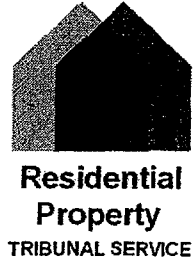


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LON/00AG/LDC/2006/0069

**APPLICATION UNDER SECTION 20ZA OF THE
LANDLORD AND TENANT ACT 1985
(AS AMENDED)**



Prémises: All Right to Buy Council dwellings in the London Borough of Camden.

Applicant: London Borough of Camden

Attending: Mr J Vicente (Consultation Manager)
Ms J Botha (works Consultation Manager)
Mr P O'Neill (Deputy Head Capital Investment Group)
Mr S Platt (Acting Head Ownership)

Respondents: All Right to Buy Leaseholders in the London Borough of Camden.

Attending: Dr D Kilcoyne (Counsel for the Association of Camden Council Leaseholders).
Mr D Auger
Miss A De Bruyker
Mr D Hammond
Mr B Mules
Miss A Brownlow

Application date: 9 October 2006

Hearing date: 13 February 2007

Decision date: Decision and Reasons dated

Members of the Leasehold Valuation Tribunal:

Mr J Sharma JP FRICS (Chairman)
Mrs R Turner JP

Background

1. This Tribunal received an application made under Section 20ZA of the Landlord and Tenant Act 1985 (the Act) from the London Borough of Camden dated 9 October 2007 seeking dispensation from the consultation requirements set out in Schedule 2 paragraphs 4(4), 4(5), 4(6) and 4(7) of the Service Charges (Consultation Requirements) in respect of a Partnering Agreement which Camden intends to enter into with contractors to deliver its programme of capital works. The application was subsequently enlarged, with the consent of the Tribunal, to include dispensation with paragraph 1(2)(c) of Schedule 2 of the Regulations both in respect of the Partnering Agreement and also a proposed Framework Agreement.
2. Camden sought partial dispensation with the consultation requirements because it claimed that the nature of the proposed agreements did not allow it to provide information necessary to satisfy fully the consultation requirements.
3. Directions for hearing were issued by a Tribunal on 24 October 2006 and 19 December 2006. In compliance with the Directions, Camden notified the respondents, tenants' associations and other tenants' representatives of the application and the Directions. There were potentially about 10,000 joint respondents. In the event, 26 made written representations to the Tribunal - 24 against the application and 2 for the application. In addition Mr Kilcoyne

represented the Association of Camden Council Leaseholders at the hearing.

The Tribunal also heard from Mr Hammond and Mr Auger.

The Law

4. Section 20 of the Act requires landlords to consult with tenants who are required to pay more than £100 per annum for any contract that exceeds 12 months in duration ("A qualifying long term agreement"). The Regulations in particular set out the form and content of notices to be serviced under the Act. Schedule 2 provides the consultation requirements for a QLTA for which public notice is required.
5. In addition to the Schedule 2 requirements, section 7(1) of the Regulations provides that where qualifying works are part of a QLTA the Landlord must also comply with the consultation requirements in Schedule 3 in respect of those works.
6. Where Section 20 applies to any qualifying works or a QLTA, the service charge payable by a tenant is capped unless the consultation requirements have either been complied with or dispensed with by a Leasehold Valuation Tribunal (LVT).
7. By Section 20ZA(1) where an application is made to an LVT for a determination to dispense with all or any of the consultation requirements, the

tribunal may do so if it is satisfied that it is reasonable to dispense with the requirements.

Hearing

(Applicant's Case)

8. Mr O'Neill for Camden said that the Capital Programme for the London Borough of Camden's Housing Department is a published programme of works and is currently set to the year 2010/11. It includes works to the envelope of Camden's housing stock, comprising mainly of works of repair or replacement to component elements of fabric and structure including roofs, windows, doors, external walls and includes the repair/replacement of elements of the common parts of these structures as well as estate based works and estate security. The programme also includes the repair/replacement of elements of mechanical and electrical infrastructure/services including lifts, door entry systems, district and individual heating systems, ventilation, gas, water, electrical installations and provision of Integrated Reception Systems (IRS), the provision of IRS is in response to central government's agenda of switching off analogue television signals by the year 2012.

