CHI/21UD/LSC/2008/0032

CHI/21UD/LSC/2008/0012

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTION 20ZA, 27A AND 20C OF THE LANDLORD AND TENANT ACT 1985

MARINE COURT, MARINA, ST LEONARDS ON SEA, EAST SUSSEX TN38 0DZ

Applicant:	Rother District Investments Ltd
Respondent:	Marine Court Residents Association Ltd
Date of hearing:	5 and 6 November 2008
Date of inspection:	5 November 2008
Appearances:	Mr M Buckpitt of counsel (Applicant)
	Mr A Martin, solicitor of Merton Law Centre (Respondent)

Members of the Leasehold Valuation Tribunal:

Mr M Loveday BA(Hons) MCIArb
Mr N Cleverton FRICS
Mr R Wilkey FRICS FICPD

BACKGROUND

1. This matter relates to Marine Court, a prominent block of flats on the seafront in St Leonard-on-Sea. The applications raise a number of issues relating to major works which took place in 2007 and 2008.

2. Three applications were listed before the Tribunal. By an application dated 28 August 2008 (CHI/21UD/LSC/2008/0012) the landlord sought an order under s.20ZA of the Landlord and Tenant Act 1985 ("LTA 1985") to dispense with consultation requirements in relation to the works. The named respondent is a recognised residents association registered under LTA 1985 s.29. The applicant also applied under LTA 1985 s.27A (CHI/21UD/LSC/2008/0032) for a determination of liability for service charges payable in the accounting year ending 31 December 2008. There is a cross application by the respondent for an order under LTA 1985 s.20C. On 2 June 2008 the Tribunal gave directions for the three applications to be heard together.

3. The parties agreed a number of matters before or at the hearing:
   (a) The applicant withdrew the section 27A application (CHI/21UD/LSC/2008/0032).
   (b) An order under s.20C was agreed in relation to the applicant's costs in connection with the three sets of proceedings before the Tribunal.
   (c) The applicant agreed to withdraw the application for an order under s.20ZA in relation to certain professional fees and insurance linked to the works. This was on the basis of a formal concession signed by the respondent's solicitor and submitted to the Tribunal. The memorandum deals with what would happen if the applicant was not to be granted s.20ZA dispensation in claim no CHI/21UD/LSC/2008/0012 in relation to the works for which those professional fees were incurred. It is agreed that in the event of such a finding, the professional fees would be payable (subject to any right the leaseholders may have to challenge those costs under LTA 1985 s.27A).

4. The issues which remain are whether the landlord has complied with the consultation regulations in relation to the major works and if not, whether an order under s.20ZA should be made.

5. At the hearing, the landlords were represented by Mr Michael Buckpitt of counsel who produced a written opening and skeleton submissions. The tenants were represented by Mr Anthony Martin (who is both a leaseholder at the subject premises and a solicitor) who produced a skeleton argument. The Tribunal is grateful to both representatives for their comprehensive submissions on this matter.

INSPECTION

6. The Tribunal inspected the subject premises before the hearing. Marine Court is a striking white Art Deco block of concrete and brick construction resembling an ocean going liner. The "starboard" side of the block forms part of the seafront esplanade of St Leonards (the Marina). The "port" side of the block is a street called Undercliff which runs roughly parallel to the Marina and the "bows" are formed by the junction between these two streets. There are retail and business uses on the ground floor with 168 flats on the 12 upper stories. Extending the width of the public pavement is a continuous concrete slab canopy at first floor level supported by steel and concrete beams. Hung from the upper outside edge of the canopy is a two section powder coated aluminium sheet fascia coloured blue to resemble the waves on which the ship sails. The upper surface of the canopy is covered in asphalt with a proprietary coating and drainage holes. Repairs to the canopy, supporting beams and the asphalt appear to have been completed recently and the works are of a satisfactory standard. On the Undercliff side of the block is a full height fire escape with painted cast iron treads and steel structure. Again, they appear to have been installed fairly recently to a reasonable standard. However, there is some corrosion to the iron treads at 9th floor level.

THE STATUTORY PROVISIONS

7. The basic provision is The Landlord and Tenant Act 1985 ("LTA 1985") s.20. This states:

Limitation of service charges: consultation requirements

20 *(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.

...

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

...

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

The "appropriate amount" under s.20(5)(b) has been set at £250.

8. Dispensation is dealt with in s.20ZA:

Consultation requirements: supplementary

s.20ZA *(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

...

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

9. The regulations are contained in the Service Charges (Consultation Requirements) (England) Regulations 2003. Regulation 2 defines the "relevant period" in relation to a

notice as "the period of 30 days beginning with the date of the notice". The substantive requirements for major works are set out in Part 2 of Schedule 4. These are:

Notice of intention

1. *- (1) The landlord shall give notice in writing of his intention to carry out qualifying works –*
(a) to each tenant; and
(b) where a recognised tenants' association represents some or all of the tenants, to the association.
(2) The notice shall -
(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
(b) state the landlord's reasons for considering it necessary to carry out the proposed works;
(c) invite the making, in writing, of observations in relation to the proposed works; and
(d) 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.
(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

Inspection of description of proposed works

2. *- (1) Where a notice under paragraph 1 specifies a place and hours for inspection -*
(a) the place and hours so specified must be reasonable; and
(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.
(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

3. *Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations.*

Estimates and response to observations

4. *- (1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.*
...
(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9) -

(a) obtain estimates for the carrying out of the proposed works;
(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.
(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.
...
(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.
(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.

