9688

HM COURTS AND TRIBUNALS SERVICE

NORTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

MAN/00BR/LDC/2012/0011

DECISION AND REASONS FOR DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 20ZA LANDLORD AND TENANT ACT 1985.

Applicant:	OM Property Management Limited (formerly Peverel OM Ltd.)
Respondent:	Mr Stephen Hughes and Others
Re:	Regent Park, Salford, Lancashire, M5 4TQ
Date of Application:	09 July 2012
Date of Hearing:	21 September and 10 December 2012

Members of the Leasehold Valuation Tribunal:

Mr. M. Davey
Mrs. E. Thornton Firkin
Mrs. J. Howell

Date of Decision: 6 February 2013

DECISION

The Tribunal determines that compliance with the consultation requirements is not dispensed with. Accordingly the application is refused.

REASONS FOR DECISION

The application

1. By an application to the Leasehold Valuation Tribunal ("the Tribunal"), dated 5 July 2012, the Applicant, OM Property Management Limited (formerly Peverel OM Ltd.), seeks a determination under section 20ZA of the Landlord and Tenant Act 1985 ("the LTA 1985") to dispense with part of the consultation requirements, provided for by section 20 of the Act and the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) ("the regulations"). The Respondents are those lessees of apartments at Regent Park, Salford, Lancashire M5 4TQ who are specified in the application.

Background

2. Regent Park, Salford, is a residential development comprising five, four storey, apartment buildings containing 170 flats. The flats are all held on long leases granted for 125 years from 1984. In 2009 a number of leaseholders (being lessees of 101 of the flats) applied to the Tribunal for a determination under section 27A of the Landlord and Tenant Act 1985 ("the LTA 1985") as to the payability and reasonableness of their service charges over a period of time. This application is referred to below as the section 27A application. The first named Respondent to that application, Peverel Properties, was the freehold reversioner at the time under the apartment leases. The second named Respondent, Peverel OM, ("POM") was the Management Company, which was a party to the leases. Both Respondents were part of the same group of companies. The first Respondent played no role in the application and POM was therefore effectively the only active Respondent in those proceedings. Thus any references below to 'the Respondent' in that case are to POM.

3. The dispute between the parties related to the service charge years from 1998 to 2010. A significant element of the application concerned a major works project at Regent Park carried out by POM between June 2007 and November 2009. On 10 March 2011 the Tribunal issued its decision. That decision included a determination that the Respondent had failed to comply fully with the consultation requirements, provided for by section 20 of the LTA 1985 and the regulations, in relation to the major works project. The relevant costs incurred in carrying out the qualifying works under the project, and which were included in the service charge accounts for 2008 and 2009, were accordingly limited to a maximum of £250 per leaseholder.

4. As recorded in the Tribunal's written reasons for decision in that case, counsel for the Respondents was asked whether her clients wished to apply for a determination under section 20ZA of the LTA 1985 for retrospective dispensation from full compliance with the consultation requirements should the Tribunal find her client to have been in breach of the consultation requirements. Counsel replied that whether her client would make such an application would depend on the outcome of the section 27A proceedings.

5. That outcome, which was set out in the Tribunal's decision of 10 March 2011, included a finding by the Tribunal that the Respondents had failed to comply properly with the consultation requirements in four respects. Peverel Properties and POM sought permission to appeal against all of those findings, but were granted permission, by the President of the Upper Tribunal (Lands Chamber), to challenge the Tribunal's decision upon only two of them. The appeal on those two grounds was heard by Judge Huskinson of the Upper Tribunal (Lands Chamber), whose decision, given on 25 July 2012, was in favour of the Appellants on both grounds.

6. That decision meant therefore, that there remained two unappealed grounds on which the Appellants had failed to comply with the consultation requirements. However, as stated above, on 9 July 2012, OM Property Management Limited (formerly known as Peverel OM Ltd) finally made the present section 20ZA application to the Tribunal for dispensation. All references hereafter to the Applicant and Respondent are to the parties referred to as such in paragraph 1 above.

