UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2009] UKUT 233 (LC)
LT Case Number: LRX/148/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT ACT – service charges – consultation requirements for qualifying works – failure at stage 2 to provide summary of observations received during stage 1 consultation period and responses to them – delay in providing copies of estimates until after lessees advised that contract awarded – whether significant prejudice caused to lessees – Landlord and Tenant Act 1985, s20ZA

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

BETWEEN **DAEJAN INVESTMENTS LIMITED** **Appellant**

and

(1) JACK BENSON
(2) DAVID LAPES
(3) PAUL WALLDER
(4) ALDENSPRING LTD
(5) ALASTAIR GRAY **Respondents**

Re: Block of Flats,
Queens Mansions,
59 Queens Avenue,
London, N10 3PD

Before: Lord Justice Carnwath, Senior President
and Mr N J Rose FRICS

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 29 and 30 October 2009

Stephen Jourdan QC, instructed by GSC Solicitors for Appellant
Fiona Dewar, instructed by direct access, for Respondents

The following cases are referred to in this decision:

Camden LBC v The Leaseholders of 37 Flats at 30-40 Grafton Way LRX/185/2006, unreported.
Eltham Properties Ltd v Kenny & others LRX/161/2006, unreported

The following cases were also cited:

ESS Production Ltd v Sully [2005] 2 BCLC 547
Martin v Maryland Estates Ltd [1999] 2 EGLR 53
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749
Lay v Ackerman [2004] L & TR 29
Ashworth Frazer Ltd v Gloucester City Council [2001] 1 WLR 2180
Cresswell v Hodgson [1951] 2 KB 92
Whitehouse v Lee [2009] 31 EG 74
Associated British Ports v C H Bailey Plc [1990] AC 703
West Midland Baptist (Trust) Association v Birmingham Corporation [1968] 2 QB 188
Arrowdell Ltd v Coniston Court (North) Hove Ltd [2007] RVR 39
AEI Ltd v Phonographic Performace Ltd [1999] 1 WLR 1507
Auger & another v Camden LBC LRX/81/2007, unreported
International Fluids Drilling Ltd v Louiseville Investments (Uxbridge) Ltd [1986] Ch 513
Cain v Francis and McKay v Hamlani [2008] EWCA Civ 1451
Bickel & others v Duke of Westminster and others [1977] 1 QB 517
Houlder Brothers & Co Ltd v Gibbs [1925] 1 Ch 575
Hartley v Birmingham CC [1992] 1 WLR 968
American Cyanamid Co v Ethicon Ltd (1975) AC 396

DECISION

Introduction

1. This is an appeal against a decision of the Leasehold Valuation Tribunal (LVT) relating to service charges in respect of a building known as Queens Mansions in Muswell Hill. The proposed charges related to works carried out by the landlord, Daejan Investments Ltd. The amount which the landlord is seeking to recover from the owners of the five long leases is approximately £270,000. The LVT held that certain aspects of the relevant consultation regulations had not been complied with, and refused to dispense with compliance. The result of that decision, if upheld, is that the liability of individual lessees is limited to £250 each. Permission to appeal was granted by the President. He stated that the issue whether the financial consequences of refusing dispensation were material in the application of sections 20 and 20ZA of the Landlord and Tenant Act 1985 was one of sufficient general importance to warrant the grant of permission, and that the appeal should if possible be heard by the Senior President of Tribunals or his nominee.

The statutory provisions

2. The present scheme was introduced in October 2003 under the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), which amended the corresponding provisions of the Landlord and Tenant Act 1985 ("the 1985 Act"). Under the earlier provisions, the consultation requirements were less detailed, and the court had power to dispense with compliance if satisfied "that the landlord acted reasonably". New sections 20 and 20ZA were introduced by the 2002 Act, and brought into force on 31 October 2003, on the same day that the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Consultation Regulations") came into force.

3. The relevant provisions have recently been considered by the Lands Tribunal in *Camden LBC v The Leaseholders of 37 Flats at 30-40 Grafton Way* LRX/185/2006, unreported, ("*Grafton*"), to which we shall need to return. In that case the tribunal summarised the effect of the provisions as follows (para 23):

> "Under section 18(1) of the Landlord and Tenant Act 1985, a service charge is an amount payable by a tenant of a dwelling as part of or in addition to the rent, which is payable for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and the whole or part of which varies or may vary according to the costs incurred by the landlord. Section 20 provides for the limitation of service charges in the event that the statutory consultation requirements are not met. The consultation requirements apply where the works are qualifying works (as they are in this case) and only £250 can be recovered from a tenant in respect of such works unless the consultation requirements have been either complied with or dispensed with."

4. The layout and drafting of the regulations leave something to be desired in terms of clarity. Furthermore, the numbering of the various versions referred to in the papers before us was not consistent. We find it appropriate to follow the same numbering of the paragraphs in Part 2 of Schedule 4 as was adopted in para 24 of *Grafton*, and which incorporated the amendments contained in a correction slip. We also note the three "stages" referred to in *Grafton*:

Stage 1

(1) **Notice of intention** Notice of intention to carry out qualifying works is given to each leaseholder and any recognised tenants' association ("RTA"). The notice must describe in general terms the proposed works, or specify a place and hours where the description may be inspected. The notice must state the reasons for the works, and invite written observations, specifying where they should be sent, over what period (30 days from the notice), and the end date. Further, the notice must contain an invitation for nominations of persons from whom the manager should obtain estimates. The landlord must have regard to written observations received during the consultation period.

