CHI-21UC-LDC-2007-0002

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 27ZA OF THE LANDLORD AND TENANT ACT 1985

CARILLON HOUSE, 18 EVERSFIELD ROAD, EASTBOURNE

Applicant:	Longmint Ltd (Freeholder)
Respondents:	The Lessees of Carillon House
Date of hearing:	11 January and 8 May 2007
Date of inspection:	11 January 2007
Appearances:	Mr S Sinnatt (counsel) instructed by messrs. Juliet Bellis & Co., Mr Ricky Colley MIRPM and Mr Paul Charlton for the applicant
	Mr Donegan of Osler Taylor Doneghan & Co., for the respondents

Members of the Leasehold Valuation Tribunal:

Mr MA Loveday BA(Hons) MCIArb
Mr JN Cleverton FRICS

Background

1. This is an application under section 27ZA of the Landlord and Tenant Act 1985 to dispense with consultation requirements in respect of fire precaution works to a block of flats. The applicant is the freehold owner of Carillon House, 18 Eversfield Road in Eastbourne. The respondents are the leasehold owners of the flats.

2. The application follows a determination by a differently constituted tribunal on 21 December 2006 in respect of an application under section 27A of the 1985 Act brought by the lessee of flat 4, Mr Naish. That determination found that the landlord had not complied in several respects with the consultation in relation to the fire precaution works.

3. The issues to be determined are:
   (a) Whether, under section 20ZA of the Act, it is reasonable to dispense with all or any of the consultation requirements.
   (b) An application under section 20C of the 1985 Act that the costs of the applicant before the tribunal should not be added to the service charges.

4. The tribunal inspected before the hearing. The subject premises were located in a residential area of central Eastbourne overlooking a park. They comprised an end of terrace 4 storey house c.1900 with a lower ground floor and a 3 storey bay to the front which were divided into seven flats. Construction was of brick under a pitched replacement tile roof and the front elevation was rendered in cement and painted. There were timber sash windows. To the side was an external staircase giving access to the main door and common parts. The house was lower to the rear with 5 storeys and a rear addition. On the day of inspection, it was evident that fire precaution works had been completed. There were surface mounted cable conduits leading to a control panel on the ground floor, further conduits with emergency lighting and smoke detectors on the upper floors and fire signage. The doors had inlaid smoke seals. Each flat that could be seen had a ceiling mounted alarm sounder and a panel

button. The tribunal inspected flat 4 on the upper ground floor. The living room widows of the flat overlooked the light well to the side of the rear addition and the rear bedroom windows overlooked the rear garden. Both were at first floor height. The internal wall between kitchen and living room had been lined with fire resistant material.

5. The tribunal was provided with bundles from the applicant and the respondents together with skeleton arguments on both sides. In addition, evidence was given by Mr Ricky Colley MRIPM, the regional director of Haywards Property Services Ltd ("Haywards") and Mr Paul Charlton of the building surveyors Dunlop Haywards. The tribunal is indebted to counsel for the applicant and to the solicitor for the respondents whose written and oral submissions were succinctly and cogently put.

The statutory provisions

6. Before dealing with the facts, it is necessary to set out the statutory framework. The first is section 20 of the 1985 Act:

> "*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.*

7. The power to dispense under section 20ZA is as follows:

> "*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.*"

8. In turn, the material consultation requirements which apply in this case are under schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2005. The relevant provisions can be summarised as follows:

> *11-(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)-*

(a) ...
(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out-
(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and
(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and
(c) make all of the estimates available for inspection.

...(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by-
(a) each tenant; and
(b) the secretary of the recognised tenants' association (if any).

(10) The landlord shall, by notice in writing to each tenant and the association (if any)-
(a) specify the place and hours at which the estimates may be inspected;
(b) invite the making, in writing, of observations in relation to those estimates;
(c) specify-
(i) the address to which such observations may be sent;
(ii) that they must be delivered within the relevant period; and
(iii) the date on which the relevant period ends.

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

***12** Where, within the relevant period, observations are made in relation to estimates by ... any tenant, the landlord shall have regard to those observations".*"

The "*relevant period*" in paragraph 11(10)(c)(iii) is defined in regulation 2 as "*the period of 30 days beginning with the date of the notice.*"

Evidence

9. The facts are not really in dispute and are largely taken from the previous determination.

10. The property is managed by Haywards, whose principal office is in Croydon. On 28 January 2004, Eastbourne Borough Council served a 'minded to' notice under Part III of the Housing Act 1985 which required

fire precaution works to be carried out within six months. Messrs Haywards successfully appealed this notice on the ground that it should have been served on the lessees as well as the reversionary owner. As a result, further similar 'minded to' notices were served on the landlord and each lessee on 9 November 2004 – again requiring the fire precaution works to be completed within six months. A key feature of these notices was that they specified the provision of a new metal external fire escape staircase from the rear bedroom window of flat 4 to the garden.

11. On 16 November 2004, Haywards served on each lessee an initial notice under paragraph 8 of Schedule 4 to the Consultation Regulations. This described the works as "*Fire safety works as per Notice issued by Eastbourne Borough Council on 09 Nov 04.*" The notice invited observations "*within 30 days of this Notice i.e. by 17th December 2004*". On 18 November, Haywards wrote to the lessees suggesting that works to the flats (including the fire escape to Flat 4) should be carried out by the individual lessees with the applicant's surveyors merely overseeing the works. The works were supervised by Mr Charlton of Dunlop Haywards (which as its name suggests is associated with Haywards). On 23 and 25 November 2004, Mr Naish wrote to Haywards proposing that the landlord should carry out the fire precaution works and recover the cost by way of the service charges. On 1 December 2004, Haywards replied stating that on legal advice they considered the new external staircase was the landlord's responsibility. They suggested that the lessees could nominate contractors and carry out the works to their individual flats themselves, but that the applicant needed a surveyor to be involved with the staircase and automated fire system in the common parts.

12. Haywards then followed an admittedly novel procedure. On 16 November 2004, the agent drafted and sent to each lessee a blank form headed "*Consent to proceed with Fire Safety Works at 18 Eversfield Road Eastbourne BN21 2AS.* The form read as follows:

> *"As lessee of Flat ___, 18 Eversfield Road, Eastbourne, BN21 2AS, I hereby authorise Haywards Property Services to proceed with the Fire Safety Works without entering into the 60 day notice period. I understand that the works will be paid for using the Service Charge account"*

The lessees were asked to sign these forms under cover of a letter which described the purpose as "*to by-pass the s20 Notice*". The forms have been described as forms of "*consent*" or "*waiver*" but the tribunal adopts the neutral label "*by pass notice*" used by the agent itself.

13. Mr Colley produced copies of by-pass notices completed and signed by all seven lessees dated between 17 November 2004 and 25 January 2005. It should be noted that the previous tribunal understood that not all the lessees had completed the forms, but it is accepted before this tribunal that all lessees have now signed and returned by-pass notices.

14. On 5 December 2004, Mr Naish nominated five contractors which included Secure Systems of Brighton and a surveyor Messrs Heynes of Eastbourne. On 15 January 2005, Eastbourne Borough Council followed up the 'minded to' notice with a notice requiring the fire precaution works under s.352 of the Housing Act 1985.

15. Between January and August 2005, Mr Colley's evidence was that he was chasing the by-pass notices from the lessees. Between August 2005 and July 2006, Mr Colley stated that further delays occurred because the financing for the works needed to be sorted out.