7. The first of the adverse findings by the Tribunal in the section 27A proceedings was that "the paragraph (b) statement" served by POM, in accordance with paragraph 11(5)(b)(ii) of Part 2 of Schedule 4 to the regulations, failed to summarise certain observations made by tenants, which the Tribunal had held to be relevant observations made in relation to the first stage of the consultation process. (Paragraph 50(3) of the LVT decision). The second finding was that POM had (1) failed to make available **all** the estimates provided by tenderers (specifically the third and fourth estimates) as required by paragraph 11(5)(c) of Part 2 of Schedule 4 to the regulations and (2) had not specified in writing the place and hours at which the estimates could be inspected (free of charge) as required by paragraph 11(10)(a). (Paragraph 50(4) of the decision).

(Note: At some stage the numbering sequence for the paragraphs in Schedule 4 Part 2 to the Regulations has been amended so that the first paragraph within Part 2 is numbered 1 rather than 8. However, this decision has retained a reference to the previous numbering as this is the basis on which the section 27A LVT proceeded).

Directions and hearing

8. The Tribunal issued Directions to the parties on 10 August 2012. A hearing was opened, at the Tribunal's premises in Manchester, on 21 September 2012. The Applicant was represented by Mr Alexander Bastin of counsel and a number of the Respondents, for whom Mr Stephen Hughes was acting as agent, were represented by Miss Ellodie Gibbons, of counsel. Those leaseholder respondents for whom Mr Hughes was acting as agent are the only leaseholders who have played an active part in the current proceedings and for sake of convenience will be referred to below as "the Respondent."

9. By agreement between Applicant and Respondent the Tribunal adjourned the hearing until, as it transpired, 10 December 2012. At the hearing on 21 September the Respondent agreed that some of the witness statements on which it intended to rely should be redacted. This followed from the Applicant's submission that the Tribunal in the present proceedings should not go beyond the findings of the earlier Tribunal as to the Applicant's breach of the consultation requirements specified in paragraphs 50(3) and (4) of its reasoned decision.

The Applicant's case

10. At the resumed hearing on 10 December 2012, the Applicant submitted, through Mr. Bastin, that both parties agreed that the issue for the Tribunal to determine in the present case was whether or not the defects in the consultation process (as found by the section 27A Tribunal) detracted from the consultation process to such extent as to cause significant prejudice to the leaseholders.

11. Mr. Bastin stated that in considering whether this was the case, one must be careful not to confuse the failure of the Applicant to consult fully, in the stage leading up to the award of the contract, with the quite separate matter of the failure of the major works project itself. All parties agreed that this contract was not well performed and that had been reflected in the section 27A LVT decision that a significant part of the costs of that project be disallowed as recoverable costs, having been unreasonably incurred and/or unreasonable in amount. Mr Bastin said that this decision, which was not appealed, would stand, even if the Tribunal in the present proceedings were minded to grant the order requested by the Applicant.

12. Mr Bastin then submitted, by reference to the authorities cited, that the Tribunal should take a four stage approach in deciding whether or not it was reasonable to dispense with the consultation requirements that were breached. They were: (1) consider the purpose of the requirement(s) not complied with; (2) decide whether on the facts that purpose has been missed; (3) decide whether the breach was so

substantial that prejudice can be assumed without further speculation (4) and if not whether there is evidence of significant prejudice.

13. Mr Bastin took each breach in turn. With regard to the Applicant's failure to make all the estimates available he submitted first, that the purpose of the statutory provisions, which was to allow the lessees to inspect the estimates, had only been partially missed. He pointed to the finding of the section 27A LVT that the Applicant had complied fully with regard to two of the estimates supplied by the tenderers, including the successful tender, which was the lowest estimate. Furthermore, he argued that the Applicant had complied partially with regard to the third estimate, by providing a summary, although he admitted that his client had not complied at all with regard to the fourth estimate.

14. Mr Bastin's second submission was that the admitted breach of procedure by the Applicant was not so serious that substantial prejudice could be assumed. He says that although there was no obligation on the Applicant to obtain more than two estimates, it had in fact obtained four. It had complied in full with the consultation requirements in respect of two of them including the estimate accepted. Indeed, he suggested that there was no evidence that the third tenderer had provided anything more than the summary made available by the Applicant to the leaseholders, whilst the fourth estimate was so high as to be an unlikely contender and therefore one which the leaseholders were unlikely to have favoured. Thus the lessees had had access to the two most competitive tenders and a summary of the third most competitive one. He said it followed therefore that any breach was not so substantial, when considered in the light of the whole consultation process, as to lead to an assumption that there must have been significant prejudice.