Stage 2

(2) **Estimates** The landlord must seek estimates. (There are detailed rules as to seeking estimates from nominees of the tenants or RTA).

(3) **The paragraph (b) statement** The landlord then issues a statement (free of charge) setting out the estimated cost from at least two of the estimates and a summary of the observations received during the stage 1 consultation period, and his responses to them. The statement is issued with a notice (see below). If any estimates have been received from leaseholders' nominees, they must be included in the statement. (The term "paragraph (b) statement" is used by the regulations themselves, by reference to sub-paragraph (5)(b) in which this requirement is found).

(4) **Notice accompanying paragraph (b) statement** The statement must be sent out with a notice… , detailing where and when all of the estimates may be inspected and inviting each leaseholder and any RTA to make written observations on any of the estimates, specifying an address where they should be sent, the consultation period (30 days from the notice) and the end date.

(5) **Regard to observations** The landlord must have regard to written observations received within this second 30-day consultation period.

Stage 3

(6) **Notification of reasons** Unless the chosen contractor is a leaseholder's or RTA nominee or submitted the lowest estimate, the landlord must give notice within 21 days of entering into the contract to each leaseholder and any RTA, stating his reasons for the selection, or specifying a place and hours for inspection of such a statement…"

5. A guidance note issued by the Leasehold Advisory Service ("LEASE") contains helpful precedents for the various notices required under this procedure. The experience of this case suggests that landlords would be well-advised to pay close regard to them, rather than attempting to devise their own versions.

[We note, as Mr Jourdan pointed out, that even these precedents may not be wholly accurate. He drew attention to the notes to Appendix 5, relating to the paragraph (b) notice, which says -

> "Where a landlord has received written observations within a consultation period in relation to a notice of proposed works, he is required to summarise the observations and respond to them in a notice of his reasons for making the agreement, *or specify the place and hours at which that summary and response may be inspected*." (emphasis added)

The words in italics are not to be found in the regulation itself. It is fair to observe, on the other hand, that this precedent is very much closer to the statutory wording than the surprisingly informal version proposed in *Gerald Sheriff: Service Charges for Leasehold, Freehold, and Commonhold*.A13.02.]

6. The issues in the present case turn on the requirements of Stage 2: steps (3), (4) and (5) in the above sequence. They relate principally to the following paragraphs in Schedule 4 Part 2 of the Regulations: step (3) paras 4(5)(b)and 4(9); step (4) para 4(10); step (5) para 5.

Factual background

[What follows is based largely on a draft "Statement of Agreed Facts and Issues" prepared by Mr Jourdan, counsel for the Appellant, and to which Miss Dewar, counsel for four of the Respondents, said that she had no objection.]

7. Queens Mansions is a block of shops and flats. There are seven flats on the ground and upper floors. Five of the seven flats, flats 1, 3, 4, 5 and 6 are held under long leases which provide for the payment of service charges. Flat 7 is vacant. Flat 2 is occupied by a tenant under a protected statutory tenancy. The Appellant ("the landlord") is the freehold owner of the building and the lessor under those leases. The property is managed for the landlord by Freshwater Property Management ("Freshwater").

8. The Respondents are the lessees under the long leases of flats 1, 3, 4, 5 and 6. They are all members of QMRA, which is a recognised tenants' association under section 29 of the 1985 Act. Ms Marks, who is the chairman of QMRA, is the partner of Mr Lapes, the lessee of flat 3. They have made most of the running for the lessees in discussions with the landlord and in the proceedings. Mr Gray, lessee of Flat 4, made some separate representations in the early stages, but he was not represented before the LVT although, at the invitation of the LVT, he provided written representations after the hearing. Mr Gray submitted representations opposing the application for permission to appeal to this Tribunal, but otherwise took no part in the appeal itself. The remaining lessees, represented by Miss Dewar, are Mr Benson (flat 1), Mr Lapes (flat 3), Mr Wallder (flat 5) and Aldenspring Ltd (flat 6).

First steps and notice of intention

9. In early 2005, Freshwater gave notice of the landlord's intention to carry out major works. On 7 March 2005, Freshwater sent QMRA a specification prepared following a meeting between Ms Marks, Mr Lapes and Chris Hall (a building surveyor employed by Freshwater). Mr Shaun Harris of Robert Edward Associates was engaged by QMRA to advise on the specification prepared by Freshwater. Subsequently, at QMRA's request, Freshwater appointed Mr Harris's firm as contract administrator.

10. A formal notice of intention to carry out major works (step (1) above) was sent to the lessees and to QMRA on 6 July 2005. It gave a general description of the proposed major works, and asked for observations and nominations of contractors to be sent to the Area Office of Freshwater by 5 August 2005. There is no outstanding issue about compliance as regards stage 1.

11. The only written observations sent to the Area Office by 5 August 2005 in response to the notice of intention were letters dated 1 and 2 August 2005 from Ms Marks. The observations in those two letters were similar. They included confirmation that leaseholders were willing to wait for the specification from Robert Edwards Associates and would require a reasonable amount of time to inspect the specification and comment. The leaseholders wanted the specification to be divided into discrete costs and areas. They wanted a separate quotation for the windows as they might require this to be phased to spread costs. Three contractors were nominated. QMRA nominated Bush Hill Building Contractors, the first four respondents nominated Rosewood Building Contractors, and Mr Gray nominated MM Palumbo.