9. He said that the reviews by Sir Michael Latham 'Constructing the Team' and Sir John Egan; Rethinking Construction' emphasised that significant potential to improve construction processes lay in establishing Partnering arrangements. Camden intends to maximise the benefits produced by a

partnering approach to construction in the procurement of the future capital programme. This will be supported by a parallel Framework Agreement.

10. Camden seeks to minimise the effects of inflation by entering into a long term agreement with one or more constructors to deliver its capital programme under Partnership Agreements. This will provide for efficiencies in procurement, economies of scale, control of supply chain and the benefits of knowledge sharing, that cannot be achieved by traditional ad-hoc procurement. Camden intends to support the Partnering proposal by a parallel Framework Agreement.

11. Partnering is a management technique embracing a range of practices designed to promote more collaborative working between contracting parties. The objective is to align and unite the parties with a shared goal of completing the scope of work in a cost effective and timely manner that is mutually beneficial. Camden is fully committed to delivering the efficiencies of Partnering as recommended. These efficiencies include

- Reduced Capital costs and Whole Life costs
- Reduced Supply and Construction Time
- Reduced levels of defects, eventually leading to zero defects
- Reduced Accidents
- Increased predictability on time, cost and quality
- Increased productivity
- Improved sustainability.

12. Competition will still apply under Partnering and constructors will go through a rigorous Pre-Qualification and Tender process. The process is tendered via guidelines set down by EU regulations and has been the subject of a Notice in the Official Journal of the European Union (OJEU). The constructors will tender accordingly and contract(s) awarded on the basis of most economically advantageous tender.

13. Sixty-nine expressions of interest have been received in response to the OJEU Notice. These will be assessed in accordance with an auditable evaluation matrix to arrive at a suitable number of contractors who may proceed to tender stage. The evaluation matrix has been established to comment on the qualitative aspects of the expressions of interest.

14. On the project scope and duration, Mr O'Neill said that Members of Camden Council agreed to procure the forward capital programme under a Partnering Agreement as follows:

- **All remaining un-commissioned 2007/09 Raising the Standard projects - value approximately £6.5 million**

External works including window repair/renewal, concrete repairs and roofing works.

- **Mechanical & Electrical forward programme - value approx £35 million**

Including lifts, heating & hot water & electrical system repair and replacement, heating infrastructure, door entry systems.

- **Integrated Reception Systems - value approx £5 million**

Digital communal television aerials to replace existing analogue aerials

- **The 2011/12 capital programme - value approximately £20 million (once set by executive in 2007).**

External works including window repair/renewal, concrete repairs and roofing works and or mechanical & electrical works including lifts, heating and hot water & electrical systems, heating infrastructure, door entry systems.

15. It is envisaged that the partnering agreement will last for 5 years. This will allow Camden to put long term agreements in place employing contractors of suitable experience and financial viability to deliver schemes as and when required. For this reason some of the requirements of consultation requirements may not be met as the specific scope, timing and costs of the individual schemes cannot be established at the outset of the partnering regime.

16. Camden intends to enter into a separate Framework Agreement with a group of 8-12 suitable contractors. The Framework Agreement will provide similar benefits in respect of control of construction costs over a similar period of time (5 years). The Framework Agreement will act to support the Partnering Agreement in the event of default by one or more of the Partnering constructors. This may be for example by poor performance or insolvency.