16. On 17 July 2006, Haywards sent each lessee a paragraph (b) statement and a notice under regulation 11(10) of Schedule 4. The former gave details of five estimates for the works from contractors which included Secure Systems (who were stated not to have submitted a tender) and the firms of Knapman & Sons and Barrett Bros (who had). The lowest estimate was from Knapman & Sons for £59,339.84. The latter included the following words:

> *"We invite you to make written observations in relation to any of the estimates by sending them to* ***Kim Shoesmith, Haywards Property Services, Phoenix House, 11 Wellesley Road, Croydon CRO 2NW.*** *Observations must be made within the consultation period of 30 days from the date of this notice. The consultation period will end on Tuesday 14th August 2006."*

The notices were posted by ordinary post.

17. On 20 July 2006, Dunlop Haywards wrote to the lessees stating that it had been instructed to proceed with the works and that the works would start on 31 July 2006. In the present proceedings, Mr Charlton gave evidence about this letter. He attributed it to the need to proceed with the works as quickly as possible to satisfy the local authority. On 21 July, Mr Naish wrote to the agent querying the cost of the surveyor, asking for copies of the estimates from the contractors and complaining that he had been allowed insufficient "consultation time". On 16 August 2006, Knapman & Sons wrote to the lessees to say they had been instructed to carry out the fire precaution works. According to Mr Naish, works commenced on 31 July 2006 (the date referred to in Dunlop Haywards letter of 13 July). According to Mr Chapman and Mr Colley, the works commenced towards the end of August 2006.

18. During the course of the hearing, the tribunal was referred to correspondence during the course of the works involving three lessees. The lessee of flat 1 is a Mr McMillan. On 4 September 2006, he wrote to the agent about how the cost of the fire escape should be divided between the lessees. The agent acknowledged this on 6 September 2006. A further holding reply was sent on 5 October 2006. The agent accepted it did not give a substantive response and on 5 December 2006 Mr McMillan wrote again. In response, on 15 December the agent triggered its complaints procedure and eventually gave a substantive response on 19 December 2006. The lessee of flat 6 is Mr Dan Wilkes. On 21 July 2006 he asked for a copy of the estimates. On 21 November he repeated this request. Mr Charlton visited in response to this letter and provided copies of the estimates. Mr Wilkes then made further observations on them in a letter

of 4 December 2006. This letter referred to the cost of recessed wiring in the specification, whereas the contractors had installed surface mounted wiring at a much cheaper cost. As stated above, the lessee of flat 4 is Mr Naish. At some stage in 2006, he contacted the fire authorities and devised a much cheaper means of satisfying the requirement for a fire escape from flat 4 (albeit one which involved works to the interior of his flat). Instead of building a metal fire escape to the rear of the house to allow escape from the first floor kitchen window, Mr Naish was prepared to partition off his kitchen with fire resistant materials. This would create a fire protected escape route to the front door to the flat down the communal staircase to the front door (the proposal is referred to in paragraph 28 of the previous determination). This scheme had emerged by 12 October 2006 when Mr Naish objected to the planning application by the landlord to install the external metal fire escape. Eastbourne BC approved these alternative proposals on 18 October 2006.

19. Mr Charlton stated that when he attended the tribunal on 1 November 2006, he and Mr Naish discussed the proposed modifications to the fire precaution works. Mr Charlton agreed with the proposals and the planning application was withdrawn on 5 December 2006.

20. The tribunal determination of 21 December 2006 found that:
    (a) The landlord's notice of intention dated 16 November 2004 complied with paragraph 8 of Schedule 4 to the regulations.
    (b) The landlord "had regard to" Mr Naish's observations in relation to the initial notice in accordance with paragraph 10 of Schedule 4 to the regulations.
    (c) The paragraph (b) statement dated 17 July 2006 did not satisfy paragraph 11(5)(b)(ii) of Schedule 4 to the regulations in that it failed to summarise the lessees' observations in relation to the initial notice.
    (d) The notice dated 17 July 2006 did not comply with paragraph 11(11)(c) of Schedule 4 to the regulations in that it specified an incorrect date on which the "*relevant period*" ended.

(e) The notice dated 17 July 2006 did not comply with paragraph 10(10)(a) of Schedule 4 in that it failed to specify a place at which estimates could be inspected. Had the notice specified such a place, Croydon would not have in any event been a "*reasonable*" place for inspection under paragraph 2(1) of the Schedule.

(f) The landlord did not "*have regard to*" observations in response to the paragraph (b) statement as required by paragraph 12 of Schedule 4.

In the absence of any application to dispense with the consultation requirements, the tribunal limited the relevant contribution by Mr Naish to £250 under section 20(6) of the 1985 Act. The present application was made on 11 January 2007, almost immediately after the previous tribunal gave its determination.

21. The works were completed in February 2007. Once the cost of the fire escape was removed from the works, the final bill was much lower than had been initially anticipated. Mr Charlton produced a copy of final account dated 13 March 2007 for £26,699.

Submissions

22. Counsel for the applicant relied on *Woodfall* at 7.199.8 which suggested the tribunal had power to dispense with the consultation requirements after works were completed. This was not challenged by the respondents.

23. Mr Sinnatt submitted that the power under section 20ZA differed from the original power to dispense under section 20 in that the tribunal had only to be satisfied that it was reasonable to dispense with the consultation requirements. Again, he relied on *Woodfall* at 7.199.8 which includes the following passage:

> "*The tribunal may make the determination [under section 20ZA] if it is satisfied that it is reasonable to dispense with the requirements. It is to be noted that (by contrast with equivalent power of the court under the original section 20) the tribunal only has to be satisfied that it is reasonable to dispense with the requirements: it does not have to be satisfied that the landlord acted reasonably*".

The tribunal therefore had to consider all the circumstances. Although this tribunal was not bound to follow decisions of other tribunals, the applicant relied on the following determinations of other tribunals:

(a) *St Anns Court, Sutton* (LON/00BR/LDC/2006/0033). Where no tenant objected, the tribunal dispensed with the consultation requirements.

(b) *Arlington House, Margate* (CHI/29UN/LDC/2004/0017). This dealt with fire precaution works. The tribunal found that the works were urgent despite the landlord having delayed.

24. The applicant relied on a number of factors to support the exercise of discretion. The previous tribunal had found that the initial notice of 16 November 2004 was valid. The breaches of the regulations had all related to the notices of 17 July 2006. The underlying purpose of section 20 and the regulations was to prevent landlords simply ignoring the consultation procedure, whereas in this instance the landlord had not sought to disregard the consultation requirements. The most significant criticism made by the previous tribunal had been that the landlord had no intention of having regard to observations in response to the estimates. However, Mr Charlton had responded to Mr Naish's suggestions made on 1 November 2006. As a result, the tenants made considerable savings in the cost of the works. In any event, the works did not in fact commence until after the consultation period (which should have been specified in paragraph 11(10)(c)(iii) of Schedule 4) had expired. As to the letter of 20 July 2006 Mr Sinnatt relied on Mr Charlton's explanation which was an entirely proper reason. Insofar as the landlord had delayed carrying out the fire precaution works, this conduct was not part of the test in section 20ZA. The reasoning in *Arlington* should be followed. Counsel also relied on the by-pass notices. Although counsel initially described these as "waiver" notices, he did not rely on equitable principles of waiver. However, he submitted that it was possible to contract out of the Act and that the notices had that effect. Counsel contrasted section 20 and the regulations with s.38 of the Landlord and Tenant Act 1954 (as amended) which expressly precluded contracting out save in certain defined

circumstances. Secondly, he submitted that even if one could not contract out, the fact that the lessees consented to the works by signing the bypass notices was highly material. The wording of the by-pass notices was clear and unlimited and they were intended to last until completion of the works. Counsel relied on the promptness of the application made once the previous tribunal determination was received. Mr Naish had given evidence to the previous tribunal that "*at no time ha[d] he ever objected to these works being carried out*". It was Mr Naish who had first suggested the fire precaution works should be carried out. In effect, the landlord had tried to comply with the regulations but in its haste had not complied with the statutory requirements. In his closing submissions, counsel accepted that the agent had not replied promptly to all correspondence from the lessees. However, the single most important suggestion by them was Mr Naish's proposal to dispense with the external fire escape. This was something the landlord could not have insisted on (because it involved Mr Naish losing part of his kitchen), but Mr Charlton had readily agreed to the revised scheme and this gave the lie to the suggestion the landlord was not prepared to listen. It was also submitted that if the discretion was not exercised to dispense with the requirements of section 20 and the regulations, the lessees would obtain a significant windfall – namely the valuable fire precaution works for a maximum contribution of £250 per head. Insofar as the relevant cost of the works may be excessive or unreasonable or that the final bill from contractors may have included matters which they should not, this was a matter for a future tribunal in any application under section 19 of the 1985 Act.