12. During the same period there were continuing discussions between the lessees, Mr Hall and Mr Harris. These discussions related to the specification of works prepared by Mr Harris, the possibility of a phased programme of works and also the possibility of a contribution to the cost by Daejan to compensate for alleged historical neglect at the property. On 30 August 2005, Mr Harris sent Ms Marks and Mr Lapes a draft specification. On 20 October 2005, there was a meeting between Ms Marks, Mr Lapes and Mr Harris to go through the comments and questions.

Receipt and analysis of estimates

13. Invitations to tender were sent on 24 October 2005, inviting tenders by 15 November 2005. The LVT rejected an argument that the tender period was too short. Mr Harris produced a detailed tender report and analysis dated 30 November 2005. He explained that a total of four tenders had been received:

(1)	RR Trading	– £542,249.	Contract Period: 16 weeks
(2)	Rosewood	– £453,980.	Contract Period: 24 weeks
(3)	Lambourn	– £441,932.	Contract Period: 26 weeks
(4)	Mitre	– £421,000.	Contract Period: 32 weeks

No tender was received from MM Palumbo or Bush Hill. The RR Trading estimate was not further examined because it was much higher than the others.

14. The report discussed the other three tenders in detail. It enclosed an "elemental breakdown", listing in a comparative table the costings for each item in the specification. It ended with a recommendation of the Mitre tender. It is sufficient to quote the "Summary and Recommendations":

> "If we accept the revised tender price of £431,980 from Rosewood, I believe that the choice of which contractor to appoint is between Rosewood and Mitre. Mitre remain the most competitive by a margin of £11,000 albeit their contract period is 8 weeks longer than submitted by Rosewood.
>
> In my opinion I consider the Rosewood tender to be most complete and possibly the more realistic. I know that Rosewood have spent a great deal of time on site and have taken time to understand the full scope of the work.
>
> From my discussions with Mitre it is clear that they know the building from past works they have carried out and have also tendered for a similar scope of work (for Queens Mansions) a year or so ago. I did have some reservations over the possibility that they were relying on their past experience of Queens Mansions rather than concentrating on the more detailed specification that we have prepared. However, I have had discussion with Mitre and their Managing Director has assured me that they are happy with their pricing and are more than capable of carrying out the work to the required standard.
>
> If Mitre were awarded the contract I would first push for a reduced contract period in line with the contract periods of Rosewood and Lambourn and I would further require a more detailed description of the scaffolding and temporary roof plan.
>
> Other considerations which may affect the outcome of the tender result are whether any of the alternative priced works are to be carried out in lieu of

> the works specified and priced. Sometimes adding and omitting certain works changes the result.
>
> To summarise, the choice of contractor at this stage is between Rosewood and Mitre. Rosewood are known to us and I would have no hesitation in recommending them as a quality contractor. Mitre are known to Freshwater and I am sure are equally capable of carrying out the works to a high standard; no doubt you could vouch for their quality in the same way that I can vouch for Rosewood.
>
> In financial terms Mitre win the contract and if they were able to reduce their contract period to 24 weeks then I believe Mitre should be awarded the contract (subject to the scaffolding clarification). If they are unable to reduce their contract period I would consider weighing up the extra time requirement of Mitre against the extra-over cost of £11K for awarding the contract to Rosewood."

15. Mr Harris's tender report was sent to the lessees on about 6 February 2006. By then, Ms Marks had been informed that two companies had been recommended (Mitre and Rosewood), and she requested sight of both tenders. A copy of Mitre's priced specification was sent to the lessees on about 2 February 2006, but not that of Rosewood. Ms Marks wrote again on 13th February 2006 requesting an opportunity to inspect all the priced tenders, and objecting to what she termed the "proposal"` to instruct Mitre before the consultation process was complete. Mr Hall replied on 14 February 2006 that there was no intention to instruct Mitre before the consultation process was complete, although they were now "the preferred contractor".

First paragraph (b) statement and notice

16. On 14 June 2006, Mr Shevlin – a building surveyor employed by Freshwater – served a notice intended to satisfy steps (3) and (4) above, but which was admittedly defective, if only because it omitted any mention of the Rosewood estimate. On 29 June 2006, Ms Marks wrote making a number of criticisms of the notice. She required to see all the priced tenders, and asked for an appointment to view these or to have them posted to QMRA immediately. She arranged to view the estimates at the Area 11 Office on 6 July 2006. However, on attending she was told that the estimates were not in the building. On 13 July 2006 Mr Shevlin wrote apologising and stating that he had requested that the other tenders should be made available to those offices.

17. On 14 July 2006, Ms Marks wrote a 4-page letter on behalf of QMRA, stated at the beginning to be "observations… in accordance with the statutory process". They were said to be "based upon the limited information that has been made available to date" and were "neither exhaustive nor final and are subject to modification upon access to all the information as requested". She commented in particular on the choice as between Mitre and Rosewood:

> "32.We do not consider that Mitre should be instructed at present.
>
> 33. The tender report prepared by the project administrator Shaun Harris of Robert Edwards Associates finds that the two companies are potential contractors. Mr Harris recommends Rosewood on attention to detail and Mitre as they have tendered a slightly lower price.
>
> 34. As the price differential between these two companies is slight and will alter according to choice of materials, options and scope the lessees are not satisfied at present that Mitre should be the company to do the works.
>
> 35. Mitre is known to residents as previously they have carried out work on the block…
>
> 38. It appears to lessees that Freshwater are only willing to instruct contractors nominated by themselves thus negating all lessees' rights…"

She reiterated her request to see the Rosewood tender, and listed six previous occasions on which the same request had been made.

