RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Number: CH1/00HG/LDC/2007/0037

Decision on an Application under Section 20ZA Landlord and Tenant Act 1985

Applicant:	Blantyre West Country Properties Ltd ("Blantyre")
Respondents:	Rev. B L & Mrs C E Walton, Flat 1 Mr S W Campbell, Flat 2 Mr D McCabe, Flat 3 Mr A Lane, Flat 4 Mr T R N Peters, Flat 5
Premises:	11 Victoria Place, Stoke, Plymouth, PL2 1BY
Date of Application:	10 December 2007
Tribunal Members:	Mr A L Strowger MA (Cantab) (Chairman) Mr M Wright FRICS FAAV Mr R Long LLB
Date of Decision:	28 February 2008

The Application and the proceedings

1 The Tribunal is asked to exercise its jurisdiction under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") to dispense with the consultation requirements of section 20 of the Act and the Service Charges (Consultation Requirements) (England) Regulations 2003 (2003/1987) ("the 2003 Regulations"). The Tribunal has power under 20ZA to dispense with compliance with all or some of the consultation requirements with regard to qualifying works if satisfied that it is reasonable to do so.

2 The application refers to a Schedule of Repair Work (attached to the application) prepared in March 2007 and sent to the Tenants on 18 July 2007 with a Notice of Major Works (in the form of a letter).

3 The application states the reason for seeking dispensation to be that the property is beginning to deteriorate and the works are urgently required.

4 The relevant qualifying works are those set out in the Schedule of Repair Work.

Background

5 The Applicant Landlord purchased the freehold in 2004. It would appear that the property was in need of repair and maintenance. Accordingly the Landlord commissioned James Barron of Barron Surveying Services to prepare an initial condition assessment survey in October 2006. This highlighted defects. This was followed up by a full survey report on 7 March 2007 (headed "Schedule of Repair Work"). Under the individual leases the Landlord is covenanted in clauses 6 (1) and (2) to keep the common parts (as defined in Part 2 of the Schedule) in good and substantial repair and condition and to keep the exterior of the building in good decorative repair and condition. The Tenant covenanted under clause 5 (3) to keep the flat (as described in Part 1 of the Schedule) in good substantial and tenantable repair and condition and under 5 (4) to decorate internally every 7 years. Under clause 4 (d) the Tenant covenanted to pay the landlord a service charge in advance on 1 September every year. Part 5 of the Schedule sets out the calculation of service charge.

6 It is common ground between the parties that the property, 11 Victoria Place, is in need of repairs and maintenance work.

The Relevant law and regulations

7 The relevant law is contained in the Landlord and Tenant Act 1985 ("the 1985 Act"), section 20 (limitation of service charges) and section 20ZA (power of the leasehold valuation tribunal to dispense with the consultation requirements of section 20) and the Service Charges (Consultation Requirements) (England) Regulations 2003 (2003/1987) ("the 2003 Regulations"). For ease of reference the relevant parts or abstracts of them are set out in Appendix A of this decision.

8 This is not an application that required Public Notice to be given

9 .To further assist the parties an extract from the website of the Leasehold Advisory Service (www.lease-advice.org) - notes on consultation requirements - is set out at Appendix B to this decision.

The Hearing

9 The pre-hearing site inspection was attended by Mrs Caroline Bagley of the Applicant company and Mr James Barron of Barron Surveying Services. The Tenants in attendance were Mr Campbell, Mr McCabe and Mr Peters with Miss Wilbraham representing Mr Lane. The parties pointed out various items that were contained in Mr Baron's schedule of works, including certain items – for example clearing the garden area in front of the property – that, by agreement, had been done by the Tenants.

10 The premises comprise a Victorian terraced house which has been divided into 5 self-contained flats. The communal areas consist of a front garden, hall and stairway, a rear hall area with a back door leading to a yard and small garden. The parties pointed out to the Tribunal the qualifying works with reference to Mr Barron's Schedule of Works. The Tribunal noted the significant number of defects to the

property and that there were some for which a provisional cost allowance had been made.

