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Case Reference	:	**CAM/38UE/LSC/2012/0136**
Property	:	**Flats 1, 2, 3, and 4, 3 Bridge Street, Abingdon, Oxon OX14 3HN**
Applicant	:	**Cathedral Holdings Limited Represented by IBB Solicitors**
Respondents	:	**E. M. Amphlett & L. J. Nielsen G.I. & E.A. Boon H. & S.F. Carter G. Humphreys & G.A. Smith Unrepresented**
Date of Application	:	**20th March 2013**
Type of Application	:	**Application for dispensation from the consultation procedure pursuant to Section 20ZA of the Landlord and Tenant Act 1985, as amended ("the 1985 Act")**
Tribunal	:	**Judge. J. Oxlade D. Banfield FRICS A. Kapur**
Date and venue of Hearing	:	**15th July 2013 Oxford Abingdon Four Pillars Hotel Marcham Road, Abingdon, Oxon OX14 1TZ**

Attendees:

Applicant	**Respondents**
Mr. G. Van Tonder, Counsel	**Mr. E. M. Amphlett & Mrs. L. Hugh**
Mr. W. Kramer, Solicitor	**Mr. G.I. & Mrs. E.A. Boon**
Mr. S. Mitchel	**Mr. G. & Mrs. G.A Humphreys**
Mr. M. Previte, Hicks Baker	**Mr. H. Carter**
Mr. Howlett, M.D. Howlett Assoc.	

DECISION

For the following reasons:

(1) The Tribunal[1] grants dispensation from the consultation requirements set out in Part 2 to Schedule 4 of the Service Charges (Consultation etc.) (England) Regulations 2003 in respect of works which were done to the premises in January 2009, subject the following conditions:

(i) the Applicant do deduct from the cost of the major works the sum of £4801.75, and

(ii) pay to the Respondents their reasonable legal and other costs of bringing the application pursuant to section 27A and responding to the section 20ZA application, such sums to be assessed by the Tribunal, if not agreed between the parties.

(2) The Tribunal makes an order pursuant to section 20C of the 1985 Act, in respect of the Applicant's costs incurred to date in the proceedings under this case number; both responding to the section 27A application and bringing the section 20ZA application.

REASONS FOR THE DECISION

Background

1. At a hearing held on 11th March 2013, the Tribunal heard oral evidence, considered documentary evidence, and heard submissions on a preliminary issue, namely, whether the Applicant had complied with the statutory consultation requirements in respect of major works to the premises.

2. A decision was announced orally that day, with written reasons promised, which were promulgated on 5th April 2013 ("the first decision"). The Tribunal found that the Applicant had not complied with the statutory consultation procedure, as a result of which the Applicant's right to recover service charges from the Respondents was limited to the statutory maximum of £250 per flat.

[1] The Decision recorded in this document was made by the First-tier Tribunal (Property Chamber) rather than the leasehold valuation tribunal, to whom the application had been made, because by virtue of The Transfer of Tribunals Function Order (2013 No1036) ('the Transfer Order') the functions of leasehold valuation tribunals were, on 1st July 2013, transferred to the First-tier Tribunal (Property Chamber). In this decision the expression 'the Tribunal' means the First-tier Tribunal (Property Chamber).

3. In the first decision the Tribunal set out in considerable detail the correspondence between the parties leading up to the works, which started in January 2009, and the parties' respective arguments. In view of the nature of the application now before us - which requires that we look at the consequences of non-compliance, to establish whether the Respondent's suffered prejudice - below are the findings which had been made in the first decision on the Applicant's failure to comply:

"35. The Tribunal has carefully considered all of the evidence adduced and submissions made, and for the following reasons finds that the Respondent failed to comply with the statutory consultation procedure.

36. The process started badly, the Respondent having failed to have any regard for the section 20 consultation procedure whatsoever; by entering into a contract with Nicholas Bolt and by having scaffolding erected for the purpose of facilitating the works under Mr. Bolt's contract. On receipt of the letter dated 28th July 2008 from Mr. Carter (page 423) referring to the right to nominate a contractor under section 20 the Respondent's intended course was brought to a halt.

37. The Respondent then engaged Solicitors, who attempted to comply with the consultation procedure by service of letters dated 17th November 2008 (stage 1) and 14th January 2009 (stage 2). However, the Regulations were not complied with in their entirety:

Stage 1

(i) Regulation 8(2)(b) requires that the notice shall state the landlord's reasons for considering it necessary to carry out the proposed works; yet the letter does not do so,

(ii) Regulation 8(2)(d) requires that the notice state the address to which the lessee can make written representations, and the date on which the period for submissions ends; yet the letter does not do so.

Stage 2

(iii) Regulation 10 requires that the landlord have "regard" for any observations made by the lessees; whilst the letter of 14th January 2009 (page 493) summarises some of the lessees observations, the fact that the letter dated 17th November 2008 states that it will award the contract to Nicholas Bolt undermines the Respondent's assertion that it has had any regard for the observations subsequently made.