Second paragraph (b) statement and notice

18. Mr Shevlin served a revised statement and notice on 28 July 2006. That referred to all four estimates received by Mr Harris. It concluded:

> "Copies of the estimates supplied by each contractor are available for inspection at the location given at the end of this letter. Subject to any observations that we may receive it would be our intention to instruct Mitre Construction to proceed with the works, but such instructions would not be given before Thursday 31 August 2006."

No "location" was in fact given at the end of the letter, although there was an address at the top (the Area 11 Office). It seems that the estimates were not in fact in that office on 28 July, as they were enclosed with an inter-office memorandum of that date, which was date-stamped as received in the Area 11 Office on Monday 31 July 2006.

Inspection of estimates and the landlord's decision

19. In the meantime, on 14 July 2006 the lessees had applied to the LVT (under s 27A of the 1985 Act) for a determination as to the reasonableness of the proposed charges ("the first application). There was a pre-trial review hearing before the LVT on 8 August 2006. At the hearing, the legal representative of Daejan, Mr Shapiro, stated that Mitre had already been awarded the contract. On the same day, Ms Marks wrote three letters to Mr Shevlin. She recorded Mr Shapiro's statement, and contrasted it with the indication in the letter of 28 July that Mitre would not be instructed before 31 August. In another letter she reiterated the lessees' preference for Rosewood, relying principally on a quotation from Mr Harris' tender report. She also commented on the continuing failure to provide the estimates for all the tenders.

20. Mr Shevlin replied on 10 August in three letters, one of which confirmed that the estimates would be available for inspection the next day. The others dealt with the timing of the award of the contract, with a confusing mixture of past and future, but without any indication that the issue was open for reconsideration in the light of further representations. In one he said that, following Mitre's written confirmation that they would reduce the contract period to 24 weeks, and considering that they were the lowest contractor "your Landlord *will be* awarding the contract to Mitre Construction Ltd" (emphasis added). In the other he said:

> "I can confirm that Mitre Construction *have been* awarded the contract and they *will not be instructed* until 17th July 2006 *[sic]*. This date has subsequently been revised following the serving of the consultation letter dated 28 July 2006. We *will not be able to raise an order* before Thursday 31 August 2006" (emphases added).

21. Finally, on 11 August 2006, Ms Marks and Mr Lapes went to Area Office 11 and were given copies of all four priced tenders. On 16 August 2006, Ms Marks wrote to Mr Shevlin complaining that the consultation process had been mismanaged:

> "Eight months after we requested the specifications and only after you had already awarded the contract to Mitre Construction did you allow leaseholders to view the priced specifications."

22. On 11 September 2006, Daejan's solicitors wrote a detailed response to Ms Marks's letter of 14 July. They stated that the section 20 process had been concluded and that the contract was "due to be awarded" to Mitre. In relation to the selection of Mitre they said that there was no reason why they should not be instructed. They commented:

> "Our client acknowledges that Mr Harris made recommendation for both Rosewood and Mitre on different bases. Therefore, it is a decision by our client to choose which contractor it wishes to award the contract to. Our client has chosen to go for the lowest tender in order to keep costs down. There is no reason why Mitre should not be carrying out the works. Perhaps you can identify why you think this should not be the case…"

There was no reply to that letter. On 27 September 2006, Mr Shevlin wrote to the lessees, stating that an order had been placed with Mitre to undertake the major works, which were to start on 3 October 2006.

The proceedings

23. The hearing of the First Application took place on 19 and 21 February, 29 March, 25 May and 20-22 November 2007, the time being taken up principally with submissions and evidence as to the reasonableness of particular items of charge, rather than the present issue. In their closing submissions, counsel for both the landlord and lessees made submissions on whether the landlord had complied with the Consultation Regulations and, if not, whether the LVT should dispense with compliance. However, the LVT indicated that it would not consider the application to dispense unless the landlord issued a formal application. Accordingly, the landlord issued a new application seeking dispensation ("the Second Application"). The

hearing of the Second Application was listed for 17 March 2008. Just before that hearing, the LVT issued its decision on the First Application ("the First Decision"), dated 11 March 2008. It dealt with a large number of matters which are not now in issue. It also held that the Appellant had not complied with the Consultation Regulations in certain respects.

24. The hearing of the Second Application took place on 17 March 2008. The landlord and lessees were both represented by counsel at the hearing, who both prepared skeleton arguments. On 7 July 2008, the LVT wrote to the parties inviting submissions on *Grafton*. On 8 August 2008, the LVT issued its decision on the Second Application, refusing dispensation.

25. We should mention one further document. Although there had been no direction for further evidence on 17 March, Mr Lapes had prepared a witness statement for the second hearing which was presented to the tribunal, but objected to by Mr Jourdan. It seems to have been left without any formal ruling as to admissibility, and it was not subject to cross-examination. Its precise status remains unclear. Miss Dewar relied on it before us as part of her submissions, rather than as evidence, and as illustrating the kind of issues which might have been raised by the lessees had they had the opportunity. We did not understand Mr Jourdan to object to our having regard to it on that basis. We shall return to it when considering the issues before us.

