be reasonably practicable to comply with the consultation requirements, for instance under subparagraph 4(6), is not a reason for granting dispensation. It may be, as submitted by Camden that the available information will be generic and unhelpful on the one hand or it may be voluminous and helpful on the other. If there may be helpful information available Camden should not be excused from the relevant consultation requirements to provide such information. If on the other hand it will not be reasonable practicable to provide such information Camden will not be required to do so anyway.

29. In summary Mr Kilcoyne argued that, for the foregoing reasons, the LVT had failed to take into consideration relevant matters and had failed to give clear and sufficient reasons for its conclusions and that the decision must be quashed.

30. He further argued that in any event there was no jurisdiction to make an order dispensing with the consultation requirements in respect of an agreement which had not yet been entered into. I return to this point at the end of this decision.

Camden's submissions

31. On behalf of Camden Mr Gallagher advanced the following arguments.

32. He drew attention to the fact that the wording of section 20ZA is apt to confer a wide discretion upon the designated decision maker, namely the LVT. The LVT may make an order dispensing with the consultation requirements "if satisfied that it is reasonable to dispense with the requirements". He argued that there is only a limited power in the Lands Tribunal to interfere with such a conclusion, especially on an appeal which is limited to an appeal by way of review. The Lands Tribunal should not interfere with the decision unless it can be shown to be plainly wrong.

33. Mr Gallagher accepted that the LVT had stated its reasons shortly. However, he drew attention to the nature of leasehold valuation tribunals and to the fact that they are entitled to express their reasons shortly. He submitted that it should not be assumed they have failed to take account of a point merely because it had not been expressly referred to.

34. Mr Gallagher drew attention to the fact the consultation requirements were highly prescriptive and that the dispensing power was an integral part of the legislation. The statute itself contemplated that it may be reasonable to dispense with consultation requirements. While accepting that the mere fact that the proposed Partnering Agreements would be subject to EU consultation was not of itself a reason for dispensing, the fact that there would be a comprehensive tendering process was a matter which the LVT was entitled to take into consideration in deciding whether it was reasonable to dispense.

35. He argued that at the point in time when the proposed agreements are entered into the actual volume profile and mix of the works to be done will not have been predetermined and it will not be possible at the time of Camden's proposal under paragraphs 4 and 5 of Schedule 2 to provide meaningful estimates of the matters under subparagraphs 4(4) to 4(7), save possibly in the broadest and most misleading and unhelpful terms. Mr Gallagher argued (see paragraph 18 of his skeleton) that in considering whether it is reasonable to dispense with the consultation requirements it is appropriate to consider:

(a) Whether and the extent to which the contributing tenants may be adversely affected by the dispensation that is sought;

(b) The benefits that may accrue to the landlord/detriment that may be avoided by the landlord if the dispensation is granted.

Mr Gallagher accepted, in answer to a question from the Tribunal, that the LVT did not undertake any detailed analysis of these two points. However, he argued that it must be inferred that the LVT did so from paragraphs 53 and following of the decision.

36. Mr Gallagher argued that at the time the landlord's notice of proposal is to be given it will either not be possible or at least not reasonably practicable to provide the detailed information contemplated by subparagraphs 4(4) to (6) and that any information that could be given would be as likely to alarm or mislead tenants as it would be to provide meaningful and useful information. He made a similar submission in respect of subparagraph 4(7).

37. Mr Gallagher drew attention to the fact that under Schedule 2 consultations there is no entitlement for tenants to put forward their own proposed contractor.

38. As regards the issue regarding the actual works to be undertaken to particular buildings, that will form the subject of the consultation under Schedule 3, in respect of which no dispensation is sought.

39. He argued that if a dispensation is not granted there will be a significant detriment in terms of very significant additional administrative costs, potential alarm and confusion to tenants, the pointlessness of consulting on rates and unit costs in circumstances where this may be nothing more than an empty formality, and possible commercial disadvantage from the disclosure of unit costs or rates before a Partnering Agreement is actually entered into.