38. Mr. Van Tonder submitted that the Regulations do not require that the notice of intention contain all of the information in one notice, and can incorporate information in other documents. The Tribunal rejects this argument for the following reasons: the Regulations refer to it as "the notice"; the Regulations prescribe strict time limits; the

Regulations provide for specific information to be contained within the notice; the Regulations provide a scheme where one thing flows from another. Where information is "peppered" throughout correspondence, as in this case, not only does it require deciphering, it makes it almost impossible to establish when time limits run.

39. The purpose of the consultation requirements is to ensure openness and transparency. The Applicant asserts that this had not happened and that the process was fatally flawed, chiefly because the first contract between Nicholas Bolt and the Respondent was not terminated. The Tribunal finds it more likely than not that the first contract was terminated. However, it is hardly surprising that the Applicant would be sceptical of the Respondent's action as at stage 1 letter (page 479) the Respondent's Solicitor stated that "it is our client's intention to award the contract to carry out the maintenance works to Nicholas Bolt and the decoration works to Gary Humphreys". As Mr. Van Tonder said that this was the stage 1 notice, it undermines the Respondent's invitation to provide observations, to nominate contractors, and the Tribunal finds that it cannot conclude that the Respondent truly had regard to the Applicants' observations.

40. The Applicants' also advanced an argument that Mr. Boon had been kept out of the picture by the failure of receipt of some of the letters. The Respondent countered this by referring to some correspondence, which undermined the assertion. The Tribunal did not hear oral evidence from Mr. Boon. However, in light of the above findings as to the defects in procedure, the Tribunal's decision on this point is unnecessary".

The Current Application

4. In anticipation of the written reasons but without knowing the precise nature of the reasons for the findings on 20th March 2013, the Applicant issued an application for dispensation from the consultation procedure, pursuant to section 20ZA of the 1985 Act. This was in respect of (i) the major works in respect of which the first decision was made, and (ii) scaffolding costs, and which the Applicant had conceded at the first hearing would require such an application.

5. The Tribunal issued directions on 5th April 2013 in respect of the new application, which included the following paragraph in the preamble:

"The following directions are made to enable the Tribunal to consider the section 20ZA application, in accordance with the guidance given in the case of Daejan Investments Limited v Benson [2013] UKSC 14. This requires the Tribunal when considering a section 20ZA application to focus on the extent to which the Lessees were prejudiced by the failure to comply with the consultation requirements (i.e. by paying for inappropriate works or paying more than would be appropriate as a result of the failure to comply or otherwise). If there is no prejudice then dispensation will be granted. If the Lessees establish a credible case for prejudice, then the Lessor will need to

rebut it; in looking at this point the Lessees need to establish what they would have said/done had there been proper consultation. The Tribunal can grant dispensation on terms, and so the Lessor should give some thought to what might be offered as "terms". The contents of the witness statements/submissions should focus on these points".

6. The matter proceeded to a full hearing on 15th July 2013. No further inspection was considered necessary.

7. On 17th August 2013 the Tribunal convened in the absence of the parties to make its decision on the new applications for dispensation, and costs, which we now do.

The hearing

8. In accordance with the pointer given in the preamble to the Directions the Respondents, by their spokesperson, Mr. Amphlett, set out what prejudice they considered they had suffered as a result of the failure to consult in respect of major works and scaffolding costs.

The Respondent's case on prejudice

9. The submissions expanded on the written statement of case made by Ms. Laura Hugh, dated 22nd April 2013, which set out the reasons that the Respondents considered that they had been prejudiced by the failure to consult.

10. The Respondents argued that:

- the Applicant had incurred significant legal costs, by unnecessarily employing Solicitors arising from the Applicant's failure to comply with the legislation, which costs were added to the service charge account ("the legal cost argument");
- the Applicant failed to state its reasons for the major works being required, and so the Respondents were unable to make informed observations on the necessity of the proposed works, most of which were external; it is difficult to seek retrospective advice about what was necessary in the absence of evidence of the original condition; the conclusion the Respondents' reach is that the works were for aesthetic reasons ("the absence of reason argument");
- the Applicant's clear intention was to appoint a contractor called Nicholas Bolt; the tender process was not fair, and the Respondent's contractor was not given a fair chance; Lambert Construction withdrew their tender, without the Applicant seeking to find out why ("lack of contractor parity argument");
- the Applicant's case is that the scaffolding was erected to facilitate inspection at the point of tendering, but it was not necessary, as Graham Boon (former freeholder) would give oral evidence that access could have been secured through a loft hatch; ("wasteful scaffolding costs argument");
- the Applicant erected scaffolding without consultation, which deprived the Respondents of the opportunity to obtain their own competitive

quotes, and the Applicant even failed to obtain their own quote ("lack of scaffolding quotes argument");
- the Applicants approach discouraged the Respondents from becoming actively involved, having resigned themselves to the fact that Nicholas Bolt would be undertaking the work ("the done deal argument").