The LVT's findings

26. In the August decision the LVT summarised its conclusions on compliance as follows:

> "24. Having considered the evidence as a whole, the Tribunal considers that Daejan:
>
> (1) failed to comply with the requirements of paragraph 4(5)(b)(ii).
>
> A summary of the observations received and the landlord's responses thereto, were not properly included.
>
> (2) failed to comply with paragraph 4(5)(c), 4(9), 4(10) and 4(11).
>
> All the estimates were not available for inspection at a place, during the hours and for the period specified in the notice. The relevant period of thirty days was cut short as it was indicated to the leaseholders that the contractor for the major works had been decided by the landlord. As a result they concluded that further representations were futile. The consultation process was for all practical purposes curtailed, and the invitation to inspect the estimates and make observations was rendered ineffective at that point.
>
> (3) failed to comply with paragraph 5.
>
> The relevant period of thirty days was cut short before the leaseholders were provided with copies of the estimates and had had an opportunity to make observations. The landlord did not have regard to the observations in respect of the

estimates which the leaseholders may have made, had they had the opportunity to do so within the relevant period."

[The Regulation paragraph numbers quoted in sub-paragraphs (1), (2) and (3) above have been amended as indicated in para 4 of this decision].

27. On the question of dispensation, having set out the submissions of the parties, the tribunal said (paragraph 84):

> "Having considered the evidence as a whole and the submissions of the parties, the tribunal concludes that failure by (landlords) to comply with the statutory consultation requirements has caused substantial prejudice to the (tenants)"

28. In the following passage the tribunal gave its reasons. The following are the main points. They said:

> "Daejan failed to comply with the requirements of the Consultation Regulations as set out earlier in this decision. It was clear from the correspondence referred to above, that it was a matter of great concern to Ms Marks of the Residents' Association, that Daejan had not provided copies of all the estimates for the consideration of the leaseholders.
>
> Another area of concern was the failure of the landlord to summarise observations and responses in the notices. In so far as this affected the Residents' Association, they would know the submissions that they had made and responses received. However, the same considerations did not necessarily apply to Mr Gray.
>
> It was not explained at the hearing why the only priced estimate provided to the leaseholders in early February 2006 was that of Mitre Construction. At first Ms Marks requested sight of the Mitre Construction and the Rosewood priced tenders. After she received Mr Harris' tender report and Mitre's tender, she asked repeatedly to see all the tenders submitted. This request was not met.
>
> Mr Harris's tender report and analysis raised numerous points which might have been clarified by consideration of the various tenders. It did not refer in detail to or attempt to analyse the tender of the fourth tendering contractor, RR Trading."

29. Of the consultation period, they said:

> "The Tribunal considers that the cutting short of the consultation period, by indicating to the leaseholders that the decision had been made to award the contract to Mitre, both at the pre-trial review and in Mr Shevlin's letter dated 10 August 2006, removed from the leaseholders the opportunity to make observations on the estimates to which landlord was obliged to have regard. This opportunity to make informed comment on these matters was central to the consultation process. It had been stressed in correspondence how important this was to the leaseholders."

30. They returned to the tender report:

> "There were detailed discussions about the content of the specification. The document produced to the leaseholders was discussed until 24 October 2005, when Mr Harris sent out the tender. However, the repeated demands by Ms Marks to see copies of the priced tenders (apart from Mitre's which had been provided) went unmet. The tender report and analysis was not a satisfactory substitute for reasons previously stated."

31. They noted the landlord's reliance on the extra statutory consultation which had been undertaken, concluding (para 96):-

> "Although this was not a case where the landlord made no attempt to comply with the Consultation Regulations, and some extra statutory consultation was carried out, the tribunal considers that this did not make good the landlord's omission in failing to provide the estimates and an opportunity to make observations."

32. In response to the submission that the tenants had been unable to identify the comments that they would have made, which might have influenced the decision to appoint Mitre, they said:-

> "…it is a matter of speculation what comments may or may not have been made by …the leaseholders and how this may have influenced the carrying out of the major works, had they had the opportunity to comment having seen all the estimates. The overall result of the landlord's failure to consult the leaseholders was that the respondents lost the opportunity to make observations in respect of the estimates provided by contractors for the major works to Queens Mansions for which they would be contractually obliged to contribute substantial amounts of money. In the case of the leaseholders who were owner occupiers, they would continue to live in the property during the major works in respect of which they had not had a proper opportunity to make observations in accordance with the Consultation Regulations. The tribunal considers that the fact that they did not have this opportunity amounts to a significant prejudice." (para 98)

33. They commented on the submission that if the tribunal found any prejudice it should consider a fair figure to compensate for such prejudice and that sum be deducted from the cost of the eventual charge. In this connection the landlords had suggested a possible reduction of £50,000. The tribunal commented:-

> "However Daejan provided no evidence in respect of the current cost of the major works already undertaken or the currently estimated final costs. There was no explanation of on what basis the figure of £50,000 could be regarded as a generous or as sufficient compensation for the prejudice suffered. The proposed figure was not accepted by the leaseholders" (para 101).

34. Finally, they considered the submission that they should take account of the disproportionate financial consequences of the refusal to make an order for dispensation on the

landlords, namely that the failure to consult resulted in them having to bear all but £250 of the cost of the major works. However, having considered the *Grafton* case, they held that:

> "… the financial effects of the grant or refusal of the application for dispensation on the landlord or tenant are not to be taken into account" (para 104).

Grafton

35. Before considering further the present facts, it is necessary to return to the decision in *Grafton*. In that case, the landlord was the housing authority, and there were 40 leaseholders, of whom 21 had formed a committee to represent them in discussions with the landlord (paras 6 and 12). There was no material problem at stage 1, but stage 2 was omitted altogether through an administrative error. The correct notice had been prepared, but the council by mistake sent another notice relating to different works (paras 18-19). In these circumstances the Lands Tribunal upheld the LVT's decision not to dispense with compliance.

