In the High Court of Justice **Case No.: HC12E04517**

Chancery Division

B e t w e e n :-

(1) BDW Trading Limited
(2) Comet Square Phase 2 Block Management Co Ltd

Claimants

-and-

South Anglia Housing Ltd

Defendant

Before Mr. N. Strauss (sitting as a deputy judge)

Hearing date: 21st June 2013
Date of judgment: ... July 2013

Mr. Philip Rainey Q.C. and Mr. James Fieldsend, instructed by Osborne Clarke, appeared for the claimant; Mr. Ranjit Bhose Q.C., instructed by Devonshires, appeared for the defendant.

Approved judgment

Introduction

1. Section 19 of the Landlord and Tenant Act 1985 provides that no more than reasonable service charges are payable by a tenant to a landlord. Section 20 provides for consultation requirements to apply to "qualifying long term agreements" ("QLTA"), (under which costs would be incurred which would form the basis of service charges) to be designated by the Secretary of State. A QLTA is defined by section 20 ZA as "an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than 12 months".

2. The issue in this case is whether this applies to a long term agreement entered into in relation to buildings which have not yet been constructed, or which are not let at the time of the agreement. If it does then, since in the absence of any tenant, consultation is impossible, the owner must seek a dispensation from the Leasehold Valuation Tribunal ("LVT") under section 20(1), failing which it cannot recover more than the "appropriate amount" (currently £100) from any later tenant. If correct, this would be likely to apply in many cases. On 1st July 2013, the LVT's functions were transferred, for England but not for Wales, to the Property Chamber, First-Tier Tribunal, but I will continue to refer to the LVT.

3. Mr. Rainey Q.C. on behalf of the claimant submits that the section cannot apply, because it refers to "the landlord", denoting an existing tenancy, and because it would not

be a sensible construction of the provisions that the owner of the land or building should be required to consult, when there would be nobody with whom to consult.

4. Mr. Bhose Q.C. on behalf of the defendant submits that there is no requirement for an identifiable tenant or sub-tenant at the time the agreement is entered into. He submits that "the landlord" must include future or prospective landlords, since otherwise there would be a major gap in the legislation, that there is provision, if consultation is impossible, for the LVT to dispense with it on application, that the regulations passed under the Act assume that it does apply to buildings not yet in existence or not yet let, and that the Act is to be construed consistently with them.

5. For the reasons set out below, I hold that the claimant's submissions are correct, and accordingly that the QLTA definition does not apply to the agreement that is the subject matter of this action. The section does not say that "the landlord" is someone who may in the future become a landlord, and there is no proper basis for stretching its meaning. The regulations passed under the Act do assume that it does have this meaning but, although potentially relevant to its interpretation, appear in this case to have been drafted without much attention to the statutory provisions and therefore carry no weight or conviction as evidence of the legislative intention.

<u>The facts</u>

6. I can take the facts from the parties' agreed statement:-

"2. The Development was constructed by the First Claimant.

3. The Development comprises of a mixed use estate. There are 4 residential blocks on the Development. The structure of ownership of each block is set out in paragraphs 5 to 16 of the Claimants' Details of Claim and can be summarised as follows:

a) The freehold title to Blocks 1-3 is held by a company known as Frontier Key (Hatfield) Limited; it was formerly held by the First Claimant.
b) The freehold interest in Block 4 is held by the First Claimant.
c) Each of Blocks 1, 2 and 3 are held on a long lease granted to the First Claimant, these were granted by way of a leaseback on the sole of the freehold to Frontier Key (Hatfield) Limited.
d) There are 79 long underleases of the flats in Block 1 granted by the First Claimant and to which the Second Claimant is a party.
e) Each of Blocks 2 and 3 are held on an underlease granted to the Defendant and the Second Claimant is a party to each lease.
f) In Block 2 there are 31 long sub-underleases with the remaining flats held on assured shorthold tenancies.
g) In Block 3 there is 1 long sub-underlease with the remaining flats held on assured shorthold tenancies.
h) In Block 4 there are 92 long leases granted by the First Claimant and to which the Second Claimant is a party.