11. The Respondents summarised the financial effects of this failure to consult:

- scaffolding costs were excessively high, having been erected unnecessarily for a long time,
- Solicitor's fees were unreasonable, as unnecessary,
- The costs of the external works were unreasonable, and not justified,
- The works specification was not sufficiently detailed, open to interpretation, and so more costly.

12. The Respondent called Mr. Boon to give oral evidence and who confirmed as accurate the contents of his witness statement dated 31st May 2013. He added that as former freeholder and current lessee, he had been on the roof very many times, through the loft hatches. He had done so to clear gutters each year until 2005, and in the past to facilitate access for surveyors as a precursor to major works to the building in 1994/5. Prior to selling the building to the Applicant, Mr. Mitchell had been on the roof through the hatch, which they had done together. In 2004/5, the Council used a loft hatch to access the roof as part of an inspection prior to making a design award, and to access the roof to install lights for municipal purposes. This was all without scaffolding.

13. In cross-examination Mr. Boon accepted that it would not be possible to do works by making use of the loft hatch, but all preliminaries could be conducted that way. He went around the whole building with Mr. Mitchell prior to purchase, and made the point that a person/company would not buy the building without doing so. It was put to him that he was fully consulted and made no real objections to the works being done, but he said that there was a considerable difference from the original price of quote of £3,740 and then £40,000. In respect of scaffolding, his position is that it was not necessary to erect it until the week before the actual works started. He was not party to getting an alternative quote for scaffolding. He was also concerned about the current managing agent's charges, whilst accepting that this had no direct impact on the dispute before the Tribunal. Peter Clarke had done the works in 1994/5, and so Mr. Amphlett has asked him to obtain a quote for the subject work.

14. The Respondent had obtained, and wished to rely on a short report from Jon Hartley a Chartered Surveyor, of Jon Hartley & Associates Limited dated 30th April 2013, which commented on the specification, as totally inadequate: it lacked instructions as to workmanship and material, and much of the detail of the works were missing from locations. Further, the tender of Southern Construction, which he did not consider to be a serious attempt at a tender, failing to provide the necessary breakdown, no mention of vat, and no address for the contractor. He made the point that there was no actual signed final

account provided and so the actual cost of the works are not yet known. He carried out a partial inspection of the building, but from that it was not possible to establish the exact location of the works; where he could establish the works done he thought that they had been done satisfactorily. He gained access to the roof through the access hatch and so was able to fully inspect the roof. The elevations were fully inspected from street-level; it would not have been necessary to erect scaffolding to provide a full and detailed specification.

The Applicant's case on prejudice

15. The Applicant relied on a statement in reply dated 17th May 2013, filed by Sarah Davies, and oral evidence of Michael Howlett, an Architectural consultant and Director of MH Howlett Associates who filed two witness statements dated 13th February 2013 and 11th June 2013.

16. The Applicant met the Respondent's assertions as to prejudice suffered, as follows:

- in respect of the legal cost argument, the Solicitor's fees did not require consultation, and so are not a proper basis for such an application; in the alternative, the Applicant did not have legal expertise and so was entitled to seek legal advice on its obligations;
- in respect of the absence of reason argument, the Respondents were aware of the works which the Applicant wished to carry out (and had sufficient information to seek independent advice) and set out in "particulars" (i) to (iii) the correspondence from the Applicant to the Respondents which informed them, which this included an outline specification (referenced to plans);
- in respect of the lack of contractor parity argument, the Applicant's position was that from August 2008 it had tried to comply with the process, which was genuinely aimed at obtaining the best tender; the fact that the Respondents nominated two contactors (Lambert Construction and Gary Humphreys) supported that; all were treated equally and subject to the same terms and conditions; the Applicant had nominated Mr. Humphreys to do the internal decorating, and he withdrew for reasons outside the Applicant's control;
- in respect of the wasteful scaffolding costs argument, whilst accepting that there was non-compliance with the consultation requirements, the Applicant maintained that the scaffolding was necessary to allow a full inspection of the building and to permit contractors to tender; there was no alternative way of doing so;
- in respect of the lack of scaffolding quotes argument, the Applicant considered that the costs were competitive and compared well with the market;
- in respect of the done deal argument, the Respondents repeatedly made comments to the Applicant about the Nicholas Bolt contract; the Respondents were not resigned to that contractor, in view of their own nominations.

17. As requested in the Directions Order, the Applicant considered what terms should be offered to ameliorate any prejudice (if found) and said that it would withdraw the scaffolding costs (save costs of erection and removal), and set this

out in an open offer in letter dated 15th May 2013, as follows: without prejudice to the issue of the Applicant's contention that they had complied with the consultation requirements, and in the alternative that no prejudice was caused, the Applicant would offer to,

"1. reduce the total amount claimed in service charges from the residential tenants between 2008 and 2012 with a sum of £4000, and
2. to pay costs of £1,000. (sic) which relate to the lessees costs incurred in relation to the Applicant's application for dispensation i.e. they do not relate to the lessees application to determine liability under section 27A of the Landlord and Tenant Act 1985".