36. The tribunal commented on the scheme of the provisions which are "designed to protect the interests of tenants" and continued:

> "...; whether it is reasonable to dispense with any particular requirements in an individual case must be considered in relation to the scheme of the provisions and their purpose.
>
> 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."

37. They considered but rejected the argument that the disproportionate cost to the landlord should be taken into account:

> "34. It was urged on us by (counsel for Camden) that the consequences, for LBC and their tenants, was a material consideration, and indeed an important one. Also material, she suggested, was the unjustified benefit that the leaseholders here would receive in the event that dispensation was not granted. We can accept that the general nature of the provisions, with the £250 limit imposed as the consequence of section 20(1) and section 20ZA, forms part of the background to the consideration of reasonableness. We cannot accept, however, that the particular effects on the landlord or the tenant in the case in question are properly to be taken into account. It is in the very nature of the provisions that the landlord will suffer financially and the tenant will gain financially in the event that dispensation is not given. If it were material to take into account the degree to which the landlord might suffer or the tenant might gain, this would mean that a failure might achieve dispensation if the contract was a very large one but might not do so if the

contract was small. We do not think that this could be the effect of the provisions. There would in any event be real practical difficulties for an LVT in dealing with a contention relating to the consequences for the landlord or other persons affected since the evidence relevant to these could be very far-reaching, time-consuming and costly to pursue and potentially inconclusive."

38. Finally they commented on the significance of the landlord's failure to provide the estimates and the opportunity to comment on them:

> "35. The requirements relating to estimates are clearly fundamental in the scheme of requirements. The landlord 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 LBC went through a tendering process that employed the services of Baily Garner 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."

39. Mr Jourdan submitted that the tribunal had been wrong in *Grafton* to hold that financial effects of granting or refusing dispensation were irrelevant. The LVT, he said, should be able, as part of a "broad based discretion", to balance the financial effects with other factors including the relative seriousness of the non-compliance. As he put it -

> "Prejudice does not come in only two varieties – serious and trivial; it is on a sliding scale from none to very serious. Similarly, the effects of refusing dispensation may be anything from trivial to very serious."

Both counsel sought to draw assistance from cases on provisions using similar language in other statutory contexts. However, we did not find such analogies helpful in interpreting the present scheme. There was no dispute that it was open to us to depart from the reasoning of *Daejan* if we felt it right to do so, although we should naturally treat it as persuasive.

40. Having considered the arguments, however, we see no reason to depart from the approach taken in *Grafton*, which in our view is supported by the statutory language. The power given to the LVT is to dispense with the consultation requirements, not with the statutory consequences of non-compliance. The principal focus, therefore, must, be on the scheme and purpose of the regulations themselves. If Parliament had intended to give a power

to remove or mitigate the financial consequences, it could easily have done so, but we would have expected it to have been done in a way which avoided an "all or nothing" result. For the same reason, we are unable to accept Mr Jourdan's alternative submission that the tribunal should, instead of refusing dispensation, accept the landlord's offer to reduce the amount of the charge to reflect its view of the prejudice suffered (whether by reference to the general requirement of reasonableness under section 19 of the 1985 Act, or otherwise). Parliament might have enacted a scheme with such an alternative, but it did not do so. The potential effects – draconian on one side and a windfall on the other – are an intrinsic part of the legislative scheme. It is not open to the tribunal to rewrite it. Nor do we think that section 19 can be used to achieve the same effect. Given the specific scheme in relation to consultation, the general provision that charges are allowed only so far as "reasonably incurred" is not apt to allow a reduction.

41. We agree, however, with the *Grafton* tribunal that the potential consequences for the parties are relevant as part of the context in which the matter is to be considered. Although we do not think it helpful or accurate to describe the provisions as "penal" (as Mr Jourdan suggested), the tribunal should keep in mind that their purpose is to encourage practical co-operation between the parties on matters of substance, not to create an obstacle race. If the non-compliance has not detracted significantly from the purpose of the regulations and has caused no significant prejudice, there will normally be no reason to refuse dispensation. Thus, in *Eltham Properties Ltd v Kenny and others* (LRX/161/2006, unreported) the Member (A J Trott FRICS) granted dispensation in a case, having found -

> "that the defective section 20 notice represents … such a minor breach of procedure and that there is no evidence that the respondents were prejudiced or disadvantaged as a result" (para 30).

42. Furthermore, having regard to that context the tribunal will be conscious that both landlord and tenant may have considerable financial incentives to play down or (conversely) play up the significance of non-compliance. It needs to examine critically such claims, using its own experience and common sense, rather than giving undue weight to the unsupported protestations of the parties.

43. Finally, we emphasise the need to consider these issues having regard to the particular facts of each case, including the nature of the parties and their relationship. For example, the tribunal may reasonably take a more rigorous approach to non-compliance by a local authority or commercial landlord, than to a case where the landlord is simply a group of lessees in another form. On the other side, we can readily understand why the *Grafton* tribunal, in a case where there were 40 lessees, only some of whom were represented by the negotiating group, was unwilling to "speculate" as to the likely response to a stage 2 consultation. The same approach may not always be appropriate to a much smaller group of tenants, jointly represented by an active association, and closely involved in the discussions from the start. On the other hand, given the carefully constructed sequence laid down by the regulations, it would rarely be "reasonable" to dispense completely with a whole stage of the consultation process, as happened in *Grafton*.