40. I should record a further point raised by Mr Gallagher in respect of the requirements of subparagraph 4(5) of Schedule 2. He argued that where subparagraph 4(4) was not reasonably practicable, then what was required under subparagraph 4(5)(b) was for the landlord to estimate as regards all the buildings and premises to which the proposed agreement relates (or was intended to relate) the total amount of his expenditure under the proposed agreement, rather than giving particulars in respect of any particular building. He argued that this information would be effectively of no use to tenants because for instance it would merely require the giving by Camden of the information that the total amount of expenditure under the proposed agreement was, say, £3m a year. I do not see the relevance of this contention but in any event I do not accept it is correct. Mr Gallagher's reading appears to involve reading paragraph (b) as though it read:

> "It is reasonably practicable for the landlord to estimate ..... the total amount of his expenditure under the proposed agreement"

ie it involves omitting the words represented by the dots, which are "as regards the building or other premises to which the proposed agreement relates" – these words might just as well not have been in subparagraph (b) if the true construction was as contended for by Mr Gallagher. His construction would also mean that in a case where, say, it was not reasonable practicable to comply with subparagraph 4(4) but where a long term qualifying agreement was to relate, say, to four buildings and where there were available detailed figures regarding the expenditure on each building, the landlord would merely be required to provide the total estimated expenditure on the four buildings rather than giving the information which would be of use to the tenants (and which subparagraph (5) surely contemplates should be given).

Conclusions

41. In my judgment this appeal must be allowed. My reasons for so concluding are substantially those advanced in argument by Mr Kilcoyne and are as follows.

42. I remind myself that this is an appeal by way of review and that the task of the LVT was to decide whether, within the wording of section 20ZA of the 1985 Act, it was "satisfied that it is reasonable to dispense with the requirements". This clearly confers upon the LVT a broad judgment akin to the exercise of a discretion. It was for the LVT to decide whether it was so satisfied. The Lands Tribunal, on an appeal by way of review, should only interfere with that decision if it is satisfied that the decision was wrong as contemplated in the analysis in paragraph 32 of *Tanfern Limited v Cameron McDonald* [2000] 1 WLR 1311 or in *AEI Limited v Phonographic Performance Limited* [1999] 1 WLR 1507 at p1523 where Lord Woolf MR cites with approval a citation from an earlier case:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account some feature that he should, or should not have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he had not balanced the various factors fairly in the scale."

43. In my judgment the LVT erred by failing to take into consideration certain relevant matters and by misdirecting itself as to certain matters as described below. I also conclude that the LVT reached a decision which was, with respect, plainly wrong.

44. For the present I assume that an application for dispensation can be made and decided prior to the execution of the relevant qualifying long term agreement (as to which see paragraphs 50 and following below).

45. It was part of the Appellants' case that the application was premature having regard to the lack of detailed provisions regarding the proposed Partnering Agreement(s). It was part of the Appellants' submission that the lack of clarity in the present case regarding the nature of the proposed Partnering Agreement(s) was such that Camden's application "boils down to an application for *carte blanche* to enter into any kind of agreement with contractors for any kind of work in the future at any rates that Camden chooses ...". In my judgment the LVT has failed to consider this argument and has made an order which in effect does give Camden *carte blanche* (or something approaching *carte blanche*) regarding the Partnering Agreement(s) which Camden may seek to enter into with the benefit of the LVT's dispensation from the consultation requirements. Thus the order is expressed in paragraph 52 of the LVT's decision which grants dispensation from subparagraphs 4(4) to (7) of Schedule 2 of the Regulations:

> ".... in respect of the Partnering and Framework Agreements Camden intends to enter into with contractors to deliver its programme of housing capital works."

There is no limitation on the number of such Partnering Agreements nor when they are to be entered into nor with whom they are to be entered into nor what the terms are to be. In my judgment such a vague and open ended dispensation for future agreement(s) cannot properly be granted under section 20ZA. Alternatively if such a dispensation could be granted the clearest of reasons would be required explaining why, despite such uncertainty, it was reasonable to grant such dispensation. No such reasons are present in the LVT's decision.

46. Further, I conclude that the LVT erred in failing to take into consideration the fact that Camden did not provide any sustainable reason for dispensing with the consultation requirements by merely showing that it was not yet (ie at the date of the LVT hearing) possible to anticipate actual costs and works such that Camden could not yet give meaningful information, within the consultation provisions, to individual leaseholders and that Camden would only be able to put forward figures which would likely to be unreliable and meaningless, see paragraph 53 to 55 of the decision. The reason why such considerations could not constitute a proper basis for dispensing with the consultation requirements is as follows, namely that if it is indeed not reasonably practicable at the relevant time (ie when Camden comes to give notice of its proposal under paragraphs 4 and 5 of Schedule 2 to the Regulations) for Camden to make the estimates or give the information required in subparagraphs 4(4) or (5) or (6) of Schedule 2, then Camden is not required in any event to give such information. The point which the LVT appears to have overlooked is that the obligation to give the information set out in subparagraphs 4(4), (5) and (6) only arises if it is reasonably practicable to provide such information. The effect of the LVT's dispensing order is therefore to excuse Camden from providing such information even if it is reasonably practicable to provide it. The LVT erred in failing to consider this point. Also this point in my judgment shows that the order made by the LVT was wrong.