18. The Applicant called Mr. Mitchell to give oral evidence. He had negotiated terms for acquiring the freehold of the building from Mr. Boon. They met at the premises in 2005, at which time Mr. Boon was completing the building of the courtyard. He regretted to disagree with Mr. Boon, but they had not gone onto the roof together, nor had he gone on the roof at another time. He had checked his file, and there were architects plans and he had permission to inspect the building control file, none of which yielded up information about the loft hatch. The hatches referred to are in the kitchen of flat 4 and one proposed hatch. When the scaffolding was erected he saw what he assumed to be a hatch of flat 5, but he could not say if it was in the roof slope or in the flat, but it was not finished in lead but something else. He has not seen the slope of the loft in flat 3. Mr. Boon had said in pre-commencement meetings in 2004, that it was not possible to view from Bridge Street.

19. In cross-examination he said that he inspected a hatch at the time that Mr. Howlett was also inspecting, done from scaffolding. He had not had a survey done prior to purchase, as it is a full-repairing lease; he had bought dozens of buildings, and would only do a survey if there were some kind of limitation on the lease as to repairing liability, or use of unusual finishing. He had bought many with pitched roofs and flat roofs. He agreed that it should be standard practice to look for access where the roof configuration was like this. He did not recall that Mr. Boon had mentioned anything about roof access at time of purchase in 2005; he had done pre-contract enquiries, which revealed that Mr. Boon had done lead works in 1994. The drawings included in the documents refer to the approximate position of the kitchen in flat 4 with a loft hatch, but he did not know what had been installed. He denied that there was a conflict in his position, on the one hand being aware of one loft hatch, but then not being aware of it.

20. In answer to the Tribunal's questions he said that they buy property as an investment, most of which are let to high street retailers; the flats above are a "by product" of the acquisition, though the proportion of properties with flats are in the minority. He had not been inside flat 4, nor on any of the roofs. When he wrote to the lessees at the beginning of the process, he said that he intended to overhaul the leaks, that he would erect scaffolding and investigate. No one said that there was a loft hatch. He had made enquiries to see if he could erect a tower of scaffolding or use a "cherry picker", but as it was a busy road, it would

require permission and a banksman. He said that it would be expensive, though he could not say what a tower would cost.

21. Mr. Howlett gave oral evidence. In evidence in chief, he said that he had been instructed to prepare a "schedule of works" excluding the timber windows (p429) but had not been asked to prepare a report on the condition or make recommendations as to what works were required, and then the report on tenders (p445). In respect of comparisons of tenders he said that the lessees nominated a contractor, Peter Clarke (p488), who had priced most of the works, but not items C1-10 (10 miscellaneous items), nor D 1-3 (electrical services), nor E (decoration to common areas 1-5, internal and external). Peter Clarke's tender (£36,882) was put against Nicholas Bolt's tender (page 462 £34,712 plus vat), and so Bolt (the chosen contractor) came out well. The lessees had made the point that the lead work was expensive, but Bolt's was half the cost of Clarke's. Naturally, the lessees would ask why not use different contactors for different parts of the work for which they are the cheapest, but this does not work. Contractors mark up their costs according to their calculations and sometimes there is an element of "loss leader". He felt that Clarke's estimate might have underestimated the amount of work actually needed. Peter Clarke's had included a 10% contingency.

22. The scaffolding was in place when he inspected, and so he had good access. The roof could have been inspected from the loft hatch - had it not been screwed down shut. 70% of the work was on the elevations and to undertake an inspection from a distant view you do not know with certainty what you will find. You therefore have to allow for generous provisional sums, and work on a worst-case scenario. It was better to have a close inspection and then more precise estimates could be done. He could envisage using a tower, on wheels, which is moveable, not that he had done it himself. In view of the busy road he thought a cherry-picker may not have been used; though it could have been done on a Sunday, to minimise disruption, and there may have been traffic management costs. Had he been without scaffolding he would have looked at the elevations from the ground floor with binoculars. However, there is a lot of stonework, and laminating stone can look ok from ground level; it is a busy street and one would want to avoid it dropping onto people below.

23. In cross-examination he said that the scaffolding was up prior to his involvement; he did not ask for it, and it would have been possible – and is usual practise – to inspect from the ground. They would not usually erect scaffolding in order to inspect. It would be usual to ask for access to the roof. His remit was not to undertake a structural survey, rather to provide a schedule of works for repairs and maintenance. He could not explain the leadwork differentials, but if the company did not have leadwork expertise, they would sub-contract. He would not expect to find this level of disparity, though it is usual to find differences. The process is to competitively tender, but without wishing to assume or cast aspersions, it is possible that they loaded it. It is possible that Peter Clarke saw more work in there, though the witness had made assumptions about cracks to gutters and the number of lead sheets needed. There is always a potential for some variation.