15. Mr Bastin's third submission was that if significant prejudice could not be presumed by virtue of the breach, and therefore needed to be demonstrated, there was no evidence that there was in fact any significant prejudice, or indeed any prejudice, at all. He said that the missing estimate was so high that realistically it was always likely to have been rejected. Furthermore, there was no evidence that any lessee had requested (albeit at a cost) to see all the estimates and been prevented from doing so. Thus the lessees were not prejudiced by not having the opportunity to see, at no cost, all of the estimates.

16. Mr Bastin then turned to the failure of the Applicant to provide in the stage 2 notice a summary of observations made by lessees following the Stage 1 notice. He conceded that the purpose of this requirement (to publicise any issue raised by lessees in respect of the proposed works) had been missed. However, he submitted that this breach was not so substantial as to give rise to an assumption of significant prejudice. He referred to the section 27A Tribunal's finding that four lessees had made observations, the majority being about payment methods, whilst one lessee, Mr Sin, had asked if internal works to the

common areas would increase the estimated costs of the project, to which POM's manager in charge of the project, Mr David Arthan, had replied that it was his understanding that those works would be included in the contract.

17. Mr Bastin submitted that this breach, when considered in the context of the size of the major works project and the whole consultation, cannot be said to be substantial. He said that queries raised by a number of lessees as to the timing of payments by them in respect of the works project were not observations *about the actual proposed works* (emphasis supplied) which was the focus of the stage 1 notice. Thus the failure to summarise them could not have had any impact on the extent or cost of the works. It did not detract substantially or at all from the purpose of the regulations or cause substantial, or indeed, any prejudice.

18. Mr Bastin then addressed Mr Sin's query and POM's reply. Mr Sin had written twice to Mr Arthan. In his letter of 25 September 2006 he asked, inter alia, "Is repair/repainting of walls in internal common areas, damaged by drainage problems also included in price?" (The drainage problems referred to, which had caused internal disrepair in the common areas, related to the roof and were to be addressed by the major works project). In his letter of reply, dated 4 October 2006, Mr Arthan stated that "The repairs to the internal areas will be included within the project cost." Mr Sin replied by letter dated 16 October 2006 and asked, in relation to the inclusion of the internal works referred to by Mr Arthan, "Was this omitted from the original scope of works and therefore is your estimate too low and likely to go up?" Mr Arthan replied by a letter dated 25 October 2006, in which he stated "It is our understanding that where there is damage to the internal common parts resulting from problems emanating from any structural failings then these will be addressed by the contract."

19. With regard to Mr Sin's observation, Mr Bastin submitted that whilst this did relate to the proposed works it should be seen more as a question which Mr Arthan had answered. He said that the query in Mr Sin's letter of 16 October, asking, *inter alia*, whether the price of the major works project would rise to cover the costs of internal repairs was met by Mr Arthan's answer that it was his understanding that such costs would be included. Mr Bastin submitted that failure to record this in the paragraph (b) statement at Stage 2 of the consultation process did not prejudice Mr Sin or any other leaseholder. He said that this was because Mr Arthan was simply replying to a query and the works were not included in the end in any event; the implication being that no lessees had been financially prejudiced by the breach. Mr Bastin also stressed that no leaseholders had complained about this non-compliance until the section 27A LVT proceedings.