25. The respondents relied on the words of Robert Walker LJ in *Martin v Maryland Estates* [1999] 2 EGLR 53:

> "*the basic statutory purpose of section 20 is, as the sidenote indicates, consultation with tenants on estimates provided to them. Parliament has recognised that it is of great concern to tenants, and a potential cause of great friction between landlord and tenants that tenants may not know what is going on or what is being done ultimately at their expense.*"

Mr Donegan submitted that lessees should know exactly what work they were being asked to contribute to, should be informed of the anticipated cost of the works and should be given an opportunity to comment on the scope of the works, the choice of contractors and the cost of the works. In this case, the previous tribunal had found several breaches of the consultation requirements. In addition, it was material that the applicant was a substantial company advised by professional agent which should have known the section procedure. The works were not of an emergency nature because it took the applicant almost 4 years to start the work. Fire precaution works were not that novel or unusual. The landlord did not make any application to dispense with the consultation requirements at an early stage (nor for that matter at the earlier tribunal hearing). No explanation had been given for why the start of the works was delayed. The cost of the works was very considerable. Had consultation been properly carried out, further savings could and would have been identified – such as the cost of recessed conduits. As to the by-pass notices, there was no provision in the Act enabling the parties to contract out of the provisions of section 20. The proper means of dispensing with the requirements was by way of a section 20ZA application. In any event, the by-pass letters did not purport to dispense with the consultation requirements – they only allowed the landlord to proceed without any further delay under the supervision of a local surveyor. Mr Donegan relied on previous tribunal determinations in the following applications where dispensation was refused:

(a) *22/22A Temple Fortune Mansions London NW11* (LON/00AC/LDC/2006/0031)

(b) *126-127 Shoreditch High Street London E1* (4 October 2004)

(c) *214-216 Brettenham Road London E17* (LON/00BH/LDC/0021)

(d) *Sussex Mansions, Eastbourne* (CHI/21UC/LDC/2005/03)

The consultation requirements were not mere formalities and they were there to protect the lessees. In effect, the works had been decided upon before the paragraph (b) notice was served and the landlord had simply ignored the lessees. In his oral submissions, Mr Donegan submitted there was no windfall for the tenants because the cost of the fire precaution

works were not recoverable in any event under the fourth schedule to the lease.

Determination

26. The first issue is the nature of the discretion to be exercised. The starting point is the underlying purpose of section 20 itself, set out by Robert Walker LJ in *Maryland Estates* in the passage quoted above. However, *Maryland Estates* was not a decision under section 20ZA but under the rather differently worded provisions of section 20(9) of the Act which section 20ZA replaced. The old discretion to dispense given to the court under section 20(9) was that:

> "*in proceedings relating to a service charge the court may, if satisfied that the landlord acted reasonably, dispense with all or any of the requirements*".

By contrast, section 20ZA permits the tribunal to dispense "*if satisfied that it is reasonable to dispense with the requirements*". The distinction is referred to in *Woodfall* at paragraph 7.199.8. However, the power of the tribunal is not narrower than the old power of the court. It is a broadening of the matters which may be taken into account, not a narrowing. In addition to the actions of the landlord, the tribunal may now take into account a wide range of other considerations. Although it would be impossible to set out a full list of these considerations they will often include matters such as the actions of the lessees (in particular whether they object), the nature of the works, the costs involved and whether there is evidence of real (as opposed to theoretical) prejudice having been caused to the lessees or the landlord. However, the conduct of the landlord will always be an important consideration, and insofar as the passage in *Woodfall* and/or the applicant may suggest otherwise, the tribunal rejects this contention.

27. However, there are limits to what should be taken into account. The discretion is one to dispense with the consultation requirements set out in section 20 of the 1985 Act. This is a quite separate jurisdiction to section 27A of the Act, which is the proper route for dealing with issues about

whether the relevant costs included in the service charges are contractually recoverable under the provisions of the lease or whether the relevant costs of the works are reasonably incurred within the meaning of section 19 of the Act. During the course of an application to dispense, the tribunal should not therefore embark on a general examination of whether the cost of the qualifying works are excessive or whether the works include matters which they ought not to either under the lease or by virtue of section 19 of the Act. We agree with the submissions of Mr Sinnatt that these are matters which may or may not arise for determination at some future date by another tribunal if an application is ever made under section 27A of the Act. However, they are not material here.

28. For similar reasons. one leasehold valuation tribunal will not generally have any regard to the determinations of previous tribunals when exercising its discretion under section 20ZA. Each set of facts will necessarily be different. The wide discretion given to us under section 20ZA means it is hazardous to take into account the reasoning of another tribunal when considering similar facts even if one tribunal was bound by the findings of another (which it is not). The tribunal therefore does not take into account the reasoning in the *Arlington House* decision or indeed any of the others cited by the parties.

29. What then are the relevant factors which assist the tribunal? Plainly, the actions taken by the landlord to satisfy the requirements of the regulations are highly relevant. The previous tribunal identified three separate breaches. Three related to the wording of the paragraph (b) statement and accompanying notice. One related to the failure to take into account representations. However, the tribunal is satisfied that this is not a case of a landlord which deliberately took no action (as was, for example the situation in *Maryland Estates*). The previous tribunal found that the landlord complied with the important initial notice requirements. Furthermore, it did send a paragraph (b) statement and accompanying notice. The failures to comply with the regulations were deficiencies in form rather than a complete absence of notice. In respect of the most

serious allegation, namely failure to have regard to submissions made by the lessees in response to the paragraph (b) statement, this was an isolated matter in that the previous tribunal found the applicant had complied with the similar obligation under paragraph 10 of Schedule 4 to the regulations. Furthermore, the landlord did eventually respond to the only substantial representation made in response to the tender documentation, namely Mr Naish's suggested scheme to dispense with the fire escape. It does not assist the landlord that it was a substantial had the resources and advice available to have complied with the consultation requirements. However, the broad picture is one, as Mr Sinnatt submitted, one of a landlord whose actions fell short of what was required rather than deliberately attempting to avoid the consultation requirements. The tribunal considers that this favours the landlord.

