



LRX/26/2006

**LANDS TRIBUNAL ACT 1949**

*LANDLORD AND TENANT – service charges – consultation requirements – section 20 of the Landlord and Tenant Act 1985 in its form pre the amendments made by Common hold and Leasehold Reform Act 2002 – failure to comply with consultation requirements – landlord not having acted reasonably – no dispensation granted – case heard before a judge sitting as both a Member of the Lands Tribunal and a Circuit Judge sitting in the County Court (the jurisdiction to consider dispensation in this pre-2002 Act case being vested solely in the County Court).*

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

**BETWEEN** **M & M SAVANT LIMITED** **Appellant**  
**and**  
**(1) MICHAEL BROWN** **Respondents**  
**(2) SUBHASH RAJA**  
**(3) ROBIN PAULEY**

**Re: 52 and 56 Gilda Court, Watford Way, London NW7 2QL**

**AND IN THE CENTRAL LONDON COUNTY COURT** **Claim No: CHY06059**

**BETWEEN** **M & M SAVANT LIMITED** **Claimant**  
**and**  
**(1) MICHAEL BROWN** **Defendants**  
**(2) SUBHASH RAJA**  
**(3) ROBIN PAULEY**

**Before: His Honour Judge Huskinson**

**Sitting at: Procession House, 110 New Bridge Street, London, EC4Y 6JL  
on 3 and 4 July 2008**

*Annette Cafferkey* instructed by Bude Nathan Iwanier on behalf of the Appellant/Claimant  
*Justin Bates* instructed by Bindmans LLP on behalf of the Respondents/Defendants

**© CROWN COPYRIGHT 2008**

The following cases are referred to in this decision:

*Martin v Maryland Estate Limited* [1999] L&TR 541

*Wilson v Stone* [1998] 26 EG153

*Hoggett v Knox* (unreported, Central London County Court, 12 November 1999)

*Richmond Housing Partnership v Smith* LRX/10/2005

*Oceanic Acquisitions and Mergers Limited v Wharton* LON/00AW/LIS/2003/0007

*Eltham Properties Limited v Kenny* LRX/161/2006

*London Borough of Haringey v Ball* (unreported, Central London County Court, 6 December 2004)

## DECISION

### Introduction

1. The Appellant appeals to the Lands Tribunal from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (“the LVT”) dated 27 September 2005 whereby the LVT reached certain decisions regarding the recoverability of service charges by the Appellant from the Respondents in respect of premises held by them as long lessees from the Appellant. Mr Brown is the lessee of 56 Gilda Court, Watford Way, London NW7 and Mr Raja and Mr Pauley are joint lessees of 52 Gilda Court. The Appellant is their landlord.

2. The LVT was concerned with the recoverability of service charges for the year 2003/2004, during which the Appellant carried out major works to the block (namely 50-61 Gilda Court) which comprises the Respondents’ respective flats. In particular the LVT was concerned with:-

- (1) whether the Appellant had complied with the consultation requirements set out in section 20 of the Landlord and Tenant Act 1985;
- (2) whether the cost of the building works carried out and invoiced for the year 2003/04 was reasonable and whether the building works had been carried out to a reasonable standard;
- (3) whether and to what extent the Respondents were liable to pay for certain specific matters namely an entry phone system, the gardening, and the cleaning of the common parts.

3. The LVT concluded that the consultation requirements under section 20 had not been complied with. Under section 20, in the form in which it was prior to certain amendments (and it is in this earlier form that section 20 applies in the present case) the LVT had no jurisdiction to consider the question of whether there should be any dispensation from the consultation requirements. The LVT accordingly concluded that the costs incurred in carrying out the qualifying works (i.e. the major works carried out in 2003-04) could only be taken into account to the extent of £1000. The LVT went on to consider the other matters including the standard of the works and the reasonableness of the charges which the Appellant sought to recover in respect of these works. The LVT concluded that the Appellant was patching up a poor property with poor workmanship which was poor value for money (paragraph 37 of its decision). The LVT made certain specific findings regarding individual items of work in paragraph 38, which involved the disallowance of a substantial amount of the costs which the Appellant sought to recover. The LVT concluded (in paragraph 39) that a reasonable sum in the circumstances for the works carried out was £18,023.50 plus 15% (which was allowed for preliminaries) making a total of £20,727.03. This resulted in a charge of £1727.25 per flat. Thus this amount would be recoverable if the consultation requirements were dispensed with under section 20, but otherwise the amount recoverable for these major works was limited to a total of £1000 in relation to the whole block.

4. Section 20, in its form as relevant to these proceedings, granted a power to dispense with the consultation requirements but jurisdiction for considering such dispensation was vested in the County Court and not in the LVT (this situation has now been altered by the amendments introduced by the Commonhold and Leasehold Reform Act 2002, but it is common ground that these amendments are not relevant to the service charges which are the subject matter of the present appeal to the Lands Tribunal).

5. On 14 February 2006 the Appellant issued proceedings in the Central London County Court seeking dispensation under section 20(9) from the relevant consultation requirements.

6. Accordingly on 10 April 2006 the President of the Lands Tribunal granted the Appellant permission to appeal against the decision of the LVT, but such permission was limited to the Appellant's grounds of appeal insofar as they sought to challenge the LVT's conclusions regarding the section 20 consultation requirements. The grounds of appeal had sought also to challenge certain specific findings of the LVT regarding the reasonableness of certain costs, but permission was not granted to challenge these findings. The President in granting permission pointed out:-

“Only the County Court has jurisdiction in respect of a pre-2002 Act dispensation. Such an application can fairly be considered only if the findings of fact made by the LVT are also reviewed which, since there may be an issue of estoppel, can only be done on appeal”.

The President gave directions that the case should be listed before a Member of the Lands Tribunal who is also a Circuit Judge so that there could be raised at a single hearing all the relevant arguments regarding (a) whether the section 20 consultation requirements had been satisfied (a matter within the jurisdiction of the LVT and the Lands Tribunal) and (b) whether, if not, they should be dispensed with under section 20(9) (a matter within the jurisdiction of the County Court). It was in this manner that the matter came before me for hearing. While the argument regarding compliance with section 20 is a matter for me sitting as a member of the Lands Tribunal and the question of dispensation is a matter for me sitting as a Circuit Judge in the County Court, I conclude that it is appropriate to give a single written decision upon the entirety of the case. I was not asked to do otherwise.