The Respondent's case

20. Miss Gibbons, counsel for the Respondents, agreed with the Applicant that a number of principles emerge from the relevant case law with regard to whether retrospective dispensation should be granted on an application under section 20ZA of the LTA 1985. The first is that the principal consideration is whether any significant prejudice has been suffered by a lessee as a consequence of the landlord's failure to comply with the consultation requirements in whole or in part. (*London Borough of Camden v The Leaseholders of flats at 30-40 Grafton Way* LRX/185/2006 at para. 33 and *Daejan v Benson* [2011] EWCA Civ. 38 at para. 72). The second is that if significant prejudice has been caused it is never right for the LVT to grant dispensation. (*Grafton Way* at para. 33). The third is that in the case of a minor breach the Tribunal will need to find evidence that tenants were prejudiced or disadvantaged. (*Stenau Properties Limited v (1) Karin Leek, Kalus Reckling and others* [2010] UKUT 478 (LC) at para. 22).The fourth is that it is reasonable to presume prejudice where there has been a substantial breach and that even if it is possible to prove that further consultation would have made no difference to the outcome it does not follow that there has been no prejudice. (*Leek* at para. 22 and *Benson* at para. 73). Finally, when considering the issue of prejudice, the first question is to consider the purpose of the statutory requirement or the opportunity it was intended to afford to the tenant and then to ask whether the tenant had been deprived of that opportunity by the error (*The Mayor and Burgesses of the London Borough of Newham v Hannan, Nessa and others* [2011] UKUT 406 at paras. 35-40 (LT).

21. Miss Gibbons submitted that when one applies these principles it is clear the lessees were deprived of the opportunity to see all the estimates, and whilst an offer was made by the Applicant to the lessees that they could see the estimates on request, it was only at a cost. This, says the Respondent, defeated the purpose of the statutory scheme whereby the lessees should have the opportunity to see the overall amount specified in two or more of the estimates, to see and inspect all the estimates themselves at no cost and to make observations on them which the landlord is then required to take into account.

22. The Respondent further submits that because there was no summary of observations on the proposed works made by tenants, the lessees as a whole were clearly deprived of the opportunity to consider those observations. Miss Gibbons said that although the lessees were offered sight of the observations on request, no such offer was made with regard to the Applicant's response(s) to the observations. This, the Respondent says, meant that other lessees were deprived of the opportunity to join in the consultation fully and meaningfully, because they did not know what lessees who had made observations were saying.

23. Miss Gibbons said that most importantly, when Mr Sin asked, in his observations, whether a panel of leaseholders could oversee the tender submissions and the awarding of the contract, he was told by Mr Arthan that they could not because there was no formal residents' association. Had the lessees been informed of this exchange some of them could have explained that there was in fact an informal committee and the lessees who were unaware of this could have got together with other tenants to pool resources to participate in the process as well as press for recognition of a formal association.

24. Miss Gibbons was referring at thjs point to Mr Sin's letter of 10 October 2006 in which he asked "As this is a large contract, can a panel of leaseholders oversee all tender submissions and award of the contractor?" In his reply of 25th October 2006, Mr Arthan stated, "Peverel are consulting with all leaseholders in accordance with legislation. If there was a formal residents Association then we would be able to jointly review all tenders and select the contractor. There is however, no formal Residents Association that is representative of the owners on the estate. We therefore can not liaise with an agreed panel of residents as they would not formally represent all owners."

25. The remaining question, says the Respondent, was whether the failings with regard to the estimates were serious enough to amount to a substantial breach that made it reasonable to assume prejudice. The Respondent says that they were, because availability of all of the estimates was a fundamental aspect of the scheme. The Respondent says that the same applies to the failure to make the observations, and the Applicant's responses thereon, available to tenants. The Respondent submits that it is reasonable to assume that the Applicant's failure meant that the other lessees would not have been able to share their views with those of lessees who had sent in observations. Furthermore, a full disclosure by the Applicant would have given the lessees confidence in the consultation process and decisions reached as a result of that process thereby allowing them to see that the Applicant had taken into account the observations received.

26. Finally, the Respondent says that even if the breaches were not in themselves sufficiently substantial to lead to an assumption of prejudice, there was evidence of **actual** prejudice or disadvantage suffered by the tenants. This is because the tenants were unable to compare all the estimates and were also deprived of the opportunity to discover the existence of the informal residents' association with whose members they could have shared information and perhaps pool resources in order to influence the award of the contract.

27. The Respondent says that although at the hearing Mr Arthan's predecessor, Mrs Elaine Horne, stated on behalf of the Applicant, that the existence of the informal residents committee was evident from notices displayed at the site in August 2005, Mrs Horne was unable to confirm when questioned at the hearing that this information was actually sent to non-resident leaseholders (which group comprised between 53% and 59% of all lessees including Mr Sin) although she assumed that had been done.