24. He did not see an immediate need for the works to be done, it could have been left for perhaps 5 years, but he was conscious that it fronts a public highway, and so there are risks. He would rather not take the risk, as there was considerable stonework, which needed attention; the cornerings were protected with leadwork but in a poor condition. He disagreed with the proposition that the works were not specified or itemised; though it was not his remit to give reasons. He saw the Respondent's point that it was difficult for them to be aware of all of these issues. He agreed that there was a roof hatch, but as there was scaffolding available, this was the easier access for him.

25. In answer to the Tribunal's questions Mr Howlett said that he had not needed to access the building though the hatch, and had never recalled seeing it open. The hatch door was screwed shut from above, though he could not recall where the screws were located. The builder was with him at the time, and he demonstrated that it would not move. He assumed that it was screwed from the outside. His remit was to provide a list of defects and the remedial action needed; though this was not advice about what was or was not needed. The detail on the flashing to the parapet was unique – a bitumen flashing arrangement – which was at the end of its life having been in place for over 10 years. The principle point of the work was the cracking of lead, which had split; the felt had not failed, so that work was optional, but it would be difficult to say how long it would last. A lot of the recommended work was re-pointing, and there had been movement on the lintels. The worry is that masonry can fall off at any time. The date of his analysis was 7th November 2008. No negotiations took place with the contractor, as the code of practice does not recommend that this take place in a competitive tender situation; though if the client is on a limited budget you might do this. No questions were asked in re-examination.

Submissions – Applicant

26. On behalf of the Applicant, Mr Van Tonder referred to the case of Benson, which is not authority for the proposition that the landlord should be punished for his failure to comply; nor should the lessees gain a windfall as a result.

27. The question here is what relevant prejudice they suffered ? The factual burden is on them, and if they discharge it, then the Tribunal must look to see the extent to which dispensation can be granted, and then ameliorate the prejudice by attaching conditions. It was not a binary choice.

28. The Respondents have argued their case in a number of different ways; it comes down to saying that they were denied the opportunity to have input, to nominate, to comment on the necessity of the works, and so ask for an assumption to be made that the works cost more. There is no evidence that the works did cost more.

29. Mr. Van Tonder ran through the pertinent correspondence: an invitation was made for the lessees to say what works they thought needed doing, that there would be redecoration and scaffolding would be required. The tenants responded and were involved. It was not a bad start and quite proactive. The suggestions were collected up, a quote obtained, a list of immediate items to be resolved provided. It was clear what was needed and no reasons were needed.

Later, after the Respondents raised section 20 the Applicant (p424) said that it would appoint a surveyor to state the necessary works, so that this was not a landlord-led exercise. On 27th August (p428) the outline specification was provided to all Respondents, and it was clear from the defective items (i.e. page 434) the reasons for works being necessary. There was an invitation to inspect contractor estimates, and whilst it did not comply, it tracked the requirements. It is not high handed, but an opportunity to comment – indeed the Respondent's did so, and there was no suggestion that these comments were ignored.

30.The Respondents imply that the works could have been done for lower cost, had they had greater input, but there is no evidence to support this. Mr. Howlett did provide a tender comparison document, and explained why one does not cherry pick items. He maintained that the contractor who was chosen did give a competitive price.

31. In summary, prejudice had not been shown; no one said "don't put up the scaffolding, as you can get access from the roof". Mr. Mitchell said that he had not accessed the roof by a loft hatch and so the scaffolding was necessary to do the inspection. If anyone knew about the roof access, no one thought to tell the landlord. Mr, Boon had accepted that to do the works, the scaffolding was necessary.

32. The Applicant accepted that the length of hire could be disallowed, and referred to page 290, the cost was £3800 to supply and fix, half of which was paid by the commercial unit. If it is accepted that scaffolding was necessary to facilitate inspection and clear tendering, then the period for discounting would be up to the 7th November – so then to January would be allowed. The gross cost of scaffolding was £100 a week for hire, of which the commercial tenants paid £50 per week. The erection and removal costs would be the same. There were extra costs for St. Micklemas Fair and licence costs of £880 (page 291), of which the commercial tenants paid half. To ameliorate the situation he agreed the following: £1,000 (20 weeks at £50 for scaffolding)

33. As there was no need to consult on Solicitor's costs he disputed that these could evidence prejudice, or that an order in respect of them could properly fall within the conditions to ameliorate. The Respondent was entitled to take legal advice, and he did not understand the argument that having a "bad start" in the consultation procedure could result in this being a cost which should not be paid.

34. The Tribunal was limited to the earlier findings on the limited ways in which consultation had not been complied with; the errors were minimal, compliance was good enough, and had no financial impact. The Applicant had made an open offer, which would ameliorate any prejudice found to have been suffered.

35. In the absence of guidance in Benson the Tribunal asked Mr. Van Tonder to say what the Applicant's position was if the Tribunal found that the open offer was insufficient to ameliorate the prejudice. Namely, whether the Tribunal should refuse to dispense with the consultation procedure at all (so limiting recovery to £250) or whether the Tribunal could substitute other conditions. He declined to make submissions on that point.