7. At the hearing before me neither party sought to challenge the LVT's findings regarding the quality of the works carried out or the reasonableness of the costs of the works carried out. Indeed neither party was entitled to challenge these matters. So far as concerns the Lands Tribunal proceedings, insofar as the Appellant had sought to challenge the LVT's findings on these matters permission to challenge these matters had been refused. So far as concerns the County Court proceedings it would not be appropriate to allow re-litigation of these findings by the LVT regarding the quality of the works and a reasonable charge for the works – these findings were made by the LVT, being the tribunal with jurisdiction to decide the points, and are not the subject of appeal to the Lands Tribunal. They cannot be challenged in the County Court proceedings for dispensation with the consultation requirements.

8. Thus I heard no expert evidence regarding the quality of the works carried out or the reasonableness of any charge for such works. I did however receive evidence directed towards the facts surrounding the consultation procedures purportedly taken under section 20 and in particular regarding the date of commencement of the relevant works.

### **Statutory provisions**

9. Section 19 of the Landlord and Tenant Act 1985 lays down that relevant costs are to be taken into account in determining the amount of a service charge payable for a period only to the extent that they are reasonably incurred and only if the services or works are of a reasonable standard. The amount payable is to be limited accordingly.

10. Section 20 in the form in which it applies to the present case provides as follows:-

“20(1) Where relevant costs incurred on the carrying out of any qualifying works exceed the limit specified in subsection (3), the excess shall not be taken into account in determining the amount of a service charge unless the relevant requirements have been either –

- (a) complied with, or
- (b) dispensed with by the court in accordance with subsection (9);

and the amount payable shall be limited accordingly.

(2) In subsection (1) ‘qualifying works’, in relation to a service charge, means works (whether on a building or on any other premises) to the costs of which the tenant by whom the service charge is payable may be required under the terms of his lease to contribute by the payment of such a charge.

(3) The limit is whichever is the greater of –

(a) £25, or such other amount as may be prescribed by order of the Secretary of State, multiplied by the number of dwellings let to the tenants concerned; or

(c) £1000, or such other amount as may be so prescribed.

(4) The relevant requirements in relation to such of the tenants concerned as are not represented by a recognised tenants’ association are -

(a) At least two estimates for the works shall be obtained, one of them from a person wholly unconnected with the landlord.

(b) A notice accompanied by a copy of the estimates shall be given to each of those tenants or shall be displayed in one or more places where it is likely to come to the notice of all those tenants.

(c) The notice shall describe the works to be carried out and invite observations on them and on the estimates and shall state the name and the address in the United Kingdom

of the person to whom the observations may be sent and the date by which they are to be received.

(d) The date stated in the notice shall not be earlier than one month after the date on which the notice is given or displayed as required by paragraph (b).

(e) The landlord shall have regard to any observations received in pursuance of the notice; and unless the works are urgently required they shall not be begun earlier than the date specified in the notice.

(5) The relevant requirements in relation to such of the tenants concerned as are represented by a recognised tenants' association are -

(a) The landlord shall give to the secretary of the association a notice containing a detailed specification of the works in question and specifying a reasonable period within which the association may propose to the landlord the names of one or more persons from whom estimates for the works should in its view be obtained by the landlord.

(b) At least two estimates for the works shall be obtained, one of them from a person wholly unconnected with the landlord.

(c) A copy of each of the estimates shall be given to the secretary of the association.

(d) A notice shall be given to each of the tenants concerned represented by the association, which shall

(i) describe briefly the works to be carried out,

(ii) summarise the estimates;

(iii) inform the tenant that he has a right to inspect and take copies of a detailed specification of the works to be carried out and of the estimates;

(iv) invite observations on those works and on the estimates, and

(v) specify the name and the address in the United Kingdom of the person to whom the observations may be sent and the date by which they are to be received.

(e) The date stated in the notice shall not be earlier than one month after the date on which the notice is given as required by paragraph (d).

(f) If any tenant to whom the notice is given so requests, the landlord shall afford him reasonable facilities for inspecting a detailed specification of the works to be carried out and the estimates, free of charge, and for taking copies of them on payment of such reasonable charge as the landlord may determine.

(g) The landlord shall have regard to any observations received in pursuance of the notice and, unless the works are urgently required, they shall not be begun earlier than the date specified in the notice.

(6) Paragraphs (d)(ii) and (iii) and (f) of subsection (5) shall not apply to any estimate of which a copy is enclosed with the notice given in pursuance of paragraph (d).

(7) The requirements imposed on the landlord by subsection (5)(f) to make any facilities available to a person free of charge shall not be construed as precluding the landlord from treating as part of his costs of management any costs incurred by him in connection with making those facilities so available.

(8) In this section ‘the tenants concerned’ means all the landlord’s tenants who may be required under the terms of their leases to contribute to the cost of the works in question by the payment of service charges.

(9) In proceedings relating to a service charge the court may, if satisfied that the landlord acted reasonably, dispense with all or any of the relevant requirements.

(10) An order under this section -

(a) may make different provision with respect to different cases or descriptions of cases, including different provision for different areas, and

(b) shall be made pursuant to statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.”

11. This section was considered by the Court of Appeal in *Martin v Maryland Estate Limited* [1999] L&TR 541. There it was held that the power of the court created by section 20(9) to dispense with all or any of the relevant statutory requirements was not a general dispensing power, but a two-stage process under which the court’s discretion only arises if the court is satisfied that the landlord has acted reasonably. “Acting reasonably” is acting reasonably in all the circumstances where section 20 is not complied with, see page 550 of the report.

## **Facts**

12. There is a factual dispute on the evidence regarding the question of when the major works to the block started and, in particular, whether they started before or after the end of the period which had been specified for consultation. I will return to that factual dispute later. Leaving that however on one side for the moment there is little or no dispute regarding the remaining facts and I find them to be as follows.