11 In her oral evidence, Miss Bagley said that her company had 21 properties under management in the south-west, out of a total of 290 managed by the company. This particular property was purchased in 2004 and identified as being in need of maintenance and repair. Mrs Bagley instructed Mr Barron to prepare a schedule of works that required attention; he wrote to the Tenants in February 2007 inviting them to advise him as to defects. He subsequently had a meeting with Mr Peters who had listed items that needed attention. Mr Barron drew up a Schedule of Repair Work and put it out to tender to three contractors. Mrs Bagley wrote to all the Tenants on 18 July 2007 enclosing a copy of the Schedule of Repair Works, advising as to the three quotations received and told the Tenants that the lowest had been accepted. This was from a Mr Dan O'Brien, a local contractor regarded as competent by Mr Barron. Miss Bagley invited comments within 30 days. She said in her evidence that the response from the Tenants to the proposal had been negative. When questioned by the Tribunal, Mrs Bagley initially said that she did not consider that she had failed to comply with the consultation requirements but when taken through the required procedure in detail she conceded that she had probably not strictly complied with the terms of the Act. She accepted that she was not familiar with the regulations. Mrs Bagley said that she was always willing to consider another contractor.

12 Mr Barron gave evidence that his initial letter to the Tenants of 21 February 2007 was to obtain access to the property and was not by way of a formal notice. He had met Mr Peters and Mr Campbell; there was a broad consensus as to the work required to be done and so there was an element of consultation with the Tenants. Mr Barron had detailed estimates in his office from the three contractors but these had not been provided to the Tenants (or submitted to the Tribunal).

13 Mr Peters spoke for the Tenants. He said that if there were contingencies in the estimates, the Tenants needed to see the breakdown in advance so as to be able to comment on them. He felt strongly that the detailed estimates should have been made available. Mr McCabe emphasised that he would want the opportunity to nominate a contractor.

Consideration of the facts and the law

14 The relevant provisions of the 1985 Act and the 2003 Regulations in respect of consultation requirements are lengthy and complicated. They are set out in Appendix A to this decision. Essentially the purpose of the requirements is to ensure that tenants are not taken by surprise, are made fully aware of any proposed qualifying works and the cost of them – and have the opportunity of making comments that must be taken into account.

15 "Qualifying works" are works the total cost of which exceeds a sum that would result in a tenant paying more than £250 amount. The consequence of a landlord not following the procedure is that he may not recover more than £250 from any tenant in respect of the works.

16 Section 20ZA of the 1985 Act gives the LVT power to dispense with the consultation requirements, on application from a landlord. An application may be made for dispensation in advance of works being done (for example in circumstances in which full compliance with the requirements would cause problems that prejudice the parties – such as emergency works that require to be done without the delay). In other circumstances an application may be made after the event. The LVT may allow dispensation if in all the circumstance it considers it is reasonable to do, taking into particular account any prejudice to the tenants arsing from the landlord's failure to consult.

17 In summary the consultation process is in two stages. Stage 1 requires the landlord under paragraph 8 of the 2003 Regulations to give written notice to the tenants of his intention to carry out qualifying works ("Notice of Intention"), explaining why the works are necessary and providing a general description of the proposed works or advising the tenants where they can inspect that information. The notice must invite observations on the proposals from the tenants within 30 days and invite them to nominate a contractor from whom the landlord is required to try to obtain an estimate. Under regulation 10 the landlord has a duty to have regard to the tenants' observations made within the time limit.

18 Stage 2 of the consultation process follows after the landlord has obtained at least two of his own estimates (including one from an unconnected person as defined by the regulations) and endeavoured (under regulation 11) to obtain an estimate from a tenant nominee(s), if asked to do so. The landlord must then serve on the tenants a second notice ("Notice of Proposals") setting out details of the proposed works and the likely costs. The landlord must supply a statement setting out the costs of at least two of the estimates. All of the estimates must be made available for inspection and observations invited from the tenants within 30 days; the landlord must then have due regard to those observations. If the reasonableness of costs is subsequently challenged then the landlord will need to show that he paid regard to the observations or give good reason why not.

19 A further step required to be taken is that if subsequently the landlord awards the contract other than to the person nominated by the tenants or the person who submitted the lowest estimate, then he must serve another notice within 21 days, giving reasons why for his decision, summarising the tenants' observations and his response to them (or he can dispense with the Notice by making all that information available for inspection).

20 The Leasehold Advisory Service note provides a helpful summary of the consultation process and requirements and this is set out at Appendix B to this decision.