30. The second consideration is the actions of the tenants. This largely turned on the question of the by-pass notices. The tribunal rejects the applicant's main contention, namely that the parties contracted out of section 20 by way of the notices for three reasons. First and foremost, the tribunal does not accept that the parties may contract out of section 20. Secondly, having abandoned any argument about equitable waiver, a contract requires consideration – and it is difficult to see what consideration was given in return for the giving up of the lessees' statutory protection. Thirdly, the wording of the by-pass notices themselves was insufficiently clear to avoid the consequences of section 20 of the Act. In any event, the tribunal considers there is substance in Mr Sinnatt's fallback position. The by-pass notices did show that in broad terms the tenants did not object to the works as originally proposed in the initial notice. Mr Donegan countered this by analysing the strict wording of the by-pass notices. The notices did not of course specifically state that the lessees waived the need to comply with paragraphs 11 and 12 of Schedule 4 to the regulations. However, taking the by-pass notices as a whole, they gave a green light to the landlord proceeding with the works originally proposed, without the lessees first having sight of estimates or further details. All the lessees signed these by-pass notices. Although this

determination should not be taken as an approval of such an unorthodox procedure in future, the by-pass notices are another factor which favours dispensation in this instance.

31. The third consideration is the nature of the works. There was considerable argument about whether the works were urgent or not. It is true that the works were not urgent in the sense that they were carried out quickly. There was, as stressed by the respondents, a four year gap between the first local authority notice and the completion of the works, and the explanation for the delays given by the applicant's witnesses are not wholly satisfactory (particularly the delay between 2005 and 2006). Moreover, fire precaution works are routine in the sense that each year many thousands of properties are subject to statutory notices under Part II of the Housing Act 1985. However, there is force in the applicant's argument that the nature of the works is important. Fire precaution works are different to routine repairs or maintenance which are the usual works covered by section 20. The local authority may prosecute for failure to carry them out and they involve the personal safety of occupiers. The nature of the works is again a factor in favour of dispensation.

32. The cost of the works is another consideration, in the sense that a tribunal might more readily dispense with consultation if the issue was a relatively trivial one. Here the costs are relatively substantial, some £26,699. The tribunal considers this factor favours the lessees.

33. The most difficult question is whether the lessees have suffered real prejudice as a result of the failure to comply with the consultation regulations. As a result of the previous tribunal's determination, the lessees cannot complain about the initial notice. They were given a broad outline of the works at an early stage and they had an opportunity to nominate contractors. As for the first of the breaches which were established, the paragraph (b) notice gave the names of each contractor who returned a tender and the costs involved. The lessees were informed that they could inspect, and were invited to make comments on the

tenders. The lessees were therefore provided with further important information about the proposed works. As for the second breach, failure to summarise the lessees' observations did not cause any obvious prejudice to the lessees. As to the notice accompanying the paragraph (b) statement the erroneous date was only slightly out. Further, the works were not commenced until after the date which should have been specified in the notice. None of these matters suggest any real prejudice was caused.

34. However, the same cannot be said for the remaining breaches. The failure to take the representations on the paragraph (b) notice into account caused real rather than a theoretical prejudice. The same can be said for the failure to give details of where the tenders could be inspected. This prejudice was compounded by the fact that the tenders were only available in Croydon (which the previous tribunal found to be an unreasonable place for inspection) and the lack of response to the correspondence by the agent at that time. Were these the only considerations, prejudice would be a factor weighing heavily against the landlord. However, the prejudice was mitigated in this instance by the subsequent actions of the landlord. The tender documents were (albeit belatedly) supplied and Mr Naish's alternative scheme was adopted by Mr Charlton. This resulted in a considerable reduction in the cost of the works. It is hard to see any further prejudice to the lessees once the external fire escape was removed from the scheme. It was suggested that the lessees lost the chance to object to the contractor's decision to use unsightly surface mounted conduits rather than chasing the wiring into the walls. However, this defect (if indeed it is a defect) was nothing to do with the tender documentation or paragraph (b) statement. The specification and tenders suggested wiring should be chased into the walls. Any challenge to these relevant costs would properly be a matter for a section 27A application. It follows that the lessees have not suffered any substantial prejudice as a result of any breach of the regulations.

35. Finally, there is the question of the effect on the landlord. Plainly, if the application fails, the tenants will have a windfall in the sense that the landlord will be unable to recover the relevant costs of the works beyond the amounts allowed by section 20 and the landlord would suffer a considerable loss. This is not wholly unexpected; the plain intention of section 20(6) is to create a penal provision to encourage landlords to consult on major works. However, it is legitimate to take into account that the landlord would suffer a considerable loss if the discretion is not exercised. The regulations are complex, and they are a fetter on the landlord's contractual right to recover its expenditure. The fact that the landlord will suffer a significant irrecoverable loss is a factor in favour of dispensing with the consultation requirements where other factors are evenly balanced.

36. Taking these factors together the tribunal considers it is appropriate to dispense with the consultation requirements in relation to the fire precaution works.

Section 20C

37. The applicant submitted that there was no prejudice to the respondents in making the application when it did. The reason no application under section 20ZA had been made before January 2007 was that before the previous LVT determination the applicant had considered it had complied with the consultation requirements. After the respondents had signed the bypass notices, it was entirely reasonable for the applicant to proceed without a section 20ZA application. Furthermore, once the application was made, the respondents could have agreed it without taking every point possible. They had not acted proportionately in the light of the landlord's agreement to take on board Mr Naish's modifications to the scheme and the considerable savings made.

38. The respondents relied on three points. First, the lack of any response to the Wilkes enquiries after works were commenced. Secondly, the fact that Mr Naish had made an application for a determination that the costs

of the works were unreasonable under section 19 of the 1985. Thirdly, that the bypass letters were not unconditional agreements to waive all rights under section 20.

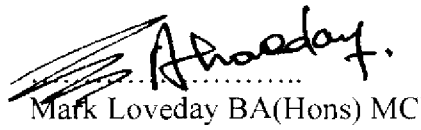
39. Having regard to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000 the tribunal considers it just and equitable to make an order under section 20C of the 1985 Act. Firstly, although the applicant has succeeded in its application, the application should properly have been made at a much earlier stage, with a resultant saving in costs. Initially, the applicant chose to adopt an unorthodox means of by-passing the section 20 procedure when parliament provided, by way of section 20ZA, a perfectly adequate method of dispensing with the consultation procedure. Subsequently, when it became obvious in the previous application by Mr Naish that failure to comply with section 20 was a live issue, it should have been obvious that a section 20ZA cross-application was needed. Either way, it is likely that any application under section 20ZA would have been made either by consent or without the need for a costly application involving counsel. Secondly, the applicant's failure to comply with the consultation regulations is entirely its own responsibility. In many cases, a section 20ZA application is made because it is not practicable to consult (e.g. for emergency roof repairs). Where an application under section 20ZA is made after the event because the applicant has failed to comply with some part of the consultation requirements, it is less likely to be fair and reasonable for the costs of that application to be added to the service charge. The works here may have been emergency works in the sense that they were fire precaution works, but it was practicable for the landlord to have complied fully with the regulations. Thirdly, the application was made very late in the day, once works had commenced. There is no really satisfactory explanation why the respondents were not supplied with copies of the estimates until after the works began. The applicant did of course accept Mr Naish's proposals which resulted in a much reduced cost for the scheme. However, this was again very late in the day after the works were

commenced. Although there will be a cost to the landlord, it would not be fair and reasonable to visit this cost on the lessees.

Conclusions

40. The previous determination found the landlord had complied with regulations 8 to 10 of Schedule 4 to the Service Charges (Consultation Requirements)(England) Regulations 2003 in respect of the cost of fire precaution works completed in 2007. The tribunal determines under section 20ZA(1) of the Landlord and Tenant Act 1985 to dispense with regulations 11 to 13 of the consultation regulations.

41. The tribunal further orders under section 20C of the 1985 Act that no part of the applicant's costs incurred before the tribunal in connection with this application are to be regarded as relevant costs in determining the amount of the service charge payable by any of the respondents.