13. Gilda Court comprises five separate blocks which contain 61 flats in total. The block with which this case is concerned contains flats 50-61, i.e. twelve flats. Gilda Court was built in about the 1930s. The Appellant became the registered freehold owner of the whole of Gilda Court on 13 February 1986, at which date the common parts and the exterior of the building and the grounds had been poorly maintained. The Appellant appointed J S Estates Limited (“JSE”) as its managing agents in January 1995 and they remained the managing agents at all times relevant to the present case. In October 2001 JSE instructed Messrs Ord Carmell & Kritzler (“OCK”), chartered surveyors, to inspect the premises at Gilda Court and to compile a schedule of works. In January 2002 OCK wrote to the lessees informing them that they had been instructed regarding proposed external repair and redecoration to Gilda Court and that they were finalising a schedule and specification of works and that it was envisaged that the matter would go out to tender. The letter invited input from the lessees, either through any residents association (if there was one) or

otherwise. The letter included an invitation to the lessees to put forward the names of contractors the lessees would like to be asked to tender. Of all the lessees at Gilda Court only two, namely Mr Brown and a Mr Mileman at 29 Gilda Court, replied to this letter. It is not necessary to consider the details of these replies, but it can merely be noted that neither reply was enthusiastic regarding the carrying out of substantial works. In about April 2002 OCK obtained two tenders for the works which ranged from £562,363.54 to £615,070.05 (excluding VAT and management fees). The Appellant (which at this time itself owned about 19 flats at Gilda Court) concluded that such expensive works were unacceptable and that it was necessary for cheaper works to be identified. Accordingly instead of instructing OCK to carry on and oversee works as proposed by them, the Appellant concluded that JSE should oversee the necessary works. Mr Schreiber of JSE himself prepared an abbreviated schedule of lesser works dated 15 March 2003 and on the basis of these sought estimates from two contractors, namely Nash Building and Restoration Services (“Nash”) and also Amberflex Limited.

14. Amberflex produced a manuscript estimate for £33,400 for the relevant block, but this estimate did not include installation of the entry phone system. The estimate stated that the same price applied for each of the other four blocks. Nash provided an estimate dated 17 March 2003 for a total of £34,915 “Less discount for contract (5 blocks) £31,423.50”. I was told in evidence by Mr Nash that in fact this was the second estimate he had provided. The earlier estimate had been more expensive and had been based upon the use of scaffolding for the block rather than a scaffolding tower (the latter being cheaper but requiring the regular movement of the tower). After this earlier estimate had been provided there had been discussions between Mr Nash and Mr Schreiber which had led to the lower estimate of 17 March 2003. I was told by Mr Nash and Mr Schreiber that JSE decided to treat the Nash estimate as an estimate at £31,423.50 but without there being any commitment on the Appellant to use Nash for the other blocks – that would depend on how the works went on the first block. This led to a letter from Nash dated 14 April 2003 to JSE thanking JSE for the opportunity of meeting on site and quoting for the works in accordance with the specification of 15 March and stating:-

“... we are able to carry out these works at a cost of £31,423.50 which includes all labour and materials.

We await your valid instructions”.

15. On 15 April 2003 JSE wrote to all of the lessees in the block in terms which are central to the present case. So far as presently relevant the letter read as follows:-

**“Internal and External Repairs and Decorations to include Door Entry System and Repairing/Renewing Rainwater Goods – 50-61 Gilda Court, Watford Way, London NW7**

As you are probably aware, the above repairs/maintenance are now due and we have obtained the following estimates in respect of these.

Amberflex Limited	£33400.00
Nash Building Services	£31423.50

Please note that these prices exclude Management Fees and V.A.T.



Accordingly, we intend to instruct Nash Building Services who have submitted the more competitive quote to undertake the necessary work. This is subject to any observation that any Lessee may wish to make to us no later than 18 May 2003.

The estimates obtained are available for inspection at our offices by any Lessee, by appointment.

This Notice is served in accordance with the provision of section 20 of the Landlord & Tenant Act 1985 as amended.”

No documents were enclosed with this letter. Mr Schreiber told me that the estimates were kept in a file at his office and, if any lessee had visited, would have been produced from the file so that the lessee could inspect them. JSEs offices are in Tottenham London N17, which is 8 to 10 miles from Gilda Court.

16. Of all the lessees in the relevant block only Mr Brown responded to this letter. Mr Brown responded not in person but through his solicitors, Osbornes, who wrote a letter dated 14 May 2003 which was received by JSE on 15 May 2003. The letter stated, so far as presently relevant:-

“Section 20 Notice Requirements

We dispute your assertion that this letter is notice served in accordance with section 20 of the Landlord and Tenant Act 1985 (“the Act”) as amended for the following reasons:

1. You have neither provided our client with a copy of the estimates nor displayed the estimates in one or more places where it is likely to come to the notice of all the tenants as required by subsection 4(b) of section 20. You have not satisfied this requirement merely by making estimates available at your offices, as this is not a place where it is likely to come to our client’s attention. It is incumbent on you to display the notice at the premises or to provide our client with a copy.
2. Your description of the works to be carried out is wholly inadequate given that you are proposing major works and that the expense involved for our client is substantial. Therefore, you have not satisfied the requirement set out in subsection 4(c) of section 20.

Please provide us with a copy of the estimates immediately and please note that the time period required for consultation does not run until we have been duly provided with such estimates. Please also provide us with a copy of the specifications.

Please note that you will not be able to recover money from our client if you proceed with these works without first serving a section 20 notice that accords with all the provisions of the Act and without allowing a period for consultation to expire.”

The letter also raised the point that the installation of an entry phone system would appear to be an improvement rather than an item of repair or maintenance and that accordingly it could not be charged for through the service charge provisions.