36. As to costs, the Applicant had made this open offer on 15th May 2013, prior to the hearing, which should have been accepted and so the Applicant's costs of this hearing should he added to the service charge account. An order under section 20C should not be made.

37. In respect of the costs of the earlier hearing (on 11th March 2013) the Applicant had made an offer to settle on the basis that there be a deduction of £4000 from the total service charge bill, made in the absence of a concession that the consultation procedure was defective; rather it was a pragmatic solution for all concerned. On examination, Mr .Van Tonder accepted that the offer dealt with many other things, and effectively bound the lessees to accept that service charge costs in other years were reasonable, which was in dispute.

Submissions - Respondent

38. Mr. Amphlett succinctly responded, making the following points:

- the Respondents maintain their position that the Applicant had not provided good reasons for doing the works, and this has only emerged during the course of the evidence of Mr. Howlett,
- the scaffolding went up as part of the Bolt contract, and was not erected with the intention of doing a full survey; it was unnecessary for inspection, as argued, and Mr. Howlett has confirmed that he would have followed the usual practise of doing it from ground level,
- they were not given any real reasons for the scaffolding going up,
- in all of the correspondence the Applicant had not pointed to any real regard had for the Respondent's comments,
- Mr. Howlett said that it would be his usual practice to ask if there was roof access, and so the Applicant should have done so; he did not need to do so as the scaffolding was in place,
- the Respondents have not asserted that the Applicant should not take legal advice; the point is that the costs of doing so are higher as the Solicitor ran the consultation procedure, which was unnecessary and unusual,

39. As to costs, he said that the offer of £4000 made on 15th May 2013 was on the basis that the Applicant would have been able to recover their costs of the 11th March hearing, which plainly was not right in light of the findings that the Applicant's failed to comply with the consultation procedure. In short, the offer of compensation was a hollow offer. In respect of the first offer in January 2013, they had by that stage made a massive effort to try to settle the case before it came to the LVT, and relied on letters at pages 672 and 673, and responses at pages 677/8 and 683 to 685. He pointed to other correspondence to say that they had set out their qualms, which had not been allayed. In short, they had no alternative but to come to the LVT, as the Applicant simply failed to acknowledge that they had done anything wrong at all. Further, following the issuing of the first application, the Applicant conceded that its service charges demands were non-compliant.

Applicant's submissions in reply

40. Mr. Van Tonder said that the Respondents' undertook a massive effort to try to get the Applicant to give up; that the Respondents could not identity what prejudice they suffered as a result.

41. At the end of the hearing, the Tribunal reserved its determination.

Relevant Law

42. Section 20ZA of the 1985 Act, as amended, provides that where an application is made to the LVT for a determination to dispense with all or any of the consultation requirements the Tribunal may make the determination "if satisfied that it is reasonable to dispense with the requirements".

43. The case of Benson provided guidance on the meaning of the provision and method that the Tribunal should adopt. The purpose of the consultation requirements was to ensure that lessees would not pay for service charges in respect of unnecessary services or those provided to a defective standard or less than acceptable standard, nor to pay more than they should for necessary services ("the primary purpose"). The consultation requirements were designed to support those ends, to give practical effect to those purposes, as was section 20ZA. So consultation goes to the appropriateness of works, and obtaining quotes goes to the issue of quality and cost of works.

44. Accordingly, when the Tribunal considers a section 20ZA application, it must focus on the extent to which the tenants were prejudiced by the landlord's failure to comply with the requirements. If the extent, quality, and cost of works are in no way affected by the failure to comply, then in the absence of some other good reason, dispensation should be granted ("relevant prejudice"). The financial consequences to the landlord of not granting dispensation are not a relevant factor.

45. The consultation requirements are not an end in themselves, and dispensation is not a punitive or exemplary exercise. Nor do the requirements remove from the landlord the decisions as to what work needs to be done, when they shall be done, who shall do them, and what amount should be paid for them.

46. The expression of a failure to comply as "serous failing" or "technical, minor, or excusable breach" is unhelpful, because it is so subjective, and fails to concentrate on whether any prejudice is caused to the lessee. Further, the consultation requirements are not intended for "transparency and accountability" above and beyond the primary purpose.

47. The Tribunal has power to grant dispensation on appropriate terms, for example dispensation conditional on the landlord agreeing to reduce the cost of the works, or costs incurred with a landlord's application.

48. The legal burden remains on the landlord to show that it would be reasonable to grant dispensation. The factual burden rests on the lessee to show some relevant prejudice that they would or might have suffered; the Tribunal may regard the lessees argument with sympathy, in view of the landlord's default, and so may resolve in their favour any doubts as to whether the works would have cost less or carried out in a different way. The Tribunal should not be too ready to deprive the tenant of the costs of investigating relevant prejudice or seeking to establish that they would suffer prejudice. Once the tenant's have raised a credible case for prejudice, the Tribunal should look to the landlord to rebut it. It would be for the landlord to show that the tenant's costs were unreasonably incurred; it is likely that they will have to costs of consulting a surveyor/solicitor paid by the landlord.