Duty to have regard to observations in relation to estimates
5. *Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.*

Duty on entering into contract
6. *- (1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any) -*
(a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and
(b) where he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.
(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest

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

THE EVIDENCE

10. There are three disputed elements of work to the roof canopy. These are the main works contract, recovering the asphalt upper surface and repairs to the support beams. There is also a complaint about the cost of works to the fire escape. The project was managed for the landlords by the firm of Godfrey John & Partners and the works were supervised by chartered surveyors Standen Associates Ltd.

11. The basic facts are not in dispute and are taken from the documents in the bundle. It was always intended that the works would be carried out with substantial grant aid from Hastings BC. The landlords prepared an Initial Notice in relation to the main works to the roof canopy dated 23 February 2006. This referred to *"repairs and renovat[ion] of the canopy above the shops in accordance with instructions from Hastings Borough Council"*. On 15 June 2006, Hastings BC sent Godfrey John & Partners a detailed specification of works prepared by quantity surveyors Adams John Kennard. On 17 August 2006, the landlords wrote to the Council to say the start of the works was to be delayed to avoid working over the winter period. On 19 September 2006, the Council agreed to delay the start of the works until April 2007, but stated that the works would have to be "in full conformity" with the Hastings BC Schedule. They also said they were serving notice under s.215 of the Town & Country Planning Act 1990 requiring the works to start by that date and that the works should comply with the June 2006 Schedule.

12. On 1 December 2006, the landlords wrote to a number of contractors to invite them to submit estimates and enclosing the Hastings BC schedule. These included a firm called Makers Ltd, who had been proposed by the residents association. On 22 December 2006, a Statement of Estimates and a paragraph (b) statement were prepared and they were then served on leaseholders. The statements referred to estimates from four contractors, the lowest of which (for £111,473.43) was from

Concrete & Corrosion Consultancy Practice Ltd ("CCCP"). The notice also mentioned that the landlords had approached Makers, but that they had *"not received any response"*. On 3 January 2007, Mr John wrote to the residents association to say there had been no communication from Makers. He also stated that it was *"anticipated"* the contract would be awarded to CCCP immediately the s.20 consultation period expired at the end of January 2007. In a reply dated 15 January 2007, the residents association stated that the notices dated 22 December 2006 were not delivered until 29 December 2006 and raised various questions about the notices and the works. There was then a meeting with the residents association. In letters dated 31 January and 5 February 2007, the residents association wrote to state a preference for two of the other contractors. In response, on 22 February 2007, Godfrey John wrote to state that the Hastings BC grant would only be made on the basis of the lowest tender (i.e. CCCP) and that this was the preferred option. On 28 February 2007, Mr John confirmed in writing his instructions to place the contract with CCCP and a letter of instruction was sent on 2 March 2007 accepting CCCP's tender. The residents association persisted with their objections to CCCP, and on 19 June 2007, they provided information about CCCP's solvency. On 11 July 2007, the Council served its threatened s.215 notice requiring the work specified in the original schedule to start by 17 August 2007. By 24 August, Hastings BC had still not completed the pavement works. On 29 August 2007, Mr John wrote to the Chairman of the residents association to say that *"the contractors for the [canopy] will be; APA Group Services."* This is a reference to APA Concrete Repairs Ltd ("APA"). Problems were by then also mounting with CCCP, who had not signed a contract. They wrote to Standen Associates on 18 October 2007 stating that no price had been given for the cost of providing the aluminium fascia and threatening to pull out of the project. The Council threatened to enforce the s.215 notice on 31 October 2007.

13. Standens were then instructed to carry out a shortened form of re-tendering. They sought an estimate from APA and from the next lowest tender in the earlier exercise, the firm of Booker & Best. Booker & Best gave a price of £159,508.04. On 25 November, APA delivered a quotation priced at £144,538.80. Standen reported on 22 November 2007. They mentioned in their letter to Mr John that APA had also priced

the cost of a liquid covering at £11,000 plus VAT. On 30 November 2007, APA were contracted to carry out the works. On 11 December 2007, Mr John wrote to individual residents to explain that APA had been appointed contractor. The letter stated that APA had been the original subcontractor for the works. A printout of this letter (without any specific address in the address field) was produced to the Tribunal. Hastings BC confirmed grant aid on 20 December 2007 and works started at about the same time. During the course of the works, additional costs arose in relation to the support beams. There is a letter dated 29 April 2008 from APA which refers to defects in four support beams and gives prices for remedying these defects. The works were then completed.

14. A separate matter is the issue of the fire escape. A Notice of Intention was given on 23 February 2006 referring to *"replacement of the fire escape"*. The lowest quote came from Winstone Engineering Co on 27 September 2007 for £31,600 and they were chosen as contractors. The quotation stated that they would *"fabricate and fix a new fire escape all to existing design and layout but to include for hot-dip galvanising"*. It referred to 14 flights and 7 landings. A Statement of Estimates and paragraph (b) notice was given on 1 October 2007. The residents association wrote on 12 October 2007 nominating ARC Engineering as a possible contractor. A new estimate was given by Winstone on 12 March 2008 for £22,765 plus VAT which was on the basis of fabricating a fixing "new fire escape to existing spec including refurbishment of treads". There was an additional invoice dated £2,335.90 for brickwork.