Mark Loveday BA(Hons) MCI Arb
Chairman
Dated: 16 June 2007

CHI-21UC-LDC-2007-0002

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 27ZA OF THE LANDLORD AND TENANT ACT 1985

CARILLON HOUSE, 18 EVERSFIELD ROAD, EASTBOURNE

Applicant:	Longmint Ltd (Freeholder)
Respondents:	The Lessees of Carillon House
Date of hearing:	11 January and 8 May 2007
Date of inspection:	11 January 2007
Appearances:	Mr S Sinnatt (counsel) instructed by messrs. Juliet Bellis & Co., Mr Ricky Colley MIRPM and Mr Paul Charlton for the applicant Mr Donegan of Osler Taylor Doneghan & Co., for the respondents

Members of the Leasehold Valuation Tribunal:

Mr MA Loveday BA(Hons) MCIArb
Mr JN Cleverton FRICS

Background

1. This is an application under section 27ZA of the Landlord and Tenant Act 1985 to dispense with consultation requirements in respect of fire precaution works to a block of flats. The applicant is the freehold owner of Carillon House, 18 Eversfield Road in Eastbourne. The respondents are the leasehold owners of the flats.

2. The application follows a determination by a differently constituted tribunal on 21 December 2006 in respect of an application under section 27A of the 1985 Act brought by the lessee of flat 4, Mr Naish. That determination found that the landlord had not complied in several respects with the consultation in relation to the fire precaution works.

3. The issues to be determined are:
   (a) Whether, under section 20ZA of the Act, it is reasonable to dispense with all or any of the consultation requirements.
   (b) An application under section 20C of the 1985 Act that the costs of the applicant before the tribunal should not be added to the service charges.

4. The tribunal inspected before the hearing. The subject premises were located in a residential area of central Eastbourne overlooking a park. They comprised an end of terrace 4 storey house c.1900 with a lower ground floor and a 3 storey bay to the front which were divided into seven flats. Construction was of brick under a pitched replacement tile roof and the front elevation was rendered in cement and painted. There were timber sash windows. To the side was an external staircase giving access to the main door and common parts. The house was lower to the rear with 5 storeys and a rear addition. On the day of inspection, it was evident that fire precaution works had been completed. There were surface mounted cable conduits leading to a control panel on the ground floor, further conduits with emergency lighting and smoke detectors on the upper floors and fire signage. The doors had inlaid smoke seals. Each flat that could be seen had a ceiling mounted alarm sounder and a panel

button. The tribunal inspected flat 4 on the upper ground floor. The living room widows of the flat overlooked the light well to the side of the rear addition and the rear bedroom windows overlooked the rear garden. Both were at first floor height. The internal wall between kitchen and living room had been lined with fire resistant material.

5. The tribunal was provided with bundles from the applicant and the respondents together with skeleton arguments on both sides. In addition, evidence was given by Mr Ricky Colley MRIPM, the regional director of Haywards Property Services Ltd ("Haywards") and Mr Paul Charlton of the building surveyors Dunlop Haywards. The tribunal is indebted to counsel for the applicant and to the solicitor for the respondents whose written and oral submissions were succinctly and cogently put.

The statutory provisions

6. Before dealing with the facts, it is necessary to set out the statutory framework. The first is section 20 of the 1985 Act:

> "*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.*

7. The power to dispense under section 20ZA is as follows:

> "*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.*"

8. In turn, the material consultation requirements which apply in this case are under schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2005. The relevant provisions can be summarised as follows:

> *11-(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)-*

(a) ...
(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out-
(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and
(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and
(c) make all of the estimates available for inspection.

...(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by-
(a) each tenant; and
(b) the secretary of the recognised tenants' association (if any).

(10) The landlord shall, by notice in writing to each tenant and the association (if any)-
(a) specify the place and hours at which the estimates may be inspected;
(b) invite the making, in writing, of observations in relation to those estimates;
(c) specify-
(i) the address to which such observations may be sent;
(ii) that they must be delivered within the relevant period; and
(iii) the date on which the relevant period ends.

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

***12** Where, within the relevant period, observations are made in relation to estimates by ... any tenant, the landlord shall have regard to those observations".*"

The "*relevant period*" in paragraph 11(10)(c)(iii) is defined in regulation 2 as "*the period of 30 days beginning with the date of the notice.*"

Evidence

9. The facts are not really in dispute and are largely taken from the previous determination.

10. The property is managed by Haywards, whose principal office is in Croydon. On 28 January 2004, Eastbourne Borough Council served a 'minded to' notice under Part III of the Housing Act 1985 which required

fire precaution works to be carried out within six months. Messrs Haywards successfully appealed this notice on the ground that it should have been served on the lessees as well as the reversionary owner. As a result, further similar 'minded to' notices were served on the landlord and each lessee on 9 November 2004 – again requiring the fire precaution works to be completed within six months. A key feature of these notices was that they specified the provision of a new metal external fire escape staircase from the rear bedroom window of flat 4 to the garden.

11. On 16 November 2004, Haywards served on each lessee an initial notice under paragraph 8 of Schedule 4 to the Consultation Regulations. This described the works as "*Fire safety works as per Notice issued by Eastbourne Borough Council on 09 Nov 04.*" The notice invited observations "*within 30 days of this Notice i.e. by 17th December 2004*". On 18 November, Haywards wrote to the lessees suggesting that works to the flats (including the fire escape to Flat 4) should be carried out by the individual lessees with the applicant's surveyors merely overseeing the works. The works were supervised by Mr Charlton of Dunlop Haywards (which as its name suggests is associated with Haywards). On 23 and 25 November 2004, Mr Naish wrote to Haywards proposing that the landlord should carry out the fire precaution works and recover the cost by way of the service charges. On 1 December 2004, Haywards replied stating that on legal advice they considered the new external staircase was the landlord's responsibility. They suggested that the lessees could nominate contractors and carry out the works to their individual flats themselves, but that the applicant needed a surveyor to be involved with the staircase and automated fire system in the common parts.

12. Haywards then followed an admittedly novel procedure. On 16 November 2004, the agent drafted and sent to each lessee a blank form headed "*Consent to proceed with Fire Safety Works at 18 Eversfield Road Eastbourne BN21 2AS.* The form read as follows:

> *"As lessee of Flat ___, 18 Eversfield Road, Eastbourne, BN21 2AS, I hereby authorise Haywards Property Services to proceed with the Fire Safety Works without entering into the 60 day notice period. I understand that the works will be paid for using the Service Charge account"*

The lessees were asked to sign these forms under cover of a letter which described the purpose as "*to by-pass the s20 Notice*". The forms have been described as forms of "*consent*" or "*waiver*" but the tribunal adopts the neutral label "*by pass notice*" used by the agent itself.

13. Mr Colley produced copies of by-pass notices completed and signed by all seven lessees dated between 17 November 2004 and 25 January 2005. It should be noted that the previous tribunal understood that not all the lessees had completed the forms, but it is accepted before this tribunal that all lessees have now signed and returned by-pass notices.

14. On 5 December 2004, Mr Naish nominated five contractors which included Secure Systems of Brighton and a surveyor Messrs Heynes of Eastbourne. On 15 January 2005, Eastbourne Borough Council followed up the 'minded to' notice with a notice requiring the fire precaution works under s.352 of the Housing Act 1985.

15. Between January and August 2005, Mr Colley's evidence was that he was chasing the by-pass notices from the lessees. Between August 2005 and July 2006, Mr Colley stated that further delays occurred because the financing for the works needed to be sorted out.