21 The chronology of events in the present case is that the initial survey was carried out by Mr Barron in October 2006, the full survey in March 2007 and the estimates obtained and forwarded to Mrs Bagley on 1 May 2007. However it was not until 17 July that Mrs Bagley wrote the flawed "consultation" letter and the application under section 20ZA was not submitted until 10 December 2007, some 7 months after the estimates were in her hands. She said in the application that various urgent matters

had been addressed in the meantime. However on the face of it there had been little urgency shown in otherwise progressing the programme of works.

22 The failure to comply and the consequent application under 20ZA would appear to have been the result of imperfect knowledge of the consultation requirements rather than because of a need for urgent action. There has been plenty of time to follow the correct procedures. From the Tribunal's inspection and the parties' evidence there is nothing to suggest that there are any matters that require such urgent action now as to persuade the Tribunal that the full consultation process should not be followed.

23 Mrs Bagley's letter of 17 July to the Tenants attempted to short circuit the process; in fact it has had the opposite effect and has led to delay in the carrying out of the works. The letter is deficient in a number of respects with regard to the statutory consultation requirements. By trying to compress the process into one single letter, the Tenants were deprived of the opportunity of commenting on the proposals. The Landlord also failed to provide the detailed estimates to the Tenants or make them available for inspection and invite observations and the Tenants were also not invited to nominate a contractor which they have since indicated they wish to do.

24 The Landlord in the present case has been inconsistent in its position. On the one hand the application to the Tribunal was made to seek dispensation from the consultation requirements (and by making it acknowledges that there had been failure to comply) and yet on the other hand Mrs Bagley, in her evidence at the Hearing, initially maintained that the Landlord had complied with the consultation requirements – in which case no application for dispensation would have been necessary at all! However after being taken through the process by the Tribunal she eventually accepted that the consultation requirements had not been met fully. The Tribunal would find this to be the position in any event.

25 The Tenants' evidence is that they would want the opportunity of nominating their own contractor. If they do so then the Landlord will have to try to obtain an estimate from him and consider it along with the Landlord's own estimates. Its surveyor will have to give his professional advice as to all the estimates obtained and the Landlord will have to make a decision as to which estimate to accept. If the lowest estimate or the Tenant's nominee is not accepted then the Landlord will have to give reasons to the Tenants for the choice of contractor. It was also clear that the Tenants had not seen (or been given the opportunity of seeing) the detailed estimates as the regulations require. The Tribunal does not consider it reasonable that they should be deprived of this opportunity and of making comment. In view of the breakdown in the relationship between the Landlord and the Tenants and the lack of mutual confidence, it is all the more important that the proper process is followed and fully complied with.

26 The Landlord has shown a less than complete understanding of the relevant legal process in relation to consultation. However it behoves a landlord to fully familiarise himself with the consultation requirements and comply with them. Indeed to recover more that £250 from each tenant he must do so. The burden is on a landlord to comply: it is not an optional process but a mandatory one. It is not good enough to comply "in a general sort of way", or with some parts and not with others. The

Landlord went through an incomplete and flawed consultation process. The failure to comply was because of lack of knowledge; there has been plenty of time to follow the correct procedures. The application to dispense has been made to remedy the Landlord's lack of knowledge and not because of a need for urgent action. Once the Landlord was aware of the failure to comply, the simple step was to re-start the consultation process in the correct way. From the Tribunal's inspection and the parties' evidence, there was nothing to suggest that there are any matters that require such urgent action now (the most urgent matters having been dealt with) so as to persuade the Tribunal that the full consultation process should not take place. The Landlord has not complied and the Tenants have been prejudiced. The Tribunal finds that it would not be reasonable in all the circumstance to grant dispensation.

27 It appears to the Tribunal that the Landlord did not know how to deal with the situation it faced and has, in effect, looked to the Tribunal to give advice through making the application that it did. However while the Tribunal is always wishing to be helpful, it is not the role of the Tribunal, as a statutory body charged with making decisions on statutory applications made to it, to give advice. It is for the parties to seek such advice from the legal profession or from voluntary organisations such as LEASE – the Leasehold Advisory Service.