15. The landlords called Mr John to give evidence. He referred to a statement dated 21 October 2008. His contract manager Andrew Buss had told him of an oral suggestion by Charles Strickland (Chairman of the residents association) in response to the Initial Notice relating to the main works. Mr Strickland suggested that the landlords should approach a firm of contractors called Makers Ltd to submit a tender. Mr Buss said he had telephoned Makers but got no response. There was also the letter of 10 December 2006 with the copy of the specification. The delay in serving the Statement of Estimates and paragraph (b) statement was as a result of the agreement with Hastings BC because of the onset of winter. He pointed out that this was an exposed location

facing the sea. After March 2007, a further delay was caused because (unknown to the landlords) Hastings BC started highway works to the pavement outside the premises. This prevented contractors from erecting scaffolding to gain access to the underside of the canopy. CCCP was asked to reprogram the start of the works to 23 June 2007. The pavement works were not in fact completed in time. At that stage, it was still intended to work with CCCP, who in turn were intending to employ APA as specialist sub-contractors. After 22 October 2007, CCCP stopped returning phone calls and it became clear they would not sign a works contract. By that stage, Hastings BC had served its statutory notice. Time was now of the essence, because if Hastings BC carried out the works in default, the grant aid would have been lost. This would have cost the leaseholders a lot more money. Mr Standen was therefore instructed to carry out the shortened re-tendering exercise. It was decided to approach the sub-contractors and to cross check this against a new price given in the second lowest tender. The decision to appoint APA was not made until after this was completed. His explanation for the letter of 29 August 2007 was that the word "*contractor*" there should have been written as "*sub-contractor*". As to the repairs to the asphalt, they had not been included in the Hastings BC Schedule, and they had not therefore been part of the original tender process. However, the residents association was aware of the need for this covering, and it had been discussed with the residents association at a meeting on 24 July 2007. APA was asked to price for this and included it in their estimate in November 2007. Their original price was £13,042.50, but it was agreed to use a better material which withstood pedestrian traffic priced at £21,737.50. These works were grant aided by Hastings BC. As to the need to carry out works to the concrete beams, this was not realised until works started and loose concrete was removed from the canopy soffit. The Council agreed the asphalt works were eligible for grant aid if they were carried out as part of the main contract. There was no contingency sum because this was not part of Hastings BC Schedule and in any event this would have increased the cost of the contract to the leaseholders. The change in specification for the fire escape was simply a result of the listing of the building. The original estimate for £31,600 was obtained on the basis of replacing treads with galvanised steel. However, when listed building consent was applied for, the Council insisted on a like for like replacement with painted cast iron. This was a much cheaper option at £26,748.87. Mr

John referred to a letter from Winstone Engineering dated 17 September 2008 which confirmed the discussions with the Council.

16. When cross examined, Mr John stated that he had not been surprised that Makers had not responded, because firms in Hastings did not exactly queue up to do work at Marine Court. There was no connection between his firm and CCCP. When asked about the letter of 29 August 2007, Mr John said he still hoped that CCCP would sign the contract at that stage. They had not had a "no" from CCCP by then. He accepted he had not informed the residents association about the decision to drop CCCP and seek other tenders until after the re-tendering process, but it seemed logical to simply go directly to the sub-contractors for a price. He would be surprised if there had been no oral contact about this issue, but he accepted he could not remember any conversations about it. CCCP and their subcontractors had always been the cheapest. As to the consultation period following the Statement of Estimates and paragraph (b) statement, no-one came back to him and objected to the estimates. He considered everything put to him and chose the cheapest tender. As to the asphalt works, the problem was that the specification from Hastings BC could not be changed. That had not identified any real problems with the canopy – it simply referred to the need for a leak detection survey. At a later stage they were alerted to the potential problem with the canopy, so it was included when the new price was obtained from APA. His overwhelming concern was that further delays would mean the loss of the Hastings BC grant aid. When questioned by the Tribunal, Mr John stated that the leaseholders had not lost anything by the change in contractors. The higher price in the APA estimate reflected the omission of the aluminium fascia from the original Schedule. This would have had to have been done – whoever the contractor was. He confirmed that he was responsible for considering the observations from the residents association and others about the works. He stated that he carefully considered all representations and replied to all written observations. Mr John stated that there was considerable pressure from Hastings BC at all times and that this was the reason he had not informed the residents association of all the details of the changes in the proposals. In particular, when it was decided not to re-tender, but to pursue the abbreviated procedure, he took into

account that the tenants had already made representations on the works earlier in the year.

17. The applicants also relied on evidence from Mr Standen MRICS who referred to a witness statement dated 16 October 2008. He confirmed that when CCCP left the scene, he knew APA was the main sub-contractor for CCCP. In effect, this was not a significant change. APA's 'base' cost quoted in November 2006 was actually lower than CCCP's 'base' cost quoted earlier that year.

18. When cross examined, Mr Standen stated that there had been leak surveys to the canopy by CCCP in 2003 and 2006 which had not thrown up any problems. It was only late in the process that it emerged that roof repairs were needed. Residents raised questions about the roof covering at a meeting on 27 July 2007. It was therefore decided to include a pc sum of £11,100.00 in the contract with APA for roof covering. Mr Standen normally included a 10% contingency in any contract, but in this instance he reduced it to only 5%. When asked about the contractual problems with CCCP, Mr Standen said it took a long time to identify the problem with them. It turned out they priced the metal fascia unrealistically low, and they were trying to increase the price. Ordinarily, a tender document would include terms which created a contract on acceptance of the tender. However, the Hastings BC Schedule did not include any terms and so no contract was made at that stage. Mr Standen asked CCCP to sign a contract, but they would not. This then got overtaken by events when the start date for the works was delayed. Had there been no delay with the pavement works, it is likely CCCP would have started works and the problems with their mispricing would have been thrown up later. When asked by the Tribunal, Mr Standen considered the residents had not been disadvantaged. They would only have done better had CCCP stuck to the tender figure, but they were never bound by a contract to do so. It would have been a disaster to have gone back to the start with the process since Hastings LBC would have carried out works in default and the grant aid would have been lost.