17. The framework Agreement will make provision for the tendering of a pricing mechanism against which the prospective framework contractors will bid in order to provide a means of fixing construction costs for a period of time. Constructors will be appointed to the Framework Agreement using the same tender evaluation processes as for the Partnering Agreement. Successful contractors will not be guaranteed a work profile as under partnering and the consequential benefits of reduction in risk premiums will not be as extensive as under partnering. The framework will not be as wide reaching as partnering in terms of the amount of work transferred within the agreement and will not result in the same extent of benefit. The framework will nonetheless provide an alternative effective hedge against inflation and provide the other qualitative benefits gained under partnering.
18. Works packages procured under the Framework Agreement will be the subject of mini competitions within the framework resulting in guaranteed maximum rates for works.
19. He said that as with Partnering it will not be possible to identify the scope of individual schemes to be procured via Framework Agreement until such time as the individual scheme is defined and mini competition is held.
20. Camden did not produce a copy of its Housing Stock Conditioning Survey. But Mr O'Neill said that the purpose of this document is to inform on budget settings and to ensure that staff resources are in place. It does not inform on specific works.

21. He said that tenders are based on work packages and indication of work types. It is activity based, not outcome based. A programme of works is not yet in place. Works will be evaluated and prioritised when tenders have been accepted and survey of buildings carried out. He sees no point in carrying out surveys before the tendering process has been completed.
22. Mr Vicente said that the procurement methods relating to the Partnering Agreement Camden is seeking to enter into cannot be completely reconciled with the consultation requirements set out within the Act. It is for this reason that Camden is seeking dispensation for paragraphs 1(2)(c) and 4(4)-(7) of Schedule 2 of the Regulations in respect of long term agreements.
23. Paragraph 1(2)(c) pertains to the Notice of Intention portion of Schedule 2 consultation, where if the relevant matters consist of or include qualifying works, the landlord's must state the reasons for considering them necessary. Given that many works have not yet been surveyed and therefore not specified to a block, it is not possible to comply with this requirement.
24. Paragraph 4 relates to the landlord's obligation to provide an estimate of the relevant contribution to be incurred by each leaseholder, or an estimate of the total expenditure to each building, or the current unit cost or hourly or daily rate application to the agreement, or an explanation of why the relevant estimates cannot be provided. The reason dispensation is required is because Camden will not be able to provide estimates until the properties

involved have been surveyed and a schedule of works specified, along with their associated costings.

25. Camden will also be organising a Framework Agreement, which will be tendered under a schedule of rates. Camden feel it can therefore comply with paragraph 4(6)(b) of the Regulations under Schedule 2.

26. He said that if dispensation is granted, Camden would initiate its consultation with its leaseholders by issuing Notices of Intention under Schedule 2. The Notice of Intention will indicate that the reasons for the qualifying works will be provided prior to the Schedule 3 notice, within a Notice of Intention that is not legally required, but which Camden is committed to including as part of the consultation. Camden would issue its notice of proposal to its leaseholders, which will include all the required information relating to the areas of the regulations that can be complied with.

27. After the Partnering Agreement is in place, and surveys carried out to a given building, Camden proposes to issue a Notice of Intention setting out the works that will form the basis of the specific capital works contract. This Notice of Intention is not a statutory obligation, as the more likely scenario would involve Camden serving a Schedule 3 Notice, which would outline the anticipated works, as well as providing leaseholders with their levels of contribution and the overall contract costs. The purpose of serving this notice of intention is twofold, firstly, to normalise the consultation, as many Camden leaseholders have grown accustomed to the two stage method of consultation

prescribed by Schedule 4, and secondly, to allow leaseholders a greater say in what works will ultimately take place. A meeting would form part of this Notice of Intention consultation wherein leaseholders would be able to view documents relating to the proposed works, such as feasibility studies and draft specifications, as well as allowing them the opportunity to ask questions of Camden officers and external personnel involved in the contract who would be able to address questions of a more technical nature. This Notice of Intention will not allow leaseholders to nominate a contractor, although Camden is willing to observe all other requirements. Once the Notice of Intention consultation has been completed, Camden will then prepare and issue its Schedule 3 Notices, wherein all the costs and individual estimates will be provided. A further meeting would be organised to go over the works that will be carried out, and explain the manner in which the estimates were arrived at. All other requirements included within the Schedule 3 portion of the consultation would be observed, with all observations being replied to, and upon the end date of the consultation, notification would be given to the project manager allowing them to initiate the contract's commencement on site.