4. The material agreement that is the subject of the claim is dated the 20 June 2005 ("the Agreement"). The parties to the Agreement are the First Claimant and Utilicom Ltd (now known as Colley-GFF Suez). The term of the Agreement is 25yrs. Under the Agreement Utilicom agree to provide hot water (for space heating and domestic water services) and electricity to each of the residential flats on the Development and the First Claimant agrees to pay a monthly charge. It is a term of the Agreement that throughout the 25yrs Utilicom will be the sole supplier of heat and power.

5. Under the terms of the underleases of Blocks 1-4 and the sub-underleases of Blocks 2 and 3, the lessees (which include the Defendant) agree to pay a proportion of the cost of providing and maintaining the plant for the supply of the heat and power to the flats and the cost of the domestic electricity, hot water and central heating consumed at the flat (that is the subject of the lease) with all associated costs. Where the Second Claimant is a party to a lease it is that company that covenants to provide and maintain the plant for the supply of energy and to provide the energy itself, and to those circumstances the costs payable by the lessee are to be paid to the Second Claimant (should the Second Claimant fall into liquidation then the First Claimant covenants to provide the services). Where the Second Claimant is not a party to a lease (e.g. in the case of the sub-underleases of Blocks 2 and 3) the Defendant covenants to procure the same services from the Second Claimant and the costs are payable to the Defendant. Each of the Defendant's assured shorthold tenants pays a service charge and a heating charge to the Defendant. It is said by the de that these charges reflect the benefit the tenant receives from the services provided under the Agreement.

6. In order that the Second Claimant can comply with its covenants, it purchases from the First Claimant (at cost) the energy supplied by Utilicom under the Agreement. There is no written documentation recording this arrangement.

7. The costs chargeable under the Agreement are invoiced to the First Claimant. In turn, the First Claimant invoices the managing agent for the Development (Ian Gibbs Estate Management) who in turn invoices the lessees.

8. **At the time the Agreement was entered into there were no lessees of Blocks 1-4 and so agreements for a lease of those blocks or any of the flats in them.**" (**my emphasis**)

The Act

7. The relevant provisions of the Act are as follows (**my emphasis**):-

"*Services charge*

18 Meaning of "service charge" and "relevant costs"
(1) In the following provisions of this Act "service-charge" means an amount payable by a tenant of a [dwelling] as part of or in addition to the rent -
(a) which is payable, directly or indirectly, for services, repairs, maintenance[, improvements] or insurance or the landlord's costs of management; and
(b) the whole or part of which varies or may vary according to the relevant costs.
(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
(3) For this purpose -
(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19 Limitation of service charges: reasonableness
(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.
(2) **Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequently charges or otherwise**. ...

20 Limitation of services 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) or (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 action "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his 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.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement -

(a) if relevant costs incurred under the agreement exceed any appropriate amount; or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations 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 determined 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 contribution 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 contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

20ZA Consultation requirements: supplementary

(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) **In section 20 and this section** -

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may be regulation provide that an agreement is not a qualifying long term agreement -

(a) if it is an agreement of a description prescribed by the regulations or

(b) in any circumstances so prescribed.

(4) In section 20 and this section ("the consultation requirements" means requirements prescribed by regulations made by Secretary of State.
(5) Regulations under subsection (4) may in particular include provision requiring the landlord -

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section -

(a) may make provisions generally or only in relation to specific cases and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

...

30 Meaning of "flat", "**landlord**" and "tenant"

In the provisions of this Act relating to service charges -

"**landlord" includes any person who has a right to enforce payment of a services charge**;

"tenant" includes -

(a) a summary tenant, and

(b) where the [dwelling] or part of it is sub-let, the sub-tenant ...