17. On 15 May 2003 JSE responded stating that they enclosed “copies of the estimates in respect of the above”. The letter raised an argument regarding the entry phone system. The letter did not deal in any way with the observations by Osbornes that JSE had failed to comply with the section 20 consultation requirements. The documents enclosed with this letter comprised copies of the following documents, namely the Amberflex estimate, the specification of works of 15 March 2003, and the Nash letter of 14 April 2003. I find that the Nash estimate of 17 March 2003 was not included, nor was any copy of the earlier Nash estimate.

18. JSE’s letter of 15 April 2003 had specified that any observation that any lessee might wish to make should be made no later than 18 May 2003 (a Sunday). On Monday 19 May 2003, early in the morning (Mr Nash said by 8am), Mr Nash and his colleague and co-worker Elliott Rowbury were on site and carrying out works. There is a dispute as to whether these works had in fact been started significantly earlier than 19 May. I return to that dispute below. However it is common ground that Mr Nash was on site and works were in progress from, at the latest, early morning on 19 May. Mr Nash said that he would have been given the final go ahead for the works either on the Friday or on the Sunday (JSE not working on the Saturday).

19. When asked what consideration he gave to Osbornes’ letter of 14 May regarding whether or not the works should go ahead on 19 May, Mr Schreiber replied that he waited for the 30 days (i.e. the consultation period) to expire and gave the go ahead. As regards the objections in Osbornes’ letter, he responded that he answered the letter and there had been no queries from any other residents. It may be noted that in paragraph 39 of his witness statement of 2 February 2006 Mr Schreiber stated that:-

“the consultation period expired on the 15 May 2003; the [Appellant] instructed the builders to commence work on Monday 19 May 2003 – this is what occurred”.

Thus it seems Mr Schreiber had in mind that the consultation period expired earlier than 18 May, which is the date specified in JSE’s letter of 15 April 2003. I find that the final go ahead was given by JSE to Mr Nash prior to 19 May 2003 – this must be the position for how otherwise could he have been on site so early in the morning on 19 May. There remains however the dispute as to when the works actually started.

20. As regards the question of when the works actually started the evidence before me is as follows:-

- (1) Mr Schreiber stated that the works started on 19 May. He confirmed that he did not give Mr Nash any written instructions to start the works – the instructions were given orally. Also there was no written contract. As regards a document stated to be Invoice No. 2 dated 19 May 2003 from Nash to JSE in the sum of £8,000 for “First payment for work carried out to date to block 50-61”, Mr Schreiber stated that this was a payment on account rather than for work already carried out before 19 May. He also stated that Invoice No. 1 in Mr Nash’s invoicing system was an invoice that had nothing to do with JSE or the Appellant. In his evidence Mr Schreiber made clear that he had his mind very firmly on the consultation period and on the fact that the works could not start within the consultation period.

- (2) Mr Nash gave evidence. He confirmed that Invoice No. 1 had nothing to do with this contract and he also confirmed that his invariable practice on the first day of any job was to ask for money on account by raising an invoice. He used the proforma invoice which always said for work carried out to date, even if, in the case of the first relevant invoice, it was more accurately described as payment on account. Mr Nash stated that the works began in the early morning of 19 May. He had been on site before that date when he had walked around the site but he did not take any tools with him.
- (3) As regards Mr Brown he stated that he thinks the works started in the early part of May 2003 but he accepted that he now cannot really remember as it is such a long time ago. The letter which Osbornes wrote on his behalf dated 14 May did not make reference to works having started. However Osbornes' subsequent letter of 10 June 2003 did state:-

“We note that you have commenced major works to 50-61 Gilda Court prior to the expiration of the one month consultation period running from 15 May 2003...”

- (4) As regards Mr Raja he gave evidence that an aunt had died in Chicago on 21 March and he had been to the funeral and returned to the United Kingdom about 29 March. Mr Raja does not live at 52 Gilda Court. Instead he and Mr Pauley, who own the flat jointly, let the flat to subtenants. Mr Raja said he could remember visiting Gilda Court after one month's mourning and he placed this visit at about 25/26 April on which occasion he said he saw workmen in the garden including a tall man (identified as Elliott) who told him that they were going to be doing some work to the block. Mr Raja did not state any works were being carried out at that stage. Mr Raja says he next visited the flat in early May prior to going away for a holiday to Brussels. He left for Brussels (to visit a Jazz marathon) on 19 May from Dover on the ferry with various friends. He said that prior to leaving he visited the flat and found works being carried out with workmen peeling off paint in the interior of the building, such that dust had got under his door into the flat. He said there were two workmen on site, Elliott and Mark (Mr Nash confirmed he did have two such workers). Mr Raja prepared a letter for sending to JSE the day after his departure, i.e. 20 May and he dated the letter 20 May, which is a letter raising certain concerns regarding the electricity installation at the premises. There is nothing in this letter referring to any works having at that stage started.

21. It is convenient for me here to give my findings on this dispute regarding the commencement of the works. It is unfortunate that there is no written record regarding the commencement. However I accept Mr Nash's explanation regarding why the invoice of 19 May was worded in the manner it was. I also find on the balance of probabilities that the works did not commence until the early morning of 19 May. I so find because, as regards Mr Brown, he accepts he cannot really remember when the works commenced and also his solicitors in their letter of 14 May made no reference to works having commenced, which it is highly likely they would have done if Mr Brown had informed them that works had started (and if works had started it is highly likely Mr Brown would have told his solicitors). So far as concerns Mr Raja he is working from recollection and he has no special reason to remember when the works commenced. I note that he makes no mention of works having commenced in his letter of complaint regarding other matters

dated 20 May. As regards Mr Schreiber he had very firmly in mind that works should not commence within the consultation period but could commence immediately thereafter. I find that by at latest Friday 16 May (i.e. within the stipulated consultation period) Mr Schreiber had given Mr Nash the go ahead to start on Monday 19 May, but that the works were not in fact started until 19 May.

### **Respondents' submissions.**

22. On behalf of the Respondents Mr Bates argued that there was a failure to comply with the consultation provisions in paragraphs (b), (c), (d) and (e) of section 20(4). He further argued that the Appellant had not "acted reasonably" within section 20(9) such that the County Court had no power to dispense with any of these consultation requirements. He finally submitted that if the Appellant had acted reasonably there should nonetheless not be any dispensation. He developed those arguments as follows.