19. The residents association called Mr Fanslau, a member of their committee. He referred to a statement dated 21 September 2008. Mr Fanslau stated that the condition of the

property had deteriorated. The canopy obviously needed repairs since 2003. CCCP apparently prepared a report in 2003, but this was not disclosed. No works were carried out. In 2005, the Council took an interest in the problems as part of a systematic upgrade of the esplanade. When the residents association received the first Notice of Intention in February 2006, Mr Strickland telephoned Godfrey John and suggested Makers. Planning consent was given in March 2006. Hastings LBC carried out their survey and the residents arranged grant aid towards the cost of the works. The landlords delayed. The Statement of Estimates and paragraph (b) statement in the bundle were hand delivered to Mr Fanslau's home on 29 December 2006. The letter of 3 January 2007 was written well within the consultation period and this showed the landlords had pre-judged the selection of the contractor. After that, the landlords offered various excuses. Eventually they pressed Hastings BC to issue the s.215 notice and to take enforcement action. On 3 December 2007, Hastings BC's Cabinet were due to vote on taking enforcement action, and the landlords provided a letter at the last moment to say that the canopy works were to start imminently. Notwithstanding this, Hastings BC voted to take action. Works commenced on 10 December 2007. He was not informed formally that APA was carrying out the works until February 2008 and he did not receive the contract letter purportedly sent on 11 December 2007. The roof coverings were mentioned by Mr Fanslau and Mr Strickland at the meeting on 24 July 2007, but no s.20 procedure was started for those works. As to the fire escape, the residents association had nominated ARC Engineering. Godfrey John had made three phone calls to ARC, but had not pursued this further. The change to painted cast iron treads would lead to ongoing maintenance costs and there had been no new s.20 consultation process when the specification changed. The landlords had paid only the barest lip service to the consultation requirements. When cross examined, Mr Fanslau stated that he was not complaining that the asphalt works were done, merely that they should have been included in the original specification and consulted upon. The landlords ought to have restarted the whole consultation from the beginning. Mr Fanslau did not accept he was being awkward in asking the landlords to retender the whole contract for the sake of £11,100 and having a further delay. As to the fire escape, the specification changed and the leaseholders should have been informed.

THE TRIBUNAL'S APPROACH TO DISPENSATION

20. In this case, the Tribunal needs to determine two matters. The first is whether there are one or more breaches of the requirements of Part 2 of Schedule 4 to the Act. The second issue is whether the Tribunal should exercise its discretion to dispense with the consultation requirements under s.20ZA.

21. This second question is a far more difficult issue. Under the present wording of s.20ZA the Tribunal may dispense with the consultation requirements where it is *"reasonable"* to do so. Mr Buckpitt referred to the case of ***Martin v Maryland Estates*** [1999] 2 EGLR 53, CA which was a case under the old s.20 requirements. Those permitted the court to dispense where it was satisfied *"the landlords acted reasonably"* – a much stricter requirement which concentrated on the landlord's behaviour alone. Three unreported but significant recent decisions of the Lands Tribunal deal with the exercise of this discretion under s.20ZA.

22. The first is ***Warrior Quay Management v Joachim*** (2007) Lands Tribunal (unreported) LRX/42/2006. In that case, the landlord failed to carry out any consultation at all in relation to major works. The Tribunal found that had such consultation been carried out the costs may well have been significantly less than was the case. It was held it was not reasonable to dispense with the consultation requirements.

23. The second is ***Eltham Properties v Kenny*** (2007) Lands Tribunal (unreported) LRX/161/2006, Mr AJ Trott FRICS considered an initial notice which failed to invite the leaseholders to nominate an alternative contractor in accordance with paragraph 8 of the Schedule. The LVT had declined to make an order under s.20ZA. In reaching its decision, the Lands Tribunal stated (para 26) that:

> *"... the LVT approached the matter on the basis that the legislation was to be applied as a punitive measure in order to punish landlords who failed to comply with the consultation requirements and that the dispensation power was to be exercised with this in mind. That was, in my judgment, an incorrect approach. What the LVT had to determine was whether it was reasonable to dispense with the consultation requirements, and the reasonableness of dispensation is to be judged in the light of the purpose for which the consultation requirements were imposed. The most important consideration is likely to be the degree of prejudice that there would be to*

the tenants in terms of their ability to respond to the consultation if the requirements were not met."

He went on to conclude (para 30):

"It is reasonable to give dispensation from the consultation requirements where there has been a minor breach of procedure that has not prejudiced the tenants. I consider that the defective section 20 notice represents, in all the circumstances of this appeal, such a minor breach of procedure and that there is no evidence that the respondents were prejudiced or disadvantaged as a result."

24. The third is ***Camden v Leaseholders of 30-40 Grafton Way*** (2008) Lands Tribunal (unreported) LRX/185/2006, the President considered a case where the local authority failed to supply any estimates in relation to works, although it had provided a great deal of other material to leaseholders in relation to the proposals. The LVT refused to grant a s.20ZA order and the President upheld this decision. He stated that (para 33):

"The principal consideration for the purpose of any decision on retrospective dispensation must, in our judgment, be whether any significant prejudice has been suffered by a tenant as a consequence of the landlord's failure to comply with the requirement or requirements in question. An omission may not prejudice a tenant if it is small, or if, through material made available in another context and the opportunity to comment on it, it is rendered insignificant. Whether an omission does cause significant prejudice needs to be considered in all the circumstances. If significant prejudice has been caused we cannot see that it could ever be appropriate to grant dispensation."