...

36 meaning of "lease" and "tenancy" and related expressions

(1) In this Act "lease" and "tenancy" have the same meaning.

(2) Both expressions include -

(a) a sub-lease or sub-tenancy; and

(b) an agreement for a lease or tenancy for (or sub-lease or sub-tenancy).

(3) The expressions "lessor" and "lessee" and "landlord" and "tenant", and references to letting, to the grant of a lease or to covenants or terms, shall be construed accordingly.
..."

<u>The Regulations</u>

8. The Service Charges (Consultation Requirements) (England) Regulations 2003 provide (**my emphasis**):

"The First Secretary of State, in exercise of the powers conferred by sections 20(4) and (5) and 20ZA(3) to (6) of the Landlord and Tenant Act 1985(a) hereby makes the following Regulations:

Citation, commencement and application

1. - (1) These regulations may be cited as the Service Charges (Consultation Requirements) (England) Regulations 2003 and shall come into force on 31st October 2003.

(2) These Regulations apply in relation to England only.

(3) These Regulations apply where a landlord -

(a) intends to enter into a qualifying long term agreement in which section 20 of the Landlord and Tenant Act 1985 applies (b) on or after the date on which these Regulations come into force; or

(b) intends to carry out qualifying works to which that section (c) applies on or after that date.

Interpretation

2. - (1) In these Regulations -

"the 1985 Act" means the Landlord and Tenant Act 1985;

...

Agreements that are not qualifying long term agreements

3. - (1) **An agreement is not a qualifying long term agreement (i) and -**

(a) it if is a contract of employment; or

(b) if it is a management agreement made by a local housing authority (j) and -

(i) a tenant management organisation; or

(ii) a body established under section 2 of the Local Government Act 2000 (k);

(c) if the parties to the agreement are -

(i) a holding company and one or more of its subsidiaries; or

(ii) two or more subsidiaries of the same holding company;

(d) if -

(i) when the agreement is entered into, there are no tenants of the building or other premises to which the agreement relates; and

(ii) the agreement is for a term not exceeding five years.

(2) An agreement entered into, by or on behalf of the landlord or a superior landlord -

(a) before the coming into force of these Regulations; and

(b) for a term of more than twelve months,

is not a qualifying long term agreement, notwithstanding that more than twelve months of the term remain unexpired on the coming into force of these Regulations. ...

Application of section 20 to qualifying long term agreements

4. - (1) Section 20 shall apply to a qualifying long term agreement if relevant costs(s) incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100. ..."

Discussion

9. The issue to be decided is whether the term "the landlord" in the definition of "qualifying long term agreement" in section 20ZA means anyone who is, or who at any later time becomes, a landlord.

10. Sections 30 and 36 define "landlord", "tenant", "lease" and "tenancy" in conventional terms with no extended meaning. It seems inconceivable, if the draftsman of the legislation considered the question of agreements entered into when the property was not yet built, or not yet let, and it was intended to apply to such agreements, that he would not have so provided in clear terms. As Mr. Rainey pointed out there are provisions in other legislation applicable to "prospective landlords": see for example Housing Act 1985 section 107B.

11. There is in addition the point that in their original form, these provisions were limited to the costs of works carried out on a building. Long term service agreements were not covered, and there were no consultation requirements applicable to such agreements, and therefore no question of including future landlords. There is no doubt that, in the original legislation, 'the landlord' had its normal meaning, and sections 30 and 36 have not been materially altered. Therefore, if the defendant's argument is correct, the draftsman of the legislation has changed the meaning of the words, for the purposes of sections 20 and 20ZA only, and without changing the definitions or explaining in respect of which sections the extended meaning applied.