16. On 17 July 2006, Haywards sent each lessee a paragraph (b) statement and a notice under regulation 11(10) of Schedule 4. The former gave details of five estimates for the works from contractors which included Secure Systems (who were stated not to have submitted a tender) and the firms of Knapman & Sons and Barrett Bros (who had). The lowest estimate was from Knapman & Sons for £59,339.84. The latter included the following words:

> *"We invite you to make written observations in relation to any of the estimates by sending them to* ***Kim Shoesmith, Haywards Property Services, Phoenix House, 11 Wellesley Road, Croydon CRO 2NW.*** *Observations must be made within the consultation period of 30 days from the date of this notice. The consultation period will end on Tuesday 14th August 2006."*

The notices were posted by ordinary post.

17. On 20 July 2006, Dunlop Haywards wrote to the lessees stating that it had been instructed to proceed with the works and that the works would start on 31 July 2006. In the present proceedings, Mr Charlton gave evidence about this letter. He attributed it to the need to proceed with the works as quickly as possible to satisfy the local authority. On 21 July, Mr Naish wrote to the agent querying the cost of the surveyor, asking for copies of the estimates from the contractors and complaining that he had been allowed insufficient "consultation time". On 16 August 2006, Knapman & Sons wrote to the lessees to say they had been instructed to carry out the fire precaution works. According to Mr Naish, works commenced on 31 July 2006 (the date referred to in Dunlop Haywards letter of 13 July). According to Mr Chapman and Mr Colley, the works commenced towards the end of August 2006.

18. During the course of the hearing, the tribunal was referred to correspondence during the course of the works involving three lessees. The lessee of flat 1 is a Mr McMillan. On 4 September 2006, he wrote to the agent about how the cost of the fire escape should be divided between the lessees. The agent acknowledged this on 6 September 2006. A further holding reply was sent on 5 October 2006. The agent accepted it did not give a substantive response and on 5 December 2006 Mr McMillan wrote again. In response, on 15 December the agent triggered its complaints procedure and eventually gave a substantive response on 19 December 2006. The lessee of flat 6 is Mr Dan Wilkes. On 21 July 2006 he asked for a copy of the estimates. On 21 November he repeated this request. Mr Charlton visited in response to this letter and provided copies of the estimates. Mr Wilkes then made further observations on them in a letter

of 4 December 2006. This letter referred to the cost of recessed wiring in the specification, whereas the contractors had installed surface mounted wiring at a much cheaper cost. As stated above, the lessee of flat 4 is Mr Naish. At some stage in 2006, he contacted the fire authorities and devised a much cheaper means of satisfying the requirement for a fire escape from flat 4 (albeit one which involved works to the interior of his flat). Instead of building a metal fire escape to the rear of the house to allow escape from the first floor kitchen window, Mr Naish was prepared to partition off his kitchen with fire resistant materials. This would create a fire protected escape route to the front door to the flat down the communal staircase to the front door (the proposal is referred to in paragraph 28 of the previous determination). This scheme had emerged by 12 October 2006 when Mr Naish objected to the planning application by the landlord to install the external metal fire escape. Eastbourne BC approved these alternative proposals on 18 October 2006.

19. Mr Charlton stated that when he attended the tribunal on 1 November 2006, he and Mr Naish discussed the proposed modifications to the fire precaution works. Mr Charlton agreed with the proposals and the planning application was withdrawn on 5 December 2006.

20. The tribunal determination of 21 December 2006 found that:
    (a) The landlord's notice of intention dated 16 November 2004 complied with paragraph 8 of Schedule 4 to the regulations.
    (b) The landlord "had regard to" Mr Naish's observations in relation to the initial notice in accordance with paragraph 10 of Schedule 4 to the regulations.
    (c) The paragraph (b) statement dated 17 July 2006 did not satisfy paragraph 11(5)(b)(ii) of Schedule 4 to the regulations in that it failed to summarise the lessees' observations in relation to the initial notice.
    (d) The notice dated 17 July 2006 did not comply with paragraph 11(11)(c) of Schedule 4 to the regulations in that it specified an incorrect date on which the "*relevant period*" ended.

(e) The notice dated 17 July 2006 did not comply with paragraph 10(10)(a) of Schedule 4 in that it failed to specify a place at which estimates could be inspected. Had the notice specified such a place, Croydon would not have in any event been a "*reasonable*" place for inspection under paragraph 2(1) of the Schedule.

(f) The landlord did not "*have regard to*" observations in response to the paragraph (b) statement as required by paragraph 12 of Schedule 4.

In the absence of any application to dispense with the consultation requirements, the tribunal limited the relevant contribution by Mr Naish to £250 under section 20(6) of the 1985 Act. The present application was made on 11 January 2007, almost immediately after the previous tribunal gave its determination.

21. The works were completed in February 2007. Once the cost of the fire escape was removed from the works, the final bill was much lower than had been initially anticipated. Mr Charlton produced a copy of final account dated 13 March 2007 for £26,699.

Submissions

22. Counsel for the applicant relied on *Woodfall* at 7.199.8 which suggested the tribunal had power to dispense with the consultation requirements after works were completed. This was not challenged by the respondents.

23. Mr Sinnatt submitted that the power under section 20ZA differed from the original power to dispense under section 20 in that the tribunal had only to be satisfied that it was reasonable to dispense with the consultation requirements. Again, he relied on *Woodfall* at 7.199.8 which includes the following passage:

> "*The tribunal may make the determination [under section 20ZA] if it is satisfied that it is reasonable to dispense with the requirements. It is to be noted that (by contrast with equivalent power of the court under the original section 20) the tribunal only has to be satisfied that it is reasonable to dispense with the requirements: it does not have to be satisfied that the landlord acted reasonably*".

The tribunal therefore had to consider all the circumstances. Although this tribunal was not bound to follow decisions of other tribunals, the applicant relied on the following determinations of other tribunals:

(a) *St Anns Court, Sutton* (LON/00BR/LDC/2006/0033). Where no tenant objected, the tribunal dispensed with the consultation requirements.

(b) *Arlington House, Margate* (CHI/29UN/LDC/2004/0017). This dealt with fire precaution works. The tribunal found that the works were urgent despite the landlord having delayed.

24. The applicant relied on a number of factors to support the exercise of discretion. The previous tribunal had found that the initial notice of 16 November 2004 was valid. The breaches of the regulations had all related to the notices of 17 July 2006. The underlying purpose of section 20 and the regulations was to prevent landlords simply ignoring the consultation procedure, whereas in this instance the landlord had not sought to disregard the consultation requirements. The most significant criticism made by the previous tribunal had been that the landlord had no intention of having regard to observations in response to the estimates. However, Mr Charlton had responded to Mr Naish's suggestions made on 1 November 2006. As a result, the tenants made considerable savings in the cost of the works. In any event, the works did not in fact commence until after the consultation period (which should have been specified in paragraph 11(10)(c)(iii) of Schedule 4) had expired. As to the letter of 20 July 2006 Mr Sinnatt relied on Mr Charlton's explanation which was an entirely proper reason. Insofar as the landlord had delayed carrying out the fire precaution works, this conduct was not part of the test in section 20ZA. The reasoning in *Arlington* should be followed. Counsel also relied on the by-pass notices. Although counsel initially described these as "waiver" notices, he did not rely on equitable principles of waiver. However, he submitted that it was possible to contract out of the Act and that the notices had that effect. Counsel contrasted section 20 and the regulations with s.38 of the Landlord and Tenant Act 1954 (as amended) which expressly precluded contracting out save in certain defined

circumstances. Secondly, he submitted that even if one could not contract out, the fact that the lessees consented to the works by signing the bypass notices was highly material. The wording of the by-pass notices was clear and unlimited and they were intended to last until completion of the works. Counsel relied on the promptness of the application made once the previous tribunal determination was received. Mr Naish had given evidence to the previous tribunal that "*at no time ha[d] he ever objected to these works being carried out*". It was Mr Naish who had first suggested the fire precaution works should be carried out. In effect, the landlord had tried to comply with the regulations but in its haste had not complied with the statutory requirements. In his closing submissions, counsel accepted that the agent had not replied promptly to all correspondence from the lessees. However, the single most important suggestion by them was Mr Naish's proposal to dispense with the external fire escape. This was something the landlord could not have insisted on (because it involved Mr Naish losing part of his kitchen), but Mr Charlton had readily agreed to the revised scheme and this gave the lie to the suggestion the landlord was not prepared to listen. It was also submitted that if the discretion was not exercised to dispense with the requirements of section 20 and the regulations, the lessees would obtain a significant windfall – namely the valuable fire precaution works for a maximum contribution of £250 per head. Insofar as the relevant cost of the works may be excessive or unreasonable or that the final bill from contractors may have included matters which they should not, this was a matter for a future tribunal in any application under section 19 of the 1985 Act.