He went on to state (para 35):

"The requirements relating to estimates are clearly fundamental in the scheme of requirements. The landlords must obtain estimates (in the plural), must include in the paragraph (b) statement the overall estimate of at least two of them and must make all of the estimates available for inspection. The purpose is to provide the tenants with the opportunity to see both the overall amount specified in two or more estimates and all the estimates themselves and to make on them observations, which the landlord is then required to take into account. In the present case stage 2 was completely omitted. It was a gross error, which manifestly prejudiced the leaseholders in a fundamental way. The fact that [the Council] went through a tendering process that employed the services of [a building consultant] and at various times provided information about the project and its progress does not, in our view, even begin to make good the omission. What the leaseholders were not provided with was the basic information about the tenders, the opportunity to inspect the tenders and the opportunity to make observations on them, with the council being obliged to take those observations

into account and publish them later together with their response to them. The extent to which, had they been told of the estimates, the leaseholders would have wished to examine them and make observations upon them, can only be a matter of speculation. The fact is that they did not have the opportunity and this amounted to significant prejudice."

25. Mr Buckpitt submitted that in exercising its discretion to dispense, the primary consideration for the Tribunal was whether any prejudice to the tenants was *"significant"* (see ***Camden*** at para 33). He stated that unless the prejudice was *"significant"*, the Tribunal should dispense with the consultation requirements. By contrast, Mr Martin submitted that a dispensation ought only to be given where there was *"a minor breach of procedure"* (see ***Eltham*** at para 30).

26. The Tribunal does not accept that either proposition is a correct statement of the effect of s.20ZA or of the decisions of the Lands Tribunal in the three cases referred to above. The LVT has a wide discretion to dispense with the consultation requirements where it is reasonable to do so *"in an overall sense or in all the circumstances"*: see ***Eltham*** at para 27. ***Warrior Quay*** is an extreme instance where no consultation took place at all. However, ***Eltham*** and ***Camden*** can be considered as 'bookend' decisions, where the Lands Tribunal sets out the limits of the LVT's discretion. One end is marked by ***Eltham***, where there was only a *"minor"* breach of procedure and *"no"* prejudice was caused to the leaseholders. In such a case it is perhaps obvious that it would generally be right for the LVT to dispense. As the Lands Tribunal stated, the object of the consultation requirements is not to punish landlords. The other end is marked by ***Camden***, where there was a breach of a *"fundamental"* requirement of the regulations and *"significant"* prejudice to the leaseholders. It may be that the President's statement in ***Camden*** is open to criticism in that one could imagine situations where significant prejudice is caused to tenants but there are still exceptional circumstances (such as natural disaster) which justify a departure from the consultation machinery.

27. The vast majority of cases before the LVT will fall somewhere between ***Eltham*** and ***Camden*** – where the breach is of a greater or lesser magnitude and there is more or less prejudice to the leaseholders. It is inevitable that a wide range of factual situations

will admit an equally wide range of quite different but proper decisions by Tribunals within the limits of these two 'bookends'. It is for this reason that we do not find the previous decisions of other LVTs cited in this matter in relation to discretion to be of any assistance.

28. However, it should also be stressed that s.20ZA requires the LVT to take relevant factors into account in addition to any prejudice to leaseholders. The guidance given by the President in ***Camden*** did not say that prejudice was the "*only*" factor, but it was the "*principal*" factor. The reason the landlords breached the regulations is obviously another material factor, but many other considerations will be relevant as well.

BREACHES

29. The first step is to identify the breaches of the consultation regulations.

30. The respondents' case. In his closing submissions, Mr Martin submitted that the requirements of the regulations were not onerous. He relied on four alleged breaches of the regulations relating to the main works contract:

    (a) In breach of para 4(1) of Part 2 of Schedule 4, the landlords failed to "*try*" to obtain an estimate from the person nominated by the tenants. The tenants requested an estimate should be obtained from Makers. It was accepted that the nomination was not in writing, but para 4(1) did not require the nomination to be made in writing (contrast the reference to observations "*in writing*" used in para 1(c) of Part 2). A dictionary definition of "*try*" suggests that the landlords should have attempted or endeavoured to get an estimate from makers, and they had failed to do so. A single telephone call was insufficient. Mr Martin referred to a previous decision of another LVT in ***Metroquest v Scott-Johnson*** (2007) LVT (unreported) LON/00AU/LSC/2006/0327.

    (b) In breach of regulation 2 and para 4(10) of Part 2 to Schedule 4 the landlords failed to state a proper date in the Statement of Estimates on which the "*relevant period*" ended. Regulation 2 defined the "*relevant period*" as 30 days "*beginning with the date of the notice*". In this case, the notice was dated 22 December 2006 and stated that the consultation ended on 27 March 2006.

However, "*date of the notice*" must mean the date of service, and the evidence of Mr Fanslau was not challenged that his notice was hand delivered on 29 December. Mr Martin referred to a previous decision of another LVT in ***Mohammed-Khabiri v Rahimzadeh*** (2007) LVT (unreported) LON/00BK/LSC/2007/0476.

(c) In breach of para 5 of Part 2 to Schedule 4, the landlords predetermined that the contract would be awarded to CCCP. Notice was served on 29 December but on 3 January 2008 the landlords indicated they had already chosen CCCP. The obligation to "*have regard to observations*" made during the whole of the relevant period meant that no decision could be made until that period had expired.

(d) A complete breach of paras 4 and 5 of Part 2 of Schedule 4. When the landlords decided to abandon CCCP and let the contract to APA, they ought properly to have obtained estimates, served a fresh Statement of Estimates and para (b) statement and had regard to any observations. This was a fundamental breach. It was not permissible to allow the landlords to let the works contract to someone other than a person named in the Statement of Estimates since that would drive a coach and horses through the legislation. In ***Camden*** the Lands Tribunal at para 35 adopted a purposive approach and this should be the approach in this case as well.