47. I further consider that the LVT misdirected itself in paragraph 58 by apparently concluding that the granting of the dispensation would not cause any diminution or significant diminution in the protection afforded to tenants against being asked to pay more than a reasonable amount in respect of the cost of any works carried out under the Partnering Agreements. I accept Mr Kilcoyne's arguments (see paragraph 21 above) that once the Partnering Agreement(s) is/are in place there will be difficulty for the tenant to say that the amount of costs incurred under such Partnering Agreement(s) on qualifying works was unreasonably high. We are not here concerned with whether the works to be carried out are reasonably necessary or are carried out to a reasonable standard – in respect of such points the tenants would still have substantial protection under section 19 of the Act. However, as regards works which the tenants accept are reasonably necessary and done to a reasonable standard, there may still be a question which the tenants wish to raise as to whether the cost which Camden seek to charge through the service charge in respect of carrying out such works is reasonable. The provisions of section 19(1) provide that relevant costs are to be taken into account only to the extent that they are "reasonably incurred". If works which are reasonably necessary and are done to a reasonable standard are carried out under a Partnering Agreement Camden will be able to meet criticism regarding the level of expense by pointing out that Camden is already contractually bound to the Partner and had to place the works with the Partner at the contract rate provided for in the Partnering Agreement, and therefore the costs were indeed reasonably incurred because, even if the works could reasonably have been expected to have been done significantly cheaper by other competent contractors, Camden

would be in breach of contract by giving the works to anyone other than the Partner. This difficulty seems to me to emphasise the importance to the tenants of being informed of, at least, the information contemplated in subparagraph 4(6) of Schedule 2 namely "the current unit costs or hour or daily rate applicable to the relevant matters to which the proposed agreement relates" so that the tenants can make observations in respect of these matters. If it is not reasonably practicable for this information to be provided under subparagraph 4(6) Camden does not have to do so anyway. Camden should not be excused, through a dispensation order, from providing this information if it is reasonably practicable for Camden to provide it as part of its proposal under paragraphs 4 and 5 of Schedule 2. It is in my judgment no answer to say (as Mr Gallagher did in submissions) that the contractor under a Partnering Agreement may not be guaranteed work to any particular level and that therefore Camden may, if it wishes to do so, be able to escape from having to put any particular work to a partner under a Partnering Agreement. This uncertainty as to whether Camden may or may not have freedom to place work outside a Partnering Agreement (despite the apparent indication that it is contemplated a Partner would be guaranteed a certain level of work every year) merely serves to underline that the present application is premature and to underline the potential benefit for tenants of being provided the relevant information under paragraph 4 of Schedule 2 if it is reasonably practicable so to provide it.

48. I further conclude that no or no sufficient reasons have been given by the LVT for concluding (if it did so conclude) that at the time when it comes for Camden to make its proposal under paragraphs 4 and 5 of Schedule 2 it will be impossible or not reasonably practicable for Camden to provide the relevant information. Even leaving aside subparagraphs 4(4) and (5), it is difficult to see why it will not be reasonably practicable to provide the information required under subparagraph 4(6), bearing in mind that Camden will by the date of the proposal have identified its preferred contractor(s) with whom it proposes to enter into Partnering Agreement(s) and it is difficult to see why, if Camden have sufficient information to have decided that these contractor(s) have put in the most economically advantageous tender(s) there will nonetheless be insufficient information available to comply with subparagraph 4(6). See also the facts recorded in paragraph 6(5) above regarding information Camden contemplates will become available through the tendering process.

49. I also consider that the LVT erred in failing to recognise that as regards at least some tenants it may be reasonably practicable to give the information contemplated in subparagraphs 4(4) and 5 of Schedule 2.

Jurisdiction to make prospective order under section 2ZA(1)

50. The question of whether there was jurisdiction in the LVT to make a determination under section 20ZA dispensing with the consultation requirements in respect of a qualifying long term agreement ("QLTA") which had not yet been entered into was not raised before the LVT and only emerged during the course of argument before me. Mr Kilcoyne in his reply indicated that he took this point. Bearing in mind that it went the jurisdiction of the LVT to make the determination it did and, in consequence, the jurisdiction of the Lands Tribunal to consider the matter, Mr Gallagher, very properly, did not feel able to object to this point being

raised albeit at this late stage. The parties agreed to put in further written submissions on the point by 20 February and the matter was restored for further oral argument before me on 21 February.