The present case

44. We turn to consideration of the LVT's conclusions on non-compliance and prejudice. In spite of the length of the submissions devoted to these issues (including more than 40 pages of Miss Dewar's "skeleton"), most of the answers seem to us reasonably straightforward. We have no doubt that the LVT was correct to find failures of compliance at Stage 2, but it is equally clear to us that for the most part these failures were minor and did not cause any significant prejudice to the lessees. We take the points in turn.

Summary of observations

45. The landlord's notice did not contain a "summary of observations", as the regulations required. In ordinary language that means a short statement of the substance of the observations, not simply a reference to the letters in which they were contained.

46. On the other hand, we are quite unable to see what prejudice was caused by the absence of such a summary. It is important to emphasise that the observations in question are the written observations made in response to the stage 1 notice, and within the period specified in that notice. As has been seen from the factual summary above, there were only two letters, both from Ms Marks in similar form in August 2005, and both of the nature of "holding" letters, preserving the position pending the substantive discussions which then took place once the specifications had been made available. By the time of the stage 2 notices in July 2006, those letters were of little more than historical relevance.

47. In this respect some of Miss Dewar's submissions were based on a misconception. She said:

> "... where the issues previously discussed included questions of whether the landlord would make a contribution to the cost, the possibility of phasing the works, and possible changes to grade and precise specification, knowing where each party stands is important in knowing how to read the estimates and the sort of observations that it is worthwhile to make... A proper paragraph (b) statement would have clarified these issues..."

However, it is not the function of the paragraph (b) statement to provide a general review of all items "previously discussed", unless they were specifically raised in the formal responses to the stage 1 notice. Accordingly there is no reason to think that a "proper paragraph (b) statement" would have assisted the lessees in this respect.

48. On any view, as the LVT recognised, a summary of observations would have been of little value to the lessees themselves, since the Association "would know the submissions that they had made and responses received". They added that "the same considerations did not necessarily apply to Mr Gray". However, Mr Gray had not made a response at Stage 1 (although he was involved in discussions in January 2006). Nor was there was any evidence before the LVT that by the time of stage 2 he regarded himself as prejudiced by lack of

knowledge of observations made by others, nor, on the other hand, that concern about his position or state of knowledge was an issue for the other lessees. The only significant point on which he seems to have differed from the others was in his unwillingness to agree to phasing, but the LVT accepted that, in the absence of agreement between the lessees, phasing was not an option (para 165).

Place and time for inspection of estimates, and invitation of observations

49. As has been seen, the stage 2 notices did not in terms specify the "place and hours" at which the estimates could be inspected. Nor, it seems, were they practically available for inspection at the time the notices were sent (whether on 14 June or 28 July).

50. However, the failure to specify the place and time for inspection did not in itself make any material difference, given that the lessees' representatives were in fact able to arrange to inspect them, and did so on 11 August. The LVT noted that it had been a "matter of great concern" to Ms Marks that she had not received the estimates, but it is not clear what they drew from that observation. Of course, the lessees were entitled to complain that it took such a long time, and so many repeated requests, to get the estimates. But that in itself would cause no prejudice provided that, once they received the estimates, they had an appropriate opportunity to consider them and to raise any significant points that might emerge from them, and that they were taken into account before a final decision was made.

51. Similarly, the notice failed in terms to "invite" the making of written observations, although there was an indication that the decision would be "subject to any observations" received. Even if such points can be regarded as technical, it is better practice to follow the statutory wording. The requirement for a positive invitation to submit observations at stage 2 has the advantage of focussing the intention of both sides on its significance. Again, however, there would be no prejudice, if the evidence showed that the notice was in fact treated as an invitation to submit observations, and the resulting submissions were taken into account.

Curtailing consultation

52. As we read the LVT's decision this was the most important issue, and it is the one which has most concerned us. They concluded that, as a result of the indication that the contract had been awarded, "the consultation process was for all practical purposes curtailed", that the lessees reasonably concluded that "further representations were futile"; and that as a result the landlord did not have regard to the observations in respect of the estimates which the lessees "may have made, had they had the opportunity to do so".

53. In the light of the evidence it is difficult to criticise those conclusions. It was not disputed before the LVT that Mr Shapiro had indeed told the pre-trial review on 8 August 2006 that the contract had been awarded to Mitre. The LVT was given no explanation why this had been stated if it was not true. Ms Marks (in her letter of 8 August) pointed out the discrepancy

between Mr Shapiro's statement and the indication in the paragraph (b) notice that the instructions to the contractor would not be given until 31 August. At that point, one might have expected the landlord (and its legal advisers) to have been at pains to correct the error in clear terms, and to reassure the lessees that the issues were still open for consideration, and that further submissions within the consultation period would be taken into account. That was not done. Mr Shevlin's further responses of 10 August gave no such unequivocal assurance. Even if one ignores the confusion of language, they tended if anything to reinforce the impression that the decision had already been made. It was particularly unfortunate that they were written immediately before the lessees finally managed to see the estimates.

54. An explanation for this apparently surprising failure by the landlords may perhaps be found in the first decision, in evidence referred to as part of Miss Dewar's submissions (paras 142-59). We say "perhaps", because unfortunately the LVT did not indicate clearly what facts it found, other than a general indication that it "preferred" Miss Dewar's submissions (para 160). We emphasise the importance of a tribunal not merely recording submissions on the evidence, but making its own findings of fact on the points of significance.