12. These are simple, powerful points, but Mr. Bhose seeks to overcome them by submitting that unless the section is interpreted so as to apply to potential future landlords, the legislation becomes absurd, as the requirement to consult can so easily be avoided, by the simple expedient of entering into long term service agreements before letting flats. I do not accept this. As Mr. Rainey submitted, later tenants would still have the protection of section 19 if costs were unreasonable so that, even if they have no right to consult, they could object if the charges were unreasonable. Also, if the long term agreement is in place, they can enquire about the level of charges before they lease the flat. Therefore, while there are disadvantages in not having the safeguard of consultation (or the requirement to obtain dispensation from the LVT), the legislation is far from absurd without it.

13. Further, while it is not always useful to compare anomalies, Mr. Bhose's construction would give rise to unexpected consequences, since it would apply equally to cases in which the agreement is entered into when the owner of the property has no intention of ever becoming a landlord, e.g. a developer who intends to sell not let, or the owner of a house who, long after making the agreement, is posted abroad and, wanting to let the house, would find that he is subject to the provisions and has to get a dispensation from the LVT.

14. Mr. Rainey's other main point, in addition to the sheer improbability of the draftsman not articulating an intention to extend the provisions to owners of property who are not, but may later become, landlords, is that it would be absurd to interpret them as imposing an obligation to consult with non-existent consultees. Nor can that realistically

be overcome by relying on the developer's ability to seek a dispensation from the LVT, since this normally operates as a body hearing adversarial disputes, and would be unlikely to be selected by statute to carry out a process of approving applications without respondents. Indeed, as the recent Supreme Court decision in Daejan Investments Limited v. Benson [2013] 1 W.L.R. 854, which relates to similar issues concerning the cost of carrying out works to the property which would be reflected in a service charge shows, the basic function of the LVT in this context is to determine, in an adversarial proceeding, whether and if so to what extent a failure by the landlord to consult has prejudiced the tenants.

15. As to this, Mr. Bhose's response is that this does not mean that, in this different situation, the LVT could not operate perfectly sensibly, since its members would have the necessary expertise. He submits that the LVT would be likely to require a prospective landlord applying for a dispensation to demonstrate, first, that it has undertaken a competition to determine the proposed other party to the agreement, rather than simply awarding the agreement without competitive analysis, second, that the rates to be charged for the works or services to be undertaken were within the market range and, third, that the Tribunal would be likely to grant dispensations on conditions – for example that any prospective lessee be informed of its decision in advance of any grant of lease. The tribunal could then be satisfied that no significant prejudice would result to any tenant if the proposed qualifying long term agreement in question was entered into.

16. Further, Mr. Bhose relies on the decision of Lewison J. in Paddington Basin Developments Limited v. West End Quay Estate Management Limited [2010] 1 W.L.R.

2735, in which it was submitted that, where a landlord wished to enter into an agreement with the monopoly supplier, so that consultation could have no effect, such an agreement was excluded from the statutory definition of section 20ZA(2), because it cannot have been intended that the regulations should apply where the consultation requirements were impossible. Lewison J. rejected this submission:-

"41. Next Ms. Holland says that if the state management deed is held to be a qualifying long term agreement that would produce an unworkable result. The unworkability (if that is a word) of the result is said to stem from the difficulty of applying the consultation requirements. Assuming (without deciding) that it is difficult to apply the consultation requirements, that would lead to the conclusion that it would be reasonable to dispense with them. The leasehold valuation tribunal has power to dispense with all or any of the requirements. It may do so either prospectively or retrospectively: see Auger v. Camden London Borough Council (unreported) 14 March 2008, a decision of the Lands Tribunal. The very fact that Parliament provided for the dispensation of the consultation requirements shows, in my judgment, that it contemplated that agreements might well fall within the definition of qualifying long term agreements even though the consultation requirements might be difficult, or even impossible to apply.