31. In respect of the additional works to the asphalt and to the roof beams, Mr Martin submitted that no consultation at all had taken place. There was a breach of paras 4 to 5 of Part 2 of Schedule 4.

32. As far as the fire escape is concerned, Mr Martin relied on para 4(4) of the regulations. He submitted that the landlords failed to "*try*" to seek an estimate from ARC Engineering, the one contractor proposed by the tenants. The managing agent may have made three telephone calls but these could not possibly fulfil the requirements of para 4(4). He referred again to ***Metroquest v Scott-Johnson***. Furthermore, the change in specification from galvanised steel to painted cast iron was a fundamental

change which required the works to be re-tendered. This was a breach of paras 1-5 of Part 2 to Schedule 4.

33. In his closing submissions, Mr Martin also suggested an additional argument not raised in his skeleton or Statement of Case. The contract letter dated 11 December 2007 was only a mail merge draft and there was no evidence it had been served on all the leaseholders as required by para 6 of Part 2 of Schedule 4 to the regulations. Indeed, Mr Fanslau denied receiving it at all.

34. The applicant's case. In relation to the main works, Mr Buckpitt submitted that:

(a) In para 4(1) of Part 2 of Schedule 4, "*try*" did not mean "*use all reasonable endeavours*". A telephone call and a letter were patently a genuine attempt to contact the nominated contractor Makers. This was reinforced by the letter dated 3 January 2007 band the para (b) notice which both mentioned attempts to contact Makers. None of the lessees complained about this at the time. In any event, there was never a valid nomination. A nomination had to be in writing – see para 1(2)(c).

(b) The "*date of the notice*" in regulation 2 meant what it said. It did not mean the date of service, since that date was a moveable feast. Regulation 2 could be contrasted with the wording of the old s.20(4)(d) which required a s.20 notice to state a period by reference to the date a notice is "*given*".

(c) There was no evidence at all of predetermination. The letter of 3 January 2008 stated clearly that the landlords would wait until expiry of the consultation period before choosing a contractor. The statement that the landlords "anticipate" appointing CCCP was not a determination – it was a statement of the obvious given that CCCP was the lowest estimate.

(d) As to the main point raised by the respondent, Mr Buckpitt made what he admitted was a "bold" submission that there was no breach. There was nothing in para 6 of Part 2 which required the landlords to enter into a contract with one of the tendering parties referred to in para 4(5). The only requirement was to give reasons in a para 6 contract statement for awarding the contract to someone who submitted "*the lowest estimate*" or a contractor nominated by the

leaseholders. Nowhere did parliament state that the landlords must contract only with a party which appears in the list of contractors who submit tenders. This made sense because major changes could occur between the estimation stage and the letting of the contract. If the contract had to be placed with one of the contractors who submitted an estimate, he accepted there had been no Statement of Estimates or paragraph (b) statement served in relation to the retendering exercise.

35. As far as the other works are concerned, Mr Buckpitt accepted that the asphalt and the beams were part of the relevant costs of the main works and not separate relevant costs (we do not therefore have to consider whether the beams fall within the financial limit of section 20). He also accepted there had been a failure to consult in relation to these works. However, in relation to the fire escape, there had been a full s.20 procedure followed, the main complaint being that landlords had not tried to contact the nominated contractor ARC. Mr Buckpitt repeated his submissions made in relation to the meaning of the word "*try*". Four telephone calls were made, which were more than adequate. In relation to the change in specification, this was only a minor change, and the ultimate cost was less than the original tender price. Finally, Mr Buckpitt observed that it may be that the relevant cost of the fire escape works may not be subject to the restrictions in s.20(5)(b) of the 1985 Act. There are 185 flats. The contract for the fire escape works was for £26,748.87, but there were additional costs of £2,335.90. The average relevant contribution from each lessee would therefore be £157.21. Mr Buckpitt was unable to say whether the contribution required by any of the larger flats would be over the £250 threshold.

36. Mr Buckpitt resisted the late point made by Mr Martin in relation to the letter of 11 December 2007 because it was not mentioned in the Statement of Case and there had been no opportunity to prepare evidence. Mr Buckpitt accepted he could not prove the contract notice had gone to all the leaseholders, but he would seek dispensation from para 6 of Part 2 of Schedule 4 to the regulations if the Tribunal found that it did not.

37. Decision. In relation to alleged breaches relating to the main contract of works, the Tribunal finds as follows:

(a) The landlords are not in breach of para 4(1) of Part 2 of Schedule 4. The word "*try*" is an ordinary English word, which needs no explanation. It does not mean that the landlords must use all reasonable endeavours to contact the nominated contractor. Here, the landlords made more than *de minimis* efforts to contact Makers Ltd. A letter to Makers containing the Schedule, a telephone call to the contractor and two letters to the leaseholders informing them that the landlords had failed to make contact plainly satisfy the test. These efforts went far beyond those in ***Metroquest v Scott-Johnson***, where the landlord's agent never even attempted to communicate with the nominated contractor because it did not have any contact details.

(b) It is therefore not necessary for the Tribunal to decide whether the obligation in para 4(1) is only triggered by a nomination in writing. However, if we were required to do so, we consider that para 4(1) was engaged in this case. The "*observations in relation to the proposed works*" in para 1(2)(c) (which must be in writing) are rather different to nominations in para 4(1). Para 4(1) nominations are proposals for "*the name of person from whom the landlord should try to obtain an estimate*" in para 1(3). These are not specifically required to be in writing.