28 However the Tribunal would comment that there are other options open to the parties to pursue in order to resolve disputes between them. The letters written to the Tribunal by the parties indicate that there are a number of issues relating to the reasonableness of service charges. These are not matters that can be considered by the Tribunal when dealing with an application under section 20ZA but it is open to either party to make application to the Tribunal under section 27A for consideration of the reasonableness of service charges either before they are incurred or after the event. This applies to service charges generally as well as to the major works that are the subject of the present application for dispensation of consultation requirements. The letters sent to the Tribunal office have also indicated that the Landlord would consider selling, and the Tenants would like to buy the freehold. Statutory procedures are there to be followed if the parties wish to explore that option and if agreement cannot be reached on the price, then an application may be made to the Tribunal to determine it.

Conclusion

29 The purpose of section 20 of the 1985 Act and the 2003 Regulations is to provide a protective regime for tenants. On the particular facts of this case, the Tribunal finds that there has been prejudice to the Tenants as a result of the failure of the Applicant Landlord to fully comply with the consultation requirements. In all the circumstances of this case, the Tribunal does not consider it reasonable to dispense with the consultation requirements of section 20 of the 1985 Act and the 2003 Regulations. Accordingly the total amount that the Landlord may recover from the Tenants is respect of the major works would be a maximum of £250 from each Tenant.

30 It is, of course, open to the Landlord to start all over again and now to follow the correct procedure with regard to consultation – and additionally, as they may see fit,

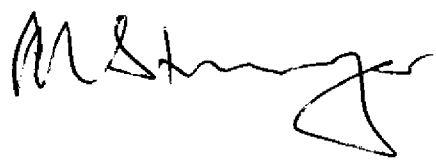
for either party to make a 27A application for consideration as to the reasonableness of the cost of the works, either in advance of the proposed works or afterwards.

31 The Tenants applied under section 20C for an order that the costs of the Landlord in connection with these proceedings before the Tribunal are not regarded as relevant costs and recoverable as part of the service charge. In view of the fact that the Landlord's application has been refused and, in the Tribunal's view was in many respects misconceived, the Tribunal finds it not appropriate that the Landlord should recover costs in connection with these proceedings from the Tenants as part of the service charge.

Summary of Decisions

32 Application by Landlord under section 20ZA refused.

33 Application by Tenants under section 20C allowed.

Signed: 

A.L.Strowger, Chairman **Dated: 28 February 2008**

APPENDIX A

RELEVANT LAW

The Landlord and Tenant Act 1985 ("the 1985 Act")

Section 20 - Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) of (7) (or both) unless the consultation requirements have been either-
   (a) complied with in relation to the works or agreement , or
   (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which may be required under the terms of the lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount –
   (a) An amount prescribed by, or determines in accordance with, the regulations, and
   (b) An amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount

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

Section 20ZA of the Act

(1) "Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

(2) Under section (2), for the purposes of section 20 and 20ZA, "qualifying works" mean works on a building or any other premises.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State. These are the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) ("the 2003 Regulations")

The relevant regulations under paragraph 7 of the 2003 Regulations in respect of this application are set out in Part 2 of Schedule 4 which apply where public notice is not required. They are headed "Notice of Intention" and state:

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

9 (1) Where a notice under paragraph 1 specifies a place and hours for inspection-
(a) the place and hours so specified must be reasonable

(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

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

Estimates and response to estimates

11 (2) Where, within the relevant period, a nomination is made by only one of the tenants....the landlord shall try to obtain an estimate from the nominated person

Sub- paragraphs (3) and (4) set out the procedure to be followed if more than one tenant and/or a recognised tenants' association makes a nomination

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

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charged, a statement ("the paragraph (b) statement") setting out-

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works;

(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

(c) make all the estimates available for inspection

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord

(7) Defines the circumstances in which a connection is assumed.

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement applies

(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by-

(a) each tenant;

(b) the secretary of the tenants' association(if any)

(10)The landlord shall, by notice in writing to each tenant and the association (if any)-

(a) specify the place and hours at which estimates may be inspected;

(b) invite the making, in writing , of observations in relation to those estimate;

(c) specify-

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii)the date on which the relevant period ends.