42. However, I do not consider that the fact that a landlord proposes to enter into a long term agreement with a monopolist (e.g. water company) is a reason for excluding such an agreement from the definition of qualifying long term agreements or necessarily excluding it from all the consultation requirements..." (**emphasis added**)

17. I consider that, while the proposition that obtaining a dispensation would be a substitute for consultation does not merit the epithet 'absurd', Mr. Rainey's argument is a strong one. Again, it is difficult to imagine that, if it had been intended that potential future landlords would be obliged to seek dispensation from the LVT, this would not have been explicitly provided for, and one would have expected provision for regulations to be issued governing the procedure before the LVT on such a one-sided application. I do not think that what Lewison J. said in Paddington Basin Developments is of any assistance in

this case; plainly he was not contemplating the present, very different, case now before the court, in which all consultation is impossible.

18. Mr. Bhose made two further points with which I should deal, although i do not think that either advances the defendant's case. First, he submitted that "the landlord" denoted the person now seeking or entitled to enforce a service charge for the time being. I think that, if that had been what was intended, there would have been a definition to that effect. Secondly, he submitted that the words "entered into" in section 20ZA were capable of meaning "to be entered into" and so of denoting a future agreement. I agree that they could, but that only means that the words "entered into" could support either construction and are neutral. They do not assist in overcoming the difficulties of the defendant's argument.

19. Thus far, I would have had no hesitation in accepting the claimant's case, which accords with the language of the statute and makes far better practical sense. But it is undeniable that Regulation 3(1)(d) assumes that the Act does apply to agreements entered into where there are no tenants, and then proceeds to exempt agreements of under five years duration, and this requires consideration.

20. The circumstances in which subordinate legislation may be used as an aid to interpretation of the principal Act are set out in the speech of Lord Lowry in Hanlon v. The Law Society [1981] A.C. 124 at 193G to 194C as follows:-

"My Lords, when these regulatory provisions are so clearly relevant, it is pertinent to ask how far they are admissible for the purpose of construing section 9(6).

A study of the cases and of the leading textbooks (*Craies on Statute Law*, 7th ed. (1971), p.158, *Maxwell on Interpretation of Statutes,* 12th ed. (1969), pp.74-75, *Halsbury's Laws of England*, 3rd ed., vol. 36 (1961), para. 606) appears to me to warrant the formulation of the following propositions:

(1) Subordinate legislation may be used in order to construe the parent Act, but only where power is given to amend the Act by regulations or where the meaning of the Act is ambiguous.
(2) Regulations made under the Act provide a Parliamentary or *administrative contemporanea expositio* of the Act but do not decide or control its meaning: to allow this would be to substitute the rule-making authority for the judges as interpreter and would disregard the possibility that the regulation relied on was misconceived or ultra vires.
(3) Regulations which are consistent with a certain interpretation of the Act tend to confirm that interpretation.
(4) Where the Act provides a framework built on by contemporaneously prepared regulations, the latter may be a reliable guide to the meaning of the former.
(5) The regulations are a clear guide, and may be decisive, when they are made in pursuance of a power to modify the Act, particularly if they come into operation on the same day as the Acct which they modify.
(6) Clear guidance may also be obtained from regulations which are to have effect as if enacted in the parent Act."

21. Mr. Bhose also sought to rely on a consultation paper issued by the Office of the Deputy Prime Minister on the proposed regulations in August 2002, which was referred to by Lord Wilson JSC in his dissenting judgment in Daejan at paragraph 109, albeit for a different purpose. Mr. Bhose relied on Craies on Legislation, 10th ed., 2012 at paragraph 27.1.11, for the proposition that such papers can be relevant evidence for the construction of legislation although – as Lord Steyn said, pertinently to the present case, in his dissenting speech in R. on the application of Eddison First Limited v. Central Valuation Officer [2003] 4 All E.R. 209:

"The question is how far, on a contextual reading of a statute, the language is capable of stretching".