51. Mr Kilcoyne accepted that it may well be sensible for there to be jurisdiction in an LVT to grant dispensation before qualifying works ("QW") or QLTAs are carried out or entered into and he further accepted that the extract from Hansard referred to by Mr Gallagher indicated that the Government may have thought that a prospective application for dispensation was permissible prior to any QWs being carried out. However Mr Kilcoyne argued that, for the following reasons, it was only a retrospective application for dispensation that was possible, ie an application after the QWs or QLTAs had been respectively, carried out or entered into.

52. Mr Kilcoyne advanced the following points:

(1). He drew attention to the wording of section 20ZA(1) and argued that this contemplates that there must exist some identifiable QWs (works on a building) or some identifiable QLTA (ie an agreement entered into) in respect of which the LVT's determination is sought. The definition of QWs and QLTA in section 20ZA(2) confirmed this point. He submitted that the language of subsection (1) and (2) (even leaving aside for the moment the significance of the language in subsection (5)) indicated a need for there to be identifiable and existing QWs or QLTAs rather than proposed QWs or QLTAs.

2. In addition Mr Kilcoyne referred to the different phraseology in section 20ZA(5) which refers to proposed works or agreements. He submitted that if the dispensing power in subsection (1) was intended to operate in respect of proposed QWs or QLTAs then wording similar to that in subsection (5) would have been used.

3. He submitted that the words in section 20(1) did not indicate any different construction. Section 20(1) is backward looking in that, by definition, the subsection can only apply (namely to limit the relevant contribution to be paid by tenants) when QWs have been carried out or a QLTA has been entered into (see also section 20(3)).

4. Mr Kilcoyne pointed out that insofar as there was any difficulty for a landlord in being unable to seek dispensation for a proposed QLTA it would be perfectly possible to enter into a QLTA with a contractor in terms which included a condition subsequent which had the effect of releasing the parties from the agreement if the LVT decline to grant dispensation in respect of the executed agreement.

5. Mr Kilcoyne argued that there was no ambiguity in section 20ZA(1) and no absurdity in restricting an application for dispensation to a retrospective application and that accordingly there was no justification for looking at Hansard pursuant to the principles in *Pepper v Hart* [1993] AC 593. He also pointed out that, if Hansard was looked at, the statement from the Minister to the effect that it was intended that applications for dispensation should be capable of being made in advance was a statement in relation to QWs only and was not made in reference to QLTAs.

53. Mr Kilcoyne added that insofar as prospective applications for dispensation could be made in advance of QLTAs being entered into (or QWs being executed) there would need to be a high degree of certainty regarding what was proposed by way of the QLTA (or QWs) otherwise the terms of the proposed QLTA might change after the date the dispensation was given with the result that it was difficult to know whether the dispensation applied to the agreement in its amended form.

54. Mr Kilcoyne accepted that the expression "dispensed with" could have, as a matter of English language, both a prospective and retrospective application (see the quotation from the Shorter Oxford Dictionary referred to below) but he contended that it was only the retrospective meaning which was used in section 20ZA(1). Mr Kilcoyne added an argument to the effect that, bearing in mind the detailed nature of the scheme of consultation, it would be odd if there was a power to dispense with the requirements of such scheme merely on the basis of reasonableness and that the Tribunal should read the power of dispensation as being limited to exceptional or rare cases. I would say immediately that I do not see any justification for so reading the dispensing provision. The wording of section 20ZA(1) makes clear that the LVT may make a determination dispensing with the requirements if satisfied that "it is reasonable to dispense with the requirements". No doubt an LVT would, in deciding whether it was reasonable to dispense with the requirements, take into account the care and detail with which the scheme of consultation had been laid out and the advantages which such a scheme was intended to bring to tenants. However, an LVT should not start from a position of advising itself that the consultation requirements should not be dispensed with unless the case could be said to be exceptional.

55. For the following reasons, which are substantially those advanced in argument by Mr Gallagher, I am unable to accept Mr Kilcoyne's submissions on this point. I conclude that there is jurisdiction in the LVT to entertain and to determine an application for dispensation with the consultation requirements in respect of QWs or a QLTA even though the QWs have not yet been carried out or the QLTA has not yet been entered into.