28. The Respondent concluded that it would not be reasonable for the LVT to grant a dispensation.

The Applicant's response

29. Mr Bastin, for the Applicant, denied the validity of the Respondent's claim that the failure to report, in the paragraph (b) statement, the exchange between Mr Sin and Mr Arthan, about whether a panel of leaseholders could have reviewed the tenders with POM, was a breach of the consultation requirements. In his submission the only findings as to breach, made by the section 27A LVT, were set out in paragraph 50(3) of the Tribunal's reasons for decision, which omitted any mention of Mr Sin's query and Mr Arthan's response.

30. He further argued that, in any event, the Respondent's submission that the failure to record the exchange between Mr Sin and Mr Arthan in the stage 2 notice had prejudiced the tenants was misguided. This was because the Respondent's claim that the leaseholders were thereby prevented from getting together to form a recognized association and then pooling resources was germane to the issue of how the works were to be carried out rather than the choice of contractor, which was the issue at the heart of the stage 2 notice.

31. Mr Bastin further argued that the former manager, Mrs Horne, was in dialogue with the leaseholders at all times and it was clear from her evidence, and that of the lessees who gave evidence themselves, that there was a parallel process of extra statutory consultation in place at Regent Park at all times.

32. Mr Bastin submitted, by way of summary that the mere fact that there has been a failure to comply fully with the consultation requirements does not rule out the possibility of a successful section 20ZA claim. He said that only if the breach was so substantial as to lead to the assumption that there must be prejudice, or, in the case of a less serious breach, evidence, ideally contemporaneous, of actual prejudice, could it be reasonable to deny the application. He denied that either of these factors was present on the facts of the present case.

33. Mr Bastin referred to the decision of the Upper Tribunal/Lands Tribunal in a number of cases where a section 20ZA order was refused and said that they were distinguishable from the present case because the breaches in those cases were far more serious and/or prejudice was established. (*London Borough of Camden v The Leaseholders of flats at 30-40 Grafton Way* (above) and *Stenau Properties Limited v (1) Karin Leek, Kalus Reckling and others* (above). Mr Bastin also referred to *Eltham Properties Limited v (1) Mrs Kenny (2) Mr Rainforth and (3) Mr Barker* LRX/161/2006 where, in his submission, a more serious breach than those being considered in the present case did not exclude a section 20ZA dispensation being granted.

34. In reply Miss Gibbons said that there was actual prejudice because as it transpired the works were carried out poorly and had the consultation been carried out properly the lessees would have felt more in control. She said that in the cases cited by Mr Bastin where a section 20ZA order had been granted there had been extra statutory consultation by the landlord.

Discussion and decision

35. The leading case on section 20ZA is the decision of the Court of Appeal in *Daejan v Benson* [2011] EWCA Civ. 38. where Lord Justice Gross stated that

"……legislative policy has sought to strengthen the position of long leaseholders by regulating service charges. How the legislature has sought to do so was summarised in *Paddington Basin Developments v West End Quay* [2010] EWHC 833 (Ch); [2010] 1 WLR 2735, by Lewison J, as follows:

> " 26. ....there are two separate strands to the policy underlying the regulation of service charges. Parliament gave two types of protection to tenants. First, they are protected by section 19 [of the Act] from having to pay excessive and unreasonable service charges or charges for work and services that are not carried out to a reasonable standard. Second, even if service charges are reasonable in amount, reasonably incurred and are for work and services that are provided to a reasonable standard, they will not be recoverable above the statutory maximum if they relate to qualifying works or a qualifying long term agreement and the consultation process has not been complied with or dispensed with. It follows that the consultation provisions are imposed for an additional reason; namely, to ensure a degree of transparency and accountability when a landlord decides to undertake qualifying works or enter into a qualifying long term agreement.....

> 27. One other general point needs to be made. The relevant provisions of ....[the Act]... do not prohibit a landlord from entering into whatever contract he pleases for the carrying out of works or the supply of services. They merely prevent him from passing on the cost of the works or services to the lessees unless he has satisfied the statutory requirements about price, quality and consultation....."