28. Camden believes that given the current climate within the construction industry that it is vital that more effective methods of procurement are considered in order to ensure that its housing stock is being managed and maintained to a high standard. This forms the basis of its intention to enter into Partnering and Framework Agreements. It would like to enter into a Partnering Agreement for a period of five to six years beginning from 2007.

This Agreement would deliver Camden's capital programmes at agreed unit costs over the life of the Partnering period with an agreed formula for uplifting costs to take into account a degree of cost inflation. Typically this formula is based on the Retail Price Index plus one percent and this formula is being used in the delivery of local authority/ALMO Decent Homes programmes across the country.

29. One or more experienced contractors would be appointed to deliver the capital programme, which would include external structural refurbishment works, and mechanical and engineering works. Contractors would be awarded a set value of work every year related to the available capital budgets; and their annual workload would be adjusted dependent on their ability to meeting key performance targets.

30. The proposed Partnering Agreement would:

- Use Open Book accounting and enable joint cost control by Council and the contractor partner(s)
- Arrive at final programme costs through a competitive tender process.
- Enable the creating of good long term relationships with a contractor(s) over a period of time and provide for mutual cooperation and sharing of benefits.
- Enable good control of quality and minimise the potential for disputes between partners through mutual understanding of the respective business cases.

- Share risk in a way that would give the Council more control of cost and at reduced risk premium.
- Create links to the construction supply chain and share the benefits accruing from such an arrangements between the Council and contractor partners.

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

32. Within the Partnering Agreement, Camden is committing to setting technical standards that the contractor would be working towards. Camden would also carry out the inspection of the work, with payments being released upon certification of the work packages. It is generally believed that this approach will ensure that a consistent quality of work will be delivered, which should improve over the term of the agreement as the contractors become more familiar with Camden's housing stock.

33. Contractors will also be expected to be involved in contract design upon being assigned a specific contract. This will ensure that the project is designed in accordance with the quality criteria set out in the activity schedules, it would also mean that contractors would have to take ownership of the project should any failure in execution occur during the contract - the contractor would be expected to make good any problems that arise due to their design. This will have several benefits, including the minimisation of the input of consultants on contracts, decrease the cost of contract design over time as contractors become increasingly familiar with Camden's properties, and will ensure that problems are made good.

34. It is also envisaged that the contractor could be involved in the scheduling of the capital programme, as this could create efficiency savings due to optimising on scheduling. An example could be a lift renewal programme where by the contractor could schedule the work in such a way that the lifts are ordered to coincide with their installation, with all the preparatory work done in the same sequence, thus saving time in the programme's delivery, as well as money in its overall execution.

35. The proposed Framework Agreement will involve entering an agreement with eight to twelve contractors who will carry out contracts that are not covered by the Partnering Agreement, these will include some external refurbishment contracts, some mechanical & engineering contract, as well as contracts

dealing with the installation of IRS systems. Potential contract could also include maintenance contract, ie. minor external repairs and decoration.

36. The rationale behind the Framework Agreement is similar to that of the Partnering Agreement in that cost control over time is the main goal, although the contractors within the framework could, should the need arise, form part of a contingency plan should one of the partners be unable to fulfil their role. Many of the benefits are identical to those of the Partnering Agreement in that cost will be controlled, and long-term familiarity with Camden properties will improve their performance. Additional benefits will include an extra layer of cost protection by means of mini-competitions for individual contracts.
37. The tendering mechanism for this framework will be a schedule of rates documents, with the contractors indicating prices to the items of work, as well as providing a year on year incremental percentage on the prices they have given. This tender document will form the price controlling mechanism, as the percentage increment will act as the contractor's price ceiling for any given unit of work. Costs, however, can be reduced in cases where individual contractors are subject to mini-competitions amongst the contractors within the framework.
38. The framework is designed to work in addition to the partnering, given Camden additional flexibility in its delivery of capital investment while retaining overall cost control and the benefits associated with these agreements over time.