23. As regards paragraph (b) of section 20(4) Mr Bates advanced the following submissions:-

- (1) He pointed out that it was common ground the letter of 15 April was not accompanied by any documentation at all. Accordingly the opening part of paragraph (b) was not satisfied.
- (2) So far as concerns the closing part of paragraph (b) he submitted that no documentation was "displayed" anywhere and that drawing a tenant's attention to the ability to inspect a document at some other location does not satisfy an obligation to "display" that documentation.
- (3) He drew attention to the difference in language between subsection (4), which is dealing with the situation where there is no tenants association, and subsection (5) which is dealing with the situation where there is a recognised tenants association. In the latter case provision is made for a notice to be given to the tenants which, inter alia, informs the tenant that he has a right to inspect and take copies of a detailed specification of the works to be carried out and the estimates, see paragraph (d)(iii) of subsection (5) and see also paragraph (f) which also contemplates facilities being given for inspection. Mr Bates argued that Parliament has made provision for it being sufficient to notify a tenant of a right to inspect documents in subsection (5) and that this is in marked contrast to the provision in subsection (4). The difference must be intentional and the requirement either actually to serve copies of the estimates or to "display" the relevant documents (i.e. as required by subsection (4)) cannot be satisfied by conduct which falls merely within the different wording of subsection (5) and involves informing the tenant of a right to inspect documents.
- (4) As regards the decision of His Honour Judge Cooke in *London Borough of Haringey v Ball* Central London County Court 6 December 2004 Mr Bates pointed out that Judge Cooke appears not to have been addressed upon an argument that the wording of section 20(5) was relevant when considering whether an ability to inspect documents was sufficient for subsection (4), see page 17 of the judgment where the judge states:-

“A slightly different system operates where there is a recognised tenants association (not applicable to these issues)”.

He also argued that the facts of the Haringey case were quite different in that there the court was concerned with a £7million project affecting hundreds of buildings borough-wide where there were difficulties as a matter of practicality in complying with the wording of subsection (4). In the present case there was no reason as to why strict compliance with section 20(4) was not practical.

- (5) Assuming he was correct on the foregoing points, Mr Bates argued that the defects in compliance with paragraph (b) were not cured by JSE sending certain documents to Osbornes by their letter of 15 May. This was because (a) the documents were only sent to one lessee, namely Mr Brown and (b) the documents could only assist the Appellant if it were possible to say that the notice of 15 April together with the documents sent on 15 May together constituted adequate compliance with section 20(4)(b), in which case a fresh consultation period would need to run from the latter date.
- (6) Mr Bates further argued that in any event the letter of 15 May did not enclose the estimates, because neither of Mr Nash’s full estimates were sent – only the shorter letter of 14 April 2003.

24. As regards paragraph (c) of section 20(4) Mr Bates submitted that the heading in the letter of 15 April 2003 was an insufficient description of the works. The words used were extremely wide, namely “internal and external repairs and decorations to include door entry system and repairing/renewing rain water goods”. Such a description was, he submitted, too broad on the face of it.

25. As regards paragraph (d) of section 20(4) Mr Bates accepted that if, contrary to his principal argument, the letter of 15 April 2003 together with the offer of the right to inspect documents at JSE’s offices was sufficient compliance with paragraph (b) of section 20(4) then paragraph (d) was satisfied. However if, contrary to his argument, the defect under paragraph (b) had been cured by the later service of documents by JSE then paragraph (d) was not satisfied and the consultation period would have to start again.

26. As regards paragraph (e) of section 20(4) Mr Bates advanced the following arguments:-

- (1) As regards the first half of paragraph (e) he submitted that the Appellant did not have regard to any observations received in pursuance of the notice served under paragraph (b) (supposing that the letter of 15 April qualified as such a notice). He drew attention to Mr Schreiber’s evidence that, having received Osbornes’ letter, he thought all he need do was send the missing documents and carry on with the intended commencement of the works on 19 May. In other words the Appellant, through JSE, carried on regardless despite reasoned objections from a lessee through his solicitors. He submitted that having regard to something means turning one’s mind to the point and considering whether to accept or reject the point, rather than merely focusing on allowing the relevant time period to expire and then immediately proceeding with the works come what may.

- (2) Mr Bates submitted that in any event the works were started before the end of the consultation period specified in the letter of 15 April. I have already considered this dispute of fact and found that the works did not start before 19 May and accordingly Mr Bates' submissions as to the legal consequences of the works starting earlier do not arise. Mr Bates' argument does of course remain on his principal point that the consultation requirements in paragraph (b) were not satisfied and accordingly no proper consultation period had expired and the Appellant was not entitled to start the works.

27. Turning to the County Court proceedings which raised the question of dispensation under section 20(9), Mr Bates advanced the following arguments:-

- (1) He submitted that I could not be "satisfied that the landlord acted reasonably" within subsection (9). It is necessary, he submitted, to concentrate on the circumstances where section 20 is not complied with, and that involves examining the circumstances surrounding the consultation procedures rather than looking back at earlier conduct by either Appellant or Respondents. Thus he submitted that Miss Cafferkey was not entitled to seek to rely upon the lack of any significant response to the OCK letter of January 2002 and the apparent (so she submitted) lack of interest shown by the relevant lessees in having works carried out to the block.
- (2) He submitted that if he were right on his principal submissions under section 20(4)(b) and if the Appellant had failed to comply with that consultation requirement, then the Appellant could not be said to have acted reasonably if, having been expressly told by solicitors for one of the lessees that it had failed to comply with the consultation requirement, the Appellant just went on regardless and started the works.
- (3) He further pointed out that there was no reason in the present case why section 20 was not complied with – the works were not urgent and there were a limited number of tenants to consult and the Appellant had had plenty of time properly to consult the tenants, because the Appellant had been considering what works to carry out since late 2001 when it instructed OCK.
- (4) He submitted that the breaches of the consultation requirements occurred because JSE were either inept or dishonest and that neither analysis allowed the conclusion that the Appellant, who had been acting through JSE, had acted reasonably.