36. In this passage the Court of Appeal thus emphasises that where a proper consultation has not taken place dispensation may be refused under section 20ZA even if the service charges were reasonably incurred, reasonable in amount and are for work provided to a reasonable standard. The issue therefore is what amounts to a proper consultation and more particularly what test should be applied in determining whether or not it is reasonable for the Tribunal to grant dispensation.

37. The answer given by the Court of Appeal in *Daejan* is that the Tribunal should refuse dispensation if the landlord's failure to comply with the consultation requirements caused significant prejudice to the tenants. (*Daejan* para 72). In the *Daejan* case there was a serious failing in that the landlord prematurely curtailed the consultation process before it had run its course by awarding the contract to a particular tenderer and informed the lessees of the same. The Court of Appeal held that this was clearly not a proper consultation and the failure in that case amounted in itself to significant prejudice to the lessees. In the subsequent Upper Tribunal decision in *Stenau Properties v Leek* (above) Judge Mole reviewed the decision in *Daejan* and the earlier Lands Tribunal decisions cited by the parties in the present case and concluded at paragraph 22 that

> "Where there has been a minor breach of procedure it will be important for a tribunal to find evidence that respondents were prejudiced or disadvantaged. Where the breach has been substantial it may be reasonable to assume prejudice. I add that even if it were possible to prove that further consultation would have made no difference to the end result, it still does not follow that therefore there has been no prejudice if the breach has been substantial. The effect of a properly conducted consultation process should be to give the tenants confidence in the decisions that are reached and leave them feeling as comfortable as they can be with the service charges that are likely to flow from those decisions. The opportunity to participate in a meaningful way in the decision-making process is of real value. Even if the end result would probably have been the same without their participation, it seems to me very arguable that tenants who are substantially deprived of their right to be included in the decision-making process are genuinely prejudiced."

38. The Tribunal accordingly considered each of the breaches in the present case in the light of the law as set out above.

"The estimates breach"

39. The provisions relating to estimates are clearly at the heart of the consultation process. Paragraph 11(5)(b) of Part 2 of Schedule 4 of the 2003 regulations requires the "paragraph (b) statement" provided for by that provision to set out the amounts of ***at least two of the estimates***. However, paragraph 11(5)(c) ***also*** requires that ***all of the estimates*** shall be made available (emphasis supplied). Paragraph 11(9) says that the paragraph (b) statement shall be supplied to and the estimates made available for inspection by each tenant. Finally, paragraph 11(10) provides that the landlord shall, by notice in writing to each tenant (a) specify the place and hours at which the estimates may be inspected; (b) invite the making, in writing, of observations in relation to those estimates and (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. The estimates must be available for inspection, free of charge at that place and during those hours which must be reasonable (paragraph 11(11).

40. The importance of these requirements was emphasized by the President of the Lands Tribunal in *London Borough of Camden v The Leaseholders of flats at 30-40 Grafton Way* LRX/185/2006. In that case the landlord obtained five tenders for a major works project from a number of contractors. Although a notice in compliance with paragraph 11(5) (b) of Part 2 of Schedule 4 to the 2003 regulations was prepared it was erroneously not sent to the leaseholders. The leaseholders simply received a summary of the successful tender. The landlord had therefore clearly failed to comply with the consultation requirements. Its section 20ZA application for dispensation from that obligation was rejected by the LVT, whose decision was upheld, on appeal, by the Lands Tribunal on the basis that the landlord's failure amounted to significant prejudice.

The President of the Lands Tribunal stated in his decision

"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."

41. Mr Bastin agrees with that decision but says that in the present case the Applicant's failure with regard to the estimates is much less culpable. Indeed he came close to submitting that as long as the landlord has complied in respect of at least two estimates failure relating to any other estimates obtained should be overlooked or be treated as incapable of giving rise to significant prejudice. The Tribunal does not agree and can find nothing in the statutory scheme or in the authorities to support that assertion. The statutory requirements are clear. The Applicant issued the stage 2 notice, dated 9 February 2007, on 13 February 2007. (The details are recited in paragraphs 34 to 43 of the section 27A LVT decision). That notice set out the amounts of all four estimates obtained, thus complying with paragraph (11)(5)(b) of part 2 of Schedule 4 to the 2003 regulations. However, it is conceded by the Applicant that it did not comply with paragraph 11(5)(c). All of the estimates were not made available (at no cost to the leaseholders) despite the fact that the notice invited leaseholders "to make observations in relation to ***any*** of the estimates." (Emphasis supplied). Furthermore, the notice did not state where the estimates could be seen for inspection.