25. The respondents relied on the words of Robert Walker LJ in *Martin v Maryland Estates* [1999] 2 EGLR 53:

> "*the basic statutory purpose of section 20 is, as the sidenote indicates, consultation with tenants on estimates provided to them. Parliament has recognised that it is of great concern to tenants, and a potential cause of great friction between landlord and tenants that tenants may not know what is going on or what is being done ultimately at their expense.*"

Mr Donegan submitted that lessees should know exactly what work they were being asked to contribute to, should be informed of the anticipated cost of the works and should be given an opportunity to comment on the scope of the works, the choice of contractors and the cost of the works. In this case, the previous tribunal had found several breaches of the consultation requirements. In addition, it was material that the applicant was a substantial company advised by professional agent which should have known the section procedure. The works were not of an emergency nature because it took the applicant almost 4 years to start the work. Fire precaution works were not that novel or unusual. The landlord did not make any application to dispense with the consultation requirements at an early stage (nor for that matter at the earlier tribunal hearing). No explanation had been given for why the start of the works was delayed. The cost of the works was very considerable. Had consultation been properly carried out, further savings could and would have been identified – such as the cost of recessed conduits. As to the by-pass notices, there was no provision in the Act enabling the parties to contract out of the provisions of section 20. The proper means of dispensing with the requirements was by way of a section 20ZA application. In any event, the by-pass letters did not purport to dispense with the consultation requirements – they only allowed the landlord to proceed without any further delay under the supervision of a local surveyor. Mr Donegan relied on previous tribunal determinations in the following applications where dispensation was refused:

(a) *22/22A Temple Fortune Mansions London NW11* (LON/00AC/LDC/2006/0031)

(b) *126-127 Shoreditch High Street London E1* (4 October 2004)

(c) *214-216 Brettenham Road London E17* (LON/00BH/LDC/0021)

(d) *Sussex Mansions. Eastbourne* (CHI/21UC/LDC/2005/03)

The consultation requirements were not mere formalities and they were there to protect the lessees. In effect, the works had been decided upon before the paragraph (b) notice was served and the landlord had simply ignored the lessees. In his oral submissions, Mr Donegan submitted there was no windfall for the tenants because the cost of the fire precaution

works were not recoverable in any event under the fourth schedule to the lease.

Determination

26. The first issue is the nature of the discretion to be exercised. The starting point is the underlying purpose of section 20 itself, set out by Robert Walker LJ in *Maryland Estates* in the passage quoted above. However, *Maryland Estates* was not a decision under section 20ZA but under the rather differently worded provisions of section 20(9) of the Act which section 20ZA replaced. The old discretion to dispense given to the court under section 20(9) was that:

> "*in proceedings relating to a service charge the court may, if satisfied that the landlord acted reasonably, dispense with all or any of the requirements*".

By contrast, section 20ZA permits the tribunal to dispense "*if satisfied that it is reasonable to dispense with the requirements*". The distinction is referred to in *Woodfall* at paragraph 7.199.8. However, the power of the tribunal is not narrower than the old power of the court. It is a broadening of the matters which may be taken into account, not a narrowing. In addition to the actions of the landlord, the tribunal may now take into account a wide range of other considerations. Although it would be impossible to set out a full list of these considerations they will often include matters such as the actions of the lessees (in particular whether they object), the nature of the works, the costs involved and whether there is evidence of real (as opposed to theoretical) prejudice having been caused to the lessees or the landlord. However, the conduct of the landlord will always be an important consideration, and insofar as the passage in *Woodfall* and/or the applicant may suggest otherwise, the tribunal rejects this contention.

27. However, there are limits to what should be taken into account. The discretion is one to dispense with the consultation requirements set out in section 20 of the 1985 Act. This is a quite separate jurisdiction to section 27A of the Act, which is the proper route for dealing with issues about

whether the relevant costs included in the service charges are contractually recoverable under the provisions of the lease or whether the relevant costs of the works are reasonably incurred within the meaning of section 19 of the Act. During the course of an application to dispense, the tribunal should not therefore embark on a general examination of whether the cost of the qualifying works are excessive or whether the works include matters which they ought not to either under the lease or by virtue of section 19 of the Act. We agree with the submissions of Mr Sinnatt that these are matters which may or may not arise for determination at some future date by another tribunal if an application is ever made under section 27A of the Act. However, they are not material here.

28. For similar reasons, one leasehold valuation tribunal will not generally have any regard to the determinations of previous tribunals when exercising its discretion under section 20ZA. Each set of facts will necessarily be different. The wide discretion given to us under section 20ZA means it is hazardous to take into account the reasoning of another tribunal when considering similar facts even if one tribunal was bound by the findings of another (which it is not). The tribunal therefore does not take into account the reasoning in the *Arlington House* decision or indeed any of the others cited by the parties.

29. What then are the relevant factors which assist the tribunal? Plainly, the actions taken by the landlord to satisfy the requirements of the regulations are highly relevant. The previous tribunal identified three separate breaches. Three related to the wording of the paragraph (b) statement and accompanying notice. One related to the failure to take into account representations. However, the tribunal is satisfied that this is not a case of a landlord which deliberately took no action (as was, for example the situation in *Maryland Estates*). The previous tribunal found that the landlord complied with the important initial notice requirements. Furthermore, it did send a paragraph (b) statement and accompanying notice. The failures to comply with the regulations were deficiencies in form rather than a complete absence of notice. In respect of the most

serious allegation, namely failure to have regard to submissions made by the lessees in response to the paragraph (b) statement, this was an isolated matter in that the previous tribunal found the applicant had complied with the similar obligation under paragraph 10 of Schedule 4 to the regulations. Furthermore, the landlord did eventually respond to the only substantial representation made in response to the tender documentation, namely Mr Naish's suggested scheme to dispense with the fire escape. It does not assist the landlord that it was a substantial had the resources and advice available to have complied with the consultation requirements. However, the broad picture is one, as Mr Sinnatt submitted, one of a landlord whose actions fell short of what was required rather than deliberately attempting to avoid the consultation requirements. The tribunal considers that this favours the landlord.