28. Finally Mr Bates submitted that if, contrary to the foregoing, I concluded the Appellant had acted reasonably then I should still in my discretion refuse to dispense with such of the consultation requirements as had not been satisfied. Mr Bates submitted that there had been a culture of secrecy on the part of the Appellant in that it had not revealed the OCK report or the tenders received by OCK (in very substantial sums) or the earlier Nash estimate. He contrasted the facts here with two cases, one in the County Court and one in a Leasehold Valuation Tribunal, where there had been dispensation, respectively *Hoggett v Knox* (Judge Ryland in the Central London County Court November 12 1999), and *Wilson v Stone* [1998] 26 EG 153. He also invited me to have regard to the LVT's findings of fact in this case regarding the low quality of the works carried out. He submitted that if there had been proper consultation then the lessees might have avoided the consequence of the works being carried out by Nash, with all the attendant problems,

including defects in the work still being remedied almost two years later. He argued that the lessees had lost a chance that another and better contractor would have been selected if proper consultation procedures had been followed.

### **Appellant's submissions**

29. On behalf of the Appellant Miss Cafferkey argued that the Appellant did properly comply with the consultation requirements in section 20(4) and that if, contrary to this submission, the Appellant failed to do so then the Appellant acted reasonably and compliance with the relevant requirements should be dispensed with. Miss Cafferkey expanded her submissions in the following manner.

30. As regards paragraph (b) of section 20(4) she accepted as a matter of fact that the notice of 15 April 2003 was not accompanied by any copy of the estimates. She accepted that the summary given in the notice regarding the estimates did not satisfy the words "accompanied by a copy of the estimates" within paragraph (b). Thus on this point she accepted the decision of this Tribunal (His Honour Judge Rich QC) in *Richmond Housing Partnership v Smith* LRX/10/2005. However she argued that paragraph (b) could properly be complied with by sending a notice to the lessees and displaying the relevant estimates. She submitted that the estimates were indeed displayed in a place where they were likely to come to the notice of all of the tenants so as to satisfy the closing part of paragraph (b). She relied upon the following points:-

- (1) She referred to the decision of Judge Cooke in the *Haringey* case and his conclusion in paragraph 37 that the consultation provisions were meant to be a practical tool rather than a ritual dance and should be given a purposive rather than literal construction because the consultation provisions were meant to be a working tool for ordinary landlords. She pointed out that section 20 is concerned not with penalising landlords but with ensuring that information is given to tenants.
- (2) She submitted that making documents available for inspection at a named office and by appointment is machinery which Judge Cooke concluded could satisfy the requirement for displaying the documents, see paragraph 49 of the judgment.
- (3) Thus the requirement for display can be satisfied by writing to the tenants and telling them where the documents are and the next question is whether this occurred in the present case. She submitted that it did indeed occur and that the place specified, namely JSE's offices, was sufficiently accessible to justify the conclusion that the lessees could get to this place without too much trouble (there are good transport links), such that it can properly be said that the documents were "likely to come to the notice of all those tenants".
- (4) She submitted that no assistance was to be obtained by a comparison with section 20(5) as that dealt with a different scenario where there was a tenants association. It would be wrong to cut down the width of what was permitted under subsection (4) by reference to what is contained in subsection (5).

31. As regards paragraph (c) of section 20(4) Miss Cafferkey submitted that the wording in heavy type at the heading of the letter of 15 April was sufficient. The lessees would have known from looking at the building as to what was wrong with the building and this letter coupled with their own observation would have adequately described the works to them. She drew attention to Judge Cooke's judgment in *Haringey* at paragraph 51 where he held that "exterior decorations" (in relation to Project 7) and "estate repairs including ceiling of garage accommodation, improvements to pram shed doors, works to communal staircases" (for Project 11) were in each case sufficient description. She referred to a Leasehold Valuation Tribunal decision in *Oceanic Acquisitions and Mergers Limited v Wharton* LON/00AW/LIS/2003/0007 which held that a section 20 notice was not required to give more than an outline of the works to be carried out - a detailed specification was not needed.

32. As regards paragraph (d) of section 20(4) Miss Cafferkey accepted that if the letter of 15 April 2003, coupled with the information as to where the estimates could be inspected, was not compliance with paragraph (b) of section 20(4), then this failure to comply with paragraph (b) was not cured by the sending later of some documents to the solicitors for one of the lessees (namely to Osbornes for Mr Brown). Accordingly her argument under paragraph (b) was that this was properly complied with by the letter of 15 April 2003. If this is correct then she submitted (and if this is correct then Mr Bates agreed) that paragraph (d) was satisfied.

33. As regards paragraph (e) of section 20(4) Miss Cafferkey pointed out that all a landlord has to do is to have regard to observations. The Appellant, through LSE, did have regard to the only observations made because they responded to these observations by replying to Osbornes by return of post enclosing the documents sought. This immediate response showed that the Appellant had regard to Osbornes' observations rather than disregarded them. She pointed out that paragraph (e) does not say that the works cannot be started until the observations have resulted in some form of agreed resolution of points in dispute. All that has to happen is that a landlord has to have regard to the observations and here the Appellant did so. As regards the question of when the works started I have already accepted Miss Cafferkey's submissions and have concluded that the works commenced on 19 May, i.e. on the next day following the expiration of the period nominated for consultation in the letter of 15 April 2003.