Duty to have regard to observations in relation to estimates

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

Duty on entering into contract

13 *Sets out the notification procedure the landlord must follow if he does not award the contract to the nominated person or the person who submitted the lowest estimate.*

Appendix B

Extract from Leasehold Advisory Service website

Consultation on major works

Where a landlord proposes to carry out works of repair, maintenance or improvement which would cost an individual service charge payer more than £250, he must, before proceeding, **formally consult** all those expected to contribute to the cost (under Section 20 of Landlord and Tenant Act 1985). This has the dual effect of giving notice of his intentions to the leaseholders and seeking their view on the proposed works.

- The landlord must **serve a notice of intention** on each leaseholder (and on the secretary of the recognised tenants' association, if there is one), which:
    - describes in general terms the proposed works or specifies where a description of the proposed works can be inspected and the hours during which it can be inspected. The inspection facilities must be made available free of charge, at a specified time and place. If, at that time and place, there are no facilities for copying the proposals, then the landlord must, on request, provide a copy of the description;
    - explains why the landlord considers the works necessary;
    - identifies the persons the landlord has asked, or proposes to ask, for an estimate of the costs;
    - invites observations in writing and states where the observation should be sent;
    - invites the leaseholder (and the recognised tenants' association) to nominate a person from whom the landlord should try to obtain an estimate. (This invitation does not apply, however, in cases where a public notice of works is to be made in the Official Journal of the European Union *(see EU implications for consultation above)*;
- The leaseholder (and the Recognised Tenants' Association) has a period of 30 days in which to send views to the landlord.
- If it is a case where the leaseholder or Recognised Tenants' Association is able to nominate a contractor and more than one nomination of an alternative contractor is made, then the landlord must try to obtain an estimate from:
    1. the person who received the most nominations; or
    2. if two or more people received the same number of nominations, then he can seek an estimate from any one or more of these nominees;
    3. if neither (1) or (2) applies, then he must obtain an estimate from any nominee.

At least one of the estimates must be from a contractor wholly unconnected with the landlord, that is, not an associated or subsidiary company or one in the ownership of the landlord. Where the leaseholders or the association has nominated a contractor, the landlord must try to obtain an estimate from that contractor and must include this in the estimates submitted or made available to the leaseholders.

Next, in most cases the landlord must serve a second notice on the leaseholders, the **Notice of Proposals**. This sets out the details of the proposed works and the likely costs. The landlord must supply a statement setting out the estimated amounts of the proposed work specified in at least two of the estimates, and make available for inspection all of the estimates for the work, without charge.

Where a public notice is required for EU purposes, a contract statement should be provided setting out the name and address of the person with whom the landlord proposes to contract; particulars of any connection between them (apart from the proposed contract); and, where reasonably practicable, an estimated amount of the relevant contribution to be incurred by the leaseholder, or, if this is not possible, the total amount of expenditure for the building to which the contract relates, again where practicable. If neither is possible, reasons should be given as to why this is so.

The notice must include a summary of the leaseholders' observations received by the landlord in response to the first notice, and the landlord's response to them.

Again, he must invite observations and allow 30 days for them to be made.

- The landlord must **'have regard to' the observations** he has received. This does not mean he is obliged to follow or act on the comments, but, if challenged later at the LVT on the reasonableness of the costs, he will need to show that he paid due regard to observations or provide justification as to why he did not.
- **If any leaseholder, or the Recognised Tenants' Association, made any observations or nominated an alternative contractor where they were able to do so, then, within 21 days after entering into the contract, the landlord must serve a further notice** on each leaseholder and any Recognised Tenants' Association stating his reasons for awarding the contract, and provide a summary of any observations received and his response to them; or, instead of serving notice, he can specify the place and hours at which a statement of those reasons may be inspected. However, this notice is not necessary where the person to whom the contract has been awarded was nominated by the leaseholders or Recognised Tenants' Association, or submitted the lowest estimate. Again, this notice can be referred to in any dispute before an LVT.

In cases where the **works are considered urgent**, for example, a leaking roof or a dangerous structure, or in other cases where the landlord wishes to proceed quickly, the landlord may apply to the LVT for an order to dispense with the consultation procedure. In such a case, the LVT will notify all service charge payers of the proposal.

If the landlord fails to carry out the consultation process in the correct form or has not sought and been given a dispensation from the LVT, he will be unable to recover the cost of the works from the leaseholders beyond the statutory limit of £250 per leaseholder.