42. Miss Gibbons says that this failure does amount to a serious breach and therefore significant prejudice can be presumed to have been caused to the lessees. The Tribunal agrees with her. In the passage quoted from the decision in *Grafton* (above) the President held (emphasis supplied) that "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 that case the leaseholders had no opportunity to see any of the estimates. In the present case they had no opportunity to see the third and fourth estimates (save by writing for them at a cost). They were thus deprived of the opportunity to see all the estimates in order to make comparisons and then observations.

43. The Tribunal concludes that this failure is a substantial breach and that it is unnecessary therefore to consider whether actual prejudice was suffered by the lessees. Mr Bastin's submission that there was no evidence that the third tenderer had provided anything more than the summary made available by the Applicant is rejected. It was certainly not asserted by POM in the earlier section 27A proceedings. The third

tender was of course close in amount to that of the second and it would have been particularly helpful for the lessees to have had the opportunity of comparing the two tenders. Mr Bastin's submission that the fourth estimate was so high as to be an unlikely contender, and one which the leaseholders were unlikely to have favoured is also quite speculative and irrelevant in view of the Tribunal's finding that failure to make all the estimates available for inspection by the lessees at no cost was a substantial breach.

The "summary of observations breach"

44. Miss Gibbons submitted that the Applicant's failure to summarise, in the paragraph (b) statement, *all* observations made within the relevant period in relation to the proposed works was also a serious breach of the consultation requirements and as such should be presumed to have caused significant prejudice. She focused on Mr Sin's observations.

45. As explained above, Mr Sin had two principal concerns. The first was whether rectification of the internal disrepair to the common areas caused by external structural defects would be covered by the major works contract. The second concern was about the consultation process and whether a panel of leaseholders could review the tenders, and decide on the successful tender, jointly with POM.

46. Mr Bastin sought to dismiss the first point by saying that it was really simply a question about the extent of the works to which Mr Arthan had replied. He did not see how, even if this exchange were to be a relevant observation for the purposes of requiring it to be summarized in the stage 2 notice, the tenants could have been prejudiced by its omission. The fact is that the works were never included.

47. With regard to Mr Sin's second point, Mr Bastin sought, by close reading of paragraph 50(3) of the section 27A Tribunal decision, to confine the Tribunal's finding of breach, with respect to POM's failure to summarise the observations made, to Mr Sin's enquiry about the internal works. The Tribunal does not agree with this interpretation of paragraph 50(3). In that paragraph the Tribunal clearly states that **all** of the responses received were observations which should have been summarized together with the landlord's responses. That is to say, including all of Mr Sin's comments in his letters of 21 September and 10 October 2006). Those letters had been put in evidence in the earlier proceedings and indeed were included in the application pack at the start of the present proceedings. It is clear from paragraph 50(3) of the section 27A LVT decision that the Tribunal found all the responses received by POM to be observations. The Tribunal agrees that those confined to methods of payment were not observations made in relation to the proposed works. However, the two observations made by Mr Sin (discussed above) were observations in relation to the proposed works.

48. The reference in paragraph 50(3) of the decision to Mr Sin's enquiry with regard to the internal works, was an example used by the Tribunal to refute Ms Meacher's submission that the observations made by those lessees who had responded, were not observations in relation to the nature or scope of the intended works. It is clear from paragraph 50(3) as a whole that the Tribunal's reference in the final sentence to "the responses", which it found to be observations made in relation to the proposed works, included those made in Mr Sin's letters of 21 September and 10 October 2006. It was in this later letter that Mr Sin had asked if a panel of leaseholders could oversee the tender submissions and award of the contract, to which Mr Arthan had replied that a recognized Residents' Association did not exist and therefore that would not be possible.