56. The Shorter Oxford English Dictionary contains the following (inter alia) in respect of the phrase "dispense with":

> "a. To exempt, excuse (a person) from doing something; ...
>
> b. To give special exemption or relief from; to relax or set aside the obligation of ...
>
> c. To grant a dispensation for (something illegal or irregular)"

The first two meanings, namely a. and b., more naturally apply where the something to be done or the obligation lies in the future. The third meaning c. applies where something illegal or irregular has already occurred. Thus the expression "dispense with" can, as a matter of English language be used to indicate not only the exempting or excusing from the obligation to do something in the future but also the excusing of some past irregularity.

57. The wording of section 20(1) is in my judgment important. This provides that where the section applies to any QWs or QLTAs the relevant contributions of tenants are limited

> ".... unless the consultation requirements have been either –
>
> (a) complied with in relation to the works or agreement, or
>
> (b) dispensed with in relation to the works or agreement. ...."

I accept that section 20(1) can, by definition, only apply where QWs have been carried out or a QLTA has been entered into. However, in relation to such QWs or QLTAs the tenant's contributions are limited unless one of two things has happened in the past – and the phraseology used to describe these two thing is identical save that as regards one the expression "complied with" is used and as regards the other the expression "dispensed with" is used. If one is considering a matter of timing then the consultation requirements can only have been "complied with" at a time when the QWs have not been carried out and the QLTA has not been entered into. Thus section 20(1)(a) is contemplating something happening before the works are done or the agreement entered into. Turning to paragraph (b) I am unable to conclude that such similar wording is limited to events which can only have occurred at a date later than the events in paragraph (a) namely after the QWs have been carried out or the QLTA has been entered into. This is particular so bearing in mind the expression "dispensed with" is entirely capable (as seen above from the OED) of applying to a prospective dispensation and is accordingly capable of applying to events which occur at the same point in time as the point in time contemplated in paragraph (a) (ie the time for compliance, namely before the QWs or QLTA is entered into). Reading section 20(1) and section 20ZA(1) together I therefore conclude that the dispensing with the requirements can be done before or after the entry into QLTA rather than merely after such event.

58. I do not consider that the phraseology of section 20ZA(5) displaces this conclusion. Of necessity the expression "proposed works or agreement" is there used because this subsection is making provision as to what may be included in the regulations regarding the consultation requirements. It is therefore wholly apt to use words which make clear to a landlord what it is required to do in respect of proposed QWs or QLTAs.

59. Accordingly, without any recourse to Hansard I conclude the proper construction of section 20ZA(1) is that there is jurisdiction for the LVT to make a determination dispensing with the consultation requirements in respect of QWs which have not yet been carried out and a QLTA which has not yet been entered into. As to whether it is reasonable so to dispense may be significantly affected by the degree of certainty with which the proposed QWs or QLTA has been identified by the landlord.

60. If, contrary to my previous conclusion, the matter is ambiguous such that it is unclear whether a prospective dispensation can be given, then I conclude in accordance with *Pepper v Hart* that it is permissible to look at Hansard. On 11 March 2002 at columns 714 and following there is a statement written by Ms Keeble, the responsible Minister. Ms Keeble stated:

> "On dispensations, as drafted, clause 150 provides that a leasehold valuation tribunal may grant dispensation from all or any of the consultation requirements in a particular case. The intention is to ensure that landlords are not penalised for technical infringements that do not disadvantage leaseholders, or in circumstances in which it is not practicable to consult fully or at all – for example, where work has to be carried out in an emergency. It is arguable that, as drafted, clause 150 allows such dispensation to be sought only after the event. The new clause therefore makes it clear that a landlord may apply to a leasehold valuation tribunal for dispensation of the requirement to consult before the works are carried out."

I do not see any distinction between the position regarding QWs and that regarding QLTAs.

Disposal

61. For the reasons given above I conclude that the LVT had jurisdiction to entertain Camden's application for a determination to dispense with the consultation requirements in respect of the proposed Partnering Agreement(s) notwithstanding that no such agreements had actually been entered into prior to the date of the LVT's decision. However, I conclude that the LVT's decision granting dispensation from the requirements of subparagraphs 4(4) to (7) of Schedule 2 of the Regulations is legally flawed and, with respect, plainly wrong for the reasons stated above.

62. Accordingly, I allow the Appellants' appeal. The LVT's order dispensing with the consultation requirements of subparagraphs 4(4) to (7) in respect of proposed Partnering Agreements and Framework Agreements is quashed.

63. Understandably neither party made any application for costs and no such order is made.

Dated 14 March 2008

His Honour Judge Huskinson