34. So far as concerns the County Court proceedings regarding dispensation, Miss Cafferkey's primary argument was that the Appellant did not need any dispensation because it complied with the consultation requirements. If this were not so, Miss Cafferkey argued that the Appellant acted reasonably. It adopted a well known method of bringing documents to the attention of tenants, namely by telling the tenants where they could inspect the documents. She drew attention to the results of the OCK letter to the lessees in January 2002 which produced only two responses both of which were totally opposed to works being done. She drew attention to Mr Schreiber's belief that he had complied with section 20 and she submitted that therefore the Appellant (acting through Mr Schreiber of JSE) acted reasonably in continuing with the works despite receiving Osbornes' letter, which was written on behalf of a lessee who had shown opposition to any works being carried out in the past. She argued that section 20 was not intended to be punitive to a landlord – if punishment was intended then there would be no provision for dispensation. She drew attention to a decision of this Tribunal in *Eltham Properties Limited v Kenny* LRX/161/2006 where the Tribunal did grant a dispensation under section 20 (although it must be noted that this was under the new form of section 20). She also drew attention to a publication of August 2002 from the



office of the Deputy Prime Minister which included the observation that the dispensation procedure was intended to cover situations where consultation was not practicable (e.g. for emergency works) and “to avoid penalising landlords for minor breaches of procedure which do not adversely effect service charge payers’ interest.”

35. If the court is satisfied the Appellant acted reasonably then the court has a general discretion to dispense with the relevant consultation requirements. Miss Cafferkey submitted that there was nothing to show any prejudice to any lessees and nothing to show that if, rather than commencing on 19 May, the Appellant had sent the relevant estimates to all the lessees and waited another 28 days, the ultimate outcome would have been any different. Miss Cafferkey also drew attention to the fact that the lessees have had their remedy under section 19 in that the amount of money expended by the Appellant has already been substantially cut down, by virtue of section 19 of the 1985 Act, such that only about £20,000 is recoverable (subject to the section 20 point). This £20,000 represents actual value received by the lessees of the building and the Appellant should not be limited to recovering only £1000.

## Conclusions

36. The principally relevant definition of the word display in the Oxford English Dictionary is:

“1. a. The act of displaying or unfolding to view or to notice: exhibition, manifestation.”

Bearing in mind this normal meaning of the word display and bearing also in mind the contrast in the language between section 20(4)(b) and (5)(d)(iii), I have difficulty in accepting that it is possible to satisfy the requirement that a notice and estimates are displayed by merely writing to a tenant informing him of a place where, on application to the appropriate person within office hours, documents will be made available for him to inspect. However I note the decision of Judge Cooke in the *Haringey* case, which appears to be to the contrary, and I also accept that an over-literal interpretation of section 20(4)(b) could give rise to avoidable problems. For instance it would be strange if the requirement to display the documents could be satisfied by nailing them to the wall in the entrance lobby of a block of flats but could not be satisfied by displaying in the entrance lobby a notice telling the tenants to ask the porter to show them the documents which were to be found in the porter’s desk in the lobby. For present purposes it is sufficient that I have reached the following conclusion. Even assuming in favour of the Appellant that the consultation requirement in paragraph (b) can be satisfied notwithstanding that the notice is sent by post but the estimates are dealt with under the “display” element of paragraph (b) and assuming further in favour of the Appellant that the display element of paragraph (b) can be satisfied by notifying the tenants of a place where the relevant estimates can be seen on application, I nonetheless conclude that in the present case the Appellant has failed to comply with paragraph (b) of section 20(4). This is because the only place in which the estimates were “displayed” was in JSE’s offices in Tottenham N17 which was 8-10 miles from Gilda Court. I do not consider that displaying the estimates (assuming they can be said to have been displayed) in JSE’s offices constituted displaying them at a place where they were likely to come to the notice of all the tenants. I reach this conclusion having regard first to the distance of JSE’s offices from Gilda Court; secondly to the fact that none of the tenants in the block appear to have gone to inspect the documents (certainly I was given no evidence that any of them had); and thirdly to the fact that there were other indications suggesting it was unlikely that they would do so. As regards the latter point JSE

(and hence the Appellant) knew that there were disabled and elderly people living at Gilda Court - if they did not know that before receiving Mr Mileman's email of 28 January 2002 in response to OCK's letter then they were made aware of that fact then. So far as concerns the relevance of the fact that none of the twelve tenants in the block attended to inspect the estimates there was no evidence before me to suggest that this was surprising. The fact that **none** of the tenants inspected is in my judgment something that weighs against the argument that a display (assuming it was a display) in JSE's offices was a display at a place where the documents were "likely to come to the notice of **all** the tenants".

37. In short the having available for inspection of documents at a place where a determined tenant has the ability if he makes an effort to see the documents in due course does not constitute a display within paragraph (b) of section 20(4), which I consider envisages the documents being displayed in a sufficiently convenient and obvious place for it to be likely that the documents will come to the attention of the tenants straight away rather than in due course – because if it were the latter then the tenants would not be aware of the full documentation until into the one month consultation period.

38. This failure properly to comply with paragraph (b) of section 20(4) was not cured (and Miss Cafferkey accepts this) by some documents being sent later to Osbornes, who are acting only for Mr Brown.

39. As regards paragraph (c) of section 20(4) I consider that the description of the works in the notice would have been sufficient if the estimates had accompanied the notice or had been properly displayed within paragraph (b). Accordingly it is paragraph (b) which has not been complied with rather than paragraph (c).

40. There having been no proper compliance with paragraph (b), it is clear that no proper one month's consultation period was given to the tenants and to that extent paragraph (d) of section 20(4) was not complied with.

41. As regards paragraph (e) of section 20(4), bearing in mind there was no proper notice accompanied by estimates as required by paragraph (b), the Appellant never received any observations in pursuance of a proper notice. What they did receive was Osbornes' letter drawing their attention to their error. The only regard that the Appellant, through JSE, paid to Osbornes' letter was to answer it and send various documents but to take no heed of the correct information given by Osbornes namely that there had not been proper compliance with section 20(4)(b). This becomes relevant when I consider below the question of whether the Appellant acted reasonably. However, for present purposes it adds nothing significant to the extent of the Appellant's failure to comply with the consultation requirements in section 20(4).

42. In summary I conclude that the Appellant did fail to comply with the consultation requirements in section 20(4) in that the Appellant failed to give the tenants a copy of the estimates and also failed to display them in one or more places where they were likely to come to the notice of all the tenants.

43. This then raises the question of whether, sitting as a Judge of the County Court, I should dispense with these consultation requirements. I can only do so if (a) I am satisfied that the Appellant acted reasonably and (b) I consider it right to do so on all the facts of the case in my discretion.