49. The critical issue therefore is whether the failure was, as Miss Gibbons submits, so serious as to lead to a presumption of serious prejudice to the lessees, or alternatively that there was evidence of prejudice to the lessees. Miss Gibbons says it was a substantial breach because it meant that non-resident lessees, who formed a significant number of the leaseholders at Regent Park, were deprived of knowledge about the informal residents' committee which, had they known about, they could have engaged with. Alternatively, she says that this factor is evidence of prejudice.

50. Mr Bastin's answer to this is that the lessees were deemed to know about the committee because of the landlord's efforts and that the landlord had sought to engage with lessees throughout the process. However, when giving evidence, Mrs Horne was unable to confirm that information about the residents' committee had been sent to all tenants including non-resident tenants, as she had intended to happen. No copy of any covering letter to tenants or evidence of actual sending of the same was produced. Some information had been posted on the site although there was disagreement between the parties as to whether it was readily accessible to all tenants.

51. The Tribunal agrees with Miss Gibbons that the total failure of the Applicant to include in the paragraph (b) statement (i.e. the second notice) the summary of Mr Sin's letters and his response to them was a serious omission which prejudiced the lessees.

52. With regard to the internal works, Mr Bastin submitted that the lessees were not prejudiced. But this depends of course on a particular view as to what constitutes prejudice. The implication is that if the works were not done the tenants did not have to pay. However, these works were obviously a matter of concern not just to Mr Sin but to other lessees. A lot of time was spent in the section 27A proceedings looking at the matter of the unsightly internal disrepair, the remedy of which was clearly of concern to many lessees. Had they been able to see a summary of the exchange they would have been able to feel

confident that the landlord intended in this project to deal comprehensively with the external and internal common area disrepair. They would also, as Miss Gibbons submitted, have been able to have confidence in the consultation process and the decisions reached as a result of that process because they would have seen that the landlord was attending to matters raised by a respondent lessee. The lessees might also have been concerned to check the estimates themselves and have discovered that the works were not in fact to be included. As Lord Justice Sedley observed in *Daejan*, "the tenants of a block of long leasehold flats like Queens Mansions have a real interest not only in the cost but in the quality of major maintenance works."

53. With regard to the summary of observations and responses breach, as the Respondent has submitted, close on 60% of the leaseholders at Regent Park were non-resident and thus a significant number of lessees will not have been aware of the informal residents' committee and were thus deprived of the ability to be involved with it so as to pool resources and decide on what steps if any they might want to take. Mr Bastin says that one should put to one side how the project turned out when considering the consultation issue. However, the disastrous nature of the project as it developed (and described in the section 27A decision document) demonstrates, as Mr Bastin acknowledged, how it is not always cost effective to select the lowest tender.

54. Mr Bastin referred to *Eltham Properties Limited v (1) Mrs Kenny (2) Mr Rainforth and (3) Mr Barker* LRX/161/2006 where, a breach (failure to invite the tenants to nominate a contractor for a decorating job costing £1,419.40) was excused by the Lands Tribunal granting a section 20ZA dispensation. However, that was a case where the Tribunal found that this was minor breach where there was no evidence of prejudice and where the Lands Tribunal found that the LVT had considered the landlord to have acted reasonably in all other respects.

55. In the present case the major works contract was a matter of concern to the residents. Had they seen the exchanges between Mr Sin and Mr Arthan they would surely have reacted by seeking to be involved in the informal group of which those residents involved would very likely have informed the other residents. When giving evidence in the present proceedings, Mr Stephen Pugh (lessee of 56 Cassandra Court, Regent Park) stated that he had discussed with the caretaker (who worked for POM) how disappointed he was with the whole process, and had been surprised to learn from the caretaker that there was an informal residents' committee, which Mr Arthan had not mentioned when Mr Pugh had discussed the project with him. Mr Pugh had immediately written to the committee chairman.

56. The Tribunal agrees with the Respondent that even if the breaches were not so substantial as to lead to an assumption of prejudice there is evidence of actual prejudice, as outlined above, and having considered the submissions made by all parties the Tribunal is not satisfied, in accordance with section 20ZA(1) of the Landlord and Tenant Act 1985, that it is reasonable to dispense with the consultation requirements specified by section 20 of that Act and by the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987).

The Tribunal accordingly determines that compliance with the consultation requirements is not dispensed with.

Martin Davey
Chairman

6 February 2013