(c) The landlords were in breach of regulation 2 and para 4(10) of Part 2 to Schedule 4 in relation to the notice dated 22 December 2006. In our view, the "*date of the notice*" means the date the notice was given. We recognise that adopting this date may lead to uncertainty for the landlords, but the adoption of the date stated in the notice could cause serious prejudice to the tenants in the event that the landlords served the notice several weeks after it was dated. ***Mohammed-Khabiri v Rahimzadeh*** found that a notice which did not specify a particular date was a breach of the regulations and we reach the same conclusion.

(d) The landlords did not predetermine that the contract would be awarded to CCCP in breach of para 5 of Part 2 to Schedule 4. The letter of 3 January 2008 cannot be construed as a determination by the landlords that they would not entertain any further observations. Indeed, that letter specifically invited observations.

(e) There was a breach of paras 4 and 5 of Part 2 of Schedule 4 in relation to the main works. We reject Mr Buckpitt's "bold" submission that the placing of the works contract with a contractor who had not been part of the original tendering exercise was not a breach of the regulations. In our view, the "*lowest estimate*" in para 6(2) of Part 2 plainly refers to the "*estimates*" in the original tendering exercise under para 4(5). As stated in para 35 of ***Camden***, the requirements relating to estimates are clearly fundamental, and in our view those estimates must include the contractor who is eventually chosen. Any other interpretation of the regulations would make the requirement to provide leaseholders with estimates a pointless exercise.

38. It is conceded there was a breach of paras 4 and 5 of Part 2 in relation to the asphalt and the beam works.

39. As to the fire escape, it is far from clear whether the works are covered by the cap in section 20. The Tribunal proceeds on the basis that the relevant contribution by any one flat exceeds £250. As far as para 4(1) of Part 2 is concerned, we adopt the same reasoning in respect of the requirement to "*try*" to obtain estimates from the leaseholders' nominated contractor. Making four telephone calls was more than a *de minimis* attempt to contact ARC. However, we find there was a breach of paras 4 and 5 generally. The Notice of Intention on 23 February 2006 referred to "*replacement of the fire escape*". The tender attached to the paragraph (b) statement was on the basis of a galvanised steel structure. What was installed was a lower specification and less weather resistant structure. This was a fundamental change in the nature of the project.

40. The Tribunal declines to allow Mr Martin to rely on his additional argument. It was not raised in the respondent's Statement of Case. The Tribunal is not prepared to find the landlords in breach without them being given the opportunity to adduce evidence from computer databases that the notices were served on all leaseholders. The lateness of the new argument meant this was impracticable.

41. It follows that the Tribunal finds there are breaches of the following:

(a) Paras 4 and 5 of Part 2 of Schedule 4 in relation to the main works (in connection with the change from to CCCP to APA as contractors).

(b) Regulation 2 and para 4(10) of Part 2 to Schedule 4 in relation to the notices dated 22 December 2006.

(c) Paras 4 and 5 of Part 2 in relation to the asphalt works to the top of the canopy.

(d) Paras 4 and 5 of Part 2 in relation to the works to the beams.

(e) Paras 4 and 5 of Part 2 of Schedule 4 in relation to the fire escape.

DISCRETION

42. Mr Martin submitted that the change from CCCP to APA was a *"fundamental"* breach as suggested by the President in the ***Camden*** case. It was wrong that the landlords had no option but to proceed with letting the contract to APA. The grant would still have been paid by Hastings BC. Furthermore, the landlords could not rely on the need for urgency since that had arisen as a result of the landlords' own delays. He relied on the decisions in ***61 Warwick Ave Ltd v City of Westminster*** (2005) LVT (unreported) LON/00BK/LDC/2005/0009 and ***Atlantic Housing v Rood*** (2007) LVT (unreported) CHI/24UD/LDC/2006/0027. In any event, gross prejudice was caused to the tenants. Had the tenants been informed of the possibility of a new contractor coming in, they could have proposed an alternative contractor that may have been cheaper. The tenants may have sought to vary the specification so that it included the works to the canopy roof which by then had become necessary.

43. In relation to the remaining breaches, Mr Martin accepted that the breach of the time limit to serve the notices dated 22 December 2006 was minor. However, he submitted that failure to include the asphalt works in the original specification was a fundamental failure on the part of the landlords. The need for the extra canopy works had been identified by 24 July 2007 at the latest. The situation was close to that in ***Warrior Quay***, where there was no consultation at all. Had the extra works been included at an earlier stage, the total bill for the leaseholders may well have been lower. Mr Martin accepted that the need to replace the beams only emerged once the works were started and that these *"did arise in an emergency"*. However, he

submitted that such an eventuality was not entirely unpredictable in the light of the Hastings BC survey. A prudent landlord would have included a contingency sum for this kind of work within the original works contract and this was precisely the kind of work which would have been carried out under such a contingency provision.

44. Mr Buckpitt stated that although there was a lot of complaint by the leaseholders in this case, but no clear identification of prejudice. The work had been done. There was no complaint about the price of the work. The leaseholders did have an input into the tendering process and the choice of contractor (unlike ***Camden***). The only difference was that legally the contract was placed with the sub-contractor rather than the contractor. Mr Standen's evidence was that there was actually a saving of money. Consulting again would have meant seeking fresh tenders (the original ones would have expired) and delay. This would have meant the Council stepped in to do the work and the grant aid (which benefitted the lessees) would have been lost.