44. I am not satisfied that the Appellant acted reasonably, i.e. reasonably in all the circumstances where section 20 was not complied with, see paragraph 11 above. On the facts of the present case it would have been simple for the Appellant, through JSE, to comply with section 20(4)(b). This is not a case of major works over a large estate where there are practical difficulties in drawing the relevant matters to tenants' attention, as was the position in the *Haringey* case considered by Judge Cooke. All that JSE had to do was to enclose with their letter of 15 April 2003 copies of the two estimates which were each on a single sheet of paper. Thus the Appellant acted unreasonably in preparing and sending the letter of 15 April 2003 in the way in which it did. Further it acted unreasonably in its response to Osbornes' letter. Where a landlord receives a letter from solicitors for a tenant being a letter which correctly asserts that the landlord is failing to comply with the consultation requirements and gives reasons as to why the landlord is failing and what the consequences of such failure may be, then if a landlord merely carries on regardless and commences the works without first properly carrying out the consultation requirements I consider such a landlord acts unreasonably rather than reasonably. I should make clear that I do not find Mr Schreiber acted in any way dishonestly (as was at one stage submitted by Mr Bates). However no satisfactory explanation (indeed no explanation that I could understand) was given to me by Mr Schreiber as to why in the light of the Osbornes' letter he merely just went on and authorised the commencement of the works as though there were no problem. The answer which he did give when asked what consideration he gave to Osbornes letter and as to whether the works should go ahead on the Monday was merely: we waited for the thirty days to expire and gave the go ahead. He seemed to think that the only thing that mattered was to wait for the thirty day period and then to start the works and that the reasoned objection by Osbornes could be ignored or was anyhow not a matter that need disturb the landlord's intention that Nash should carry out the works.

45. If it is permissible to look more widely at the Appellant's conduct over a more substantial time frame when considering for the purpose of section 20(9) whether the Appellant acted reasonably (Miss Cafferkey submits it is permissible to do so but Mr Bates submits otherwise) then I still remain not satisfied that the Appellant acted reasonably. Miss Cafferkey invited me to conclude that the attitude shown by the tenants to OCK's letter of January 2002 (showing either indifference or positive aversion to works being carried out) was something which made reasonable the Appellant's approach to the extent to which the tenants needed to be notified of the Nash and Amberflex estimates for the works. The implication appeared to be that the tenants had shown by their past conduct that they would either disregard information or be against the works and that it was reasonable for the Appellant to do no more than it did. I cannot accept that submission. The attitude of the tenants to the OCK letter in January 2002 can form no foundation justifying a cavalier attitude to the consultation requirements of section 20(4). Further I do see some substance in a submission made by Mr Bates to the effect that, if one does look at this earlier material, there is an undesirable air of secrecy regarding the proposed works. It could reasonably be said that if chartered surveyors in a written report had concluded that works, for which tenders had been obtained, should be carried out to the cost of over £500,000 over the five blocks together, then this was information which the tenants could reasonably be expected to have been made aware of. This is especially so bearing in mind that, so I was told, some portion at least of the cost of the OCK report was paid for by the tenants through their service charge. If major works are

proposed to a block it would be reasonable for the tenants to be told of the quantity surveyors' report and of the extent and cost of the works which the quantity surveyors thought were needed. This might be unwelcome news to the tenants but it at least would enable them to make a reasoned decision as to whether they should object to lesser works being carried out by, as it turns out, a sole trader. This was one of the objections raised by Osbornes in their letter of 10 June 2003 (i.e. that Nash was a sole trader) but by then it was too late and the works were underway.

46. In the light of my conclusion that I am not satisfied that the Appellant acted reasonably in relation to the consultation requirements, whether viewing that over a narrow or a wider time frame, I have no jurisdiction to dispense with the consultation requirement in section 20(4)(b). I would merely add that if I had had such jurisdiction I would not have thought it reasonable to dispense with the requirement. I repeat the matters I have just mentioned regarding the Appellant's conduct. As already noted one of Osbornes' objections, when they did have the estimates, was that the works should not be placed with a sole trader. I see some force in Mr Bates' submission that the tenants lost the chance of pursuing objections which could have led to a more substantial and skilled contractor being involved so as to avoid the problems of the works being unsatisfactory and having to be made good later. I do not overlook the fact that the LVT concluded that a sum of £20,727.03 was a reasonable sum for the works which were carried out – i.e. that works which could reasonably have been valued in this sum were carried out and the tenants have had the benefit of those works. However while this is the ultimate reasonable value of works carried out it does not alter the fact that the works involved poor workmanship and had to be made good later. The tenants could reasonably consider they would have been more happily placed if they had been spared the problems and anxiety and disruption of works being done badly and then having to be made good later. I do not find it an attractive argument for it to be said that, even if there had been proper consultation, the tenants would almost inevitably have ended up having Mr Nash doing the works anyway, because that is what the Appellant intended and preferred and because the Appellant could have chosen to reject any observations to the contrary and could have instructed Mr Nash despite the objections.

47. In the result therefore:

1. So far as concerns the appeal to the Lands Tribunal, the Appellant's appeal is dismissed.
2. So far as concerns the Claimant's application to the County Court under section 20(9) for an order dispensing with the consultation requirements, the Claimant's application is dismissed.
3. So far as concerns costs:
  - (1) In the Lands Tribunal neither party sought to argue that, in the light of the very limited costs jurisdiction, there should be an order for costs against the other party.
  - (2) So far as concerns section 20C of the 1985 Act Miss Cafferkey did not seek to argue that, in the event of the Appellant losing in both the Lands Tribunal and the County Court proceedings, there should not be an order made under section 20C. Accordingly I do order that the costs incurred by the Appellant in connection with these proceedings (both in the Lands

Tribunal and in the County Court) are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by Mr Brown, Mr Raja or Mr Pauley.

- (3) So far as concerns the question of costs in the County Court proceedings the parties may make written representations to me in relation to these (this is what Counsel wished to do) within 21 days of the date of this decision.

Dated 8 August 2008

His Honour Judge Huskinson