22. I am satisfied that both the Regulations and the consultation paper (which contain the same provision that became Regulation 3(1)(d) in the attached draft regulations, except that there was no exemption for agreements for less than 5 years) are admissible in evidence, on the ground that they were sufficiently contemporaneous with the Act. The legislation received the Royal Assent on 1st May 2002, the draft regulations were in existence by 17th July 2002 and were attached to the consultation paper in August 2002. It is also clear that the Act and the Regulations were intended to be part of one code. It does not, of course, follow that the understanding of the civil servant(s) who drafted the Regulations and wrote the consultation paper (who may or may not be the same person) represents the intention of the legislation which was drafted by a Parliamentary draftsman. One simply cannot know the extent of the consultation on the relevant point at issue, if any, between the persons concerned. It is always necessary to keep in mind the practical reality, that the person drafting subordinate legislation, or other admissible documents such as a consultation paper, may simply have misunderstood the meaning of the Act. Where, as here, there is really little doubt as to the meaning of the Act, and considerable stretching of the language required to produce an ambiguity, the Regulations and any other admissible documents are likely to be of very little weight.

23. In the present case, the Consultation on Draft Regulations dated August 2002 strongly suggest that their draftsman did not focus on this issue at all, but simply assumed that the Act applied to long term agreements entered into when no part of the building was let, without applying his mind to whether this was so. I take this from two passages in the document: the first is from Chapter 3, headed "Consultation on long term contract", which has a passage about the term "qualifying long term agreement" as follows:-

"2. Qualifying long term agreement' is defined in section 20ZA of the 1985 Act (as amended by section 151 of the 2002 Act) as an agreement for a period of more than twelve months. A contract with an initial period of 12 months or less with an option for renewal with the agreement of both parties is not considered to be a qualifying long term agreement for the purposes of section 20ZA. Indefinite contracts that can be terminated by either party on service of a notice are also not considered to be qualifying long term agreements for those purposes. However, if such contracts stipulate a minimum contract period of more than 12 months then they would be caught by the definition.

3. Under the draft Regulations the consultation requirements applicable to qualifying long term agreements would be triggered if any leaseholder would have to pay more than £25 per year (see regulation 5 of the draft Regulations). A wide variety of situations would be covered, from the simple to the complex, ranging from a two year contract for the provision of cleaning materials to a thirty year PFI arrangement for the refurbishment and maintenance of a substantial part of a local authority's housing stock."

24. As Mr. Rainey correctly submits, the summary of the definition in paragraph 2 leaves out what for present purposes is the crucial wording "by the landlord", which hardly suggests any awareness of, let alone close attention to, the issue.

25. The second passage occurs in Chapter 5, headed "Exemptions, Commencement and Transitional Provisions" and concerns the exempting provision what became Regulation 3(1)(d). This passage reads:-

"3. Concerns have been expressed about the consultation requirements in relation to new developments or conversions. For example, situations where a landlord enters into a long term agreement with a managing agent as soon as a new development is completed but no properties have been sold. Obviously no consultation could have taken place. We are of the view that service charge payers will buy such properties in the knowledge of what the charges will be and as such will not be able to resist payment on grounds of non-consultation. They will still be able to challenge the reasonableness of the charges under section 9 of the 1985 Act. We therefore propose to exempt contracts where there are no service charge payers to consult (see regulation 4(1)(d) of the draft Regulations).

Q.8. DO YOU AGREE WITH THE EXEMPTION WHERE NO SERVICE CHARGE PAYERS ARE AVAILABLE FOR CONSULTATION?

(Q.8. refers to the passage above it).

26. This passage too demonstrates that the person who wrote the consultation document was unaware that there was any issue as to whether the Act applied where there was no letting and was simply assuming, without considering the meaning or intention of the principal legislation, that it did apply. Therefore, in my view, neither the Regulations nor the consultation document have any persuasive power as an aid to the interpretation of the principal Act, and they do not come remotely near dislodging what is otherwise the clear meaning of section 20ZA.

Conclusion

27. I therefore conclude that the consultation requirements of the Act have no application in this case.