Findings

49. The Tribunal has carefully considered all of the evidence filed, and submissions made.

50. The Tribunal's findings as to the failure by the Applicant to comply with the consultation procedure are fully set out above. Accordingly, the Tribunal proceeds to consider whether the Respondents' have established relevant prejudice, focusing on the six areas of prejudice identified by the Respondents: "the legal cost argument", "the absence of reason argument", "lack of contractor parity argument", "wasteful scaffolding costs argument", "lack of scaffolding quotes argument"; and "the done deal argument".

The Legal costs argument

51. The Tribunal found in the first decision that the process of consultation started off badly, as the Applicant failed to have regard any for the consultation requirements, and it was the lessee's reference (in correspondence) to section 20 which caused the Applicant to then engage Solicitors; the Solicitors then failed to conduct the consultation procedure in accordance with section 20.

52. Whilst the Applicant's are entitled to seek legal advice, the Applicant went further than just seeking advice. They engaged Solicitors, who dealt with the whole of the section 20 process, which involvement included corresponding with the lessees. Whilst the Tribunal is used to seeing landlord's employing managing agents to deal with the section 20 process, reliance on Solicitors for the whole process is not often seen; it is not necessary, and is costly. The Tribunal finds that there is a direct factual link in this case between the lessee raising the section 20 point, and what appears to be a knee-jerk reaction by the Applicant to engage Solicitors. The Tribunal would usually expect to see costs of £500 for managing agents to send out the section 20 documents, and to liaise with lessees, rather than the Solicitors costs of £3800, incurred in this case. The Tribunal considers that the Respondents have raised strong arguments as to prejudice in respect of a sum which the Tribunal quantifies as £3,300.

53. Mr. Van Tonder sought to rebut the claimed prejudice by saying that as Solicitor's costs are not something on which consultation needs to take place, it cannot "count" as prejudice. The Tribunal rejects this argument: firstly, it is

quite usual in section 20 notices to see the landlord provide a schedule of all costs anticipated in the major works, including managing agents and other professional fees, and so there is nothing in the point that these costs cannot be consulted upon; secondly, the Tribunal finds that these costs were a direct consequence of the failure to comply with requirements, and an unnecessary cost to incur.

54. Accordingly, the Respondent has satisfied the Tribunal that the Legal costs argument is established, not rebutted and disallow the Applicant's recovery of £3,300.

The absence of reason argument

55. The Tribunal found a fact that the Applicant's stage 1 letter dated 17th November 2008 (page 478) failed to state the reasons why the works were necessary. The statement that the Applicant "wishes to carry out maintenance and repair works to the external fabric and internal common areas" does not say why this was necessary.

56. However, by 27th August 2008 the Respondents had been provided with an outline specification of works (page 428) compiled by Mr. Howlett, which was accompanied by a plan of the building on which the location of some of the repairs were noted. This referred under headings:

- A 2 to 8 to replacing defective bricks, raking out defective mortar, removing friable material, removing redundant fixings, raking out cracks and inserting wedges, tacking off defective rendering and repairing defective mortar.
- B 2 to 8, remove defective fillet, flashing, and leadwork, cover exposed and protect specific items,
- C 1 to 10, remove damaged zinc covering, defective grouting, cracked pane of timber window, missing seal, damaged plaster, unlagged open plasterboard, replace rotted doorframe, overhauling window
- D2 and 3, investigate malfunctioning lights and allow for testing.

57. The general picture painted is of a building which needs to be brought up to scratch, because there are aspects which were deteriorating. It may have been better for the Applicant to have set out in layman's terms what was the motivation for the works i.e. very poor leadwork on the roof, with the risk of considerable damp penetration; further, that whilst the scaffolding was up the other items of masonry and other works should have attention, in view of the proximity to the high street and the risk of items falling from it. The Tribunal accepts that the Respondents may not have understood the full outline specification. However, had they at that stage sought advice, then the reasons for it would have emerged.

58.The Respondent may have felt on the backfoot on receipt of this specification, but by the time that the 17th November 2008 letter was sent, the Respondent had ample time to take advice. Further, there was adequate information for the Respondents' nominated contractor to provide a quote in early January 2009. In light of the information provided, whilst the reasons were not "spelt out" the

Tribunal does not consider that the Respondents were prejudice by this failure to state the reasons.

Lack of Contractor Parity and Done deal arguments

59. The Respondents have made known their suspicions that the tender process was not a fair one. Firstly, the contractor Bolt was appointed in June 2008, there is no documentary evidence to show that his contract was cancelled, and as the stage 1 letter of 17th November said that Bolt would be appointed, the Applicant did not keep an open mind. Secondly, the conditions set for contractors were onerous and there was no parity.