30. The second consideration is the actions of the tenants. This largely turned on the question of the by-pass notices. The tribunal rejects the applicant's main contention, namely that the parties contracted out of section 20 by way of the notices for three reasons. First and foremost, the tribunal does not accept that the parties may contract out of section 20. Secondly, having abandoned any argument about equitable waiver, a contract requires consideration – and it is difficult to see what consideration was given in return for the giving up of the lessees' statutory protection. Thirdly, the wording of the by-pass notices themselves was insufficiently clear to avoid the consequences of section 20 of the Act. In any event, the tribunal considers there is substance in Mr Sinnatt's fallback position. The by-pass notices did show that in broad terms the tenants did not object to the works as originally proposed in the initial notice. Mr Donegan countered this by analysing the strict wording of the by-pass notices. The notices did not of course specifically state that the lessees waived the need to comply with paragraphs 11 and 12 of Schedule 4 to the regulations. However, taking the by-pass notices as a whole, they gave a green light to the landlord proceeding with the works originally proposed, without the lessees first having sight of estimates or further details. All the lessees signed these by-pass notices. Although this

determination should not be taken as an approval of such an unorthodox procedure in future. the by-pass notices are another factor which favours dispensation in this instance.

31. The third consideration is the nature of the works. There was considerable argument about whether the works were urgent or not. It is true that the works were not urgent in the sense that they were carried out quickly. There was, as stressed by the respondents, a four year gap between the first local authority notice and the completion of the works, and the explanation for the delays given by the applicant's witnesses are not wholly satisfactory (particularly the delay between 2005 and 2006). Moreover, fire precaution works are routine in the sense that each year many thousands of properties are subject to statutory notices under Part II of the Housing Act 1985. However, there is force in the applicant's argument that the nature of the works is important. Fire precaution works are different to routine repairs or maintenance which are the usual works covered by section 20. The local authority may prosecute for failure to carry them out and they involve the personal safety of occupiers. The nature of the works is again a factor in favour of dispensation.

32. The cost of the works is another consideration, in the sense that a tribunal might more readily dispense with consultation if the issue was a relatively trivial one. Here the costs are relatively substantial, some £26,699. The tribunal considers this factor favours the lessees.

33. The most difficult question is whether the lessees have suffered real prejudice as a result of the failure to comply with the consultation regulations. As a result of the previous tribunal's determination, the lessees cannot complain about the initial notice. They were given a broad outline of the works at an early stage and they had an opportunity to nominate contractors. As for the first of the breaches which were established, the paragraph (b) notice gave the names of each contractor who returned a tender and the costs involved. The lessees were informed that they could inspect, and were invited to make comments on the

tenders. The lessees were therefore provided with further important information about the proposed works. As for the second breach, failure to summarise the lessees' observations did not cause any obvious prejudice to the lessees. As to the notice accompanying the paragraph (b) statement the erroneous date was only slightly out. Further, the works were not commenced until after the date which should have been specified in the notice. None of these matters suggest any real prejudice was caused.

34. However, the same cannot be said for the remaining breaches. The failure to take the representations on the paragraph (b) notice into account caused real rather than a theoretical prejudice. The same can be said for the failure to give details of where the tenders could be inspected. This prejudice was compounded by the fact that the tenders were only available in Croydon (which the previous tribunal found to be an unreasonable place for inspection) and the lack of response to the correspondence by the agent at that time. Were these the only considerations, prejudice would be a factor weighing heavily against the landlord. However, the prejudice was mitigated in this instance by the subsequent actions of the landlord. The tender documents were (albeit belatedly) supplied and Mr Naish's alternative scheme was adopted by Mr Charlton. This resulted in a considerable reduction in the cost of the works. It is hard to see any further prejudice to the lessees once the external fire escape was removed from the scheme. It was suggested that the lessees lost the chance to object to the contractor's decision to use unsightly surface mounted conduits rather than chasing the wiring into the walls. However, this defect (if indeed it is a defect) was nothing to do with the tender documentation or paragraph (b) statement. The specification and tenders suggested wiring should be chased into the walls. Any challenge to these relevant costs would properly be a matter for a section 27A application. It follows that the lessees have not suffered any substantial prejudice as a result of any breach of the regulations.

35. Finally, there is the question of the effect on the landlord. Plainly, if the application fails, the tenants will have a windfall in the sense that the landlord will be unable to recover the relevant costs of the works beyond the amounts allowed by section 20 and the landlord would suffer a considerable loss. This is not wholly unexpected; the plain intention of section 20(6) is to create a penal provision to encourage landlords to consult on major works. However, it is legitimate to take into account that the landlord would suffer a considerable loss if the discretion is not exercised. The regulations are complex, and they are a fetter on the landlord's contractual right to recover its expenditure. The fact that the landlord will suffer a significant irrecoverable loss is a factor in favour of dispensing with the consultation requirements where other factors are evenly balanced.

36. Taking these factors together the tribunal considers it is appropriate to dispense with the consultation requirements in relation to the fire precaution works.

Section 20C

37. The applicant submitted that there was no prejudice to the respondents in making the application when it did. The reason no application under section 20ZA had been made before January 2007 was that before the previous LVT determination the applicant had considered it had complied with the consultation requirements. After the respondents had signed the bypass notices, it was entirely reasonable for the applicant to proceed without a section 20ZA application. Furthermore, once the application was made, the respondents could have agreed it without taking every point possible. They had not acted proportionately in the light of the landlord's agreement to take on board Mr Naish's modifications to the scheme and the considerable savings made.

38. The respondents relied on three points. First, the lack of any response to the Wilkes enquiries after works were commenced. Secondly, the fact that Mr Naish had made an application for a determination that the costs

of the works were unreasonable under section 19 of the 1985. Thirdly, that the bypass letters were not unconditional agreements to waive all rights under section 20.

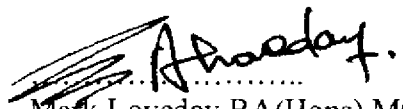
39. Having regard to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000 the tribunal considers it just and equitable to make an order under section 20C of the 1985 Act. Firstly, although the applicant has succeeded in its application, the application should properly have been made at a much earlier stage, with a resultant saving in costs. Initially, the applicant chose to adopt an unorthodox means of by-passing the section 20 procedure when parliament provided, by way of section 20ZA, a perfectly adequate method of dispensing with the consultation procedure. Subsequently, when it became obvious in the previous application by Mr Naish that failure to comply with section 20 was a live issue, it should have been obvious that a section 20ZA cross-application was needed. Either way, it is likely that any application under section 20ZA would have been made either by consent or without the need for a costly application involving counsel. Secondly, the applicant's failure to comply with the consultation regulations is entirely its own responsibility. In many cases, a section 20ZA application is made because it is not practicable to consult (e.g. for emergency roof repairs). Where an application under section 20ZA is made after the event because the applicant has failed to comply with some part of the consultation requirements, it is less likely to be fair and reasonable for the costs of that application to be added to the service charge. The works here may have been emergency works in the sense that they were fire precaution works, but it was practicable for the landlord to have complied fully with the regulations. Thirdly, the application was made very late in the day, once works had commenced. There is no really satisfactory explanation why the respondents were not supplied with copies of the estimates until after the works began. The applicant did of course accept Mr Naish's proposals which resulted in a much reduced cost for the scheme. However, this was again very late in the day after the works were

commenced. Although there will be a cost to the landlord, it would not be fair and reasonable to visit this cost on the lessees.

Conclusions

40. The previous determination found the landlord had complied with regulations 8 to 10 of Schedule 4 to the Service Charges (Consultation Requirements)(England) Regulations 2003 in respect of the cost of fire precaution works completed in 2007. The tribunal determines under section 20ZA(1) of the Landlord and Tenant Act 1985 to dispense with regulations 11 to 13 of the consultation regulations.

41. The tribunal further orders under section 20C of the 1985 Act that no part of the applicant's costs incurred before the tribunal in connection with this application are to be regarded as relevant costs in determining the amount of the service charge payable by any of the respondents.



Mark Loveday BA(Hons) MCI Arb
Chairman
Dated: 16 June 2007