39. Camden feels that by entering into Partnering and Framework Agreements its residents are being offered greater value for money with regards to the provision of a more efficient and less expensive capital programme. This will mean that leaseholders who experience capital works within the future programmes will realise works of a high standard, while their exposure to the risks of the current construction climate being controlled and reflected in lower levels of contribution in real terms.

40. Camden provided a copy each of its intended Notice of Intention for both the proposed Partnering and Framework Agreements and asked the Tribunal to consider, if dispensation from paragraph 1(2)(c) of Schedule 2 is not granted, whether or not the words below satisfy the requirements of paragraph 1(2)(c):-

“The above works described are necessary or required under the management and repair obligations contained within the lease agreement in order to ensure that your property is safe, warm and dry, to ensure that any facilities and services are in good working order, and prioritisation may be informed by the recommendations set out within Camden’s recent stock condition”.

(Respondent’s Case)

41. Mr Kilcoyne, representing some of the respondents said that the obvious purpose of Parliament in introducing the consultation provisions is to give

tenants an added layer of protection (in addition to section 19 of the Act reasonableness) where large scale works are being undertaken.

42. Where there is a QLTA for which public notice is required, the consultation requirements in Schedule 2 of the Regulations are significantly reduced because landlords do not have to collect estimates from contractors nominated by tenants. However, tenants are still entitled to important information about any proposed works, and the estimated costs thereof, on which they are entitled to make comments which the landlord must take into account. In particular, the requirement of paragraph 1(2)(c) of Schedule 2 entitles the tenant at an early stage to information about why the landlord considers it 'necessary to carry out' relevant works to the tenant's property. Paragraph 4(4)-(7) of Schedule 2, at a later stage, require a landlord to give information about the estimated expenditure involved in the proposed works so that the tenant will have an opportunity to consider the cost, or likely cost, and make observations thereon.

43. He submitted that paragraph 4(4)-(7) of Schedule 2 requires consideration of two important matters:

- (i) what work is needed for the tenant's property in the near future?
- (ii) what is the likely cost of that work (or the works of which it forms a part)?

Paragraph 1(2)(s) of Schedule 2 requires consideration of only the first of those matters.

44. On the meaning of “reasonable” in Section 20ZA of the Act, he said there is no statutory indication as to what is meant by ‘reasonable’. However, he submitted that the following 4 principles should apply.

(1) It would not be reasonable for the LVT to dispense with any requirements merely because the applicant is a local authority and the relevant QLTA is Partnering or Framework Agreement.

In LVT decision LON/00BE/LDC/2006/0036, the LVT, it is submitted, correctly observed:

‘Whilst consultation borough wide may place an onerous burden on the applicant, this is not a consideration the Tribunal must bear in mind when determining this application. No doubt, had Parliament intended to confer this exemption on local authorities it would have done so and no such exemption exists under the relevant legislation ..’ [paragraph 10]

The meaning of ‘reasonable’ in section 20ZA should always involve consideration of the protection that a tenant is left with if an order for dispensation is made. In the case of a Schedule 2 dispensation, this would only leave a tenant with Schedule 3 consultation and section 19 of the Act.

The protection afforded to tenants under section 19 deals both with the standard of the work and whether the costs have been ‘reasonably incurred’.

- is it reasonable for requirements to be dispensed with for this particular tenant?

It follows from this that the reasonableness test is not necessarily answered in exactly the same way for all tenants affected by an application for dispensation.

45. Mr Kilcoyne said that certain relevant factors to be considered have emerged in previous decisions of the LVT which have considered whether to dispense in whole or part with paragraph 4(4-7) of Schedule 2. The following considerations emerged in favour of dispensation.

(i) the nature of the particular partnering agreement meant that it was not reasonably practicable for the landlord to give the required information at the landlord's proposal stage of the consultation process (LON/00AP/LDC/2004/00 at paragraph 14(a)).