60. The Tribunal has had the benefit of hearing from Mr. Howlett, whose evidence it found to be credible and reliable. Mr. Howlett conducted a standard tender comparison process, and produced a report to weigh up the competing quotes. On receipt of the (late) quote from Peter Clarke, he did consider it, and noted that there was an absence of tendering for the full-job. The Tribunal is satisfied that this was a genuine process. Further, the Tribunal not only found in the first decision that the first Bolt contract was terminated, but that the acceptance of Mr. Humphrey's quote for decorating was a genuine acceptance. The Tribunal heard insufficient details about the contractor conditions attached to the work to find that they were unduly onerous, or that the conditions created a disparity. The Tribunal bears in mind that however on the back foot the Respondents felt, and that Bolt may be chosen contractor, to their credit they nevertheless kept open the lines of communication, and nominated their own contractor. The Tribunal accepts that it is not usual practice on a relatively small job such as this to "cherry-pick" items from one contractor against another, and so it was really a question of choosing one contractor or another. It is a worthwhile reminder that in Benson the Supreme Court said that the decision over which contractor to choose rested with the landlord. Accordingly, the Respondents have not made out these grounds.

Wasteful Scaffolding Costs Argument

61. The chronology of the matter is set out in the first decision, particularly at paragraphs 14 to 16. The Tribunal rejects the Applicant's argument that scaffolding was erected for the purpose of providing inspection facilities to Mr. Howlett, and the contractors. Rather, scaffolding was erected as part and parcel of the contract with Bolt, which was cancelled. Mr. Howlett's evidence was that it was convenient that scaffolding was present to enable him to gain access, but if it was not in place he would have done an inspection from the ground with binoculars and tried to gain access to the roof (which was only 30% of the works) another way. Indeed, Bolt's initial quote (which the Applicant had accepted) was not provided when scaffolding was in place.

62. The Respondents' case was that there was access by loft hatch and there was a conflict in the evidence between Mr. Boon and Mr Mitchell as to whether or not they went up on the roof in 2005 through a loft hatch prior to purchase. The Tribunal preferred the evidence of Mr. Boon to that of Mr. Mitchell on this point.

The Tribunal heard, and accepted as accurate, Mr. Boon's evidence that there were many many occasions when he went onto the roof for various purposes. Although Mr. Howlett referred to being shown by the builder in 2008/9 as to the loft hatch being unopenable, it is not clear when this happened or how it could have happened.

63. In short, the Tribunal finds that the Applicant aborted the Bolt contract, but not the scaffolding. It was used for the purposes of inspection very many months later, but this was convenient and a "bonus", but not necessary. The Tribunal rejects the Applicant's complaint that the Respondents did not (when told scaffolding would be erected) mention the loft hatch: at that stage the Applicant referred to redecorating the building which would need scaffolding (p 393); Mr Boon accepted that the works would need scaffolding – just not the inspection.

64. Accordingly, some of the scaffolding costs were unnecessarily incurred: the total costs were £7568.50 (page 287); the costs of erection, hire, and removal of scaffolding were quoted at £4465.00; the Tribunal finds that £3103.50 were incurred unnecessarily, of which £1501.75 were paid by the Respondents. The Tribunal finds that the sum of £1501.75 in respect of scaffolding is not to be recovered from the service charge account.

Lack of scaffolding quote argument

65. The Applicant did not obtain alternative quotes. Whilst the Respondent questions whether the costs are reasonable, there are no competing quotes to support this, though it would seem possible to have done so retrospectively. This does not discharge the burden of establishing prejudice. It may be that in light of the finding at 64, the matter can be laid to rest.

Summary

66. In light of the above, the Tribunal finds that (i) the Respondents have established that they suffered prejudice as a result of the Applicant's failure to comply with the consultation procedure, (ii) the Applicant has failed to rebut all of the arguments as to prejudice. The costs arising can be quantified as £4801.75. The Tribunal makes it a condition of dispensation that this sum be deducted from the service charge account for the works and scaffolding.

Costs

67. The Applicant relies on a without prejudice offer made in January 2013 (prior to the first hearing), and an open offer made in May 2013. Mr. Amphlett made pertinent observations as to why the offers were not accepted, and their defects.

68. None of the terms "beat" the Tribunal's findings as to financial consequences of prejudice.

69. The Tribunal finds that in light of the first decision and the findings arising above, that:

(a) it is just and convenient that the Applicant should be prevented from adding its legal and other costs incurred in the proceedings to date to the service charge account, and that
(b) as a condition of dispensation the Applicant should pay to the Respondents a sum which meets their reasonable legal and other costs arising from (i) bringing the section 27A application and (ii) responding to the section 20ZA application.

70. In the event that the parties do not agree on what is reasonable, the Tribunal will determine the point.

Conclusion

71. The Tribunal should make it clear that it has not considered the reasonableness of the costs of the works to the premises, nor the standard of the works.

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Joanne Oxlade

Judge of the First Tier, Property Chamber (Residential Property)

7th October 2013