45. As far as the other items are concerned, Mr Buckpitt submitted that any error in the dates on the notices of 22 December 2006 would be a 'classic' case for dispensation under s.20ZA. The leaseholders had responded to the consultation and had not been prejudiced in any way. As to the asphalt works, the additional works were not a major part of the contract and such a variation was inevitable. It would plainly be unworkable if every variation to works contracts had to be consulted upon by way of s.20 consultation procedure. The reason from the omission of the asphalt works from the original consultation was also material. The specification had to be prepared in the form drawn up by Hastings BC to comply with their requirements, and it only really emerged later that the asphalt works were needed. The beams were another classic instance where relevant costs were incurred to remedy problems which emerged once works were underway. There was no real option other than to ask APA to do this. As to the suggestion that there should have been a provision, the net cost to the leaseholders for the beams would have been the same whether or not a provision was made.

46. Decision. The Tribunal exercises its discretion to dispense with paras 4 and 5 of Part 2 of Schedule 4 in relation to the main works. We consider the nature of the change from CCCP to APA as contractors was unusual. The main consideration is that the uncontested evidence of the landlords is that this was a technical change in the legal identity of the contractor rather than a substantive change in the works or the price. As specialist subcontractor, APA would have carried out the bulk of the works even had the contract been signed with CCCP. The second factor is that there was plainly pressure from Hastings BC to carry out the works quickly. Statutory notices were served by the Council and penalties threatened. There would have considerable delays and uncertainties. Furthermore, the landlords employed a professional project manager and acted on Mr Standen's advice. As far as prejudice is concerned, the loss of the opportunity to comment on tenders in ***Camden*** was to some extent theoretical. They had already been given the opportunity to comment and had done so. The prejudice was also mitigated by Mr Standen's shortened retendering exercise. There was some evidence that the leaseholders would have been prejudiced more by going back to the estimates stage in para 4 of Part 2 of the Schedule. Mr Standen certainly considered that Hastings BC would have carried out works in default and that the cost would have fallen on the leaseholders without attracting grant aid. Whether that is the case (and the residents association disputes this), the landlords were entitled to rely on this advice. The one real point of criticism is that the residents association and leaseholders were not told of the change from CCCP to APA before APA started on site. This could easily have been done, and prejudice was caused by this. However, the Tribunal does not consider the prejudice was significant given the limited options available to the landlords at that time. In these unusual circumstances, the Tribunal finds that the breach of the regulations is not a fundamental one and that the prejudice is not serious. We therefore find that the matter falls far closer to ***Eltham*** end of the range than the ***Camden*** end of the range.

47. The Tribunal also exercises its discretion to dispense with the regulations in respect of the notices of 22 December 2006, the asphalt works and the repairs to the support beams. As far as the notices are concerned, Mr Martin conceded that the error on the face of the 22 December 2006 notices was "minor". There is no obvious prejudice

caused to the leaseholders by this error. They did respond to the information contained in those notices in any event. We therefore dispense with the requirement of Regulation 2 and para 4(10) of Part 2 to Schedule 4 in relation to the notices of 22 December 2006. As to the asphalt works to the roof canopy, the Tribunal finds that the need for these works were not evident at the time of the tender process. The two surveys by CCCP had not thrown up any need for recovering the canopy and the canopy works were not included in the Hastings LBC Schedule of works. It would have been inconvenient and would have delayed matters had the canopy works not been added to the APA contract which was concluded soon afterwards. Again, there was some prejudice through lack of consultation, but this was not very great. We dispense with paras 4 and 5 of Part 2 in relation to the asphalt works to the top of the canopy. Finally, the Tribunal considers the works to the beams are a 'classic' instance for the exercise of s.20ZA. The need for these emerged once the contractors were on site. Full consultation in these circumstances is impossible since the main contract works would almost certainly have had to stop pending the service of statutory notices. The landlords relied on the judgment of Mr Standen, and it is reasonable to dispense with paras 4 and 5 of Part 2 in relation to the beams.

48. Finally, there is the separate issue of the fire escape. Here, the change in specification was a major one. Corrosion will always be a problem in the salty air of the sea front at St Leonards. Indeed, the Tribunal observed corrosion already appearing on the fire escape treads within months of the contract being completed. The use of galvanised steel (as opposed to painted cast iron) for the treads would have mitigated long term maintenance problems. The leaseholders were entitled to be consulted about the decision to go for a lower specification solution at lower cost or to consider a more expensive lower maintenance replacement. Furthermore, there is no evidence Hastings BC was pressing for the fire escape works to be carried out. The involvement of Hastings BC was in relation to listed building consent and further discussions may well have been possible on the point. The leaseholders lost the chance to have an input into these discussions and this prejudice was significant. The fact that the eventual bill was much lower is not significant, since the ongoing maintenance costs are likely to be higher. The Tribunal considers that the prejudice caused outweighs the

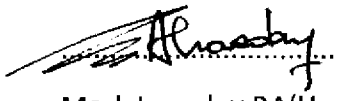
other factors and that no order under s.20ZA should be made in relation to the fire escape.

CONCLUSIONS

49. The Tribunal orders that the following consultation requirements are dispensed with:
    (a) Paras 4 and 5 of Part 2 of Schedule 4 in relation to the main works (in connection with the change from to CCCP to APA as contractors).
    (b) Regulation 2 and para 4(10) of Part 2 to Schedule 4 in relation to the notices dated 22 December 2006.
    (c) Paras 4 and 5 of Part 2 in relation to the asphalt works to the top of the canopy.
    (d) Paras 4 and 5 of Part 2 in relation to the works to the beams.

50. The landlords have not complied with the consultation regulations in relation to the fire escape works, but the Tribunal does not dispense with the consultation requirements in this regard. Whether the relevant costs of the fire escape works are irrecoverable under LTA 1985 s.20 is a matter for agreement between the parties or another Tribunal.

51. The Tribunal notes the agreements between the parties recorded above.



Mark Loveday BA(Hons) MCIArb
Chairman
10 December 2008