(ii) The landlord cannot calculate in advance the cost to an individual tenant, as the properties have not yet been surveyed and no specifications of actual works have been prepared (LON/00AU/LDC/2005/0039 at paragraph 3.1);

(iii) if the landlord is obliged to put forward estimated service charge contributions based on future indicative or budgetary figures, these are likely to be unreliable and meaningless to lessees who may or may not have work

done some time in the future under the contracts after a detailed survey has been carried out (LON/00BE/LDC/2006/0024 at paragraph 26 (and previous similar decision)).

In contrast, in LVT decision, LON/00BE/LDC/2006/0036, the dispensation was not granted. Here, the LVT considered that there was sufficient financial detail with the landlord's own evaluations to enable it to consult within the meaning of Schedule 2(at paragraph 9).

46. He also referred the Tribunal to Woodfall's Law of Landlord and Tenant Volume 1. Appendix A1/102 to A1/104 and to LVT decision LON/00AG/LDC/2004/0038.

47. Mr Auger and Mr Hammond endorsed the arguments and submissions by Mr Kilcoyne and added that it is difficult to believe that Camden has no detail in place for such a substantial budget item. Indication of works to be undertaken must be available and tenants in general would prefer to have a figure than no figure.

48. Prior to the hearing, Mr Auger also provided the Tribunal with a written detailed statement of case.

Decision

49. That part of the application to dispense with paragraph 1(2)(a) of Schedule 2 of the Regulations in respect of the proposed Partnering and Framework Agreements is refused.

50. Camden's case for entering into the agreements is based on the need for it to carry out essential works in the future. It follows therefore that it must have reasons for considering it necessary to carry out these works.

51. In any event, the Tribunal was of the view that Camden's draft Notice of Intention does meet the requirement of paragraph 1(2)(c) of Schedule 2. Mr Kilcoyne also held a similar view.

52. That part of the application to dispense with the consultation requirements of paragraphs 4(4), 4(5), 4(6) and 4(7) of the Regulations is granted in respect of the Partnering and Framework Agreements Camden intends to enter into with contractors to deliver its programme of housing capital works.

53. The Tribunal accepted Camden's argument that it cannot in advance calculate the cost to an individual tenant, as the properties have not been surveyed and no programme of works in place. Works will be carried out as needed and the contractor paid accordingly. It is not yet possible to anticipate actual works and costs.

54. Camden's intention is to carry out surveys and prepare a programme of works after tenders have been accepted. It will then be in a position to give meaningful information on works and costs to individual leaseholders. This approach appears to be reasonable and the Tribunal does not wish to interfere with it by refusing the dispensation sought without evidence of real benefits to Camden and its leaseholders.
55. If Camden is forced to put forward estimated service charge contributions based on future indicative or budgetary figures, these are likely to be unreliable and meaningless to leaseholders who may or may not have work done some time in the future under the agreements.
56. Camden's decision to deliver its housing capital works by way of long term agreements rather than piece-meal contracts is not an issue within the jurisdiction of the Tribunal; even though, some of the leaseholders may have thought so judging from remarks made in their written representations. This is a matter entirely within the discretion of Camden. The Tribunal only had to decide whether or not the application for partial dispensation was reasonable, given the consultation requirements for such QLTAs. It concluded that the grounds for the dispensation was made out and reasonable.
57. In granting this partial dispensation, the Tribunal also took into consideration (1) that the proposed agreements are subject to EU rules (2) the method for tendering, (3) the process for selection and (4) tenants' involvement. It is of

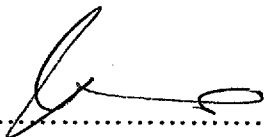
the opinion that the leaseholders will not be significantly prejudiced by the dispensation.

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

Tribunal:

Mr J C Sharma JP FRICS (Chairman)

Mrs R Turner JP

CHAIRMAN  DATE 12/3/07