55. Miss Dewar was recorded as submitting that the consultation process had been "entirely disconnected" from the production of the specification, the tendering process and the decision as to the appropriate contractor; and that Mr Shevlin had been ill-equipped to conduct the section 20 process. The evidence showed that he had been only recently appointed, lacked working knowledge of the block, had had little contact with the other employees who had been involved in drafting the specification or the tender process, and had no role in the decision making process as to the award of the tender. A letter of 18 July 2006 (prior to the service of the second paragraph (b) notice) from Mr Shapiro, the landlord's lawyer, had advised him that "all you have to do now is make all the estimates obtained available for inspection". Mr Shevlin's evidence was that this was the only outstanding obligation under section 20 of which he was aware at the time, and that he did not anticipate "any further meaningful consultation" after that date.

56. Assuming, as we would infer, that the LVT accepted this as a fair summary of the evidence, they were entitled in our view to conclude that by August 10 the landlord had effectively closed its mind to any new observations on the choice of contractors, and that the lessees had reasonably formed the view that this was so.

Prejudice

57. Even accepting that the lessees were denied an effective opportunity to make representations having seen the estimates, there remains the question of prejudice: in particular whether the estimates did in fact disclose any new material, and whether the lessees would have had anything new to say. Neither of the LVT's decisions says much about specific prejudice. They in effect dismissed this inquiry as "a matter of speculation", apparently echoing the language used in *Grafton*. However, as we have already noted, the circumstances in *Grafton* were rather different: there were many more lessees, not all represented by the main

group, and it could not be said that all the same information had been made available in another form.

58. In the present case, Mr Jourdan relied on Mr Harris's tender report, made available to the lessees long before stage 2, which contained a detailed analysis of the principal tenders and included a comparative table of all the costings of all the items in the specifications. The LVT mentioned this report, but discounted it because it "raised numerous points which might have been clarified by consideration of the various tenders", and because it contained no analysis of the tender of RR Trading. The latter comment is surprising, since Mr Harris understandably dismissed the RR tender at the outset on costs grounds, and there was not (and never has been) any suggestion by the lessees that he was wrong to do so. Unfortunately, the LVT offered no elaboration of the "numerous points" which might have been clarified by sight of the estimates.

59. Even in her lengthy written submissions before us, Miss Dewar did not pinpoint any specific aspects of the lessees' case which might have been strengthened or illuminated by anything in the estimates, once they had sight of them. In her argument she placed the main emphasis on the choice of contractors. As we recorded her submission:

> "… the lessees lost the real opportunity they thought they would have to make representations about the choice of contractors by reference to the estimates as well as the tender reports."

As already noted, the lessees preference for Rosewood over Mitre had been one of the main issues raised in Ms Marks' letter of 14 July.

60. The only specific item which Miss Dewar was able to identify in the estimates, relevant to this issue, was a tick in the Rosewood estimate (but not in the Mitre estimate) against the name of a contractor for "water booster works". We found this unconvincing, not least because the point had not previously been raised as a significant one either before the LVT or since. Mr Lapes's statement to the second hearing (the uncertain status of which we have already mentioned) dealt with the question of prejudice a little more fully. He pointed out that the Mitre and Rosewood tenders had been very closely priced, and that a detailed examination showed some individual items which offered scope for narrowing the differences, or conversely indicated that Mitre might be cutting corners. Their preference for Rosewood had been based on their own previous experiences of the work of Mitre, as compared to favourable accounts they had received of Rosewood from lessees of other buildings, and their own impression of the thoroughness with which they had approached the tendering process. Even if we are entitled to have regard to it, this statement, prepared almost two years after the events, raises the question why similar representations were not made in August 2006, or in response to Mr Shapiro's letter of 11th September. Even if the lessees thought the pass had been sold, it is hard to see any reason for not at least attempting to reopen the decision and to put their full case.

Conclusion

61. We have not found this an easy case. Although the LVT was entitled to find a material breach of the regulations, the evidence of actual prejudice is weak. However, we remind ourselves that we are reviewing their decision, not substituting our own judgment. It is common ground that we can only interfere if the LVT has gone wrong in principle, or left material factors out of account, or its balancing of the material factors led it to a result which was clearly wrong. The LVT was in our view entitled to regard this as a serious breach, rather than a technical or excusable oversight. It involved a failure by a corporate landlord to ensure that those responsible in their office for the stage 2 consultation properly understood its requirements and its significance. The result was that the lessees' statutory right at stage 2, to make further representations following examination of the estimates, was nullified.

62. As to prejudice, the tribunal was entitled to start from the position that, given the seriousness of the breach, it was not for the lessees to prove specific lack of prejudice. It was enough that there was a realistic possibility that further representations might have influenced the decision. We bear in mind that, as is clear from the tender report, Mr Harris's decision to recommend Mitre in preference to Rosewood was a very close one. Although the issue was raised in Ms Marks's letter of 14 July, she made clear that it was an interim comment, pending access to full information. The lessees were entitled to proceed on the basis that they would have a further opportunity to present their case in its strongest terms and in the light of the full information; and that, given the marginal difference between the two tenders, they might be able to persuade the landlord to change its mind. In these circumstances, we are unable to say that LVT has erred in principle, or that its decision was clearly wrong. The financial consequence may be thought disproportionately damaging to the landlord, and disproportionately advantageous to the lessees, but, as we have said, that is the effect of the legislation.

63. The appeal is dismissed.

Dated: 27 November 2009

Lord Justice Carnwath
Senior President

N J Rose FRICS